

FILED: June 19, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRIENDS OF THE COLUMBIA GORGE, INC.,
Petitioner,

v.

COLUMBIA RIVER GORGE COMMISSION,
Respondent.

Columbia River Gorge Commission

A150010

Argued and submitted on April 08, 2013.

Gary K. Kahn argued the cause for petitioner. With him on the briefs were Reeves, Kahn, Hennessy & Elkins, and Nathan J. Baker and Friends of the Columbia Gorge.

Jeffrey B. Litwak argued the cause and filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

WOLLHEIM, J.

Affirmed.

1 WOLLHEIM, J.

2 The management plan for the Columbia River Gorge National Scenic Area
3 requires Oregon and Washington to develop "a regional air quality strategy" for the
4 scenic area, which must be submitted to the Columbia River Gorge Commission
5 (commission) for approval. In 2011, the states, pursuant to that obligation, submitted the
6 *Columbia River Gorge Air Study and Strategy*, which the commission approved as the
7 states' regional air quality strategy. Petitioner now seeks judicial review of the
8 commission's decision to approve that air quality strategy. We affirm.

9 By way of brief introduction, Congress in 1986 passed the Columbia River
10 Gorge National Scenic Area Act (the Scenic Area Act), Pub L 99-663, §§ 2-18, 100 Stat
11 4274 (1986), now codified at 16 USC §§ 544-544p. The Scenic Area Act created the
12 Columbia River Gorge National Scenic Area, which encompasses roughly 292,000 acres
13 along the Columbia River in Oregon and Washington. As authorized by the Scenic Area
14 Act, Oregon and Washington entered into an interstate compact and created the Columbia
15 River Gorge Commission, which, in cooperation and consultation with the United States
16 Secretary of Agriculture, is charged with developing, implementing, and administering a
17 management plan for the scenic area. 16 USC §§ 544c, 544d; ORS 196.150; RCW
18 43.97.015.

19 As relevant to this case, the commission amended the existing management
20 plan in May 2000 to include the following:

1 "Air quality shall be protected and enhanced, consistent with the
2 purposes of the Scenic Area Act. The States of Oregon and Washington
3 and the U.S. Forest Service shall:

4 "(1) Continue to monitor air pollution and visibility levels in
5 the Gorge;

6 "(2) Conduct an analysis of monitoring and emissions data to
7 identify all sources, both inside and outside the Scenic Area, that
8 significantly contribute to air pollution. *Based on this analysis, the*
9 *States shall develop and implement a regional air quality strategy to*
10 *carry out the purposes of the Scenic Area Act, with the U.S. Forest*
11 *Service, the Southwest Air Pollution Control Authority and in*
12 *consultation with affected stakeholders.*

13 "The States and the Forest Service shall together provide annual
14 reports to the Commission on progress made regarding implementation of
15 this policy. The first report shall include a workplan and timeline for
16 gathering/analyzing data and developing and implementing the strategy.
17 *The workplan and strategy shall be submitted to the Commission for*
18 *approval."*

19 (Emphases added.)

20 Pursuant to the amended management plan, Oregon's and Washington's air
21 quality agencies (collectively, the "air agencies"),¹ issued an air quality workplan in
22 2001. The workplan anticipated that a regional air quality strategy would be developed
23 and ready for implementation by 2006, a date that was eventually pushed back.

24 On September 13, 2011, the air agencies presented the *Columbia River*
25 *Gorge Air Study and Strategy* to the commission. In that document, the air agencies

¹ Initially, three air agencies were involved: Oregon's Department of Environmental Quality (DEQ) and Washington's Department of Ecology and its Southwest Clean Air Agency (SWCAA), formerly known as the Southwest Air Pollution Control Authority. Later, only DEQ and SWCAA were involved in developing the regional air quality strategy.

1 recommended that the commission approve a "key strategy of using requirements of the
2 federal Regional Haze Program as the vehicle and framework for improving visibility in
3 the Gorge." The Regional Haze Program was created in 1999 by the Environmental
4 Protection Agency (EPA) to improve visibility in designated national parks and
5 wilderness areas (known as "Class I areas"). Under the program, states are required to
6 develop and update regional haze plans every five years to assure reasonable progress
7 toward meeting national goals concerning visibility impairment in Class I areas.

8 Although the Gorge itself is not a Class I area, the air agencies noted in the
9 strategy that "it is closely located between two Class I areas, Mt. Hood and Mt. Adams,
10 and will benefit from Oregon and Washington's Regional Haze Programs." The air
11 agencies explained that "the sources contributing to haze in the Gorge are the same
12 sources that contribute to haze across the entire Northwest," and that "tying visibility
13 improvement in the Gorge to the Regional Haze Program provides an on-going
14 regulatory framework for haze reduction and checkpoints for the Gorge strategy through
15 a coordinated visibility improvement effort across multiple states." Thus, the air agencies
16 "recommend[ed] specifically tracking Gorge air quality each time the Regional Haze Plan
17 is updated to ensure that the regional strategies continue to benefit air quality in the
18 Scenic Area." The commission voted to approve the recommended strategy.

19 On judicial review, petitioner urges us to remand the commission's decision
20 approving the regional air quality strategy. Petitioner presses two overarching themes:
21 First, the *Columbia River Gorge Air Study and Strategy* is a "strategy" in name only and

1 does not possess any of the necessary features of a true strategy, such as substantive
2 goals, prescriptive criteria, binding measures, or incentive programs. In fact, petitioner
3 argues, the strategy is little more than a summary of the preexisting Regional Haze
4 Program, which was not designed for the Gorge. Second, petitioner argues that, even
5 assuming that the document could be characterized as a "strategy," it nonetheless fails to
6 carry out the essential requirements of the management plan and the Scenic Area Act--
7 *i.e.*, it neither protects nor provides for the enhancement of air quality or the scenic,
8 natural, cultural, and recreational resources of the Gorge. Consequently, petitioner
9 maintains, the commission's decision in this case is inconsistent with the management
10 plan and violates the Scenic Area Act. *See* ORS 196.115(3)(d) (the reviewing court shall
11 remand when the commission's exercise of discretion is "(B) [i]nconsistent with an
12 agency rule, an officially stated agency position or a prior agency practice, unless the
13 inconsistency is explained by the agency,"² or "(C) [o]therwise in violation of a * * *
14 statutory provision").

15 In response, the commission argues that it properly exercised its discretion
16 to approve the *Columbia River Gorge Air Study and Strategy*, and that nothing in the
17 management plan or the Scenic Area Act requires that the regional air quality strategy
18 include regulatory provisions, rule proposals, or any of the other items that petitioner says

² *See Friends of Columbia Gorge v. Columbia River (S055916)*, 346 Or 433, 444, 23 P3d 1191 (2009) (stating that "the management plan, both in its original and its revised (and, in this case, amended) form, is much like a 'rule' as that term is defined in the Oregon APA").

1 are necessary. In the commission's view, the mere fact that petitioner wants a *different*
2 strategy is not a basis for remanding the decision. We agree with the commission.

3 As an initial matter, we have little difficulty concluding that the *Columbia*
4 *River Gorge Air Study and Strategy* is a "strategy" within the meaning of the
5 management plan--albeit not the strategy petitioner would have chosen. As set forth
6 above, the management plan requires the air agencies to develop a "regional air quality
7 strategy to carry out the purposes of the Scenic Area Act." Because "strategy" is not
8 defined in the management plan or in the Scenic Area Act itself, petitioner looks to the
9 pertinent dictionary definition of strategy: "a careful plan or method," *Webster's Third*
10 *New Int'l Dictionary* 2256 (unabridged ed 2002). "Plan" and "method," petitioner asserts,
11 are "defined, respectively, as 'a detailed and systematic formulation of a large-scale
12 campaign or program of action' and 'a procedure or process for attaining an object.'"
13 (quoting *Webster's* at 1422, 1729-30). From those definitions, as well as examples from
14 other parts of the management plan, petitioner argues that "a strategy in this context
15 means affirmative measures or actions designed to reduce pollution and thereby restore
16 the functions of good air quality in the Scenic Area."

17 The commission agrees (as do we) that, up to that point in the argument,
18 petitioner offers "a fine definition of strategy." The problem, though, is that petitioner
19 proceeds to load that definition with additional freight. Petitioner argues that an air
20 quality strategy must do more than rely on a preexisting framework like the Regional
21 Haze Program, and that the strategy must contain concrete targets, such as timelines,

1 benchmarks, binding criteria, or incentive programs to ensure the protection and
2 enhancement of air quality in the scenic area. Simply put, those requirements do not
3 appear, explicitly or implicitly, anywhere in the management plan or the Scenic Area Act.

4 Moreover, contrary to petitioner's argument, the *Columbia River Gorge Air*
5 *Study and Strategy* includes a goal and a plan for meeting that goal. The document
6 expressly states at various points that the goal of the strategy is "continued improvement"
7 of visibility in the Gorge. To achieve that goal, the air agencies' recommendation
8 essentially is to rely on existing pollution control measures--notably, the Regional Haze
9 Program. That is, under the strategy, the air agencies will "assess improvements in
10 visibility every five years when the Regional Haze Plan is updated," and will compare the
11 improvement trend in the Gorge to the improvement trend in the nearby Mt. Hood and
12 Mt. Adams wilderness areas. By the air agencies' current estimations, existing pollution
13 control measures will "provide a path forward for continued visibility improvement over
14 time." However, to the extent that "the air agencies find that Gorge haze levels are
15 increasing rather than decreasing as expected, the air agencies will investigate the reasons
16 and consult with the Gorge Commission to discuss possible remedies."

17 Thus, the *Columbia River Gorge Air Study and Strategy* sets forth a goal
18 ("continued improvement" in visibility); a framework for achieving the goal (compliance
19 with existing pollution control measures, including mandates, benchmarks, and timelines
20 for improving visibility across the surrounding region, as established by the Regional
21 Haze Program); criteria by which to determine whether the goal has been met (continued

1 monitoring); and a contingent plan in the event that the goal is not met (further
2 consultation between the air agencies and the commission). Given those features, we are
3 not persuaded by petitioner's contention that the *Columbia River Gorge Air Study and*
4 *Strategy* was not actually a "regional air quality strategy" within the meaning of the
5 management plan. We therefore reject petitioner's first assignment of error.

6 In its second assignment of error, petitioner argues that, even if the
7 *Columbia River Gorge Air Study and Strategy* can be called a "strategy," it fails to carry
8 out the requirements of the Scenic Area Act to protect and enhance air quality or Gorge
9 resources. Specifically, petitioner contends that the air quality strategy "focuses
10 exclusively on visibility, leaving unaddressed the other air quality problems in the Scenic
11 Area and ignoring the Gorge's other resources affected by poor air quality."

12 Although the air agencies focused their strategy on visibility, scenic
13 resources and visibility issues were not their exclusive focus. The regional air quality
14 strategy explicitly addresses public health concerns (particulate matter and ozone
15 standards) and ecological effects, including excess deposits of nitrogen and acid. But,
16 rather than addressing those issues separately, the air agencies used visibility as a
17 surrogate for other pollution issues. The strategy explains:

18 "Because *pollutants that impair visibility in the Gorge are the same*
19 *that can affect broader ecosystem issues in the Gorge*, the air agencies
20 believe that the strategies set forward in this document to reduce haze
21 pollution would both, directly and indirectly, *benefit all the valued*
22 *resources that must be protected under the Scenic Area Act.*"

23 (Emphasis added.) Another section of the strategy similarly explains that haze reduction

1 will have corresponding benefits for public health, as well as natural and cultural
2 resources: "The primary focus of these regional haze plans is on visibility improvement;
3 however, this haze reduction work will also have general benefits for public health, as
4 well as reducing acid deposition that can threaten other important natural and cultural
5 resources."

6 Nothing in the Scenic Area Act or the management plan mandates that a
7 regional air quality strategy individually address each type of resource--scenic, cultural,
8 recreational, and natural--listed in the Scenic Area Act. The air agencies' focus on
9 visibility as a surrogate for other pollution concerns was a legally permissible approach,
10 and the commission acted within its discretion to approve that strategy.³

11 In sum, petitioner has not demonstrated that the commission erred in
12 approving the *Columbia River Gorge Air Study and Strategy* as the regional air quality
13 strategy for the scenic area. Although the strategy does not include the elements that
14 petitioner believes it should, neither the management plan nor the Scenic Area Act
15 requires those elements in a regional air quality strategy. Our role on judicial review is
16 not to determine whether the commission could have approved a *better* strategy; rather,
17 the question before us is whether the commission's exercise of discretion to approve the
18 strategy was inconsistent with the management plan or in violation of the Scenic Area

³ Petitioner also argues that the strategy violates the Scenic Area Act because the strategy does not address new sources of pollution or require the air agencies to take action if pollution levels remain constant. Neither of those arguments is well taken, and we reject them without discussion.

1 Act. And, in light of that standard of review, ORS 196.115(3)(d), we affirm the
2 commission's decision.

3 Affirmed.