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SUPREME COURT OF THE STATE OF WASHINGTON

SUMAS MOUNTAIN COMMUNITY FOR LANDSLIDE
AWARENESS and PAUL KENNARD,

Petitioners,

v.

WASHINGTON STATE FOREST PRACTICES BOARD,

Respondent,

and

WASHINGTON FOREST PROTECTION ASSOCIATION,

Respondent-Intervenor.

**RESPONDENT-INTERVENOR WFPA'S
ANSWER TO PETITION FOR REVIEW**

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I. INTRODUCTION

Sumas Mountain brought an Administrative Procedure Act (“APA”) challenge to a guidance document despite unambiguous Supreme Court precedent that advisory and non-binding documents have no legal effect and are not subject to review under the APA. Sumas Mountain objects to the May 2016 revisions to one chapter of the Forest Practices Board Manual (“Revised Section 16”), which describes itself as a non-binding guidance manual that serves as a technical supplement to Washington’s Forest Practices Rules. Revised Section 16 is designed to help regulated parties navigate the Forest Practices Application process. Sumas Mountain objects that the revisions to Section 16 do not sufficiently limit timber harvest and other forest practices on steep and unstable slopes. Sumas Mountain misrepresents the purpose of Revised Section 16; it does not limit rights or impose requirements like the forest practices rules. Instead, it is an agency guidance document that provides context and technical guidance related to the rules.

The APA does not permit this type of challenge to agency guidance documents such as Revised Section 16 because they are non-binding. *Washington Education Association v. Washington State Public Disclosure Commission* (“WEA”), 150 Wn.2d 612, 618-19, 80 P.3d 608, 611 (2003). As such, the Superior Court correctly dismissed Sumas Mountain’s lawsuit,

explicitly relying on *WEA*. The Court of Appeals upheld the Superior Court's decision, also relying on *WEA*.¹

The Court of Appeals denied a motion to publish its opinion dismissing the case.² In doing so, the Court of Appeals effectively ruled that its decision (1) does not determine any new or unsettled questions of law; (2) does not modify, clarify, or reverse any established principle of law; (3) is not of general public interest or importance; and (4) is not in conflict with prior opinions of the Court of Appeals. *See* RAP 12.3(d).

Sumas Mountain does not address how its petition meets this Court's standards in RAP 13.4. That is because it does not. This Court's discretionary review is unwarranted because the Court of Appeals correctly applied controlling precedent that needs no refinement. There is no conflict between appellate divisions because the established APA case law prohibits review of guidance. There are no significant questions of law, constitutional questions, or issues of substantial public interest raised by dismissal of an improper APA challenge to an advisory, guidance document.

Sumas Mountain has other available options to pursue its grievances. It could challenge Revised Section 16 as *de facto* rulemaking,

¹ The Court of Appeals' unpublished opinion is **Attachment 1** to Sumas Mountain's Petition for Review.

² The order denying publication is **Attachment 2** to Sumas Mountain's Petition for Review.

or it could challenge Revised Section 16 on an as-applied basis if it is improperly treated like a rule in individual Forest Practices Applications. Another solution is continued participation in the existing adaptive management program, which is the process required by the Legislature to change the forest practices rules. Sumas Mountain is not barred from seeking relief in other contexts, but it cannot challenge Revised Section 16 in the manner it has chosen here because neither the APA nor this Court allows challenges to non-binding guidance. This Court should deny review.

II. ISSUES PRESENTED FOR REVIEW

The Forest Practices Board adopts guidance to supplement the Forest Practices Rules, consistent with the Legislature's encouragement to agencies to issue written guidance. RCW 34.05.230. Is revised advisory guidance that does not bind any party, does not create a right of enforcement, and only summarizes updates to science and best management practices an "agency action" subject to judicial review?

III. RESTATEMENT OF THE CASE³

Under the APA, agencies are encouraged to adopt non-binding guidance to supplement their rules and ensure consistency in application of rules and procedures. *See* RCW 34.05.230(1); *WEA*, 150 Wn.2d at 618-19;

³ WFPA concurs with the restatement of the case in the Forest Practices Board's concurrently filed answer.

see also *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 174, 256 P.3d 144 (2011).

Revised Section 16 is an example of such guidance.⁴ Substantively, it resembles a science textbook. For example, it provides pictures and diagrams to help identify different kinds of landslides:

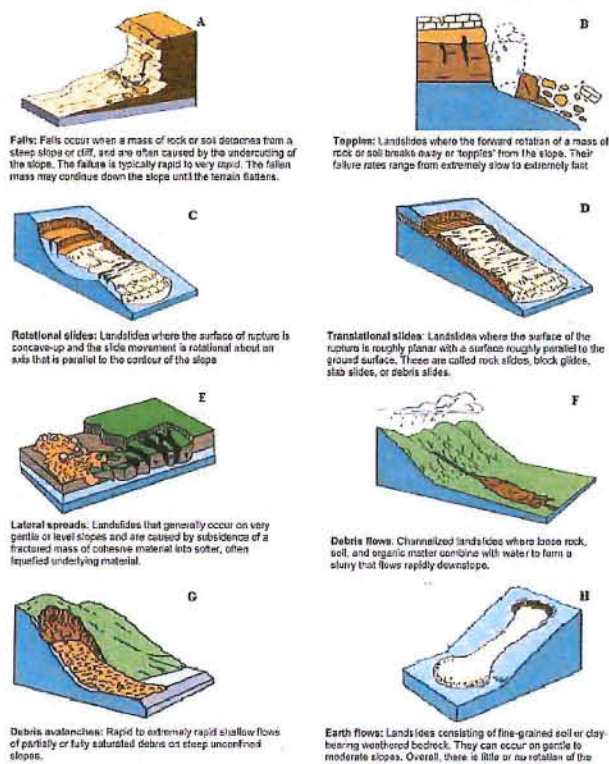


Figure 1. Illustrations of the major types of landslide movement (all from Highland and Bobrowsky 2008, except the earth flows illustration is from U.S. Geological Survey 2004).

CP at 52. Likewise, Revised Section 16 provides examples that illustrate

⁴ Revised Section 16 was not attached to Sumas Mountain's petition, but is attached to the Forest Practices Board's concurrently filed answer as **Appendix A**. It is also available at CP 46-139, and the final version is on DNR's webpage at: <https://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board/rules-and-guidelines/forest-practices-board-manual> (last visited February 9, 2019).

different kinds of earth movement. CP at 55. Revised Section 16 assists regulated parties in preparing their forest practices application. For example, it describes geology concepts that are relevant to landslides:

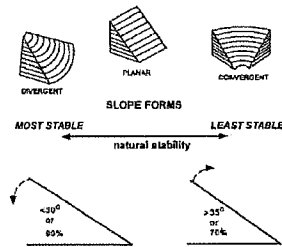


Figure 62a. Slope configurations as observed in map view.

Figure 62a shows three major slope forms (divergent, planar, and convergent) and their relative stability. These slope form terms are used in reference to contour (across) directions on a slope. Typically, convergent areas with slope gradients equal to or greater than 35 degrees (75%) are at a higher risk of sliding.¹⁹

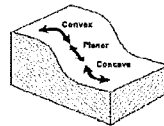


Figure 62b. Slope configurations as observed in profile: convex, planar, and concave. These terms are used in reference to up and down directions on a slope (drawing by Jack Powell, DNR 2004).

CP at 59. These descriptions are not prescriptive. Section 16 states that it is not binding and merely provides guidance:

Like all Board Manual Sections, [Section 16] serves as an advisory technical supplement to the forest practices rules.

CP at 48; *see also* CP 49, 60, 73, 83, 88, and 109 (references to guidance).

Sumas Mountain alleges that the Forest Practices Board acted arbitrarily and capriciously when it adopted revisions to Section 16 addressing the identification of unstable slopes. Petition for Review at 15, 18. Unlike a normal APA challenge, however, rather than identifying particular revisions that were so prescriptive that they were functionally rules requiring rule-making, Sumas Mountain alleged that Section 16 was

not as prescriptive as they wanted. Although throughout the litigation Sumas Mountain has adamantly disavowed it seeks to convert Section 16 to a rule, that is the remedy they ask this Court to impose: require the Board to revise Section 16 to make it so prescriptive it functions like a rule.

IV. REASONS WHY REVIEW SHOULD BE DENIED

RAP 13.4 establishes the criteria for determining whether the Supreme Court should accept discretionary review of a case. Sumas Mountain makes only passing reference to two of these criteria, instead focusing on the merits argument they would have made if their litigation had not been dismissed. Petition at 7, 15. None of RAP 13.4's criteria are met here. The Superior Court and the Court of Appeals correctly applied well-settled judicial precedent in concluding that the advisory Revised Section 16 being challenged has no legal effect and thus is not reviewable.

A. There is No Conflict with any Decision of the Supreme Court Or the Court of Appeals

This Court considers accepting review if the appealed decision is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals. RAP 13.4(b)(1), (2). This case is not. Rather, as Sumas Mountain stated in its response to WFPA's motion to publish, the Court of Appeals viewed this case as a "garden-variety application of binding

Washington Supreme Court Precedent.” Sumas Mountain’s Answer to WFPA’s Motion to Publish at 3 (filed December 11, 2018).

The dispositive legal issue in this case was conclusively decided in *WEA*, 150 Wn.2d 612. *WEA* establishes that agency guidance documents are reviewable only if they have “legal effects”; that is, if they can be enforced or violated. *Id.* at 619. Revised Section 16 is not reviewable because it is advisory only. Its very text states that it is an “advisory technical supplement.” CP 48. It is not prescriptive but descriptive. It cannot be enforced or violated: by law, it cannot form the basis for a penalty or enforcement action under the Forest Practices Act. *See* RCW 76.09.050(9) (appeals filed with appeals board), 76.09.080 (stop work orders), 76.09.090 (notice of failure to comply), 76.09.170 (notice of conversion). Thus, under *WEA*, Revised Section 16 is unreviewable.

Sumas Mountain directs this Court to an earlier unpublished decision by Division I of the Court of Appeals that does not evaluate the ability of a party to challenge Revised Section 16. *Esses Daman Family, LLC v. Pollution Control Hearings Board*, No. 76016-5-I (Unpublished Opinion, August 14, 2017).⁵ At the outset, citation to this case does not meet the requirements of accepting review under RAP 13.4(b)(2), which requires conflict with a *published* decision of the Court of Appeals.

⁵ The decision is **Attachment 4** to Sumas Mountain’s Petition.

More fundamentally, there is no conflict between this case and the *Esses Daman Family* case. *Esses Daman Family* involved a factual dispute about two forest practices permits at a particular location; it did not involve an abstract consideration of the adoption of a revised section of the Board Manual. It did not even involve the same Board Manual section. Its unpublished decision does not conflict with the result in this case.

Sumas Mountain relies on a 2002 Division I decision addressing an agreement for water diversions in the Cedar River. *Muckleshoot Indian Tribe v. Dep't of Ecology*, 112 Wn. App. 712, 50 P.3d 668 (2002), review denied, 150 Wn.2d 1016 (2003). As a preliminary matter, this case was decided *before* the controlling precedent issued by this Court in *WEA* (in 2003) and thus does not distinguish nor deviate from *WEA*.

More significantly, *Muckleshoot* involves a different type of underlying document and its holding therefore does not support Sumas Mountain's position here. The Court of Appeals' decision in *Muckleshoot* acknowledges that an agency action can be challenged but that the definition of agency action excludes proprietary contracts. *Id.* at 719, citing RCW 34.05.010(3). No party argues that Revised Section 16 was a contract, and *Muckleshoot* recognizes that certain types of actions are excluded from judicial review, resulting in a lack of justiciability. *Muckleshoot* supports the correct decisions of the Superior Court and Court of Appeals.

The decisions of the Superior Court and the Court of Appeals in this case are correct and consistent with the prior decisions of the Supreme Court and Courts of Appeal. Indeed, Sumas Mountain seeks the same remedy that the Supreme Court denied in *WEA*: an advisory opinion on an abstract dispute where the guidance has no legal or regulatory effect. 150 Wn.2d at 614-15.

B. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by this Court

RAP 13.4(b)(4) allows the Supreme Court to accept review of cases that raise issues of substantial public interest. This is not such a case. The Court of Appeals already effectively made this finding by denying WFPA's motion to publish.

Sumas Mountain fails to demonstrate how Section 16's revisions raise a question of substantial public interest requiring this Court's review. Allegations that the revisions to Section 16 do not go as far as Sumas Mountain would like is not a cognizable legal theory in a guidance challenge. Sumas Mountain's remedy is to challenge the adequacy of the rules or to challenge the guidance for functioning as a rule without compliance with the APA rulemaking requirements, as argued in more detail in the Forest Practices Board's concurrently filed answer. *See* RCW

34.05.570(4)(b). Sumas Mountain has adamantly disclaimed that this litigation does either. Petition at 17-18.

Although the Forest Practices Board does important environmental and economic work, that does not mean the revisions create a legal issue of substantial public interest. Sumas Mountain challenged a revised section of an advisory, guidance document, not a rule or statute. This is not the vehicle the Legislature designed to change the rules. Sumas Mountain's litigation is an inefficient and inappropriate use of limited judicial resources.

Sumas Mountain and other concerned citizens have numerous available remedies. If there is a genuine concern that there is an error in the regulatory program, they can file a rule challenge, petition for rule-making, challenge the approval of individual forest practices applications, or participate in the public process. RCW 34.05.570, 34.05.330, 76.09.205, 76.09.370(6). What they cannot do is ignore the APA and Supreme Court's limitations on review of agency guidance.

C. Sumas Mountain's Additional Arguments Do Not Withstand Scrutiny

As the Superior Court and Court of Appeals found, a close look at Sumas Mountain's additional arguments reveals that each is either irrelevant or misguided.

1. The rules' cross-reference to Section 16 does not change its role as guidance.

Sumas Mountain focuses intently on one parenthetical in one rule while disregarding the plain intent language. *See* WAC 222-16-050(d)(i). As the Superior Court and Court of Appeals correctly found, there is no authority to support Sumas Mountain's argument that Revised Section 16 has legal effects because the Forest Practices Rules contain references to it. These cross references are designed to assist regulated parties.

The legal test is whether the revisions to Section 16 create binding legal obligations. They do not. The challenged revisions do not contain prescriptions or create an independent right of enforcement, nor are the provisions mandatory. Section 16 aids consultants, applicants, and DNR staff by providing a summary of the background science and best methodology to identify relevant landscape features to ensure forest practices applications are complete and accurate. RCW 76.09.050; WAC Ch. 222-20. Under *WEA*, when a document has no legal effect, it is guidance and not subject to judicial review under the APA. 150 Wn.2d at 623.

WAC 222-16-050(d)(i) states: "For the purpose of this rule, potentially unstable slopes or landforms are one of the following: (See Board Manual section 16 for more descriptive definitions)." The Rule

identifies the categories of unstable slopes or landforms (known as “rule-identified landforms”), such as “Inner gorges, convergent headwalls, or bedrock hollows with slopes steeper than thirty-five degrees (seventy percent).” WAC 222-16-050(d)(i)(A). Part 4.1 of Revised Section 16 contains descriptions and pictures of bedrock hollows, convergent headwalls, and inner gorges, with references to scientific literature and illustrative figures. CP at 60-69. Part 5 of Revised Section 16 goes on to list recommended procedures for identifying, delineating, and characterizing rule-identified landforms. CP at 75-88. Far from having the force of law or direct legal consequences, Revised Section 16 provides background information and technical guidance to help applicants recognize potentially unstable slopes and landforms when preparing a forest practices application. It also identifies useful procedures and resources for conducting reviews and assessments of potential unstable areas.

Adopting Sumas Mountain’s cross-references argument requires embracing a subtle but critical error in logic. Sumas Mountain’s argument relies on a false equivalency between usefulness, on the one hand, and legal consequences, on the other. It can hardly be disputed that Revised Section 16 is a useful document. It is useful because it is inherently challenging to describe the physical environment using only words. To help with this, Revised Section 16 acts as an interpretive aid, providing pictures, diagrams,

descriptions, and examples that foster understanding of the rules. References in the rule to Section 16 do not make it binding, and, more importantly, they do not require DNR or regulated parties to utilize them. Revised Section 16 does not have legal consequences solely because it is useful. *See WEA*, 150 Wn.2d at 619 (finding a document that “serve[d] only to aid and explain the agency’s interpretation of the law” unreviewable).

2. Sumas Mountain’ self-serving declarations fail to identify situations where Revised Section 16 was treated like a rule.

Sumas Mountain attempts to distinguish Revised Section 16 from case law interpreting other agency guidance documents by relying on self-serving declarations. Use of self-serving declarations is improper under the APA’s well-established limits on extra-record evidence in an APA challenge. RCW 34.05.554, .558, .562. But even if considered, these declarations fail to identify any evidence of improper use of Revised Section 16. Sumas Mountain has not identified a single agency action, such as an enforcement order or a forest practices permit, where Revised Section 16 was used like a rule. Sumas Mountain therefore has no support for its assertion that Section 16 must go further to implement the (unchallenged) rules. *See WEA*, 150 Wn.2d at 622-23. In contrast, the statute, rules, and Revised Section 16 itself all acknowledge that it is “an advisory technical

supplement to the forest practices rules.” RCW 76.09.040(3)(c); WAC 222-12-090; CP 48.

It is a purely legal question whether Revised Section 16 has legal effects (i.e., whether it can be enforced or violated) or otherwise affects anyone’s legal rights. Declarations have no relevance to this legal inquiry, and indeed to assume otherwise is to embrace the notion that DNR has legal authority to convert guidance to rule through its on-the-ground conduct, which is emphatically not the case as a matter of administrative law.

Both the Superior Court and Court of Appeals recognized that if DNR did, in fact, treat Revised Section 16 like a rule, aggrieved parties would have plain, adequate, and speedy remedies available to them. First, they could bring a challenge under the APA that the revisions to Section 16 should have been adopted through rule-making. Second, they could petition the agency to adopt Section 16 as a rule. RCW 34.05.330, .570. Third, a party aggrieved by a DNR permit decision could challenge the specific forest practices application for inconsistency with the Forest Practices Act or Rule. Thus, there are “checks” on DNR treating Revised Section 16 like a rule.

3. Process timelines do not convert guidance to rules.

Sumas Mountain’s complaints that the process required by statute, rule, and federal contract (the Adaptive Management Process) is too time

consuming is not a legal basis to invalidate Revised Section 16. *See* Petition at 18. It was the Legislature’s prerogative to require this process for rule revisions, and the remedy for that process is a change to the statute and law, not judicial review of non-binding guidance. *See* RCW 76.09.370(6), (7); WAC 222-12-045.

In addition to their complaints that a science-based process is time-consuming, Sumas Mountain objects that if the challenged section of the Board Manual must comply with that process, then every other section in the manual might also be required to comply with the process. Petition at 18. This “argument,” made without any supporting legal authority, is equally unavailing. The existence of a process, such as the APA’s rule-making process in RCW Chp. 34.05, does not allow parties to skip or subvert compliance with those legal requirements, just because multiple steps take more time.

V. CONCLUSION

Review of revised guidance in an APA challenge would not be consistent with RAP 13.4 or refine an ambiguous or problematic issue in agency compliance with implementation of the APA. The Court of Appeals correctly applied established precedent. There is no need for review created by the May 2016 revisions to Section 16 that apply best available science

and best management practices for the Forest Practices Act and rules. WFPA respectfully asks this Court to deny the petition for review.

RESPECTFULLY SUBMITTED this 18th day of February, 2019.



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CERTIFICATE OF SERVICE

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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 February 18, 2019 in Seattle, Washington.


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