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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION II

CENTER FOR RESPONSIBLE
FORESTRY,
Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL
RESOURCES, BOARD OF
NATURAL RESOURCES, and
COMMISSIONER OF PUBLIC
LANDS HILARY FRANZ, in her
official capacity,
Respondents,

and

MURPHY COMPANY, DBA
MURPHY COMPANY OF
OREGON,

Intervenor.

No. 569647-II

**APPELLANT'S
CONSOLIDATED
RESPONSE TO
AMICUS BRIEFS
SUBMITTED BY
AMERICAN FOREST
RESOURCE
COUNCIL AND
LEWIS COUNTY
AND WASHINGTON
FOREST
PROTECTION
ASSOCIATION**

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I. INTRODUCTION

Appellant Center for Responsible Forestry (“Center”) herein collectively responds to the amicus briefs filed by two timber industry trade associations: the American Forest Resource Council (“AFRC”), which focuses on logging and milling timber from public lands, and the Washington Forest Protection Association (“WFPA”), which focuses on logging and milling timber from private lands. These two organizations share the business goal of converting rare old forests on public lands to lumber. Their briefs are very similar in substance and perspective. AFRC is joined by Lewis County.

The briefs largely repeat the arguments made by Respondents. However, three main useful points emerge. First, Amici correctly point out that the legal issues raised by Appellants extend to similarly situated DNR timber sales that also propose the logging of structurally complex forest. The Department of Natural Resources’ (“DNR”) adopted policy to identify and protect structurally complex forests to meet older

forest targets affects timber sales and land management across western Washington and requires resolution by this Court.

Second, the amicus briefs confirm that despite its governing laws and policies, DNR has not completed or followed the required plan to restore older forest on DNR-managed lands. DNR has not completed its requirements under the Identification and Management Procedure to identify, map, and protect existing structurally complex forests so that they can grow into older and fully functional forests. Like DNR, Amici cannot identify any document or map in which DNR has identified these classes of forest or developed a plan to meet the agency's legal requirements to protect percentages of them. The amicus briefs thus confirm the Center's arguments that DNR's approval of About Time is contrary to the letter and spirit of the Identification and Management Procedure, Policy for Sustainable Forests, and State Trust Lands Habitat Conservation Plan.

Third, Amici seek to avoid the substance of the Center's appeal by making a barrage of inapt procedural arguments, by

accusing the Center of trying to stop timber harvest on state lands, and by asserting the Court should blindly defer to agency expertise as how to interpret and enforce DNR's existing forest commitments and policies. To the contrary, this case is a standard appeal of an agency decision and its compliance with SEPA. The Center asks this Court to apply DNR's own factual determinations from the administrative record to the plain text of the agency's procedures and legal commitments to determine that the agency unlawfully deviated from those commitments without rationale.

As explained in Appellant's merits briefing and summarized herein, DNR concedes that the About Time timber sale contains structurally complex forest, that DNR has not completed its internal Identification and Management Procedure to identify and protect such forest, that DNR has only attained an abysmal 0.2 percent older forest in the South Coast HCP Planning Unit, and that this condition is far below the 10-15 percent target for older forest and fully functional forest

established by the Policy for Sustainable Forests and State Trust Lands Habitat Conservation Plan. Appellant asks the Court to interpret and apply the agency's legal commitments to determine that the approval of the About Time timber sale was arbitrary and capricious and contrary to law, which is squarely the purview of the Court.

II. ARGUMENT

A. DNR Concedes that About Time Contains Structurally Complex Forest and the Agency Did Not Complete the Required Identification and Management Procedure.

AFRC argues that the Identification and Management Procedure does not apply to About Time because the forests within this sale are not yet structurally complex, and then contradicts its own assertion by agreeing with DNR that stands within About Time are today botanically diverse.¹ By definition, botanically diverse stands are structurally complex. AR 16774; 17108; 403; AR 1268. Under DNR's EIS for its Policy for

¹ AFRC br., at 29.

Sustainable Forests and DNR's own policies, DNR considers forests "structurally complex" if they include any one of these three features: botanically diverse, niche diversification, or fully functional. As the Center pointed out in its opening brief,² DNR concluded that the trees within the About Time sale are approximately 84 years old and are, today, botanically diverse, and thus structurally complex. AR 1045-1046. This conclusion is consistent with age-based criteria for structurally complex and botanically diverse forests provided in Table IV.14 of the HCP, and Table B-2 of DNR's 2003 Sustainable Harvest Draft EIS. AR 3654; AR 16474.

This conclusion is also consistent with conditions on the ground. About Time exhibits all the physical characteristics of structurally complex forests. Snags and large legacy trees up to four feet in diameter are common in many parts of the sale unit; and frequent gaps and a diversity of tree species provide a diverse patchwork of wildlife habitat that is characteristic of structurally

² Op. br. at 34.

complex forests. AR 744; 746; AR 747-756; AR 17108-17109. Neither DNR nor Murphy challenged the Center's characterization of About Time as structurally complex, or DNR's report finding that About Time today contains at least *some* structurally complex forest: This fact is binding on DNR today. About Time has achieved consideration as forest that required careful consideration under DNR's Identification and Management Procedure.

AFRC's confusion as to About Time forest's has not reached structural complexity also highlights that this suit, and related suits, are problems of DNR's own making. DNR has pushed environmentally harmful timber sales and widespread confusion leading to litigation by failing to implement the Identification and Management Procedure. Had DNR followed its own procedure, there would be inventories and maps of structurally complex forest for each planning unit, and associated plans to meet the 10-15 percent requirements of the Policy for Sustainable Forests and State Trust Lands HCP. There would be

a simple determination for whether a given timber sale contained protected forests necessary to meet present and future obligations.

DNR does not contest that it failed to identify or map structurally complex forest in compliance with the Identification and Management Procedure. The Center has attempted to determine whether any maps or plans exist through public disclosure request and confirmed there are none. The Center submitted a request to DNR's Public Disclosure Office on August 5, 2022, for data on the spatial distribution of different stand development stages (including structurally complex forests) on lands managed by DNR. In response, DNR's Public Disclosure Office confirmed that structurally complex forests have not been mapped by DNR.³

DNR's failures are not just poor land management practice; they caused arbitrary and capricious decision making

³ See <https://www.c4rf.org/about-time> (last accessed December 9, 2022).

and violations of the State Environmental Policy Act. The purpose of the Identification and Management Procedure is to give DNR and the public the data so that DNR can make *informed*, not vague and undocumented, decisions about complying with DNR's commitment to provide 10-15 percent older and fully functional forests within each HCP planning unit by the year 2096. DNR is failing in those efforts. According to DNR's most recent Sustainable Harvest FEIS, only about 3% of forested state trust lands are "structurally complex." AR 17801; AR 17810. Had DNR complied with the Identification and Management Procedure, it would have known that About Time's forests are necessary for DNR to meet its commitments, and the associated environmental impacts caused by logging.

In sum, AFRC's late arguments about About Time's forests are both wrong and serve to confirm that DNR has not carried out its obligations under the Identification and Management Procedure, with resulting violations of DNR laws and policies, as well as the State Environmental Policy Act.

B. Resolution of this Appeal is Significant for the Restoration of Old Growth on Public Lands, But Does Not Have the Economic Impacts Predicted by Amici.

Amici appropriately recognize that a decision on this case is important for management of public lands in western Washington. Implementation of the Identification and Management Procedure, Policy for Sustainable Forests, and State Trust Lands HCP will determine whether old growth conditions will be restored across at least 10-15 percent of each HCP planning unit on DNR-managed lands in western Washington, as DNR has long promised will occur. Conversely, if DNR continues its current practice of logging structurally complex forests without a map or plan, DNR cannot possibly comply with its policy, because the agency will not determine where complex forests are located, or which stands are most suitable to be managed to help meet older forest targets.

The factual circumstances which led to this appeal are increasingly common as DNR has aggressively moved to log many of the oldest and most structurally complex forests on

DNR-managed lands. This is a consolidated appeal, which the parties stipulated raises a common set of legal issues. The Prospero and Bluehorse timber sales, also at issue, both also contain structurally complex forest. CP 872-75; 927-29 (to avoid multiple cases, the Center stipulated that Bluehorse and Prospero contain “one common legal and/or factual issue: DNR’s compliance with its HCP and Policy.”)

AFRC accuses the Center of filing multiple timber sale appeals to harass DNR and obstruct its timber sales program.⁴ The Center acknowledges that it has filed numerous other appeals where sales contain structurally complex forests, including the referenced sale in Lewis County. However, contrary to AFRC’s accusations, the Center has limited its appeals to timber sales that involve the logging of increasingly rare, structurally complex forests; and has worked collaboratively with DNR and the intervenors to streamline and expedite judicial review of this important issue. At every

⁴ AFRC br. at 5.

juncture, the Center has respected judicial economy and has sought to avoid waste of judicial resources. For example, in response to DNR's motion to dismiss the other cases (CP 798-870), the Center's appeals were either voluntarily withdrawn or consolidated into About Time to respect judicial economy and to avoid litigation of the same legal issue in different counties. CP 872-75; 927-20. Thus, About Time is a bellwether case that will decide the multiple cases that are in, or will soon be, in the DNR timber sale pipeline.

While resolution of the issues raised in this appeal is environmentally significant, Amici's assertions of economic harm are unsupported. Requiring compliance with existing policies, which have provided significant legal benefits to DNR and timber purchasers, is not a new economic impact. And, while Amici forecast severe impacts, they never even attempt to substantiate how much logging would be reduced or where. They cannot do so because DNR has not identified and mapped the structurally complex forests implicated in this appeal.

Despite the lack of information created by DNR's lack of planning, the Center notes that a ruling in its favor is unlikely to have significant economic impacts. The primary outcome of such a ruling would be that DNR could comply with the Identification and Management Procedure, and develop plans for each planning unit to attain 10-15 percent older forest and fully functional forest.

In some planning units, such as the Olympic Experimental State Forest and North Puget planning units, the plans would be largely informational, as the 10-15 percent requirements are likely largely achieved by protections for threatened species such as marbled murrelets and northern spotted owls. *See* AR 1588-89, Table 2 and Table 5.

In other planning units, the plans would involve identifying and setting aside the oldest trees from logging. Some of these trees would already be protected through other mechanisms. Even if not, the protection would affect 10-15 percent of the overall planning unit at most, meaning that at a

minimum 85-90 percent of the planning unit would be unaffected.

On the individual timber sale level, logging could continue to occur. Sales would simply omit certain stands that were identified and mapped as structurally complex forest or otherwise designated to meet older forest and fully functional forest commitments.

Thus, for AFRC, whose members purchase and profit from timber sales on public land, and Lewis County, the economic impacts of a ruling in this case, if any, are likely short-term and minimal.

For WFPA, whose members own and log timber on private land, the assertions of economic impact are wildly hyperbolic and attenuated. WFPA members have largely already logged all classes of older forest on their own lands and converted the once ecologically rich forests on those lands to tree plantations. The Identification and Management Procedure, Policy for Sustainable Forests, and State Trust Lands HCP only

apply to DNR-managed lands. Thus, there can be no direct impact of this case on private lands.

The industry association asserts without basis that reduction of any logging on State lands would as a matter of course adversely impact the overall industry, including WFPA's members. There are numerous flaws in this assertion. First, as outlined above, the Center is only seeking compliance with existing policies, so there are no new economic impacts. Second, the likely impact on timber volume associated with any ruling in this case is at most minimal.

Third, to the extent there is any attenuated economic relationship between this case and the profitability of logging private lands, WFPA has no legal or moral entitlement to maximize profits based on logging of older forests on public lands. Timber companies including members of WFPA have logged Washington's once great reserves of old growth and the associated ecosystems. They have already profited greatly from the degradation of Washington's natural heritage. They do not

have any right to further economic benefit from precluding the restoration of some old growth conditions on public lands.

C. The Appeal is Based on Agreed Facts in the Administrative Record, Not Technical Disagreements.

WFPA asserts that this appeal boils down to a factual dispute over DNR's ability to meet its older-forest targets, and thus the Court should defer to DNR's expertise.⁵ This assertion is incorrect. The Center's appeal is based on whether DNR complied with its governing policies and the application of facts in the administrative record to those governing laws and policies.

1. The Center's arguments rest on application of facts from the administrative record to governing laws and policies.

Contrary to WFPA's assertions, the Center's arguments rest on application of facts from the administrative record to the plain text of the Identification and Management Procedure, Policy for Sustainable Forests, and State Trust Lands HCP. In summary:

⁵ See WFPA Amicus Curiae Brief, at 3.

- DNR concedes that it did not create a plan to identify and protect structurally complex forest in the South Coast HCP Planning Unit, as required by the Identification and Management Procedure, despite having 15 years to do so. AR 1269, DNR Resp. Br. at 33 (“The Center correctly states that DNR has not developed a ‘forest land plan’ for the South Coast Planning Unit.”).
- DNR did not fulfill the requirement of the Identification and Management Procedure to “designate in a department lands database additional suitable structurally complex forest stands or acreage to equal 10-15% of the HCP planning unit managed for older forest targets.” AR 1269. No such database or map exists in the administrative record and DNR has not identified one. DNR Resp. at 35-36; Center Reply at 14-16.
- Because “suitable structurally complex forest

stands” do not “constitute at least 10% of the HCP planning unit, other (not otherwise withdrawn) stands,” such as those in About Time, are not “available for the full spectrum of timber harvests.” AR 12592; 1270. Under the plain text of the Identification and Management Procedure, the structurally complex forests in About Time may not be logged.

- The Policy for Sustainable Forests is implemented through the Identification and Management Procedure. Violation of the Procedure violates the Policy for Sustainable Forests. AR 1268.
- The Policy for Sustainable Forests requires that “Through landscape assessments, the department will identify suitable structurally complex forest stands to be managed to help meet older-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.” AR 12592. As set forth above, DNR has not completed the required landscape assessments in form or substance. According to the agency’s own reports, DNR is impossibly far from reaching the 10-15 percent older forest targets in the South Coast HCP Planning Unit, with only 0.1-0.2 percent protected. AR 1588-99. Thus, the structurally complex forest in About Time may not be considered for harvest activities.

- The State Trust Lands HCP, which is based on and is supported by a Biological Opinion, includes a commitment to provide fully functional forests at least 150 years old across 10-15% of each HCP planning unit. DNR is required to achieve this target by Year 100 of the HCP, meaning the year

2096.⁶ DNR's own report projects that the agency will have less than 6.3 percent fully functional forests at least 150 years old in the South Coast HCP Planning Unit in 2096. AR 1589. Logging of About Time furthers DNR's conceded deviation from its HCP.

- In DNR's SEPA Checklist and DNS, DNR relied on adherence to each of the policies above, and in particular, its commitment to provide 10-15 percent older forests by the year 2100 in the South Coast HCP Planning Unit, as mitigation. AR 714-715 (About Time environmental checklist). Such reliance is clearly erroneous.
- In DNR's SEPA Checklist and DNS, DNR failed to disclose conflict with each the above policies, in violation of WAC 197-11-330(e)(iii).

⁶ See Center's Op. br, at 13-15.

Contrary to WFPA’s assertions, each of the Center’s arguments is based on the administrative record and the plain text of applicable laws and policies. DNR’s after-the-fact arguments in litigation are simply post-hoc rationalizations, not subject to deference.

2. DNR’s misinterpretation of and failure to follow its governing laws and policies is not entitled to deference.

WFPA argues that the Court should and must defer to DNR’s interpretation and enforcement of its policies and its unsubstantiated determination that it is on track to comply with these policies. In support, WFPA cites *Northwest Alloys, Inc. v. DNR*, 10 Wn. App.2d 169, 187, 447 P.2d 620 (2019) for the principle that courts must defer to the “administrative agencies’ specialized expertise” of statutes or technical decisions.⁷ But while courts defer to an agency’s interpretation or findings that stem from the agency’s “specialized knowledge and expertise,” *Northwest Alloys*, 10 Wn. App.2d at 187, courts do not defer to

⁷ WFPA br., at 6, 9.

agency interpretations of unambiguous law. *Schuh v. Dept. of Ecology*, 100 Wn.2d 180, 183-84, 667 P.2d 64 (1983). Any deference owed DNR to interpret and implement its governing documents does not trump the court’s plain reading of a governing text. *Port of Seattle v. Pollution Control Hrgs. Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004); *see also Friends of the Columbia Gorge v. Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.2d 354 (2005); *Franklin Cy. Sherriff’s Ofc. V. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982). DNR is *not* entitled to deference if its interpretation of its “decisional authority” is not part of the agency’s “established policy” or is in direct conflict with unambiguous law. *Friends*, 129 Wn. App. at 48-49; *Esses Daman Family, LLC. v. Pollution Control Hearings Bd.*, 200 Wn. App. 1021, 2017 WL 3476785 (2017)(unpublished opinion subject to GR 14.1).

- 3. Achieving 10-15 percent older forest in the South Coast planning unit is a target to which DNR committed in its governing laws and policies; DNR relied on compliance with these polices as part of its SEPA analysis for About Time.**

AFRC argues that the fully functional stand structure targets described in the HCP and Biological Opinion are only “general policy objectives and modeled outcomes,” and that DNR’s governing law and Board-adopted policies do not create “enforceable “mandates” or a commitment to grow 10-15 percent fully functional or older forests in each planning area.⁸

This argument ignores that the Identification and Management Procedure, which implements the Policy for Sustainable Forests and HCP, is binding. DNR’s violations of the Procedure are set forth above. AFRC also misstates the nature of the Center’s claims. The Center does not seek to independently enforce the Procedure, the Policy for Sustainable Forests, or HCP. The Center’s claim is that DNR approved the About Time timber sale while deviating from these commitments without rationale, which demonstrates arbitrary and capricious decision-making. DNR’s reliance on the Procedure, Policy for Sustainable

⁸ AFRC br., at 24-29.

Forests, and HCP as mitigation, without disclosing conflicts with the HCP, also violates SEPA. WAC 197-11-330(3)(e)(iii).

With that noted, the HCP does set forth fully functional forest requirements. The acceptance of the HCP and approval of DNR's 1997 ITP by the US Fish and Wildlife Service was conditioned on the assumption that the stand structure objectives, including the 10-15 percent fully functional stand structure objective, would be met by 2096. In its Biological Opinion, USFWS clearly interpreted the stand structure objectives, including DNR's objective to provide 10-15 percent fully functional forests by 2096 within each HCP planning unit, as commitments. These objectives are also repeatedly referred to as commitments in the 1997 HCP; and are central to achieving the objectives of the spotted owl, riparian, and multispecies conservation strategies of the HCP.⁹ Table IV.14 of DNR's federal HCP sets forth the 10-15 percent "fully functional" forest commitment; this table expressly states that this percentage is an

⁹ Op. br. at 13-18.

“objective,” not just an “aspiration,” as AFRC characterizes it. AR 3654.

Table IV. 14’s context in DNR’s HCP similarly supports an interpretation that DNR made a commitment: Table IV. 14 is contained within a separate section of DNR’s HCP pertaining to “multi-species conservation” for “unlisted species.” AR 3608, 3618. DNR’s HCP refers to the commitments in this section as a “strategy” for “other managed forests.” AR 3618. Recent post-HCP implementation and planning documents incorporate and tier to DNR’s representation that it will meet fully functional stand structure objectives. For example, DNR’s environmental impact statement for its 2015-2024 Sustainable Harvest Calculation evaluates the extent to which these objectives are met by 2067, as part of its analysis of alternatives. AR 16777; 16787-16788; 16206; 16209; 16213; 16233-16237; 16448-16461; 17061-17062; 17238-17243.

The Policy for Sustainable Forests also provides DNR has *committed*, not just aspired, to identify and conserve 10-15% of

its forests in each planning area. AR 12591 (“DNR *intends* to actively manage suitable structurally complex forests *to achieve* older-forest structures across 10-15% of each Western Washington HCP planning unit in 70-100 years.”)(emphasis added); 12592 (“The Department *will* target 10-15% of each Western Washington habitat planning unit for “older forests—based on structural characteristics—over time.”); 12283 (EIS for the 2006 PSF states its old forest goals “will be accomplished.”)(emphasis added).

The Identification and Management Procedure are DNR’s contemporaneous interpretation of how to implement and comply with the HCP and Policy for Sustainable Forests. Notably, the Procedure states requirements. *See, e.g.*, AR 1269 (“The identification and review of landscape level management strategies to achieve the 10-15% older forest target will be completed during the forest land planning process that will be conducted for each HCP planning unit.”)(emphasis added). The Procedure even uses the term “must,” AR 1269, and that it

“restates” and implements its Policy for Sustainable Forests. AR 1580. The plain terms of these documents reflect a deliberate policy commitment to achieve, not merely an aspiration, target, or projection of future conditions. DNR’s reliance on these documents as mitigation, and deviation from them without explanation, is arbitrary and capricious and violates SEPA.

4. The post-hoc letter from the USFWS’s state office does not control.

AFRC’s argument relies heavily on a post-hoc letter, written to DNR by Bradley Thompson, State Supervisor for the United State Fish and Wildlife Service (USFWS), stating that DNR’s 10-15 percent commitment is merely a “projection” and not a requirement.¹⁰ AFRC argues that this post-approval letter from a state office, that had undergone no public comment or review, trumps the administrative record; and accuses the Center of “supplanting” or second-guessing the USFWS’ opinion of DNR’s commitments.¹¹

¹⁰ AFRC br. at 16-18.

¹¹ *Id.*, at 18

There are multiple reasons why Mr. Thompson’s letter does not control this case. First, the letter is dated October 27, 2021 (AR 9430), whereas the About Time timber sale decision was made September 7, 2021. AR 463. Agencies may not rely on post-hoc rationalizations to justify their actions. *Aviation West Corp. v. Wash Dep’t of Labor and Indus.*, 138 Wn.2d 413, 446, 980 P.2d 701 (1999) (citing *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 474–475, 832 P.2d 1310 (1992)). On the contrary, “[i]t is well-established that an agency’s action must be upheld, if it all, on the basis articulated by the agency itself.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983).

Second, the 1997 HCP, its Draft EIS, and its Final EIS, were all published in the Federal Register, as required by the implementing regulations of the Endangered Species Act. *See* 61 Fed. Reg. 15297; 61 Fed. Reg. 56563; 62 Fed. Reg. 8980 (publications); 50 C.F.R. § 17.22; 50 C.F.R. § 17.32(b)(1)(ii) (requirements to publish). These documents set forth the stand

structure objectives and call them commitments. Mr. Thompson's letter, which purports to eliminate the stand structure commitments, was not published in the Federal Register and has not undergone public comment. In the case of inconsistency between Mr. Thompson's letter and the HCP, the HCP must prevail.

Third, Mr. Thompson's letter contradicts the plain terms of the HCP and the text of the 1997 Biological Opinion that explicates the HCP. As we have shown, the HCP itself does refer to the stand structure objectives as commitments. AR 5653. The Biological Opinion is also explicit that 10-15 percent target for fully functional forests is a commitment.¹² Mr. Thompson even admits that his interpretation conflicts with specific language in the agency's Biological Opinion. AR 9430.

Mr. Thompson cannot amend the text of the HCP merely by writing a letter, behind closed doors, 24 years after the fact. Courts do not allow even individual legislators to re-interpret

¹² See Op. br, at 18.

legislative acts after the fact. *See State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375 (2004). Still less should this Court allow an individual agency staffer to re-interpret the 1997 HCP and accompanying Biological Opinion.

Finally, AFRC argues that forcing DNR to live up to its old forest commitments does an end-run around the regulatory certainty HCP's are intended to avoid, the so-called "no surprises" principle.¹³ This argument makes no sense. Here, the Center is holding DNR to commitments it has already made in its HCP. The Center is not asking DNR to commit "additional land or financial undertaking" and there should be no "surprises" to anyone here. It does not violate the ESA's "no surprises" principle—or DNR's specific HCP—when an HCP works as written, committed, and intended.

D. The Center's Challenge to a Timber Sale Will Not Jeopardize HCPs or Usurp Federal Powers.

¹³ AFRC br. at 18-22.

AFRC advances several sky-is-falling arguments, including that the Center is not merely holding DNR to its governing documents but is usurping the federal government's authority to enforce HCPs,¹⁴ undermining landowner incentives to enter into HCPs,¹⁵ and jeopardizing the regulatory certainty of HCPs in general.¹⁶ The Court should ignore this rhetoric.

The Center has a right under the Public Lands Act and SEPA to hold DNR accountable to its adopted forest planning and management commitments. It has the right to object when DNR resorts to speculation and future promises in lieu of complying with its policies. This does not “pull” DNR's HCP into endless litigation.¹⁷

E. Lewis County Does Not Speak for All Counties When It Comes to Protecting Older Legacy Forests.

Amici AFRC and Lewis County imply that all counties defend DNR's decision to log current or soon-to-be fully

¹⁴ AFRC br., at 16-18.

¹⁵ *Id.*, at 19-23.

¹⁶ AFRC br., at 6-7.

¹⁷ AFRC br., at 19.

functional forests today without first developing or accounting for land plans that would demonstrate how DNR can reach its old forest goals by the end of its HCP period.¹⁸ Lewis County, however, does not speak for all counties. At least three different counties, Jefferson, Whatcom, and Thurston counties, and the City of Port Angeles, have recently written letters relative to specific DNR-proposed timber sales urging DNR to live up to its commitment to protect older forests and not approve a pending sale.¹⁹ Accordingly, the Court should not infer that Lewis County speaks for all Washington counties. To the contrary, many local governments recognize the important public interest served by asking DNR to adhere to its commitments, and by restoring some old growth conditions on DNR-managed lands in Washington.

¹⁸ AFRC br. at 8-11.

¹⁹ *Available here:* <https://www.c4rf.org/about-time> (last accessed Dec. 9, 2022).

III. CONCLUSION

For all the reasons stated herein, the amicus briefs are unpersuasive and only serve to confirm that DNR has not identified or protected structurally complex forests as required, and is deviating from its requirements to restore old growth conditions on DNR-managed lands. The Court should declare that approval of the About Time sale is arbitrary and capricious and violated the Public Land Act and SEPA, reverse the decision of the Grays Harbor County Superior Court, and remand the sale back to DNR and the Board with an order that the sale be withdrawn and reconsidered.

Pursuant to RAP 18.17, I certify that the number of words contained in this document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images, is 4,856.

Dated this 9th day of December, 2022.

Respectfully submitted,

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**DECLARATION OF DOCUMENT FILING AND
SERVICE**

I, WYATT GOLDING, STATE THAT ON THE 9th DAY OF DECEMBER 2022, I CAUSED THE ORIGINAL APPELLANT’S CONSOLIDATED RESPONSE TO AMICUS BRIEFS TO BE FILED IN THE COURT OF APPEALS – DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ELECTRONICALLY ON THE PARTIES VIA THE APPELLATE’S COURT’S ELECTRONIC FILING PORTAL.

SIGNED AT SEATTLE, WASHINGTON, THIS 9th DAY OF DECEMBER, 2022.

/s Wyatt Golding
Wyatt Golding

ZIONTZ CHESTNUT

December 09, 2022 - 3:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56964-7
Appellate Court Case Title: Center for Responsible Forestry, Appellant v. WA State Dept. of Natural Resources, Respondent
Superior Court Case Number: 21-2-00519-8

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