IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CENTER FOR RESPONSIBLE FORESTRY, *Appellant*, v. WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, BOARD OF NATURAL RESOURCES, and COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, in her official capacity, *Respondents,* and MURPHY COMPANY, DBA MURPHY COMPANY OF OREGON, *Intervenor*.	No. 569647-II

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In the opening brief, Appellants, the Center for Responsible Forestry ("Center"), explained that the Board of Natural Resources and Department of Natural Resources (collectively "DNR") made repeated, important commitments to restore areas of old growth like conditions in Western Washington, and that the agency has abdicated those commitments by approving logging stands of structurally complex forest—a class of rare future old growth specifically identified for protection—in the About Time timber sale. DNR's deviation from its binding commitments without rationale renders the approval of About Time arbitrary and capricious and contrary to law.

The Policy for Sustainable Forests and the State Trust Lands Habitat Conservation Plan both commit DNR to restore old growth like conditions on at least 10 percent of the DNR-managed landscape in each planning unit in Western Washington. Specifically, the commitment is to grow and

protect 10 to 15 percent of "older forests" and "fully functional forests" in each planning unit.

As the parties agree, forest management is complex. That is why in 2007 DNR developed and approved the "Identification and Management Procedure" as a detailed mechanism to implement older forest and fully functional forest commitments. The Procedure lays out a step-by-step plan, which entails identifying existing structurally complex forest stands that will grow into older forests, designating those forests in a mapping database, and protecting them from logging until the planning area's forest goals are met.

In approving About Time, DNR completely disregarded the Identification and Management Procedure and its related commitments. It never identified structurally complex forests, never mapped them, never designated them in a database, and never protected them. This violated the Procedure and led to violations of the Policy for Sustainable Forests and HCP. Other than through speculation, there is no plan to meet the

requirements to restore and protect 10 to 15 percent older forests and fully functional forests in each planning unit. In response, DNR cannot show in the administrative record where structurally complex forests are identified and designated—because such plans do not exist.

DNR's lack of compliance with its Procedure is significant because the analysis that has been conducted illustrates that the agency is very far from its requirements. In the South Coast planning unit, where About Time is located, DNR currently has only **between 0.1 and 0.2 percent** older forest, and will not reach even 1 percent until 2070. This shortfall, coupled with DNR's continued, aggressive commercial logging of structurally complex forests, means that absent correction from this Court it will only become more difficult for the agency to fulfill its commitments to the public to restore areas of old growth conditions.

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II. RESTATEMENT OF FACTS

DNR asserts that the Center seeks to stop all logging across huge swaths of land, prevent millions of dollars of timber revenue, or requests that the agency exercise its discretion to stop lawful logging. *See, e.g.*, DNR Resp. at 40-41. These assertions are inaccurate. The Center's claims in this suit focus on a narrow outcome: to invalidate a timber sale because DNR has not complied with its procedures, policies, and legal commitments with respect to certain classes of protected old forests. Adherence to those policies would only affect those stands which currently qualify as structurally complex or older forest, which represent a very small fraction of DNR's forested land base and which DNR has already committed to protect and restore. AR 1268, 12551, 12591-12592.

DNR emphasizes that it already protects 50 percent of its managed forests under its federal HCP. *See, e.g.*, DNR Resp. at 38. This assertion is both immaterial to the resolution of this case and subject to several important nuances. First, the asserted

protections are not specific to attaining forest conditions, and they feature varied levels of protections for other objectives (such as limiting logging on unstable slopes or in riparian buffers). Many of the "protected" areas will not attain old growth like status within the life of the HCP. AR 1579-1592.

Second, the alleged protected areas are concentrated within the North Puget Sound HCP planning unit, and the Olympic Experimental State Forest (OESF). Other planning units (such as the South Coast HCP planning unit) have fewer protections and are subject to more extensive logging. The policies at issue require protections in each planning unit, and the intent of the Policy for Sustainable Forests is to ensure "conservation of biodiversity across forested landscapes." AR 12550-12551, 12580-12581.

Third, DNR's records concede that many of the protections "are not permanent designations," but based on initial mapping assessments of areas that are subsequently released "as

specific forest stands or sites are re-evaluated" for logging. AR 1548.

III. ARGUMENT

DNR's deviation from its commitments to protect structurally complex forest and restore older and fully functional forests without reasoned explanation renders the approval of About Time arbitrary and capricious and contrary to law.

A. DNR's Deviation from the Identification and Management Procedure is Arbitrary and Capricious.

The Identification and Management Procedure is the mechanism DNR developed to ensure compliance with the Policy for Sustainable Forests and its related State Trust Lands HCP. It requires careful and detailed identification and designation of structurally complex forests, such as those present in About Time, in order to meet older forest and fully functional forest requirements and to restore old growth like conditions. DNR completely ignored the Procedure, and never identified, mapped, designated, or protected structurally complex forests as

required. This deviation without explanation from agency policy was arbitrary and capricious.

1. The Procedure is a binding plan, and deviation from it without justification or documentation demonstrates arbitrary and capricious decisionmaking.

DNR adopted the Identification and Management Procedure to enable it to plan for where and how structurally complex forests will grow over time into older forests and fully functional forests. AR 1268-70. The Procedure expressly implements the older forest requirement of the Policy for Sustainable Forests, and by association, the State Trust Lands HCP. AR 1268-69. DNR may only deviate from its requirements if the Land Management Division Manager approves "variances to this procedure." AR 1270.

The Procedure applies to structurally complex forests. DNR's own stand report concedes that at least part of the About Time timber sale consists of botanically diverse, 84-year-old structurally complex forest. AR 1046. In response briefing,

DNR refers to the sale as "75 acres of previously harvested, second-growth timber," without addressing or rebutting the record evidence. *See* DNR Resp. Br. at 41-42. Stands within About Time qualify as structurally complex, and the Identification and Management Procedure applies here.

In response briefing, DNR states that "[t]he internal guidance provides direction to staff to ensure individual timber sales are consistent with all policies and governing laws, but the internal procedures cannot deviate from the Board-adopted policies." DNR Br. at 28. DNR staff explain that the Identification and Management Procedure "restates" and implements the Policy for Sustainable Forests. AR 1580. Given the linkage between the Procedure and the Policy for Sustainable Forests, the Procedure is essential to implement the Board's policy.

In response, DNR mistakenly asserts that the Center seeks to enforce the Identification and Management Procedure. This is a mischaracterization. The Center argues that DNR's approval

fails to establish a rational connection between the facts found and conclusions made because the agency deviated from its approved, internally binding policy without reasoned explanation. *See* Opening Br. at 52-53 (citing *Ins v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996); *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)).

In *Esses Daman Family, LLC v. Pollution Control Hr'gs Bd.*, No. 76016-5-I, 2017 Wash. App. LEXIS 1936, at *19 (Aug. 14, 2017) (unpublished and thus persuasive authority under GR 14.1) the court considered the Pollution Control Hearings' Board's application of the Forest Practices Board Manual to the approval of a logging permit. The Manual, like the Identification and Management Procedure here, is a non-regulatory guidance document which provides the presumptive means of complying with applicable law and policy. WAC 222-12-090 ("the manual

serves as an advisory technical supplement to these forest practices rules"). The court ruled that misinterpretation and misapplication of the text of the Manual without a reasoned basis constituted legal error. *Id.* at *19. This rationale applies here.

It is well settled that "an agency action is arbitrary and capricious when it is willful and unreasoning and taken without regard to the facts and circumstances." *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998); *see also Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). An agency action which departs from internal direction without explanation thus is arbitrary and capricious. *Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish and Wildlife*, 157 Wash. App. 935, 950, 239 P.3d 1140 (2010).

DNR questions the Center's reliance on *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, (9th Cir. 2018), in which the court invalidated a logging plan for deviating from the agency's guidelines and plans relating to old growth

forests. DNR argues that the case is distinguishable because "[t]he federal code at issue in *Alliance for the Wild Rockies* required federal agency action to be consistent with adopted land management plans." DNR Resp. at 31-32.

DNR misreads the case. The Ninth Circuit found both that the Forest Service's redefinition of old growth protections was contrary to the plan at issue (and thus violated the statute), and that it was arbitrary and capricious. *All. for the Wild Rockies*, 907 F.3d at 1117. Indeed, the Ninth Circuit held with respect to deviation from a related non-binding guideline: "we conclude that the elimination of the existing guideline was contrary to the 2003 Plan in violation of the NFMA, *see* 16 U.S.C. § 1604(i)…**and** the Forest Service's failure to articulate a satisfactory explanation for the elimination of Fire Guideline 0313 was arbitrary and capricious." *Id.* at 114 (emphasis added).

DNR also ignores that the Identification and Management Procedure implements the Policy for Sustainable Forests. 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, AR 542-44.

2. DNR deviated from the Identification and Management Procedure to approve the About Time timber sale without basis.

The Identification and Management Procedure envisions that DNR would create a detailed forest land plan for each HCP planning unit, plans that would identify and map structurally complex forest stands that are designated to grow into older forest. AR 1268. This is a key component of Policy for Sustainable Forest and HCP compliance. However, DNR made no attempt to create a forest land plan for the South Coast planning unit, and 15 years after adoption of the Identification and Management Procedure, no such plan exists. *See* DNR Resp. at 33 ("The Center correctly states that DNR has not developed a 'forest land plan' for the South Coast Planning Unit.").

Absent a forest land plan, the Procedure provides discussion of an alternative series of steps and required "Action" items to implement prior to authorizing logging of structurally

complex forest. AR 1269. The steps, and DNR's deviations from those steps, are as follows.

The first action step requires that DNR "[i]dentify acres of existing structurally complex stands managed for older forest conditions." AR 1269. There is no record evidence that DNR has ever identified such acres to manage for older forest conditions. In response briefing, DNR simply asserts without basis that "DNR has done that in the conservation areas." DNR Resp. at 35. DNR lists six citations for protections for listed species and features. These citations have no actual relationship to structural complexity or older forest conditions. The first two citations are to maps without identification of any forest condition or acreage. *See* AR 1048, 1050. The third citation relates to northern spotted owl protections in the Olympic Experimental State Forest, which is irrelevant. *See* AR 1387-89. The fourth and fifth citations are generic definitions of long-term forest cover, with no reference to the South Coast planning unit

or structurally complex forests. AR 9387, AR 1581. The sixth citation simply lists types of conservation strategies. AR 11787.

This scattershot of records confirms that DNR has never identified or designated "acres of existing structurally complex stands managed for older forest conditions," as required by the Identification and Management Procedures, and likewise never considered such acreage as part of the approval of About Time. Backfilling with after the fact reference to at best tangentially related records does not constitute reasoned decision making. *See Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891, 903 (2007). "Courts do not accept appellate counsel's post-hoc rationalizations for agency action." *Nat. Res. Def. Council v. Env't Prot. Agency*, 31 F.4th 1203, 1207 (9th Cir. 2022) (citation omitted).

The second action step dictates that "[i]f 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." Again, there is no record evidence that DNR has ever conducted such an assessment or designated structurally complex stands in a department lands database.

In response briefing, DNR asserts without citation that "that acreage exceeds 10 percent of the South Coast Planning Unit." DNR Resp. at 35. This assertion, aside from being unsubstantiated, simply assumes that any protected acres are structurally complex, when in fact such forest conditions are quite rare. Indeed, in 2019 DNR concluded that only 3% of forestlands overall were structurally complex. AR 17801, 17810. The South Coast planning unit has been subject to more extensive logging than other areas. *See* AR 1589.

The third action step requires that only after such a designation of suitable structurally complex forests is made, and "[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." Here, no designation was made, and as a result "other (not otherwise withdrawn) stands" in About Time are not "available for a full spectrum of timber harvest." Nonetheless DNR approved the sale, with no explanation for its deviation from the Identification and Management Procedure.

The Procedure requires public accountability: all the information above "should be included in the State Environmental Policy Act (SEPA) checklist for the proposed harvest activity for public review." AR 1269-70. The information required was never developed, and thus not included in the SEPA checklist.[1]

3. The Center properly raised DNR's violation of the Identification and Management Procedure.

DNR argues that "[t]he Center's dilatory challenge to DNR's compliance with the 2007 Procedure is procedurally

[1] This lack of disclosure also violates SEPA. WAC 197-11-330(e)(iii).

defective because the Center waived its challenge by failing to address the 2007 Procedure in the superior court." DNR Resp. at 29; *see also* Murphy Br. at 21.

These arguments fail because the Center **did** raise arguments concerning the Identification and Management Procedures below, both substantively in the opening brief, and expressly in both the notice of appeal and the reply brief. *See* CP 88 and CP 103-106 (opening brief), CP 756 (reply brief). The trial court considered and ruled on the issue. *See* DNR Resp., App. 2 (Superior Court order) at 3 ("Respondents complied with the procedural requirements for the About Time, Bluehorse, and Prospero timber sales."). RAP 2.5(a) and the cases that DNR cites are inapplicable, because each involve issues that were not addressed in briefing or argument below.

In the opening brief before the superior court, the Center repeatedly raised as its core argument that DNR did not assess, map, or protect structurally complex forest—the requirements described in the Identification and Management Procedures. CP

88, 103-106. The Center further argued that under the Policy for Sustainable Forests' General Silvicultural Strategy (which in relevant part is repeated in the Identification and Management Procedure), DNR may not log structurally complex forest until the older forest requirement is met. Thus, even if not identified by name, the issues were substantively raised.

In the response brief in superior court, Murphy Co. responded with argument concerning the designation of structurally complex forest. CP 133-34. DNR asserted that, because the Center had not specifically named the Procedure, any challenge related to those Procedure was waived. CP 223 n. 11. But on reply the Center explicitly identified the Procedure and their linkage to the Policy for Sustainable Forest. CP 756. The Center then argued that "the About Time sale has not undergone review consistent with policy PR 14-004-046," the Identification and Management Procedure, and that this "constitutes a violation of DNR' s policy." CP 758. Neither DNR nor Murphy Co. sought to file a surreply or moved to strike.

The superior court considered all arguments presented and ruled against the Center on the merits. CP 965. This issue was properly presented to this Court.

Furthermore, RAP 2.5(a) only indicates that it "is a discretionary decision to refuse review." *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604, 606 (2011). Equity favors consideration here. The Center clearly raised the issue to DNR in written comments submitted prior to that agency decision, AR 744-746, 537, and it was fully presented and decided before the trial court. This Court engages in *de novo* review. Given the close linkage between the issues presented, DNR's awareness of the Center's concerns prior to the appealed decision, and that the Procedure is addressed below, it is equitable for the Court to consider the Center's arguments.

B. DNR's Approval of About Time Violates the Policy for Sustainable Forests.

The Policy for Sustainable Forests requires that DNR "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." AR 12591. The Policy further requires that "[t]hrough 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).

As set forth *supra*, DNR never completed the referenced landscape assessments and never identified suitable structurally complex stands to meet older-forest targets. DNR thus has not conducted the planning steps required by the Policy for Sustainable Forests.

DNR also has not met the older-forest targets. The internal Estep-Buffo memo, a desktop analysis conducted shortly before approval of About Time, sets forth two classifications for older forest. Those classifications are one based on asserted

stand characteristics of un-mapped older forests (Table 2), and age of 150 years or more (Table 5). Under either method, DNR is far from its requirements. Table 2 indicates that the South Coast planning unit contains 0.2 percent older forest, while Table 5 indicates that the South Coast planning unit contains 0.1 percent older forest. AR 1589. Either metric is extraordinarily far from complying with the older forest target minimum of ten percent. Because older-forest targets are not met, structurally complex forest stands such as those present in About Time may not "be considered for harvest activities." AR 12592. According to a plain text understanding of the Policy for Sustainable Forests and DNR's own analysis, logging of About Time violates the Policy's older forest requirements.

In response, DNR argues that it will meet the older forest requirements decades from now, based on unsubstantiated projections and a redefined classification of those forests. DNR Resp. at 38. DNR also asserts that fully functioning forest can

be as young as 80-90 years old, *see* DNR Resp. at 11-12, and that DNR will meet these targets by the year 2100. *Id.*

There are numerous flaws in DNR's argument. First, it conflicts with the plain text of the Policy, which requires identification and designation of structurally complex forests and achievement of older forest targets as conditions precedent to logging structurally complex stands. AR 12592. The plain text of the Policy is unambiguous and controls, and the Court need not defer to DNR's unprecedented rereading of that text. *See Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992); *Esses Daman Family*, 2017 Wash. App. LEXIS 1936, at *11.

Second, DNR has no plan to meet its older forest targets, and so cannot plausibly rely on an optimistic unsubstantiated projection of meeting them in the future. The cursory Estep-Buffo memo, prepared in May 2021 only after comments from the Center, strongly evidences that DNR never considered or planned how to meet its older forest requirements for the fifteen

years after the adoption of the Policy for Sustainable Forests in 2006. The Center detailed flaws in the Estep-Buffo memo to DNR, which the agency has never addressed. AR 1984-1986, 532-541.

DNR asserts that "active management" can "create older forest structural conditions in younger aged forests," *see* DNR Resp. at 11, but the Estep-Buffo memo states that only 4,000 acres, or 0.25% DNR managed forest lands, will be actively managed to accelerate the development of older forest characteristics. AR 1587.

While the Center agrees that stand characteristics ultimately determine forest classification, older forests are in fact "older," and require time to develop requisite stand structure and complexity. The Estep-Buffo memo dismisses all contrary reports and plans without explanation (AR 1581); appears to suggest that forests 90 to 115 years old may have older forest conditions (AR 1584); provides no basis for the assumptions; and never explains how it derives the figures contained in Table 2.

The memo contains no identification or designation of structurally complex forests that will become older forest over time, includes no maps of structurally complex or older forests, and has no plan to get to the targets. DNR has simply redefined its terminology such that it appears that nearly any forest currently alive is assumed to be "older forest" by 2100. The memo's unexplained analysis does not demonstrate compliance with the Policy for Sustainable Forests.

While age is an imperfect metric, it has the benefit of providing a discrete measurement. In past policies, DNR has described older forest as having old growth like conditions. Indeed, both the niche diversification and fully functional development stages (the two characteristics of older forests) are described 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 are at least 210 years old. AR 1308. DNR elsewhere suggests that 220 years is normally required to achieve fully functional forests. *See* DNR

Resp. at 11-12. These repeated descriptions across DNR administrations strongly suggest that the information provided in Table 5, in which older forests must be at least 150 years old, is the more reliable measurement. AR 1589. That table clearly demonstrates that even under DNR's projections it will not meet the older forest requirements.

DNR nevertheless asserts that "[t]wenty years of data collection and modeling, analyzed on eight occasions, has consistently confirmed that DNR will meet the target with the conserved lands." *See* DNR Resp. at 38. However, the citations are to the Estep-Buffo memo and one report of modeling methodology. The cited records do not show that DNR has any plan to meet older or fully functional targets in the South Coast HCP planning unit.

C. DNR's Approval of About Time Violates the State Trust Lands HCP.

The State Trust Lands HCP requires DNR to provide fully functional forests at least 150 years old across 10 to 15 percent

of each HCP planning unit. Table IV.14, AR 3654. DNR is required to achieve this target by Year 100 of the HCP, meaning the year 2096.

As with the Policy for Sustainable Forests, DNR has not identified or designated the forests necessary to meet the HCP's fully functional forest requirement. DNR's analysis demonstrates that in 2096 the South Coast planning unit will have between 3.8 percent and 6.8 percent 150-year-old forest, well short of the established objectives. AR 1589.

In response, DNR first asserts that the HCP differs from the Policy for Sustainable Forests in that the 10 to 15 percent requirement is attained across all planning units other than the Olympic Experimental State Forests, and is not a requirement for each planning unit. *See* DNR Resp. at 50. This parsed reading is implausible. The HCP is organized by planning unit, and repeatedly relies on conservation in planning unit as the basis for protection of both listed and unlisted species and other environmental benefits. AR 3332-33. Indeed, 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. Similar analyses are replete in the record. *See* Opening Br. at 13-15.

DNR and Murphy Co. also rely on a post-hoc memo from USFWS (written after approval of About Time) to assert that the HCP's fully functional forest objectives are not requirements. *See* DNR Resp. at 51. This after-the-fact, staff-level memo cannot rewrite the HCP and does not inform the Court's review of DNR's approval of About Time, which is based on the administrative record before the agency at the time of the decision.

D. DNR's Approval of About Time Violates SEPA.

In response, DNR and Murphy Co. fault the Center for making brief SEPA arguments. The reason for this brevity is that the SEPA claims are largely derivative of the substantive claims—undisclosed conflict with "laws or requirements for the

protection of the environment" gives rise to the associated SEPA violation. WAC 197-11-330(e)(iii); *Nisqually Delta Ass'n v. City of Dupont*, Civ. No. 54893-3-II, 2022 Wash. App. LEXIS 716, at *9 (Mar. 29, 2022) (nonbinding authority pursuant to GR 14.1). The SEPA threshold determination is also invalid because it improperly relies on mitigation that is not likely to occur, AR 714-715. This is a well-established violation of SEPA. RCW 43.21C.060; *Kiewit Const. Group, Inc. v. Clark Cy.*, 83 Wash. App 133, 143, 920 P.2d 1207 (1996). SEPA requires consideration of how a present-day decision (like logging old forests that are needed to rebuild older forests) can make existing conditions (lack of such forests) worse. *Davidson Serles & Assoc. v. City of Kirkland*, 159 Wash. App. 16, 635, 246 P.3d 822 (2011); *Lancze G. Douglas v. City of Spokane*, 154 Wash. App. 408, 416-17, 225 P.3d 448 (2010).

The SEPA claims differ from the substantive claims in one important respect—under SEPA, DNR must disclose conflict and consider such a conflict as evidence of a probable,

adverse environmental impact, regardless of whether the underlying laws are independently enforceable. This is a meaningful distinction because for each commitment at issue, DNR argues in defense that the older forest and fully functional forest requirements are unenforceable. This defense is incorrect. However, it is also irrelevant to the SEPA process, which requires disclosure of all such conflicts as evidence of environmental impacts.

E. DNR's and Murphy Company's Various Other Defenses Lack Merit.

The Center's case is a conventional appeal under the Public Lands Act and SEPA of a DNR decision. *See, e.g.*, *Nw. Alloys, Inc. v. Dep't of Nat. Res.*, 10 Wash. App. 2d 169, 447 P.3d 620 (2019). Nonetheless, DNR and Murphy argue that the Center is impermissibly seeking to enforce federal law or cannot bring its claims until at least 2090.[2]

[2] DNR br., at 44, 46, 47; Murphy br., at 23, 29.

The Center's complaint does not allege or assume a violation of federal law. *Cutler v. Phillips Petroleum Co*., 124 Wn.2d 749, 765, 881 P.2d 216 (1994). Nor did DNR move to dismiss the Center's appeal under CR 12 (b)(6) for failing to state a claim under state law. *See Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 229-30, 962 P.2d 104 (1998). The Center timely and properly challenged this timber sale under the Public Lands Act, RCW 79.02.030, and SEPA. Just because this argument potentially overlaps with the question of whether this failure conflicts with DNR's federal HCP requirements does not deprive the state court of general jurisdiction from reviewing DNR's timber sale approval.

Similar cases involving failure to comply with a federal HCP and agency policies have been heard by the Pollution Control Hearings Board and its predecessor, the Forest Practices Appeals Board. *See Alpine Lakes Prot. Soc. v. DNR, Forest Practices App. Board et al.*, 1997 WL 556192 (1997); *Walker v. DNR*, 1999 WL 418008 (1999) ("the requirements of an HCP are

pertinent to the state law enforced by DNR. Compliance or noncompliance with an HCP is admissible as evidence to prove the absence of a significant, adverse environmental effect under SEPA.").

Another reason why the Center does not seek to "enforce" DNR's HCP is because it does not seek injunctive relief mandating affirmative steps to attain compliance, as would occur in an enforcement action. Nor does the Center seek any relief against USFWS, which is not a party.

DNR and Murphy assert that the Center's case is not "ripe" because it will not be conclusively known until 2097 whether DNR has met the older and fully functional forest requirements.

The four elements for establishing a justiciable controversy are set forth in *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). All four elements must coalesce so that a court does not step "into the prohibited area of

advisory opinions." *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973).

The Center timely appealed the About Time, a specific DNR and Board-approved timber sale. The Center alleged that at the time of approval, DNR's decision deviated without adequate justification or documentation from the Identification and Management Procedure, Policy for Sustainable Forests, and its HCP. This case targets those failures and omissions as they exist at the time of sale approval. A decision for the Center will, moreover, provide the Center relief today. If the Court agrees with the Center, it will invalidate the challenged action and affect whether and how DNR and the Board reconsider the About Time sale and its SEPA. Because DNR expressly used its purported compliance with binding documents in its SEPA threshold determination, AR 714-15, this error is ripe for judicial review today. *See, e.g.*, *Cottonwood Environmental Center v. U.S. Forest Service*, 789 F. 3d 1075, 1083 (9th Cir. 2015)(challenge to federal decision timely even if "future project-specific

consultations might result in mitigation or elimination of any potential harm…").

Ripeness also includes a prudential component. The ripeness doctrine provides that "claims are ripe for judicial review when the issues raised are primarily legal, and do not require further factual development." *Thun v. City of Bonney Lake*, 3 Wash. App.2d 453, 460, 416 P.3d 743 (2018)(citation omitted). The court looks at "whether the case will be better decided at a later date and whether the parties will be prejudiced by the delay." *Thun*, 3 Wash. App.2d at 461. Here, equity favors hearing this appeal, because DNR must conserve—at least for the time-being—forests like About Time, in order to reach its old forest targets. The issues presented, which include the meaning and application of DNR policies, are legal issues that are ripe for review.

F. DNR Does Not Violate Any Fiduciary Duty When It Adheres to Its Commitments and Requirements.

DNR argues that it must log About Time to comply with fiduciary responsibilities. DNR Resp. at 40. Because the Center's action simply seeks to hold DNR and the Board accountable to its HCP and adopted policies, there is no fiduciary issue in this case. There is no question that DNR's management of its lands consistent with its HCP complies with any owed fiduciary duty. *See* 1996 Op. Atty. Gen. 11, at 30.

The Center notes for context that DNR's response fails to provide the full scope of its legal authority and duties. In *Conservation Northwest v. Commissioner of Public Lands*, Civ. No. 991-839 (July 21, 2022), the Court recently held that DNR must comply with three separate legal obligations in administration of public lands: to provide some benefit for enumerated beneficiaries (not necessarily revenue and not necessarily logging), to comply with applicable law, and to serve the interests of the general public. With respect to the last factor, article XVI, section 1 of the constitution requires that "[a]ll the public lands granted to the state are held in trust for all the

people," and the State Supreme Court noted that this comprises a "constitutional mandate of article XVI, § 1" to manage State lands and forests for the benefit of the general public. *Id.* at 21-24, 25. This discretion is consistent with State law, which only requires DNR to not overharvest, RCW 79.22.010, allows setting aside lands for public use, RCW 79.10.210, and provides for multiple uses, RCW 79.10.110.

G. The Center's Request for Costs and Attorneys' Fees.

DNR relies on RAP 18.1 to argue that the Center was required to detail a request for fees in the opening brief. The Center acknowledges it could have provided more detail, but in strictest terms, the Center complied with the direction of RAP 18.1 by devoting a section of the opening brief to costs and fees. It is within this Court's discretion to manage briefing and argument, and the Center simply requests exercise of that discretion to provide separate briefing for purposes of judicial economy.

To the extent the Court wishes to consider the issue now, the Center potentially may recover fees pursuant to the Equal Access to Justice Act, RCW 4.84.340–370. The Center is a 501(c)(3) corporation, DNR and the Board are government agencies, and this court's review constitutes "judicial review" under RCW 4.84.340(4) because RCW 79.02.030 authorizes this Court to conduct "de novo review … expressly authorized by provision of law." *See* RCW 34.05.510(3).

DNR's approval of the About Time timber sale and the associated SEPA analysis was "agency action" under RCW 4.84.340(2). While RCW 34.05.010(3) exempts "proprietary decisions" from being "agency action" subject to judicial review under the APA, *see State Owned Forests v. Sutherland*, 124 Wash. App. 400, 408, 101 P.3d 880, 884 (2004), RCW 34.05.510(3) also recognizes "agency action" where "agency action is expressly authorized by provision of law" other than the APA. The Public Lands Act is one such law, and in *Nw. Alloys, Inc.*, 10 Wash. App. 2d at 184, the court determined that "DNR

acted in its administrative capacity" for approval of a sublease which was appealed under the Public Lands Act. Finally, the Center has explained how DNR's decision was arbitrary and capricious, and thus also not substantially justified. RCW 4.84.350(1).

IV. CONCLUSION

The Center requests invalidation of the approval of the About Time timber sale and associated SEPA analysis.

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 5,820.

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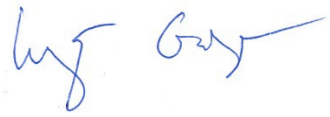
Dated this 6th day of October, 2022.

Respectfully submitted,

ZIONTZ CHESTNUT



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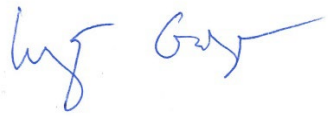
DECLARATION OF DOCUMENT FILING AND SERVICE

I, WYATT GOLDING, STATE THAT ON THE 6th DAY OF OCTOBER 2022, I CAUSED THE ORIGINAL APPELLANTS' REPLY 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 VASHON, WASHINGTON, THIS 6TH DAY OF OCTOBER, 2022.



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Wyatt Golding

ZIONTZ CHESTNUT

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