Hearing Date: April 5, 2024
Hearing Time: 1:30 pm
Judge/Calendar: Judge Anne Egeler

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNT OF THURSTON

LEWIS COUNTY, a Washington County; SKAGIT COUNTY, a Washington County; and AMERICAN FOREST RESOURCE COUNCIL, a non-profit corporation,

Plaintiffs,

v.

WASHINGTON DEPARTMENT OF NATURAL RESOURCES, an agency of the State of Washington; and RECREATION, CONSERVATION, AND TRANSACTIONS DIVISION MANAGER KRISTEN OHLSON-KIEHN, in the official capacity,

Defendants,
And

WASHINGTON CONSERVATION ACTION EDUCATION FUND, a non-profit corporation; CONSERVATION NORTHWEST, a non-profit corporation; OLYMPIC FOREST COALITION, a non-profit corporation,

Defendant-Intervenors

Case No.: 22-2-03245-34

DEFENDANT-INTERVENORS' RESPONSE BRIEF

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I. INTRODUCTION

Defendant-Intervenors Washington Conservation Action Education Fund, Conservation Northwest, and Olympic Forest Coalition respond to Plaintiffs' opening brief. In furtherance of judicial economy and in accordance with this Court's order granting intervention, Defendant-Intervenors generally support the Department of Natural Resource (Department or DNR) response, endeavor not to repeat arguments, and focus this brief on additional arguments and facts from the record.

The agency action at issue is the Department's programmatic decision to pursue leases for carbon credits on a modest portion of public forestlands managed by the agency (the "Project"). Plaintiffs argue that pursuit of carbon leases is outside of the Department's statutory authority and conflicts with the sustainable harvest statutes. This argument amounts to a radical contention that the Department must, as a matter of law, pursue logging on all operable Department-managed lands. No legal authority imposes a logging requirement on the Department. To the contrary, the Department has an obligation to balance the various benefits of public forests, and broad discretion in how it chooses to do so.

The Washington State Constitution, article XVI, section 1 requires that "[a]ll the public lands granted to the state are held in trust for all the people." While the Department also has trust obligations to generate revenue or other benefits for enumerated institutional beneficiaries, the recent Washington State Supreme Court decision *Conservation Northwest v. Commissioner of Public Lands* instructs that the Department may serve those beneficiaries with non-financial benefits, and the Department has discretion in balancing the interests of the public and the enumerated beneficiaries. According to the Court, "[t]here appear to be myriad ways DNR could choose to generate revenue from the state and forest board lands or otherwise put them to use for

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the benefit of the enumerated beneficiaries." *Conservation Nw. v. Comm'r of Pub. Lands*, 199 Wn.2d 813, 835, 514 P.3d 174, 186 (2022).

In accordance with its broad authorities and discretion under the constitution and common law, the Department has broad statutory authority to enter leases for nearly any purpose that achieves fair market value. RCW 79.13.010; RCW 79.22.050. The sustainable harvest statutes cited by Plaintiffs are planning statutes that ensure that public lands are not logged too intensively or unsustainably. These planning statutes contain specific measures allowing for adjustments of the planned harvest level as policies and circumstances change, and provisions to address an outcome in which the planned volume is not obtained. The sustainable harvest statutes do not mandate logging of a minimum volume or on any specific parcels.

With respect to the State Environmental Policy Act (SEPA) arguments, Plaintiffs fundamentally mischaracterize the nature and scope of the challenged action. In an appropriate and lawful measure, the Department solicited public notice and comment and conducted review under SEPA on the Project at the earliest possible time. As a result, the Project is still in its infancy. It may involve up to a maximum 10,000 acres of leases—but the briefing and record reflects that those leases have not yet occurred. If the leases do occur, site specific market and trust analysis is required by law, and Plaintiffs will be able to pursue site-specific legal challenge as appropriate. Likewise, a developer or market is not finally identified. Given those uncertainties and future legally required analysis, the thorough procedural steps and transparent public process undertaken by the Department are more than adequate.

II. BACKGROUND

The history of the Project is set forth in the Department's response and not repeated here.

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Plaintiffs improperly attempt to turn a case largely based on the State Environmental Policy Act into an evidentiary proceeding about the question of how best to store carbon and sequester carbon in forests. That is not the posture of this case. This case turns on: 1) whether DNR has the legal authority to initiate a program to lease a subset of DNR-managed lands for sale of carbon credits, and 2) whether DNR clearly erred and violated SEPA when performing environmental review of a project that involves entering 40-year leases at some point in the future, in which the leases would preserve the environmental status quo on up to approximately 10,000 acres of forests.

To answer those limited questions, some limited additional factual background on carbon storage and sequestration provides helpful context.

A. Carbon storage and sequestration

DNR manages approximately two million acres of forests, which constitute a tremendously valuable public resource. They provide many public values including protecting and enhancing air quality, water quality and quantity, fisheries and shellfisheries, wildlife habitat, recreation, foraging, and other benefits. The areas with potential to be selected for the Project are those screened for particularly high conservation value. REC 60-61.

While the overall benefits of DNR-managed lands are invaluable and challenging to quantify, one economic analysis has concluded that the "ecosystem service value" of DNR-managed forests is about $1.2 billion. REC 3316, 6604. In addition, DNR's forests have an annual recreation value of almost $1 billion, and a total "social cost of carbon" value of between $16.56 and $19 billion. REC 3316; 6591. The "social cost of carbon is an estimate of the cost, in dollars, of the damage that would be done by each additional ton of carbon emissions. Conversely, it is an estimate of the benefit of action taken to reduce a ton of carbon emissions."

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REC 6669-70. According to scientific literature, "[t]he moist forests of the Pacific Northwest United States are among the most naturally carbon rich ecoregions in the world." REC 14456. DNR's forests have such high values because its vast forests both store and sequester carbon. While Plaintiffs conflate these two concepts, there are important distinctions.

Carbon storage refers to the carbon held in a tree's roots, associated soil, trunk, and branches. More than 20 percent of the carbon stored in a tree is below ground, with significant additional carbon stored in forest soils. *See* REC-017543; REC-014458. Absent logging, carbon storage continuously increases throughout a tree's life. Trees common in the Pacific Northwest, such as Douglas fir and western red cedar, can live for hundreds of years or longer. REC 14464. Natural forests typically feature trees of a variety of species and ages, with abundant downed wood. After a tree dies and falls to the forest floor, it releases some carbon as it decays, but continues to store other carbon in its remaining structures and soil. As the tree decays, some carbon is slowly released into the air and other carbon is returned to the soil, which helps fuel future growth of new trees. Through this long process, mature forests store vast reserves of carbon. *See* REC 906 (SHC analysis of carbon storage). Carbon storage occurs in soils, downed wood, and live trees. *See generally*, REC 17536-60 (white paper discussing carbon storage on DNR-managed lands).

In contrast, if logging occurs, carbon storage in trees is dramatically reduced. Nearly all the trees in a harvested area (for DNR-managed lands, typically 100 to 200 acres) are cut and killed at once. The carbon stored in wood is not fully carried into forest products. While estimates vary depending on species, products, and other factors, one study states that up to 40% of the harvested wood does not become a product, and cautions that wood products themselves

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decay over time, resulting in product accumulation much smaller than the total amount harvested. REC 14725.

As detailed in extensive literature, *see* REC 14723-33 and associated citations, logging operations also involve significant emissions. Logging is an industrial operation that requires operation of heavy machinery for road building, cutting trees, stripping the tree of branches to just the bole (merchantable portion of the trunk), skidding boles to landings, loading them, and hauling them to the mill. Mill operations involve further machinery and associated emissions. A percentage of each bole is turned into lumber, while a percentage is scrap that often is either burned on site to generate electricity or turned into fuels such as wood pellets. The lumber is then shipped again to the store and the end user. Every stage of the production process involves significant emissions.

Following logging, machinery is used to unearth root balls and stack them along with discarded limbs and sections of unused trees into piles, called slash piles. These piles are allowed to dry and then burned. Because the process depletes soil nutrients, fertilizer is often spread. Replanting nurseries require heating and cooling, and crews drive to the site and plant small trees. Following replanting, herbicides are spread, often by plane or helicopter. Every aspect of this process causes carbon emissions compared to unlogged conditions. *See* REC 908 (totaling emissions from forest operations) REC 14726 (chart showing lifecycle analysis of wood products).

In contrast, forests that are preserved for longer rotations or in perpetuity store nearly all their carbon and logging emissions are foregone. As a result, the consensus of scientific literature and DNR's past environmental reviews is that land management schemes that involve reduced logging, or logging on longer rotations, store far more carbon than forests managed for

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logging. "[W]hen both above and belowground carbon stocks are considered, old-growth forests can be found to store an average of 50 percent more carbon than managed forests on some sites." REC 14465. Throughout the scientific literature on carbon forestry, "it is agreed that managing for longer rotations and older, more diverse forest conditions would enhance in-forest carbon storage levels." REC 14457.

The emissions impacts of logging are not cured by replanting. "While it is theoretically possible that a replacement forest will grow and absorb a like amount of CO2 to that emitted decades or a century before, there is no guarantee that this will happen, and the enforcement is transferred to future generations. In any rational economic analysis, a benefit in the distant future must be discounted against the immediate damage associated with emissions during combustion." REC 14730.

The second concept is carbon sequestration. This concerns the active process of a tree absorbing carbon from the atmosphere. Trees continuously sequester carbon throughout their lives. While this process occurs at changing rates over time, it is additive—continual carbon sequestration results in ever-increasing carbon storage. *See* REC 17560.

Considering these two concepts, entering into carbon leases for 40 years provides a mechanism by which the Department can pause and lengthen logging rotations to enhance carbon storage and sequestration, while preserving options for potential future forestry or other uses of the lands. *See* REC 17422-17426 (Seattle Times editorial from Washington Conservation Action and Conservation Northwest explaining carbon benefits of longer rotation forestry); REC 1150 (discussion of benefits of diversification of assets). Based on our region's abundant rains and rich soils, studies have concluded that preserving forests in the Pacific Northwest is a critical opportunity to offset and mitigate the impacts of climate change. REC

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17409-11. The record in this case contains references to hundreds of technical papers discussing and documenting the relative benefits of preserving forests, managing forests for carbon storage, and managing them actively for various approaches to logging, all of which DNR relied on in making its carbon leasing decision. *See* REC 8463 to REC 17446 (studies relied upon).

B. Carbon credits and markets

There are government-run carbon markets and voluntary carbon markets. While no system is perfect, both are well-established and highly prescriptive and controlled. Plaintiffs characterize voluntary carbon markets and credits as unregulated. To the contrary, the markets and methodologies being considered by the Department, including the American Carbon Registry standard and Improved Forest Management protocol, are highly scrutinized, require regular verification, and include mechanisms to account for fire risk. *See* REC 17518-17521.

C. Effects of earning carbon credits

Contrary to Plaintiffs' contention, selling carbon credits does not necessarily **lead** to additional pollution; it allows entities to purchase "credits" to **offset** their pollution. In that way, the owners of natural climate solutions, such as forests, are paid by the market to maintain existing emissions for social, business, or regulatory reasons. In voluntary carbon markets, buyers are electing to purchase the credits, generally as part of a sustainability strategy. This means that they are not buying or earning the right to increased emissions, and there is no causal link between purchase of a credit and increased emissions.

Plaintiffs' characterization of lands managed for carbon storage and sequestration is also inaccurate and unsupported. Carbon verification systems seek to protect forest assets. They therefore encourage fuels management and allow light thinning, which can both enhance carbon sequestration for remaining trees and reduce fire risk. Carbon verification systems also require a

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buffer pool as insurance—these consist of extra offset credits that are reserved as backup in case of wildfire. "The buffer pool is an insurance mechanism into which [credited] forest projects contribute offsets based on a project-specific risk reversal analysis. Most projects contribute 16-20% of their gross [credits] into the buffer pool to completely insure projects against unintentional reversals." REC 17520. This effectively provides extra carbon storage and sequestration and insulates against climate impacts of fire on the leased forestlands.

III. ARGUMENT

The Department has broad discretion as a manager of almost six million acres of public lands, including approximately two million acres of forests. Leasing forestlands for forty years to generate revenue and allow for other uses, while preserving the forest asset for future consideration, is well within the bounds of the Department's discretion. The Department has clear constitutional, statutory, and common law authority to lease forestlands to obtain carbon offset credits. Contrary to Plaintiffs' baseless claims, no law, regulation, or policy requires the Department to pursue logging on all available forests. Numerous statutes expressly allow Department-managed lands to be leased, set aside, and/or managed for multiple uses.

Plaintiffs' SEPA claims also fail. The timing and scope of the claims are wrong. With respect to timing, SEPA requires the Department to engage in environmental review "at the earliest possible time." Programmatic, non-project review is encouraged to prevent "snowballing," in which environmental review is delayed until after a decision has so much momentum it is effectively predetermined. Here, the Department did exactly what SEPA requires—conduct environmental review at the earliest possible time, at a programmatic level. The only decision made thus far is to proceed with a carbon leasing program and tentatively identify candidate forests. Given that the Department's SEPA review does not include any

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specific leases, the level of site-specific detail in the SEPA checklist and DNS is entirely appropriate. Once a carbon developer, final parcels, and actual leases are identified, DNR will consider individual leases. At that time, once the site-specific facts are known, Plaintiffs may participate in public comment, challenge the leasing decision, and argue that site-specific SEPA review is required to disclose and analyze alleged negative environmental effects.

A. The Project advances and is consistent with DNR's constitutional mandate to serve "all the people" and its common law duties to enumerated beneficiaries.

Under the Washington State Constitution, article XVI, section 1, "[a]ll the public lands granted to the state are held in trust for all the people." This requirement constitutes a "constitutional mandate that all granted public lands shall be held in trust for 'all the people' in Washington." *Conservation Nw. v. Comm'r of Pub. Lands*, 199 Wn.2d 813, 835, 514 P.3d 174, 186 (2022) (hereinafter *Cons. Nw. v. CPL*).

The Department must balance its obligations to "all the people" with common law duties to provide benefits—either financial or other benefits—for enumerated beneficiaries. *Id.* at 833-34. The Department must also comply with applicable law. *Id.* Thus, the Department manages lands according to three overarching duties: 1) a constitutional mandate to serve all the people, 2) common law trust duties to benefit enumerated beneficiaries, and 3) compliance with applicable law. In accomplishing this balancing, DNR has broad discretion. As observed by the State Supreme Court, "[t]here appear to be myriad ways DNR could choose to generate revenue from the state and forest board lands or otherwise put them to use for the benefit of the enumerated beneficiaries." *Id.*

While forestry is an important component of rural economies and State land management and will remain so for the foreseeable future, it is not strictly legally required on DNR-managed

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lands. The Department has no legal obligation to generate **any** revenue for enumerated trust beneficiaries—it may generate some revenue from lands it manages "**or otherwise put them to use for the benefit of the enumerated beneficiaries.**" *Id.* (emphasis added). The Department thus has flexibility in its "exercise of its discretion to make state and forest board lands productive properties," and must only present a defensible position. *Id.* at 835. "If there is room for two opinions, a court will not find arbitrary and capricious action even if the reviewing court believes the agency's decision wrong." *Id.* (quoting *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241, 1249 (1998)).

Provided it includes an adequately articulated rationale, the Department could defensibly elect to remove lands from logging entirely to provide non-financial benefits to the people of Washington and enumerated beneficiaries. *See, e.g.*, RCW 79.10.210 ("the department is authorized to identify and to withdraw from all conflicting uses at such times and for such periods as it shall determine appropriate, limited acreages of public lands under its jurisdiction").[1]

But the Project falls well short of removing lands from production. It includes leases of a modest portion of DNR-managed lands for money that will flow to enumerated beneficiaries and preserve the forests as both assets and environmental benefits. The Project generates revenue,

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[1] Defendant-Intervenors provide argument and citation to respond to Plaintiffs' characterization of the common law trust duties. Plaintiffs tellingly do not assert in their complaint or in their briefing that DNR's decision to lease up to 10,000 acres of its forests to a carbon credit program violates a fiduciary duty DNR owes to its beneficiaries.

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provides environmental benefits, and preserves forests for potential future uses including possible future logging. Given these many benefits and the Department's reasonable rationale supporting the Project, it is clearly within the scope of the Department's constitutional and trust obligations and authorities.

B. The Project complies with the Department's statutory obligations.

Plaintiffs argue that the Department's decision to defer 10,000 acres of forested trust lands violates the statutes that commit the Department to calculating and generally adhering to sustainable harvest strategies. Pls.' Br. at 24 (citing RCW 79.10.310–330). The Plaintiff's argument is essentially that the Department has a statutory duty to log all available acres of forest, including the 10,000 acres that are part of the Project, on the schedule that the Plaintiffs would prefer. But the sustainable harvest statutes do not create an affirmative duty to carry out any given amount of logging. Rather, the sustainable harvest statutes are planning provisions that require calculation of a sustainable harvest level, and adjustment of that level as necessary to accommodate changes in policy or conditions. RCW 79.10.320. The statutes prohibit unsustainable logging, through overly rapid or overly extensive harvest. In other words, they dictate a ceiling, not a floor. They do not set a minimum amount of logging, and certainly do not require logging on all available Department managed forests.

Under the plain language of RCW 79.10.320, the Department has discretion to determine which forests are "primarily valuable for the purpose of growing forest crops on a sustained yield basis." *Id.* As a corollary authority, the Department thus has the authority to determine that some forests are **not** "primary valuable" for logging. As the Department makes these determinations, it may adjust the sustainable harvest level. *Id.* Under established Department policy, the determination of sustained yield is flexible based on region and conditions. REC

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1189. The Department's decision that certain ecologically valuable forests are most valuable for carbon credit generating leases over the next 40 years is well within the Department's obligations under the sustainable harvest statutes.

The Department possesses express statutory authority to adjust the sustained yield as necessary to reflect its determination of which forests are primary valuable for growing forest crops: "[t]o this end, the department shall periodically adjust the acreages designated for inclusion in the sustained yield management program and calculate a sustainable harvest level." RCW 79.10.320. Likewise, the Department has statutory authority and an established policy in place to adjust the subsequent sustainable harvest level to account for arrearage—forested acres slated for logging that were not harvested. *See* RCW 79.10.330; REC 1185-86.

Indeed, the record reflects that the decision to not pursue certain acres regularly occurs. The Department regularly determines whether certain parcels are logged on shorter or longer rotations, the design and scope of any timber harvest, and whether certain parcels are best reserved from logging in response to site-specific considerations and operational constraints, such as geologic hazards, protection of water bodies, community concerns, or access issues. *See* REC 887; REC 1185-86. These decisions are all within the broad discretion of a land manager. In the prior sustainable harvest calculation, the Department envisioned extensive logging in riparian buffers. During the subsequent years, the Department determined that logging these acres was challenging and expensive. As a result, it elected not to log those acres of riparian forests. REC 841-42. This decision was an appropriate exercise of the Department's discretion, not a violation of the sustained yield statutes.

To further understand the sustained yield statutes, it is appropriate to look to "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a

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whole." *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740, 742 (2015) (citation omitted). In this broader statutory scheme, numerous statutes undermine Plaintiffs' contention that the sustainable yield statutes mandate logging on their preferred rotation cycle on all available lands.

As is the case here, the Department may lease lands for virtually any purpose. RCW 79.13.010 ("the department may lease state lands for purposes it deems advisable, including, but not limited to, commercial, industrial, residential, agricultural, and recreational purposes in order to obtain a fair market rental return to the state or the appropriate constitutional or statutory trust, and if the lease is in the best interest of the state or affected trust."); RCW 79.22.050 (leasing authority for state forestlands). RCW 79.10.120 authorizes a broad variety of multiple uses other than logging. RCW 79.10.210 authorizes designation and full withdrawal of public lands from management for scientific or other purposes of public benefit.

There is no statutory authority supporting the proposition that the Department must log all its lands, and extensive statutory authority supports the Department's broad authority to pursue multiple uses. Those uses include deferring logging on a modest subset of public lands in order to generate revenue through carbon credits.

C. Plaintiffs' SEPA arguments fail.

Plaintiffs raise a series of SEPA arguments, which fall into three categories. First, Plaintiffs contend that DNR did not adequately consider various impacts of the Project (Plaintiffs' Issues 1-3, 6). Second, Plaintiffs argue that DNR did not perform adequate site-specific disclosure or analysis (Plaintiffs' Issues 3-4). Third, Plaintiffs assert that purely economic impacts to public services constitute environmental effects under SEPA (Plaintiffs' Issue 5). Each argument, and the related sub-arguments, is unsupported by the SEPA statute, regulations, and caselaw, and therefore fails.

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1. DNR adequately considered impacts to the environment, and SEPA does not provide a forum to impose policy preferences.

The central question in SEPA analysis is whether the agency adequately disclosed and considered probable adverse effects to the environment. "In passing SEPA, the legislature expressed 'the clear aim of injecting environmental awareness into all levels of governmental decision-making.'" *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 855, 502 P.3d 359, 364 (2022) (citing *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 104, 392 P.3d 1025 (2017) (Stephens, J., dissenting)). A review of the record must show that "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wash. App. 274, 286-87, 232 P.3d 1154 (2010) (quoting *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wash. App. 59, 73, 510 P.2d 1140 (1973)).

As summarized in *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d at 872–73:

> SEPA does not demand any particular substantive result in governmental decision making." *Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973). Instead, SEPA "'is an attempt by the people to shape their future environment by deliberation, not default.'" *Sisley*, 89 Wn.2d at 89, 569 P.2d 712 (quoting Stempel, 82 Wn.2d at 118, 508 P.2d 166). SEPA demands a "thoughtful decision-making process" where government agencies "conscientiously and systematically consider environmental values and consequences." ASARCO, 92 Wash.2d at 700, 601 P.2d 501; SETTLE, supra, § 3.01[2], at 3-4.
>
> We assess the validity of an agency's threshold determination by determining whether the environmental factors were "evaluated to such an extent as to constitute prima facie compliance with SEPA procedural requirements." *Hayden v. City of Port Townsend*, 93 Wn.2d 870, 880, 613 P.2d 1164 (1980), overruled on other grounds by *Save a Neighborhood Env't (SANE) v. City of Seattle*, 101 Wash.2d 280, 676 P.2d 1006 (1984). We also consider whether the decision to issue an MDNS was "based on information sufficient to evaluate the proposal's environmental impact." *Anderson*, 86 Wash. App. at 302, 936 P.2d 432. However, "[a]n agency does not have to consider every conceivable environmental impact

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> when making its threshold SEPA determination." *PT Air Watchers*, 179 Wash.2d at 932, 319 P.3d 23; WAC 197-11-060(4)(a) (SEPA requires consideration of environmental impacts, "with attention to impacts that are likely, not merely speculative.").

Thus, the question is not whether the agency got the answer right, but rather whether the agency adequately considered the relevant factors and made a threshold determination that was supported by substantial evidence and not clearly erroneous.

Plaintiffs raise various policy concerns with carbon friendly forestry and carbon markets. They assert that not logging forests increases fire risks, that selling carbon credits increases net emissions, and that it is environmentally preferable (and not incidentally, more profitable for industry plaintiffs) to perform intensive logging on public lands and store carbon in lumber products. Each of these arguments is substantively wrong and has been widely debunked by experts. *See, e.g.*, REC 14466 (recommending "higher carbon storage and timber yields in extended rotations compared to business as usual, with modest wood premiums and/or carbon incentive payments needed to close the financial gap between extended rotations and business-as-usual"); REC 14470 ("Strategies in this region involve a combination of preserving old forests where they exist and increasingly managing public forests toward these conditions.").

More importantly, Plaintiffs arguments are irrelevant and misplaced here because there will be no actual change from the status quo on the ground—the forests that are leased will simply be allowed to grow, with non-harvest management continuing. Projects that do not actually deviate from the baseline and impact the environment do not have "probable significant environmental effects," and thus cannot necessitate a determination of significance. *See* WAC 197-11-330 (threshold determination). In administering SEPA, Washington courts regularly look to NEPA caselaw. *See Kucera v. State, Dep't of Transp.*, 140 Wash. 2d 200, 216 n. 10, 995

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P.2d 63, 72 (2000). The Ninth Circuit has determined that "[w]hen we consider the purpose of NEPA in light of Supreme Court guidance on the scope of the statute, we conclude that an EA or an EIS is not necessary for federal actions that conserve the environment." *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995). The same principle applies under SEPA.

Even if there were environmental impacts of the Project, each of Plaintiffs' arguments were raised in comment letters and adequately considered by DNR in its environmental review. The administrative record reflects that the agency considered and provided rational responses to each of Plaintiffs' concerns. *See* REC 30-70 (response to comments). DNR's Project is part of its broader strategic plan, REC 3286, and is based in part on third-party assessments recommending DNR to participate in carbon markets, *see* REC 17536-60. These documents are all part of the administrative record and substantiate the adequacy of DNR's environmental review.

2. DNR correctly carried out SEPA at the earliest possible time and Plaintiffs' site-specific concerns are premature.

In furtherance of its planning goals, SEPA requires that "[t]he SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems." WAC 197-11-055(1). Accordingly, "agencies should adopt procedures for environmental review and for preparation of EISs on private proposals at the conceptual stage rather than the final detailed design stage." WAC 197-110-055(4). SEPA provides for review of "non-project actions," which consist of "adoption of any policy, plan, or program that will govern the development of a series of connected actions." WAC 197-11-704(2)(b)(iii).

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Black letter SEPA caselaw supports early environmental planning. Under *King Cnty. v. Washington State Boundary Rev. Bd. for King Cnty.*, 122 Wn.2d 648, 663, 860 P.2d 1024, 1033 (1993) and progeny, "[o]ne of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences… When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences before the project picks up momentum, not after."

Performing environmental review early, in accordance with SEPA, presents tradeoffs in that the precise details may not yet be known. The SEPA statute and regulations take into account these tradeoffs and favor conceptual, early environmental review at a programmatic level. This early implementation of SEPA is essential to fulfill the statutory mandate to "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." RCW 43.21C.030(b).

While Plaintiffs critique the Department for not disclosing and analyzing site-specific effects, the Department appropriately and lawfully elected to consider environmental effects at the earliest possible time, for the non-project action. WAC 197-11-055(1). This is particularly appropriate here, where the timing, location, and extent of the Project remains uncertain. Indeed, the Notice of Final Determination for the Project is dated October 26, 2022, and there is no indication that the Project has moved forward. There are still no specific leases.

Plaintiffs will be able to address any site-specific concerns when those areas are identified. In the future, if the Department decides to lease identified parcels, that decision will be subject to criteria. DNR must determine that the leases "obtain a fair market rental return to

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the state or the appropriate constitutional or statutory trust, and if the lease is in the best interest of the state or affected trust." RCW 79.13.010(1), RCW 79.22.050. That decision is subject to review by constitutional writ of certiorari or other writ procedure. *See, e.g.*, *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn.App. 284, 310, 381 P.3d 95, 109 (2016).

Plaintiffs will also have the opportunity to argue that specific future carbon credit leases should require additional SEPA review. Leases are generally categorically exempt from review under SEPA, WAC 197-11-800(5)(c), in legislative and regulatory recognition that leases generally lack significant environmental effects. However, that exemption is subject to a significant exception. The exemption only applies to "[l]easing, granting an easement for, or otherwise authorizing the use of real property when the property use will remain essentially the same as the existing use for the term of the agreement." WAC 197-11-800(5)(c). In addition to challenging the leases themselves under numerous Washington statutes, Plaintiffs are free to argue at a site-specific level that the use for carbon storage and sequestration is not "essentially the same as the existing use," and that further site- specific SEPA review of a proposed future lease is required. Plaintiffs may also argue that additional information necessitates revisiting the programmatic SEPA review for purposes of leases. WAC 197-11-335.

In sum, DNR correctly and lawfully conducted environmental review at the conceptual stage, at the earliest possible time. Plaintiffs' site-specific challenges are premature, speculative, and unfounded. If leases occur, Plaintiffs can raise their concerns then.

3. SEPA is an environmental statute that does not require analysis of economic impacts.

SEPA—the State **Environmental** Policy Act—is an environmental statute. RCW 43.21C.030 sets forth the core procedural requirements of SEPA. The sole focus on

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environmental values is unmistakable. Each agency must "[u]tilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact **on the environment**." RCW 43.21C.030(a)(emphasis added). The core principle of SEPA is that "[t]he legislature recognizes that **each person has a fundamental and inalienable right to a healthful environment** and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3)(emphasis added).

Plaintiffs rely on the regulatory definition of "elements of the environment," which includes "Public services and utilities." WAC 197-11-444(2)(d). However, this consideration applies to imposition of impacts on those services, and does not extend to purely economic budgetary and financial considerations. "It is well established that purely economic interests are not within the zone of interests protected by SEPA." *Kucera v. State, Dep't of Transp.*, 140 Wash. 2d 200, 212, 995 P.2d 63, 70 (2000) (citing *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wash.App. 44, 52–53, 882 P.2d 807 (1994)). In *Kucera*, the State Supreme Court allowed property owners' SEPA claims to proceed with respect to the impacts of the Chinook ferry wake because "their SEPA claim is based on the State's alleged failure to consider the *environmental* effects of the Chinook, not its *economic* effects." *Id.* (emphasis in original).

There are good policy and practical reasons for this limitation. The legislature passed SEPA to "insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." RCW 43.21C.030(b). Economics and revenue considerations already drive government decision making, and in this context, there are already statutory provisions in place to require fair market

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value to be achieved. *See* RCW 79.13.010. SEPA's purpose is to give consideration to the environmental impacts of decisions which might otherwise be ignored.

As a practical consideration, if SEPA applied to purely economic impacts, every budget, contract, tax, or salary decision of a State or local government agency would require environmental review. This is plainly not SEPA practice, and if it was, would be completely untenable and grind government to a halt. The SEPA statute and regulations must be interpreted to avoid such absurd results. *See Samish Indian Nation v. Washington Dep't of Licensing*, 14 Wash. App. 2d 437, 444, 471 P.3d 261, 265 (2020).

Finally, even if economic impacts analysis was required, Plaintiffs' concerns are premature. As set forth *supra*, the Project remains at the conceptual stage. Individual leases have not been identified. When they are, the location and terms of the leases will be determined. As of yet the economic impacts are unknown and speculative. The leases will generate some revenue, and the forests at issue will remain available for potential logging after the leases are completed. It may well be that leasing provides a more consistent and preferable financial benefit to public services, or that the combination of leasing and later logging generates more overall revenue. But at this time, those impacts are unknown and not susceptible to review.

IV. CONCLUSION

The Department has clear constitutional, statutory, and common law authority and discretion to enter into leases to generate carbon credits. The Department conducted a thorough analysis of the relative carbon benefits of carbon credit programs compared to logging and was clearly within its discretion to conclude that a limited carbon credit leasing program was in the best interests of the public and enumerated beneficiaries. The Department's modest carbon leasing program will cause no changes from the status quo on the ground, has no significant

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environmental effects, and the determination of non-significance was not clearly erroneous. Plaintiffs' appeal should be denied and the Department's decisions affirmed.

Respectfully submitted this 18th day of March, 2024.

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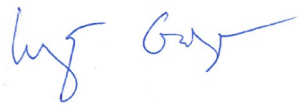

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on March 18, 2024, as follows:

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I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 18th day of March, 2024, at Seattle, Washington.

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