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BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

SDS LUMBER COMPANY,)	<i>FPAB</i>
)	
Appellant,)	NO. 92-27
)	
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND ORDER
STATE OF WASHINGTON,)	
DEPARTMENTS OF NATURAL)	
RESOURCES AND WILDLIFE,)	
)	
Respondents.)	

THIS MATTER came on for hearing before the Forest Practices Appeals Board, William A. Harrison, Administrative Appeals Judge, presiding, with board members Norman L. Winn and Dr. Martin Kaatz.

Appearances were as follows:

1. For the appellant, Michael E. Haglund, attorney at law, Haglund & Kirtley, 101 S.W. Main, Suite 1800, Portland, Oregon 97204.

2. For the respondent Department of Natural Resources, Jonathon A. Gurish, Assistant Attorney General, Highways-Licenses Building, Olympia, Washington 98504-0100.

1 3. For the respondent Department of Wildlife, Robert K.
2 Costello, Assistant Attorney General, Highways-Licenses
3 Building, Olympia, Washington 98504-8089.

4 An informal hearing was conducted in Seattle from September
5 30, 1992, to October 1, 1992, on appellant SDS Lumber Company's
6 Motion to Dissolve Stop Work Order, appeal of the Stop Work
7 Order, and Motion to Dismiss Department of Wildlife as a
8 Respondent. Gene Barker & Associates provided court reporting
9 services.

10 Having heard arguments of counsel and having considered the
11 testimony and exhibits at hearing and being fully advised, the
12 Board adopts the following Findings of Fact, Conclusions of Law
13 and Order.

14 FINDINGS OF FACT

15 1. An application for forest practices was received by the
16 Department of Natural Resources ("DNR") Southeast Region on July
17 2, 1992, for the property located within Section 23, Township 5
18 North, Range 10 East. (Exhibit R-1.) At the time the
19 application was submitted, a spotted owl site center was located
20 near, but not on, land proposed for harvest by SDS Lumber
21 Company, Inc. ("SDS").

22 2. Because the proposed forest practices were within 1.8
23 miles of a known northern spotted owl site center the
24 application was classified as a Class IV-Special and evaluated
25 under procedures required by the State Environmental Policy Act.
26

1 On August 2, 1992, DNR issued a Determination of Non-
2 Significance and approved the forest practices application.

3 3. On or about March 5, 1992, DNR issued a memo from Art
4 Stearns, Supervisor of the Department of Natural Resources, to
5 Regional Managers entitled "Spotted Owl Memo 3" ("Owl Memo #3").
6 Owl Memo #3 sets forth the guidelines for interpreting the
7 language "lands known to contain a breeding pair or the nest or
8 breeding grounds" of federally threatened or dangerous species
9 as that phrase is used in emergency rule WAC 222-16-050(1)(b)(i)
10 with regard to the Northern Spotted Owl ("Spotted Owl").

11 4. Owl Memo #3 provides that where an application proposes
12 to harvest or modify spotted owl habitat within 1.8 miles (in
13 the Northern Cascade Range) of a spotted owl nest, or site
14 center of a pair or a territorial single owl, the application
15 must be classified as a Class IV - Special, pursuant to WAC 222-
16 16-050(1)(b)(i). The Washington Department of Wildlife
17 identifies spotted owl sites and updates the database relied
18 upon by the Department of Natural Resources in classifying
19 forest practices applications.

20 5. Spotted Owl Memo #3 was not adopted as a rule through
21 the rulemaking process as provided in the APA. Further, no
22 threshold determination was made or other procedures followed
23 pursuant to the State Environmental Policy Act in connection
24 with the adoption of Owl Memo #3. Finally, Owl Memo #3 has not
25 been utilized in an advisory fashion. The memo is applied as a
26 directive of general applicability in that it applies to all

1 persons as a class who desire to conduct logging within the
2 areas designated by the memo.

3 6. On or about August 28, 1992, the site center of a
4 breeding pair of spotted owls was moved to a position located
5 centrally within the area proposed for logging by appellant SDS.

6 7. On or about September 1, 1992, the Department of Natural
7 Resources issued a stop work order to appellant SDS to cease all
8 lumber felling identified in the application. The proposed
9 logging would have reduced suitable habitat below 500 acres
10 within the core area around the site center. According to
11 current scientific opinion, such a reduction in suitable owl
12 habitat would eliminate the Spotted Owl pair in question or
13 their reproductive capacity with resultant material damage to
14 that species of wildlife.

15 8. The Spotted Owl is a species of wildlife as that term is
16 used in RCW 76.09.020(13).

17 9. The Washington Department of Wildlife carried out a role
18 intertwined with the Department of Natural Resources and is a
19 necessary party to this action.

20 10. Any Finding of Fact which is deemed a conclusion of law
21 is hereby adopted as such.

22 CONCLUSIONS OF LAW

23 1. Washington Department of Wildlife is a necessary party
24 to this action as defined by Civil Rule 19 of the Superior Court
25 Civil Rules. See WAC 223-08-030.

1 2. Respondent DNR cannot withdraw a determination of
2 nonsignificance once the application was approved. WAC 197-11-
3 340(3)(b) ~~(iii)~~. Because the Department of Natural Resources had
4 already issued a Determination of Non-Significance on the
5 proposed forest practices, it was not free to withdraw its
6 approval of the application.

7 3. Owl Memo #3 is not an interpretive or policy statement
8 as defined by RCW 34.05.230(1). Such statements are advisory
9 only. RCW 34.50.230(1).

10 4. The Washington Administrative Procedures Act ("APA")
11 defines a "rule" as "any agency order, directive, or regulation
12 of general applicability . . . the violation of which subjects a
13 person to a penalty or administrative sanction." RCW
14 34.05.010(15). Owl Memo #3 is a regulation of general
15 applicability which subjects persons to an administrative
16 sanction. Because the APA rule-making procedures were not
17 followed, Owl Memo #3 is an invalid rule. See Simpson Tacoma
18 Kraft Company v. Department of Ecology, No. 57949-1 (Wash. Sup.
19 Ct. Sept. 10, 1992).

20 5. Owl Memo #3 cannot support the issuance of the stop work
21 order at issue in this proceeding.

22 6. However, the stop work order was properly issued in
23 accordance with the following statute and administrative rule.
24 The Washington State Forest Practices Act authorizes stop work
25 orders where "immediate action is necessary to prevent
26

1 continuation of or to avoid material damage to a public
2 resource." RCW 76.09.080.

3 7. In determining that the SDS proposal would cause
4 material damage to a public resource, DNR properly relied upon
5 administrative rules adopted on an emergency basis, which state
6 that a potential for a substantial impact to the environment
7 exists whenever there is harvesting on lands known to contain a
8 breeding pair or the nest or breeding grounds of any threatened
9 species. WAC 222-16-050(1)(b)(i). These standards, although
10 imprecise, are sufficient to provide notice of state
11 requirements. The State Forest Practices Board is not required
12 to develop specific numerical standards. Weyerhaeuser v.
13 Southwest Pollution Control Authority, 91 Wn. 77, 80, 586 P.2d
14 1163 (1978).

15 8. In this case, the state has shown persuasively that
16 material damage would occur to Northern Spotted Owls if logging
17 were allowed as proposed. Wildlife such as the Spotted Owl is a
18 public resource. RCW 76.09.020(13).

19 9. We know of no authority which would prevent protection
20 afforded to the owl from moving with the owl. Thus, we conclude
21 that the protection afforded this owl pair moved with them to
22 their new site center. The State, however, is cautioned to
23 promptly notify private landowners of the relocation site
24 centers. In this case, information gathered by the Department
25 of Wildlife was not communicated so as to signal its full import
26 until the eve of logging operations on September 1, 1992.

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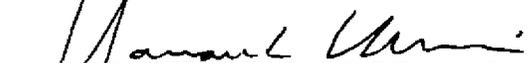
1 3. That the Stop Work Order issued by the Department of
2 Natural Resources to SDS Lumber Company is hereby affirmed.

3 DATED this 11th day of December, 1992.

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5 

6 William A. Harrison
7 Administrative Appeals
8 Judge Presiding

9 FOREST PRACTICES APPEALS BOARD

10 

11 Norman Winn
12 Board Member

13 

14 Dr. Martin Kaatz
15 Board Member

16 Presented by:

17 KENNETH O. EIKENBERRY
18 Attorney General

19 
20 JONATHON A. GURISH
21 Assistant Attorney General
22 WSBA No. 20992
23 Attorneys for Respondent
24 Department of Natural Resources

25 Approved as to Form and Notice
26 of Presentation Waived:

HAGLUND & KIRTLEY

Nancy K. Nakata (Per telephonic
authorization of 11-12-92)

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FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER - 8

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