

FILED  
Court of Appeals  
Division II  
State of Washington  
7/25/2022 4:52 PM

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON

DIVISION II

CENTER FOR  
RESPONSIBLE FORESTRY,

No. 569647-II

*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.*

APPELLANT'S OPENING BRIEF

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. ASSIGNMENT OF ERROR.....	4
III. STATEMENT OF FACTS.....	4
A. Identity of the Parties .....	4
1. Plaintiff Center for Responsible Forestry.....	4
2. Respondents DNR and Hillary Franz.....	5
3. Respondent Board of Natural Resources.....	6
B. DNR’s Legal Responsibilities.....	6
C. The Endangered Species Act .....	7
1. The Northern Spotted Owl, Marbled Murrelet, and Salmon.....	9
2. The 1997 State Trust Lands HCP, Biological Opinion, and Incidental Take Permit.....	10
3. The 2019 HCP Amendment, Biological Opinion, and Incidental Take Permit .....	19
D. The Policy for Sustainable Forests .....	19
E. PR-14-004-046 (“Identifying and Managing Structurally Complex Forests to Meet Older-Forest Targets (Westside) January 2007”).....	24
F. The 2021 About Time Timber Sale .....	27
G. DNR’s Internal Analysis.....	29

H. About Time Stand Assessment .....	32
IV. STANDARD OF REVIEW AND LEGAL BACKGROUND.....	36
A. The Public Lands Act.....	36
B. SEPA.....	37
C. Standard of Review on Appeal .....	43
V. ARGUMENT .....	43
A. DNR’s Approval of About Time Violates the Public Lands Act Because It is Inconsistent with the Forest Identification and Management Procedure, the Policy for Sustainable Forests, and the HCP .....	44
1. Approval of About Time Departs from the Identification and Management Policy Without Basis.....	48
2. Approval of About Time violates the Policy for Sustainable Forests .....	53
3. Approval of About Time violates the State Trust Lands HCP and the Public Lands Act.....	56
B. DNR’s Determination of Non-Significance Violates SEPA Because It Fails to Disclose Conflict with Environmental Laws and Improperly Tiers to Programmatic Review Documents .....	59
C. Costs and Fees.....	61
VI. CONCLUSION.....	61

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>All. for the Wild Rockies v. United States Forest Serv.</i> , 907 F.3d 1105, (9th Cir. 2018) .....	36, 44, 45, 46, 52
<i>Anderson v. Pierce County</i> , 86 Wn. App. 290 (1997) .....	39
<i>ASARCO Inc. v. Air Quality Coalition</i> , 92 Wn.2d 685, 601 P.2d 501 (1979) .....	41
<i>Columbia Riverkeeper v. Port of Vancouver, USA</i> , 188 Wn.2d 80, 392 P.3d 1025 (2017) .....	40
<i>Conservation Northwest v. Commissioner of Public Lands</i> , Civ. No. 991-839 (July 21, 2022) .....	6, 7
<i>Conservation Northwest v. Okanogan County</i> , 194 Wn. App. 1034, 2016 WL 3453666 (2016) .....	39, 41
<i>Leschi Improvement Council v. Wash. State Highway Comm’n</i> , 84 Wn.2d 271 (1974) .....	38
<i>Norway Hill Preservation and Protection Association v. King County Council</i> , 87 Wn.2d 267, 552 P.2d 674 (1976). 38, 39, 41	
<i>Nw. Alloys, Inc. v. Dep’t of Natural Res.</i> , 10 Wn. App. 2d 169, 447 P.3d 620 (2019) .....	36
<i>Puget Sound Harvesters Ass’n v. Washington State Dept. of Fish and Wildlife</i> , 157 Wash. App. 935, 239 P.3d 1140 (2010) ....	36, 47, 52
<i>Pub. Util. Dist. No. 1 of Clark County</i> , 137 Wn. App 150, 151 P.3d 1067 (2007) .....	40

<i>Roskelley v. Wash. State Parks &amp; Recreation Comm'n</i> , Civ. No. 48423-4-II, 2017 Wash. App. LEXIS 747 (Mar. 28, 2017) ....	52
<i>Sisley v. San Juan Cty.</i> , 89 Wn.2d 78, 569 P.2d 712 (1977) ...	41
<i>Spokane County v. E. Wash. Growth Management Hr'gs Bd.</i> , 176 Wn. App 555, 309 P.3d 673 (2013), <i>review denied</i> 179 Wn. 2d 1015, 318 P.3d 279 (2014).....	39, 41
<i>Swoboda v. Town of La Conner</i> , 97 Wash. App. 613, 987 P.2d 103 (1999) .....	42

<u>Federal Statutes and Regulations</u>	<u>Page</u>
64 Fed. Reg. 14308, 14517, 14508 (March 1999).....	9
70 Fed. Reg. 37159 (June 2005) .....	9
72 Fed. Reg. 26722 (May 2007) .....	9
16 U.S.C. §§ 1531–1544 .....	7
16 U.S.C. § 1532(19) .....	8
16 U.S.C. § 1536(a).....	8
16 U.S.C. § 1536(a)(2) .....	8
16 U.S.C. § 1536(b).....	8
16 U.S.C. § 1539(a)(1)(B).....	8
16 U.S.C. § 1539(a)(2)(A) .....	8

18 U.S.C. § 1538(a)(1)(B)..... 7

<u>State Statute and Regulations</u>	<u>Page</u>
RCW 34.04.130(6)(e).....	41
RCW 43.21C .....	27
RCW 43.21C.033 .....	37
RCW 43.30.105 .....	5
RCW 43.30.205–.295 .....	6
RCW 43.30.411 .....	5
RCW Title 79 .....	5
RCW 79.02.030 .....	35
RCW 79.10.100 .....	43
WAC 197-11-055(2) .....	37
WAC 197-11-310(5) .....	37
WAC 197-11-330 .....	39
WAC 197-11-330(4) .....	37
WAC 197-11-330(e)(iii) .....	38, 58
WAC 197-11-335 .....	39, 40

WAC 197-11-340.....	37
WAC 197-11-350.....	40
WAC 197-11-360.....	37
WAC 197-11-360(1).....	37
WAC 197-11-600(3).....	39, 59
WAC 197-11-794(2).....	59
WAC 332-41-665(1)(f).....	44
<u>NMC</u>	<u>Page</u>
NMC 14.05.120.B.....	40
<u>Court Rules</u>	<u>Page</u>
GR 14.1.....	40, 41, 52
<u>Other Authorities</u>	<u>Page</u>
24 Wash. Practice: Environmental Law & Practice § 17.1.....	40

## I. INTRODUCTION

The Center for Responsible Forestry (“Center”) appeals the approval of the 75-acre About Time timber sale in Southwest Washington by the Washington State Department of Natural Resources (“DNR”) and Board of Natural Resources (“Board”), as well as the associated determination under the State Environmental Policy Act that the logging carried out under the sale will not have any probable significant adverse environmental impacts.

Defendants the Department of Natural Resources and the Board of Natural Resources (collectively, DNR) have committed in three key binding programmatic documents—the Policy for Sustainable Forests, the DNR Trust Lands Habitat Conservation Plan, and associated Implementation and Management Procedures—to achieve, maintain, and preserve 10 to 15 percent of fully functional forest and older forest in each planning unit in western Washington. Until 10 to 15 percent of the “South Coast” planning unit, where About Time, constitutes older forest,



structurally complex stands such as those contained within About Time are unavailable for logging.

According to its own analysis DNR currently has only 0.2 percent older forest in the South Coast planning unit, and will be well short of its requirements to achieve 10 to 15 percent older forest and fully functional forest by 2096. As a result, the agency was required to identify the structurally complex forests in About Time and elsewhere in the planning unit, protect those forests, and attain 10 to 15 percent older forest conditions prior to making them available for logging. These procedures are necessary to ensure that the agency develops the promised forest conditions over time, with associated environmental benefits.

Instead, DNR decided to log About Time timber sale in plain violation of its governing commitments, policies, and procedure. The agency's plain deviation from established requirements without rational explanation or basis is the hallmark of arbitrary and capricious decision making.

The timber sale has broad importance because virtually all

private and public land in Southwest Washington has been logged at some point, and as a result most of the few remaining structurally complex and fully functional forests that remain are located on forestlands managed by DNR. Many state and federal listed wildlife species, and other species of concern covered under DNR's HCP, are dependent on structurally complex or fully functional forest habitat. These forests also sequester huge amounts of carbon in trees, roots, and soils. Protection of existing structurally complex stands like those in About Time is the only foreseeable means for Southwest Washington to regrow even a small fraction of its once grand old growth forests.

The appeal is also significant because timber sales similar to "About Time" are planned over the next year in Southwest Washington. Stands within those sales qualify as structurally complex. With so little fully functional and structurally complex forest habitat remaining in the South Coast planning unit, it is vitally important for DNR to live up to its commitments to identify and protect structurally complex forest stands to grow

into older forest and fully functional forest.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in holding that DNR complied with its adopted policies and rules relative to achieving old forests before they are harvested and in holding that the DNR's approval of the About Time timber sale was compliant with the State Environmental Policy Act.

## **III. STATEMENT OF FACTS**

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

#### **1. Plaintiff Center for Responsible Forestry.**

The Center for Responsible Forestry is a Washington State-registered non-profit corporation based in Tacoma, Washington. The Center's mission is to promote a balanced approach to the management of Washington state forestlands that allows DNR to generate revenue for trust beneficiaries (such as counties and schools), while conserving and accelerating the development of older forests.

The Center's members regularly visit and recreate in DNR-managed forestlands, including those in the upper Chehalis River Basin. The Center's members gain aesthetic enjoyment from visiting older-forests and observing the wildlife that inhabits these forests. The Center's members have visited the About Time project area in the past and have plan to do so again in the future. Their enjoyment of the area will be diminished if the logging approved by the About Time timber sale goes forward and the structurally complex forests in that region are degraded or destroyed. Those same interests will be protected if the Court issues injunctive relief to prevent logging from going forward under the About Time timber sale.

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

DNR is the state agency responsible for administering the public forestlands. RCW 43.30.411, Title 79 RCW. Hilary Franz, the Washington State Commissioner of Public Lands, is the administrator of DNR. RCW 43.30.105. DNR conducted the environmental review of the About Time timber sale and issued

the SEPA DNS at issue in this case. AR 709–735 (About Time environmental checklist); AR 736–742 (About Time DNS).

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

The Board of Natural Resources (“Board”) is the state agency that determines whether, which, and how much timber to sell from Washington’s public forestlands. RCW 43.30.205–.295. The Board adopts policies that govern timber disposal, including the Policy for Sustainable Forests, and HCP Implementation Procedures. *Id.* The Board approved the About Time timber sale at issue in this case. AR 479–531 (descriptions of ten timber sales considered at Board’s Sept. 7, 2021 meeting, including About Time at AR 481, 489–492); AR 460–468 (all ten timber sales considered at Sept. 7 meeting, incl. About Time, approved at AR 463).

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

During the pendency of this appeal, the Washington State Supreme Court decided *Conservation Northwest v. Commissioner of Public Lands*, Civ. No. 991-839 (July 21,

2022), which provides a clear statement of DNR’s legal responsibilities in managing trust lands. The Court determined that DNR manages trust lands, including the lands at issue, subject to three main legal duties: 1) fulfillment of trust obligations to support enumerated beneficiaries, 2) compliance with the “constitutional mandate of article XVI, § 1” to serve “all the people,” and 3) compliance with other applicable State and Federal laws. *Id.* at 21-22; 25. The decision whether to propose or carry out logging is discretionary with the agency. *Id.* at 23. DNR does not have a duty to maximize revenue from logging, or even necessarily to carry out logging at all, but must provide some support to beneficiaries while also taking into account the interests of the general public. *See id.* at 22-24.

### **C. The Endangered Species Act.**

The federal Endangered Species Act, 16 U.S.C. §§ 1531–1544, prohibits any action by any entity, public or private, state or federal, which may result in the “taking” of a federally listed endangered species. 18 U.S.C. § 1538(a)(1)(B). “Take” means to

harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

An entity may lawfully take a species only pursuant to an incidental take permit. 16 U.S.C. § 1539(a)(1)(B). One required component of an incidental take permit is that the applicant for such a permit obtain approval of a Habitat Conservation Plan from the Secretary of the Interior. 16 U.S.C. § 1539(a)(2)(A). The HCP must specify the steps the permittee will take to minimize and mitigate the permittee's impacts on the listed species and its critical habitat. *Id.*

Before approving a proposed HCP, the federal agencies issue a formal "Biological Opinion" under the Endangered Species Act. 16 U.S.C. § 1536(a), (b). If, in the Biological Opinion, the agencies conclude that the HCP provides sufficient protection such that the proposed action "is not likely to jeopardize the continued existence" of listed species, then the

HCP will be approved and an incidental take permit issued. 16

U.S.C. § 1536(a)(2).

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

The USFWS listed the northern spotted owl as threatened in July 1990 and the marbled murrelet in October 1992. *See* 1997 HCP, AR 3309–3827, at AR 3342. At the same time the birds’ post-listing fate was being debated, it became increasingly apparent that several salmon species would also have to be listed under the Endangered Species Act. *See* 1997 HCP, at AR 3411 (“several [salmon] stocks in the HCP are candidates for federal listing”). Throughout the 1990s and early 2000s, multiple salmon species, steelhead, and bulltrout in Washington State were listed, including Columbia River and Puget Sound species (March 1999, 64 Fed. Reg. 14308, 14517, 14508; June 2005, 70 Fed. Reg. 37159; May 2007, 72 Fed. Reg. 26722).

Commercial logging can eliminate or diminish nesting, roosting, and foraging habitat for owls and murrelets, and lead to



increased peak flows and degradation of water quality and/or spawning habitat that harms protected fish.

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

In 1997, the U.S. Fish and Wildlife Service and National Marine Fisheries Service granted incidental take permits (ITP) to DNR under ESA Section 10, authorizing the harming or incidental take of threatened and endangered species during logging and associated forest management activities. In exchange, DNR must comply with the terms and conditions of DNR's "State Trust Lands Habitat Conservation Plan" (HCP). AR 3309–3827.

The HCP was accompanied by a Biological Opinion drafted by the consulting federal agencies, which found that, if the protections in the HCP are followed, DNR's forest management activities would not likely jeopardize the continued existence of listed species, including the spotted owl and marbled murrelet. AR 3849–4007, at AR 3983.

The 1997 HCP also includes a Multispecies Conservation Strategy that specifically directs DNR to provide suitable habitat for "unlisted animal species of concern and other unlisted animal species". The strategy names a total of 62 animal species of concern, but allows that other species are likely to be added to the list, because it is "difficult to predict which species are, or will be, at the brink of 'at risk.'" AR 3608.

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

Many of the unlisted species referenced in the Multispecies Conservation Strategy of the 1997 HCP are dependent on structurally complex forests. For example, the conservation of suitable breeding, foraging, and nesting habitat

for the northern goshawk, Vaux's swift, pileated woodpecker, myotis bats, Pacific fisher, and olive-sided flycatcher, are dependent upon the "large contiguous landscapes of mature and old growth forest" that the 1997 HCP is "expected" to provide. AR 3632-3643.

As a general measure of the 1997 HCP's efficacy in conserving habitat for listed and unlisted species, WDNR committed to, and USFWS assumed, eventual achievement of certain stand structure objectives. Broadly speaking, these objectives reflected percentages of certain age classes of trees across the landscape, including expected percentages of structurally complex and fully functional forests, that DNR and the US Fish and Wildlife Service (USFWS) identified as necessary for the protection of both listed and unlisted species. According to the Biological Opinion, "the HCP includes commitments to provide... certain percentages of stand structural classes from open forest to fully functional complex forests." AR 3856-3857. Achieving these stand structure

objectives was considered by the USFWS to be necessary to “ensure that the full range of upland forest habitats are available for use by species in the HCP area.” AR 3865. The stand structure objectives use age-class as a surrogate to represent the expected percentages of forest habitat that would likely exist after 100 years of WDNR’s implementation of the 1997 HCP. The objectives provide that 25 to 35 percent of the West-side planning units would be “structurally complex (> 70 years old) at year 100; and 10-15% of the West-side planning units would be at a “fully functional” ( $\geq$  150 years old) at year 100. AR 3654; 3260.

In its 1997 Biological Opinion, the USFWS projected that fully functional conifer forests, an older subset of structurally complex forests, would comprise a minimum of 12% of each HCP planning unit at least 150 years old by 2096. AR 3873.

In its Biological Opinion, USFWS clearly anticipated the stand structure objectives, including DNR’s objective to provide 10-15% fully functional forests by 2096 within each HCP

planning unit, as firm DNR commitments. These objectives are also repeatedly referred to as commitments in the 1997 HCP. *See, e.g.*, AR 3833 ("DNR commits to maintaining the conservation objectives described in Chapter IV of the HCP"); AR 3856-3857 ("the HCP includes commitments to provide... certain percentages of stand structural classes from open forest to fully functional complex forests"); AR 3865 ("DNR's commitment to obtaining stand structure objectives ensure a landscape that provides the full range of upland forest stand structures as habitat"); AR 3479 ("DNR's HCP conservation strategies include commitments to develop and maintain wildlife habitat (in this case, NRF habitat and dispersal habitat for the northern spotted owl) over time in designated amounts and areas."); AR 3655 ("The projections for year 70 will be a part of the U.S. Fish and Wildlife Service's evaluation of whether DNR has met the commitments of the HCP at year 70.").

Under its consideration of uncommon habitat conservation, the Biological Opinion clarifies that "DNR would

ensure that stand structural stages not provided by other conservation strategies of the HCP are present in the HCP area”; and that “timber harvest, road maintenance and construction, other commercial forest management related activities, and nontimber resource activities must be consistent with the goals and objectives of the HCP to develop and maintain these habitat types,” in particular, the specific “percentages of stand structural classes from open forest to fully functional forest” defined in the HCP. AR 3873; 3857.

The acceptance of the HCP and approval of DNR’s 1997 ITP by the US Fish and Wildlife Service was therefore conditioned in part on the assumption that the stand structure objectives, including the 10-15% fully functional stand structure objective, would be met by 2096.

The approval of that 1997 HCP gave DNR the right, upon a new ESA listing of a species covered by the agreement, to some incidental take of the newly listed species. The implementing agreement contained in the final 1997 HCP outlined the

procedure by which USFWS would modify WDNR's 1997 ITP. AR 3707-3726. The Implementation Agreement for the 1997 HCP (IA) requires USFWS to add newly listed species to the 1997 ITP upon WDNR's written request but does not require any additional findings or investigation on USFWS's part. Importantly, the effectiveness of the Multispecies Conservation Strategy of the HCP is measured by the stand structure objectives, which the IA refers to as "measurable criteria for the biological success of the HCP." AR 3714. Having found that the conservation strategies outlined in the 1997 HCP would provide adequate habitat to protect unlisted species, USFWS and DNR entered into an unlisted species agreement that was codified in the Implementation Agreement for the 1997 HCP.

The IA contractually bound the DNR to the commitments of the 1997 HCP, 1997 ITP, and the IA. One of these commitments is to "maintain[] conservation objectives described in Chapter IV of the HCP," including the stand structure objectives of the multi-species conservation plan. AR 3711. The

IA also commits DNR to the “conservation strategies afforded all habitat types,” including the Multispecies Conservation Strategy. These strategies contain “measurable criteria [that should be used to assess] . . . the biological success of the HCP,” such as the stand structure objectives under the Multispecies Conservation Strategy. AR 3714. Therefore, these stand structure objectives defined DNR’s commitments under the Multispecies Conservation Strategy, and were a part of USFWS’ analysis for negotiating and accepting the Multispecies Conservation Strategy.

The acceptance of DNR’s Spotted Owl Conservation Strategy by USFWS was also conditioned in part on the assumption that the stand structure objectives, displayed in Table IV.14 of the 1997 HCP, would be met by 2096. USFWS used these stand structure objectives to describe the anticipated distribution of northern spotted owl habitat across each planning unit (see Table 11, AR 3917). USFWS described DNR’s stand structure objectives, including its 10-15% fully functional stand



structure objective, as “overall spotted owl landscape commitments”. AR 3857. Thus the stand structure objectives defined, in part, DNR’s commitments under the Spotted Owl Conservation Strategy, and were a part of USFWS’ analysis for negotiating and accepting the Spotted Owl Conservation Strategy.

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

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

AR 3957 (emphasis added).

The Board adopted the HCP by resolution. AR 3310; 542–544.

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

In 2019, DNR, together with the US Fish and Wildlife Service, prepared a joint long-term conservation strategy (LTCS) for the marbled murrelet. The LTCS for the marbled murrelet amended the 1997 HCP, and constituted DNR's application for an amended incidental take permit. The 2019 HCP amendment is specific to the marbled murrelet, and does not affect the provisions of the spotted owl, riparian, or multispecies conservation strategies of the 1997 HCP, or excuse DNR from meeting its commitment to provide fully functional forests across at least 10-15% of forestlands within each HCP planning unit by the year 2096.

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

In 2006, DNR and the Board adopted a statewide forest management policy, its Bible called the Policy for Sustainable Forests. AR 12540–12609. The Policy for Sustainable Forests directs the management of 2.1 million acres of forested state trust

lands, including lands in the South Coast Planning Unit. The purpose of the Policy for Sustainable Forests is to “conserve and enhance the natural systems and resources of forested state trust lands managed by DNR to produce long-term, sustainable trust income, and environmental and other benefits for the people of Washington.” AR 12548. By its own rule and policy, DNR must manage its forests consistent with its federal HCP and Policy for Sustainable Forests. WAC 332-41-665 (1)(f); AR 3310, 542-44.

Forests in the fully functional and niche diversification stages of stand development are collectively referred to in the Policy for Sustainable Forests as “older-forests.” The Policy for Sustainable Forests is intended, in part, to implement the HCP, and ensure that the 10-15% fully functional stand structure objectives are met. The Policy for Sustainable Forests deviated somewhat from the HCP, in that the 10-15% fully functional stand structure objectives were modified to include forests in the

“niche diversification” stage of stand development and are referred to as “older forest.”<sup>1</sup>

Despite the change in nomenclature, the intended outcomes of the Policy for Sustainable Forests align with the HCP, and include “[c]onserving old growth and targeting other suitable structurally complex forests to meet a 10 percent to 15 percent older-forest target for each Western Washington HCP planning unit, over 70 years.” AR 12551.

The Policy for Sustainable Forests’ “General Silvicultural Strategy,” AR 12591–12592, provides as follows:

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

AR 12591.

---

<sup>1</sup> The reason for DNR’s change in terminology is not clear, and older forest in most if not all cases should have the same attributes as fully functional forest. Ultimately, the HCP requires attainment of 10 to 15 percent fully functional forest, and the Policy for Sustainable Forests cannot alter that requirement.

Similarly: “The department will target 10-15 percent of each Western Washington Habitat Conservation Plan planning unit for ‘older’ forests—based on structural characteristics—over time.” AR 12592.

Critically, the General Silvicultural Policy of the Policy for Sustainable Forests states 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 (emphasis added).

Under this rule, a “structurally complex” stand cannot be harvested until the 10-15% older-forest target is met.

The environmental impact statement (AR 12072–12539) that accompanied the Policy for Sustainable Forests and General Silvicultural Strategy expounds on this requirement to defer or delay harvest of structurally complex forests:

The Board’s Preferred Alternative builds on Alternative 2 by including the following: the

discussion for old growth has been moved to the Old-Growth Stands in Western Washington policy subject area; specifies how suitable older stands will be identified to help meet older-forest targets; emphasizes that the **10-15 percent older-forest targets** will be accomplished over time; and specifies that once older-forest targets are met (expected to take 70 years or more), structurally complex forest stands that are not needed to meet the targets may be considered for harvest activities.

AR 12283 (emphasis added).

The clear intent of the General Silvicultural Policy is to help restore old growth conditions across 10-15% of lands managed by DNR. Indeed, both the niche diversification and fully functional development stages are described in the 2007 Addendum to DNR's 2004 Sustainable Harvest FEIS as "old-growth like forests." AR 17540. DNR's guide to Identifying Mature and Old Forests indicates that the niche diversification stage of stand development is the "first stage of old-growth", and describes forests in the niche diversification stage of stand development as at least 210 years old. AR 1308.<sup>2</sup>

---

<sup>2</sup> The niche diversification stage of stand development is also

**E. PR-14-004-046 (“Identifying and Managing Structurally Complex Forests to Meet Older-Forest Targets (Westside) January 2007”).**

Achieving the 10 to 15 percent requirements of the HCP and Policy for Sustainable Forests requires detailed inventory and analysis. To accomplish its requirements and impose safeguards until they are met, DNR adopted PR-14-004-046, titled “Identifying and Managing Structurally Complex Forests to Meet Older Forest Targets (Westside) January 2007” (hereinafter “Identification and Management Procedure”). AR 1268-1270. This procedure is the applied mechanism for how DNR meets its legal requirements with respect to fully functional forest objectives in the Policy for Sustainable Forests.

The Identification and Management Procedure provides that:

The identification and review of landscape level management strategies to achieve the 10 to 15 percent older forest target will be completed during

---

referred to in DNR’s Guide to Identifying Mature and Old Forests as the “vertical diversification” development stage. A key to development stages is provided on page 103 of the guide (AR 1333).

the forest land planning process that will be conducted for each HCP planning unit. However, until that time, the following programmatic guidance to aid in identifying appropriate stands to manage to meet older forest targets must be followed.

Prior to development of a forest land plan, proposed harvest activities in FMUs that are considered structurally complex forests must be accompanied by the following information: a) an assessment of forest conditions using readily available information, b) an analysis of the known landscape management strategies and, c) role of the structurally complex stand in meeting older forest targets. For the actions listed below, the Land Management Division has sources of information it will make available.

AR 1269 (emphasis added).

The Identification and Management Procedure further establishes that:

If less than 10 percent of the HCP planning unit contains structurally complex forests prioritized to meet older forest targets based on the assessment, [DNR must] designate in a department lands database additional suitable structurally complex forest stands or acreage to equal 10 to 15 percent of the HCP planning unit managed for older forest targets. Once those stands designated as suitable constitute at least 10 percent of the HCP planning



unit, other (not otherwise withdrawn) stands are available for the full spectrum of timber harvests.

AR 1269-70. In other words, the Identification and Management Procedure confirms the direction from the Policy for Sustainable Forests, which is that DNR must first identify and protect sufficient structurally complex forest to meet its older-forest targets. Only after those stands are designated and protected, may DNR harvest other structurally complex forest.

“Structurally complex” forests include “fully functional, niche diversification, and botanically diverse stand development stages,” starting at botanically diverse stand development. AR 1298. “Stand structural complexity begins notably in the botanically diverse stage.” AR 1298. In practice, this means that structurally complex forests must be both relatively old and exhibit a degree of biological diversity that is typically achieved through natural regrowth and development (rather than plantation management).

DNR has not accomplished the requirements of PR-14-004-046. There is no record evidence of a forest land plan for the South Coast Planning Unit. DNR has not provided an assessment, analysis, or description of the role of structurally complex stands in meeting its 10-15 percent older-forest objective.

**F. The 2021 About Time Timber Sale.**

The About Time timber sale is located within the South Coast Planning Unit, approximately fifteen miles west of Oakville, WA, and would include the logging of approximately 75 acres of state-owned timber lands in Grays Harbor County. AR 489. Consistent with their respective roles in disposing of state-owned timber, DNR proposed the sale to the Board, who adopted it by resolution at the Board's meeting on September 7, 2021. AR 489–492 (DNR proposal); AR 460–468 (all ten timber sales considered at Sept. 7 meeting, incl. About Time, approved at AR 463).

DNR approved the About Time sale and purported to evaluate the environmental impacts of the sale pursuant to the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. SEPA requires the preparation of a SEPA checklist, a series of questions aimed at identifying possible environmental impacts of a proposal. DNR duly filled out the SEPA checklist. AR 709–735. The SEPA checklist was explicitly predicated on compliance with the HCP, and the Policy for Sustainable Forests, among other policy documents. AR 711. The SEPA checklist specifically noted that the About Timber harvest would be conducted in conformity with the HCP and Policy for Sustainable Forests, and summarily claimed (without any explanation or documentation) that, even in light of the About Time timber sale, “[t]he South Coast HCP Planning Unit will meet at least 10% older forest within conservation areas by 2100.” AR 714–715. Based on the answers in the SEPA checklist, DNR issued its determination that the About Time timber sale would not result in significant adverse impacts. AR

736 (“This decision was made after review of a completed environmental checklist and other information on file with the agency.”)

### **G. DNR’s Internal Analysis.**

In response to multiple complaints from the Center and others (*see, e.g.*, AR 1904-1926), DNR conducted an analysis of DNR’s progress toward achieving its fully functional or “older” forest targets. The results of the analysis were presented to the Board of Natural Resources by Mike Buffo on June 1, 2021. AR 402-406. The methods used to calculate anticipated percentages of older forest within each planning unit in Western Washington were described in detail in an internal DNR memo prepared by Allen Estep and Mike Buffo (the “Estep-Buffo memo”) in May of 2021, which the Center obtained through public disclosure. AR 1579–1592.

The Estep-Buffo memo provides critical information as to the current status of DNR forests. The memo candidly acknowledges that the South Coast Planning Unit today only has

(at most) 0.1% of forest land in “fully functional” status—at least 150 years old (Table 5, AR 1589); and that only 0.2% of forestlands within the South Coast planning unit can currently be described as protected older-forests.

Even if we accept the results of the Estep-Buffo analysis on their face, by the year 2100 (already four years past the Year 100 deadline of the 1997 Biological Opinion, and three years past the Year 100 deadline of the HCP), the memo predicts that DNR will only achieve 6.3% fully functional forests (> 150 years old) in the South Coast HCP planning unit. This is substantially less than the 10-15% fully functional forests at least 150 years old that DNR is committed to provide by 2096 under the terms of its HCP. The analysis clearly indicates that it is impossible for DNR to provide fully functional conifer forests over 150 years old across 10-15% of the South Coast HCP planning unit by 2096 unless additional structurally complex forests are excluded from commercial harvest.

The projections further confirm that the protections set forth in the Identification and Management Procedure for structurally complex forests apply in the South Coast planning unit.

The forest data provided in the Estep-Buffo memo is dispositive in this case because it demonstrates that DNR has not attained the forest conditions that are a prerequisite to logging the structurally complex forest stands contained in About Time. However, the Estep-Buffo memo analysis contains numerous deficiencies relating to its ultimate conclusion that DNR is on track to meet its obligations to provide 10-15% fully functional or “older” forests within the life of its HCP. Contrary to the HCP, and DNR Guidelines for Identifying Mature and Old Forests (AR 1271-1336), the Estep-Buffo memo assumes, without evidence, that tree plantations that were commercially logged and replanted as recently as 1977 are eligible to contribute to DNR’s 10-15% fully functional forest objective. To support this contention, Estep and Buffo provide an unreferenced table in the

memo that suggests that Douglas fir forests are capable of achieving maximum relative density in as little as 43 years; and that old-growth like conditions can be produced in such stands within 80 years of achieving maximum relative density. AR 1583; 1592. The authors refer the reader to Appendix F of DNR's 2019 Final Environmental Impact Statement (FEIS) on Alternatives for the Establishment of a Sustainable Harvest Level for more information. No information on relative density calculations, older forests, or fully functional forests is to be found in Appendix F of the FEIS. AR 17954-17978. As explained above, there is nothing in the record that supports DNR's contention that a forest that was clearcut and re-planted in the 1970's is capable of maturing into a fully functional old growth forest within the life of the HCP. To the contrary, the record indicates that a minimum of 150 years is required for a forest to enter the fully functional stage of stand development.

#### **H. About Time Stand Assessment.**

DNR approved the About Time timber sale in September 2021. After sale approval, in October 2021, DNR prepared a stand analysis for About Time that details the history and characteristics of the forest. AR 1042-46. The preparation is significant in that it confirms that DNR prepared no such analysis prior to project approval.

The analysis is also important because it observes that the logging area includes stands that are 84 years old, and that the site was at most only partially replanted, and was subject to disturbance from fire. AR 1045. The report provides that:

The stand is diverse in nature due to the timing of original harvest and the history of natural disturbances creating a mosaic of different stand types across the sale area. In the areas dominated by conifer, portions of the overstory are comprised of open grown Douglas-fir with some codominant western hemlock while others have hemlock higher percentage of western hemlock with some codominant Douglas-fir. The understory is made up of western hemlock and western red cedar and ranges between 10 - 30 feet in height in areas of recent wind-throw and upwards of 80 feet in other areas.



AR 1045. In other words, the stand has all the hallmarks of a structurally complex forest: it is relatively old, has a history of natural disturbance, a diverse mix of tree species and sizes, multiple canopy layers, and an abundance of standing dead trees. AR 17108-17109.

The report specifically concludes that “[a]fter reviewing Identifying Mature and Old Forests in Western Washington (2007 Van Pelt), About Time is in the Competitive Exclusion (pole exclusion) stage, Competitive Exclusion (large tree exclusion) and the Understory Development Stage which can also be considered botanically diverse.” AR 1046.

Under DNR’s policies and definitions, “botanically diverse” is one form of “structurally complex” forest. *See* AR 1268 (Identification and Management Procedure, defining structurally complex as including “fully functional, niche diversification, and botanically diverse stand development stages.”). Therefore, DNR concedes that “About Time” contains structurally complex forest conditions.

Other DNR documents demonstrate the value of the forest contained in *About Time*. DNR concluded in 2019 that the vast majority of forestlands covered under its HCP (86%) were within the “relatively low-value Competitive Exclusion stage” of stand development, while only 3% of forestlands were structurally complex. AR 17801; 17810. The amount of structurally complex forest appears to be declining. AR 1983-1984. Logging the *About Time* project, and similarly situated sales facing the same old forest issue, would carve a large hole out of the middle of one of the largest remaining (1,200 acre) blocks that contains structurally complex forest in Southwest Washington, fragmenting the forest habitat and threatening the viability of sensitive wildlife populations that reside there. AR 533. Because structurally complex forests comprise such a small percentage of DNR-managed lands, identifying and protecting these stands in compliance with DNR’s commitments would have limited overall impact on the agency’s ability to carry out logging across State lands.

## **IV. STANDARD OF REVIEW AND LEGAL BACKGROUND**

### **A. The Public Lands Act.**

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

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

RCW 79.02.030.

The statute provides that the court's hearing of the case "shall be de novo before the court, without a jury, upon the pleadings and papers so certified..." meaning closed-record review. *Id.* The statute does not specify what standard of review the court is to apply to the timber-sale decision, but the Court of Appeals has applied the standard of "arbitrary and capricious or

contrary to law” to leasing and sale decisions arising under the Public Lands Act. *See Nw. Alloys, Inc. v. Dep’t of Natural Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019).

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

## **B. SEPA.**

SEPA requires each governmental proposal that may significantly affect the quality of the environment to undergo an assessment of the proposal’s environmental impacts. The first step of the SEPA process is the “threshold determination.” RCW

43.21C.033; WAC 197-11-055(2). After evaluating the proposal and identifying the probable adverse impacts, the lead agency must issue a formal decision as to whether the proposal may cause significant adverse environmental impacts. All threshold determinations must be documented in one of two ways: either a determination of non-significance (DNS) or a determination of significance (DS). WAC 197-11-310(5). If the responsible official determines that the proposal will have no significant adverse environmental impacts, the lead agency shall prepare and issue a DNS per WAC 197-11-340. *Id.* If the responsible official determines that a proposal may have significant adverse environmental impacts, the lead agency shall prepare and issue a DS. WAC 197-11-360. The question for the threshold determination is whether adverse impacts may be probable—not that they are probable. WAC 197-11-360(1). *See also* WAC 197-11-330(4) (“If . . . the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.”) (emphasis added).

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

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

The threshold determination is the most consequential step in the SEPA process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with significant impacts.

*Norway Hill Preservation and Protection Association v. King County Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976).

As part of the threshold determination, the agency must consider “[c]onflict with local, state, or federal laws or requirements for the protection of the environment,” as evidence of significant impacts. WAC 197-11-330(e)(iii). While agencies may “tier” to programmatic SEPA review documents, the agency must document deviations from the expectations and impacts

described in those documents in consideration of the impact of the later proposal. WAC 197-11-600(3).

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

Ultimately, the threshold determination “must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns.” *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, \*32 (2016) (unpublished nonbinding authority per GR 14.1). “SEPA seeks to ensure that

environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are ‘rational and well documented.’” *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). This information must be adequate to demonstrate that the agency has taken the requisite “hard look” at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App 150, 158, 151 P.3d 1067 (2007).

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



that purpose, the information provided in the checklist must be detailed and complete. *Id.*; see also *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, \*32 (2016) (unpublished nonbinding authority per GR 14.1). Broad generalizations and rote answers in a checklist are condemned as improper. *Id.*

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

“The purpose of the broad scope of review is to ensure that an agency, in considering the need for an [environmental impact statement], does not yield to the temptation of expediency thus

short-circuiting the thoughtful decision-making process contemplated by SEPA.” *Id.* at 700–701.

### **C. Standard of Review on Appeal.**

The Court of Appeals stands in the same position as the superior court when reviewing an administrative decision. *Swoboda v. Town of La Conner*, 97 Wash. App. 613, 617, 987 P.2d 103 (1999).

## **V. ARGUMENT**

DNR’s approval of the About Time timber sale violates the Public Lands Act because DNR failed to comply with the Identification and Management Procedure, the Policy for Sustainable Forests, and the Habitat Conservation Plan. DNR also failed to provide a rational explanation for its deviation from the applicable laws and policies, which renders its decision arbitrary and capricious.

The associated determination of non-significance for the About Time sale violates SEPA, because the logging of rare structurally complex forests in the South Coast planning unit has

significant environmental impacts, and because DNR failed to disclose conflicts with laws and policies governing protection of the environment. DNR improperly tiered to prior environmental review documents for the Habitat Conservation Plan and Policy for Sustainable Forests, without disclosing deviation from the expectations set forth in those documents.

**A. DNR’s Approval of About Time Violates the Public Lands Act Because It is Inconsistent with the Forest Identification and Management Procedure, the Policy for Sustainable Forests, and the HCP.**

The Public Lands Act requires DNR to administer the public lands “in the best interests of the state and the general welfare of the citizens thereof, and ... consistent with the applicable provisions of the various lands involved.” RCW 79.10.100. Consistent with this requirement, DNR’s and the Board’s regulations provide that “[d]epartment policies for the sale of timber from public lands are found under DNR’s habitat conservation plans, any amendments to DNR’s habitat conservation plans, or in the Policy for Sustainable Forests

adopted in 2006 and any future updates to the policy.” WAC 332-41-665(1)(f).

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

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

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

desired vegetation conditions in the short or long-term.

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

The court ruled for plaintiffs, observing that the agency’s argument was “facially inconsistent with the Plan, which acknowledges historic presence of both large tree size class and old growth in virtually all of the PVGs, and mandates specific percentage of large tree size class on each PVG.” *Id.* at 1117. Accordingly, the court held that the agency did not consider the relevant factors, did not articulate a rational connection between the facts found and the choice made, and thus the decision was arbitrary and capricious. *Id.* (citing *Pyramid Lake Paiute*

*Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)).

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

DNR's approval of "About Time" effectively redefined the agency's requirements, by not identifying the stands as structurally complex, not protecting those stands, and not attaining the 10-15 percent targets of the Policy for Sustainable Forests and HCP. As in *Alliance for the Wild Rockies*, DNR's approval was "facially inconsistent" with its legal commitments and procedures, and thus was arbitrary and capricious. *Id.* at 1117; *see also Puget Sound Harvesters Ass'n*, 157 Wn. App. at 950.

**1. Approval of About Time Departs from the Identification and Management Policy Without Basis.**

The Identification and Management Policy is an important tool adopted by DNR to facilitate compliance with the Policy for Sustainable Forests and HCP. The precautionary approach set forth in the Identification and Management Procedure is necessary because the fully functional forests required by the HCP and older-forest required by the Policy for Sustainable Forests take more than 100 years to grow. Once structurally complex forests are logged, they will not provide fully functional forest habitat within the life of the HCP.

The Identification and Management Procedure sets forth mandatory steps that DNR “must” undertake relative to structurally complex forests. AR 1269. It specifically directs DNR to “identify suitable structurally complex forest stands to be managed to help meet older-forest targets.” AR 1268. DNR estimates that structurally complex forests currently represent only about 3% of all forests managed by DNR in Western

Washington. AR 17800-17801; 17810. Protection of structurally complex forests, such as About Time, is therefore critical to meeting fully functional forest objectives. Yet DNR has failed to produce information on the locations of any specific, structurally complex stands that have been identified to help meet older-forest targets, despite multiple requests to DNR's Public Disclosure Office for this information (AR 18124-18127). There is no record evidence that DNR ever identified or mapped structurally complex forest or older-forest.

DNR's own stand report acknowledges that stands in the About Time timber sale would harvest structurally complex forest, because they are botanically diverse, approximately 84 years old, at least partially developed from natural regrowth, contain an abundance of large standing dead trees, and have a history of natural disturbance. AR 1046.

There is no record evidence of a forest land plan setting forth a strategy for the South Coast planning unit to meet its 10 to 15 percent commitments. Such a plan does not appear to exist



and there are no indications that DNR has any intention to complete such a plan. As a result, “proposed harvest activities...must be accompanied by the following information: a) an assessment of forest conditions using readily available information, b) an analysis of the known landscape management strategies and, c) role of the structurally complex stand in meeting older forest targets.” None of this information was generated or provided to the public or to the Board of Natural Resources prior to approval of About Time.

The Identification and Management Procedure further mandates that if “less than 10 percent of the HCP planning unit contains structurally complex forests prioritized to meet older forest targets based on the assessment, [DNR must] designate in a department lands database additional suitable structurally complex forest stands or acreage to equal 10 to 15 percent of the HCP planning unit managed for older forest targets.” AR 1269-70. The Estep-Buffo memo indicates that less than 10 percent of the South Coast planning unit contains structurally complex

forests, and there is no record evidence that DNR has prioritized any such forests to meet older forest targets. Again, there is also no evidence that DNR has conducted such a designation of structurally complex forests.

Finally, the Identification and Management Procedure states that “[o]nce those stands designated as suitable constitute at least 10 percent of the HCP planning unit, other (not otherwise withdrawn) stands are available for the full spectrum of timber harvests.” AR 1270. DNR has prepared no such designation and has not attained at least 10 percent designated forests. Because no such designation has occurred, structurally complex stands such as those in About Time are not “available for the full spectrum of timber harvests.” Yet that is exactly what DNR approved in the About Time sale.

In sum, DNR has failed to carry out each and every requirement of the Identification and Management Procedure. Given the severe lack of structurally complex and older-forest in the South Coast planning unit, the Identification and

Management Procedure required retention of the structurally complex forest in About Time. DNR plainly violated the Identification and Management Procedure requirements, rendering its decision arbitrary and capricious.

While DNR may argue that the procedures set forth are merely internal policy, it is well-established that deviation from agency procedures without rational basis constitutes arbitrary and capricious decisionmaking. If the agency “announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion.’” *Ins v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996); *accord Puget Sound Harvesters Ass’n*, 157 Wash. App. at 950; *Alliance for the Wild Rockies*, 907 F.3d at 1117; *Roskelley v. Wash. State Parks & Recreation Comm’n*, Civ. No. 48423-4-II, 2017 Wash. App.

LEXIS 747, at \*29 (Mar. 28, 2017) (unpublished opinion not cited as binding authority per GR 14.1).

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

## **2. Approval of About Time violates the Policy for Sustainable Forests.**

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

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

AR 12591.

Similarly:

The department will target 10-15 percent of each Western Washington Habitat Conservation Plan

planning unit for ‘older’ forests – based on structural characteristics – over time.

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 (emphasis added).

The older-forest targets for each of the six planning areas in Western Washington were a foundational aspect of the Policy for Sustainable Forests. The Final Environmental Impact Statement (AR 12072–12539) that accompanied the Policy for Sustainable Forests and General Silvicultural Strategy expounds on this point. AR 12283. DNR’s commitment in the Policy for Sustainable Forests is implemented in part through the Identification and Management Policy, discussed *supra*.

In sum, the Policy for Sustainable Forests requires DNR to achieve 10 to 15 percent “older-forest” by the year 2096 (70 to 100 years after the adoption of the HCP) in each of the six

planning units, and it cannot log structurally complex forests until it meets these thresholds. This sequence makes sense, because if DNR has not achieved older-forest targets, the only way to achieve them within the anticipated timeframe is to allow structurally complex forests to grow into older forests. Logging those structurally complex forests, like About Time, when there are so few structurally complex forests remaining, only dooms the agency to non-compliance.

As set forth *supra*, stands in About Time are structurally complex. As a result, they may only be logged under the Policy for Sustainable Forests once older-forest targets are met. AR 12592.

DNR has not met its older-forest targets. AR 1588. According to the Estep-Buffo memo, the South Coast Planning Unit (where About Time is located) is only at 0.1-0.2% older-forest, the worst in the state.

Given that DNR without question has not met the 10-15% older-forest target and is far off track from doing so, under the

Policy for Sustainable Forests it may not log structurally complex forests, such as those within About Time. This understanding is confirmed by the Identification and Management Policy, which was put into place shortly after the Policy for Sustainable Forests.

Approval of About Time violates the Policy for Sustainable Forests' protections for structurally complex forests, and thus violates the Public Lands Act.

### **3. Approval of About Time violates the State Trust Lands HCP and the Public Lands Act.**

The HCP, which is based on and is supported by a formal Biological Opinion, includes a commitment to provide fully functional forests at least 150 years old across 10-15% of each HCP planning unit, as discussed above. Table IV.14, AR 3654. DNR is required to achieve this target by Year 100 of the HCP, meaning the year 2096. Compliance with the targets in Table IV.14 is mandatory, as explained above.

It is evident, based on a review of DNR's annual HCP implementation reports, that the fully functional stand structure

objectives of the HCP have been ignored by DNR. Between 1998 and 2013, land that was sold or acquired by DNR was routinely classified by age class as open (0-10 yrs old), regeneration (11-20 yrs old), pole (21-40 yrs old), closed (41-70 yrs old), complex (71-150 yrs old), or functional (over 150 yrs old). This tends to reinforce DNR's reliance on an age-based system for classifying stands by development stage. However, there is no mention at all of DNR's older forest or fully functional stand structure objectives between 2009 and 2020, and no indication of how close DNR is to meeting its older forest or fully functional stand structure targets, in any annual report that was published by DNR between 1998 and 2020. AR 9432-11777. The only reference to fully functional forests in any of the annual reports published between 2014 and 2020 is in the glossary, where fully functional is described as a desired future condition for riparian management zones. This constitutes a violation of DNR's commitment to monitor its progress toward meeting stand structure objectives, as described in the HCP. AR 3655.



DNR is planning to log structurally complex forests throughout Western Washington for commercial harvest, many of which are close to 100 years old. (*See, e.g.* AR 1660-1669; 1689-1710; 1711-1717; 1740-1752; 1759-1767; 1888-1890; 1904-1926; 1989-2003; 2004-2007; 2028-2036; 2037-2049). DNR's own analysis indicates that that DNR is well behind in meeting its older forest and fully functional stand structure objectives, and will not meet these objectives within the life of the HCP, unless additional structurally complex and other forests are excluded from commercial harvest. Table 5, AR 1589.

About Time includes forests that are 84 years old (AR 1045) and will be 160 years old by 2096. The continued commercial harvest of structurally complex forests, such as those found in About Time, that are clearly capable of helping DNR to meet the fully functional forest objectives of the HCP, constitutes a violation of DNR's 1997 ITP, which incorporates the terms and conditions of the HCP and 1997 Biological Opinion by reference.

The loss of these structurally complex forests, including those in About Time, will contribute to the South Coast Planning Unit failing to meet the 10-15% fully functional stand structure target.

DNR's deviation from its HCP violates the Public Lands Act and renders the approval of About Time arbitrary and capricious.

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

Under SEPA, DNR was required to disclose, and consider as part of its threshold determination, "conflict with local, state, or federal laws or requirements for the protection of the environment." WAC 197-11-330(e)(iii). SEPA also forbids DNR from relying on existing environmental analysis where it departs from the assumptions in that analysis. WAC 197-11-600(3).

Approval of About Time violates the Identification and Management Procedure, Policy for Sustainable Forests, and the HCP, yet DNR did not disclose that conflict. Instead, DNR asserted compliance with the Policy for Sustainable Forests and HCP, and relied on those programmatic documents and their environmental review as mitigation supporting the determination of non-significance. AR 714-15. This determination was clearly erroneous.

The threshold determination must take into account the “context and intensity” of the impact to determine whether it is significant, which varies based on physical setting. WAC 197-11-794(2). “‘Significant’ as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” As detailed in comments submitted to the Board by the Center, the low-elevation, old, structurally complex forests contained within the About Time timber sale are located in the middle of a much larger, 1,200-acre block of natural forest. This large, largely unplanted, native forest has the

potential to play a critical role in preserving the genetic, biological, and ecological legacies of the upper Chehalis River watershed; and DNR plans to commercially harvest virtually all of the trees within this 1,200-acre forest in the near future. AR 536; 534-535.

Moreover, these forests are uniquely important because they are essential to help DNR comply with its commitments under the Policy for Sustainable Forests and HCP to provide 10-15% fully functional or older-forests in the South Coast planning unit by 2096.

The determination of non-significance was therefore clearly erroneous.

### **C. Costs and Fees.**

The Center respectfully requests to defer briefing on the issues relating to costs and attorneys' fees until after a ruling on the merits.

## **VI. CONCLUSION**

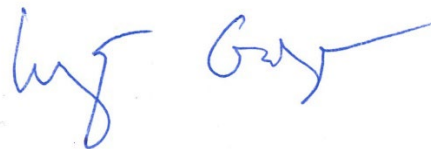
For all the reasons set forth herein, Appellant respectfully requests that the Court declare that approval of About Time violated the Public Lands Act, the State Environmental Policy Act, and was arbitrary, capricious, and contrary to law.

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 9,721.

Dated this 25th day of July, 2022.

Respectfully submitted,

ZIONTZ CHESTNUT

A handwritten signature in blue ink, appearing to read "Wyatt Golding", is written over a horizontal line.

---

Wyatt Golding, WSBA #44412  
2101 4<sup>th</sup> Avenue, Suite 1230  
Seattle, WA 98121  
wgolding@ziontzchestnut.com  
Ph: 206-448-1230  
Fax: 206-448-0963

WASHINGTON FOREST LAW  
CENTER



---

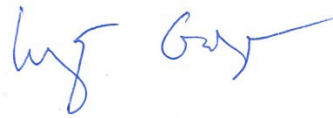
Peter Goldman, WSBA No. 14789  
4132 California Ave SW  
Seattle, WA 98116-4102  
Telephone: 206-223-4088  
pgoldman@wflc.org

*Attorneys for Center for Responsible  
Forestry*

**DECLARATION OF DOCUMENT FILING AND  
SERVICE**

I, WYATT GOLDING, STATE THAT ON THE 25th DAY OF JULY 2022, I CAUSED THE ORIGINAL APPELLANTS' OPENING BRIEF 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 25TH DAY OF JULY, 2022.



---

Wyatt Golding

**ZIONTZ CHESTNUT**

**July 25, 2022 - 4:52 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

**The following documents have been uploaded:**

- 569647\_Briefs\_20220725165117D2030208\_0210.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Final C4RF Brief 7.25.22 for filing.pdf*

**A copy of the uploaded files will be sent to:**

- RESOlyEF@atg.wa.gov
- cgriffith@hk-law.com
- kiera.miller@atg.wa.gov
- lbartholet@ziontzchestnut.com
- martha.wehling@atg.wa.gov
- pgoldman@wflc.org
- tkaps@wflc.org
- weis@hk-law.com

**Comments:**

---

Sender Name: Wyatt Golding - Email: wgolding@ziontzchestnut.com  
Address:  
2101 4TH AVENUE  
SUITE 1230  
SEATTLE, WA, 98121-2323  
Phone: 206-448-1230

**Note: The Filing Id is 20220725165117D2030208**