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The Washington Equal Access to Justice Act: A Substantial Proposal for Reform

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THE WASHINGTON EQUAL ACCESS TO JUSTICE ACT: A SUBSTANTIAL PROPOSAL FOR REFORM

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Abstract: Under the Washington Administrative Procedures Act, a party can challenge an agency action in superior court. The Washington Legislature adopted the Equal Access to Justice Act, which provides fees to qualified parties that prevail in judicial reviews of agency actions, to encourage individuals and small businesses to oppose unjust agency actions. The effectiveness of this fee-shifting provision is significantly limited because awards are not authorized when a court decides that the agency action is substantially justified. The legislature should remove this limitation. Where the agency action involves factual determinations or the interpretation of statutes or regulations within the expertise of the challenged agency, the standard for reviewing the underlying agency action (which turns on a determination of reasonableness) makes the substantial-justification limit redundant. Where the agency action involves questions of pure law, the limit thwarts the legislature's goal of encouraging individuals to oppose unjust agency actions for their own and society's benefit.

Jurisprudence in the United States requires that each party pay its own litigation costs. While this "American rule" regarding attorney's fees is the prevailing practice, federal and state legislatures have enacted numerous statutory exceptions to the rule.[1] Modeled after a federal act,[2] Washington State has adopted one such fee-shifting provision: the Washington Equal Access to Justice Act (WEAJA).[3] The WEAJA provides fees to qualified parties that prevail in judicial reviews of agency actions.[4] However, the application of the WEAJA is restricted by a statutory limitation that prevents a prevailing party from recovering attorney's fees where the agency action is "substantially justified."[5] Since the adoption of the WEAJA in 1995,[6] the Washington Courts of Appeal have awarded attorney's fees under the WEAJA only four times.[7]

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1. *See generally* Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 549 (1995).

2. 28 U.S.C. § 2412 (1994 & Supp. 1998).

3. WASH. REV. CODE § 4.84.350 (2001); 1995 WASH. LEGIS. SERV. CH. 403, § 903 (West).

4. WASH. REV. CODE § 4.84.350.

5. *Id.* § 4.84.350(1).

6. 1995 Wash. Legis. Serv. Ch. 403, § 903 (West).

7. There are thirteen Washington Appellate cases in which a qualified party requested fees pursuant to the WEAJA. The four cases that awarded fees are *Sugano v. University of Washington*, No. 98-2-00128-3, 2000 WL 339895 (Wash. Ct. App. Mar. 27, 2000), *Hunter v. University of Washington*, 101 Wash. App. 283, 2 P.3d 1022 (2000), *Alpine Lakes Protection Society v. Washington State Department of Natural Resources*, 102 Wash. App. 1, 979 P.2d 929 (1999), and *Aponte v. Washington State Department of Social & Health Services*, 92 Wash. App. 604, 965 P.2d

This parsimonious allowance of fees under the WEAJA prevents a legislatively mandated fee-shifting provision from protecting the rights of citizens against an encroaching administrative state. As legislatures delegate rule-making authority, administrative agencies are largely responsible for the distribution of benefits conferred to a state's citizens and for the assessment of fines where a private entity has breached a statutory duty. However, administrative agencies are not directly responsible to the citizenry, and ensuring agency accountability becomes a concern in a free society.[8]

Judicial review of agency action provides a critical tool for policing agency actions.[9] However, when administrative agencies benefit from vast expertise, substantial funds, and deferential standards of review, private citizens are disadvantaged and courts cannot effectively regulate agency action. The Washington Legislature adopted the WEAJA in order to level the playing field for the aggrieved party, thereby benefiting society as a whole.[10]

The Legislature should remove the substantial justification limit from the WEAJA for two reasons. First, where a party challenges either an agency's factual ruling or an interpretation of a statute or regulation within the agency's expertise, the standard of review required by the Washington Administrative Procedures Act (WAPA) renders the substantial justification limit redundant. Second, where a party challenges an agency decision based on pure law, the substantial justification limit functions contrary to legislative intent.

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626 (1998). There may be many Superior Court cases in which fees were awarded or denied but not appealed. That seems unlikely: any action that an agency is willing to defend in court is likely to elicit an appeal from a decision awarding fees. Commentator Susan Olson tried to gather information on trial court decisions of state EAJAs and found that the addition of trial court applications to appellate courts did not significantly increase the number of reported EAJA cases. Olson, *supra* note 1, at 549. This author attempted to compile information on Superior Court decisions regarding the WEAJA with little success. WASH. REV. CODE § 43.88.067 requires the Office of Financial Management to create a report detailing fees awarded pursuant to the WEAJA. However, the Office of Financial Management and the Public Records Officer of the Attorney General's Office contend that no such report exists because the Legislature decided it no longer required those reports, but did not change the statute. E-mail from Kim McLain, Public Records Officer, Washington State Attorney General's Office, to D. Greg Blankinship (Mar. 13, 2001) (on file with author).

8. JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING 10 (1990).

9. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 634–35 (1993).

10. *See infra* note 32 and accompanying text (discussing the public policy benefits of the WEAJA).

I. THE FEDERAL EQUAL ACCESS TO JUSTICE ACT

One of the most significant exceptions to the American rule regarding attorney's fees is the Equal Access To Justice Act (EAJA), the federal statute upon which the WEAJA is based.[11] The federal EAJA provides fees to any qualified party that prevails against the United States government or its agencies in any civil action not sounding in torts.[12] However, where the government's position (including the underlying agency action and the steps taken by the government to defend that action) is "substantially justified," fees may not be awarded.[13] Per the United States Supreme Court in *Pierce v. Underwood*,[14] an agency's position is substantially justified if the action is "justified to a degree that could satisfy a reasonable person [as having a] reasonable basis in both law and fact."[15]

A. The American Rule

The "American rule" requires litigants to pay their own litigation costs.[16] Its purpose is "to ensure ready access to the courts by reducing penalties for failure."[17] Courts justify the rule on the grounds of *stare decisis* and separation of powers, reasoning that it is the role of the legislature to change this long-standing rule.[18] Under this rule, a court may only grant fees to a prevailing party if there is express statutory authority allowing fees, or if one of the few common law exceptions applies.[19]

The American rule reflects the assumption that potential litigants gain easier access to the courts when not faced with the risk of paying the litigation costs of both sides.[20] However, where the resources of one party outstrip those of the other party, the better-heeled party can deter

11. Olson, *supra* note 1, at 555.

12. 28 U.S.C. § 2412 (1994 & Supp. 1998).

13. *Id.*

14. 487 U.S. 552 (1988).

15. *Id.* at 565 (internal quotation marks omitted).

16. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

17. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1597 (1974).

18. *See, e.g.*, Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796).

19. *See generally* Stephen B. Shapiro & Michelle D. Hertz, *Legislative Update: Recovery of Attorney's Fees in Federal and State Construction Cases*, CONSTRUCTION LAW, July 1999, at 37.

20. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

the other party from pursuing its rights by driving up costs.[21] Furthermore, state agencies are often "repeat players," because they repeatedly face similarly situated litigants. As such, state agencies may engage in "hard-bargaining" tactics, which are more extreme than a case warrants but are effective in deterring would-be litigants.[22]

There are three common law exceptions to the American rule. The first exception applies when the non-prevailing party has acted in a manner that threatens the integrity of the court system.[23] The second exception applies where a party has acted in bad faith by initiating or prolonging litigation.[24] The third exception applies when litigation has created or preserved "a fund for the benefit of others" and allows attorneys to collect their legal fees from the fund.[25] Because courts narrowly construe the common law exceptions, litigants generally rely on statutory fee authorizations.[26]

B. The Structure of the Federal Equal Access to Justice Act

The federal EAJA was adopted amidst the anti-regulatory climate of the 1980s as an attempt to limit government agencies' infringement upon individuals' and small businesses' rights.[27] The Act establishes a one-way fee-shifting provision, awarding fees to party-opponents of the United States.[28] The Act requires courts to award fees and costs incurred by eligible[29] parties "in any civil action . . . including proceedings for judicial review of agency action."[30]

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21. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1619 (1993).

22. *Id.* at 1620.

23. *Id.*

24. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257–59 (1975).

25. *Id.* at 257.

26. Shapiro & Hertz, *supra* note 19, at 37. Statutory exceptions to the American rule are specific legislative provisions, such as the Longshore and Harbor Worker's Act, which provides that a worker who prevails in a compensation claim is entitled to receive fees. 33 U.S.C. § 928(a) (1994). In 1993, one commentator identified 153 such statutes. ALBA CONTE, 2 ATTORNEY FEE AWARDS 321–30 (2d ed. 1993).

27. *See* Susan G. Mazey & Susan Olson, *Fee Shifting and Public Policy: The Equal Access to Justice Act*, 77 JUDICATURE 13, 15 (1993).

28. 28 U.S.C. § 2412(a)(1) (1994).

29. To qualify as an eligible party, an individual's net worth may not exceed $2,000,000; the net worth of a business cannot exceed $7,000,000, and it may not have more than 500 employees. *Id.* at § 2412(d)(2)(B).

30. *Id.* at. § 2412(d)(1)(a).

Congress adopted the Act to encourage citizens to vindicate their rights against administrative action. As Justice Brennan explained in his concurrence to *Pierce v. Underwood*,[31] Congress was concerned that administrative agencies with "vast resources, could force citizens into acquiescing to adverse Government action, rather than vindicating their rights, simply by threatening them with costly litigation."[32] The federal EAJA also serves a wider social function by encouraging parties to oppose unjust agency actions that often implicate a public interest. As the Fourth Circuit has noted, the purpose of the EAJA was not merely to ensure that individuals could prevail against unreasonable agency action: "The public interest would [also] be served by insuring, through a more balanced adversarial process, that only reasonable governmental positions . . . would be enforced."[33]

However, the federal EAJA prohibits an award of fees if the court finds that the position of the United States was "substantially justified."[34] The legislative history of the federal EAJA indicates that "'substantially justified' was a congressional attempt to fashion a 'middle ground' between [a] proposal to award fees in all cases in which the Government did not prevail, and [a] proposal to award fees only when the Government's position was 'arbitrary, frivolous, unreasonable, or groundless.'"[35] In 1988, the Supreme Court interpreted "substantially justified," holding in *Pierce* that the phrase means "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person."[36] Writing for the majority, Justice Scalia looked to "substantial" as applied in judicial reviews of agency actions. That phrase means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[37] In adopting this definition, the Court affirmed the Ninth Circuit's formulation that the government's position is substantially justified if it has "[a] reasonable basis both in law and in fact."[38]

Under the federal EAJA, an agency action is substantially justified only if both the underlying agency action and the subsequent litigation

31. 487 U.S. 552 (1988).
32. *Id.* at 575 (Brennan, J., concurring in part) (internal citations omitted).
33. Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 138 (4th Cir. 1993).
34. 28 U.S.C. § 2412(a)(1).
35. *Id.* at 578 (Brennan, J., concurring in part and concurring in the judgment).
36. *Id.* at 565 (internal quotation marks omitted).
37. *Id.* (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).
38. *Id.*

position taken by the agency are substantially justified.[39] However, when the first version of the federal EAJA was enacted, it only stated that if the "position of the United States" was substantially justified, an award of fees was disallowed.[40] Appellate courts reasoned that the position of the United States could mean either "the governmental action that precipitated the lawsuit . . . [or] the posture assumed by the government in litigation. These two interpretations have come to be known, respectively, as the 'underlying action' and the 'litigation position' theories."[41] The circuits were divided on whether it was only the underlying action that must be substantially justified, or the litigation position, or both.[42] Congress ended the confusion in 1985, by adding a definition to the statute: "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based."[43]

The determination of whether the underlying action or inaction by an agency is substantially justified is different than the test for whether the litigation position of the agency in defending the underlying action is substantially justified. The Ninth Circuit has distinguished an analysis that focuses solely on the merits of the underlying action (that is, the logic or reasoning that the agency used to reach its determination to act or not act) from an analysis that looks to extraneous factors such as the existence of precedent or the complexity of an issue. Only where the litigation position of the agency is in question are external factors relevant to a determination of substantial justification.[44] Thus, the Ninth Circuit held in *Kali v. Bowen*[45] that "[t]he inquiry into the nature of the underlying government action will . . . concern only the merits of that action . . . . [t]he second inquiry must also focus upon extraneous circumstances bearing upon the reasonableness of the government's decision to take a case to trial."[46]

39. 28 U.S.C. § 2412(d)(2)(D).
40. 5 U.S.C. § 504(a)(1) (1994 & Supp. 1996); 28 U.S.C. § 2412(d)(1)(I).
41. Spencer v. NLRB, 712 F.2d 539, 546 (D.C. Cir. 1983).
42. *Id.*
43. 28 U.S.C. § 2412(d)(2)(D).
44. Or. Natural Res. Council v. Madigan, 980 F.2d 1330, 1331–32 (9th Cir. 1992).
45. Kali v. Bowen, 854 F.2d 329 (9th Cir. 1988).
46. *Id.* at 332.

II. THE WASHINGTON STATE EQUAL ACCESS TO JUSTICE ACT

The purpose of the WEAJA is to reduce incidents of unreasonable agency action.[47] While there are differences between the federal EAJA and the WEAJA, they both require a court to award fees to qualified parties that prevail in a judicial review of an agency action unless the agency action was substantially justified.

A. The Purpose of the WEAJA Is To Remedy Unjust Agency Action

In 1995, Washington passed the Washington Equal Access to Justice Act to encourage certain individuals and qualified organizations to defend themselves against unreasonable agency action.[48] The legislature felt it necessary to encourage individuals to pursue judicial review "because of the expense involved in securing the vindication of their rights."[49] The Legislature believed the problem was compounded by the greater resources and expertise that administrative agencies could bring to bear in litigation.[50] Therefore, the Legislature adopted the WEAJA "to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights."[51]

B. Statutory and Judicial Prerequisites to Recovery Under the WEAJA

There are four statutory and judicial prerequisites to recovery under the WEAJA. First, the party must prevail in a judicial review of an agency action; second, the party must be qualified;[52] third, the agency action cannot have been substantially justified; and fourth, an award of fees cannot be unjust.[53]

The Washington Court of Appeals has interpreted the statute to have at least two other limits to recovery. First, recovery is only available when the opponent party is an active and interested party. In *Duwamish*

47. 1995 WASH. LEGIS. SERV. CH. 403 § 901 (West).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. A qualified party is either an individual whose net worth does not exceed one million dollars or a business or other organization whose net worth does not exceed five million dollars. WASH. REV. CODE § 4.84.340(5) (2001).

53. WASH. REV. CODE § 4.84.350(1) (2001).

Valley Neighborhood Preservation Coalition v. Central Puget Sound Growth Management Hearings Board,[54] the court declined to award fees pursuant to the WEAJA because the hearing board is a purely adjudicative body and not an agency within the meaning of the statute.[55] Rather, the proper agency responsible for fees was the municipality that violated the Growth Management Act.[56] The second limit to recovery is that fees incurred at the administrative level are not recoverable. The Washington Court of Appeals in *Alpine Lakes Protection Society v. Washington State Department of Natural Resources (ALPS)*[57] held that, because the statute makes fees available to a party that prevails in a judicial review of an agency action, "our Legislature did not intend to make fees incurred at the administrative level available."[58]

For the purposes of this Comment, there are two significant differences between the federal EAJA and the WEAJA. First, the federal statute awards costs and fees to a prevailing party incurred "in any civil action (other than cases sounding in tort) including proceedings for judicial review of agency action."[59] The WEAJA, in contrast, only applies to judicial review of an agency action.[60] Second, the federal EAJA requires that fees cannot be awarded if the "position of the United States" was substantially justified,[61] whereas the WEAJA requires that, in order to avoid paying fees to a prevailing party, an agency need only substantially justify its "action."[62]

The Washington Court of Appeals has adopted the *Pierce* standard for determining when an agency's action is substantially justified.[63] The implications of that decision are the subject of this Comment.

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54. 97 Wash. App. 98, 982 P.2d 668 (1999).

55. *Id.* at 101, 982 P.2d at 669; *see also* Cascade Court Ltd. P'ship v. Noble, 105 Wash. App. 563, 571–72, 20 P.3d 997, 1002–03 (2001).

56. Duwamish Valley Neighborhood Pres. Coalition v. Cent. Puget Sound Growth Mgmt. & Hearings Bd., 97 Wash. App. 98, 101, 982 P.2d 668, 669 (1999).

57. Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res., 102 Wash. App. 1, 19, 979 P.2d 929, 938 (1999) [hereinafter ALPS].

58. *Id.* at 938.

59. 28 U.S.C. § 2412(d)(1)(A) (1994).

60. WASH. REV. CODE § 4.84.350(1) (2001).

61. 28 U.S.C. § 2412(d)(1)(A).

62. WASH. REV. CODE § 4.84.350(1).

63. *ALPS*, 102 Wash. App. at 19, 979 P.2d at 938.

III. JUDICIAL REVIEW AND THE ADMINISTRATIVE PROCEDURES ACT

In order to recover fees under the WEAJA , a party must first prevail upon a trial court to reverse an administrative agency's action. The Washington Administrative Procedure Act (WAPA) sets out limited circumstances in which a court can reverse an agency's action,[64] creating substantial hurdles for individuals seeking redress. Furthermore, Washington courts, in determining the standard of review required under the APA, have granted substantial deference to agencies in all circumstances, except where the issue is one of pure law or where the interpretation of a statute or regulation is outside the expertise of the challenged agency.

A. Circumstances Under Which Courts Can Review Agency Actions

The WAPA provides the exclusive basis for judicial review of an agency action, and it establishes that the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity."[65] Where the agency action involves rulemaking, a court will only overturn the agency if the rule violates constitutional provisions, if it exceeds the statutory authority of the agency, if the rule was adopted without compliance with statutory rulemaking procedures, or if the rule is arbitrary and capricious.[66] Courts will overturn an agency's adjudicative order if it violates a constitutional provision, if it is outside the statutory authority or jurisdiction of the agency, or if the agency has engaged in unlawful procedures or decision-making.[67] Courts will also overturn an agency's adjudicative order if the agency has erroneously interpreted or applied the law, if the order is not supported by substantial evidence, if the agency has not decided all issues requiring resolution, if the order is inconsistent with a rule of the agency, or if it is arbitrary or capricious.[68]

64. WASH. REV. CODE § 34.05.570(1)(b) (2001).
65. *Id.* § 34.05.570(1)(a).
66. *Id.* § 34.05.570(2)(c).
67. *Id.* § 34.05.570(3).
68. *Id.*

B. *Washington Courts Grant Substantial Deference to Agency Actions Unless Questions of Pure Law Are at Issue*

Not only are the statutory requirements for reversal of agency action difficult to meet, but courts grant substantial deference to agencies' determinations that their own actions meet those requirements. When reviewing an agency action, Washington courts grant agencies substantial deference in every case except those that turn on questions of pure law. There are three types of agency action, each of which requires a different standard of review: questions of fact, questions of law (which can be divided between pure questions of law and questions involving statutes or regulations within the expertise of a challenged agency), and mixed questions of fact and law (as when a rule or statute is applied to a particular factual situation).[69]

1. *Questions of Fact Are Reviewed Under the Substantial Evidence Test*

Washington courts give substantial deference to agency adjudications that turn on questions of fact. In *Wenatchee Sportsmen Ass'n v. Chelan County*,[70] the Court adopted the substantial evidence test for determining whether an administrative adjudicator had made a factual error.[71] Under the substantial evidence standard, courts defer to agencies' factual determinations as long as "there [is] a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true."[72] In other words, unless the agency's factual determination is unreasonable, courts will defer to the agency decision.

Recall that the United States Supreme Court in *Pierce* defined "substantial justification" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[73] Similarly, the agency need only have "a sufficient quantum of evidence . . . to persuade a reasonable person that the declared premise is true."[74]

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69. *See* Franklin County Sheriff's Office v. Sellers, 97 Wash. 2d 317, 329, 646 P.2d 113, 119 (1982). Because none of the cases that address the WEAJA involve a mixed question of law and fact, this category of agency action is not discussed in this Comment.

70. 141 Wash. 2d 169, 4 P.3d 123 (2000).

71. *Id.* at 176, 4 P.3d 123, 126.

72. *Id.*

73. Pierce v. Underwood, 487 U.S. 552, 565 (1988).

74. *Wenatchee Sportsmen*, 141 Wash. 2d at 176, 4 P.3d at 126.

2. *Agencies' Interpretation of Statutes Within the Expertise of the Challenged Agency Are Given Substantial Deference*

Where the statute falls within the agency's expertise, courts grant substantial weight to the agency's view of the law. For instance, the *ALPS* court noted that "[r]eviewing courts . . . give substantial weight and deference to an agency's interpretation of the statutes and regulations it administers, and the agency's interpretation should be upheld if it reflects a plausible construction of the language of the statute and is not contrary to legislative intent."[75] Thus, where the agency action at issue concerns statutory or regulatory interpretation, an aggrieved party must prove that the agency's interpretation was not even plausible or was contrary to legislative intent.[76]

3. *Pure Questions of Law Are Reviewed Under the Error of Law Standard*

On the other hand, pure questions of law, which are reviewed under the error of law standard, require a significantly different inquiry. Typical questions of pure law involve the interpretation of statutes that are not within the expertise of the challenged agency; when that is the case, courts grant no deference to the agency.[77]

IV. THE APPLICATION OF THE SUBSTANTIAL JUSTIFICATION LIMIT BY THE WASHINGTON COURT OF APPEALS

There are thirteen Washington Court of Appeals cases that address the WEAJA. In two of those cases, the court did not reach the substantially justified question because the non-prevailing party was not an agency within the meaning of the statute.[78] In three other cases, the Court of Appeals did not reach the substantial justification question because the

75. *ALPS*, 102 Wash. App. 1, 14, 979 P.2d 929, 936 (1999).

76. WASH. REV. CODE § 34.05.570(3) (2001).

77. *See* Yamauchi v. Employment Sec. Dep't, 28 Wash. App. 427, 431, 624 P.2d 197, 199 (1981) (overruled on other grounds).

78. Duwamish Valley Neighborhood Preservation Coalition v. Central Puget Sound Growth Mngmt. & Hearings Bd., 97 Wash. App. 98, 101, 982 P.2d 668, 669 (1999) (holding that a county zoning board is not an "agency" within the meaning of RCW § 4.84.340(1)); Cascade Court Ltd. P'ship v. Noble, 105 Wash. App. 563, 571–72, 20 P.3d 997, 1002–03 (2001) (holding that the Tax Assessor is not an "agency" within the meaning of WASH. REV. CODE § 4.84.340(1) (2001)).

agency prevailed on appeal.[79] The remaining eight cases are organized below based on the applicable standard of review.

There are no defining characteristics of Washington case law regarding the substantial justification limit to the WEAJA. When viewed collectively, Washington cases on this issue are either a hodge podge of conflicting rules and interpretations or they are fact-specific analyses that simply conclude that an action is or is not substantially justified, with little or no explanation.

A. Factual Determinations

There have been two Washington Court of Appeals cases in which the agency action involved factual determinations. In *Aponte v. Washington State Department of Social and Health Services*,[80] the court ruled that an agency's action cannot be substantially justified if the agency removes an issue from consideration of the reviewing court.[81] As such, *Aponte* is only helpful to a practitioner facing an agency that capitulates. Mr. Aponte's foster care license was revoked by the Department of Social and Health Services (DSHS) because he refused to undergo a sexual deviancy evaluation.[82] DSHS also disqualified Mr. Aponte from employment at a licensed daycare facility.[83] After judicial review had commenced, and after Mr. Aponte's counsel had fully briefed his client's position in both the license and the employment disqualification issues, the Department withdrew the employment disqualification from consideration.[84] The court held that, "[g]iven DSHS's capitulation on the issue, we are hard pressed to see how DSHS has met its burden of demonstrating the decision to disqualify Mr. Aponte . . . was substantially justified."[85] The court was silent as to whether the underlying agency action on the employment disqualification issue was in fact substantially justified.

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79. McFreeze Corp. v. State Dep't of Revenue, 102 Wash. App. 196, 6 P.3d 1187 (2000); Stuewe v. State Dep't of Revenue, 98 Wash. App. 947, 991 P.2d 634 (2000); State Dep't of Revenue v. Jenson, No. 22446-1-II, 1998 WL 79186 (Wash. Ct. App. Nov. 13, 1998).

80. 92 Wash. App. 604, 965 P.2d 626 (1998).

81. *Id.* at 623, 965 P.2d at 635.

82. *Id.* at 611, 965 P.2d at 629.

83. *Id.* at 608, 965 P.2d at 627.

84. *Id.* at 623, P.2d at 635.

85. *Id.*

While the *Aponte* court was willing to separate distinct issues for purposes of determining whether an agency action was substantially justified, the court in *del Rosario v. Washington State Department of Labor and Industries*[86] reasoned that it was enough that the agency's actions in their entirety were "essentially" justified.[87] In doing so, the *del Rosario* court declined to separate distinct charges for purposes of the WEAJA.[88] In *del Rosario*, the court affirmed the Department of Labor and Industries (the Department) decision to cite Ernest del Rosario's West & Loomis Ranches (Rosario) for failure to implement an accident prevention program and for failure to provide effective information and training on hazardous chemicals in the work area.[89] The Department also cited Rosario for not providing protective gear.[90] While the Department prevailed on the first two citations, it did not prevail on the protective gear citation.[91] However, the Court of Appeals affirmed the superior court's ruling that the board's position was substantially justified, stating that it was "essentially" justified.[92] The Court of Appeals did not elaborate further on what "essentially" justified meant in relation to substantially justified or why the agency was in fact substantially justified. Nor did it elaborate on how many of the total number of citations issued must fail the substantially justified test before a party that prevails on at least one substantive and discrete citation can recover fees.

Thus, the two cases that address the substantial justification of an agency's factual determinations are inconsistent. On the one hand, the *Aponte* court held that an agency that withdraws an issue from consideration cannot be substantially justified, even if it was justified with regard to other issues involved in the same litigation.[93] On the other hand, the rule established by the *del Rosario* court implies that an agency's action, viewed in its entirety, need only be essentially justified.[94]

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86. No. 17447-6-III, 1999 WL 495138 (Wash. Ct. App. July 13, 1999).

87. *Id.* at *5.

88. *Id.*

89. *Id.* at *1.

90. *Id.*

91. *Id.* at *5.

92. *Id.*

93. Aponte v. Wash. State Dep't of Social & Health Servs., 92 Wash. App. 604, 623, 965 P.2d 626, 635 (1998).

94. *Del Rosario*, 1999 WL 495138 at *5.

B. *Interpretation of Statutes or Regulations Within the Expertise of the Administrative Agency*

In three WEAJA cases before the Washington Court of Appeals, the underlying agency action involved the interpretation of statutes or regulations within the expertise of the challenged agency. Here, too, the practitioner is faced with conflicting decisions. In *ALPS*, the Court of Appeals held that there was no substantial justification where an agency action conflicted with the clear structure and intent of the relevant statute.[95] However, in *Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board*[96] (*HEAL*), the court looked to factors extraneous to the interpretation of the statute in question in order to excuse an agency action that was clearly contrary to legislative intent.[97] Finally, in *Plum Creek Timber Co. v. Washington State Forest Practices Appeals Board*,[98] although the agency prevailed, the Court of Appeals explained in dicta that the agency was substantially justified.[99] In doing so, it reasoned that where the issues are difficult, an agency is substantially justified.[100] The result is that a practitioner cannot be certain that fees may be awarded even where an agency has acted in a manner that is clearly contrary to the structure and purpose of a statute.

In *ALPS*, the court held that an agency's interpretation of a statute is not substantially justified when it is so clearly contrary to the intent of the Legislature that it "begs reason."[101] The Department of Natural Resources (DNR) chose to base its decision to allow logging in the Alps Watershed based on a watershed analysis that ignored future forestry practices.[102] The court ruled that the DNR's construction of the statute and regulations was not plausible. In essence, the court reasoned that the DNR could not allow a watershed analysis that ignores the effect of future forestry practices to serve as an alternate regulatory scheme that avoids review of forestry practices in environmentally sensitive areas:

95. *ALPS*, 102 Wash. App. 2, 16, 979 P.2d 929, 936 (1999).
96. 96 Wash. App. 522, 979 P.2d 864 (1999) [hereinafter HEAL].
97. *Id.* at 536, 979 P.2d at 872.
98. 99 Wash. App. 579, 993 P.2d 287 (2000).
99. *Id.* at 595–96, 993 P.2d at 295–96.
100. *Id.*
101. *ALPS*, 102 Wash. App. at 19, 979 P.2d at 938.
102. *Id.* at 8, 979 P.2d at 933.

> [I]t begs reason to conclude that . . . forest practices that would otherwise require threshold [state EPA review] . . . can be ignored in the process of threshold . . . analysis . . . . This is not a plausible construction of the statutes and regulations here at issue.[103]

The court addressed the question of whether the DNR's action was substantially justified. Noting that the WEAJA was patterned after the Federal Act, the court, with no justification other than the statement that "[w]e find this definition persuasive and adopt it,"[104] adopted the definition announced in *Pierce v. Underwood*.[105] Under *Pierce*, "substantially justified" means "justified in substance or in the main—in other words, justified to a degree that could satisfy a reasonable person."[106] The court also adopted the "abuse of discretion" standard of review announced in *Pierce*.[107] The *ALPS* court awarded fees because "DNR's position that future forest practices need not be considered during threshold review begs reason."[108] The court gave little or no deference to the agency's interpretation of the statute and regulations in question despite the fact that this was a matter of first impression. In ruling that the DNR was not substantially justified, the court did not consider any factors beyond the strictures of statutory interpretation, despite the fact that this was a matter of first impression, that it involved a complicated issue, and that there were competing interests involved.[109]

In contrast, the Court of Appeals in *HEAL* looked to the circumstances surrounding the Central Puget Sound Growth Management Hearings Board's (Board) interpretation of the Growth Management Act (GMA) to determine whether its action was substantially justified.[110] In 1995, the City of Seattle amended both its critical areas regulations and the policies upon which those regulations are based.[111] Honesty in Environmental Analysis and Legislation and other landowners challenged the city's new regulations and policies on the basis that they were not formulated using

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103. *Id.* at 16, 979 P.2d at 937.

104. *Id.* at 19, 979 P.2d at 938.

105. 487 U.S. 552, 565 (1988).

106. *Id.*

107. *ALPS*, 102 Wash. App. at 19, 979 P.2d at 938. (citing Pierce v. Underwood, 487 U.S. 552, 565 (1988)).

108. *Id.*

109. *Id.*

110. *HEAL* 96 Wash. App. 522, 536, 979 P.2d 864, 872 (1999).

111. *Id.* at 523, 979 P.2d at 867.

the best available science.[112] The Board determined that, while it had jurisdiction to review the city's new *regulations*—because the GMA only requires the city to adopt critical areas regulations—it did not have jurisdiction to review the *policies* of the city regarding critical areas because the GMA does not require cities to adopt critical areas policies.[113]

The *HEAL* court examined the question of whether use of the best available science is required in the formulation of critical areas *policies* via standard and straightforward principles of statutory interpretation. The GMA states that "[i]n designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing *policies* and development regulations to protect the functions and values of critical areas."[114] In rejecting the Board's decision that it did not have jurisdiction to review critical areas policies, the court concluded that:

> [s]uch a holding would render a portion of [the statute] a nullity . . . . RCW 36.70A.172(1) provides that counties and cities "shall include" the best available science in developing both policies and regulations regarding critical areas. Inclusion of best available science in the development of critical areas policies and regulations is therefore a mandate of the GMA.[115]

Despite the fact that the Board failed in a basic task of statutory interpretation, the court decided that its position was substantially justified.[116] The court reasoned that, because the Board's jurisdiction to review a city's critical areas policies are implicit, rather than explicit, and because an agency should be reluctant to assume jurisdiction beyond that which is expressly granted, its action was substantially justified.[117] To support this claim, the court stated that "the Legislature . . . takes a dim view of agencies granting themselves additional authority . . . . The Board's reluctance to assert jurisdiction beyond that expressly granted, is substantially justified . . . ."[118]

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112. *Id.*
113. *Id.* at 524, 979 P.2d at 867.
114. WASH. REV. CODE § 36.70A.172.(1) (2001) (emphasis added).
115. *HEAL*, 96 Wash. App. at 528, 979 P.2d at 868.
116. *Id.* at 536, 979 P.2d at 872.
117. *Id.*
118. *Id.*

In *Plum Creek*, the court provided dicta regarding "substantial justification" to the effect that, where the decision is a difficult one, an agency is presumed to be substantially justified.[119] The court's statements regarding the WEAJA are dicta because the court ruled that the Forest Practices Appeals Board (FPAB) was the prevailing party in all respects.[120] Nevertheless, the court argued that FPAB's actions were substantially justified, largely based on four extraneous factors. First, "the case involves the balancing of sensitive, sometimes competing or conflicting interests in a controversial area"; second, it "requires analysis of close questions"; third, it is a case "on which there is no clear precedent on point'"; and fourth, "[t]he FPAB's decision required consideration of a complicated regulatory scheme as well as the subjective issue of aesthetics."[121] All of these reasons are extrinsic to the quality of the justification itself. Rather, these are conditions which, when present, seem to give a presumption of reasonableness to the FPAB's position.

While the *ALPS* court ignored extraneous factors, the *HEAL* and *Plum Creek* courts embraced them. Consequently, where the agency's action involves a question of statutory or regulatory interpretation within the expertise of the agency, Washington Court of Appeals decisions are inconsistent.

C. *Questions of Pure Law*

The case law regarding the substantial justification of an agency's action where the issue is one of pure law is likewise inconsistent. Of the three cases, one, *Hunter v. University of Washington*,[122] merely concludes that where the administrative agency keeps no record of its decision, there can be no substantial justification.[123] While this may be a straightforward rule, the fact that the court applied the substantial justification test to the wrong action by the agency puts that rule in doubt. The other two cases inconsistently resolve the question of whether an agency can be substantially justified when it violates agreed-to procedures. In *Construction Industry Training Council v. Washington*

119. Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd., 99 Wash. App. 579, 595–96, 993 P.2d 287, 295–96 (2000).

120. *Id.*

121. *Id.*

122. 101 Wash. App. 283, 2 P.3d 1022 (2000).

123. *Id.* at 294, 2 P.3d at 1029.

State Apprenticeship and Training Council (CITC),[124] the court ruled that, where circumstances justify, an agency may disregard its own stipulations regarding settled matters.[125] However, the court in *Sugano v. University of Washington* held that an agency was not substantially justified when it violated agreed-to procedures.[126]

In *Hunter*, the court held that the University of Washington's decision to exclude law students from a tuition reduction program that targeted veterans was not substantially justified because the University's administrative record did not justify the regulations.[127] However, the court ruled that the University's regulation regarding veteran tuition reductions (the underlying agency action) was invalid because it did not comply with the requirements of the Washington APA.[128] The reason the University did not develop a record was that it maintained the position that the tuition regulations did not fall within the Washington APA; therefore, no record was necessary.[129] Even though this procedural decision was the agency action that underlay the cause of action, the court looked to the justification of the substantive regulations to determine whether the overall action was substantially justified.[130]

The Washington statute at issue in *Hunter* provides that "universities . . . may exempt veterans of the Vietnam conflict . . . from the payment of all or a portion of any increase in tuition and fees."[131] The University imposed regulations on the tuition reduction program that, among other things, excluded law students.[132] The Court of Appeals reversed the trial court's determination that the regulations did not fall within the APA.[133]

Because the University maintained that the regulations were not subject to the Washington APA, it failed to keep an adequate record justifying its position in compliance with WASH. REV. CODE § 34.05.320.[134] There was also no public comment period, as required by

124. 96 Wash. App. 59, 977 P.2d 655 (1999).
125. *See infra* text accompanying notes 137–140.
126. 2000 WL 339895 (Wash. Ct. App. Mar. 27, 2000).
127. *Hunter*, 101 Wash. App. at 294, 2 P.3d at 1029.
128. *Id.* at 291, 2 P.3d 1028.
129. *Id.* at 292–93, 2 P.3d at 1027–28.
130. *Id.* at 294, 2 P.3d at 1029.
131. *Id.* at 288, 2 P.3d at 1026.
132. *Id.* at 286, 2 P.3d at 1025.
133. *Id.* at 291, 2 P.3d at 1028.
134. *Id.*

the Washington APA.[135] Because the regulations were not properly adopted, and because of the paucity of the record, the court declined to address the merit of the regulations, instead ruling that they were invalid.[136]

In *CITC*, the court looked to extraneous factors to determine that the agency action was substantially justified, despite the fact that the agency violated its own stipulations and a court order.[137] The Court of Appeals ruled that the Council's position was substantially justified.[138] The court listed three reasons for its decision: the agency's referral of the program to adjudication was taken on advice of counsel, it was made in direct response to a Supreme Court decision on similar facts, and the action was taken in good faith as part of an effort to avoid unnecessary delay in the final outcome of the instant case.[139] The court did not address the reasonableness of the Council's decision to ignore its stipulation that it would not refer the program to adjudication and the trial court's order to the same effect.[140]

In contrast, the *Sugano* court ruled that the agency was not substantially justified in violating procedures agreed to in arbitration.[141] In 1993, Sugano was denied tenure. Sugano petitioned the University for an adjudication of the tenure decision.[142] The panel recommended reinstatement pending a second review by a mentoring committee that was not to include the faculty members who were on Sugano's tenure review committee.[143] The University President Gerberding accepted this remedy.[144]

Sugano was not granted tenure in the second review.[145] She petitioned for a second adjudication, and the second adjudication panel found that the vote "did not comply with the first panel's prescribed remedy."[146]

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135. *Id.* at 292–93, 2 P.3d at 1028.

136. *Id.*

137. Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 96 Wash. App. 59, 63, 977 P.2d 655, 657 (1999).

138. *Id.* at 69, 977 P.2d at 660.

139. *Id.*

140. *Id.*

141. Sugano v. Univ. of Wash., No. 98-2-00128-3, 2000 WL 339895, *7 (Wash. Ct. App. Mar. 27, 2000).

142. *Id.* at *1–2.

143. *Id.*

144. *Id.* at *2.

145. *Id.*

146. *Id.*

President McCormick, recently appointed, reversed the findings of the second adjudication panel and upheld the denial of tenure.[147] Sugano petitioned for judicial review of this action, and the Superior Court found that the University did not follow the appropriate procedures in the second tenure review.[148] The Superior Court also awarded fees pursuant to the WEAJA.[149] The Court of Appeals upheld the award of fees because the University's decision constituted an "erroneous interpretation or application of the law and [was] based on a decision-making process that was inconsistent with the agreed-to procedure, in the first adjudication. Given this finding, we conclude that the court did not abuse its discretion in also finding that the University's decision was not substantially justified."[150]

Thus, Washington Court of Appeals decisions regarding questions of pure law are inconsistent. First, the *Sugano* court held that an agency action could not be substantially justified when it failed to follow agreed-to procedures.[151] Conversely, the *CITC* court looked to extraneous factors to determine that the agency was substantially justified, despite the agency's decision to ignore a court order and its own stipulations regarding its conduct.[152] Moreover, the *Hunter* court's decision is unreliable due to its erroneous focus on the improper agency action.[153]

V. WHERE THE AGENCY ACTION IS A FACTUAL DETERMINATION OR A STATUTORY OR REGULATORY INTERPRETATION WITHIN ITS AREA OF EXPERTISE, THE SUBSTANTIAL JUSTIFICATION LIMIT IS REDUNDANT

The purpose of the substantial justification limit is to prevent administrative agencies from having to pay every time a court overturns their actions.[154] That function is more than adequately served by the deferential standard of review courts use when reviewing agency

147. *Id.* at *3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at *7.

152. Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 96 Wash. App. 59, 63, 977 P.2d 655, 657 (1999).

153. *See supra notes* 129–130 and accompanying text.

154. *See supra* Part I.B. Washington Legislative history is silent on the purpose of the substantial justification limit. But see *infra* Part V.B for a discussion of the persuasiveness of federal judicial interpretations on state statutes that parallel a like federal statute.

decisions involving factual determinations or the interpretation of statutes and regulations that are within the expertise of the challenged agency. Because the determination on judicial review of whether an agency action in these cases should be overturned and the substantial justification question are functionally the same, the latter is redundant. At best, the dual inquiries are a waste of judicial resources. At worst, the redundancy provides an opportunity for overworked appellate courts to make erroneous decisions by improperly applying the substantial justification limit.

A. The Deferential Standard of Review Afforded Agencies' Factual Determinations Renders the Substantial Justification Limit Redundant

Because a court can overturn an agency's factual determination only if it is not based on substantial evidence,[155] the substantial justification limit is redundant. Both questions turn on the same determination of reasonableness: an action cannot be substantially justified unless it has a reasonable basis, and the determination that an agency action was without substantial evidence turns on whether the evidence is sufficient to convince a reasonable person.[156] Because the legislature stated that the WEAJA was adopted to encourage citizens to defend themselves against "inappropriate state agency actions" and against "unreasonable agency action,"[157] it is illogical to conclude that they intended to exempt state agency actions that are not based on evidence sufficient to convince a reasonable person.

Unfortunately, the two Court of Appeals cases that address questions of fact do not properly reach the question of substantial justification. Because the cases do not include the information necessary to determine whether the substantial justification limitation (as opposed to the limits on judicial review embodied in the APA) would have made a difference in the outcome of the case, conclusive observations regarding the limitation cannot be made. However, these cases do provide an illustration of what might have happened had the courts properly reached the substantial justification question.

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155. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash. 2d 169, 176, 4 P.3d 123, 126 (2000).

156. *See supra* Part II.B.

157. 1995 WASH. LEGIS. SERV. CH. 403, § 901 (West).

In *Aponte*, the court did not properly reach the substantial justification issue because it ruled that an agency's action cannot be substantially justified if the agency withdraws the issue from consideration of the reviewing court.[158] This holding confuses litigation position and agency action by equating a decision made in litigation with the merits of the underlying action.[159] As the Supreme Court noted in *Pierce*, a decision made after litigation begins does not necessarily reflect on the merits of the underlying action, as when an agency settles a matter prior to the completion of the litigation.[160] Thus, the *Aponte* court did not properly reach the substantial justification question.

Because the *Aponte* court did not include a description of what the agency's justification was, it is difficult to say what the effect of the substantial justification limit (as opposed to the standard of review required by the APA) would have had on that case.[161] However, given that the agency did not feel strongly enough about its decision to prevent Mr. Aponte from working in a daycare facility as an employee (despite the fact that DSHS believed that he might be a child molester),[162] it seems unlikely that it would have survived judicial review. Therefore, the outcome regarding fees would likely have been the same regardless of whether the substantial justification limit was in the statute.

The *del Rosario* court affirmed the Department's decision to cite Rosario for failure to implement an accident prevention program and for failure to provide effective information and training on hazardous chemicals in the work area.[163] The Department also cited Rosario for not

158. Aponte v. Wash. State Dep't of Soc. and Health Servs., 92 Wash. App. 604, 623, 965 P.2d 626, 635 (1998)

159. *See supra* notes 38–43 and accompanying text.

160. Pierce v. Underwood, 487 U.S. 552, 568 (1988).

161. Furthermore, a rule that precludes the substantial justification of an agency action where the agency withdraws the issue from consideration is contrary to the legislature's intent in enacting the WEAJA and wastes judicial resources. An agency may well continue to pursue a case that it strongly suspects it will not win if it will otherwise automatically pay fees. Thus the *Pierce* court rejected a rule that settlements unfavorable to an agency precluded a finding of substantial justification: "[t]o hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements." *Id.* Qualified individuals might likewise be discouraged as their legal bills mounted in the face of an intransigent agency. *See* Estate of Merchant v. Comm'r IRS, 947 F.2d 1390, 1395 (9th Cir. 1991) ("The government's decision to concede, rather than to litigate an arguable legal issue, does not in itself indicate that the government's pre-settlement position was unreasonable.").

162. *Aponte*, 92 Wash. App. at 609–10, 965 P.2d at 628–29.

163. Del Rosario v. Wash. State Dep't of Labor & Indus., 1999 WL 495138, *2 (Wash. Ct. App. July 13, 1999).

providing protective gear.[164] As the court noted, "the primary question here is simply whether the findings of fact are supported by substantial evidence."[165] While the Department prevailed on the first two citations, it did not prevail on the protective gear citation.[166] However, the court affirmed the superior court's ruling that the board's entire action was substantially justified.[167]

The *del Rosario* court did not properly apply the WEAJA. It is true that, in the federal scheme, a court must look at the entirety of the government's position to determine the substantial justification issue.[168] However, where only the underlying agency action must be substantially justified, and where a party prevails on an issue that could have been a cause of action in its own right (as when a business is issued multiple citations), then a party should only need to prove that the government's action in regard to that one issue was not substantially justified. Of course, only fees and costs incurred as a result of litigating the issue upon which the party prevailed ought to be awarded. This was the reasoning of the *Aponte* court, which awarded fees to Mr. Aponte that he incurred in connection with the employment issue only, even though he failed to prevail on the licensing issue.[169]

The *del Rosario* court did not discuss why the trial court ruled in favor of Rosario, and so it is not possible to say whether the application of the substantial evidence standard here would have yielded a different result than the substantial justification limit. As noted above, the result should have been the same. However, because the Court of Appeals was forced to engage in the additional substantial justification inquiry, its resources were unnecessarily expended. Furthermore, the appeals court was afforded an opportunity to make an erroneous decision with the unfortunate result of encouraging administrative agencies to litigate beyond the point at which they might otherwise settle a matter.[170]

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164. *Id.* at *1.

165. *Id.* at *2.

166. *Id.* at *1–2.

167. *Id.* at *5.

168. *See* Roanoke River Basin Ass'n v. Hudson, 991 F.2d 132, 139 (4th Cir. 1993) (stating that the EAJA inquiry does not focus only upon the narrow issue on which a party prevailed but upon the entire litigation of which that issue may have been only a small part).

169. Aponte v. Wash. State Dep't of Soc. & Health Servs., 92 Wash. App. 604, 624, 965 P.2d 626, 635 (1998).

170. *See supra* note 161.

B. *The Deferential Standard of Review Afforded Interpretations of Statutes or Regulations Within the Expertise of the Challenged Agency Renders the Substantial Justification Limit Redundant*

A court will only overturn an agency's interpretation of a statute or regulation within its expertise if the agency has acted in an unreasonable fashion, either because its interpretation was implausible or because it was clearly contrary to legislative intent.[171] Similarly, the substantial justification limit turns on reasonableness.[172] Both questions require the same determination: an action cannot be substantially justified unless it has a reasonable basis, and a determination that an agency's interpretation was implausible or clearly contrary to legislative intent precludes a finding of reasonableness. When the legislature stated that the WEAJA was adopted to allow citizens to defend themselves against "inappropriate state agency actions" and against "unreasonable agency action,"[173] it seems unlikely that it intended for state agency actions that were implausible or clearly contrary to legislative intent to be exempt from the statute's coverage.

The Washington Court of Appeals cases that have addressed the "substantial justification" of an agency's interpretation of a statute or regulation within its expertise either would have been resolved in the same way had the substantial justification limit not been part of the statute or they were erroneously decided. The erroneous decisions occurred either because the court improperly applied extraneous factors in deciding whether an agency action was substantially justified or because the court did not properly reach the substantial justification issue. The legislature's goals would have been more properly served had the "substantial justification" limit not been required and judicial resources could have been put to more productive use.

There are two cases from the Washington Court of Appeals that properly reach the question of whether an agency's statutory or regulatory interpretation was substantially justified.[174] In *ALPS*, the outcome would have been the same had the "substantially justified"

171. *See supra* Part II.

172. Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res., 102 Wash. App. 1, 19, 979 P.2d 929, 938 (1999).

173. 1995 WASH. LEGIS. SERV. CH. 403, § 901 (West).

174. In *Plum Creek*, the court addressed a question of statutory and regulatory interpretation as well. Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd., 99 Wash. App. 579, 595–96, 993 P.2d 287, 295–96 (2000). However, because the agency prevailed, that discussion is dicta. *See infra* Part IV.B.

limitation not been in play. However, in *HEAL*, relying on the APA limits to judicial review would have pre-empted an erroneous application of the law of "substantial justification."

The *ALPS* court awarded fees to the plaintiffs after determining that the DNR was not substantially justified in adopting and implementing its watershed analysis regulations.[175] The court began its discussion by noting that, in drafting a regulation pursuant to a statute, all the agency need do to prevail in a judicial review is to come forward with a plausible statutory or regulatory construction that is not contrary to legislative intent.[176] In approving the superior court's award of fees, the *ALPS* court stated that "DNR's position that future forest practices need not be considered during threshold review begs reason."[177] Thus, the court used the same reasoning to determine both whether the agency action was substantially justified and if the action was plausible and not contrary to legislative intent.

The *HEAL* court examined the Board's interpretation of the GMA de novo.[178] Nevertheless, it noted that "[w]e accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues. . . ."[179] Even given that deference, the court ruled that the Board failed in an everyday matter of statutory interpretation. Because the Board was the only body authorized to hear complaints that a governmental agency is not in compliance with the GMA, "the Board's decision that it . . . has no jurisdiction . . . would render a portion of [the statute] a nullity."[180]

An interpretation that renders a portion of a statute null is not plausible. The *HEAL* court implied that the proper statutory language was clear: "[t]he legislature *must* have intended an enforcement mechanism for RCW 36.70.172. Because the Board's review is that mechanism, implicitly the legislature *must* have intended the Board have jurisdiction."[181]

Nevertheless, the *HEAL* court held that the Board's action was substantially justified. The court reasoned that "the Board's reluctance to

175. *ALPS*, 102 Wash. App. at 19, 979 P.2d at 938.

176. *Id.* at 14, 979 P.2d at 936.

177. *Id.* at 19, 979 P.2d at 938.

178. *Id.* at 14, 979 P.2d at 935.

179. Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 96 Wash. App. 522, 526, 979 P.2d 864, 867 (1999).

180. *Id.* at 528, 979 P.2d at 868.

181. *Id.* at 536, P.2d at 872 (emphasis added).

assert jurisdiction beyond that expressly granted, is substantially justified."[182] Here, the court looked beyond the strictures of proper statutory interpretation by explaining the context in which the interpretation was made; agencies are reluctant to assume jurisdiction.[183] These considerations are properly applied to the justification of a litigation position, not an agency action.

Washington courts, like the one in *HEAL*, that use factors external to the justification of the underlying agency action have not taken sufficient account of the differences between the federal and state Acts. While the former requires that the *position* of the agency must be substantially justified in order to avoid an award of fees,[184] the latter requires only "that the *agency action* [be] substantially justified."[185] Thus, the federal EAJA calls for an evaluation of the agency's conduct both at the time of the underlying action as well as during the ensuing litigation over the propriety of that initial action. In contrast, the WEAJA only requires that the agency action be substantially justified. Because external factors are only relevant where the litigation position of the agency must be substantially justified,[186] reliance on external factors where only the justification of the agency action is in question is not in accord with the Legislature's intent.

Washington courts will assume that the Legislature was aware of the distinction between agency action and an agency's position in litigation when it adopted the WEAJA. The WEAJA was adopted in 1995; by then, the 1985 amendments to the Federal Act were ten years old, and numerous federal cases made clear the effect of the action/position distinction.[187] In *Woodson v. State*, the Washington Supreme Court noted that the Legislature "is presumed to know the existing state of the case law in those areas in which it is legislating."[188] Furthermore, where different words are used in a state statute that is modeled after a federal

182. *Id.*

183. *Id.*

184. 28 U.S.C. § 2412(d)(1)(a) (1994) (emphasis added).

185. WASH. REV. CODE § 4.84.350(1) (2001); 1995 WASH. LEGIS. SERV. CH. 403, § 903 (West) (emphasis added).

186. *See supra* Part I.

187. *See, e.g.*, Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988).

188. 95 Wash. 2d 257, 262, 623 P.2d 683, 685 (1980).

statute, it is reasonable to infer that the state legislature intended a different meaning.[189]

Rules of statutory interpretation in Washington compel the conclusion that extraneous factors ought not be considered when determining whether an agency action is substantially justified. Washington courts have adopted the rule that judicial interpretations of similar statutes of other jurisdictions are persuasive authority.[190] When construing a state statute that substantially parallels a federal statute, courts may consider federal interpretations of the parallel statute.[191] Similarly, when there are differences between otherwise similar laws, courts assume that legislatures intended for there to be a difference in the interpretation of those statutes.[192] Therefore, the application of the substantial justification standard that best represents the intent of the legislature is one that only considers the merits of the underlying agency action. That is, discussions of extraneous factors such as other authority, whether the matter is one of first impression, and so on, are not proper.

Using extraneous factors to determine whether the underlying agency action is substantially justified also serves as a deterrent to any would-be party who wishes to challenge an agency's reluctance to assume jurisdiction. Regardless of the (un)reasonableness of an agency's decision, as long as its jurisdiction is only implicit, a party must accept that it will pay all of its own litigation costs. This result is contrary to the legislature's intent to prevent "certain individuals . . . and other organizations [from being] deterred from seeking review . . . against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings."[193] Neither is the public interest served by discouraging aggrieved parties from litigating against administrative agencies that fail to enforce the mandates of the legislature, especially in regards to the GMA and similar environmental statutes that depend on agency enforcement for effectiveness. It is unlikely that any single individual will have a

189. *See* Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 96 Wash. App. 59, 66, 977 P.2d 655, 660 (1999) ("If the Legislature had intended to adopt the federal scheme, it would have done so explicitly, not by omission."); *see also* Bloom v. Richards, 2 Ohio St. 387, 403, (1853).

190. Hearst Corp. v. Hoppe, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978) (holding that "judicial interpretations of [similar acts] are particularly helpful in construing our own").

191. Hollingsworth v. Wash. Mut. Sav. Bank, 37 Wash. App. 386, 390, 681 P.2d 845, 848 (1984).

192. *See supra* note 189.

193. 1995 WASH. LEGIS. SERV. CH. 403, § 901 (West).

sufficient economic stake in a particular case or decision to justify paying costly attorney's fees. Consequently, only a fee-shifting provision like the WEAJA can ensure vigorous opposition to agency's who fail to perform their statutorily imposed duties.

The *HEAL* decision demonstrates that the only way a court can find that an agency interpretation of a statute or regulation within its expertise should be overturned, yet not award costs, is to misapply the substantial justification limit. Rather than invite such erroneous decisions, the limit itself should be removed.

VI. WHERE THE AGENCY ACTION IS A QUESTION OF PURE LAW, THE SUBSTANTIAL JUSTIFICATION LIMIT PREVENTS THE ACHIEVEMENT OF THE GOALS OF THE WASHINGTON STATE EQUAL ACCESS TO JUSTICE ACT

Where the agency action involves either the interpretation of statutes that are outside the scope of its expertise, or where the issue is one of pure law, then the substantial justification inquiry is not redundant because the standard of review is error of law, and courts do not defer to the agency.[194] However, the application of the substantially justified limitation in these circumstances results in consequences contrary to the goals that the Legislature intended to achieve when it enacted the WEAJA. It has also created an unpredictable body of law. This exception is also an unwarranted drain on judicial resources. In other words, where it matters, the limit can eclipse the statute.

A. Applying the Substantial Justification Limit Is Contrary to the Legislative Intent Underlying the WEAJA

Where courts overturn an agency action yet find that the underlying action is substantially justified, they act contrary to the goals the legislature intended to meet when it enacted the WEAJA. First, where the Washington Court of Appeals applies factors extraneous to the merits of the underlying action to determine whether it was substantially justified, it places a stumbling block before the prevailing party that is not contemplated by the statute.[195] Thus, in *CITC*, the court denied fees despite the fact that there was no substantial justification for the

194. See *supra* Part III.

195. *See supra* notes 38–43 and accompanying text (discussing the inapplicability of extraneous factors to the substantial justification of agency actions).

underlying action.[196] By ignoring its own stipulations and the resulting pre-trial order,[197] the agency violated Washington court rules.[198] Nevertheless, the *CITC* court found that the agency's action was substantially justified.[199]

Aside from the obvious problem with tacit approval of agencies' decisions to ignore court orders, the *CITC* court looked only to extraneous factors to decide whether the agency action was substantially justified.[200] Absent those factors, the court would have been compelled to conclude that ignoring stipulations and court orders was not a substantially justified action: no court should find that a party that ignores a court order acted reasonably. To do so would be to question the orderly administration of justice wherein parties appeal court orders that they disagree with rather than taking matters into their own hands.

Furthermore, where the agency has not prevailed on a question of pure law, a failure to award fees is contrary to the purposes of the WEAJA.[201] For instance, had the *Hunter* court properly applied the substantial justification limit to the appropriate agency action, it is entirely possible that the court would have found that action substantially justified. There, the dispositive issue turned out to be the University's erroneous conclusion that regulations that restrict a tuition reduction benefit do not fall within the APA.[202] Nevertheless, the court looked to the University's adoption of the regulation itself (rather than the validity of the procedures by which it was adopted) to determine whether the action was substantially justified.[203] The court held that the University was not substantially justified as "the paucity of the University's record prevents it from substantially justifying its actions."[204] However, the position of the University was not that the regulations themselves were substantially justified; rather, the University's contention was that the regulations were not subject to the APA; therefore, the University is not required to justify

196. *See supra* notes 137–140 and accompanying text.

197. Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 96 Wash. App. 59, 63, 977 P.2d 655, 657 (1999).

198. *See* Wash. Superior Ct. R. 16.

199. *CITC*, 96 Wash. App. at 69, 977 P.2d at 660 (1999).

200. *Id.*

201. While the meager legislative history of the WEAJA is silent on the need to protect the public interest, the federal law upon which it is modeled was enacted for that purpose. *See supra* note 33 and accompanying text.

202. Hunter v. Univ. of Wash., 101 Wash. App. 283, 293, 2 P.3d 1022, 1025 (2000).

203. *Id.* at 294, 2 P.3d at 1029.

204. *Id.*

them.[205] Their claim was either that the regulations were fiscal processes, or that the benefit was conferred by the University: in either case, the issue was one of pure law, and the record that the University made regarding the justification of the regulations was immaterial.[206] Instead, the underlying action was the decision not to apply WAPA procedures. Because a person can challenge an agency action based on procedure,[207] the choice of procedure is also an underlying agency action. If the University itself had been correct in its interpretation of the requirements of the APA, then its regulation would have been validly adopted.

Had the court looked to the proper action to determine whether the agency was substantially justified, the outcome might well have been different. Aside from the unpredictability inherent in deciding whether an agency was reasonable in its actions, the court might have applied extraneous factors to find in favor of the University. For instance, the question of whether the University must follow APA procedures when adopting regulations regarding statutorily authorized tuition reductions is a matter of first impression.

If the court had found that the action was substantially justified, Mr. Hunter would have won the right to a fair and just regulation regarding tuition reduction for Vietnam veterans throughout the state, but entirely at his own expense. While Mr. Hunter may have been willing to incur the kinds of debt that litigation breeds (or he may have found an attorney to take his case pro bono), a legislative scheme that aims to foster public-minded litigation like Mr. Hunter's cannot assume that such altruistic behavior is the rule and not the exception. If it were, there would be no need for the WEAJA in the first instance.

VII. WASHINGTON COURTS' APPLICATION OF THE SUBSTANTIAL JUSTIFICATION LIMIT HAS RENDERED THE APPLICATION OF THE WEAJA UNPREDICTABLE

A court's decision regarding the substantial justification limit is unpredictable to a practitioner deciding whether to pursue judicial review of an agency action on behalf of a qualified party. Predictability is a central "rule of law" value, and the Washington Supreme Court has directed courts to interpret statutes in a manner that is predictable.[208]

205. *Id.* at 290, 2 P.3d at 1027.

206. *Id.* at 290–91, 2 P.3d at 1027–28.

207. WASH. REV. CODE § 34.05.570(3)(c) (2001).

208. *See* Salts v. Estes, 133 Wash. 2d 160, 170, 943 P.2d 275, 280 (1997).

However, the ambiguous nature of what constitutes a substantial justification is a roadblock to predictability. As the *Pierce* court noted, the issue is "a multifarious and novel question, little susceptible . . . [to] useful generalization."[209]

For instance, the *Sugano* court could well have decided the issue of substantial justification differently. The court reasoned that, because the University had erroneously interpreted the law and violated agreed-upon procedures that resulted from a previous adjudication, it was not substantially justified.[210] However, the court could have decided that, because the issue was one of first impression, the University was substantially justified. Furthermore, the *Sugano* court's implication that a failure to follow agreed-upon procedures precludes a finding of substantial justification is contradicted by the *CTIC* court, which found that the agency's action was substantially justified, despite the fact that the agency failed to follow agreed-to stipulations and a court order.[211]

The Washington Court of Appeals has also established contradictory, and thus unpredictable, rules regarding substantial justification. For instance, the court in *Aponte* held that each separate cause of action must be independently and substantially justified.[212] In contrast, the *del Rosario* court held that an agency was substantially justified, even though it only reached that conclusion in two of three separate and distinct citations issued by the Department.[213] Thus, a practitioner defending multiple charges cannot predict whether a court will award fees if one charge is unreasonable but others issued at the same time are reasonable. And in *ALPS*, the court did not consider that the issue was one of first impression, where the court in *HEAL* found that factor (amongst others) persuasive.[214] These contradictory rules render the WEAJA unpredictable.

209. Pierce v. Underwood, 487 U.S. 552, 562 (1988).

210. Sugano v. Univ. of Wash., 2000 WL 339895, *7 (Wash. Ct. App. 2000).

211. Constr. Indus. Training Council v. Wash. State Apprenticeship & Training Council, 196 Wash. App. 59, 62, 977 P.2d 655, 657 (1999).

212. Aponte v. Wash. State Dep't of Soc. & Health Servs., 92 Wash. App. 604, 624, 965 P.2d 626, 635 (1998)

213. Del Rosario v. Wash. State Dep't of Labor & Indus., 1999 WL 495138, *3–5 (Wash. Ct. App. July 13, 1999).

214. *See supra* Part IV.B.

VIII. CONCLUSION

Where the issue is one of fact or where it regards statutory or regulatory interpretation within the purview of an administrative agency, the substantially justified limit to awards under the WEAJA is superfluous at best, and is thus a waste of judicial resources. At worst, forcing courts and litigants to engage in another layer of justification (separate from that engaged in when evaluating the underlying agency action) creates opportunities for erroneous consideration of extraneous factors.

Where questions of pure law are at issue, the application of the substantial justification does not serve the legislature's intention to level the playing field between agencies and private actors for the benefit of both those individuals and for the wider society. By definition, qualified parties are not in the position to squander their meager financial resources in pursuit of justice. Where questions of law are at issue, particularly matters of new impression that potentially affect large numbers of people, society is not served if administrative agencies can control the field by virtue of their size and resources, except when they act the most unreasonably.

Furthermore, removing the substantial justification limit is not antithetical to the goal of preventing an award of fees every time an individual or business prevails in a judicial review of an agency action. Aside from the fact that fees are awarded only when the agency has failed to overcome the generous standards of review courts afford them, there are still two other statutory prerequisites to recovery. The party must be qualified,[215] meaning that wealthy plaintiffs cannot recover, and the award cannot be unjust.

The adversarial system serves a social function, in that it provides a vigorous interrogation of legal and social issues that, by virtue of the functioning of precedent, affects ever-larger numbers of people. In these instances, it is not just that one individual or a small group of individuals is forced to bear half the litigation costs of this social good, even when they prevail. It is one thing to ask individuals (and often practitioners) to risk losing a case. It is a different question to ask that they pay the costs of their valuable social service in all cases except those in which the administrative agency acts unreasonably. As Justice Brennan noted, "I would hope that the Government rarely engages in litigation [where the

215. *See supra* note 52.

Government's position was one having no substance]."[216] Yet it is to those circumstances that the jurisprudence of substantial justification has limited the WEAJA. At its earliest opportunity, the Washington Legislature should remove it from the statute.

216. Pierce v. Underwood, 487 U.S. 552, 577 (1988) (Brennan, J., concurring in part and concurring in the judgment).