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**STATE OF WASHINGTON
JEFFERSON COUNTY SUPERIOR COURT**

CENTER FOR SUSTAINABLE
ECONOMY and SAVE THE OLYMPIC
PENINSULA,

Appellants,

v.

WASHINGTON STATE DEPARTMENT
OF NATURAL RESOURCES, BOARD
OF NATURAL RESOURCES, and
COMMISSIONER OF PUBLIC LANDS
HILARY FRANZ, in her official capacity,

Respondents.

NO. 22-2-00015-16

**DNR'S AMENDED
RESPONSE BRIEF**

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I. INTRODUCTION

The Department of Natural Resources (DNR) sustainably manages state trust lands to generate revenue while simultaneously using the lands for environmental and public benefits, like habitat conservation, carbon sequestration, and recreation. Most of the state-owned forests are held in trust for designated beneficiaries. DNR is required to manage these lands on a sustainable yield basis so that forest harvest occurs on a continuing basis without major prolonged curtailment or cessation of harvest. RCW 79.10.310. DNR also manages these lands for many other purposes, such as recreation and conservation. Balancing the competing interests while acting in the best interest of the trust beneficiaries requires planning. DNR operates under a federal Habitat Conservation Plan that provides a strategy for protecting important habitat for certain threatened and endangered species so DNR can continue to sustainably harvest timber. As directed by the Legislature, in RCW 79.10.320-.330, DNR must set a sustainable harvest level every decade. DNR also develops individualized forest land plans for certain geographic regions that incorporate DNR’s legal obligations and policies into the plan that direct future harvests in that region¹.

The Center for Sustainable Economy’s (Center’s) and Save the Olympic Peninsula’s (STOP’s) (collectively, Petitioners) challenge the “Taylor Downhill Sorts” and the “Goodman” timber sales under RCW 79.02.030 and under the State Environmental Policy Act (SEPA). Petitioners argue that DNR must analyze the impact that each of these timber harvests will have on the global climate and how the climate will affect the harvests. DNR has extensively studied how its timber harvests impact the climate and how climate change impacts all of DNR’s forest management activities, including timber harvests. This review was conducted in the final environmental impact statements (FEISs) required for DNR’s programmatic decisions and regional land plans. Analyzing climate impact for DNR’s individual sales is duplicative and

¹DNR will provide the Court with a shortened version of the record. The record contains several large documents. These will not be included in the shortened record. Only portions of these large documents will be in the shortened record.

1 provides no new information to the decision makers. This court should dismiss Petitioners'
2 claims.

3 II. STATEMENT OF FACTS

4 A. The State Holds These Lands in Trust for the Benefit of Specified Beneficiaries, and 5 DNR Manages These Lands for These Beneficiaries and as Directed by the 6 Legislature.

7 Respondents, Commissioner of Public Lands, Washington State Department of Natural
8 Resources, and the Board of Natural Resources (Board) (collectively, DNR) manage
9 approximately three million acres of forested state-owned lands across Washington.
10 *Conservation Nw. v. Comm’r of Pub. Lands*, ___ Wn.2d ___, 514 P.3d 174, 177 (Wash. No. 99183-
11 9, July 21, 2022) Although the precise acreage has fluctuated over time, several hundreds of
12 thousands of acres of land were initially granted to the State of Washington by the federal
13 government pursuant to the Omnibus Enabling Act of 1889, ch. 180, 25 Stat. 676 (Enabling Act).
14 *Id.* This significant land grant was made “for the support of common schools” and other state
15 institutions. Individual counties have also granted land to the State pursuant to RCW 79.22.040
16 with the explicit understanding that they are held in trust for the benefit of those counties (county
17 beneficiaries). *Id.*; RCW 79.22.040 (tax foreclosure land suitable for forestry granted by counties
18 to state in trust for counties). Through the Enabling Act, the federal government granted
19 Washington several hundreds of thousands of acres of land for the support of common schools
20 and other public institutions that were to be “held, appropriated, and disposed of exclusively for
21 the purposes” of those schools and institutions. Enabling Act, ch. 180, 25 Stat. 676 §§ 10, 12, 16,
22 and 17 (1889); *Conservation Nw.*, 514 P.3d at 180. These provisions make clear that the federal
23 government intended to create a trust whereby the State accepted control of the granted lands
24 with the express understanding that the lands were not its absolute property but, instead, were to
25 be held and used exclusively for the enumerated purposes. *Conservation Nw.*, 514 P.3d at 181.
26

1 **B. The 2006 Policy for Sustainable Forests Guides DNR's Management of Forest Lands**
2 **to Achieve a Variety of Objectives.**

3 The Policy for Sustainable Forests (Policy) contains the Board's management direction
4 for managing the state trust forests. REC 4611-4678. These polices ensure that state lands are
5 sustainably managed to provide timber harvest and other benefit. REC 4617. These policies
6 require DNR to actively manage the land and modify silvicultural practices in order to ensure
7 that forests are healthy and productive. DNR is directed to protect and maintain a diverse gene
8 pool of native trees on state forest trust lands to ensure well-adapted future forests. REC 4654.
9 Having a diversity of genetic material may provide trees that are more adaptable to climate
10 change. The Board directs DNR to provide professional and active management of the forests.
11 REC 4660-4661. DNR employs scientists to meet research and management needs that involve
12 forest ecology, silviculture, economics, hydrology, fisheries, wildlife biology, and other related
13 subjects. REC 4461. In addition to staying informed of the latest scientific findings, DNR
14 conducts research to learn more about forests. REC 4461. Monitoring the forests' responses to a
15 changing climate will be essential to producing productive and healthy forests. DNR is directed
16 to apply research to evaluate silvicultural activities, test current practices and, where appropriate,
17 change practice. REC 4662-4663. This adaptive approach to management is an integral part of
18 DNR's duty to achieve, on a landscape basis, a combination of forest structures that, over time,
19 provide broad and balanced economic, ecological, and social benefits. REC 4661. DNR will use
20 intensive and innovative silviculture to guide the desired progressions of stand development to
21 simultaneously produce trust revenue and create structural diversity across the land scape. REC
22 4661.

23 **1. Taylor Downhill Sorts.**

24 Taylor Downhill Sorts Timber Sale (Taylor) consists of three units as shown at
25 REC 8796. Units 1 and 2 are located west of Highway 101, near Woods Road, and Unit 3 is
26 located south of Highway 104 near Center Valley Road. REC 8797. Taylor is a "contract harvest

1 sale,” meaning that DNR hires a harvester to complete any required road maintenance or
2 construction, harvest the trees, prepare the fallen timber for transport, and sort the logs by species
3 and size. RCW 79.115.500-.540. DNR sells these “sorts” to the highest qualified bidder at a
4 public auction. RCW 79.15.050. The harvester then hauls the logs to the location designated by
5 the successful purchaser. RCW 79.15.500(4) (harvesting cost includes transporting sorted logs);
6 RCW 79.16.520(2).

7 Taylor is located on land managed for commercial forestry and is surrounded by federal
8 land and land primarily used for commercial forestry. REC 8568. Taylor is a variable retention
9 harvest, which is a type of stand-replacement harvest that leaves elements of the existing stand
10 in place. REC 3095; REC 8794-95. DNR’s variable retention harvests leave trees in-place to
11 protect streams, wetlands, and seeps (REC 8794-8795), and uncommon habitats (REC 4653).
12 DNR also leaves behind additional trees for natural regeneration (REC 8746) and to create a
13 more complex future stand. For example, Unit 2 is 92.6 acres in size, but DNR is setting aside
14 37 acres for habitat, streams, wetlands, and leave trees, reducing the total harvest area to 55.6
15 acres. REC 8732. In contrast, a clear-cut take would remove all of the existing stand. REC 3095.
16 The only area designated for “clear cut” is one acre for the access road connecting Units 1 and
17 2. REC 8733; REC 8732. Taylor is state forest land held in trust for Jefferson County under
18 RCW 79.22.040 and the Common School Trust. REC 8789.

19 As part of the process for obtaining Board approval of the Taylor sale, DNR prepared an
20 environmental checklist as required by WAC 197-11-340.² REC 8547-8577. The purpose of the
21 checklist was to determine if there are any probable significant adverse environmental impacts
22 resulting from the Taylor sale. WAC 197-11-330(1)(b). DNR timber sales staff submitted the
23 SEPA checklist to DNR’s responsible official as designated in DNR’s SEPA rule WAC 332-41-
24 910. Following review of the checklist, the responsible official made a threshold determination
25

26 ² Taylor is a Class III forest practices permit under RCW 76.09.050 and the decision to grant a permit is exempt from SEPA. RCW 43.21C.037.

1 as required by RCW 43.21C and WAC 197-11-330. The responsible official made a
2 determination of nonsignificance and sent notice to the Department of Ecology as required by
3 WAC 332-41-505 and WAC 197-11-340. REC 8577. DNR provided the requisite 14 days for
4 public comment. WAC 197-11-340(2)(a)(1). The Center commented that DNR violated the
5 requirements for a threshold determination under SEPA because DNR did not include an
6 assessment of the sale's impact on global climate change. REC 8711-8717. The Department of
7 Ecology also provided comments, but did not mention the issue of global climate change. REC
8 8590-8591. Petitioner STOP did not file any comments related to the Taylor sale. See REC 8528-
9 8785; REC 8840.

10 DNR issued a Notice of Final Determination, retaining the threshold determination of
11 nonsignificance on December 23, 2021, which included DNR's response to SEPA comments,
12 primarily intended for the Center. REC 8539. DNR disagreed that that a greenhouse gas
13 assessment was required at the project level for individual planned timber sales. REC 8540.

14 The Center attended the January 4, 2022 meeting of the Board of Natural Resources and
15 again voiced opposition to the Taylor Sale based on its impact to global warming. REC 7758.
16 When DNR presented the January timber sales to the Board, DNR responded to the Center's
17 comments:

18 One main issue was the analyses of carbon and climate as part of the SEPA
19 checklist for timber sales. The response provided to the public is more nuanced
20 than the reference purporting the SEPA checklist does not include carbon and
21 climate change as a requirement for the analysis. SEPA analysis is complete
22 through two processes with the first a formal Environmental Impact Statement
(EIS) at a larger programmatic/policy level. For the Sustainable Harvest
Calculations, staff completed an extensive analysis of carbon sequestration and
climate change as part of the 2019 EIS.

23 REC 7765.

24 The issue of carbon sequestration and the 2019 EIS for the sustainable harvest calculation
25 arose during Board discussion at REC-7766-7767. A Board member (Dr. Brown) asked about
26

1 an assessment of carbon impacts and DNR described the carbon assessment in the EIS for the
2 sustainable harvest (level). REC 7766-7767. The Board later approved the proposed timber sales
3 for January, including the Taylor Sale. REC 7768. Petitioner filed this appeal under
4 RCW 79.02.030 on February 3, 2021, challenging both the Taylor Sale and the Goodman 1
5 Sale.³

6 **2. Goodman 1 Timber Sale.**

7 Goodman 1 timber sale (Goodman) is a five-unit variable retention harvest located on
8 commercial forestland seven miles south of the town of Forks. REC 7831. The entire sale covers
9 274 acres, but only 166 acres will be subject to harvest. REC 7225-26. DNR is deferring from
10 harvest 99 acres to protect riparian management zones and unstable slopes and five acres as leave
11 trees. REC 7225-26. Existing roads comprise nine acres. REC 7225-26. The forest stands are
12 mostly a mix of Douglas-fir and western hemlock. REC 7226. The stand ages reflect previous
13 commercial harvest between the 1960s to late 1980s. REC 7226. These stands adjoin other
14 privately owned industrial forest stands and federal lands that are managed for timber
15 production. REC 7228-29 (cumulative effects). Revenue from the sale of timber will benefit the
16 University Trust. REC 7227.

17 The Goodman sale followed a different SEPA route than that of Taylor. Because
18 Goodman sale was classified under the forest practices rules as a Class IV, the decision to grant
19 a forest practices permit was not exempt from SEPA. WAC 222-16-050(1)(d). The SEPA
20 checklist was submitted as part of the application for a forest practices permit under the Forest
21 Practices Act, RCW 79.06. WAC 222-10-010(4); REC 7145. The SEPA responsible official for
22 forest practices permits made the threshold determination of nonsignificance and provided a 14-
23 day public comment period. REC 7206. The Center commented on the determination of
24 nonsignificance threshold and argued, again, that the SEPA checklist failed to analyze the

25
26 ³ The Taylor sorts sold at public auction. The trees have been harvested, processed into logs, and delivered to the purchasers. All that remains is site cleanup with the possibility of burning debris in the fall.

1 potential impact of the Goodman Sale on the climate. REC 7382. The Department of Ecology
2 also submitted comments, identical to those submitted for Taylor, and did not address climate
3 issues. REC 7213. The SEPA responsible official responded to the Center's letter indicating that
4 they did not see any new information warranting a change to the determination of
5 nonsignificance. REC-7289. The SEPA responsible official retained the determination of
6 nonsignificance and DNR received an approved forest practices permit for Goodman. REC
7 7387-7527.⁴

8 DNR then prepared to present the sale to the Board of Natural Resources in January 2022,
9 and included the SEPA Checklist used for obtaining the forest practices permit for the Board's
10 review. REC 7698, 7710-7716. In late January 2022, the Center and STOP submitted a letter to
11 the Board asking the Board to disapprove the Goodman Sale and rescind its earlier approval of
12 Taylor. REC 16617-16624. The Center and STOP submitted additional materials found at
13 REC 16625-17027. The Board approved the Goodman Sale on February 2, 2022. The next day,
14 the Center and STOP filed an appeal under RCW 79.02.030 for both the Goodman and Taylor
15 sales.

16 **3. Climate Change Facts.**

17 Climate change is a change in average temperature and weather patterns that occurs on a
18 regional or global scale over decades and centuries. REC 4000. The earth is naturally warmed
19 by the greenhouse gas effect. REC 4000. Greenhouse gases, such as carbon dioxide, methane,
20 and nitrous oxide, trap heat from the sun and warm the atmosphere. REC 4000. When the volume
21 of greenhouse gases in the atmosphere increase to a certain, point, global temperatures rise.
22 REC 4000.

23 Multiple lines of evidence indicate that humans have been the primary driver of recent
24 warming over the past 50 years and will continue to be the primary driver of climate change into
25

26 ⁴ No one appealed the Goodman forest practices permit, and it became final 30 days later. See
RCW 76.09.240 (30-day appeal period).

1 the future. REC 2823 (citing Intergovernmental Panel on Climate Change). Most greenhouse gas
2 emissions from human activities originate from burning fossil fuels. REC 2823; REC 16406-07.
3 Carbon dioxide (CO2 or carbon) is the most prevalent greenhouse gas, so reducing CO2 is the
4 focus of current efforts to reduce greenhouse gases. REC 16209.

5 **4. Trees and Carbon Sequestration.**

6 Trees sequester carbon through photosynthesis. REC 4002. Trees and other plants absorb
7 carbon dioxide from the atmosphere and, at the cellular level, combined it with water to form
8 sugar (glucose) and oxygen. The tree uses some of the sugar for energy for growth and converts
9 the remainder to starch and stores it as wood, bark, needles/leaves, and roots. REC 4002. Forest
10 stands can absorb large quantities of carbon dioxide and sequester the carbon for potentially long
11 periods of time. Carbon is released over time through decomposition or wildfire. REC 4002. The
12 amount of carbon sequestered in a forest stand depends on factors such as tree growth, mortality,
13 species composition, age distribution, structure class, time between harvests, and forest health.
14 REC 4003. The rate of sequestration varies over the life of the tree and declines as growth slows
15 in mature trees. REC 40. Overall, forest lands in the United States are a net sink for CO2. REC
16 16421. The main drivers of forest carbon sequestration include forest growth, increasing forest
17 area, and accumulation of carbon in harvested wood products. REC 16421. The science of
18 measuring carbon sequestration, emissions and removals from forests and trees is evolving. REC
19 16720. There is no policy requirement for a standard practices. REC 16720.

20 **C. DNR's Broader-Scale Planning Documents Include an Analysis of How Timber 21 Harvest Will Impact Carbon Dioxide Emissions and How Global Climate Change 22 Will Impact DNR's Forests in the Future.**

23 DNR has evaluated timber harvests in the context of climate change in three recent
24 planning documents. In 2016, DNR analyzed the impacts of harvest in the Olympic Experimental
25 State Forest (OESF) Land Plan Final Environmental Analysis (EIS). REC 3682-4062. In 2019,
26 DNR amended its 1997 Habitat Conservation Plan (1997 HCP) to include a long-term strategy

1 for the conservation of the marbled murrelet (Marbled Murrelet Strategy). REC 2668-3095. This
2 process included an analysis of the impact of harvest on climate included in the final EIS
3 accompanying the decision. REC 2668-3095. Also in 2019, the Board established a sustainable
4 harvest level for all state forested lands in Western Washington and the accompanying final
5 environmental impact statement included an analysis of how DNR's harvest activities could
6 affect climate change. REC 3499-3668.

7 **1. Olympic Experimental State Forest Land Plan**

8 The Goodman sale is located in the OESF. The OESF encompasses over 270,000 acres
9 and is located in western Clallam and Jefferson counties on the Olympic Peninsula. REC 3707-
10 08. The OESF uses an "experimental" integrated management approach. REC 3713. Unlike
11 other forests that divide forested land into separate zones for timber harvest and habitat
12 conservation, the OESF integrates the two forest uses so that ecological values are interspersed
13 with sustainable harvesting. REC 3713. The goal is to create a functioning, healthy, productive
14 forest ecosystem with conditions ranging from young stands to mature, structurally complex
15 stands and provide quality timber for harvest and habitat for native species across the forested
16 landscape. REC 3713.

17 A forest land plan is a document that defines land-management objectives for a specific
18 geographical area. REC 3708. A forest land plan includes goals, measurable objectives,
19 strategies and other information necessary to meet important policy objectives. REC 3708. The
20 OESF plan implements these policies based on the regional conditions identified in the OESF,
21 but does not include site-specific information for individual management activities such as
22 timber sales. REC 3708. Figure ES-1 at REC 3710 demonstrates the hierarchy of the forest land
23 management process, beginning with policies established by the Board that apply to large areas
24 of DNR-managed lands (such as Western Washington), tactical forest land plans intended to
25 implement these policies in a smaller area (*e.g.*, OESF) through guidance to DNR foresters, and
26

1 ending with a proposed timber sale designed to implement guidance provided in the forest land
2 plan.

3 **a. Impact of DNR's Harvests in the OESF on Climate.**

4 In 2016, DNR adopted the Olympic Experimental State Forest Land Plan as a
5 programmatic or non-project "action" under SEPA. REC 4466-67; WAC 197-11-704(b). In the
6 OESF Land Plan Final Environmental Impact Statement DNR analyzed three alternatives:
7 (1) the no action alternative, (2) the Landscape Alternative, and (3) the Pathways Alternative.
8 REC 3715-17. DNR used numerous environmental criteria to identify potential environmental
9 impacts, including impact to climate and the impact of climate on the OESF. REC 3788-4019
10 (Chapter 3 Environmental Analysis); REC 4000-4019 (Climate Change). DNR analyzed the
11 impacts over a 100-year period to identify potential long-term changes to the environment.
12 REC 3797.

13 DNR analyzed two alternatives along with the no action alternative. REC 3715-17. The
14 "no action alternative" represented the current land management practices, including the
15 standard watershed analysis as specified in the 1997 HCP and the northern spotted owl
16 conservation strategy applied to the individual landscape within the OESF. REC 3715-16. The
17 Landscape Alternative featured the use of a forest estate model to assist in planning. Forest estate
18 models are powerful, computer-based tools that enable DNR to consider the entire land base at
19 once to find efficient and effective ways to balance multiple objectives of forest land
20 management. REC 3716. The model incorporates and automates the complex watershed
21 assessment process, incorporates another computer probability model to predict stands likely to
22 suffer windthrow (trees toppled by strong winds), and provides harvest suggestions to meet
23 DNR's northern spotted owl and other management objectives. REC 3716-17. The forest estate
24 model is built with information on current conditions, management objectives, management
25 activities, and an understanding of the natural growth processes and how forests respond to
26

1 management activities REC 3716. The model creates a suggested harvest schedule that lists the
2 location, timing, and recommended methods of harvest. REC 3716.

3 The Pathways Alternative is based on the Landscape Alternative, but includes application
4 of a “management pathway” to each landscape. REC 3717. A management pathway is a course
5 of action designed to achieve one or more of the following objectives: attain the threshold
6 proportion of northern spotted owl habitat in each landscape more quickly than projected under
7 the Landscape Alternative, create or accelerate habitat development in areas deferred from
8 harvest, and consolidate habitat in larger patches near existing or high quality habitat on state
9 trust lands and federal forest lands. REC 3717. Most pathways involve selecting forest stands as
10 candidates for either active management (thinning) to create or accelerate habitat development,
11 or passive management (deferred from harvest). REC 3717.

12 To assess whether the alternatives adversely affected the climate, DNR looked at the
13 difference between the amount of carbon sequestered and the amount of carbon emitted (net
14 carbon). REC 4002. DNR considered whether, in the OESF, the total amount of carbon
15 sequestered in forest stands on state trust lands and in wood products made from the harvested
16 wood from state trust lands is projected to be greater or less than the amount of carbon emitted
17 from the burning or decay of wood harvested from state trust lands over the 100-year analysis
18 period (refer to Figure 3-32). REC 4004. For this analysis, DNR followed the methodology
19 described in *Methods for Calculating Forest Ecosystem and Harvested Carbon with Standard*
20 *Estimates for Forest Types of the United States* (Smith and others 2006) (REC 12659-12880).
21 This method estimates the amount of carbon sequestered in forest stands and the amount of
22 carbon sequestered and emitted from harvested wood over time.

23 First, DNR estimated the amount of carbon sequestered in forests on state land over a
24 100-year period under the three OESF Land Plan alternatives to measure the sequestration of
25 carbon over time. REC 4002. Forest stands sequester carbon in six different places or “pools”:
26 (1) live trees, (2) dead standing trees (snags), (3) understory vegetation, (4) down, dead wood,

1 (5) forest floor (litter, humus), and (6) soil. REC 4002-03. The amount of carbon sequestered in
2 a forest stand depends on factors such as tree growth, mortality, species composition, age
3 distribution, structure class, time between harvests, and forest health. REC 4003. Newly planted
4 forests accumulate carbon rapidly for several decades. REC 4003. Sequestration declines as trees
5 mature and growth slows, and sequestration stops when the trees die. Standing dead trees and
6 dead trees lying on the forest floor take several decades to decay. REC 4003. DNR determined
7 that the total amount (sum of the pools) of carbon sequestered in the forest stands increased under
8 all of the alternatives. In calculating the amount of carbon sequestered under the no action
9 alternative and the Landscape Alternative, DNR determined that both alternatives increased the
10 amount of sequestered forest carbon over the 100-year analysis period, and that there was very
11 little difference between the two alternatives in terms of the amount sequestered in each decade
12 or in total over the 100-year analysis period. (See bar chart 3-39 at REC 4009.)

13 DNR next examined the amount of carbon that harvested wood products emitted through
14 burning or decay. REC 4007-4008. When trees are harvested, some of the carbon they retain
15 remains on site (*e.g.*, slash, stumps) and some is removed as cut timber. REC 4005. The wood
16 that is removed is made into a variety of wood-based products, such as paper or lumber for homes
17 and furniture. REC 4005. Wood-based products sequester carbon for varying lengths of time.
18 REC 4005. For this analysis, DNR followed the methodology described in *Methods for*
19 *Calculating Forest Ecosystem and Harvested Carbon with Standard Estimates for Forest Types*
20 *of the United States* (Smith and others 2006). REC 4005. This method estimates the amount of
21 carbon sequestered in forest stands and the amount of carbon sequestered and emitted from
22 harvested wood over time. Using this methodology, DNR assumed that at the end of the 100-
23 year analysis period, about 21 percent of the wood harvested would remain in use, 16 percent
24 would be sealed in sanitary landfills, and 63 percent would be emitted. DNR calculated the total
25
26

1 emission of 4,509,892 tonnes⁵ of carbon for the no action alternative and 4,666,376 tonnes
 2 emitted for the Landscape Alternative. REC 4012. The carbon emitted for the no action
 3 alternative was far below the 43,783,570 tonnes of total sequestered carbon. The carbon emitted
 4 under the Landscape Alternative was far below the 43,629,100 tonnes of total carbon
 5 sequestered. REC 4013. DNR’s analysis produced similar results for all alternatives: the amount
 6 of carbon sequestered in forest stands and harvested wood products greatly exceeded the amount
 7 of carbon emitted from decay and burning of harvested wood products. REC 4008.

8 **Comparison of No Action and Landscape Alternatives Carbon Sequestered**
 9 **and Carbon Emitted Over 100-year Analysis Period⁶**

OESF Land Plan Alternatives	No Action	Landscape
Carbon Sequestered in Forest Stand (total of all forest stand pools) ⁷	40,079,456 tonnes ⁸	39,828,258 tonnes
Carbon Sequestered In-Use Wood Products ⁹	1,540,350 tonnes	1,597,452 tonnes
Carbon Sequestered in Land Fills ¹⁰	1,163,764 tonnes	1,203,390 tonnes
Total Carbon Sequestered¹¹	42,783,570 tonnes	42,629,100 tonnes
Carbon Emitted from Harvested Wood ¹²	4,509,802 tonnes	4,666,376 tonnes

17 DNR selected the Pathways Alternatives for the OESF Land Plan. This alternative was
 18 essentially the same as the Landscape Alternative, but included “management pathways” to
 19 achieve certain objectives related to accelerating northern spotted owl habitat. The Landscape
 20 and the Pathways Alternatives have substantially the same harvest schedules. REC 3804. Under
 21 the Pathways Alternative, DNR will thin forest stands in operable (intended for harvest) and

22 ⁵ One tonne is metric unit equal to 1,000 kilograms (kg) or 2,205 pounds. A “tonne” is also referred as a
 23 “metric ton” to distinguish it from the non-metric units of “ton” or “short ton” used in the United States.

⁶ This table was created for this brief by pulling information from various tables at REC 4009-12,

⁷ Table 3-65 REC 4009.

⁸ One tonne of CO2 is one metric ton of CO2.

⁹ Table 3-68 REC 4012.

¹⁰ Table 3-68 REC 4012.

¹¹ Total tonnes sequestered for each alternative, REC 4013.

¹² Table 3-69 REC 4012.

1 deferred areas to create or accelerate development of northern spotted owl habitat. REC 4011.
2 These areas are expected to have a temporary decrease in standing volume followed by an
3 increase as the remaining trees are released from competition and grow. REC 4011. Over time,
4 DNR expects these stands to sequester more carbon as compared to an untreated stand in a
5 similar condition. REC 4011.

6 **b. The Impact of Climate Change on Forests within the Olympic**
7 **Experimental State Forest**

8 Climate change is an emerging science. REC 4014. Although there are many studies
9 being conducted, there are no definitive answers on the severity and timing of climate change or
10 the extent to which climate change will impact forests in the Pacific Northwest. REC 4014. In
11 developing the OESF Land Plan, DNR could not draw clear conclusions about the relative
12 impacts of climate change on the three alternatives analyzed in the OESF Land Plan Final
13 Environmental Impact Statement. REC 4014. DNR examined existing studies to identify
14 potential future changes to OESF conditions as a result of the anticipated results of climate
15 change. REC 4014. These potential impacts from climate change include the following:

- 16 • Warmer temperatures, reduced snowpack, increased frequency of extreme weather
17 events, and a rise in sea level. REC 4001.
- 18 • Increasing tree mortality from insect outbreaks, wildfire, and tree diseases. REC 4014.
- 19 • Species moving into the higher elevations. REC 4014
- 20 • Sitka spruce and western hemlock currently occupy nearly 75 percent of the OESF and
21 appear less vulnerable than other species. REC 4015
- 22 • Silver fir currently occupies about 24 percent of the OESF and may be more
23 vulnerable.
- 24 • Summer temperatures may increase drought stress. REC 4016.
- 25 • Drought tolerant species may become dominate at low elevation on the west side of the
26 Olympic Peninsula. REC 4016.

- 1 • Larger and more intense wildfires. REC 4016.
- 2 • Constrained distribution of Douglas-fir in lower elevation of the Olympic Peninsula.
- 3 REC 4016.
- 4 • More precipitation falling as rain rather than snow, reduced snow pack, and changes to
- 5 timing of snow melt. REC 4016.
- 6 • Changes to peak flow in stream and temperature of streams. REC 4016-4017.

7 **2. Sustainable Harvest Level**

8 The legislature directs DNR to manage forested lands on a sustained yield basis and in
9 compliance with other statutory directives. RCW 79.10.320. A sustained yield plan refers to
10 management of the forest to provide harvesting on a continuing basis without major prolonged
11 curtailment or cessation of harvest. RCW 79.10.310. DNR periodically adjusts the acreages
12 designated to be included in the sustainable yield management program and calculates a
13 sustainable harvest level. RCW 79.10.330. DNR must examine its level of harvest at the end of
14 every planning decade, and establish a sustainable harvest level for the next decade. RCW
15 79.10.330; *see* RCW 79.10.340 (identifying 1984-1993 as the first planning decade).

16 In 2019, the Board established a sustainable harvest level for the 2015-2024 planning
17 decade. REC 3669-71 (Section 7). As part of this process, the Board examined a range of
18 alternatives and their associated environmental impacts. REC 3518-19. The results of this
19 analysis was published in *Alternatives for the Establishment of a Sustainable Harvest Level for*
20 *Forested State Trust Lands in Western Washington, Final Environmental Impacts Statement.*
21 REC 3499-3668. The Board included an analysis of climate change in terms of the effect that a
22 changing climate might have on DNR's forest management (REC 3578-82) and the effects that
23 DNR's management might have on a changing climate. REC 3610-3615.

24 DNR used the same methodology as used in the OESF HCP Planning Unit Forest Land
25 Plan Final EIS. This analysis estimates the net amount of carbon sequestered in both forested
26 stands as live trees, standing trees, understory vegetation, downed wood, forest litter, and organic

1 soil. REC 3611. DNR then estimated the amount of carbon stored long-term in harvested wood
2 products and landfills. REC 3612. These carbon pools total the amount of carbon sequestration
3 likely to result from state-owned forests in Western Washington. REC 3611. DNR then estimated
4 the carbon emissions from harvested wood, primarily through burning or decay. REC 3612-13.
5 DNR also estimated carbon emitted through its land management activities. REC 3613. DNR
6 compared the carbon sequestered to the carbon emitted under the six alternative harvest levels.
7 The results are presented in bar charts at REC 3614. The bar charts at REC 3615 show the total
8 of sequestered carbon (with emission deducted) at the end of the planning decade and after 50
9 years.

10 DNR also considered how climate change may affect forest composition, unstable slopes,
11 riparian areas, and wildlife. REC 3578- 3581.

12 **a. Vegetation**

13 In ecosystems where moisture availability is the main factor limiting growth,
14 productivity will likely decrease under drought conditions. REC 3578. Ecosystems where energy
15 (sunlight or warmth) is the primary factor limiting growth, productivity might increase at higher
16 elevations as temperatures increase, but could decline at lower elevations under summer drought
17 conditions. REC 3578.

18 Subalpine parkland¹³ will likely decline if temperatures increase and snow decreases.
19 REC 3578. Lower elevation vegetation may move upward, and species composition may shift
20 to favor more drought-tolerant species. The timing of such changes may relate partly to the
21 annual and seasonal trends in temperature and moisture, and occurrence of stand-replacing
22 disturbances. REC 3578.

23 **b. Disturbances.**

24 Higher temperatures and/or below average precipitation can lead to tree stress and
25 increased mortality, reduced growth and productivity, and increase in the frequency of drought-

26 ¹³ Subalpine parkland is a high-elevation vegetation type without continuous tree cover. REC 3579 n. 7.

1 related disturbances such as insect outbreaks and wildfire. REC 3659. Drought can affect the
2 regeneration of plant and tree species and possibly result in species living together in unusual
3 assemblages. REC 35679. While many climate models consistently predict higher temperatures,
4 future annual precipitation projections are less certain. REC 3579. Future participation patterns
5 are more certain when viewed seasonally and predict less precipitation during summer. REC
6 3579. This means that summer frequency and severity may increase in Western Washington.
7 REC 3579.

8 Future drought, warmer temperatures, and reduced summer precipitation may increase
9 the likelihood of wildfire. Several studies project an increase in the area burned by wildfire. REC
10 3579. Most studies predict a doubling of the area burned. REC 3579. It is likely that Washington
11 will see large patches of stand-replacing fire. REC 3578-3579.

12 Many coastal west-side forests are more frequently disturbed by wind than by fire, but
13 there is little scientific literature examining projections of the future climate's impact on wind.
14 The only known study did not find a consistent trend in future episodic wind events, and the
15 projected future climate suggests that wind events are no more or less frequent than in the past.
16 REC 3580.

17 **c. Earth and Aquatic Resources**

18 Seasonal precipitation projections suggest that precipitation and flooding will increase in
19 the winter. REC 3580. DNR notes that increased seasonal precipitation in winter could saturate
20 the soil and increase the possibility of landslides, but this is speculative given the lack of
21 supporting data and literature. REC 3580. Increased precipitation could increase winter stream
22 flows. Increased rain and increased temperatures will reduce the snowpack. REC 3580. The
23 consequences of these trends will vary by watershed type. REC 3580.

24 Western Washington currently classifies watersheds as either "rain-dominant" or "mixed
25 rain-and-snow dominant." REC 3580. Rain-dominant watersheds produce peak flows
26

1 throughout the winter with little precipitation falling as snow. REC 3580. Mixed rain-and-snow
2 dominant watersheds have two peak streamflow periods occurring during the fall resulting from
3 rain, and one late in spring or early summer resulting from snowmelt. REC 3580. It is likely that
4 the mixed rain-and-snow dominant watersheds will be most affected by climate change.
5 Historically mixed rain-snow watershed in Western Washington are primarily found on the west
6 slope of the Cascades Mountains and the northeast portion of the Olympic Peninsula. REC 3581.
7 These may become rain-dominant. REC 3581. Also the timing of peak flow event could change
8 due to projected declines in snowpack. REC 3581.

9 The magnitude and frequency of streamflow could increase, especially in watersheds
10 currently classified as rain-and-snow dominant. REC 3581. This may result in rivers adjusting
11 to new hydrological patterns, new sediment loads, and new peak flow magnitudes. In turn, this
12 will change the physical environment adjacent to rivers, potentially impacting riparian and in-
13 stream habitat. REC 3581.

14 Wetlands, in particular, are expected to be impacted by climate change because of their
15 relationship to hydrology, temperature, and precipitation. REC 3581. Wetland habitat may
16 change with the change in timing of precipitation, increasing temperatures, and increasing
17 frequency of summer droughts. REC 3581.

18 Changes in precipitation intensity, changes in flow regime, and changes in stream
19 temperature will likely impact stream and wetland habitat for cold-water adapted species such
20 as salmon, steelhead trout, and bull trout. Warm temperatures and reduced stream flow in
21 summer will likely increase thermal stress and impede migration. Increased winter flooding
22 could cause scouring in stream channels, adversely impacting salmon eggs and altering life
23 history events. REC 3681.

24 **d. Wildlife**

25 The projected impact on wildlife will vary by species. Climate change and the
26 corresponding habitat changes could affect the physiology, distribution, and timing of life-cycle

1 events. REC 3481. Across the northwest, amphibians and reptiles are considered more sensitive
2 to habitat changes disturbance. REC 3581. Also, amphibians and reptiles cannot disperse as
3 easily as plants, mammals, and birds. REC 3581. The response of individual species will vary
4 based on their sensitivity to habitat. REC 3581. Species that can live in a broad range of habitats
5 are less sensitive because they can disperse and likely are better able to adapt than species that
6 can live in only narrow habitat niches. REC 3581-3582.

7 **3. DNR's Environmental Impact Analysis for the Sustainable Harvest Level**
8 **Included a Discussion of Potential Mitigation Measures.**

9 In DNR's comparison of alternatives, DNR analyzed possible mitigation measures that
10 DNR could implement if the projected possible conditions become reality, and analyzed which
11 alternatives were better at mitigation. REC 3616-3620.

12 **a. Vegetation**

13 Forest productivity will increase or decrease depending on the species and location. REC
14 3616. The Olympic Peninsula and the Puget Trough are more likely to decline in productivity,
15 but this loss might be offset by increased forest productivity at higher elevations. REC 3616.
16 Increases in summer drought and temperatures could decrease productivity, but it is unclear if a
17 loss in productivity could be offset by increasing productivity elsewhere. REC 3616.

18 Forest conditions can be changed through management. DNR may be able to accelerate
19 late-successional forest conditions by thinning younger second-growth forests. This would
20 reduce drought-related stress in younger and more moisture sensitive trees. REC 3616.

21 With a changing climate, regenerating forests using current seedlings and genetic
22 material may not be successful REC 3616-3617. Certain individual trees may have a genetic
23 makeup that will make them more adaptable than other individuals of the same species. REC
24 3617. DNR has already fostered genetic diversity by collecting genetic material from trees that
25 demonstrated the ability to survive in a wide range of environments. REC 3617. Silvicultural
26

1 techniques can also be modified to account for changing conditions that might impede growth.
2 REC 3617.

3 **b. Disturbance.**

4 Given the possibility of an increasing likelihood of larger, stand-replacing wildfires,
5 maintaining forest cover is a reasonable strategy to increase west-side forest resistance to the
6 adverse effects of climate change. REC 3618. Retaining older forested land would help resist
7 climate change because older trees are better able to persist through unfavorable conditions than
8 are seedlings. REC 3618. Also, preserving well-distributed patches rather than a few, larger
9 patches, will better increase the probability that habitat will persist if wildfire occurs. REC 3619.

10 **c. Potential Climate-Related Impacts on the Sustainable Harvest Level.**

11 Projecting the change on future harvest level is difficult because of uncertainty about
12 future forest productivity and composition. REC 3620. Based on current scientific
13 understanding, over the first decade and for the next fifty years, natural disturbances will likely
14 be the greatest climate-change-related threat to harvest and long-term conservation goals. REC
15 3620.

16 **4. Long-Term Conservation Strategy for the Marbled Murrelet FEIS**
17 **September 2019**

18 In 1997, DNR, the U.S. Department of Fish and Wildlife, and the National Marine
19 Fisheries Service (the Services) entered a REC 2392. HCP covers 1.6 million acres of forested
20 state lands that lie within the range of the northern spotted owl. REC 891; REC 887. DNR's
21 purpose was to obtain long-term income from timber harvest and other forest management
22 activities. REC 1850. In exchange for taking specified steps to conserve habitat for the northern
23 spotted owl, the marbled murrelet, and other species over a 70 to 100 year period, DNR would
24 receive and "incidental take permit" that would protect it from liability under the Endangered
25 Species Act. REC 842; REC 897; REC 1850.

1 In 1997, the Services and DNR lacked sufficient information to design a conservation
2 strategy. REC 2339. The Services and DNR agreed to include an interim strategy in the 1997
3 HCP that would be updated when DNR and the Services devolved a long-term strategy. REC
4 2393. DNR and the Services agreed to a long-term conservation strategy for the marbled murrelet
5 that underwent detailed environmental review under SEPA and NEPA. In 2019, the Services and
6 DNR amended the HCP and issued DNR a new incidental take permit.

7 In its environmental analysis, DNR considered eight alternatives, lettered A-H with A
8 being the no action alternative. All alternatives include lands already protected as long-term
9 forest cover as old-growth forests, high-quality northern spotted owl habitat, riparian areas,
10 natural areas, and other conservation commitments. A total of approximately 567,000
11 conservation acres would be protected under each alternative. Although preserved for other
12 reasons, these areas would provide conservation benefits to the marbled murrelet by supplying
13 nesting habitat and buffers to nesting habitat. REC 2697.

14 *The Long-Term Conservation Strategy for the Marbled Murrelet Final Environmental*
15 *Impact Statement* (Strategy FEIS) is found at REC 2668-3095. The Strategy FEIS analyzed a
16 range of alternatives that had differing amounts of habitat that would be set aside for marbled
17 murrelet conservation. REC 2698. The alternatives are summarized at REC 2698-2699. The
18 Strategy FEIS included an analysis of the potential net carbon sequestration produced by the
19 various alternatives and a discussion of how climate changes will impact the conservation
20 strategy for the marbled murrelet. The conservation strategy for the marbled murrelet was
21 developed in tandem with the sustainable harvest level discussed above. As such, the analysis of
22 impacts of the various alternatives on climate and the impact of climate on the alternatives is the
23 same as that for the sustainable harvest calculation.

24 As in its sustainable harvest FEIS, DNR used the net carbon calculation to assess the
25 potential environmental impact that its land management activity might have on global climate
26 change. REC 2907. The analysis compares the total amount of carbon sequestered in both forest

1 stands and harvested wood products to carbon emissions from DNR management activities
2 (including harvest), and the amount of carbon emitted from the burning or decay of harvested
3 wood. REC 2907. DNR used this methodology to see whether the marbled murrelet strategy
4 options exacerbated climate change. REC 2907-2915. Again, the net carbon analysis shows that
5 the amount of sequestered carbon greatly exceeds the emissions associated with harvested wood.
6 REC 2911.

7 III. APPLICABLE LAW

8 A. The Board's Decisions to Sell Timber is Subject to Review Under RCW 79.02.030.

9 RCW 79.02.030 provides that any applicant to purchase valuable materials and "any
10 person whose property rights or interest will be affected by such sale . . . feeling aggrieved by
11 any order or decision of the board . . . may appeal . . . to superior court of the county in which
12 such lands or materials are situated." Acting in its appellate capacity, the Court hears and decides
13 this review based upon DNR's record. *See Stewart v. State*, 191 Wn.2d 42, 52, 419 P.2d 838
14 (2018) (review of administrative decision denying unemployment benefits). Petitioners have
15 challenged two timber sales approved by the Board: (1) Taylor Downhill Sorts Timber Sale
16 approved by the Board in January of 2022 and (2) Goodman 1 Timber Sale approved by the
17 Board in February of 2022. Review is based upon the DNR's record. RCW 79.02.030.

18 B. Both the Arbitrary and Capricious and Clearly Erroneous Standards of Review 19 Allow This Court to Defer to DNR's Facts, Expertise, Interpretation, and 20 Implementation of Its Governing Laws.

21 The standard of review under RCW 79.02.030 is arbitrary and capricious. *Nw. Alloys v.*
22 *Dep't of Nat. Res.*, 10 Wn. App. 2d 169, 184, 447 P.3d 620 (2019), *review denied*, 194 Wn.2d
23 1019 (2020).

24 Agency action is arbitrary and capricious if it is willful, unreasoned, and taken
25 without regard to the attending facts or circumstances. Where there is room for
26 two opinions, agency action taken after due consideration is not arbitrary and
capricious even if a reviewing court may believe it to be erroneous. Deference
will be given to the specialized knowledge and expertise of the administrative

1 agency. The party who challenges an agency action under this standard carries a
2 heavy burden.

3 *Id.* at 187.

4 An agency’s discretion is particularly broad when it acts in a proprietary capacity, which
5 DNR does when it is managing the state trust lands. *City of Tacoma v. Taxpayers of Tacoma*,
6 108 Wn.2d 679, 692, 743 P.2d 793 (1987); *State Owned Forests v. Sutherland*, 124 Wn. App.
7 400, 408, 101 P.3d 880 (2004); *see Conservation Nw.*, 514 P.3d at 185.

8 The standard of review under SEPA is “clearly erroneous.” *Wild Fish Conservancy v.*
9 *Dep’t of Fish & Wildlife*, 198 Wn.2d 846, 867, 502 P.3d 359 (2022). The agency’s threshold
10 determination is given “substantial weight,” and this Court “recognizes and defers to the expertise
11 of the administrative agency.” RCW 43.21C.090; WAC 197-11-714(2), 197-11-920; *Wild Fish*, 198
12 Wn.2d at 866. Petitioners must demonstrate based on the record that DNR’s threshold
13 determination is clearly erroneous. DNR’s threshold determination is affirmed unless this Court
14 is “left with the definite and firm conviction that a mistake has been committed.” *Id.*

15 The record in this case supports DNR’s decision not to include a calculation of carbon
16 emission in the SEPA checklist. This number provides no useful information by itself. DNR has
17 already conducted regional analyses that the carbon sequestered in DNR’s sustainably managed
18 forests greatly exceed the carbon emitted by all the projected timber sales in the relevant area. Even
19 Petitioners’ materials support DNR’s decision.

20 IV. ARGUMENT

21 A. SEPA Requires DNR to Give Careful Consideration to all Reasonably Likely 22 Environmental Consequences of the Taylor and Goodman Sales.

23 The State Environmental Policy Act (SEPA), RCW 43.21C, and WAC 197-11, is a procedural
24 law designed to ensure that government agencies consider environmental impacts before taking
25 action. *Cornelius v. Wash. Dep’t of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015). SEPA
26 does not dictate substantive results, but requires that decision-makers “consider

1 environmental values and consequences” before approving an action. *Wild Fish*, 198 Wn.2d at 873;
2 *Chuckanut Conservancy v. Dep’t of Nat. Res.*, 156 Wn. App. 274, 284, 232 P.3d 1154 (2010);
3 RCW 43.21C.030. SEPA review begins with preparation of a checklist to determine whether the
4 proposed action is likely to have a probable, significant, adverse environmental impact on any
5 specific elements of the environment. *Wild Fish*, 198 Wn.2d. at 856; WAC 197-11-310, 197-11-315,
6 197-11-330, 197-11-444, 197-11-960. A “significant impact means a “reasonable likelihood exists
7 that the proposal will have more than a moderate adverse impact on environmental quality.” WAC
8 197-11-794. *Wild Fish*, 198 Wn.2d at 893. An agency does not have to consider every conceivable
9 environmental impact when making a threshold SEPA determination. *Wild Fish*, 198 Wn.2d at 837.
10 If the checklist does not identify an impact, the Responsible Official issues a threshold
11 “determination of non-significance” (DNS). *Wild Fish*, 198 Wn.2d at 856; WAC 197-11-340(1);
12 A DNS is “a proposal [that] is not likely to have a significant adverse environmental impact, and
13 therefore an [environmental impact statement] is not required.” WAC 197-11-734. Issuance of a DNS
14 completes compliance with SEPA’s procedural requirements and allows the action to proceed. *Wild*
15 *Fish*, 198 Wn.2d at 856.

16 **B. The Record Shows that DNR Carefully Analyzed Environmental Factors for Which**
17 **There was a Reasonable Likelihood of Environmental Impact.**

18 This Court must evaluate whether DNR’s threshold determination was correct. *Norway Hill*
19 *Pres. & Prot. Ass’n. v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976); WAC 197-
20 11-310, 197-11-797. This Court should determine whether “the environmental factors were
21 evaluated to such an extent as to constitute prima facie compliance with SEPA procedural
22 requirements.” *Wild Fish*, 198 Wn.2d at 873; *Chuckanut*, 156 Wn. App. at 287. The agency’s
23 threshold determination is given “substantial weight,” and this Court “recognizes and defers to
24 the expertise of the administrative agency.” RCW 43.21C.090; WAC 197-11-714(2), 197-11-920;
25 *Wild Fish*, 198 Wn. 2d at 866. The Court should only reverse the threshold determination if, after
26

1 reviewing the record, based on ether entirety of the evidence, the Court is left with the definite and
2 firm conviction that a mistake has been committed. *Wild Fish*, 198 W.2d at 866.

3 DNR's threshold determinations for the Taylor and Goodman timber sales gave careful
4 consideration to all reasonably likely environmental consequences. In Taylor, the record shows that
5 DNR carefully evaluated the need to build a road through wetlands to reach unit 2 and developed a
6 means to mitigate for the road. REC 8460-8461. DNR researched the history of the present stand in
7 order to determine if it qualified as old growth or older forests. DNR investigated caves found in the
8 vicinity of the sale and decided to maintain and protect the structural integrity of the microclimate
9 associated with the caves. REC 8471-8475. DNR also investigated and confirmed that the largest of
10 the cliffs and all the balds were excluded from the harvest unit and DNR left trees in the harvest area
11 to protect these uncommon habitats. REC 8476-8480. DNR found a wooden structure within or
12 adjacent to unit 2 and had it evaluated by an archeologist to determine if it was historic or of modern
13 vintage. REC 8481-8483. All these potential impacts were included in the SEPA checklist. REC 8576.
14 There is no reasonable likelihood that emissions from the Taylor and Goodman timber sales will result
15 in a significant adverse impact on the global climate. DNR's threshold determinations for Taylor and
16 Goodman timber sales are supported by the record, based on significant agency expertise in forest
17 management, and complied with SEPA's procedural requirements. Petitioners' challenge rests upon
18 the assumption that calculating the quantity of CO2 released from harvested wood equates to a
19 significant environmental impact and that DNR's decision to not calculate CO2 was erroneous.

20 The most reasonably foreseeable impact for the Goodman sale was its location adjacent to
21 potentially unstable slopes. REC 7635. All unstable slopes were excluded from the harvest area.
22 REC7638. DNR included variable width buffers for the numerous streams located at or near the site.
23 REC 7637. DNR considered whether the sale would adversely affect endangered species and
24 implemented measures to reduce mitigate for the potential impact. REC 7644.

1 DNR did not believe there was a reasonable likelihood that the Goodman and Taylor sales
2 would have any impact on the global climate. DNR was reasonable to believe this based on the
3 environmental analyses completed for their significant regional planning documents.

4 The object of the threshold determination is to identify reasonably likely impacts to the
5 environment. CO2 emissions, by themselves, provide no information about impact to the
6 environment. In DNR's climate impact analysis, DNR used the accepted methodology of calculating
7 net carbon (subtracting total emissions from total sequestration). So long as sequestration is equal to
8 or greater than emissions, there is not impact to climate.

9 **C. The Environmental Analysis Supporting DNR's OESF Plan, the Sustainable Harvest
10 Level and the Marbled Murrelet Strategy all Demonstrate that DNR's Sustainable
11 Management of its Forests Causes Much More Carbon to be Sequestered Than Is
12 Emitted by Harvests And Other Forest Management Activities.**

12 Petitioner Center's initial comment letters for both timber sales touted the methodology
13 described in *Methods for Calculating Forest Ecosystem and Harvested Carbon with Standard*
14 *Estimates for Forest Types of the United States* (Smith and others 2006). REC 7308 (n. 4); REC
15 8523 (n. 4). DNR used this methodology used in analyzing the potential impact that DNR's
16 planning decisions would have on the climate. The FEIS for the OESF Plan, FEIS for the
17 sustainable harvest level, and the FEIS for the Marbled Murrelet Strategy all used this
18 methodology as follows. REC 4000-4014; REC 3577-3583, REC 3610-3615; REC 2823-2829,
19 REC 2907-2911. First, sum all the carbon sequestered in forest stands (live trees) (standing dead)
20 (downed dead trees), understory, litter, and soil. REC 4002-4004; REC 3611; REC 2909. Add to
21 this estimations of the carbon stored in harvested wood products in use and in landfills. REC
22 4007-4008; REC3612 REC 2909. This provides a total sequestration. Net carbon is determined
23 by subtracting from sequestration the carbon emissions associated with the harvest of trees
24 (including emissions from the decay or burning of harvested wood products.) REC 4011-4013;
25 REC 3612-3613; REC 2910-2911. All three analyses concluded that the amount of sequestered
26

1 carbon greatly exceeded the emissions associated with harvest and harvested wood products.
2 REC 4012; REC 3614-3615; REC 4010.

3 Given the large quantities of carbon sequestered on DNR's land, there is no reasonable
4 likelihood that these two sales would emit so much CO2 as to turn DNR's forests from a net sink
5 to a net emitter of carbon.

6 **D. The Projected Carbon Emissions from the Goodman and Taylor Sales Are Included**
7 **in DNR Sustainable Harvest Calculation and the Environmental Impact of Their**
8 **Emissions Were Analyzed in the Sustainable Harvest FEIS, Along with All Other**
9 **Projected Timber Sales in Western Washington.**

9 Both the Taylor and the Goodman sales were generated from the output of the forest
10 estate based on the current sustainable harvest level. The forest estate model is a mathematic
11 computer model of forests that can manipulate large quantities of data. REC 3504. The model
12 solves very complex problems related to managing the forest. REC 3548. The model is built
13 from information on current conditions, management objectives, management activities, and an
14 understanding of natural growth process of how forests respond to management activities (such
15 as harvests). REC 3548-49. The model is able to simultaneously consider all the information and
16 develop an optimal solution indicating where, when, and which harvest method (e.g., variable
17 retention harvest) will achieve DNR's objectives. REC 3549. Goodman and Taylor are harvests
18 identified by this model as being in line with the sustainable harvest level and other management
19 objectives, such as conservation and habitat protection. The estimated quantity of wood from
20 Goodman and Taylor were included in the sum total project for all harvested wood under the
21 selected sustainable harvest level. The emissions associated with the Goodman and Taylor
22 harvest were included in the sum total of all emissions projected for the selected sustainable
23 harvest level. The sum total of sequestered carbon far exceeds the sum total of projected
24 emissions. REC 3615. It is mathematically impossible for the emissions from Taylor and
25 Goodman to exceed the carbon sequestered in DNR's forests.

1 **E. The Forest and Tree Greenhouse Gas Inventory for 2001-2016 Demonstrate That**
2 **DNR's Forest Management, Including Timber Harvest, Sequesters Far More**
3 **Carbon Than Is Emitted by the Harvest of Wood.**

4 Petitioners look to the 2022 *Forest and Trees Greenhous Gas Inventory for 2001 – 2016*
5 authored by the Climate Action Committee (2022 Report). REC 16713-59. This report estimates
6 the quantity of carbon dioxide (CO2) emitted by forest disturbance and the effect of these
7 emissions on net carbon removal associated with forest lands in Jefferson County. Petitioners
8 assert that 266,961 metric tons of CO2 are emitted each year from wood products harvested from
9 all forested lands in the county, making it the “single largest source of emissions in the county.”¹⁴
10 Petitioners pulled the value of 266,961 metric tons from Table 1 in the 2022 Report. REC 16730.
11 The function of the table is to explain the conclusion that of the total weight of harvested wood
12 products between 2011 and 2015, 23 percent of this sequestered in “in use” products and in
13 landfills. REC 16730. The table is not a calculation of net carbon emissions associated with
14 forest lands in Jefferson County.

15 Table 3 at REC 16733 provides a better context for evaluating of CO2 emissions
16 associated with forestry-related land use. Carbon dioxide emission and sequestration from
17 forestry-related land use is calculated over three five-year periods. REC 16733. In each time
18 period, the sum of sequestration greatly exceeded the sum of emission. REC 16733. This is true
19 even when federal park and wilderness lands are excluded from the table. REC 16733. “Overall,
20 results indicate Jefferson County forests generate significant removals.” REC 16734.

21 The 2022 Report parsed the data on the basis of land ownership. REC16736-47. The
22 2022 Report’s analysis of DNR’s land-base is consistent with DNR’s analysis of forestry impact
23 on climate change in the programmatic FEISs. Table 8 at REC 16743 calculates the carbon flux
24 or net carbon on DNR land for three five-year periods. The table reveals that in each five-year
25 period, the amount of carbon sequestered in the category of “forest remaining undisturbed”

26 ¹⁴ This table uses information from DNR’s Timber Harvest Reports which report on the quantity of wood
harvested in each county on an annual basis using Department of Revenue tax receipts.
<http://www.dnr.wa.gov.TimberHarvestReports>.

1 greatly exceeded the amount of carbon released by “harvest” (which includes emissions from
2 harvest, wood products, and reforestation). DNR’s forested land base offsets any emissions from
3 harvests and contributes to offsetting other sources of emission. REC 16743. The 2022 Report
4 notes that DNR had the largest carbon sequestration outside of federal land and wilderness area.
5 REC16743. In a striking contradiction to Petitioners’ argument that timber harvests significantly
6 impact climate change, the 2022 Report concludes as follows:

7 Given the results above for Jefferson County as a whole, the net [greenhouse gas]
8 balance of forests and trees (a net sequestration) represents 8 times the total
9 sector-based emissions in 2005 . . . and 13 times of total sector-based emission in
10 2018. Note the 2018 inventory also included consumption based inventory, which
11 was 642,443 metric tons of CO₂e. The net sequestration above for Jefferson
12 County as a whole . . . represents 6 times the total consumption-based emissions
13 in 2018.

14 REC 16747-48.

15 This report is consistent with DNR’s belief that the quantity of carbon sequestered in
16 state-owned forests far exceeds the emissions resulting from the harvest of wood. Also, the
17 carbon emissions estimate that Petitioners put forward are far less that carbon sequestration
18 attributed to DNR’s lands in the 2022 Report, REC 16743.

19 **F. Department of Ecology’s Greenhouse Gas Reporting Thresholds and the Proposed**
20 **“GAP” Rule Do Not Apply and Provide No Useful Analogy.**

21 Petitioners’ argue that the legislature regards any projects that generate more than 10,000
22 metric tons of CO₂ equivalent¹⁵ to be a significant project. Unfortunately, Petitioners’ citation
23 is out of date. Petitioners seem to be referring to the threshold set by the Department of Ecology
24 in Chapter 173-441 WAC. Any owner or operator of any facility with total greenhouse gas
25 emissions that exceed 10,000 metric tons CO₂ equivalent per calendar year from all applicable
26 source categories listed in WAC 173-441-120 must comply with the reporting requirements of
27 Chapter 173-441 WAC. Source categories listed in 173-441-120 include a variety of activities

¹⁵ CO₂ equivalents are a measure used to compare emissions from various greenhouse gases based on their global warming potential. RCW 70A.65.010(13).

1 such as stationary fuel combustion source, electricity generation, cement production, ammonia
2 manufacturing, to name just a few. Timber harvest is not on the list of targeted sources.

3 The 10,000 metric tons CO2 equivalent threshold is not a scientifically derived threshold
4 indicating an environmental impact. The threshold is a policy choice made by the State. Another
5 example of a policy choice is the list of emissions that are exempted from the reporting quantity
6 requirement. RCW 70A.65.080(7). This includes emissions from combustion of aviation fuels;
7 emissions from certain watercraft, and CO2 emissions from combustion of biomass or biofuel.
8 The threshold for emission reporting is not applicable to SEPA analysis.

9 Likewise Petitioners direct the Court's attention to the "GAP" rule. The purpose of
10 proposed rule is intended for large fossil fuels and industrial projects. REC 16821.

11 Large fossil fuel and industrial projects have the potential to emit high amounts
12 of [greenhouse gas] emissions, which result in adverse environmental impacts.
13 The GAP rule will provide methods to assess [greenhouse gas] emission from
14 these projects and require a plan to eliminate, reduce or offset the environmental
15 impacts.

16 REC 16821.

17 In *PT Air Watchers*, the court noted a fundamental difference between CO2 emissions from
18 burning biomass.

19 Biomass is part of the earth's carbon cycle, where plants take in carbon dioxide
20 from the atmosphere and then release it when they decay or die. . . Biomass
21 naturally releases this carbon dioxide if left on the forest floor to decompose.
22 Forest fires and slash burning also release carbon dioxide stored in biomass. In
23 contrast fossil fuels are not part of the earth's carbon cycle. . . Fossil fuels release
24 carbon dioxide into the earth's atmosphere only when they are burned.

25 *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 927-28, 319 P.3d 23 (2014).

26 Carbon emissions from wood products are not analogous to carbon released from burning fossil
fuel and other industrial processes. These latter sources lack a natural mechanism to sequester
carbon. Forestry has such a mechanism.

1 **G. DNR has Identified the Likely Effects of Global Climate Change in Three of its**
2 **Regional Planning Documents and Will Use Adaptive Management to Keep the**
3 **Forests Productive and Healthy.**

4 DNR has identified the likely impacts that the changing climate may have on DNR's
5 forests in the FEISs supporting the OESF Plan, the sustainable harvest level, and the Marbled
6 Murrelet Strategy. REC 4014-4019; REC 3616-3621; REC 2912-2915. Petitioner presents no
7 rationale that supports repeating these analysis for individual timber sales. Further, the FEIS for
8 the sustainable harvest level and the Marbled Murrelet Strategy discuss actions DNR could take
9 if these impacts arise.

10 DNR is committed to "adaptive management" under the HCP. REC 2424. Adaptive
11 management provides for ongoing modifications of management practices to respond to new
12 information and scientific developments. REC 2424-2425. This approach will help DNR
13 monitor the impacts of climate change in lands managed for timber production as well as lands
14 managed for habitat.

15 DNR is not required to analyze alternatives at the threshold determination state of SEPA
16 review. There is no real, unresolved conflict as to the use of this land.

17 Petitioners reference DNR's obligation to consider reasonable alternatives. Appellants
18 opening brief, p. 27. An alternatives analysis is required for and environmental impact statement.
19 RCW 43.21C.030(1)(c)(iii); WAC 197-11-402(1). Recently the Supreme Court has recognized
20 that an alternatives analysis may be required at the threshold determinations stage. *Wild Fish*,
21 198 Wn. 2d at 864-65. Under RCW 43.21C.030(2)(e), agencies are required to study, develop,
22 and describe appropriate alternatives to recommended courses of action in any proposal which
23 involves unresolved conflicts concerning alternative uses of available resources.

24 An alternatives analysis is appropriate when a proposal involves a competition
25 over the use of a resource whereby selecting one manner of using a resource will
26 preclude all other uses. These competing uses cannot be theoretical. The choice
is between different uses and *available* resources. The competing options for how
to use the resource must concern a resource that is actually capable of being used
to accomplish its relative purpose. Finally, this competition must be unsolved,
unsettled, or, in other word, actively in dispute.

1 *Id.*

2 DNR has reserved many acres of land for conservation purposes. These conservation
3 lands sequester CO2. DNR has made a management decision as to which lands will be harvested
4 and which will be conserved. DNR has also decided to fulfill its duties to the beneficiaries by
5 raising revenue through timber sales. This conflict has been resolved by DNR's decision to
6 establish a sustainable harvest calculation and amend the HCP to include the long-term strategy
7 for the marbled murrelet. Such decisions are left to the DNR's sound discretion. *Conservation*
8 *Nw.*, 514 P.3d at 185. Finally, these are trust lands and must be managed for the benefit of the
9 beneficiaries. These lands are for their benefit. Trust lands can be used for recreational and
10 habitat to the extent such uses are compatible with DNR's duty to the trust. RCW 79.10.120.
11 The Petitioners' preference that this land be set aside for carbon sequestration is only a
12 theoretical conflict.

13 **H. Petitioners are not Entitled to Attorney Fees Because Board Approval of a Timber**
14 **Sale is Not an Agency Action Under the APA.**

15 The Center is not entitled to attorney's fees, even if it prevails on the merits. "[A]ttorney
16 fees are recoverable only if specifically authorized by statute, by agreement of the parties, or
17 upon a recognized equitable ground." *Clark v. Washington Horse Racing Comm'n*, 106 Wn.2d
18 84, 92-93, 720 P.2d 831 (1986); *ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 715-16,
19 601 P.2d 501 (1979).

20 Petitioners' claim for attorney's fees is based on the Equal Access to Justice Act, RCW
21 4.84 (EAJA). The EAJA does not apply to the Center's claims. Under the EAJA, courts may
22 award fees, in limited situations, to a party who "prevails in a judicial review of an *agency*
23 *action*." RCW 4.84.350 (emphasis added). "Agency action" is limited to actions that are
24 challenged under the Administrative Procedures Act, RCW 34.05 (APA). RCW 4.84.340. The
25 decision to sell timber is not an agency action under the APA.
26

1 Agency action does not include an agency decision regarding . . . any sale, lease,
2 contract, or other proprietary decision in the management of public lands or real
property interest.

3 RCW 34.05.010(3)(c). *See State Owned Forests*, 124 Wn. App. at 412 (“other proprietary
4 decisions” exempts DNR’s land plan from APA review).

5 Further, the judicial review provided in RCW 34.05.510 applies only to “review of
6 agency action”. RCW 34.05.510. Again, “agency action” does not include a sale, lease, contract,
7 or other proprietary decision in the management of lands or real property interest. RCW
8 34.05.010(3). The EAJA does not apply to decisions made by DNR is selling timber from DNR-
9 managed lands.

10 Petitioners allege that the Court’s review under RCW 79.02.030 is judicial review as
11 defined in RCW 34.05.510(3). The statute states the contrary.

12 This chapter establishes the exclusive means of judicial review of *agency action*,
13 except . . . to the extent that de novo review or jury review of agency action is
expressly authorized by provision of law.

14 RCW 34.05.510 (3) (emphasis added).

15 First, DNR’s decision to sell timber is not an agency action so RCW 34.05.510 has no
16 application. Even if we ignore the definition of agency action, the statute excludes from its
17 application agency actions for which the legislature has provided another means of review in
18 statute. The Legislature has provided for judicial review of DNR’s de decision to sell timber
19 under RCW 79.02.030. RCW 34.05.510 does not apply.

20 **I. Petitioners are Required to Pay for Production of the Record, but the Court Need
21 not Reach This Issue as DNR Incurred No Costs in Transferring the Agency Record
to the Court.**

22 Petitioners argue that RCW 79.02.030 requires DNR to pay for the record that is produced
23 to the Superior Court for review. RCW 79.02.030 clearly states that “costs on appeal shall be
24 awarded to the prevailing party as in actions commenced in superior court, but no costs shall be
25 awarded against the state, the board, or the commissioner.” In this case, the court need not reach
26

1 this issue. The Jefferson County Court clerk received an electronic copy of DNR's record using the
2 internet. As such, DNR did not incur costs in making a paper copy of the record for filing with the
3 Court.

4 V. CONCLUSION

5 Petitioners failed to meet their burden of showing that DNR's determination of
6 nonsignificance was erroneous. Petitioners cannot demonstrate a reasonable likelihood that the
7 relatively small amounts of CO2 emitted by the harvest of these two sales will have an impact on
8 global climate. The record and the material Petitioners submitted to DNR show that DNR's
9 sustainably managed forests sequester far more carbon than is emitted by DNR's timber sales. DNR
10 analyzed the impact on climate for all of its scheduled, Western Washington timber sales when
11 DNR established the sustainable harvest level. The total emissions from all DNR's timber sales did
12 not cause a significant climate impact. As such, DNR was correct in not analyzing climate impacts
13 for these two sales. As such, these two harvests do not have a significant adverse impact on climate.
14 DNR respectfully request the Court to dismiss Petitioners' appeal.

15
16 DATED this 7th day of September 2022.

17 ROBERT W. FERGUSON
18 Attorney General

19 *s/ Christa L. Thompson*
20 CHRISTA L. THOMPSON, WSBA #15431
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25 *Department of Natural Resources, Board of*
26 *Natural Resources, and Commissioner of*
Public Lands Hilary Franz

1 CERTIFICATE OF SERVICE

2 I certify that I caused a copy of the foregoing document to be served on all parties or their
3 counsel of record on September 7, 2022, as follows:

4 Claudia M. Newman 5 Alexander Sidles 6 Bricklin & Newman, LLP 7 123 NW 36th Street, Suite 205 8 Seattle, WA 98107 9 10 newman@bnd-law.com sidles@bnd-law.com cahill@bnd-law.com <i>Attorneys for Appellants</i>	<input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email
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11 I certify under penalty of perjury, under the laws of the state of Washington, that the
12 foregoing is true and correct.

13 DATED this 7th day of September 2022, at Olympia, Washington.

14
15 s/ Danni E. Friesner
16 DANNI E. FRIESNER
17 Legal Assistant
18 Public Lands and Conservation Division
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