



To: Columbia River Gorge Commission
From: Michael Lang, Friends of the Columbia Gorge
Subject: Mandatory Enforcement Role of the Executive Director
DATE: September 10, 2019

Congress gave mandatory authority to the Gorge Commission to enforce the requirements of the National Scenic Area Act. The courts, including the Washington Supreme Court, have affirmed this mandatory duty to enforce. Congress did not give citizens any rights to directly sue violators for violating the Scenic Area Act and rules (as it did in other federal statutes such as the Endangered Species Act, Clean Air Act, and Clean Water Act). In exchange for that limitation, Congress made enforcement by the Gorge Commission mandatory.

The staff is denying this mandatory duty to enforce and are attempting to reduce the Commission's authority to that of a quasi-judicial appellate body, such as the Washington's Growth Management Hearings Board or the Oregon Land Use Board of Appeals. The Commission staff has suggested that the counties and citizens assume the role that Congress assigned directly to the Commission and its staff. This is the most significant effort to weaken the Gorge Commission's responsibilities and Gorge protection since Congress passed the National Scenic Area Act in 1986.

The Columbia River Gorge National Scenic Area Act ("Act") assigns a mandatory enforcement role for the Gorge Commission in Section 15(a)(1) (emphasis added).

16 U.S.C. § 544m **Enforcement**

(a) Administrative Remedies

- (1) Commission Orders - **The Commission shall** monitor activities of counties pursuant to sections 544 to 544p of this title and shall **take such actions as it determines are necessary to ensure compliance.**

Congress gave the Commission strong civil penalty authority in Section 15(a)(3).

- (3) Civil penalties – Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to sections 544 to 544p of this title may be assessed a civil penalty by the Commission not to exceed \$10,000 for each violation. No penalty may be assessed under this subsection unless such person or entity is given notice and opportunity for a public hearing with respect to such violation. The Commission may compromise, modify, or remit, with or without conditions, any penalty imposed

under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the violator to remedy the violation in a timely manner.

There are many references to the Commission's mandatory enforcement powers in the legislative history of the National Scenic Area Act. See Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 *Envtl. L.* 863, 900, 906–07, 962–63, 968 (1987) (“The Commission is given considerable authority to ensure compliance with its enforcement mandate.”), (“Considerable debate occurred during the hearings process over whether enforcement by the Commission should be discretionary or mandatory. The Act is unambiguous. The Commission is required to enforce the Act, but has discretion regarding the method of ensuring compliance: “[t]he Commission shall monitor activities of counties pursuant to this Act and shall take such actions as it determines are necessary to ensure compliance.””).

The Act Does Not Prescribe a Mandatory Enforcement Role for the Counties

There is no analogous mandatory enforcement language in the Act that applies to the counties. However, several Oregon and Washington statutes implement the compact and the Act. These statutes grant authority to and direct the states and the counties to carry out their respective functions under the Act.

The Washington Supreme Court Affirmed this Mandatory Enforcement Duty in Columbia River Gorge Commission v. Skamania County (Bea)

Bea decision attached. See Pacific Reporter pages 249, 250 and 255, or Washington Reporter pages 47 and 59.

The Washington Supreme Court agreed with all of the parties that the Gorge Commission's enforcement obligation in section 15(a)(1) of the Scenic Area Act is “mandatory” and that it has a “duty . . . to ensure compliance with the Act.” *Skamania Cnty.*, 144 Wn. 2d at 47; see also *id.* at 59 (J. Ireland, concurring) (“The Commission has a duty to enforce under § 544m(a)(1) of the Act”)

Where the Washington Supreme Court found error with the Commission in the Bea case was in the fact that, rather than Commission staff appealing the Bea decision through the normal appeals process at the Gorge Commission, the Gorge Commission staff sought to **overturn a valid final land use decision** through its enforcement powers, long after the appeal period had expired. Furthermore the court found that the Commission erred by failing to include the landowner as a party in the enforcement proceeding and by failing to first consider equitable factors before issuing an injunction. **Again, all parties agreed that the enforcement obligation is mandatory.**

The Columbia River Gorge Commission's Rules Describes the Duties of the Executive Director in Executing Her Mandatory Enforcement Role (350-30)

The adopted rules regarding enforcement can be found here:

<http://www.gorgecommission.org/images/uploads/pdfs/Commission%20Rule%20350-30%2020110501.pdf>

Of particular note and relevance:

Commission Rule 350-30-020. Investigation.

“(1) The Director shall investigate alleged violations of the measures listed in subsection 1 of 350-30-015 of this Division. “

“(2) The Director may inspect the subject property if necessary to conduct an investigation under subsection (1) of this section.”

Commission Rule 350-30-030. Notice of Alleged Violation.

“(1) If the violation is not de minimis, the Director shall serve written notice of violation on the alleged violator by personal service or by registered or certified mail.”

Commission Rule 350-30-100. Summary Order.

“Where an imminent threat exists to resources protected under the law and/or to public health, safety or welfare, the Director may issue a summary order requiring the alleged violator to promptly stop work or take other necessary action pending a notice of alleged violation and a contested case hearing before the Commission under 350-30-070.”

These rules require the Commission’s Director to investigate alleged violations, require the Director to issue a notice of violation whenever she becomes aware of a violation, and authorize the Director to issue a stop-work order even before issuing a notice of violation, if necessary to protect the public health, safety, or welfare. These rules are not currently being complied with.

The “Appearance of Fairness” Doctrine Does Not Apply to the Commission Staff

The appearance of fairness requirement in Commission Rule 350-16 expressly applies to *members* of the Gorge Commission acting in their quasi-judicial capacity. The appearance of fairness doctrine does not apply to staff, including the Director, who are not members of the Commission.

Commission Rule 350-16-017. Appearance of fairness.

“Members of the Commission shall comply with Washington’s appearance of fairness doctrine in appeals and proceedings under this rule and under Rules 350-60 et seq. and Rules 350-70 et seq.”

Conclusion

In summary,

- **The Gorge Commission has a mandatory responsibility to ensure compliance with the Act through enforcement;**
- **Under Commission Rules, the Director is solely responsible for issuing notices of alleged violation;**
- **Under Commission Rules, the Director is solely responsible for issuing stop work orders; and**
- **The appearance of fairness doctrine does not apply to Commission staff, including the Director, so the Director's duties are in no way curtailed by the doctrine.**