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Kettle Range Conservation Group v. Washington Dep't of Natural Res., No. 29077-4-II, 2003 Wash. App. LEXIS 3053 (Wash. Ct. App. Dec. 23, 2003)

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WASHINGTON

Kettle Range Conservation Group v. Washington Dep't of Natural Res., No. 29077-4-II, 2003 Wash. App. LEXIS 3053 (Wash. Ct. App. Dec. 23, 2003) (holding that evidence of erroneous data and calculations regarding road plans and sedimentation prescriptions contained in a watershed analysis is insufficient for watershed analysis approval for a logging operation and may cause more sediment to reach watershed waterways than the amount allowable under the Washington Forest Practices Act).

The Kettle Range Conservation Group and the Lands Council (collectively, "Kettle Range") initiated a regulatory compliance action before the Washington Forest Practices Appeals Board ("Board") against Stimson Lumber Company ("Stimson"). Seeking summary judgment, Kettle Range argued that the Washington Department of Natural Resources ("DNR") acted contrary to the requirements of the State Environmental Protection Act ("SEPA") when it issued a modified determination of nonsignificance ("MDNS") to Stimson based in part on a faulty watershed analysis. Kettle Range claimed that the watershed analysis did not comply with Washington Forest Practices Rules because it did not adequately address the adverse environmental impacts of Stimson's proposed logging project. Specifically, Kettle Range alleged that Stimson should not have received forest practice permits, which allowed the company to harvest timber in the watershed, because Stimson did not first submit a full Environmental Impact Statement ("EIS") for the project. Kettle Range argued for rescission of Stimson's forest practice permits and moved for an emergency stay, followed by a motion for a preliminary stay.

Stimson and the DNR moved for partial summary judgment, asserting that the Stimson watershed analysis was sufficient to satisfy the requirements of the Forest Practices Act. The Board granted Stimson's and the DNR's motions for summary judgment, denied all Kettle Range motions, and ruled for Stimson and the DNR on multiple remaining issues.

Subsequently, Kettle Range sought judicial review under the Washington State Administrative Procedure Act. The Superior Court of Thurston County, Washington granted review and affirmed the Board's decision in favor of the DNR and Stimson. Kettle Range then appealed to the Court of Appeals of Washington, Division Two. The court of appeals affirmed in part, reversed in part, and held there was "substantial evidence to support the Board's determination that the DNR adequately considered Stimson's future forest practices." However, the court agreed with Kettle Range that because parts of the watershed analysis were "based on significant erroneous data and calculations," the court could not conclude that the watershed analysis would "cure adverse impacts of Stimson's proposal on the

environment or comply with Forest Practice Rules.”

On appeal, Kettle Range argued that the Board erroneously found that it lacked authority to adjudicate a claim that the DNR acted contrary to federal and state clean water legislation. However, the court of appeals interpreted this argument as directly challenging the water quality standards developed by the Forest Practices Board and Ecology, and agreed that the Board lacked jurisdiction to hear the claim. Affirming the Board, the court of appeals explained that Kettle Range failed to file a petition for declaratory judgment in the superior court, as required to challenge administrative rules.

Next, Kettle Range argued that the Board erred in finding that the DNR adequately evaluated the effects of Stimson’s future forest practices in issuing the MDNS. Specifically, Kettle Range claimed that the DNR decision failed to address protection of the native grizzly bear and its habitat and, therefore, the DNR should have required a project-specific EIS. However, the court of appeals again disagreed, finding that the DNR was entitled to rely on both an EIS previously prepared pursuant to the National Environmental Protection Act and a Conservation Agreement (“CA”) entered into by Stimson. The court held the EIS and CA appropriately addressed problematic issues as required, including land specific plans to mitigate negative effects on the grizzly bear, even if the logging activities in question were not part of the particular logging project described in the prior EIS and CA.

Additionally, Kettle Range argued that the watershed analysis completed by Stimson and approved by the DNR contained inadequate and incorrect soil erosion prescriptions, contrary to Washington law. The DNR responded that the prescriptions contained in the watershed analysis were an improvement over previous methods, regardless of the practices proposed at the time. The court of appeals, however, agreed with Kettle Range on this point and held that though Stimson provided a higher level of environmental protection than exercised in the past, the “legal requirement that the prescriptions must meet minimum protective standards” was not met. In support of this conclusion, the court of appeals pointed to evidence that Stimson based soil erosion prescriptions on omitted roads in the road plan and false sediment-delivery-level calculations, which would likely cause unwarranted damage to the watershed. Ironically, the court of appeals pointed out, the purpose of the erosion prescriptions was to prevent such watershed damage.

Finally, the court of appeals rejected Kettle Range’s request for attorney’s fees because of its ruling that the DNR was “substantially justified in approving the watershed analysis.” The court of appeals affirmed in part and reversed and remanded to the DNR. Furthermore, the court of appeals required Stimson to correct the sedimentation calculations, watershed analysis prescriptions, and road plan be corrected. After Stimson made the corrections, the court of appeals ordered the DNR to determine if the revised watershed analysis and road plan complied with the Washington Forest Practices

Rules for watershed analysis approval.

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O'Hagan v. State, No. 28897-4-II, 2003 Wash. App. LEXIS 2928 (Wash. Ct. App. Dec. 16, 2003) (holding (1) agency properly determined property was wetland, (2) restrictions in conditional water permit were valid, and (3) landowner failed to show that wetland restrictions deprived property of all economic value).

Patrick O'Hagan sued the Washington State Department of Ecology ("DOE"), challenging its decision to impose six conditions on a permit the DOE issued to O'Hagan in accordance with section 401 of the Clean Water Act ("CWA"). O'Hagan sought to log and convert three acres of his property, known as Bog 33, into a cranberry bog. The United States Army Corps of Engineers classified Bog 33 as forested wetland. Based on the wetland classification, section 401 of the CWA required O'Hagan to obtain a permit prior to dredging or filling his wetlands. The DOE granted O'Hagan a conditional permit, imposing six conditions on the permit intended to mitigate wetland loss. O'Hagan appealed all six conditions. The Superior Court of Pacific County affirmed the DOE conditions, and O'Hagan appealed the trial court's decision to the Washington Court of Appeals.

On appeal, O'Hagan challenged the DOE finding that Bog 33 constituted "wetlands," and further challenged the DOE's authority to impose conditions on wetlands. O'Hagan argued that the Pollution Control Hearings Board ("PCBH") finding that conversion of Bog 33 could adversely affect wildlife was arbitrary, and thus, the DOE had no authority to impose conditions. Alternatively, O'Hagan argued the DOE action constituted a regulatory taking without compensation, and that the DOE waived the permitting requirement by failing to issue the permit within one year of O'Hagan's application.

The court dismissed all of O'Hagan's claims. First, the court noted that the Washington legislature authorized the DOE to take all necessary action to comply with the CWA, and held the DOE's grant of a conditional permit was not an abuse of agency authority. Second, the court rejected O'Hagan's claim that the DOE action constituted a taking. The court also held that a regulatory taking may occur where the regulation does not support a legitimate state interest and denies the property owner "all economically viable use of the property." Applying this standard, the court held that O'Hagan's potential lost profits from cranberry production did not constitute deprivation of all economic uses of his land. The court then dismissed as moot O'Hagan's claim that the PCBH's upholding of the DOE conditions was arbitrary and capricious and violated O'Hagan's due process rights because the permit and its conditions expired in 2000. Therefore, because the court could provide no relief for O'Hagan's claims, the court dismissed them as moot.

Holly Shook