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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY

CENTER FOR SUSTAINABLE
ECONOMY and SAVE THE OLYMPIC
PENINSULA

NO. 22-2-00015-16

Appellants,

APPELLANTS' REPLY BRIEF

v.

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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1 **I. INTRODUCTION**

2 By not arguing otherwise in its response, DNR agrees with Appellants that climate change
3 impacts are an element of the environment that must be assessed by the Department of Natural
4 Resources (DNR) as part of its review of project actions under the State Environmental Policy Act
5 (SEPA). The parties also agree that the DNR responsible officials did not conduct any SEPA
6 analysis of project level climate change impacts of the Taylor Downhill Sorts and Goodman 1
7 timber sales.
8

9 DNR argues instead that the responsible officials were not required to analyze the project
10 level climate change impacts of the timber sales because DNR previously reviewed climate change
11 impacts in earlier programmatic Environmental Impact Statements. That is incorrect. While SEPA
12 does allow an agency to rely on the climate change impact analysis in existing programmatic EISs,
13 the responsible official must still engage in an independent analysis of climate change impacts at
14 the project level. They can't just skip that step entirely. In addition, the responsible official must
15 explicitly state its intention to phase the review and, at the very least, reference the earlier prepared
16 EISs in the DNS. Because the responsible officials did not do any of this, both DNSs should be
17 reversed.
18

19 DNR's attorneys' attempt to do the job now that the responsible officials were required to
20 do below should not be allowed. In its Response Brief, DNR presents a SEPA analysis of the project
21 level climate change impacts of the timber sales for the first time. Appellants are at a distinct
22 disadvantage of attempting to respond to new information, new scientific arguments, and new
23 analysis about the significance of impacts of these specific timber sales after the record has closed
24 when none of this analysis or information was presented below. The DNSs did not even mention
25 the programmatic EISs that are discussed extensively in DNR's Response Brief. This court should
26

1 not engage in reviewing an attorneys’ analysis of climate change impacts of the timber sales. We
2 request that the court remand the matter back to the responsible official to allow for a proper SEPA
3 threshold determination process on the climate change impacts by that official with public input
4 allowed as required by SEPA.

5
6 As an aside, the purposes and public benefits associated with DNR’s obligation to manage
7 state lands are not relevant to the question presented to this court. This is not a question of balancing
8 or equities – the court is presented with a question of law under SEPA. When a state agency
9 engages in a major action, no matter how beneficial or necessary it may be, that state agency is
10 required by law to consider the environmental impacts before it takes action. And, in this case,
11 DNR failed to consider the climate change impacts of the Goodman 1 and Taylor Downhill Sort
12 timber sales before they were approved. Frankly, that failure likely resulted in a failure to actually
13 take the steps necessary to mitigate the climate change impacts that will be caused by these timber
14 sales in the manner that was anticipated and expected by DNR’s hopeful high-level programmatic
15 planning.

17 II. STANDARD OF REVIEW

18 The Center for Sustainable Economy and Save the Olympic Peninsula (collectively referred
19 to as either the “Center” or “Appellants”) are appealing decisions made by the Department of
20 Natural Resources (DNR) responsible official under the State Environmental Policy Act (SEPA),
21 ch. 43.21C RCW. This appeal is purely rooted in SEPA. The Center is not challenging a proprietary
22 decision made by DNR. Thus, DNR’s reference to the deference to agency discretion required by
23 *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) and other case law
24 of that ilk should be disregarded. Similarly, the “arbitrary and capricious” standard does not apply
25 to review of a SEPA appeal of a Determination of Non-Significance (DNS). The arbitrary and
26

1 capricious standard in RCW 79.02.030 applies to questions that concern the legality of the timber
2 sale itself, not to the questions about whether the DNSs were erroneous. The standard of review
3 that applies to this court’s review of those decisions is the “clearly erroneous” standard. *Wild Fish*
4 *Conservancy v. Dep’t of Fish and Wildlife*, 198 Wn.2d 846, 502 P.3d 359 (2022).

6 III. ARGUMENT

7 A. Climate change impacts are an element of the environment that must be 8 assessed by an agency as part of its SEPA review of a site-specific project.

9 In the Center’s Opening Brief, we established that climate change is an element of the
10 environment that must be considered in an agency’s SEPA environmental review of a site-specific
11 project.¹ This is a fundamental requirement that is rooted in basic black letter law.² We spent more
12 time than would otherwise be necessary arguing this basic point because DNR’s SEPA responsible
13 official stated that she was not required to assess climate change impacts at all as part of her SEPA
14 review of a site-specific project because the project-level environmental checklist did not mention
15 climate change impacts.³ After all of that, Respondents did not even attempt to defend the
16 responsible official’s position. There is, therefore, no dispute that the responsible official erred as
17 a matter of law when she claimed that climate change impacts are not an element of the
18 environment that must be assessed by DNR as part of its SEPA review of a project action.
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¹ See App. Op. Br. at 17-21.

25 ² WAC 197-11-444(1)(b)(iii); WAC 197-11-960(B)(2)(a); REC 16822-16823; *Wash. State Dairy*
26 *Fed. v. State*, 18 Wn. App. 2d 259, 307-309, 490 P.3d 290 (2021). Please note that there is a typo in Footnote 85 in
Appellants’ Opening Brief. In that footnote, the (1) is missing from WAC 197-11-444(1)(b)(iii).

³ REC 8540; See App. Op. Br. at 21. See also DNR Resp. Br. at 5 (“DNR disagreed that a greenhouse
gas assessment was required at the project level for individual planned timber sales.”).

1 **B. DNR introduced a new justification for DNR’s failure to assess climate change**
2 **impacts of the timber sales in its Response Brief that is different from the DNR**
3 **responsible official’s position.**

4 DNR introduced a new justification for DNR’s failure to assess climate change impacts of
5 the timber sales in its Response Brief that is different from the DNR responsible official’s position.
6 In its Response Brief, DNR claimed that it was not required to conduct a specific project level
7 assessment of climate change impacts of the timber sales because DNR had previously reviewed
8 the climate change impacts of broader programmatic decisions and regional land plans that have
9 previously been adopted by DNR. Specifically, DNR points to three prior, non-project FEISs:

- 10 • Olympic Experimental State Forest (OESF) Land Plan Final Environmental Impact
11 Analysis (2016).⁴
- 12 • Alternatives for the Establishment of a Sustainable Harvest Level for Forested State
13 Trust Lands in Western Washington, Final Environmental Impact Statement (2019).⁵
- 14 • The Long-Term Conservation Strategy for the Marbled Murrelet Final Environmental
15 Impact Statement (2019).⁶

16 This new argument was not presented in either the DNS for Taylor Downhill Sorts, nor the
17 DNS for the Goodman 1 timber sale. It is, in fact, the opposite of what the SEPA responsible official
18 said in the DNS for the Taylor Downhill Sorts timber sale. In that DNS, the responsible official
19 said that it was improper for the public to comment on the climate impacts analysis that had been
20 presented in programmatic environmental review stage.⁷ The Goodman timber sale DNS provides
21 no justification for the failure to assess project level climate change impacts.⁸

23 4 REC 3682-4062.

24 5 REC 3499-3688.

25 6 REC 2668-3095.

25 7 REC 8540.

26 8 REC 7387-7527. The environmental review document contains no reference whatsoever to
 greenhouse gas emissions. In response to the question about impacts from emissions in the environmental checklist,
 DNR indicated project would have minor amounts of engine exhaust and some smoke generated if landing debris is
 burned. REC 7509.

1 This new argument is being presented after the DNSs were issued and after the public
2 comment periods have closed. The responsible officials never mentioned any of the three
3 programmatic EISs that are extensively summarized in DNR’s brief in either DNS. The public did
4 not have opportunity to comment on whether the climate change analyses in those EISs was
5 adequate, up to date, or otherwise appropriate to rely on for purposes of assessing the climate
6 change impacts and mitigation at the project level. It’s unfair and inappropriate for DNR to
7 sandbag the public in this manner. Indeed, in a particularly ironic turn, the Taylor Downhill Sorts
8 DNS, which is mentioned above and quoted in full in our Opening Brief,⁹ characterized the
9 Center’s comments as being *improperly* focused on the EISs for the broader policies and plans that
10 guide management at the state level instead of the site-specific timber sales.¹⁰ Now, DNR’s
11 Response Brief argues the opposite.
12

13
14 In its Response Brief, DNR attempts to leave the impression that this new justification was
15 presented below during the SEPA process. For this purpose, DNR cites to a transcript from the
16 January 4th Board of Natural Resources meeting on January 6, 2022 that echoes the new argument
17 that’s been presented in its Response Brief.¹¹ According to the minutes, at that meeting, DNR
18 Division Manager of Sales and Leasing, Duane Emmons, stated that SEPA analysis is completed
19 through two processes with the first a formal environmental impact statement (EIS) at a larger
20 programmatic/policy level.¹² He indicated that staff had completed an “extensive analysis of carbon
21 sequestration and climate change as part of the 2019 EIS” for the sustainable harvest calculations.¹³
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25 9 App. Op. Br. at 21-22.
26 10 REC 8540.
 11 DNR Resp. Br. at 5.
 12 REC 7765.
 13 *Id.*

1 Mr. Emmons stated that DNR never completes any SEPA analysis for individual timber projects
2 because the initial analysis was completed during the larger EIS process.¹⁴

3 Not only does this reveal that it's DNR's practice to skip project level review of climate
4 change impacts entirely in violation of SEPA, but it's also a false flag for Respondents to pretend
5 that this justification was part of the SEPA review. These comments were made by Mr. Emmons
6 after the DNS's had been issued and the comment periods had closed. Also, Mr. Emmons was not
7 the "responsible official," and, therefore, did not prepare or issue the SEPA DNS for either project.
8 This was the first time that the sustainable harvest calculations in the 2019 EIS had been mentioned
9 by anyone at DNR with respect to SEPA review of climate impacts for the timber sales. And Mr.
10 Emmons did not even mention the other two programmatic EISs that now show up in DNR's
11 Response Brief for the first time.
12

13
14 Had DNR followed SEPA by disclosing its intent to rely on a phased review and identifying
15 relevant prior analyses, Appellants and other members of the public would have been able to
16 challenge the legitimacy of those analyses and their relevancy for understanding the climate
17 impacts of the two timber sales and also have input. In particular, Appellants would have been able
18 to reference evidence that (a) there is significant new information and changed conditions that
19 invalidate their findings and warrant preparation of supplemental EISs;¹⁵ (b) that the prior analyses
20 failed to consider the deleterious, on-the-ground climate impacts of logging (such as exacerbation
21 of heat waves), and (c) that none of those documents can be used as-is for project level analyses
22 since they did not provide any information about the climate impacts (benefits) of a no-action
23 alternative (i.e. not logging). And, perhaps most importantly, Appellants could have argued that
24
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14 *Id.*

15 WAC 197-11-600. A SEIS is required when there is "[n]ew information indicating a proposal's probable significant adverse environmental impacts."

1 DNR could and should incorporate mitigation measures that were identified at the programmatic
2 level to mitigate impacts at the project level.

3 **C. DNR must conduct project level review of climate change impacts for timber**
4 **sales even when it previously engaged in review of climate change impacts at**
5 **the programmatic level.**

6 DNR’s central argument in its Response Brief is that it was not required to conduct a
7 specific project level assessment of climate change impacts of the timber sales because DNR had
8 previously reviewed the climate change impacts of broader programmatic decisions and regional
9 land plans that have previously been adopted by DNR.¹⁶ DNR claims that analyzing climate
10 impacts at the site-specific project level was unnecessary because it is “duplicative and provides
11 no new information to the decision makers.”¹⁷ This new argument is not only incorrect; it is also
12 based on a misconception of what is legally required when an agency “phases” environmental
13 review under SEPA.
14

15 Analyzing climate impacts at the site-specific project level was not only “necessary,” it was
16 required by law. DNR must conduct project level review of climate change impacts for timber sales
17 even when it previously engaged in review of climate change impacts at the programmatic level.
18 SEPA allows an agency to “phase” its environmental review when the sequence is from a non-
19 project document to a document of narrower scope, such as a site-specific analysis.¹⁸ With phased
20 review, the coverage of general matters in broader environmental documents is followed by
21 environmental review in subsequent narrower documents concentrating solely on the issues
22 specific to the later analysis.¹⁹ Thus, phased review requires two separate and distinct steps: (1)
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25 ¹⁶ DNR Resp. Br. at 1-2.
26 ¹⁷ *Id.*
¹⁸ WAC 197-11-060(5)(b) and (c).
¹⁹ WAC 197-11-774; WAC 197-11-776.

1 Phase 1 is environmental review of impacts on a broader scale in the programmatic EIS and (2)
2 Phase 2 is environmental review of site-specific project level impacts in a site-specific EIS or DNS.
3 While an agency is allowed to rely on existing environmental documents to evaluate the
4 environmental impacts of a site-specific proposal, the agency is still required to engage in an
5 independent analysis of impacts at the project level.²⁰
6

7 To the extent that the three prior programmatic FEISs do, in fact, have relevance for the
8 Goodman 1 and Taylor Downhill Sorts timber sales, then SEPA provides guidance on how this
9 phased review must be carried out:

10 A nonproject proposal may be approved based on an EIS assessing its broad
11 impacts. When a project is then proposed that is consistent with the approved
12 nonproject action, the EIS on such a **project shall focus on the impacts and**
13 **alternatives including mitigation measures specific to the subsequent project**
and not analyzed in the nonproject EIS. If it is not valid, the analysis shall be
reanalyzed in the project EIS.²¹

14 This is precisely what Appellants are seeking – an informed disclosure of climate impacts,
15 alternatives, and mitigation measures specific to the two timber sales performed by the DNR
16 responsible official. The existence of prior analyses – especially information contained in non-
17 project EISs - necessitates further refinement during project level SEPA analysis in order to address
18 impacts (like GHG emissions or lost carbon sequestration capacity from roads) that can only be
19 ascertained at the level of individual projects. Nonproject EISs, like those cited by DNR, provide
20 guidance for more refined and relevant analysis of climate impacts at the project level, where the
21 impacts actually take place.
22

23 The three FEISs that DNR has referenced in its brief expressly state that further analysis is
24 required at the project level. The Olympic Experimental State Forest FEIS states:
25

26 _____
²⁰ WAC 197-11-600(2); WAC 197-11-704(2).

²¹ WAC-197-11-443 (emphasis supplied).

1 Because the proposed forest land plan is a non-project action, DNR did not analyze
2 the potential environmental impacts of site-specific management activities such as
3 individual timber sales or the construction of specific sections of roads. Those
4 potential impacts are analyzed at the time they are proposed, at the operational phase
5 of planning.²²

6 The Marbled Murrelet Long-term Conservation Strategy FEIS states:

7 Review under SEPA occurs at each stage of planning. Policies are evaluated at the
8 strategic stage, forest land plans are reviewed at the tactical stage, and most site-
9 specific projects or actions, such as individual timber sales, are evaluated at the
10 operational stage as they are proposed.²³

11 The Alternatives for the Establishment of a Sustainable Harvest Level FEIS devotes an
12 entire page to explaining that individual projects will receive Phase 2 SEPA review.²⁴ That FEIS
13 explains that, “[a]s a non-project action under SEPA, the sustainable harvest level is not site-
14 specific” and the FEIS promises that “[s]upplemental review of site-specific projects, such as
15 timber sales” will occur under SEPA.²⁵

16 **D. A project level climate change impact assessment of the timber sales would not
17 be duplicative and would provide new information.**

18 A project level climate change impact assessment of the timber sales would not be
19 duplicative and would provide new information. In other words, requiring DNR to follow the law
20 would result in a concrete beneficial outcome consistent with SEPA goals.

21 Phase 2 review allows an agency to assess the extent that the previous analysis of impacts,
22 alternatives, and mitigation measures considered at the programmatic level adequately addresses
23 and discloses the probable impacts, alternatives, and mitigation measures at the project level. Is
24 the information in the programmatic EIS specific enough to inform the agency about project level

25 ²² REC 3717.
26 ²³ REC 2730; REC 3538.
²⁴ REC 3538.
²⁵ *Id.*

1 impacts? Does the agency have additional site-specific information that was not available at the
2 programmatic level that should be considered? Does the agency have access to new information
3 that would inform a more accurate assessment of project level impacts? Is the information that was
4 in the programmatic EIS still current and up-to-date? Should the agency incorporate the mitigation
5 measures that were identified at the programmatic EIS level into the specific project? Are there
6 new and different mitigation measures that may be appropriate based on the updated and more
7 specific analysis?
8

9 While Appellants do not have a legal obligation to demonstrate that a project level
10 assessment of impacts would be a worthwhile endeavor (because it's required by law regardless),
11 it's plainly evident that a failure to conduct Phase 2 review with respect to climate change impacts
12 constitutes a failure to update information, focus on specific impacts, develop mitigation at the
13 project level, and consider alternatives to site-specific timber sales. We address some of these
14 concepts in more detail below.
15

16 **1. The climate change analysis in the prior EISs is outdated and of limited**
17 **relevance for the project-level decisions.**

18 With respect to new information, the science on climate and logging has evolved rapidly
19 since 2016 (date of the Olympic FEIS). New research has determined that logging in the Pacific
20 Northwest is a significant source of GHG emissions (in fact the single greatest source in Oregon
21 and in Jefferson County), that DNR's chosen indicator for climate impacts (carbon flux) is
22 inappropriate for evaluating the climate impacts of its logging program²⁶ and that logging, logging
23 roads and timber plantations are amplifying the effects of climate change by depleting water
24 supplies, increasing wildfire risk, and exposing plants, wildlife, reforestation workers and others
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²⁶ REC 16625-16760.

1 that traverse recently cutover lands to temperature extremes that can be 40 degrees higher than in
2 the forests before they were cut down.²⁷

3 And with respect to changing conditions, changes in the policy landscape have been rapid
4 during this time and have direct bearing on DNR’s timber sale program decisions. They include
5 (a) passage of the Climate Commitment Act (RCW 70A.65.005), finding that existing GHG
6 concentrations in the atmosphere are causing significant adverse environmental impacts in
7 Washington); the Commissioner’s Order 202006 on Climate Resilience, ordering DNR staff to take
8 all practicable steps “to incorporate climate change considerations into all relevant decisions,
9 policies, procedures, and operations”²⁸, Department of Ecology’s Draft Greenhouse Gas
10 Accounting Rule for Projects (GAP), which further reinforces the 10,000 metric ton CO2 rule of
11 thumb for significance of GHG emissions,²⁹ the Glasgow Leaders’ Declaration on Forests and Land
12 Use, which commits the US to ending deforestation and forest degradation by 2030,³⁰ and President
13 Biden’s Executive Order on Strengthening the Nation’s Forests by protecting mature and old
14 growth forests for their climate benefits³¹ (both projects will log or degrade mature stands and old
15 growth attributes). All these changed policy conditions have bearing on what DNR should be doing
16 to minimize the climate impacts of its logging program.
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21 _____
22 ²⁷ REC 16855–16904.

23 ²⁸ Some of this information that we provide here is outside of the record, but we did not have an
24 opportunity to submit it to the record below for the reasons we’ve explained in this brief. We do not provide this
25 evidence for the truth of the matter and don’t expect the court to rely on this for its decision on the merits, but rather
26 this information is meant to demonstrate what Appellants were not able to present to DNR and what would be presented
if this matter is remanded and if we have a proper opportunity to comment. DNR (2020): Commissioners Order on
Climate Resilience. Available online at https://www.dnr.wa.gov/publications/em_climate_resilience_cplo_202006.pdf

27 ²⁹ REC 16815 – 16854.

28 ³⁰ Glasgow Leaders’ Declaration on Forests and Land Use (11/2/21). Available online at:
<https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>.

29 ³¹ EO 14072, available online at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/22/executive-order-on-strengthening-the-nations-forests-communities-and-local-economies/>.

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2. Project level review would provide monitoring information and site-specific information about climate change impacts that were not available and/or developed at the programmatic level.

Project level review would provide monitoring information and site-specific information about climate change impacts that were not available and/or developed at the programmatic level. The Response Brief states that DNR is committed to “adaptive management,” which provides for “ongoing modification of management practices to respond to new information and scientific developments.”³² The brief explains that “[t]his approach will help DNR monitor the impacts of climate change in lands managed for timber production as well as lands managed for habitat.”³³

The DNR Response Brief says: “The OESF implements these policies based on the regional conditions identified in the OESF, but does not include site-specific information for individual management activities such as timber sales.”³⁴ DNR even points to a figure that demonstrates the hierarchy of the forest land management process, beginning with policies that apply to broad areas of land, tactical forest plans intended to implement these policies in a smaller area, and then ending with a proposed timber sale designed to implement guidance provided in the forest plan

What better way to engage in ongoing monitoring of management practices and/or to respond to new information and scientific developments than assessing the specific climate change impacts at the climate level? DNR has the methods and sources of information that it needs to carefully consider climate impacts of each timber sale and consider mitigation at the project level with detailed specificity and certainty that was not available at the programmatic level.

³² DNR Resp. Br. at 31 *citing* REC 2424-2425.
³³ *Id.*
³⁴ DNR Resp. Br. at 9.

1 **3. Project level review would allow DNR to incorporate mitigation**
2 **measures that were identified at the programmatic level to mitigate**
3 **impacts at the project level.**

4 The phased review process is not just about making environmental documents and
5 conclusions about environmental impacts transparent and coherent but also about ensuring that any
6 mitigation measures identified at the programmatic level be considered and adopted at the project
7 level. SEPA review for nonproject actions requires agencies to consider the “big picture” by, among
8 other steps, “[o]utlining successful mitigation measures” that can be used to minimize the
9 environmental impacts at the project level.³⁵ Indeed, and as noted in DNR’s Response Brief, all
10 three of the referenced programmatic documents proffered by DNR in its Response Brief anticipate
11 project level analyses that operationalize their recommended mitigation measures to minimize
12 environmental impacts as well as the impacts of climate change on DNR forestlands. DNR chose
13 to ignore all of them in violation of SEPA’s phased review procedures.
14

15 For example, the Sustainable Harvest Calculation FEIS has found that “[w]ith a changing
16 climate, future regeneration success using the same species and genetic material as presently used
17 may decrease.”³⁶ DNR also found that climate change will probably result in more forest cover loss
18 from disturbances, such as wildfire.³⁷ The FEIS goes on to suggest mitigation strategies that
19 include using more climate adapted seed sources, changing silviculture methods on the ground to
20 dampen climate effects on tree growth, and allowing more forests to grow into structurally complex
21 stands with higher resistance to climate change.³⁸ These are precisely the mitigation measures
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24

25 ³⁵ SEPA Guidance at: [https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-
26 review/SEPA-guidance/Guide-for-lead-agencies/Non-project-proposals](https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Non-project-proposals).

³⁶ REC 3616.

³⁷ *Id.*

³⁸ REC 3616–3619.

1 Appellants have been asking DNR to attach to its timber sales. But because climate impacts were
2 excluded from SEPA review, none of these mitigation measures were considered or adopted.

3 As another example, the FEIS for the Habitat Conservation Plan (HCP) includes a
4 discussion on how to best ensure climate resilience on DNR forestlands:

5
6 ...maintaining forest cover is a reasonable strategy to promote west-side forest
7 resistance (for example, forestall change) and resilience under a changing
8 climate.... Retaining older forest stands could help resist eventual change because
9 older trees are better able to persist through unfavorable conditions created by
10 disturbances than young trees and seedlings.³⁹

11 Again, Appellants specifically asked for DNR to consider retaining forest cover as a
12 mitigation option and use thinning instead of clearcutting (variable retention harvest) to minimize
13 new seedlings' exposure to heat stress. DNR's failure to adopt or even discuss these mitigation
14 measures for the Goodman 1 and Taylor Downhill Sorts projects when they were identified in the
15 programmatic documents cited and by informed stakeholders is arbitrary and capricious and at odds
16 with the clear intent of SEPA's guidance for use of prior, non-project EISs that recommend such
17 measures.

18 **4. An alternatives analysis at the project level would address substantial
19 unresolved conflicts over proposed uses of DNR forestlands.**

20 The heart of the SEPA process is consideration of alternatives that can achieve project
21 objectives while minimizing environmental impacts. In particular, SEPA requires that DNR and
22 other state agencies:

23 (e) Study, develop, and describe appropriate alternatives to recommended courses
24 of action in any proposal which involves unresolved conflicts concerning alternative
25 uses of available resources;⁴⁰

26 ³⁹ REC 2913.
⁴⁰ RCW 43.21C.030.

1 DNR asserts that the agency is exempt from considering reasonable alternatives to the two
2 timber sale projects because “there are no real, unresolved conflict as to the use of this land.”⁴¹ This
3 is a baseless assertion. Throughout the SEPA process, Appellants and many members of the public
4 have specifically requested that DNR consider reasonable alternatives to the two timber sale
5 projects that substitute variable density thinning for clearcutting to maintain forest cover, bar
6 construction of new roads in order to preserve carbon sequestration capacity, and to set aside the
7 most ecologically significant portions of these sale areas as forest carbon reserves that can be put
8 to work earning revenues from carbon payments.⁴² These are not just hypothetical alternatives.
9 They are actually being implemented on DNR is now doing in the context of its carbon projects in
10 Whatcom, Thurston, King, and Grays Harbor counties.⁴³

12 As DNR points out, an alternatives analysis can be required at the threshold determination
13 stage. *Wild Fish*, 198 Wn.2d at 864-865. But here, DNR ignores the idea of site-specific
14 alternatives by skipping over Phase 2 review entirely. There are alternatives to choices that are
15 made specific to these timber sales that can have less of an environmental impact. DNR must
16 consider alternatives at the project level, not just the programmatic level.

18 **E. DNR did not conduct any project level review of climate change impacts for**
19 **the timber sales at all.**

20 Climate change impacts of the timber sales were not evaluated to such an extent as to
21 constitute *prima facie* compliance with SEPA procedural requirements as required by well-
22 established case law that was detailed in our Opening Brief, much less at all. ⁴⁴

25 _____
41 DNR Resp. Br. at 31.

26 42 REC 8580-8585; REC 16617-17027; REC 7314-7320.

43 <https://www.dnr.wa.gov/CarbonProject>.

44 *See* App. Op. Br. at 20-21.

1 In its response brief, DNR tells us that the responsible official reviewed wetland impacts,
2 geotechnical impacts, archaeological impacts, and other miscellaneous environmental impacts that
3 are not relevant to the question presented by the Center in this appeal.⁴⁵ But the focus of the Center’s
4 appeal is climate change impacts. And with respect to climate change impacts, the record is clear:
5 DNR did not conduct any analysis of project level climate change impacts of the timber sales. DNR
6 does not dispute that the responsible official failed to conduct any project level analysis of the
7 specific climate change impacts of the timber sales.
8

9 This case is easily distinguished from *PT Airwatchers v. Department of Ecology*, 179
10 Wn.2d 919, 927-28, 319 P.3d 23 (2014). In that case, the agency conducted a review of climate
11 change impacts and the court upheld that analysis. Importantly, however, the court stated “had
12 Ecology and the Board entirely ignored the impacts of greenhouse gas emissions from woody
13 biomass incineration, . . . we might reach a different result.” That is precisely what occurred in this
14 case. DNR entirely ignored the climate change impacts of the timber sales stating that it was not
15 required to conduct any analysis whatsoever of climate change impacts from those sales. Because
16 the DNR responsible officials did not assess specific project level climate change impacts of the
17 timber sales (*See App. Op. Br at 21-22*), the relief requested by the Center should be granted.
18

19 **F. DNR did not comply with SEPA’s phased review process requirements.**

20 SEPA regulations and guidance prescribe the specific steps DNR must follow to incorporate
21 prior, non-project EISs into its timber sale decisions. If the agency intends to rely on phasing, it
22 must clearly state the agency is using phased review.⁴⁶ The rules state: “When a lead agency knows
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24
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26 ⁴⁵ DNR Resp. Br. 24-26.
⁴⁶ WAC 197-11-060(5)(e).

1 it is using phased review, it shall so state in its environmental document.”⁴⁷ The agency must
2 explicitly incorporate the Phase 1 document by reference in the Phase 2 environmental document.⁴⁸

3 These are not just meaningless procedural steps. It tells reviewers of an agency’s actions to
4 look in two places for the agency’s SEPA analysis – in the project record, and in any programmatic
5 documents that it has relied upon to back up assertions about environmental impacts. In this case,
6 DNR did not do this. The environmental documents for the timber sales do not contain that
7 disclosure. Instead, DNR offered its ‘phased review’ explanation for the first time in its Response
8 Brief in hopes of getting this Court to allow it to use those prior analyses as a substitute for even
9 thinking about climate impacts at the project level. Had DNR followed this process and, at very
10 least incorporated the three prior analyses into the environmental checklist as specified by SEPA
11 guidance,⁴⁹ any conclusions of fact or law contained in those documents could have been
12 scrutinized, including DNR’s baseless claim that because its lands are sequestering more carbon
13 than is emitted by logging that there is “not a climate impact.”⁵⁰ As previously noted, any further
14 increase in GHG emissions associated with logging or loss of carbon sequestration (such as from
15 logging roads) puts upward pressure on the concentration of GHG pollution in the atmosphere, a
16 concentration that has long surpassed the threshold for significance.
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23 ⁴⁷ WAC-197-11-060(5)(e). *See also* SEPA Guidance at <https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Determining-if-SEPA-is-required>.

24 ⁴⁸ WAC 197-11-600; WAC 197-11-060(5)(b).

25 ⁴⁹ “To incorporate documents by reference, the agency must identify and describe the documents in the
26 current environmental checklist, threshold determination, or EIS.” SEPA Guidance at:
<https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-guidance/Guide-for-lead-agencies/Revising-and-adopting-existing-documents>.

⁵⁰ DNR Resp. Br. at 26.

1 would have any impact on the global climate. DNR’s attorneys summarized the programmatic
2 analysis climate change impacts based on documents that were not even mentioned, reviewed, or
3 referenced by DNR in the process below. DNR’s attorneys crafted their own conclusions about
4 project-level impacts based on this summary essentially acting as if they were the responsible
5 officials conducting SEPA review for the timber sales.
6

7 Many of the statements made in the Response Brief that tie the programmatic EIS analysis
8 to the timber sales have no citations to the record. For example, the Response Brief states: “Given
9 the large quantities of carbon sequestered on DNR’s land, there is no reasonable likelihood that
10 these two sales would emit so CO2 as to turn DNR’s forest from a net sink to a net emitter of
11 carbon.” That statement is not followed by any citation to the record. Again, with no citation to the
12 record, DNR argues that the projected carbon emissions from the Taylor and Goodman sales are
13 included in the DNR sustainable harvest calculation.
14

15 In addition, the brief introduces complex disputes about the evidence that the court should
16 not entertain at this point because the responsible official has not considered these questions yet.
17 For example, the attorneys tell the Court that Table 3 at REC 16733 provides a better context for
18 evaluating CO2 emissions associated with forestry related land use and argues that Table 1 in the
19 2022 Forest and Trees Greenhouse Gas Inventory for 2001-2016 Report (REC 16713-59) is not a
20 calculation of net carbon emissions associated with forest lands in Jefferson County. That is an
21 example of an issue for the responsible official to consider, not this court.
22

23 Moreover, DNR’s reasoning that the climate impacts of the two timber sales are
24 insignificant is based on an illogical conclusion made by lawyers not climate scientists. They
25 reason that, since on balance, its lands are still pulling in more carbon than is given off by logging:
26

1 “[s]o long as sequestration is equal to or greater than emissions, there is not a climate impact.”⁵³
2 The assertion is like owners of proposed offshore oil rigs claiming their climate impacts are
3 insignificant since the ocean still pulls in more carbon than they emit. The reality is that the two
4 timber sales in combination with past and planned logging operations on federal, state, and private
5 lands is putting undeniable upward pressure on GHG concentrations in the atmosphere – the most
6 important metric in any credible climate impacts analysis – by creating sources of GHG emissions
7 that would not otherwise exist and causing the land to absorb less CO₂ by cutting down trees and
8 building roads over some of the most productive carbon-capturing lands in the world. The carbon
9 sequestration capacity of DNR forests, oceans, and other sinks has already been degraded to the
10 point where atmospheric concentrations of GHG pollution is rising.
11

12
13 And it is already a matter of scientific fact that greenhouse gas (GHG) concentrations in the
14 atmosphere have surpassed the level needed to ensure climate stability, and that every new source
15 of GHG emissions or reduction in the Earth’s ability to sequester those emissions is having a
16 significant cumulative effect. In keeping with this scientific reality, the legislature has determined
17 that the existing level of GHG pollution in the atmosphere has already passed the threshold of
18 significance and is having increasingly devastating effects on Washington:
19

20 [C]limate change is one of the greatest challenges facing our state and the world
21 today, an existential crisis with major negative impacts on environmental and
22 human health. Washington is experiencing environmental and community impacts
23 due to climate change through increasingly devastating wildfires, flooding,
24 droughts, rising temperatures and sea levels, and ocean acidification. Greenhouse
25 gas emissions already in the atmosphere will increase impacts for some period of
26 time.⁵⁴

⁵³ DNR Resp. Br. at 26.
⁵⁴ RCW 70A.65.005.

1 Moreover, DNR’s post hoc reasoning fails to consider all of the ways intensive logging
2 projects make the land more susceptible to climate change, such as by increasing fire risk, reducing
3 dry season water supplies, and making the land hotter and drier. Evidence of these adverse climate
4 impacts associated with the two timber sales, including ways to measure such impacts, were
5 provided to DNR by Appellants during the SEPA review process but ignored at that stage and again
6 in the Response Brief.⁵⁵ A credible climate impacts analysis needs to consider both GHG emissions
7 and these on-the-ground effects.

8
9 DNR’s claim of non-significance is also at odds with the significance threshold Department
10 of Ecology already uses in its regulation of GHG emissions associated with certain facilities:
11 10,000 metric tons CO₂-equivalent (“CO₂-e”) in a year.⁵⁶ Forthcoming ‘GAP’ rules for analyzing
12 the GHG emissions associated with projects going through SEPA review also refer to this
13 significance threshold, and the intention is for that rule to apply to emissions from biogenic sources
14 (*i.e.*, logging) in addition to sources that burn fossil fuels.⁵⁷ DNR contends that these thresholds are
15 not scientific, just a “policy choice”⁵⁸ but the reality is that Department of Ecology has far more
16 expertise and experience with mitigation of climate impacts than DNR and has determined that
17 projects or facilities that generate GHG pollution at or above this threshold should be regulated.
18 No doubt this “policy choice” was based on the best available science. Regardless, the main point
19 is that 10,000 metric ton CO₂ is a considered to be a significant threshold for emissions by the
20 state. At the very least, it is fair to say that the state believes that this is “more than a moderate”
21 (the definition of “significant” in SEPA)⁵⁹ amount of emissions for purposes of climate change
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25 ⁵⁵ REC 16641-16644; REC 16855-16904.
26 ⁵⁶ WAC 173-441-030.
 ⁵⁷ REC 16823-16824.
 ⁵⁸ DNR Resp. Br. at 30.
 ⁵⁹ See App. Op. Br. at 23.

1 impacts. The 10,000 CO₂-e significance benchmark is one that DNR did not even think to consider
2 during the SEPA process, and one that will be breached many times over should the Taylor
3 Downhill Sorts and Goodman 1 timber sales be completed according to the evidence provided by
4 Appellants.⁶⁰

5
6 We address the potential significance of the climate change impacts of the timber sales
7 solely to demonstrate that there is a basis for proving that the DNR attorneys' analysis and
8 conclusions about the impacts of the timber sales is incorrect. We are not asking this Court to get
9 into the weeds about the validity of DNR's post hoc rationalizations about the significance of
10 climate impacts associated with the two timber sales. We are only asking the Court to find that
11 DNR should have presented this reasoning at the appropriate stage of decision making – during the
12 SEPA review of the two timber sales – and not forced this Court and Appellants to sift through
13 reasoning and conclusions drawn from documents that were never cited or incorporated into the
14 project decisions. The significance determination is the most important part of the SEPA process
15 and if nothing else, it should be made transparent in an agency's SEPA documents and not
16 presented for the first time in litigation.
17

18 **H. The Court should award appellants their attorneys' fees under the Equal**
19 **Access to Justice Act.**

20 Appellants are entitled to attorneys' fees if they prevail on the merits. Contrary to DNR's
21 claim otherwise, the Equal Access to Justice Act does apply to the Center's claims. The agency
22 action that is under review and the decision under the State Environmental Policy Act to issue a
23 determination of non-significance is not a proprietary decision under RCW 34.05.010(3)(c).
24 Appellants have appealed decisions made by the DNR responsible official under the State
25

26

⁶⁰ REC 7314-7320; REC 8580-8585.

1 Environmental Policy Act (SEPA), ch. 43.21C RCW. This appeal is rooted in SEPA. “Agency
2 action” means licensing, the implementation or enforcement of a statute, the adoption or application
3 of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.
4 RCW 34.05.010. The question presented revolves around the implementation of SEPA and,
5 therefore, fits squarely within the definition of “agency action.”
6

7 **IV. CONCLUSION**

8 For the reasons provided above, Appellants request that the court grant the relief requested in
9 its Opening Brief.

10 Dated this 26th day of September, 2022.

11 Respectfully submitted,

12 BRICKLIN & NEWMAN, LLP

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14 

15 By:

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17 Attorneys for Center for Sustainable Economy
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