No: 56964-7-II

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.

AMICUS CURIAE BRIEF OF WASHINGTON FOREST PROTECTION ASSOCIATION

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INTEREST OF THE AMICUS CURIAE

The Washington Forest Protection Association ("WFPA") is a not-for-profit trade association committed to advancing sustainable forestry in the state of Washington. WFPA represents large and small forest landowners and managers of nearly four million acres of productive working timberland located in the coastal and inland regions of the state of Washington. WFPA's members include large and small companies, individuals, and families that grow, harvest, and regrow trees.

WFPA was founded in 1908 to help fight and prevent uncontrolled forest fires. Today, its mission is to promote and encourage stewardship of Washington's forestlands, primarily for timber and other wood products. Its members are also committed to helping develop public policies that will encourage managing Washington's forests for healthy fish and wildlife, air and water quality, recreation, and other environmental and social

values. To this end, WFPA's members are founding partners in the historic Forests & Fish Agreement that created a forestry blueprint for science-based, collaborative assurances under the federal Endangered Species Act and the Clean Water Act.

WFPA's members have a strong interest in this litigation. The fates and fortunes of public and private timberlands are interwoven. WFPA's members operate in the same marketplace for timber products as the Department of Natural Resources ("DNR"), and many of its members purchase public timber for processing in their mills. Changes in the regulatory environment and proprietary management of public timber have significant impacts on the private timber marketplace. If the Court rules against DNR, the impacts would reverberate across timber markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, WFPA presents four arguments for why the Superior Court's decision should be affirmed. First, WFPA

argues that judicial deference doctrines should decide this case. Second, WFPA argues that Plaintiff's lawsuit challenges policy decisions DNR made in exhaustive, rigorous, and highly public processes and is therefore an impermissible collateral attack on policy choices that should be rejected as such. Third, WFPA points out the implausibility of Plaintiff's contention that DNR is purposefully and blatantly ignoring its older-forest targets. Last, WFPA argues that harm would befall the timber industry and rural communities were the Court to second-guess and overturn DNR's forest policy decisions.

This case boils down to a single key factual disagreement: whether DNR is on track to meet its older-forests policies. Plaintiff asserts that DNR will not meet its older-forests targets if it harvests the About Time timber sale ("About Time"). DNR disagrees, asserting that it has studied this question in depth, has a comprehensive compliance strategy, and is on track to meet its older-forests targets regardless of what happens with About Time.

Plaintiffs' briefing includes other arguments too, but none are compelling. First, Plaintiff asserts that DNR has not followed its own internal procedures for the About Time sale. However, that argument is thoroughly and comprehensively rebutted as a factual matter in DNR's responsive briefing. *See* Brief of Resp't at 32-36. The procedures clearly were followed.[1] *Id.* Second, Plaintiff argues, almost nonsensically, that currently meeting older-forests targets is a condition precedent to any timber harvest in existing older-forest stands. DNR thoroughly refutes this argument as well, *id.* at 37-41, and WFPA will not pile on except to point out that it would make no sense at all for DNR to create a policy that would eliminate huge chunks of land from its harvest base while simultaneously counting on those harvests to meet its fiduciary obligation to state trust land beneficiaries. As discussed below, DNR is entitled to substantial deference with respect to interpreting its own policies, and Plaintiff's argument

[1] DNR also argues that Plaintiff waived this argument on appeal. This may be so, but it makes little difference given how clear it is from the record that DNR did, in fact, follow its own internal procedures.

that DNR is mis-interpreting its own policies does not add up because it would be inconsistent with DNR's robust management framework, which has been developed over the last two decades with considerable public input and consideration of DNR's fiduciary obligations and of other compatible uses of the state trust lands.

That leaves a single substantive question, and it is a question of fact: Is DNR is on track to meet its older-forest targets? As discussed further below, this question should be resolved through recourse to judicial deference doctrines. DNR has studied this question in depth and concludes that it is, in fact, on track to meet its older-forest targets. *Id.* at 15-20, 38, 43-44, 48-52. That is all that is needed. The Court is not empowered to second-guess DNR's forest management choices on a landscape scale, across two million acres, over a 100-year time horizon. This is a textbook example of a time in which deference is due to the agency to make policy decisions and choices that should not be disturbed under the guise of arbitrary and capricious review.

Arbitrary and capricious review should be reserved for times when the agency acts arbitrarily, not when it has a comprehensive set of policies that it is following closely and a thoroughly vetted, science-based, well-reasoned strategy for satisfying those policies.

ARGUMENT

I. Deference Should Decide This Case.

Agency deference doctrines were created for cases like this one. Such doctrines are foundational to administrative law and serve numerous salutary functions. *See, e.g.*, Terence J. McCarrick, IN DEFENSE OF A LITTLE JUDICIARY: A TEXTUAL AND CONSTITUTIONAL FOUNDATION FOR CHEVRON, 55 San Diego L. Rev. 55 (2018).

Several state-law deference doctrines apply here.

First, courts defer to administrative agencies' specialized expertise and their exercises thereof. *Northwest Alloys, Inc. v. Department of Natural Resources*, 10 Wn. App. 2d 169, 187, 447 P.3d 620 (2019) ("Deference will be given to the specialized

knowledge and expertise of the administrative agency."). In particular, courts "defer to the administrative agency's environmental expertise." *Wild Fish Conservancy v. Washington Department of Fish and Wildlife*, 198 Wn.2d 846, 866, 502 P.3d 359 (2022). "The reviewing court cannot simply substitute its judgment for that of the agency." *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 556, 527 P.2d 1121 (1974). Factual findings within an agency's area of expertise are afforded special deference. *E.g.*, *Cobra Roofing Service, Inc. v. Department of Labor & Industries*, 122 Wn. App. 402, 411, 97 P.3d 17 (2004).

This doctrine is relevant because Plaintiff asks the Court to second-guess DNR in DNR's area of core expertise. Plaintiff's primary argument is that DNR will not meet its older-forest targets if it does not act differently by, for example, halting sales like About Time. But DNR reached the exact opposite conclusion. Br. of Resp't at 15-20, 38, 43-44, 48-52. DNR reached this conclusion by exercising its expertise. *See id.*

DNR's foresters scrutinized the older-forests policies, analyzed DNR's land base, identified future harvests and future set-asides, and concluded they were on track to meet the older-forests goals. *Id.* In other words, DNR studied its older-forest policies and came up with a strategy for how to meet it. *See id.* DNR is now implementing that strategy. *See id.* All of these actions were undertaken and conclusions reached through direct exercise of forestry expertise, environmental expertise, and expertise in the specific policies that DNR itself enacted. Deference is therefore mandatory. *See Wild Fish Conservancy*, 198 Wn.2d at 866. Nested within these conclusions are factual determinations based on expertise, which warrant special deference. *See Cobra*, 122 Wn. App. at 411. The Court does not have expertise in these areas and therefore should not "substitute its judgment for that of the agency." *Ballard Elks Lodge*, 84 Wn.2d at 556. The Court is an expert in the law, but Plaintiff's arguments do not flow from the law; they are attacks on factual conclusions that are squarely within DNR's expertise and special knowledge.

Courts also afford substantial deference to agencies' interpretations of the statutes, regulations, and policies they are charged with implementing and enforcing. *See, e.g.*, *Echo Bay Community Ass'n v. State, Dept. of Natural Resources*, 139 Wn. App. 321, 326, 160 P.3d 1083 (2007) ("Although our review is de novo, we give substantial weight to an agency's interpretation of statutes and regulations that it implements and enforces."); *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979) ("Considerable judicial deference is given to the construction of legislation by those charged with its enforcement."). Courts generally "will uphold an agency's interpretation if it reflects a plausible construction of the statutory language and is not contrary to legislative intent and purpose." *Echo Bay*, 139 Wn. App. at 331; *Cobra*, 122 Wn. App. at 409.

This doctrine is critical for two reasons. First, it applies directly to the question of whether DNR's policies require it to halt older-forest timber sales unless older forest targets are being

currently met. DNR does not interpret the policy (or the underlying statutes that give it force and effect) in that way. Rather, DNR interprets the policy as requiring it to meet its older forests targets over the time horizon set in the policies. That interpretation is entitled to "substantial" and "considerable" deference. *See Echo Bay*, 139 Wn. App. at 326; *Keller*, 92 Wn.2d at 731. DNR's interpretation is a "plausible construction of the statutory language and is not contrary to legislative intent and purpose." *Cobra*, 122 Wn. App. at 409. It should therefore be upheld. *See id.* Deference is further warranted with respect to this interpretation given that DNR wrote the policies at issue and therefore can be presumed to know what they mean.

The second reason this deference doctrine is critical to this case is because the actions being challenged are all taken pursuant to DNR's overarching statutory mandates. Everything DNR does with respect to older-forest harvest and planning to meet its policies is at its core an interpretation of the requirements of the numerous and various statutes governing

DNR's management of public timberlands. These interpretations deserve deference. *See Echo Bay*, 139 Wn. App. at 326; *Keller*, 92 Wn.2d at 731. DNR is entitled to such deference while it is implementing its statutory mandate. *See Echo Bay*, 139 Wn. App. at 326; *Keller*, 92 Wn.2d at 731.

II. Plaintiff's Lawsuit is an Improper Collateral Attack on Settled Policy Choices.

Another basic problem with Plaintiff's case is that they do not make the kinds of arguments that are cognizable in a court of law.

Plaintiff makes policy arguments. They believe DNR's older-forest policies should be different than they are. For example, they argue that no older forests should be harvested until all older-forest targets are met. That is not what the governing documents say; Plaintiff wants to change the policy through this litigation. Plaintiff also argues that the policies should be implemented differently, i.e., that DNR's older-forest calculations should be undertaken using an age-based

methodology. But that is not how DNR has chosen to implement the governing regulatory policies. Plaintiff wants DNR to make different choices than it made.

This is not the right forum for those arguments. These arguments should have been (and in many cases were) made in policy and legislative fora, during public comment periods, and in the course of agency negotiations when the policies were adopted. That is where policy arguments belong: in policy fora, not in a court of law.

Nor is it the right time to make these arguments. The time to make these arguments was when the policy debates were taking place in the years leading up to 1997 for the State Lands HCP, and to 2006 for the Policy for Sustainable Forests. These policy debates were rich with opportunities for public participation, and indeed, a broad suite of perspectives participated in those debates over periods of many years. The result of those policy debates were the regulatory and policy documents that today govern DNR's practices with respect to

older forests. The processes of yesterday that led us to today's policy environment were rigorous, public-facing, and took years to complete. They incorporated the divergent voices, practical concerns, scientific expertise, testimony, budgetary and policy constraints, and additional context that cannot be part of a lawsuit like this one. DNR's approval of the About Time timber sale was also a multi-year process incorporating many reviews and requirements. These processes and their eventual outcomes represent hard work and compromise. They need to be respected and should not now be disturbed where there is no legitimate legal basis for doing so.

That, in a nutshell, is why Plaintiff's arguments are not compelling. Plaintiff's arguments do not flow from legal standards and principles but rather present ideas and arguments for why DNR should have made different policy choices. And Plaintiffs couch their policy arguments in terms of the "arbitrary and capricious" standard, but the bulk of their arguments are, in essence, policy-based. That leaves the Court no room to seriously

entertain their positions because courts are not arbiters of policy but rather of legal principles. Plaintiff's arguments are virtually bereft of controlling legal principles.

This fact is particularly salient with respect to the "About Time" sale. About Time is a run-of-the-mill sale within its class. The foresters who designed the sale did nothing out of the ordinary or wrong. All they did was follow policies that, in many cases, have been in place for decades. These policies were the result of exhaustive agency, policy, and legislative process. There is no uniqueness to About Time that merits a challenge, which indeed is reflected in Plaintiff bringing numerous identical challenges in other lawsuits then abandoning them in favor of a single appeal. In reality, Plaintiff is not challenging the About Time sale at all but rather the policies underlying it. That is an inappropriate collateral attack on settled policy decisions and should be treated as such, i.e., disregarded.

Respecting settled policy choices is especially important in the timber sector. It has to be. This is an industry in which

harvest cycles range from 40 to 70 years. Timber landowners, including DNR, need to be able to make decisions grounded in regulatory certainty and with the knowledge that change is slow, gradual, and will balance competing interests and science. The timber industry requires a stable prescriptive framework, as is reflected in DNR's older forest targets having hundred-year time horizons for completion. DNR has invested heavily in creating a lasting long-term prescriptive framework that allows it to sustainably harvest trees over a period of decades. DNR has made these years-long investments in policy and agency process so that it could attain the level of regulatory certainty needed to do business successfully.

III. DNR Understands the Importance of Complying With Regulatory Mandates.

Throughout Plaintiff's briefing, there is an undercurrent of suggestion (and in some places outright assertion) that DNR is blatantly or intentionally disregarding its older forest target obligations. The Court should understand just how implausible it

is that DNR, a state agency, would outright disregard its own rules and policies.

One way in which DNR and WFPA's members are similar is that they understand the paramount importance of their social license to operate. The timber industry in Washington has vast landholdings and is inextricably linked to the ecological health of our state's forests, wildlife, and waters. Landowners consider themselves stewards of the forests for future generations and for wildlife. The timber industry as a whole (and public timber management in particular) relies very heavily on the general public to, in effect, consent to the timber industry continuing to operate. In Washington, there are diverging views about whether timber should be harvested, especially on public lands. The spotted owl sagas of the 1990's demonstrated just how true this supposition is; hundreds of thousands of acres of federal forest lands were taken out of production after public outcry and backlash. *See Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1304-05 (W.D. Wash. 1994); *see also* Jon A. Souder et al.,

IS STATE TRUST LAND TIMBER MANAGEMENT "BETTER" THAN FEDERAL TIMBER MANAGEMENT? A BEST CASE ANALYSIS, 14 Hastings J. Env't L. & Pol'y 921, 963 (2008) ("[There were] sharp reductions in the cut on state lands that occurred during the early 1990s. . . . With problems in federal sales resulting from the National Forest Management Act and the ESA court suits, federal timber sales have practically disappeared from the market . . . . "). Timber companies, and even more so public timberland managers, understand that they cannot remain viable enterprises for long without broad-based public support.

In Washington, this social license to operate is derived directly from our state's forest practices regulations. Washington is one of the most heavily regulated timber environments in the world. Our regulatory framework under the Forests & Fish Habitat Conservation Plan[2] is a one-of-a-kind commitment to set aside sensitive ~~forest lands~~forestlands for the benefit of the environment. So is the State Trust Lands HCP. These are unique

[2] Also called the Forest Practices Habitat Conservation Plan.

conservation plans whereby landowners both public and private make enormous financial sacrifices in order to keep our state's wildlife thriving, forests healthy, and waters cool and clean. The inclusive nature of our state's forest practices system also gives every stakeholder (including the general public) a seat at the table in regulating forest practices. This inclusiveness is reflected in DNR's Habitat Conservation Plan as well.

DNR understands, just as WFPA's members do, that its social license to operate depends on compliance with these regulatory frameworks and conservation agreements. And though these regulations demand a lot of landowners, they also ensure that the timber industry in Washington does not damage the environment in ways that could turn the public against timber interests.

DNR, like WFPA members, has the utmost respect for these regulations because they represent the balance between maintaining the timber industry and being a steward of the environment. The notion that DNR would blatantly or

intentionally disregard its obligations is simply not credible and should not be countenanced. That is not to suggest that DNR is beyond reproach or immune from judicial review, but DNR emphatically would not purposefully ignore its regulatory obligations, as Plaintiff implies and suggests.

IV. Changing the Rules of the Game Would Have Serious Consequences.

A ruling against DNR in this case would have major impacts on timber markets and rural economies.

A stable regulatory environment is critically important to our state's timber economy. It is only long-term regulatory certainty that allows public timberland managers to invest in rural communities. And indeed, public timberlands are an important source of jobs in rural communities. Rural forest dependent communities rely almost exclusively on state and private timber offerings for economic opportunity. *See generally* Susan Charnley, et al., *Socioeconomic Well-Being and Forest Management in Northwest Forest Plan-Area Communities*, ch. 8, Synthesis of Science to Inform Land Management Within the

Northwest Forest Plan Area, U.S. Dep't of Agric. (2018), https://fs.usda.gov/pnw/publications/chapter-8-socioeconomic-well-being-and-forest-management-northwest-forest-plan-area. Today, nearly 30% of timber harvest in Washington occurs on either State or County land. *See* Washington Department of Revenue, Harvest Statistics (2020), https://dor.wa.gov/taxes-rates/other-taxes/forest-tax/harvest-statistics. The forest products industry in Washington supports more than 102,000 jobs and $5.6 billion in wages, predominantly in rural resource communities. *See* Healthy Working Forests Are Essential to Jobs and Washington's Economy (2021), https://data.workingforests.org/.

It would harm rural communities to rule that DNR must meet older-forest targets before any harvest can occur. Such a ruling would bring state timber sales to a grinding halt, which could result not only in reduced revenues, but also in mill closures. Mill closures are problematic because mill work supports a stable source of high-paying jobs. *See, e.g.*, Dylan

Darling, *Uprooted: Mill Closures Hit Rural Oregon, but Diversified Economies Help Absorb the Cost*, Register-Guard (June 9, 2019), https://stories.usatodaynetwork.com/closedmills/home/. A single mill can support numerous jobs, many of which are high-skill positions. A mill typically employs deck workers, machine operators, saw operators, dry kiln operators, job site managers, and many other kinds of workers. Closing mills can drive high-wage earners out of rural communities and create long-term unemployment. Forestry activities create significant numbers of jobs, primarily in rural communities where family-wage jobs are not widely available—from foresters to biologists to road builders to logging contractors and more. Eliminating these jobs could be devastating to many rural communities.

V. CONCLUSION

Plaintiff's arguments do not provide a legal basis for overturning DNR's actions in the About Time sale. DNR is on track to meet its older-forest targets, there have been no

procedural fouls, and DNR is not required to meet older-forest targets in the present as a condition precedent to harvesting older-forest stands. This case amounts to a disagreement on the policies DNR enacted, and this is not the right forum to re-litigate DNR's policy choices. This court should AFFIRM the decision of the Superior Court.

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I certify that this document, exclusive of words contained in the appendix, the title sheet, the table of contents, the table of authorities, the certificate of compliance, and the signature block, contains 3432 words.

DATED this 21st day of October 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October 2021, I caused the foregoing document to be served by email to all parties listed below:

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SIGNED at Suquamish, Washington this 21st day of October 2021.

/s/ Sabrina Mitchell
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