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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,

Intervenor-Respondent.

RESPONDENT FOREST PRACTICES BOARD'S ANSWER TO
AMICUS WASHINGTON ENVIRONMENTAL COUNCIL

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I. INTRODUCTION

The Washington Environmental Council (WEC) filed an amicus brief presumably to help the Court determine under RAP 13.4(b) whether to grant review. WEC's amicus brief does not even address the controlling case law that makes clear that the Court of Appeals' opinion is consistent with Supreme Court precedent.

This Court should deny review for all the reasons explained in the Forest Practices Board's (Board's) Answer to the Petition for Review. In finding that the Board's advisory scientific guidance on unstable slopes was not an "other agency action" subject to Administrative Procedure Act (APA) review, the Court of Appeals' unpublished decision properly followed *Washington Education Association v. Public Disclosure Commission*, 150 Wn.2d 612, 80 P.3d 608 (2003) (*WEA*). The Court of Appeals' decision does not conflict with established Supreme Court precedent under RAP 13.4(b)(1) and does not meet the "substantial public interest" threshold in RAP 13.4(b)(4).

II. IDENTITY OF RESPONDENT

The Board is an agency of state government established under the Forest Practices Act, RCW 76.09, which has rule-making responsibilities. The Board is a respondent in this matter.

III. ARGUMENT

A. WEC's Brief Fails to Address Relevant Law Regarding the Court of Appeals' "Agency Action" Analysis.

In general, WEC's brief appears to contend that the Board Manual has some sort of "legal effect" that the Court should find reviewable. But WEC omits mention of the Court of Appeals' careful analysis of the Forest Practices Act's structure and how that supported the Court's conclusion that Board Manual Section 16 had no legal effect.

The Court of Appeals noted that both sides of the case agreed that *WEA*'s test governed the outcome of this case. *Sumas Mountain Cmty. for Landslide Awareness and Paul Kennard v. Wash. State Forest Practices Bd.*, No. 76447-1-I, slip op. at 6 (Nov. 5, 2018) (unpublished). *WEA* considered whether the issuance of guidelines interpreting the meaning of laws and rules was an APA "agency action" subject to judicial review. This Court held that "an agency's written expression of its interpretation of the law *does not implement or enforce the law* and is 'advisory only.'" *WEA*, 150 Wn.2d at 619 (emphasis added). The Court found that the Public Disclosure Commission (PDC) "implemented" the public disclosure laws only when it engaged in rulemaking or when it issued formal enforcement orders. *Id.* at 615 and 619. The key aspect of the Court's analysis in *WEA* concerned the legal effect of the PDC's guidance. "The [PDC's] document

is meant only to aid and assist in compliance with the law and does not purport to have the effect of law or regulation.” *Id.* at 621.

The Department of Natural Resources (DNR) has no legal ability to use the Board Manual to regulate forestry operations. If DNR denies a forest practices permit application, it must provide the rule or statutory basis for its decision. RCW 76.09.050(5). Should DNR need to issue enforcement orders or civil penalties, similar statutory provisions require a statutory or rule basis for those violations. RCW 76.09.080(1)(a), .090(1)(b), and .170(1).

WEC’s brief ignores these statutory provisions, and instead assumes the entire Board Manual has a legal effect.¹ But the Board Manual does not dictate how or whether a landowner can harvest timber on potentially unstable slopes – it provides only advisory guidance. Because no rights or obligations are tied to the *Guidelines for Evaluating Potentially Unstable Slopes*, it has no legal effect.

The Court of Appeals’ decision carefully considered the Forest Practices Act’s statutory framework when it evaluated the Board’s guidance for unstable slope guidance for legal effects. The Court of Appeals read RCW 76.09.050(5) as the Board did, and found “nothing to suggest that

¹ WEC raises no specific concern about a legal effect associated with Board Manual Section 16, *Guidelines for Evaluating Potentially Unstable Slopes*.

DNR must evaluate the application based on any provision within the Board Manual.” Slip op. at 10-11. The Court of Appeals also noted that the Board describes the Manual in WAC 222-12-090 as an “advisory technical supplement to the forest practices rules,” (slip op. at 2 and 10), and that the Manual “uses advisory, rather than directive, language” consistent with its stated purpose. Slip op. at 8. The Court of Appeals also noted that both sides of the case agreed “that the agency [DNR] can take no enforcement action based on the manual.” Slip op. at 9. WEC’s amicus brief simply ignores all of this legal analysis.²

WEC attaches legal significance to the fact that the Board Manual is referenced or discussed in certain historical documents. None of those historical sources indicate that Board Manual Section 16 is legally binding, however. Like the Petitioners, WEC mistakenly conflates the *usefulness* of administrative guidance with legally binding requirements. Administrative guidance may affect how parties voluntarily choose to present their views to an agency without dictating specific outcomes or requirements to regulated parties. *See, e.g., Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). The Legislature encourages the use of non-binding guidance to help the regulated public voluntarily comply with statutes and

² WEC also overlooks Sumas’s failure to tie its allegations that Board Manual Section 16 has a legal effect to a rule challenge action under RCW 34.05.570(2). See Board’s Answer to Petition for Review at 12-14.

rules. *WEA*, 150 Wn.2d at 618-19. Providing useful, non-binding advice is the hallmark of proper administrative guidance, and, as found by the Court of Appeals, the Board used this approach in its *Guidelines for Evaluating Potentially Unstable Slopes*.

The Court of Appeals followed well-established law when it determined that the Board's approval of advisory guidance did not constitute "agency action." Because it broke no new ground, the unpublished decision created no issue of substantial public interest for further review.

B. The Court of Appeals Did Not Rule on "Justiciability," but a Dispute About Advisory Guidance Constitutes a Non-Justiciable Controversy.

WEC frames the Court's question of whether to grant review in terms of justiciability. WEC Amicus Brief at 1, 9-10; WEC Motion to File as Amicus Curiae at 4. But the Court of Appeals' decision did not analyze this case in justiciability terms.³ The Board reserved the issue of justiciability (as well as Appellants' lack of standing) in this proceeding and briefly describes the issue below. Rather than aid the Appellants, justiciability provides an independent ground to dismiss Appellants' challenge.

³ In contrast, the superior court dismissed due to the lack of a justiciable controversy, in addition to finding that the Board's approval of non-binding guidance was not "agency action" under *WEA*. CP 426; 437.

Justiciability ensures that courts do not issue advisory opinions. *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994). Contrary to the simplified two-step process WEC sets forth (WEC Amicus Brief at 4, 9), Washington courts define a justiciability controversy as:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

WEA, 150 Wn.2d at 622-23 (quoting prior cases). These factors reflect “the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

Multiple Washington courts have found challenges to guidance documents nonjusticiable. *WEA* found that the PDC’s guidelines “have no legal or regulatory effect, and the PDC’s issuance of the guidelines does not implicate [the] actual or direct legal interests of the WEA.” *WEA*, 150 Wn.2d at 623. Thus, WEA failed to allege “an actual, present, existing dispute, or the seeds of a mature one and its claims are not justiciable.” *Id.* The Court of Appeals reached similar results in *Teamsters Local Union No. 117 v. Human Rights Commission*, 157 Wn. App. 44, 153 P.3d 858 (2010)

(agency's opinion letter did not create a justiciable controversy); and *Sudar v. Department of Fish and Wildlife Commission*, 187 Wn. App. 22, 33-36, 347 P.3d 1090 (2015) (agency's internal policy presents a non-justiciable controversy).

WEC does not establish justiciability here because it does not show how the Manual imposes a direct, immediate effect on the Appellants. Board Manual Section 16 educates readers on the generally accepted meaning of geologic terms and it provides option-based guidance. But this document is described as guidance, is written in permissive terms, and imposes no binding requirements. Because Section 16 has no legal or regulatory effect, the guidance does not implicate any actual, present, or existing dispute involving the legal interests of the Appellants. *WEA*, 150 Wn.2d at 623.⁴ Appellants' challenge fails to rise to the level of justiciability established under this Court's precedent.

The lack of a justiciable controversy provides another reason why the superior court's dismissal order was correct, and why review of the Court of Appeals' affirmance of that decision is unwarranted. Concepts of justiciability raise no issue of substantial public importance requiring review here.

⁴ As in *WEA*, the challenge to guidance here is akin to a "facial" challenge, involving no actual use of the guidance in a site-specific forest practice proposal.

IV. CONCLUSION

The Court of Appeals' unpublished opinion appropriately followed *WEA*'s analysis and does not conflict with *WEA*. This case presents no RAP 13.4(b)(1) issue, and nothing in WEC's amicus brief contends otherwise.

The Court of Appeals also thoroughly analyzed the Petitioners' extensive arguments alleging that the Board Manual had a legal effect, and it did so using *WEA*'s analytical framework. The Court of Appeals correctly found that advisory guidance is not an "agency action," and its unpublished decision was consistent with other similar published decisions. This case simply fails to rise to the level of a "substantial public interest" that warrants this Court's review under RAP 13.4(b)(4).

The standards for granting discretionary review have not been demonstrated, either by the Petitioners or by WEC. The Board respectfully asks the Court to deny the Petition for Review.

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RESPECTFULLY SUBMITTED this 15th day of April, 2019.

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CERTIFICATE OF SERVICE

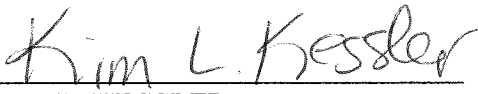
I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on April 15, 2019, as follows:

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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 15th day of April, 2019, at Olympia, Washington.



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