

No. 32047-9-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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ALPINE LAKES PROTECTION SOCIETY, FRIENDS OF THE  
LOOMIS FOREST, KETTLE RANGE CONSERVATION GROUP,  
THE MOUNTAINEERS, NORTHWEST ECOSYSTEM ALLIANCE,  
PENINSULA NEIGHBORHOOD ASSOCIATION, SEATTLE  
AUDUBON SOCIETY, WASHINGTON ENVIRONMENTAL  
COUNCIL, WASHINGTON WILDERNESS COALITION, AND  
WHIDBEY ENVIRONMENTAL ACTION NETWORK,

*Appellants,*

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

*Respondent,*

And

WASHINGTON FOREST PROTECTION ASSOCIATION AND  
WASHINGTON STATE DEPARTMENT OF  
NATURAL RESOURCES,

*Intervenor-Respondents.*

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

The Washington Department of Ecology (“Ecology”) has the authority under RCW 43.21C.110(1) to prescribe State Environmental Policy Act (“SEPA”) rules for state agencies that apply SEPA to permits under their jurisdiction. This authority includes adopting rules prescribing WAC 197-11-305 (“Section 305”) review for permits that might otherwise be exempt from SEPA regardless of the source of their SEPA exemption. Ecology’s authority and duty under RCW 43.21C.110(1) to promulgate SEPA rules for all agencies and all kinds of SEPA actions is consistent with SEPA and complementary to Ecology’s statutory responsibility to promulgate rules for the administration of SEPA exemptions under RCW 43.21C.110(1)(a).

Ecology’s Section 305 SEPA rule implements fundamental and vital SEPA purposes and policies governing how agencies should administer the SEPA categorical exemptions. Section 305 does **not** un-exempt a forest practice deemed exempt under the Forest Practices Board’s (“FPB”) rules. Rather, Section 305 requires agencies to determine whether a permit was **segmented** or whether it **related** to another type of permit that is not exempt from SEPA. Section 305 does not undermine SEPA categorical exemptions; as courts have held, it assures agency compliance with SEPA.

Ecology's authority to adopt fundamentally important SEPA rules such as Section 305 must be viewed in context with RCW 43.21C.120(1), the SEPA provision that permits other agencies, like the FPB, to adopt their own customized SEPA rules. The FPB neglected to avail itself of this provision but instead adopted Ecology's SEPA rules by reference. The FPB, not Ecology, is the entity that should undertake rulemaking if the FPB believes Section 305's principles should not apply to forest practices.

Ecology claims its 2003 rulemaking was intended to correct its inadvertent decision in 1983 to include the statutory exemptions on its WAC 197-11-800 list. The issue in this case is not what Ecology intended in 1983 but only whether Ecology had the authority and duty to do what it did. For the reasons set forth below, Ecology did nothing *ultra vires* in promulgating its SEPA rules. Rather, Ecology erred in 2003 when, under pressure from the timber industry, it failed to defend its SEPA powers and instead effectively repealed 12 years of cases applying Section 305 to forest practices deemed segmented by the courts and the Forest Practices Appeals Board.

The Court should reverse Ecology's 2003 rulemaking because it was based on a fundamental misinterpretation of Ecology's statutory authority.<sup>1</sup>

## II. ARGUMENT

### A. This Case is Governed by an Error of Law Standard of Review.

The question of whether Ecology erred as a matter of law in interpreting its statutory authority to promulgate SEPA rules for other agencies is reviewed *de novo*. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). Determining the extent of an agency's rule-making authority is a question of law. *Local 2916, IAFF v. Public Employment Relations Comm'n*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995).

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<sup>1</sup> The respondents and intervenor assert that ALPS waived its claim that Ecology's 2003 rulemaking should have gone through the environmental impact statement (EIS) process. Ecology Br., at 2 n.1; WFPA Br., at 4 n.4. ALPS did not abandon this claim but it is simply not germane to this case on appeal given the nature of Ecology's action. Ecology candidly admits that its 2003 rulemaking (deleting the statutory exemptions from its WAC 197-11-800 list) was based entirely on its interpretation of its statutory authority. AR 4251; Ecology Br., at 10-11, 13-17. If the Court reverses Ecology's interpretation, it will direct Ecology to revoke its 2003 rulemaking and go back to the drawing board following standard SEPA procedures. *H&H Partnership v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003); RCW 34.05.574(1)(authorizing Court to set aside agency action). Because Ecology would have to either reconduct or abandon its rulemaking, a request for Ecology to prepare an EIS for its rule amendments would be premature.

The Court does not defer to Ecology's interpretation of its statutory authority. *Northwest Ecosystem Alliance v. Forest Practices Bd.*, 104 Wn. App. 901, 916, 17 P.3d 697 (2001), *reversed on other grounds*, 149 Wn.2d 67, 66 P.3d 614 (2003). The ultimate authority to interpret a statute rests with the court. *Waste Management of Seattle*, 123 Wn.2d at 627-28.

The appellate court reviews the administrative record before Ecology, not the Superior Court record. *Aviation West Corp. v. Dept. of L&I*, 138 Wn.2d 413, 422, 980 P.2d 701 (1999). The appellate court sits in the same position as the superior court. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998).

Intervenor Washington Forest Protection Association ("WFPA") (but not Ecology and DNR) argues the appellate court should review the administrative record for Ecology's 2003 rulemaking decision under the arbitrary and capricious standard of review. WFPA Br., at 16-19. WFPA asks the Court to defer to Ecology's interpretation of the statutory and regulatory scheme and the entire administrative record. WFPA Br., at 17-18.

WFPA's proposed standard of review is incorrect. Ecology's decision to amend WAC 197-11-800 (the "Part Nine" list of categorically exempt actions) was based on Ecology's interpretation of its statutory

authority, that it did not have the authority to make Section 305 apply to forest practices. AR 4251. This is clearly a legal issue because it involves Ecology's statutory authority and the construction of statutes.

**B. RCW 43.21C.110(1) Gives Ecology the Authority and Responsibility to Promulgate SEPA Rules For Agencies' Administration of the SEPA Categorical Exemptions.**

Ecology, DNR, and WFPA argue that Ecology's SEPA rulemaking powers under RCW 43.21C.110(1) do not authorize Ecology to apply Section 305 to the statutory SEPA exemptions. Rather, they claim that Ecology's only authority to promulgate Section 305 is pursuant to RCW 43.21C.110(1)(a), the provision directing Ecology to adopt rules for the SEPA categorical exemptions Ecology administers (the "administrative exemptions"). Ecology Br., at 16 (lines 10-12).

This argument ignores Ecology's broad duties to adopt SEPA rules, the plain terms in RCW 43.21C.110(1), the statutory scheme, and fundamentally misinterprets how Section 305 operates relative to forest practices.

**1. The plain terms of RCW 43.21C.110(1) authorize Ecology to promulgate SEPA rules for agencies charged with administering the SEPA categorical exemptions.**

"Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of authority." *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d

1382 (1994) citing *Municipality of Metro. Seattle v. Pub. Empl. Relations Comm'n*, 118 Wn.2d 621, 633, 826 P.2d 158 (1992).<sup>2</sup>

When interpreting a statute, the court's goal is to determine and give effect to the legislature's intent. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). To determine legislative intent, the court examines the statute's plain language and ordinary meaning. *Nat'l Elec. Contractors*, 138 Wn.2d at 19. The court reviews the statutory scheme to determine legislative intent. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

The terms of RCW 43.21C.110(1) broadly authorize Ecology to “adopt and amend thereafter rules of interpretation and implementation of [SEPA] for the purpose of providing uniform rules and guidelines to all branches of government.” RCW 43.21C.110(1) goes on to say, “The rule-making powers authorized in this section shall include, but shall not be

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<sup>2</sup> The *Tuerk* court elaborated on agency authority:

Agencies have implied authority to carry out their legislatively mandated purposes. When a power is granted to an agency, “everything lawful and necessary to the effectual execution of the power” is also granted by implication of law. Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. Agencies also have implied authority to determine specific factors necessary to meet a legislatively mandated general standard.

*Tuerk*, 123 Wn.2d at 125, 864 P.2d 1382 (quoting *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 481 206 P.2d 456 (1949)).

limited to” an enumerated list of Ecology tasks specified in RCW 43.21C.110(1)(a)-(m). Ecology adopted its SEPA rules after years of public review and consideration. R. Settle, *The State Environmental Policy Act*, §5.01 [2], at 5-2-3 (2003).

Ecology, DNR, and WFPA cast aside RCW 43.21C.110(1)’s broad statutory language authorizing Ecology to adopt SEPA rules, claiming it is limited by Ecology’s duty under RCW 43.21C.110(1)(a) to administer the Ecology-created administrative SEPA exemptions. Ecology Br., at 10, 15-16. Ecology’s narrow interpretation of its authority conflicts with well-established principles of administrative law. When the Legislature gives an agency (here, Ecology) general authority to promulgate regulations and this general grant of authority is followed by a list that enumerates certain specific duties, the agency’s authority is not limited to the enumerated powers. *PUD No. 1 v. Pend Oreille Cy.*, 146 Wn.2d 778, 807 n.7, 51 P.3d 744 (2002)(Ecology had authority to promulgate comprehensive, specific water quality standards for regulating state navigable waters, as well as a statewide antidegradation policy, because authorizing statute was broader than list of enumerated powers). This is because the phrase “includes but not limited to” is a term of enlargement. *See Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P. 3d 921 (1998). Accordingly, RCW 43.21C.110(1) granted Ecology broad authority to guide agencies’

compliance with SEPA and none of the sub-sections in RCW 43.21C.110 (1)(a)-(m) diminish that power.<sup>3</sup>

When it adopted SEPA rules, Ecology prescribed Section 305 for all SEPA exemptions. WAC 197-11-305(b); former WAC 197-11-800 (25). This was within and consistent with Ecology's broad powers under RCW 43.21C.110(1). Whether Ecology's decision to require Section 305 review for all SEPA exemptions was purposeful or inadvertent is immaterial. The issue for the Court today is not how Ecology adopted Section 305 in 1983 but whether Ecology had the authority to do so. Ecology had this authority because the enumerated powers in RCW 43.21C.110(1)(a)-(m) do not limit the broad grant of authority to Ecology in RCW 43.21C.110(1).

Ecology's stingy interpretation of its powers would read a limitation into its rulemaking powers under RCW 43.21C.110(1) and would undermine Ecology's power to prescribe SEPA rules governing SEPA. *Muckleshoot Indian Tribe v. Dep't of Ecology*, 112 Wn. App. 712, 720, 50 P.3d 668 (2002)(in construing a statute, court should give effect to all its language so that no portion of the statute is rendered meaningless or

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<sup>3</sup> SEPA is not "just" another law; it overlays everything that an agency must do. *Bellevue Farm Owners Ass'n v. Shoreline Hrgs. Bd.*, 100 Wn. App. 341, 353, 997 P.2d 380 (2000).

superfluous), *review denied*, 150 Wn.2d 1016, 79 P.3d 446 (2003). Such an interpretation reads limits into SEPA that simply do not exist.

**2. Ecology’s authority to prescribe Section 305 for either the statutory or administrative SEPA exemptions is consistent with the statutory scheme and legislative intent.**

As argued above, the plain terms of RCW 43.21C.110(1) authorized Ecology to promulgate SEPA rules for it and other agencies that have the responsibility for administering actions that are potentially-exempt from SEPA by either Ecology or the Legislature. But even if RCW 43.21C.110(1) is ambiguous relative to Ecology’s authority to promulgate SEPA rules for other agencies, Ecology’s authority to prescribe a Section 305-like rule for **all** agencies applying the statutory exemptions is consistent with legislative intent and the statutory scheme.

A statute is ambiguous if it is susceptible to more than one reasonable meaning. *State Owned Forests v. Sutherland*, 124 Wn. App. 400, 410, 101 P.3d 880 (2004). Statutes should be construed as a whole and interpreted in a manner that reconciles conflicting provisions and that is consistent with its stated goals. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000); *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996).

Ecology's power to prescribe SEPA rules for other agencies' administration of SEPA exemptions is entirely consistent with the statutory scheme and legislative intent.

**a. Relative to Section 305, there is no difference between the administrative and statutory exemptions.**

Ecology, DNR and WFPA repeatedly argue that there is a fundamental distinction between "statutory" and "administrative categorical" SEPA exemptions. SEPA neither explicitly nor implicitly distinguishes between categorical and statutory exemptions; indeed, the relevant statutory language in no way creates or recognizes a purported difference between these exemptions. Rather, the plain language of the statute authorizes Ecology to apply Section 305 to all SEPA exemptions.

Even if there is a difference between types of exemptions, any purported difference cannot be based on the origin of the exemption *because all of the cited exemptions, even SEPA's administrative categorical exemptions, are statutory. See RCW 76.09.050(1)(Class I-III forest practices) and RCW 43.21C.110(1)(a)(Ecology-determined categorical exemptions).* Rather, as Ecology argues, any differences in the kinds of SEPA exemptions has more to do with: (1) whether the exemptions apply without regard to the activity's environmental impact;

and (2) whether the exemption is activity-specific or applies to a category or type of action. Ecology Br., at 3-4, 15-16.

Viewed in this light it is clear that the forest practices SEPA exemptions are far more like the administrative exemptions than like the other so-called “statutory” exemptions cited by Ecology. Much like Ecology’s administrative exemptions, the Forest Practices Act exempts *categories* of forest practices based on their relative environmental impact. Compare RCW 76.09.050(1) with RCW 43.21C.110(1)(a). For example, the Forest Practices Act exempts forest practices with no or a less than ordinary potential for damaging public resources (Class I and II). However, much like SEPA’s prohibition on exempting “major actions significantly affecting the...environment”, the Act requires SEPA review of forest practices with the potential for a substantial environmental impact. RCW 76.09.050(1); WAC 222-16-050(1). See also *Plum Creek Timber Co. v. FPAB*, 99 Wn. App. 579, 591, 993 P.2d 287 (2000)(rejecting argument that statutory and administrative categorical exemptions were different).

Ecology’s administrative categorical exemptions and the forest practices exemptions are also similar because they are not activity specific. In the Forest Practices Act, the Legislature did not immunize specific activities from SEPA as it did for the long list of statutory

exemptions cited by respondents. Ecology Br., at 3; WFPA Br., at 30; *and see* RCW 43.21C.035 (fifty cubic feet per second for agricultural irrigation); RCW 43.21C.038 (school closures); RCW 43.21C.0381 (air operating permits); RCW 43.21C.0382 (water restoration and fish habitat enhancement projects); RCW 43.21C.0383 (waste discharge permits); RCW 43.21C.0384 (personal wireless services facilities). Rather, the Forest Practices Act exempted categories of activities just as SEPA did in RCW 43.21C.110(1)(a).

Ecology has the authority to prescribe Section 305 for forest practices because the Forest Practices Act's exemptions are just like SEPA's categorical exemptions. Unlike the other statutory exemptions described above, the Forest Practices Act specifically requires SEPA to apply to environmentally-degrading forest practices. RCW 76.09.050(1). Because the FPB has the statutory duty to apply SEPA and because Ecology had the authority to tell the FPB how to apply SEPA to potentially segmented permits, it is completely within the statutory framework for Ecology to have the authority to prescribe categorical exemption rules for the FPB. Stated differently, without SEPA rules, the FPB cannot apply SEPA to forest practices or even classify forest practices, as the FPB is required to do by RCW 76.09.050(1).

**b. Ecology did not force the FPB to adopt Section 305.**

Ecology claims it did not have the authority to “require” the FPB to apply SEPA to forest practices. DNR Br., at 16. This is a red-herring issue. To be sure, Ecology adopted Section 305 and prescribed it for all permits potentially subject to a SEPA categorical exemption. Ecology, however, never forced the FPB to adopt its Section 305 rule. Rather, Ecology merely prescribed such a rule because it is entirely consistent with SEPA. RCW 43.21C.120(1) explicitly gave the FPB the option to adopt Section 305 or some modified version of it; Ecology’s authority should not be questioned when the FPB had 15 years of opportunity to adopt its own rules governing the categorical exemptions.<sup>4</sup>

**3. Section 305 does not undermine or limit the statutory forest practices SEPA exemptions.**

The thrust of the respondents’ argument is that the application of Ecology’s Section 305 rule to forest practices is *ultra vires* because it, in effect, “undermines” the statutory SEPA exemptions. Ecology Br., at 13-17; WFPA Br., at 22-24. This argument relies on a fundamental misinterpretation of how Section 305 operates.

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<sup>4</sup> In a companion appeal, No. 33676-6-II, the conservation group plaintiffs assert that, regardless of Section 305, the FPB has failed to comply with its statutory duty under SEPA to adopt a rule that functions like Section 305.

Section 305 does not undermine an otherwise statutorily exempt action. It does not, for example, direct or require DNR to consider the environmental consequences of a specific exempt forest practices permit. *See Snohomish County v. State*, 69 Wn. App. 655, 668-69, 850 P.2d 546 (1993)(DNR not required to consider every forest practices permit for SEPA review), *rev. denied*, 123 Wn.2d 1003, 868 P.2d 871 (1994).

On the contrary, courts and the Forest Practices Appeals Board have repeatedly held that Section 305 is a *multiple permits* rule that requires review of applications that are related to others or are a segment of a larger proposal. *Plum Creek*, 99 Wn. App. at 590 (“The limitation of Section 305 on forest practices exemptions is consistent with the legislative directive in RCW 76.09.050(1) that forest practices with a potential for a substantial environmental impact be subject to SEPA review.”) Rather than applying SEPA to exempt permits, Section 305 serves as a SEPA-required limit on the scope of the exemptions.<sup>5</sup>

Section 305 also serves another purpose unrelated to assessing a permit’s potential environmental impact. Section 305 ensures that a permit that may otherwise be exempt by statute undergoes SEPA review

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<sup>5</sup> The Legislature has failed to amend RCW 43.21C.110(1) in the years following the judicial and Appeals Boards’ decisions applying Section 305 to segmented forest practices. Its inaction should be interpreted as its acquiescence in Ecology’s authority. *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n* 148 Wn.2d 887, 905 n. 14, 64 P.3d 606 (2002).

when it is also necessary to obtain a permit that is not exempt from SEPA. *Foster v. King County*, 83 Wn. App. 336, 348, 921 P.2d 552 (1996)(statutorily-exempt irrigation permit is not exempt under Section 305 because it was in conjunction with a permit to authorize waterskiing on a lake, a permit that is not exempt from SEPA). The Forest Practices Appeals Board has also used Section 305 to require SEPA review for a statutorily-exempt forest practices permit that was being proposed in conjunction with an un-exempt shoreline permit. *Muckleshoot Indian Tribe v. DNR*, 1996 WL 752117, FPAB Nos. 96-25 & 26 (1996). (Appendix 1.)

Courts and the Forest Practices Appeals Board have long held Section 305 is completely consistent with the Legislature's decision to exempt Class I, II, and III forest practices from SEPA. *Plum Creek*, 99 Wn. App. at 590; *Snohomish County*, 69 Wn. App. at 669; *Plum Creek Timber Co. v. Washington State Forest Practices Appeals Board*, King County Superior Court Case No. 97-2-24568-1SEA, Final Order, at 9 ¶3 (June 22, 1998)(“There is nothing in WAC 197-11-305...that is inconsistent with the statutory parameters in RCW 76.09.050(1)”) (Appendix 2); *ALPS v. Washington DNR, et al.*, 1997 WL 556192, FPAB No. 97-4, Order on Motions to Dismiss, at 8 ¶V (April 28, 1997)(“We see no intent by the Legislature to disregard the impact on the

environment which review under WAC 197-11-305 may disclose from time to time”(Appendix 3).

Ecology and WFPA argue *Plum Creek* is not precedent for this case because the Court there assumed it was reviewing a FPB-adopted rule and because the Court was not interpreting Ecology’s authority to prescribe Section 305 for certain segmented Class I, II, and III forest practices. Ecology Br., at 35-37; WFPA Br., at 25-29. These distinctions are wrong.

While Ecology’s authority to make Section 305 applicable to forest practices was not at issue in *Plum Creek*, the *Plum Creek* Court nevertheless held that Section 305 does not undermine statutorily-exempt forest practices permits and is entirely consistent with the statutory scheme set forth in the Forest Practices Act and SEPA. *Plum Creek*, 99 Wn. App. at 590. If Section 305 does not undermine a statutory SEPA exemption, Ecology’s adoption of it does not constitute Ecology interference with the statutory exemptions. The *Plum Creek* Court also observed that a SEPA rule preventing segmentation is different than a rule exposing a single subject permit to SEPA. *Plum Creek*, 99 Wn. App. at 591.

**C. Ecology’s Intent Should Not Be Confused With Its Authority.**

Ecology and WFPA argue that the only reason why Section 305 has been applied to forest practices is because Ecology inadvertently included Class I, II, and III forest practices permits on its WAC 197-11-800 “convenience” list of actions exempt from SEPA. Ecology Br., at 5, WFPA Br., at 7-8. Ecology and WFPA impliedly argue that not only did Ecology lack the authority to prescribe Section 305 for all SEPA exemptions but it did not overtly intend to do so.

It is true that Ecology’s inclusion of forest practices permits on its WAC 197-11-800 list is the action that triggered Section 305 for certain forest practices and that Ecology’s 2003 rulemaking reverses this inclusion; this is because, by its own terms, Section 305 applies only to permits listed on Ecology’s WAC 197-11-800 list. However, it is immaterial how Ecology prescribed Section 305 for categorically exempt permits (e.g., on purpose or through inadvertence). Rather, the only issue in this case is whether Ecology had the **authority** to prescribe that agencies, like the FPB, incorporate Section 305-like SEPA rules into their own SEPA rules.

**D. Ecology’s Recitation of Legislative History Does Not Support Its Argument.**

Ecology asserts the legislative history behind the 1983 SEPA amendments reflect that the Legislature did not intend to give Ecology the

power to do anything other than administer the Ecology-based SEPA exemptions. Ecology Br., at 19-20. The legislative history says no such thing. The legislative history simply reflects that the Legislature intended to exempt Class I, II, and III forest practices from SEPA and authorized the FPB to determine by rule which forest practices would undergo SEPA review.

Nowhere in the legislative history, however, is it stated that Ecology did not have the authority to adopt SEPA rules guiding the FPB's administration of SEPA or that forest practices that could have an adverse environmental impact should not undergo SEPA review. On the contrary, the Legislature's 1983 SEPA amendments made it clear that Ecology's rules were regulatory and not just guidelines. R. Settle, *State Environmental Policy Act*, §4.01, at 4-5 (2003). Moreover, as discussed above, Section 305 does not usurp the FPB's authority to expose forest practices to SEPA. Rather, Section 305 merely implements the FPB's duty to apply SEPA to certain forest practices because it prescribes "connected actions review of segmented SEPA-exempt forest practice permits." *Plum Creek*, 99 Wn. App. at 590.

### **III. CONCLUSION**

Courts and the Forest Practices Appeals Board have repeatedly held that Section 305 does not undermine the Legislature's intent to

exempt Class I, II, or III forest practices from SEPA. Rather, Section 305 merely requires connected action review of segmented forest practices permits. If Section 305 does not undermine a statutory exemption, the respondents simply cannot assert that Ecology's rule was beyond its authority.

Since 1993, several courts and the Forest Practices Appeals Board have held that Ecology's Section 305 SEPA rule can apply to certain forest practices because its application is completely consistent with and required by both SEPA and the Forest Practices Act. Neither Ecology nor the FPB questioned Ecology's authority to prescribe Section 305 for all kinds of potentially SEPA-exempt actions or permits; the Legislature never stepped in either.

It was not until 2002, after the Forest Practices Appeals Board's decision in *The Mountaineers v. Plum Creek Timber Co.*, 2002 WL 1650474, FPAB No. 00-029 (2002), a case involving a series of large, sequentially permitted clear-cuts by a single industrial landowner, that Ecology conceded it did not have the "authority" to prescribe Section 305 for forest practices. This is despite the fact that SEPA authorizes the FPB to adopt its own SEPA rules or amend the rules to rectify what some perceive as a threat to a reliable system of categorical exemptions.

Ecology should not be permitted to overrule 12 years of case law under the guise of conducting “housekeeping” of its rules. SEPA clearly gave Ecology the authority to adopt uniform statewide rules for agencies, such as the FPB, prescribing how those agencies should apply SEPA. Those rules logically include how agencies should administer the categorical exemptions. Ecology’s Section 305 rule is wholly consistent with the statutory and regulatory scheme.

The timber industry seeks to void Section 305 because it prevents them from filing segmented forest practices permits. The Court should not permit Ecology to surrender its authority over SEPA merely because a regulated industry is unhappy that SEPA is working the way it is supposed to work. The Court should reverse Ecology’s 2003 rulemaking decision.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of November, 2005.

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