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SUPERIOR COURT OF WASHINGTON
FOR GRAYS HARBOR COUNTY

CENTER FOR RESPONSIBLE FORESTRY,)	
)	
Appellant,)	NO. 21-2-00519-14
)	
v.)	
)	APPELLANT’S OPENING BRIEF
WASHINGTON STATE DEPARTMENT OF)	
NATURAL RESOURCES, BOARD OF)	
NATURAL RESOURCES, and)	
COMMISSIONER OF PUBLIC LANDS)	
HILARY FRANZ, in her official capacity,)	
)	
Respondents.)	
)	
)	

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I. INTRODUCTION

The Center for Responsible Forestry (“Center”) appeals two decisions of the Washington State Department of Natural Resources (“DNR”) and Board of Natural Resources (“Board”). Under the Public Lands Act, the Center appeals the Board’s decision to put up for an auction the About Time timber sale, a 75-acre stand of trees located on state-owned lands fifteen miles west of Oakville. Under the State Environmental Policy Act (SEPA), the Center also appeals DNR’s decision to issue a Determination of Nonsignificance (“DNS”) for the About Time sale.

The About Time timber sale is in a forest called the South Coast Planning Unit. Logging on state-owned timberlands in the South Coast Planning Unit is subject to two sets of requirements: the 1997 Habitat Conservation Plan (HCP) and the 2006 Policy for Sustainable Forests (PSF). The 1997 HCP requires DNR to achieve 10 to 15 percent “fully functional forest” by the year 2097. The 2006 PSF prohibits the harvest of structurally complex stands DNR can show that it has achieved a target of 10 to 15 percent “older forest.” The About Time timber sale violates both the HCP requirements and the PSF requirements.

DNR is not on track to meet the HCP habitat target for fully functional forest. DNR’s own projections show that it will not achieve the required 10 to 15 percent fully functional forest by the year 2097. The About Time timber sale will contribute to DNR’s missing the target, because the About Time timber stand would have reached fully functional status by the year 2097 were it not for the About Time sale. DNR cannot use its unachievable goals as mitigation for sales, like About Time, that would contribute to fully functional forests if left undisturbed.

1 DNR has also not met the PSF habitat target for older forest. In a memo dated May 11,
2 2021, DNR concluded that the South Coast Planning Unit is only 0.2 percent towards its goal
3 of 10 to 15 percent older forest. Under the PSF, DNR may not harvest a structurally complex
4 stand until it reaches the 10 to 15 percent older forest target, which will not occur in the South
5 Coast Planning Unit until the year 2110. Under the Public Lands Act, the About Time timber
6 sale should be reversed because it violates DNR's duties to follow its HCP and PSF.
7

8 In addition, DNR's SEPA review of the About Time sale is predicated on the erroneous
9 notion that DNR will comply with the HCP and PSF. Therefore, the SEPA DNS was not based
10 on information reasonably sufficient to evaluate the impacts of the About Time timber sale. The
11 Court should remand the DNS to DNR to conduct further environmental review of the actual
12 impacts of the About Time sale and prepare an environmental impact statement.
13

14 II. STATEMENT OF FACTS

15 The Center believes the facts recited in this section are substantially uncontested. Where
16 potentially contested facts exist, the Center notes the potential dispute and defers further
17 discussion to the argument section, below.

18 A. Identity of the Parties.

19 1. Plaintiff Center for Responsible Forestry.

20 The Center for Responsible Forestry is a Washington State-registered non-profit
21 corporation based in Tacoma, Washington. The Center's mission is to promote a balanced
22 approach to the management of Washington state forestlands that allows DNR to generate
23 revenue for trust beneficiaries (such as counties and schools), while preserving and accelerating
24 the development of older forests—the very objectives of the ITP and HCP. Decl. of Kropp, ¶
25

26 3.
27

1 The Center’s members regularly visit and recreate in DNR-managed forestlands,
2 including those in the upper Chehalis River Basin. The Center’s members gain aesthetic
3 enjoyment from visiting older-forests and observing the wildlife that inhabits these forests. The
4 Center’s members have visited the About Time project area in the past and have plan to do so
5 again in the near future. Their enjoyment of the area will be diminished if the logging approved
6 by the About Time project goes forward and the structurally complex forests in that region are
7 degraded or destroyed. Those same interests will be protected if the Court issues injunctive
8 relief to prevent logging from going forward under the About Time project. *Id.*, ¶ 4.

9
10 **2. Respondents DNR and Hillary Franz.**

11 DNR is the state agency responsible for administering the public forestlands. Answer,
12 ¶ 13; RCW 43.30.411, Title 79 RCW. Hilary Franz, the Washington State Commissioner of
13 Public Lands, is the administrator of DNR. Answer, ¶ 15; RCW 43.30.105. DNR conducted the
14 environmental review of the About Time timber sale and issued the SEPA DNS at issue in this
15 case. AR 709–735 (About Time environmental checklist); AR 736–742 (About Time DNS).

16
17 **3. Respondent Board of Natural Resources.**

18 The Board of Natural Resources (“Board”) is the state agency that determines whether,
19 which, and how much timber to sell from Washington’s public forestlands. Answer, ¶ 14; RCW
20 43.30.205–.295. The Board establishes policies that govern timber disposal, including the
21 sustainable harvest policy mandated by the ITP and HCP. *Id.* The Board also decides whether
22 individual timber sales, such as About Time, should be put up for auction. *Id.* The Board
23 approved the About Time timber sale at issue in this case. AR 479–531 (descriptions of ten
24 timber sales considered at Board’s Sept. 7, 2021 meeting, including About Time at AR 481,
25
26
27

1 489–492); AR 460–468 (all ten timber sales considered at Sept. 7 meeting, incl. About Time,
2 approved at AR 463).

3 **B. The Endangered Species Act and the 1997 ITP and HCP.**

4 **1. The Endangered Species Act.**

5 The federal Endangered Species Act, 16 U.S.C. §§ 1531–1544, prohibits any action by
6 any entity, public or private, state or federal, which may result in the “taking” of a federally
7 listed endangered species. 18 U.S.C. § 1538(a)(1)(B). “Take” means to harass, harm, pursue,
8 hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
9 16 U.S.C. § 1532(19).
10

11 In addition to protecting the individual animals themselves, the ESA also provides that
12 the Secretary of Interior shall first designate, and then promulgate regulations protecting, the
13 “critical habitat” of an endangered species. 16 U.S.C. § 1533(b)(2). Where a species is listed as
14 “threatened” rather than “endangered,” the Secretary shall promulgate such regulations as are
15 necessary to protect the species and its critical habitat. 16 U.S.C. § 1533(d).
16

17 Once a species and its critical habitat have been designated, and appropriate regulations
18 promulgated, an entity may take a species only pursuant to an incidental take permit. 16 U.S.C.
19 § 1539(a)(1)(B). One required component of an incidental take permit is that the applicant for
20 such a permit must obtain approval from the Secretary for a habitat conservation plan (HCP).
21 16 U.S.C. § 1539(a)(2)(A). The HCP must specify the steps the permittee will take to minimize
22 and mitigate the permittee’s impacts on the listed species and its critical habitat. *Id.*
23

24 Before approving a proposed HCP, the federal agencies issue a formal “biological
25 opinion” under the Endangered Species Act. 16 U.S.C. § 1536(a), (b). If, in the biological
26 opinion, the agencies conclude that the HCP provides sufficient protection such that the
27

1 proposed action “is not likely to jeopardize the continued existence” of listed species, then the
2 HCP will be approved and an ITP issued. 16 U.S.C. § 1536(a)(2).

3
4 **2. The Northern Spotted Owl, Marbled Murrelet, and Salmon.**

5 The USFWS listed the northern spotted owl as threatened in July 1990 and the marbled
6 murrelet in October 1992. *See* 1997 HCP, AR 3309–3827, at AR 3342. The birds’ listing touch
7 off years of litigation among environmental groups, the logging industry, and governmental
8 land managers and regulators regarding the extent to which these old-growth-dependent species
9 would require old-growth forests and mature second-growth forests to be preserved on private,
10 state, and federal lands. *See generally*, Steven L. Yaffee, “Lessons about Leadership from the
11 Spotted Owl Controversy,” 35 Nat. Res. J. 381 (Spring 1995).

12 At the same time the birds’ post-listing fate was being debated, it became increasingly
13 apparent that several salmon species would also have to be listed under the Endangered Species
14 Act. *See* 1997 HCP, at AR 3411 (“several [salmon] stocks in the HCP are candidates for federal
15 listing”). Sure enough, throughout the 1990s and early 2000s, multiple salmon species in
16 Washington were listed, including various Snake River species (August 1997, 62 Fed. Reg.
17 43937) and Columbia River and Puget Sound species (March 1999, 64 Fed. Reg. 14308, 14517,
18 14508; June 2005, 70 Fed. Reg. 37159; May 2007, 72 Fed. Reg. 26722).

19
20
21 **3. The 1996 Biological Opinion, the 1997 ITP, and the 1997 HCP.**

22 In the wake of the Northwest Forest Plan and Endangered Species Act listings of old
23 growth dependent species, many forest landowners, including DNR, obtained permits under
24 ESA Section 10 governing the management of its lands. To insulate itself against Endangered
25 Species Act liability for taking spotted owls and marbled murrelets in the course of logging the
26 state lands, DNR applied for and was granted an ITP in 1997. Consistent with the requirements
27

1 for ITP described above, DNR’s ITP was accompanied by an HCP. AR 3309–3827. Consistent
2 with the ESA, the HCP was accompanied by a 1996 biological opinion drafted by the consulting
3 federal agency, here the U.S. Fish and Wildlife Service, providing that, if the protections in the
4 HCP are followed, DNR’s forest practices will not likely jeopardize the continued existence of
5 listed species, including the spotted owl and marbled murrelet. AR 3849–4007, at AR 3983
6 (“An incidental take permit issued to DNR is accordance with section 10(a) of the [Endangered
7 Species] Act as evaluated in this biological opinion, must require compliance with all terms and
8 conditions of the HCP and IA submitted with the DNR application.”). Finally, consistent with
9 the Board’s policy-setting role regarding Washington State timber sales, the Board adopted the
10 1997 HCP by resolution. AR 3310; 542–544.
11

12 In a prescient move, DNR incorporated protections for salmon into the 1997 HCP, even
13 though the majority of salmon species had not yet been listed at the time of the HCP. To
14 accommodate the future species listings, the 1997 HCP provides that the original ITP may be
15 amended from time to time as new species are listed. AR 3708, ¶ 7.0. The current iteration of
16 the ITP was approved November 14, 2019, under permit no. TE-812521-1. AR 9128–9144.
17 The 2019 ITP’s authorization to take endangered species remains “subject to full and complete
18 compliance with, and implementation of the 1997 [HCP]...” AR 9129.
19

20 The 1997 HCP divides Washington’s state forestlands into nine planning units based on
21 watersheds. AR 3332. State forestlands in Grays Harbor County fall into the South Coast
22 Planning Unit. AR 3333. For the five west-side planning units (one of which is the South Coast
23 Planning Unit), the 1997 HCP requires DNR to achieve certain old structural forest targets by
24 “year 100,” laid out in Table IV.14. AR 3654. Specifically, the HCP requires 10–15 of the
25 planning unit to consist of “fully functional” habitat by year 100 of the HCP. *Id.* Fully functional
26
27

1 habitat is defined as a stand in which the trees are 150 years old or older. *Id.* Thus, no later than
2 the year 2097 (“year 100” of the 1997 HCP), 10 to 15 percent of the South Coast Planning Unit
3 land area must consist of tree stands that are 150 years old or older.

4
5 The habitat targets are described in numerous parts of the HCP as “commitments” on
6 the part of DNR. *See, e.g.*, AR 3479 (“DNR’s HCP conservation strategies include
7 commitments to develop and maintain wildlife habitat (in this case, NRF habitat and dispersal
8 habitat for the northern spotted owl) over time in designated amounts and areas.”); AR 3655
9 (“The projections for year 70 will be a part of the U.S. Fish and Wildlife Service’s evaluation
10 of whether DNR has met the commitments of the HCP at year 70.”). Indeed, the federal agencies
11 intend to monitor DNR’s performance to determine whether DNR has achieved its
12 commitments. AR 3655 (“Finally, as mentioned above in this section, the U.S. Fish and
13 Wildlife Service and the National Marine Fisheries Service will review DNR’s progress in
14 meeting the conservation objectives and may require an extension of the HCP if it can be
15 demonstrated that DNR failed to achieve the commitments of the HCP.”)

17 **C. The Policy for Sustainable Forests.**

18 In 2006, DNR and the Board adopted a new statewide forest management policy, the
19 Policy for Sustainable Forests (PSF). Answer, ¶ 28; AR 12540–12609. The PSF replaces the
20 earlier, pre-HCP 1992 Forest Resources Plan. AR 12542. It guides the management of 2.1
21 million acres of forested state trust lands, including lands in the South Coast Planning Unit.
22 The purpose of the Policy for Sustainable Forests is to “conserve and enhance the natural
23 systems and resources of forested state trust lands managed by DNR to produce long-term,
24 sustainable trust income, and environmental and other benefits for the people of Washington.”
25
26 AR 12548.

1 The PSF outlines ten policy objectives, the first of which is to “Meet all federal and state
2 laws, including the trust obligations and the contractual commitments of DNR’s trust lands
3 Habitat Conservation Plan (HCP).” *Id.*

4 Critical to this case is the Policy for Sustainable Forests’ “General Silvicultural
5 Strategy,” AR 12591–12592, which provides as follows:
6

7 DNR intends to actively manage suitable structurally complex forests to achieve
8 older-forest structures across 10-15 percent of each Western Washington HCP
9 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.

10 AR 12591.

11 Similarly: “The department will target 10-15 percent of each Western Washington
12 Habitat Conservation Plan planning unit for ‘older’ forests—based on structural
13 characteristics—over time.” AR 12592.
14

15 The environmental impact statement (AR 12072–12539) that accompanied the 2006
16 Policy for Sustainable Forests and General Silvicultural Strategy expounds on this requirement
17 to preserve older forests:

18 The Board’s Preferred Alternative builds on Alternative 2 by including the
19 following: the discussion for old growth has been moved to the Old-Growth Stands
20 in Western Washington policy subject area; specifies how suitable older stands will
21 be identified to help meet older-forest targets; emphasizes that the **10-15 percent
22 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.

23 AR 12283 (emphasis added).
24

25 **D. The 2021 About Time Timber Sale.**

26 The About Time timber sale area occurs within the South Coast Planning Unit and
27 comprises approximately 75 acres of state-owned timber lands in Grays Harbor County, located

1 approximately fifteen miles west of Oakville, WA. AR 489. Consistent with their respective
2 roles in disposing of state-owned timber, DNR proposed the sale to the Board, who adopted it
3 by resolution at the Board’s meeting on September 7, 2021. AR 489–492 (DNR proposal); AR
4 460–468 (all ten timber sales considered at Sept. 7 meeting, incl. About Time, approved at AR
5 463).

6
7 DNR approved the About Time sale and purported to evaluate the environmental
8 impacts of the sale pursuant to the State Environmental Policy Act (SEPA), Ch. 43.21C RCW.
9 SEPA requires the preparation of a SEPA checklist, a series of questions aimed at identifying
10 possible environmental impacts of a proposal. DNR duly filled out the SEPA checklist. AR
11 709–735. The SEPA checklist was explicitly predicated on the 1997 HCP, among other policy
12 documents. AR 711. The SEPA checklist specifically noted that the About Timber harvest
13 would be conducted in conformity with the 1997 HCP and summarily claimed (without any
14 explanation or documentation) that, even in light of the About Time timber sale, “[t]he South
15 Coast HCP Planning Unit will meet at least 10% older forest within conservation areas by
16 2100.” AR 714–715. Based on the answers in the SEPA checklist, DNR issued its determination
17 that the About Time timber sale would not result in significant adverse impacts. AR 736 (“This
18 decision was made after review of a completed environmental checklist and other information
19 on file with the agency.”)

20
21
22 The Center disputes the claim in the SEPA checklist that the South Coast Planning Unit
23 will achieve the minimum 10% older forest target mandated by the 1997 HCP. In reality, the
24 South Coast Planning Unit will miss its target, and the About Time timber sale will only further
25 exacerbate DNR’s inability to achieve its old forest targets. Therefore, DNR should have
26
27

1 determined that the environmental impacts of the About Time timber sale are actually
2 significant.

3 **III. STANDARD OF REVIEW AND OVERVIEW OF THE LAW**

4 The Center challenges the Board’s decision to approve the About Time timber sale
5 under the Public Lands Act. The Center challenges DNR’s determination that the About Time
6 timber sale would not have significant adverse environmental impacts under SEPA. Finally, the
7 Center notes that a dispute exists as to which party is responsible for paying the costs of the
8 record under the Public Lands Act.

9 **A. The Public Lands Act.**

10 The Public Lands Act provides a unique cause of action for appealing the sale of state-
11 owned timber:
12

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

20 RCW 79.02.030.

21 The statute provides that the court’s hearing of the case “shall be de novo before the
22 court, without a jury, upon the pleadings and papers so certified...” meaning closed-record
23 review. *Id.* The statute does not specify what standard of review the court is to apply to the
24 timber-sale decision, but the Court of Appeals has applied the standard of “arbitrary and
25 capricious or contrary to law” to leasing and sale decisions arising under the Public Lands Act.
26 *See Nw. Alloys, Inc. v. Dep’t of Natural Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019).
27

1 The Public Lands Act also provides that the costs of producing the administrative record
2 shall be borne by “the applicant.” RCW 79.02.030. The Center and the state agencies dispute
3 whether the Center is “the applicant” (who must pay for the record) or “the appellant” (who is
4 not required to pay for the record). As this involves a pure question of statutory interpretation,
5 not review of an agency decision, review of the record costs dispute is de novo. *Id.*
6

7 **B. SEPA.**

8 SEPA requires each governmental proposal that may significantly affect the quality of
9 the environment to undergo an assessment of the proposal’s environmental impacts. The first
10 step of the SEPA process is the “threshold determination.” RCW 43.21C.033; WAC 197-11-
11 055(2). After evaluating the proposal and identifying the probable adverse impacts, the lead
12 agency must issue a formal decision as to whether the proposal may cause significant adverse
13 environmental impacts. All threshold determinations must be documented in one of two ways:
14 either a determination of non-significance (DNS) or a determination of significance (DS). WAC
15 197-11-310(5). If the responsible official determines that the proposal will have no significant
16 adverse environmental impacts, the lead agency shall prepare and issue a DNS per WAC 197-
17 11-340. *Id.* If the responsible official determines that a proposal may have significant adverse
18 environmental impacts, the lead agency shall prepare and issue a DS. WAC 197-11-360. The
19 question for the threshold determination is whether adverse impacts may be probable—not that
20 they are probable. WAC 197-11-360(1). *See also* WAC 197-11-330(4) (“If . . . the lead agency
21 reasonably believes that a proposal may have a significant adverse impact, an EIS is required.”)
22 (emphasis added).
23
24

25 (U)nder SEPA an agency's decision to approve a project impliedly, if not expressly,
26 determines that the project is consistent with the citizen's fundamental right to a
27 healthful environment and with the legislatively mandated policy that an agency

1 action allow to the citizens the widest practicable range of beneficial uses of the
2 environment without degradation.

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

4 The threshold determination is probably the most important single step in the SEPA
5 process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with
6 significant impacts. *Norway Hill Preservation and Protection Association v. King County*
7 *Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976).

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

14
15 Washington courts have repeatedly articulated what this standard requires:

16
17 For the MDNS to survive judicial scrutiny, the record must
18 demonstrate that environmental factors were considered in a
19 manner sufficient to amount to prima facie compliance with the
procedural requirements of SEPA and that the decision to issue
an MDNS was based on information sufficient to evaluate the
proposal's environmental impact.

20 *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000) (citations omitted).

21 Ultimately, the threshold determination “must indicate that the agency has taken a searching,
22 realistic look at the potential hazards and, with reasoned thought and analysis, candidly and
23 methodically addressed those concerns.” *Conservation Northwest v. Okanogan County*, 194
24 Wn. App. 1034, 2016 WL 3453666, *32 (2016) (unpublished nonbinding authority per GR
25 14.1). “SEPA seeks to ensure that environmental impacts are considered and that decisions to
26 proceed, even those completed with knowledge of likely adverse environmental impacts, are
27

1 ‘rational and well documented.’” *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d
2 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice §
3 17.1, at 192). This information must be adequate to demonstrate that the agency has taken the
4 requisite “hard look” at environmental impacts. *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn.
5 App 150, 158, 151 P.3d 1067 (2007).
6

7 For the purpose of deciding whether an EIS is required, the relevant information
8 necessary to assess the project impacts must be specified in the environmental checklist that is
9 prepared and submitted with the application. NMC 14.05.130. A threshold determination must
10 ultimately be based on the information that is provided in the environmental checklist and any
11 additional information that is requested by the responsible official. NMC 14.05.120.B. *See also*
12 WAC 197-11-335 and 197-11-350. The purpose of the checklist is to ensure that the agency
13 fully discloses and carefully considers a proposal’s environmental impact before adopting it.
14 *Spokane County v. E. Wash. Growth Management Hr’gs Bd.*, 176 Wn. App at 579. For that
15 purpose, the information provided in the checklist must be detailed and complete. *Id.* *See also*
16 *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, *32
17 (2016) (unpublished nonbinding authority per GR 14.1). Broad generalizations and rote
18 answers in a checklist are condemned as improper. *Id.*
19
20

21 A DNS that relies on an inadequate or incomplete information about project impacts is
22 noncompliant with SEPA requirements and must be reversed and remanded for additional
23 review. *Conservation Nw. v. Okanogan County*, 2016 WL 3453666 at *31

24 “The standard for review of a ‘negative threshold determination’ [*i.e.*, a DNS] is whether
25 the agency's decision is ‘clearly erroneous in view of the entire record as submitted and the
26 public policy contained in the act of the legislature authorizing the decision or order.’” *ASARCO*
27

1 *Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979) (citing RCW
2 34.04.130(6)(e); *Sisley v. San Juan Cty.*, 89 Wash.2d 78, 569 P.2d 712 (1977); *Norway Hill*
3 *Preserv. & Protec. Ass'n v. King Cty. Council*, 87 Wn.2d 267, 552 P.2d 674 (1976)).

4 “The purpose of the broad scope of review is to ensure that an agency, in considering
5 the need for an [environmental impact statement], does not yield to the temptation of
6 expediency thus short-circuiting the thoughtful decision-making process contemplated by
7 SEPA.” *Id.* at 700–701.

9 IV. ARGUMENT

10 The South Coast Planning Unit is dangerously far from achieving the old structural
11 forest target set forth in and anticipated by its 1997 HCP and its 2006 PSF. The About Time
12 timber sale will further exacerbate DNR’s inability to achieve compliance with this legal and
13 policy target. The approval of the About Time sale constitutes two violations of the law. First,
14 the About Time sale violates the Public Lands Act because DNR arbitrarily and capriciously
15 failed to comply with its 1997 HCP and the Board’s PSF. Second, the approval of the DNS for
16 the About Time sale violates SEPA, because the violation of the 1997 HCP and the PSF reflects
17 that the About Time sale will have significant adverse environmental impacts stemming from this
18 non-compliance.
19

20
21 **A. If the About Time Timber Sale Will Cause or Exacerbate DNR’s Non-
22 Compliance with the 1997 HCP and the 2006 Policy for Sustainable Forests,
23 Then the About Time Sale Is Arbitrary, Capricious, and Inconsistent with
24 the Law.**

25 The Public Lands Act requires DNR to administer the public lands “in the best interests
26 of the state and the general welfare of the citizens thereof, and ... consistent with the applicable
27 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

1 from public lands are found under DNR’s **habitat conservation plans**, any amendments to
2 DNR’s habitat conservation plans, or in the **Policy for Sustainable Forests adopted in 2006**
3 and any future updates to the policy.” WAC 332-41-665(1)(f) (emphasis added).

4 Furthermore, as noted above, the Board adopted the 1997 HCP by resolution and
5 directed the Commissioner of Public Lands to implement the HCP. AR 3310; 542–544. DNR
6 signed an agreement with the federal agencies in 1997, in which DNR committed to implement
7 the HCP. AR 3828–3848. DNR’s 1997 ITP makes “full and complete compliance with, and
8 implementation of the 1997 [HCP]...” a mandatory condition of the permit. AR 9129. And the
9 Board made compliance with the HCP mandatory when it adopted the statewide 2006 Policy
10 for Sustainable Forests. AR 12548.

11
12 For the foregoing reasons, if the About Time timber sale will cause or contribute to a
13 violation 1997 HCP or the 2006 PSF, then the sale would be arbitrary, capricious, and unlawful.
14 We will argue below that the About Time sale will indeed cause or contribute to a violation of
15 the 1997 HCP and the 2006 PSF. The HCP and the PSF are two different documents that impose
16 two different targets. The About Time timber sale violates both sets of targets.

17
18 **B. If the About Time Timber Sale Will Cause or Significantly Impede**
19 **Compliance with the 1997 HCP and the 2006 PSF, Then the Environmental**
20 **Impacts of the Sale Were Not Properly Considered, Then the Sale’s**
21 **Environmental Impacts Were Not Properly Considered, and the DNS**
22 **Should Be Reversed.**

23 Failure to comply with the 1997 HCP and 2006 PSF is not only a violation of the Public
24 Lands Act. It is also a violation of SEPA. The SEPA DNS for the About Time sale is predicated
25 on compliance with the 1997 HCP and 2006 PSF. DNR’s failure to comply with the 1997 HCP
26 and 2006 PSF means DNR failed to consider the environmental impacts of the About Time sale,
27 in violation of SEPA.

1 As noted above, SEPA requires DNR to prepare an environmental impact statement for
2 any action that may have an adverse effect on the environment. In making the threshold
3 determination of whether the action will have significant, adverse effects, the agency must be
4 “based upon information reasonably sufficient to evaluate the environmental impacts” of the
5 action. WAC 197-11-335. For a threshold determination of nonsignificance to survive judicial
6 review, the agency “must demonstrate that it actually considered relevant environmental factors
7 before reaching that decision.” *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718, 47 P.3d
8 137 (2002).

9
10 Here, DNR’s threshold determination was that the About Time sale would not have a
11 significant, adverse impact. AR 736–742 (About Time DNS). However, that determination was
12 predicated on the notion that the South Coast Planning Unit would achieve its habitat target
13 even if the About Time sale is approved: “The South Coast HCP Planning Unit will meet at
14 least 10% older forest within conservation areas by 2100.” AR 714–715.

15
16 If, as we argue below, the South Coast Planning Unit will miss its habitat targets, and
17 the About Time timber sale will contribute to missing the target, then DNR failed to base its
18 threshold determination upon reasonably sufficient information to evaluate the effects of the
19 About Time sale. It failed to consider all relevant factors, as required by Boehm. This failure is
20 grounds to reverse the DNS under WAC 197-11-335.

21
22 The failure to achieve the targets set forth in the 1997 HCP and 2006 PSF is not only a
23 failure to consider relevant factors. It is also evidence of a significant, adverse environmental
24 impact, such as a determination of significance should have been issued and an environmental
25 impacts statement prepared. A “significant” impact is one that is “reasonably likely to have
26 more than a moderate adverse effect on the quality of the environment.” *Norway Hill Pres. and*
27

1 *Prot. Ass'n v. King Cty.*, 87 Wn.2d 267, 278, 552 P.2d 674 (1976). Where an environmental
2 problem already exists, and a proposed action will worsen the problem, appellate courts have
3 called it “analytically sound” to conclude that the proposed action will have “more than a
4 moderate adverse effect.” See *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn.
5 App. 408, 416–417, 225 P.3d 448 (2010). The “search for factors indicating more than a
6 moderate effect on the environment must be considered in light of the public policy of SEPA.”
7 *ASARCO*, 92 Wn.2d at 702. SEPA’s public policy, again, is non-degradation of the
8 environment. *Id.* at 700.

9
10 Here, as we will argue below, the existing environmental problem is that DNR will not
11 achieve its habitat targets set forth in the HCP and the various documents related thereto (FEIS,
12 ITP, biological opinion, PSF). The South Coast Planning Unit will continue to lack suitable old-
13 growth habitat, because it will miss the habitat target set forth in the HCP, so the existing
14 environmental problem will continue to exist. And, as we will also show, the About Time timber
15 sale will worsen the problem. In light of all this, the Court should conclude that the About Time
16 timber sale is “reasonably likely to have more than a moderate adverse effect on the quality of
17 the environment.” *Norway Hill*, 87 Wn.2d at 278. Therefore, DNR erred in issued a DNS.
18 Instead, it should have prepared an environmental impact statement.
19

20
21 **C. DNR’s Own Projections Show that the South Coast Planning Unit Will Not
22 Achieve the 1997 HCP Target.**

23 Using DNR’s own projections, the Center will show that DNR will not achieve either
24 the 1997 HCP or the 2006 PSF. We first address the issue of DNR’s failure to achieve the 1997
25 HCP target.
26
27

1 **1. DNR’s own projections show that the south coast planning unit will**
2 **not achieve the HCP’s habitat target of 10–15% fully functional**
3 **forest by 2097.**

4 The HCP, which is based on and is supported by a formal biological opinion, sets a
5 target of 10 to 15 percent of the west-side planning units at least 150 years old, as discussed
6 above. Table IV.14, AR 3654. DNR is required to achieve this target by Year 100 of the HCP,
7 meaning the year 2097.

8 Compliance with the targets in Table IV.14 is mandatory, not optional. The HCP
9 describes these targets as “stand structure objectives.” *Id.* The HCP also says that DNR may log
10 stands aged 60 years or younger, but DNR may not log older stands only “as long as DNR can
11 show that reaching the stand structure objectives is likely.” *Id.* As noted above, the About Time
12 stand is 84 years old (AR 1045), so DNR may log About Time only if DNR can show that
13 reaching the targets of achieving 10 to 15 percent fully functional forest by the year 2097.
14

15 The 10 to 15 percent target is further supported by the federal agencies’ scientific
16 review, contained in the 1996 biological opinion. The 1996 biological opinion evaluates the
17 effects of DNR’s harvest plans for the state lands. The biological opinion contains a list of
18 “uncommon habitats” that will be affected by DNR’s harvest of the state lands. AR 3870–3874.
19 The biological opinion notes that “[t]he HCP would provide specific protection to certain habitat
20 types as described below in all west-side and the OESF Planning Units.” AR 3870. (And recall
21 that the South Coast Planning Unit is a west-side planning unit.)
22

- 23 • Based on DNR’s commitment to manage to HCP objectives for stand
24 structures that provide habitat for all species, it is estimated that
25 approximately 31 percent of the west-side planning units and 60 to 70
26 percent of the OESF Planning Unit would have complex forests (at least 70
27 years old) by 2096.
- Fully functioning conifer forest, a subset of complex forest, would be
 provided. **By 2096 these would comprise 12 percent of west-side**

1 **planning units at least 150 years old** and 10 to 15 percent of the OESF
2 Planning Unit at least 200 years old.

3 Biological Opinion, at AR 3873 (emphasis added).

4 Thus, the *requirement* in the HCP is 10 to 15 percent of forestland 150 years old, and
5 the *expectation* in the biological opinion is 12 percent of forestland 150 years old.

6 In May 2021, DNR prepared an analysis (the Estep-Buffo memo, which the Center
7 obtained through public disclosure) of DNR’s progress toward achieving these targets. AR
8 1579–1592. There is no evidence the Board was presented the Estep-Buffo memo, nor that the
9 conclusions of the memo formed any part of the Board’s consideration of the About Time sale.
10 This omission is relevant and probative because the Estep-Buffo memo candidly reveals that
11 DNR will miss its habitat targets and biological goals for the South Coast Planning Unit.
12

13 According to the Estep-Buffo memo, the South Coast Planning Unit today only has 0.1
14 percent of forest land at least 150 years old. Table 5, AR 1589. By the year 2100 (already four
15 years past the Year 100 deadline of the 1996 biological opinion, and three years past the Year
16 100 deadline of the 1997 HCP), the South Coast Planning Unit will only consist of 6.3% of
17 forests 150 years old or older. Not until the year 2110 will the South Coast Planning Unit hit its
18 bare minimum requirement of 10 percent. In the year 2110, the South Coast Planning Unit will
19 finally achieve 10.1 percent forest cover aged 150 years old ... 13 years after the Year 100
20 deadline set forth in the 1997 HCP. Given the urgency and uncertainty of climate change, these
21 are wildly speculative and unsupported biological assumptions and risk.
22

23 The projections from the Estep-Buffo memo reflect that the South Coast Planning Unit
24 is distantly far off from achieving the specific goals set forth in DNR’s HCP and PSF, which
25 committed to 12 percent forests aged 150 years by 1996, nor the bare minimum requirement of
26 the HCP, which mandates 10 to 15 percent forests aged 150 years by 1997. Therefore, DNR is
27

1 not on track to comply with the 1997 HCP, as required by WAC 332-41-665(1)(f) and DNR’s
2 commitments in the numerous documents cited above (HCP, ITP, implementation agreement,
3 Sustainable Forest Policy, etc.).

4
5 **2. The south coast planning unit will fall even further out of compliance**
6 **than DNR’s projections indicate, because the projections themselves**
7 **do not comply with the 2006 policy for sustainable forests.**

8 The foregoing discussion shows that, even if the Court accepts the projections in the
9 Estep-Buffo memo on their face, the South Coast Planning unit will miss its mandatory
10 minimum target of 10-15 percent forest land aged 150 years or older by the year 2097. However,
11 the true situation in the South Coast Planning Unit is even worse than what the Estep-Buffo
12 memo projection depicts.

13 For purposes of hitting the fully functional forest target, the Estep-Buffo memo
14 projection erroneously counted stands of old growth as small as five acres in area. The authors
15 of the projection twice confirm they are counting five-acre stands for this purpose. *See* AR 1587
16 and 1589 (“DNR found the percent of each HCP Planning Unit [in] stands **larger than 5 acres**
17 **older than 150 years, or 200 years in the OESF...**”) However, the 2006 Policy for Sustainable
18 Forests provides that only stands 80 acres in area or larger may be counted as fully functional
19 forests. According to the 2006 Policy for Sustainable Forests Final Environmental Impact
20 Statement (AR 12072–12539):

21
22 **Stands of less than 80 acres** are often influenced by edge conditions and are **not**
23 **expected to provide interior fully functioning old growth forest conditions.**
24 Still, stands less than 80 acres may provide the forest structures that may still play
25 important ecological roles within a landscape context.

26 AR 12165 (emphasis added).

27 DNR has not demonstrated, nor can it, that a five-acre stand can constitute a “fully
functional” forest, no matter how old it gets. On the contrary, as the PSF acknowledges, it takes

1 a stand of 80 acres to be a fully functional forest. Eight acres is supported by data from the U.S.
2 Department of Agriculture and was specifically added to the final EIS for the 2006 Policy for
3 Sustainable Forests in response to comments on the draft EIS. AR 12406. Thus, when the Estep-
4 Buffo memo projection counted five-acre stands as part of the fully functional forest projection
5 for the South Coast Planning Unit, it counted stands that should not have been included.
6

7 DNR's erroneous inclusion of sub-80-acre stands in its forest projections is not confined
8 to the Estep-Buffo memo projection. The same error is repeated elsewhere in the record. For
9 example, AR 18123 is a map of "long-term forest cover" (LTFC) is the Mill/Elk Creek/Upper
10 Chehalis. As the map shows, many of the stands are small, isolated pockets, often less than an
11 eighth of a mile long and far less than an eighth of a mile in width. The area of these isolated
12 stands is not stated, but it is obvious that they are not 80-acre stands. (A stand one-eighth of a
13 mile wide would have to be one mile long to equal 80 acres, and none of the isolated stands are
14 anywhere near that long.) Similarly, the map at AR 1048 shows a different part of the South
15 Coast Planning Unit, again with many small, isolated pockets of LTFC that are not anywhere
16 close to 80 acres in size.
17

18 It is not known how many of these sub-80-acre stands DNR erroneously included in the
19 Estep-Buffo memo projection. However, given that the projection shows the South Coast
20 Planning Unit will just barely eke across the 10 percent target by the year 2110 (13 years too
21 late, per the HCP), it is reasonable to conclude that, absent the erroneous inclusion of the sub-
22 80-acre stands, the South Coast Planning Unit would not achieve the target at all, even by the
23 year 2110.
24

25 Thus, not only does the Estep-Buffo memo projection show, on its face, that the South
26 Coast Planning Unit will miss its fully functional forest target, the projection also overstates
27

1 that amount of fully functional forest that will be present. At a bare minimum, DNR must run
2 the numbers again, this time excluding all stands less than 80 acres in size.

3 **3. The About Time Timber Sale will be a significant impediment to**
4 **south coast planning unit reaching its HCP habitat target.**

5 As the numbers above show, the South Coast Planning Unit will miss the HCP habitat
6 target even if no trees are cut between now and the year 2110. However, timber harvest can still
7 occur in the South Coast Planning Unit, provided that the trees to be harvested would not have
8 contributed to meeting the habitat target. For example, stands of young trees can be harvested
9 if those trees would not have reached 150 years of age by the year 2097.
10

11 Unfortunately for DNR, the trees it selected for harvest in the About Time timber sale
12 would have contributed to meeting the habitat target. In October 2021, DNR prepared a report
13 on the About Time timber sale stand structure and characteristics. AR 1042–1046. According
14 to this report, “the [About Time] stand is approximately 84 years of age.” AR 1045.¹ Simple
15 math tells us that a stand that is 84 years old in the year 2021 will be 160 years old by the year
16 2097, the Year 100 deadline to meet the HCP habitat target. Thus, the About Time trees would
17 have contributed to the South Coast Planning Unit meeting the HCP target. Their loss will
18 contribute to the South Coast Planning Unit failing to meet the target—or, to be precise, their
19 loss will increase the magnitude by which the South Coast Planning Unit misses the target.
20
21
22
23
24
25
26

27 ¹ Photos of the beautiful, old trees in the About Time timber sale area are at AR 18111–18120 and
are well worth the Court’s time.

1 **D. DNR’s Data Shows that the South Coast Planning Unit Has Not Met Its**
2 **Older Forest Targets Set Forth in the 2006 PSF.**

3 As noted above, the 1997 HCP target for fully functional forest is only one target that
4 DNR must achieve. The 2006 PSF also sets a separate target that DNR must achieve. As we
5 will show below, DNR has not met that target, either.

6 **1. The 2006 PSF sets a target of 10 to 15 percent “older forest.” Older**
7 **forests means stands at least 123 years old.**

8 The General Silvicultural Policy of the 2006 Policy for Sustainable Forests states that:

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

14 AR 12591.

15 Similarly:

16 The department will target 10-15 percent of each Western Washington Habitat
17 Conservation Plan planning unit for ‘older’ forests – based on structural
18 characteristics – over time.

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

23 AR 12592.

24 The Final Environmental Impact Statement (AR 12072–12539) that accompanied
25 the 2006 Policy for Sustainable Forests and General Silvicultural Strategy
26 expounds on this requirement to preserve older forests:

27 [The Board’s Preferred Alternative] 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. DNR
intends to actively manage structurally complex forests, especially those suitable
stands in the botanically diverse stage of stand development, to achieve older-forest
structures across 10-15 percent of each Western Washington HCP planning unit in

1 70-100 years. Older-forest structures that contribute to this target are represented
2 by stands in the niche diversification or fully functional stage of stand development.

3 AR 12283.

4 To put it in plain terms, the 2006 PSF requires DNR to achieve 10 to 15 percent “older
5 forest” by the year 2096 (100 years after the adoption of the PSF). “Older forest” means either
6 fully functional forest of “niche diversification” forest. The term “fully functional forest” will
7 be familiar to the Court from the previous section regarding the HCP’s target—it means 150
8 year-old stands. But the term “niche diversification” is new. It appears in the PSF but not the
9 HCP. The term requires explanation:

11 “Niche diversification” is defined in the 2006 Policy for Sustainable Forests as “[a]
12 forest stand development stage in which structural complexity is evident and the stand has taken
13 on characteristics of older forests.” AR 12603. That term is given more concrete meaning in the
14 accompanying 2004 “Final Environmental Impact Statement on Alternatives for Sustainable
15 Forest Management of State Trust Lands in Western Washington and for Determining the
16 Sustainable Harvest Level.” AR 16653–17536. According to the 2004 FEIS, niche
17 diversification begins at a stand’s “Max RD age” plus 80 years. AR 17094. A stand’s “Max RD
18 age” is a silvicultural term, meaning the age at which a stand’s annual growth reaches its
19 maximum, as the Estep memo explains. AR 1581. For west-side Douglas-fir forests, the Max
20 RD age is 43 years, according to the Estep memo. AR 1583.

22 Thus, a west-side Douglas-fir stand like About Time enters the niche diversification
23 stage at an age of 123 years: 43 years (max RD) plus 80 years (2004 FEIS definition). Therefore,
24
25
26
27

1 under the 2006 PSF, DNR must achieve 10 percent forest cover aged 123 or older by the year
2 2096 (Year 100 of the 2006 PSF).²

3 **2. The 2006 PSF prohibits cutting “structurally complex” stand until**
4 **the target has been met.**

5 The General Silvicultural Policy of the 2006 Policy for Sustainable Forests states that:

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

9 AR 12592 (emphasis added).

10 Under this rule, a “structurally complex” stand cannot be harvested until the 10-to-15
11 percent older forest target is met, meaning at least 10 to 15 percent of the forest aged 123 years
12 old or older. Critically, the PSF does not say that a structurally complex stand may be harvested
13 if DNR is “on track” to hit its older forest target. It says that a structurally complex stand may
14 be harvested only if the older forest target “is met.” Only once 10 to 15 percent of the forest has
15 *already* hit the 123-year-old mark may structurally complex stands be harvested. (Stands that
16 are not structurally complex may, of course, be harvested at any time.)

17
18 **3. The south coast planning unit has not met the 2006 PSF older forest**
19 **target.**

20 According to Table 2 of the Estep memo, DNR’s progress toward achieving the 2006
21 PSF older forest target has been abysmal. AR 1588. Only the Olympic Experimental State
22

23
24 ² The Estep memo’s definition of “niche diversification” contrasts with an earlier DNR definition
25 of niche diversification. “Niche diversification” is synonymous with vertical diversification, according to the
26 guide. AR 1333. “Vertical diversification is the first stage of old-growth,” according to the guide. AR 1294. Old
27 growth begins at an age of 210 years, according to the guide’s table at AR 1308. Thus, under the guide to
identifying mature and old forests, a niche diversification stand would have to be at least 210 years old. We use
the Estep memo’s definition of 123 years, even though it is inconsistent with DNR’s guide definition of 210 years,
to demonstrate that even under the most favorable definition of niche diversification, DNR is still not in compliance
with the 2006 PSF.

1 Forest has achieved the 10 percent target as of 2021. The South Coast Planning Unit (where
2 About Time is) is only at 0.2 percent older forest, the worst in the state. The South Coast unit
3 will not hit the 10 percent target until the 2100, when it will finally reach 12.5% older forest
4 cover. *Id.*

5
6 **4. The About Time stand is structurally complex. Therefore, it cannot
be harvested until the 2006 PSF older forest target is met.**

7 The About Time stand is described in the October 2021 report as being in a “botanically
8 diverse” development stand, because it “contains timber that falls within several different stages
9 of stand development.” AR 1046. A “botanically diverse” stand is, by definition, structurally
10 complex. AR 16774.

11
12 Therefore, because the About Time timber sale is a structurally complex stand in a
13 planning unit that has not met its older-forest targets, it is a violation of the General Silvicultural
14 Policy of the 2006 Policy for Sustainable Forests to harvest About Time.

15 **E. The Court Should Reverse the DNS and the About Time Sale and Remand
16 It to The Board for Reconsideration of How, if Ever, DNR Can Achieve Its
17 Targets While Logging This Unique Old Stand of 75 Acres.**

18 As the foregoing shows, the About Time timber sale will contribute to the failure of the
19 South Coast Planning Unit to hit the habitat targets in the 1997 HCP. This failure is a violation
20 of WAC 332-41-665(1)(f). In addition, the About Time timber sale involves the harvest of a
21 structurally complex stand in the South Coast unit, which has not met its habitat target in the
22 2006 PSF. This violation of the 2006 PSF is another violation of WAC 332-41-665(1)(f) The
23 Court should conclude that the About Time sale was arbitrary, capricious, and contrary to law
24 and should reverse the sale pursuant to RCW 79.02.030.

25
26 In addition, the Court should reverse the SEPA DNS under RCW 43.21C.075. Given
27 that the SEPA checklist promises that there will be compliance with the 1997 HCP and 2006

1 PSF, when in fact there will not be compliance, the Court should conclude that the About Time
2 timber sale is making a bad problem worse, and therefore the probable impacts of the About
3 Time timber sale will be significant and adverse. The Court should instruct DNR to prepare an
4 environmental impact statement under RCW 43.21C.030, -.031. At a bare minimum, the Court
5 should conclude that the DNS was not based on information reasonably sufficient to evaluate
6 the About Time sale, since the DNS predicates its analysis on the erroneous belief that DNR will
7 achieve compliance with the 1997 HCP and 206 PSF. This, too, is grounds to reverse the DNS.
8

9 **F. The Court Should Order DNR to Pay the Costs of the Administrative**
10 **Record.**

11 DNR and the Center dispute which party should be responsible for paying the costs of
12 preparing the administrative record in this case. For the following reasons, it should be DNR.

13 The Public Lands Act contains the following regarding costs:

14 **Any applicant** to purchase, or lease, any public lands of the state, or any valuable
15 materials thereon, and **any person** whose property rights or interests will be
16 affected by such sale or lease, feeling aggrieved by any order or decision of the
17 board, or the commissioner, concerning the same, may appeal therefrom to the
18 superior court of the county in which such lands or materials are situated, by serving
19 upon all parties who have appeared in the proceedings in which the order or
20 decision was made, or their attorneys, a written notice of appeal, and filing such
21 notice, with proof, or admission, of service, with the board, or the commissioner,
22 within thirty days from the date of the order or decision appealed from, and at the
23 time of filing the notice, or within five days thereafter, filing a bond to the state, in
24 the penal sum of two hundred dollars, with sufficient sureties, to be approved by
25 the secretary of the board, or the commissioner, conditioned that the **appellant** shall
26 pay all costs that may be awarded against the **appellant** on appeal, or the dismissal
27 thereof. Within thirty days after the filing of notice of appeal, the secretary of the
board, or the commissioner, shall certify, under official seal, a transcript of all
entries in the records of the board, or the commissioner, together with all processes,
pleadings and other papers relating to and on file in the case, except evidence used
in such proceedings, and file such transcript and papers, **at the expense of the**
applicant, with the clerk of the court to which the appeal is taken. Costs on appeal
shall be awarded to the prevailing party as in actions commenced in the superior
court, but no costs shall be awarded against the state, the board, or the
commissioner. Should judgment be rendered against the **appellant**, the costs shall
be taxed against the **appellant** and the **appellant's** sureties on the appeal bond,

1 except when the state is the only adverse party, and shall be included in the
2 judgment, upon which execution may issue as in other cases.

3 RCW 79.02.030 (emphasis added).

4 We have added the bolded text to highlight that the statute contemplates an “**applicant**
5 to purchase, or lease, any public lands of the state, or any valuable materials thereon,” as well
6 as an “**appellant**” of the Board’s ultimate decision. Costs for the record must be borne by the
7 applicant, whereas costs for an unsuccessful appeal must be borne by the appellant, and those
8 costs will be taxed against a bond the appellant was required to post. The statute uses the word
9 applicant twice and the word appellant five times.
10

11 Courts “presume the legislature intends a different meaning when it uses different
12 terms.” *Foster v. Dep’t of Ecology*, 184 Wn.2d 465, 473, 362 P.3d 959 (2015). Thus, under the
13 Public Lands Act, the applicant for a timber sale is not necessarily the appellant of that timber
14 sale. The statute allows for an applicant to be an appellant (for example, if the proposed timber
15 sale is denied), but the statute also allows for “any person whose property rights or interests
16 will be affected by such sale or lease” to be an appellant, even if that person is not an applicant.
17 Indeed, that is the very scenario here, where DNR applied to the Board for authorization to sell
18 About Time (making DNR the applicant), and the Center then appealed that decision to this
19 Court (making the Center the appellant). Certainly, the Center cannot be construed as the
20 applicant, because the Center has not sought to “purchase, or lease, any public lands of the state,
21 or any valuable materials thereon.” Quite the contrary, the Center’s position is that the About
22 Time trees should be left to mature under the 1997 HCP. The Center posted the \$200 bond
23 required of the appellant by the Public Lands Act, because the Center is the appellant in this
24 case. But the only applicant in this case is DNR.
25
26
27

1 This reading of the statute—where the “appellant” may be distinct from the
2 “applicant”—is bolstered by the legislative history of the statute. In its original form, the statute
3 provided that “Any person who is an applicant to purchase any tide lands may appeal from any
4 finding or decision of the board of state land commissioners...” Laws of 1895, c. 178 § 82.
5 There was no corresponding right of appeal for aggrieved persons who were *not* the applicant.
6 The right of appeal for non-applicants was added in 1901, when the statute was also amended
7 to include appeals of timber sales, not just sales of tide lands. Laws of 1901, c. 62 § 1. The 1901
8 amendment was also the first time the Legislature mentioned costs of preparing the record,
9 which costs it assigned to the applicant. *Id.* § 4.
10

11 This legislative history proves that the Legislature is well aware of the difference
12 between appellants who are applicants versus appellants who are not applicants. When the
13 Legislature chose to assign costs of the record to the applicant, it did so in the very same
14 amendment where it first created a right of appeal for a non-applicant. This Court should
15 conclude that the Legislature was acting deliberately when it made this distinction. Since DNR
16 is the applicant in this case, the Court should order DNR to pay the costs of the record.
17

18 **G. The Court Should Award the Center Its Attorney Fees under the Equal**
19 **Access to Justice Act.**

20 If the Court rules in the Center’s favor, the Center is entitled to attorney fees under the
21 Equal Access to Justice Act, RCW 4.84.340–370. The Center is a 501(c)(3) corporation, so it
22 is a “qualified party” under RCW 4.84.340(5). DNR and the Board are government agencies
23 under RCW 4.84.340(1). The About Time timber sale was “agency action” under RCW
24 4.84.340(2) as that term is defined in 34.05.010(3) because it was a decision by the Board to
25 grant benefits (in the form of a timber auction) and a license (in the form of permission to
26 harvest state-owned timber) and the implementation of a statute (the Public Lands Act, which
27

1 authorizes such auctions). And, this court’s review constitutes “judicial review” under RCW
2 4.84.340(4) as that term is defined in RCW 34.05.510(3), because RCW 79.02.030 authorizes
3 this Court to conduct “de novo review ... expressly authorized by provision of law.” Therefore,
4 the Center is entitled to attorney fees if it prevails and if the Court concludes that DNR and the
5 Board’s position was not “substantially justified.” RCW 4.84.350(1).
6

7 An agency’s position is substantially justified if, even though the position is wrong, the
8 agency still had a “reasonable” basis for its position in law and fact. *Arishi v. Wash. State Univ.*,
9 196 Wn. App. 878, 910, 385 P.3d 251 (2016). The decision must be justified to a degree that
10 would “satisfy a reasonable person.” *Brown v. Dep’t of Soc. and Health Servs.*, 190 Wn. App.
11 572, 597, 360 P.3d 875 (2015). Here, where DNR’s own projections shows that the 1997 HCP
12 will be violated, DNR and the Board cannot be said to have acted “reasonably.” A reasonable
13 person, looking at the agencies’ decision to log a stand that would have reached 150 years of
14 age, when the agencies are already falling far short on stands that will reach that age, would not
15 be satisfied with the agencies’ justification. The Court should award the Center its fees.
16

17 V. CONCLUSION

18 Appellant respectfully requests the following relief:

- 19 1. An order reversing the Board’s approval of the About Time project for auction.
- 20 2. An order reversing DNR’s SEPA DNS for the About Time project and
21 remanding it to DNR for the preparation of a new SEPA checklist and to the Board of Natural
22 Resources for reconsideration with this new SEPA checklist.
- 23 3. A declaration that the About Time project could have probable, significant
24 adverse impacts to the environment, necessitating preparation of an environmental impact
25 statement.
26
27

1 4. An order enjoining all forest practices pursuant to the About Time project.

2 5. If necessary and appropriate, an order requiring mitigation for any impacts of
3 the About Time project.

4 6. An order granting Appellant its costs and attorneys' fees based on the Equal
5 Access to Justice Act, RCW Ch. 4.84, or any other applicable provision of law.
6

7 7. Any other relief that this Court deems just and proper.

8 Dated this 10th day of January, 2022.

9 Respectfully submitted,

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