

1 EXPEDITE (if filing within 5 court days of  
2 hearing)

3 No hearing is set.

4  Hearing is set

5 Date: August 2, 2024

6 Time: 9:00 AM

7 Judge/Calendar: Hon. Donald J. Richter

8 **STATE OF WASHINGTON**

9 **PACIFIC COUNTY SUPERIOR COURT**

10 LEGACY FOREST DEFENSE COALITION, a  
11 Washington non-profit corporation,

12 Appellant,

13 v.

14 WASHINGTON STATE DEPARTMENT OF  
15 NATURAL RESOURCES, BOARD OF NATURAL  
16 RESOURCES, and COMMISSIONER OF PUBLIC  
17 LANDS HILARY FRANZ, in her official capacity,

18 Respondents,

19 STIMPSON LUMBER COMPANY,

20 Respondent-Intervenor.

NO. 24-2-00050-25

**CLERK'S ACTION REQUIRED:  
PLACE ON MOTION DOCKET**

APPELLANT'S OPENING BRIEF

MOTION FOR SUMMARY

JUDGMENT

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2 **MOTION**

3 Appellant Legacy Forest Defense Coalition (“LFDC”) respectfully moves the Court  
4 for summary judgment against Respondents and Respondent-Intervenor entering an order  
5 declaring that approval of the Freedom Timber Sale violated the Public Lands Act, the State  
6 Environmental Policy Act, and was arbitrary, capricious, and contrary to law and thus void.  
7 This Motion is supported by the following points and authorities, the pleadings and papers on  
8 file in this matter, and the Declaration of Alicia LeDuc Montgomery (“LeDuc Decl.”) and  
9 exhibits concurrently filed herewith.  
10

11 **I. INTRODUCTION**

12 This case concerns DNR’s longstanding commitment to restore old growth conditions  
13 on across 10 to 15 percent of state forestlands, and the agency’s failure to comply with existing  
14 policies and procedures intended to ensure that commitment is met. The core contention of this  
15 case is that DNR unlawfully failed to identify and protect roughly 135 acres of structurally  
16 complex forests located within the boundaries of the Freedom Timber Sale which should have  
17 been identified and set aside to help DNR meet its commitment.  
18

19 DNR previously adopted a number of policies, procedures, and plans to ensure that its  
20 forest management activities comply with state and federal law. Among these are the Policy  
21 for Sustainable Forests, the Habitat Conservation Plan (“HCP”), and agency procedures for  
22 Identifying and Managing Structurally Complex Forests to Meet Older Forest Targets  
23 (hereinafter, “Identification and Management Procedures”).  
24

25 The Policy for Sustainable Forests, which is intended, in part, to implement the HCP,  
26 requires that DNR complete a landscape assessment for each of six planning units in Western  
27 Washington to identify and designate suitable “structurally complex” forests needed to restore

1 old growth conditions across 10 to 15 percent of the planning unit (the “Older Forest Targets”).  
2 Until sufficient structurally complex forests have been identified and set aside for this purpose,  
3 structurally complex forests may not be considered for harvest.

4         The Identification and Management Procedures clarify that suitable structurally  
5 complex forests will be identified and set aside during the “forest land planning process,” and  
6 that the forest land planning process will result in the production of a “forest land plan” for each  
7 planning unit. Forest land plans have been completed for other planning units, but DNR has  
8 made no attempt to produce the required forest land plan for the Columbia HCP Planning Unit  
9 in which the Freedom Timber Sale is located.

10  
11         An analysis conducted by DNR in 2021 revealed that DNR has set aside only 5,815  
12 acres of structurally complex forest in the Columbia HCP Planning Unit, which represents just  
13 two percent of the Columbia HCP Planning Unit. If less than 10 percent of any planning unit  
14 contains structurally complex forests designated and set aside to meet Older Forest Targets,  
15 then the Identification and Management Procedures require that DNR designate in a database  
16 additional structurally complex forests, until the designated structurally complex forests  
17 constitute 10 to 15 percent of the planning unit. Despite DNR’s own finding that protected,  
18 structurally complex forests constitute just two percent of the Columbia HCP Planning Unit,  
19 DNR has failed to identify or set aside any additional structurally complex forests in the  
20 planning unit to meet the Older Forest Target.

21  
22  
23         The Older Forest Target and policies and procedures regarding it stem from the fact that  
24 many state and federal listed wildlife species, and other species of concern covered under  
25 DNR’s HCP, require structurally complex and older forest habitat to survive. Most of the  
26 forests found in the Columbia HCP Planning Unit are monocrops of nursery-grown Douglas  
27

1 fir. DNR’s own records reveal that structurally complex forests are rare, and currently  
2 constitute only about three percent of all state trust lands in Western Washington. AR-  
3 00009462 (Figure 3.3.2), AR-00009471. The Freedom Timber Sale would clearcut 135 acres  
4 of some of the oldest structurally complex forests that remain in the Columbia HCP Planning  
5 Unit. Additional timber sales planned over the next ten years in the Columbia HCP Planning  
6 Unit, such as the “Finale” timber sale, scheduled for auction in January of 2025, and the “Ten  
7 Fir” timber sale, scheduled for auction in February of 2026, would further undermine DNR’s  
8 ability to meet its Older Forest Target by logging other, nearby structurally complex forests in  
9 the Columbia HCP Planning Unit.  
10

11 The approval of the Freedom Timber Sale by DNR constitutes two violations of law.  
12 First, the Freedom Timber Sale violates the Public Lands Act because DNR arbitrarily and  
13 capriciously failed to comply with the provisions of the HCP and Policy for Sustainable Forests  
14 prior to its approval. Second, the approval of the DNS for the Freedom Timber Sales violates  
15 SEPA, because the violation of the HCP and the Policy for Sustainable Forests will undermine  
16 DNR’s ability to meet its Older Forest Target, which will result in significant adverse direct  
17 and cumulative environmental impacts.  
18

## 19 **II. STATEMENT OF FACTS**

### 20 **A. Identity of the Parties.**

#### 21 **1. Plaintiff Legacy Forest Defense Coalition.**

22 The Legacy Forest Defense Coalition is a Washington State-registered non-profit  
23 corporation based in Tacoma, Washington. LFDC’s mission is to promote a balanced approach  
24 to the management of Washington state forestlands that allows DNR to generate revenue for  
25  
26  
27

1 trust beneficiaries (such as counties and schools), while conserving and accelerating the  
2 development of older forests.

3 LFDC’s members regularly visit and recreate in DNR-managed forestlands, including  
4 those in the Grays River watershed. LFDC’s members gain aesthetic enjoyment from visiting  
5 structurally complex forests and observing the wildlife that inhabits these forests. LFDC’s  
6 members have visited the Freedom Timber Sale in the past and have plan to do so again in the  
7 future. Their enjoyment of the area will be diminished if the logging approved by the Freedom  
8 Timber Sale goes forward and the structurally complex forests in that region are degraded or  
9 destroyed. Those same interests will be protected if the Court issues injunctive relief to prevent  
10 logging from going forward under the Freedom Timber Sale.  
11

12 **2. Respondents DNR and Hillary Franz.**

13 DNR is the state agency responsible for administering the public forestlands. RCW  
14 43.30.411, Title 79 RCW. Hilary Franz, the Washington State Commissioner of Public Lands,  
15 is the administrator of DNR. RCW 43.30.105. DNR conducted the environmental review of  
16 the Freedom Timber Sale and issued the SEPA DNS at issue in this case. AR-00011539-11569  
17 (Freedom Sale SEPA Checklist); AR-00011538 (Freedom DNS).  
18

19 **3. Respondent Board of Natural Resources.**

20 The Board of Natural Resources (“Board”) is the state agency that determines whether,  
21 which, and how much timber to sell from Washington’s public forestlands. RCW 43.30.205–  
22 .295. The Board adopts policies that govern timber disposal, including the Policy for  
23 Sustainable Forests, and HCP Implementation Procedures. *Id.* The Board approved the  
24 Freedom Timber Sale at issue in this case. AR-00012758-12797 (descriptions of six timber  
25 sales considered for approval at the Board’s February 6, 2024 meeting, including Freedom at  
26  
27



1 AR-00012772- 00012776); AR-00012734-12757 (minutes of February 6, 2024 Board meeting;  
2 all six timber sales considered, including Freedom, approved at AR-00012756).

3 **B. DNR’s Legal Responsibilities.**

4 The Washington State Supreme Court recently decided *Conservation Northwest v.*  
5 *Commissioner of Public Lands*, 514 P.3d 174 (Wash. 2022), which provides a clear statement  
6 of DNR’s legal responsibilities in managing trust lands. The Court determined that DNR  
7 manages trust lands, including the lands at issue, subject to three main legal duties: 1)  
8 fulfillment of trust obligations to support enumerated beneficiaries, 2) compliance with the  
9 “constitutional mandate of article XVI, § 1” to serve “all the people,” and 3) compliance with  
10 other applicable State and Federal laws. *Id.* at 21-22; 25. The decision whether to propose or  
11 carry out logging is discretionary with the agency. *Id.* at 23. DNR does not have a duty to  
12 maximize revenue from logging, or even necessarily to carry out logging at all, but must provide  
13 some support to beneficiaries while also taking into account the interests of the general public.  
14 *See id.* at 22-24.

17 **C. The Endangered Species Act.**

18 The federal Endangered Species Act, 16 U.S.C. §§ 1531–1544, prohibits any action by  
19 any entity, public or private, state or federal, which may result in the “taking” of a federally  
20 listed endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” means to harass, harm, pursue,  
21 hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.  
22 16 U.S.C. § 1532(19).

24 An entity may lawfully take a species only pursuant to an incidental take permit. 16  
25 U.S.C. § 1539(a)(1)(B). One required component of an incidental take permit is that the  
26 applicant for such a permit obtain approval of a Habitat Conservation Plan from the Secretary  
27

1 of the Interior. 16 U.S.C. § 1539(a)(2)(A). The HCP must specify the steps the permittee will  
2 take to minimize and mitigate the permittee’s impacts on the listed species and its critical  
3 habitat. *Id.*

4 Before approving a proposed HCP, the federal agencies issue a formal “Biological  
5 Opinion” under the Endangered Species Act. 16 U.S.C. § 1536(a)-(b). If, in the Biological  
6 Opinion, the agencies conclude that the HCP provides sufficient protection such that the  
7 proposed action “is not likely to jeopardize the continued existence” of listed species, then the  
8 HCP will be approved and an incidental take permit issued. 16 U.S.C. § 1536(a)(2).

9  
10 **1. The Northern Spotted Owl, Marbled Murrelet, and Salmon.**

11 The USFWS listed the northern spotted owl as threatened in July 1990 and the marbled  
12 murrelet in October 1992. *See* 1997 HCP (AR-00001173-1718) at AR-00001209. At the same  
13 time the birds’ post-listing fate was being debated, it became increasingly apparent that several  
14 salmon species would also have to be listed under the Endangered Species Act. *Id.* at AR-  
15 00001283 (“several [salmon] stocks in the area covered by the HCP are candidates for federal  
16 listing”). Throughout the 1990s and early 2000s, multiple salmon species, steelhead, and  
17 bulltrout in Washington State were listed, including Columbia River and Puget Sound species  
18 (March 1999, 64 Fed. Reg. 14308, 14517, 14508; June 2005, 70 Fed. Reg. 37159; May 2007,  
19 72 Fed. Reg. 26722).

20  
21  
22 Commercial logging can eliminate or diminish nesting, roosting, and foraging habitat  
23 for owls and murrelets, and lead to increased peak flows and degradation of water quality and/or  
24 spawning habitat that harms protected fish.

1                                   **2. The 1997 State Trust Lands HCP, Biological Opinion, and**  
2                                   **Incidental Take Permit.**

3                   In 1997, the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries  
4 Service granted incidental take permits (“ITP”) to DNR under ESA Section 10, authorizing the  
5 harming or incidental take of threatened and endangered species during logging and associated  
6 forest management activities. In exchange, DNR must comply with the terms and conditions  
7 of DNR’s State Trust Lands Habitat Conservation Plan (“HCP”). AR-00001173-1718.

8                   The HCP was accompanied by a Biological Opinion drafted by the consulting federal  
9 agencies which found that if the protections in the HCP are followed, DNR’s forest  
10 management activities would not likely jeopardize the continued existence of listed species,  
11 including the spotted owl and marbled murrelet. AR-00000809-968.

12                   The 1997 HCP also includes a Multispecies Conservation Strategy that specifically  
13 directs DNR to provide suitable habitat for “unlisted animal species of concern and other  
14 unlisted animal species.” The strategy names a total of 62 animal species of concern, but allows  
15 that other species are likely to be added to the list, because it is “difficult to predict which  
16 species are, or will be, at the brink of ‘at risk.’” AR-00001487.

17                   The Multispecies Conservation Strategy of the 1997 HCP constituted DNR’s  
18 application for an unlisted species agreement. The purpose of the Multispecies Conservation  
19 Strategy is to provide assurances to DNR that no additional land restrictions or financial  
20 compensation will be required from DNR for species adequately covered by the 1997 HCP in  
21 light of unforeseen or extraordinary circumstances.

22                   Many of the unlisted species referenced in the Multispecies Conservation Strategy of  
23 the 1997 HCP are dependent on structurally complex forests. For example, the conservation of  
24

1 suitable breeding, foraging, and nesting habitat for the northern goshawk, Vaux's swift, pileated  
2 woodpecker, myotis bats, Pacific fisher, and olive-sided flycatcher, are dependent upon the  
3 "large contiguous landscapes of mature and old growth forest" that the 1997 HCP is "expected"  
4 to provide. AR0-00001512-00001523.

5  
6 As a measure of the 1997 HCP's efficacy in conserving habitat for listed and unlisted  
7 species, WDNR committed to, and USFWS assumed, eventual achievement of certain stand  
8 structure objectives. Broadly speaking, these objectives reflected percentages of forests in  
9 certain development stages across the landscape, including expected percentages of structurally  
10 complex and fully functional forests, that DNR and USFWS identified as necessary for the  
11 protection of both listed and unlisted species. According to the Biological Opinion, "the HCP  
12 includes commitments to provide... certain percentages of stand structural classes from open  
13 forest to fully functional complex forests." AR-00000816-00000817. Achieving these stand  
14 structure objectives was considered by USFWS to be necessary to "ensure that the full range of  
15 upland forest habitats are available for use by species in the HCP area." AR-00000833. The  
16 stand structure objectives provided in the HCP use age-class as a surrogate to represent the  
17 expected percentages of forest habitat that would likely exist after 100 years of WDNR's  
18 implementation of the 1997 HCP. The objectives provide that 25 to 35 percent of the West-  
19 side planning units would be "structurally complex (> 70 years old) at year 100; and 10-15%  
20 of the West-side planning units would be at a "fully functional" ( $\geq$  150 years old) at year 100."  
21 AR-00001534.

22  
23  
24 In its 1997 Biological Opinion, the USFWS projected that fully functional conifer  
25 forests at least 150 years old would comprise a minimum of 12 percent of each HCP planning  
26 unit by 2096. AR-00000833.

1 In its Biological Opinion, USFWS clearly situated the stand structure objectives,  
2 including DNR's objective to provide 10-15 percent fully functional forests by 2096 within  
3 each HCP planning unit, as firm DNR commitments. These objectives are also repeatedly  
4 referred to as commitments in the 1997 HCP. *See, e.g.*, AR-00001597 ("DNR commits to  
5 maintaining the conservation objectives described in Chapter IV of the HCP"); AR-00000816-  
6 00000817 ("the HCP includes commitments to provide... certain percentages of stand structural  
7 classes from open forest to fully functional complex forests"); AR-00000825 ("DNR's  
8 commitment to obtaining stand structure objectives ensure a landscape that provides the full  
9 range of upland forest stand structures as habitat"); AR-00001535 ("The projections for year  
10 70 will be a part of the U.S. Fish and Wildlife Service's evaluation of whether DNR has met the  
11 [stand structure] commitments of the HCP at year 70.").

12  
13  
14 Under its consideration of uncommon habitat conservation, the Biological Opinion  
15 clarifies that "DNR would ensure that stand structural stages not provided by other conservation  
16 strategies of the HCP are present in the HCP area"; and that "timber harvest, road maintenance  
17 and construction, other commercial forest management related activities, and nontimber  
18 resource activities must be consistent with the goals and objectives of the HCP to develop and  
19 maintain these habitat types," in particular, the specific "percentages of stand structural classes  
20 from open forest to fully functional forest" defined in the HCP. AR-00000816-00000817.

21  
22 The acceptance of the HCP and approval of DNR's 1997 ITP by USFWS was therefore  
23 conditioned in part on the assumption that the stand structure objectives, including the 10-15  
24 percent fully functional stand structure objective, would be met by 2096.

25 The approval of that 1997 HCP gave DNR the right, upon a new ESA listing of a species  
26 covered by the agreement, to incidental take of newly listed species. The implementation  
27

1 agreement contained in the final 1997 HCP outlined the procedure by which USFWS would  
2 modify WDNR's 1997 ITP. AR-00001593-00001611. The Implementation Agreement for the  
3 1997 HCP ("IA") requires USFWS to add newly listed species to the 1997 ITP upon WDNR's  
4 written request but does not require any additional findings or investigation on USFWS's part.  
5 Importantly, the effectiveness of the Multispecies Conservation Strategy of the HCP is  
6 measured by the stand structure objectives, which the IA refers to as "measurable criteria for  
7 the biological success of the HCP." AR-00001600. Having found that the conservation  
8 strategies outlined in the 1997 HCP would provide adequate habitat to protect unlisted species,  
9 USFWS and DNR entered into an unlisted species agreement that was codified in the IA for  
10 the 1997 HCP.  
11

12 The IA contractually bound the DNR to the commitments of the 1997 HCP, 1997 ITP,  
13 and the IA. One of these commitments is to "maintain[] conservation objectives described in  
14 Chapter IV of the HCP," including the stand structure objectives of the multi-species  
15 conservation plan. AR-00001597. The IA also commits DNR to the "conservation strategies  
16 afforded all habitat types," including the Multispecies Conservation Strategy. These strategies  
17 contain "measurable criteria [that should be used to assess] . . . the biological success of the  
18 HCP," such as the stand structure objectives under the Multispecies Conservation Strategy.  
19 AR-00001600. Therefore, the stand structure objectives defined DNR's commitments under  
20 the Multispecies Conservation Strategy, and were a part of USFWS's analysis for negotiating  
21 and accepting the Multispecies Conservation Strategy.  
22

23 The acceptance of DNR's Spotted Owl Conservation Strategy by USFWS was also  
24 conditioned in part on the assumption that the stand structure objectives would be met by 2096.  
25 USFWS used these stand structure objectives to describe the anticipated distribution of northern  
26  
27

1 spotted owl habitat across each planning unit. *See* Table 11, AR-00000877. USFWS described  
2 DNR’s stand structure objectives, including its 10-15 percent fully functional stand structure  
3 objective, as “overall spotted owl landscape commitments.” AR-00000817. Thus the stand  
4 structure objectives defined, in part, DNR’s commitments under the Spotted Owl Conservation  
5 Strategy, and were a part of USFWS’s analysis for negotiating and accepting the Spotted Owl  
6 Conservation Strategy.  
7

8 The 1997 Biological Opinion confirms that the stand structure objectives of the HCP,  
9 including the 10 to 15 percent fully functional forest objective, are commitments, stating:

10 Under the HCP, DNR *will meet* forest stand structure objectives on the West-  
11 side Planning Units and the OESF. These objectives presented at year 100 are  
12 currently provided in Appendix 3 of the FEIS, p. A3-81.

13 AR-00000817 (emphasis added).

14 Consistent with the Board’s policy-setting role regarding Washington State timber sales,  
15 the Board formally adopted the HCP by resolution. AR-00001174; AR-00000805-808.

16 **3. The 2019 HCP Amendment, Biological Opinion, and Incidental**  
17 **Take Permit.**

18 In 2019, DNR, together with the US Fish and Wildlife Service, prepared a joint long-  
19 term conservation strategy (“LTCS”) for the marbled murrelet. AR-00004637-5064. The  
20 LTCS for the marbled murrelet amended the 1997 HCP, and constituted DNR’s application for  
21 an amended incidental take permit. The 2019 HCP amendment is specific to the marbled  
22 murrelet, and does not affect the provisions of the spotted owl, riparian, or multispecies  
23 conservation strategies of the 1997 HCP, or excuse DNR from meeting its commitment to  
24 provide fully functional forests across at least 10-15 percent of forestlands within each HCP  
25 planning unit by the year 2096. AR-00000877; AR-00001534.  
26

1           **D.     The Policy for Sustainable Forests.**

2           In 2006, DNR and the Board adopted a statewide forest management policy, the Policy  
3 for Sustainable Forests. AR-00010538-10609. The Policy for Sustainable Forests directs the  
4 management of 2.1 million acres of forested state trust lands, including lands in the Columbia  
5 HCP Planning Unit. The purpose of the Policy for Sustainable Forests is to “conserve and  
6 enhance the natural systems and resources of forested state trust lands managed by DNR to  
7 produce long-term, sustainable trust income, and environmental and other benefits for the  
8 people of Washington.” AR-00010548. By its own rule and policy, DNR must manage its  
9 forests consistent with its federal HCP and Policy for Sustainable Forests. WAC 332-41-665  
10 (1)(f); AR-00000805-808.

11  
12           Intended outcomes of the Policy for Sustainable Forests include “Conserving old  
13 growth and targeting other suitable structurally complex forests to meet a 10 percent to 15  
14 percent older-forest target for each Western Washington HCP planning unit, over 70 years.”  
15 AR-00010551.

16  
17           The Policy for Sustainable Forests’ “General Silvicultural Strategy,” AR-00010591–  
18 00010592, provides as follows:

19           DNR intends to actively manage suitable structurally complex forests to achieve  
20 older-forest structures across 10-15 percent of each Western Washington HCP  
21 planning unit in 70-100 years. Older-forest structures that contribute to this target  
22 are represented by stands in the fully functional or niche diversification stage of  
stand development.

23 AR-00010591. Similarly, it states “The department will target 10-15 percent of each Western  
24 Washington Habitat Conservation Plan planning unit for ‘older’ forests—based on structural  
25 characteristics—over time.” AR-00010592.

26           Critically, the General Silvicultural Policy of the Policy for Sustainable Forests states:  
27



1 Through landscape assessments, the department will identify suitable structurally  
2 complex forest stands to be managed to help meet older-forest targets. **Once older-**  
3 **forest targets are met**, structurally complex forest stands that are not needed to meet  
the targets may be considered for harvest activities.

4 AR-00010592 (emphasis added).

5 Under this rule, a “structurally complex” stand cannot be considered for harvest until  
6 the 10-15 percent older-forest target is met.

7 The Environmental Impact Statement (“EIS”), AR-00010054-10529, that accompanied  
8 the Policy for Sustainable Forests and General Silvicultural Strategy expounds on this  
9 requirement to defer or delay harvest of structurally complex forests:  
10

11 The Board’s Preferred Alternative builds on Alternative 2 by including the  
12 following: the discussion for old growth has been moved to the Old-Growth Stands  
13 in Western Washington policy subject area; specifies how suitable older stands will  
14 be identified to help meet older-forest targets; emphasizes that the **10-15 percent**  
15 **older-forest targets will be accomplished** over time; and specifies that once older-  
forest targets are met (expected to take 70 years or more), structurally complex  
forest stands that are not needed to meet the targets may be considered for harvest  
activities.

16 AR-00010268 (emphasis added).

17 The clear intent of the General Silvicultural Policy is to restore old growth conditions,  
18 defined as forests in the niche diversification and fully functional stages of stand development,  
19 across 10-15 percent of lands managed by DNR. Indeed, both the niche diversification and  
20 fully functional development stages are described in the 2007 Addendum to DNR’s 2004  
21 Sustainable Harvest FEIS as “old-growth like forests.”  
22

23 **E. Procedures for Identifying and Managing Structurally Complex Forests to**  
24 **Meet Older-Forest Targets.**

25 Achieving DNR’s commitments to meet its stand structure objectives, described in the  
26 HCP and Policy for Sustainable Forests, require detailed inventory and analysis. To accomplish  
27

1 these requirements and impose safeguards until they are met, DNR adopted procedures for  
2 “Identifying and Managing Structurally Complex Forests to Meet Older Forest Targets  
3 (Westside)” in January, 2007. AR-00010897-10899. These procedures constitute the applied  
4 mechanism that dictates how DNR is to go about restoring old growth conditions within each  
5 HCP planning unit.  
6

7 The Identification and Management Procedures provide that:

8 The identification and review of landscape level management strategies to  
9 achieve the 10 to 15 percent older forest target *will be completed* during the  
10 forest land planning process that *will be conducted* for each HCP planning unit.

11 AR-00010898 (emphasis added). A step-by-step procedure is provided to ensure that Older  
12 Forest Targets are met:

- 13 • Identify acres of existing structurally complex stands managed for older  
14 forest conditions.
- 15 • Determine if 10 to 15 percent or more of the HCP planning unit contains  
16 structurally complex forest prioritized to meet older forest targets.
- 17 • If less than 10 percent of the HCP planning unit contains structurally  
18 complex forests prioritized to meet older forest targets based on the  
19 assessment, designate in a department lands database additional suitable  
20 structurally complex forest stands or acreage to equal 10 to 15 percent of  
21 the HCP planning unit managed for older forest targets.
- 22 • Determine suitability based on a landscape context, considering such things  
23 as:
  - 24 – Stand size.
  - 25 – Proximity to old growth or other structurally complex forest stands  
26 in the ownership block, landscape or watershed.
  - 27 – Scarcity of other structurally complex stands in the ownership  
block, landscape or watershed.
  - Future strategic plans for the stand within the ownership block,  
landscape or watershed.
- Once those stands designated as suitable constitute at least 10 percent of the  
HCP planning unit, other (not otherwise withdrawn) stands are available for  
the full spectrum of timber harvests.

AR-00010898-99. In other words, the Identification and Management Procedures confirm and  
implement the requirement in the Policy for Sustainable Forests that DNR first identify and set

1 aside sufficient structurally complex forest to meet its Older Forest Targets before considering  
2 structurally complex forests for harvest.

3 DNR has not complied with the Identification and Management Procedures. There is  
4 no record evidence that a forest land plan has been developed for the Columbia HCP Planning  
5 Unit, and DNR has not designated in a department lands database additional structurally  
6 complex forest stands, despite its own finding that structurally complex forests prioritized to  
7 meet its Older Forest Target constitute only two percent of the Columbia HCP Planning Unit.  
8 AR-00012650-12656.  
9

10 **F. The 2024 Freedom Timber Sale.**

11 The Freedom Timber Sale is located in the Grays River watershed in Pacific County,  
12 approximately 12 miles east of Naselle, and would involve logging 138 acres of state-owned  
13 timber lands in the Columbia HCP Planning Unit. AR-00012760; 00012774-12775. Consistent  
14 with their respective roles in disposing of state-owned timber, DNR presented the Freedom  
15 Timber Sale to the Board for approval on February 6, 2024, and the Board approved the timber  
16 sale. AR-00012758-12797 (descriptions of six timber sales considered for approval at the  
17 Board’s February 6, 2024 meeting, including Freedom at AR-00012772- 00012776); AR-  
18 00012734-12757 (minutes of February 6, 2024 Board meeting; all six timber sales considered,  
19 including Freedom, approved at AR-00012756).  
20  
21

22 DNR submitted a forest practices application to DNR’s Forest Practices Division on  
23 November 27, 2023. AR-00011836-11868. The Freedom Timber Sale is divided into five units  
24 and would require the construction of up to nearly a mile and a half of new roads. While DNR  
25 selected a few trees to be retained on site as “leave trees”, and excluded riparian corridors from  
26 the logging area, in each of the units DNR proposes “even-aged” logging, more commonly  
27

1 known as “clearcutting” (the term arises from the fact that the logging results in an “even-aged”  
2 tree plantation regrowing, because all the standing merchantable trees are cut down). AR-  
3 00011842. A map of all the units is provided in both the forest practices application and SEPA  
4 checklist. AR-00011855 (“Forest Practices Activity Map”).

5  
6 DNR Regulatory approved the forest practices application on December 12, 2023 after  
7 purporting to evaluate the environmental impacts of the sale pursuant to the State  
8 Environmental Policy Act (SEPA), Ch. 43.21C RCW. AR-00011868. SEPA requires the  
9 preparation of a SEPA checklist, which includes a series of questions aimed at identifying  
10 possible environmental impacts of a proposal. DNR duly filled out the SEPA checklist. AR-  
11 00011539-11569. The SEPA checklist was explicitly predicated on compliance with the HCP,  
12 and the Policy for Sustainable Forests, among other policy documents. AR-00011541-42. The  
13 SEPA checklist specifically noted that the Freedom Timber Sale would be conducted in  
14 conformity with the HCP and Policy for Sustainable Forests, and summarily claimed (without  
15 any explanation or documentation) that, even in light of the Freedom Timber Sale, “[t]he  
16 Columbia HCP Planning Unit will meet at least 10% older forest within conservation areas by  
17 2090.” AR-00011546. Based on the answers in the SEPA checklist, DNR issued its  
18 determination that the Freedom Timber Sale would not result in significant adverse impacts.  
19 AR-00011538 (“This decision was made after review of a completed environmental checklist  
20 and other information on file with the lead agency.”).

21  
22  
23 **G. DNR’s Internal Analysis.**

24 Stephen Kropp, Appellant LFDC’s President as well as the founder of the Center for  
25 Responsible Forestry, raised significant concerns during a series of meetings with DNR  
26 management staff in 2020 regarding DNR’s ability to meet its Older Forest Targets. In  
27

1 response, the Director of DNR’s Forest Resources Division, Andrew Hayes, directed DNR staff  
2 to evaluate DNR’s progress toward achieving its Older Forest Targets. The results of the  
3 analysis were presented to the Board of Natural Resources by Mike Buffo on June 1, 2021. AR-  
4 00012246-12250. The methods used to calculate anticipated percentages of older forest within  
5 each planning unit in Western Washington were described in detail in an internal DNR memo  
6 prepared by Allen Estep and Mike Buffo (the “Estep-Buffo memo”) in May of 2021, which  
7 LFDC obtained through public disclosure. AR-00010915-10928.

9 The Estep-Buffo memo candidly acknowledges that protected forests over 150 years old  
10 occupy only 0.8 percent of the Columbia HCP Planning Unit (Table 5, AR-00010925), and that  
11 only one percent of forestlands within the Columbia HCP Planning Unit can currently be  
12 described as protected Older Forests. DNR thus admits that it is far from meeting its Older  
13 Forest Target in the Columbia HCP Planning Unit.

15 Despite this conclusion, the Estep-Buffo memo analysis predicts that DNR will meet its  
16 Older Forest Target in the Columbia HCP Planning Unit by 2090. AR-00010924 (Table 2).  
17 However, the Estep-Buffo memo provides no maps, parcel numbers, or other data that would  
18 suggest that DNR has designated in a department lands database sufficient structurally complex  
19 forest stands to meet its Older Forest Target. To the contrary, data obtained by LFDC from  
20 DNR’s Public Disclosure Office reveals that structurally complex forest stands designated to  
21 meet the Older Forest Target constitute only 2 percent of the Columbia HCP Planning Unit.  
22 AR-00012650-12656.

24 The methods used to arrive at the conclusion that the Older Forest Target will be met in  
25 the Columbia HCP Planning Unit by 2090 are inconsistent with the requirements of the Policy  
26 for Sustainable Forests and the Identification and Management Procedures. Contrary to the  
27

1 requirement spelled out in the Policy for Sustainable Forests, and the Identification and  
2 Management Procedures, that DNR identify and manage structurally complex forests to meet  
3 Older Forest Targets, the Estep-Buffo memo assumes, without evidence, that the Older Forest  
4 Targets can be met by setting aside tree plantations that were commercially logged and re-  
5 planted as recently as 1977. To support this contention, Estep and Buffo include an  
6 unreferenced table in the memo that suggests that Douglas fir forests are capable of achieving  
7 maximum relative density in as little as 43 years; and that old-growth like conditions can be  
8 produced in such stands within 80 years of achieving maximum relative density. AR-00010919,  
9 10928. The memo authors refer the reader to Appendix F of DNR's 2019 Final Environmental  
10 Impact Statement (FEIS) on Alternatives for the Establishment of a Sustainable Harvest Level  
11 for more information. But Appendix F of the FEIS contains no information on relative density  
12 calculations, older forests, or fully functional forests. AR-00009615-9639. As explained  
13 above, there is nothing in the record that supports DNR's contention that a forest that was  
14 clearcut and re-planted in the 1970's is capable of exhibiting old growth conditions by 2096.

17 Although the Estep-Buffo memo admits that DNR is required to designate suitable  
18 structurally complex forest stands or acreage to equal 10 percent of the planning unit for Older  
19 Forest Targets, nothing in the Estep-Buffo memo suggests that this has been done. In short, the  
20 Estep-Buffo analysis constitutes a post-hoc attempt to demonstrate that DNR can meet its Older  
21 Forest Targets without identifying or protecting any additional structurally complex forest  
22 stands, as DNR is required to do under the terms of its Policy for Sustainable Forests and  
23 Identification and Management Procedures. But this is not actually possible.

25 ///

26 ///

1                   **H. Presence of Structurally Complex Forests in the Freedom Timber Sale.**

2                   Appellant LFDC submitted comments, and addendums to those comments, to  
3 Respondents providing detailed information that demonstrates why the forests found within the  
4 boundaries of the Freedom Timber Sale qualify as structurally complex:  
5

- 6                   • Many of the dominant trees in the Freedom Timber Sale are nearly 200 feet tall. AR-  
7                   00012657-12665.
- 8                   • There are numerous gaps in the overstory which have allowed for the development of  
9                   understory canopies, and a diverse variety of forest floor plants. AR-00012666-12690.
- 10                  • The trees have a variety of diameters and heights, and natural mortality or stem loss is  
11                  evident throughout the area. AR-00012666-12690.

12  
13 DNR defines botanically diverse stands as those where “multiple canopies of trees and  
14 communities of forest floor plants are evident” and “large and small trees have a variety of  
15 diameters and heights. Decayed and fallen trees are lacking in abundance.” AR-00008707,  
16 AR-00010602. The stands within the boundaries of Freedom Timber Sale meet these criteria  
17 and are structurally complex pursuant to DNR’s own definitions.

18                  Indeed, DNR did not dispute Appellant’s conclusion that the Freedom Timber Sale  
19 would clearcut structurally complex forests, until *just hours before* close of business the day  
20 before DNR presented the Freedom Timber Sale proposal to the Board for approval. At 1:40  
21 PM on February 5, 2024, DNR submitted an addendum to its SEPA Checklist, in which it  
22 asserted that the stands identified for harvest are not structurally complex – its only rebuttal to  
23 Appellant’s extensive submissions and data. AR-00011831. The addendum to the SEPA  
24 checklist was submitted more than a month *after* the public comment period had ended, and 28  
25 days *after* DNR issued its notice of final determination retaining its determination of non-  
26  
27

1 significance. Leaving virtually no time for Appellants or the public to learn about, let alone  
2 respond to, this erroneous, newly revised SEPA Checklist – which factors into whether a timber  
3 sale may be approved – DNR attempted to ramrod the Freedom Timber Sale through the final  
4 stages of the approval process by submitting the sale proposal to the Board mere hours later.  
5 The Board, Appellant LFDC, and the public were given less than 24 hours to review, assess,  
6 and comment on DNR’s new addendum.  
7

8 In the revised addendum, DNR asserts that the Freedom Timber Sale is composed of  
9 stands in the competitive exclusion, biomass accumulation, and “Maturation I” stages of stand  
10 development. *Id.* According to DNR’s Guidelines for Identifying Mature and Old Growth  
11 Forests, stands in the “Maturation I” stage of stand development are stands that are between 70  
12 to 160 years old, where the dominant trees have lost their lower branches, and shade tolerant  
13 plants, like hemlock, cedar, and silver fir are present in the understory. AR-00012078, AR-  
14 00012088. This description is similar to DNR's definition of botanically diverse forests:  
15 “Multiple canopies of trees and communities of forest floor plants are evident. Large and small  
16 trees have a variety of diameters and heights. Decayed and fallen trees are lacking abundance.”  
17 AR-00008707, AR-00010602. The description is also consistent with the definition of  
18 “structurally complex” forests outlined in the HCP, which defines structurally complex forests  
19 as those that are more than 70 years old. AR-00001534.  
20  
21

22 Indeed, DNR guidelines state that Maturation I forests include stands in both the  
23 “understory development and botanically diverse” stages of stand development. AR-00012113.  
24 The Policy for Sustainable Forest FEIS states that: DNR intends to actively manage structurally  
25 complex forests, *especially those suitable stands in the botanically diverse stage of stand*  
26  
27



1 *development*, to achieve older-forest structures across 10-15 percent of each Western  
2 Washington HCP planning unit in 70-100 years. AR-00010268 (emphasis added).

3 This requirement is repeated in the Identification and Management Procedures:

4       The department intends to actively manage suitable structurally complex forests (fully  
5       functional, niche diversification, and botanically diverse stand development stages) to  
6       meet older forest targets.

7 AR-00010897. The Identification and Management Procedures further explain that “Stand  
8 structural complexity begins notably in the botanically diverse stage.” *Id.*

9       Further, the untimely addendum to the SEPA Checklist states that the Freedom Timber  
10 Sale includes stands in the “Maturation I” stage of stand development, but does not state how  
11 much of the timber sale was classified as “Maturation I”. AR-00011831.

12       In summary, DNR admits that: (a) the HCP and Policy for Sustainable Forests both  
13 require the “evaluation and identification of suitable structurally complex forest to be managed  
14 to meet the older-forest outcomes,” and (b) that the Freedom Timber Sale include stands in the  
15 Maturation I stage of stand development. *Id.*

16       Yet unconvincingly, DNR asserts in the untimely addendum to the SEPA Checklist  
17 that forests in the Maturation I stage of stand development “are not considered ‘structurally  
18 complex’ per the department’s guidance,” and that DNR is therefore not required to protect or  
19 manage these forests to meet older forest targets. *Id.* This assertion fails for multiple, obvious  
20 reasons.  
21

22       *First*, the approved method for determining whether a forest is structurally complex,  
23 as described in the 2004 Sustainable Harvest Calculation FEIS (AR-00008707); the  
24 Identification and Management Procedures (AR-00010897-99), and the Policy for Sustainable  
25 Forests (AR-00010602-3), is based on an entirely different system of stand classification than  
26  
27

1 the system DNR used to attempt to justify its Freedom Timber Sale proposal. There is no  
2 reference to the “Maturation I” stage of stand development in any approved DNR policy,  
3 planning document, or procedure relating to meeting Older Forest Targets. Indeed, the Estep-  
4 Buffo memo confirms that the classification system described in DNR’s Guidelines for  
5 Identifying Mature and Old Growth Forests “does not redefine the direction set in the Policy  
6 for Sustainable Forests, nor the definitions used in the fulfillment of the policy.” AR-00010917.  
7

8 *Second*, DNR guidelines indicate that forests in the Maturation I stage of stand  
9 development include stands that are botanically diverse, which are by definition structurally  
10 complex. AR-00012113.

11 *Third*, the Freedom Timber Sale is adjacent to other protected, structurally complex  
12 forests of similar composition and age that were found to contain occupied marbled murrelet  
13 nests. AR-00011741; *see also* Declaration of Stephen Kropp In Support Of Appellant’s Motion  
14 for Preliminary Injunction, Ex. S, “Comparison of Freedom Timber Sale to Nearby Forests  
15 DNR has Set Aside to Meet Older Forest Targets.” It belies scientific reason and common  
16 sense that a nearly identical forest next door would be designated and set aside to meet Older  
17 Forest Targets but the forests at issue in the Freedom Timber Sale possessing similar  
18 characteristics would not.  
19

20 *Fourth*, the Freedom Timber Sale is dominated by trees that are significantly larger and  
21 older than the trees in other forests that DNR has classified as structurally complex. Declaration  
22 of Stephen Kropp In Support Of Appellant’s Motion for Preliminary Injunction, Ex., ¶¶ 27-29,  
23 Exs. S-T. Again, this disparity in designating and protecting the forests within the Freedom  
24 Timber Sale belies reasoning.  
25  
26  
27

1           *Fifth*, DNR has not designated in a department lands database suitable structurally  
2 complex forests equal to 10 to 15 percent of the Columbia HCP Planning Unit.

3           *Finally*, even if DNR’s assertion that the Freedom Timber Sale does not contain any  
4 “structurally complex” forests is taken as true – which it definitively is not – the forests at issue  
5 are still indisputably among the oldest and most complex of any forests that presently exist  
6 within the Columbia HCP Planning Unit, and closest to meeting the “Older Forest”  
7 requirement, and therefore should logically have been designated for protection to meet DNR’s  
8 Older Forest Target, regardless of a formal “structurally complex” classification.

9           The addendum to the SEPA Checklist includes maps that ostensibly “illustrate the  
10 spatial representation of the areas identified to be managed to meet older forest targets,” but  
11 these appear to be maps of all of the areas that are currently unavailable for commercial timber  
12 harvest – including those that are inaccessible, unproductive, or managed on long rotations –  
13 and not maps of forests that are structurally complex. AR-00011833-34. The actual map of  
14 protected, structurally complex forests shows that only 2 percent of the Columbia HCP Planning  
15 Unit contains structurally complex forests that have been designated to meet older forest targets.  
16 AR-00012652.

17  
18  
19  
20           **III. STANDARD OF REVIEW AND LEGAL BACKGROUND**

21           **A.     The Public Lands Act.**

22           The Public Lands Act provides a unique cause of action for appealing the sale of state-  
23 owned timber:

24           Any applicant to purchase, or lease, any public lands of the state, or any valuable  
25 materials thereon, and any person whose property rights or interests will be affected  
26 by such sale or lease, feeling aggrieved by any order or decision of the board, or  
27 the commissioner, concerning the same, may appeal therefrom to the superior court

1 of the county in which such lands or materials are situated, by serving upon all  
2 parties who have appeared in the proceedings in which the order or decision was  
made, or their attorneys, a written notice of appeal[.]

3 RCW 79.02.030. The statute provides that the court’s hearing of the case “shall be de novo  
4 before the court, without a jury, upon the pleadings and papers so certified...” meaning closed-  
5 record review. *Id.* The statute does not specify what standard of review the court is to apply to  
6 the timber-sale decision, but the Court of Appeals has applied the standard of “arbitrary and  
7 capricious or contrary to law” to leasing and sale decisions arising under the Public Lands Act.  
8 *See Nw. Alloys, Inc. v. Dep’t of Natural Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019).

9  
10 An agency that does not consider compliance with its own goals when it makes a  
11 decision acts arbitrarily and capriciously. *Puget Sound Harvesters Ass’n v. Washington State*  
12 *Dept. of Fish and Wildlife*, 157 Wash. App. 935, 950, 239 P.3d 1140 (2010). Likewise,  
13 deviation from agency plans and procedures without explanation demonstrates that the agency  
14 failed to consider the relevant factors and articulate a rational connection between the facts  
15 found and the choice made, and thus the decision was arbitrary and capricious. *All. for the Wild*  
16 *Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1117 (9th Cir. 2018).

17  
18 **B. SEPA.**

19 SEPA requires each governmental proposal that may significantly affect the quality of  
20 the environment to undergo an assessment of the proposal’s environmental impacts. The first  
21 step of the SEPA process is the “threshold determination.” RCW 43.21C.033; WAC 197-11-  
22 055(2). After evaluating the proposal and identifying the probable adverse impacts, the lead  
23 agency must issue a formal decision as to whether the proposal may cause significant adverse  
24 environmental impacts. All threshold determinations must be documented in one of two ways:  
25 either a determination of non-significance (DNS) or a determination of significance (DS).  
26  
27

1 WAC 197-11-310(5). If the responsible official determines that the proposal will have no  
2 significant adverse environmental impacts, the lead agency shall prepare and issue a DNS per  
3 WAC 197-11-340. *Id.* If the responsible official determines that a proposal may have  
4 significant adverse environmental impacts, the lead agency shall prepare and issue a DS. WAC  
5 197-11-360. The question for the threshold determination is whether adverse impacts may be  
6 probable—not that they are probable. WAC 197-11-360(1); *see also* WAC 197-11-330(4) (“If  
7 . . . the lead agency reasonably believes that a proposal may have a significant adverse impact,  
8 an EIS is required.”) (emphasis added). Further:

9  
10 (U)nder SEPA an agency's decision to approve a project impliedly, if not expressly,  
11 determines that the project is consistent with the citizen's fundamental right to a  
12 healthful environment and with the legislatively mandated policy that an agency  
13 action allow to the citizens the widest practicable range of beneficial uses of the  
14 environment without degradation.

15 *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271 (1974).

16 The threshold determination is the most consequential step in the SEPA process. The  
17 public policy of SEPA is thwarted if an EIS is not prepared for a project with significant  
18 impacts. *Norway Hill Preservation and Protection Association v. King County Council*, 87  
19 Wn.2d 267, 273, 552 P.2d 674 (1976).

20 As part of the threshold determination, the agency must consider “[c]onflict with local,  
21 state, or federal laws or requirements for the protection of the environment,” as evidence of  
22 significant impacts. WAC 197-11-330(e)(iii). While agencies may “tier” to programmatic  
23 SEPA review documents, the agency must document deviations from the expectations and  
24 impacts described in those documents in consideration of the impact of the later proposal. WAC  
25 197-11-600(3).

1 The threshold determination must be based on “information reasonably sufficient to  
2 evaluate the environmental impact of a proposal.” WAC 197-11-335; WAC 197-11-330;  
3 *Anderson v. Pierce County*, 86 Wn. App. 290, 301(1997); *see also Norway Hill Preservation*  
4 *and Protection Ass’n v. King County Council*, 87 Wn.2d at 276; *Spokane County v. E. Wash.*  
5 *Growth Management Hr’gs Bd.*, 176 Wn. App 555, 579, 309 P.3d 673 (2013), *review denied*  
6 *179 Wn. 2d 1015, 318 P.3d 279 (2014).*

8 Ultimately, the threshold determination “must indicate that the agency has taken a  
9 searching, realistic look at the potential hazards and, with reasoned thought and analysis,  
10 candidly and methodically addressed those concerns.” *Conservation Northwest v. Okanogan*  
11 *County*, 194 Wn. App. 1034, 2016 WL 3453666, \*32 (2016) (unpublished nonbinding authority  
12 per GR 14.1). “SEPA seeks to ensure that environmental impacts are considered and that  
13 decisions to proceed, even those completed with knowledge of likely adverse environmental  
14 impacts, are ‘rational and well documented.’” *Columbia Riverkeeper v. Port of Vancouver,*  
15 *USA*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law  
16 and Practice § 17.1, at 192). This information must be adequate to demonstrate that the agency  
17 has taken the requisite “hard look” at environmental impacts. *Pub. Util. Dist. No. 1 of Clark*  
18 *County*, 137 Wn. App 150, 158, 151 P.3d 1067 (2007).

21 A threshold determination must ultimately be based on the information provided in the  
22 environmental checklist and any additional information that is requested by the responsible  
23 official. NMC 14.05.120.B; *see also* WAC 197-11-335, WAC 197-11-350. The purpose of  
24 the checklist is to ensure the agency fully discloses and carefully considers a proposal’s  
25 environmental impact before adopting it. *Spokane County v. E. Wash. Growth Management*  
26 *Hr’gs Bd.*, 176 Wn. App at 579. For that purpose, the information provided in the checklist  
27

1 must be detailed and complete. *Id.*; *see also Conservation Northwest v. Okanogan County*, 194  
2 Wash. App. 1034. Broad generalizations and rote answers in a checklist are condemned as  
3 improper. *Id.*

4 “The standard for review of a ‘negative threshold determination’ [*i.e.*, a DNS] is whether  
5 the agency's decision is ‘clearly erroneous in view of the entire record as submitted and the  
6 public policy contained in the act of the legislature authorizing the decision or order.’”  
7 *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979) (citing RCW  
8 34.04.130(6)(e)); *Sisley v. San Juan Cty.*, 89 Wash.2d 78, 569 P.2d 712 (1977); *Norway Hill*  
9 *Preserv. & Protec. Ass'n*, 87 Wn.2d at 267.

10  
11 “The purpose of the broad scope of review is to ensure that an agency, in considering  
12 the need for an [environmental impact statement], does not yield to the temptation of  
13 expediency thus short-circuiting the thoughtful decision-making process contemplated by  
14 SEPA.” *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d at 700–701.

#### 15 16 **IV. ARGUMENT**

17 *First*, DNR’s approval of the Freedom Timber Sale violates the Public Lands Act  
18 because DNR failed to comply with the Identification and Management Procedures, the Policy  
19 for Sustainable Forests, and the Habitat Conservation Plan. DNR also failed to provide a  
20 rational explanation for its deviation from the applicable laws and policies, which renders its  
21 decision arbitrary and capricious.

22  
23 *Second*, the associated determination of non-significance for the Freedom Timber Sale  
24 violates SEPA, because the logging of rare structurally complex forests in the Columbia HCP  
25 Planning Unit has significant environmental impacts, and because DNR failed to disclose  
26 conflicts with laws and policies governing protection of the environment. DNR improperly  
27

1 tiered to prior environmental review documents for the Habitat Conservation Plan and Policy  
2 for Sustainable Forests, without disclosing deviation from the expectations set forth in those  
3 documents.

4 **A. DNR’s Approval of the Freedom Timber Sale Violates the Public Lands Act**  
5 **Because It is Inconsistent with the Forest Identification and Management**  
6 **Procedures, the Policy for Sustainable Forests, and the HCP.**

7 The Public Lands Act requires DNR to administer the public lands “in the best interests  
8 of the state and the general welfare of the citizens thereof, and ... consistent with the applicable  
9 provisions of the various lands involved.” RCW 79.10.100. Consistent with this requirement,  
10 DNR’s and the Board’s regulations provide that “[d]epartment policies for the sale of timber  
11 from public lands are found under DNR’s habitat conservation plans, any amendments to  
12 DNR’s habitat conservation plans, or in the Policy for Sustainable Forests adopted in 2006 and  
13 any future updates to the policy.” WAC 332-41-665(1)(f).

14  
15 DNR’s departure from the requirements, procedures, and goals of the Identification and  
16 Management Procedures, Policy for Sustainable Forests, and HCP violates the Public Lands  
17 Act and is arbitrary and capricious.

18 While decided under federal law, *All. for the Wild Rockies v. United States Forest Serv.*,  
19 907 F.3d 1105 (9th Cir. 2018) is closely analogous. There, plaintiffs challenged a logging  
20 project based on its deviation from the broader management plan. As summarized by the court:  
21

22 In its discussion of old forest and old growth, the 2003 Plan sets forth a standard  
23 that requires maintaining at least 20 percent of the acres within each forested  
24 PVG [potential vegetation group, a unit] in the large tree size class. This standard  
25 is aimed at helping certain species that are dependent upon large trees. Where  
26 the large tree size class constitutes less than 20 percent of the total PVG acreage,  
27 management action shall not decrease[] the current area occupied by the large  
tree size class, except where, among other things, management actions would  
not degrade or retard attainment of desired vegetation conditions in the short or  
long-term.



1  
2 *Id.* at 1116. Plaintiffs alleged that the Forest Service redefined “old forest” for a given  
3 timber project in such a way that allowed the agency to log old forest in violation of the  
4 2003 Plan. The agency argued that it had simply added criteria and nuance to the  
5 definition according to its expertise.

6 The court ruled for plaintiffs, observing that the agency’s argument was  
7 “facially inconsistent with the Plan, which acknowledges historic presence of both large  
8 tree size class and old growth in virtually all of the PVGs, and mandates specific  
9 percentage of large tree size class on each PVG.” *Id.* at 1117. Accordingly, the court  
10 held that the agency did not consider the relevant factors, did not articulate a rational  
11 connection between the facts found and the choice made, and thus the decision was  
12 arbitrary and capricious. *Id.* (citing *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept.*  
13 *of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)).  
14

15 The Forest Service’s 20 percent requirement of the referenced 2003 Plan is  
16 similar to the 10-15 percent requirement of the Policy for Sustainable Forests and HCP.  
17 Like the Policy for Sustainable Forests and the Identification and Management  
18 Procedures, the Forest Service’s Plan required protection of certain age class trees until  
19 thresholds were met.  
20

21 DNR’s approval of the Freedom Timber Sale effectively redefined the agency’s  
22 requirements, by using a different stand classification system than prescribed by the  
23 Policy for Sustainable Forests, and failing to follow established procedures for meeting  
24 the Older Forest Target for the Columbia HCP Planning Unit. As in *Alliance for the*  
25 *Wild Rockies*, DNR’s approval was “facially inconsistent” with its legal commitments  
26  
27

1 and procedures, and thus was arbitrary and capricious. *Id.* at 1117; *see also Puget Sound*  
2 *Harvesters Ass’n*, 157 Wn. App. at 950.

3 **1. Approval of the Freedom Timber Sale Departs from the Identification and**  
4 **Management Policy Without Basis.**

5 The Identification and Management Policy is an important tool adopted by DNR to  
6 ensure compliance with the Policy for Sustainable Forests and HCP. The precautionary  
7 approach set forth in the Identification and Management Procedures are necessary because the  
8 fully functional forests described in the HCP, and the Older Forests described in the Policy for  
9 Sustainable Forests, take more than 100 years to grow. Once structurally complex forests are  
10 logged, they will not provide fully functional forest habitat within the life of the HCP.

11  
12 The Identification and Management Procedures set forth mandatory steps that DNR  
13 “will” undertake to meet its Older Forest Targets. AR-00010897-10899. It specifically directs  
14 DNR to “identify suitable structurally complex forest stands to be managed to help meet older-  
15 forest targets.” AR-00010897. DNR estimates that structurally complex forests currently  
16 represent only about three percent of all forests managed by DNR in Western Washington. AR-  
17 00009462 (Figure 3.3.2), AR-00009471. Protection of structurally complex forests, such as  
18 those found in the Freedom Timber Sale, is therefore critical to meeting DNR’s Older Forest  
19 Target. Yet DNR has failed to produce information on the specific locations of any structurally  
20 complex stands that have been identified to help meet older-forest targets beyond the current  
21 two percent, despite multiple requests to DNR’s Public Disclosure Office for this information.  
22 AR-00012711-12715. There is no record evidence that DNR ever identified or mapped  
23 additional structurally complex forest or older-forest as required.  
24  
25  
26  
27

1 DNR admits that the Freedom Timber Sale would harvest stands in the “Maturation I”  
2 stage of stand development, which includes botanically diverse forests. Botanically diverse  
3 forests are by definition structurally complex. AR-00010897.

4  
5 There is no record evidence of a forest land plan setting forth a strategy for the  
6 Columbia HCP Planning Unit to meet its 10 to 15 percent commitments. Such a plan does not  
7 appear to exist and there are no indications that DNR has any intention to complete such a plan.  
8 As a result, “proposed harvest activities...must be accompanied by the following information:  
9 a) an assessment of forest conditions using readily available information, b) an analysis of the  
10 known landscape management strategies and, c) role of the structurally complex stand in  
11 meeting older forest targets.” AR-00010898. DNR denies that the Freedom Timber Sale would  
12 result in the harvest of structurally complex forests, and therefore made no attempt to evaluate  
13 the role of the structurally complex forests in the Freedom Timber Sale in meeting its Older  
14 Forest Target.  
15

16 The Identification and Management Procedures further mandate that if “less than 10  
17 percent of the HCP planning unit contains structurally complex forests prioritized to meet older  
18 forest targets based on the assessment, [DNR must] designate in a department lands database  
19 additional suitable structurally complex forest stands or acreage to equal 10 to 15 percent of the  
20 HCP planning unit managed for older forest targets.” AR-00010898-10899. Data obtained  
21 from DNR’s Public Disclosure Office reveals that only two percent of the Columbia HCP  
22 Planning Unit contains structurally complex forests prioritized to meet the Older Forest Target,  
23 yet there is no record evidence that DNR has made any effort to identify or designate any  
24 additional structurally complex forests to meet the Older Forest Target.  
25  
26  
27

1 Finally, the Identification and Management Procedures state that “[o]nce those stands  
2 designated as suitable constitute at least 10 percent of the HCP planning unit, other (not  
3 otherwise withdrawn) stands are available for the full spectrum of timber harvests.” AR-  
4 00010899. Designated structurally complex forests do not constitute 10 percent of the HCP  
5 planning unit. Therefore, structurally complex stands such as those in the Freedom Timber Sale  
6 are not “available for the full spectrum of timber harvests.”  
7

8 In sum, DNR has failed to carry out each and every requirement of the Identification  
9 and Management Procedures. Given the severe lack of structurally complex and Older Forests  
10 in the Columbia HCP Planning Unit, retention of the structurally complex forest in the Freedom  
11 Timber Sale is required to satisfy the requirements of the Policy for Sustainable Forests, and  
12 the Identification and Management Procedures, which implement those requirements. DNR  
13 plainly violated the Identification and Management Procedures, rendering its decision arbitrary  
14 and capricious.  
15

16 While DNR may argue that the procedures set forth are merely internal policy, it is  
17 well-established that deviation from agency procedures without rational basis constitutes  
18 arbitrary and capricious decisionmaking. If the agency “announces and follows—by rule or by  
19 settled course of adjudication—a general policy by which its exercise of discretion will be  
20 governed, an irrational departure from that policy (as opposed to an avowed alteration of it)  
21 could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of  
22 discretion.’” *Ins v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996); *accord Puget Sound Harvesters*  
23 *Ass’n*, 157 Wash. App. at 950; *Alliance for the Wild Rockies*, 907 F.3d at 1117; *Roskelley v.*  
24 *Wash. State Parks & Recreation Comm’n*, Civ. No. 48423-4-II, 2017 Wash. App. LEXIS 747,  
25 at \*29 (Mar. 28, 2017) (unpublished opinion not cited as binding authority per GR 14.1).  
26  
27

1 DNR's failure to comply with the Identification and Management Policy constitutes a  
2 deviation from agency procedures and policy without rationale. This renders the decision  
3 arbitrary and capricious and in violation of the Public Lands Act.

4  
5 **2. Approval of the Freedom Timber Sale violates the Policy for Sustainable  
6 Forests.**

7 The General Silvicultural Policy of the Policy for Sustainable Forests states that:

8 DNR intends to actively manage suitable structurally complex forests to achieve  
9 older-forest structures across 10-15 percent of each Western Washington HCP  
10 planning unit in 70-100 years. Older-forest structures that contribute to this target  
11 are represented by stands in the fully functional or niche diversification stage of  
12 stand development.

13 AR-00010591.

14 Similarly, it states:

15 The department will target 10-15 percent of each Western Washington Habitat  
16 Conservation Plan planning unit for 'older' forests – based on structural  
17 characteristics – over time.

18 Through landscape assessments, the department will identify suitable structurally  
19 complex forest stands to be managed to help meet older-forest targets. ***Once older-  
20 forest targets are met, structurally complex forest stands that are not needed to  
21 meet the targets may be considered for harvest activities.***

22 AR-00010592 (emphasis added).

23 The older-forest targets for each of the six planning areas in Western Washington  
24 were a foundational aspect of the Policy for Sustainable Forests. The Final Environmental  
25 Impact Statement, AR-00010054-10529, that accompanied the Policy for Sustainable  
26 Forests and General Silvicultural Strategy expounds on this point. AR-00010149-  
27 00010166. DNR's commitment in the Policy for Sustainable Forests is implemented in  
part through the Identification and Management Policy, discussed *supra*.

1 In sum, the Policy for Sustainable Forests requires DNR to achieve 10 to 15 percent  
2 Older Forests by the year 2096 (70 to 100 years after the adoption of the HCP) in each of the  
3 six planning units, and it cannot log structurally complex forests until it meets these thresholds.  
4 This sequence makes sense, because if DNR has not achieved Older Forest Targets, the only  
5 way to achieve them within the anticipated timeframe is to allow structurally complex forests  
6 to grow into Older Forests. Logging structurally complex forests, like those found in the  
7 Freedom Timber Sale, when there are so few structurally complex forests remaining, further  
8 dooms the agency to non-compliance.

9  
10 As set forth *supra*, stands in the Freedom Timber Sale are structurally complex. As a  
11 result, they may only be logged under the Policy for Sustainable Forests once older-forest  
12 targets are met. AR-00010592.

13  
14 DNR has not met its older-forest targets. AR-00012650-12656. According to the Estep-  
15 Buffo memo, protected, Older Forests constitute just one percent of the Columbia HCP  
16 Planning Unit, where the Freedom Timber Sale is located. AR-00010924. Given that DNR  
17 without question has not met the 10-15 percent older-forest target and is far off track from doing  
18 so, under the Policy for Sustainable Forests it may not log structurally complex forests, such as  
19 those within the Freedom Timber Sale. This understanding is confirmed by the Identification  
20 and Management Policy, which was instituted shortly after the Policy for Sustainable Forests.

21  
22 Approval of the Freedom Timber Sale violates the Policy for Sustainable Forests'  
23 protections for structurally complex forests, and thus violates the Public Lands Act.

24 ///

25 ///

26 ///

1                   **3. Approval of the Freedom Timber Sale violates the State Trust Lands HCP and**  
2                   **the Public Lands Act.**

3                   The HCP, which is based on and is supported by a formal Biological Opinion, includes  
4 a commitment to provide fully functional forests at least 150 years old across 10-15 percent of  
5 each HCP planning unit, as discussed above. Table IV.14, AR-00001534. DNR is required to  
6 achieve this target by Year 100 of the HCP, meaning the year 2096. Compliance with the targets  
7 in Table IV.14 is mandatory, as explained above.

8                   It is evident, based on a review of DNR’s annual HCP implementation reports, that the  
9 fully functional stand structure objectives of the HCP have been ignored by DNR. Between  
10 1998 and 2013, land that was sold or acquired by DNR was routinely classified by age class as  
11 open (0-10 yrs old), regeneration (11-20 yrs old), pole (21-40 yrs old), closed (41-70 yrs old),  
12 complex 71-150 yrs old), or functional (over 150 yrs old). This tends to reinforce DNR’s  
13 reliance on an age-based system for classifying stands by development stage. However, there  
14 is no mention at all of DNR’s Older Forest or fully functional stand structure objectives between  
15 2009 and 202, and no indication of how close DNR is to meeting its older forest or fully  
16 functional stand structure targets, in any annual report that was published by DNR between  
17 1998 and 2022 (e.g., AR-00003320-3422, AR-00003423-3525). The only reference to fully  
18 functional forests in any of the annual reports published between 2014 and 2022 is in the  
19 glossary, where fully functional is described as a desired future condition for riparian  
20 management zones. This constitutes a violation of DNR’s commitment to monitor its progress  
21 toward meeting stand structure objectives, as described in the HCP. AR-00001535.  
22  
23  
24

25                   DNR is planning to harvest other structurally complex forests in the Columbia HCP  
26 Planning Unit, and throughout Western Washington, over the next five years, many of which  
27

1 are close to 100 years old. DNR’s own analysis indicates that that DNR is well behind in  
2 meeting its Older Forest Target in the Columbia HCP Planning Unit, and has not identified or  
3 set aside suitable structurally complex forests to meet its Older Forest Target. AR-00010924,  
4 AR-00012650-12656.

5  
6 The Freedom Timber Sale includes forests that are 96 to 101 years old (AR-00011543,  
7 AR-00012657) and will be 163 to 177 years old by 2096. The continued commercial harvest  
8 of structurally complex forests, such as those found in the Freedom Timber Sale, that are clearly  
9 capable of helping DNR to meet the Older Forest Target for the Columbia HCP Planning Unit,  
10 constitutes a violation of DNR’s 1997 ITP, which incorporates the terms and conditions of the  
11 HCP and 1997 Biological Opinion by reference. AR-00000816-17, AR-00000825, AR-  
12 00000833. The loss of these structurally complex forests, including those in the Freedom  
13 Timber Sale, will further undermine DNR’s ability to meet its Older Forest Target in the  
14 Columbia HCP Planning Unit.  
15

16 DNR’s deviation from its HCP violates the Public Lands Act and renders the approval  
17 of the Freedom Timber Sale arbitrary and capricious.

18 **B. DNR’s Determination of Non-Significance Violates SEPA Because It Fails**  
19 **to Disclose Conflict with Environmental Laws and Improperly Tiers to**  
20 **Programmatic Review Documents.**

21 SEPA requires DNR to disclose and consider in its threshold determination “conflict  
22 with local, state, or federal laws or requirements for the protection of the environment.” WAC  
23 197-11-330(e)(iii). SEPA forbids DNR from relying on existing environmental analysis where  
24 it departs from assumptions in the analysis. WAC 197-11-600(3).

25 Approval of the Freedom Timber Sale violates the Identification and Management  
26 Procedures, Policy for Sustainable Forests, and the HCP, yet DNR did not disclose that conflict.  
27



1 Instead, DNR asserted compliance with the Policy for Sustainable Forests and HCP, and relied  
2 on those programmatic documents and their environmental review as mitigation supporting the  
3 determination of non-significance. AR-00011546. This determination was clearly erroneous.

4           The threshold determination must take into account the “context and intensity” of the  
5 impact to determine whether it is significant, which varies based on physical setting. WAC  
6 197-11-794(2). “‘Significant’ as used in SEPA means a reasonable likelihood of more than a  
7 moderate adverse impact on environmental quality.” As detailed in comments submitted to the  
8 Board by LFDC, the rare, old, structurally complex forests contained within the Freedom  
9 Timber Sale are located in close proximity to other structurally complex forests. These forests  
10 have the potential to play a critical role in preserving the genetic, biological, and ecological  
11 legacies of the Grays River watershed; and upcoming timber sales will severely reduce and  
12 fragment these forests. Moreover, these forests are uniquely important because they are  
13 essential to help DNR comply with its commitments under the Policy for Sustainable Forests  
14 and HCP to meet its Older Forest Target for the Columbia HCP Planning Unit by 2096.

15           The Jefferson County Superior Court similarly concluded that DNR was not complying  
16 with its SEPA policy regarding timber sales in the Last Crocker Sorts case concerning nearly  
17 identical facts and legal issues. LeDuc Decl., Ex. A. In its order issuing the preliminary  
18 injunction, the court ruled that, even on an incomplete record, it was clear on “The record before  
19 this court is that the forest land plan has not been established for the Straits Planning Unit, and  
20 that Units 1 and 2 of the Last Crocker Sorts are structurally complex forests. DNR’s SEPA  
21 checklist does not adequately explain the role Units 1 and 2 play in meeting the ‘older forest  
22 target,’” and further that “The record reflects that DNR has identified about 5 percent of the  
23 planning unit to be protected as structurally complex forests. *DNR does not provide a rational*  
24  
25  
26  
27

1 *basis for not following its own policy in the SEPA checklist.”* LeDuc Decl., Ex. A at 3  
2 (emphasis added). The same is true here.

3 The determination of non-significance was therefore clearly erroneous.

4 **C. Costs and Fees.**

5 If the Court rules in Appellant’s favor, LFDC is entitled to attorney fees under the  
6 Equal Access to Justice Act, RCW 4.84.340–370. However, LFDC respectfully requests to  
7 defer briefing on the issues relating to attorneys’ fees and costs until after a ruling on the merits.  
8

9 **V. CONCLUSION**

10 For all the reasons set forth herein, Appellant Legacy Forest Defense Coalition  
11 respectfully requests that the Court declare that approval of the Freedom Timber Sale violated  
12 the Public Lands Act, the State Environmental Policy Act, and was arbitrary, capricious, and  
13 contrary to law, and that the sale is void.  
14

15 DATED: June 20, 2024.

16 *Respectfully Submitted,*

17 

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26  
27

1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury under the laws of the State of Washington  
3 that on June 20, 2024, I caused the foregoing **APPELLANT’S MOTION FOR SUMMARY**  
4 **JUDGMENT** to be served upon the parties in the following manner:  
5

6 **Via Email**

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