COMM​ENTS

The Washington Forest Practices Act: When is Compliance with SEPA Required?

Evergreen forest land characterizes nearly one half of Washington State.1 Abundant timber resources are the basis of the state's giant timber industry2 and a significant factor in the recreational orientation of its citizenry.3 Timber management policy is therefore paramount to the continuing economic and environmental vitality of Washington. In the 1974 Forest Practices Act (FPA),4 the legislature delegated major control over protection and use of forest land resources to the forest practices board.5 Three years prior to enactment of the FPA, Washington adopted the State Environmental Policy Act (SEPA),6 mandating consideration of environmental factors in all major state


5. Wash. Rev. Code § 76.09.030 (1981). The eleven-member board is composed of five elected officials, including the Commissioner of Public Lands, and six members of the general public, two of whom must have affiliations with the timber industry. One commentary has suggested that such public commissions may not provide the innovative resources necessary to effect long range social and environmental goals. Cortner & Schweitzer, Institutional Limits to National Public Planning for Forest Resources: The Resources Planning Act, 21 Nat. Resources J. 203, 216 (1981).

agency decisions. The original 1974 Forest Practices Act did not expressly require compliance with SEPA. The 1975 amendments, however, specifically exempt certain types of forest practices from SEPA procedures. These exempted forest practices avoid stringent environmental impact statement (EIS) review under SEPA.

The resulting FPA is incompatible with the functioning of SEPA because it reduces environmental scrutiny of forest land activities, despite the recognized potential of timber harvesting practices for environmental degradation. This apparent statutory inconsistency led to the promulgation of regulations which virtually exempt forest land activities from the aegis of SEPA policy, contrary to express provisions of the Forest Practices Act.


8. “Forest practice” is defined as any activity conducted on or directly pertaining to forest land and relating to growing, harvesting, or processing timber. WASH. REV. CODE § 76.09.020(8) (1981).

9. For a discussion of the effect of requiring an environmental impact statement (EIS), see infra note 85.

10. A 1971 report found poor logging road construction to be the major cause of siltation in Washington’s Clearwater River. G. DESCHAMPS, A REPORT ON SILTATION IN STEQUALEHO CREEK 5 (Dep’t of Fisheries, Aug. 4, 1971). The Federal Environmental Protection Agency has also found logging roads to be a primary cause of sedimentation, erosion, and landslides. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, LOGGING ROADS AND PROTECTION OF WATER QUALITY (1975). In 1979, the Washington State Department of Ecology prepared several monographs disclosing the impact of logging road construction and use on the water quality of Washington’s streams and rivers. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Reports 79-5a-1 through 79-5a-4 (1979). Water quality is only one environmental factor affected by forest activities. Critics blame intensive management techniques such as clear-cutting, designed to maximize timber production, for deterioration of forest soils, loss of diversified wildlife habitat and recreational/aesthetic qualities of forests. H. ANDERSON, THE EFFECTS OF CLEARCUTTING ON STREAM TEMPERATURE, A LITERATURE REVIEW (DNR Report No. 29, Mar. 1973); Liberty, Forestland Preservation, 5 HARV. ENV’L L. REV. 153, 159-61 (1981); Spurr, Clearcutting on National Forests, 21 NAT. RESOURCES J. 223 (1981).

11. WASH. ADMIN. CODE chs. 222-08 to 222-50 (1980).

12. The Forest Practices Act states:

[I]t is in the public interest for public and private commercial forest lands to be managed consistent with sound policies of natural resource protection; that coincident with the 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.

WASH. REV. CODE § 76.09.010(1) (1981). To implement this policy, the Act requires review under SEPA for forest practices threatening substantial environmental impact. See WASH. REV. CODE § 76.09.050(1) (1981). For further discussion, see infra note 53.
In 1977, state citizens challenged these forest practices regulations when the Department of Natural Resources (DNR) did not require SEPA review prior to a timber harvest of forest land adjacent to a state park on Whidbey Island. In *Noel v. Cole*, the court found the proposed harvest of the Whidbey Island Classic "U" tract subject to SEPA and the exemption from SEPA under the forest practices regulations unlawful. The court criticized the forest practices board for "over-zealous actions . . . in removing forest practices from SEPA considerations." Although recognizing the board’s legitimate interest in balancing the economic impacts of environmental protection with forest industry needs, the court acknowledged the board’s failure to implement the balance intended by the legislature. The court concluded "the administrative agencies have done what the Legislature would not do, and have nearly completely exempted

13. Noel v. Cole, No. 78-9806, mem. op. (Wash. Super. Ct., Island County, June 23, 1978). Near South Whidbey State Park, on Whidbey Island, the University of Washington owns a timbered land tract managed by the Department of Natural Resources. In 1977, Whidbey Island residents became aware of the sale and proposed clear-cutting of the timber from this tract. In protest, they gathered at the site, physically obstructing the operations. Island County sheriffs dispersed the protesters, and a temporary restraining order issued two days later. *State of Washington Department of Natural Resources, Final Environmental Impact Statement, Classic "U" Timber Sale 3-6* (June 12, 1981) [hereinafter cited as Classic "U" EIS]. The plaintiffs in *Noel v. Cole* included Jack Noel, as area resident, and two organizations of Whidbey Island residents, Save the Trees and SWIFT. The Attorney General intervened as a party plaintiff. Memorandum from John Woodring, Staff Counsel of the Senate Natural Resources Committee to Senator Peterson and members of the Senate Natural Resources Committee (Mar. 7, 1978) (copy on file with the *University of Puget Sound Law Review*). Plaintiffs alleged that the timber sale was not a forest practice regulated by the Forest Practices Act, and was therefore subject to SEPA. For further discussion of *Noel v. Cole*, see infra notes 98-108 and accompanying text.

14. The timber sale itself was actually exempted under SEPA guidelines providing categorical exemptions for all timber sales. *Wash. Admin. Code* 197-10-175(4)(g) (1980). If the DNR had classified the Classic "U" timber harvest as a Class IV - special forest practice, the harvest would have been subject to SEPA under the Forest Practices Act. *Wash. Admin. Code* 222-16-050(1) (1980). The 1975 Forest Practices Act amendment gave the forest practices board the authority to establish by rule which forest practices were subject to SEPA as Class IV practices. *Wash. Admin. Code* 222-16-050 contains the forest practice classes, including those designated as Class IV - special. (The entire text of Class IV is printed infra note 93.) Any forest practice not classified as a Class IV - special practice is exempt from SEPA procedures under *Wash. Admin. Code* 197-10-170(19)(a) (1980), the state SEPA guidelines. The Classic "U" timber harvest had been designated as Class III by the DNR. *Noel v. Cole*, No. 78-9806, mem. op. at 15 (Wash. Super. Ct., Island County, June 23, 1978).


16. *Id.* at 15.
DNR and the timber industry from the provisions of SEPA."  

The Classic "U" controversy prompted the legislature to amend SEPA in 1981. The SEPA amendment parallels the FPA by exempting from EIS requirements agency decisions concerning the same forest practices previously exempted under the FPA. The impact of this amendment on the interpretation of the FPA is unsettled. The new SEPA provisions, however, indicate legislative approval of the Classic "U" holding that any forest practice operation with significant environmental consequences is subject to SEPA under the Forest Practices Act.

The Forest Practices Act recognizes the importance of the

17. Id. at 16.

The forest industry proposed the amendment as a technical change to prevent a court finding that the SEPA exemptions in the Forest Practices Act amended SEPA and were therefore invalid. Hearing on S.B. 3725 Before the Senate Natural Resources Committee, 47th Leg., at Olympia (Mar. 4, 1981) (on file with the University of Puget Sound Law Review).

The fear was prompted by the action of the Washington Supreme Court in 1979, striking down § 76.09.240(a), (c) of the Forest Practices Act dealing with local government authority over forest practices under the Shoreline Management Act, WASH. REV. CODE ch. 90.58 (1981). Weyerhaeuser Co. v. King County, 91 Wash. 2d 721, 592 P.2d 1108 (1979). The court reasoned that the Forest Practices Act's section which limited local governments' authority under the Shoreline Management Act was in effect an amendment of the Shoreline Management Act. Id. at 729, 592 P.2d at 1113. Because the legislature had failed to indicate an amendment to the Shoreline Management Act when passing § 76.09.240(a), (c) of the Forest Practices Act, the passage of that section was procedurally invalid under art. II, § 37, of the Washington State Constitution. Id. at 730, 592 P.2d at 1114.

19. See infra text accompanying notes 73-84.
20. The effect of the SEPA exemptions in the 1975 amendments to the Forest Practices Act was initially questioned in Comment, Protection of Recreation and Scenic Beauty under the Washington Forest Practices Act, 53 WASH. L. REV. 443, 458-61 (1978) [hereinafter cited as Comment, Protection of Recreation and Scenic Beauty]. The comment's author concluded that the Forest Practices Act may require the forest practices board to comply with SEPA, but noted that the board in promulgating the forest practices regulations did not follow that interpretation. Id. at 461. In fact, both the board, in adopting forest practices regulations, and the DNR, in proceeding under them, assume that forest practices are exempt from SEPA unless designated by the board as Class IV activities. Class IV practices, by definition, require a Department of Natural Resources evaluation under SEPA procedure. See letter from Eugene Nielson for Brian Boyle, Washington State Commissioner of Public Lands, to Senator Art Gallaghan and Representative Wilma Rosbach (Oct. 27, 1981) (on file with the University of Puget Sound Law Review).

The impact of the 1981 SEPA amendment on the Forest Practices Act is discussed infra text accompanying notes 71-91.

21. See infra text accompanying notes 98-106. Noel v. Cole is a superior court decision and is not necessarily binding on any other court faced with a similar case.
state's valuable timber resources and balances industry needs for efficient timber management with protection of the state's environmental quality, including fisheries, wildlife, water and air quality, recreation, and scenic beauty. Notwithstanding the FPA's provisions for reduced environmental review, the Act does not authorize the forest practices board to adopt regulations that virtually exempt forest practices from SEPA's EIS requirements.

To analyze the problems created by the FPA's scheme for environmental review, this comment first examines the statutory definitions of the forest practices classes, determining which forest practice classes are within the scope of SEPA review under the Forest Practices Act. Second, the comment discusses the effect of the 1981 SEPA amendment on the types of forest practices exempt from SEPA. The comment further points out the failure of the existing forest practices regulations to achieve the policy balance required by the Forest Practices Act. The comment's conclusion is two-fold: the Classic "U" holding best represents the legislature's statutory intent regarding the scope of SEPA review of forest practices; continued failure of the forest practices board to reconcile its regulations with the legislative directive will necessitate an FPA amendment requiring strict environmental review of all forest practices.

I. The Forest Practices Act

Under the FPA, the forest practices board must classify forest practices according to environmental impact. The greater


23. The Forest Practices Board essentially ignored the policy declaration when promulgating the forest practices rules. See Comment, Protection of Recreation and Scenic Beauty, supra note 20, at 454-56. At best, the rules were intended to provide adequate water quality protections. Government researchers assessing the regulations for water quality protection concluded that when there was compliance with the forest practices regulations adverse impacts on quality were rare. J. Sachet, S. Keller, A. McCoy, T. Ott & N. Wolff, An Assessment of the Adequacy of Washington's Forest Practices Rules and Regulations in Protecting Water Quality - Summary Report 15, 19 (Wash. State Dep't of Ecology Report No. DOE 80-7, 1980). The study further revealed, however, widespread noncompliance with road maintenance regulations making documentation of the effectiveness of water-related regulations difficult. Id. at 19. The team evaluated 102 forest practice applications; only 22 were conducted in complete compliance with water quality related regulations. Id. at 20.

24. The Forest Practices Act provides that the forest practices board shall establish by rule which forest practices are within the statutory definitions. Wash. Rev. Code §
the environmental impact, the more stringent the statutory requirements of DNR review and authorization. The class definitions also determine whether an included practice is subject to SEPA provisions.25

By rule, the forest practices board designates the practices that are included within each statutory class.26 The board's authority to classify forest practices is limited only by the requirement that each practice be assessed in light of the statutory criteria. In exercising this authority, the board must satisfy the purposes and policies of the FPA.27 The statutory structure of the Act implies that some forest practices will be subject to SEPA under the class definitions.28

A. The 1974 Act

The original Forest Practices Act of 197429 made no reference to SEPA, but, because SEPA was concurrently in effect, presumably all forest practices requiring the DNR approval were to be evaluated for possible SEPA review.30 Environmental protection and maintenance of a healthy forest products industry was to be assured by the regulation of three classes of forest

76.09.050(1) (1981).


28. See discussion of Class IV, infra text accompanying notes 51-53 and 94-97. In relevant part, Class IV is defined as those forest practices "which have a potential for a substantial impact on the environment and therefore require an evaluation . . . pursuant to [SEPA]." Wash. Rev. Code § 76.09.050(1) (1981).


practices. Of the three classes, only Class I practices were identified by their relationship to the environment, but notification of the DNR prior to conducting such a practice was not required. By definition, Class II and III practices required an approved application and were differentiated from each other only by the period of time allowed for approval of an application. Significantly, the statute did not describe the permissible environmental impact of practices to be included in either Class II or Class III.

B. The 1975 Amendments to the FPA

The current Forest Practices Act, amended in 1975, provision:

31. Section 5(1) of the Forest Practices Act of 1974 contained the following provisions:

Class I: Minimal or specific forest practices that may be conducted without submitting an application: PROVIDED, That no forest practice shall be within Class I if it has a direct potential for damaging a public resource.

Class II: Forest practices for which the application must be approved or disapproved by the department within fourteen calendar days from the date the department receives the application.

Class III: Forest practices for which the application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application.

32. Id. § 5(1).
33. Id.
34. See supra note 31.


Regulation of forest practices prior to 1974 had consisted mainly of minimal reforestation requirements in a 1945 statute. Act of Mar. 15, 1945, ch. 193, 1945 Wash. Laws 556 (repealed 1974). Opposition to the new act appeared immediately. Contract loggers and small "woodlot" timber owners feared that the extra operating cost attributable to the Forest Practices Act requirements would drive them out of business.

Opponents organized to obtain repeal and were successful in the Washington State Senate on April 21, 1975. 1 Senate Journal 1036, Reg. & 1st Ex. Sess. (1975). Nine days later, House Bill 1078 (the 1975 amendments to the Forest Practices Act) passed the House and was transmitted to the Senate. 1 Senate Journal 1182, Reg. & 1st Ex. Sess.
serves the original purposes and policy statements, but provides for four, instead of three, forest practices classes with more detailed environmental impact criteria, and a complex notification-application system in place of the original application procedure. The amended Act also grants specific class exemptions from the SEPA requirement of an EIS.

Initially, it is important to note that the legislature has at no time declared the Forest Practices Act exempt from SEPA. Instead, the legislature amended the FPA to exempt three of the four classes of forest practices from EIS requirements. The amended Act defines the classes with criteria related to environmental impact. Arguably, the amended Act as a whole remains subject to SEPA, an attribute significant to the board’s rules classifying forest practices.


38. The original 1974 Act required application approval by the Department of Natural Resources for both Class II and Class III forest practices. See Act of Feb. 14, § 8. In contrast, the amended Act requires only departmental notification for Class II forest practices and the submission of applications for Class III and Class IV forest practices. WASH. REV. CODE § 76.09.050(1) (1981).

39. Forest practices under Classes I, II, and III are exempted from EIS requirements, but Class IV practices are not. WASH. REV. CODE § 76.09.050(1) (1981).

40. Environmental impact statements are required under SEPA for any major action significantly affecting the quality of the environment. WASH. REV. CODE § 43.21C.030(2)(c) (1981). See infra note 85 discussing the function of an EIS under SEPA.

41. See supra text accompanying note 17.

42. These SEPA exemptions of Class I, II, and III forest practices function integrally with the forest practices classes definitions. The relationship is discussed infra text accompanying notes 58-70.


44. During the drafting of the original forest practices regulations in 1974, the forest practices board displayed considerable reluctance to acknowledge the applicability of SEPA to the promulgation of the regulations. D. Syrdal & J. Keegan, The Washington Forest Practices Act of 1974, Part III, at 11-12 & nn.64-65 (May 21, 1975) (unpublished manuscript on file with the University of Puget Sound Law Review). Although a full EIS was eventually prepared, there is no record of a formal decision by the board to undertake an EIS. Id.

County officials criticized the proposed rules for failure to consider several environmental factors, including failure to address SEPA requirements. Id. at 15. However, it is clear that the intense opposition to the new Forest Practices Act, see supra note 35, was felt by the board, who feared that stringent regulations would result in reprisal by the
The FPA's statutory classes provide the guidelines to which the board's rules must conform. The amended Act defines Class I practices as minimal or specific practices with no direct potential for damaging a public resource. Conducting such practices requires neither notification of the DNR nor a permit. Class II practices are those having less than ordinary potential for damaging a public resource. Prior to commencing a Class II practice, the DNR must be notified, although no approval is needed. In addition, forest practices under Class I and II are exempt from the SEPA's EIS requirement.

The Act defines Class IV forest practices by their relationship to the environment, rather than to public resources. Class IV excludes those practices determined to be Class I or II, but includes all other practices having a potential for substantial impact on the environment. This class is not included in the EIS exemption; approval of Class IV applications requires agency evaluation under SEPA.

legislature. Id. at 10.

When changes in the forest practice regulations were drafted in 1981, an EIS was prepared as a routine matter, apparently without comment. See PROPOSED REGULATIONS CHANGES EIS, supra note 35.

45. WASH. REV. CODE § 76.09.050(1) (1981). "Specific" is not defined by the Act; it may indicate that engaging in multiple practices requires a Class II application.

46. This definition is similar to the 1974 definition of Class I. See Act of Feb. 14, § 5. Public resources are defined as water, fish and wildlife, and capital improvements of the state. WASH. REV. CODE § 76.09.020(13) (1981).

47. WASH. REV. CODE § 76.09.050(1) (1981).

48. Id.

49. Id.

50. Id.

51. Id. A discussion of the significance of "environment" in the FPA may be found infra text accompanying notes 86-89. Public resources are defined supra note 46.

52. WASH. REV. CODE § 76.09.050(1) (1981). See infra note 94 for the full text of the Class IV definition.

53. The FPA clearly includes in Class IV those forest practices "which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the State Environmental Policy Act." WASH. REV. CODE § 76.09.050(1) (1981). It is not clear, however, why the legislature used "potential for substantial impact on the environment" to identify those practices to be evaluated under SEPA when the language in SEPA itself reads "significantly affecting the quality of the environment." WASH. REV. CODE § 43.21C.030(2)(c) (1981). The disparity of language between these two statutes is discussed in Comment, Protection of Recreation and Scenic Beauty, supra note 20, at 461 n.79. The author concludes that the language of the Forest Practices Act does not appear to require a higher degree of impact on the environment before SEPA will apply. Id.

Only indirect legislative history is available on the point. Prior to final passage of the 1975 amendments containing the "substantial impact" Class IV definition, Senator
Unlike the other forest practices classes, Class III contains no explicit environmental standard.\textsuperscript{54} The Act directs that forest practices not otherwise contained in Classes I, II, or IV constitute Class III.\textsuperscript{55} An application approved by the DNR is required.\textsuperscript{56}

The definitions limit the permissible environmental impact of practices within each class and specifically exclude practices within other classes. As a result of the exclusiveness, classification of a forest practice requires consideration of the environmental standards provided for each class.\textsuperscript{57} These environmental impact criteria, when considered with the EIS exemptions of Classes I, II, and III, seem to indicate legislative intent regarding the level of environmental scrutiny required in the board’s rules.\textsuperscript{58}

The addition of Class I, II, and III SEPA exemptions has proved confusing.\textsuperscript{59} Simply stated, rules exempting any forest practice from specific SEPA requirements must comply with the criteria identifying Class IV in the Forest Practices Act.\textsuperscript{60} In effect, Class IV acts as a specific statutory limit on SEPA-
exempt practices. Nevertheless, the board continues to exempt forest practices with a potential for serious environmental degradation by restricting the reach of the Class IV regulation. Such action is not supported by the Act.

The criteria distinguishing the forest practices classes suggests legislative intent to limit the practices exempted from SEPA evaluation. For instance, because the DNR is not required to approve Class I or II activities, the exemption of Class I and II is consistent with the SEPA policy that requires an EIS only when a governmental body undertakes a major action significantly affecting the quality of the environment. As the DNR exercises no discretion with regard to undertaking Class I or II forest practices, there is no major action within the meaning of SEPA. Interpreting the FPA to require that Class I and II practices satisfy the SEPA definition of a nonmajor action automatically limits Class I and II practices without reference to the environmental standards in the definitions. Without this interpretation, the FPA directly collides with SEPA provisions.

Class III is also exempt from the EIS requirement but the DNR must approve these practices prior to their commencement. Because such approval may constitute a major action under SEPA, arguably the legislative exemption means that

61. A discussion of the forest practices regulation's Class IV is found infra notes 92-97 and accompanying text.

62. See PROPOSED REGULATIONS CHANGES EIS, supra note 35. The changes in the rules were undertaken in response to the Classic "U" decision, see infra text accompanying note 103, finding the forest practices regulation's Class IV invalid. PROPOSED REGULATIONS CHANGES EIS, supra note 35, at 5-6. Nevertheless, the proposed regulations will continue to exempt some practices from Class IV even though the board's special study committee identified these as practices which "can have potential for a substantial impact." Id. at 52, 55. See infra note 94 discussing the new rules.


64. WASH. REV. CODE § 43.21C.030(2)(c) (1981).

65. A major action is governmental action having both discretionary and nondiscretionary qualities. Loveless v. Yantis, 82 Wash. 2d 754, 764, 513 P.2d 1023, 1029 (1973). There is no discretion when, as here, the Department of Natural Resources cannot forbid the commencement of a forest practice under Class I or II. The Department may only require that notification be received for Class II practices. WASH. REV. CODE § 76.09.050(1) (1981). However, Class I and II forest practices must be conducted in accordance with the forest practices regulations and are subject to the official sanctions authorized by the Act for any violations. WASH. REV. CODE § 76.09.050(4) (1981).

66. Unless the exemption of Class I and II is applied consistently with SEPA, the danger exists of an implied amendment of SEPA by the FPA. Such an amendment is unconstitutional under article II, section 37, of the Washington State Constitution. See supra note 18.

Class III must exclude practices that significantly affect the environment. In any case, the exemption supports the view that Class III cannot include practices with a potential for substantial impact on the environment because those practices must be evaluated under SEPA pursuant to Class IV. 68

Evaluating Class III practices is complicated by the absence of an environmental standard in the definition. To satisfy all the statutory requirements, however, the board must include within Class III only practices with ordinary (or greater) potential for damaging the environment or a public resource, 69 not practices with the potential for substantial environmental impact. Even though no such definition is articulated in the Forest Practices Act, the statutory requirements support the inference that permissible Class III environmental impact is limited, which restricts the types of practices that the DNR may approve without SEPA review. 70

Although the Forest Practices Act provides guiding standards for determination of the forest practices to be included within each class, it is clear that the board should not interpret without reference to SEPA the environmental protection each classification requires. The Forest Practices Act's definitions, which provide for only limited exemptions from SEPA, support the view that the board's classifications must facilitate compliance with SEPA when the DNR applies the exemptions to forest practices. At the same time, reading the class definitions to include only practices that comply with SEPA limits the scope of the practices allowable in each class.

68. Id.

69. The forest practices board evidently accepts a similar definition. PROPOSED REGULATIONS CHANGES EIS, supra note 35, at 60.

70. When the legislature enacts a statutory definition, such definition controls the interpretation of the defined term. Dominick v. Christensen, 87 Wash. 2d 25, 548 P.2d 541 (1976). The Washington Supreme Court also presumes that when a definition expressly includes certain matters, other matters not expressed are excluded. Id.

Thus, forest practices included in Classes I, II, and IV must fall within the scope of the environmental criterion expressed in each of their definitions. All other forest practices, necessarily excluded from Classes I, II, and IV by definition, are encompassed by Class III. However, as Class III has not been given an environmental definition, the intent of the legislature with regard to the permissible environmental impact of Class III practices must be deduced from the statutory context and from what the legislature said about the other forest practices classes. Cf. Champion v. Shoreline School Dist. No. 412, 81 Wash. 2d 672, 504 P.2d 304 (1972) (interpreting the scope of "certified employee" under WASH. REV. CODE § 28A.67.070 (1971)).
II. 1981 SEPA Amendment

During the 1981 legislative session, SEPA was amended to exempt "decisions pertaining to applications for Class I, II, and III forest practices, as defined by the rule of the forest practices board" from the requirements of an EIS. The SEPA amendment is limited explicitly to forest practice application decisions. It is a narrow exemption compared to the broader exemption of forest practices from SEPA procedures in the Forest Practices Act.

Whether this SEPA amendment modifies the interpretation of the necessary forest practices class review under SEPA is doubtful. The history of the SEPA amendment indicates that

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72. Act of May 18, 1981, ch. 290, 1981 Wash. Legis. Serv. 886 (West) (codified at WASH. REV. CODE § 43.21C.037 (1981)). This amendment contains a sunset provision, causing it to expire on June 30, 1983, unless extended by law. Id.

73. The requirements referred to in the amendment are listed in SEPA: [A]ll branches of government of this state, including state agencies, municipal and public corporations, and counties . . . include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official:

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


75. The legislative action during the 1981 session was equivocal. Although several bills related to the FPA were introduced, they were intended to correct the apparent constitutional deficiencies in the Act and were not directly addressed to the forest practices classes definitions. See memorandum from John Woodring, Staff Counsel for the Senate Natural Resources Committee, to members of the Senate Natural Resources Committee (Mar. 3, 1981) (on file with the University of Puget Sound Law Review).
the major concern of its timber industry proponents was the potential for a judicial invalidation of the Forest Practices Act exemption provisions as an unconstitutional amendment of SEPA. The only constitutional challenge to the SEPA exemptions in the FPA decided prior to the 1981 legislative sessions was Noel v. Cole. There, the court rejected plaintiff's argument that the FPA’s SEPA exemptions unconstitutionally amended SEPA and construed the FPA and SEPA harmoniously, finding that interpretation of the forest practices class definitions requires compliance with SEPA.

Members of the 1981 legislature were very aware of the Noel v. Cole decision, yet the 1981 SEPA amendment reflects an intent to narrow the SEPA exemption. Had the legislature desired to reject the Noel v. Cole reconciliation of the FPA and SEPA provisions, broad language exempting the entire Forest Practices Act from SEPA would have been necessary. The effect of the amendment’s new language is not to eliminate required compliance with SEPA when the board makes rules applying the forest practices class definitions. Rather, the amendment only exempts actions pertaining to forest practices application decisions.

The amendment's exemption clearly encompasses Class III application approval, and suggests that discretion to approve or disapprove a Class III practice application is not subject to SEPA. But it is not evident whether the exemption extends to

76. See supra note 18.
78. See infra note 101. In Noel v. Cole, the court asserted that if the legislature wished to exempt forest practices from SEPA it must say so. Also see supra text accompanying notes 15-17 for the context of that statement. Noel v. Cole, No. 78-9806, mem. op. at 10 (Wash. Super. Ct., Island County, June 23, 1978).
79. During floor debate in the House, one representative remarked that the forest practices board had failed to comply with the intent of the Class IV designation. House Journal 630, Reg. & 1st Ex. Sess. (1981). Legislators had closely followed the progress of the Classic “U” controversy over the preceding several years. See Hearing on S.B. 3725 Before the Senate Natural Resources Committee, 47th Legis., at Olympia (Mar. 4, 1981) (on file with the University of Puget Sound Law Review); memorandum from John Woodring, Staff Counsel of the Senate Natural Resources Committee, to Senator Peterson and members of the Senate Natural Resources Committee (Mar. 7, 1978) (on file with the University of Puget Sound Law Review).
80. See supra note 78.
81. Because approved applications are required only for Class III and IV, the amendment seems to unnecessarily exempt Class I and II application decisions.
82. The FPA provides the DNR with discretion to disapprove a satisfactorily completed application for failure to comply with the provisions of the Act or the forest prac-
other DNR actions under the FPA. The DNR must also determine the class designation of each application.\textsuperscript{83} If not included within the exempted activity, this DNR discretion under the FPA is limited by its role as a state agency under SEPA.\textsuperscript{84}

Compliance with SEPA requires more than writing and reviewing an EIS.\textsuperscript{85} SEPA creates an independent duty to con-

\textsuperscript{83} When the Department of Natural Resources receives an application or notification (an identical form is used for both), the application is reviewed by the DNR for designation of the proper forest practices class. Each forest practice described on the application is evaluated first under the criteria for Class IV in the forest practices regulations, and then as a Class I or II. If it meets none of those criteria, it is designated as Class III. Interview with Eugene Nielson, Private Forestry Division, Department of Natural Resources, in Olympia (July 28, 1981).

\textsuperscript{84} It is unclear whether the decision to designate the application's forest practices class is included within the meaning of the SEPA exemption. To the extent that the classification of forest practices is the responsibility of the forest practices board in the promulgation of the regulations, the DNR has little discretion. The DNR apparently views the classification of an application as a nondiscretionary function. See supra note 83. The Washington Supreme Court, however, has determined there is discretion whenever choice exists, however narrow the statutory criteria may be. Loveless v. Yantis, 82 Wash. 2d 754, 764, 513 P.2d 1023, 1029 (1973). Under this rule, the DNR must be viewed as taking discretionary action whenever forest practice applications are given class designations.

\textsuperscript{85} An EIS is the method required by SEPA to insure full disclosure of environmental information so that environmental matters can be properly considered during relevant decisionmaking. Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wash. 2d 267, 272, 552 P.2d 674, 677 (1976). When an EIS is required under SEPA, as in the decision to approve a Class IV application, compliance with SEPA requires the acting agency to both disclose and actually consider environmental impacts before taking an action significantly affecting the quality of the environment. Id. at 275, 552 P.2d at 679. If, however, a governmental agency makes a determination of no significant environmental impact under SEPA, it must show that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 73, 510 P.2d 1140, 1149 (1973). Whether the decision to prepare an EIS results from the consideration of the environmental factors is immaterial; the
sider environmental impacts when class designation of an application will exempt a forest practice from SEPA, and mandates identification of any forest practice which, when undertaken, would result in a significant adverse impact on the environment. Once identified, the DNR must evaluate the practice to assess the effect on aesthetics, economic factors, social factors, and a range of physical environmental factors, and determine the cumulative impacts. These factors must be balanced to ensure that any action taken is consistent with the right of Washington's citizens to a healthful environment. An exemption may not result from the application's class designation when the requested forest practice is the type of activity to which the legislature intended these SEPA safeguards to apply.

This conclusion is supported by the legislative definitions of forest practices classes, which imply that the board's class rules must give consideration to both SEPA policies and the requirements of the Forest Practices Act. The 1981 SEPA amendment


86. The SEPA guidelines, designed to clarify an agency's role under SEPA, exempt numerous DNR activities from SEPA provisions. WASH. ADMIN. CODE 332-40-170(19) (1980). However, the guidelines also limit the scope of these categorical exemptions. Specifically, agency proposals or actions that include a series of exempt actions "physically or functionally related to each other,. . . which together may have a significant environmental impact" are not exempt. Id. 332-40-190(4). But cf. Downtown Traffic Planning Comm. v. Royer, 26 Wash. App. 156, 612 P.2d 430 (1980) (agency applying an exemption under SEPA guidelines must consider the likely environmental effects before exempting the activity pursuant to guideline criteria).


88. SEPA's recognized purpose is not only prevention of further environmental degradation but also reversal, where possible, of ecological damage already done. ASARCO, Inc. v. Air Quality Coalition, 92 Wash. 2d 685, 701, 601 P.2d 501, 515 (1979). The DNR may base its action on disclosures in the EIS; SEPA confers the authority to deny a forest practice application because of environmental considerations. See Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978).

89. The Free Conference Committee, the drafter of the final version of the 1975 amendments to the Forest Practices Act, see supra note 35, apparently believed that the Forest Practices Act and the forest practices regulations would provide adequate protection against the environmentally adverse consequences of most, but not all, forest practices. 2 Senate Journal 2220, 1st Ex. Sess. (1975).

90. See supra notes 45-58 and accompanying text for a discussion of the definitions of the forest practices classes.

91. See infra text at notes 99-103.
cannot be read as a clear legislative mandate to exclude the Forest Practices Act from SEPA. The amendment’s narrow focus requires the DNR to evaluate forest practices applications, designating the appropriate class to achieve the environmental protections mandated by the Forest Practices Act. Recognizing Class IV practices is crucial to the DNR’s application of SEPA exemptions, but the regulations fail to provide adequate guidance.

III. The Board’s Rules

The board, pursuant to its rulemaking authority, is required to assess the environmental impact of forest practices and categorize them according to the statutory class definitions. The regulations, however, fail in any practical sense to distinguish between Class III and Class IV practices. Thus, they cannot adequately guide the DNR’s assessment of applications.

The specific practices conclusively identified as Class IV practices are so limited that they rarely are present in timber

93. See infra note 83.
94. The Forest Practices Act defines Class IV as:

Class IV: Forest practices other than those contained in Class I or II: (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 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development, and/or (d) which have a potential for substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the State Environmental Policy Act, chapter 43.21C RCW.


The Forest Practices Board has interpreted the use of the disjunctive and the conjunctive phrase as granting authority to divide Class IV into Class IV - general and Class IV - special. Wash. Admin. Code 222-16-050(1)-(2) (1980). Only Class IV - special is subject to EIS requirements. The regulations provide as follows:

1. “Class IV - Special.” . . .
   (a) Harvesting, road construction, site preparation or aerial application of pesticide on lands known to contain the nest or breeding grounds of any threatened or endangered species of wildlife as designated by the Department of Game in accordance with federal criteria and procedure, and approved by the Board.
   (b) Widespread use of DDT or a similar persistent insecticide.
   (c) Harvesting or road construction on landlocked parcels within the boundaries of any national park, State park or any part of a local governmental entity.
   (d) Utilization of an alternate plan except those involving field evaluation of a new forest practice technology or any reforestation practice.

Id. New regulations promulgated June 25, 1982, to become effective Oct. 1, 1982, make
management activities. While limiting Class IV to the occurrence of certain unusual conditions, the rules provide the DNR with no method for identifying "usual" forest practices operations that may have "potential for substantial impact on the environment." Although a greater than ordinary environmental impact may result when a number of moderately impacting practices are conducted together, such an effect is not recognized in the rules. Nor do the rules require evaluation of site specific conditions that indicate a potential for serious impact. EIS

several changes in Class IV - special. The new regulations limit unscrutinized pesticide applications in watersheds, although they do not address the problem of water quality degradation from harvesting activities. Importantly, the new regulations require environmental evaluation when certain forest practices are proposed for steep slopes near watercourses. Amendments to WASH. ADMIN. CODE 222-16-050, Wash. Admin. Reg. 82-16-077 (1982) (to be codified at WASH. ADMIN. CODE 222-16-050).

Although significant, these changes still fail to provide the DNR with the flexibility needed to function in compliance with SEPA.

95. Prior to the final vote in the Senate on the 1975 amendments to the Forest Practices Act, Senator Lewis stated that the Free Conference Committee believed that the Forest Practices Act and regulations would provide sufficient environmental protection for ninety-five percent of forest practices. 2 Senate Journal 2220, 1st Ex. Sess. (1975). The legislature apparently expected that approximately five percent of forest practices would require an evaluation by the Department of Natural Resources as to whether an EIS was required. However, the department estimated that as of March, 1978, eleven forest practices were determined to be in Class IV - special out of over 27,000 forest practice applications. Hearing on S.B. 3725 Before the Senate Natural Resources Committee, 47th Legis., at Olympia (Mar. 4, 1981) (testimony of Daniel D. Syrdal) (on file with the University of Puget Sound Law Review). Only two of the eleven Class IV - special practices required the preparation of an EIS, both for chemical applications. Since then, fewer than ten Class IV - special applications have been received by the department. No EIS's were required. Interview with Eugene Nielson, Private Forestry Division, Department of Natural Resources, in Olympia (July 28, 1981).

96. A proposed activity may contribute to existing adverse conditions or uses in the affected area. Such cumulative impact is a relevant factor to be considered under SEPA. ASARCO, Inc. v. Air Quality Coalition, 92 Wash. 2d 685, 705, 601 P.2d 501, 514 (1979). In ASARCO, Inc., the court found significant environmental impact when a continuing level of sulfur dioxide emissions would cumulatively exceed the level authorized by the Puget Sound Air Pollution Control Agency.

No provision in the forest practices regulations addresses the cumulative impact of forest practices, or the conditions under which such impacts might require EIS evaluation. Recently, however, upon the recommendation of the Class IV - Special Technical Committee, the forest practices board began planning for a cumulative effects study. Minutes of the State of Washington Forest Practices Board 5 (May 21, 1981) (on file with the University of Puget Sound Law Review).

97. Apparently the board prefers to allow the DNR to impose conditions on the application which are intended to mitigate the potential adverse impacts. PROPOSED REGULATIONS CHANGES EIS, supra note 35, at 60, 64. The DNR, however, views the invalidation of the Class IV regulations by the Noel v. Cole court as providing the department the necessary latitude to review Class III applications for significant impact. Several such Class III applications were cited to the board as examples of practices that required
requirements cannot be effectively or lawfully implemented without a definite standard for Class III exemptions.

Noel v. Cole\textsuperscript{98} illustrates the unlawful exercise of the EIS exemption under the inadequate board rules. The court, finding a potentially significant effect on the quality of the environment in the circumstances of the Classic "U" sale,\textsuperscript{99} ordered the preparation of an EIS despite the Class III designation.\textsuperscript{100} The court concluded that the forest practices board had exceeded its authority by attempting to exempt from SEPA a forest practice with a potential for substantial impact on the environment.\textsuperscript{101} In

reclassification to Class IV. Minutes of the State of Washington Forest Practices Board 13 (Jan. 8, 1981). But this latitude will be lost, according to the DNR, once the new Class IV regulations are promulgated. Id. at 14.


99. When the Department of Natural Resources sells timber, the forest practice required for the harvest must be predetermined for the purpose of writing the contract. The decision to sell is the decision to harvest. Because it would be illogical for the DNR to deny a permit to harvest, the appropriate point to evaluate the forest practices application is while deciding to sell. This is not the case, however, with a private timber harvest. The appropriate point for evaluation in that case is upon application for a permit.

The 255 acre Classic "U" tract had been sold for harvesting without the benefit of an EIS. Originally, the entire tract had been scheduled for clear-cutting, except for selective logging of a buffer strip along the highway between the tract and South Whidbey State Park. A portion of the trees in the tract is in a rare period of succession unique to Whidbey Island. Adverse effects on certain unusual wildlife populations also were expected from the clear-cut. Noel v. Cole, No. 78-9806, mem. op. at 12 (Wash. Super. Ct., Island County, June 23, 1978).

100. Id. at 15. Defendants contended that the categorical exemption granted by the Council on Environmental Policy exempting all timber sales from SEPA was controlling. The court found, however, that because the sale contract included entitlements of use, it satisfied SEPA requirements of a major action. Id. at 3. Furthermore, the court could not find that the legislature intended timber sales to be considered as forest practices, and concluded, therefore, that timber sales were not regulated by the Forest Practices Act. Id. at 4-5.

The EIS for the Classic "U" timber sale was issued June 12, 1981. Classic "U" EIS, supra note 13. The proposed action, the result of a compromise settlement reached between the parties to the Noel v. Cole litigation, differs considerably from the original proposal to clear-cut the entire 255 acre tract. Id. As proposed, the tract is to be divided into seven units, three to be scheduled for immediate clear-cutting, with some salvage of wind-thrown trees on other parcels. The remaining four parcels will be clear-cut over a period of approximately ten years. A fifteen acre buffer strip between the parcel and South Whidbey State Park will be left for twenty years, after which it will be selectively logged. Id.

101. The court stated:

[I]t is further apparent that the legislature anticipated that some forest practices would require compliance with SEPA since they did not exempt Class IV practices from the scope of SEPA . . . . Under the Forest Practices Act any forest practice which has a potential for a substantial impact on the environment must have an "evaluation" to determine whether or not a detailed statement must be prepared pursuant to SEPA . . . .
the Classic "U" case, the forest practices regulations proved insufficient to enable the DNR to identify critical environmental concerns, such as an increase in recreational uses of Whidbey Island forest land with a concurrent decrease in forest land area.\textsuperscript{103} To the extent that the board's Class IV definition thwarted the legislative intent to require agency evaluation of these concerns, it was declared invalid.\textsuperscript{103}

The Noel court premised its interpretation of the forest practices regulations on legislative intent not to exempt all forest practices from SEPA, but rather to allow exemptions only where the forest practices regulations provide adequate environmental protection.\textsuperscript{104} The 1981 amendment to SEPA does not change that interpretation.\textsuperscript{105} Although a case-by-case judicial review of forest practices would specify those which the legislature intended to exempt from the requirement for an EIS, litigation is unquestionably a cumbersome, expensive method to effect agency review. The list itself would foster continual challenge. The function of judicial review in assuring environmental protection must be to deter the tendency of agencies to short-cut the thoughtful decisionmaking required by SEPA.\textsuperscript{106}

Clearly, the legislature has delegated the function of balancing the benefits to be gained by a proposed activity against its environmental effects to the forest practices board.\textsuperscript{107} This balancing is not the court's role.\textsuperscript{108} But the board must articulate a balance that satisfies the intent of the FPA.

\textsuperscript{102} Id. at 12.

\textsuperscript{103} The forest practices board undertook a Class IV study, but proposed adoption of only one of the fifteen suggested additions to the class. \textit{Proposed Regulations Changes EIS, supra} note 35, at 7-11. A second Class IV study prompted two additional changes. \textit{See supra} note 94.

\textsuperscript{104} Such a construction avoids the constitutional question which seemed to be the main issue during the passage of the 1981 amendment to SEPA. \textit{See supra} note 18.

\textsuperscript{105} \textit{See supra} notes 81-91 and accompanying text.


\textsuperscript{108} \textit{See ASARCO, Inc. v. Air Quality Coalition, 92 Wash. 2d} 685, 714, 601 P.2d 501, 519 (1979).
IV. Conclusion

The current forest practices regulations hamper the DNR’s environmental assessment of forest practices applications. Under regulations severely restricting forest practices subject to SEPA, the DNR cannot fulfill its own role under SEPA. The regulations do not recognize the potential threat of applications that present adverse site-specific conditions that cannot be mitigated by imposed conditions, or locations where cumulative harms endanger a stable environment. Even a broadening of the narrow list of categories presently encompassed in the Class IV forest practices regulations is unlikely to reach many conceivable conditions found on forest practice applications. Unless the forest practices board’s regulations are amended to give the DNR the necessary latitude to make meaningful environmental evaluations, the DNR’s exempted forest practice applications will remain subject to voidance by a court.

If the Class IV forest practices regulations persist in restricting the scope of SEPA review beyond the intent of the Forest Practices Act, then the exemptions from SEPA provisions provided by SEPA and the Forest Practices Act must be removed. Without explicit exemptions, Class III practices would receive the additional environmental review required under SEPA to identify those specific applications with potentially harmful consequences now unrecognized by the rules.

Washington’s forests are the foundation of the state’s economic and recreational life. Sound environmental policy for the preservation of forest lands for future generations is an indisputable necessity, demanding continual and critical legislative review of the policy’s effectiveness, and prompt remedies when administrative solutions have failed. The legislature should not leave these remedies to the courts. Uncertainty over the scope of forest practices exemptions from SEPA deserves legislative clarification.

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