BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA GORGE and COLUMBIA AUDUBON SOCIETY,	)	FPAB NO. 93-61
Appellants,	)	
v.	)	FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES; FOREST PRACTICES BOARD; DEPARTMENT OF ECOLOGY; and SDS LUMBER COMPANY,	)	
Respondents.	)	

This matter came on for hearing before the Honorable William A. Harrison, Administrative Appeals Judge, presiding; and Appeals Board Members Norman L. Winn, Chairman; and Robert E. Quoidbach.

The matter is an appeal from the approval, by the Department of Natural Resources, of a forest practices application submitted by SDS Lumber Company.

Appearances were as follows:

1. Gary K. Kahn, Attorney at Law for the appellants.
2. Michael E. Haglund, Attorney at Law for respondent, SDS Lumber Company.
3. Kay Brown, Assistant Attorney General for the Department of Natural Resources.
4. Patricia Hickey O'Brien, Assistant Attorney General for the Forest Practices Board.
5. The Department of Ecology did not appear.

The hearing was conducted at Lacey, on October 12, 1993. Gene Barker and Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

This matter arises on Underwood Mountain in Skamania County near the towns of Underwood, White Salmon and Bingen along the Columbia River.

II

Respondent SDS Lumber Company (SDS) owns 5,020 acres on Underwood Mountain. These were acquired over a 40 year period in 6 to 10 land transactions. The acreage is managed as commercial timber land.

III

On November 17, 1986, the President signed into law an Act of Congress entitled the "Columbia Gorge National Scenic Area Act" (Public Law 99-663). The Act (NSAA) creates a Scenic Area containing within it: 1) urban areas, 2) special management areas (SMAs), and 3) general management areas (GMAs). The Scenic Area created by the NSAA spans both sides of the Columbia River for the 83 miles between Washougal and the mouth of the Deschutes River. This encompasses some 252,000 acres. Of these, approximately 9 percent is urban area, 38 percent is SMA and 52 percent is GMA.

IV

The NSAA is distinct from other Congressional acts creating national parks, national recreation areas or national wild and scenic rivers. Only portions of the Klickitat and White

Salmon Rivers, in this area of Washington, were designated as national wild and scenic rivers. The Columbia River was not so designated.

V

Under the NSAA, there is no federal regulation of urban areas. There is stringent federal regulation of SMAs. In the GMAs only state law governs forest practices on non-federal timber land.

VI

A portion of Underwood Mountain lies within a GMA of the Scenic Area created by the NSAA. Of the 5,020 areas owned by SDS on Underwood Mountain, 1,896 acres are within the Scenic Area, all within a GMA.

VII

Respondent, SDS, uses clearcutting to log its lands on Underwood Mountain. Prior to the facts of this case it had clearcut near the top of the Mountain. In 1990 it filed with respondent Department of Natural Resources (DNR) an application to clearcut 220 additional acres on the upper slopes of the Mountain. The DNR classified that application as Class III, and therefore exempt from consideration under the State Environmental Policy Act, chapter 43.21C RCW. This classification was made pursuant to a rule of respondent Forest Practices Board, WAC 222-16-050. The DNR then approved the SDS application. Appellants now appeal from a renewal of that application.

VIII

Respondent, SDS, did not clearcut the entire 220 acres authorized by the approved application at one time. In this, it was guided by two considerations. First, the timber within the 220 acres is in blocks of differing age classes. Second, SDS was aware of concern by the Columbia Gorge Commission, created by NSAA, over the effect of its operations on scenic

beauty. That led SDS to voluntarily consult with the U.S. Forest Service on how to conduct harvesting with concern for the visual landscape.

IX

Of the 220 acres authorized for clearcut, SDS harvested 35 acres in 1990, 48 acres in 1991, 78 acres in 1992 and 10 acres in 1993. At present, 44 acres remain to be clearcut. The rest will be rehabilitated or thinned.

X

The SDS logging on Underwood Mountain is visible from Bingen, the Hood River Bridge, Interstate 84 on the Oregon side, State Route 141 in Washington, Panorama Point, and the Cook-Underwood Road. Each of these is designated as a "key viewing area" in the Management Plan adopted by the Gorge Commission pursuant to the NSAA.

XI

Under the Gorge Commission's Management Plan, Underwood Mountain, as viewed from the key viewing areas, lies in the "middle ground" (2 to 5 miles away) or the "back ground" (5 or more miles away). The Management Plan classifies the area being logged as within the "second order" of "landscape significance" and in an area of "low to moderate" "landscape sensitivity." These Management Plan classifications have no direct regulatory effect upon non-federal forest lands, such as these, in the GMA.

XII

The SDS logging on Underwood Mountain leaves the overall impression of a mosaic of timbered and open areas. It is likely that what is now open will in the future be timbered, and that what is now timbered will in the future be open. There is a production-based reason to expect this result. That is because the timber is harvested in blocks as it reaches a mature age class. The mosaic effect is also assisted by the Forest Practices Board's rule limiting clearcuts

to 240 acres, with requirements that subsequent cuts be held back until the first cut has "greened up." Although that rule was adopted in 1992, SDS has met its requirements in this case whether or not the rule applied at all times.

XIII

There are other clearcuts on Underwood Mountain, one being a timber sale by DNR. Other clearcutting exists within view of places from which Underwood Mountain can be seen. These include cuts near the Little White Salmon River, several miles away. These are not SDS operations.

XIV

In 1992, when the Forest Practices Board (FPB) was considering extensive amendments to the forest practices rules, both the Gorge Commission and U.S. Forest Service urged that logging on non-federal lands in the Scenic Area be subject to SEPA review under the forest practices rules. These requests were rejected by the FPB. In its explanatory statement, the FPB said:

> *Although the FPB recognizes that there are aesthetic impacts caused by forest practices within the boundaries of or near federal Wild and Scenic Rivers, and the Columbia Gorge National Scenic Area, the FPB felt these impacts are not substantial except when a permanent removal from the forest land base is planned. Such forest practices are classified as Class IV - General and do receive SEPA review.*

XV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

This case is the appeal of an approved forest practices application ("permit") granted by Department of Natural Resources (DNR) to the SDS Lumber Company (SDS). Appellants, Friends of the Columbia Gorge and Columbia Gorge Audubon Society, allege that the permit was granted in violation of the State Environmental Policy Act of 1971 (SEPA), chapter 43.21C RCW.

II

The issues in this matter are as follows:

1. Was forest practices application number FP A-11-16781, a renewal of A-11-12575, properly classified as a Class III forest practice application?

2. Must DNR rely solely upon rules promulgated by the FPB and the Department of Ecology (DOE) in classifying forest practice application?

3. Does the Forest Practices Appeals Board (FPAB) have jurisdiction to determine the validity of rules promulgated by the FPB and DOE?

4. Assuming the FPAB has jurisdiction to determine the rule validity issue, is WAC 222-16-050(1) valid?

5. Does WAC 197-11-305(1)(b) require environmental review of this forest practice application under the State Environmental Policy Act?

Pre-Hearing Order entered June 7, 1993.

We now take these up in turn.

III

Issue No. 1: Was the SDS permit properly classified as Class III? The Legislature has provided four classes of forest practices. It has delegated to the Forest Practices Board (FPB) the responsibility to determine by rule which forest practices fit into each class. RCW 76.09.050(1). A Class IV forest practice is defined to include those:

> *d) which have a potential for a substantial impact on the environment.* RCW 76.09.050(l)(d).

IV

With exceptions not pertinent here, any forest practice which does not meet this criteria is classified as Class I, II or III. These latter three classes are exempt from the requirements for a detailed statement (EIS) under SEPA. The Class IV forest practices are not exempt from those requirements of SEPA. RCW 76.09.050. See also RCW 43.21C.037.

V

Pursuant to the authority granted to it in RCW 76.09.050, the FPB has promulgated a rule establishing which forest practices fall within each class. WAC 222-16-050. Under the terms of that rule, only, DNR properly classified the SDS permit as Class III. Appellants assert, however, that the forest practices approved by this permit do, in fact, have "a potential for a substantial impact on the environment" and were thus exempted from SEPA in contravention of both the Forest Practices Act, at RCW 76.09.050 and SEPA, at RCW 43.21C.037. By the analysis which follows, we conclude that the classification of the SDS permit as Class III (SEPA exempt) was consistent with the Forest Practices Act, and SEPA, and should be affirmed.

VI

Issue No. 2: Must DNR rely solely upon rules promulgated by the FPB and DOE in classifying forest practices applications? The role of DNR in classifying forest practices applications has been determined as follows:

> *SEPA and its amendments present a statutory scheme in which uniform rules are established to identify actions generally exempt from SEPA without the necessity of further review. To require DNR to fully apply SEPA to the process of classifying each forest practice application would render SEPA's categorical exemptions meaningless...We hold that the Legislature's exemption of Class III forest practices from SEPA spares DNR (and the parties) from individual case-by-case environmental review. The Legislature intended to prevent unnecessary paperwork, delays and bureaucratic processing that would be a significant burden on government and taxpayers. It is noteworthy in this regard that in 1988, DNR processed over 8,000 forest practices permits.* Snohomish County v. State, 69 Wn.App 655, 669 (1993).

The DNR must adhere to the rules promulgated by the FPB and DOE in classifying forest practices applications. In addition, the DNR must adhere to the final decisions of the FPAB. RCW 76.09.110.

VII

Issue No. 3: Does the FPAB have jurisdiction to determine the validity of rules promulgated by the FPB and DOE? We hold that the FPAB does not have jurisdiction to issue declaratory judgments on the validity of rules as promulgated, but that the FPAB does have jurisdiction to review the validity of a rule, as applied, in the issuance of specific permits. Our reasoning follows.

VIII

The FPAB functions in a manner which is distinct from the DNR. The FPAB is organized within the State Environmental Hearings Office. RCW 43.21B.005. That office includes also, the Pollution Control Hearings Board, the Shorelines Hearings Board and the Hydraulics Appeals Board. Id. The FPAB, like the other Boards of the office is exclusively a quasi-judicial, administrative tribunal.[1] The FPAB has exclusive jurisdiction to hear appeals arising from an action or determination by the DNR. RCW 76.09.220(7). The Forest Practices Act thus delegates quasi-judicial powers to the FPAB while delegating quasi-executive powers to the DNR and quasi-legislative powers to the FPB. Id. and RCW 76.09.050.

IX

The Court of Appeals has recently ruled that the FPAB does not have rule review authority, since, "... only superior courts have jurisdiction under the APA to issue declaratory judgments on the validity of rules ..." (Emphasis added.) Snohomish County v. State, supra, at 664. That holding was based upon Seattle v. Department of Ecology, 37 Wn. App. 819, 683 P.2d 244 (1984). The Seattle case affirmed a decision of the Pollution Control Hearings Board (PCHB) that it lacked authority to review the promulgation of a rule by DOE. That case involved a challenge to rule making, and not to the application of a rule to the issuance of specific permits. The FPAB does not have authority to review the validity of a rule as promulgated.

[1] The three members of the FPAB are appointed by the Governor for six year terms, and are qualified by training and experience in pertinent matters pertaining to the environment. RCW 76.09.210(1). At least one member of the FPAB shall have been admitted to the practice of law. Id.

X

The Supreme Court has recently held that the PCHB has authority to review the application of a rule in the issuance of specific permits. D/O Center v. Department of Ecology, 119 W.2d 761 (1992). In that case, brought in Thurston County Superior Court, the Superior Court agreed with DOE and the Northwest Pulp and Paper Association, that because the challenge to pulp mill permits involved factual issues, primary jurisdiction lay in the PCHB, not the superior court. The permits had been issued pursuant to a SEPA exemption rule, and were challenged by D/O Center.

XI

The Supreme Court ruled that where an appellant's claim challenges not a rule itself, but the application of a rule in the issuance of a specific permit, primary jurisdiction lies with the appropriate quasi-judicial administrative agency (in this case the Forest Practices Appeals Board). 119 Wn.2d at 770, 776.

In this case, and in every other case appealed to the Forest Practices Appeals Board, the appellant has challenged the issuance of a specific permit. In each case the appeal has raised factual issues as to the appropriateness of the DNR's actions in issuing the permit. Where an appellant raises factual issues as to whether the permit was issued without compliance with SEPA, jurisdiction over such challenges lies with the quasi-judicial administrative agency, in this case the Forest Practices Appeals Board. D/O Center, 119 Wn.2d at 772-774.

XII

This case lies squarely within the holdings of D/O Center. The appellants both there and here challenge not a rule itself as promulgated, but the application of a rule in the issuance of a specific permit. Appellants in D/O Center challenged specific NPDES permits as wrongly

issued under a SEPA exemption rule because of their claim that the permits allowed "major action" requiring compliance with EIS requirements. Appellants here challenge this specific forest practice permit as wrongly issued under a SEPA exemption rule because of their claim that the permit allows activity with "a potential for a substantial impact on the environment" requiring compliance with EIS requirements. Both the term "major action" and the term "a potential for a substantial impact" are statutory limitations in SEPA governing permissible SEPA exemption rules. The former is within RCW 43.21C.110. The latter is from RCW 76.09.050 of the Forest Practices Act incorporated by reference in RCW 43.21C.037 of SEPA. Both cases involve a contention that the application of a rule in the issuance of a permit is invalid because of inconsistency with governing statutes.

XIII

Like the PCHB's authority to review the NPDES permits in D/O Center, see RCW 43.21B.110(l)(c), the FPAB has authority to review the "approval or disapproval of an application to conduct a forest practice." RCW 76.09.220(8)(a). Like the PCHB, see 43.21B.310(l), the FPAB has exclusive jurisdiction. RCW 76.09.220(7).

XIV

In the event that any conflict exists between the Court of appeals ruling in Snohomish County and the Supreme Court's ruling in D/O Center, the latter case controls. The FPAB has authority to review the validity of an FPB or DOE rule, as applied, in the issuance of specific forest practices permits. The object of that review is to determine not only the permit's consistency with FPB or DOE rules, but also its consistency with governing statutes, including SEPA and the Forest Practices Act.

XV

The foregoing conclusions determine the challenge to FPAB jurisdiction made by the FPB and others. That challenge has been fully briefed, argued and decided. Our decision in this matter is a precedent which should discourage the refiling of that jurisdictional challenge in future cases before the FPAB.

XVI

Issue No. 4: Is WAC 222-16-050(l) valid? From the foregoing conclusions on jurisdiction, our review of this issue is limited to: Whether the SEPA exemption rule, WAC 222-16-050(l), is valid as applied in approving the permit in question? That rule was applied by DNR in granting a SEPA-exempt forest practices permit to SDS. Such an action or determination by DNR is under the exclusive review jurisdiction of the FPAB. RCW 76.09.220(7) and (8).

XVII

Forest practices on non-federal timber land in the NSAA Scenic Area GMA's are governed only by state law. The pertinent state law includes both the Forest Practices Act, chapter 76.09 RCW (FPA) and SEPA. It is well established that SEPA policies can restrict projects otherwise permitted. Victoria Partnership v. Seattle, 59 Wn. App. 592, 597 800 P.2d 380 (1990); Cougar Mountain Associates v. King County, 111 Wn.2d 742, 752, 765 P.2d 264 (1988); Dep't of Natural Resources v. Thurston County, 92 Wn.2d 656, 665, 601 P.2d 494 (1979), appeal dismissed, 449 U.S. 802 cert. denied, 449 U.S. 830 (1980); Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 66, 578 P.2d 1309 (1978); West Main Assocs. v. Bellevue, 49 Wn.App. 513, 525, 742 P.2d 1266 (1987) review denied, 112 Wn.2d 1009 (1989): Cook v. Clallam County, 27 Wn.App. 410, 415, 618 P.2d 1030 (1980), review denied, 96 Wn.2d 1008 (1981).

XVIII

SEPA's authority is supplemental and enlarges the authority of all units of government. Victoria Tower Partnership, supra, at 601. Polygon Corp., supra, at 63.

XIX

Agency action attended by SEPA noncompliance would be unlawful. The appropriate remedy would be invalidation of the agency action. A forest practices permit which has been granted without compliance with SEPA should be reversed. See Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wn.App. 59, 73-74, 510 P.2d 1140 (1973); Barrie v. Kitsap County, 93 Wn.2d 843, 861, 613 P.2d 1148 (1980).

XX

Aesthetics and scenic beauty are elements of the environment under SEPA. Victoria Tower Partnership, supra, 601. RCW 43.21C.020(2)(b) and WAC 197-11-444 (l)(e)(v), (2)(b)(iv).

XXI

The issue in this case is whether the SDS permit for these operations on Underwood Mountain is exempt from SEPA.[2] As we have previously held, this determination depends upon the SEPA exemption language of RCW 43.21C.037 which states:

> *"Decisions pertaining to applications for Class I, II, and III forest practices, as defined by rule of the forest practices board under RCW 76.09.050, are not subject to the requirements of RCW 43.21C.030(2)(c) as now or hereafter amended."*
> (Emphasis added.)

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[2] The FPAB's review in this and similar matters is de novo both in the standard and scope of review. RCW 34.05.410 and WAC 223-08-177. Unlike proceedings in Thurston County Superior Court under RCW 34.05.570(2), the standard of review is not limited by RCW 34.05.570(2)(c). The scope of review may include, but is not limited to, a rule making record.

The pertinent provision of RCW 76.09.050 prohibits the classification and exemption from SEPA of those forest practices:

> *"...(d) which have a potential for a substantial impact on the environment and therefore require an evaluation by the department [DNR] as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C RCW."*
> [Brackets added].

XXII

The question, then, is whether the permit granted by DNR to SDS for operations on Underwood Mountain had a potential for a substantial impact on the environment. If not, the permit was issued in compliance with SEPA and should be affirmed. If so, the permit was not issued in compliance with SEPA and should be reversed.

XXIII

We conclude that the permit did not have a potential for a substantial impact on the environment. Our conclusion is grounded on the following factors. First, the logging under this and prior and probable future permits is occurring in a mosaic pattern which is compatible with the greater surrounding area. Second, the operations occur in the middle distance or beyond when seen from key viewing areas. Third, the result which we reach is consistent with the NSAA Scenic Area's concept of lesser scenic restriction on logging in non-federal lands within GMAs. We do not construe the law to restrain logging, even clearcutting, simply because it is visible. More than that is required, as in Friends of White Salmon v. DNR, FPAB Nos. 89-18 and 90-1 (1991) where uncommon elements (e.g. national wild and scenic rivers) led to the potential for a substantial scenic impact.

XXIV

Appellants apparently seek a universal determination that all logging on non-federal lands in the Scenic Area GMAs, be subject to SEPA review under the forest practices rules. This universal request is appropriate for consideration by the FPB, which has previously denied it, or by the Thurston County Superior Court on review of the existing SEPA exemption rule under RCW 34.05.570(2). Review by the FPAB is limited to the granting or denial of specific permits. Our decision in this matter is a precedent which should discourage the filing of appeals similar to this one in the NSAA Scenic Area GMAs outside national wild and scenic river corridors.

XXV

We conclude that the remaining logging, as proposed by SDS, did not have the potential for a substantial impact on the environment, and thus was approved consistently with SEPA and the FPA. The SEPA exemption rule, WAC 222-16-050(l) is valid as applied in approving the SDS permit in question.

XXVI

Issue No. 5: Does WAC 197-11-305(l)(b) require environmental review of this permit under SEPA? The Court of Appeals has recently ruled that the forest practices SEPA exemption is limited under WAC 197-11-305(1) for any proposal where cumulative effects are involved. Snohomish County v. State, supra, at 668.

XXVII

WAC 197-11-800(25)(a) is a SEPA exemption rule which exempts all Class I, II, and III forests practices "as defined by RCW 76.09.050 or regulations thereunder." (Emphasis added.) RCW 76.09.050 prohibits the classification and exemption from SEPA of forest

practices which have a potential for substantial impact on the environment. See text in Conclusion XXI, supra.

XXVIII

In Snohomish County v. State, the Court of Appeals noted that categorical exemptions are limited under WAC 197-11-305(1) for any proposal which is part of a series of actions, some or all of which are categorically exempt, and together which may have a probable significant adverse environmental impact. The Court approved the SEPA analysis of this Board:

> *"The [Forest Practices] Appeals Board noted that forest practices exemptions from SEPA must be made with regard to environmental significance. The Appeals Board also concluded that 'the terms of SEPA's forest practices exemption [include] the limitation that forest practices with a potential for substantial impact on the environment require an evaluation as to whether or not a detailed statement must be prepared pursuant to SEPA.' " Conclusions of Law (Appeals Board 17).*

Snohomish County v. State, supra, at 668, footnote 1.

XXIX

In this case, appellants urge that the previous clearcuts of others in combination with those of SDS require environmental review in the aggregate although each separate cut might not. However, it has not been shown that these cuts, distributed over a substantial distance, are either related actions or sufficient cumulatively to have a potential for a substantial impact on the environment. On these facts, WAC 197-11-305(1)(b) does not require SEPA review of the SDS permit on Underwood Mountain.

XXX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

The forest practices permit granted by DNR to SDS Lumber Company is hereby affirmed.

DONE this 30th day of November, 1993.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

NORMAN L. WINN, Chairman

ROBERT E. QUOIDBACH, Member

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