

0089B

BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

FRIENDS OF THE WHITE SALMON,)

Appellant,)

v.)

STATE OF WASHINGTON, DEPARTMENTS)
OF NATURAL RESOURCES; ECOLOGY;)
FOREST PRACTICES BOARD; and SDS)
LUMBER COMPANY,)

Respondents.)

FPAB Nos. 89-18 & 90-1

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter came on for hearing before the Forest Practices Appeals Board, William A. Harrison, Administrative Appeals Judge, presiding; and Board Members Claudia K. Craig, Chair; Norman L. Winn and Dr. Martin R. Kaatz.

The matter is an appeal from Department of Natural Resource's approval of forest practices applications by SDS Lumber Company.

Appearances were as follows:

1. B. Gil Sharp, Attorney at Law, and Dennis White for Friends of the White Salmon.
2. Kathryn L. Gerla, Assistant Attorney General, for Department of Natural Resources.
3. Michael E. Haglund, Attorney at Law, for SDS Lumber Company.
4. Patricia O'Brien, Assistant Attorney General, for the Forest Practices Board.

1 5. Department of Ecology filed a hearing brief, but did not
2 appear.

3 The hearing was conducted at White Salmon on July 18, 19, and 20,
4 1990. Post hearing briefs were filed, the last on August 22, 1990.

5 Tami Kern provided court reporting services.

6 Witnesses were sworn and testified. Exhibits were examined. The
7 Board viewed the site of the proposal in the company of Judge Harrison
8 and the parties. From testimony heard and exhibits examined, the
9 Forest Practices Appeals Board makes these

10 FINDINGS OF FACT

11 I

12 This matter arises in the vicinity of the White Salmon River
13 north of the towns of White Salmon and Bingen in Klickitat Conty.

14 II

15 On November 17, 1986, the President signed into law an act of
16 Congress entitled the "Columbia River Gorge National Scenic Area
17 Act." (Public Law 99-663). A provision of that law designated a
18 segment of the White Salmon River under the National Wild and Scenic
19 Rivers Act (16 USC §1271, et. seq.). That segment, which is at issue
20 here, extends some eight miles from the mouth of Gilmer Creek, near
21 the town of BZ corner, to the mouth of Buck Creek. It is known as the
22 lower White Salmon River.

III

2 The United States Forest Service (USFS) is responsible for
3 establishing the exact boundaries of a corridor along that part of the
4 White Salmon River designated under the Wild and Scenic Rivers Act.
5 At times pertinent to this appeal, the USFS had fixed an interim
6 boundary. The final boundary and management plan will issue following
7 consideration of an environmental impact statement under the National
8 Environmental Policy Act.

9 IV

10 At the time of designation the lower White Salmon River corridor
11 was entirely within private land ownership. It is the objective of
12 the USFS to obtain fee title or scenic easements, by purchase, within
13 the corridor. Such purchases depend on funding, however, that is not
14 practically available until the final boundary and management plan is
15 adopted.

16 V

17 Respondent, SDS Lumber Company (SDS), is the largest private
18 employer in the Columbia Gorge, employing 350-400 people. SDS owns
19 50,000 acres of private timberland within a 100 mile radius of Bingen,
20 in both Washington and Oregon. SDS delivers its logs to pulp, plywood
21 and stud mills located, for the most part, in the Columbia River
22 Gorge. In the past, about 15% of SDS logs originated on its private
23 timber land, about 60% from USFS land and the balance were bought from
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1 other landowners. Anticipating a major reduction in timber
2 availability on USFS lands, SDS has turned to its private lands. It
3 now harvests annually, from its private lands, the amount of timber
4 which it deems to be sustained yield.

5 VI

6 SDS owns about 40% of the lands within the interim boundary of
7 the lower White Salmon River corridor as established by the USFS under
8 the Wild and Scenic Rivers Act. SDS's ownership is therefore about
9 700 acres in the corridor. SDS has applied under the Washington State
10 Forest Practices Act, chapter 76.09 RCW to harvest most of these lands.

11 VI

12 On August 28, 1989, SDS filed an application under the Washington
13 State Forest Practices Act with respondent Washington Department of
14 Natural Resources (DNR). By this, SDS sought approval to harvest 80
15 acres. The application under "Type of Operation" stated "Clearcut."
16 Under "Estimated volume to be cut" it stated "100%." Approximately 12
17 acres of this proposed harvest lies within the interim boundary of the
18 lower White Salmon River corridor established by the USFS under the
19 Wild and Scenic Rivers Act. Although within the corridor, these lands
20 lie along Rattlesnake Creek which is tributary to the White Salmon
21 River and are not on the River itself. The application was numbered
22 FPO1-04362 and the harvest is proposed in Section 30, T4N, R11E.W.M.
23 For simplicity it will be referred to as the "southern tract."
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VII

2 Despite the declarations "Clearcut" and "100%", SDS does not wish
3 to harvest the southern tract entirely by clearcut. It completed the
4 application as it did to reserve that possibility. SDS intends,
5 however, to harvest the southern tract by a mixture of operations
6 including 1) clearcut, 2) overstory removal with smaller trees left,
7 and 3) overstory or shelterwood removal with replanting. While SDS
8 estimates that its largest clearcut would be 10 acres, it does not
9 know the mix of clearcut versus overstory removal nor the location of
10 these relative to the lower White Salmon River corridor established
11 under the Wild and Scenic Rivers Act. These decisions would be made
12 on the site at the time of harvest.

VIII

13
14 On January 24, 1990, SDS filed a second forest practices
15 application with DNR. By this, SDS sought to harvest 20 acres. The
16 application under "Type of Operation" stated "Overstory Removal."
17 Under "Estimated volume to be Cut" it stated "100%." Approximately 10
18 acres of this proposed harvest are within the scenic corridor of the
19 lower White Salmon River. The application excludes a 200 foot strip
20 along the White Salmon River which is subject to selective cutting
21 only as a shoreline of statewide significance under the Washington
22 State Shoreline Management Act, chapter 90.58 RCW. This application
23 was numbered FP01-04565 and the harvest is proposed in Section 19,
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1 T4N, R11E.W.M. For simplicity it will be referred to as the "northern
2 tract."

3 IX

4 The declaration of "Overstory Removal" and "100%" mean that the
5 northern tract would be neither clearcut nor selectively cut, but
6 harvested of its mature timber with immature trees left unharvested.
7 The application indicates that there would be an average of 400 stems
8 per acre left unharvested. The size of these is unspecified and would
9 vary.

10 X

11 Both SDS timber cutting applications were classified by DNR under
12 WAC 222-16-050 as exempt from the Washington State Environmental
13 Policy Act, chapter 43.21C RCW (SEPA). The northern tract proposal
14 with 10 acres in the scenic corridor was processed as a Class II
15 notification. The Southern tract proposal with 12 acres in the scenic
16 corridor was processed as a Class III application.

17 XI

18 DNR contends that it lacked authority to consider the scenic or
19 aesthetic effects of the proposed timber cutting. DNR did not
20 consider those effects. It did consider the effect of the proposal on
21 Indian cultural resources, wildlife and a county trail.

22 XII

23 DNR approved the SDS timber cutting applications for both the
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1 northern and southern tracts. Appellant Friends of the White Salmon
2 appeals from these approvals.

3 XIII

4 The evidence in this matter can be divided into four major
5 headings. These are the effect of the proposed timber cutting on: 1)
6 scenic beauty (aesthetic effect), 2) Indian cultural resources, 3)
7 wildlife, and 4) a Klickitat County trail.

8 XIV

9 Scenic Beauty. The lower White Salmon River was designated
10 under the following Congressional declaration of policy appearing in
11 the Wild and Scenic Rivers Act (Public Law 90-542)-October 2, 1968.

12 § 1271. Congressional declaration of policy

13 *It is hereby declared to be the policy of the United*
14 *States that certain selected rivers of the Nation*
15 *which, with their immediate environments, possess*
16 *outstandingly remarkable scenic, recreational,*
17 *geologic, fish and wildlife, historic, cultural, or*
18 *other similar values, shall be preserved in*
19 *free-flowing condition, and that they and their*
20 *immediate environments shall be protected for the*
21 *benefit and enjoyment of present and future*
22 *generations. The Congress declares that the*
23 *established national policy of dam and other*
24 *construction at appropriate sections of the rivers of*
25 *the United States needs to be complemented by a policy*
26 *that would preserve other selected rivers or sections*
27 *thereof in their free-flowing condition to protect the*
water quality of such rivers and to fulfill other vital
national conservation purposes. (16 USC §1271,
emphasis added).

The lower White Salmon River and its immediate environments within the

1 interim scenic corridor do possess outstandingly remarkable scenic
2 beauty.

3 XV

4 Lands within the scenic corridor are subject to a mosaic of uses
5 including town sites, orchards, farm fields, and timber growing.
6 There are natural and planted stands of timber. There are natural and
7 man made openings in the forest. The objective of the USFS is to
8 retain this mosaic of uses, including timber production, within the
9 scenic corridor.

10 XVI

11 The aesthetics of clearcutting in areas designated under the Wild
12 and Scenic Rivers Act has been addressed in the Timber/Fish/Wildlife
13 Agreement. The TFW Agreement is best explained in the Introduction to
14 its Final Report. This describes the TFW Process, in pertinent part,
15 as follows:

16
17 *It is the culmination of nearly six months of intense,
18 difficult work. It represents the knowledge, hopes and
19 aspirations of a group of dedicated men and women who
20 decided to try a new way. They chose to resolve their
21 differences through education, negotiation and respect
22 for each others views. To the extent they succeeded
23 the citizens of the State of Washington and the natural
24 resources they revere are the winners.*

25
26 *Those who forged the agreement held one thing in
27 common; a deep love and respect for the natural
resources of our state. It was this bond that kept
them at the table through some 60 long, difficult often
emotionally draining meetings.*

1 Participants in the negotiations included
2 representatives of a number of Indian tribes, the
3 Northwest Indian Fisheries Commission, the Columbia
4 River Intertribal Fish Commission, Washington
5 Environmental Council and Audubon Society, Washington
6 Forest Protection Association and Washington Farm
7 Forestry Association, Weyerhaeuser, Georgia Pacific,
8 Plum Creek and Simpson Timber companies, and the state
9 departments of Natural Resources, Ecology, Fisheries
10 and Game. The discussion received crucial assistance
11 from the Northwest Renewable Resources Center of
12 Seattle in organizing and facilitating this effort.

13 They met in July 1986, over forty individuals,
14 representing the tribes, the environmental community,
15 state natural resources agencies, and the timber
16 industry. They adopted new ground rules for doing
17 business with one another. The rules were quite
18 simple. The results they produced are quite profound.
19 The participants agreed that the State of Washington
20 needs a viable timber industry and it needs to protect
21 and enhance its fish, wildlife, water and
22 cultural/archeological resources. Further, they agreed
23 that these needs are not mutually exclusive. They are
24 compatible

25 XVII

26 The TFW Agreement provides:

27 The participants also agree that, given the need to
balance all of these concerns, the aesthetics of
clearcutting should not be an issue in timber harvest
management in this state except in areas already
designated or under consideration for wild and scenic
river status. (Final Report, p. 32, emphasis added.)

XVIII

At the end of the 101st Congress, First Session (1989), segments
of the following rivers were designated under the Wild and Scenic
Rivers Act in Washington:

1. Skagit River, 16 USC §1274 (18)

1 the Cascade Range to Ponderosa Pine forests associated with lands east
2 of the Cascades. Yet the principal tree species of unique value to
3 wildlife in the area is the oak. SDS has conferred with the
4 Washington Department of Wildlife (WDW) concerning the oak. WDW has
5 indicated oak's value for the Western Gray Squirrel which is listed by
6 Washington as a threatened species. Accordingly, SDS has agreed that
7 pure stands of oak will not be cut as part of this proposal. It has
8 further agreed to consult WDW concerning oak removal from mixed
9 stands. WDW approved an oak management plan submitted by SDS.

10 XXI

11 Klickitat County Trail. The Weldon Wagon Trail, an historic
12 pioneer route, is now owned by Klickitat County which maintains it
13 within its county trail system. The Wagon Trail is used regularly for
14 hiking and passes through the SDS southern tract. SDS has voluntarily
15 agreed to a leave strip along this right of way.

16 XXII

17 The evidence in this case shows that SDS has conducted itself as
18 responsible timber owner and manager.

19 XXIII

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

22 CONCLUSIONS OF LAW

23 I

24 Jurisdiction. As a threshold matter, the Forest Practices
25

1 Board and the other respondents contend that we lack jurisdiction to
2 review the consistency of forest practices regulations with the State
3 Forest Practices Act, chapter 76.09 RCW, and the State Environmental
4 Policy Act, chapter 43.21C RCW when such regulations are applied by
5 DNR in a permit action which is brought before us for review. We hold
6 that we have such jurisdiction in contested cases involving DNR permit
7 or enforcement actions. Snohomish County and Washington Environmental
8 Council v. Department of Natural Resources, et. al., FPAB Nos. 89-12
9 and 89-13 (1989). Our primary jurisdiction in this regard was also
10 established in Snohomish County v. Department of Natural Resources,
11 et. al., Thurston County Superior Court No. 89-2-01491-0 (1989).
12 Contra, Snohomish County v. Department of Natural Resources, et.al.,
13 Snohomish County Superior Court No. 89-2-06923-5 (1990).

14 II

15 Rule Validity. Appellant Friends of the White Salmon,
16 challenges the validity of WAC 222-16-050, a forest practices
17 regulation which classifies those forest practices which are subject
18 to the State Environmental Policy Act, chapter 43.21C RCW (SEPA). The
19 regulation, as applied by DNR in this case, provides in pertinent
20 part, as follows:

- 21 (1) "Class IV - special." Application to conduct
22 forest practices involving the following
23 circumstances requires an environmental checklist
24 in compliance with the state environmental policy
25 act (SEPA), and SEPA guidelines, as they have been
26 determined to have potential for a substantial
impact on the environment. It may be determined
that additional information or a detailed
environmental statement is required before these
forest practices may be conducted.

- 2 (a) Aerial application of pesticides to an "area of
3 water supply interest" as determined according
4 to WAC 222-38-020(5) (i).
- 5 (b) Harvesting, road construction, site preparation
6 or aerial application of pesticides:
7 (i) On lands known to contain a breeding pair
8 or the nest or breeding grounds of any
9 threatened or endangered species; or
10 (ii) Within the critical habitat designated
11 for such species by the United States
12 Fish and Wildlife Service.
- 13 (c) Widespread use of DDT or a similar persistent
14 insecticide.
- 15 (d) Harvesting, road construction, aerial
16 application of pesticides and site preparation
17 on all lands within the boundaries of any
18 national park, state park, or any park of a
19 local governmental entity, except park managed
20 salvage of merchantable forest products.
- 21 (e) Construction of roads, landings, rock quarries,
22 gravel pits, borrow pits, and spoil disposal
23 areas on slide prone areas as defined in WAC
24 222-24-020(6) when such slide prone areas occur
25 on an uninterrupted slope above a Type 1, 2, 3
26 or 4 Water where there is potential for a
27 substantial debris flow or mass failure to
cause significant impact to public resources.

This rule is under-inclusive. It is not reasonably consistent with RCW 76.09.050(1) which makes SEPA applicable to forest practices "which have a potential for a substantial impact on the environment." WAC 222-16-050(1) exceeds the statutory authority of RCW 76.09.050(1) and is invalid. Snohomish County, FPAB Nos. 89-12 and 89-13, supra; accord, Snohomish County, Sno. Co. Superior Ct. No. 89-2-06923-5, supra.

III

DNR's classification of these forest practices as exempt from

1 SEPA in reliance upon WAC 222-16-050, an invalid regulation, was
2 improper. On review, we will look to the evidence before us to
3 determine whether the proposed forest practices have a "potential for
4 a substantial impact on the environment" and are thus subject of SEPA
5 under RCW 76.09.050(1) of the Forest Practices Act. See Snohomish
6 County, FPAB Nos. 89-12 and 89-13, supra, at p. 33 (lines 21-24).

7 IV

8 Scenic resources and aesthetics are elements of the environment
9 under SEPA. WAC 197-11-444(1)(e)(v), (2)(b)(iv). See also, Victoria
10 Tower Partnership v. Seattle, 59 Wn. App. 592 (1990). We do not
11 believe that the phrase "potential for a substantial impact on the
12 environment" as used in the Forest practices Act imparts any different
13 meaning to the word "environment." To the contrary, the Legislative
14 finding and declaration within the Forest Practices Act provides:

15 . . . that it is in the public interest or public and
16 private commercial forest lands to be managed
17 consistent with sound policies of natural resource
18 protection; that consistent with maintenance of a
19 viable forest products industry, it is important to
20 afford protection to forest soils, fisheries, wildlife,
21 water quantity and quality, air quality, recreation
22 and scenic beauty. RCW 76.09.010 (emphasis added.)

23 We conclude that scenic beauty is an element of the environment as
24 expressed in the phrase "potential for a substantial impact on the
25 environment" within RCW 76.09.050 of the Forest Practices Act.

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V

Designation of the lower White Salmon River under the U.S. Wild and Scenic Rivers Act is relevant, probative and persuasive evidence that scenic values there are such that timber cutting in the scenic corridor will have a "potential for a substantial impact on the environment" under the Forest Practices Act.

VI

Respondent, SDS, cites Section 17(c) of the Columbia River Gorge National Scenic Area Act (Public Law 99-663) - November 17, 1986.

This provides:

Except for the management, utilization, or disposal of timber resources of non-Federal lands within the special management areas, nothing in this Act shall affect the rights and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable state law supersede such Acts.

Yet it is not that Act which obligates state officials to consider the effects of timber cutting on scenic beauty. That obligation comes from the Forest Practices Act. If the latter statute requires that timber cutting be examined under SEPA, nothing in the 1986 U.S. Scenic Area Act changes this. If the Forest Practices Act was not administered with protection for scenic beauty under SEPA in the past, that is due not to the meaning of the Act but the invalid regulation, WAC 222-16-050, through which the Act has been administered to this date. Section 17(C) of the U.S. Scenic Area Act does not prohibit examination of timber cutting under SEPA and the Forest Practices Act.

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VII

The TFW Agreement is not a binding administrative rule in that DNR has not adopted it in substantial compliance with rule making procedures. RCW 34.05.375. Neither does it appear to be binding as an interpretive and policy statement for even were it such a statement it would be advisory. RCW 34.05.230. The TFW Agreement involves negotiations with participants, and not an engagement between parties upon a legal consideration. It therefore does not constitute a binding contract.

VIII

The TFW Agreement is the written consensus of diverse persons, public and private, each with a keen interest and substantial stake in Washington's forest resource. As such it is relevant evidence that clearcutting in a national scenic river corridor will have a "potential for a substantial impact on the environment" under the Forest Practices Act.

IX

The applications at issue, even as conditioned and explained in the testimony, do not rule out either clearcutting or overstory removal which leaves behind stock of unspecified size. This also tends to establish a "potential for a substantial impact on the environment" under the Forest Practices Act.

X

This case involves clearcutting or overstory removal leaving stock of unspecified size within a National Wild and Scenic River corridor. The sum total of these facts establishes that the proposed forest practices have a potential for a substantial impact on the environment. Therefore, these applications should be remanded to DNR for an evaluation as to whether or not a detailed statement must be prepared pursuant to SEPA. RCW 76.09.050(1).

XI

The actions and determinations by DNR with respect to Indian cultural resources, wildlife and the Klickitat County trail were correct.

XII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

The forest practices applications of SDS Lumber Company approved by Department of Natural Resources are hereby reversed as to the land within the Interim Boundaries of the White Salmon National Scenic River corrior amd remanded to DNR for evaluation as to whether or not a detailed statement must be prepared pursuant to the State Environmental Policy Act, chapter 43.21C RCW. The applications are affirmed as to land outside the Interim Boundaries.

DONE at Lacey, Washington, this 16th day of January 1991.

FOREST PRACTICES APPEALS BOARD

Claudia K. Craig
CLAUDIA K. CRAIG, Chairperson

Norman L. Winn
NORMAN L. WINN, Member

Dr. Martin R. Kaatz
DR. MARTIN R. KAATZ, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge