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SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY

LEGACY FOREST DEFENSE COALITION,)
)
 Appellant,)
)
 v.)
)
 WASHINGTON STATE DEPARTMENT OF)
 NATURAL RESOURCES, BOARD OF)
 NATURAL RESOURCES, and)
 COMMISSIONER OF PUBLIC LANDS)
 HILARY FRANZ, in her official capacity,)
)
 Respondents.)
)
)
)
)

NO. 23-2-00251-16

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

APPELLANT’S MOTION FOR
PRELIMINARY INJUNCTION AND
REQUEST FOR SITE VISIT

I. INTRODUCTION

Appellant Legacy Forest Defense Coalition seeks a narrow preliminary injunction pausing logging and road construction in Unit 1 and Unit 2 of the Last Crocker Sorts timber sale due to the presence of “structurally complex” forests in those areas. These forests are comprised of a natural, diverse species mix of trees that are approximately 90 years old. The forests occupy approximately 76 acres of the 142-acre timber sale, and DNR was required to identify, assess, and protect these forests in order to fulfill its commitment to restore old growth conditions on 10 to 15 percent of State-managed public lands in the Straits HCP

1 planning unit.

2 DNR’s approval of Last Crocker is unlawful because it authorizes logging of
3 structurally complex forests that clearly should have been designated as protected under
4 applicable DNR policies and procedures, and DNR violated those policies and procedures
5 without rationale and without disclosing the environmental impacts.
6

7 Logging would forever eradicate the rare forests at issue and thus constitutes
8 irreparable harm. A balancing of the equities heavily favors Appellants, because the
9 injunction is narrowly tailored and the trees have already been alive for 90 years—a delay of
10 several months to allow development of an administrative record and a decision on the merits
11 will have no meaningful impact on Respondents. Because this is a “sorts” sale, DNR
12 contracts and controls the timing of any logging. Any harm to Respondents is self-imposed
13 by a rush to conduct an auction and quickly commence logging operations.
14

15 As demonstrated in a case on the same issues titled *Center for Responsible Forestry v.*
16 *DNR*, Civ. No. 6964-7-11 (September 26, 2023) (unpublished opinion subject to General Rule
17 14.1) (Exh. D to the Notice of Appeal), if an injunction is not issued and the trees are logged,
18 it results in an appeal being dismissed for mootness, leaving the trees logged and no legal
19 remedy available. On the contrary, if an injunction is issued and Appellants later lose on the
20 merits, DNR could simply log the trees then. Appellants meet the standard for issuance of a
21 preliminary injunction.
22

23 Appellants respectfully request that if the Court has availability and interest, that the
24 Court conduct a site visit to view the trees at issue and gain context for the dispute. The visit
25 could occur either on the noted hearing date or the following week, with or without the parties
26 in attendance. If the Court is interested, Appellants will coordinate with the Parties to develop
27

1 an agreed map and plan for access. Appellants further request a ruling before January 29,
2 2023, the date which DNR has indicated it plans to commence logging and road construction.

3 **II. BACKGROUND**

4 **A. Policy and Procedural Requirements**

5 A thorough legal background is set forth in the Notice of Appeal and Complaint, and
6 the case attached thereto titled *Center for Responsible Forestry v. DNR*, in which the court did
7 not reach the merits but recognized DNR’s legal requirements with respect to structurally
8 complex forests. Appellants summarize the applicable policies and procedures below.

9 The propriety division of DNR, known as DNR State Lands, is responsible for
10 managing forests on State-owned lands, subject to the oversight of the Commissioner of
11 Public Lands and the Board of Natural Resources. As set forth in *Conservation Northwest v.*
12 *Commissioner of Public Lands*, 199 Wash.2d 813, 831-832, 835 (2022), DNR must manage
13 lands under its jurisdiction subject to three concurrent overarching duties: 1) a common law
14 trust duty to generate some unspecified amount of revenue or equivalent economic services
15 for the identified institutional beneficiaries, as determined by the sole discretion of the
16 Legislature, the Board, and DNR; 2) a “constitutional mandate” to serve the general public,
17 “all the people,” pursuant to Art. XVI, Section 1 of the State constitution, and 3) applicable
18 state and federal laws.
19
20
21

22 In an effort to comply with its legal duties, DNR has adopted a variety of
23 programmatic procedures, policies, and plans. This suit is focused on DNR’s longstanding
24 commitment to regrow old growth forests on some DNR-managed lands, and the agency’s
25 failure to honor that commitment. As detailed below, the policies and procedures require
26 DNR to identify and protect structurally complex forests, in order that those forests will grow
27

1 into classes of forests with old growth conditions, termed “fully functional forests” or “older
2 forests.” The core contention of this suit is that DNR unlawfully failed to identify and protect
3 the structurally complex forests in the Straits HCP planning unit, including those that
4 comprise roughly 76 acres of the Last Crocker Timber sale.
5

6 DNR’s pursuit of restoring old growth forest is governed by three primary documents:
7 the State Trust Lands Habitat Conservation Plan (“HCP”), which DNR developed in
8 consultation with the U.S. Fish and Wildlife Service as part of its compliance with the federal
9 Endangered Species Act; the Policy for Sustainable Forests, which the Board adopted in part
10 to ensure that state trust lands are managed in accordance with the HCP; and an internal
11 procedure titled “PR 14-004-046: Identifying and Managing Structurally Complex Forests to
12 Meet Older Forest Targets” (“PR 14-004-046”).
13

14 The HCP requires DNR to achieve 10 to 15 percent “fully functional” forest in each
15 planning unit. “Fully functional” forests are commonly understood to be those demonstrating
16 conditions similar to old growth and are generally 150 years old or older. *See* Ex. A to the
17 Declaration of Wyatt Golding, 1997 State Lands Habitat Conservation Plan, Table IV.14.
18

19 “Older forest” is another term used by DNR to describe old growth forest conditions.
20 *See* Ex. B DNR Policy for Sustainable Forests, pp. 46-47. The Policy for Sustainable Forests
21 requires DNR to achieve 10 to 15 percent of “older forests” in each planning unit. The purpose
22 of the requirements in the HCP and the Policy for Sustainable Forests is to regrow old growth
23 conditions over time, in order to provide habitat for a variety of protected and unlisted species.
24

25 To achieve compliance with the 10 to 15 percent requirements of the HCP and Policy
26 for Sustainable Forests, DNR must identify and protect “structurally complex forests,” those
27 forest stands poised to develop into older forest and fully functional forests. DNR defines

1 structurally complex forests as those where multiple canopies of trees and communities of forest
2 floor plants are evident; and large and small trees have a variety of diameters and heights.

3 DNR policies recognize that carefully managing and protecting structurally complex
4 forests is essential to achieving compliance with the HCP and Policy for Sustainable Forests.
5 Under the 2006 Policy for Sustainable Forests, DNR is committed to “actively manage
6 structurally complex forests, especially those suitable stands in the botanically diverse stage of
7 stand development, to achieve older-forest structures across 10 to 15 percent of each Western
8 Washington HCP planning unit in 70-100 years.” Exh. B at 47.

9
10 Critically, the Policy for Sustainable Forests goes a step further and recognizes that
11 protection of structurally complex forests is required, and that structurally complex forests may
12 not be logged until older-forest targets are met. The Policy states that:

13
14 The department will target 10-15 percent of each Western Washington
15 Habitat Conservation Plan planning unit for “older” forests—based on
structural characteristics—over time.

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

19 *Id.* (emphasis added). The “landscape assessments” referenced by the Policy for
20 Sustainable Forests are achieved in part through compliance with PR 14-004-046.

21 PR 14-004-046 provides sequential steps requiring DNR to inventory structurally
22 complex forests in each planning unit, create a plan to attain the required thresholds, and in
23 the absence of a plan, refrain from logging structurally complex forests. *See* Exh. C. PR 14-
24 004-046 is the procedure DNR established to ensure compliance with the HCP and the Policy
25 for Sustainable Forests.
26
27

1 A discussion section of the PR 14-004-046 states that “[s]tand structural complexity
2 begins notably in the botanically diverse stage but is significantly functional only in the niche
3 diversification and fully functional stages of stand development.” PR 14-004-046 at 1. It then
4 quotes the provisions of the HCP and Policy for Sustainable Forests discussed above. It further
5 states that DNR must develop a land plan for each forest management unit (FMU) in order to
6 achieve the 10 to 15 percent targets. “Prior to development of a forest land plan, proposed
7 harvest activities in FMUs that are considered structurally complex forests must be
8 accompanied by the following information: a) an assessment of forest conditions using readily
9 available information, b) an analysis of the known landscape management strategies and, c)
10 role of the structurally complex stand in meeting older forest targets.” *Id.* at 2.
11

12 The Last Crocker timber sale is in the Straits Planning Unit. DNR has not created a
13 forest land plan for the Straits Planning Unit. As a result, the SEPA checklist is required to
14 include the assessment and analysis listed above. This information is intended to help
15 determine the appropriate pathway under the next section of PR 14-004-046, titled “Action.”
16 There, PR 14-004-046 first directs DNR that “[i]f a proposed forest management unit is
17 determined to be in one of the three structurally complex stages, assess and describe the
18 landscape conditions.” Next, “[b]ased on the assessment above determine if 10 to 15 percent
19 or more of the HCP planning unit contains structurally complex forest prioritized to meet older
20 forest targets.”
21

22 If yes, “stands managed for structural complexity will be designated in a department
23 lands data base. Structurally complex forests in addition to the amount identified and designated
24 may be subject to harvest activities designed to meet other objectives.” In other words,
25 sufficient structurally complex forest must be formally identified and protected before
26
27

1 additional forests may be logged. DNR has not identified and protected structurally complex
2 forests as required by PR 14-004-046.

3 If “less than 10 percent of the HCP planning unit contains structurally complex
4 forests prioritized to meet older forest targets based on the assessment,” PR 14-004-045 directs
5 DNR to “designate in a department lands database additional suitable structurally complex
6 forest stands or acreage to equal 10 to 15 percent of the HCP planning unit managed for older
7 forest targets. Once those stands designated as suitable constitute at least 10 percent of the HCP
8 planning unit, other (not otherwise withdrawn) stands are available for the full spectrum of
9 timber harvests.”
10

11 DNR has identified and mapped structurally complex forests in existing conservation
12 areas and determined that protected structurally complex forests that have been prioritized to
13 meet older forest targets comprise only 5% of the Straits Planning Unit. *See* Declaration of
14 Stephen Kropp at Par. 14. Despite this finding, DNR has made no attempt to “designate in a
15 department lands database additional suitable structurally complex forest stands or acreage to
16 equal 10 to 15 percent of the HCP planning unit managed for older forest targets.” *See id.* at
17 Par. 15.
18

19 PR 14-004-046 requires that “Information gathered in the previous steps should be
20 included in the State Environmental Policy Act (SEPA) checklist for the proposed harvest
21 activity for public review.” *Id.* at 3. Deviation from the Procedures requires disclosure and
22 approval from the Land Management Division Manager. *Id.* No such disclosure or approval
23 is documented for the Last Crocker sale.
24

25 **B. Factual Background**

26 As set forth in the Notice of Appeal and Complaint, the “Last Crocker” timber sale
27

1 consists of 142.2 acres of low-elevation, diverse species mix and stand structure forest located
2 in Jefferson County, approximately 14 miles north of Quilcene. *See* Exh. D (FPA) at 1; *see*
3 also Exh. E (SEPA Checklist) at 5. The timber sale is located in the Straits Planning Unit. *Id.*
4 at 9.

5
6 DNR State Lands submitted a forest practices application to the DNR regulatory
7 division, known as DNR Regulatory, on August 30, 2023. *Id.* The proposed logging consists
8 of four units and two rights of way. While there are leave trees and riparian corridors
9 excluded from the logging area, in each of the units DNR proposes “even-aged” logging,
10 which is term for what is known in layperson’s language as clearcutting (the term arises from
11 the fact that the logging results in an “even-aged” tree plantation regrowing, because nearly
12 all the standing merchantable trees are cut down). *Id.* at 6. In each unit, 95 percent of the tree
13 volume in each unit would be logged, and the two proposed road corridors 100 percent would
14 be logged. *Id.* A map of all the units is provided on .pdf page 16 of the forest practices
15 application. *Id.* at 16. DNR regulatory approved the application on September 29, 2023. *Id.*
16 at 31.

17
18 Because the timber sale is an agency action separate from forest practices permit
19 approval by DNR regulatory, it is subject to review under the State Environmental Policy Act
20 (SEPA). *See Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982); *see also* WAC 332-41-833.
21 DNR State Lands is the SEPA lead agency. DNR State Lands prepared a SEPA Checklist
22 dated August 9, 2023. *See* Exh. E.

23
24 The SEPA Checklist states that it relies upon a list of programmatic policies and
25 documents as part of its analysis, including the Policy for Sustainable Forests and the DNR
26 [State] Trust Lands Habitat Conservation Plan. *Id.* at 3. It lists the approximate origin date
27

1 and species of the trees proposed for logging. *Id.* at 5. Units 1 and 2 feature Douglas fir, red
2 alder, and western red cedar of origin dates in 1932, 1934, and 1938. The trees are 92, 90,
3 and 86 years old, respectively, and the stand composition and origin date suggests that they
4 were naturally regrown in a diverse species mix rather than planted in a monoculture.
5

6 For context, in 1932 when these trees germinated, Franklin Delano Roosevelt defeated
7 Herbert Hoover in the Presidential election, the Dust Bowl and Prohibition were ongoing, and
8 Amelia Earhart became the first woman to fly solo nonstop across the Atlantic Ocean.

9 The SEPA Checklist briefly addresses older forest issues, stating as follows:

10 Landscape assessments made in May 2021 demonstrate that, through
11 implementation of the HCP and other policies and laws, older forest targets
12 will be met in conservation areas over time. These conservation areas include
13 identified long-term forest cover under the marbled murrelet longterm
14 conservation strategy, riparian areas, areas conserved under the multispecies
15 conservation strategy, potentially unstable slopes, spotted owl nest patches,
16 and spotted owl habitat that must be maintained to comply with the northern
17 spotted owl conservation strategy. The Straits HCP Planning Unit, which
18 includes this proposal site, will meet at least 10% older forest within
19 conservation areas by 2090.

20 Exh. B, SEPA Checklist at 9. The Checklist contains no identification, designation, or
21 discussion of structurally complex forests. It concedes that the Straits Planning Unit has not
22 met the 10 percent older forest requirement, and will not do so until 2090 (93 years after the
23 adoption of the HCP).

24 For background, the referenced May 2021 “Landscape assessment” is not a forest land
25 plan, and does not identify or designate structurally complex forests. Rather, it is an internal
26 memo titled “Identifying Stands to Meet Older Forest Targets in Western Washington,” by
27 DNR staff Allen Estep and Mike Buffo (the “Estep-Buffo memo”). Exh. F.

The Estep-Buffo memo distinguishes between “older forest” and “fully functional

1 forest,” and assesses the anticipated presence of each over time in each planning unit.¹ For
2 the Straits, the memo acknowledges that in 2021 the unit was comprised of 1.7 % protected
3 older forest, and would not achieve the minimum 10% until between 2080 and 2090. With
4 respect to fully functional forest, the memo acknowledges that in 2021 there was 0.6% fully
5 functional forest, and the minimum 10% would not be achieved until between 2090 and 2100.
6 For reference, the HCP ends in 2067, so all of these dates are well beyond the plan’s term.
7

8 Crucially, the Estep-Buffo memo does not identify and designate structurally complex
9 forest in any planning unit to meet the 10% to 15% requirements, even though those actions
10 are required by the Policy for Sustainable Forests and PR 14-004-046. Rather, the memo
11 presumes that DNR may log such forests now (even though they are the closest to becoming
12 older forest), while conserving much younger and simpler forests that the agency projects will
13 become structurally complex, and then older forest, decades from now.
14

15 Appellants submitted comments and addendums to those comments, *see* Exh. G and
16 Exh. H, which include detailed information explaining why trees in Unit 1 and Unit 2 qualify
17 as structurally complex, as follows. Many of the dominant trees in Units 1 and 2 of Last
18 Crocker are close to 200 feet tall. There are numerous gaps in the overstory which have
19 allowed for the development of understory canopies, and a diverse variety of forest floor
20 plants, particularly in Units 1 and 2. Trees have a variety of diameters and heights, and
21 natural mortality or stem loss is evident throughout these two units. DNR defines botanically
22 diverse stands as those where “multiple canopies of trees and communities of forest floor
23 plants are evident” and “large and small trees have a variety of diameters and heights.
24 Decayed and fallen trees are lacking in abundance.” Units 1 and 2 of this timber sale meet
25

26 _____
27 ¹ Appellants dispute that distinction but it is not necessary to resolve here.

1 these criteria and are structurally complex.

2 DNR has never disputed the Coalition’s conclusion that these stands are structurally
3 complex. In its notice of final determination, DNR retained its determination of non-
4 significance. See Exh. I at 1. In a response to comments, DNR asserted that in relevant part
5 that:
6

7 The Straits Planning Unit is on track to meet at least 10% older forest within
8 conservation areas by 2100. Other areas not designated to meet this goal, like
9 the stands in this proposal, are available for timber harvest consistent with
10 previously mentioned policies and BNR approved sustainable harvest levels.
11 DNR staff has provided information to the Board of Natural Resources in a
series of Board meetings to address concerns about the amount of structurally
complex forests that is expected to be on the DNR-managed landscape at the
termination of the 1997 HCP, fifty years in the future.

12 *Id.* at 7. DNR ignored the requirements of the Policy for Sustainable Forest and PR 14-004-
13 046 with respect to structurally complex forests, and did not further explain any identification,
14 assessment, or protection of structurally complex forests.

15 The Board of Natural Resources approved the Last Crocker Sorts sale for auction on
16 November 7, 2023. DNR auctioned the timber to various companies that purchased different
17 sizes and species of wood, including Defendant-Intervenor Murphy Company. On December
18 7, 2023, Appellants timely filed and served a Notice of Appeal of the Last Crocker Timber
19 Sorts Sale and Associated Environmental Review and Complaint Seeking Declaratory
20 Judgment.
21

22 In an email dated December 19, 2023, DNR attorney Phil Ferester represented to
23 undersigned counsel that DNR had auctioned the timber, and would not move forward with
24 logging operations until January 29. He further represented that DNR could not delay beyond
25 that date for sufficient time to compile an administrative record or conduct accelerated
26

1 briefing on the merits. *See* Declaration of Wyatt Golding, Par. 3.

2 Neither DNR nor Defendant-Intervenor has filed an answer. By filing this preliminary
3 injunction, Appellants do not waive the right to pursue a default judgment.

4 **III. LEGAL BACKGROUND**

5 **A. The Public Lands Act.**

6 The Public Lands Act requires DNR to administer the public lands “in the best
7 interests of the state and the general welfare of the citizens thereof, and ... consistent with the
8 applicable provisions of the various lands involved.” RCW 79.10.100. The Public Lands Act
9 provides a statutory cause of action for appealing the sale of state-owned timber:
10

11 Any applicant to purchase, or lease, any public lands of the state, or any valuable
12 materials thereon, and any person whose property rights or interests will be affected
13 by such sale or lease, feeling aggrieved by any order or decision of the board, or
14 the commissioner, concerning the same, may appeal therefrom to the superior court
15 of the county in which such lands or materials are situated, by serving upon all
parties who have appeared in the proceedings in which the order or decision was
made, or their attorneys, a written notice of appeal...

16 RCW 79.02.030.

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

23 An agency that does not consider compliance with its own goals when it makes a
24 decision acts arbitrarily and capriciously. *Puget Sound Harvesters Ass’n v. Washington State*
25 *Dept. of Fish and Wildlife*, 157 Wash. App. 935, 950, 239 P.3d 1140 (2010). Likewise,
26
27

1 deviation from agency plans and procedures without explanation demonstrates that the agency
2 failed to consider the relevant factors and articulate a rational connection between the facts
3 found and the choice made, and thus the decision was arbitrary and capricious. *All. for the Wild*
4 *Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1117 (9th Cir. 2018).

5
6 **B. SEPA.**

7 SEPA requires each governmental proposal that may significantly affect the quality of
8 the environment to undergo an assessment of the proposal's environmental impacts. Each
9 agency may adopt SEPA policies that govern its review and imposition of mitigation measures.
10 For timber sales, DNR 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 DNR's
12 habitat conservation plans, or in the Policy for Sustainable Forests adopted in 2006 and any
13 future updates to the policy." WAC 332-41- 665(1)(e).

14
15 The first step of the SEPA process is the "threshold determination." RCW 43.21C.033;
16 WAC 197-11-055(2). After evaluating the proposal and identifying the probable adverse
17 impacts, the lead agency must issue a formal decision as to whether the proposal may cause
18 significant adverse environmental impacts. If the responsible official determines that the
19 proposal will have no significant adverse environmental impacts, the lead agency shall prepare
20 and issue a determination of non-significance or mitigated determination of non-significance.
21 *See* WAC 197-11-340. *Id.* If the responsible official determines that a proposal may have
22 significant adverse environmental impacts, the lead agency shall prepare and issue a
23 determination of significance. WAC 197-11-360. The question for the threshold determination
24 is whether adverse impacts may be probable. WAC 197-11-360(1); *see also* WAC 197-11-
25
26
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1 330(4) (“If . . . the lead agency reasonably believes that a proposal may have a significant
2 adverse impact, an EIS is required.”) (emphasis added).

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

9
10 The threshold determination must be based on “information reasonably sufficient to
11 evaluate the environmental impact of a proposal.” WAC 197-11-335; WAC 197-11-330;
12 *Anderson v. Pierce County*, 86 Wn. App. 290, 301 (1997); *see also Norway Hill Preservation*
13 *and Protection Ass’n v. King County Council*, 87 Wn.2d 267, 276 (1976); *Spokane County v.*
14 *E. Wash. Growth Management Hr’gs Bd.*, 176 Wn. App 555, 579, 309 P.3d 673 (2013), *review*
15 *denied* 179 Wn. 2d 1015, 318 P.3d 279 (2014).

16
17 Ultimately, the threshold determination “must indicate that the agency has taken a
18 searching, realistic look at the potential hazards and, with reasoned thought and analysis,
19 candidly and methodically addressed those concerns.” *Conservation Northwest v. Okanogan*
20 *County*, 194 Wn. App. 1034, 2016 WL 3453666, *32 (2016) (unpublished nonbinding authority
21 per GR 14.1); *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 80, 92, 392 P.3d
22 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). This
23 information must be adequate to demonstrate that the agency has taken the requisite “hard look”
24 at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App 150, 158, 151
25 P.3d 1067 (2007).
26
27

1 “The standard for review of a ‘negative threshold determination’ [*i.e.*, a DNS] is whether
2 the agency's decision is ‘clearly erroneous in view of the entire record as submitted and the
3 public policy contained in the act of the legislature authorizing the decision or order.’” *ASARCO*
4 *Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979) (citing RCW
5 34.04.130(6)(e); *Sisley v. San Juan Cty.*, 89 Wash.2d 78, 569 P.2d 712 (1977); *Norway Hill*
6 *Preserv. & Protec. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 552 P.2d 674 (1976)).

8 **IV. STANDARD OF REVIEW**

9 To obtain a preliminary injunction in the state of Washington, the moving party must
10 show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of
11 immediate invasion of that right, and (3) that the acts complained of are either resulting in or
12 will result in actual and substantial injury to him. *Bellevue Square, LLC v. Whole Foods Mkt.*
13 *Pac. Nw., Inc.*, 6 Wash. App. 2d 709, 715 (2018). These three criteria must be examined in
14 light of equity including balancing the relative interests of the parties and the interests of the
15 public. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209 (2000) (holding that the trial
16 court abused its discretion when it concluded that a failure to follow minimum requirements
17 of SEPA in an environmentally sensitive area did not require a balancing of interests before
18 issuing a preliminary injunction).

19 To determine whether the party has a clear legal and equitable right, the court will
20 examine only the *likelihood* that the party will prevail on the merits. *Bellevue* at 717. *See also*
21 *Rabon v. City of Seattle*, 135 Wn.2d 278, 285 (1998). The plaintiff need not prove and the
22 trial court does not reach or resolve the merits of the issues underlying the requirements for
23 injunctive relief. *NW. Gas Ass'n v. Utils. & Transp. Comm'n*, 141 Wn. App. 98, 115-116,
24 (2007). However, the “court may reach the merits of any purely legal question provided that
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1 the interim harm factor is undisputed.” *Rabon* at 285; *Kucera v. DOT*, 140 Wash. 2d 200,
2 216-17, 995 P.2d 63, 72 (2000).

3 **V. ARGUMENT**

4 Appellants meet the test for an injunction. Appellants are likely to prevail on the
5 merits, because the facts conceded in the SEPA Checklist and other DNR documents
6 demonstrate that DNR failed to comply with PR 14-004-046 and the Policy for Sustainable
7 Forests. DNR violated the Public Lands Act and acted arbitrary and capriciously by failing to
8 provide a rational explanation for its deviation from the applicable laws and policies. The
9 associated determination of non-significance for the Last Crocker sale violates SEPA and is
10 clearly erroneous, because the logging of rare structurally complex forests in the South Coast
11 planning unit has significant environmental impacts, and because DNR did not include the
12 required information about structurally complex forests in the SEPA Checklist, and failed to
13 disclose conflicts with laws and policies governing protection of the environment.

14 DNR has represented to Appellants’ counsel that it plans to commence logging
15 operations on January 29, 2024. This provides a well-grounded fear of invasion of
16 Appellants’ legal rights and resulting harm. The balancing of the equities favors Appellants
17 because the proposed injunction is narrowly tailored, and while trees that are logged will
18 never be recovered, an injunction would only pause potential logging pending a ruling on the
19 merits.
20
21
22

23 **A. DNR’s Approval of Last Crocker Violates the Public Lands Act and SEPA
24 Because It is Deviates from PR 14-004-046 Without Rationale.**

25 DNR’s clear departure from the requirements, procedures, and goals of PR 14-004-
26 046 without rationale violates the Public Lands Act and is arbitrary and capricious.
27

1 PR 14-004-046 is an important tool adopted by DNR to facilitate compliance with the
2 Policy for Sustainable Forests and HCP. It states that “structurally complex forest [is]
3 prioritized to meet older forest targets,” and provides the mechanism to achieve this
4 prioritization. The precautionary approach to identify, designate, and protect structurally
5 complex forests to meet the corresponding requirements for older forest and fully functional
6 forest are necessary because forests take decades to grow and develop, and once structurally
7 complex forests are logged, they will not provide older forest or fully functional forest within
8 the foreseeable future.
9

10 DNR’s approval of Last Crocker deviated from PR 14-004-046 in at least five ways.

11 First, the Procedures require that DNR create a forest land plan for each forest
12 management unit, with a clear plan to identify, designate, and protect structurally complex
13 forest such that it grows into older forest and fully functional forest over time. It has been
14 almost twenty years since the promulgation of the PR 14-004-046 and the Policy for
15 Sustainable Forests. No plan is discussed in the SEPA checklist or otherwise, because DNR
16 has not developed a forest land plan for the Straits Planning Unit.²
17

18 Second, because there is no forest land plan, DNR was required to provide the
19 following information: a) an assessment of forest conditions using readily available
20 information, b) an analysis of the known landscape management strategies and, c) role of the
21 structurally complex stand in meeting older forest targets.” *Id.* at 2. To the extent DNR
22 provided this information in the SEPA Checklist and response to comments, it was cursory
23 and incomplete. There is no assessment of structurally complex forest, no analysis of the role
24
25

26 ² In contrast, there is a forest land plan for the Olympic Experimental State Forest Planning Unit, and DNR
27 records indicate that that forest has relatively high percentages of older forest and fully functional forest.

1 of that forest within landscape management strategies, and no meaningful discussion of the
2 role of the structurally complex forests in meeting older forest targets. Rather, DNR simply
3 asserts based on one internal memo that it is permissible to log these forests and grow other
4 forests to meet objectives in 2090. This does not comply with the direction to assess and
5 identify structurally complex forest as the primary and most immediate means of growing
6 older forest and fully functional forest.
7

8 Third, DNR was required to designate in a Department database sufficient structurally
9 complex forest to meet the 10 to 15% older forest and fully functional forest objectives.
10 There is no evidence in the SEPA Checklist or response to comments that such designation
11 has been carried out. As detailed in the declaration of Stephen Kropp, Appellant has
12 submitted public disclosure requests and had discussions with DNR staff requesting such
13 information, and learned that it was not available. *See* Dec. of Kropp, Par. 14.
14

15 Fourth, until such identification, designation, and protection is carried out, DNR may
16 not log structurally complex forest absent express approval and explanation. DNR must
17 “designate in a department lands database additional suitable structurally complex forest
18 stands or acreage to equal 10 to 15 percent of the planning unit managed for older forest
19 targets,” and only “[o]nce those stands designated as suitable constitute at least 10 percent of
20 the HCP planning unit, other (not otherwise withdrawn) stands are available for the full
21 spectrum of timber harvests.” *Id.* at 2-3. DNR’s proposed logging of structurally complex
22 forest within Last Crocker without following the required procedures violates PR 14-004-046.
23

24 Here, DNR has identified roughly 5 percent of the Planning Unit as protected
25 structurally complex forest. However, it has failed to designate the remaining necessary 5
26 percent, or create any sort of plan or database to identify, assess, and protect those required
27

1 acres of forest. Dec. of Kropp at 13.

2 Finally, PR 14-004-046 requires that all of the information discussed above be
3 disclosed in the SEPA Checklist. This did not occur. There is no identification, assessment,
4 or designation of structurally complex stands in the SEPA Checklist.
5

6 DNR plainly violated PR 14-004-046 and provided no rationale for doing so,
7 rendering its decision arbitrary and capricious. While DNR may argue that the procedures set
8 forth are merely internal policy, it is well-established that deviation from agency procedures
9 without rational basis constitutes arbitrary and capricious decisionmaking. If the agency
10 “announces and follows—by rule or by settled course of adjudication—a general policy by
11 which its exercise of discretion will be governed, an irrational departure from that policy (as
12 opposed to an avowed alteration of it) could constitute action that must be overturned as
13 ‘arbitrary, capricious, [or] an abuse of discretion.’” *Ins v. Yueh-Shaio Yang*, 519 U.S. 26, 32
14 (1996); *accord Puget Sound Harvesters Ass’n*, 157 Wash. App. at 950; *Alliance for the Wild*
15 *Rockies*, 907 F.3d at 1117; *Roskelley v. Wash. State Parks & Recreation Comm’n*, Civ. No.
16 48423-4-II, 2017 Wash. App. LEXIS 747, at *29 (Mar. 28, 2017) (unpublished opinion not
17 cited as binding authority per GR 14.1).
18

19 DNR’s approval and threshold determination violate SEPA. SEPA requires full
20 disclosure of environmental impacts in the threshold determination, WAC 197-11-335; WAC
21 197-11-330, including disclosure of conflicts with applicable laws and policies. *See* WAC
22 197-11-330. DNR regulations adopt DNR policies as SEPA policies. WAC 332-41-
23 665(1)(f). The failure to disclose information about structurally complex forests, provide the
24 information in the SEPA Checklist specifically required by PR 14-004-046, and the failure to
25 identify conflicts with applicable laws and policies, renders the threshold determination
26
27

1 clearly erroneous and violates SEPA. *See* WAC 197-11-330(e)(iii).

2 **B. Approval of Last Crocker violates the Policy for Sustainable Forests and SEPA.**

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

4
5 Through landscape assessments, the department will identify suitable
6 structurally complex forest stands to be managed to help meet older-forest
7 targets. **Once older-forest targets are met, structurally complex forest
stands that are not needed to meet the targets may be considered for
harvest activities.**

8 *See* Exh. B at 47 (emphasis added).

9 As with PR 14-004-046, DNR must: a) conduct an assessment and identification of
10 structurally complex stands sufficient to meet its older forest requirements, and b) until the
11 targets are met, DNR may not log structurally complex forests.

12 Again, DNR has not conducted an assessment and identification of structurally
13 complex stands in the Straits Planning Unit. DNR has not met its older-forest targets.
14 According to the Estep-Buffo memo, the Straits Planning Unit is less than 2% older-forest.
15 Despite these failures, the agency plans to log structurally complex forests in Last Crocker.

16 Approval of Last Crocker violates the Policy for Sustainable Forests' protections for
17 structurally complex forests without explanation, and thus violates the Public Lands Act and
18 is arbitrary and capricious. The threshold determination also violates SEPA. DNR was
19 required to disclose, and consider as part of its threshold determination, "conflict with local,
20 state, or federal laws or requirements for the protection of the environment." WAC 197-11-
21 330(e)(iii). SEPA also forbids DNR from relying on existing environmental analysis where it
22 departs from the assumptions in that analysis. WAC 197-11-600(3).

23 As set forth above, DNR's violations of PR 14-004-046 and the Policy for Sustainable
24 Forests establishes the first two prongs of the injunction standard. Appellants have
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1 established a legal right under public laws, and DNR has committed procedural violations of
2 those laws, invading Appellant’s legal rights. In other words, Appellants are likely to prevail
3 on the merits.

4 **C. Harm is Imminent.**

5 Following approval of Last Crocker, DNR moved quickly to hold an auction. Counsel
6 for DNR has represented that DNR intends to commence logging operations on January 29,
7 2024. This impending logging imposes substantive invasion of Appellant’s legal rights and
8 immediate risk of harm. The harms to Appellants are detailed in the attached declaration of
9 Stephen Kropp.

10 **D. The Equities Balance in Favor of Issuing an Injunction to Maintain the Status Quo**

11 This court shall view the factors supporting a preliminary injunction in light of
12 equitable principles, including balancing the relative interests of the parties and, if
13 appropriate, the interests of the public. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 96
14 Wash.2d 785, 792, 638 P.2d 1213 (1982). In reviewing a motion for preliminary relief where
15 the government is a party, courts consider the balance of equities and the public interest
16 together. *Envtl. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 991 (9th Cir. 2020) (citations
17 omitted). If irreparable environmental injury is sufficiently likely, the balance of harms
18 usually will favor the issuance of an injunction to protect the environment. *Id.* (citing *Amoco*
19 *Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987), see also *W. Org. of*
20 *Res. Council v. Johanns (in re Geertson Seed Farms)*, 541 F.3d 938, 950 (9th Cir. 2008); *All.*
21 *For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (there is a “well-
22 established public interest in preserving nature and avoiding irreparable environmental
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1 injury.”). In addition, when the alleged action by the government violates federal law, courts
2 find that the public interest factor weighs in favor of issuing the injunction. *Bernhardt*, 391 F.
3 Supp. 3d at 1025, 1026 (citing *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir.
4 2013)).

5
6 In the instant case, this court should preserve the status quo, which favors the
7 important public interest of protecting the environment in the short term so that the court can
8 resolve the merits of this matter. *See* RCW 43.21C.020(3) (SEPA recognizes the broad policy
9 "that each person has a fundamental and inalienable right to a healthful environment."). Here,
10 Plaintiffs have demonstrated actual and substantial injury to these rights that will result from
11 logging the Last Crocker sale. *See* Decl. Kropp Pars. 16-23; Exh. G at 4 (describing harms to
12 wildlife species that depend on structurally complex habitat for survival), 6 (describing values
13 of maintaining older native forests).

14
15 Further, the public has an interest in preventing the state from acting in a manner
16 inconsistent with the applicable law. As Federal courts have recognized, “[t]his invokes a
17 public interest of the highest order: the interest in having government officials act in
18 accordance with the law.” *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081, 1096 (W.D.
19 Wash. 1991), *aff’d*, 952 F.2d 297 (9th Cir. 1991); *see also Kootenai Tribe of Idaho v.*
20 *Veneman*, 313 F.3d 1094, 1125 (9th Cir. 2002) (in actions to protect the environment, “the
21 public’s interest in preserving precious, unreplenishable resources must be taken into account
22 in balancing the hardships”). As discussed above, the state is violating its obligations set forth
23 in the PR 14-004-046, its 2006 Policy for Sustainable Forests (CITE), and its 1997 State Trust
24 Lands Habitat Conservation Plan (CITE), to restore older forest and fully functional forest
25 across 10-15% of forestlands within each HCP planning unit in Western Washington. The
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1 public interest weighs in favor of ensuring that the state comply with these obligations, and
2 maintaining the status quo so the court can reach these issues with a full record before it.

3 Finally, the public interest weighs in favor of maintaining the status quo so this court
4 can reach the merits rather than risking a repeat of what occurred in *Center for Responsible*
5 *Forestry v. Wash. DNR*, Case No. 56964-7-II. In that case, which brought similar claims
6 against a DNR timber sale, despite recognizing that there were 69 pending sales containing
7 structurally complex forests planned for auction, and recognizing that the issues were likely to
8 repeat themselves, the court dismissed the case as moot because the timber company logging
9 the entire sale at issue in that case. Order at 6. The court noted that “assuming the
10 requirements for an injunction could be met and a stay is prudently obtained, there is not
11 reason to assume review of those sales would not occur.” *Id.* That review should occur here
12 and now in this case, which presents the opportunity for the court to reach these issues after
13 entering a short-term preliminary injunction that prohibits additional logging in violation of
14 the above-discussed obligations.
15

16
17 Here the State and Defendant-Intervenors will likely argue that it has an economic
18 interest in moving forward with logging the Last Crocker sale. However, a short pause to
19 resolve this case on the merits imposes no well-grounded economic harm. The trees at issue
20 are approximately 90 years old. A delay of less than a year will not appreciably effect the
21 timber, and if an injunction is improperly issued DNR can simply log the forests later.
22

23 To the extent there is any economic harm to DNR or Murphy Company, it is self-
24 imposed. Because this is a sorts sale, DNR controlled the auction timing and controls the
25 timing of any logging.

26 In terms of balancing economic harm, “the Government’s economic loss cannot be
27

1 considered compelling if it is to be gained in contravention of [state] law.” *Wilderness Soc’y*
2 *v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988); see also *Seattle Audubon Soc’y v. Evans*,
3 771 F.Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d*, 952 F.2d 297 (9th Cir. 1991) (unlike
4 permanent environmental harm, “economic effects of an injunction are temporary and can be
5 minimized in many ways”). Moreover, the public interest in protecting the ecologically-
6 critical areas at risk of destruction by logging favors Plaintiffs’ injunction request. There is a
7 “public interest in preserving nature and avoiding irreparable environmental injury,” in
8 “careful consideration of environmental impacts before major federal projects go forward,”
9 and in “suspending such projects until that consideration occurs ‘comports with the public
10 interest.’” *Alliance for the Wild Rockies*, 632 F. 3d at 1138 (citations omitted).

11
12 Furthermore, Appellants have minimized any economic risk by seeking a narrowed
13 injunction that only applies to Units 1 and 2 of the timber sale, which constitutes
14 approximately half of the sale. DNR may elect to log Unit 3 and Unit 4, and sell the resulting
15 timber and pulpwood.

16
17 In sum, the equities and public interest strongly weigh in favor of this court entering a
18 narrowed preliminary injunction to prohibit the logging of Unit 1 and Unit 2 of the Last
19 Crocker sale and maintain the status quo while this court reaches the merits of these issues
20 with the benefit of a full record and briefing by the parties.

21
22 **VI. BOND**

23 Under the Washington Superior Court Civil Rule 65, “no restraining order or
24 preliminary injunction shall issue except upon the giving of security by the applicant, in such
25 sum as the court deems proper, for the payment of such costs and damages as may be incurred
26 or suffered by any party who is found to have been wrongfully enjoined or restrained.” The
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1 amount of an injunction bond is “within the trial court’s discretion.” *Fisher v. Parkview*
2 *Props., Inc.*, 71 Wn. App. 468, 479, (1983). Further, it is within the court’s discretion to
3 dispense with the security requirement, however, or to request mere nominal security, where
4 requiring security would effectively deny access to judicial review. *Cal. ex rel. Van De Kamp*
5 *v. Tahoe Reg’l Plan. Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985).
6

7 The cause of action provided by the Public Lands Act, RCW 79.02.030, provides a
8 bond requirement. It requires “filing a bond to the state, in the penal sum of two hundred
9 dollars, with sufficient sureties, to be approved by the secretary of the board, or the
10 commissioner, conditioned that the appellant shall pay all costs that may be awarded against
11 the appellant on appeal, or the dismissal thereof.” Appellants have complied with that
12 requirement. Because the statute specifically identifies a bond procedure and amount, that has
13 been determined adequate by the Legislature and no further bond is required.
14

15 If the Court determines an additional bond is required, a nominal bond is appropriate.
16 In Washington, the Forest Practices Appeals Board (now consolidated with the Pollution
17 Control Hearings Board) has found that in the event of a stay of logging in an appeal brought
18 by a public interest organization, only a nominal bond is appropriate. *Washington Trout,*
19 *Appellant v. Washington State Department of Natural Resources and Weyerhaeuser*
20 *Company, Respondent*, FPAB No. 02-019, 2002 WL 31497905, at *2 (October 10, 2002). In
21 *Washington Trout*, the appellant moved for an emergency stay to prohibit the Weyerhaeuser
22 Company from cutting and removing trees within a potential channel migration zone. Given
23 the appellant’s evidentiary showing and time and energy devoted to “this important
24 controversy,” the Forest Practices Appeals Board granted the emergency stay with a nominal
25 bond set at \$50 and concluded that the amount could be re-addressed if a longer stay was
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27

1 requested. *Id.*

2 Courts have also issued nominal bonds where a government entity has failed to
3 comply with SEPA. In *Kucera*, the trial court held that the State of Washington had failed to
4 present significant evidence of potential economic damages it would suffer from a
5 preliminary injunction. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 207 (2000). The
6 court concluded in its memorandum opinion that it was unlikely that it would learn facts at
7 trial that might convince it that SEPA did not apply and that it did not consider the cost of
8 complying with state law an element of damage. *Id.* In addition, there is a long-standing
9 Federal precedent that requiring nominal bonds is proper in public interest litigation, and the
10 overwhelming majority of district courts in the Ninth Circuit have issued injunctions on cases
11 involving logging on public lands with, at most, only a nominal bond. *Save Our Sonoran, Inc.*
12 *v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005).

13
14
15 For all of these reasons, Plaintiffs respectfully request this court waive the bond for the
16 injunction as already provided under RCW 79.02.030 or set it at nominal amount.

17 **VII. SITE VISIT**

18 While Appellants recognize that there is limited time available, a site visit to Units 1
19 and 2 of the sale would provide the Court with helpful context for the nature of the forest at
20 issue. If the Court is so inclined, Appellants would work with opposing counsel to develop an
21 agreed map and access plan, and the visit could occur with or without the parties present.

22
23 **VIII. CONCLUSION**

24 For all of the reasons stated above, Appellants respectfully request that a preliminary
25 injunction pausing all logging and other forestry in Units 1 and 2 be granted, and no bond or a
26 nominal bond be issued.

1
2 Dated this 12th day of January, 2024.

3 Respectfully submitted,

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20 **CERTIFICATE OF SERVICE**

21 I hereby certify under penalty of perjury under the laws of the State of Washington
22 that on January 12, 2024, I caused the foregoing to be served upon the parties via email as
23 follows:

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