

FOREST PRACTICES BOARD

State of Washington

February 13, 2003

Petition For Rulemaking (RCW 34.05.330) For Forest Practices Board to Adopt Rule(s) Requiring SEPA Cumulative Effects Review For Forest Practices Permits That Are Physically or Functionally Related to Past, Present, or Reasonably Foreseeable Future Permits or For Forest Practices Permits That Are Physically or Functionally Related To Permits Not Exempt From SEPA Review

Petitioners:

Alpine Lakes Protection Society
Friends of the Loomis Forest
Gifford Pinchot Task Force
Kettle Range Conservation Group
The Mountaineers
Northwest Ecosystem Alliance
Peninsula Neighborhood Association
Seattle Audubon Society
Washington Environmental Council
Washington Wilderness Coalition
Whidbey Environmental Action Network
Wildlife Forever of Grays Harbor

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I. INTRODUCTION AND SUMMARY

“Last week I went to Ellensburg to look at timber harvest plans in the Teanaway River area which left me unsettled about the potential for cumulative effects on lands that have both owls and fish currently listed. The issue is not the company or specifics of these particular circumstances but rather looking at a plan that appears to meet the minimum forest practice rule requirements, yet it seems counter-intuitive to think that there won’t be cumulative impacts as a result. I’m not sure this is what was ultimately intended as the new rules were being negotiated.”

*Letter to Forest Practices Board from John Daly,
former DNR Deputy Supervisor, Resource
Protection, dated January 2, 2001*

Multiple related SEPA-exempt forest practices in a single watershed or distinct geographic area can, and often do, have a significant, adverse cumulative impact on aquatic species, upland wildlife or elements of the environment protected by SEPA, such as aesthetics. Yet, the current Washington forest practices rules contain no "catch-all" mechanism or SEPA review process to ensure that these impacts do not occur. Rather, the current rules permit forest landowners to sequentially file physically and functionally related SEPA-exempt forest practice applications. Furthermore, the rules do not clearly authorize the Department of Natural Resources (“DNR”) to require landowners to disclose their future forest practice plans for purposes of conducting a meaningful SEPA cumulative effects or segmentation review. The Forest Practices Board’s (“FPB”) historic failure to adopt rules of this nature violates the FPB’s duties to implement both SEPA and the 1974 Forest Practices Act.

Scientifically-sound landscape-level planning or watershed analysis coupled with effective forest practices rules is the best mechanism for preventing and mitigating

cumulative impacts. In the meantime, however, a well-established and commonsensical SEPA rule authorizes DNR to conduct segmentation and cumulative effects review, WAC 197-11-305 (“Section 305”). Section 305 provides that an otherwise SEPA categorically- exempt action can trigger SEPA review if:

- ...(b) The proposal is a segment of a proposal that includes:
 - ...(ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction.

Several courts and the Forest Practices Appeals Board (“FPAB”) have held that Section 305 requires cumulative effects review for segmented forest practice applications, even those that are Class I, II, or III, under the forest practice rules.

In response to a Plum Creek Timber Co. lawsuit, however, the Washington Department of Ecology (“Ecology”) has recently commenced rulemaking to provide that Section 305 cannot be applied to Class I, II, or III forest practices. Ecology's rulemaking, coupled with the FPB’s anticipated argument that it never adopted Section 305 when it adopted the SEPA rules in 1984, requires the FPB to act immediately and to clearly adopt its "own" Section 305-like rule.

This Petition sets forth the legal reasons why the FPB has a duty-- an immediate duty-- to adopt a Section 305-like rule. This Petition also contains specific evidence forest "piecemealing" has taken place in both the Teanaway and Carbon River valleys and that this has resulted in serious adverse cumulative impacts on public resources and elements of the environment protected by SEPA.

The Petitioners commit to working with the FPB and other forest stakeholder to develop these rules.

II. RECENT DEPARTMENT OF ECOLOGY ACTION REQUIRING IMMEDIATE FOREST PRACTICES BOARD ACTION

During the past twelve years, two appellate courts,¹ the King County Superior Court,² and at least three panels of the FPAB,³ have held that Ecology's rule Section 305, as adopted by the FPB (WAC 222-12-050),⁴ applies to forest practice permit applications that are "segmented." In the most recent case, The Mountaineers v. Plum Creek Timber Co. and DNR, FPAB No. 00-029, the FPAB defined a "segmented" forest practice permit as one that is "operationally linked" to a past, present, or future forest practice permit."⁵ In response to this ruling, DNR has issued a Policy Memorandum clarifying for the Regions how they are required to apply Section 305 to forest practices. Attachment 7.

Plum Creek Timber Co. has appealed the FPAB's latest ruling to the Thurston County Superior Court and, in conjunction with that appeal, filed a formal lawsuit arguing that Section 305 cannot be applied under any circumstances to permits deemed Class I, II, or III under the forest practices rules.

DOE, however, has decided that its SEPA rule cannot be applied to Class I, II, or III forest practices. In a CR 102 rulemaking notice filed on January 15, 2003, Ecology announced its proposal to amend its SEPA rules to "clarify" that Ecology did not intend

¹ Snohomish County v. State, 69 Wn.App. at 666, 850 P.2d at 553 (1993); Plum Creek Timber Co., v. Washington State Forest Practices Appeals Bd., 99 Wn.App. 579, 589-91, 993 P.2d 287 (2000). Attachments 1, 2.

² Alpine Lakes Protection Society v. Plum Creek Timber Co., King County Superior Court No. 97-2-24568-1. Attachment 3.

³ Friends of the Columbia Gorge v. DNR and SDS Lumber Co., FPAB 93-61. Attachment 4. Alpine Lakes Protection Society v. DNR and Plum Creek Timber Co., FPAB 92-31 (1993). Attachment 5.

⁴ There is a legal issue of whether the FPB adopted Section 305 when it adopted the SEPA rules. This issue will be resolved in The Mountaineers case. This Petition assumes that the FPB did not legally adopt Section 305 when it adopted the SEPA rules. Petitioners, however, do not abandon or modify their position that the FPB adopted Section 305 when it adopted the SEPA rules in 1984.

⁵ Attachment 6.

to require SEPA review for Class I, II, or III forest practices that would otherwise be statutorily categorically-exempt from SEPA review. Attachment 8. Ecology is not proposing to change Section 305 itself. Rather, Ecology is attempting to make Section 305 inapplicable to forest practices by removing Class I, II, and III forest practices from the list of actions Ecology has administratively deemed to be exempt from SEPA review. This list of actions exempt from SEPA is set forth in WAC 197-11-800 and is known as Part Nine of the SEPA rules. Ecology anticipates the rule amendment will be adopted in April or May of 2003. Attachment 9.

In a letter to the FPB dated October 2, 2002, Tom Fitzsimmons, Director of Ecology, notified the FPB of Ecology's pending rule change. Mr. Fitzsimmons' letter suggested that Ecology's amendment requires the FPB to re-examine its own rules. Attachment 10. The FPB was planning to discuss this issue at its October 11, 2002 meeting but postponed this discussion without explanation.

In summary, the FPB has an immediate duty, particularly in light of Ecology's proposed amendment of WAC 197-11-800, to adopt forest practices rules that function in a manner similar to Ecology's Section 305. If the FPB does not adopt such a rule, the FPB will be in violation of its statutory duty under SEPA and the Forest Practices Act to classify forest practices according to their environmental impact. RCW 76.09.050(1).

II. ORGANIZATION OF PETITION

This Petition is organized as follows.

Section III: Identifies the petitioners.

Section IV: Summarizes the law pertaining to the petition for rulemaking process and the FPB's duty to implement statutory mandates.

Section V: Summarizes the statutory and regulatory scheme for forest practices.

Section VI: Describes Section 305 and the subject areas to which courts and the FPAB have held that it applies. This section explains what Section 305 is, where it came from, how it has been applied to forest practices, and recent legal developments that require the FPB to adopt a rule of this nature to counter-balance Ecology's proposed amendment of Section 305.

Section VII: This section explains the FPB's duty to adopt a rule that functions in a manner similar to Section 305 to prevent the piecemealing of forest practice applications. It also provides background relating to two geographic locations, the Teanaway Watershed and the Carbon River valley, where piecemealed individual forest practice applications have had a significant adverse impact on public resources and elements of the environment protected under SEPA.

The petitioners believe that the significant adverse environmental impacts that industrial logging has caused in these two locations could have been prevented or mitigated if the FPB's rules made clear that individual forest practices permits that are physically or functionally related require SEPA review when they pose a significant adverse cumulative impact.

III. DESCRIPTION OF PETITIONERS

Petitioners are twelve (12) conservation organizations whose members use, enjoy, and endeavor to protect Washington's forests, rivers, and mountains. Collectively, petitioners have invested hundreds of hours in numerous forums to develop, improve, and

obtain forest practice rules that provide adequate protection for forests, waters, wetlands, and other natural resources of Washington State. Their members derive recreational, aesthetic, life support, scientific, and educational benefits from the existence of healthy forests. Petitioners have also devoted extensive time to monitoring and challenging, where appropriate, individual forest practice applications that threaten to harm natural resources and the environment. Regrettably, petitioners have not been able to achieve adequate protection for natural resources through these efforts. The individual petitioner organizations are:

Alpine Lakes Protection Society, 1000 Second Avenue, Suite 1750, Seattle, WA 98104, (206) 363-6954. Contact: Rick McGuire. Established in 1968, ALPS is a nonprofit corporation existing under and by virtue of the laws of the State of Washington, having its principal place of business in Seattle, Washington. ALPS has approximately 225 members and is dedicated to the protection of the outstanding natural qualities of the Alpine Lakes region in the Central Cascades of Washington.

Friends of the Loomis Forest, P.O. Box 36, Loomis, WA 98827, (509) 826-1424. Contact: Mark Skatrud. Friends of the Loomis Forest is a non-profit conservation group who has worked since 1988 to conserve the natural values of the Loomis Forest.

Gifford Pinchot Task Force, P.O. Box 61647, Vancouver, WA 98666, (360) 992-8733. Contact: Susan Jane Brown. Since 1984, the Gifford Pinchot Task Force is a non-profit organization advocating for the ecosystems and communities of southwest Washington with particular focus on the Gifford Pinchot National Forest.

Kettle Range Conservation Group, P.O. Box 150, Republic, WA 99166, (509) 775-2667. Contact: Tim Coleman. Kettle Range Conservation Group is a rural-based, grassroots non-profit environmental organization formed in 1976 to seek wilderness protection for the Kettle River Mountains of northeast Washington. Kettle Range Conservation Group's ecosystem protection activities are focused on the Colville, Okanogan and Wenatchee National Forest, lands managed by DNR, and south-central British Columbia.

The Mountaineers, 300 Third Avenue West, Seattle, WA 98119, (206) 284-6310. Contact: Norm Winn or Nancy Neyenhouse. The Mountaineers is a nonprofit corporation organized in 1906 and existing under and by virtue of the laws of the State of Washington, having its principal place of business in Seattle, Washington. The Mountaineers has over 15,000 members, with organized chapters in Seattle, Tacoma, Bellingham, Everett, Olympia, and Wenatchee. The organization's purpose is to explore,

study, enjoy, and preserve, through protective legislation and otherwise, the natural resources and beauty of the Pacific Northwest.

Northwest Ecosystem Alliance, 1421 Cornwall Avenue, Suite 201, Bellingham, WA 98225, (360) 671-9950. Contact: Dave Werntz. Based in Bellingham, Washington, Northwest Ecosystem Alliance was founded as a non-profit organization in 1988 and has over 10,000 members. NWEA protects and restores wildlands in the Pacific Northwest and supports such efforts in British Columbia. NWEA bridges science and advocacy, working with activists, policy makers and the general public to conserve our natural heritage.

Peninsula Neighborhood Association, P.O. Box 507, Gig Harbor, WA 98335, (360) 858-3400. Contact: Joel Wingard. The PNA is a non-profit, grassroots community group dedicated to protecting and preserving the small-town feel and rural quality of life on the Gig Harbor and Key peninsula. The mission of the PNA is to: protect the environment, preserve the rural/residential character, and promote livable communities in the Gig Harbor and Key Peninsulas.

Seattle Audubon Society, 8050 35th Avenue NE, Seattle, WA 98115, (206) 523-4483. Contact: Alex Morgan. Seattle Audubon is a non-profit environmental organization committed to providing leadership for environmental issues, influencing public policy, and cooperating with neighborhoods, governments and other organizations to protect birds and nature. Since 1916, Seattle Audubon members and volunteers have continually worked for the protection, restoration and preservation of natural habitat for birds and other wildlife.

Washington Environmental Council, 615 Second Avenue, Suite 380, Seattle, WA 98104, (206) 622-8103. Contact: Becky Kelley. Washington Environmental Council is a 33 year-old non-profit conservation organization whose members use, enjoy, and endeavor to protect Washington's forests, rivers, and mountains and the hundreds of species living within these forests. WEC consists of approximately 90 member organizations and 3,000 individual members.

Washington Wilderness Coalition, 4649 Sunnyside Avenue North, Suite 520, Seattle, WA 98103, (206) 633-1992. Contact: Jill Smith. Washington Wilderness Coalition's mission is to defend Washington's remaining wild forests and rivers through education, grassroots organizing, and creative advocacy.

Whidbey Environmental Action Network, P.O. Box 53, Langley, WA 98260, (360) 579-4202. Contact: Marianne Edain. WEAN is a Washington nonprofit corporation formed in 1992, existing under and by virtue of the laws of the State of Washington and having its principal place of business in Langley, Washington. WEAN has approximately 400 members and is dedicated to the preservation and restoration of the native biological diversity of Whidbey Island and the Pacific Northwest.

Wildlife Forever of Grays Harbor, 231 N. Sand Creek Rd, McCleary WA 98557, (360) 495-3101. Contact: Dean Schwickerath. Wildlife Forever of Grays Harbor was founded in 2000 for the following purposes: 1) to protect wildlife habitat and the natural environment through science, advocacy, law, organizing and empowerment; 2) to educate the public about threats to wildlife habitat and the natural environment and the means and opportunities, including pollution prevention, to address these threats; 3) to provide incentives to individuals and corporations to abide by the letter and spirit of environmental laws for the benefit of wildlife habitat and the natural environment, and to hold persons accountable for actions taken in violation of environmental laws; and 4) to do any and all things necessary and desirable for the attainment of these purposes.

IV. LAW PERTAINING TO PETITIONS FOR RULEMAKING

A. The Petition Procedure.

The petition for rulemaking procedure is set forth in RCW 34.05.330. This provision authorizes interested citizens to file rulemaking petitions that request agencies to adopt, amend, or repeal a rule. The agency has sixty (60) days from the filing of a rulemaking petition to take one of two courses of action:

- (1) Deny the petition in writing stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner, and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner; or
- (2) Initiate rulemaking.

RCW 34.05.330 (1).

Petitioners request the FPB to act on this Petition within 60 days from the date of the filing of this Petition as set forth in RCW 34.05.330. We make this request even though the Board does not have a regularly scheduled meeting until May 14, 2003. We would be pleased to make special meeting arrangements with the Board.

B. Exhaustion of Administrative Remedies.

In a case involving the FPB's alleged failure to adopt or amend certain forest practice rules consistent with state law, Division Two of the Court of Appeals held that the filing of a petition for rulemaking was not a required exhaustion step prior to suing the agency under the RCW 34.05.570(4)(b) for failing to comply with its statutory mandates. Northwest Ecosystem Alliance v. Forest Practices Bd., 104 Wn.App. 901, 17 P.3d 697 (2000). The Washington State Supreme Court, however, accepted review of this case and held oral argument on September 19, 2002. A decision is pending. Given the pendency of this issue in the Supreme Court, petitioners have chosen to follow the Petition for Rulemaking procedure.

C. The FPB's Decision Whether to Initiate Rulemaking.

Agencies have the statutory duty to adopt regulations that are mandated by state statutes. Hillis v. Dept. of Ecology, 131 Wn.2d 373, 932 P.2d 139 (1997); Washington Coalition for the Homeless v. Dept. of Social and Health Services, 133 Wn.2d 894, 949 P.2d 1291 (1997). While agencies have the discretion to consider a variety of procedural factors in deciding when and how to implement these mandates, once the agency accumulates evidence that additional rulemaking is required to meet those mandates, the agency has a duty to act and this duty is not excused by fiscal or prioritization considerations. Rios v. Dept. of Labor and Indust., 103 Wn. App. 126, 5 P.3d 19, affirmed 145 Wn. 2d 483, 505 (2002). An agency's duty to act is particularly compelling where, as here, the FPB has invested its resources in investigating a subject area, such as the cumulative impact of multiple forest practices. Rios, 145 Wn.2d at 505.

Nor does an agency have the discretion to determine the scope of extent of its own authority. Rios, 145 Wn.2d at 510 (Alexander, J., concurring). An agency's discretion is limited to the terms of the statutory scheme that provides the agency its authority. Id.

In summary, the FPB has a legal duty to initiate rulemaking once it has been informed, as we do in this Petition, that circumstances (such as Ecology's pending amendment of WAC 197-11-800) have occurred that legally require the FPB to act.

V. STATUTORY BACKGROUND

A. The FPB's Responsibility - Forest Practices on 11,000,000 Acres.

Over half of Washington State is forested, with approximately one-half of this land under the management of the federal government and Native American Tribes. The balance, eleven million acres, is owned privately (approximately 78%) and by Washington State and various counties (approximately 22%), and is managed primarily for timber production.

B. The Forest Practices Act of 1974.

In 1974, the Washington State Legislature enacted the Washington Forest Practices Act, ("1974 Act") which is codified at RCW Ch. 76.09. Among the principal purposes of the 1974 Act is the intent "coincident with maintenance of a viable forest products industry" to protect "forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty." RCW 76.09.010(1).

The 1974 Act, along with regulating forest practices on private and state-owned land, also created the FPB, composed of eleven gubernatorial appointees and chaired by the Commissioner of Public Lands. RCW 76.09.030. The FPB's statutory responsibilities

include the duty to promulgate forest practices rules that accomplish all of the purposes and policies of the 1974 Act, and to establish minimum standards for the conduct of forest practices. RCW 76.09.010(2), 76.09.040(1), 76.09.040(1)(d). The FPB's duty to prepare and adopt forest practices rules that comply with the requirements of the 1974 Act is a continuing duty. RCW 76.09.010(2) states that the FPB must "create and maintain . . . a comprehensive statewide system of . . . forest practice regulations" that will achieve the purposes of the 1974 Act. See also RCW 76.09.040(1); WAC 222-08-035. Finally, to achieve these purposes, the 1974 Act requires the FPB to "utilize all reasonable methods of technology" in adopting rules governing the conduct of forest practices." RCW 76.09.010(2)(b).

C. The State Environmental Policy Act.

In 1971, the Legislature enacted SEPA, chapter 43.21C. SEPA requires a detailed environmental impact statement for any action that may have a significant adverse impact on the environment. RCW 43.21C.031. In addition, SEPA authorizes state agencies to impose substantive mitigation measures, or even refuse to approve a proposed project, in order to reduce or avoid significant adverse effects. RCW 43.21C.060.

SEPA procedures do not apply to all proposed forest practices on state and private lands, however. Under both SEPA and the 1974 Act, such procedures apply only to forest practices that "have a potential for a substantial impact on the environment." RCW 43.21C.037(3); RCW 76.09.050(1). In order to distinguish among the impacts of proposed forest practices, the 1974 Act creates four classes of practices. RCW 76.09.050(1). Only one of these, Class IV forest practices, are subject to SEPA procedures and must include all forest practices that "have a potential for a substantial

impact on the environment.” Id. The 1974 Act and SEPA exempt Class I, II, and III forest practices from SEPA review. RCW 76.09.050(1); RCW 43.21C.037.

The 1974 Act does not itself specify which forest practices fit into which classes. Rather, it delegates to the FPB the authority to make this determination through rule making. RCW 76.09.050(1). The FPB rules classifying those forest practices that have a potential for a substantial impact on the environment, and are therefore subject to SEPA, are set forth in WAC 222-16-050 and WAC 222-16-080. These rules, collectively referred to as the “Class IV-Special” rule, cover a limited and specific set of forest practices, including, for example, logging or road-building in critical wildlife habitat and forest practices on steep, slide-prone slopes above certain waterways and wetlands. WAC 222-16-050(1)(a)-(i).

SEPA supplements other existing agency authority (RCW 43.21C.030, WAC 197-11-030), and applies to all proposals that are not categorically exempt.

A proposal may be categorically exempt from SEPA in one of two ways. First, an action may be exempt by statute. Since adopting SEPA in 1971, the Legislature has enacted ten statutory exemptions for a wide variety of activities, including forest practices that the FPB has determined by rule to be Class I, II, and III. RCW 43.21C.037(1); 76.09.050(1).

The Legislature authorized Ecology to administratively-exempt activities from SEPA review which are not major actions significantly affecting the environment. RCW 43.21C.110(a). Ecology publishes its list of administratively exempt actions at WAC 197-11-800.

Although the Legislature gave agencies (such as the FPB and Ecology) the authority to determine whether an action shall be exempt from SEPA, the Legislature expressly directed that agencies adopt SEPA rules providing for circumstances where even categorically exempt actions are subject to SEPA review:

The rules shall provide for certain circumstances where actions which potentially are categorically exempt require environmental review.

RCW 43.21C.110(1)(a).

VI. WAC 197-11-305 AND FOREST PRACTICES

A. What is Section 305 and Where It Came From?

Section 305 is a SEPA rule promulgated by Ecology in WAC Ch. 197-11. Section 305 provides that an otherwise SEPA categorically-exempt proposal **can** trigger SEPA review if:

- ...(b) The proposal is a segment of a proposal that includes:
 - ...(ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction.

WAC 197-11-305 (emphasis added).

Section 305's origin is as follows. When it adopted SEPA in 1971, the Legislature assigned several responsibilities to Ecology, including the following: (1) to determine the types of actions that should be administratively exempt from SEPA review (e.g., those that do not constitute potential major actions significantly affecting the environment. RCW 43.21C.110(1)(a); and (2) to “provide for certain circumstances where actions which potentially are categorically exempt require environmental review.”

RCW 43.21C.110(1)(a).

In addition, a 1983 amendment to SEPA directed Ecology to adopt uniform statewide SEPA rules for interpreting and implementing SEPA. RCW 43.21C.110. The SEPA rules are codified at WAC 197-11. SEPA also required all state agencies to adopt, within 180 days, the SEPA rules “into [their] various programs under their jurisdiction.” RCW 43.21C.120(1).

Ecology adopted WAC 197-11-305 out of its responsibility to provide exemptions for multiple SEPA-exempt actions that may, cumulatively, have a significant adverse environmental impact or for actions that are related to actions that are not exempt from SEPA.

As required by SEPA, the FPB adopted the SEPA rules. The FPB did not specify which SEPA rules it adopted but, rather, adopted all of the SEPA rules in wholesale fashion in August of 1984. WAC 222-10-050. The FPB’s rule adopting the SEPA rule provides:

Except to those rules that may not be applicable, the forest practices board hereby adopts by reference chapter 197-11 WAC, the “SEPA rules” adopted by the Washington [D]epartment of [E]cology.”

WAC 222-12-050.

The FPB also adopted several SEPA policy rules to guide the FPB and DNR’s application of SEPA. The FPB has declared that the FPB’s SEPA classification rules are among the mechanisms for preventing multiple forest practices from having an adverse cumulative impact. WAC 222-12-046(2).

B. How Has Section 305 Been Applied to Forest Practices?

Over the years, courts and the FPAB have applied Section 305 to forest practices in several different ways. In Plum Creek Timber Co. v. Forest Practices Appeals Bd., 99

Wn.App. 579, 590, 993 P.2d 287 (2000), the Court characterized Section 305 as an anti-segmentation rule. In Plum Creek, the landowner sought to build a logging road to access its timber adjacent to the federal Alpine Lakes Wilderness area. DNR classified the proposed road as a “Class III forest practice,” which makes it categorically exempt from SEPA review. The landowner did not, however, disclose the nature of its future plans to cut timber from that road, and the plaintiff offered to prove that some of this future roadbuilding and logging, in combination with the present road permit, would have an adverse cumulative impact on elements of the environment, such as recreation and scenic beauty of adjacent public areas.

The Plum Creek court held that Section 305 applied to Plum Creek’s “road only” forest practice permit. The Court reasoned that Section 305 requires SEPA review when a proposal is a segment of a proposal and where the multiple segments can have a significant adverse environmental impact. Plum Creek, at 584. The Court held that the road and the future logging were related multiple segments. The Court also characterized Section 305 as, “recogniz[ing] that actions that are physically or functionally related to each other, but which would be exempt if evaluated in isolation, are subject to SEPA review if together they “may have a probable significant adverse environmental impact.” Plum Creek, at 590.

Twelve years earlier, the FPAB held that Section 305 permits DNR to take present and past logging into account when it considers a proposed forest practice application (“FPA”) that appears to be the first segment of a probable future proposal to conduct extensive logging in a specific geographic area. In Snohomish County v. State, FPAB 89-12, 13 (1989) (Lake Roesiger)(Attachment 11) a forest landowner (GSI) owned

2,600 acres of forest and another landowner (TAT) owned 5,200 acres. In March of 1989, GSI filed four (4) FPAs seeking to clear-cut 1,175 acres of their lands (75% of GSI's merchantable timber). Two months later, TAT filed two (2) FPAs to clear-cut 395 acres (13% of its merchantable timber). GSI and TAT eventually declared their intent to clear-cut all of their land within two years. FOF XIV.

While the FPAB eventually found that the FPAs were, as conditioned, not likely to cause significant cumulative adverse impacts to either fish habitat or terrestrial wildlife, FOF XXX, XXXIII, the FPAB nevertheless held that DNR was authorized and required to consider TAT and GSI's current FPAs in light of their past and future forest practices:

...[T]he term "impact" is defined under WAC 197-11-752 of the SEPA rules as "the effects or consequences of actions..." See also WAC 197-11-060(4)(e) specifying cumulative impacts. The impact of these proposed operations on water quality, wildlife, and other elements of the environment should be assessed in light of previous forest operations. The "effects or consequences of actions" proposed in present actions may intensify when added to actions already approved. Nothing in SEPA or the Forest Practices Act compels DNR to consider the forest practice application in isolation from previously approved applications in the same vicinity. The conclusion which we reach that these applications do not have a potential for a substantial impact on the environment is made with consideration of the cumulative impact of these and past forest practices approvals.

Lake Roesiger, C.O.L. XXIV (FOF, C.O.L., dated Nov. 13, 1989) (emphasis added).

On appeal, the Court of Appeals did not disturb the FPAB's ruling that DNR had the authority to consider the alleged cumulative impact of TAT and GSI's present and past FPAs. While the Snohomish County Court held that DNR could not subject individual Class III FPAs to SEPA review, the Court twice observed that individual FPAs could **lose** their categorical exemption "by operation" of Section 305. Snohomish County

v. State, 69 Wn.App. 655, 668,669, 850 P.2d 546 (1993)(“categorical exemptions are limited under WAC 197-11-305(1) for any proposal where cumulative effects are involved;” “[t]he contention of the County and WEC that SEPA applies to all forest practices applications is rejected. SEPA’s EIS requirements do not apply to the first three classes of forest practices, unless by operation of WAC 197-11-305(1)”).

The FPAB has also characterized Section 305 as a SEPA rule that applies to proposals “where cumulative effects are involved.” Friends of the Columbia Gorge v. DNR and SDS Lumber Co., FPAB 93-61, at C.O.L. XXVI (1993)(See Attachment 4). Cumulative effects are “changes to the environment resulting from the effects of two or more forest practices.” WAC 222-12-046. The FPB has expressly acknowledged, “public resources may be adversely affected” by cumulative effects. WAC 222-22-010(1). The National Environmental Policy Act (“NEPA”) defines cumulative impacts as, “the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable actions.” 40 C.F.R. § 1508.7. Federal NEPA law expressly requires consideration of cumulative impacts. Muckleshoot Indian Tribe v. U.S.F.S., 177 F.3d 800, 809 (9th Cir. 1999).

C. The Most Recent Case Involving Section 305.

In The Mountaineers v. Plum Creek and DNR, FPAB 00-029, Attachment 6, citizens learned that Plum Creek had a written business plan to conduct extensive future forest practices in a corridor adjacent to Mount Rainier National Park. Plum Creek did not share this business plan with DNR nor did DNR officials request it, even though they knew Plum Creek had future harvest plans in the same area.

Pursuant to its business plan, Plum Creek filed and DNR approved twenty-eight (28) FPAs over a period of five (5) years adjacent to the application at issue, which was one mile from the entrance to Mount Rainier National Park. Each of these FPAs was exempt under SEPA because each was classified as a Class III forest practice application.

When Plum Creek filed a permit to clear-cut 28 acres one and one-half miles from the National Park gate (the “Doggone” timber harvest), The Mountaineers filed an appeal alleging that Plum Creek was impermissibly segmenting its permits. The Mountaineers filed an appeal and motion for injunction, which the FPAB denied in a 2-1 opinion. Although Plum Creek logged the parcel, the FPAB refused to dismiss (on Plum Creek’s motion) the case as moot in order to resolve the Section 305 issue whether multiple, geographically or functionally related forest practices could trigger SEPA review under Section 305.

In a precedent-setting decision dated March 21, 2002, the FPAB held that Plum Creek’s sequential filing of FPAs in the same location could, under some circumstances, trigger SEPA review. The FPAB held that Section 305 requires SEPA review when a landowner files an application for a permit and the application is “operationally linked” to a past, present, or future forest practice. The FPAB, however, held that a permit application does not trigger Section 305 merely because the application is physically, geographically, or functionally related to a past, present, or future forest practice. One board member dissented from this conclusion. The decision was appealed to the Thurston County Superior Court, where it is pending. Plum Creek Timber Company, v. FPAB, et al., Thurston Co. Superior Court No. 02-2-00490-1.

D. Recent Legal Developments Requiring the FPB to Immediately Adopt a Forest Practice Rule That Functions in a Manner Similar to WAC 197-11-305: Ecology's Modification of the SEPA Rules.

In response to the FPAB's ruling in *The Mountaineers'* case, Plum Creek filed a Petition for Declaratory Judgment pursuant to RCW 34.05.570(2) in the Thurston County Superior Court. Plum Creek's Petition argues that Section 305 is solely an Ecology-promulgated SEPA rule that cannot be applied, in any manner and under any circumstances, to trigger SEPA review for Class I, II, or III FPAs. Plum Creek's Petition requests the Thurston County Superior Court to strike down the availability or applicability of Section 305 to any Class I, II, or III FPA.

On August 23, 2002, a delegation from the environmental community met with Ecology Director Tom Fitzsimmons and his staff to discuss this matter. The delegation urged Mr. Fitzsimmons not to amend Section 305 or the other SEPA rules implementing it because (1) two courts and several panels of the FPAB have held that the rule may be applied to segmented forest practice applications; (2) the FPB had adopted the rule in WAC 222-12-050 and that only the FPB can repeal the rule with respect to forest practices; and (3) the rule is an essential tool to prevent segmentation and adverse cumulative impact of FPAs under SEPA.

Ecology rejected this request and has decided to amend its SEPA rule, WAC 197-11-800, to remove Class I, II, and III forest practices from the list of administrative activities that Ecology has deemed categorically exempt from SEPA.

In addition, *The Mountaineers* moved the Thurston County Superior Court to order Plum Creek to join the FPB in this case on the grounds that the FPB adopted the SEPA rules in WAC 222-12-050 and, as a result, the FPB was a "necessary party" for

purposes of Plum Creek's rule challenge. The Court granted The Mountaineers' motion on Friday, January 24, 2003.

In Plum Creek's lawsuit seeking to invalidate Section 305, Plum Creek filed this action only against Ecology, not the FPB. Plum Creek reasons that Section 305 is "only" an Ecology rule and not a rule that was, in any manner, adopted by or applicable to the forest practice rules. The FPB's decision not to defend Section 305 and its related decision that it has not "adopted" Section 305, makes it all the more important that the FPB now adopt a rule which, we believe, it is required to adopt.

VII. THE FPB HAS AN IMMEDIATE DUTY TO ADOPT SUBSTANTIVE FOREST PRACTICES OR SEPA RULES THAT FUNCTION IN A MANNER SIMILAR TO WAC 197-11-305

Summary:

The FPB's existing system for approving FPAs unlawfully fails to implement the FPB's duty to apply SEPA to forest practices that could have a significant adverse environmental impact. The system is inadequate because it permits forest landowners to file multiple physically and functionally related SEPA-exempt FPAs in a single location without providing any mechanism that would trigger SEPA when these individual "segmented" FPAs could potentially have a significant adverse cumulative impact. In other words, the current system permits forest landowners with established business plans to conduct future logging in a specific location to file multiple SEPA exempt FPA's that will, once they are logged, have a significant adverse cumulative impact. The existing permitting system is also defective because, without Section 305, there is no mechanism requiring SEPA review for forest practices that are physically or geographically related to an action or permit that is not exempt from SEPA.

A. The FPB Has A Duty to Adopt a Rule or Rules Ensuring That Multiple Related Forest Practices In the Same Watershed or Viewshed Are Not Segmented and Do Not Have a Significant Adverse Cumulative Impact On the Environment.

SEPA only applies to forest practices deemed Class I, II, or III by FPB rule. The FPB's wide discretion to classify forest practices (and exempt certain FPA's from SEPA), however, certainly does not mean that the FPB has the unbridled authority to ignore fundamental SEPA principles and policies when it develops its forest practice rules and SEPA polices for processing forest practice permits. On the contrary, there are several fundamental principles of the 1974 Act and SEPA with which the FPB must comply in crafting its classification rules and other rules implementing SEPA.

1. As a matter of law, the FPB has a duty to adopt a Section 305-like "catch-all" rule as part of its duty to implement SEPA.

As discussed above, the 1974 Act requires the FPB to adopt forest practices rules "necessary to accomplish the purposes and policies" of the 1974 Act, RCW 76.09.040(1). The 1974 Act also requires the FPB to require SEPA review for individual forest practices that can have a significant adverse cumulative impact. RCW 76.09.050.

SEPA requires Washington agencies that are required to apply SEPA to adopt rules implementing SEPA. RCW 43.21C.120(1). SEPA directs that, to the fullest extent possible, "the policies, regulations, and laws of the State of Washington shall be interpreted and administered in accordance with the policies set forth in SEPA." RCW 43.21C.030(1); WAC 197-11-030(2)(a). **Furthermore, SEPA expressly requires agencies to adopt SEPA rules that are consistent with the purposes and policies of SEPA.** RCW 43.21C.120(1).

Under these statutory provisions, the FPB has a duty to adopt a rule that functions in a manner similar to WAC 197-11-305. Ecology's adoption of Section 305 reflects the commonsense principle that segmented or multiple SEPA-exempt proposals can have an adverse cumulative impact. Death cannot occur by a thousand cuts. If the 1974 Act requires the FPB to classify individual forest practices that could have an adverse environmental impact as Class IV, it follows that the FPB must require multiple geographically related SEPA-exempt forest practices to similarly require SEPA review.

The FPB's duty to adopt an anti-segmentation or cumulative effects rule is especially important in light of the Washington State Supreme Court's decision in Dioxin/Organochlorine Center v. Pollution Control Hrgs. Bd., 131 Wn.2d 345 (1997). In Dioxin, the Supreme Court held that a party cannot challenge an individual categorically-exempt permit under SEPA, but that a party could challenge the agency's determination that the permit or multiple exempt permits should have been exempt from SEPA in the first place.

2. The FPB is required to adopt a rule or rules that function in a manner similar to Section 305 because such a rule is necessary to prevent segmentation and cumulative effect impacts, impacts not taken into account by the existing forest practices rules.

As set forth above, agencies (like the FPB) that are required to apply SEPA to certain regulatory programs under its control, have a duty to adopt SEPA rules implementing SEPA.

Numerous SEPA rules require agencies having the responsibility and authority to apply SEPA to adopt rules that prevent landowners from segmenting their permit applications for a land use, or from causing multiple SEPA-exempt permits from having an adverse cumulative impact. The rules include the following:

- WAC 197-11-060(3)(b): requires consideration of a proposal’s cumulative impact on the environment.
- WAC 197-11-060(4)(e): defines “impact” to include cumulative impact.
- WAC 197-11-330(3): provides that, in determining an impact’s significance, the agency shall consider that several marginal impacts taken together may result in a significant adverse impact.
- WAC 197-11-960 (SEPA checklist, Question A.7, “Do you have any plans for ...future activity related to or connected with this proposal?”).
- WAC 197-11-792(2)(a)(ii), (2)(c)(iii): provides that impacts can be either connected or cumulative.
- WAC 197-11-060(3)(b) prohibits “segmentation” or improper “phasing” of actions. Phasing occurs when “proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.” WAC 197-11-060(5) expressly provides that phased review is not appropriate when it (ii) would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or (iii) it would segment and avoid present consideration or proposals and their impacts that could be evaluated into a single environmental document.

Without a rule such as Section 305, the FPB’s forest practices rules would permit improper phasing or segmentation of forest practice applications.

The FPB has already taken the first steps to committing itself to Section 305-like procedures. The FPB has adopted the SEPA policies. WAC 222-10-010(3). The FPB has also declared that SEPA is among the tools it uses to ameliorate the adverse cumulative impact of multiple forest practices. WAC 222-12-046(2).

Given these adoptions, the FPB must adopt a Section 305-like rule since among the most important SEPA policies are those preventing segmentation; a fundamental policy of SEPA is to prevent phasing that divides a proposal (which SEPA defines as a permit or series of connected actions) into exempt fragments. See WAC 197-11-060 (5)(d)(ii); WAC 197-11-060(3)(b). These provisions require evaluation of "related actions" or "similar actions" at the same time. The FPB has an affirmative duty to adopt a rule that makes up for the anticipated repeal of Section 305.

3. There are no mandatory or effective cumulative impact or anti-segmentation provisions in the existing Washington forest practice rules.

The current rules are not sufficient to prevent cumulative impacts. WAC 222-12-046 sets forth the FPB's policy statement concerning cumulative effects. None of these "policies," individually or cumulatively, prevent cumulative effects. WAC 222-12-046 (1), the provision providing that the "standard" forest practice rules prevent cumulative effects, does not do so because the "standard" rules are of state-wide application and are not landscape-specific. The EIS for the Forests and Fish Report, moreover, candidly admits that the mere application of the standard rules, without watershed analysis, will not prevent cumulative effects. EIS for Forest and Fish Report, Feb. 13, 2001, at P. 3-204-06.

WAC 222-12-046(2), the Class IV-Special list, does not prevent cumulative effects. Any competent natural resource professional knows that forest practices not listed on the Class IV list can still have a cumulative adverse environmental impact.

WAC 222-12-046(3) also does not prevent cumulative impacts. This section contains voluntary procedures that also are not landscape-specific.

Finally, WAC 222-12-046(4), the reference to watershed analysis as being a cumulative effects tool, is also not such a tool. Following the adoption of the Forests and Fish Report, forest landowners are not continuing to perform watershed analysis and only a paltry 10% of Washington's watersheds have undergone watershed analysis.

Washington forest practice regulations define cumulative effects as follows:

[T]he changes to the environment caused by the interaction of natural ecosystem processes with two or more forest practices.

WAC 222-16-010. Washington regulators have long known that cumulative impact of forest practices within a watershed can and do have serious adverse environmental impact. In fact, a study commissioned by the FPB in 1983 clearly laid out the problem and the inadequacies of Washington forest practices laws. R. Geppert, C. Lorenz, A. Larson, Cumulative Effects of Forest Practices on the Environment (hereinafter “Geppert”). Geppert defines cumulative effects as follows:

A cumulative effect occurs whenever an environmental change caused by a forest practice interacts with environmental change(s) from other forest practices. If environmental effects of individual forest practices do not interact, there are no cumulative effects. Interaction may be additive (accumulate), subtractive, or synergistic. Cumulative effects are either temporary or persistent. Temporary cumulative effects will recover at some time within the forest management time frame with the affected element of the environment returning to its baseline condition. On the other hand, the change to the baseline caused by persistent cumulative effects will continue as long as the forest practices that cause this change continue without modification. Restoration of persistent cumulative effects via natural ecosystem processes is slow and continually aggravated by additional forest practices. Persistent cumulative effects are probably more important than temporary ones.”

Federal law clearly requires NEPA consideration for related forest practices in the same watershed. Save the Yaak Committee v. Block, 840 F.2d 714, 719 (9th Cir. 1988); Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985); Kern v. BLM, 284 F.3d 1062, 1075 (9th cir. 2002).

Although cumulative impacts are well accepted in the forestry arena, Washington does not have any general cumulative impact provisions. In the following, we explain why Washington needs a general and specific cumulative impacts tool.

Aquatic Impacts

While perhaps more environmentally-protective than the rules that preceded them, the Forests and Fish Report (“Report”) forest practices rules are not “self-mitigating” in

the sense that forest practices conducted under these new rules does not necessarily mean that forest practices will not have an adverse cumulative impact.

The FPB's own planning documents reflect that the Report is not a cumulative effects mechanism. The environmental impact statement for the Report (Chapter 3, pp. 3-208-09)(Attachment 12) expressly acknowledges that the Washington forest practices regulations lack a cumulative effects provision. The EIS concedes that, while the Report constitutes a substantial improvement over the previous rules, the Report's abandonment of watershed analysis means there will not be a tool that takes a careful look at the cumulative impact of an individual forest practice on a specific watershed.

It is important to remember that the Report, and the forest practices rules adopted consistent with the Report, apply state-wide and make no distinction between logging conducted in heavily logged watersheds with existing water quality problems, or more pristine watersheds.

Upland Terrestrial Wildlife

The current Class IV-Special list only considers forest practices that will be conducted on habitat of species that are threatened or endangered listed species as included in the current Class IV Special Rule. WAC 222-16-080. The watershed analysis rules do not contain a module for upland wildlife and the Landscape Planning pilot project developed in RCW 76.09.350 never produced a single landscape plan.

The cumulative effect deficiency with respect to upland wildlife is that the current SEPA trigger, WAC 222-16-050, fails to require SEPA review for projects with the potential to adversely impact, through cumulative effects, habitat critical to the survival and recovery of listed and unlisted wildlife at-risk of extinction or extirpation from

Washington. There are no rules that require SEPA review of individual forest practices that, in connection with other multiple, distinct, or segmented forest practices over time and space, have the potential to result in substantial, adverse cumulative effects to at-risk wildlife and wildlife habitat.

Without SEPA review for potential adverse cumulative effects, forest practices can collectively and substantially impact habitat for threatened and endangered species, and other species at-risk of extinction and extirpation without preventing or mitigating such adverse impacts. In the absence of rules that trigger SEPA review of substantial cumulative impacts to wildlife habitat, the existing rules fail to protect wildlife.

Current rules (WAC 222-12-046) do not contain sufficient provisions to require consideration and review of individual forest practices that, in connection with other multiple, distinct, or segmented forest practices over time and space, have the potential to result in cumulative effects to wildlife and wildlife habitat. The rules do not address the cumulative effects of forest practices in a technically credible way and, in particular, fail to address cumulative effects of forest practices on habitat for elk, forest birds, raptors, forest carnivores, and other wide-ranging species. Even with well-documented losses of critical wildlife habitat, old-growth and riparian forest, biological legacies of older forests, talus environments, and deep litter and duff layers, there are no provisions for the analysis or mitigation of cumulative effects on forested wildlife habitat. Neither the itemization of a few specific parameters for forest practices nor the option of performing a watershed analysis (which itself only addresses aquatic species) sufficiently address the omission in the current rules of a cumulative effects analysis.

As a consequence, many of these species are harmed by the effects of forest practices even though the harm may not be linked to any one single forest practice. Without cumulative effects review, forest practices can collectively impact habitat for threatened and endangered species, and other species at-risk of extinction and extirpation without efforts to prevent or mitigate adverse impacts. Instead of “considering measure to further protect ... wildlife resources” (WAC 222-12-046(4)), rules must be developed, implemented, and enforced.

Recreation and Aesthetics

There are no rules of state-wide application that trigger SEPA review for forest practices that could have an adverse **cumulative** impact on the recreational or scenic qualities of a public location. The existing Class IV-Special list requires SEPA review for aesthetics and recreation only in national parks or the Columbia Gorge. These rules, however, do not guard against the cumulative impact of multiple clear-cuts in a single geographic location. [Please refer to the materials appended to this Petition relating to forest practices conducted in the Carbon River watershed.]

B. To Prevent “Piecemealing” of Forest Practice Applications, the FPB Has a Duty to Adopt a SEPA Rule or a Substantive Forest Practice Rule That Requires DNR to Ask Forest Landowners to Declare Their Future Plans With Respect to Logging In Physically or Geographically Related Areas.

The current forest practice permit system permits forest landowners to present a forest practice application for a specific tract of land and authorizes DNR to approve or disapprove of that application based on the current FPB-adopted forest practices rules.

The current forest practices rules, however, do not expressly authorize DNR to request or review future harvest information from forest landowners to determine

whether presently proposed logging, in conjunction with past or future foreseeable logging, could have an adverse cumulative environmental impact. Attachment 13, pgs. 6-8 of DNR's Prehearing Brief in The Mountaineers v. Plum Creek and DNR, FPAB 00-029 (2002). Rather, according to DNR's Attorney General, the DNR may only consider the impacts of the "proposal being considered, not those impacts stemming from the proposal being considered and other proposals, such as past or future forest practice applications."

This "hear no evil, see no evil" approach to the processing of FPAs completely flies in the face of the fundamental SEPA anti-piecemealing and cumulative effect provisions noted above.

We believe the far more sensible and lawful approach would be consistent with a Memorandum prepared by Lenny Young of the DNR dated November 8, 2002. Attachment 7. Mr. Young's Memorandum advises DNR Regions how to administer Section 305. The Memorandum sets forth numerous types of permit scenarios where SEPA review should be required for certain types of forest practices that are connected to actions which are NOT exempt from SEPA:

These include the following:

- FPAs that involve a local government permit.
- FPAs that involve a hydraulic permit.
- FPAs that involve the sale of timber from state lands.
- An FPA that depends on another FPA to proceed (e.g., the use of one FPA to facilitate another, such as ground skidding location or a helicopter landing zone.
- An FPA for a forest road only where the FPA does not disclose future harvest information (tributary timber harvest) from that road.

We believe Mr. Young's Memorandum makes the case why a rule such as Section 305 is necessary. The Memorandum reflects that there can be numerous unexplained

future relevant events at the time a landowner files for a forest practice permit and that these events should be considered, not ignored, by DNR when it acts on these applications.

C. Two Case Studies Reflecting Why The FPB Needs To Adopt An Anti-Piecemealing Rule That Functions Like WAC 197-11-305.

The FPB's forest practice rules make most individual FPAs exempt from SEPA. It is common knowledge, however, that forest landowners frequently have long-term plans to harvest a specific geographic area, these landowners sequentially file multiple SEPA-exempt forest practices permits, and cumulative effects often occur as a result of the failure of any agency to consider the long-term cumulative impact of multiple related FPAs. This type of "phasing" or "segmentation" deprives State agencies of the information they need to make informed and timely decisions about specific FPAs. It encourages the piecemealing of FPAs, oftentimes resulting in significant **cumulative** adverse impacts on fish, wildlife, and scenic beauty in discrete geographic areas, such as watersheds and viewsheds.

This is where Section 305 plays an extremely valuable role. Section 305 provides a mechanism for DNR to require cumulative effect review when a landowner has long term plans to conduct physically or functionally related logging in a specific watershed, the landowner files multiple SEPA-exempt FPAs, the individual forest practices are linked in some manner, the agency does not have the benefit of knowing what's going to happen next, and the multiple forest practices have the potential for producing a significant adverse environmental impact.

In conjunction with this Petition, we have researched two watersheds that have suffered extensive cumulative environmental harm as a result of piece-mealed SEPA-exempt forest practices. We will provide additional information to the FPB about these two watersheds at a public meeting.

EXAMPLE # 1:

THE TEANAWAY BASIN

Background

The Teanaway Basin drains about 207 square miles and is a tributary to the Yakima River (DOE 2000). The basin is divided into several smaller watersheds (“WAU”) including North Fork (Teanaway Watershed Analysis, Boise Cascade 1996), the West Fork (Draft Watershed Analysis partially completed), the Middle Fork, the Upper North Fork, and Mason Creek. The portion of the basin below National Forest System land has been logged two or three times since 1903. Past logging practices included construction of railroads up most of the valley bottoms and the use of splash dams to float timber downstream (DOE 2000). Grazing has also occurred in portions of the basin since the 1920s.

A watershed analysis (version 2.1) was completed for Boise Cascade Corporation for the North Fork Teanaway WAU in July 1996 (Boise Cascade 1996). At the time, Boise Cascade owned 18,724 acres in the watershed (63 percent of the watershed), which was subsequently sold to U.S. Timberlands in 1999. U.S. Timberlands purchased all of the Boise Cascade holdings in the Teanaway Basin (referred to as the “Teanaway Block”), and with them the approved (FPAs) submitted by Boise Cascade prior to the

sale. **Since acquiring the land, U.S. Timberlands has dramatically accelerated the rate of harvest in the Teanaway Basin, likely affecting fish and wildlife habitat, including water quality and endangered species in the basin- northern spotted owl and steelhead trout.** Most of this harvest has occurred through individual SEPA-exempt FPAs.

The following list summarizes activities from 175 approved FPAs submitted either by U.S. Timberlands since their acquisition of the land in 1999, or by Boise Cascade between 1997 and 1999 and transferred to U.S. Timberlands. Within the 56,000 acre Teanaway Block, U.S. Timberlands has been approved for:

- 9,968 acres of even age management (18 percent of the Teanaway Block)
- 21,890 acres of uneven age management (39 percent of the Teanaway Block)
- a total of 31,558 acres of harvest (57 percent of the Teanaway Block)
- 87.5 miles of new road construction
- 44.8 miles of road reconstruction
- 498.9 miles of road maintenance
- 11.9 miles of road abandonment

This increased level of activity drew the attention of DNR in 2000, which had a Forest Practices Science Team review the Teanaway River Basin “in light of the high rate of harvest taking place there... The team considered mass wasting, surface erosion, and water quality to be the main items of concern that need to be considered in the current harvest activity. Significant differences from the original WA=s (sic) have been found in the areas of mass wasting and surface erosion.” (DNR 2000a).

John Daly, the former FPB Chair and Deputy for Resource Protection, stated in a letter to the FPB members in January 2001 (Daly 2001, Attachment 14):

Last week I went to Ellensburg to look at timber harvest plans in the Teanaway River area which left me unsettled about the potential for cumulative effects on lands that have both owls and fish currently listed. The issue is not the company or specifics of these particular circumstances

but rather looking at a plan that appears to meet the minimum forest practices rule requirements, yet it seems counter intuitive to think that there won't be cumulative impacts as a result.

Although increased harvest has occurred across U.S. Timberlands holdings in the Teanaway Basin, this report will primarily focus on the North Fork Teanaway WAU because of the available information and analysis in the Teanaway Watershed Analysis (Boise Cascade 1996).

Harvest Rates

Past harvest rates in the North Fork Teanaway WAU under Boise-Cascade management were noted in the watershed analysis (Boise Cascade 1996). From 1990 to 1996, 1,586 acres of land were harvested using even and uneven-aged management yielding 13,028 mbf of timber (Table 1). The annual average for the period was 264 acres yielding 2,171 mbf of timber. Data for U.S. Timber includes approved FPAs from 1997 through December 2002 in the NF Teanaway, and includes approved FPAs transferred from Boise-Cascade. Table 1 clearly shows the increase in timber harvest based on approved FPA applications. The proposed average annual timber harvest increased 329 percent to 7,137 mbf and the average area harvested increased 717 percent to 1,895 acres.

Table 1. Harvest levels under Boise-Cascade management versus U.S. Timberlands management.

Harvest levels reported in NF Teanaway WA (Boise Cascade 1996)

Year	Harvest (mbf)	Area Harvested ¹ (acres)
1990	3,692	410
1991	1,876	192
1992	352	27
1993	2,032	170
1994	2,640	396
1995	2,436	391
Total	13,028	1,586

Average annual	2,171	264
Percent of Watershed		5%

US Timberlands approved FPAs

Year FPA approved	Harvest (mbf)	Area Harvested ¹ (acres)
1997 ²	800	270
1998 ²	6,780	1,552
1999 ²	2,303	943
2000	21,437	6,732
2001	8,272	1,262
2002	3,230	613
Total	42,822	11,372
Average annual ³	7,137	1,895
Percent of Watershed		38% ³

Percent Increase⁴	329%	717%
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¹ Includes both even and uneven aged management.

² Approved FPAs submitted by Boise Cascade prior to the sale and transferred to US Timberlands.

³ Based on individual FPA acreages. Some FPAs may overlap or occur in the same area.

⁴ Harvest reported in US Timberlands approved FPAs during six year period from 1997 through 2002 versus timber harvest reported in NF Teanaway WSA from 1990 to 1996.

Roads

To support this increased level of harvest, U.S. Timberlands has done considerable work on roads in the North Fork Teanaway (Table 2). The 1996 Watershed Analysis listed 124 miles of roads resulting in a road density of 2.7 miles/square mile. In approved FPAs from 1997 through August 2001, U.S. Timberlands proposed 33.8 miles of new roads increasing the road density in the WAU by 27 percent to 3.4 miles/square mile. The NMFS Working Guidance document (NMFS 1996) for coastal salmon states that road densities of less than 2 miles/square mile are required to meet properly functioning conditions and that road densities over 3 miles/square mile with many valley bottom roads (as is the case in the Teanaway) is not properly functioning (NMFS 1996).

Many historic roads were constructed on abandoned railroad beds, which were often built in the riparian corridor or parallel to streams (DOE 2000).

Approved FPAs in the NF Teanaway WAU by U.S. Timberlands also included 18.3 miles of road reconstruction and 150.7 miles of road maintenance. Maintenance and reconstruction would likely improve drainage and fix road segments with erosion or drainage problems. However, it would also disturb existing roadbeds and expose fine sediment to erosion. The Standard Method for Conducting Watershed Analysis (version 4.0) indicates that erosion rates for new roads (less than 2 years) is about double that of older roads (FPB 1997).

Table 2. Existing Roads in NF Teanaway WAU and Road-Related Activity on U.S. Timberlands FPAs from 1997 through August 2001.

Roads reported in the NF Teanaway WA (1996)

Existing roads (miles)	124
Road Density (miles/mile ²)	2.7

Roads in approved US Timberlands FPAs

New road construction (miles)	33.8
Road reconstruction (miles)	18.3
Road maintenance (miles)	150.7
Roads abandoned (miles)	3.8
New road density (miles/mile ²)	3.4
Increase in road density (percent)¹	27%

¹ Includes decrease in road miles due to abandonment.

Road-Related Sediment

Sediment delivery from forest roads can be a significant, or in some landscapes, the dominant source of road-related sediment to streams (USDA 2000). “The single greatest factor affecting generation of sediment from road surfaces is the amount of traffic.” (Reid and Dunne 1984 *in* FPB 1997). Standard Method for Conducting Watershed Analysis (version 4.0) indicates “traffic use should reflect an average of the

use expected over the next 5 years. If the future road use is not known, the analyst may assume that the past 5-years use rate is a good representation.” (FPB 1997). That method was used in the NF Teanaway Watershed Analysis based on past harvest levels, and it underestimates the volume of harvest and hence the level of logging traffic by about 300 percent. That estimate does not include traffic related to harvest equipment, operations, and road construction. Therefore, the NF Teanaway Watershed analysis far underestimates road-related erosion and the potential risk of harm from sedimentation that is occurring from the recent accelerated rate of harvest by U.S. Timberlands.

It is important to note that under the Standard Method for Conducting Watershed Analysis (version 4.0) the sediment delivery rates from increasing levels of traffic do not increase linearly. For example, if traffic levels increase from no traffic to light traffic/not active, the erosion rate increases by a factor of 50 (FPB 1997). In the NF Teanaway Watershed Analysis, most of the main sections of gated roads were assigned a “40% light use/60% non-use” and about 45 percent of all the roads in the basin were classified as “no traffic/abandoned” (Boise-Cascade 1996). With over 11,000 acres of the 29,632-acre watershed harvested from 1997 to 2002, the traffic levels on secondary logging roads would likely increase to light or moderate use levels, and the main lines would increase to moderate or heavy use.

By using the original modeling results and increasing the traffic levels by one level for each of the categories in the original Watershed Analysis, the resulting sediment yield would increase from 56.5 tons to over 1200 tons, a 21-fold increase. This calculation is only a rough estimate; it does not take into account road upgrades, the change in sediment yield from newly reconstructed roads or road maintenance, the 3.8

miles of abandoned roads, or the 33.8 miles of new road. However, it clearly demonstrates how sensitive road surface erosion is to traffic levels and how the increased rate of logging could exacerbate sedimentation in Teanaway Basin streams, which was identified in the Temperature TMDL is a significant contributor to elevated temperatures (DOE 2000).

Increased sedimentation from increased traffic levels is described and supported in the Watershed Analysis document itself. The NF Teanaway Watershed Analysis considered four scenarios for road sediment and delivery, with the maximum scenario assuming that the logging roads were not gated, and that they would receive light traffic (i.e., recreational use). The result of that change to the traffic levels of only 13% of the roads in the modeling scenario resulted in 2.75 times as much sediment production as the selected scenario. The report also states: “The increased sediment delivery yield above background in the Teanaway WAU as the result of roads [for the selected 56.5 ton scenario] can be considered to be a low hazard but may be chronically detected in some stream reaches of some sub-basins, i.e., the additional sediment will enter the channel system in pulses during wet weather and/or increased traffic levels so that individual channel segments may be affected by relatively high turbidity levels.” (Boise Cascade 1996).

The adjacent Draft West Fork Teanaway Watershed Analysis assigned a high hazard rating to road erosion, with roads contributing about the same level of sediment as background levels. This was largely attributed to poor road conditions and highly erodible soils (similar to those found in the NF Teanaway). U.S. Timberlands holdings in

the West Fork WAU have also seen a dramatic increase in harvest levels similar to the North Fork Teanaway WAU.

Harvest-Related Sediment

Increased harvest levels would cause increased hillslope erosion. The NF Teanaway Watershed Analysis states that, based on past levels of harvest and the observed erosion rates, “The average annual amount of sediment delivered to the stream system as a result of harvest activities is considered to be minor...” The Standard Method for Conducting Watershed Analysis (version 4.0) assumes that the forest practice rules “are effective at preventing excessive surface erosion, unless the soils are especially erosive.” (FPB 1997). About 32 percent of the soils in the NF Teanaway are classified as having a “high potential for soil erosion” (Boise Cascade 1996). Although surface erosion from harvesting was considered minimal in the NF Teanaway Watershed Analysis, the dramatic increase in the rate of harvest (329%) and the area disturbed (717%) is likely to increase the amount sediment delivered to streams.

Mass Wasting

Mass wasting can contribute a significant amount of sediment to streams. The NF Teanaway Watershed Analysis indicated that mass wasting occurs with relatively low frequency in the NF Teanaway basin, and that management-related mass-wasting is limited. However, a subsequent review by the DNR (DNR 2000b, Attachment 15) indicated that:

- Deepseated landslides were greatly under-mapped during the watershed analysis and most deepseated landslides contain unstable areas that are actively sliding or have been active in the not too distant past.
- U.S. Timberlands is bounding most unstable areas out of planned harvest areas, however, unstable areas are being missed which will increased (sic) post-harvest landsliding.

Deleted:

- Fieldwork on U.S. Timberlands applications (outside of the area covered by a Watershed Analysis) have found areas which should have been Class 4 specials and were not due to lack of time for foresters to walk harvest boundaries.
- Three deepseated landslides near Story Creek and one near Rye Creek were reactivated after recent harvest (within the last 10 years).
- ...a number of areas have been found where current prescriptions will not prevent resource damage from mass wasting.

The insufficient level of detail in the mass wasting module of the NF Teanaway Watershed Analysis combined with the increased rate of harvest by U.S. Timberlands in the NF Teanaway is likely to cause further sedimentation problems in the Teanaway Basin.

Temperature

The Teanaway River, including the North, Middle, and West Forks of the Teanaway are all listed on the 1998 303(d) list for temperature, which triggered the development of a Total Maximum Daily Load (TMDL) (DOE 2000, DOE 2001, DOE 2002). Factors contributing to high temperatures include low flows, lack of riparian shading, and stream channel widening. Low flows are primarily the result of diversions, but are also influenced by a “flashy” hydrograph. Lack of riparian shading is attributed to past harvest and management in riparian areas with potential effects from continued grazing. Stream channel widening is attributed to both high winter flows and sediment loading from natural and management-related causes. Roads have been identified as a significant source of sediment in the West Fork Teanaway, and sub-basins with significant amounts of U.S. Timberlands ownership were assigned high road hazard rating (Plum Creek Timber Company 1997).

Although several factors were described as affecting stream temperatures in the Teanaway Basin, sediment input from management activities was cited as contributing to

higher width-depth ratios and degraded fish habitat. As described above, the increased rate of timber harvest in the basin has likely increased the sediment load, which contributes to elevated temperatures in the water-quality limited Teanaway River.

Fish and Wildlife

Salmonids

Anadromous fish species found in the Teanaway River include spring-run chinook salmon (*Oncorhynchus tshawytscha*) and steelhead trout (*O. mykiss*). Resident fish species include cutthroat trout (*O. clarki*), bull trout (*Salvelinus confluentus*), and rainbow trout (*O. mykiss*). Historically, the Yakima River basin supported anadromous fish populations on the order of 600,000 to 960,000 (Boise Cascade, 1996). The 1996 Watershed Analysis of the North Fork Teanaway notes that current (to 1996) anadromous fish counts in the Yakima basin are on the order of 7,000. Also, the Endangered Species Act listings of steelhead and bull trout in 1999 highlight the general decline in the numbers of these species utilizing the river.

Several factors are attributed to the decline in anadromous fish and fish habitat in the Teanaway: Rosa dam along the Yakima that precludes fish passage, intensive local fishing, agricultural diversions, dams along the Columbia River, declining habitat, and degraded water quality (Boise Cascade, 1996).

Recent efforts have been taken to increase the numbers of salmon in the river. The Teanaway River Restoration Project, a collaborative effort between federal, tribal, state, and regional agencies, includes reducing diversions and a rearing and acclimation facility located near Jack Creek. As a result of these efforts, salmon redd counts are increasing from the very low levels observed over the last 15 years (Daily Record, 2003).

Temperature and Sediment Effects on Fish

Forestry activities can have several adverse impacts on fish habitat, which in turn may cause fish harm, mortality, or behavior modification. These impacts may be categorized as follows: alteration of sediment type (i.e., coarse and fine) and quantity in a stream system; alteration of hydrologic regime and water quantity in a system; disruption of large woody debris and leaf/needle litter recruitment; floodplain and off-channel habitat modification; increased water temperatures; introduction of toxic chemicals; and blockage of fish passage (Washington Forest Practices Board, 2001). The two types of effects that this discussion will focus on are excess fine sediment loading and elevated temperature, since these two effects are the most documented in the Teanaway River Basin (see discussion above).

Excess fine sediment can smother eggs and fry that incubate in redds, and it could cause gill damage in fish. The introduction of fine sediment may result in the reduction of intergravel dissolved oxygen, which can in turn reduce the survival rate of salmonid embryos. Reduced dissolved oxygen, in general, may cause stress on fish. Fine sediment can also increase turbidity and restrict sunlight penetration. Increased turbidity and decreased light penetration may decrease primary production, which in turn affects higher trophic levels by reducing the amount of food available (Washington Forest Practices Board, 2001).

Salmonid species require cold water temperatures to survive. Water temperatures of 50 – 57 degrees F are considered properly functioning conditions for salmonid habitat (NMFS, 1996). In temperatures above this general range, cold-water fish must increase their metabolic rate, which requires the fish to expend more energy, even at rest.

Dissolved oxygen levels also decrease as temperatures increase, increasing stress on fish. Temperatures above 70 degrees F can cause direct mortality of salmon and trout species. Long-term exposure to sub-lethal water temperatures can negatively affect the health of salmonids, making them more susceptible to disease. Bull trout require especially low temperatures for spawning and egg incubation (Washington Forest Practices Board, 2001).

Although harvest now occurs under the Forests and Fish Report rules, which are more protective of the riparian corridor than the old forestry rules, the cumulative impact of hundreds of U.S. Timberlands FPAs on fish habitat and populations has not been determined. As stated in the FEIS for the Forests and Fish Report: “It is not clear that [the Forest and Fish rules] are sufficiently protective to prevent cumulative effects in watersheds containing high levels of past harvests or other disturbances.” (Washington Forest Practices Board, 2001, p. 3-209).

Northern Spotted Owl

The Teanaway Basin is located within the I-90 East Spotted Owl Special Emphasis Area. This area has historically supported populations of northern spotted owl (*Strix occidentalis caurina*), and there are approximately sixteen spotted owl circles overlapping U.S. Timberlands lands within the Teanaway basin. Since acquiring the land in 1999, U.S. Timberlands has decertified four owl circles within the Teanaway basin and challenged numerous suitable habitat designations (WDFW 2003).

The U.S. Forest Service has been conducting demography studies on the northern spotted owl on the east slope of the Cascade Mountains since 1989. The study area, totaling 1,787 km², includes the U.S. Timberlands Teanaway tract. The 2002 annual

report for this study (Forsman et al., 2002) (Attachment 16) notes a decline of approximately 60% in the total number of occupied territories on the study area from 1992-2002. Also, indicators of reproductive potential are in a declining trend: the number of sites containing reproductive pairs and the odds of females nesting and fledging young have been decreasing since 1992. While the study does not attempt to explain these negative trends, it is noted that the federal lands in the study area (approximately 60% of the study area) have endured little harvest since 1989, leaving harvest on non-federal lands, invasion of barred owls, and/or weather patterns as possible factors in this decline (Forsman, et al., 2002).

On December 7, 2000, the Washington Department of Fish and Wildlife (WDFW) sent U.S. Timberlands a letter recommending that they develop a Landowner Option Plan for spotted owls on their Teanaway Tree Farm. Attachment 17. In the letter, WDFW expressed concern about spotted owls in the Teanaway basin under state regulations and U.S. Timberlands proposed actions (WDFW 2000):

The spotted owl circle-by-circle approach was considered a fall-back position... and one not likely to achieve the spotted owl conservation goals. The Teanaway Tree Farm still has enough habitat above minimum amounts to allow for the type of management flexibility envisioned for landscape planning for spotted owl conservation. However, the fact that your company has submitted FPAs in suitable habitat indicates to us that your company is not considering options for developing a landscape plan with long-term management flexibility.

I remain concerned that the current and proposed rate of harvest in the Teanaway, along with your company's efforts to decertify five spotted owl circles, will result in conditions that do not meet the conservation goals of the I-90 East Spotted Owl Special Emphasis Area. These goals are to provide enough forested habitat to support reproduction and dispersal of spotted owls.

Since this letter was written, U.S. Timberlands has successfully decertified four of the five owl circles it has surveyed, and submitted over fifty additional FPAs (through October 2002).

The effects of the extensive harvest on spotted owls fall into two general categories: habitat modification and disturbance (Spotted Owl Science Advisory Group, 1993).

Habitat modification may result in the degradation or destruction of owl habitat that renders the habitat unusable by owls. Examples include harvest of their primary habitat, i.e. nest trees and foraging range; or the destruction of habitat for owl prey species, which would cause a decline in the prey species and consequently a decline in owls.

Disturbance may result from six types of forestry activities: timber harvesting/forest clearing, logging traffic, slash burning, concentrated helicopter use, aerial application of pesticides, and blasting (Spotted Owl Science Advisory Group, 1993). These activities may cause behavior modification in owls, such as abandonment of juveniles or nests, disruption in feeding of juveniles, or startling that may result in damaged eggs. If this behavior modification occurs during the owl breeding period (March 1 – July 31), it may result in lower reproduction rates.

It is clear that there is considerable concern by WDFW about the spotted owl, U.S. Timberlands' accelerated rate of harvest, and the current ability of state regulations to protect spotted owls and spotted owl habitat in the Teanaway Basin. Because U.S. Timberlands declined to develop a voluntary Landowner Option Plan (along with other private timber companies in Washington), the current system of individual FPA approval

without landscape-level analysis is unlikely to provide the necessary protections for the spotted owl in the Teanaway Basin.

References

Boise Cascade. 1996. North Fork Teanaway Watershed Analysis Resource Assessment Report.

Daily Record. 2003. Fish appreciate home improvements- Salmon return to river. By Michael Gallagher. Accessed online at:
<http://www.kvnews.com/articles/2003/01/23/news/news02.txt>

Daly, John. 2001. Letter to Forest Practices Board Members. January 2, 2001.

DNR. 2000a. Teanaway Status and Work Plan by Nancy Sturhan. 9/14/00.

DNR. 2000b. Teanaway Mass Wasting Review. Laura Vaugeois, Lorraine Powell, and Jack Powell (9/12/2000). (Corrections made by Jack Powell on 10/17/00).

DOE (Department of Ecology). 2000. Teanaway River Basin Temperature Pilot Technical Assessment. Department of Ecology Publication number 00-03-015.

DOE (Department of Ecology). 2001. Teanaway Temperature Total Maximum Daily Load Submittal Report. Department of Ecology Publication number 01-10-019.

DOE (Department of Ecology). 2002. Teanaway Temperature Total Maximum Daily Load Detailed Implementation Plan Final Draft. Department of Ecology Publication number (unassigned).

Forsman, E.D., S. Sovern, M. Taylor. 2002. Unpublished Annual Report for Demography of spotted owls on the east slope of the Cascade Range, Washington, 1989-2002, FY 2002. Wildlife Ecology Team, Wildlife Habitat Relationships in Washington and Oregon. U.S. Forest Services, Pacific Northwest Research Station, Cle Elum Ranger District.

FPB (Forest Practices Board). 1997. Board Manual: Standard Methodology for Conducting Watershed Analysis under Chapter 222-22 WAC. Version 4.0, November 1997.

NMFS National Marine Fisheries Service. 1996. Coastal Salmon Conservation: Working Guidance for Comprehensive Salmon Restoration Initiatives on the Pacific Coast. NOAA NWR Office, Portland, OR.

Plum Creek Timber Company. 1997. Draft West Fork Teanaway Watershed Analysis: Resource Assessment Report. Plum Creek Timber Company and Resource Assessment Team, Seattle, WA.

Spotted Owl Scientific Advisory Group. 1993. Spotted Owl Habitat in Washington: A Report to the Washington Forest Practices Board.

USDA US Department of Agriculture. 2000. Forest Roads: A Synthesis of Scientific Information.

WDFW Washington Department of Fish and Wildlife. 2000. Letter from Jeff Koenings, Director of WDFW to John Rudey, President and CEO of US Timberlands. December 7, 2000.

WDFW. 2003. Personal Communication. January 30, 2003.

Washington Forest Practices Board. 2001. Environmental Impact Statement on Alternatives for Forest Practices Rules for Aquatic and Riparian Resources.

EXAMPLE # 2:

THE CARBON RIVER VALLEY

The Carbon River Valley is located in Pierce County, near the Northwestern corner of Mount Rainier National Park.

During the past five years, Plum Creek Timber Co. has filed 28 forest practice applications over a period of five (5) years directly adjacent to Mount Rainier National Park. Each of these FPAs was exempt under SEPA because each was classified as a Class III forest practice application. Discovery in the case, however, revealed that Plum Creek had an official business plan to guide its logging in the Carbon River Valley. Attachment 18. Yet Plum Creek never shared this plan with DNR. Nor did DNR, whose forest practice foresters knew about the likelihood of future connected logging, request future harvest information from Plum Creek. The end-result was that Plum Creek logged

a substantial portion of the Carbon River Valley without any SEPA review for the issue of whether this logging could have an adverse cumulative impact on aesthetics.

DNR did not condition any of these applications to mitigate adverse cumulative effects for impacts to recreation and scenic beauty. In fact, recreation and scenic beauty are not triggers on the Class IV-Special List (WAC 222-16-050) and there are no substantive forest practices rules protecting recreation and scenic beauty.⁶

Several experts have stated in Declarations relating to the Carbon River FPAB case that Plum Creek's industrial clear-cut logging has severely impaired the aesthetic value of this important public scenic corridor. These experts believe that adoption of a rule or policies requiring landscape planning coupled with cumulative impact analysis is the only way to avoid this harm. Attachment 19, Declaration of PhD. Economist Ed Whitelaw; Attachment 20, Declaration of Charlie Raines; Attachment 21, Declaration of Dean Apostol, landscape architect.

In a precedent-setting decision dated March 21, 2002, the decision that prompted the Ecology to amend WAC 197-11-800, the FPAB held that Section 305 requires SEPA review when multiple "operationally linked" forest practices could have a significant adverse environmental impact. The FPAB, however, held that Section 305 does not apply when multiple forest practices are merely physically, geographically, or functionally related. Attachment 6. In other words, the FPAB held that Section 305 was an available tool for showing cumulative impact of multiple "operationally linked" forest practices, but that the plaintiffs in the case did not show that the specific FPA at issue in the case was "operationally linked" to a different FPA.

⁶ In Northwest Ecosystem Alliance v. Forest Practices Board, Supreme Court No. 70787-6.

Without Section 305, it would not have been possible for the plaintiffs in the Carbon River Valley case to bring an action against Plum Creek. Section 305 provided a vitally-needed mechanism to ensure that DNR has the tools to determine whether presently proposed logging could have a significant adverse cumulative impact in conjunction with past and potential future logging.

Plum Creek's logging in the Carbon River Valley reflects the SEPA loophole in the forest practices rules. Plum Creek has repeatedly filed SEPA-exempt FPAs despite the fact that the company had developed a business plan to conduct future logging in the valley and despite the fact that cumulative impacts to aesthetics have resulted from this logging.

VIII. CONCLUSION

The FPB has a duty to adopt a SEPA rule or a substantive forest practice rule that prevents forest landowners, particularly those with future harvest plans, from filing multiple physically or functionally related SEPA-exempt forest practice applications that could have a significant adverse cumulative impact, without DNR conducting some landscape level review of these applications.

We do not argue that most forest practices applications require SEPA review. Nor do we question the FPB's authority to exempt certain forest practices from SEPA review. We do, however, believe that the FPB has a duty to faithfully implement and incorporate into its rules the cumulative effect and anti-segmentation purposes and policies of SEPA. The FPB cannot sit idly by while certain forest landowners with extensive future harvest plans sequentially destroy a watershed or viewshed without required SEPA review.

The FPB's duty to act is particularly urgent in light of Ecology's proposed amendment of the SEPA rules. Section 305 is the one SEPA rule that vests in DNR the authority to require SEPA review for physically and functionally related forest practices that could have a significant adverse cumulative impact. Numerous court and FPAB cases over the years reflect the use of Section 305 to prevent segmentation and cumulative effects. If Ecology amends this rule as proposed, it arguably removes this mechanism from DNR's toolbox. This new development requires the FPB to act immediately and to promulgate an interim emergency rule.

Respectfully submitted this 13th day of February 2003.

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