

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

PILCHUCK-NEWBERG )  
ORGANIZATION and ANDREA)Case No. 94-3-0018  
MOORE, ISABEL LOVELUCK,) )  
STEVEN THOMAS and )  
BARBARA MILES,)FINAL DECISION AND  
)ORDER  
Petitioners,) )  
)  
v.) )  
)  
SNOHOMISH COUNTY,) )  
)  
Respondent,) )  
)  
and) )  
)  
WEYERHAEUSER REAL ESTATE)  
COMPANY,) )  
)  
Intervenor.) )  
)

**I.PROCEDURAL HISTORY**

On October 31, 1994, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the Pilchuck-Newberg Organization, Andrea Moore, Isabel Loveluck, Steven Thomas and Barbara Miles (hereafter collectively referred to as **PNO**).PNO challenges the adoption of that portion of Snohomish County (the **County**) Amended Motion 94-210 pertaining to the "Bosworth Block" property.For purposes of this order, Amended Motion 94-210 is Exhibit 70(b).

Following a November 30, 1994 prehearing conference, the Board entered an Order Granting Intervention to [Weyerhaeuser Real Estate Company] WRECO and Prehearing Order on December 1, 1994.The order established a schedule for filing dispositive or other motions and prehearing briefs, and listed six legal issues to be decided by the Board.

On January 19, 1995, the Board held a hearing on the two dispositive motions that had been filed and on February 1, 1995, the Board issued an Order Denying Dispositive Motions.As a result, Legal Issues Nos. 1 and 2, as set forth in the Prehearing Order, were fully resolved.

On February 16, 1995, a Stipulated Exhibit List was filed with the Board.References to the parties' exhibits correspond to the exhibit numbers on the Stipulated Exhibit List, unless otherwise noted.Also on that date, the Board received the Pilchuck-Newberg Organization and Individual Petitioners' Prehearing Brief (**PNO's Brief**). On March 2, 1995, Snohomish County's Hearing Brief (**County's Brief**) was filed with the Board as was

Weyerhaeuser Real Estate Company's Prehearing Response Brief (**WRECO's Brief**).

On March 10, 1995, "Pilchuck-Newberg and Additional Petitioners' Reply to Prehearing Response Briefs" (**PNO's Reply**) was filed.

The Board held a hearing on the merits of the remaining legal issues on Monday, March 13, 1995, at 1225 One Union Square, Seattle. M. Peter Philley, presiding, and Chris Smith Towne were present from the Board. William Goldstein represented PNO; Gordon W. Sivley represented the County; and Mark C. McPherson and Thomas J. Ehrlichman represented WRECO. Court reporting services were provided by Karen E. Komoto, CSR, of Sandra Baker & Associates. No witnesses testified.

The Board ruled on the admissibility of several exhibits that were filed with the briefs but not contained on the Stipulated Exhibit List. Unless otherwise indicated, an admitted exhibit is part of the record below rather than a supplemental exhibit:

Exhibit A to PNO's Brief (computer print-out)	<b>Admitted</b>	
Exhibit B to PNO's Brief (Forest Practices Application/Notification)	<b>Admitted</b>	
Exhibit C to PNO's Brief (John Ellis testimony transcript)	<b>Admitted</b>	
Exhibit D to PNO's Brief (map)		<b>Admitted for illustrative purposes only</b>
Exhibit E to PNO's Brief (handwritten table)	<b>Admitted for illustrative purposes only</b>	
Exhibit F to PNO's Brief (4/29/93 Flynn memo)	<b>Denied</b>	
Exhibit G to PNO's Brief (Motion 92-283)	<b>Board takes official notice</b>	
Exhibit H to PNO's Brief (3/9/94 Wells memo)	<b>Admitted as a supplemental exhibit</b>	
Exhibit I to PNO's Brief (Amended Ordinance 93-083)	<b>Board takes official notice</b>	
Exhibit A to County's and WRECO's Briefs (Amended Ordinance 93-021)	<b>Board takes official notice</b>	
Exhibit B to County's Brief (Amended Ordinance 93-085)	<b>Board takes official notice</b>	

During the hearing on the merits, the presiding officer also ordered that: WRECO or the County file a June 11, 1993 letter; the County file the relevant maps that were attached to Motion 94-210 but had not been filed with the Board; and PNO file any documents showing that the organization had Growth Management Act (**GMA** or the **Act**) standing to pursue its appeal -- all by March 27, 1995.

On March 27, 1995, WRECO filed a copy of its June 11, 1993 letter and attached map to Greg Williams of the County Planning Department. This exhibit had been inadvertently omitted from the record prior to the hearing on the merits. It becomes Exhibit 86.

Also on March 27, 1995, the County filed a "Supplemental Exhibit" ordered by the Board during the hearing on the merits. It is a certified copy of the underlying enactment in question, Snohomish County Council Motion 94-210 including a copies of maps from Exhibit C to Motion 94-210 relating to Site 10 as described in Section 2(1)(h) of Motion 94-210. Motion 94-210 is Exhibit 70(b); Exhibit C to Motion 94-210 is Exhibit 70(b)(ii).

PNO did not submit any documentation regarding its organizational GMA standing before the Board.

## II. FINDINGS OF FACT

1. For purposes of this appeal, the Bosworth Block of property located in Snohomish County, Washington, is defined as that property, including both lands owned and not owned by WRECO:

...as shown on Figure J of the "Staff Evaluation and Recommendation of Properties Evaluated Pursuant to Planning Policy 10 in Ordinance 92-101 Adopting Interim Regulations to Conserve Forest Lands, January 5, 1994." PNO's "Clarification of Petition for Review," at 1; *see also* Exhibit 20, at 49.

2. The Bosworth Block is a subset of what is referred to as the "Lake Bosworth island." Lake Bosworth island comprises approximately 2,885 acres of land of which WRECO owned "approximately 1,760 acres"<sup>[1]</sup> as of November, 1993. Exhibit 20, at 45; *see also* Exhibit 4, at 2. The Bosworth Block comprises 2,317 acres. Exhibit 70 (b), Findings and Conclusions 11(e), at 5. Table 2 to the Supplemental Sheet for Nonproject Actions indicates that Site 10 contains 2,317 acres. Exhibit 62.

3. In 1988, the last commercial timber production activities by the Weyerhaeuser [Timber] Company on what would become WRECO's property took place. Exhibit 70(b), Amended Motion 94-210, Findings and Conclusions 11(e), at 6. Precommercial thinning and scarification had ended in 1985. Exhibit 57, at Exhibit I, at 6.

4. As prior Findings of Fact by the Board have indicated regarding WRECO's property:

In 1990, the Weyerhaeuser Company conveyed property in the Bosworth Tract, in the vicinity of Granite Falls, to its subsidiary, Weyerhaeuser Real Estate Company (WRECO). The property had been designated as Rural-5 in 1984, as a part of the County's Granite Falls Comprehensive Plan. That designation permits low-density residential development of one dwelling unit per five acres. The County Zoning Code, SCC 18.12.040, designates the land as R-5, allowing single-family, mobile home and duplex dwellings.

In 1990, WRECO removed the property from the tax designation for timber lands, paying a compensating tax of "approximately \$460,000" to the County. In March, 1991, WRECO segregated the entire property into lots of approximately 20 acres; since that date, it has sold 27 lots and carried out minor road improvements. *Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order Granting WRECO's Petition for Reconsideration and Modifying Final Order; and Order Denying SNOCO PRA's Petition for Reconsideration, Findings of Fact 35(a) and (b), at 2 (citations to specific exhibits omitted).

5. Prior Findings of Fact also have reviewed the history of the forest land designation placed on the WRECO property:

In a memorandum from the [Snohomish County Planning] Department to the County Council, dated December 11, 1992, Figure A, attached to that transmittal, recommends that WRECO's property be designated as IFR....

The notice of the County Council's December 14, 1992 hearing to consider the proposed Motion [92-283] and Ordinances [92-101 and -102] included a map that showed that the proposed designation of the WRECO property as IFR pursuant to proposed Alternative 3.

On December 14, 1992, after public testimony had been received and that portion of the hearing closed, Councilmember Hurley proposed amending the Planning Department's recommended designation map proposing to designate the WRECO property ICF, even though it had been recommended as IFR.

...

During the County Council's consideration of the Motion and Ordinances, this amendment was discussed and passed. Consequently, when the Council adopted the Motion and Ordinances, the WRECO property was designated ICF instead of IFR, as previously recommended. *Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order Granting WRECO's Petition for Reconsideration and Modifying Final Order; and Order Denying SNOCO PRA's Petition for Reconsideration, Findings of Facts 36(a) and (b) and 37(a) and (b), at 3 (citations to exhibits omitted).

6. On December 14, 1992, the Snohomish County Council passed Motion No. 92-283. Exhibit G to PNO's Brief, at 3. Section 3 of Motion 92-283 adopted the Interim Forest Land Conservation Plan (the **Interim Forest Plan**), which was attached as Exhibit A to the Motion. Section 3 of Motion 92-283 also adopted forest land classifications and designations (**Interim Forest Designations**) as shown on maps attached to the motion as Exhibits B and C.

7. Also on December 14, 1992, the Snohomish County Council passed Amended Ordinance 92-101, entitled "Adopting Interim Regulations to Conserve Forest Lands..." (**Interim Forest Regulations**). Exhibit B to County's Dispositive Motion.

8. Section 2(10) of Amended Ordinance 92-101, captioned "Planning Policy 10," established a mechanism for landowners, within six months of adoption of the Interim Forest Plan, to request that their property be excluded from an interim forest land designation. Exhibit B to County's Dispositive Motion, at 5.

9. On March 9, 1993, the Board received a Petition for Review from WRECO challenging Motion 92-283, Amended Ordinance 92-101 and Ordinance 92-102 regarding the County's forest land designation of WRECO's property. The matter was consolidated with Case No. 93-3-0003, *Twin Falls v. Snohomish County*.

10. On May 3, 1993, the Snohomish County Council passed Ordinance No. 93-021, the Rural Cluster Subdivision Ordinance. Exhibit A to County's and WRECO's Briefs.

11. In a June 11, 1993 letter, WRECO requested removal of its property from interim forest land designation pursuant to Planning Policy 10 of Amended Ordinance 92-101. Exhibit 86. See also Exhibit 20, at 45. Requests for exclusion were accepted by the County until June 15, 1993, six months after the Interim Forest Plan was adopted. Exhibit 20, at 2.

12. On September 7, 1993, the Board issued a Final Decision and Order in *Twin Falls v. Snohomish County* that found Snohomish County Motion 92-283 and Ordinances 92-101 and 92-102 in compliance with the GMA and the State Environmental Policy Act. Subsequently, on October 6, 1993, the Board entered an "Order Granting WRECO's Petition for Reconsideration and Modifying Final Decision and Order; and Order Denying SNOCO PRA's Petition for Reconsideration." However, this order did not change the Board's ultimate conclusion that the challenged actions complied with the Act.

13. On October 11, 1993, the Snohomish County Council adopted a Right to Practice Forestry Ordinance, Snohomish County Amended Ordinance No. 93-083. Exhibit I to PNO's Brief.

14. On November 11, 1993, WRECO's Ric Leir sent a letter to Joan Earl, Acting Director of the County's Planning Department, providing additional information for WRECO's Request for Exclusion.<sup>[1]</sup> Exhibit 106, at Exhibit I, at 1.

15. On November 29, 1993, staff from the Snohomish County Planning Department conducted a field visit to WRECO's property within the Bosworth Block. Exhibit 20, at 45. In total, County staff reviewed 21 sites owned by six landowners, including WRECO, for removal from, or change in, interim forest designation pursuant to Planning Policy 10 of Ordinance 92-101. Exhibit 20, at 2; *see also* Exhibit 70(b), findings and conclusions no. 1, at 2.

16. On December 2, 1993, WRECO requested consideration of a change in designation from ICF to IFR in addition to its earlier request for removal. *See* Exhibit 20, at 45.

17. On January 5, 1994, County Planning Department staff issued a "Staff Evaluation and Recommendation of Properties Evaluated Pursuant to Planning Policy 10 in Ordinance 92-101 'Adopting Interim Regulations to Conserve Forest Lands'" (**Staff Evaluation**). The Staff Evaluation "considers only those lands owned by WRECO on June 11, 1993, when its request for removal from designation was submitted to the County." The WRECO property was referred to as "Site 10." The Staff Evaluation contained specific "Findings" regarding WRECO's property (Exhibit 20, at 45), and concluded that all but 20 acres of WRECO's property should be designated IFR instead of ICF. Staff concluded that the remaining 20 acres should be totally removed from forest land designation. Exhibit 20, at 48.

18. Site 10 contains several unnamed Type 3, 4 and 5 streams, and ponds and wetlands that drain into the Pilchuck River, which borders portions of the site. A small portion of Site 10 drains into Lake Bosworth, which is located one quarter mile away. Exhibit 62, environmental checklist, at question B(3)(a)(1).

19. Portions of Site 10 are within the 100-year flood plain of the Pilchuck River where the river enters or borders the site. Exhibit 62, environmental checklist, at question B(3)(a)(5).

20. Site 10 is part of a bald eagle migration route. Exhibit 62, environmental checklist, at question B(5)(c).

21. The areas affected by the proposal and adjacent areas are primarily used for timber production or consist of undeveloped land. Site 10 contains homesteads or "very low density residential development," including "a few" new residences. Some adjacent areas contain low density rural residential development. Exhibit 62, environmental checklist, at question B(8)(a) and (c). Building permits have been issued for three residences within the 2,885 acre "Lake Bosworth island" on property no longer owned by WRECO. Exhibit 20, at 45.

22. The current shoreline master program designation for Site 10 is Conservancy and Rural. Exhibit 62, environmental checklist, at question B(8)(g).

23. Site 10 is used informally for recreation such as hiking, horseback riding, fishing and camping. Exhibit 62, environmental checklist, at question B(12)(a).

24. A portion of Site 10 is bordered by a county road and it contains several miles of private roads. Exhibit 62, environmental checklist, at question B(14)(a).

25. Site 10 is five to ten miles from public bus service. Exhibit 62, environmental checklist, at question B(14)(b).

26. Very limited utility development is located on lands within Site 10. Exhibit 62, environmental checklist, at question B(16)(a).

27. On January 25, February 22 and March 22, 1994, the Snohomish County Planning Commission (**Planning Commission**) studied the Planning Department's January 5, 1994 staff report and held public hearings on the staff's findings and conclusions. Exhibit 70(b), Finding of Fact 4, at 2.

28. On February 22 and March 22, 1994, the Planning Commission submitted its recommendations regarding the requests for redesignation. The Planning Commission noted:

...

c. Lots designated ICF within the "Lake Bosworth island" that are not identified as part of Site 10, should be treated the same as Site 10 because many of these properties were already designated forest land by the Interim Forest Land Conservation Plan when they were purchased or the landowners were notified of its pending designation as forest land prior to purchase.

d. The "Lake Bosworth island" is largely under single ownership, divided into 20-acre lots and may be sold as 20-acre lots, but may not be further subdivided or developed in clusters while designated ICF.

e. With a designation of IFR the "Lake Bosworth island" could be developed into clusters, allowing the landowner to maintain some larger areas for commercial forestry.

f. The allowable density for cluster subdivision of land designated IFR is based on the underlying zoning. Since the underlying zoning of the "Lake Bosworth island" is R-5, an IFR designation would allow approximately 400 home sites, while an underlying 20-acre zoning would allow approximately 100 home sites, which is slightly higher than existing due to a density bonus.

g. A temporary emergency 20-acre downzone of the "Lake Bosworth island" in conjunction with an IFR designation would allow the landowner to cluster subdivide while preventing a large increase in residential density during the comprehensive planning process.

h. The "Lake Bosworth island" needs more discussion and should remain at a low density during the comprehensive planning process. Exhibit 70(b), at 2-3.

29. On April 2, 1994, Governor Lowry signed ESSB 6228 (Laws of 1994, Chapter 307) which amended the GMA's definition of "forest lands" at RCW 36.70A.030(8).

30. On June 9, 1994, ESSB 6228 became effective.

31. On July 25, August 3 and August 31, 1994, the County Council held public hearings to consider the petitions for inclusion in and exclusion from ICF and IFR designations, and to consider the Planning Commission recommendations, and to take public testimony. Exhibit 70(b), Finding of Fact No. 5, at 3.

32. On August 16, 1994, the County issued a "Determination of Non-significance" regarding the proposed redesignation of forest lands from ICF to IFR. It indicated that the proposed amendments to the Interim Forest Plan would:

... 2. change the designation of 2,497 acres from ICF to IFR [sites 10 and 15] Exhibit 62, at 1.

33. On August 31, 1994, the Snohomish County Council passed Amended Motion 94-210, amending Motion 92-283, relating to interim forest land designations. Exhibit 70(b). Finding of Fact No. 1 adopts and incorporates by reference the findings contained in the January 5, 1994 staff report. Exhibit 70(b), at 2.

34. Amended Motion 94-210 changed from ICF to IFR the designation of all interim commercial forest land within the "Lake Bosworth island", including all of WRECO's property within the Bosworth Block, i.e., Site 10. Exhibit 70 (b), Section 2(1)(h), at 8.

35. The Pilchuck-Newberg Organization is a nonprofit Washington organization incorporated on September 8, 1994. PNO's Petition for Review, ¶ 4.1 at 4.

### **III. DISCUSSION**

#### **A. LEGAL ISSUE NO. 3**

***Does PNO's Petition for Review constitute a challenge to the County's Interim Forest Land Development Regulations?***

PNO abandoned this issue, presumably because the focus of its petition for review is upon Amended Motion 94-210, which amended the Interim Forest Designations, rather than on the Interim Forest Regulations. In any case, because PNO abandoned Legal Issue No. 3, the Board will not review it.

#### **CONCLUSION**

PNO abandoned Legal Issue No. 3. Therefore, Legal Issue No. 3 is dismissed with prejudice.

#### **B. LEGAL ISSUE NO. 4**

***If Legal Issue No. 3 is answered affirmatively, does the Board have jurisdiction to consider a challenge to the County's Interim Forest Land Development Regulations (enacted more than 60 days prior to the filing of the petition for review) when reviewing an amendment to the County's interim designation of forest resource lands?***

Since Legal Issue No. 3 was abandoned, the Board will not review Legal Issue No. 4.

#### **CONCLUSION**

Because PNO abandoned Legal Issue No. 3, the Board did not determine the answer to that issue. Therefore, the Board will not address Legal Issue No. 4 and it is dismissed with prejudice.

## C.LEGAL ISSUE NO. 5

***Does that portion of Snohomish County Motion 94-210 that relates to the Bosworth Block comply with the requirements of the Growth Management Act, specifically RCW 36.70A.020, .030(8), .060, .110 and .170? RCW 36.70A.030(8)***

When the GMA was initially adopted, "forest land" was defined at RCW 36.70A.030(8) as:

...land primarily useful for growing trees, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, for commercial purposes, and that has long-term commercial significance for growing trees commercially.<sup>[1]</sup>

It was this definition of the phrase "forest land" that the Board reviewed in its *Twin Falls* decision. There the Board held:

### 1. Definition of Forest Lands

Before the County could comply with the GMA's requirement at RCW 36.70A.170(1) to "designate" appropriate forest lands, it first had to determine what lands constituted forest lands. Although the Act contains a definition of "forest lands" at RCW 36.70A.030(8), the definition itself does not enable one to readily or easily ascertain exactly what constitutes such land. To make this determination, the County first classified forest lands. Classification is a way to describe what constitutes forest lands. WAC 365-190-040(1) provides that:

Classification is the first step in implementing RCW 36.70A.050. It means defining categories to which natural resource lands... will be assigned.

In preparing for the designation of forest lands, the County was guided by the Act's definition of forest lands at RCW 36.70A.030(8).

The Act's definition of "forest lands," when considered with the Act's definition of "long-term commercial significance," coupled with the directive to designate such lands "not already characterized by urban growth" and to adopt development regulations that assure the conservation of forest lands while not prohibiting "uses legally existing" on the land, is the most complex equation this Board has been asked to review to date.

### Primarily Useful

Summarized in broadest strokes, the Petitioners' position is that the County failed to comply with the GMA because certain designated properties did not fit within the definition of "forest lands." Both *Twin Falls* and *WRECO*, for instance, contend that property cannot be "primarily useful for growing trees" if it is not being managed for timber production. Accordingly, they maintain that the property owner's intent controls: only if the land owner intends to manage the land for commercial timber production can the land be designated as forest land.

The Board rejects the contention by *Twin Falls* and *WRECO* that because a parcel of land is not being managed for commercial forestry purposes, it cannot be designated forest lands. Neither the GMA's definition of forest lands, nor its requirements that counties and cities designate forest lands and adopt interim development regulations that assure the conservation of those lands, bolster such a contention. Simply put, if the intent of the landowner were the crucial determining factor for designating forest lands, there might be far fewer forest lands designated, since high density residential or commercial use would be more lucrative. This would defeat the purpose of interim forest land development regulations -- to conserve these lands until GMA required comprehensive plans and implementing development regulations are adopted.

The Petitioners' suggestion that the landowner's intent to manage land for forestry purposes should control mirrors the historic pattern of land utilization in the central Puget Sound region: **market forces** have driven where, when, and how land would be used. The GMA has put a sudden stop to this practice. Market forces, coupled with the landowner's intent, are no longer the sole controlling factors for determining where

commercial forestry will take place -- land use planning that assures the conservation of forests for commercial purposes in appropriate areas has now become part of the formula.

This holding is consistent with the legislature's intent. The Board finds that RCW 36.70A.060(1)(a), regarding agricultural lands, is worded virtually identically to subsection (1)(b) of that section, regarding forest lands. However, the definitions of the two types of natural resource lands are significantly different. While RCW 36.70A.030(8) defines forest land as "land **primarily useful** for growing trees," RCW 36.70A.030(2) defines agricultural land as "land **primarily devoted** to the commercial production of horticultural... products." (Emphasis added). The latter terminology includes the landowner's intent: if the land is not currently being utilized for the commercial production of agricultural products, it cannot be designated agricultural land.

In sharp contrast, "primarily useful" is not limited to the land owner's intent to currently manage property for commercial timber production. Instead, it addresses the possibility of using the property for forestry purposes. The legislature was obviously aware of the distinction between the terms "primarily useful" and "primarily devoted." The Board concludes that "useful" is a much broader term. Accordingly, the Board holds that the land owner's intent relative to management of the property for commercial timber production is not controlling in determining whether the land should be designated as forest land. *Twin Falls*, at 28-29 (emphasis in original).

In 1994, the legislature, at least partially in response to the *Twin Falls* decision (see Exhibit 32, a letter on the subject from Senator Mary Margaret Haugen) amended the definition of the term "forest land" so that RCW 36.70A.030(9) now reads:

(9) "Forest land" means land **primarily devoted** to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, and that has long-term commercial significance. In determining whether forest land is primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, the following factors shall be considered: (a) The proximity of the land to urban, suburban, and rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d) the availability of public facilities and services conducive to conversion of forest land to other uses. (emphasis added).

The 1994 legislature's uncodified statement of intent, Section 1 of Laws of 1994, Chapter 307 (ESSB 6228), provides:

The legislature finds that it is in the public interest to identify and provide long-term conservation of those productive natural resource lands that are critical to and can be managed economically and practically for long-term commercial production of food, fiber, and minerals. Successful achievement of the natural resource industries' goal set forth in RCW 36.70A.020 requires the conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible to the management of designated lands. The 1994 amendment to RCW 36.70A.030(8) (section 2(8), chapter 307, Laws of 1994) is intended to clarify legislative intent regarding the designation of forest lands and is not intended to require every county that has already complied with the interim forest land designation requirement of RCW 36.70A.170 to review its actions until the adoption of its comprehensive plans and development regulations as provided in RCW 36.70A.060(3). (emphasis added).

WRECO and PNO urge the Board to apply the 1994 definition<sup>[1]</sup> to the County's adoption of Amended Motion 94-210, while the County contends that the original definition still applies until the County adopts its comprehensive plan and implementing development regulations. County's Brief, at 12-15. The Board concludes that the County was required to apply the new definition of "forest lands" when it amended Motion 92-283.

The Board's conclusion is based upon a literal interpretation of the above-emphasized words. Given the interim nature of development regulations adopted prior to comprehensive plan adoption, the fact that some jurisdictions

had yet to even attempt to comply with the RCW 36.70A.170, and the additional effort and cost for counties that had already complied in being required to amend such "interim" regulation, one would have expected the above-emphasized language in Section 1 of ESSB 6228 to instead have read:

The 1994 amendment... is not intended to require counties that have already complied with the interim forest land designation requirement of RCW 36.70A.170 to review their actions until the adoption of their comprehensive plans and development regulations...

The legislature did not enact such language, however, and the language it used, although possibly unexpected, does not leave an absurd result. For certain jurisdictions, the legislature elected to postpone the effective date of the new definition (i.e., June 9, 1994) until after they adopted new comprehensive plans and development regulations.

Therefore, the legislature used the language "... is not intended to require every county that has already complied..." Emphasis added. The use of the phrase "not ...every county that has... complied" means that at least some counties that had already complied with the requirements of RCW 36.70A.170 (i.e., to designate forest lands) would nonetheless have to utilize the new definition of "forest lands" prior to adoption of a comprehensive plan if they elect to amend the designation.<sup>[1]</sup>

Here, not only did the County attempt to comply with the Act's requirements to designate forest lands and adopt development regulations to assure their conservation, but the Board upheld those actions as complying with the GMA. See *Twin Falls*. Consequently, if the County had not passed Amended Motion 94-210, it would not have been required to apply the new definition of "forest land" until it adopts its comprehensive plan and implementing development regulations. However, by amending its forest land designations, the County triggered the application of the 1994 definition of forest lands, i.e., RCW 36.70A.030(9). Accordingly, the Board must remand Amended Motion 94-210.

On remand, if the County elects to redesignate forest lands at that time or, when the County does adopt its comprehensive plan and implementing development regulations, it will have to use the new definition of "forest land." In essence, by amending the definition, the Legislature deleted the phrase "primarily useful for" and replaced it with "primarily devoted to." The legislature did not amend the definition of "agricultural lands" which the Board reviewed in its *Twin Falls* decision. Interestingly, although the Legislature amended the definition of "forest lands" to mirror that of "agricultural lands" by including the "primarily devoted to" language, the legislature also added a set of four factors to examine in determining whether the land was indeed "primarily devoted to" growing trees commercially. None of these four factors expressly involves the landowner's intent.

Ironically, when the Board in *Twin Falls* examined the "primarily devoted to" language in the definition of "agricultural lands," it concluded that the use to which land is primarily devoted can be determined by looking at what is actually occurring on-site: "if the land is not currently being utilized for the commercial production of agricultural products, it cannot be designated agricultural land." *Twin Falls*, at 29. Thus, as the Board indicated, landowner intent is part of the formula, at least by implication. With the 1994 amendment of the definition of "forest land," the Board's test, that "primarily devoted to" is determined by ascertaining actual use of the property including an examination of landowner intent, has been replaced with a review of the four factors listed in RCW 36.70A.030(9) -- none of which involves a landowner's intent. Accordingly, the Board rejects WRECO's argument that the current definition of "forest lands" (created in 1994) is merely an inquiry into the landowner's intent. Had the legislature amended the original definition to include just the first sentence of RCW 36.70A.030(9) as now written, the Board might agree with WRECO. However, the legislature added the second sentence, which contains the four factors unrelated to landowner intent.

#### RCW 36.70A.060

This GMA provision in part deals with development regulations to assure the conservation of forest lands designated under RCW 36.70A.170. The County did not amend its forest land regulations when it passed Amended Motion 94-210. Therefore, as the Board indicated in Legal Issue No. 3 above, it will not review this provision.

#### RCW 36.70A.110

PNO contends that the redesignation of the Bosworth Block from ICF to IFR will allow urban growth to occur outside of designated urban growth areas, in violation of RCW 36.70A.110. PNO's Brief, at 12. The County

responds that since PNO did not challenge the County's 1993 adoption of a series of interim urban growth area ordinances (**IUGA Ordinances**) in a timely fashion, it cannot now challenge those ordinances. County's Brief, at 12. *See also* Exhibit B to County's Brief. The Board agrees with the County that it is too late for PNO to now challenge the County's IUGA Ordinances. However, the Board will always determine whether a subsequent legislative enactment permits urban growth to occur outside an urban growth area. *See Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 94-3-0005 (1994), at 19-20.

The County's Rural Cluster Subdivision Ordinance provides that its provisions may be used for the development of single family and/or duplex residences on property that has been designated IFR. Exhibit A to County's and WRECO's Briefs, SCC 32.30.020, at 3. Sixty percent of land where this ordinance is applied must be retained in "restricted open space." Exhibit A to County's and WRECO's Briefs, Table 1, at 5(a).

Sixty percent of the Bosworth Block's 2,317 acres (*see* Finding of Fact No. 2) equals 1,390 acres of required open space and 927 acres of developable land. A maximum of 463 lots can be developed on this 927 acres. Exhibit 62, at Table 2 to the Supplemental Sheet for Nonproject Actions. Therefore, WRECO can put up to 463 dwelling units (**du**) on 927 acres of land which equals 1 du/two acres of non-open space (or 1 du/five acres of total land within the Bosworth Block). The Board holds that this level of clustered development does not constitute "urban growth" outside an IUGA.<sup>[1]</sup>

#### RCW 36.70A.170

Because the Board is remanding Amended Motion 94-210 to the County with instructions to apply the 1994 definition of "forest land" before redesignating such lands, the Board will not determine whether the redesignation of the Bosworth Block as IFR complies with the GMA. Before the County can redesignate the Bosworth Block or any of its forest lands, it must first apply the 1994 definition of "forest land."

#### RCW 36.70A.020

The Board will not determine whether Amended Motion 94-210 complies with RCW 36.70A.020 because it is remanding that enactment.

## CONCLUSION

Snohomish County Amended Motion 94-210 does not comply with the requirements of the GMA because it does not apply the 1994 definition of "forest land" at RCW 36.70A.030(9). The Board holds that the event that invokes usage of the 1994 definition for counties that have already complied with RCW 36.70A.170 is an amendment to any forest land designation prior to adoption of a comprehensive plan.

## D.LEGAL ISSUE NO. 6

### ***Did the County violate the State Environmental Policy Act (SEPA) by issuing a Determination of Nonsignificance (DNS) for Motion 94-210?***

Although PNO argues that the County should have prepared an environmental impact statement (**EIS**), the County's decision to instead issue a DNS for Motion 94-210 did not violate SEPA. RCW 43.21C.030 requires that an EIS "shall be prepared on proposals for legislation and other major actions having a probable significant adverse environmental impact." WAC 197-11-330 establishes the process for making a "threshold determination" whether an EIS should be prepared or whether a DNS should be issued. Crucial to this determination is deciding, pursuant to WAC 197-11-330(1)(b):

... if the proposal is likely to have a probable significant adverse environmental impact, based upon the proposed action, the information in the [environmental] checklist (197-11-960), and any additional information furnished under 197-11-335 and 197-11-350;

The County determined that the proposed amendments to the Interim Forest Plan and Designations did not have a probable significant adverse impact on the environment. Finding of Fact No. 32. PNO argues that the environmental

checklist and supplemental sheet for nonproject actions<sup>[1]</sup> attached to the DNS prove that an EIS should have been required.

The DNS in choosing to focus repeatedly ... on the 60% of IFR land that would be preserved as open space under the Rural Cluster Subdivision Ordinance, fails entirely to focus on the 40% of IFR that would be opened to concentrated rural cluster development under the proposal. Of WRECO's 1,750 acre Bosworth Block property, hundreds of acres could, under the Rural Cluster Subdivision Ordinance, be open to concentrated rural cluster development. PNO's Brief, at 30.

The Supplemental Sheet for Nonproject Actions, in answering "[H]ow would the proposal be likely to affect plants, animals, fish, or marine life?" provides:

The proposal is likely to result in a loss of commercial timber in areas ... changed from ICF to IFR (2,497 acres)... Sixty percent of areas designated IFR must be conserved as open space for timber production when developed... Furthermore, commercial timber may be lost from 40 percent of the land changed from ICF to IFR by this proposal. On sites that would be removed from ICF or changed from ICF to IFR by the proposal and which already consist of potential legal 20-acre building sites [including site 10], the commercial timber likely to be lost from this proposal is lower per acre than that described above....

The proposal may reduce the quality and/or quantity of fish and wildlife habitat supporting native plants, animals and fish. Habitat reduction is possible in areas removed from ICF (2,063 acres) since a higher density of development would be allowed in those areas. Exhibit 62, at question 2 of Supplemental Sheet.

Further information indicates that:

The county's interim regulations to conserve forest lands (Chapter 32.13 SCC) prohibit division of designated ICF and IFR land into lots less than 80 acres. The regulations allow IFR lands to be subdivided at the underlying density in a cluster subdivision if 60 percent of the area is conserved as open space that may be used for timber production... Table 2 reports the potential change in lot yield if areas removed from interim forest land designation are developed at their maximum density allowed under existing zoning. If this proposal is approved, approximately 362 additional lots may be available in rural areas of the county.... Exhibit 62, at question 5 of Supplemental Sheet.

Table 2, dated August 16, 1994, indicates that Site 10 contains 2,317 acres. Under an ICF designation, Site 10 could contain at a maximum 115 lots. If Site 10 were designated IFR, it could contain a maximum of 463 lots that would have to be clustered, or 348 more lots under IFR designation than ICF. Exhibit 62, Table 2 to Supplemental Sheet. The standard of review for determining whether the County's issuance of a DNS violated SEPA is the "clearly erroneous" standard. *King County v. Boundary Review Board for King County*, 122 Wn.2d 648, 661, 860 P.2d 1024 (1993); *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979); *Sisley v. San Juan County*, 89 Wn.2d 78, 85, 569 P.2d 712 (1977); *Norway Hill Preservation and Protection Assn. v. King County Council*, 87 Wn.2d 267, 273-76, 552 P.2d 674 (1976); see also Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* §13(b) (Issue 3 1992), at 115.

Under this standard, the agency action may be reversed when the reviewing court is firmly convinced in light of the record and the public policy contained in RCW 43.21C.010<sup>[1]</sup> that a mistake has been committed. In such reviews, the court recognizes and defers to the expertise of the administrative agency. *West 514 v. Spokane County*, 53 Wn. App. 838, 844, 770 P.2d 1065 (1989) (footnote and emphasis added; citations omitted).

Deference to agency expertise is also expressly required by SEPA. RCW 43.21C.090, "Decision of governmental agency to be accorded substantial weight," states:

In any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a "detailed statement", the decision of the governmental agency shall be accorded substantial weight.

Thus, PNO has a substantial burden of proof when challenging the validity of the County's issuance of a DNS on this nonproject action. PNO has not met the burden. The Board is not definitely and firmly convinced that a mistake has been made. *Norway Hill*, at 274. The Board holds that issuance of a DNS for this nonproject action complies

with SEPA. PNO has not made a sufficient showing why the mere possibility of placing an additional 348 lots on 2,317 acres of land for a maximum total of 463 lots will cause a significant, adverse environmental impact. The County's issuance of a DNS for Amended Motion 94-210 does not violate SEPA. In the future, whether a DNS can again be issued or an EIS will be required depends on what actions the County actually takes in designating forest lands and whether any development applications are filed on specific parcels of property. Although a DNS will probably suffice for nonproject actions similar to Amended Motion 94-210, the filing of a specific project application may require the County to require an EIS, depending on the scope and location of the proposed action.

## CONCLUSION

The County did not violate SEPA in issuing a DNS for Motion 94-210, a nonproject action for which more detailed environmental impact analysis can occur when a site specific development application is actually submitted.

## E.PNO's STANDING

WRECO contends that the Pilchuck-Newberg Organization lacks standing to bring this appeal before the Board, pointing out that PNO's Petition for Review itself indicates that the organization was formed after adoption of Amended Motion 94-210. WRECO's Brief, at 7. In response, PNO contends that WRECO's motion is untimely and that WRECO should be prevented from bringing a dispositive motion in its prehearing brief. PNO's Reply Brief, at 17.

Following the hearing on the merits, PNO was given additional time to submit evidence that the organization, as opposed to individual petitioners, has standing to appear before the Board since the fact that PNO incorporated after passage of Amended Motion 94-210 did not necessarily mean that the organization had not obtained GMA standing in this matter before then. However, no such documentation was submitted.

Challenges to either SEPA or GMA standing before the Board can be brought at any time by either a party or the Board on its own initiative. *See West Seattle Defense Fund v. Seattle*, CPSGMHB Case No. 94-3-0016 (1995), Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss SEPA Claim, at 3. Although the Board agrees with PNO that it would have been more appropriate for WRECO to file its motion to dismiss when dispositive motions were due, the Board did give PNO additional time after the hearing to respond even though PNO already had the opportunity to respond in its reply brief.

The Board holds that the Pilchuck-Newberg Organization does not have the requisite GMA standing to bring this action: it did not appear before the County nor has it shown that it was in fact injured by the County's action. *See Friends of the Law (I) v. King County*, CPSGPHB Case No. 94-3-0003 (1994), Order on Dispositive Motions, at 8-17.

## CONCLUSION

The Pilchuck-Newberg Organization does not have standing to appear before the Board.

## IV. ORDER

Having reviewed and considered the above-referenced exhibits and documents, the parties' briefs and the oral arguments of the parties, and having deliberated on the matter, the Board finds that Snohomish County Amended Motion 94-210 is **not in compliance** with the requirements of the Growth Management Act.

1. Amended Motion 94-210 is **remanded** with instructions for the County to apply the 1994 definition of "forest land" before redesignating forest lands or to repeal Motion 94-210 in its entirety in order for the GMA's original

definition of "forest land" to remain in effect until the County adopts its comprehensive plan and implementing development regulations.

2.The Pilchuck-Newberg Organization is **dismissed with prejudice** from this case for lack of standing.The individual petitioners remain parties to the case.

3.Legal Issues Nos. 3 and 4 are **dismissed with prejudice**.

4.Pursuant to RCW 36.70A.300(1)(b), the County is given until **5:00 p.m. on Friday, June 2, 1995**, to bring Amended Motion 94-210 into compliance with the Board's Final Decision and Order and the requirements of the Act.The County shall file by **5:00 p.m. on Friday, June 9, 1995**, one original and two copies with the Board and serve a copy on PNO of a statement indicating what attempts it made to comply with this Final Decision and Order. The Board will promptly schedule a compliance hearing sometime thereafter.

So ordered this 28th day of April, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley, Presiding Officer

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Chris Smith Towne

Note: This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

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[\[1\]](#) WRECO owned 2,400 acres of property near Lake Bosworth in 1992.Exhibit 4, at 1.Subsequently, WRECO sold 29 twenty-acre parcels (totaling 580 acres).Exhibit 4, at 7.WRECO owned "approximately 1,750 acres" of land within the Bosworth Block as of January 25, 1995. Exhibit 4, at 2.

[\[1\]](#) Although Exhibit 57 refers to a July 28, 1993 Request for Exclusion, the actual request was dated June 11, 1993.*See* Exhibit 86.

[\[1\]](#) "Long-term commercial significance" includes the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land. RCW 36.70A.030(11) [subsection (10) in the initial version of the GMA].

[\[1\]](#) Although WRECO and PNO both argue that the 1994 amendment should apply, each has a dramatically different opinion of what that definition involves.

[\[1\]](#) Similarly, for counties that had not yet complied with RCW 36.70A.170 by the time the 1994 definition of "forest land" became effective, they would have to use the new definition when they did attempt to comply.

[\[1\]](#) "Urban growth" is defined at RCW 36.70A.030(15) as making:

... intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of minerals....

[\[1\]](#) WAC 197-11-704(2)(b) indicates that "nonproject" actions include decisions on policies, plans or programs such as the adoption or amendment of ordinances, rules or regulations, or the adoption or amendment of comprehensive plans or zoning ordinances.WAC 197-11-774 indicates that nonproject actions are different or broader than a single site specific project.

[\[1\]](#) RCW 43.21C.010, entitled "Purposes," provides:

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

[\[1\]](#) As the County points out, the filing of site specific development applications very likely could trigger SEPA's phasing process which is applicable when the sequence is from a nonproject document to a site specific analysis.*See* WAC 197-11-065(5)(c)(i).