

No. 48360-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ESSES DAMAN FAMILY, LLC,

Respondent/Cross-Appellant,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Appellant/Cross-Respondent,

QUINAULT INDIAN NATION, POLLUTION CONTROL HEARINGS
BOARD, and SHERMAN ESSES,

Respondents.

**QUINAULT INDIAN NATION'S ANSWER TO
AMICUS CURIAE BRIEF OF WASHINGTON FOREST
PROTECTION ASSOCIATION**

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I. Introduction

In its amicus brief to this Court, Washington Forest Protection Association (“WFPA”) repeatedly misconstrues the case below and the administrative record. As a result, its arguments are often based on erroneous premises and are not persuasive.

For example, WFPA spends ten pages arguing that the Superior Court erred by construing the Forest Practices Board Manual as a rule, and that “the Board Manual should not be treated as a rule.” WFPA Br. at 8 (emphasis in original). The argument is misplaced because the Superior Court explicitly and correctly explained that “Forest Practices Board Manual itself is not law; although it was adopted by the Forest Practices Board, it is not a statute nor an agency adopted rule. However, the PCHB applied the law in interpreting the Manual, both citing and applying rules of statutory construction in its interpretation of the Manual.” Opinion and Order at 4; CP 2764. The Superior Court then carefully examined the Pollution Control Hearings Board’s analysis, found it to be flawed in numerous respects, and appropriately reversed and remanded.

As explained below, WFPA’s other arguments are also incorrect and untethered from this case, and should not influence the proceedings.

II. Statement of the Case

This case focuses on the Pollution Control Hearings Board's analysis and interpretation of the term "permanent dike or levee" as that term is used in the Forest Practices Rules and explained in the Forest Practices Board Manual. The PCHB devoted several pages to interpretation of a page in the Board Manual which explains when features such as roads are considered a "permanent dike or levee" and then explicitly sets forth an exception detailing when a road "is not considered a 'permanent dike or levee.'" *See* WAC 222-16-010; CP 599. The PCHB erred by misapplying case law and tools of statutory construction to conclude that the text of the Board Manual regarding when a road "is not considered a permanent dike or levee" had nothing to do with channel migration zones, but rather concerned a wholly unrelated "separate thought." The PCHB further erred by determining that the South Shore Road is a permanent dike or levee. The South Shore Road is a dirt road perforated by culverts big enough to walk through, and water and fish from the Quinault River regularly pass from one side of the road to the other. Under any reasonable understanding, the South Shore Road is not a permanent dike or levee.

In a thorough and well-cited opinion, the Superior Court reversed and remanded the PCHB's decision. Quinault Indian Nation's statement of the case is set forth in full in its opening brief.

III. Argument

WFPA's main argument is that the Board Manual is a policy statement that should have been inconsequential in the Superior Court's review. That argument is wrong because it ignores the fact that the PCHB, as well as all of the parties below, relied on the Board Manual as the primary means of determining whether or not the South Shore Road is a permanent dike or levee. No party appealed the PCHB's basic methodology of using the Board Manual as the presumptively correct means of implementing the Forest Practices Act and Rules. The Superior Court simply reviewed the PCHB's decision as the PCHB made it, which is the appropriate method to approach an Administrative Procedure Act appeal. The PCHB used legal analysis to interpret the Board Manual and apply it to the findings of fact. The Superior Court's Order stands for the proposition that, if the PCHB applies analysis of the Board Manual to reach a conclusion, that analysis must be sound. The misapplication of case law and legal analysis constitutes legal error and is arbitrary and capricious.

WFPA is also incorrect in characterizing the Board Manual as a policy statement. To reach its conclusion, WFPA relies upon the premise that an agency document must either be a rule or a policy statement. However, there is no authority supporting WFPA's premise. In fact, the Board Manual predates the Administrative Procedure Act ("APA"), exists pursuant to independent statutory command, RCW 76.09.040(3)(c), and is neither a rule nor a policy statement as defined in the APA. Because the Forest Practices Board Manual is a unique agency document, WFPA's argument that judicial scrutiny of the Board Manual will have a chilling effect generally on the development and use of policy statements in other agencies and contexts falls flat.

The Quinault Indian Nation addresses WFPA's arguments in turn, with primary focus on arguments not already addressed in briefing.

A. The Board Manual Implements the Forest Practices Rules.

WFPA first argues that the Board Manual should not be treated as a rule. The Quinault Indian Nation agrees. Under the Forest Practices Act, the Board Manual is "technical guidance" that must "assist with implementation of the standards incorporated into the forest practices rules." RCW 76.09.040(3)(c).¹ As recognized by the Superior Court, the

¹ WFPA misleadingly cites this statute in its brief to substitute the word "interpretation" for "implementation." WFPA Br. at 7.

Quinault has never argued that the Board Manual is a rule and does not do so in these proceedings. Opinion and Order at 13; CP 2773.

WFPA next argues that “[t]he proper role of the Board Manual is determined by the APA,” and extrapolates from there to argue that the Board Manual must either be a rule or a policy statement as defined in the APA. WFPA Br. at 5. Largely by process of elimination, WFPA concludes that the Board Manual must be a policy statement.

This Court does not need to resolve the legal description of the Board Manual. The agency order on appeal is the PCHB’s “Findings of Fact and Conclusions of Law,” and the Quinault’s appeal is based on the PCHB’s incorrect application of case law and legal analysis to the Board Manual rather than the status of the Board Manual itself. The PCHB relied heavily on its legal analysis of the Board Manual text as the dispositive factor in reaching its conclusions; the Superior Court simply reversed and remanded the agency order based in flaws in the analysis the PCHB set forth. RCW 34.05.570(3).

But if this Court is inclined to reach the question of the Board Manual’s legal status, WFPA’s argument that the Board Manual is a policy statement is incorrect. WFPA’s argument rests on the false premise that all agency documents must fit into a defined category under the APA. However, the APA does not create exclusive categories that all agency

actions must fit into. The APA instead recognizes that aside from defined actions there are also “other agency actions” that an agency may undertake. RCW 34.05.570(4). Indeed, WFPA sometimes concedes that there are undefined agency documents, at times writing that the Board Manual is neither a rule nor a policy statement but rather something “akin to a policy statement.” WFPA Br. at 7.

WFPA also fails in its characterization of the Board Manual as a policy deserving little weight. The Board Manual is an independent document promulgated pursuant to independent authority in the Forest Practices Act. RCW 76.09.040(3)(c). The Board Manual is more significant than “merely a policy statement,” WFPA Br. at 10, because it implements the rules and is referenced or incorporated throughout the Forest Practices Rules to provide substance to terse standards.²

² The following regulations expressly incorporate or reference different sections of the Board Manual. WAC 222-12-0401 (Alternate plans); WAC 222-12-045 (Adaptive management program); WAC 222-16-010 (General definitions); WAC 222-16-030 (Water typing); WAC 222-16-036 (Wetland mapping); WAC 222-16-070 & WAC 222-38-020 (Pesticides); WAC 222-23-020 & WAC 222-23-025 (easement programs) WAC 222-24-015 (Construction in wetlands); WAC 222-24-020 (Road location and design); WAC 222-24-030 (Road construction); WAC 222-24-040 & WAC 222-24-041 (water crossings); WAC 222-24-044 (Temporary bypass culverts, flumes, or channels); WAC 222-24-046 (Bank protection); WAC 222-24-050 & WAC 222-24-052 (Road maintenance); WAC 222-30-020 (Harvest unit planning and design); WAC 222-30-021 (Western Washington riparian management zones); WAC 222-30-040 (Shade requirements to maintain water temperature); WAC 222-30-050 (Felling and bucking); WAC 222-30-060 (Cable yarding); WAC 222-30-070 (Ground-based logging systems); WAC 222-30-100 (Slash disposal or prescribed burning).

The Board Manual serves as a functional handbook designed for everyday use at every stage of forest practices regulation. It is a handbook of general applicability, which provides a common set of methods and standards to implement the Forest Practices Rules. In that manner it is fundamentally different from internal guidance or policy goals such as those described in *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wash. App. 22, 30, 347 P.3d 1090, 1093 (2015). Indeed, the Board Manual is instrumental to implementing the Forest Practices Rules at every stage of the forest practices regulatory process.

The instructions for forest practices applications and the application both reference the Board Manual as the presumptive means of implementing the rules.³ The “CMZ Assessment Form,” which must be attached to any forest practices application situated near a channel migration zone, first directs the applicant to refer to the Board Manual.⁴ The Board Manual also plays a key role in achieving compliance with Federal law. The State’s programmatic “Habitat Conservation Plan,” which affords protection from Federal Endangered Species Act liability, *see* 16 U.S.C. § 1539(a)(2), as well as some Federal Clean Water Act obligations, describes the Board Manual as “a document that serves as an

³ http://www.dnr.wa.gov/publications/fp_form_ewfpan_instructions.pdf (instructions); http://www.dnr.wa.gov/publications/fp_form_ewfpan.pdf (FPA).

⁴ http://www.dnr.wa.gov/publications/fp_form_app_c_cmz.pdf

advisory technical supplement to the forest practices rules, and therefore, is part of the foundation of the Forest Practices Habitat Conservation Plan.”⁵

The Board Manual is further unlike a policy statement because it has legally prescribed development procedures that require stakeholder and public engagement. WAC 222-12-090. The Forest Practices Board approves the Board Manual and revisions thereto. The Forest Practices Board is an independent State agency separate from the regulating body that applies the Board Manual. The Board is composed of 13 members that represent the public, the timber industry, and a variety of agencies.⁶ Board members meet in quarterly sessions and approve the Board Manual by motion and majority vote. Prior to approval, the Department of Natural Resources must cooperate with various stakeholders, including other agencies and affected Indian tribes. WAC 222-12-090. The development process often takes a year or more with numerous technical subgroups and lengthy negotiations. Because the Board Manual is approved by motion and vote in an open public meeting, there is public notice and opportunity for comment separate from APA procedures. RCW 42.30.030.⁷ The

⁵ http://www.dnr.wa.gov/publications/fp_hep_22appf.pdf

⁶ <http://www.dnr.wa.gov/about/boards-and-councils/forest-practices-board>

⁷ This brief does not comment on the separate question of whether or not approval of a Board Manual constitutes “agency action” subject to judicial review under the APA.

rigorous and lengthy development process is designed to ensure that the Board Manual represents a common methodology for implementing Forest Practices Rules, something far different from an easily modified and relatively informal agency policy statement.

In sum, the appeal before this Court is focused on the PCHB's analysis rather than the exact nature of the Board Manual itself. If this Court sees a need to define the Board Manual, WFPA is incorrect that the Board Manual is a policy statement. The Board Manual is an independent guidance document that plays a vital role implementing the Forest Practices Rules.

B. The Superior Court Did Not Treat the Board Manual as a Rule.

WFPA argues that 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." WFPA Br. at 10. WFPA misrepresents the decision below. The Superior Court did not find that the decision was necessarily arbitrary and capricious solely because it did not agree with the Board Manual.

What the Superior Court actually wrote was:

Perhaps DNR is correct in saying that the Manual need not be followed if there is a "reasonable reason" (DNR Response brief at p. 23); otherwise, why have a Manual at all and pretend to follow it. This Court cannot find a

"reasonable reason" not to follow the explicit language in the Manual with respect to the issue raised in this appeal.

Opinion and Order at 13; CP 2773. In other words, the Superior Court treated the Board Manual as non-binding guidance, which sets forth the presumptively correct method of implementing the Forest Practices Rules. The Superior Court correctly determined the meaning of the Board Manual, applied the facts as found by the PCHB to the Board Manual, and then reviewed whether or not the PCHB had set forth a reasoned rationale for departing from the Board Manual's guidance. Only upon failing to find adequate rationale did the Superior Court deem the PCHB's decision arbitrary and capricious. The Superior Court's methodology is well supported in administrative law. *See, e.g., Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1119 (9th Cir. 2012) (agency deviation from definitions in Endangered Species Act handbook without adequate explanation rendered biological opinion arbitrary and capricious); *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n. 4 (9th Cir. 1998).

WFPA next argues that the approach the Superior Court should have taken was to consider whether the PCHB's interpretation of the Board Manual violated the Forest Practices Rules based on dictionary definitions. However, that approach would have required the Superior

Court to unlawfully ignore the agency order below. RCW 34.05.570(3). The PCHB relied exclusively on its interpretation of the Board Manual to determine what “permanent dike or levee” means, and so the Superior Court correctly reviewed that analysis.

If this Court does decide to turn to the dictionary analysis, the definitions cited by WFPA only support the Superior Court’s decision. As WFPA describes it, a “dike or levee” must protect an area from flooding or prevent flooding. WFPA Br. at 12. Under that definition, a perforated road that allows flood water to flow under, over, and behind it is in no way a “permanent levee or dike” because it does not block flood flows.

Finally, WFPA argues that a perforated road should be considered a “permanent dike or levee” so that logging may occur on the far side. Under WFPA’s reasoning, the sole purpose of the channel migration regulation is to protect trees that will someday deliver to a stream or river channel as part of the natural stream migration and erosion process. WFPA Br. at 13. If a road blocks river movement, WFPA argues there is no reason to protect trees on the far side of roads.

WFPA is correct that one of the purposes of channel migration zone protections is to provide large woody debris in the future. However, a perforated road that allows fish and water passage under (and sometimes over) it by definition does not block river movement. Instead, such a road

may serve to cross an active river channel, with valuable fish habitat on either side. If water and fish pass to the far side of the road, the shade and large woody debris provided by channel migration zone regulations will provide valuable habitat protection regardless of whether the road persists. The two sides of the road are physically, chemically, and biologically connected. It therefore makes sense to extend protections to the furthest reaches of the channel migration zone regardless of the presence of the road.

WFPA also misses the fact that channel migration zone protections are intended to provide environmental benefits other than large woody debris recruitment. While WFPA failed to cite any authority describing the purpose of the channel migration zone regulations, one of the best resources to determine the intended benefits of the forest practices regulations is the environmental impact statement associated with Washington's Forest Practices Habitat Conservation Plan.

The habitat conservation plan is the basis for the issuance of two federal "incidental take permits" under the Endangered Species Act ("ESA"). *See* 16 U.S.C. § 1539(a)(2). Those permits insure the State's and private landowners' compliance with the ESA. The current Forest Practices Rules serve to apply the terms of the habitat conservation plan to landowners in Washington.

The final environmental impact statement (“FEIS”) associated with the habitat conservation plan (and by extension, the Forest Practices Rules) explains that in addition to promoting delivery of large woody debris, channel migration zones are important for protecting water quality, water quantity, hyporheic zones, groundwater, shade, floodplain areas, and off-channel habitat. The FEIS states:

[the habitat conservation plan] would protect Channel Migration Zones and provide greater riparian protection, increasing the likelihood that floodplains, off-channel habitats, and hyporheic zones would be maintained relative to No Action Alternative...

...floodplains and off-channel areas include side channels, backwater alcoves, ponds, and wetlands connected at least seasonally to flowing waters. Hyporheic zones are the saturated areas beneath and beside these features. Off-channel areas provide important habitat seasonally or to particular life stages (Brown and Hartman 1988; Peterson and Reid 1984; Spence et al. 1996; Bjornn and Reiser 1991). Off-channel areas may have shallow, low velocity water that is important during fry rearing periods. These areas can also provide protection from high water velocities during flood flows. Some backwater alcoves and ponds result from groundwater and hyporheic water seeps and may have higher shade levels and lower temperatures than the main channel. These areas provide cool-water refugia during high summertime temperatures. They also may supply spawning areas where groundwater or hyporheic waters emerge (Edwards 1998).

FEIS at 4-191; *see also* FEIS at 4-64 (CMZs protect hyporheic zones and water temperature), 4-65 (CMZs protect dissolved oxygen and nutrient content), 4-83 (CMZs protect groundwater), 4-86 (CMZs protect water

quantity), 4-191 (CMZs protect shade and water temperature).⁸ In other words, the prohibition on logging in channel migration zones provides many benefits other than increasing delivery of large woody debris. Those protections are important wherever water and fish from a river travel. Where a perforated road allows water and fish to pass under it, channel migration zone protections should extend to that area as well.

The EIS's expectations are borne out in this case. The area behind the South Shore Road is off-channel habitat that provides refugia to salmon from the Quinault River at high flows and important rearing areas. CP 483-485.

An interpretation of the Board Manual and Forest Practices Rules that does not consider a perforated road a "permanent dike or levee" also aligns with a broader effort to gradually eliminate stream parallel roads. The Rules ban construction of stream parallel roads due to their many environmental impacts. WAC 222-24-020(2); *see also* EIS at 4-192. The Rules also institute a "road maintenance and abandonment program" that over time is expected to eliminate many stream parallel roads and insure "no net loss of fish habitat." WAC 222-24-050; WAC 222-24-010. It therefore makes sense not to consider a stream parallel road that impacts

⁸ http://www.dnr.wa.gov/publications/fp_hcp_feis_chapter_4.pdf

fish habitat as a “permanent dike or levee,” because the Rules call for such roads to be phased out and avoided over time.

Finally, there is a practical reality, which is that it is unlawful to block fish passage, and so existing culverts are very unlikely to be filled or eliminated in favor of dikes or levees. WAC 222-24-010(2); *United States v. Washington*, No. 13-35474, 2016 WL 3517884, at *12 (9th Cir. June 27, 2016). A road that allows a significant amount of water to pass over and behind it is very unlikely to persist over the timeframe set forth for channel migration zone protections (140 years), and therefore cannot be considered permanent.

In sum, the Board Manual text, the dictionary, the regulatory context of the Forest Practices Rules, and practical considerations of road construction all dictate that a road such as the South Shore Road, which is perforated and allows passage of anadromous fish and flood water, should not be considered a “permanent dike or levee.” The Superior Court was correct.

C. The Harmless Error Doctrine Does Not Apply.

WFPA asserts that, even if the PCHB erred in its interpretation of the Board Manual, the error was harmless and therefore not subject to reversal. WFPA misapplies the relevant rule. An error is harmless only if it “in no way affected the final outcome of the case.” Both cases cited by

WFPA, *Kopp v. Washington State Dep't of Emp't Sec.*, 185 Wash. App. 1008 (2014), and *Port of Seattle v. Pollution Control Hearings Board*, 151 Wash. 2d 568, 90 P.3d 659 (2004), demonstrate that the harmless error doctrine is extremely limited and only applies in instances where an error is truly trivial.

In contrast, the PCHB's ruling makes clear that the Board Manual is fundamental to its resolution of the case. The PCHB fully disregarded the Quinault's geotechnical expert's analysis, despite her unmatched experience working on the Quinault River, because her analysis deviated in some ways from the Board Manual. CP 489. The PCHB devoted a full four pages of analysis to the text of the Board Manual relating to whether a road is a "permanent dike or levee," including copying the relevant text in full. CP 507-510. Each of its conclusions regarding the South Shore Road included reference to the text of the Board Manual for support. *See, e.g.*, CP 510 Conclusion of Law 12.

Given the dispositive weight the PCHB assigned to the Board Manual, and the extensive effort put into interpreting the Board Manual's definition of the term "permanent dike or levee," it is an implausible stretch of the imagination to argue that the PCHB's understanding of the Board Manual "in no way affected the outcome of the case." The harmless error doctrine does not apply.

D. WFPA's Expectation of Far Reaching Implications is Unrealistic.

WFPA raises a flurry of policy concerns that it fears will occur if the Board Manual is applied as a rule. WFPA's concerns are overstated because neither the PCHB nor the Superior Court applied the Board Manual as a rule, and the Quinault Indian Nation does not seek such a decision from this Court.

The Quinault Indian Nation advocates for the regulatory system that is already in place, as described in statute, regulation, and the Board Manual itself. The Board Manual provides the presumptively correct method of implementing the Forest Practices Rules. RCW 76.09.040(3)(c). It reflects a wide variety of stakeholders' input and is intended to be used as a practical handbook in the field. WAC 222-12-090. Because the Board Manual is guidance, and not rule, an applicant, the Department of Natural Resources, an Indian tribe, or a member of the public may advocate for a deviation from the Board Manual's direction. In approving or disapproving an application, DNR may impose a deviation from the Board Manual if it provides a reasoned explanation. *See* CP 610.

On *de novo* appeal, the PCHB must similarly make findings of fact, and determine the text of the Board Manual according to its plain terms. The PCHB then applies facts to the Forest Practices Rules and the

Board Manual, with the key difference between the two being that the PCHB may deviate from the Board Manual's text if it provides a reasoned basis. The standard of review on appeal of the PCHB decision is "substantial evidence" for findings of fact, "error of law" for the application of case law and legal analysis to determine the meaning of the Rules or Board Manual, and "arbitrary and capricious" to determine if the decision to deviate from the Board Manual's guidance was lawful. RCW 34.05.570(3).

The Superior Court correctly agreed with the analytical framework set forth by the Quinault. Use of the Board Manual as the presumptively correct means of implementing the Forest Practices Rules recognizes the imperative for consistent, transparent rule application and limitation on permitting deference. At the same time, it allows for important regulatory flexibility so long as an adequate explanation is given. A meaningful Board Manual helps promote consistent and fair application of the Forest Practices Rules across the landscape, which is a fundamental goal of the forestry regulatory regime in Washington.

In contrast, WFPA's vision of a Board Manual with no legal effect leaves the Forest Practices Rules without substance or direction. DNR would have nearly unfettered discretion to apply terse rule definitions, such as the one-sentence regulatory definition of a channel migration

zone. This rudderless system would give DNR such broad discretion so as to functionally render judicial review and public accountability unavailable. Opinion and Order at 12; CP 2772.

IV. Conclusion

For all of the reasons stated herein, the Quinault Indian Nation disagrees with WFPA's arguments and respectfully requests this Court to uphold the Superior Court's order reversing and remanding the Pollution Control Hearings Board's "Findings of Fact, Conclusions of Law and Order (Corrected)."

Respectfully submitted this 7th day of September, 2016.



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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2016, I caused a true and correct copy of QUINAULT INDIAN NATION’S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON FOREST PROTECTION ASSOCIATION and this CERTIFICATE OF SERVICE to be served upon the parties herein, as indicated below:

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Transmittal Letter

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