BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

COLUMBIA RIVER GORGE COMMISSION and CENTRAL CASCADES ALLIANCE,	)	FPAB NO. 95-31
and	)	
UNITED STATES FOREST SERVICE,	)	FPAB NO. 95-32
Appellants,	)	
v.	)	**FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT**
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES, SEEDER TREE COMPANY, SKAMANIA COUNTY, and FOREST PRACTICES BOARD,	)	
Respondents.	)	

This matter came on before the Honorable William A. Harrison, Administrative Appeals Judge, presiding, and Board Member, Robert E. Quoidbach. Board Members, Dr. Martin R. Kaatz, Chairman, and Gregory T. Costello have considered the record.

The matter concerns the relationship of State forest practices approvals and the Columbia River Gorge National Scenic Area Act. The parties have filed cross motions for summary judgment in this matter. The following documents were filed and considered:

1. Appellant United States Forest Service Motion for and Memorandum in Support of Summary Judgment, filed December 8, 1995.

2. Motion for Summary Judgment of Appellants, Columbia River Gorge Commission and Central Cascades Alliance, and attachments thereto, filed December 11, 1995.

3. Seeder Tree Company's Motion for Summary Judgment, and attachments thereto, filed December 12, 1995.

4. Forest Practices Board and Department of Natural Resources' Response to Summary Judgment Motions, and attachments thereto, filed December 21, 1995.

5. Skamania County's Response to Motions for Summary Judgment, and attachments thereto, filed December 21, 1995.

6. Seeder Tree Company's Memorandum in Opposition to Appellants' Motions for Summary Judgment, and attachments thereto, filed December 26, 1995.

7. Reply Memorandum of Authority in Support of Motion for Summary Judgment of Appellant Columbia River Gorge Commission and Response to Seeder Tree's Motion for Summary Judgment, and attachments thereto, filed April 5, 1996.

8. Appellant Central Cascade Alliance and U.S. Forest Service's Reply in Support of Their Motion for Summary Judgment and Response to Seeder Tree's Motion for Summary Judgment, and attachments thereto, filed April 8, 1996.

9. Seeder Tree Company's Reply Memorandum in Support of Its Motion for Summary Judgment, filed April 15, 1996.

In addition, the oral argument of counsel was heard on June 14, 1996, with appearances as follows:

1. Lawrence Watters, Attorney at Law, for the appellant, Columbia River Gorge Commission.

2. Gary Kahn, Attorney at Law, for the appellant, Central Cascades Alliance.

3. Jocelyn B. Somers, Office of General Counsel, Department of Agriculture, for the appellant, United States Forest Service.

4. Kay M. Brown, Assistant Attorney General, for the respondent, Washington State Department of Natural Resources.

5. Bradley W. Anderson, Prosecuting Attorney, for the respondent, Skamania County.

6. Patricia Hickey O'Brien, Assistant Attorney General, for the respondent, Washington State Forest Practices Board.

7. Michael E. Haglund, Attorney at Law, for the respondent, Seeder Tree Company, Inc. Having considered the motions and supporting documents, having heard the oral argument of counsel, having considered the record and file herein, and being fully advised, and having determined that there is no genuine issue of material fact, the following is hereby entered:

FINDINGS OF FACT

I

Respondent, the Washington State Department of Natural Resources (DNR), administers the State Forest Practices Act, chapter 76.09 RCW which requires approval by prior permit for

timber harvests on private and state lands. Respondent, Seeder Tree Company, owns a 240 acre tract of forest land in Skamania County near the Columbia River.

II

On November 2, 1995, Seeder Tree filed a forest practices application with DNR by which it sought to harvest 147 acres of its tract. The method specified was "even-age" harvest, which may be equated to a clear-cut (five trees per acre would remain on the 147 acres after harvest).

III

Seeder Tree's forest land tract lies within the Columbia Gorge Scenic Area, so designated by Congress in the Columbia River Gorge National Scenic Area Act (NSAA). This Act protects the scenic and other resources of the Columbia River Gorge area in Washington State and Oregon. Seeder Tree's tract is within a "Special Management Area" under the NSAA.

IV

Upon receiving Seeder Tree's forest practices application, the DNR sent copies of it to the Washington State Department of Fish and Wildlife, the Columbia River Gorge Commission, and the U.S. Forest Service. The DNR also sent a letter to the applicant, Seeder Tree, indicating that the site lay within the Columbia Gorge Scenic Area, and informing Seeder Tree of the need to comply with the NSAA. This is the DNR's standard practice for forest practice applications in the Columbia Gorge Scenic Area.

V

On November 13, 1995, a representative of the Washington State Department of Fish and Wildlife submitted a letter to the DNR confirming that habitat for the Larch Mountain Salamander, a state-listed sensitive species, is found at seven locations within the site. The letter went on to indicate that the NSAA, and plans and ordinances under it, would require a "natural resources mitigation plan" to protect sensitive wildlife and other resources.

VI

Appellant, the Columbia River Gorge Commission, is a bi-state commission whose members are appointed by the states of Washington and Oregon, and which was authorized by Congress in the NSAA. On November 15, 1995, the Executive Director of the Gorge Commission provided the DNR with a list of requirements from the NSAA Management Plan. These included mandatory buffer areas for wetlands and streams, and for sensitive wildlife species such as the Larch Mountain salamander. In addition, the Executive Director pointed out the maximum size for any newly created opening, which was stated to be 15 acres. Reference was also made to requirements for thermal cover for big game winter range.

VII

On November 16, 1995, an official of the U.S. Forest Service also wrote to the DNR citing requirements of the NSAA and its plans and ordinances. His letter stated that "...the forest practice, as submitted to DNR, is inconsistent with the National Scenic Areas Act and Management Plan...".

VIII

On November 20, 1995, the DNR granted a forest practices approval (FPA) to Seeder Tree, for the even age harvest of 147 acres, as sought. The FPA, however, contained this express disclaimer:

> Compliance with this application/notification does not ensure compliance with the Endangered Species Act, or other federal, state or local laws.

IX

From this approval, the Columbia River Gorge Commission, the Central Cascades Alliance and the U.S. Forest Service appeal.

X

Pursuant to an Order entered herein on November 30, 1995, the parties have agreed that no action under the disputed FPA will be undertaken except upon 7 days notice by Seeder Tree to the appellants. As of the date hereof, no such notice or action has been given or commenced. Seeder Tree recognizes the applicability of the NSAA to its tract, and does not propose to harvest in violation of the NSAA.

XI

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

The appellants contend that the DNR's approval of Seeder Tree's forest practice application was in contravention of the NSAA and that the DNR should have denied, or added site-specific conditions to, its approval in order to meet the NSAA. We hold that: 1) the DNR was not bound to deny, or add site-specific conditions to, its approval in order to meet the NSAA, 2) that the approval in this case was proper, and 3) that the effect of the NSAA upon the DNR differs from its effect upon one who applies to harvest or manage timber. Our reasoning follows:

THE DNR WAS NOT BOUND TO DENY, OR ADD SITE-SPECIFIC CONDITIONS TO, ITS APPROVAL IN ORDER TO MEET THE NSAA.

II

The State Forest Practices Act. The State Forest Practices Act is specific in linking the approval or disapproval of a state forest practices application to the Forest Practices Act and its regulations. The Act grants the DNR the power of approval or denial over forest practices applications as follows:

> (5) The department of natural resources shall notify the applicant in writing of either its approval of the application or its disapproval of the application *and the specific manner in which the application fails to comply with the provisions of this section or with the forest practices regulations.*
> RCW 76.09.050 (5) *Emphasis added.*

The DNR must therefore make its approval or disapproval decision based solely upon the Forest Practices Act and its regulations. In this case, no provision of the Forest Practices Act or

regulations requires the disapproval or conditioning of Seeder Tree's forest practices application to meet the more restrictive requirements of the NSAA.

III

The National Scenic Area Act. Nothing in the National Scenic Area Act or the state legislation ratifying the NSAA, RCW 43.97.015 ("compact"), requires or suggests that the DNR must deny or condition forest practices applications to meet the NSAA. Rather, the NSAA contemplates administration by either the Gorge Commission or the counties.

IV

Throughout the NSAA, Congress directs the Gorge Commission to develop land use designations for the non-federal lands within the scenic area. 16 USC Sec. 544d (b). The land use designations, along with guidelines for the adoption of land use ordinances, are to be adopted by the Gorge Commission in the form of a Management Plan. 16 USC Sec. 544d (c). The non-federal (private and state) lands within the scenic area "shall be administered" by the Gorge Commission in accordance with the NSAA and Management Plan. 16 USC Sec 544e (a). Counties shall submit to the Gorge Commission a land use ordinance consistent with the Management Plan. 16 USC 544e (b). Thus, either the Gorge Commission or the counties administer the NSAA. We do not have before us, and do not decide, which of these two entities has lead responsibility, only that it is one or the other of them, and not the state DNR.

V

Appellants cite the following language of the NSAA for the proposition that the DNR must administer the NSAA through its forest practices program:

> [T]he States of Oregon and Washington shall provide to the Commission, state agencies, and the counties under state law the authority to carry out their respective functions and responsibilities *in accordance with paragraph 1 (A) of this subsection.*
> 16 USC Sec. 544c (a) (1) (B). *Emphasis added.*

Paragraph 1 (A), cited above, provides:

> [T]he States of Oregon and Washington shall establish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission, and shall incorporate this Act by specific reference in such agreement. The Commission shall carry out its functions and responsibilities in accordance with the provisions of the interstate agreement and of the Act and shall not be considered an agency or instrumentality of the United States for the purposes of any Federal law; 16 USC Sec 544c (a) (1) (A).

The meaning of these two paragraphs is that the states must provide the Gorge Commission, state agencies and counties with the authority to allow the Gorge Commission to carry out its duties under the NSAA. These sections do not impose a requirement upon the DNR to administer the NSAA.

VI

Appellants also cite the following language of the compact implementing the NSAA for the proposition that the DNR must administer the NSAA through its forest practices program:

> [T]he governor, the Columbia River Gorge Commission, and all state agencies and counties are hereby directed and provided authority to carry out *their respective functions and responsibilities in accordance with the compact* executed pursuant to RCW 43.97.015, *the Columbia River Gorge National Scenic Area Act, and the provisions of this chapter.*RCW 43.97.025 (1) *Emphasis added.*

The "functions and responsibilities" of the state DNR are to approve or disapprove forest practices applications based solely upon the State Forest Practices Act and regulations. RCW 76.09.050 (5), *supra.* However, this must be carried out "in accordance with" the NSAA. RCW 43.97.025 (1), *supra.* The phrase "in accordance with" is not specially defined. Therefore it must be given its usual and accustomed meaning. *See, e.g.* State v. Friend, 59 Wn. App. 365, 367 (1990). The dictionary may be used to determine the usual and accustomed meaning. Discipline of Blauvelt, 115 Wn.2d 735,741 (1990). The dictionary defines "accordance" to mean "agreement." *Webster's Third New International Dictionary*, 12 (1971). "Agreement" means " the act of agreeing or coming to a mutual agreement." *Id.* p.42. To be in mutual agreement with the NSAA, the DNR must not approve an FPA which purports to supervene the NSAA. It has not done so here. In this case, the DNR stipulates that the NSAA supplements existing forest practices regulations under the state Forest Practices Act (Response to Summary Judgment Motions, p.4, lines 10-13). The DNR issued its FPA with the disclaimer that compliance with it does not ensure compliance with other federal or state laws. This places the FPA granted by the DNR in mutual agreement with the NSAA and its site-specific requirements. Those requirements are to be formulated by the Gorge Commission, or counties, as administrator of the NSAA.

VII

A requirement to be "in accordance with" or in mutual agreement with the NSAA is distinct from a requirement to administer the NSAA. Where the Legislature intended that an entity of government administer both its traditional program and the NSAA simultaneously, it

proceeded differently. First, it amended the enabling statute of the entity concerned, and, second, it made the exercise of the entity's traditional powers "subject to" NSAA authority. For example, the following was added to the State Shoreline Management Act, chapter 90.58 RCW:

> With respect to the National Scenic Area, as defined in the Columbia [River] Gorge National Scenic Area Act, [16 USC Sec. 544, et. seq.], the exercise of any power or authority by a local government or the department of ecology pursuant to this chapter shall be *subject to* and in conformity with the requirements of chapter 43.97 RCW, including the management plan regulations and ordinances adopted by the Columbia River Gorge Commission pursuant to the Compact. RCW 90.58.600 *Emphasis added.*

By contrast, the Legislature did not amend the Forest Practices Act. Nor is the phrase "in accordance with", used in the compact at RCW 43.97.025 (1), *supra,* the same as the phrase "subject to", used in the Shoreline Management Act at RCW 90.58.600, *supra*. *See also:* RCW 35.22.700; RCW 35.63.150; RCW 35A.63.200; RCW 36.32.550; and RCW 36.70.980 amending the county enabling statutes, and employing the phrase "subject to" as in RCW 90.58.600, *supra.* Where the Legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent. United Parcel Service v. State, Dep't. of Revenue, 102 Wn. 2d. 355, 687 P.2d. 186 (1984), Seeber v. Washington State Public Disclosure Com'n., 96 Wn. 2d 135, 634 P.2d 303 (1981), and Van Dyk v. Department of Revenue, 41 Wash.App. 71, 702 P.2d 472 (1985). Here, the Legislature used the phrase "in accordance with" in RCW 43.97.025 (1) to mean that DNR's FPA must be in mutual agreement with the NSAA. It was so by virtue of its disclaimer. The Legislature used the phrase "subject to", as set out above, to require an agency to administer the NSAA. It chose not to so require in the case of the DNR.

VIII

The foregoing statutes determine that the DNR administers the Forest Practices Act, only, and not the NSAA. The Management Plan adopted by the Gorge Commission to further the NSAA provides for this:

> Each state forest practices agency *should regulate forest practices in the SMA*, using the SMA guidelines for protection of the scenic, cultural recreation and natural resources, with the Forest Service providing the review for compliance with these guidelines. *If the state fails to assume this role*, the Gorge Commission shall assume this regulatory responsibility. Until a regulatory mechanism is in place, the Forest Service shall continue to review site plans for forest practices for compliance with these guidelines.
> Management Plan, II-36, *Emphasis added.*

The first phrase emphasized above, that each state agency "should" regulate forest practices in the SMA, is merely aspirational. It cannot contradict the contrary statutory result. The second phrase emphasized above, "If the state fails to assume this role", is presently compelled by statute, and is recognized in the Management Plan.

IX

In summary, the DNR is limited by the Forest Practices Act to approving or disapproving an FPA pursuant to the Forest Practices Act and its regulations. The National Scenic Area Act does not alter this, nor require the DNR to administer the NSAA. The DNR was not bound to deny, or add site-specific conditions to, its approval in order to meet the NSAA.

THE APPROVAL IN THIS CASE WAS PROPER.

X

There has been no showing in this case that Seeder Tree's application failed to comply with the Forest Practices Act or its regulations.

XI

The FPA issued by the DNR did not purport to disregard or supervene the NSAA, and contained a disclaimer that compliance with the FPA does not ensure compliance with other federal or state laws. The FPA was therefore issued in accordance with the NSAA and related authority.

XII

The FPA granted by DNR to Seeder Tree was proper, and should be affirmed.

THE EFFECT OF THE NSAA UPON THE DNR DIFFERS FROM ITS EFFECT UPON ONE WHO SEEKS TO HARVEST OR MANAGE TIMBER.

XIII

No competent authority has been cited to us, and we know of none, by which the NSAA preempts the Forest Practices Act or by which the Forest Practices Act preempts the NSAA. Rather, these are acts derived from mutual federal and state jurisdiction over forest practices. In such a situation, as we have held, the DNR administers the Forest Practices Act while the Gorge Commission or the counties administer the NSAA. However, one who seeks to conduct a forest practice is subject to both enactments. RCW 76.09.050 and 16 USC 544e (a) and -544o (c). Under these circumstances, consistency between the acts is achieved through the principle that the more stringent provision controls. One who seeks to conduct a forest practice must determine through the DNR what the Forest Practices Act requires, and through the Gorge

Commission, or the county, what the NSAA requires. Thus, while DNR does not administer the NSAA, the NSAA requirements bind one who conducts a forest practice. It is the responsibility of the DNR not to issue an FPA which purports to supervene the NSAA. But it is the responsibility of the one proposing a forest practice to know and adhere to the specific requirements of the NSAA. In that respect the effect of the NSAA upon the DNR differs from its effect upon the one proposing a forest practice.

XIV

The relationship between the Forest Practices Act and the NSAA is like that between the Forest Practices Act and several other laws affecting forest practices, including:

1. The Federal Endangered Species Act, 16 USC Sec. 1531, et. seq.
2. The Sec. 404 permit program of the Federal Clean Water Act, 33 USC Sec. 1344.
3. The Sec. 401 permit program of the Federal Clean Water Act, 33 USC Sec. 1341.
4. The State Shoreline Management Act, chapter 90.58 RCW.
5. The State Hydraulics Act, chapter 75.20 RCW.
6. The County Zoning, Filling and Grading Ordinances.

One who seeks to conduct a forest practice must not only determine through the DNR what the Forest Practices Act requires, but must determine through another entity of government what each of the above acts require. The NSAA is not unique in that respect.

XV

Finally, we commend the DNR's policy of informing the applicant by letter of the NSAA, where it applies. Neither here, nor elsewhere that we are aware of, has the DNR left an

applicant with the misapprehension that activity conducted under a state FPA is immune from the NSAA.

XVI

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

ORDER

1. The appellants' Motions for Summary Judgment are denied.

2. The respondent's Motion for Summary Judgment is granted.

3. The FPA issued by the Department of Natural Resources to the Seeder Tree Company is, hereby, affirmed.

DONE at Lacey, Washington, this 10th day of October 1996.

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

DR. MARTIN R. KAATZ, Chairman

ROBERT E. QUOIDBACH, Member

GREGORY T. COSTELLO, Member