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STATE OF WASHINGTON
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No. 96755-5

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.

**AMICUS CURIAE BRIEF OF
WASHINGTON ENVIRONMENTAL COUNCIL**

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**I. HISTORY AND EXPERTISE OF *AMICUS CURIAE*
WASHINGTON ENVIRONMENTAL COUNCIL
REGARDING WASHINGTON STATE’S FOREST
PRACTICES REGULATORY STRUCTURE**

The Washington Environmental Council (WEC) has been engaged with development and implementation of various provisions of the Forest Practices Board Manual for decades. For many years, and currently, WEC maintains staff positions whose focus is development and implementation of Manual provisions.

WEC’s ongoing and intimate knowledge regarding how sections of the Manual are developed, amended, and implemented in relation to applicable law and the public interest enables it to have a detailed understanding of how the Manual’s provisions interact with and are an integral part of the state’s regulatory scheme. The FPA is intended to prevent significant material damage¹ to the public’s interest in conservation of both natural resources and human enjoyment of them while maintaining a sustainable forest products industry. As amicus, WEC wishes to inform the Court about those relationships and how they relate to the justiciability arguments you are being asked to review.

In the 1970s and 1980s the federal courts confirmed that under their treaties with the United States, Native American Tribal entities hold

¹ The phrase “material damage” appears in six different sections of the FPA. The point is “to ensure that no potential or actual material damage occurs to the natural resources of this state.” RCW 76.09.150.

property and management rights to anadromous fisheries in much of Washington State. Those fisheries are dependent on conservation oriented long-term forest management. Ultimately, Tribal management rights were held to include a right to influence how the state manages natural resources, including forests, both state and privately owned².

By the early 1980s it became clear to both the Tribal entities and the environmental community that the forest practices were not adequate to ensure long term conservation of various natural resources, including anadromous fisheries. A negotiating forum was created rather than forcing the interested parties into litigation. This forum led to the “Timber/Fish/Wildlife Agreement: A Better Future in Our Woods and Streams,” February 17, 1987 (TFW).³

The second major change in forest practices regulations occurred as a result of the 1990s listings of numerous runs of anadromous fish in Washington State under the federal Endangered Species Act (ESA). The pattern of the 1980s repeated itself, with a descendant of TFW formed called “forests and fish” created to negotiate further improvements to the forest practices regulatory structure. The ultimate result was the “Forests and Fish Report” (FFR)⁴. FFR included another broad overhaul of the

² *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980), 759 F.2d 1353 (9th Cir. 1985) (9th Cir. 1985)

³ https://www.dnr.wa.gov/publications/fp_tfw_agrmnt_1987.pdf

⁴ https://www.dnr.wa.gov/publications/fp_tfw_ffr_1999.pdf

forest practices regulatory scheme, implemented by state legislation⁵ and a habitat conservation plan under the ESA⁶.

Under the administrative compliance structure created by the FFR legislation and HCP, discussions continue regarding how to improve the forest practices regulatory structure, including how to improve forest practices as the science advances. The instant appeal is an indication of the failure of that “adaptive management” process⁷.

I. ARGUMENT BY *AMICUS CURIAE*

A. Whether Promulgation of the Forest Practices Board Manual Is Justiciable Under the APA Is an Issue of Substantial State Wide Public Interest that Should Be Determined by the Supreme Court of the State of Washington.

RAP 13.4(b)(4) provides that this Court may accept cases for discretionary review that “involves an issue of substantial public interest that should be determined by the Supreme Court.”

Counsel cannot find an appellate decision applying RAP 13.4(b)(4) to a rule making or similar activity. However, by analogy: Federal courts have held that the public interest in review of agency actions impacting fish and wildlife resources militates in favor of APA⁸ justiciability: *Natural Resources Defense Council v. Evans*, 316 F.3d 904, 909-911 (9th

⁵ 1999 1st sp.s. c 4; Forest Practices HCP

⁶ 71 Fed. Reg. 56107 (Sept. 26, 2006); Notice of availability of Final Record of Decision and issuance of permits (DNR Forest Practices HCP, Incidental Take Permit No. 1573).

⁷ See RCW 76.09.020(1), 370 (the Forests and Fish law—Laws 1999 sp.s. c 4—constrains fisheries related Board rulemaking authority; it is subject to a lengthy process.

⁸ Federal Administrative Procedure Act is at 5 U.S.C. § 551, et seq.

Cir. 2003)(National Marine Fisheries Services required to comply with federal APA notwithstanding claim of “emergency”); *Friends of the Wild Swan v USFWS*, 945 F.Supp. 1388, 1395 (fn. 8) (D.Or. 1996)(emergency listing action under ESA is justiciable under the federal APA).

Amicus WEC submits that the decades of intense political, legislative, and administrative efforts in Washington State to devise a forest practices regulatory structure that effectively applies the best available science to the conservation of public resources and infrastructure as well as the protection of people from serious harm, or death, due to poorly conducted forest practices, are issues of substantial public interest.

B. The Adoption of the Forest Practices Board Manual by the Forest Practices Board Is Agency Action for Purposes of the State Administrative Procedure Act

WEC urges this Court to consider the justiciability of challenges to the Manual in a two step process. The first question is whether the Manual is an “agency action.” Under the Administrative Procedure Act (RCW Chapter 34.05—APA), parties may only bring into court challenges of agency actions as defined in RCW 34.05.010(3): “Agency action” means licensing, the *implementation or enforcement* of a statute, the adoption *or application* of an agency rule or order...” (emphasis added).

Assuming the challenged action is an “agency action” under the APA, the second and controlling question is whether the action is “final.” Under settled law, only “final agency actions” are justiciable.

The Manual is clearly an “agency action” under the APA based on the history of the Manual starting with the initial adoption of WAC 222-22-090. In 1981, the Board proposed to amend that rule to initiate rulemaking—requiring the Forest Practices Board (Board) to add to the Manual three new sections of the Manual:

AMENDATORY SECTION (Amending Order 263, filed, June 16, 1976)

...

- (6) Guidelines for clearing slash and debris from Type 4 Waters.
- (7) Guidelines for landing location and construction.
- (8) Aerial chemical application guidelines for *requiring* untreated strips on Type 4 Waters.

WSR 81-20-067 (emphasis added).

The same section of the Manual was the subject of the TFW agreement in 1987. That landmark agreement was reached as a result of negotiations between a number of parties, and:

It provides the framework, procedures and requirements for successfully managing our state’s forests so as to meet the needs of a viable timber industry and at the same time provide protection for our public resources; fish, wildlife and water...

Timber/Fish/Wildlife Agreement, Introduction.

The parties at the TFW table had negotiated an extensive and detailed list of prescriptive measures needed to conserve public resources in small streams (“Type 4 and 5 Waters”), and *they were to be put into the Manual*. These prescriptive measures included:

Generally, slash and debris removal *will be required* wherever there is evidence of potential mass failure that will result in downstream damage to public resources and capital improvements.

Timber/Fish/Wildlife Agreement, p. 47 (emphasis added)

The late 1990s “Forests and Fish Report” (FFR) process had a similar result. The April 29, 1999 FFR Report contains extensive prescriptive measures *to be included in the Manual*. The subject matters covered by these provisions include pesticide spraying (pp. 2, 8, 14), channel migration zones (p. 3), deep-seated landslides (p. 4), riparian strategies (pp. 5-6), roads (pp. 6-7, 10-13), wetlands (p. 9). For example:

Appendix B – Riparian Strategies

...

(c) In connection with the adoption of a stream-typing rule, a field protocol *to be used* in locating the mapped divisions between stream types on the ground *will be developed* pursuant to the adaptive management procedures described in Appendix L. Once developed, the field protocol *will be added to the Forest Practices Board Manual*.

A major goal of the FFR process was to obtain a Habitat Conservation Plan under the federal Endangered Species Act. The FEIS⁹ for the regulatory scheme to implement the FFR refers to provisions in the Manual that will mitigate for potential harm to public resources. These measures are described in a prescriptive manner. For example: “The Forest Practices Board Manual contains a list of general guidelines *to be followed* in the road design process. ... Policy goals *allow the enforcement*

of these guidelines or more restrictive measures if potential for damage to resources exists.” Forest Practices Habitat Conservation Plan, Final EIS, p. F-11 (emphasis added).

Under the FFR and authorizing legislation¹⁰, the State of Washington succeeded in obtaining an “incidental take permit” (ITP) from the National Marine Fisheries Service (NMFS)¹¹; in exchange for specific improvements to the forest practices regulatory structure, the state would not be liable under the ESA for harm to anadromous fisheries that occurs “incidentally” to the business of forestry permitted by the state.

One of the documents prepared by NMFS in the course of issuing the ITP is a “biological opinion” (BO). The BO for the FFR HCP is a 337 page document titled in part “Endangered Species Act Section 7 Consultation Biological Opinion and Section 10 Statement of Findings.” There are twenty references to the Manual in the BO indicating how the forest practices rules *and the Manual* are intended to, and expected to, protect public resources. For example, among the findings:

The upland strategy includes Washington Forest Practices Rules, guidance from the *Forest Practices Board Manual*, and guidance issued through the WDNR Forest Practices Division related to unstable slopes and landforms; the location, design, construction,

⁹ <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan#FEIS>

¹⁰ RCW 76.09.370; RCW 77.85.180-190.

¹¹ Documents concerning the State of Washington’s Forest Practices HCP are available here: <https://www.dnr.wa.gov/programs-and-services/forest-practices/forest-practices-habitat-conservation-plan> (visited March 31, 2019)

maintenance, and abandonment of forest roads; and harvest-induced changes in rain-on-snow peak flows.

BO, p. 291 (emphasis added).

As part of the implementation of the FFR HCP, DNR's forest practices division conducts extensive compliance monitoring activities and issues reports.¹² The compliance reports consistently indicate that the Manual is an integral part of the state's forest practices structure:

The Board, working with the public, stakeholder groups and the Department of Natural Resources (DNR), adopts FP rules and approves technical guidance (Forest Practices Board Manual or "Board Manual") which assists landowners in implementing the FP rules.

p. 8 (2012 Compliance Report).

The state's forest practices permit application process confirms the integration of the Manual in the management scheme. There are 31 references to the Manual in "Western Washington Forest Practices Application/Notification Instructions¹³." For example:

10. Are there potentially unstable slopes or landforms in or around the area of your forest practices activity?
... Refer to *Forest Practices Board Manual Section 16- Guidelines for Evaluating Potentially Unstable Slopes and Landforms* [[hyper link to https://www.dnr.wa.gov/publications/bc_fpb_manual_section16.pdf](https://www.dnr.wa.gov/publications/bc_fpb_manual_section16.pdf)] for information on assessing and identifying areas for slope instability.

P. 8 (emphasis added; color and hyperlink in original)

¹² <https://www.dnr.wa.gov/programs-and-services/forest-practices/rule-implementation>

¹³ <https://www.dnr.wa.gov/programs-and-services/forest-practices/review-applications-fpars/forest-practices-forms-and>

As the APA clearly states, “agency action” includes “the *implementation or enforcement* of a statute.” RCW 34.05.010(3) (emphasis added). The Board Manual has been an *integral part* of the State of Washington’s regulatory structure under the Forest Practices Act for over forty years. The Manual is an “agency action” under the APA.

C. Provisions of the Forest Practices Manual Adopted by the Forest Practices Board Are Justiciable as Final Agency Actions Because Rights or Obligations Have Been Determined and from Which Legal and Environmental Consequences Flow

The second step in considering the justiciability of a specific agency action, such as the Board’s adoption or amendment of the Manual, is whether the action affects legal interests:

As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "*rights or obligations have been determined,*" or from which "*legal consequences will flow.*"

Bennett v. Spear, 520 U.S. 154, 177-8, 117 S.Ct. 1154 (1997) (internal citations omitted; emphasis added).

For over forty years the State of Washington has maintained a forest practices regulatory scheme in which significant “rights and obligations” are determined by compliance or non-compliance with the Manual. The legal, environmental, and public safety consequences flowing from application of the Manual’s numerous provisions is expressly a matter of both federal and state law.

II. CONCLUSION

The issue here is whether the petitioners should be allowed to challenge the accuracy of specific Manual provisions under the APA.

From the very first forest practices rules in 1976 there has been a “Forest Practices Board Manual” as part of the management scheme to incorporate the best available scientific information *directly into the permitting structure*. As the state has grown from 3.5 to 7.5 million people in forty years, the state of the science has also advanced significantly.

Through the state’s permitting process, the Manual explicitly and directly informs how forest practices are conducted on the ground. The results are not “tentative or interlocutory” and are matters of great public interest throughout the state. These actions can and often have severe adverse impacts on natural resource as well as public safety. Forest practices have real consequences that cannot be undone or redone.

The accuracy of the Manual to assess and mitigate the risks of specific permitting decisions by the state should be justiciable under the APA each time the Forest Practices Board acts to adopt or amend it.

RESPECTFULLY SUBMITTED this 15th day of March, 2019.



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NATURAL RESOURCE LAW AND POLICY

April 01, 2019 - 2:14 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96755-5
Appellate Court Case Title: Sumas Mountain Comm for Landslide Awareness v. WA State Forest Practices Board
Superior Court Case Number: 16-2-13691-5

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