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Reply to: Seattle Office

June 13, 2024

VIA EMAIL TO: sepacenter@dnr.wa.gov

SEPA Center
Washington Department of Natural Resources
Environmental & Legal Affairs
P.O. Box 47015
Olympia, WA 98504-7015

Re: Public Comments on SEPA DNS for FPA No. 2819391, File No. 24-053001

To Whom it May Concern:

Our firm represents the Lake Cavanaugh Trust, a group of landowners along the shore of Lake Cavanaugh in Skagit County. Our client's members and their neighbors around the lake oppose the pending forest practice application submitted by Timberline Logging, Inc., for road building and logging on the slopes of Frailey Mountain, FPA No. 2819391. For the reasons described in our comment letter of May 30, 2024 regarding FPA No. 2819391 (which is attached hereto as Attachment A and incorporated by reference), DNR should deny this forest practices application.

As explained below, the agency's May 30, 2024 threshold determination of nonsignificance under SEPA for FPA No. 2819391, File No. 24-053001, was issued in error. The agency lacked sufficient information from the applicant and other sources to support the determination of nonsignificance. Further, based upon the information that the agency did have, the agency should have concluded that the proposed road building and logging project may have probable, significant adverse environmental impacts. Because the proposed project may have probable, significant adverse environmental impacts, the agency should have issued a threshold determination of significance.

I. LEGAL REQUIREMENTS UNDER SEPA

A. SEPA is a Full Disclosure Law.

SEPA is the legislative pronouncement of Washington's policy regarding the environmental impacts of government decisions. *See, e.g., Stempel v. Dept. of Water Resources*, 82 Wn.2d 109, 118 (1973) (describing purposes of SEPA); *ASARCO, Inc. v. Air Quality Coal.*, 92 Wn.2d 685, 707 (1979) (same). In essence, SEPA is an environmental full-disclosure law. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 272 (1976). It requires public agencies (including cities) to assess potential impacts of their decisions up front. If those impacts might be

significant, the agency must prepare a thorough environmental study, known as an Environmental Impact Statement (“EIS”). The EIS must disclose and analyze the proposal’s significant impacts and address alternative designs and mitigation measures that can reduce or eliminate those impacts. *See generally* RCW 43.21C.030; WAC 197-11-400 to -440 (discussing contents of EIS). By requiring government actors to confront and explain the environmental impacts of their decisions, and to consider alternatives, SEPA aims to ensure that the future of our shared environment is shaped by “deliberation, not default.” *Stempel, supra*, 82 Wn.2d at 118.

B. The Threshold Determination is a Critical Step in the SEPA Disclosure Process.

“SEPA seeks to ensure that environmental impacts are considered and that decisions to proceed, even those completed with knowledge of likely adverse environmental impacts, are rational and well-documented.” *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 92 (2017) (internal quotation and citation omitted).

To accomplish the goal of fully informed and transparent decision making, SEPA requires every government agency contemplating a decision that might affect the environment to issue a “threshold determination,” the purpose of which is to determine whether an EIS is needed. If the agency determines that there “will be no probable significant adverse environmental impacts from a proposal,” then the agency issues a Determination of Nonsignificance (“DNS”), avoiding the requirement for full environmental study and an EIS. WAC 197-11-340(1). The DNS may also take the form of a “Mitigated” Determination of Nonsignificance (“MDNS”), imposing conditions to reduce the proposal’s impacts to a non-significant level. WAC 197-11-350.

In contrast, if the proposal “may have a probable significant adverse environmental impact” even after the imposition of mitigating conditions, then the agency must issue a Determination of Significance (“DS”) and an EIS must be prepared—meaning, the agency must fully document and assess the adverse impacts likely to be caused and consider alternatives to avoid or mitigate those impacts. WAC 197-11-360(1); WAC 197-11-330(4). In that case, the agency must also respond to public comments, making it accountable to the public.

The threshold determination is likely the most important single step in the SEPA process. *Norway Hill, supra*, 87 Wn.2d at 273. If a negative threshold determination is issued in error, the purposes of SEPA are thwarted by wrongfully avoiding the EIS requirement.

C. The Threshold Decision Must be Based on Adequate Information.

In reviewing the validity of a threshold determination, SEPA requires a searching review: the agency “must demonstrate that it actually considered relevant environmental factors” before issuing a DNS and the record must demonstrate that the [agency] “adequately considered the environmental factors in a manner sufficient” to comply with SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711 (2002) (internal citations and footnotes omitted). Further, the threshold determination “must be based on information sufficient to evaluate the proposal’s environmental

impact.” *Id.* See also WAC 197-11-335 (threshold determination must be based on “information reasonably sufficient to evaluate the environmental impact of a proposal”).

Ultimately, the threshold determination “must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns.” *Conservation Nw. v. Okanogan Cty.*, 194 Wn. App. 1034, 2016 WL 3453666 at *31 (2016). When “information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies should obtain and include the information in their environmental documents.” WAC 197-11-080(1). If the costs of obtaining such information is exorbitant, or the means of obtaining it are not known, the agency must prepare a worst-case analysis. WAC 197-11-080.

It is “clear that the legislature intended that environmental values be given full consideration in government decision making, and it implemented this policy through the procedural provisions of SEPA[.]” *Norway Hill, supra*, 87 Wn.2d at 277. An “agency action that does not comply with SEPA is unlawful.” *Conservation Nw., supra*, 2016 WL 3453666 at *34.

II. THE AGENCY LACKED SUFFICIENT INFORMATION TO ASSESS THE ENVIRONMENTAL IMPACTS AND ISSUE THE THRESHOLD DETERMINATION OF NONSIGNIFICANCE.

A. The Agency Lacked Sufficient Information about Project Revisions.

The applicant submitted a revised FPA on May 29, 2024. DNR’s Forest Practices Application Review System (FPARS) states the “notification date” for FPA 2819391 as 06/03/24 and the FPA shows revisions dated May 29, 2024.¹ The SEPA DNS was signed on May 29, 2024. The revised application was not accompanied by a revised environmental checklist.

Among other things, the revised May 29, 2024 FPA revisions added 15,000 board feet (15 mbf) to the volume proposed to be harvested. That increases the total proposed harvest from 30 mbf to 45 mbf—a significant increase. The additional harvest area in the revised FPA would be a 100% harvest (an increase over the 90% harvest in the original FPA) and according to the applicant would be located on significantly steeper slopes (70% slopes in contrast to the originally proposed 60% slopes). Moreover, because the revised additional harvest areas coincide with the area of the proposed road bed, which would cross several streams, the newly proposed harvest would occur directly adjacent to streams.

There is no indication that the agency reviewed the revised FPA 2819391 prior to issuing the DNS the same day DNR received the revised application. Indeed, the agency’s reviewer, Braelyn Hamilton, inserted a comment in red text on the first page of the environmental checklist that states: “I have reviewed this SEPA checklist and have included comments in red. 5/22/2024. BH.” May 22 was, of course, well prior to the May 29 FPA revisions. In addition, the agency comment

¹ <https://fortress.wa.gov/dnr/protection/fparssearch/FPARResult.aspx?fpa=2819391> (last visited June 13, 2024).

on SEPA Checklist Question 4.b states: “FPA 2819391 indicates removal of 30 mbf of timber 5/22/2024 BH.” This also shows that the agency did not consider the revised FPA when assessing the project’s probable environmental impacts and issuing the DNS. The revised FPA admits that 45 mbf, not 30 mbf, will be harvested as part of the proposed project. The agency did not consider that in issuing the DNS.

DNR did not request or require a revised checklist to address the new proposal. There is no indication that any of these increased probable, significant environmental impacts were considered when the agency issued the DNS the same day it received the new proposal. DNR could not have considered (or adequately considered) the probable, significant adverse environmental impacts of the May 29, 2024 revised FPA when it issued the DNS that same day.

B. The Agency Lacked Sufficient Information about the Applicant’s Forestland Owner Status.

The FPA claims that Timberline Logging is a small forestland owner as defined in RCW 76.09.450 (FPA PDF 3/50) and that Timberline Logging owns less than 500 acres of timber lands (FPA PDF 4/50, response to Question 11.i regarding the trigger for Appendix J. Marbled Murrelet Form). Both statements are incorrect, because Timberline Logging is co-owned by David and Robert Nielsen, who co-own Nielsen Brothers, Inc. The two companies use the same mailing address in Bellingham: 900 Dupont Street, Bellingham, WA, 98225. The contact email for the “Timberline Logging Inc.” landowner is: SamP@nielsenbrothers.net (note Nielson Brothers email address). Page 1 (PDF 2/50) of FPA No. 2819391 confirms that the timber owner of this FPA is really Nielsen Brothers, Inc. Note also that the applicant’s SEPA checklist is signed by the same person that signed the FPA—Samuel Petska—and on that SEPA checklist he states his position and organization as “Forester/Nielsen Brothers Inc.” SEPA Checklist at PDF 15. Mr. Petska failed to include his email address on the SEPA checklist (SamP@nielsenbrothers.net), even though the checklist form requires that information.

In light of the intertwined nature of the businesses, Timberline Logging’s timber harvest and land ownership must be aggregated with Nielsen Brothers and any other companies controlled by the Nielsen Brothers (including but not limited to West Side Logging). Without a showing by Nielsen Brothers that it (together with its corporate alter egos) meets the definition of “small forestland owner” in RCW 76.09.450, Timberline Logging cannot qualify for the more lenient rules applicable to small landowners.

DNR should deny the FPA unless Timberline Logging discloses its true nature as a large forestland owner, not a small forest landowner. Such a disclosure likely would require Timberline Logging to revise various portions of this FPA.

Timberline Logging/Nielsen Brothers appear to acknowledge that it is appropriate to consider all logging operations by both Timberline and Nielsen because this application includes a Marbled Murrelet Form. The form is required only if the FPA is within 50 miles of saltwater and the

company own more than 500 acres of forestland in Washington State.² Submission of the form is an implicit acknowledgment that both of those criteria are met.

C. The Agency Lacked Sufficient Information about Cumulative Impacts.

The proposed new road (“Road A Extension”) would connect South Shore Drive to the applicant’s existing Road B. Road B provides access to vast timberlands on Frailey Mountain owned by Nielsen Brothers, Inc., either directly or through the corporate alter-egos Timberline Logging and West Side Logging.

But Road B cannot currently be accessed from South Shore Drive. This issue was litigated at length previously, resulting in a 2023 decision by the Court of Appeals. The court concluded that the portion of Road B traversing private land subject to subdivision restrictive covenants could not be used for commercial logging purposes. *Lake Tr. v. Skagit Cnty.*, 25 Wn. App. 2d 1042, review denied sub nom. *The Lake Tr. v. Skagit Cnty.*, 534 P.3d 796 (Wash. 2023) (unreported case attached hereto as Attachment B for convenience). As a result of that 2023 Court of Appeals decision, the applicant lost access to Road B and the timberlands accessible from Road B. The applicant’s FPA 2819391, which would provide a new route to access Road B and the timberlands accessible via Road B, followed shortly thereafter. It seems clear that FPA 2819391 was filed because the applicant needed to replace its lost access to Road B.

This FPA would replace the lost access from South Shore Drive to the timberlands accessible from Road B by constructing an extension from Road A to Road B. As such, the proposed Road A Extension is shown connecting to Road B and thus provide access to vast timberlands on Frailey Mountain owned by Nielsen Brothers, Inc., and corporate alter-egos Timberline Logging and West Side Logging. If it were not intended to provide that access and thus open up those additional timberlands for logging, there would be no need for the Road A Extension to continue past the triangular area of the currently proposed timber harvest (timber harvest “Unit 1” in the revised FPA). Road A Extension could have stopped at timber harvest “Unit 1,” but it is instead proposed to continue well past Unit 1, at great cost because of numerous stream crossings, to connect with existing Road B.

Neilson Bothers Inc. owns additional parcels of forest land on Frailey Mountain that, following the court decision discussed above, can only be accessed by building the Road A extension. FPA 2819391 is clearly intended to open up a large amount of land to logging activities, beyond the acreage currently described in the SEPA Checklist and revised FPA. The cumulative environmental impacts of those additional logging activities must be addressed by the agency when it considers the probable, significant adverse environmental impacts of the currently proposed project.

² The applicant used an outdated form. The current instructions for the Appendix J Marbled Murrelet Form state: “This form is only necessary if you are harvesting timber, salvaging timber, or constructing forest roads within 50 miles of saltwater (marine waters).” https://www.dnr.wa.gov/publications/fp_form_murrelet_instructions.pdf (last visited May 30, 2024).

Because the applicant provided no information to the agency regarding the use of the Road A Extension to access additional timberlands on Frailey Mountain, the agency lacked sufficient information to assess the cumulative impacts of the proposed project and the DNS was issued in error.

D. The Agency Lacked Sufficient Information about Steep or Hazardous Slopes.

In response to SEPA Checklist Question 1.a, the applicant merely used a highlighter to highlight the words “hilly, steep slopes, mountainous.” No text was provided to give a general description of the site. The checklist requires substantially more detailed information, so that the agency can assess the project’s probable, significant adverse impacts on the earth element. The checklist instructions state: “Steep or hazardous slopes. Describe hazardous slopes, including slope percentage and vertical height. Identify any large, deep-seated slumps, unstable areas, and any mass wasting features.” None of that information was provided by the applicant in response to Checklist Question 1.a. Without that detailed information, the agency lacked sufficient information to assess the project’s probable, significant adverse environmental impacts on the earth element. As a result, the DNS was issued in error.

Moreover, the applicant’s answer under Checklist Question 1.b (“What is the steepest slope on the site (approximate percent slope)?”) is inaccurate and incomplete. The applicant inserted “80%.” As discussed above, this checklist was prepared and submitted before the project’s FPA was revised. Under the revised FPA, the areas of timber harvest include the area of the roadbed, which dives into very steep ravines at the several stream fords. The slopes in the areas of the stream crossings exceed 100%. This was not disclosed by the applicant or considered by the agency.

As further described in our comment letter of May 30, 2024 regarding FPA No. 2819391 (which is attached hereto and incorporated by reference), FPA No. 2819391 proposes a road extension across alluvial fans and the associated streams and proposes a timber harvest on an alluvial fan. Moreover, the agency lacked sufficient information regarding the quantity and source of fill material for the proposed new road. The applicant did not disclose the amount of fill material, the type of fill material, or the source of the fill material except to state: “The fill source will be hard rock from existing forestry rock pits.” Checklist Question B.1.e. No information was provided about where these rock pits are located, whether the source of the fill presents likely impacts from invasive plants like English ivy, how and by what route the material would be trucked in, or whether the material would need to be crushed (and, if so, where and with what noise and dust impacts).

The agency lacked sufficient information to assess the impacts of road building and logging on an alluvial fan.

E. The Agency Lacked Sufficient Information about Impacts to Surface Water.

The applicant admits that “fuel, oils or other heavy machinery waste materials may inadvertently reach surface waters because of heavy equipment use or failures.” Checklist Question 3.a.6. But the applicant fails to disclose the impacts of herbicide spraying following logging activity. Nor does the applicant disclose that fuel, oil, other waste materials, or herbicides that are discharged into streams at any of the seven typed stream crossings will end up in Lake Cavanaugh—the sole source of drinking water for dozens of residences. The proposed logging and road building would occur on very steep slopes and any pollutants discharged into any of the several stream crossings would reach Lake Cavanaugh very rapidly. Without that disclosure, the agency lacked sufficient information to issue the DNS.

F. The Agency Lacked Sufficient Information about Impacts to Waste Runoff and Stormwater.

As discussed above, the applicant proposes logging and roadbuilding on very steep slopes, on and across steep gradient streams that flow down the side of Frailey Mountain, past residential homes, and into Lake Cavanaugh. The applicant admits that petrochemicals and waste materials may reach surface waters. But the applicant does not disclose the speed, concentrations and total loading of waste and sediment-laden stormwater runoff that could reach surface waters that provide the sole source of drinking water for adjacent residences, or how denuding the steep hillside is likely to increase the volume and velocity of stormwater runoff. See the photo in Section III.B, below, showing increased runoff about to enter the lake (in the background), laden with sediment, from last year’s logging that was performed in the immediate area of this proposal.

G. The Agency Lacked Sufficient Information about Impacts to Vegetation.

As discussed above in Section II.A, the agency did not consider the increase in proposed harvest from 30 mbf in the originally-submitted FPA to 45 mbf in the revised FPA. When it issued the DNS, the agency lacked sufficient information regarding that substantial increase in harvest, which is also is a significant impact to vegetation.

The agency also lacked information about replanting. The applicant states in response to Checklist Question 4.d: “Conifer will be replanted after timber harvest.” The applicant does not provide the species of conifer that will be used for replanting. Without that disclosure, the agency lacked sufficient information to issue the DNS.

H. The Agency Lacked Sufficient Information about Impacts to Animals.

Nearby residents have observed many more species of animals and birds on and near the project site than were identified by the applicant, including but not limited to: wood ducks, loons, finches, fox, mountain lions, eagles, herons, osprey, and hummingbirds. The agency lacked sufficient information about impacts to animals to issue the DNS.

I. The Agency Lacked Sufficient Information about Noise Impacts.

The applicant states in response to Checklist Question B.7.b.2: “Short term noise will be created from timber harvesting and road building equipment.” No information is provided regarding the hours during which noise would come from the site or the decibel levels of that noise as experienced at adjacent property lines or the existing noise levels in this rural environment. But in response to Checklist Question B.14.e, the applicant states that heavy truck traffic will occur starting at 5am for the life of the project. The noise from heavy trucks on steep grades in the early morning hours is likely to have significant adverse noise impacts. The agency lacked sufficient information about noise impacts to issue the DNS.

J. The Agency Lacked Sufficient Information about Impacts to Adjacent Residential Land Uses.

The applicant states in response to Checklist Question 8.a: “The proposed project should have no affect t the site [sic] or adjacent sites.” The proposed project is likely to greatly increase the levels of traffic, noise, dust, and visual aesthetics impacts during and after construction. The applicant failed to provide information necessary to evaluate these impacts. Without that disclosure, the agency lacked sufficient information to issue the DNS.

K. The Agency Lacked Sufficient Information about Impacts to Aesthetics.

The applicant states in response to Checklist Question 10.b: “Proposal is visible from the lake Cavanaugh area.” The applicant fails to describe the severity and extent of the those impacts. The number of homes and the nature of the view impacts was not provided. Without that disclosure, the agency lacked sufficient information to issue the DNS.

L. The Agency Lacked Sufficient Information about Impacts to Recreation.

South Shore Drive is frequently used by residents and visitors for walking, running, skating, and biking. This road has no sidewalks and little or no shoulders. The addition of heavy trucks used for transporting logs and fill to this narrow road is likely to have significant adverse impacts on these recreational uses and is likely to create a safety hazard to recreational users of the road. In addition, runoff from the proposed activity is likely to transport large woody debris to Lake Cavanaugh, creating a safety hazard to recreational boaters from shallow submerged or barely visible floating woody debris. The agency lacked sufficient information about impacts to recreation to issue the DNS.

M. The Agency Lacked Sufficient Information about Impacts to Transportation.

As described above, South Shore Drive lacks sidewalks and shoulders and is frequently used by local residents and visitors. The applicant’s response to Checklist Question B.14.e states that trips per day will be: “Approximately 10-15 trips per day while the logging/road building work is active. Most traffic would occur between 5am and 4pm at the site.” This response does not seem accurate;

more trucks than that are likely required for the transportation of fill and the removal of 45 mbf of timber (note that this checklist was prepared when the applicant was proposing 30 mbf of timber harvest and has not been updated to reflect the increase to 45 mbf). No public street or vicinity map showing access to the site was provided, so the agency lacks information on the route(s) that heavy trucks would take to and from the project site. Nor is the location of the lumber mill to which the logs will be transported provided. Without that route information and accurate information regarding the volume of heavy truck traffic, traffic impacts cannot be adequately assessed by the agency.

III. BASED ON THE INFORMATION THAT WAS PROVIDED TO THE AGENCY, A THRESHOLD DETERMINATION OF SIGNIFICANCE WAS REQUIRED.

A. The Project May Have Probable Significant Adverse Impacts on Slope Stability.

As further described in the May 27, 2024 comment letter of Dan McShane, L.E.G., M.Sc. (submitted together with our comment letter of May 30, 2024 regarding FPA No. 2819391), FPA No. 2819391 proposes a road extension across alluvial fans and the associated streams and proposes a timber harvest on an alluvial fan.

Timber harvest is not permitted on alluvial fans associated with Type Np (no fish, perennial flow) streams. WAC 222-30-021(2)(b)(vi) (“No timber harvest is permitted within an alluvial fan”). Unlike buffer requirements, which are adjustable depending on local circumstances, the prohibition against harvest on an active alluvial fan is absolute (subject only to the stream-crossing exception, but no stream is crossed in AF-2 and the proposed timber harvest goes well beyond any road building activity).

The geotechnical report attached to FPA No. 2819391 (Icicle Creek Engineers, Nov. 1, 2023,³ hereinafter “ICE Geotech Report”) identifies three alluvial fan areas: AF-1, AF-2 and AF-3. The applicant admits that AF-1 and AF-3 are active alluvial fans. But the applicant asserts that AF-2 is a “relict” alluvial fan and thus deems it “OK to harvest” as part of the “Proposed Harvest Unit.” ICE Geotech Report at Figure 12 (“ALLUVIAL FAN MAP”), PDF 48/50. The “Proposed Harvest Unit is elsewhere identified as “Unit 1.” FPA 2819391 at PDF 11, 14. This Unit 1 is proposed to be clearcut. ICE Geotech Report at 3, PDF 24/50 (“TLI is proposing clearcut harvest of . . . primarily mature conifer trees”).

Harvesting trees on an active alluvial fan can contribute to the destabilization of the fan, as the Board Manual notes at M7-8: “Alluvial fans may build up over thousands of years and be covered by trees. The roots of these trees can serve to stabilize fan channels.” Yet nothing in FPA No. 2819391 proposes a replacement for the lost ecological function of removing the mature trees in

³ Icicle Creek Engineers, Inc. Report of Geotechnical Services Evaluation of Potentially Unstable Slopes and Landforms and Alluvial Fans Proposed Road A Extension and Harvest Unit SW¼ Section 27, Township 33 North, Range 6 East Lake Cavanaugh Area, Skagit County, Washington November 1, 2023, ICE File No. 1319-005.

the roadbed, which cuts across three alluvial fans. FPA No. 2819391 specifies that potentially unstable slopes are present both “in” and “around” the proposed roadbuilding and logging. FPA No. 2819391 at PDF 1/50. The FPA also specifies that the soils in the area of the proposed roadbuilding and logging are both “Highly Erodible” and “Highly Unstable.” *Id.*

Mr. McShane agrees with ICE that AF-1 and AF-3 are active alluvial fans. But he and Lake Cavanaugh Trust disagree with ICE regarding AF-2. AF-2 is not a relict alluvial fan. Instead, “AF-2 is essentially part of the same alluvial fan as AF-3.” McShane Comment, May 27, 2024, at 2. Mr. McShane provides three reasons demonstrating that ICE’s determination that AF-2 is a relict alluvial fan is incorrect.

First, bare earth LiDAR imagery “shows what appear to be three swales or old channels on the fan area surface. These swales are not described in the report and suggest that stream channels occupied this surface in the past.” McShane Comment, May 27, 2024, at 2 (and see LiDAR image on same page). “The lidar also indicates features that appear to be overflow berms – a typical feature of debris flow deposition on alluvial fans.” *Id.*

Second, ICE describes Stream #2 as incised 10 to 15 feet into the fan surface at the apex of AF-2. ICE Geotech Report at 9, PDF 30/50. ICE opines that “AF-2 was formed when Stream 2 was at a higher base level, and therefore under geologic conditions which are no longer present and are no longer dynamic[.]” *Id.* But the “approach of using base elevation or incision into the fan surface is inconsistent with the Forest Board Manual for alluvial fan assessments.” McShane Comment, May 27, 2024, at 3. “The degree of channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential, as infrequent but large flood events or debris flows can rapidly fill the channel.” (Forest Board Manual, page M2-37). Infrequent but large flood events or debris flows are likely in Stream #2, as explained by Mr. Shane in his third reason why ICE’s determination that AF-2 is a relict alluvial fan is incorrect.

Third, evidence from nearby similarly-sized and similar gradient stream watersheds indicates that infrequent large debris flows should be expected on Stream #2:

- a. “A large debris flow took place on the stream two streams to the west of Stream #2 in 2016. That stream was similarly incised into the upper fan and debris completely filled the channel and was deposited on the fan surface just past the top edge of the channel beginning at the apex of the alluvial fan.” McShane Comment, May 27, 2024, at 3. “The presence of mature trees on the fan prevented debris flow material from leaving the stream route and thus prevented an avulsion onto the upper fan surface. However, debris did escape the stream route as soon as it entered the clear cut harvest on the lower part of the fan.” *Id.* As Mr. McShane points out, this 2016 debris flow event “supports the Board Manuals statement that ‘channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential’ as this stream nearly immediately incised back down to bedrock on the upper fan.” *Id.*

- b. “A similar event took place on another stream of similar size further to the west in approximately 2002. That stream also filled its incised channel, but escaped the channel onto the fan surface as soon as the debris flow reached a clear cut on the fan surface.” *Id.*
- c. “A debris flow took place to the east as well in approximately 2016. That debris flow stopped on the upper part of the fan, but does indicate that debris flows are an ongoing active geology process on the streams that extend to the ridge of mountain slope above.” *Id.*

“The three streams described above have watersheds of a similar size and gradient to that of Stream 2 and demonstrate that the geologic processes that lead to debris flows filling incised channels and fan processes at these alluvial fans is still active and dynamic under current geology and climate conditions.” *Id.*

Timber harvesting on alluvial fans is prohibited for a good reason—they are unstable and prone to landslides and debris flows originating above. Because the applicant proposes to harvest timber on an alluvial fan, the project may have probable significant adverse impacts on slope stability.

B. The Project May Have Probable Significant Adverse Impacts on Surface Waters.

In its SEPA Checklist, the applicant admits that “fuel, oils or other heavy machinery waste materials may inadvertently reach surface waters because of heavy equipment use or failures.” SEPA Checklist Question B.3.a.6 (PDF 6). More generally and not limited to inadvertent failures, the applicant admits that “sediment from road building and logging could enter surface waters.” SEPA Checklist Question B.3.c.2 (PDF 7). That is an understatement. The photograph below shows increased runoff about to enter the lake (in the background), laden with sediment, from last year’s logging that was performed in the immediate area of this proposal. Those residential lots were directly and severely impacted from the increased runoff flooded that flooded those lots and South Shore Drive:



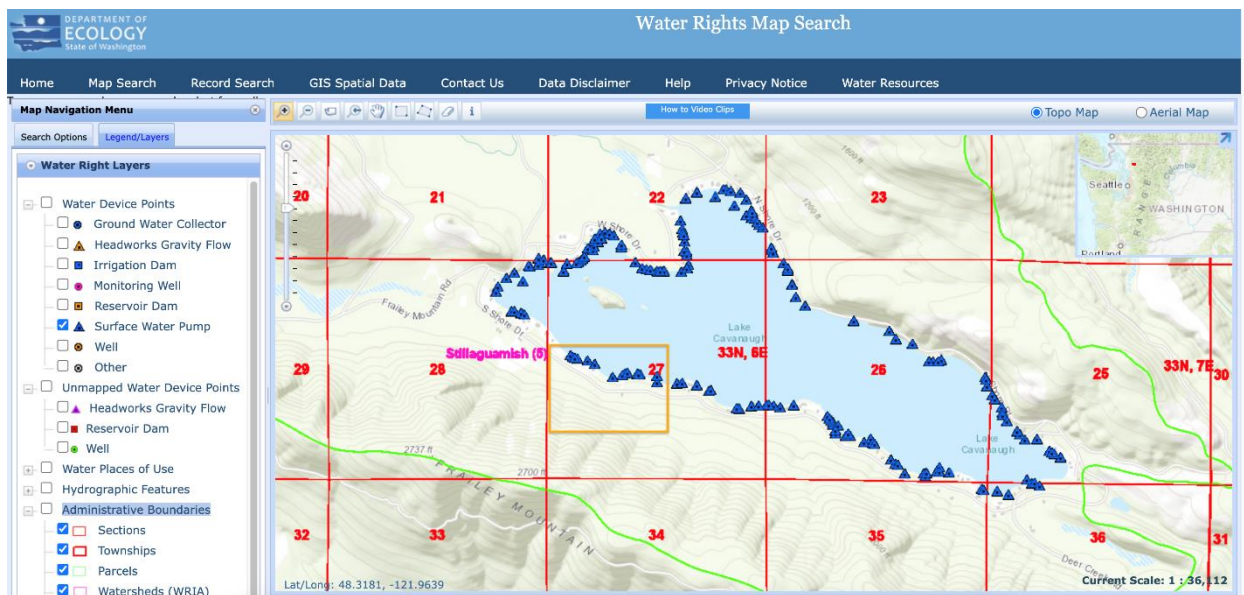
The DNS was issued in error because the project may have probable significant adverse impacts to surface waters.

C. The Project May Have Significant Adverse Impacts on Fish.

The increase in sediment laden runoff from the proposed project described above is likely to have a significant adverse impact on fish. The applicant admits that the streams in the project area are fish-bearing. The applicant proposes to cross those streams with a combination of multiple fords, culverts, and a bridge. FPA 2819391 (May 29, 2024 revision) at PDF 5/50. The applicant admits that its proposed project may result in discharges of fuels, oils, waste materials, and sediment to these streams. The applicant states that the fish-bearing sections of the streams are downstream of the proposed logging and road building, but ignores that any pollutants discharged to these steep gradient streams would be rapidly transported into the fish-bearing sections and into Lake Cavanaugh. These discharges of pollutants may have significant adverse impacts to fish.

D. The Project May Have Significant Adverse Impacts on Domestic Drinking Water Supplies.

Lake Cavanaugh supplies drinking water via surface water withdrawals for dozens of residences. There are dozens and dozens of lake residents who are not able to drill wells due to the rock formations beneath their homes and rely on lake water as their sole source of water. Many others around the lake also rely on the lake water for the acts of daily living. The figure below includes only surface water pumped withdrawals around the lake (excluding wells). The area of the proposed land disturbing activity is highlighted with an orange box:



Given the indicated water run-off noted in the applicant's response to Checklist Question B.3.a, there is a tremendous potential for harmful impact to those residents in the vicinity of the proposed logging sites. Gasoline, herbicides, and other harmful liquids used on site have a high likelihood to enter the lake. For instance, the mention of water run-off being directed to "suitable road drainage systems" is not possible as described in the submitted Environmental Checklist.

All natural waters (streams, rainfall, snowfall) draining Frailey Mountain run into drainage ditches running East-West along Southshore Drive. All of these drainage ditches ultimately pass under South Shore Drive through large metal/concrete drainage pipes. These drain directly into the lake.

The SEPA checklist indicates, the fish in the lake will be impacted by any contaminated water entering the lake. But those same impacts will be visited upon the families who rely on lake water as a sole water source. Heavy metals, detergents, fuel, motor oil, herbicides, and other contaminants can be extremely dangerous even if ingested in small amounts. Exposure to these substances over time only exacerbates the issue for the lake residents.

The DNS was issued in error because the project may have significant adverse impacts to nearby drinking water supplies.

E. The Project May Have Significant Adverse Impacts on Aesthetics.

The project would involve heavy trucks climbing and descending steep grades and accelerating onto South Shore Drive, starting as early as 5am, for the life of the project. That noise is likely to have significant adverse impacts on nearby residents, destroying the peaceful rural environment, awakening sleeping souls, and potentially causing health impacts.

The project clearcutting and roadbuilding would be highly visible from Lake Cavanaugh. The visible denuding and scarring of scenic Frailey Mountain, which is prominent in the view enjoyed from the residences surrounding Lake Cavanaugh, would cause significant adverse visual aesthetic impacts to the residents of and visitors to Lake Cavanaugh.

F. The Project May Have Significant Adverse Impacts on Transportation.

The addition of new heavy truck traffic to South Shore Drive is likely to have a significant adverse impact on transportation. These heavy trucks would be moving at slow speeds when they enter onto or exit from South Shore Drive. The use of heavy trucks on South Shore Drive would degrade the road surface at an accelerated rate. While no route map or traffic study was provided by the applicant, it is likely that the heavy truck traffic would impact levels of service at intersections along the haul route.

G. The Project May Have Significant Adverse Impacts on Recreation.

The proposed project is likely to have a significant adverse impact on recreational users of South Shore Drive (which lacks sidewalks and shoulders and is frequently used for walking, running,

skating, and biking). The proposed project is also likely to have significant adverse impact on recreational users of Lake Cavanaugh, by adding large woody debris that would float just under the surface of the lake or be barely visible on the surface, causing a safety hazard to boaters, water skiers, and wakeboarders.

H. The Project May Have Significant Adverse Impacts on Waste Runoff and Stormwater.

The ICE Geotech Report states that Stream #2 crossing is located where the creek is incised into a 10- to 15-foot deep valley. ICE Geotech Report at 8, PDF 29/50. ICE opines that “Stream #2 will occasionally convey naturally-occurring debris flows sourced in its upper watershed[.]” *Id.* at 9, PDF 30/50. ICE states that the “naturally-occurring debris flows conveyed by Stream #2 also have the potential to overtop the channel, avulse into a new channel, and possibly affect South Shore Drive and residential structures downstream of Stream Crossing #2, so we expect that the naturally-occurring risk to public safety will be **moderate to high.**” *Id.* at 10, PDF 31/50 (bold emphasis in original).

Mr. McShane and Lake Cavanaugh Trust agree that the proposed bridge over Stream #2 has sufficient clearance to “allow clear water floods to pass under the bridge.” McShane Comment, May 27, 2024, at 4. But “debris flow peak discharges typically greatly exceed clear water floods. Debris flood and debris flows have peak discharge rates that can be considerably greater than 100-year flood return periods.” *Id.* “Debris flow peak discharges up to 50 times the peak discharge of a 200-year return period clear water flood have been reported by Jakob and Jordan (2001).” *Id.*

“[C]reeks subject to debris flows and debris floods may flood more frequently and at much greater intensity than the predicted clear water flood return periods based on standard run off analysis.” *Id.* “Large logs will likely be incorporated within the debris flows” at the proposed Stream #2 bridge crossing. *Id.* Mr. McShane has personally observed this “on most of the debris flows on the streams coming off the upper ridge of Frailey Mountain[.]” *Id.* Mr. McShane provides a photo as an example:



Large logs from debris flow in stream two watersheds to the west, a similar sizes and gradient stream to Stream #2. Note large logs deposited as much as 20 feet above bottom of stream channel.

Id. at 5. “Large debris flows with large logs will very likely become jammed at a bridge crossing at [the proposed bridge over Stream #2]. This will alter the flow path of the debris flows out of the channel increasing the risk to down slope properties that are located away from the stream path and also potentially causing a larger debris dam failure downstream of the bridge location.” *Id.* at 4. In sum, as stated by Mr. McShane:

Removal of trees on the alluvial fan will increase the risk of debris flows traveling further down the alluvial fan and increase the risk of debris flows with large logs impacting properties and public resources on the lower reaches of the alluvial fan. The removal of trees also will increase the risk of a channel avulsion impacting properties and public resources lower on the fan surface. Placing a permanent bridge across an area where debris flows are expected to flow increases the risk of channel blockage during a large debris flow event resulting in an increase to the risk [of] down fan properties and public resources.

Id. at 6.

IV. CONCLUSION

For the foregoing reasons, DNR should withdraw the SEPA DNS and issue a DS for this project.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Zachary Griefen
griefen@bnd-law.com

ATTACHMENT A



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

May 30, 2024

VIA EMAIL TO: northwest.region@dnr.wa.gov
NW_FP@dnr.wa.gov

Jay Guthrie, Regional Manager
Teresa Guard, Forest Practices Permit Specialist
Northwest Region
919 N. Township St.
Sedro Wooley, WA 98284-9384

Re: Public Comments on FPA No. 2819391

Dear Mr. Guthrie, Ms. Guard, and DNR:

Our firm represents the Lake Cavanaugh Trust, a group of landowners along the shore of Lake Cavanaugh in Skagit County. Our client's members and their neighbors around the lake oppose the pending forest practice application submitted by Timberline Logging, Inc., for road building and logging on the slopes of Frailey Mountain, FPA No. 2819391. For the reasons described here, DNR should deny approval of FPA No. 2819391.

As an initial matter, the applicant submitted a revised FPA on May 29, 2024. The comment period on FPA No. 2819391 ends on May 30, 2024. As of May 30, 2024, DNR's Forest Practices Application Review System (FPARS) states the "notification date" for FPA 2819391 as 5/29/24.¹ The public comment period should run from the current notification date of this FPA. In light of the new notification date and yesterday's revisions to FPA 2819391 (on the literal eve of the comment period deadline), we request that the comment period on FPA 2819391 be restarted, so that our comment letter, our consultant's comment letter, and the comments of nearby residents can address the revised FPA.

It is unfair to allow the applicant to revise the application on the next-to-last day of the comment period without also extending the comment period. For example, our consultant, Dan McShane, provided us with his comment letter several days ago (submitted herewith) and is in the field today, so he cannot revise his comments to address the revised application. Any references in Mr. McShane's comment to page numbers in the FPA refer to the pagination of the FPA prior to yesterday's revisions.

¹ <https://fortress.wa.gov/dnr/protection/fparssearch/FPARResult.aspx?fpa=2819391> (last visited May 30, 2024).

1. Timberline Logging, Inc. Is Not a Small Forest Landowner

The FPA claims that Timberline Logging is a small forestland owner as defined in RCW 76.09.450 (FPA PDF 3/50) and that Timberline Logging owns less than 500 acres of timber lands (FPA PDF 4/50, response to Question 11.i regarding the trigger for Appendix J. Marbled Murrelet Form). Both statements are incorrect, because Timberline Logging is co-owned by David and Robert Nielsen, who also co-own Nielsen Brothers, Inc. The two companies use the same mailing address in Bellingham: 900 Dupont Street, Bellingham, WA, 98225. The contact email for landowner is: SamP@nielsenbrothers.net (note Nielsen Brothers email address). Page 1 (PDF 2/50) of FPA No. 2819391 confirms that the timber owner of this FPA is Nielsen Brothers, Inc. Note also that the applicant's SEPA checklist is signed by the same person that signed the FPA—Samuel Petska—and on that SEPA checklist he states his position and organization as “Forester/Nielsen Brothers Inc.” SEPA Checklist at PDF 15.

In light of the intertwined nature of the businesses, Timberline Logging's timber harvest and landownership must be aggregated with Nielsen Brothers and any other companies controlled by the Nielsen Brothers (including but not limited to West Side Logging). Without a showing by Nielsen Brothers that it (together with its corporate alter egos) meets the definition of “small forestland owner” in RCW 76.09.450, Timberline Logging cannot qualify for the more lenient rules applicable to small landowners.

DNR should deny the FPA unless Timberline Logging discloses its true nature as a large forestland owner, not a small forest landowner. Such a disclosure likely would require Timberline Logging to revise various portions of this FPA.

Timberline Logging/Nielsen Brothers appear to acknowledge that it is appropriate to consider all logging operations by both Timberline and Nielsen because this application includes a Marbled Murrelet Form. That form was submitted because this FPA is within 50 miles of saltwater and Timberline Logging/Nielsen Brothers own more than 500 acres of forestland in Washington state.²

2. No Road Maintenance and Abandonment Plan (RMAP)

FPA No. 2819391, page 4 (PDF 5) shows no abandonment date for “Road A Extension.” Large forest landowners are required to submit a full RMAP. WAC 222-24-051. As described above, Timberline Logging/Nielsen Brothers is a large forestland owner, not a small forestland owner. The absence of a full RMAP is grounds to deny this FPA. The “Small Forest Landowner Checklist Road Maintenance and Abandonment Plan” that is included in the FPA starting at PDF 18/50 is insufficient.

² We note that the current instructions for the Appendix J Marbled Murrelet Form state: “This form is only necessary if you are harvesting timber, salvaging timber, or constructing forest roads within 50 miles of saltwater (marine waters).” https://www.dnr.wa.gov/publications/fp_form_murrelet_instructions.pdf (last visited May 30, 2024).

3. FPA No. 2819391 Proposes Forest Practices on an Alluvial Fan.

As further described in the May 27, 2024 comment letter of Dan McShane, L.E.G., M.Sc. (submitted together with this comment letter under the same cover email), FPA No. 2819391 proposes a road extension across alluvial fans and the associated streams and proposes a timber harvest on an alluvial fan.

Timber harvest is not permitted on alluvial fans associated with Type Np (no fish, perennial flow) streams. WAC 222-30-021(2)(b)(vi) (“No timber harvest is permitted within an alluvial fan”). Unlike buffer requirements, which are adjustable depending on local circumstances, the prohibition against harvest on an active alluvial fan is absolute (subject only to the stream-crossing exception, but no stream is crossed in AF-2 and the proposed timber harvest goes well beyond any road building activity). While modifications to buffer requirements might be minor (as in *Quinault Nation*), harvest on an alluvial fan is more than minor and forbidden.

The geotechnical report attached to FPA No. 2819391 (Icicle Creek Engineers, Nov. 1, 2023,³ hereinafter “ICE Geotech Report”) identifies three alluvial fan areas: AF-1, AF-2 and AF-3. The applicant admits that AF-1 and AF-3 are active alluvial fans. But the applicant asserts that AF-2 is a “relict” alluvial fan and thus deems it “OK to harvest” as part of the “Proposed Harvest Unit.” ICE Geotech Report at Figure 12 (“ALLUVIAL FAN MAP”), PDF 48/50. The “Proposed Harvest Unit is elsewhere identified as “Unit 1.” FPA 2819391 at PDF 11, 14. This Unit 1 is proposed to be clearcut. ICE Geotech Report at 3, PDF 24/50 (“TLI is proposing clearcut harvest of . . . primarily mature conifer trees”).

Harvesting trees on an active alluvial fan can contribute to the destabilization of the fan, as the Board Manual notes at M7-8: “Alluvial fans may build up over thousands of years and be covered by trees. The roots of these trees can serve to stabilize fan channels.” Yet nothing in FPA No. 2819391 proposes a replacement for the lost ecological function of removing the mature trees in the roadbed, which cuts across three alluvial fans. FPA No. 2819391 specifies that potentially unstable slopes are present both “in” and “around” the proposed roadbuilding and logging. FPA No. 2819391 at PDF 1/50. The FPA also specifies that the soils in the area of the proposed roadbuilding and logging are both “Highly Erodible” and “Highly Unstable.” *Id.*

Mr. McShane agrees with ICE that AF-1 and AF-3 are active alluvial fans. But he and Lake Cavanaugh Trust disagree with ICE regarding AF-2. AF-2 is not a relict alluvial fan. Instead, “AF-2 is essentially part of the same alluvial fan as AF-3.” McShane Comment, May 27, 2024, at 2. Mr. McShane provides three reasons why ICE’s determination that AF-2 is a relict alluvial fan is incorrect.

³ Icicle Creek Engineers, Inc. Report of Geotechnical Services Evaluation of Potentially Unstable Slopes and Landforms and Alluvial Fans Proposed Road A Extension and Harvest Unit SW¼ Section 27, Township 33 North, Range 6 East Lake Cavanaugh Area, Skagit County, Washington November 1, 2023, ICE File No. 1319-005.

First, bare earth LiDAR imagery “shows what appear to be three swales or old channels on the fan area surface. These swales are not described in the report and suggest that stream channels occupied this surface in the past.” McShane Comment, May 27, 2024, at 2 (and see LiDAR image on same page). “The lidar also indicates features that appear to be overflow berms – a typical feature of debris flow deposition on alluvial fans.” *Id.*

Second, ICE describes Stream #2 as incised 10 to 15 feet into the fan surface at the apex of AF-2. ICE Geotech Report at 9, PDF 30/50. ICE opines that “AF-2 was formed when Stream 2 was at a higher base level, and therefore under geologic conditions which are no longer present and are no longer dynamic[.]” *Id.* But the “approach of using base elevation or incision into the fan surface is inconsistent with the Forest Board Manual for alluvial fan assessments.” McShane Comment, May 27, 2024, at 3. “The degree of channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential, as infrequent but large flood events or debris flows can rapidly fill the channel.” (Forest Board Manual, page M2-37). Infrequent but large flood events or debris flows are likely in Stream #2, as explained by Mr. Shane in his third reason why ICE’s determination that AF-2 is a relict alluvial fan is incorrect.

Third, evidence from nearby similarly-sized and similar gradient stream watersheds indicates that infrequent large debris flows should be expected on Stream #2:

- a. “A large debris flow took place on the stream two streams to the west of Stream #2 in 2016. That stream was similarly incised into the upper fan and debris completely filled the channel and was deposited on the fan surface just past the top edge of the channel beginning at the apex of the alluvial fan.” McShane Comment, May 27, 2024, at 3. “The presence of mature trees on the fan prevented debris flow material from leaving the stream route and thus prevented an avulsion onto the upper fan surface. However, debris did escape the stream route as soon as it entered the clear cut harvest on the lower part of the fan.” *Id.* As Mr. McShane points out, this 2016 debris flow event “supports the Board Manuals statement that ‘channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential’ as this stream nearly immediately incised back down to bedrock on the upper fan.” *Id.*
- b. “A similar event took place on another stream of similar size further to the west in approximately 2002. That stream also filled its incised channel, but escaped the channel onto the fan surface as soon as the debris flow reached a clear cut on the fan surface.” *Id.*
- c. “A debris flow took place to the east as well in approximately 2016. That debris flow stopped on the upper part of the fan, but does indicate that debris flows are an ongoing active geology process on the streams that extend to the ridge of mountain slope above.” *Id.*

“The three streams described above have watersheds of a similar size and gradient to that of Stream 2 and demonstrate that the geologic processes that lead to debris flows filling incised channels and fan processes at these alluvial fans is still active and dynamic under current geology and climate conditions.” *Id.*

4. The Construction of a Bridge Across Stream #2 Will Increase the Risk of a Stream Channel Avulsion.

The ICE Geotech Report states that Stream #2 crossing is located where the creek is incised into a 10- to 15-foot deep valley. ICE Geotech Report at 8, PDF 29/50. ICE opines that “Stream #2 will occasionally convey naturally-occurring debris flows sourced in its upper watershed[.]” *Id.* at 9, PDF 30/50. ICE states that the “naturally-occurring debris flows conveyed by Stream #2 also have the potential to overtop the channel, avulse into a new channel, and possibly affect South Shore Drive and residential structures downstream of Stream Crossing #2, so we expect that the naturally-occurring risk to public safety will be **moderate to high.**” *Id.* at 10, PDF 31/50 (bold emphasis in original).

Mr. McShane and Lake Cavanaugh Trust agree that the proposed bridge over Stream #2 has sufficient clearance to “allow clear water floods to pass under the bridge.” McShane Comment, May 27, 2024, at 4. But “debris flow peak discharges typically greatly exceed clear water floods. Debris flood and debris flows have peak discharge rates that can be considerably greater than 100-year flood return periods.” *Id.* “Debris flow peak discharges up to 50 times the peak discharge of a 200-year return period clear water flood have been reported by Jakob and Jordan (2001).” *Id.*

“[C]reeks subject to debris flows and debris floods may flood more frequently and at much greater intensity than the predicted clear water flood return periods based on standard run off analysis.” *Id.* “Large logs will likely be incorporated within the debris flows” at the proposed Stream #2 bridge crossing. *Id.* Mr. McShane has personally observed this “on most of the debris flows on the streams coming off the upper ridge of Frailey Mountain[.]” *Id.* Mr. McShane provides a photo as an example:



Large logs from debris flow in stream two watersheds to the west, a similar sizes and gradient stream to Stream #2. Note large logs deposited as much as 20 feet above bottom of stream channel.

Id. at 5. “Large debris flows with large logs will very likely become jammed at a bridge crossing at [the proposed bridge over Stream #2]. This will alter the flow path of the debris flows out of the channel increasing the risk to down slope properties that are located away from the stream path and also potentially causing a larger debris dam failure downstream of the bridge location.” *Id.* at 4. In sum, as stated by Mr. McShane:

Removal of trees on the alluvial fan will increase the risk of debris flows traveling further down the alluvial fan and increase the risk of debris flows with large logs impacting properties and public resources on the lower reaches of the alluvial fan. The removal of trees also will increase the risk of a channel avulsion impacting properties and public resources lower on the fan surface. Placing a permanent bridge across an area where debris flows are expected to flow increases the risk of channel blockage during a large debris flow event resulting in an increase to the risk [of] down fan properties and public resources.

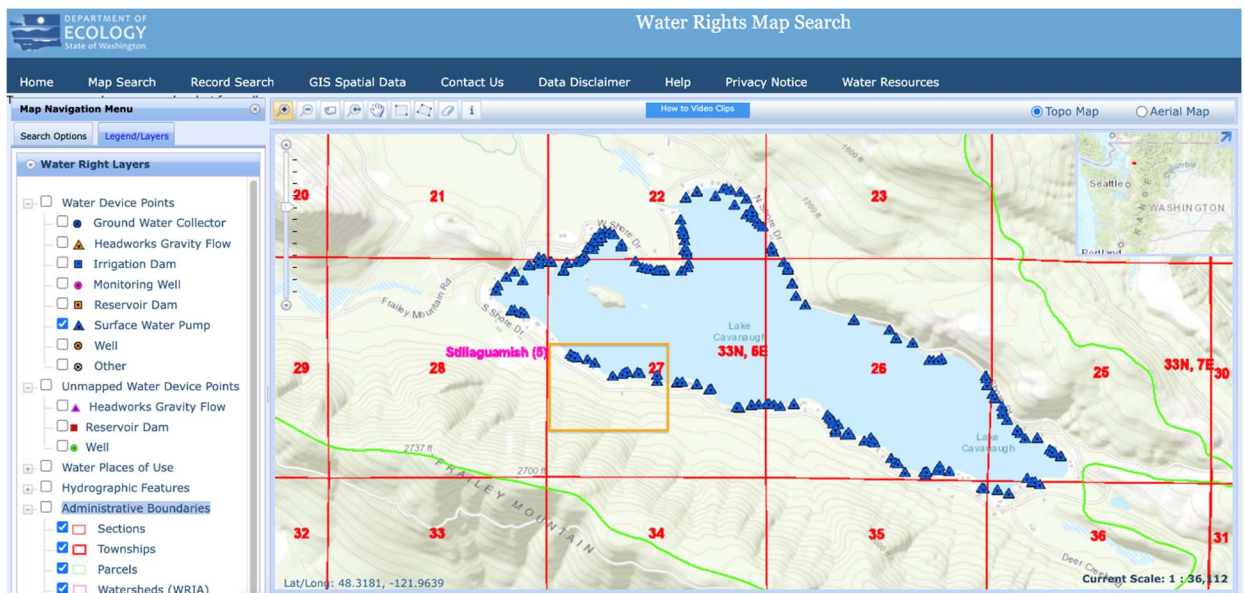
Id. at 6.

5. The Applicant's Marbled Murrelet Form is Inadequate.

The Marbled Murrelet Form is inadequate, because it asserts that there are no marbled murrelet nesting platforms within 300 feet while admitting that no protocol survey was done. The applicant admits in its SEPA Checklist: "This proposal is affected by marbled murrelet timing restrictions." SEPA Checklist, Question B.5.b (PDF 8). This FPA should not be approved without a protocol survey approved by WDFW.

6. The Project Would Adversely Impact Domestic Water Supplies.

All of the project streams drain to Lake Cavanaugh, which supplies drinking water via surface water withdrawals for dozens of residences. The figure below includes only surface water pump devices around the lake (excluding wells). The area of the proposed land disturbing activity is highlighted with an orange box:



In its SEPA Checklist, the applicant admits that "fuel, oils or other heavy machinery waste materials may inadvertently reach surface waters because of heavy equipment use or failures." SEPA Checklist Question B.3.a.6 (PDF 6). Moreover, the applicant admits that "sediment from road building and logging could enter surface waters." SEPA Checklist Question B.3.c.2 (PDF 7). That is an understatement. The photograph below shows increased runoff about to enter the lake (in the background), laden with sediment, from last year's logging that was performed in the immediate area of this proposal, where residential lots were impacted and increased runoff flooded South Shore Drive:



The FPA should be denied because of the significant risk that it poses to nearby drinking water supplies.

7. Additional Concerns

- In Appendix D of the FPA form, the applicant should have also checked “Other” under Question 2.a and accurately described the alluvial fans. The same comment applies to Appendix D, Question 3.a.
- The harvest area appears to extend onto a parcel not owned by Timberline Logging. If the scale on ICE Geotech Report Figure 6 (PDF 42/50) is accurate, then it appears that the harvest area (and perhaps part of the proposed road) is on two parcels with the southern tip of the triangle on Parcel No. 18465. Parcel No. 18465 is owned by West Side Logging LLC, which is yet another alter ego of Nielsen Brothers, Inc.
- The applicant should have reviewed this forest practices activity area to determine whether it may involve historic sites and/or Native American cultural resources, under FPA Question 8 (PDF 3).
- Under FPA Question 11.1 (PDF 4), the applicant should have checked the “Yes” box, because Timberline Logging is an alter ego of Nielsen Brothers, Inc., which owns more than 500 acres of forestland in Washington.

- Under FPA Question 20, the applicant failed to specify any particular conifer species for replanting, even though the question directs the applicant to specify the tree species.
- The ICE Geotech Report at Section 4.0 (PDF 24/50) states: “Based on our review of TLI's preliminary Activity Map (September 20, 2023; shown on Figure 2) and discussions with Mr. Petska, we understand that the three streams crossed by the Road A Extension alignment are likely to be Type Np (no fish, perennial flow) at the crossing locations, and Type F (fish use) downstream of the crossing locations.” Several reports from local residents indicate fish may be present in these streams. This should be further evaluated to ensure this application is completed correctly and proposed mitigations will be sufficient to protect fish.

8. Conclusion

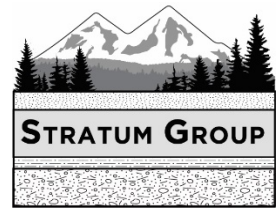
For the foregoing reasons, DNR should deny approval of FPA No. 2819391.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Zachary Griefen
griefen@bnd-law.com



PO Box 2546, Bellingham, Washington 98227

May 27, 2024

Re: **Comments on Forest Practice Application 2819391**
Lake Cavanaugh, Skagit County, Washington

WAC 222-30-021(2)(b)(vi) states “No timber harvest is permitted within an alluvial fan.”

Forest Practice Application 2819391 proposes a road extension across alluvial fans and the associated streams and proposes a timber harvest on an alluvial fan.

The geotechnical report (Icicle Creek Engineers, 2023) identifies three alluvial fan areas: AF-1, AF-2 and AF-3. The report indicates that AF-1 and AF-3 are active alluvial fan areas. I concur with that assessment based on my on the ground observations of both AF-1 and AF-3 and my interpretation of the geology of the area and lidar bare earth imagery of the fans.

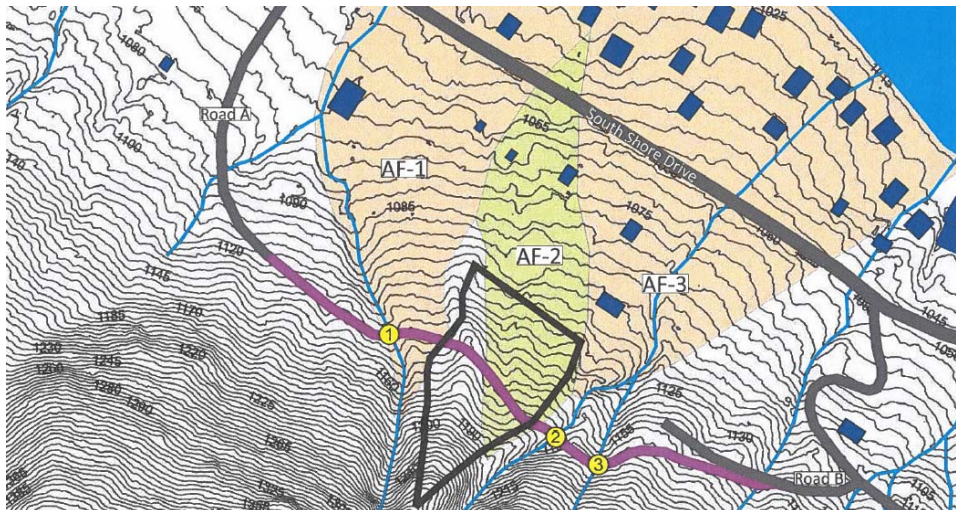


Figure 12 from Icicle report

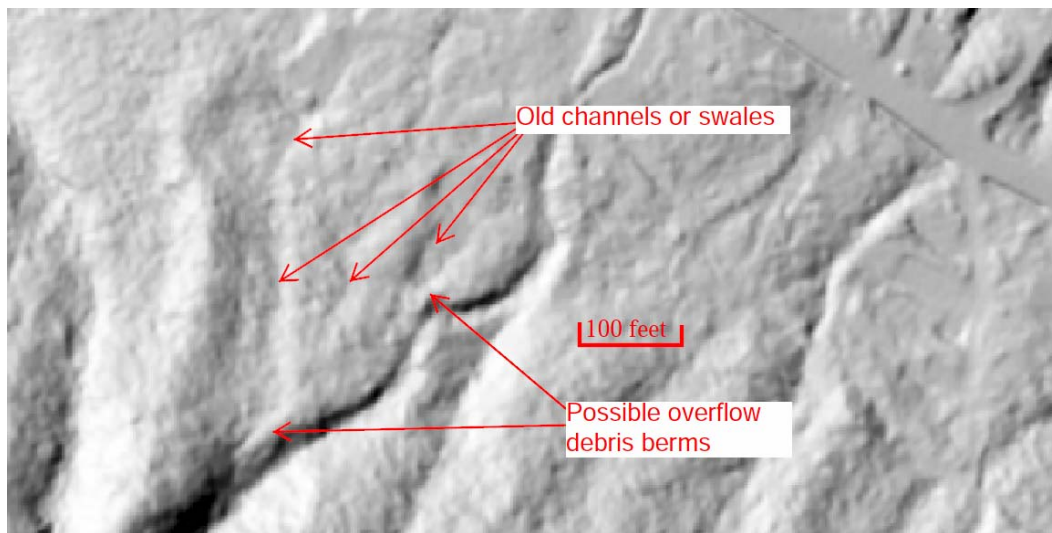
AF-2 is essentially part of the same alluvial fan as AF-3. Icicle has interpreted AF-2 as a relict alluvial fan on page 9 of their report:

AF-2 (Relict) – AF-2 is characterized by broadly divergent, smooth topography; the feature no longer contains a stream channel, though Stream #2 borders the upper (southeast) edge of AF-2 for about 100 feet before the stream diverts east. At the apex of AF-2, Stream #2 is incised into the adjacent topography about 10 to 15 feet and is lined with bedrock. AF-2 is vegetated with mature conifer trees and occasional deciduous trees, and light to medium dense brush.

We did not observe evidence of recent or historic channel avulsion, overtopping or accumulation on this surface. We did not observe evidence of streambank erosion or high water (such as scouring or sediment/woody debris deposition) at the apex, which could indicate a history of high flow events or debris flows with potential to inundate AF-3. In our opinion, AF-2 was formed when Stream #2 was at a higher base elevation, and therefore under geologic conditions which are not currently present and are no longer dynamic; based on our evaluation, AF-2 should be considered **Relict**, and is not considered an Alluvial Fan from a regulatory perspective (WAC 222-16-010("Sensitive Sites")(5)).

The following comments are provided regarding the interpretation of the alluvial fan being considered relict.

1. Lidar bare earth imagery shows that the surface of AF-2 shows what appear to be three swales or old channels on the fan area surface. These swales are not described in the report and suggest that stream channels occupied this surface in the past. The lidar also indicates features that appear to be overflow berms – a typical feature of debris flow deposition on alluvial fans.



Lidar bare earth imagery of AF-2 and Stream 2

2. Using base elevation of the stream channel on an alluvial fan is not consistent with the Forest Board Manual.

Icicle Creek describes Stream #2 as incised 10 to 15 feet into the fan surface at the apex of AF-2. Icicle Creek opines that “AF-2 was formed when Stream 2 was at a higher base level, and therefore under geologic conditions which are no longer present and are no longer dynamic”.

The approach of using base elevation or incision into the fan surface is inconsistent with the Forest Board Manual for alluvial fan assessments. The Manual states that “The degree of channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential, as infrequent but large flood events or debris flows can rapidly fill the channel.” (page M2-37 of Manual).

3. Empirical evidence at nearby similar sized and similar gradient stream watersheds indicate that infrequent large debris flows should be expected on Stream #2.

A large debris flow took place on the stream two streams to the west of Stream #2 in 2016. That stream was similarly incised into the upper fan and debris completely filled the channel and was deposited on the fan surface just past the top edge of the channel beginning at the apex of the alluvial fan. Debris was deposited all along the edge of the fan surface above the stream channel. The presence of mature trees on the upper fan prevented debris flow material from leaving the stream route and thus prevented an avulsion onto the upper fan surface. However, debris did escape the stream route as soon as it entered the clear cut harvest on the lower part of the fan. The event supports the Board Manuals statement that “channel incision at the fan head is not a reliable indicator of the lack of channel shifting potential” as this stream nearly immediately incised back down to bedrock on the upper fan.

A similar event took place on another stream of similar size further to the west in approximately 2002. That stream also filled its incised channel, but escaped the channel onto the fan surface as soon as the debris flow reached a clear cut on the fan surface.

A debris flow took place to the east as well in approximately 2016. That debris flow stopped on the upper part of the fan, but does indicate that debris flows are an ongoing active geology process on the streams that extend to the ridge of mountain slope above.

The three streams described above have watersheds of a similar size and gradient to that of Stream 2 and demonstrate that the geologic processes that lead to debris flows filling incised channels and fan processes at these alluvial fans is still active and dynamic under current geology and climate conditions.

4. The construction of a bridge across Stream #2 will increase the risk of a stream channel avulsion.

The Icicle Creek report states that Stream #2 crossing is located where the creek is incised into a 10- to 15-foot deep valley (page 8). Icicle Creek opines “that Stream #2 will occasionally convey naturally-occurring debris flows sourced in its upper watershed” (page 9).

On page 10 Icicle Creek states that “the bridge will have 15-feet of clearance between the bottom of the bridge and the 100-year high-water mark.” On this basis they expect the crossing should allow natural conveyance of water, sediment and debris during high flow and/or debris flow events”.

I agree that the clearance will readily allow clear water floods to pass under the bridge; however, debris flow peak discharges typically greatly exceed clear water floods. Debris flood and debris flows have peak discharge rates that can be considerably greater than 100-year flood return periods. Debris flow peak discharges up to 50 times the peak discharge of a 200-year return period clear water flood have been reported by Jakob and Jordan (2001).

While heavy rainfall events often trigger landslides in drainage basins leading to debris flows and floods, the debris flows and floods that exceed 100-year return period clear water flood events can occur more frequently than the calculated clear water flood return period. That is, creeks subject to debris flows and debris floods may flood more frequently and at much greater intensity than the predicted clear water flood return periods that are based on standard run off analysis. The return frequency and size of peak discharges associated with debris flows and debris floods is dependent upon stream morphology and stream basin geomorphic processes. Hence, it is essential to have a good understanding of the geomorphic processes and stream morphology to assess the scale of and the frequency of debris events.

As noted above, empirical evidence from nearby streams with similar watershed area and gradients that extend to the summit ridge of Frailey Mountain have had infrequent but very large debris flows. Similar infrequent large debris flows should be expected at this site.

Large logs will likely be incorporated within the debris flows. Such has been the case on most of the debris flows on the streams coming off the upper ridge of Frailey Mountain (personal observations at six similar streams on the north side of Frailey Mountain and pictured below).

Large debris flows with large logs will very likely become jammed at a bridge crossing at this location. This will alter the flow path of the debris flows out of the channel increasing the risk to down slope properties that are located away from the stream path and also potentially causing a larger debris dam failure downstream of the bridge location.



Large logs from debris flow in stream two watersheds to the west, a similar sizes and gradient stream to Stream #2. Note large logs deposited as much as 20 feet above bottom of stream channel.

Closure

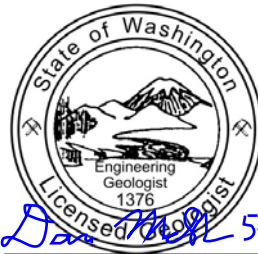
Removal of trees on the alluvial fan will increase the risk of debris flows traveling further down the alluvial fan and increase the risk of debris flows with large logs impacting properties and public resources on the lower reaches of the alluvial fan. The removal of trees also will increase the risk of a channel avulsion impacting properties and public resources lower on the fan surface. Placing a permanent bridge across an area where debris flows are expected to flow increases the risk of channel blockage during a large debris flow event resulting in an increase to the risk down fan properties and public resources.

Thank you for considerations of these comments.

Sincerely yours,
Stratum Group



Dan McShane, L.E.G., M.Sc.
Licensed Engineering Geologist



DANIEL McSHANE

ATTACHMENT B

25 Wash.App.2d 1042

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

The LAKE TRUST, a revocable trust governed by the laws of Washington, Appellant,

v.

SKAGIT COUNTY, a Washington municipal corporation including its Planning & Development Services, Defendant,

Richmond JPJ Enterprises Inc., a Washington corporation, and Nielsen Brothers, Inc., a Washington corporation, Respondents.

No. 83761-3-I

Filed February 13, 2023

Appeal from Skagit Superior Court, Docket No: 19-2-01188-5, Honorable Laura M. Riquelme, Judge

Attorneys and Law Firms

John T. Cooke, Houlihan Law, 100 N 35th St, Seattle, WA, 98103-8606, for Appellant.

Peter Robert Dworkin, Belcher Swanson Law Firm, P.L.L.C., 900 Dupont St, Bellingham, WA, 98225-3105, for Respondents.

UNPUBLISHED OPINION

Maxa, J.¹

***1** The Lake Trust appeals the trial court's rulings after a bench trial that (1) a subdivision plat's restrictive covenant that prohibited the use of lots for commercial business purposes did not apply to real estate holding company Richmond JPJ Enterprises, Inc.'s (JPJ) and logging company Nielsen Brothers, Inc.'s (NBI) use of a lot in the subdivision for their commercial logging operations, and (2) the

restrictive covenant had been abandoned. The trial court stated that the term “commercial business” normally would apply to a logging operation. But the court concluded that the historical context of the area when the subdivision was platted in the 1940s, specifically the fact that timber was actively being harvested and transported through the subdivision, showed that the covenant was not intended to apply to logging operations. The trial court also held that the abandonment defense applied because after the subdivision was platted, the area continued to be used for logging activities.

We reverse the trial court's decision and remand for the trial court to enter judgment in favor of the Lake Trust.

FACTS²

Parties and Relevant Properties

The Lake Trust owns two lots in division 3 of the Lake Cavanaugh Subdivision in Skagit County (Lake Trust property). Both of the lots are located on South Shore Drive. One of the lots abuts the shore of Lake Cavanaugh and is improved with a single family residence. The other lot is upland across South Shore Drive and is vacant. Robert McCullough is trustee of the Lake Trust. McCullough and his wife acquired the Lake Trust property in September 2004 and later transferred ownership to the Trust.

JPJ, West Side Logging, LLC and Timberline Logging, Inc. are real estate holding companies either affiliated with, run by, or owned by brothers Robert Nielsen and David Nielsen. NBI is a logging and contracting company that also is either affiliated with or owned by the Nielsen brothers. NBI contracts with JPJ, West Side and Timberline to harvest timber from their properties.

In 2018, JPJ acquired a lot in division 3 of the Lake Cavanaugh Subdivision (“JPJ property”). The lot is located on South Shore Drive approximately 2,500 feet away from the JPJ Property. JPJ purchased the lot for the sole purpose of using it for an access road for NBI's logging operations on the timberlands.

Timberline and West Side own four parcels of land totaling approximately 276 acres abutting the Lake Cavanaugh Subdivision (“Timber property”). The zoning of the Timber property allows timber cultivation and harvest of forest products.

Historical Background

In the early 1940s, the English Lumber Company owned much of the land surrounding Lake Cavanaugh, including what is now the Timber property, the Lake Trust property, and the JPJ property. English Lumber harvested timber on the properties using a series of roads and rail lines to move equipment and to remove and transport timber.

***2** In January 1945, English Lumber sold most of its timberlands around Lake Cavanaugh (“timberlands”) to Puget Sound Pulp and Timber Company, including most of the Timber property. English Lumber retained the property it owned abutting Lake Cavanaugh (“Lake Cavanaugh lands”).

In September 1945, English Lumber sold the Lake Cavanaugh lands to Leslie Eastman. The deed to Eastman stated that the deed was subject to an easement created under an agreement dated as of January 1, 1945 (1945 agreement) between the seller, English Lumber, and the purchaser, Puget Sound Pulp.³ Under the 1945 Agreement, Puget Sound Pulp was permitted reasonable rights of way over the Lake Cavanaugh lands for the purpose of logging its timber. These rights of way and Puget Sound Pulp's rights expired 10 years from the date of the agreement. The deed to Eastman also was subject to easements granted to the State Division of Forestry to construct and maintain roads for forest protection purposes and other agreements.

Between 1946 and 1948, Eastman, Eastman's estate, and other successors-in-interest (primarily Richard Shorett, trustee) subdivided the Lake Cavanaugh lands into the Lake Cavanaugh Subdivision. Lake Cavanaugh division 3 was recorded in July of 1948 and created approximately 244 lots.

The plat maps for divisions 2 and 3 of the Lake Cavanaugh Subdivision dedicated rights of ways for public travel including what would later become South Shore Drive. The plat map for division 3 also dedicated a right of way between lots 20 and 21 of Block 2. The face of the plat division 3

includes the following “Restriction”: “No lots shall be used for commercial business or manufacturing purposes.” Clerk's Papers (CP) at 449. The face of the plat also contains a “Title Certificate,” which identifies easements that encumber the lots in division 3 granted to the State Division of Forestry and Puget Sound Pulp. CP at 449.

Use of JPJ Property

Tract A of division 3, together with tracts A, B, and C of division 2 and other property conveyed by English Lumber to Puget Sound Pulp in 1945, make up the whole of the Timber property. Westside and Timberline acquired the Timber property from Weyerhaeuser Company in 1918.

In July 2019, West Side, Timberline, and JPJ (as landowner) and NBI (as timber owner and operator) submitted a Forest Practice Application (FPA) to the Department of Natural Resources (DNR) for the harvest of timber on approximately 25 acres of the Timber property. The FPA proposed using the JPJ property for access to the Timber property. DNR approved the FPA in August 2019.⁴ Under the FPA, logging operations could take place only from May 15 through September 30.

The FPA proposed three separate harvest areas: units 1, 2 and 3. Units 1, 2 and 3 are separated by streams and/or gullies. The FPA proposed two separate road systems to access the harvest areas from South Shore Drive because unit 1 cannot connect to units 2 and 3 without construction of a large and expensive bridge. Road A accesses unit 1 from South Shore Drive through the right of way between lots 20 and 21 as designated in the plat for division 3. Road B provides access to units 2 and 3 from South Shore Drive by connecting with Road C. Road B connects South Shore Drive to the Timber property by going through the JPJ Property.

***3** After DNR approved the FPA, JPJ submitted a County Road Access Application to construct access from the JPJ property to South Shore Drive for Road B. The application identified the access as commercial. The County approved the application and required JPJ to construct the access to Commercial Class Road Approach standards.

The JPJ property was used for the transit of vehicles (including but not limited to logging trucks, bulldozers and

logging equipment) to and from the Timber property to South Shore Drive. JPJ and NBI have used and continue to use the JPJ property to remove timber from Units 2 and 3. The removal of timber included the transport of logging equipment and road building machinery and equipment as well as the employees needed to remove approximately 900,000 board feet of timber from units 2 and 3 and to transport the timber to various mills in the region. Log trucks went through the JPJ property to haul timber out of the Timber property.

Lawsuit and Trial

In October 2019, the Lake Trust filed a lawsuit against JPJ and NBI that included a claim for breach of the commercial business restrictive covenant and requested declaratory judgment and injunctive relief. The Lake Trust alleged that JPJ's and NBI's use of the JPJ property for commercial access associated with commercial logging violated the restrictive covenant. In their answer, JPJ and NBI asserted affirmative defenses of abandonment of the covenant, equitable cancellation or modification of the covenant, and waiver. They also asserted counterclaims for a private way of necessity and implied easement.

The trial court presided over a two-day bench trial. The court entered a Memorandum and Order Following Trial. In addition to adopting the parties' stipulated facts, the court issued detailed findings of fact and conclusions of law.

Findings of Fact

The trial court found that the January 1, 1945 agreement allowed for Puget Sound Pulp to have an easement for purposes of transporting timber across the Lake Cavanaugh lands. And after the timberlands were conveyed to Puget Sound Pulp, Puget Sound Pulp used the timberlands to harvest timber. In the late 1940s and early 1950s, Puget Sound Pulp removed the railroads and converted those grades to trucking roads.

The trial court further found as follows:

Because Leslie Eastman was aware of the January 1, 1945 Agreement, [Puget Sound Pulp's] logging operations in the timberlands,

and [Puget Sound Pulp's] continued rights of way over what was to become Subdivision 3 when he created the subdivision. *It was his intention to exclude logging transit to and from the timberlands from the term "commercial business."*

CP at 544 (emphasis added).

Regarding Road B, the trial court found that Road B connects the Timber property to South Shore Drive via the JPJ property. The court found that Road B was in existence, either as a road or a railroad grade, before English Lumber's sales to Puget Sound Pulp and Eastman. The road was in use after conveyance of the timberlands to Puget Sound Pulp and into the 1950's, but there is no evidence that Road B remained in use on or after January 1, 1955.

Regarding the JPJ property, the trial court found that JPJ purchased the property solely to use it as an access road for NBI's logging on the timberlands. The court found, "JB [sic] and NBI's interests on the property are purely related to the commercial business of logging." CP at 543. JPJ/NBI's anticipated use of the JPJ property was to have logging and dump trucks pass through the lot for at least eight weeks each year over the course of three or four years. The logging trucks would be expected to cross the property up to 24 times a day while going to and from the timberlands. It takes a couple of minutes for trucks to cross the JPJ property. The timber harvest on the timberlands is expected to produce a gross amount of \$4 million of timber.

***4** The trial court found that the restrictions for division 3 include a prohibition on use "for commercial business or manufacturing purposes." CP at 545. The court specifically found that "JB [sic] and NBI's intended use of the JB [sic] Property is for commercial business." CP at 545.

Regarding JPJ/NBI's abandonment defense, the trial court discussed the uses of four properties in division 3 of the Lake Cavanaugh subdivision. In 2004, James and Amy Wepler were granted a permit for the purposes of harvesting merchantable timber, along with road construction, on their lot. The logging was not for purposes of clearing the lot for construction of a residence. The Wepler property was logged at some point between 2004 and 2008.

The Linert property also is in division 3, and the property's primary use is as a single family residence. The property owner, Brett Linert, has lived there for 25 years. Linert operates a handyman business in which he goes to other properties to do work on them. Linert has a small pickup truck for the business that he parks on his property. The Secretary of State's address for the business is Linert's property.

Another property within division 3 had a connection with Happy Valley Trucking, Inc. That property address was registered with the Secretary of State as the principal mailing address for the business and its registered agent. The lot also contained an occupied residence. The lot had several commercial vehicles parked on it, primarily dump trucks and a trailer, and piles of rocks that likely were gravel until the property changed hands shortly before trial. Happy Valley Trucking was actively running its operations from that address. Trucks for Happy Valley Trucking had been observed entering and exiting that property over the last several years.

At least one home within division 3 was rented as a VRBO vacation property. Nothing about the outward appearance of that building would suggest that it was anything other than a residence.

Conclusions of Law

The trial court denied the Lake Trust's breach of covenant claim and dismissed that claim. The court provided the following analysis:

Here, [Puget Sound Pulp] was actively logging the timberlands at the time that phrase was added to the plat restrictions. The January 1, 1945 Agreement and evidence of multiple old railroad grades and truck roads leading into South Shore Drive indicate that the Lake Cavanaugh Lands and specifically Subdivision 3 would be used for access to the timberlands at least through 1954 and potentially longer depending on the use of the right of way or the easement contemplated in the January 1, 1945 Agreement.

While the intention in subdividing the property was to create a more residential area around Lake Cavanaugh,

Leslie Eastman clearly contemplated that logging operations would be a component of the area. Under the January 1, 1945 Agreement, logging operations were required to transit through Subdivision 3 for several more years after the subdivision was platted in 1948. *The term "commercial business" would normally apply to a logging operation, but it does not given the historical context of the area surrounding Lake Cavanaugh.* The intended use for Subdivision 3 at the time of its creation was for it to be a residential area around the lake that allowed access to the timberlands, where [Puget Sound Pulp] was actively harvesting timber and entitled to liberal rights of way through Subdivision 3 through the end of 1954.

*5 CP at 548 (emphasis added).

The trial court also ruled that JPJ/NBI's abandonment affirmative defense applied.⁵ The court stated,

Here, there is substantial evidence that the timberlands continued to be logged after Subdivision 3 was platted and that areas such as Road B within the subdivision continued to be used into the 1950s for purposes of accessing the timberlands for logging. Even if the restrictive covenant was intended to exclude that type of use, it was immediately abandoned by then-owners of lots in Subdivision 3 who permitted such use.

CP at 549. The court did not mention the four uses of other lots discussed in the findings of fact.

Finally, the trial court denied JPJ/NBI's implied easement counterclaim. The court stated, "Given the express language of the January 1, 1945 Agreement, the court concludes that Road B was a temporary right of way and that an implied easement does not exist for this potential access road to the timberlands." CP at 550.

Lake Trust appeals the trial court's Memorandum and Order Following Trial.

ANALYSIS

A. Failure To Properly Assign Error

Initially, JPJ/NBI argue that all of the trial court's findings of fact are verities on appeal because Lake Trust did not specifically challenge any numbered findings of fact in its notice of appeal or assignments of error. In reply, Lake Trust argues that it sufficiently identified the issues for appeal. And in its reply brief, the Lake Trust also formally assigns error to the trial court's finding of fact 10 and the court's conclusion of law stating that the Lake Trust's predecessors in interest abandoned the restrictive covenants in the 1950s.

RAP 10.3(g) states, “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” The Lake Trust assigned error generally to the trial court's Memorandum and Order Following Trial and did not specifically reference finding of fact 10 or any other finding. Unchallenged findings of fact are verities on appeal. Real Carriage Door Co. ex rel. Rees v. Rees, 17 Wn. App. 2d 449, 457, 486 P.3d 955, review denied, 198 Wn.2d 1025 (2021).

Based on RAP 10.3(g), we typically do not review a claimed error not included in an assignment of error. See Phillips v. Greco, 7 Wn. App. 2d 1, 9, 433 P.3d 509 (2018). Nevertheless, in the exercise of discretion we can address findings of fact not included in specific assignments of error where the nature of the challenge is apparent from the content of the opening brief.  Harris v. Urell, 133 Wn. App. 130, 137–38, 135 P.3d 530 (2006).

Here, the Lake Trust did not comply with the requirements of RAP 10.3(g). However, the Lake Trust's brief clearly indicated that it was challenging finding of fact 10, that Eastman's intention was “to exclude logging transit to and from the timberlands from the term ‘commercial business.’” CP at 544. And the Lake Trust's brief clearly challenged the trial court's conclusion that abandonment had occurred. The issues raised and grounds for appeal were clear enough that JPJ/NBI were able to discern them and address Lake Trust's arguments. Accordingly, we exercise our discretion and consider the Lake Trust's challenge to finding of fact 10 and the trial court's finding of abandonment.

B. Standard of Review

***6** We review a trial court's decision after a bench trial to determine whether the findings of fact are supported by substantial evidence and whether the conclusions of law are supported by the findings of fact. Real Carriage Door, 17 Wn. App. 2d at 457. Substantial evidence is the amount of evidence sufficient to convince a rational, fair-minded person that a premise is true. *Id.* All evidence and reasonable inferences are viewed in the light most favorable to the prevailing party. *Id.* As noted above, findings of fact that are unchallenged are treated as verities on appeal. *Id.*

The trial court's application of facts to law and the conclusions of law are reviewed de novo. *Id.*

C. Interpretation of Restrictive Covenant

The Lake Trust argues that the trial court erred in determining that JPJ/NBI's commercial logging activities did not violate the restrictive covenant prohibiting the use of lots in the Lake Cavanaugh subdivision for commercial business purposes. The Lake Trust claims that the trial court improperly used extrinsic evidence to interpret the term “commercial business” to exclude logging operations. JPJ/NBI argues that the trial court properly applied the context rule in interpreting the restrictive covenant to exclude logging operations. We agree with the Lake Trust.

1. Legal Principles

Restrictive covenants are enforceable promises regarding the use of land.  Viking Props., Inc. v. Holm, 155 Wn.2d 112, 119, 118 P.3d 322 (2005), abrogated on other grounds by  Yim v. City of Seattle, 194 Wn.2d 682, 702, 704, 451 P.3d 694 (2019). The purpose of restrictive covenants is “to make residential subdivisions more attractive for residential purposes.”  Hollis v. Garwall, Inc., 137 Wn.2d 683, 699, 974 P.2d 836 (1999). Covenants are enforceable by injunctive relief if a plaintiff shows (1) a clear legal or equitable right, and (2) a well-grounded fear of immediate invasion of that right. *Id.*

The interpretation of a restrictive covenant is a question of law, and we apply the rules of contract interpretation in determining the meaning of a covenant.  Wilkinson v.

Chiwawa Communities Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014). The primary objective in contract interpretation is determining the drafter's intent. *Id.* at 250. Although interpretation of a covenant is a question of law, the drafter's intent is a question of fact. *Id.* But questions of fact may be determined as a matter of law if reasonable minds could reach but one conclusion. *Id.*

“In determining the drafter's intent, we give covenant language its ‘ordinary and common use’ and will not construe a term in such a way ‘so as to defeat its plain and obvious meaning.’ ” *Id.* (quoting *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993)). When examining the covenant language, we must “consider the instrument in its entirety.” *Wilkinson*, 180 Wn.2d at 250.

In general, Washington courts follow the “objective manifestation theory” of contract interpretation, under which the focus is on the reasonable meaning of the contract language to determine the parties’ intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). But to assist in determining the meaning of contract language, including restrictive covenants, courts also apply the *Berg*⁶ “context rule.” *Hollis*, 137 Wn.2d at 693, 696. This rule “enables trial courts to look to the surrounding circumstances of the original parties to determine the meaning of specific words and terms used in the covenants.” *Id.* at 696. The context rule allows consideration of extrinsic evidence, but certain extrinsic evidence is not admissible: (1) “[e]vidence of a party's unilateral or subjective intent as to the meaning of a contract word or term,” (2) “[e]vidence that would show an intention independent of the instrument,” or (3) “[e]vidence that would vary, contradict or modify the written word.” *Id.* at 695.

*7 The court in *Wilkinson* emphasized the limited use of extrinsic evidence. *Id.* 180 Wn.2d at 251-52. The court stated that extrinsic evidence can be used only “ ‘to illuminate what was written, not what was intended to be written.’ ” *Id.* at 251 (quoting *Hollis*, 137 Wn.2d at 697). Further, courts “do not consider extrinsic ‘[e]vidence that would vary, contradict or modify the written word’ or ‘show an intention

independent of the instrument.’ ” *Wilkinson*, 180 Wn.2d at 251 (quoting *Hollis*, 137 Wn.2d at 695).

2. Trial Court Findings and Conclusions

The trial court made unchallenged findings of fact that “JPJ purchased the JPJ property solely for purposes of using it as an access road for NBI's logging on the timberlands” and “JBJ [sic] and NBI's interests on the property are purely related to the *commercial business* of logging.” CP at 543 (emphasis added). In addition, the trial court made an unchallenged finding of fact that “JBJ [sic] and NBI's intended use of the JPJ Property is for *commercial business*.” CP at 545 (emphasis added). And the court noted in its conclusions of law that “[t]he term ‘commercial business’ would normally apply to a logging operation.” CP at 548.

Nevertheless, the trial court relied on extrinsic evidence to make a finding of fact that “[i]t was [Eastman's] intention to exclude logging transit to and from the timberlands from the term “ ‘commercial business’ ”, and to conclude that the term “ ‘commercial business’ “does not apply to logging operations “given the historical context of the area surrounding Lake Cavanaugh.” CP at 548. The court focused on the fact that when the restrictive covenant was included in the plat for division 3 in 1948, Puget Sound Pulp was actively harvesting timber in the timberlands and had a right of way to use division 3 for access to the timberlands until at least the end of 1954. As a result, the court found that Eastman “clearly contemplated that logging operations would be a component of the area.” CP at 548.

The dispositive issue here is whether the trial court properly relied on extrinsic evidence to determine the meaning of “commercial business” in the restrictive covenant.

3. Analysis

There is little question that the ordinary, common, plain, and obvious meaning of the term “commercial business” includes JPJ/NBI's logging activities. The trial court expressly found that JPJ and NBI used the JPJ property for “commercial business,” and concluded that a logging operation “normally” would constitute a commercial business. CP at 548. JPJ/NBI suggest that the term “commercial business” is

ambiguous, but the trial court's unchallenged findings refute that suggestion. The trial court confirmed that a logging operation is a commercial business.

As a result, the trial court necessarily was not using extrinsic evidence “to determine the meaning of specific words and terms used in the covenant[],”  Hollis, 137 Wn.2d at 696, or to “ ‘to illuminate what was written.’ ”  Wilkinson, 180 Wn.2d at 251 (quoting  Hollis, 137 Wn.2d at 697). The trial court already had determined the meaning of the term “commercial business.” Instead, the trial court used extrinsic evidence to conclude that even though a logging operation was a commercial business, Eastman intended to exclude logging operations from the scope of the restrictive covenant. But the covenant contained no such exclusion, and instead stated without qualification that use for commercial business purposes was prohibited.

***8** The Supreme Court in *Wilkinson* was clear: courts “do not consider extrinsic ‘[e]vidence that would vary, contradict or modify the written word’ or ‘show an intention independent of the instrument.’ ”  180 Wn.2d at 251 (quoting  Hollis, 137 Wn.2d at 695). But that is exactly what the trial court did here. The court essentially rewrote the covenant to state that use of lots for commercial business purposes was prohibited except for commercial logging operations.

JPJ/NBI argue that the restrictive covenant must be considered in its entirety, and they focus on the title certificate on the face of the plat. JPJ/NBI emphasize that the title certificate expressly references Puget Sound Pulp's timber access easement over division 3. They claim that the title certificate and the restrictive covenant are contradictory, requiring extrinsic evidence to resolve the contradiction.

However, the trial court did not make any findings of fact or conclusions of law regarding the title certificate. The court apparently did not find any tension between the title certificate and the restrictive covenant. Further, the title certificate does not contradict the restrictive covenant. The title certificate notes that Puget Sound Pulp had an access *easement* across division 3. The restrictive covenant states that no *lots* shall be used for commercial business purposes. Although the trial court found that Puget Sound Pulp used Road B on the JPJ property into the 1950s, there is no indication in the record that Puget Sound Pulp owned any

lots in division 3 when the subdivision was platted as opposed to exercising its easement right to access timber.

We conclude that the trial court erred in using extrinsic evidence to vary the plain language of the restrictive covenant. Accordingly, we hold that the trial court erred in ruling that the restrictive covenant did not apply to JPJ/NBI's logging operations.

4. “Use” of Property

In the alternative, JPJ/NBI argue the trial court's order should be affirmed based on the theory that temporarily transporting logs over the JPJ property does not constitute a “use” for commercial business purposes. We disagree.

JPJ/NBI focus on the fact that their activity is temporary, not permanent. But the trial court found that JPJ/NBI's intended “use” of the land was for commercial business. And the covenant's prohibition on the use of the land for commercial business does not include any temporal qualification. Instead, the covenant imposes a blanket prohibition on the use of the land within the plat for commercial business. Under *Wilkinson*, a temporal exception or qualification cannot be grafted onto the plain language of the covenant. We reject JPJ/NBI's argument.

D. Affirmative Defenses

JPJ/NBI argue that we should affirm the trial court's decision based on three affirmative defenses: abandonment, cancellation/modification, and waiver.² We disagree.

1. Abandonment of Covenant

***9** The Lake Trust argues that the trial court erred in concluding that the restrictive covenant was abandoned in the 1950s. JPJ/NBI argue that the trial court's abandonment ruling should be affirmed. We agree with the Lake Trust.

a. Legal Principles

Abandonment is an equitable defense that will preclude enforcement of a covenant. Mountain Park Homeowners

Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). “The defense of abandonment requires evidence that prior covenant violations by other residents have so eroded the general plan as to make enforcement useless and inequitable.” *Id.* at 342. Equity will not enforce a covenant if it “has been *habitually and substantially violated* so as to create an impression that it has been abandoned.” *Id.* (emphasis added) (quoting  *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407 (1983)).

However, a few violations of covenants do not constitute abandonment. *Peckham v. Milroy*, 104 Wn. App. 887, 890, 17 P.3d 1256 (2001). “Violations must be material to the overall purpose of the covenant, and minor violations are insufficient to find abandonment.” *Mountain Park Homeowners*, 125 Wn.2d at 342.

Whether a violated covenant has been abandoned generally is a question of fact.  *Green v. Normandy Park Riviera Section Cmty. Club*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007). However, we can decide questions of fact as a matter of law if reasonable minds could not differ. See *Meyers v. Ferndale School Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021).

b. Trial Court Ruling

The trial court concluded that the Lake Trust's “predecessors in interest abandoned the restrictive covenants in the 1950s when Subdivision 3 experienced significant logging activity.” CP at 549. The court found that “there is substantial evidence that the timberlands continued to be logged after Subdivision 3 was platted and that areas such as Road B within the subdivision continued to be used into the 1950s for purposes of accessing the timberlands for logging.” CP at 549. The court reasoned that even if the restrictive covenant was intended to exclude that type of use, “it was immediately abandoned by then-owners of lots in Subdivision 3 who permitted such use.” CP at 549.

c. Analysis – 1950s Logging

It is undisputed that Puget Sound Pulp continued to use the Lake Cavanaugh subdivision property, including Road B on

what is now the JPJ property, for its logging activities after the restrictive covenant was imposed in the division 3 plat. But there is no indication in the record that these activities violated the covenant.

Puget Sound Pulp had the contractual right to a right of way on the Lake Cavanaugh lands under the 1945 Agreement with English Lumber, which allowed the right of way for 10 years. Therefore, evidence of logging in and around division 3 is consistent with Puget Sound Pulp's preexisting rights. And division 3 owners could not enforce the covenant because of these contractual rights. Not coincidentally, the trial court found no evidence that Road B was used on or after January 1, 1955 – when the January 1945 agreement expired.

In addition, the trial court did not find and there is no evidence in the record that Puget Sound Pulp violated the restrictive covenant. Covenants run with the land, and burdens the owner of property subject to the covenant with a duty to comply with the restriction. *Kiona Park Estates v. Dehls*, 18 Wn. App. 2d 328, 336, 491 P.3d 247 (2021). Therefore, the covenant here necessarily applied only to owners of lots in division 3. But there is no evidence that Puget Sound Pulp or any other logging company owned a lot within division 3 during the 1950s.⁸ As a result, they were not subject to the covenant and could not have violated it.

***10** There is no evidence that the restrictive covenant was “‘habitually and substantially violated’ ” in the 1950s. *Mountain Park*, 125 Wn.2d at 342 (quoting  *White*, 34 Wn. App. at 769). Therefore, we conclude that the trial court erred in concluding that the restrictive covenant had been abandoned because of logging activity in the 1950s. We hold that as a matter of law, no such abandonment occurred.

d. Analysis – Four Alleged Violations

The trial court did not find abandonment based on the four more recent alleged violations of the restrictive covenant by the Weppers, Linert, Happy Valley Trucking, and the VRBO property. Nevertheless, JPJ/NBI argue that these violations are sufficient to affirm the trial court's finding of abandonment. We disagree.

Even if we find that substantial evidence supports those alleged violations, we conclude they are insufficient to support JPJ/NBI's defense of abandonment. The four alleged violations involve four separate properties in a 244 lot subdivision. There is no indication that these were habitual and substantial violations. And we cannot reasonably conclude that these alleged violations "so eroded the general plan as to make enforcement useless and inequitable." Mountain Park, 125 Wn.2d at 342.

We hold as a matter of law that the four alleged violations of the restrictive covenant cannot support the trial court's ruling that the defense of abandonment applied.

2. Cancellation/Modification of Covenant

JPJ/NBI argues that we should affirm the trial court's decision by applying the equitable doctrine of cancellation/modification to the restrictive covenant. We disagree.

Changed neighborhood conditions is an equitable defense to the enforcement of a restrictive covenant. Mountain Park, 125 Wn.2d at 341-42. A material change in the character of the neighborhood can modify or eliminate a restrictive covenant. Peckham, 104 Wn. App. at 893. Whether the neighborhood's character has changed is a question of fact. *Id.*

JPJ/NBI argue that the history of the Lake Cavanaugh area demonstrates that logging and forestry have constantly been around Lake Cavanaugh and division 3 from before its creation to the present. But no material change has occurred in the Lake Cavanaugh lands neighborhood. The character of the neighborhood has remained the same for decades. Therefore, we reject this argument as a matter of law.

3. Waiver of Covenant

JPJ/NBI argues that we should affirm the trial court's decision by concluding that the restrictive covenant has been waived. We disagree.

JPJ/NBI argue that the equitable doctrine of waiver is applicable because the Lake Trust took no action against past

violations over the past 18 years of ownership. But waiver is not listed among the eight equitable defenses identified by the Supreme Court in *Mountain Park* that are available to preclude enforcement of a restrictive covenant. See 125 Wn.2d at 341-42. And JPJ/NBI provide no authority suggesting that waiver is a defense applicable to the enforcement of restrictive covenants. Therefore, we reject this argument as a matter of law.

CONCLUSION

We reverse the trial court's decision and remand for the trial court to enter judgment in favor of the Lake Trust.

WE CONCUR:

Diaz, J.

Mann, J.

All Citations

Not Reported in Pac. Rptr., 25 Wash.App.2d 1042, 2023 WL 1960890

Footnotes

- ¹ The Honorable Bradley Maxa is a judge on the Court of Appeals, Division Two, sitting in Division One pursuant to RCW 2.06.040 by order of the Associate Chief Justice.
- ² The parties stipulated to many of the relevant facts, and the stipulation was adopted by the trial court in its findings of fact. Other facts come from unchallenged findings of fact.
- ³ The original 1945 agreement was not independently recorded and the parties to this lawsuit have been unable to find a copy of the original agreement.
- ⁴ The Lake Cavanaugh Trust appealed the FPA. Robert McCullough is a board member of the Lake Cavanaugh Trust.
- ⁵ The trial court declined to address the additional affirmative defenses of equitable cancellation and waiver.
- ⁶  Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).
- ⁷ The trial court ruled that abandonment had occurred, but declined to rule on cancellation/modification, and waiver. But we can affirm a trial court's decision based on any grounds supported by the record. Hoover v. Warner, 189 Wn. App. 509, 526, 358 P.3d 1174 (2015).
- ⁸ Puget Sound Pulp purchased two “tracts” in division 3, but those tracts were not lots.