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DEPUTY  
WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,  
Appellant/Cross-Respondent,

v.

ESSES DAMAN FAMILY, LLC,  
Respondent/Cross-Appellant,

and

QUINAULT INDIAN NATION and POLLUTION CONTROL  
HEARINGS BOARD,  
Respondents.

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**AMICUS CURIAE BRIEF OF  
WASHINGTON FOREST PROTECTION ASSOCIATION**

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ORIGINAL

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## I. INTRODUCTION

At issue in this appeal is whether a permanent county road constitutes a permanent dike or levee for purposes of determining the boundary of a channel migration zone (“CMZ”), as defined by the Forest Practices Act’s (“FPA”) implementing regulations. These regulations prohibit timber harvest in the CMZ to protect the ecological functions of the stream or river channel. WAC 22-30-020(13); *see also* PCHB No. 12-118c, Findings of Fact, Conclusions of Law, and Order (Corrected), Finding of Fact No. 13 (Apr. 29, 2014).

The Pollution Control Hearings Board (“PCHB”) appropriately found that a particular county road at a specific location constituted a permanent dike or levee limiting the extent of a CMZ. This PCHB finding was supported by substantial evidence and consistent with the FPA and its implementing regulations.

The Jefferson County Superior Court decision issued on November 4, 2015 erroneously reversed the findings of the PCHB ruling dated April 29, 2014. The Superior Court erred because it applied the Forest Practices Board Manual (“Board Manual”) as a rigid and prescriptive statement of law. Such a decision has adverse implications under the FPA as well as the Administrative Procedures Act (“APA”).

The decision is contrary to the purpose of the FPA and its implementing regulations. If affirmed and followed, this decision will result in the Board Manual being applied as a mandatory and prescriptive set of regulations that were never enacted as rules in accordance with the

FPA or the APA. This use of the Board Manual, which is intended only as guidance, will strip away the discretion of the expert agencies, the Washington Department of Natural Resources (“DNR”) and the PCHB, to meaningfully consider competing scientific viewpoints and site-specific facts when applying and enforcing the FPA.

The Superior Court’s decision is also contrary to the APA because it subverts the Forest Practices rules to a non-binding guidance document that was never promulgated with the same degree of scrutiny or procedural oversight as would otherwise occur through the APA rulemaking process. If the Superior Court’s decision in this case is left to stand, it will open the door for the treatment of a potentially broad range of policy statements as binding on the public, on our governmental agencies, and on our administrative review bodies. It suggests that such policy statements should be given the same weight as actual rules, even though those policies were never created in compliance with the APA. Additionally, it will create a chilling effect on the distribution of agency guidance, which is essential for the application and enforcement of the Forest Practices rules in circumstances where there is scientific complexity and an untold variety of site conditions across the varying landscapes and ecological conditions of the entire State of Washington.

For these reasons, Amicus Curiae Washington Forest Protection Association (“WFPA”) respectfully requests the Court to reverse the decision of the Superior Court and uphold the PCHB’s decision.

## **II. IDENTITY AND INTEREST OF AMICUS CURIAE**

The WFPA is a trade association that has represented private forest landowners in Washington State since 1908, including large and small companies, individuals and families, who grow, harvest, and re-grow trees on about four million acres. The WFPA advocates for balanced forest policies that encourage investment in forestland; protect fish, water, and wildlife; and promote responsible forest management as a preferred land use. A detailed statement of the WFPA's interest in this matter is included in the WFPA's Motion for Leave to File Amicus Curiae Brief filed concurrently with this brief and incorporated herein by reference.

The WFPA represents private forest landowners who seek to conduct activities governed by the FPA and are thus impacted by the treatment of the Board Manual as a tool for interpreting and demonstrating compliance with the FPA and its implementing regulations. The WFPA and its members have an interest in assuring that the Board Manual is reviewed and applied as a guidance document, and not a rule, so that its members, the DNR, and, when necessary, the PCHB can use the Board Manual to inform the application and enforcement of the rules to a variety of site-specific circumstances without being bound by hyper-technical interpretations of the Board Manual that conflict with the purposes of the FPA and its implementing regulations.

## **III. STATEMENT OF THE CASE**

The WFPA incorporates by reference DNR's counterstatement of the case in its Response Brief to Esses Daman Family, LLC.

#### **IV. SUMMARY OF THE ARGUMENT**

The PCHB appropriately found that the county road constituted a permanent dike or levee. This PCHB finding was supported by substantial evidence and consistent with the FPA and its implementing regulations. The Superior Court erred by treating language in the Board Manual as prescriptive rules that must be followed by the PCHB without exception or flexible interpretation. The Board Manual fits within the definition of a policy statement under the APA because it is a technical guidance document that is prepared to facilitate the implementation of the Forest Practices rules. A fundamental characteristic of policy statements is that they are advisory in nature.

Failure to follow a strict interpretation of the Board Manual should not be the exclusive basis to find that the PCHB's decision was arbitrary and capricious. Regardless of the consistency of the PCHB's decision with the Superior Court's interpretation of the Board Manual, the decision was not arbitrary and capricious because it was consistent with the plain text of the FPA rule and supported by other substantial evidence. Misinterpretation of the Board Manual, if any, was harmless error because the PCHB was not required to strictly follow the Board Manual. The Superior Court's review and use of the Board Manual under principles that are applicable to rules is improper and in direct contravention of the APA and the role of the Board Manual under the FPA. The Superior Court's decision has harmful implications for the public, regulated lands, the

Forest Practices Board, DNR, and the PCHB under the APA as well as the FPA.

## V. ARGUMENT

### A. Background

The proper role of the Board Manual is determined by the APA. The legislature carefully crafted a hierarchy of agency actions under the APA, giving increasing force and deference to agency actions that involve a more rigorous and public adoption process. *Ass'n of Wash. Bus. v. State of Wash., Dep't of Revenue*, 155 Wash. 2d 430, 446-447, 120 P.3d 46 (Wash. 2005).<sup>1</sup> This brief focuses on the differences in treatment between two types of agency actions that are part of the APA hierarchy: rules and policy statements.

A rule is defined by RCW 34.05.010(16) as any agency order, directive, or regulation of general applicability that fits within one of five categories:

- (1) the violation of which results in a penalty,
- (2) which establishes or alters the procedures for hearings,
- (3) which establishes or alters the enjoyment of benefits or privileges conferred by law,
- (4) establishes or alters licenses, and
- (5) effects manufacturing standards.

*Ass'n of Washington Bus.*, 155 Wash. 2d at 448-49. The APA requires compliance with stringent procedures for rule adoption, which include selecting draft language, preparing applicable cost-benefit and small

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<sup>1</sup> The APA creates various buckets under which agency actions fit: legislative rules, interpretive rules, procedural rules, policy statements, and adjudications. The bucket into which an action falls determines the impact of such action, the type of procedures that the agency must comply with in adopting such action, and the level of deference owed to the agency with regard to such action. *See generally Ass'n of Wash. Bus.*, 155 Wash. 2d 430.

business impact statements, conducting a State Environmental Policy Act (“SEPA”) analysis, holding public comment periods, and responding to comments. *See, e.g.*, RCW 34.05.320; RCW 34.05.325; *see also Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wash. 2d 640, 649, 835 P.2d 1030 (Wash. 1992).

In contrast, a policy statement is defined as:

a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including where appropriate the agency’s current practice, procedure, or method of action based upon that approach.

RCW 34.05.010(15). Policy statements are only subject to very minimal procedural requirements, none of which are aimed at allowing public participation and input. RCW 34.05.230.

Understanding and respecting the distinction between rules and policy statements is critical to maintaining the integrity of the APA and in providing the public with non-prescriptive tools for practical decision-making. Rules, when properly adopted, have the force and effect of law, whereas policy statements are advisory only. *Manor v. Nestle Food Co.*, 131 Wash. 2d 439, 445, 932 P.2d 628, *amended by* 945 P.2d 1119 (Wash. 1997); RCW 34.05.230(1).<sup>2</sup> Although agency employee’s actions

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<sup>2</sup> In this way, policy statements are similar to interpretative rules under the Federal APA. This similarity is significant in that:

[A] legislative rule has the same binding effect as a statute. It binds members of the public, the agency, and even the courts, in the sense that courts must uphold a legislative rule as long as it represents a valid exercise of agency authority. *By contrast, interpretive rules are not*

should generally be consistent with agency policy statements, administrative bodies and courts, in reviewing agency decisions, are not bound to follow such policy statements. 1 Richard J. Pierce, *Administrative Law Treatise*, § 6.4 (5th ed. 2010). This allows reviewing agencies to consider the facts specific to the question to ensure that the decision is consistent with the overall statutory scheme.

**B. The Board Manual Is Merely a Non-Binding Guidance Document, Akin to a Policy Statement, and Should Not Be Treated as a Rule.**

The Board Manual is a guidance document, akin to a policy statement. The opinion below properly recognizes the Board Manual as a non-binding guidance document. The legislature intended for the forest practices regulatory scheme to include both binding rules and non-binding guidance, providing that “the board shall establish and maintain technical guidance in the forest practices board manual” to assist in the interpretation of the rules. RCW 76.09.040(3)(c). It is clear from the plain text of the Board Manual, as well as the provisions it was adopted under, that the Board Manual is a technical guidance document which provides a menu of analytical options, but does not prescribe affirmative conduct or legislative standards. It provides permit applicants with

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*binding on courts or on members of the public. . . . A court may choose to give binding effect to the position taken by an agency in an interpretive rule, but it is the court that provides the binding effect of law through its process of statutory interpretation; the agency's interpretive rule serves only the function of potentially persuading the court that the agency's interpretation is correct.*

*Ass'n of Washington Bus. v. State, Dep't of Revenue*, 121 Wash. App. 766, 774-75, 90 P.3d 1128 (Wash. Ct. App. 2004) (quoting 1 Richard J. Pierce, *Administrative Law Treatise*, § 6.4) (emphasis added).

various methods for on-the-ground determinations of compliance with the FPA (RCW Ch. 76.09) and the SEPA (RCW Ch. 43.21C).

A critical characteristic of the Board Manual is its inherent flexibility.<sup>3</sup> For example, the Board Manual states that it “offers two tools to help you to determine whether harvest is likely to be permitted.” Washington Department of Natural Resources, Forest Practices Board Manual, at M7-4 (Nov. 2004). The plain text of the Board Manual section at issue in this case, which addresses how to determine the CMZ, identifies the Board Manual as a “technical supplement.” *Id.* at M2-6. It further provides that “[t]he purpose of this section of the board manual is to *help* identify the point along the stream where measurement of the riparian management zone (RMZ) begins.” *Id.* at M2-1 (emphasis added). Furthermore, the terms used in the Board Manual are generally non-prescriptive. The Board Manual uses “may” and “should” rather than “must” and “shall” in many places.<sup>4</sup>

The Board Manual should not be treated as a rule. It does not fit within any of the five exclusive categories of a rule. *Sudar v. Dep’t of Fish & Wildlife Comm’n*, 187 Wash. App. 22, 30-31, 347 P.3d 1090 (Wash. Ct. App. 2015). In particular, a violation of the Board Manual does not subject a person to a penalty or administrative sanction.

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<sup>3</sup> It is a document that landowners, DNR, and the PCHB can use to apply regulations, including applying the regulations defining a CMZ, to a variety of unique and divergent circumstances across the state and all of its unique landscapes and properties.

<sup>4</sup> *See, e.g.*, Forest Practices Board Manual, at M2-6 (“An understanding of general river processes may also be helpful to the landowner. To this end, technical background (Part 2.5) is included, and users of this manual are encouraged to become familiar with the concepts offered.”)

*Compare with Simpson Tacoma Kraft Co.*, 119 Wash. 2d at 647

(Ecology's standard for numeric water quality was in fact a rule because it was "an agency directive which would subject the respondents to punishment if they do not comply with the standard."). The Board Manual also does not add any qualifications to the statutory basis for obtaining a benefit, such as a permit. When Washington courts have evaluated similar agency pronouncements, they have determined that such pronouncements are policy statements, not rules. *See generally Sudar*, 187 Wash. App. 1046.

The Board Manual was not adopted as a rule under either the APA<sup>5</sup> or the FPA<sup>6</sup> and, therefore, cannot be treated as a rule. Indeed, DNR, the agency that is responsible for preparing the Board Manual, does not have rulemaking authority under the FPA and the Forest Practices Board, in approving the Board Manual, did not abide by the APA rulemaking procedures. Compliance with such procedures is required before an agency pronouncement may become binding.<sup>7</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 313, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) ("Certainly

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<sup>5</sup> For example, the Board Manual did not go through a formal APA rulemaking notice and comment period. RCW 34.05.310-395.

<sup>6</sup> The Board Manual did not go through the Adaptive Management Program established by the state legislature for Forest Practices rules. RCW 76.09.370(6), (7); WAC 222-08-160(2). Rules covering aquatic resources under the FPA may be adopted or amended only if consistent with recommendations resulting from the Adaptive Management Program established by the Forest Practices Board. AGO 2015 No. 1, Authority of Forest Practices Board to Adopt a Moratorium on Forest Practices Applications Due to Potential Slope Instability (Apr. 17, 2015).

<sup>7</sup> Where policy statements have been adopted without compliance with the APA's stringent rulemaking procedures, RCW 34.05.310-395, but have the character of rules, a court may declare such rules invalid. *Ass'n of Washington Bus.*, 155 Wash. 2d at 437.

regulations subject to the APA cannot be afforded the ‘force and effect of law’ if not promulgated pursuant to the statutory procedural minimum found in that Act.”); *see also Manor*, 131 Wash. 2d at 445.

Because the Board Manual is merely a policy statement, it does not bind the PCHB and does not require strict technical compliance. Instead, it provides a basic framework for the PCHB to consider when weighing all of the facts in the case to determine whether compliance with the relevant rule has been satisfied.

**C. The Superior Court Erred by Treating the Board Manual as a Rule and Ignoring the Forest Practice Rule Defining CMZ.**

**1. The PCHB’s Decision Was Not Arbitrary and Capricious.**

The Superior Court erred when it found that the PCHB’s decision was necessarily arbitrary and capricious because the facts did not align with the Superior Court’s interpretation of the Board Manual. In this way, the Superior Court erroneously treated the Board Manual as if the PCHB’s decision had to be consistent with the Board Manual in the first place. It does not.

The relevant question is not whether the PCHB’s decision demonstrated strict adherence to the Board Manual. As explained above, the Board Manual is simply a guidance document. It is meant to be flexible and adaptable to a variety of different scenarios. This is one reason why neither the public nor the courts (and the PCHB, which is a

quasi-judicial agency that acts like a special court<sup>8</sup>) are bound to strictly comply, or find strict compliance with guidance documents when considering statutory and regulatory compliance. 1 Richard J. Pierce, *Administrative Law Treatise*, § 6.4.

If an administrative review body's decision is arbitrary and capricious solely because it departed from an agency policy statement, then the policy statement would be binding—that is, the guidance would not be guidance at all, but instead would be a rule. *See Shannon v. Pay 'N Save Corp.*, 104 Wash. 2d 722, 729, 709 P.2d 799 (Wash. 1985), *abrogated on other grounds by La.-Pac. Corp. v. Asarco Inc.*, 131 Wash. 2d 587, 934 P.2d 685 (Wash. 1997)) (jury not required to follow guideline because court refused “to elevate a guideline, the purpose of which is to ensure the uniform exercise of prosecutorial discretion, into a rule of law which would change the determination of discrimination into an arbitrary numbers game.”).

Instead, the court must determine whether the PCHB's application of the law—the relevant Forest Practices rule in this case—to this particular factual scenario was reasoned. In this case, the question is whether there was evidence that a perforated road, such as the South Shore Road, is a channel limiting feature under the Forest Practices rule.

The PCHB's decision is consistent with the plain language of the Forest Practices rule at issue, WAC 222-16-010, which defines CMZ as

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<sup>8</sup> *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 591-92 (Wash. 2004).

the area where the active channel of a stream is prone to move and thus results in a potential near-term loss of riparian function and associated habitat adjacent to the stream, except as modified by a permanent levee or dike. For this purpose, near-term means the time scale required to grow a mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and delineation guidelines.)

Although permanent dike or levee is undefined in the rules, “absent ambiguity or a statutory definition, we give the word[] [its] common and ordinary meaning. . . . To determine the plain meaning of an undefined term, we may look to the dictionary.” *Estate of Hazelwood v. Bremerton Ice Arena, Inc.*, 166 Wash. 2d 489, 498, 210 P.3d 308 (Wash. 2009) (citation omitted). “Permanent” speaks to the longevity of the dike or levee, but does not change the general nature of a dike or levee.

“Permanent” is defined by Merriam-Webster as “lasting or continuing for a very long time or forever: not temporary or changing.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/> (last visited Aug. 3, 2016). Permanence is unrelated to perforation. A dike is defined as “a bank or mound of earth that is built to control water and especially to protect an area from flooding.” *Id.* A levee is similarly defined as “an embankment for preventing flooding.” *Id.* Additionally, the reference to permanent dike or levee in the greater context of the definition of the CMZ indicates that a dike or levee is something that would constrain the channel of a stream from where it is ordinarily prone to move. Neither the plain meaning of levee or dike, nor the context of the rest of the rule, requires

that a dike or levee must not be perforated. It is entirely possible for a road to have drainage culverts beneath the road bed—perforations—and to also be a long-lasting structure that prevents channel migration.

Therefore, the PCHB's decision correctly applied the law when it made a reasoning finding that a perforated road was also a permanent dike or levee limiting the CMZ.

The PCHB's decision is also consistent with the general purpose behind the CMZ delineation. In particular, the FPA and its implementing regulations require applicant landowners, DNR, and, on appeal, the PCHB, to delineate a CMZ as an area where timber harvest is not allowed and is buffered so that trees and large wood debris will deliver to a stream or river channel as part of the natural stream migration and erosion process over the near term (i.e., time to grow a mature forest stand). WAC 222.16.010. If a river channel will not migrate beyond such a linear feature, there is no point in requiring the landowner to retain trees that will never deliver to a stream through the erosion process. Trees and large wood debris would still be unable to deliver to a river or stream even if there is some perforation in a road that acts as a dike or levee.

The PCHB's decision under the rule was well reasoned and supported by substantial evidence. The PCHB considered evidence regarding the role that the South Shore Road plays in determining whether the river is prone to migrating beyond the South Shore Road in the next 140 years. PCHB No. 12-118c, Findings of Fact, Conclusions of Law, and Order (Corrected), Finding of Fact No. 31 (Apr. 29, 2014). The

record is replete with evidence supporting the PCHB's decision that the South Shore Road is a channel limiting feature which serves as a boundary of the CMZ. The PCHB made a fact-intensive and site-specific determination that the road was likely to remain a limitation on the CMZ. In particular, the PCHB considered evidence that the road is a "major collector road," receives regular maintenance from the county, has armored sections that will likely protect against erosion caused by the river, and that the county will reinforce the portion of the road in the vicinity of the parcels in the future. *Id.* Additionally, the PCHB relied on four expert witnesses, ultimately giving credit to the expert put forth by DNR, Witness Lingley. The PCHB explained why Ms. Lingley's analysis was more credible, including that it was based on the longest period of analysis for the establishment of the historic migration zone and because it takes a conservative approach to the erosion calculation. *Id.* at 29:5-10.

Not only did the Superior Court fail to consider whether the PCHB's decision was a correct interpretation and application of the rule, but by interpreting the guidance as it did, it adopted a position which is inconsistent with the plain language of the rule. The Superior Court's interpretation of the Board Manual as requiring that a permanent dike or levee must not be perforated reads a new requirement into the rule that is not in, or supported by, the plain text of the rule itself.

The Superior Court improperly disregarded the Forest Practices rule by failing to consider whether the PCHB's decision was well-reasoned under the rule. Instead, it improperly assigned a binding role to

the Board Manual. For these reasons, the Superior Court erred when it found that the PCHB's decision was arbitrary and capricious.

**2. Any Interpretative Error of the Board Manual Is Not Reversible Error.**

Even if the PCHB's interpretation of the Board Manual was incorrect, misinterpretation of the Board Manual is not reversible error. The PCHB was not interpreting or applying *the law* when interpreting and applying the Board Manual. Therefore, the PCHB's decision is not reversible on the grounds that it did not follow such policy statement.

If the PCHB misapplied the law in determining that the Board Manual is ambiguous, such error was harmless.<sup>9</sup> Under RCW 34.05.570(1)(d), a court "may not grant relief unless we determine that the complaining party has been substantially prejudiced by the action complained of." *Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wash. App. 513, 522, 262 P.3d 81 (Wash. Ct. App. 2011). Assuming that the PCHB's interpretation of the Board Manual was entirely incorrect and, therefore, the PCHB failed to follow the Board Manual in its decision-making process, the PCHB's overall conclusions regarding the delineation of the CMZ would have been the

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<sup>9</sup> *Kopp v. Washington State Dep't of Emp't Sec.*, 185 Wash. App. 1008, 1008 (Wash. Ct. App. 2014) ("A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.") (citation omitted). Application of the harmless error doctrine "makes sense where the agency's determination as to one issue fails to meet the appropriate review standard but that failure is insufficient to adversely affect the whole decision." Charles Koch, *Administrative Law and Practice*, § 9:29 (3d ed. 2010) (citing *Salt River Project Agric. Improvement & Power Dist. v. United States*, 762 F.2d 1053, 1060-61 n.8 (D.C. Cir. 1985)).

same. First, any correction of the PCHB's interpretation of the Board Manual will not affect the legitimacy of the outcome because the PCHB was not bound by the Board Manual guidance in making its determination. Second, the PCHB found that the CMZ delineation at the South Shore Road was consistent with not only the Board Manual, but with the rule. PCHB No. 12-118c, Findings of Fact, Conclusions of Law, and Order (Corrected), Conclusion of Law Nos. 7 and 13.

The Quinault Indian Nation cites *Whatcom County v. Western Washington Growth Management Hearing Board*, 186 Wash. App. 32, 344 P.3d 1256 (Wash. Ct. App. 2015), *review granted sub nom. Hirst v. W. Wash. Growth Mgmt. Hearing Bd.*, 183 Wash. 2d 1008 (Wash. 2015), to argue that the PCHB's errors require invalidation of the agency action. *Whatcom County* is inapposite because the error discussed in that case was a misinterpretation of a statute, not non-binding guidance. *Whatcom County* involved a direct challenge to the validity of an ordinance under a statute. The primary issue on appeal was whether the Growth Management Hearings Board's determination that the ordinance was inconsistent with a statute was based on an erroneous interpretation of the statute. *Id.* at 1263.

A Washington Court has found error to be harmless in an analogous situation. In *Port of Seattle*, the court was faced with a question of whether the PCHB improperly excluded from the record an inadvertently disclosed privileged document as a matter of law. The court found that even if the interpretation of law was incorrect, the error was harmless. The court explained that this document, an agency employee's

notes as to the opinion of an attorney, without legal citation or reasoning, was “not relevant to this court’s resolution of the legal question of whether a water right is required for the third runway project.” 151 Wash. 2d at 643. In the instant case, an interpretation of the Board Manual, as an advisory document, will not itself resolve the legal question of whether the South Shore Road is a channel limiting feature for purposes of determining the CMZ under the Forest Practices rules.

**D. Treatment of the Board Manual as a Rule Will Have Far Reaching Implications under the APA and the FPA.**

**1. FPA Implications**

If the Board Manual is applied as a rule, it takes away its inherent flexibility as guidance, which is a critical characteristic of the Board Manual. The Washington Legislature intended that the Board Manual be applied and interpreted as guidance. RCW 76.09.040(3)(c). Determinations under the Forest Practices rules must be made in a variety of unique and divergent circumstances across the state and all of its unique landscapes and properties. A one-size fits all approach simply will not work. If the Board Manual is applied as a rule and intended to be prescriptive, then it must be rewritten and reenacted, removing the myriad number of “options” provided in the Board Manual.

**2. APA Implications**

It would be contrary to the APA to treat the Board Manual as binding because this would vitiate the distinction between rules and policy statements under the APA. Treating policy statements that have not

complied with the APA rulemaking procedures like rules opens the door for agencies to circumvent the rigorous rule-making process, but still achieve the same effect as a rule.<sup>10</sup> Policy statements would bind the public without allowing the public the opportunity to comment. This is contrary to the purpose of the APA rulemaking procedures, which “is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.” *Simpson Tacoma Kraft Co.*, 119 Wash. 2d at 649.

Additionally, if guidance documents are given a binding effect, it will have a chilling effect on state agencies’ willingness to publish guidance documents. Agencies will be less likely to publish their interpretations, particularly in situations where the agency has not had the opportunity to put its policies into practice because agencies will be bound by such policy statements. This in and of itself is contrary to the APA, under which:

[t]he legislature encourages administrative agencies to issue interpretative statements advising the public of “its current opinions, approaches, and likely courses of action” because

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<sup>10</sup> There are many state agency manuals, particularly in the field of environmental law: Washington State Department of Transportation Environmental Manual, State Environmental Policy Act Online Handbook, Shoreline Master Program Handbook, Stormwater Management Manual for Western Washington, and Washington State Department of Ecology Dam Safety Guidelines to name a few. If the Board Manual is treated as a rule, these manuals too would be open to such inappropriate application, and thus potentially subjecting the public to many additional obligations on which they had no opportunity to comment. Furthermore, if these guidance documents are given a binding effect, they are all subject to invalidation under the APA because the APA specifically provides for review of agency pronouncements that are being used as rules, but that were adopted without complying with rulemaking procedures. RCW 34.05.570.

it recognizes “that a cooperative partnership between agencies and regulated parties that emphasizes education and assistance *before* the imposition of penalties will achieve greater compliance with laws and rules.”

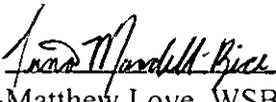
RCW 34.05.230(1); *Wash. Educ. Ass’n v. Wash. State Pub. Disclosure Comm’n*, 150 Wash. 2d 612, 618-19, 80 P.3d 608, 611 (Wash. 2003).

## VI. CONCLUSION

The WFPA asks this court to reverse the Superior Court ruling because the Superior Court’s decision disregards the proper roles of rules and policy statements under the APA and ignores the substantial evidence supporting the PCHB’s decision.

Respectfully submitted this 4th day of August, 2016.

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**Certificate of Service**

I certify that I caused a copy of Washington Forest Protection Association's *Amicus Curiae Brief of Washington Forest Protection Association* to be served on all parties or their counsel of record on the date below as indicated.

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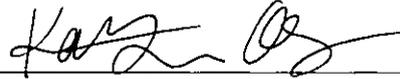
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I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

DATED this 4<sup>th</sup> day of August, 2016, at Seattle, WA.



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