

FILED: February 23, 2012

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

A146584

Argued and submitted on November 03, 2011.

Gary K. Kahn argued the cause for petitioner. With him on the briefs was Reeves, Kahn, Hennessy & Elkins.

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

Before Ortega, Presiding Judge, and Sercombe, Judge, and Edmonds, Senior Judge.

SERCOMBE, J.

Affirmed in part, reversed in part, and remanded for reconsideration.

1 SERCOMBE, J.

2 Petitioner Friends of the Columbia Gorge, Inc., seeks judicial review of the
3 Columbia River Gorge Commission's (commission) revision of its management plan,
4 arguing that various changes made to the plan violate the Columbia River Gorge National
5 Scenic Area Act (Scenic Area Act or the Act), 16 USC §§ 544 - 544p. The commission
6 approved those changes in response to a decision of the Supreme Court, which held that
7 several aspects of an earlier revision of the management plan violated the Act. [Friends of](#)
8 [Columbia Gorge v. Columbia River \(S055722\)](#), 346 Or 366, 213 P3d 1164 (2009). The
9 court remanded the case to the commission to remove erroneous provisions or to
10 promulgate new provisions that satisfy the Act's requirements. *Id.* at 413. Here,
11 petitioner challenges three of the revisions adopted by the commission on remand. We
12 affirm in part, reverse in part, and remand for reconsideration.

13 We begin with a brief overview of the legal context and the facts leading to
14 this review.¹ Congress created the Columbia River Gorge National Scenic Area Act in
15 1986 with the purposes of (1) "establish[ing] a national scenic area to protect and provide
16 for the enhancement of the scenic, cultural, recreational, and natural resources of the
17 Columbia River Gorge" and (2) "protect[ing] and support[ing] the economy of the
18 Columbia River Gorge area by encouraging growth to occur in existing urban areas and
19 by allowing future economic development in a manner that is consistent with" the first

¹ For a more complete discussion of the legal framework of the Act, see *Friends of Columbia Gorge*, 346 Or at 369-73.

1 purpose. 16 USC § 544a. The Act designated certain land along the Columbia River as
2 the Columbia River Gorge National Scenic Area (the scenic area), 16 USC § 544b, and
3 authorized Oregon and Washington to enter into an interstate compact to form a regional
4 agency--the commission--which, in tandem with the Secretary of Agriculture of the
5 United States, would manage the scenic area.² 16 USC § 544c. As part of its
6 management scheme, the Act

7 "divides the land in the scenic area into three categories: (1) 'Special
8 Management Areas' (SMAs), over which the Secretary of Agriculture is to
9 have primary responsibility; (2) 'Urban Areas,' which the Act largely
10 exempts from the commission's control; and (3) all remaining areas, which
11 would come to be known as the 'General Management Area' (GMA). 16
12 USC §§ 544(b), (e)."

13 *Friends of Columbia Gorge*, 346 Or at 370. The Act directs the commission to conduct a
14 resource inventory of all land within the scenic area, develop land use designations for
15 the use of scenic area lands, and adopt a management plan that incorporates those land
16 use designations and is consistent with certain enumerated standards. 16 USC § 544d(a)
17 - (d). All counties within the scenic area must adopt land use ordinances that are
18 consistent with the management plan. 16 USC § 544e.

19 The enumerated standards in the Act mandate that the management plan
20 include certain protective provisions. Among other things,

21 "[t]he management plan * * * shall include provisions to--

22 "* * * * *

² Oregon and Washington subsequently created and ratified an interstate compact establishing the commission. ORS 196.150; RCW 43.97.015.

1 "(7) require that commercial development outside urban areas take
2 place without adversely affecting the scenic, cultural, recreation, or natural
3 resources of the scenic area;

4 "(8) require that residential development outside urban areas take
5 place without adversely affecting the scenic, cultural, recreation, and
6 natural resources of the scenic area; and

7 "(9) require that the exploration, development and production of
8 mineral resources, and the reclamation of lands thereafter, take place
9 without adversely affecting the scenic, cultural, recreation and natural
10 resources of the scenic area."

11 16 USC § 544d(d). In turn, the Act defines "adversely affecting" as

12 "a reasonable likelihood of more than moderate adverse consequences for
13 the scenic, cultural, recreation or natural resources of the scenic area, the
14 determination of which is based on--

15 "(1) the context of a proposed action;

16 "(2) the intensity of a proposed action, including the magnitude and
17 duration of an impact and the likelihood of its occurrence;

18 "(3) *the relationship between a proposed action and other similar*
19 *actions which are individually insignificant but which may have*
20 *cumulatively significant impacts; and*

21 "(4) proven mitigation measures which the proponent of an action
22 will implement as part of the proposal to reduce otherwise significant
23 affects to an insignificant level[.]"

24 16 USC § 544(a) (emphasis added).

25 Pursuant to the Act's directives, the commission adopted a management
26 plan in 1991. As part of its periodic review, *see* 16 USC § 544d(g) (requiring review of
27 the management plan at least every 10 years and authorizing the commission to make
28 revisions), the commission adopted revisions to the plan in 2004. Petitioner, among
29 others, then sought judicial review of the revised management plan, arguing that various

1 aspects of the plan violated the Act. As relevant to this review, the petitioners argued that
2 (1) the management plan failed to comply with the Scenic Area Act's requirement that it
3 include provisions protecting natural resources because the plan contained no protective
4 guidelines for geologic resources, and geologic resources were "natural resources" within
5 the meaning of the Act; and (2) the management plan failed to comply with the Scenic
6 Area Act's requirement that it protect (a) scenic resources, (b) natural resources, and (c)
7 cultural resources from "cumulative adverse effects."

8 Ultimately, the Supreme Court granted review and rendered a decision
9 remanding the case to the commission to make further changes to the plan consistently
10 with its decision. *Friends of Columbia Gorge*, 346 Or 366. The subject of this review, as
11 framed by the parties' arguments, is whether the commission complied with the Supreme
12 Court's directives on remand. Consequently, we recount parts of the court's decision in
13 some detail.

14 In addressing the petitioners' argument that the plan failed to protect
15 geologic--and therefore natural--resources in violation of the Scenic Area Act, the court
16 agreed that the Act did, in fact, require protection of "natural resources," whatever that
17 term may mean:

18 "The Act provides that the management plan must include provisions
19 *requiring* that commercial, residential, and mineral resource development
20 take place without adversely affecting the scenic area's natural resources.
21 16 USC §§ 544d(d)(7), (8), and (9). *If* geological resources are natural
22 resources within the meaning of the Act, then the management plan must
23 include provisions that will preclude adverse effects to those resources--
24 whether or not those provisions *specifically* identify 'geologic resources' as
25 their object."

1 *Id.* at 402 (footnote omitted; emphases in original). It further explained, however, that
2 the Act itself does not define "natural resources" and that the term is ambiguous. In light
3 of that ambiguity, the court opined that, under *Chevron USA v. Natural Res. Def.*
4 *Council*, 467 US 837, 104 S Ct 2778, 81 L Ed 2d 694 (1984), the commission's
5 reasonable interpretation of the term would be entitled to deference. *See Friends of*
6 *Columbia Gorge*, 346 Or at 377-84, 403-05 (discussing the application of *Chevron*
7 deference to the commission's interpretations of the Scenic Area Act).

8 Nonetheless, the court observed that the management plan contained two
9 conflicting definitions of "natural resources"--a broadly worded glossary definition,
10 which would encompass geologic resources, and a more narrow definition of the term
11 contained in the "Natural Resources" chapter of the management plan, which would not
12 encompass geologic resources.³ *Id.* at 403-04. The court then considered whether the
13 more narrow definition was sufficiently reasonable to warrant deferential treatment:

14 "As we have observed, * * * 'natural resources' is an indefinite term that,
15 along with its clear basis in the world of naturally occurring objects,
16 conveys in a far more vague sense the idea that those objects must be
17 valuable or beneficial. Thus, the narrower definition now under discussion
18 could reflect the commission's considered determination as to which natural
19 features of the scenic area are valuable in that sense, and its list of
20 phenomena that qualify as 'natural resources' is not inherently unreasonable.
21 Neither would it necessarily be unreasonable that the commission had

³ The glossary of the management plan defined "natural resources" as "[n]aturally occurring features including land, water, air, plants, animals (including fish), plant and animal habitat, and scenery." The Natural Resources chapter of the plan, on the other hand, defined the term to mean "wetlands, streams, ponds and lakes, riparian areas, wildlife and wildlife habitat, rare plants, and natural areas." Management Plan, Part I, ch 3 (Natural Resources).

1 excluded a whole category--geological features--from its definition of
2 'natural resources.' The commission could rationally conclude that many
3 'geological resources,' *e.g.*, dirt *qua* dirt, are not valuable in and of
4 themselves, and that geological features that *are* valuable for a particular
5 reason can and should be protected as such--for example, as scenic
6 resources or as a component of animal and plant habitat.

7 "Our problem, however, is that we see no real evidence of a
8 conscious commission choice either way. The management plan itself
9 contains two competing definitions, both of which the commission
10 apparently considers permissible under the Act. As our discussion of each
11 definition indicates, we find both to be permissible under *Chevron*. But we
12 decline to defer to the commission unless and until it takes some action that
13 reflects a considered choice between the two definitions, or the
14 abandonment of one of them. * * * We therefore * * * direct that the
15 commission on remand specifically address which of the two definitions of
16 'natural resources' it is relying on, preferably doing so in light of petitioners'
17 express concerns respecting areas of geological hazard."

18 *Id.* at 404-05 (emphasis in original).

19 The court also addressed the petitioners' arguments concerning cumulative
20 adverse effects to scenic, natural, and cultural resources. As pertinent to all three types of
21 resources, the court noted that

22 "16 USC §§ 544d(7), (8), and (9), direct the commission to include
23 provisions in the management plan that 'require' that development occur
24 without causing more than 'moderate' adverse effects, including adverse
25 *cumulative* effects, to scenic[, cultural, or natural] resources. If those
26 requirements are to be enforceable, implementing agencies must have some
27 basis for determining when they have--or have not--been met. The
28 management plan must contain provisions that by some means 'require' that
29 residential, commercial, and mineral resource development occur without
30 causing adverse cumulative effects to scenic[, cultural, or natural]
31 resources."

32 *Id.* at 387 (footnote omitted; emphasis in original).

33 The court began its "cumulative adverse effects" inquiry by examining the
34 management plan's provisions concerning *scenic* resources. *Id.* at 385-91. The court

1 focused, in particular, on two of the plan's provisions that provided that "[e]ach
2 development shall be visually subordinate to its setting as seen from key viewing areas"
3 and that "[d]etermination of potential visual effects and compliance with visual
4 subordination policies shall include consideration of the cumulative effects of proposed
5 developments." Management Plan, Part I, ch 1 (Scenic Resources), GMA Provisions,
6 Key Viewing Areas, GMA Guidelines 2, 3.

7 Based on those provisions, the court concluded that the management plan
8 satisfied the Act's mandate to protect scenic resources from adverse effects, including
9 cumulative effects, caused by development:

10 "We are persuaded that at least some of the cited provisions 'require'
11 that commercial, residential, and mineral resource development take place
12 without adversely affecting scenic resources. In particular, the Key
13 Viewing Areas policies and guidelines require each new development to be
14 'visually subordinate' to the relevant 'setting' * * * and expressly provide
15 that the determination of visual subordination must include an assessment of
16 cumulative effects. When those 'key viewing areas' policies and guidelines
17 are read together, it is clear that the management plan requires
18 implementing agencies to make such a cumulative impacts determination
19 each time that they are presented with a development application, and to
20 prohibit development that would adversely affect scenic resources.

21 "* * * We conclude that the provisions in the management plan
22 requiring planners to take cumulative impacts into account when
23 determining, for each development proposal, how the visual subordination
24 standard can be achieved, are consistent with [the Act]--that is, the plan
25 contains provisions requiring that development in the scenic area take place
26 without causing adverse effects, including cumulative effects, to scenic
27 resources."

28 *Friends of Columbia Gorge*, 346 Or at 390.

29 In contrast, the court determined that the management plan did not contain
30 provisions that adequately protected *natural* resources from the cumulative adverse

1 effects of development. *Id.* at 393-99. That is because the "Natural Resources" chapter
2 of the plan contained no provisions that were functionally equivalent to the guidelines in
3 the "Scenic Resources" chapter:

4 "The chapter of the management plan devoted to protection of natural
5 resources contains no policy or guideline that is equivalent to the noted key
6 viewing areas policies and guidelines, which require that each development
7 shall be visually subordinate to its setting, the GMA, and which explicitly
8 require that determination of compliance with that visual subordination
9 policy include consideration of cumulative effects. As discussed, those two
10 guidelines, in combination, satisfy, on a case-by-case basis, the statutory
11 directive that the management plan require that development take place
12 without causing adverse cumulative effects to scenic resources."

13 *Id.* at 394 (citation and emphasis omitted). Nor were there alternative provisions in the
14 management plan that achieved the same result (of preventing development from
15 adversely affecting natural resources). The commission argued that it had satisfied the
16 Act through a "landscape approach" in which numerous provisions of the plan--mainly
17 regulations of parcel size and land use designations--operated collectively to ensure that
18 no adverse cumulative effects occurred. The court rejected that argument, concluding
19 that, although such an approach could theoretically fulfill the Act's requirements, the
20 actual provisions in the plan failed to eliminate the potential for adverse effects to natural
21 resources on all types of land within the GMA. *Id.* at 397-98. Thus, the management
22 plan violated the Act in that respect.

23 Similarly, the court concluded that the management plan did not contain
24 provisions that required development to occur without causing cumulative adverse effects
25 to *cultural* resources. *Id.* at 405-08. That aspect of the plan failed for much the same

1 reason as the portion of the plan concerning natural resources: it contained no provisions
2 requiring a case-by-case determination of the cumulative impacts of development, and
3 the provisions cited by the commission in support of a "landscape approach" failed to
4 preclude the possibility that development would cause adverse cumulative effects to
5 cultural resources. Consequently, the court remanded the case to the commission to
6 correct those violations of the Scenic Area Act.

7 On remand, the commission proposed to (1) adopt the more narrow
8 definition of natural resources, (2) add a provision to the management plan requiring
9 consideration of cumulative adverse effects to natural resources for certain development
10 proposals, and (3) add a provision to the plan requiring consideration of cumulative
11 adverse effects to cultural resources for certain development proposals.⁴ Specifically,
12 commission staff recommended the following changes to the management plan:

13 *"Delete the definition of 'natural resources' in the Glossary * * * and*
14 *replace it with language from the Introduction to the Natural Resources*
15 *chapter:*

16 **"Natural resources:** ~~Naturally occurring features including land,~~
17 ~~water, air, plants, animals (including fish), plant and animal habitat, and~~
18 ~~scenery.~~ Wetlands, streams, ponds and lakes, riparian areas, wildlife and
19 wildlife habitat, rare plants, and natural areas.

20 "* * * * *

21 "* * * *Add new Guideline 1 to the Natural Resources chapter* * * *:

22 "* * * Determination of potential natural resources effects shall
23 include consideration of cumulative effects of proposed developments
24 within the following areas: 1) wetlands, streams, ponds, lakes, riparian

⁴ Only changes relevant to this review are discussed.

1 areas and their buffer zones; 2) rare plants and their buffer zones; 3) sites
2 within 1000 feet of sensitive wildlife areas and site[s]; and 4) sites within
3 1000 feet of rare plants.

4 "* * * * *

5 "* * * *Add new Guideline 1 to the beginning of the Cultural*
6 *Resources chapter* * * *:

7 "* * * Determination of potential effects to significant cultural
8 resources shall include consideration of cumulative effects of proposed
9 developments that are subject to any of the following: 1) a reconnaissance
10 or historic survey; 2) a determination of significance; 3) an assessment of
11 effect; or 4) a mitigation plan."

12 After holding public hearings and receiving public comment over the course of several
13 months, the commission adopted the proposed revisions.

14 Petitioner now seeks judicial review of those revisions, advancing three
15 assignments of error, which we address in turn. First, petitioner argues that the
16 commission failed to make a "considered choice" when it elected to adopt the more
17 narrow definition of "natural resources" for the management plan because, in so doing, it
18 created internal conflicts within the plan and acted inconsistently with its prior practices.⁵
19 Thus, in petitioner's view, the commission failed to comply with the Supreme Court's
20 directives.

⁵ We note that petitioner does not explain what "prior practices" the commission has contradicted. Instead, it argues that certain provisions in the plan protect features of the scenic area that are now excluded from the revised definition of "natural resources." We see no reason why the plan could not protect features of the scenic area that are not included in the definition of "natural resources." See, e.g., *Friends of Columbia Gorge*, 346 Or at 404 (noting that the commission could exclude a whole category of features from the definition of "natural resources" and still protect certain components of those features through the management plan).

1 As noted, the Supreme Court found that both definitions of "natural
2 resources" contained in the management plan were "permissible under *Chevron*" but that,
3 until the commission chose between the two conflicting definitions, it would not defer to
4 the commission's interpretation. *Friends of Columbia Gorge*, 346 Or at 405. On remand,
5 the commission made a choice: it abandoned the glossary definition of "natural
6 resources" and expressly adopted the more narrow definition of the term. As the
7 Supreme Court has already determined, that interpretation of "natural resources" is
8 reasonable. Thus, petitioner's arguments to the contrary are unavailing.

9 To the extent that petitioner argues that the commission abused its
10 discretion in choosing between the two legally permissible definitions, *see* ORS
11 196.115(3)(d) (providing for review of commission's exercise of discretion), we conclude
12 that the commission did not abuse its discretion. "A familiar but nonexclusive test for
13 determining whether discretion has been abused is whether the decision reached was
14 'clearly against reason and evidence.'" [*EMC Mortgage Corp. v. Davis*](#), 174 Or App 524,
15 528, 26 P3d 185 (2001) (citation omitted). Meeting minutes and staff memoranda, which
16 the commission relied on in reaching its decision, indicate that the commission believed
17 that the scope of the Natural Resources chapter was consistent with the more narrow
18 definition of "natural resources," that counties had primary responsibility for geologic
19 hazard regulation, and that additional regulation of geologic features and hazards was
20 unnecessary. Those considerations were grounded in reason and evidence. The
21 provisions cited by petitioner do not establish that the plan is internally inconsistent or

1 otherwise undermine the commission's decision. Nor has petitioner identified any legal
2 standard from which the commission has departed in adopting its definition of "natural
3 resources." *See Friends of Columbia Gorge*, 346 Or at 377 (explaining that a facial
4 challenge to the lawfulness of the management plan is reviewed for whether the
5 substance of the action "departed from a legal standard expressed or implied in the
6 particular law being administered, or contravened some other applicable statute"
7 (citation, internal quotation marks, and emphasis omitted)).

8 Petitioner next argues that the commission violated the Scenic Area Act "by
9 failing to adopt provisions in the management plan that prevent cumulative adverse
10 effects to natural resources." Specifically, petitioner argues that the new provision
11 adopted by the commission on remand merely requires "consideration" of cumulative
12 effects to natural resources but does not *eliminate the potential* that those resources will
13 be adversely affected by the cumulative impacts of development. Moreover, petitioner
14 contends, the new provision contemplates only a review of the effects of *proposed*
15 developments on natural resources, rather than requiring an analysis of the combined
16 effects of past, present, and "reasonably foreseeable" future actions. In addition,
17 petitioner argues that the "newly adopted language would require cumulative impacts
18 review only in narrowly defined geographic areas," namely, areas that contain "select
19 natural resources and their buffers." According to petitioner, then, development that
20 occurs outside those "select" areas is not subject to cumulative effects review under the
21 revised management plan even though such development could have an impact on natural

1 resources. Thus, petitioner concludes that the revised plan violates the Act's standards
2 that require the plan to include provisions preventing cumulative adverse effects to
3 natural resources.

4 The commission responds that the provision it adopted to address
5 cumulative adverse impacts to natural resources "mirrors the cumulative effect provision
6 for scenic resources that the Oregon Supreme Court concluded was permissible." The
7 commission argues that that provision, taken together with other natural resource
8 provisions, satisfies the Act's standards by requiring a case-by-case determination of the
9 cumulative effects of proposed developments and prohibiting development that would
10 adversely affect natural resources. However, the commission does not point to specific
11 provisions within the management plan that support its argument.

12 At the outset, we reject petitioner's argument that the new provision
13 improperly limits review of cumulative effects to "proposed" developments instead of
14 requiring, for each new use, a consideration of all developments that have preceded the
15 new use and that may foreseeably follow it. First, quite aside from the practical
16 difficulties of speculating about what future uses will take place on a particular piece of
17 land, there is simply no requirement that cumulative effects review include a
18 consideration of future actions. Petitioner does not point to any provision of the Act that
19 suggests otherwise. Second, although the new provision does not explicitly refer to the
20 collective effects of past development actions, it does so implicitly. That is because an
21 inquiry into the "cumulative effects" of a proposed development necessarily entails

1 consideration of its combined effects with other actions, including past actions. *See, e.g.,*
2 Management Plan, Glossary ("Cumulative effects [are the] combined effects of two or
3 more activities. * * * Cumulative effects can result from individually minor but
4 collectively significant actions *taking place over a period of time.*" (Emphasis added.)).
5 Thus, the revised plan is not defective in that respect.

6 We also reject petitioner's contention that the newly adopted provision fails
7 to fulfill the Act's mandate because it does not require consideration of cumulative effects
8 for every development within the GMA. The management plan generally protects the
9 areas that include or are near to a specified natural resource. *See* Management Plan, Part
10 I, ch 3 (Natural Resources), GMA Provisions, Wetlands, GMA Guidelines, Review Uses
11 1, 2; Streams, Ponds, Lakes and Riparian Areas, GMA Guidelines, Review Uses 1, 2;
12 Wildlife Habitat, GMA Guidelines, Review Uses 1; Rare Plants, GMA Guidelines,
13 Review Uses 1. The commission has determined, in its legislative judgment, that there is
14 a "reasonable likelihood of more than moderate adverse consequences" to natural
15 resources only where development is within or immediately adjacent to specified natural
16 resource areas. 16 USC § 544(a) (defining "adversely affect"). Petitioner has not
17 identified any reason why that judgment is improper. Thus, we need not discuss that
18 aspect of the plan any further.

19 As relevant to petitioner's remaining arguments, we reiterate that the Scenic
20 Area Act mandates that the management plan "shall include provisions" that "require"
21 commercial, residential, and mineral resource development to "take place without

1 adversely affecting the scenic, cultural, recreation, or natural resources of the scenic
2 area." 16 USC § 544d(d)(7) - (9). In other words, the management plan must ensure that
3 development will have no adverse effect, including adverse cumulative effects, on natural
4 resources. *Friends of Columbia Gorge*, 346 Or at 396-97.

5 In *Friends of Columbia Gorge*, the Supreme Court determined that two of
6 the management plan's provisions for scenic resources, *in combination*, fulfilled the Act's
7 mandate. One provision provided, "Each development shall be visually subordinate to its
8 setting as seen from key viewing areas," and the other provided, "Determination of
9 potential visual effects and compliance with visual subordination policies shall include
10 consideration of the cumulative effects of proposed developments." Management Plan,
11 Part I, ch 1 (Scenic Resources), GMA Provisions, Key Viewing Areas, GMA Guidelines
12 2, 3. The first provision sets forth a substantive standard that requires each development
13 to be visually subordinate (*i.e.*, to blend in) to its setting, and the second provision
14 requires a consideration of cumulative effects as part of the visual subordination
15 determination. When read together, then, the two provisions require that each proposed
16 development be subjected to a cumulative effects analysis, and they prohibit
17 developments that would not be visually subordinate to their setting. The Supreme Court
18 determined that those provisions jointly satisfied the Act's mandate to prevent cumulative
19 adverse effects to scenic resources. *Friends of Columbia Gorge*, 346 Or at 390.

20 Here, the new natural resources provision of the management plan, which is
21 intended to replicate those scenic resources provisions, provides:

1 "Determination of potential natural resources effects shall include
2 consideration of cumulative effects of proposed developments within the
3 following areas: 1) wetlands, streams, ponds, lakes, riparian areas and their
4 buffer zones; 2) rare plants and their buffer zones; 3) sites within 1000 feet
5 of sensitive wildlife areas and site[s]; and 4) sites within 1000 feet of rare
6 plants."

7 Management Plan, Part I, ch 3 (Natural Resources), GMA Provisions. That provision,
8 standing alone, replicates only one of the scenic resources provisions--the provision
9 providing that determinations of visual subordination shall include consideration of the
10 cumulative effects of proposed developments. However, the provision itself contains no
11 language that *prohibits* adverse cumulative effects from taking place or ensures, through
12 a substantive standard (like the visual subordination policy for scenic resources), that
13 those effects will not occur. Furthermore, the commission does not identify any other
14 provision of the management plan that would achieve, in combination with the new
15 provision, the required result of preventing cumulative adverse effects to natural
16 resources. Instead, the commission relies upon the cumulative effects guidelines as
17 satisfying the directives of the Supreme Court.

18 Nonetheless, our own review of the management plan reveals provisions
19 that do comply, in part, with the Act's mandate to protect natural resources from the
20 cumulative adverse effects of development. The portion of the natural resources chapter
21 applicable to the GMA is divided into four sections addressing different types of natural
22 resources: wetlands; streams, ponds, lakes, and riparian areas; wildlife habitat; and rare
23 plants. Each of those sections contains guidelines regulating uses within resource areas
24 and their buffer zones. Proposed uses in all of those areas are "subject to compliance

1 with guidelines for the protection of * * * natural * * * resources and [approval criteria]
2 in this section." Management Plan, Part I, ch 3 (Natural Resources), GMA Provisions,
3 Wetlands, GMA Guidelines, Review Uses 1, 2; Streams, Ponds, Lakes and Riparian
4 Areas, GMA Guidelines, Review Uses 1, 2; Wildlife Habitat, GMA Guidelines, Review
5 Uses 1; Rare Plants, GMA Guidelines, Review Uses 1. That standard of compliance with
6 guidelines for the protection of natural resources "in this section" refers, among other
7 things, to the new provision on cumulative effects. Thus, a consideration of cumulative
8 effects is required, on a case-by-case basis, for proposed developments within the
9 specified resource areas.

10 The question remains whether the plan contains standards that prevent
11 adverse cumulative effects to natural resources; in other words, provisions equivalent to
12 the visual subordination policy for scenic resources. We conclude that the plan contains
13 provisions that prohibit adverse effects, including adverse cumulative effects, only to
14 wildlife habitat and rare plants. See Management Plan, Part I, ch 3 (Natural Resources),
15 GMA Provisions, Wildlife Habitat, GMA Policies 7 ("Proposed uses that would
16 adversely affect sensitive wildlife areas or sites shall be prohibited."); Wildlife Habitat,
17 GMA Guidelines, Approval Criteria for Review Uses Near Sensitive Wildlife Areas and
18 Sites 6, 8 (requiring wildlife management plan for proposed uses that would adversely
19 effect sensitive wildlife areas or sites); Wildlife Habitat, GMA Guidelines, Wildlife
20 Management Plans D, E (generally prohibiting new uses within the core habitat and
21 intensive uses in the buffer zones); Rare Plants, GMA Policies 4, 5 (prohibiting new uses

1 within sensitive plant species buffer zones); Rare Plants, GMA Guidelines, Approval
2 Criteria for Review Uses Near Sensitive Plants 4 ("New uses shall be prohibited within
3 sensitive plant species buffer zones, except for those uses that are allowed outright.").
4 Those provisions, in combination with the new provision adopted on remand, require
5 consideration of cumulative effects and prohibit proposed uses that would adversely
6 affect those types of natural resources. Thus, the sections on wildlife habitat and rare
7 plants comply with the Act.

8 However, we cannot discern any equivalent provisions that prevent
9 cumulative adverse effects to the other types of natural resources (wetlands, streams,
10 ponds, lakes, and riparian areas). Instead, the sections pertaining to those resources
11 merely require development taking place within the resource areas to use practicable
12 alternatives for relocating the development (should they exist) and to minimize the
13 impacts of the development to the extent possible. See Management Plan, Part I, ch 3
14 (Natural Resources), GMA Provisions, Wetlands, GMA Guidelines; Streams, Ponds,
15 Lakes, and Riparian Areas, GMA Guidelines. Although those provisions minimize
16 adverse effects where it is feasible, they in no way *require* that development take place
17 without causing adverse effects, including adverse cumulative effects, to wetlands and
18 riparian areas, which are included in the definition of natural resources. Thus, in that
19 respect, the plan violates the Scenic Area Act.

20 In its final assignment of error, petitioner contends that the new provision
21 addressing cumulative adverse effects to cultural resources suffers from some of the same

1 infirmities as the provision addressing cumulative effects to natural resources. In
2 particular, it argues that the new provision limits cumulative effects review to "proposed
3 developments" instead of requiring a cumulative effects determination for "all past,
4 present, and reasonably foreseeable future actions."⁶ Petitioner further argues that the
5 new provision fails to fulfill the Act's mandate because it does not require land divisions
6 to undergo a cumulative effects review. The commission responds that petitioner
7 misconstrues the cultural resources chapter of the management plan and argues that the
8 plan ensures that no cultural resources will be adversely affected.

9 The newly adopted provision addressing cumulative effects to cultural
10 resources provides:

11 "Determination of potential effects to significant cultural resources shall
12 include consideration of cumulative effects of proposed developments that
13 are subject to any of the following: 1) a reconnaissance or historic survey;
14 2) a determination of significance; 3) an assessment of effect; or 4) a
15 mitigation plan."

16 Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, Guidelines. That
17 provision requires that, when making a determination of effects to significant cultural
18 resources, an implementing agency consider the cumulative effects of certain proposed
19 developments. That provision is superficially similar to the provision addressing
20 cumulative impacts to natural resources. Nonetheless, the chapter of the management
21 plan devoted to cultural resources differs in important respects from its natural resources
22 counterpart.

⁶ We reject that argument for the reasons already expressed in this opinion.

1 The management plan employs a four-step process to protect cultural
2 resources. Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, GMA
3 Policies 3. Under that scheme, all proposed uses that involve more than a minimal level
4 of ground disturbance are subject to a reconnaissance survey for cultural resources.
5 Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, GMA Policies 6.
6 If a proposed use may affect cultural resources, the significance of those resources must
7 be evaluated. Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions,
8 GMA Policies 10. In turn, if the cultural resources are determined to be significant, an
9 assessment of effects is required. Management Plan, Part I, ch 2 (Cultural Resources),
10 GMA Provisions, GMA Policies 12. That assessment, according to the new provision,
11 must include consideration of cumulative effects. Finally, if a proposed use would have
12 an adverse effect on significant cultural resources, a mitigation plan must be prepared to
13 ensure that the proposed use will have no adverse effect on significant cultural resources.
14 Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, GMA Policies 13,
15 14. *"Uses that would adversely affect significant cultural resources shall be prohibited."*
16 Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, GMA Policies 14
17 (emphasis added).

18 For the vast majority of development, that process both requires a
19 determination of the development's effects, including cumulative effects, on significant
20 cultural resources and prohibits adverse effects from taking place. Nonetheless,
21 petitioner is correct that land divisions--a type of "development" under the plan--are

1 exempt from reconnaissance surveys and, therefore, are not subject to cumulative effects
2 review unless cultural resources are incidentally discovered on the land. *See*
3 Management Plan, Part I, ch 2 (Cultural Resources), GMA Provisions, GMA Policies
4 6(A) (exempting from reconnaissance surveys proposed uses that would not disturb the
5 ground, including land divisions). Because land divisions do not disturb the ground, they
6 cannot, in and of themselves, adversely affect cultural resources. However, the
7 exemption for land divisions may still violate the Act to the extent that an approval of a
8 land division authorizes further development on the land without separate approval.
9 Under those circumstances, an exemption for a land division would also, in effect,
10 exempt the subsequent development on that land from a reconnaissance survey and
11 cumulative effects assessment. That would contravene the Act's directive that the plan
12 must contain provisions requiring that commercial, residential, and mineral resource
13 development take place without causing adverse effects, including adverse cumulative
14 effects, to cultural resources.

15 We cannot tell from the face of the plan whether the approval of a land
16 division would have that effect. Because we are already remanding this case to the
17 commission to bring the natural resources section of the plan into compliance with the
18 Act, on remand, the commission should also clarify the import of the land division
19 exemption in the cultural resources section of the plan and bring the plan into compliance
20 to the extent that it violates the Act as we have described.

21 In sum, the revised management plan violates the Scenic Area Act in that it

1 fails to include provisions that require commercial, residential, and mineral resource
2 development to take place without adversely affecting natural resources. We remand to
3 the commission to correct that violation and to reconsider the provisions of the Act
4 addressing adverse cumulative effects to cultural resources. In all other challenged
5 respects, the plan complies with the Act.

6 Affirmed in part, reversed in part, and remanded for reconsideration.