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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NO. 62707-4-I
(Consolidated)

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES
et al.,

Appellants,

v.

CHUCKANUT CONSERVANCY, et al.,

Petitioners.

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BRIEF OF CHUCKANUT CONSERVANCY AND
NORTH CASCADES CONSERVATION COUNCIL

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I. INTRODUCTION

Blanchard Forest provides outstanding recreation opportunities and wildlife habitat in close proximity to major population centers. There are few, if any, places like it in the State.

The Department of Natural Resources (DNR) manages this land in trust for Skagit County and to advance other public values, like recreation, aesthetics, and wildlife habitat. For years, DNR balanced these competing interests in an *ad hoc*, piecemeal basis. Finally, with the adoption of the Strategies, DNR undertook a more holistic approach, developing a plan for the forest as a whole.

Deciding which portions of the forest would be logged and which would be protected for other public uses and values should have been based on a rigorous environmental analysis in the form of an environmental impact statement as required by the State Environmental Policy Act (SEPA). But the agency made its planning decision without the benefit of the required EIS. The Superior Court, the Honorable Susan Craighead, correctly determined that the agency was in violation of SEPA's requirements.

The agency's primary litigation defense of its failure to prepare an EIS is that it could have decided to log the entire forest and, therefore, a plan to

protect *any* portion of the forest creates an environmental benefit, not an adverse impact. DNR's litigation defense is at odds with the agency's position during the administrative process. DNR's attorneys also ignore that while DNR has authority to log the entire forest, the agency also is mandated to protect other non-timber public resources and it is has the means to do so.

Specifically, the Legislature authorizes DNR to transfer lands out of the trust to protect non-timber public resources, as long as the trust is compensated for the withdrawal. Because of this mandate and authority to protect non-timber public resources, DNR's decision here to cut two-thirds of the Blanchard Forest is a decision with huge environmental ramifications.

SEPA requires that before DNR makes a decision of this type, it inform itself of alternatives courses of action and compare impacts of the proposal with impacts of alternative courses of action. It is undisputed that critical analysis of alternatives was not done. It was not included in the prior environmental impact statements or statewide and regional plans referenced by the petitioners. There was no analysis of alternatives in the checklist prepared for this decision. There will not be a comparative analysis of alternatives in any future checklist specific to an individual logging operation.

The absence of a detailed, comparative analysis of the proposal and alternatives to the proposal renders DNR's compliance with SEPA's mandate inadequate. The Superior Court correctly ruled that the agency had erred in and properly remanded the matter for preparation of an EIS.

II. COUNTER-STATEMENT OF THE ISSUES

We believe the following provides the Court with a more balanced and useful statement of the issues than the ones provided by the appellants:

1. Whether the adoption of a plan for the management of Blanchard Forest (the "Strategies") delineating areas to be logged and areas to be managed for multiple public resource values (*e.g.*, recreation and wildlife) is a decision with probable significant adverse environmental impacts warranting preparation of an EIS?

2. Whether the baseline for assessing the impacts of the new plan should assume that the entire forest will be logged so that a decision to spare any lands from logging represents a benefit or should the analysis recognize that the agency has the authority to protect some or even all of the forest from logging, so that a decision to log it represents an adverse impact?

3. Whether the existing plans and rules regulating logging on Blanchard State Forest assure that logging two-thirds of the Forest will have no significant adverse environmental impacts?

4. Whether EISs previously prepared by DNR for statewide and Western Washington plans and policies adequately analyzed (or even considered) alternatives to the Strategies and consequent impacts and mitigation measures?

5. Whether the Superior Court erred in retaining jurisdiction over the remaining non-SEPA claim?

III. STATEMENT OF THE CASE

A. Blanchard Forest Contains Unique Wildlife Habitat and Regionally Significant Recreational Opportunities

Blanchard Forest is the largest undeveloped block of land in the rapidly urbanizing Puget lowlands. CABR 3568 (area ownership map);¹ CABR 3574 (area LANDSAT Image). It lies west of I-5, south of Bellingham. *Id.*

¹ This and a few other color maps from the record are collected in Appendix A hereto.

The administrative record filed by the Department of Natural Resources with the Superior Court is referenced herein using the CABR (Civil Appeal Board Record) acronym.

This lowland forest has been spared development because of a geologic anomaly. It is the only place on the east side of Puget Sound where the Cascade foothills come down to the sea.² Blanchard Forest and the adjacent Larrabee State Park together provide an important regional public land resource for residents of Bellingham, Mount Vernon, Anacortes, and other nearby areas. Like the Issaquah Alps, Blanchard Mountain provides hiking and other outdoor recreation opportunities close by a major urban area – as DNR has recognized:

The existing trail system on Mt. Blanchard and Larrabee State Park is reportedly one of the best low elevation trail systems available in the Puget Sound Basin. The increasing population growth of the Puget Sound Basin will place continually increasing demands for open space for recreational pursuits in the Blanchard Mountain area. The Chuckanut Mountain Range is within the lowland growth sector of Puget Sound and will undoubtedly become a significant focus for Washington State residents in their future pursuit for high quality trail systems in close proximity.

CABR 3509 (DNR's 1999 Blanchard Mountain Assessment).

² See CABR 3580 (1999 DNR geologic assessment of Blanchard Mountain) (“It is the only place that Shuksan complex rocks crop out on the coast.”); CABR 3513 (Blanchard Mountain Assessment, 1999, p. 12; “Blanchard Mountain is one of a few places in the region where ancient marine rocks have been preserved as coastal mountains... all other areas along the eastern shoreline of Puget Sound (except for Deception Pass/Mount Erie area) consist of coastal plains made up of fluvial and glacial deposits.”); CABR 3572 (geologic map that goes with 3513 quote); and CABR 3532 (“The Chuckanut Mountain Range, including Blanchard Mountain, is the only landscape in Puget Sound where the Cascade Mountains descend to Puget Sound”).

Recreational use of Blanchard Forest has been “extremely high” for a number of years and use is expected to continue to grow. CABR 9368 (1998 DNR timber sale document). The mountain’s outstanding trail system is a primary attraction. As reported by DNR:

Hiking. Blanchard Mountain provides 20 miles of high-quality trails accessible from several trailheads. These trails offer diverse terrain through a mixture of open pathways along cleared logging roads, upland lakes and wetlands, and dense, mature forests. A portion of the Blanchard Mountain trails are part of the 1,200 mile Pacific Northwest Trail that runs from the Continental Divide to the Pacific Ocean. An expansion of the Lost Lizard Trail is due to be completed in the near future and will link Blanchard Mountain with the adjacent Larrabee State Park to establish a trail network encompassing 60 miles. **These two areas are reported to have one of the best low-elevation trail systems in the Puget Sound basin.**

CABR 4312 (DNR, *Evaluation of Blanchard Mountain Social, Ecological and Financial Values* (2002)) (emphasis supplied).

“Close to population centers in both Whatcom and Skagit Counties, the Chuckanut Mountains are well known and appreciated by an increasing number of people in both counties, and by many “outsiders” from Seattle, Vancouver and beyond...” CABR 1388 (Whatcom County, *Chuckanut Mountain Trails Master Plan* (1996)). As of six years ago, recreational visitor usage of Blanchard Mountain was estimated at 30,000 to 50,000

individuals per year. CABR 4312 (DNR, *Evaluation of Blanchard Mountain Social, Ecological & Financial Values*). With expected population growth in the area, DNR expects the recreational demand and use to continue to increase. CABR 4308; 3571 (recreation map in 1999 DNR Assessment). An effort by DNR “to encourage non-motorized, dispersed day use” could be expected to increase recreational use dramatically. Rec. 4352 at 44 (referring to dramatic increases at Tiger Mountain when DNR encouraged recreational use there). In its 2000 Natural Resource Conservation Area assessment (CABR 3582 – 3590), DNR concluded: “The high level of non-passive recreation in the area may make it [Blanchard Mountain] a more suitable site for local or State Park designation.” CABR 3583.

Blanchard Mountain and Blanchard Forest also are important as wildlife habitat. Due to its unique geology and proximity to Puget Sound, and as a large block of undeveloped land, Blanchard provides particularly important habitat for a broad range of species. *See, e.g.*, CABR 1517 – 1525 (Chuckanut Mountain Trail Plan: Biological Considerations, June 30, 1995); CABR 3527 (1999 Assessment) (“The diversity of amphibians in this area is of regional significance.”); CABR 3528 (“Of the total potential bird species

in the area, 24 are associated with marine habitats and generally use nearshore and shoreline habitats at the base of the mountain.”).

Of particular note is the marbled murrelet, a robin-sized marine bird. Due its unusual habitat requirements, the marbled murrelet has been in decline in Washington State for many years and is listed as threatened under the federal Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* See App. C (57 Fed. Reg. 45328-45337 (Oct. 1, 1992)). Conservation of marbled murrelet habitat is a major component of DNR’s 1997 Habitat Conservation Plan (HCP). See CABR 4271 *et seq.* (EIS for HCP, § 4.2.2), CABR 1744 – 1751 (HCP marbled murrelet mitigation strategy). The bird’s habitat needs are a function of its unusual “lifestyle.” Though a marine bird, it roosts in old, upland forests. There are not many old forests still remaining close to marine waters (within 50 miles) to fill this critical need. 57 Fed. Reg. 45333. Blanchard Forest is one of the only remaining marbled murrelet nesting sites along the Sound. CABR 9246 at ¶ 5.³ Logging destroys this vital habitat for many decades. To the extent that some of Blanchard’s forests are not yet quite old enough to be suitable for murrelets, they will be soon (if not logged)

³ See also CABR 2474-75 (Discussion of murrelet recovery requirements: “increasing the amount, quality and distribution of suitable nesting habitat, decreasing fragmentation, protecting recruitment habitat, providing replacement habitat through silvicultural techniques . . .).

and, thus, will soon provide an important addition to the bird's currently limited, nesting habitat.

B. Logging and Road Building Cause Significant Adverse Impacts to Public Resources

Logging and road building damage or destroy the outdoor recreation, aesthetic, and wildlife values of places like Blanchard Mountain. These impacts are well documented in the record. These impacts occur despite DNR's adoption of plans and regulations that have curbed the worst logging excesses common 50 and 100 years ago.

Most dramatically, logging changes the quantity and quality of habitat available to wildlife species. Converting a large area of older forest to clear cuts and young trees makes it impossible for species dependent on older forests to survive. It is well accepted that the loss of older forest habitat is the main cause of the decline of the two bird species listed under the Endangered Species Act – northern spotted owls and marbled murrelets. “The marbled murrelet is threatened by the loss and modification of nesting habitat (older forests) primarily due to commercial timber harvesting.” 57 Fed. Reg. at 45328 (reprinted in App. B). The situation is similar for the owls: “The juxtaposition of owl habitat and proposed timber sales was one of the major reasons for proposing threatened status for the northern spotted owl. Logging

has substantially reduced the quantity, availability, and distribution of spotted owl habitat.” 55 Fed. Reg. 26114, 26125 (June 26, 1990) (reprinted in App. B).

But impacts are not limited to these two species. These species are the “canaries in the coal mine,” giving warning to the demise of entire ecosystems.⁴ Many species dependent on older forests and forested streamside (riparian) habitat have been harmed by a century of heavy timber harvest. A long list is included in an earlier EIS.⁵ CABR 5143 (2004 EIS at 4-89). All creatures, great and small, are impacted. In DNR’s euphemistic words, even a number of small forest-dwelling amphibians have been determined to be “sensitive to timber harvest.” CABR 3856 (2001 EIS at 3-175).

The State’s forest practice regulations focus on individual logging operations and do not limit the rate of clearcutting across large landscapes,

⁴ “The northern spotted owl is heavily dependent on old-growth timber for its habitat. The owl is considered an “indicator species” for old-growth forest, meaning that the presence and number of northern spotted owls give an accurate indication of the health of the old-growth forest and the presence of other old-growth dependent species. As go the owls, naturalists say, so go the other species.” *Portland Audubon Soc. v. Lujan*, 884 F.2d 1233, 1235 (9th Cir.1989).

⁵ All EISs cited herein were published by DNR. While they include some general information on environmental impacts, they do not include detailed information specific to Blanchard Mountain, as we discuss in detail later in this brief.

like Blanchard Mountain. DNR's plans and policies for its own lands limit the rate of cut but, so far at least, have not abated the ecological crisis brought on by past clearcutting. In particular, there is no evidence that DNR has yet developed a marbled murrelet recovery plan specific to the region which includes Blanchard Forest.⁶

Some of the most significant impacts of logging emanate from the road network built on mountainsides to support the logging. CABR 2538. Dirt and mud washes off of forest roads, clouding streams, burying aquatic habitat, and increasing the risk of landslides. "Many studies have shown that on a unit area basis, roads have the greatest effect on slope stability of all

⁶ DNR's "Habitat Conservation Plan "for murrelets, approved by the federal agencies, expressly adopted an "interim conservation strategy" while a long-term marbled murrelet conservation strategy on state lands based on monitoring and scientific work is prepared. CABR 1745 – 1751 (HCP at 4-39 – 4-45). The long term strategy developed by DNR,

would likely include information on the location of occupied sites, the distribution of habitat in each planning unit, current research results, landscape-level analysis and consideration, and the site-specific management plans developed by DNR. The long term strategy would address such factors as developing habitat where gaps exist, developing or maintaining replacement habitat, and would protect the vast majority of occupied sites.

CABR 1750 (HCP EIS at 4-44). This long-term strategy – and the environmental analysis supporting it – are not in the record, apparently because they do not exist.

activities on forest lands (Sidle, et al., 1985).” CABR 3689 (2001 EIS at 3-8).⁷

Again, modern rules and policies have not eliminated the problem, as even DNR concedes:

[A] recent [Timber Fish Wildlife] report on the effectiveness of forest road BMPs [Best Management Practices] on state and private forest lands for existing Forest Practices Rules, concluded that the BMPs for road construction (*e.g.*, road crossing structures [culverts] and cut slope construction) were ineffective at preventing chronic sediment delivery for roads near streams (Rashin, et al., 1999). Cut and fill slope construction and maintenance BMPs were determined to be

⁷ DNR acknowledges that roads cause a myriad of environmental harms, including sedimentation of streams; intercepting, concentrating, and re-routing normal run-off patterns;” interfering with or blocking fish and wildlife corridors; affecting “soil productivity;” introducing “non-native species in the forest environment;” and creating visual impacts (especially where logging and roads are visible from public vantage points, like highways). CABR 8831 (PSF FEIS). DNR stated in this programmatic EIS:

Generally, forest vegetation stabilizes soils, reduces soil erosion and slows sediment transport to streams, thereby minimizing the impact of sedimentation on water quality. However, surface erosion from roads, harvest units and skid trails can be a chronic source of fine sediment to the drainage network, as well as an episodic source of coarse sediment. Chronic sources of fine sediment can have potentially significant adverse effects on the physical habitat of the aquatic system and certain lifestages of aquatic biota, degrade water quality and affect soil productivity in both riparian and upland areas.

CABR 8830. Another earlier EIS (CABR 2538) stated:

Road-caused erosion in upland areas can have significant detrimental impacts to salmonid habitat in downstream areas (Hicks et al. 1991). Only rarely can roads be built that have no negative effects on streams (Furniss et al. 1991). Roads are a major source of management-related sedimentation in streams (Cedarholm and Reid 1987). The contribution of sediment per unit area from roads is often greater than that from all land management activities combined (Furniss et al. 1991).

partially effective to ineffective at the majority of the sites studied.

CABR 3962 (DNR's 2001 EIS at B-2).

Roads and clearcuts alter the hydrology of the watershed, *e.g.*, substantially increasing the volume of peak flows during and after storms. Rec. 3708 - 14. In Western Washington, these impacts are most severe at elevations that, intermittently, are cold enough for heavy snow and, soon after, heavy rain (the "rain on snow" zone). The region's most disastrous floods continue to be precipitated by logging activity on these hillsides, lying between 1,000 and 3,000 feet above sea level. *Id.* Most of Blanchard Mountain falls in this range making it particularly vulnerable to such cataclysmic events. Indeed, even without the added risks associated with more logging, Blanchard Forest has a history of catastrophic slide activity.

CABR 3514.

Of course, clearcutting also has a major adverse impact on recreation and aesthetics. Though an isolated clearing and/or thinning can enhance view corridors, clearcutting large swaths of the mountain creates eyesores. DNR recognizes that higher harvest levels are "likely to have relatively high impacts compared to [lower harvest levels]." CABR 5235 (2004 EIS at 4-181). The more timber that is harvested, the greater the quantity of visually

unappealing clear cuts. CABR 5241 (2004 EIS at 4-187). Associated road construction also significantly diminishes recreational values.

Blanchard Forest contains miles of heavily used trails, such as the Lily and Lizard Lakes Trail, the Pacific Northwest National Scenic Trail, and the British Army Trail. CABR 46 (Strategies Map); CABR 1398 (1996 Chuckanut Mountain Trails Map). CABR 4312. A substantial portion of these highly prized trails are outside the “Core” area proposed for protection in the Strategies. *Id.* The Strategies’ significant aesthetic impact on trail use was raised by the public, but not addressed by DNR. CABR 135-138.⁸

The fish, water, wildlife, recreation and aesthetics impacts discussed above are both site-specific (individual clearcuts) and cumulative (combined effect of multiple clearcuts and roads in the same area).

C. Development of the Blanchard Forest Management “Strategies”

1. The public has sought increased protection for Blanchard Forest because of its well-documented wildlife, recreation and aesthetic values

⁸ Any protections promised from the “Visual Management Area” zone touted by the Strategies will not mitigate the visual impacts to these trails. As seen in the Strategies map, CABR 46, the “Visual Management Area” is located primarily to the south and does not cover large portions of trails located in the non-core areas that will be impacted by the Strategies.

The natural resources in the Blanchard Forest have been well documented in a series of studies prepared by and for DNR to inventory the forest's natural resource values (timber and non-timber). *See, e.g.*, CABR 1379 – 1544 (Chuckanut Mountain Trails Master Plan (1996)); CABR 3497 – 3577 (Blanchard Mountain Assessment (1999)); CABR 4305 – 4383 (Evaluation of Blanchard Mountain Social, Ecological, and Financial Values (2002)). But simultaneously with preparation of these inventories, portions of the forest continued to be subject to individual logging proposals, at an increasing rate (*see* AFRC Br. at 13), with no overall plan for forest management to guide site specific decisions. CABR 3570 (reprinted in App. A).

This logging occurred with no assessment of the cumulative impacts and no consideration of alternative management approaches (like protecting more of the forest's multiple uses). Instead, DNR promised some years ago to assess those issues in the development of the Blanchard Forest "Strategies." *See, e.g.*, CABR 9233; CABR 9426.

2. DNR set up an advisory group to make recommendations

In recognition of the intense competition between logging and other public uses, and the need to address the cumulative impacts of logging and

road building, then Lands Commissioner Sutherland appointed a Blanchard Forest Strategies Group (“Group”) to allow direct input from several interest groups. Two environmental groups were included, but hiking groups, including respondents Chuckanut Conservancy and North Cascades Conservation Council (NCCC) were not represented in the Group. CABR 35 (list of members). In just a few months, the Group produced recommendations for DNR — “the Management Strategies for Blanchard Forest State Trust Lands (“Strategies”)” -- which are the focus of this litigation. CABR 51-57 (App. C hereto).⁹ The Group passed its recommendations to DNR and they were adopted by the agency as its own. CABR 44-49, 209. The Strategies were developed and adopted without the benefit of an environmental impact statement that would have analyzed alternative plans for Blanchard Forest and the impacts and possible mitigation associated with each alternative.

3. The Strategies establish a Landscape Plan for Blanchard Forest

The Strategies constitute a foundational landscape-level plan for Blanchard Forest. The Strategies prescribe a majority of Blanchard Forest to

⁹ Documentation of the content and range of the Group’s deliberations is not in the record. CABR 37 (“Compilation of Blanchard Forest Strategy Group Meeting Notes ... available at the Northwest Regional Office”).

be logged and a smaller area (the “Core”) to be protected. Among other things, the Strategies include commitments by DNR to:

- Establish a Blanchard Forest “core zone” of approximately 1600 acres, in which timber production would be secondary to non-timber values (Strategy Addendum p. 1, CABR 47);
- Maintain commercial timber harvest levels “consistent with the DNR sustainable harvest model,” in the remainder of the Blanchard Forest (i.e., on about 3227 acres, or 2/3 of the entire acreage) (Strategy Addendum p. 3, CABR 49);
- “[D]evelop a road system to support the anticipated harvest” (Strategy Addendum p. 2, CABR 48); and
- “[D]evelop strategies to fully compensate the Skagit County State Forest Trust including the junior taxing districts that currently receive revenue from Blanchard forest, to replace revenues that would otherwise be lost from the core management zone.” (Strategy III.A, CABR 45.)

In short, the Strategies contain specific allocations of Blanchard’s resources among timber, wildlife, recreation and other environmental resources. The Strategies appropriately contemplate reimbursement of the trust for revenues lost in the course of managing for non-logging, multiple uses in the “core zone.”

4. DNR’s environmental checklist for the “Strategies” acknowledged some environmental impacts and downplayed others

DNR prepared a SEPA “checklist” prior to adopting the Strategies. CABR 92-107. *See* WAC 197-11-315. The checklist did not examine any alternatives to the proposal. *Id.*

As to the one alternative considered (*i.e.*, the proposed “Strategies”), the checklist identified a wide range of impacts that might result from individual timber sales, but stated additional environmental review would occur later. AR 94-97, 99. For example, the checklist stated: “Anticipated future projects, particularly road construction, are expected to generate run off. These future site-specific project actions will be evaluated separately.” CABR 97. Likewise, in many places, the checklist notes that the proposal is the development of a plan or set of policies which will not directly impact the environment and that “future site-specific project actions that require SEPA environmental review will address work at the time the [site specific] project is proposed.” CABR 98 (plants); CABR 99 (wildlife).

But DNR did not promise that the future “environmental review” would consist of an EIS. Rather, as the petitioners acknowledge in their briefs, only more checklists will be prepared. Because environmental checklists do not evaluate alternatives, the promise of “future environmental review” does not include any hope of ever obtaining an analysis of

alternatives to the Strategies (*e.g.*, different sizes and configurations of a protected “core” area) or a comparative analysis of the impacts of those alternatives. Thus, alternatives to and the cumulative impacts of the Strategies will never be analyzed in an EIS.

Given the deferral of environmental review to later checklists, the Strategies checklist itself – while touching on many issues -- offers little detail. For instance, the environmental checklist states that 227 vertebrae species have been identified in Blanchard Forest, including bald eagles, beaver, bobcat, salmon, and deer, CABR 98, but the checklist does not identify the impact of the proposal on these species. *Id.*

The environmental checklist identifies a number of tree species on Blanchard Mountain including red alder, Pacific Madrona, Douglas Fir, Grand Fir, Western Hemlock, Western Red Cedar, White Pine, and Sitka Spruce, CABR 97, but, again, the environmental checklist does not describe the extent to which the proposal would impact these species. *Id.*

The checklist states that the proposed Strategies will “support and encourage recreational use that is compatible with a working forest...” CABR 102, but there is no discussion of existing recreational uses nor the

extent to which those uses will be temporarily or permanently terminated or the outdoor experience diminished by extensive logging.

The checklist quantifies road construction in the most general way (“2.5 miles per square mile”), but there is no analysis of the impacts of this density of roads on wildlife, recreation, or aesthetics. CABR 86-87, 103-104. There also is no specific mitigation for roads identified in the checklist (or the DNS).

5. DNR decides adopting a plan to log two-thirds of Blanchard Forest will not have significant impacts and, therefore, issues a DNS

Based on the above-described environmental checklist, DNR issued a draft Determination of Non-Significance (DNS), *i.e.*, a tentative determination that impacts associated with a decision to log two-thirds of Blanchard Forest would not have a significant adverse impact on the environment. CABR 108-109. Respondents Chuckanut Conservancy, NCCC, and others provided extensive comments urging withdrawal of the DNS and preparation of an EIS. CABR 110, 112, 117, 120, 122, 124-149. But DNR stuck to its position and issued a final DNS. CABR 156. DNR provided a lengthy response to the comment letters, attempting to justify the DNS. CABR 157-203.

DNR's formal response to comments on the preliminary DNS repeatedly references DNR's earlier broad-scale planning policies and states that logging in Blanchard Forest will be consistent with those earlier adopted policies. It variously infers or states explicitly that the prior EISs contain "intensive" analyses that address the issues and alternatives that were being discussed by the Blanchard Forest Strategies Work Group. *See, e.g.,* CABR 162. But DNR's contention that the EISs prepared for those earlier statewide or Western Washington plans include an "intensive" analysis of Blanchard Forest issues is not supported by any citation to specific portions of those earlier EISs. We explore this issue in more detail later.

Another theme in the DNR response suggests, conversely, that there are environmental issues in need of analysis, but that it is appropriate to defer that analysis till later:

Future activities and projects carried out under this proposal will undergo additional environmental analysis, if required, at the time they are proposed. This is the appropriate method of procedure for a phrased review such as this.

Id.

In other words, according to DNR, the commenters's request for an EIS was being rejected either because it was too late (the earlier EISs covered

the issues) or it was too early (more review might be done later). There was, according to DNR, no need to address the issues now.

D. Proceedings Below

Concerned that DNR had adopted a long-range plan for Blanchard Forest without adequate environmental information and an analysis of alternatives, respondents Chuckanut Conservancy and NCCC initiated this action seeking review of DNR's compliance with SEPA. CP 1-66. The respondents also sought a review of the substance of the Strategies under the Public Lands Act. *Id.* A Writ of Review was issued (CP 226-227) and the administrative record filed with the trial court. The trial court denied DNR's motion challenging the plaintiffs' standing to contest DNR's adoption of the Strategies. Supp. CP 404-407.

Plaintiffs' challenge to the DNS was litigated in an appellate-style fashion, on the administrative record, with briefs and oral argument. The trial court, the Honorable Susan J. Craighead, issued a lengthy letter ruling determining that adopting the plan for the management of Blanchard Forest involves significant adverse environmental impacts and required an EIS. CP 309-318. She accurately and succinctly captured the essence of Blanchard

Mountain, in part, by quoting from the 1999 Blanchard Mountain Assessment prepared for DNR:

This case concerns the forest blanketing Blanchard Mountain, the southernmost mountain of the Chuckanut range. It is a unique place, both because of its proximity to rapidly growing urban areas in Skagit and Whatcom Counties and because it is the only place where the Cascade foothills come down to Puget Sound. As one comprehensive assessment of the forest concluded:

The Blanchard Mountain Assessment Area provides a unique combination of ecological, topographical, scenic and low-impact recreation values within Washington State. Key attributes of this area include: (1) a unique coastal mountain range with a relatively intact mature forest; (2) rare cave habitat; (3) a high diversity of fish, wildlife and invertebrates; (4) an intricate trail system; (5) a high public interest; (6) and panoramic views of a large archipelago and sea level farm lands. These values combined with those conserved in adjoining Larrabee State Park help maintain many of the unique values and species assemblages found in the Chuckanut Mountain Range.

CABR 3538. The forest is crisscrossed by a network of 20 miles of trails used by some 35,000 visitors each year. It is also habitat for a number of endangered and threatened species, from the marbled murrelet to the Townsend's big-eared bat and even a rare fungus fly.

CP 310. Judge Craighead accurately described the development of the Strategies and its content. CP 311. She noted that the environmental

checklist frequently deferred review of environmental issues to “[f]uture site-specific project actions.” *Id.* at 9945 (*citing* CABR 98). Judge Craighead then identified two overarching issues that controlled the outcome of the appeal.

First, she noted that “the parties differ about where to set the baseline for evaluating the significance of the Strategies.” *Id.* DNR and American Forest Resource Council (AFRC) contend that the baseline is logging and, therefore, “the Strategies actually provide an environmental benefit by protecting the Core Area from logging.” *Id.* “The plaintiffs, on the other hand, contend that as long as the Trust beneficiaries are compensated for the value of the timber on the land, the land does not have to be logged.” *Id.*

Judge Craighead acknowledged that DNR is “required to manage Trust land with undivided loyalty to Skagit County and the other taxing districts,” but that DNR and AFRC had acknowledged “that DNR is also required to manage the land for multiple uses, including recreation, hunting, fishing, and other sports activities, wildlife activities and maintenance of scenic areas, provided that ‘if such additional uses are not compatible with the financial obligations in the management of trust land, they may be permitted only if there is compensation for such uses satisfying the financial

obligations.’ RCW 79.10.120.” CP 313. Given the competing statutory commands and the opportunity to address the potential conflict by compensating the trust for set aside lands, Judge Craighead concluded: “I cannot say that the baseline against which environmental impacts are to be measured is inevitably logging.” *Id.*

The second overarching issue addressed by Judge Craighead involved the “granularity” of the environmental review. CP 312. She accurately summarized the parties’ contentions:

DNR relies on several policies of very broad application (such as the Habitat Conservation Plan covering western Washington) that have been the subject to the full EIS process to argue that because Blanchard Forest will be managed consistent with these policies, there is no need for a “landscape level” EIS for this forest. Each individual timber sale will be subject to the SEPA process, as they are now. Thus, DNR and the Council [AFRC] argue that there is no need to impose on DNR the burden of an EIS at the level of the Strategies. The plaintiffs contend that the impacts of the Strategies cannot be accurately appreciated at either the 30,000 foot level of the broad policies (which do not even mention Blanchard Forest) or at the 100-acre level of the individual timber sale. Only an EIS of the Strategies would accurately assess the environmental impact of the Strategies on this unique place and allow alternatives to be considered, they contend.

Id.

Judge Craighead described that granularity issue as “a central issue in this case.” CP 313. She noted that the various policies and rules relied on by DNR “cover either the entire State or western Washington. None of them even mention Blanchard Forest.” CP 314. While they are “extremely detailed about such things as how to design a logging road, . . .” they “are not at all specific, however, about geography. To take one example, the Habitat Conservation Plan (HCP) covers 1.6 million acres of State forest lands, These broad policies do not say anything about how a specific forest will be managed – this is ‘operational detail’ outside their scopes.” *Id.*

Judge Craighead concluded that “[a]lthough analysis at the macro-level has a great deal of utility for some purposes, it is insufficiently detailed to satisfy SEPA’s demands at the level of Blanchard Forest.” CP 315. Judge Craighead explained:

While it may be true that Blanchard Forest is not as ecologically unique as plaintiffs paint it to be, the forest is nonetheless highly unusual. It is the only place where the Cascades meet Puget Sound. Whether or not it remains a nesting spot for the marbled murrelet, it is home to many diverse species. Blanchard Mountain is the most prominent geologic feature in the area. Most important, Blanchard Forest represents a slice of near-wilderness in the middle of a rapidly urbanizing area. Some 35,000 people currently use the forest for recreation annually, and that number can only be expected to grow as the area’s population increases and wild places become harder to find. Blanchard Forest is

distinguished by this extremely intense interface between the forest and the communities that surround it. As one DNR assessment put it, Blanchard Mountain is “locally significant in many ways . . . The mountains’ worth and uniqueness can be assessed locally as combination of all its attributes as a cherished recreational site that affords exceptional views of the San Juan Islands and the North Cascades and as a conveniently located educational site.” CABR 3583. Without careful planning on a landscape level, the cumulative impact of road building and clear-cutting could create extremely negative environmental impacts for people who use the forest. It has taken this forest the better part of 80 years to recover from the first wave of logging. Future generations will live with the results of the decision to implement the Strategies.

CP 316-317. Judge Craighead stated she was “left with the definite and firm conviction that a mistake has been made” and “remanded to DNR for preparation of an Environmental Impact Statement.” CP 317.¹⁰ This appeal followed the Superior Court’s certification for discretionary review. CP 323-340.

IV. ARGUMENT

A. Standard of Review

The Court reviews DNR’s decision to adopt the Strategies without the benefit of an EIS using the “clearly erroneous” standard of review. A decision is clearly erroneous when the court “is left with a definite and firm

conviction that a mistake has been made.” *Norway Hill Preservation and Protection Ass’n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). In determining whether a “mistake has been made,” the court must consider all of the evidence in the record in light of the public policies supporting the law being applied. *Id.* In *Norway Hill*, the Court determined that when reviewing a DNS, a “broader standard” of review, the “clearly erroneous” standard, is required to ensure SEPA’s policies are met:

In deciding upon the proper scope of judicial review applicable to “negative threshold determinations” made pursuant to SEPA, it is important to consider the broad public policy promoted by that act. Briefly stated, the procedural provisions of SEPA constitute an environmental full disclosure law. The act’s procedures promote the policy of fully informed decision making by government bodies when undertaking “major actions significantly affecting the quality of the environment.”

...

In order to achieve this public policy it is important that an environmental impact statement be prepared in all cases. As a result, the initial determination by the “responsible official,” see RCW 43.21C.030(2)(c), as to whether the action is a “major action significantly affecting the quality of the environment” is very important. *The policy of the act, which is simply to ensure via a “detailed statement” the full disclosure of environmental information so that environmental matters can be given proper consideration*

¹⁰ DNR’s claims that Judge Craighead “did not find any flaw in DNR’s SEPA analysis,” and that DNR still does not know what impacts are significant, DNR Br. at 16, 30, are inexplicable.

during decision making, is thwarted whenever an incorrect “threshold determination” is made.

Id. at 271-273 (emphasis supplied). *See also, Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“[d]eference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them”).¹¹

Arguments made by agencies should be given no deference when made for the first time during litigation. *See Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007) (agency or executive body not entitled to deference when argument is a “by-product of current litigation,” not a matter of pre-existing policy). *See also Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (agency cannot “bootstrap a legal argument into the place of agency interpretation”). DNR’s primary defense in this case -- that the Strategies’ DNS was not clearly erroneous because the Strategies create environmental benefits, not harms --

¹¹ Washington courts look for guidance to federal cases construing and applying provisions of the National Environmental Policy Act (NEPA), since much of the language in SEPA is taken verbatim from NEPA. *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200, 215 – 16 & n. 10, 995 P.2d 663 (2000) (NEPA applied notwithstanding “slight differences”); *Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d 475, 488 n. 5, 513 P.2d 36 (1973); *Des Moines v. Puget Sound Council*, 98 Wn. App. 23, 28 n. 28, 988 P.2d 27 (1999).

should be given no deference because the argument is being raised for the first time during this litigation by attorneys for the agency and their allied interveners. This rationale was not mentioned as a basis for the DNS by DNR when it conducted its SEPA review. CABR 22-42, 92-109, 157-208.

AFRC argues that DNR's earlier EISs adequately address the issues and excuse the absence of an EIS specific to Blanchard Forest. But, as explained below, DNR did not base its decision on the adequacy of prior EISs. DNR did not "adopt" those EISs in lieu of preparing a new one here. Because the agency did not make *that* decision, no deference is due regarding that defense advanced by AFRC.

B. The State Environmental Policy Act ("SEPA")

The declared purposes of SEPA include: to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment; to stimulate the health and welfare of man; and to enrich the understanding of the ecological systems and natural resources important to the state and nation. RCW 43.21C.010. See *Erickson & Associates v. McLerran*, 123 Wn 2d. 864, 872 P.2d 1090 (1994). SEPA also "recognizes the broad policy 'that each person has a fundamental and inalienable right to a healthful environment.'" *Kucera*

v. *Dep't of Transp.*, *supra*, 140 Wn.2d at 213 (*quoting* RCW 43.21C.020(3)).

SEPA is an “overlay” statute, adding to an agency’s other duties and authorities. See *Bellevue Farm Owners Ass’n v. Shorelines Bd.*, 100 Wn. App. 341, 354, 997 P.2d 380 (2000).

1. SEPA requires environmental review to take place before decisions are made

To ensure that SEPA’s policies become part of the decision-making process, SEPA requires state agencies to conduct environmental review before pursuing a major action that may significantly affect the quality of the environment. RCW 43.21C.030(2)(c); *Kucera*, 140 Wn.2d at 214; *Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 117-18, 508 P.2d 166 (1973). The purpose of SEPA is “to provide consideration of environmental facts at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences.” *King County v. Boundary Review Board*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993). It assures that agency decisions are made “by deliberation, not default.” *Stempel, supra*.

Our Supreme Court has noted the serious consequences of failing to conduct environmental review:

[Agency decisions without aid of an EIS] may begin a process of government action which can “snowball” and acquire virtually unstoppable administrative inertia. [Citation

omitted.] Even if the adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When the government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences before the project picks up momentum, not after.

King County v. Boundary Review Board, supra at 664.

2. SEPA requires the identification and evaluation of significant impacts

The Department of Ecology has adopted detailed regulations that provide extensive guidance on the application of SEPA's broad requirements. Ch. 197-11 WAC. Those regulations provide a carefully defined process that all state agencies must use to fully evaluate environmental consequences of their contemplated actions.

SEPA's most fundamental procedural requirement is that an EIS be prepared prior to an agency taking an "action" that will have probable significant adverse environmental impacts. RCW 43.21C.031. The term "action" is broadly defined to include both "project actions" and "nonproject actions." WAC 197-11-704. Project actions are defined to include things like building a road or logging a forest, where the agency decision to issue a permit or undertake an activity will "directly modify the environment . . ."

WAC 197-11-704(2)(a). “Nonproject actions” involve decisions like the one DNR made here, where the agency adopts policies and plans that guide future decisions. WAC 197-11-704(2)(b).

To determine whether a proposed action will have probable significant adverse impacts, agencies are required to make a “threshold determination.” WAC 197-11-310. To assist the agency in making its threshold determination, *i.e.*, to determine whether an EIS is required, the proponent of a project is required to complete an “environmental checklist.” WAC 197-11-315. The checklist enables the project proponent to briefly describe the proposal and to provide a brief assessment of its environmental consequences. A checklist is not a substitute for the rigorous analysis of environmental impacts and alternatives to the proposal that would be contained in an EIS. WAC 197-11-080; WAC 197-11-100. *See also Glenbrook Homeowners Assn. v. Tahoe Regional Planning Agency*, 425 F.3d 611, 615, n. 1 (9th Cir. 2005) (“An EIS is a comprehensive document, or set of documents reporting on the potential environmental impact of a project. An EIS is much more comprehensive than either an Initial Environmental Checklist or Environmental Assessment”). Where an agency is both the project proponent and the SEPA lead agency, the same agency prepares the

checklist and reviews it to make the threshold determination, but, “[w]henver possible, agency people carrying out SEPA procedures should be different from agency people making the proposal.” WAC 197-11-926(2). Here, petitioner Wallace both assisted in development of the proposal and conducted the SEPA review of it.

If an agency decides that a project’s impacts are probably significant, then it issues a “determination of significance” and an EIS is prepared. WAC 197-11-360. If the agency determines that the project will not have probable significant adverse environmental impacts, it issues a “determination of non-significance” or “DNS.” WAC 197-11-340. In this case, DNR decided its adoption of the Strategies for Blanchard Forest would not have significant adverse environmental impacts and issued a DNS. CABR 108-109, 204-210.

“Significance” is defined as: “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” WAC 197-11-794. “Significance involves context and intensity . . . The context may vary within the physical setting.” *Id.* Impacts that are required to be considered include short-term and long-term impacts, indirect and direct impacts and cumulative impacts. WAC 197-11-060(4).

3. SEPA requires an agency to ensure environmental review is based upon adequate information and analyses

In making a threshold determination, the Responsible Official is required to collect information reasonably sufficient to evaluate a proposal's impacts. WAC 197-11-080; -335. *See also* WAC 197-11-030(2)(c) (“agencies shall to the fullest extent possible: . . . prepare environmental documents that are supported by evidence that the necessary environmental analyses have been made”). Indeed, when important information is missing, SEPA requires an agency to obtain it:

- (1) If information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs to obtain it are not exorbitant, agencies shall obtain and include the information in their environmental documents.

WAC 197-11-080(1) (emphasis supplied).

Courts reverse negative threshold determinations where insufficient information or analysis supports the negative threshold determination. *See, e.g., Kettle Range Conservation Group v. Washington Department of Natural Resources*, 120 Wn. App. 434, 470, 85 P.3d 894 (2004); *Asarco Incorporated v. Air Quality Coalition*, 92 Wn.2d 685, 703-04, 601 P.2d 501 (1979).

4. SEPA allows an agency to adopt prior EISs in some circumstances

When a proposal will have significant impacts, but the agency previously has prepared an EIS which addresses some or all of the issues that are raised by the proposal in sufficient detail, the agency may issue a Determination of Significance and then adopt the prior EIS in lieu of drafting a new one. WAC 197-11-060(5)(f); WAC 197-11-630. In that case, the agency must “independently review the content of the” prior EIS and determine that it is appropriate to use for the current decision. WAC 197-11-630(1). If it decides to adopt the prior EIS, it must do so “by identifying the document and stating why it is being adopted, using the adoption form substantially as in WAC 197-11-965.” WAC 197-11-630. If an agency adopts a prior EIS and does not bolster it with a supplemental EIS specific to the pending proposal, the agency must circulate the adopted EIS to the Department of Ecology, other agencies with jurisdiction, the counties where the proposal is located, and other local agencies and political subdivisions. WAC 197-11-630(3)(a)(i). Further, a “copy of the adopted document must accompany the current proposal to the decision maker; . . .” WAC 197-11-630(4).

As discussed in more detail below, DNR has prepared EISs regarding some of its statewide and large regional (*e.g.*, western Washington) programs

and policies. However, DNR did not determine that the Strategies would cause significant impacts; did not issue a Determination of Significance; did not formally adopt those prior EISs for use in making the Blanchard Forest decision at issue here; and did not circulate them to other agencies or the public. DNR's failure to adopt the prior EISs makes sense from DNR's perspective: DNR issued a DNS, *i.e.*, a determination that there was no need for an EIS. Given that negative determination, there was no need for DNR to "adopt" an earlier EIS when there was (from DNR's perspective) no need for an EIS at all.

5. An EIS – but not a checklist – analyzes alternatives to the proposal

Professor Richard Settle has described the central importance of the alternatives analysis in an EIS:

Open-minded, imaginative design and consideration of alternative courses of agency action is crucial to SEPA's ultimate quest – environmentally enlightened government decisionmaking. Unless agencies venture beyond their traditional modes of operation, the mere preparation of impact statements environmentally analyzing customary agency conduct would be little more than costly ritual without practical effect. SEPA, like NEPA, requires that environmental impact statements describe and analyze "alternatives to the proposed action." More important and far-reaching is the statute's separate action-forcing provision that agencies "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal

which involves unresolved conflicts concerning alternative uses of available resources.” Thus, in both EIS preparation and the entire process of agency decisionmaking, the development, analysis, and consideration of alternatives is required. The SEPA Rules recognize the indispensability of agency amenability to alternatives and focus EIS attention on comparative environmental review of alternative courses of action.

Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 14.01[2], [6] (2006). The comparative analysis between the proposal and alternatives to the proposal has been described as the “heart” of the EIS. *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 508 F.3d 508, 550 (9th Cir. 2007).

The rules direct the agency to “[d]evote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives, including the proposed action. WAC 197-11-440(5)(c)(v). See also WAC 197-11-440(5)(b) (“Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation”).

The Supreme Court in *Weyerhaeuser v. Pierce County* 124 Wn.2d 26, 873 P.2d 498 (1994) vacated an EIS under the rule of reason where the EIS failed to evaluate an adequate range of alternatives. The Court explained the requirements for an adequate alternatives analysis:

There must be a reasonably detailed analysis of a reasonable number and range of alternatives. Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 14(b)(ii) (4th ed. 1993). Under WAC 197-11-440(b)(c), the alternatives section of the EIS must describe the objectives, proponents and principal features of reasonable alternatives, including the proposed action with any mitigation measures; describe the location of alternatives, including a map, . . . devote sufficiently detailed analysis to each alternative so as to permit a comparison of the alternatives; present a comparison of the environmental impacts of the alternatives; and discuss benefits and disadvantages of reserving implementation of the proposal to a future time.

Id. at 41.

In contrast to an EIS, an environmental checklist does not identify alternative courses of action and does not include a comparative analysis of them. WAC 197-11-315.

6. EISs are to be used in making a decision, not simply to provide a *post-hoc* rationalization

The rules emphasize that preparation of an EIS is not a make-work, academic exercise, but rather is intended to create a thorough environmental analysis that is *used* by the agency in making its substantive decision. “The point of an EIS is not to evaluate agency decisions after they are made, but rather to provide environmental information to assist with making those decisions.” *King County, supra*, at 666. “EISs shall serve as the means of

assessing the environmental impact of a proposed agency action, rather than justifying decisions already made.” WAC 197-11-402(10). As DNR acknowledges, “the SEPA process provides opportunities for other agencies, stakeholders, the Tribes and the public to participate in developing and analyzing information. This process . . . ensures that the [DNR] understands the environmental consequences of its decisions and considers mitigation of probably significant adverse environmental impacts when making these decisions.” CABR 8619 (PSF FEIS) at 1-1.

C. The “Baseline” Issue: DNR Has Discretion to Log or Protect Some, All, or None of Blanchard Forest

Evaluating the magnitude of the Strategies’ environmental impacts required establishing a baseline. DNR claims the appropriate baseline was the *status quo ante*, *i.e.*, every acre was subject to logging. But, as detailed below, this ignores that DNR’s statutory authority also provides that every acre also was to be managed taking into account other public uses, too. Further, the Legislature provided a mechanism for DNR to accomplish its competing public use and trust obligations simultaneously by compensating the trust for lands withdrawn from logging. Given the range of statutory options that were available to DNR when it made its decision, DNR’s

decision to log and road build throughout most of Blanchard Forest was a decision with significant adverse impacts.

Judge Craighead reviewed the applicable statutes and correctly concluded that logging all of Blanchard Forest was not a foregone conclusion. CP 313 (baseline is not “inevitably logging”). Judge Craighead correctly determined that existing laws and plans left DNR with multiple options to log or protect all, some, or none of Blanchard Forest.

As Judge Craighead observed, DNR manages Blanchard Forest under two sets of potentially competing, statutory commands. Because the lands are managed by DNR in trust for Skagit County, DNR is subject to certain trust obligations (*i.e.*, a sustained yield of income-producing logging). But in addition, the Legislature also has directed DNR to manage these lands for the purpose of advancing a wider range of public objectives (*i.e.*, “multiple use”). RCW 79.10.100. As the Superior Court stated in denying DNR’s standing motion, “the Legislature in RCW 79.10.100-.120 recognizes the tension that exists between the interests of the beneficiaries and those of the public ...”¹²

Legislative recognition of this tension was accompanied by a mechanism for addressing it. The statute authorizes DNR to withdraw trust

¹² Supp. CP 406 (Letter Ruling Denying Motion for Summary Judgment (Feb. 26, 2008)) at 3.

land from logging (and hence income generation) if necessary to serve other public purposes, as long as the trust beneficiaries are compensated. As the Superior Court explained, the legislation “acknowledges that one way to reconcile these interests is to compensate the beneficiaries for actions that serve the public at the expense of the beneficiaries.” *Id.*

Though the petitioners go on at length about DNR’s trust obligations, the existence and scope of those obligations are not disputed. We recognize that the lands at issue here are county tax forfeiture lands, deeded to the State for management decades ago, and are managed in trust for Skagit County.¹³

But the petitioners studiously ignore the other half of DNR’s obligation and authority: the duty to manage lands not just for logging, but for a wide-variety of multiple uses and DNR’s authority to protect trust lands from any logging as long as the trust is compensated. As described below, this obligation and authority is clearly set forth in the statutes (and case law and an Attorney General Opinion construing the statutes) and is confirmed by DNR’s policies and its own action in this case. Given DNR’s decision to

¹³ We do not agree, though, that DNR’s trust responsibilities to the County also create an obligation to provide security to privately-owned local mills. *See* AFRC Br. at 29.

protect one-third of Blanchard Forest, how can petitioners claim DNR lacked authority to protect more?

1. The statutory framework applicable in this case demonstrates that all of Blanchard Forest need not be logged

The applicable statutory framework in this case, ch. 79.10 and 79.22 RCW, gives DNR ample flexibility in its management of trust lands to protect more than the one-third of Blanchard Forest protected by the Strategies. In RCW 79.10.100, the Legislature directs DNR to utilize the “multiple use” concept in managing forest lands. The Legislature then defines “multiple uses” on forest lands to include not just logging, but also recreation, protection of wildlife resources, maintenance of scenic areas, and scientific and educational pursuits. RCW 79.10.120; CABR 8 (DNR’s comparable description of RCW 79.10.120).

RCW 79.10.140 authorizes DNR to construct, operate, and maintain primitive outdoor recreation conservation facilities on trust lands “to achieve maximum effective development of such lands.” RCW 79.10.200 states that DNR may adopt a “multiple use land resource allocation plan” for all portions of the land it manages. This plan may consider, among other factors,

the ecological conditions, natural features, public use potential, and recreational potential.

These “multiple use” requirements are applicable to trust lands and non-trust lands alike. The statute that compelled the counties to deed to the State their tax forfeiture lands expressly provides that while those lands are to be managed in trust by DNR, they are subject to the same protections as other non-trust State forest lands:

... Such land shall be held in trust and administered and protected by the department in the same manner as other state forest lands.

RCW 79.22.040 (emphasis supplied).

That the multiple use concept applies to trust lands also is explicit in the multiple use statute. As noted by the Superior Court, that statute acknowledges the tension between DNR’s trust obligation and managing for a broader set of public purposes and provides for compensation of the trust as a mechanism that DNR can use to simultaneously meet its trust and multiple use obligations:

If such additional [multiple] uses are not compatible with the financial obligations in the management of trust land, they may be permitted only if there is compensation from such uses satisfying the financial obligations.

RCW 79.10.120.

In like vein, RCW 79.10.210 specifically authorizes the withdrawal of state trust forest land from timber production:

For the purpose of providing increased continuity in the management of public lands and of facilitating long range planning by interested agencies, 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. Acreages so withdrawn shall be maintained for the benefit of the public and, in particular, of the public schools, colleges, and universities, as areas in which may be observed, studied, enjoyed, or otherwise utilized the natural ecological systems thereon, whether such systems be unique or typical to the state of Washington. Nothing herein is intended to or shall modify the department's obligation to manage the land under its jurisdiction in the best interests of the beneficiaries of granted trust lands.¹⁴

While the foregoing statutes are plain enough, the concept that DNR is subject to laws of general applicability when it manages trust lands also is reflected in the case law (*See e.g., Noel v. Cole*, 98 Wn.2d 375, 380, 655 P2d 245 (1982) (DNR subject to SEPA even as to lands held in trust), and in a formal Attorney General Opinion (“AGO”) (referring to these trust lands by the generic term “forest board transfer lands”):

Skamania [County v. State, 102 Wn.2d 127, 685 P.2d 576 (1984)] also reaffirmed the broad police power authority of the Legislature in enacting laws of general application. This

¹⁴ In addition, under RCW 79.22.300 DNR can reconvey trust lands to counties for park purposes.

holding of *Skamania* applies with greater force to the statutorily created Forest Board transferred lands trust. *Skamania*, 102 Wn.2d at 132. To the same effect are the numerous cases discussed in this opinion in response to Question 2(a), relating to the federal grant lands. We know of no principle suggesting that the trust status of property frees that property or those charged with administering it from laws of general application simply because those laws may affect the value of trust assets or entail costs to the trust.

In summary then, the Forest Board transfer lands trust is a creature of statute. The Legislature may alter or repeal this statutory trust, provided that it does so in a manner consistent with constitutional requirements, including Article II, Section 37, of the Washington Constitution. This statutory trust does not constrain the authority of the Legislature in enacting laws of general application.

Wash. AGO 1996, No. 11 at 56-57 (Aug. 1, 1996) (excerpt reprinted in App. D).

The AGO quotes and emphasizes the statute that provides that these County tax forfeiture lands “shall be held in trust and administered and protected by the department as other state forest lands.” *Id.* at 58 (emphasis supplied by Attorney General). The AGO explains that “by virtue of RCW 76.12.030, the terms of the Forest Board transferred lands trust are found in statutes directing administration and protection of State forest lands.” These other statutes “define the trust relationship and the Department’s obligations and authority in administering the trust.” *Id.*

Neither petitioner discusses these statutes or its impact on this case. These statutes are and have been at the center of our arguments and were expressly relied on by the Superior Court in its decision. CP 313. The petitioners suffer from either a huge blind spot or else tactically plan to address these statutes only in reply briefs. We will move to strike if the latter occurs. *See, e.g., Ohnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 516, n.3, 108 P.3d 1273 (2005).

2. DNR's pre-existing policies recognize DNR's authority to protect lands like Blanchard Forest

Three policies in DNR's own Policy for Sustainable Forests (PSF 2006) explicitly recognize DNR's ability to manage significant portions of its forest land for non-timber values. CABR 8697 (emphasis supplied).

First, under "Harvest Deferral Designations," DNR has the ability to designate land as not available for timber harvest on either a short or long-term basis. CABR 8657-8658. Second, DNR has discretion to identify "special ecological features" and not allocate them to timber harvest to conserve their non-timber values. CABR 8694-8698. Finally, the amount of trees logged off of trust lands (the so-called "sustainable harvest calculation") may be adjusted downward (or upward) as "legal requirements" or Board of Natural Resources policies change. CABR 9110.

DNR also acknowledged that it is not required to log all of its lands in an earlier EIS: “In many cases, [special ecological] features on forested state trust lands can be transferred out of trust status, with full market value compensation to ensure their protection.” CABR 8697.

Not surprisingly, in light of these policy statements, more than one-third of DNR’s Western Washington forest trust lands (approximately 516,000 acres) currently are not managed for timber production. CABR 8658 (citing to Table 2.6-4 in SHC FEIS at CABR 5032). Yet, the major premise for DNR’s argument is that it could not protect another few thousand acres on Blanchard Mountain.

3. DNR’s decision to protect the Core Area demonstrates that all of Blanchard Forest need not be logged

That the statutes and prior plans did not commit DNR to logging all of Blanchard Forest is nowhere better exemplified than by DNR’s decision in the Strategies to protect one-third of the forest in the “Core Area.” DNR’s decision to set aside 1,600 acres as the “Core Area” demonstrates that DNR believed it had the authority to set aside a large portion of the forest from logging. If DNR could set aside 1,600 acres, why not more?

DNR’s brief acknowledges that it had the authority to set aside the “Core Area” as long as it provided compensation for the trust. DNR Br. at

33. Similarly, DNR's "Non-Project Review Form for the Proposed Strategies" states:

1. Trust land management policy guidance is currently flexible enough to accommodate multiple values, pursuant to RCW 79.68. If providing for recreation or other amenity uses substantially curtails forest management activities that produce trust revenue, **options exist to seek financial compensation to the trust beneficiaries . . .**

CABR 27 (emphasis supplied).

The statutes and plans discussed above, along with DNR's own decision here to protect a third of Blanchard Forest, demonstrate the fallacy of petitioners' assertions that the only use for Blanchard Forest trust lands is logging and road building and that all of the forest would be, or has to be, logged. DNR has the flexibility to manage Blanchard Forest, like any trust lands, in multiple ways.

Because of that flexibility, the baseline used by DNR for its SEPA review was wrong and resulted in a gross understatement of the impacts. The proper baseline would have recognized that DNR had the legal authority to protect more, even all, of Blanchard Forest. From that baseline, the decision to allow most of the forest to be logged and roaded poses huge environmental impacts. Petitioners' arguments, based primarily on the presumption that the Strategies could not create adverse impacts because the entire forest was

subject to logging, fails in the face of DNR's clear legislative authority to the contrary.¹⁵

4. Casting the issue as impinging on DNR's discretion to "define the proposal" does not change the result

AFRC takes a different tact with regard to the baseline issue. According to AFRC, DNR has broad discretion to define the proposal as it sees fit. Because DNR has chosen to define the proposal as a plan to protect one-third of Blanchard Forest, the trial court overstepped its authority by defining the proposal "to include the option of discontinuing all forestry on the Blanchard block." AFRC Br. at 41.

AFRC's efforts to cast the issue as the proper definition of the "proposal" misses the larger issue. Even if DNR had the discretion to define the "proposal" as the specific solution developed by the Strategies Group, (an issue we address in a note below), still, the issue is whether *that* proposal would have significant adverse impacts. The issue of whether *that* proposal would have significant impacts necessarily requires an assessment of the

¹⁵ Despite petitioners' frequent reference to the efforts of some to protect Blanchard Mountain by creating a park, respondents have not asked that all forestry be discontinued, but rather that more protective alternatives be considered. The mechanism by which protection is achieved (*e.g.*, a park, a "Natural Area Preserve," or a "Natural Resource Conservation Area" – CABR 3582-90) is not critical to the SEPA analysis. The SEPA

other options DNR had discretion to select in managing that forest. Given the preceding analysis that demonstrates DNR’s authority to protect more of the forest than the one-third provided by the Strategies, the conclusion remains the same, that the “proposal” as defined by DNR results in probable significant impacts. Neither the Superior Court nor the respondents have taken issue with DNR’s definition of the proposal. Rather, we have demonstrated (and the Superior Court found) that the proposal *as defined by DNR* would result in probable significant impacts given the other options that DNR had available to it.¹⁶

“baseline” issue is whether DNR has the authority to provide protection to trust lands. It clearly does.

¹⁶ AFRC also is on weak ground in contending that DNR had unbridled discretion to define the proposal. SEPA rule makers and the courts have long recognized that agencies intent on avoiding the required analysis of alternatives might seek to define the proposal in narrow terms. To avoid that, the SEPA rules provide:

Proposals should be described in ways that encourage considering and comparing alternatives. Agencies are encouraged to describe a public or non-project proposals in terms of objectives rather than preferred solutions.

WAC 197-11-060(3)(a)(iii). The rule goes on to provide an example:

A proposal could be described, for example, as “reducing flood damage and achieving better flood control by one or a combination of the following means: building a new dam; maintenance dredging; use of shoreline and land use control; purchase of flood prone areas; or relocation assistance.”

Id.

Case law emphasizes the importance of not unduly constraining the alternatives analysis by narrowly describing the proposal. *City of N.Y v. Dept of Trans.*, 715 F.2d 732,

D. Adopting the Strategies Plan for Blanchard Forest is Likely to Have Significant Adverse Environmental Impacts Warranting Preparation of an EIS

Deciding which parts of Blanchard Forest will be logged and which ones spared is certainly a decision that has probable significant adverse impacts. In the abstract, it seems beyond obvious that an EIS would be required before such a momentous decision were made. After all, SEPA requires environmental review to take place “at the earliest possible time to ensure that planning and decisions reflect environmental values . . .” WAC 197-11-055(1). It will be too late (and too broad an inquiry) to consider the advantages and disadvantages of alternative configurations for the protected core area at the time of individual logging sales.

When it prepared the Blanchard checklist, DNR did not take the position that the Strategies would not create adverse impacts because of it “all

743 (2d Cir. 1983) (“an agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered”). Instead, the cases reference the agency’s statutory authority as forming the bounds on a reasonable range of alternatives. *Id.* (“[s]tatutory objectives provide a sensible compromise between unduly narrow objectives an agency might choose to identify to limit consideration of alternatives and hopelessly broad societal objectives that would unduly expand the range of relevant alternatives”); *Citizens Against Burlington, Inc. v. Busey, supra*, 938 F.2d at 196 (in defining proposal, agency should take into account goals of the parties involved and “should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency’s statutory authorization to act”). Here, given DNR’s express

can be logged” baseline. Rather, the checklist repeatedly acknowledges that the plan will generate adverse impacts and states that they will be addressed in later checklists for individual logging operations. CABR 92-107. It was only with the advent of this litigation that DNR’s attorneys developed the “baseline” argument. That litigation argument is entitled to no deference.

DNR does not really contest that logging and roading two-thirds of Blanchard Forest would cause significant adverse impacts if the baseline is something other than “it all can be logged.” DNR offers no other defense to salvage the DNS, if its “baseline” argument fails. And for good reason.

Assessing whether impacts are “significant” involves taking account of the “context” and “physical setting.” WAC 197-11-794. Perhaps devising a management plan for 5000 acres of forest land somewhere else might not have significant consequences. But in the richly endowed and heavily used setting of the Blanchard Forest, the consequences are huge for wildlife, recreation, aesthetics, water quality, and a host of other environmental resources.

Without an EIS, DNR did not have the benefit of knowing exactly what wildlife, recreation, scenic, and other environmental resources would be

statutory authority to withdraw lands from trust, the “proposal” should be drafted or construed in a way that includes that option within the range of reasonable of alternatives.

impacted and to what degree. An EIS would have informed DNR's decision so that it knew not only the impacts associated with the current proposal, but also the impacts associated with reasonable alternatives, such as the alternatives of protecting a greater percentage or even all of Blanchard Forest.

As described above, logging and roading generate numerous significant adverse environmental impacts. Vegetation is lost and with it significant wildlife habitat. Repeated logging of the same tracts, even at 60 or 80 year intervals, permanently precludes the re-establishment of older ("late successional") forests vital to species like the marbled murrelet. Stormwater filled with sediment inevitably makes its way to streams. That pollution is not just an aesthetic insult. It degrades the creeks and nearby saltwater habitat vital for the survival of amphibians and fish, including endangered salmon. *See, supra* at § III(B).

Logging great swaths of Blanchard Forest undoubtedly will destroy recreational opportunities and the forest's scenic grandeur. Hikers, mountain bikers, horseback riders, and others will lose the opportunity to enjoy the tranquility and beauty of the forest. True, those impacts will not be perpetual. Decades after the logging, the forest will return. But SEPA recognizes that significant impacts can occur even if they are not permanent. WAC 197-11-

060(4)(c) (SEPA requires consideration of short-term and long-term impacts). Other than by misplacing reliance on its “everything can be logged” baseline, there was no way for DNR to justify its “no significant impacts” conclusion and its decision not to prepare an EIS.¹⁷

E. The “Granularity” Issue: DNR’s Checklist Was Not an Adequate Substitute for an EIS, But Rather Further Demonstrated the Need for an EIS

Repeatedly, the petitioners reference the environmental checklist prepared for the Strategies as evidence that DNR gave adequate consideration to environmental impacts. But an environmental checklist, no matter how detailed, is no substitute for an EIS. *See, e.g., Glenbrook Homeowners’ Ass’n v. Tahoe Regional Planning Agency, supra.*

Checklists contain no analysis of reasonable alternatives – the heart of any EIS. *See Settle, The Washington State Environmental Policy Act, supra; Center for Biological Diversity v. NHTSA, supra.* This omission alone is a fatal flaw in any effort by the petitioners to rely on the checklist as a substitute for an EIS.

¹⁷ Assertions that an EIS is expensive do not excuse compliance with SEPA. The petitioners cannot cite any part of the statute or implementing rules that allow an agency to forego preparation of an EIS because of the expense and cite nothing from the administrative record (only a litigation affidavit) to support their expense claim. *See AFRC Br. at 44.*

Furthermore, information necessary to a reasoned decision – the detailed information that would be presented in an EIS specific to this proposal – was not contained in the checklist. WAC 197-11-080; -335. As summarized *supra* at § III(C)(4) and in the following paragraphs, data gaps abound.

Even as to the one alternative addressed in the checklist, DNR’s discussion of recreation and aesthetics is conclusory and abbreviated. The data and analyses of earlier studies is missing,¹⁸ presumably because nothing in those earlier reports would justify a finding that disrupting public access for months at a time and ruining scenic vistas and the forest cathedral experience for decades are not significant impacts.

Visual impact analysis is even more cursory. The checklist identifies an area of “high visual sensitivity” and then states that “Management practices are site specific and will be addressed on a case by case basis through the timber sale review process.” CABR 101 (Strategies checklist, item 10(c)); CABR 85 (supplemental checklist material). Analysis of the visual impacts of logging is missing.

¹⁸ Compare, e.g., CABR 102 (checklist item 12) and CABR 85 with 1996 Chuckanut Mountain Trails Master Plan (CABR 1379-1544), the 1999 Blanchard Mountain Assessment (CABR 3479-3577), and the 2002 Evaluation (CABR 4305-4383).

Under the Strategies, older forest habitat, and stands approaching “older” status, will be logged, thus precluding their use for recovery by marbled murrelets and other ESA-listed, old growth-dependent species. Earlier, DNR committed to undertake a “landscape level analysis” to protect marbled murrelets, CABR 1750 (*e.g.*, at a scale like Blanchard Forest), yet, if such analysis has been done, it does not appear in the SEPA record. *See* note 8, *supra*. Nor is there an analysis of how logging and road building on Blanchard Mountain will impact murrelets or their habitat needs.

Analysis of impacts from the inevitable soil erosion also is deferred to the future. CABR 94. Analyses of impacts to surface water quality and runoff rates, which will occur from road building and tree removal, are deferred to the future. CABR 97. Given the above omissions and deferrals, the checklist -- in addition to failing to analyze alternatives -- did not include an EIS level of analysis of impacts or mitigation for the one alternative it did address. On all counts, the checklist is not the functional equivalent of an EIS.

F. The Failure to Prepare an EIS Is Not Excused by Reference to Pre-Existing Rules and Plans

In the recitation of facts, AFRC makes the argument that logging and road building on Blanchard Mountain will have no adverse impacts because

existing rules and plans establish requirements and prescriptions that assure no adverse impacts will result. According to AFRC, DNR simply would not permit any individual logging sale (or road building) that would rise to the level of requiring an EIS.

One need only consider the seemingly annual winter floods and landslides emanating from denuded hillsides and the continuing tenuous status of many forest-dependent species to question the credibility of the proposition that modern rules have eliminated all significant impacts.

1. AFRC's argument ignores cumulative effects

The short and complete answer to AFRC's claim is that it wholly ignores the issue of cumulative effects. Even if any individual logging operation falls below the EIS threshold, the issue presented here focuses on the cumulative effects of a forest-wide plan that commits two-thirds of Blanchard Forest to logging. Those cumulative impacts include decimation of an extraordinary system of trails heavily used by nearby residents and distant visitors alike; the loss of the tranquility and visual splendor of the current forest; and the loss of mature forest habitat critical to several endangered species. Those impacts are not addressed in a checklist review of individual 40 acre, logging projects nor by application of existing rules and

plans to those individual projects. Those cumulative effects can only be analyzed in a forest-wide analysis.

2. DNR acknowledges that prior plans and rules have not been sufficient to avoid significant impacts

The longer answer to AFRC's claim involves a review of the rules and plans AFRC cites and a demonstration that they do not guarantee an absence of significant impacts. Fortunately, even this exercise can be significantly shortened. AFRC's brief includes a lengthy recitation of the succession of rules and plans adopted from 1974 through 2006. But the impact of all but the last of these rules can be addressed by quoting a recent DNR document. AFRC's claims notwithstanding, even DNR recently acknowledged that the prior plans and rules were not adequate to avoid significant adverse impacts, rising even to the level of the extirpation of entire species:

The loss of old growth forests in the Pacific Northwest has resulted in cumulative adverse impacts in the loss and endangerment of wildlife and plant species. The listing of the northern spotted owl, marbled murrelet and various salmonid species are responses to these adverse cumulative impacts.

2006 EIS (CABR 8716). So much for the claim that the 1974 rules, the 1992 amendments, and the alphabet soup of other plans and policies (*e.g.*, HCP, SHC, and EISs) have been sufficient to eliminate the adverse impacts of

logging. All of these rules and plans were, by necessity, the result of political compromises. That the political forces at the time resulted in certain policy decisions does not mean that those policy decisions eliminated all adverse impacts of logging.

Further, DNR's rules and plans have been developed in recent years to address species on the brink, but virtually no attention has been paid to recreation and aesthetic issues. The existing rules and plans provide precious little protection for those resources.

3. DNR lacks legal authority to rely on the Forest Practices Board rules to avoid preparation of an EIS

As a matter of law, reliance on the Forest Practice Board rules to provide assurance that logging and road building in Blanchard Forest will not cause significant impacts is not authorized by SEPA. The Legislature has authorized local governments to rely on development regulations as proof that impacts will not be significant. But the Legislature has not provided parallel authority to DNR. Given that explicit authorization to local governments and no parallel authorization for state agencies, the same authorization cannot be implied for state agencies by the courts. *See e.g. Washington State Republican Party v. Washington State Public Disclosure Comm.*, 141 Wn.2d 245, 280, 4 P.3d 808 (2000) (“Where a statute

specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, *i.e.*, the rule of *expressio unius est exclusio alterius* applies”).

In 1995, SEPA was amended to allow counties and cities planning under the Growth Management Act (ch. 36.70A RCW), in certain circumstances, to use development regulations to issue a DNS contingent upon compliance with development regulations. *See* RCW 43.21C.240. However, for RCW 43.21C.240 to apply, a local jurisdiction still is required to identify the significant impacts that would be caused by the proposal and specifically identify how the jurisdiction’s development regulations adequately address those impacts. *See* RCW 43.21C.240(2).

RCW 43.21C.240 is informative in this case for two reasons. One, that statute clearly is limited to local jurisdictions, not state agencies. Because the Legislature declined to grant similar authority to state agencies, the courts should not infer that authority. To the contrary, the required inference is that the Legislature did not intend state agencies to have that authority.

Two, even if RCW 43.21C.240 applied by analogy, DNR has not acted consistent with its requirements. Under that statute, previously adopted

rules and regulations can be relied upon to support a DNS only when adequate SEPA review identifies and connects specific impacts to be caused by a proposal with adequate, specific mitigation in the regulations or rules. RCW 43.21.240(1)-(2). That has not occurred here. Thus, AFRC's reliance on Forest Practice Board rules to explain away DNR's failure to prepare an EIS should be rejected as a matter of law, too.

4. DNR's most recent policy statement does not assure only insignificant impacts from the Strategies

The most recent programmatic action taken by DNR applicable to Blanchard Forest is the 2006 Policy for Sustainable Forests (PSF). CABR 9075-9144; EIS at CABR 8608-9074. The PSF is DNR's current statement of how it intends to implement its various plans and legal obligations. It incorporates and carries forward earlier plans and EISs. CABR 8643-8644 (referencing the 1992 rules EIS, the 1997 HCP and EIS, the 2004 SHC EIS, and the 2006 PSF and EIS). Yet, as quoted above, DNR has acknowledged that those prior rules and plans have not stopped the significant adverse impacts of logging. *See supra* at 64.

When DNR drafted the 2006 PSF, DNR acknowledged that implementing its new policies would not necessarily eliminate all significant impacts and expressly identified transferring land out of trust as a mechanism to avoid those impacts:

The potential adverse impacts under Alternative 4 and the Board's Preferred Alternative are expected to be less than the other alternatives, because of the increased flexibility added to Alternative 4 and the Board's Preferred Alternative that can provide permanent protection of visually significant forested state trust lands through transfer out of trust status with compensation to the affected trust(s). Under Alternative 4 and the Board's Preferred Alternative, visually significant forested state trust lands can be permanently protected through transfer out of trust status, with full market value compensation to the affected trust(s). However, this strategy is primarily reserved for Common School Federal Grant Lands, and is not generally available for other types of trust lands, especially State Forest Lands.

Under all alternatives, the environmental impacts associated with visual management strategies that are developed through a forest land planning process or as part of a timber harvest design would be evaluated at that time as part of a SEPA review.

CABR 8800.¹⁹

The FEIS also noted significant impacts to wildlife under the chosen alternative:

However, Alternative 3 and the Board's Preferred Alternative may not provide the amount and suitability of wildlife habitat associated with small, less mobile native species or species assemblages because it may lack the degree of attention given to localized issues, *i.e.*, providing habitat conditions that contribute to sustaining native wildlife populations or communities.

¹⁹ The qualification that transferring lands out of trust is not "generally" available for State Forest Lands (those at issue here) is not supported by a reference and is contrary to the statute, *see* RCW 79.22.040. Moreover, DNR can work around any such limitation, if it exists, by trading lands among the trusts, as it commonly does.

CABR 8733.

Consequently, AFRC's "factual" claim (AFRC Br. at 19-28) that implementation of the existing DNR plan assures no significant impacts from logging lacks support from the very document cited by AFRC. The 2006 PSF and EIS confirm common sense: logging two-third of Blanchard Forest will significantly impact recreation, aesthetics, riparian corridors, and other wildlife habitat.

G. AFRC's "Phased Review" Defense Is Not Supported by the Law or the Facts

The SEPA rules recognize that there often is a relationship among a series of decisions an agency makes over time. The rules address the issue of SEPA compliance in such circumstances, by allowing for "phased review" if certain conditions are met. WAC 197-11-060(5). Phased review is appropriate, for instance, when "the sequence is from a nonproject document to a document of narrower scope such as a site specific analysis . . ." WAC 197-11-660(5)(c)(i). The Court in *Indian Trail Property Owner's Association v. City of Spokane, supra*, 76 Wn. App. 430, 442, 886 P.2d 209 (1994), stated:

Phased review is defined as "the coverage of general matters in broader environmental documents, with subsequent

narrower documents concentrating solely on the issues specific to the later analysis.” WAC 197-11-776. SEPA allows for “phased review” because it assists agencies and the public to focus on issues ready for decision and to exclude from consideration issues already decided or not yet ready. WAC 197-11-060(5)(b).

While there is a role for phased review in some cases, this is not one.

Phased review is not appropriate when it would “avoid discussion of cumulative impacts.” WAC 197-11-060(5)(d)(ii). The agency may not piecemeal the process by limiting review to “current segments of public works projects and postponing environmental review of later segments until construction begins.” *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Dept. of Transp.*, 90 Wn. App. 225, 231, n.2, 915 P.2d 812 (1998). Moreover, “phased review of a project is inappropriate where phasing avoids discussion or distorts the impact of a project’s cumulative effects.” *East County Reclamation v. Bjornsen*, 125 Wn. App. 432, 441, 105 P.2d 94 (2005) (citing *See Indian Trail Prop. Owner's Assn. v. City of Spokane, supra*).

AFRC claims this is a case involving phased review. According to AFRC, the earlier statewide and Western Washington EISs constituted the first phase and the checklist prepared for the Strategies constitutes the second phase. AFRC Br. at 41-42. But as the rules and cases plainly state, phasing

cannot be used to avoid discussion of cumulative effects. The Superior Court looked in vain for any discussion in the prior EISs of the cumulative effects on recreation, aesthetics, and wildlife resulting from a decision to log two-third of Blanchard Forest. CP 314.

Further, phasing cannot be used to avoid SEPA's basic requirements like an analysis of alternatives. When a programmatic EIS is followed by a finer-grained EIS, both EISs consider alternatives appropriate to the level of detail of each action. But here, DNR has linked a broad scale EIS with a checklist. The checklist does not discuss alternatives, let alone address their impacts and possible mitigation in detail. Phasing cannot be used to eviscerate the "heart" of SEPA's EIS requirements in this fashion.

Moreover, even as to analyzing the impacts of the chosen alternative, the phasing arguments comes up short because the prior EISs were exceedingly general (not "searching," AFRC Br. at 41) and they were linked with the Strategies checklist that deferred most issues for review in yet later checklists. For instance, in 2004, DNR prepared an EIS assessing impacts of certain logging policies for all of western Washington, including the Olympics. The impact and mitigation analysis in this EIS for various logging rates in all of western Washington was, necessarily, very general. "The

assessment presented in this environmental analysis is programmatic, meaning that it established direction and potential harvest levels for broad land areas rather than scheduling activities on specific patches of land.” CABR 5234. The discussion of impacts resulting from different levels of logging activity were similarly general. For instance, regarding the impact on recreation throughout western Washington, the EIS states:

The linear nature of the trail system suggests that trail use would be the most likely recreation activity to be affected by increased harvest activities. Trails in active harvest areas are likely to be closed, moved, or decommissioned as a result of harvest activities. In addition, trails, campgrounds, picnic areas, and some overlook areas could be negatively affected by noise, dust, and traffic generated during logging activities. Higher harvest volumes would likely increase these potential effects.

CABR 5233 (2004 EIS) at 4-179. As Judge Craighead noted, this very general level of analysis did not include any analysis specific to Blanchard Forest. There is no discussion of the recreation opportunities afforded by Blanchard Forest or the impact to recreation in Blanchard Forest from the various logging levels discussed in the 2004 EIS. Nor, of course, was there any discussion of any of the alternatives considered during development of the Strategies nor the varying impact on recreation resources that would result from protecting more or less of Blanchard Forest from logging.

Similarly, with regard to the impact to scenic resources, the 2004 EIS states that the proposal being evaluated “does not include site-specific harvest plans that can be evaluated for their scenic impacts.” CABR 5240 at 4-186. The best that could be offered was that there was some indication that the alternatives with higher logging rates could result in “larger amounts of open forest,” and, apparently, greater adverse impacts to scenic quality. CABR 5241 at 4-187. Again, there was no specific analysis of scenic impacts on Blanchard Mountain.

Impacts to wildlife were evaluated in a very general manner, too. For most species, the 2004 EIS simply identified which alternatives would have the greatest impact on various wildlife species, which would have the least impact, and the relative ranking of other alternatives in between. *See* CABR 5143. Again, there was no analysis specific to wildlife in Blanchard Forest. There was no description of the wildlife in Blanchard Forest and no discussion of the extent to which wildlife habitat could be protected depending on the amount and location of areas to be logged in Blanchard Forest.

Two years later, DNR published an EIS assessing various policies for its non-logging activities. CABR 8608-9074. This EIS was very generic,

too. Its geographic scope was even broader than the 2004 EIS, covering both eastern and western Washington forests. CABR 8609 (“The policies contained in this document will guide long-term sustainable management of 2.1 million acres of forested state trust lands”).

The alternatives discussion in the 2006 EIS is done separately for each of several issue areas, such as “Harvest Deferral Designations,” “Wildlife Habitat,” and “Watershed Systems.” See CABR 8614 – 8618 (table of contents). As with the 2004 EIS, the alternatives are general, not site-specific, and there is no mention of any specific tract such as Blanchard Forest.

The 2006 EIS discussion of public access and recreation is typical of the level of detail throughout the EIS. Existing conditions are described in terms such as “forested state trust lands provide a broad range of opportunities, including but not limited to: hunting, fishing, camping, equestrian use, motorcycle and all-terrain vehicle riding, hiking, mountain biking, camping, four-by-four riding, educational field tours, boating and sightseeing.” CABR 8775-8776. The EIS states that the agency’s recreation program “includes 143 recreational sites and more than 1,100 miles of trails statewide.” *Id.* The analysis of impacts to these recreational resources was couched in general, comparative terms. Each alternative is simply rated as

having more or less impact to recreation resources than the other on a statewide basis. CABR 8785-8786. There is no analysis of recreational use or impacts in Blanchard Forest. There is no assessment of the variation in recreational impacts that would result depending on the extent to which lands in Blanchard Forest are dedicated to logging as opposed to some other use. *Id.* Judge Craighead aptly characterized these EISs as providing analysis from “the 30,000 foot level.” CP 312.

At times, AFRC claims that a more detailed analysis really can be found in the 2006 EIS, but even DNR does not join in that claim. Rather, DNR has recognized that the statewide 2006 PSF does not address all impacts at a smaller, watershed scale. “In no way does the Board’s Preferred Alternative prevent analysis of potentially significant cumulative impacts on a watershed scale or at an intensity similar to regulatory watershed analysis. To do so is obviously necessary when addressing potentially significant cumulative impacts to watershed systems.” CABR 8960. While the 2006 PSF states that it is “obviously necessary” to do additional analysis of cumulative impacts at the watershed level (*e.g.*, Blanchard Forest), that analysis was not forthcoming here. DNR has failed to prepare an EIS as it suggested it would. Worse, it has not even used the “expanded checklists” it

promised either. *See, e.g.*, CABR 8834-38. (Even if it had, an “expanded checklist” is not a legal substitute for the rigorous review and alternatives analysis contained in an EIS. *See supra* at § IV(B)(2) & (5).)

In addition to the two general EISs published in the last few years, DNR also prepared an EIS in 1997 focused upon the impacts of logging on two bird species listed as threatened under the ESA, spotted owls and marbled murrelets. The EIS was prepared to assess a proposed Habitat Conservation Plan (HCP) that DNR sought to have approved by federal agencies implementing the federal Endangered Species Act.

The EIS for the HCP does not address impacts on recreation and aesthetic resources at all. *See* CABR 2373 (1997 EIS at 4-1) (scope of discussion of environmental consequences). Even with respect to marbled murrelets, a species explicitly included in the document, the EIS is very general. The discussion does not assess impacts associated with various levels of logging in particular areas. CABR 2471 (HCP EIS at 4-97). The EIS acknowledges that the region containing the Blanchard Forest is likely to see a significant loss of murrelet habitat under the proposal, CABR 2495 (HCP EIS at 4-121), but there is no mention or analysis of the Blanchard Forest itself.

Like the more recent EISs, the 1997 EIS contained no analysis of Blanchard Forest. The EIS suggested that analysis at that smaller scale would be forthcoming later: “The most efficient and precise application of the conservation strategies [of the HCP] will be accomplished through landscape planning.” CABR 1904 (HCP EIS) at 4-192. But when the time came to divvy up the Blanchard Forest landscape between logging and non-logging uses, no EIS was prepared to inform that decision.

In sum, this is not a case about phased review. The earlier EISs do not adequately address Blanchard Forest issues and they were not followed by an EIS that filled that analytical gap. Most importantly, none of the earlier EISs analyzed alternatives to the proposal to protect just one-third of Blanchard Forest nor the impacts associated with each of those alternatives. AFRC’s phased review defense fails.

H. The Trial Court Did Not Err by Staying the Remaining Claim Pending Resolution of This Appeal and Ordering an EIS for the Strategies

In addition to the SEPA claim, respondents’ Petition for Review alleged that the substance of DNR’s Strategies violated requirements of the Public Lands Act. Upon finding that DNR had violated SEPA, the trial court stayed the remaining non-SEPA claims. CP 324 (¶ 3). The trial court

deferred until after a remand from this Court the issue of whether and when to address the non-SEPA claims. *Id.*, ¶ 4.

DNR asserts the trial court erred in reserving for later the issue of whether to address the non-SEPA claims following a potential remand. Yet if the trial court's SEPA decision were to be reversed, the non-SEPA claims would be squarely before the trial court at that time.

Apparently, DNR is concerned about the opposite scenario, *i.e.*, a decision by this Court affirming the trial court's SEPA decision. In that scenario, DNR argues it would be improper for the trial court at that time to pass judgment on the non-SEPA issues. It may be that the proper course, in that event, would be for the trial court to continue the stay of the non-SEPA issues and await further action by DNR subsequent to complying with SEPA. But it is speculative and premature at this point for this Court to review that forthcoming decision by the trial court. The trial court has not made that decision yet. There is nothing for this Court to review.

AFRC attacks the relief provided by the order, contending that the order does not take account of the options DNR has to withdraw the Blanchard Strategies or to modify them. AFRC Br. at 49. Nothing in the trial court's order precludes DNR from doing that. SEPA may preclude DNR

from proceeding on such a piecemeal basis, but nothing in the trial court's order does. There is nothing in the order to appeal on that score.

AFRC also muses that the Strategies could be revamped to totally eliminate all adverse impacts. If DNR were to do so, respondents' efforts to protect all or virtually all of the treasured environmental resources on Blanchard Mountain would have been accomplished. If DNR decides to do that, we will happily stipulate to a waiver of the EIS requirement.

V. CONCLUSION

For the foregoing reasons, this Court should sustain the Superior Court decision in all respects.

Dated this 20 day of July, 2009.

Respectfully submitted,

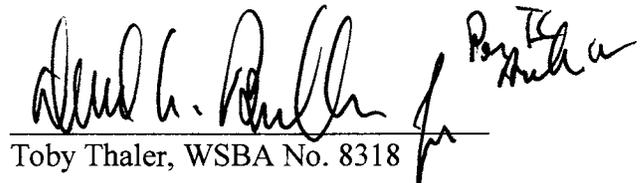
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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHUCKANUT CONSERVANCY,
NORTH CASCADES
CONSERVATION COUNCIL, and on
behalf of INDIVIDUAL MEMBERS
there of as taxpayers of Whatcom and
Skagit Counties, and the State of
Washington,

Respondents,

vs.

WASHINGTON STATE
DEPARTMENT OF NATURAL
RESOURCES, acting through
WILLIAM WALLACE, Northwest
Region Manager, and other officials,

Petitioners,

and

SKAGIT COUNTY, a municipal
corporation of the State of Washington,
COSERVATION NORTHWEST,
AMERICAN FOREST RESOURCES
COUNCIL, and CARPENTERS
INDUSTRIAL COUNCIL,

Intervenors.

No. 62707-4-I
(Consolidated)

King County Superior Court
No. 07-2-29723-5 SEA

DECLARATION OF
SERVICE

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