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SUPERIOR COURT OF WASHINGTON
FOR JEFFERSON COUNTY

CENTER FOR SUSTAINABLE ECONOMY, SAVE THE OLYMPIC PENINSULA)	
)	
Appellants,)	NO. 22-2-00015-16
)	
v.)	
)	
WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, BOARD OF NATURAL RESOURCES, and COMMISSIONER OF PUBLIC LANDS HILARY FRANZ, in her official capacity,)	APPELLANTS' OPENING BRIEF
)	
Respondents.)	
)	
)	

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I. INTRODUCTION

Before a state agency can move forward with a major action, such as approving a large logging project on state lands, it must first assess whether that action may have significant adverse impacts associated with climate change pursuant to the Washington State Environmental Policy Act (SEPA), RCW Ch. 43.21C. Despite this legal requirement, the Washington State Board of Natural Resources (the “Board”) recently approved two major timber sales without any prior analysis of the extent of greenhouse gas emissions and other climate change related impacts that those two timber sales will have. There is no mention at all of climate impacts in the project-level SEPA documents, nor does the analysis of the climate impacts of the projects appear in any other document in the administrative record. In response to concerns expressed by appellants during the process below about this, the Department of Natural Resources (“DNR”) said that they were not legally required to consider climate change impacts at all.

This position was and is baffling because it is so obviously without any legal basis. SEPA clearly requires that state agencies assess climate change impacts. Department of Ecology’s statewide SEPA regulations and guidance require consideration of climate impacts as an element of the environment and require accounting for greenhouse gas emissions associated with projects that cause such emissions. The Court of Appeals has expressly ruled that state agencies must consider the climate impacts of projects they authorize during SEPA review in order to fulfill the duties of this generation as a trustee of the environment for succeeding generations.

Meanwhile, the evidence demonstrates that these two timber sales will indeed cause significant adverse climate change impacts. Logging on DNR lands is a source of greenhouse

1 gas emissions that drives climate change and amplifies climate change risks. Logging on DNR
2 lands exacerbates climate change by making the land more susceptible to heat waves, droughts,
3 wildfires, water shortages, floods, landslides and extirpation of fish, wildlife, and plants critical
4 to the region’s economy and human wellbeing.
5

6 For these reasons, it is imperative to fold climate change considerations into the SEPA
7 analysis of DNR logging proposals. The severity of these climate change impacts is almost
8 entirely dictated by site-specific factors that DNR can control through its SEPA review of
9 timber sale decisions. Using its SEPA authority, DNR can control what type of trees are being
10 harvested, whether the site is clearcut or thinned, how many acres and what volume of timber
11 is logged, whether logging sites are dry or wet, whether the sites targeted for logging will be
12 south facing or north facing, what types of logging equipment will be used, what the distance
13 is to the nearest mills, and so forth. DNR could include a prohibition on construction of new
14 roads or preserving portions of each sale area as carbon reserves that could earn income for
15 beneficiaries through voluntary or compliance offset markets. The Jefferson County Board of
16 County Commissioners has repeatedly called on DNR to quantify the effects of timber sales on
17 carbon sequestered and emitted by DNR timber sales and explore such reasonable alternatives
18 to clearcutting. By failing to do the bare minimum of disclosing and assessing the extent of
19 climate change impacts that this logging will cause, respondents are overlooking the potential
20 design options and mitigation measures available to reduce or eliminate adverse climate
21 impacts.
22
23

24 The Center for Sustainable Economy (the “Center”) and Save The Olympic Peninsula
25 (“STOP”) appeal the decisions by DNR and the Board to approve the Taylor Downhill Sorts
26 and Goodman 1 timber sales. The timber sales are unlawful in that greenhouse gas emissions
27

1 and other climate change impacts were not considered in violation of the Public Lands Act
2 (RCW Title 79) and SEPA. We are asking this Court to vacate DNR’s SEPA Determination of
3 Non-Significance (“DNS”) for the timber sales because such a determination cannot be made
4 without consideration of humanity’s most pressing environmental issue: climate change. DNR
5 and the Board had a legal duty to consider greenhouse gas emissions and other climate impacts
6 of these timber sales and they failed to discharge that duty.
7

8 II. STATEMENT OF FACTS¹

9 A. Appellant Center for Sustainable Economy

10 The Center for Sustainable Economy is a Washington State-registered non-profit
11 corporation based in Port Townsend, Washington.² The Center’s mission is to expedite the
12 transition to a sustainable economy by eliminating harmful policies, programs, and projects like
13 clearcutting on DNR lands and scaling up alternatives, like climate smart forestry, that provide
14 triple bottom line benefits to the economy, society, and environment.³
15

16 The Center’s members regularly visit and recreate in DNR-managed forestlands,
17 including those in the Little Quilcene, Snow Creek, Tarboo Creek, Chimacum Creek and
18 Goodman Creek Basins.⁴ The Center’s members gain aesthetic enjoyment from visiting and
19 recreating on DNR forestlands and observing the native wildlife, fish, and plants that inhabit
20 these forests.⁵ The Center’s members have visited the Taylor Downhill Sorts and Goodman 1
21 project areas in the past and plan to do so again in the near future.⁶ Their enjoyment of these
22

23
24 ¹ Appellants believe the facts recited in this section are substantially uncontested. Where potentially
25 contested facts exist, appellants note the potential dispute and defer further discussion to the argument section,
below

26 ² Declaration of John Talberth (Aug. 4, 2022), ¶ 2.

27 ³ *Id.*

⁴ *Id.*, ¶ 3.

⁵ *Id.*

⁶ *Id.*, ¶ 4.

1 areas will be diminished if logging, road building and post-harvest activities like establishing
2 timber plantations, burning and spraying goes forward.⁷ Those same interests will be protected
3 if the Court issues injunctive relief to prevent logging and harmful post-harvest activities from
4 going forward under the Taylor Downhill Sorts and Goodman 1 projects.⁸

5
6 **B. Appellant Save The Olympic Peninsula**

7 Save The Olympic Peninsula is a Washington State-registered non-profit corporation
8 based in Port Angeles, Washington.⁹ STOP's mission is to ensure the best use of the land, the
9 lakes, the rivers and the skies above the Olympic Peninsula in order to retain the unique
10 character of this area, protect its environmental qualities, and provide for its enjoyment by
11 generations to come.¹⁰

12 STOP's members regularly visit and recreate in DNR-managed forestlands, including
13 those in the Little Quilcene, Snow Creek, Tarboo Creek, Chimacum Creek and Goodman Creek
14 Basins.¹¹ STOP's members gain aesthetic enjoyment from visiting and recreating on DNR
15 forestlands and observing the native wildlife, fish, and plants that inhabit these forests. STOP's
16 members have visited the Taylor Downhill Sorts and Goodman 1 project areas in the past and
17 plan to do so again in the near future.¹² Their enjoyment of these areas will be diminished if
18 logging, road building and post-harvest activities like establishing timber plantations, burning
19 and spraying goes forward.¹³ Those same interests will be protected if the Court issues

24 ⁷ *Id.*

25 ⁸ *Id.*

26 ⁹ Declaration of Ron Richards (Aug. 4, 2022), ¶ 2.

27 ¹⁰ *Id.*

¹¹ *Id.*, ¶ 3.

¹² *Id.*, ¶ 4.

¹³ *Id.*

1 injunctive relief to prevent logging and harmful post-harvest activities from going forward
2 under the Taylor Downhill Sorts and Goodman 1 projects.

3 **C. Respondents DNR, Commissioner of Public Lands, and Board of Natural**
4 **Resources**

5 Respondents Washington State Department of Natural Resources, the Commissioner of
6 Public Lands, and the Board of Natural Resources manage approximately three million acres
7 of forested state-owned lands in Washington State.¹⁴ The Commissioner of Public Lands is a
8 statewide elected official who chairs the Board of Natural Resources and administers DNR.¹⁵
9 DNR is responsible for administering the public forestlands.¹⁶ The Board of Natural Resources
10 (“Board”) determines whether, which, and how much timber to sell from Washington’s public
11 forestlands.¹⁷ The Board also decides whether individual timber sales should be put up for
12 auction.¹⁸

13
14 DNR conducted the environmental review of the Taylor Downhill Sorts and Goodman
15 1 timber sales and issued the SEPA DNSs at issue in this case.¹⁹ The Board approved the Taylor
16 Downhill Sorts and Goodman 1 timber sales.²⁰

17
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22 ¹⁴ *Conservation Northwest v. Commissioner of Public Lands*, No. 99183-9, 2022 WL 2840077 at *1 (Wa.
Sup. Ct. Jul. 21, 2022).

23 ¹⁵ Answer, ¶ 17; RCW 43.30.105.

24 ¹⁶ Answer, ¶ 15; RCW 43.30.411, Title 79 RCW.

25 ¹⁷ Answer, ¶ 16; RCW 43.30.205–.295.

26 ¹⁸ *Id.*

27 ¹⁹ AR 8547-8577 (Taylor Downhill Sorts environmental checklist); AR 8578 (Taylor Downhill Sorts DNS);
AR 7323-7348 (Goodman 1 environmental checklist); AR 7298 (Goodman 1 DNS).

²⁰ AR 8787-8828 (descriptions of timber sales considered at Board’s January 4, 2022 meeting, including
Taylor Downhill Sorts at AR 8789, 8791–8797); AR 7814-7867 (descriptions of timber sales considered at Board’s
February 1, 2022 meeting, including the Goodman 1 at AR 7816, 7826–7832); AR 460–468 (all ten timber sales
considered at Sept. 7 meeting, incl. About Time, approved at AR 463).

1 **D. The Taylor Downhill Sorts Timber Sale**

2 The Board approved the Taylor Downhill Sorts Sale on January 4, 2022.²¹ The Taylor
3 Downhill Sorts timber sale will result in the logging of 153 acres of trees that average 85 years
4 in age in the upper reaches of the Quilcene River including sites on a ridgeline used for
5 recreational purposes.²² The timber sale will likely yield 5.2 million board feet of logs to local
6 mills.²³

7
8 DNR completed an environmental review of the Taylor Downhill Sorts sale using a
9 standard environmental checklist developed by Department of Ecology.²⁴ The checklist report
10 contains a summary of all of the factors DNR included in its environmental review.²⁵ The
11 responsible official did not review climate change impacts at all.²⁶ The review did not contain
12 an analysis of greenhouse gas emissions, ways the logging proposal would amplify the effects
13 of climate change, ways climate change may necessitate changes in the project’s configuration,
14 alternatives to the project that would lessen or eliminate climate impacts, or mitigation measures
15 adopted to minimize those impacts as well.²⁷

16
17 On November 18, 2021, DNR opened its 14-day comment period on its environmental
18 review.²⁸ On November 30, the Center provided detailed comments citing and providing links
19 to scientific and technical information on the following:

- 20
21 (a) that greenhouse gas emissions associated with the Taylor Downhill
22 Sorts timber sale are likely to be significant, in the order of 30,000 metric
 tons CO₂ or more;

23
24 ²¹ AR 8787-8828 (descriptions of timber sales considered at Board’s January 4, 2022 meeting, including
Taylor Downhill Sorts at AR 8789, 8791–8797).

25 ²² AR 8617. This site is an undeveloped shooting range used by locals from the Quilcene area.

26 ²³ *Id.*

27 ²⁴ AR 8594-8624.

28 ²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ AR 8592.

- 1
- 2 (b) that by clearcutting the forest canopy and building new roads the Taylor
- 3 Downhill Sorts timber sale is likely to amplify the effects of climate
- 4 change by making the land more susceptible to wildfires, floods,
- 5 droughts, heat waves, and other climate stressors;
- 6
- 7 (c) that DNR has access to all of the methods and sources of information the
- 8 agency needs to quantify GHG emissions and analyze these climate
- 9 impacts;
- 10 (d) that there are reasonable alternatives to the proposal that minimize
- 11 climate impacts such as variable density thinning instead of clearcutting,
- 12 barring construction of new roads, and earning revenues from carbon
- 13 payments, and;
- 14 (e) that the SEPA analysis and draft DNS were in error by omitting any
- 15 consideration of these factors.²⁹

16 As a remedy, the Center requested that DNR (a) rescind the DNS; (b) redo the SEPA

17 analysis to include climate impacts, and (c) consider a climate smart alternative in this revised

18 SEPA analysis.³⁰ DNR also received a comment letter signed by 94 individuals including those

19 affiliated with 26 organizations expressing similar concerns and requesting the identical

20 remedies.³¹

21 On December 31, 2021, DNR issued a notice indicating that the DNS was final.³² No

22 changes were made to the DNS or environmental checklist. That response included an

23 addendum that purported to address appellants' concerns. In that addendum, DNR justified

24 omitting climate impacts from the SEPA analysis by stating that “[a]t this time, the SEPA

25 Environmental Checklist does not include analysis of climate impacts”³³ and that “all of the

26 concerns raised in your letter address disagreements with statewide-level policies and plans,

27

28 ²⁹ AR 8580-8585

29 ³⁰ AR 8585.

30 ³¹ AR 8705-8710.

31 ³² AR 8539-8546.

32 ³³ AR 8540.

1 rather than the specific Taylor Downhill Sorts proposal. Therefore, the points raised in your
2 letter do not change the determination of this proposal.”³⁴

3 Contrary to DNR’s description otherwise, nothing in the Center’s comments could be
4 fairly characterized as disagreeing with statewide-level policies and plans.³⁵ The Center’s letter
5 was focused entirely on the probable significant adverse climate impacts, including greenhouse
6 gas emissions, associated with this particular timber sale. Also, as we demonstrate in more
7 detail below in the Argument section of this brief, the fact that the SEPA environmental
8 checklist does not contain the word “climate” does not absolve DNR of its duty to assess
9 whether the project will have significant adverse impacts related to climate change, including
10 greenhouse gas emissions as a factor related to air quality.³⁶

11
12 Consistent with their respective roles in disposing of state-owned timber, DNR
13 proposed the sale to the Board, who considered it during the Board’s meeting on January 4,
14 2022. The Center’s Dr. John Talberth provided testimony during that meeting and requested
15 that the Board rescind the DNS and consider the climate impacts of the Taylor Downhill Sorts
16 timber sale, reasonable climate smart alternatives, and mitigation measures to reduce climate
17 impacts.³⁷ Many other members of the public provided substantially similar testimony.³⁸
18 Despite this, the Board approved the timber sale without discussion or response to any of these
19 concerns.³⁹
20
21
22
23

24 ³⁴ AR 8545.

25 ³⁵ AR 8580-8585.

26 ³⁶ *See infra*, Section V.A.

27 ³⁷ DNR’s webinar recording can be accessed here: <https://twv.org/video/washington-state-board-of-natural-resources-2022011018/?eventID=2022011018>. Dr. Talberth’s testimony begins at 1:10:39.

³⁸ *Id.*

³⁹ *Id.*

1 On January 26, 2022, and prior to the Taylor Downhill Sorts timber sale being offered
2 for auction, the Center, joined by STOP, made yet another request to rescind the DNS for this
3 project (as well as the Goodman 1 timber sale, which was scheduled to be considered during
4 the Board's upcoming February 1, 2022 meeting). The request took the form of an extensive
5 memorandum accompanied by 14 exhibits, most of which were included as citations with links
6 in the Center's November 30, 2021 SEPA comments.⁴⁰ The memorandum and exhibits once
7 again made the case that the Taylor Downhill Sorts DNS was made in error because climate
8 change considerations, including GHG emissions, were not considered. More details of this
9 filing appear below. The Center's Dr. John Talberth again testified at the February 1 Board
10 meeting again, to no avail.⁴¹

11
12
13 **E. The Goodman 1 Timber Sale**

14 The Board voted to approve the Goodman 1 Timber Sale on February 1, 2022.⁴² The
15 Goodman 1 timber sale will clearcut approximately 170 acres of forestlands south of Forks.⁴³
16 The project is anticipated to yield over 3.8 million board feet of timber.⁴⁴

17 Consistent with their respective roles in disposing of state-owned timber, DNR
18 completed an environmental review using a standard environmental checklist developed by
19 Department of Ecology, which DNR presented to the Board in advance of the February 1, 2022
20 decision meeting.⁴⁵ The checklist report contains a summary of all of the factors DNR included
21

22
23

⁴⁰ AR 16617-17027.

24 ⁴¹ DNR's webinar recording for its February 1st meeting can be accessed here:
25 <https://www.dnr.wa.gov/about/boards-and-councils/board-natural-resources>. Dr. Talberth's testimony begins at
26 1:12:50.

27 ⁴² AR 7814-7867 (descriptions of timber sales considered at Board's February 1, 2022 meeting, including
the Goodman 1 at AR 7816, 7826-7832).

⁴³ AR 7826.

⁴⁴ *Id.*

⁴⁵ AR 7626-7657.

1 in its environmental review.⁴⁶ DNR's review did not review climate change impacts for the
2 project at all. Their review did not include any analysis of greenhouse gas emissions, ways the
3 logging proposal would amplify the effects of climate change, ways climate change may
4 necessitate changes in the project's configuration, alternatives to the project that would lessen
5 or eliminate climate impacts, or mitigation measures adopted to minimize those impacts as
6 well.⁴⁷

8 On December 16, 2021, DNR opened its 14-day comment period on its environmental
9 review. On December 21, 2021, the Center provided detailed comments citing and providing
10 links to scientific and technical information on the following:

- 11 (a) that greenhouse gas emissions associated with the Goodman 1 timber
12 sale are likely to be significant, in the order of 48,348 metric tons CO₂ or
13 more;
- 14 (b) that by clearcutting the forest canopy and building new roads the
15 Goodman 1 timber sale is likely to amplify the effects of climate change
16 by making the land more susceptible to wildfires, floods, droughts, heat
17 waves, and other climate stressors;
- 18 (c) that DNR has access to all of the methods and sources of information the
19 agency needs to quantify GHG emissions and analyze these climate
20 impacts;
- 21 (d) that there are reasonable alternatives to the proposal that minimize
22 climate impacts such as variable density thinning instead of clearcutting,
23 barring construction of new roads, and earning revenues from carbon
24 payments, and;
- 25 (e) that the SEPA analysis and draft DNS were in error by omitting any
26 consideration of these factors.⁴⁸

26 ⁴⁶ *Id.*

27 ⁴⁷ *Id.*

⁴⁸ AR 7314-7320.

1 As a remedy, the Center requested that DNR (a) rescind the DNS; (b) redo the SEPA
2 analysis to include climate impacts, and (c) consider a climate smart alternative in this revised
3 SEPA analysis.⁴⁹

4 On January 6, 2022, DNR issued notice indicating that the DNS was final.⁵⁰ No
5 changes were made to the DNS or environmental checklist and appellants were provided no
6 explanation as to why their concerns were not addressed.

7 On January 26, 2022, the Center and STOP filed an extensive memorandum to the
8 Board, containing 14 exhibits further amplifying their climate related concerns with both the
9 Goodman 1 and Taylor Downhill Sorts timber sales.⁵¹

10 The memorandum provided several reasons why DNR should either delay or cancel the
11 Goodman 1 and Taylor Downhill Sorts timber sales until climate impacts can be disclosed and
12 mitigated. In particular, because:
13

- 14
- 15 (a) climate change is an existential threat to humanity;
 - 16 (b) logging is a significant source of greenhouse gas emissions that is driving
17 climate change;
 - 18 (c) logging is the single largest source of greenhouse gas emissions in
19 Jefferson County according to the County's Forests and Trees
Greenhouse Gas Inventory;
 - 20 (d) the Taylor Downhill Sorts and Goodman 1 timber sales are likely to
21 generate significant quantities of greenhouse gas emissions;
 - 22 (e) logging is making the land more susceptible to climate change;
 - 23 (f) climate change affects DNR forestlands in ways that necessitate
24 mitigation at the project level;
 - 25 (g) SEPA requires analysis of climate impacts, and;

26 ⁴⁹ AR 7320.

⁵⁰ AR 7350.

27 ⁵¹ AR 16617-17027.

1
2 (h) failure to follow SEPA procedures has precluded consideration of
3 climate smart alternatives to both proposals.⁵²

4 In addition, the Center’s Dr. John Talberth provided testimony during the February 1,
5 2022 Board meeting, in which he reviewed the content of the memorandum and exhibits, and
6 requested that the Board rescind the DNS and consider the climate impacts of the Taylor
7 Downhill Sorts and Goodman 1 timber sales, reasonable climate smart alternatives to these
8 projects, and mitigation measures to reduce climate impacts.⁵³ Despite this, the Board approved
9 the timber sale without discussion or response to any of these concerns.

10 **III. OVERVIEW OF THE LAW**

11 **A. The Public Lands Act**

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

14
15 Any applicant to purchase, or lease, any public lands of the state, or any valuable
16 materials thereon, and any person whose property rights or interests will be
17 affected by such sale or lease, feeling aggrieved by any order or decision of the
18 board, or the commissioner, concerning the same, may appeal therefrom to the
19 superior court of the county in which such lands or materials are situated, by
20 serving upon all parties who have appeared in the proceedings in which the order
21 or decision was made, or their attorneys, a written notice of appeal...⁵⁴

22 The Public Lands Act provides that the court’s hearing of the case “shall be de novo
23 before the court, without a jury, upon the pleadings and papers so certified...” meaning closed-
24 record review.⁵⁵

25 ⁵² *Id.*

26 ⁵³ DNR’s webinar recording for its February 1st meeting can be accessed here:
<https://www.dnr.wa.gov/about/boards-and-councils/board-natural-resources>. Dr. Talberth’s testimony at the Feb.
27 1st meeting begins at 1:12:50.

⁵⁴ RCW 79.02.030.

⁵⁵ *Id.*

1 **B. The Washington State Environmental Policy Act (SEPA)**

2 The Washington State Environmental Policy Act (SEPA), Chapter 43.21C RCW, was
3 enacted to assure the integration of environmental values into the decision-making process of
4 state agencies. Recognizing the “profound impact” of development and resource utilization and
5 exploitation (among other things) on the natural environment, the legislature declared that
6 Washington State’s policy is, in part, to “[f]ulfill the responsibilities of each generation as
7 trustee of the environment for succeeding generations.”⁵⁶ The legislature recognized that “each
8 person has a fundamental and inalienable right to a healthful environment and that each person
9 has a responsibility to contribute to the preservation and enhancement of the environment.”⁵⁷
10 The central purpose of SEPA is to protect these individual fundamental and inalienable rights.⁵⁸

11 SEPA imposes the responsibility to protect these fundamental rights on state agency
12 decision-makers.⁵⁹ Agencies must “use all practicable means” to (a) foster and promote the
13 general welfare; (b) create and maintain conditions under which human beings and nature can
14 exist in productive harmony; and (c) fulfill the social, economic, and other requirements of
15 present and future generations of Washington citizens.⁶⁰ This trust is more than merely a stirring
16 maxim or artful slogan - it is the quickening principle in the application of the statute.⁶¹

17 To implement this goal of protecting these rights, SEPA requires that for every decision
18 on a major action significantly affecting the quality of the environment, the lead agency must
19 prepare an “Environmental Impact Statement” or “EIS.”⁶² The primary purpose of an EIS is to
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24 ⁵⁶ RCW 43.21C.020.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ RCW 43.21C.020; RCW 43.21C.060.

⁶⁰ *Id.*

⁶¹ *The Lands Council v. Washington State Parks & Recreation Commission*, 176 Wn. App. 787, 807–808,
309 P.3d 734 (2013).

⁶² RCW 43.21C.030; WAC 197-11-400.

1 ensure that SEPA’s policies of protecting the environment are an integral part of the ongoing
2 actions of state and local government.⁶³ SEPA also authorizes decisionmakers to either deny a
3 project outright solely because of its environmental impacts and/or place conditions on a project
4 to mitigate its impacts.⁶⁴

5
6 The first step of the SEPA process is a “threshold determination,” which is issued by
7 the SEPA responsible official.⁶⁵ The threshold determination is a formal decision as to whether
8 a project will or will not cause significant adverse environmental impacts and, therefore,
9 whether an EIS will be required for the project.⁶⁶ The content of environment review that is
10 required for a threshold determination is specified in WAC 197-11-330 and WAC 197-11-
11 444.⁶⁷ WAC 197-11-444 provides a list of all of the elements of the environment that must be
12 considered by the responsible official, such as air (including climate), water, plants, animals,
13 and much more.

14
15 If the responsible official determines that the proposal will have no significant adverse
16 environmental impacts, the lead agency shall prepare and issue a Determination of Non-
17 Significance (DNS) per WAC 197-11-340. If the responsible official determines that a proposal
18 may have significant adverse environmental impacts, the lead agency shall prepare and issue a
19 Determination of Significance (DS) and require an EIS.⁶⁸

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⁶³ WAC 197-11-400.

⁶⁴ WAC 197-11-060. *See Polygon Corp.*, 90 Wn.2d at 63-65.

⁶⁵ RCW 43.21C.033; WAC 197-11-055(2).

⁶⁶ WAC 197-11-330.

⁶⁷ WAC 197-11-060(2)(b).

⁶⁸ WAC 197-11-360.

1 The threshold determination is probably the most important single step in the SEPA
2 process. The public policy of SEPA is thwarted if an EIS is not prepared for a project with
3 significant impacts.⁶⁹

4 IV. STANDARD OF REVIEW

5
6 When a court is reviewing a SEPA DNS appeal, the “clearly erroneous” standard of
7 review applies.⁷⁰ A decision is clearly erroneous when the reviewing court is left with a definite
8 and firm conviction that a mistake has been committed even if some evidence supports the
9 challenged decision.⁷¹

10 The clearly erroneous standard is a broad standard of review that calls for a higher
11 degree of judicial scrutiny of agency decisions.⁷² “The scope of judicial review of a
12 governmental determination of ‘no environmental significance’ is extremely broad.”⁷³ This
13 increased judicial scrutiny of a decision to issue a DNS is based on a determination that more
14 proactive judicial review is necessary to ensure that the policies of SEPA are achieved.⁷⁴ “The
15 purpose of the broad scope of review is to ensure that an agency, in considering the need for an
16 EIS, does not yield to the temptation of expediency thus short-circuiting the thoughtful
17 decision-making process contemplated by SEPA.”⁷⁵

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23 ⁶⁹ *Norway Hill Preserv. and Protec. Ass'n v. King County Council*, 87 Wn.2d 267, 273, 552 P.2d 674
(1976).

24 ⁷⁰ *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979) (citing RCW
25 34.04.130(6)(e); *Sisley v. San Juan Cty.*, 89 Wn.2d 78, 569 P.2d 712 (1977); *Norway Hill Preserv. & Protec.*
Ass'n, 87 Wn.2d at 275.

26 ⁷¹ *Norway Hill Preser. and Protec. Ass'n*, 87 Wn.2d at 274.

27 ⁷² *Id.* See also *Polygon Corp. v. City of Seattle*, 90 Wn. 2d 59, 68, 578 P.2d 1309 (1978).

⁷³ *Sisley*, 89 Wn. 2d at 84.

⁷⁴ *Polygon Corp.*, 90 Wn.2d at 68.

⁷⁵ *Asarco*, 92 Wn.2d at 700–701.

1 With this standard, the amount of deference is neither unlimited, nor does it approximate
2 a rubber stamp.⁷⁶ It requires the court to conduct a “critical review” and is a “more intense”
3 standard of review than the arbitrary and capricious standard.⁷⁷

4 The clearly erroneous standard requires the court to consider the public policy of the
5 laws that authorize the decision.⁷⁸ Consequently, that public policy is part of the standard of
6 review.⁷⁹ Judicial review of the SEPA DNS decision should, therefore, advance the SEPA
7 policies that are described above.

9 The statute does not specify what standard of review the court is to apply to the timber-
10 sale decision, but the Court of Appeals has applied the standard of “arbitrary and capricious or
11 contrary to law” to leasing and sale decisions arising under the Public Lands Act.⁸⁰

12 The question of who must pay for the cost of producing the administrative record for
13 this court (addressed at the end of this brief) involves a pure question of statutory interpretation
14 rather than review of an agency decision, and must therefore be reviewed using the *de novo*
15 standard of review.⁸¹

17 V. ARGUMENT

18 Respondents have violated SEPA in two ways. First, DNR clearly erred when it failed
19 to assess greenhouse gas emissions and climate change impacts in its SEPA review of the timber
20 sales. Climate change and greenhouse gas emissions are elements of the environment that must
21 be assessed by the responsible official when making a SEPA threshold determination. The
22

24 ⁷⁶ *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435, 166
25 P.3d 1198, 1209 (2007).

⁷⁷ *Id. citing Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988).

⁷⁸ *Norway Hill Preser. and Protec. Ass'n*, 87 Wn.2d at 272.

⁷⁹ *Id.*

⁸⁰ *See Nw. Alloys, Inc. v. Dep't of Natural Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019).

⁸¹ *State, Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

1 DNSs can be reversed as a matter of law on this error alone with a remand instructing DNR to
2 withdraw the DNSs and disclose and assess the climate change and greenhouse gas emission
3 impacts of both timber sales before issuing a new threshold determination.

4
5 Second, the evidence in the record demonstrates that the timber sales will cause
6 significant adverse climate change and greenhouse gas emission impacts. For this reason, DNR
7 erred because it should have issued Determinations of Significance for the timber sales instead
8 of DNSs.

9 Either of these errors is grounds to reverse the two DNSs and the Board’s timber sale
10 decisions that rely on the DNSs.⁸²

11 **A. Climate change and greenhouse gas emissions are elements of the**
12 **environment that must be assessed by the responsible official when making**
13 **a SEPA threshold determination**

14 DNR’s statement that “[a]t this time, the SEPA Environmental Checklist does not
15 include analysis of climate impacts”⁸³ does not absolve DNR of the responsibility to analyze
16 the climate change and greenhouse gas emission impacts of its actions. Climate change and
17 greenhouse gas emissions, which very well may be the most consequential environmental
18 impacts of human activities, are elements of the environment that must be considered by a
19 responsible official when making a threshold determination. Any conclusion otherwise is
20 clearly erroneous for several reasons.

21
22 First, SEPA clearly requires such an analysis. Department of Ecology’s SEPA
23 regulations and guidance – which are binding on all state agencies - requires consideration of
24 climate impacts as an element of the environment and requires accounting for greenhouse gas
25

26 ⁸² RCW 43.21C.075(1), (2); *King County v. Wash. State Boundary Review Bd.*, 122 Wn. 2d 648, 667, 860
27 P.2d 1024 (1993) (*en banc*).

⁸³ AR 8540.

1 emissions associated with projects that cause such emissions. The content of environmental
2 review, for the purpose of deciding whether an EIS is required, is specified in WAC 179-11-
3 330 and 197-11-444.⁸⁴ The responsible official must include consideration of all of the elements
4 of the environment that are listed in WAC 197-11-444 and that section explicitly identifies “air”
5 and “climate” as elements of the environment that are subject to SEPA review.⁸⁵ And, as the
6 Center, STOP and Dr. Talberth explained in their memoranda and exhibits to DNR and the
7 Board, climate change affects every other element of the environment, too, from
8 “environmental health” to “plants and animals” and “fire.”⁸⁶

10 Second, the environmental checklist does contain language requiring an analysis of
11 climate impacts. Specifically, element B.2.a requires the types of emissions to the air that
12 would result from the proposal to be identified and quantified.⁸⁷ Furthermore, element B.2.c
13 requires proposed measures to reduce or control emissions or other impacts to air to be
14 addressed.⁸⁸ In several ways logging operations release huge quantities of CO2 into the air.
15 This CO2 causes more heat reflected off the earth to be trapped in the air and therefore increases
16 the ambient temperatures. This impact to air is the main driver behind climate change.
17 Certainly, this major emission and this critical impact must be within the information required
18 by WAC 197-11-960.

21 Even if it were appropriate to rely solely on what the SEPA checklist says (which is not
22 what SEPA calls for), the Department of Ecology has made clear that the SEPA checklists itself
23 *already asks about greenhouse gases*. Ecology is currently considering promulgating a new
24

25 ⁸⁴ WAC 197-11-060(2)(b).

26 ⁸⁵ WAC 197-11-444(b), (b)(iii).

27 ⁸⁶ AR 8580-8585; AR 7314-7320; AR 16617-17027.

⁸⁷ WAC 197-11-960.

⁸⁸ *Id.*

1 rule called the “Greenhouse Gas Assessment for Projects” rule.⁸⁹ The proposed rule would
2 establish a standardized, statewide framework for how project proponents will analyze their
3 greenhouse gas emissions going forward.⁹⁰ However, Ecology has been very clear that project
4 proponents *already* have an obligation to consider greenhouse gas emissions at the project level
5 SEPA review:
6

7 The GAP rule will not change SEPA law or the language in WAC 197-11, the
8 SEPA rule. The GAP rule supplements the SEPA rule by providing detailed
9 instructions regarding the analysis and mitigation of [greenhouse gas] emissions.
10 **[Greenhouse gas] emissions are already considered in the SEPA
11 environmental review process as an air pollutant.** However, WAC 197-11
12 does not describe detailed methods for analyzing any particular pollutant or
13 resource; typically, other rules, guidance, and policies direct the analysis of
14 impacts. For example, water quality standards are used for analysis of water
15 quality impacts. **For [greenhouse gas] emissions, the analysis is currently
16 done on a case-by-case basis by the SEPA lead agency ...** It is important to
17 note that the GAP rules does not exempt any project from considering
18 [greenhouse gas] emissions in an environmental review. For projects where the
19 GAP rule does not apply, **[greenhouse gas] emissions will still need to be
20 considered, in a manner determined by the SEPA lead agency.**⁹¹

21 On its SEPA Checklist Guidance website,⁹² DNR even provides helpful pointers for
22 how to estimate greenhouse gas emission on a SEPA checklist:
23

24 Greenhouse gas emissions are considered an air pollutant and may need be
25 addressed. If the amount of emission cannot be quantified, describe the source(s)
26 including known or assumed quantities. For example: "Liquid manure from X
27 number of dairy cows will be sprayed on X acres from May through September.
The material will be collected on-site in an X-gallon capacity dairy lagoon." It
is probably wise to check any estimates against existing data.

Third, the controlling case law also requires this. The Court of Appeals recently held
that climate impacts must be considered during project-level SEPA analysis.⁹³ The Court held

⁸⁹ AR 16815-16854.

⁹⁰ AR 16830.

⁹¹ AR 16822-16823 (emphasis added).

⁹² <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/SEPA-checklist-guidance/SEPA-Checklist-Section-B-Environmental-elements/Environmental-elements-Air>

⁹³ *Wash. State Dairy Fed. v. State*, 18 Wn. App. 2d 259, 307-309, 490 P.3d 290 (2021).

1 the duty to consider climate impacts at the project level arises out of SEPA’s requirement that
2 all agencies of the state must “[f]ulfill the responsibilities of each generation as trustee of the
3 environment for succeeding generations,” RCW 43.21C.020(2)(a), as well as “[a]ttain the
4 widest range of beneficial uses of the environment without degradation, risk to health or safety,
5 or other undesirable and unintended consequences.”⁹⁴

7 Finally, DNR cannot simply treat the checklist as a closed universe outside of which no
8 other evidence matters. It has long been the rule that “[i]f the checklist does not contain
9 sufficient information to make a threshold determination, the applicant may be required to
10 submit additional information.”⁹⁵ The threshold determination must be based on “information
11 reasonably sufficient to evaluate the environmental impact of a proposal.”⁹⁶ Washington courts
12 have repeatedly articulated what this standard requires:

14 For the MDNS to survive judicial scrutiny, the record must demonstrate that
15 environmental factors were considered in a manner sufficient to amount to prima
16 facie compliance with the procedural requirements of SEPA and that the
17 decision to issue an MDNS was based on information sufficient to evaluate the
18 proposal's environmental impact.⁹⁷

19 Ultimately, the threshold determination “must indicate that the agency has taken a
20 searching, realistic look at the potential hazards and, with reasoned thought and analysis,
21 candidly and methodically addressed those concerns.”⁹⁸ “SEPA seeks to ensure that
22 environmental impacts are considered and that decisions to proceed, even those completed with

23 ⁹⁴ *Id.* at 308 citing RCW 43.21C.020(2)(c).

24 ⁹⁵ *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176 (2000).

25 ⁹⁶ WAC 197-11-335; WAC 197-11-330; *Anderson v. Pierce County*, 86 Wn. App. 290, 301(1997). *See also*
26 *Norway Hill Preservation and Protection Ass’n v. King County Council*, 87 Wn.2d 267, 276 (1976); *Spokane*
27 *County v. E. Wash. Growth Management Hr’gs Bd.*, 176 Wn. App. 555, 579, 309 P.3d 673 (2013), *review denied*
179 Wn. 2d 1015, 318 P.3d 279 (2014).

⁹⁷ *Wenatchee Sportsmen Ass’n*, 141 Wn.2d at 176 (citations omitted).

⁹⁸ *Conservation Northwest v. Okanogan County*, 194 Wn. App. 1034, 2016 WL 3453666, *32 (2016)
(unpublished nonbinding authority per GR 14.1).

1 knowledge of likely adverse environmental impacts, are ‘rational and well documented.’”⁹⁹
2 This information must be adequate to demonstrate that the agency has taken the requisite “hard
3 look” at environmental impacts.¹⁰⁰
4

5 Thus, there can be no dispute that greenhouse gas emissions, and the associated climate
6 impacts therefrom, are a mandatory element of the environment that must be assessed in SEPA
7 review.

8 **B. DNR clearly erred when it failed to assess greenhouse gas emissions and**
9 **climate change impacts in its SEPA review of the timber sales**

10 DNR did not consider greenhouse gas emission or climate change in its environmental
11 review of the Goodman 1 and Taylor Downhill Sorts timber sales. In fact, DNR said so
12 explicitly in its decision following the issuance of the DNS for the Taylor Downhill Sorts timber
13 sale.¹⁰¹ In fact, DNR went on at some length on the subject of its deliberate decision not to
14 review climate change:

15 While your letter does touch on some specifics of this proposed timber harvest,
16 the bulk of your comments are directed toward the broader policies and plans
17 that guide our management at the statewide level. We conduct SEPA analyses
18 at the project level for individual planned timber harvests; we conduct
19 environmental impact statements before adopting new policies and whenever we
20 develop statewide plans that set standards for the use of the environment (WAC
197-11-704(2)(b)(i)). The Agency does not agree that the analysis you
recommend is appropriate for including in the project level checklist. The
Department will however address some of the concerns raised in your letter.

21 At this level of project review with a Determination of Nonsignificance, the
22 appropriate form used is the Department of Ecology's environmental checklist,
23 WAC 197-11-960. At this time, the SEPA Environmental Checklist does not
24 include analysis of climate impacts. The topic of climate impacts is an evolving
25 issue as new science emerges and agencies work to include that new science in
their work. When the Department of Ecology establishes criteria that provides
meaningful analysis of climate impacts at the project level, it is expected they

26 ⁹⁹ *Columbia Riverkeeper v. Port of Vancouver, USA*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24
Wash. Practice: Environmental Law and Practice § 17.1, at 192).

27 ¹⁰⁰ *Pub. Util. Dist. No. 1 of Clark County*, 137 Wn. App 150, 158, 151 P.3d 1067 (2007).

¹⁰¹ AR 008540.

1 will make updates to WAC 197-11-960 that include climate impacts in the SEPA
2 checklist.¹⁰²

3 As demonstrated above, this statement is rooted in an incorrect interpretation of SEPA
4 requirements. As Ecology explained in the context of its proposed GAP rule, where there is no
5 standardized method for reviewing a particular environmental impact, each agency must review
6 that impact on its own, with a methodology the agency develops on its own, case-by-case basis.
7 As shown above, Ecology expects that agencies are already analyzing project-level climate
8 change impacts, using the existing SEPA checklist.
9

10 DNR's willful failure to assess the climate change and greenhouse gas emission impacts
11 of the Goodman 1 and Taylor Downhill Sorts timber sales constitutes clear legal error. The
12 DNS can be reversed as a matter of law on this error alone with a remand instructing DNR to
13 withdraw the DNS, declare the DNS and timber sale approvals void, and properly disclose and
14 assess the climate change and greenhouse gas emission impacts of both timber sales before
15 issuing a new threshold determination.¹⁰³
16

17 **C. The timber sales will cause significant adverse climate change and
18 greenhouse gas emission impacts**

19 The evidence in the record demonstrates not only that the DNS was issued in error
20 because DNR did not consider climate impacts at all, but also that the DNS was issued in error
21 because the timber sales will in fact cause significant adverse climate change and greenhouse
22 gas emission impacts. DNR should have issued a Determination of Significance instead of a
23 DNS for the timber sales.¹⁰⁴
24
25

26 ¹⁰² *Id.*

27 ¹⁰³ *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 667, 860 P.2d 1024 (1993) (*en banc*).

¹⁰⁴ WAC 197-11-330.

1 A court may, on the administrative record, remand based on findings that confirm an
2 EIS is required due to “significant impacts” that were not analyzed in a NEPA document.
3 *Friends of Back Bay v Corps*, 681 F.3d 581 (4th Cir. 2012). Under SEPA, “significant” means
4 “a reasonable likelihood of more than a moderate adverse impact on environmental quality.”¹⁰⁵
5 Synonyms for “moderate” include “modest, average, medium, ordinary and mediocre.”¹⁰⁶
6 “Moderate” is defined as “tending toward the mean or average amount or dimension” and
7 “having average or less than average quality; Mediocre.”¹⁰⁷ Therefore, an impact is
8 “significant” under SEPA if it is above a modest amount.¹⁰⁸ The question for the threshold
9 determination is whether adverse impacts may be probable—not that they are probable.¹⁰⁹
10

11 The Taylor Downhill Sorts and Goodman 1 timber sales will generate significant
12 quantities of greenhouse gas emissions and amplify the effects of climate change. As
13 summarized below, the uncontroverted evidence demonstrates that the known climate change
14 impacts from these two timber sales add up to “a reasonable likelihood of more than a moderate
15 adverse impact on environmental quality.”¹¹⁰
16

17 **1. Logging activities in Jefferson County cause significant greenhouse**
18 **gas emissions**

19 The record shows that logging activities are a major source of greenhouse gas emissions
20 in Jefferson County. The greenhouse gas emissions associated with logging any particular stand
21 of trees is well known and can be estimated through methods available to DNR.¹¹¹ Sources
22

23
24 ¹⁰⁵ WAC 197-11-794.

¹⁰⁶ *Merriam-Webster Thesaurus* (2020).

¹⁰⁷ *Merriam-Webster Dictionary* (2020).

¹⁰⁸ WAC 197-11-794.

¹⁰⁹ WAC 197-11-360(1). *See also* WAC 197-11-330(4) (“If . . . the lead agency reasonably believes that a
25 proposal may have a significant adverse impact, an EIS is required”) (emphasis added).
26

¹¹⁰ WAC 197-11-794.

¹¹¹ AR 8580-8581; AR 7314-7316; AR 16625-16630; AR 16675-16695.
27

1 include fossil fuels used by heavy equipment during road construction, logging, and hauling
2 timber to mills and as well as fossil fuel energy used to process wood at mills.¹¹² They include
3 the carbon stored in trees that is eventually released into the atmosphere when wood products
4 are manufactured, used, worn down, and discarded.¹¹³ They include the decay and burning of
5 logging slash left behind after logging operations have concluded, which makes recent clearcuts
6 a source of emissions for 10-15 years after logging.¹¹⁴ In addition, when trees are cut down,
7 they stop sequestering carbon and when new roads or infrastructure are constructed this
8 reduction in carbon sequestration capacity of the land is permanent. This loss of carbon
9 sequestration capacity is considered an indirect form of emissions since it has the same effect
10 as a new emissions source in raising atmospheric carbon dioxide levels.¹¹⁵

11
12
13 In its Forests and Trees Greenhouse Gas Inventory, Jefferson County estimated a
14 subset of these logging related emissions (carbon removed from site minus share stored in long
15 lived wood products) to be 266,961 metric tons CO₂ equivalent per year, which is by far the
16 single largest source of emissions in the county.¹¹⁶ By way of contrast, the second largest source
17 of GHG emissions is transportation, estimated to contribute about 182,000 metric tons CO₂ per
18 year.¹¹⁷

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23 ¹¹² *Id.*; AR 3613.

¹¹³ *Id.*; AR 3612.

¹¹⁴ *Id.*; AR 16696-16712.

¹¹⁵ AR 8581; AR 7315.

¹¹⁶ AR 16713-16760; AR 16619.

¹¹⁷ *Id.*; AR 016671-016811. It may strike the Court as counterintuitive that a clearcut could increase carbon dioxide in the atmosphere. The explanation is simple. Living trees constantly remove carbon from the atmosphere. When trees are cut, they cease to remove carbon. The more trees that are cut, the more carbon remains in the atmosphere. For purposes of atmospheric carbon dioxide levels, cutting trees is no different than building a new source of pollution pumping that same volume of carbon into the atmosphere.

1 **2. The Taylor Downhill Sorts and Goodman 1 Timber Sales, by**
2 **themselves, constitute significant sources of emissions**

3 Using a methodology similar to Jefferson County’s own greenhouse gas emission
4 estimation tools, the Center calculated that the Taylor Downhill Sorts timber sale will result in
5 the release of at least 39,337 tons of carbon dioxide, and the Goodman 1 timber sale will result
6 in the release of at least 48,348 tons of carbon dioxide.¹¹⁸ In other words, these two timber sales,
7 by themselves, will emit an amount equivalent to 33 percent of Jefferson County’s annual
8 carbon emissions from the entire logging sector—and that sector is by far the County’s largest
9 source of emissions, as described above. The fact that these two projects generate such a large
10 share of the County’s greenhouse gas emissions is grounds to conclude that they generate more
11 than a moderate impact on the environment.
12

13 Besides considering the timber sales’ emissions in relative terms (one third of the
14 County’s logging related emissions), it is also appropriate to consider them in absolute terms.
15 The Washington State Legislature regards any project that generates more than 10,000 tons of
16 carbon dioxide (or its equivalent) as a significant project. In 2008, the Legislature amended
17 Washington’s Clean Air Act to require that any single facility generating more than 10,000 tons
18 carbon dioxide (or its equivalent) must report its emission to the Department of Ecology.¹¹⁹
19 These timber sales, which will likely release quadruple or more that amount, would each trigger
20 mandatory pollution reporting to Ecology if they were point sources like power plants instead
21 of area-wide clearcuts. This is further evidence that they have “a reasonable likelihood of more
22 than a moderate adverse impact on environmental quality.”
23
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27 ¹¹⁸ AR 16620.

¹¹⁹ See Laws of 2008, Ch. 14, § 5 (amending RCW 70.94.151).

1 **3. Impacts of climate change will be significant on the affected parcels**

2 There is one other aspect of the environmental problem to consider: not just the impacts
3 the timber sales will have on climate change, but the impact climate change will have on the
4 timber sales. Citing DNR’s own Climate Resiliency Plan, Appellants called attention to the fact
5 that climate change is affecting DNR forestlands, including lands within the Taylor Downhill
6 Sorts and Goodman 1 timber sale areas, in ways that may necessitate changes in the
7 configuration of each project, such as the size of buffers, the use of more climate sensitive
8 harvesting methods, choices of trees to replant, and location of roads.¹²⁰

9
10 In particular, DNR acknowledges that its forestlands will be subject to damage from
11 insects and pathogens, reforestation challenges, negative impacts on forest productivity and
12 changes in conditions that trigger landslides or damage roads.¹²¹ The agency has also
13 recognized its duty to consider these “climate-related risks at project initiation.”¹²² Yet none of
14 that review and mitigation was done for the Goodman 1 and Taylor Downhill Sorts sales. The
15 Court should conclude that, just as DNR failed to consider how Goodman 1 and Taylor
16 Downhill Sorts will affect the climate, it also failed to consider how the climate will affect
17 Goodman 1 and Taylor Downhill Sorts.
18

19 **4. Better, climate smart timber sales were possible**

20 It is not appellants’ burden, nor the Court’s duty, to design better timber sales for DNR.
21 The purpose of SEPA review is to enable DNR to design better timber sales for itself.
22 Nevertheless, we will briefly outline possible alternatives to the Goodman 1 and Taylor
23 Downhill Sorts that would have reduced their environmental impact while preserving the flow
24
25

26 ¹²⁰ AR 16920.

27 ¹²¹ AR 16920.

¹²² AR 16981.

1 of timber to local mills. We do not suggest the Court must impose any particular one of these
2 alternatives. The purpose of this exercise is merely to illustrate to the Court why it is important
3 to hold DNR to its SEPA obligations to consider reasonable alternatives. Armed with a full
4 understanding of climate impacts, DNR is perfectly capable at arriving at any of these
5 environmentally sound alternatives itself—or some other alternative we haven't thought of.
6

7 As discussed in the context of appellants' January 26th filing with DNR, reasonable
8 alternatives and climate mitigation measures at DNR's disposal for consideration in timber sale
9 planning are many, such as avoiding the logging of large, carbon rich trees, eliminating new
10 road construction, replanting species more tolerant of drought and heat waves, thinning instead
11 of clearcutting to help keep forestlands cool, and avoidance of areas that may be more
12 susceptible to floods and wildfires made worse by climate change.¹²³
13

14 The foregoing is merely a hint of what kinds of timber sale DNR might have devised if
15 it had followed its statutory duty to consider climate change impacts prior to approving the
16 Goodman 1 and Taylor Downhill Sorts sales. By omitting climate change from its SEPA
17 review, DNR foreclosed these possibilities—the precise kind of short-sighted decision-making
18 SEPA was enacted to prevent.
19

20 **D. If appellants prevail, the Court should order DNR to pay the costs of the
21 administrative record**

22 DNR and appellants dispute which party should be responsible for paying the costs of
23 preparing the administrative record in this case. For the following reasons, it should be DNR.
24

25 The Public Lands Act contains the following regarding costs:

26 **Any applicant** to purchase, or lease, any public lands of the state, or any
valuable materials thereon, and **any person** whose property rights or interests
will be affected by such sale or lease, feeling aggrieved by any order or decision

27 ¹²³ AR 16617-17027.

1 of the board, or the commissioner, concerning the same, may appeal therefrom
2 to the superior court of the county in which such lands or materials are situated,
3 by serving upon all parties who have appeared in the proceedings in which the
4 order or decision was made, or their attorneys, a written notice of appeal, and
5 filing such notice, with proof, or admission, of service, with the board, or the
6 commissioner, within thirty days from the date of the order or decision appealed
7 from, and at the time of filing the notice, or within five days thereafter, filing a
8 bond to the state, in the penal sum of two hundred dollars, with sufficient
9 sureties, to be approved by the secretary of the board, or the commissioner,
10 conditioned that the **appellant** shall pay all costs that may be awarded against
11 the **appellant** on appeal, or the dismissal thereof. Within thirty days after the
12 filing of notice of appeal, the secretary of the board, or the commissioner, shall
13 certify, under official seal, a transcript of all entries in the records of the board,
14 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, except when the state is the only
adverse party, and shall be included in the judgment, upon which execution may
issue as in other cases.¹²⁴

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

21
22 Courts “presume the legislature intends a different meaning when it uses different
23 terms.”¹²⁵ Thus, under the Public Lands Act, the applicant for a timber sale is not necessarily
24 the appellant of that timber sale. The statute allows for an applicant to be an appellant (for
25

26
27 ¹²⁴ RCW 79.02.030 (emphasis added).

¹²⁵ *Foster v. Dep’t of Ecology*, 184 Wn.2d 465, 473, 362 P.3d 959 (2015).

1 example, if the proposed timber sale is denied), but the statute also allows for “any person
2 whose property rights or interests will be affected by such sale or lease” to be an appellant, even
3 if that person is not an applicant. Indeed, that is the very scenario here, where DNR applied to
4 the Board for authorization to sell Goodman 1 and Taylor Downhill Sorts (making DNR the
5 applicant), and then the Center and STOP appealed that decision to this Court (making the them
6 the appellants). Certainly, the Center and STOP cannot be construed as the applicant, because
7 they have not sought to “purchase, or lease, any public lands of the state, or any valuable
8 materials thereon.” Appellants posted the \$200 bond required of the appellant by the Public
9 Lands Act, because the Center and STOP are the appellants in this case. But the only applicant
10 in this case is DNR.
11

12 This reading of the statute—where the “appellant” may be distinct from the
13 “applicant”—is bolstered by the legislative history of the statute. In its original form, the statute
14 provided that “Any person who is an applicant to purchase any tide lands may appeal from any
15 finding or decision of the board of state land commissioners...”¹²⁶ There was no corresponding
16 right of appeal for aggrieved persons who were *not* the applicant. The right of appeal for non-
17 applicants was added in 1901, when the statute was also amended to include appeals of timber
18 sales, not just sales of tide lands.¹²⁷ The 1901 amendment was also the first time the Legislature
19 mentioned costs of preparing the record, which costs it assigned to the applicant.¹²⁸
20
21

22 This legislative history proves that the Legislature is well aware of the difference
23 between appellants who are applicants versus appellants who are not applicants. When the
24 Legislature chose to assign costs of the record to the applicant, it did so in the very same
25

26 ¹²⁶ Laws of 1895, c. 178 § 82.

27 ¹²⁷ Laws of 1901, c. 62 § 1.

¹²⁸ *Id.* § 4.

1 amendment where it first created a right of appeal for a non-applicant. This Court should
2 conclude that the Legislature was acting deliberately when it made this distinction. Since DNR
3 is the applicant in this case, the Court should order DNR to pay the costs of the record.

4 **E. The Court should award appellants their attorney fees under the Equal**
5 **Access to Justice Act**

6 If the Court rules in the Center’s favor, the Center is entitled to attorney fees under the
7 Equal Access to Justice Act, RCW 4.84.340–.370. The Center is a 501(c)(3) corporation, so it
8 is a “qualified party” under RCW 4.84.340(5).¹²⁹ DNR and the Board are government agencies
9 under RCW 4.84.340(1). The challenged timber sales were “agency action” under RCW
10 4.84.340(2) as that term is defined in 34.05.010(3) because it was a decision by the Board to
11 grant benefits (in the form of a timber auction) and a license (in the form of permission to
12 harvest state-owned timber) and the implementation of a statute (the Public Lands Act, which
13 authorizes such auctions). And, this court’s review constitutes “judicial review” under RCW
14 4.84.340(4) as that term is defined in RCW 34.05.510(3), because RCW 79.02.030 authorizes
15 this Court to conduct “de novo review ... expressly authorized by provision of law.” Therefore,
16 the Center is entitled to attorney fees if it prevails and if the Court concludes that DNR and the
17 Board’s position was not “substantially justified.”¹³⁰

18 An agency’s position is substantially justified if, even though the position is wrong, the
19 agency still had a “reasonable” basis for its position in law and fact.¹³¹ The decision must be
20 justified to a degree that would “satisfy a reasonable person.”¹³² Here, where DNR willfully
21 failed to review climate change impacts, despite SEPA and Ecology’s guidance to the contrary,
22
23
24

25
26 ¹²⁹ Talberth Dec., ¶ 2.

¹³⁰ RCW 4.84.350(1).

¹³¹ *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 910, 385 P.3d 251 (2016).

¹³² *Brown v. Dep’t of Soc. and Health Servs.*, 190 Wn. App. 572, 597, 360 P.3d 875 (2015).

1 DNR and the Board cannot be said to have acted “reasonably.” A reasonable person, knowing
2 the scale of the climate change issue, would not be satisfied with DNR’s excuse that climate
3 change does not appear on a checklist. The Court should award the Center its fees.

4 **VI. CONCLUSION**

5 Appellant respectfully requests the following relief:

6
7 1. An order invalidating the Board’s approval of the Taylor Downhill and
8 Goodman 1 projects for auction.

9 2. An order invalidating the DNSs for the Taylor Downhill and Goodman 1
10 projects as “clearly erroneous.”

11 3. A declaration that climate impacts are a necessary component of SEPA analysis
12 for DNR logging proposals, including the Taylor Downhill and Goodman 1 projects.

13 4. A declaration that the Taylor Downhill and Goodman 1 projects could have
14 probable, significant adverse impacts to the environment, necessitating preparation of an
15 environmental impact statement.

16 5. An order enjoining all forest practices pursuant to the Taylor Downhill and
17 Goodman 1 projects.

18 6. If necessary and appropriate, an order requiring mitigation for any climate
19 impacts of the Taylor Downhill and Goodman 1 projects.

20 7. An order granting Appellant its costs and attorneys’ fees based on the Equal
21 Access to Justice Act, RCW Ch. 4.84, or any other applicable provision of law.

22 8. Any other relief that this Court deems just and proper.
23
24
25
26
27

1 Dated this 5th day of August, 2022.

2 Respectfully submitted,

3 BRICKLIN & NEWMAN, LLP

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6
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