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POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

LAKE CAVANAUGH TRUST,

Appellant,

v.

COMMISSIONER OF PUBLIC LANDS
HILARY FRANZ (in her official
capacity); WASHINGTON STATE
DEPARTMENT OF NATURAL
RESOURCES, FOREST REGULATION
DIVISION; TIMBERLINE LOGGING,
INC.

Respondent.

No.

NOTICE OF APPEAL AND MOTION
FOR AN EMERGENCY STAY
PURSUANT TO WAC 223-08-087(4)

Lake Cavanaugh Trust (“Appellant” or “Trust”) seeks review by the Pollution Control Hearings Board (“Board”) of the Washington State Department of Natural Resources Forest Practices Application/Notification Notice of Decision (“Decision”) approving Forest Practices Application No. 2819518, which was submitted by Timberline Logging, Inc., a corporation governed by Robert Nielsen and David Nielsen. This Notice of Appeal is filed pursuant to RCW 43.21B.230 and RCW 76.09.205.

The permit authorizes risky and unlawful logging and road construction across steep slopes, alluvial fans, and channel migration zones directly above many homes and Lake

1 Cavanaugh, in violation of the Forest Practices Act and rules and the State Environmental
2 Policy Act. There have been landslides in the immediately surrounding area in 2016, and
3 flooding and sediment delivery to homes and Lake Cavanaugh following logging as recently as
4 November 2022. This is a dynamic and highly unstable area. Indeed, in November of 2022,
5 following logging that was contested before this Board, a stream appears to have relocated
6 from its channel, flowed down a driveway, and the pictured flooding and debris flow occurred:



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16 The threat of increased slope instability caused by logging is very real and serious.

17 DNR did not provide SEPA public comment or conduct SEPA for the proposal.
18 Instead, it did so for a separate FPA and proposal that was rescinded months prior. The scope
19 of the SEPA review that did occur was inadequate and unlawful. The admitted and express
20 purpose of the road construction is to access extensive additional logging above Lake
21 Cavanaugh with probable cumulative effects on slope stability, drinking water quality, and
22 other resources, but the SEPA wholly fails to identify or assess any impacts from that related
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1 logging. Finally, the proposed would occur within ¼ mile of documented occupied marbled
2 murrelet habitat.

3 DNR’s approval and associated SEPA determination contain many procedural and
4 substantive violations of the Forest Practices Act and the State Environmental Policy Act.

5 The following is submitted in support of this appeal.

6 **1. Name and Address of Appellant.**

7 Appellant is Lake Cavanaugh Trust, a Washington non-profit organization registered
8 with the Washington Secretary of State. As detailed herein, Lake Cavanaugh Trust and its
9 members are aggrieved and have standing because it has suffered procedural harms from
10 violations of SEPA and the Forest Practices Act, which are connected to likely harm that
11 would occur due to logging, road construction, and road use: loss of slope stability, risk of
12 injury or death, risk of harm to water quality, loss of access to homes, impaired aesthetic views
13 and experience, and impaired enjoyment of the native ecosystem, including fisheries and
14 threatened marbled murrelets. These injuries are caused by DNR’s actions, and would be
15 remedied by the requested relief.

16 Appellant has a registered mailing address of 16004 73rd Place West, Edmonds, WA,
17 98026-4552. Appellant is represented by Wyatt Golding of Ziontz Chestnut law firm, located
18 at 2101 Fourth Avenue, Suite 1230, Seattle, WA 98121. The telephone number of Ziontz
19 Chestnut is (206) 448-1230. The fax number of Ziontz Chestnut is (206) 448-0962.

20 **2. Other Party.**

21 Respondent is the Commissioner of Public Lands, Hilary Franz (in her official capacity
22 as head of Washington State Department of Natural Resources) and the Washington State
23

1 Department of Natural Resources, Forest Regulation Division, an agency of the State of
2 Washington that issued the Notice of Decision appealed herein.

3 The permittee is Timberline Logging, Inc. Timberline Logging’s registered agent is
4 Bradley Swanson. The registered address is 900 Dupont St., Bellingham, WA, 98225-3105.
5 The two governors of the organization are Robert Nielsen and David Nielsen.

6 **3. Action Appealed.**

7 The action appealed is the Department of Natural Resources Forest Practices
8 Application/Notification Notice of Decision approving Forest Practices Application (“FPA” or
9 “Application”) Number 2819518 for the construction of a road and subsequent logging of
10 forest land in the surrounding area, and the associated State Environmental Policy Act
11 Determination of Non-Significance (DNS), File No. 24-053001.

12 The DNS was issued for a separate, rescinded FPA, FPA No. 2819391. The public
13 comment deadline for that application was June 13, 2024. After FPA No. 2819391 was
14 rescinded, DNR did not update public notice or accept additional SEPA comments. However,
15 upon approval of FPA No. 2819518 on September 18, 2024, DNR then updated the DNS to
16 apply to that later, separate FPA, FPA No. 2819518. The modified DNS was also issued
17 September 18, 2024.

18 The permit approval and modified DNS was received by Appellant by email on
19 September 18, 2024. A copy of Forest Practices Application No. 2819518 and attached Notice
20 of Decision is attached as Exhibit A and incorporated herein by this reference. A copy of the
21 modified DNS and associated SEPA materials are attached as Exhibit B and incorporated
22 herein by reference.
23

1 **4. Statement of Facts Upon Which Appellant Relies.**

2 The facts regarding the permit application and approval, and SEPA determination
3 process, are set forth in the attached materials and comments, attached as Exhibits A-C to the
4 Declaration of Wyatt Golding. Those exhibits are incorporated herein by reference.

5 In summary, Timberline Logging, Inc. is a corporation governed by Robert and David
6 Nielsen. The proposed logging and road construction would occur above Lake Cavanaugh, in
7 Skagit County. The approved permit is for logging and road construction across a steep slope,
8 alluvial fans, and channel migration zones directly above Lake Cavanaugh, South Shore Road,
9 and the many homes on the shores of Lake Cavanaugh. The risky proposal includes seven
10 stream crossings, multiple alluvial fans and channel migration zones, and is within ¼ mile of
11 documented occupied marbled murrelet habitat. The FPA asserts that the applicant is a small
12 forestland owner, that no marbled murrelet protocol survey is required, and that small
13 forestland owner road maintenance and abandonment processes are appropriate.

14 Lake Cavanaugh Trust is comprised of homeowners and other members of the
15 community who are dedicated to the protection of Lake Cavanaugh and the surrounding
16 environment. Along with an interest in public safety and environmental protection, members
17 of Lake Cavanaugh Trust have an interest in protecting water quality in the lake. There are
18 180 active water permits for homeowners who rely upon surface water from the lake for
19 drinking water and other uses.

20 The proposed road construction is a piecemeal approach to access additional timber
21 above Lake Cavanaugh on Frailey Mountain, that is also owned by Robert and David Nielsen
22 through a separate corporation named West Side Logging, LLC. Indeed, the modified DNS
23 acknowledges that “the planned road will be used for future forestry/logging uses. Including

1 but not limited to, equipment hauling, rock hauling, timber hauling, road maintenance, timber
2 harvest, and silviculture activities.” See Exh. B Notice of Final Determination.

3 In 2020, the Board considered an appeal and denied a request for preliminary injunction
4 involving the same parties and similar issues. Lake Cavanaugh Trust appealed FPA No.
5 2817112. See *Lake Cavanaugh Trust et al. v. DNR, Timberline Logging, Richmond JPJ,*
6 *Nielsen Brothers, Inc., and West Side Logging, LLC*, PCHB No. 19-065 (Order Denying
7 Second Motion for Stay) (May 14, 2020). The FPA involved proposed logging on a different
8 portion of an alluvial fan, which the Applicant and DNR asserted was relict and inactive.

9 That FPA was distinct from this application in that it did not include the same degree of
10 road construction and logged a different area. In reviewing the request for an injunction, the
11 Board observed that “Mr. McShane contends that this ‘alluvial fan should be considered active
12 under current geologic and climatic conditions,’ and that a debris flow event in 2016 ‘clearly
13 demonstrates that conditions on this alluvial fan stream are dynamic.’ Id., ¶ 8. He concluded
14 that harvest of trees in this area ‘will open up a potential pathway for debris flows and increase
15 the risk of debris flows down to South Shore Drive, presenting a significantly increased risk to
16 homes below Road A.’ Id.”

17 After logging in 2021, there were heavy rains the following winter. It appears that
18 flows from the slopes above may have redirected, diverting significant water, sediment, and
19 debris across South Shore Road, into private homes, and into Lake Cavanaugh. This picture,
20 provided by members of Lake Cavanaugh Trust, was taken downslope from the West Harvest
21 Area of FPA No. 2817112, from South Shore Road in November of 2022.

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This picture shows upslope, with flows coming down a driveway across the street.



These events give the Lake Cavanaugh Trust serious and understandable concern about the cumulative effects of even more logging on the slopes above their homes.

1 **5. Statement of Grounds for Appeal/Assignments of Error.**

2 Appellant incorporates by reference all preceding paragraphs as if fully set forth herein,
3 as well as the attached comment letters and reports, and further sets out the following
4 additional statement of grounds for appeal:

5 **A. The Determination of Non-Significance Violated SEPA Statutory and Regulatory**
6 **Requirements and Was Clearly Erroneous.**

7 The approved permit is a “Class IV Special,” and thus subject to SEPA and not
8 categorically exempt, “as they have been determined to have potential for a substantial impact
9 on the environment.” WAC 222-16-050(1). DNR is the lead SEPA agency for the approval of
10 a forest practices application. SEPA requires that the lead agency:

11 Include in every recommendation or report on proposals for legislation and other major
12 actions significantly affecting the quality of the environment, a detailed statement by
13 the responsible official on:

- 14 (i) the environmental impact of the proposed action;
- 15 (ii) any adverse environmental effects which cannot be avoided should the proposal be
16 implemented;
- 17 (iii) alternatives to the proposed action;
- 18 (iv) the relationship between local short-term uses of the environment and the
19 maintenance and enhancement of long-term productivity; and
- 20 (v) any irreversible and irretrievable commitments of resources which would be
21 involved in the proposed action should it be implemented;

22 RCW 43.21C.030(c). To implement the statutory requirement, the lead agency must review a
23 SEPA checklist, consider public comment, and make a threshold determination. “A threshold
determination is required for any proposal which meets the definition of action and is not
categorically exempt.” WAC 197-11-310.

 An “action” includes an agency approval of a “specific project.” WAC 197-11-704.

 “‘Proposal’ means a proposed action. A proposal includes both actions and regulatory
decisions of agencies as well as any actions proposed by applicants. A proposal exists at that

1 stage in the development of an action **when an agency is presented with an application**, or
2 has a goal and is actively preparing to make a decision on one or more alternative means of
3 accomplishing that goal, and the environmental effects can be meaningfully evaluated.” WAC
4 197-11-784 (emphasis added).

5 In making the threshold determination, the agency must consider adequate information
6 to make an informed decision. It must evaluate the direct, indirect, and cumulative effects of
7 the action. WAC 197-11-752. Under WAC 197-11-060(4)(c), (d):

8 (c) Agencies shall carefully consider the range of probable impacts,
9 including short-term and long-term effects. Impacts shall include those
10 that are likely to arise or exist over the lifetime of a proposal or, depending
11 on the particular proposal, longer.

12 (d) A proposal's effects include direct and indirect impacts caused by a
13 proposal. Impacts include those effects resulting from growth caused by a
14 proposal, as well as the likelihood that the present proposal will serve as a
15 precedent for future actions. For example, adoption of a zoning ordinance
16 will encourage or tend to cause particular types of projects or extension of
17 sewer lines would tend to encourage development in previously
18 unsewered areas.

19 Where a proposal is subject to SEPA, but linked to other proposals that may be categorically
20 exempt from SEPA, the lead agency must consider all the proposals together. It must consider
21 the cumulative effects of a series of actions where there are “[a] series of actions, physically or
22 functionally related to each other, some of which are categorically exempt and some of which
23 are not,” or “[a] series of exempt actions that are physically or functionally related to each
24 other, and that together may have a probable significant adverse environmental impact in the
25 judgment of an agency with jurisdiction.” WAC 197-11-305(b).

26 A determination of significance is required where there is a “reasonable likelihood of
27 more than a moderate adverse impact on environmental quality.” WAC 197-11-794. This
28 determination of significance “involves context and intensity...and does not lend itself to a

1 formula or quantifiable test. The context may vary with the physical setting. Intensity depends
2 on the magnitude and duration of an impact.” *Id.* “The severity of an impact should be
3 weighed along with the likelihood of its occurrence. An impact may be significant if its chance
4 of occurrence is not great, but the resulting environmental impact would be severe if it
5 occurred.” *Id.*

6 DNR violated SEPA requirements in basic ways. The overarching failure was the
7 failure to adequately consider all direct, indirect, and cumulative impacts of the proposal in
8 compliance with RCW 43.21C.010 *et seq.*, and WAC 197-11-010 *et seq.*. Specific violations
9 include, but are not limited to, the following:

10 **First**, DNR failed to provide SEPA notice, comment, or review for the approval of FPA
11 No. 2819518. Instead, DNR conducted SEPA for a prior permit application, FPA No.
12 2819391. That FPA was fully rescinded. At the point of rescission, FPA No. 2819391 became
13 completely null and void. It is no longer a proposal and has been removed from FPARs (the
14 public FPA review system).

15 Later, DNR received and considered approval of FPA No. 2819518, a separate and
16 distinct proposal. To the best of Appellants’ knowledge, DNR never put approval of FPA
17 2819518 out for public comment, and did not accept SEPA comments on the consideration of
18 the FPA. The FPA differed in various ways from FPA No. 2819391, but most importantly, it
19 was a different proposal under a different number at a different time. Only on the date of
20 approval did DNR update and change the FPA numbers to apply the old SEPA. *See* Exh. B,
21 NFD.

22 **Second**, DNR failed entirely to consider the indirect and cumulative effects of the
23 proposal, and instead engaged in illegal piecemealing. As acknowledged by DNR, the purpose

1 of the road is to access future logging in a distinct and known location. Together, the
2 cumulative effects of logging and associated forest practices, such as road building, drainage,
3 slope instability, water quality, impacts to water quality standards and Safe Drinking Water Act
4 compliance, forest chemical application (including herbicide applications near drinking water).
5 However, DNR failed entirely to identify or analyze the cumulative effects of the logging
6 directly and explicitly associated with—the but for cause of—the road construction. This is a
7 clear violation of SEPA. Phased review is not appropriate or lawful because it “would merely
8 divide a larger system into exempted fragments or avoid discussion of cumulative impacts.”
9 WAC 197-11-060(5)(d)(ii). Indeed, the classic example of unlawful segmentation is this exact
10 situation—in which the Forest Service attempted to separately analyze the impacts of a road
11 from the anticipated logging, even though the logging was the purpose of construction of the
12 road. *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). This seminal case is directly on
13 point.

14 As a related violation, DNR relied upon an incomplete and often incorrect SEPA
15 Checklist, and failed to require additional information where necessary to take a hard look at
16 probable impacts.

17 **Third**, DNR failed to adequately the context and intensity of impacts, including the
18 consequences of a landslide or debris flow. “An impact may be significant if its chance of
19 occurrence is not great, but the resulting environmental impact would be severe if it occurred.”
20 WAC 197-11-794(2). The proposed logging is not in the middle of industrial timberland.
21 Rather, the proposed logging, road construction, and related logging caused by the road
22 construction are directly above a dense community of homes, public roads, an important public
23 fishery, and drinking water sources (both in affected streams and Lake Cavanaugh). Slope

1 failure, debris flows, and sediment delivery, and other effects have the real potential to be
2 catastrophic. These severe effects require a careful, hard look, which DNR did not provide.

3 **Fourth**, DNR failed to identify identified requirements in WAC 197-11-330(3),
4 including the requirement to consider cumulative impacts, WAC 197-11-330(3)(c), and the
5 requirement to consider the potential of the proposal to “(ii) Adversely affect endangered or
6 threatened species or their habitat,” and to “(iii) Conflict with local, state, or federal laws or
7 requirements for the protection of the environment.” Namely, the project admittedly is less
8 than .25 miles from occupied marbled murrelet habitat, and DNR failed to require surveying
9 and failed to disclose or consider the impacts of logging, road construction, and ongoing road
10 usage on the threatened marbled murrelet, in likely violation of the Federal Endangered
11 Species Act, ESA § 9.

12 The timber harvest, road construction, and associated road use have the probable
13 impact of harming marbled murrelets. It would create edge effects on marbled murrelet
14 habitat, expose nesting murrelets to predation, and create long-term impacts through the noise
15 and disturbance associated with road use. These impacts are well-documented in DNR’s own
16 State Trust Lands Habitat Conservation Plan Marbled Murrelet Long-term Conservation
17 Strategy and associated environmental review documents, which is a closely related and
18 relevant resource.

19 The Biological Opinion for the MMLTCS states that “[t]imber harvesting and road
20 construction can result in both direct and indirect effects to murrelets. These effects can include
21 the direct loss and fragmentation of nesting habitat, increased risk of nest predation near
22 clearcut edges, habitat degradation associated with clearcut edges, disruption of nesting
23 behaviors associated with audio and visual disturbance, and the potential for direct injury or

1 mortality of murrelet eggs or chicks.” The BiOp expressly recognizes “New Roads and
2 Yarding Corridors in Occupied Sites and Buffers” as a significant source of “take” of marbled
3 murrelets under the ESA.¹ Marbled murrelets have nesting fidelity to specific locations, so
4 whether or not timing restrictions or other mitigation is imposed, fragmenting the nesting
5 habitat and associated buffer is likely to cause take and inhibit reproduction.

6 DNR violated SEPA but failing to acknowledge the clearly probable impacts to
7 marbled murrelets.

8 **B. Forest Practices Act Violations**

9 The approval violates several provisions of the Forest Practices Act and rules. Those
10 violations are set forth in attached comment letters, and include, but are not limited to:

11 **1. Unlawful logging in channel migration zone areas**

12 First, the permit includes unlawful logging in channel migration zones and associated
13 riparian management zones. “No harvest, construction or salvage will be permitted within the
14 boundaries of a channel migration zone except for the construction and maintenance of road
15 crossings in accordance with applicable rules and the creation and use of yarding corridors
16 consistent with WAC 222-24-020(6), 222-30-060(1), and 222-30-045(2).” WAC 222-30-
17 020(13). “RMZs are measured horizontally from the outer edge of the bankfull width or
18 channel migration zone, whichever is greater.” WAC 222-30-021.

19 Under Forest Practices Rules, a channel migration zone “means the area where the
20 active channel of a stream is prone to move and this results in a potential near-term loss of
21 riparian function and associated habitat adjacent to the stream, except as modified by a
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23 ¹ https://www.dnr.wa.gov/publications/lm_mm_usfws_biological_opinion.pdf at 85; 65-66.

1 permanent levee or dike. For this purpose, near-term means the time scale required to grow a
2 mature forest. (See board manual section 2 for descriptions and illustrations of CMZs and
3 delineation guidelines.)” WAC 222-16-010.

4 The “near-term” in western Washington is generally 140 years. Chapter 2 of the Board
5 Manual provides instructive guidance:

6 By definition, the channels on alluvial fans migrate and are therefore subject to
7 CMZ delineation. Alluvial fans are also identified as “sensitive sites” in WAC
8 222-16-010 and no timber harvest is permitted within an alluvial fan (WAC 222-
9 30-021(2)(b)(vi) and 022(2)(b)(ii)(C)(IV)). An alluvial fan will need CMZ
10 delineation where historical map and aerial photograph and field evidence
11 demonstrate that channel migration has occurred or can occur due to active fan
12 Forest Regulation Division building processes upstream. Channels can be located
13 anywhere on the fan and are best observed starting from the apex or upstream
14 portion of the fan and following them downstream. The CMZ will generally
15 encompass the entire fan surface because of the difficulty in predicting the future
16 channel location.

17 All or some portions of the fan may no longer be subject to channel shifting if the
18 fan-building processes have ceased or diminished. The degree of channel incision
19 at the fan head is not a reliable indicator of the lack of channel shifting potential,
20 as infrequent but large flood events or debris flows can rapidly fill the channel. A
21 relict fan may have one or more small modern fans building at the downstream
22 margin of the larger feature. In this situation, only the smaller, active fan has a
23 CMZ. Technical expertise may be necessary to evaluate the age and frequency of
fanbuilding processes.

Board Manual M2-36 to 37 (emphasis added). Here, there should be channel migration zones
identified for each of the streams crossed, with particular emphasis on the streams identified as
Stream 1 and Stream 2.

The FPA includes “Appendix E,” which is the CMZ Assessment Form. The analysis
fails to delineate the CMZ for the entirety of Stream 1 or any other stream based on the
assertion that “[b]y rule” the CMZ only begins below the transition point from non-fish bearing
stream to fish bearing (“Type F”) stream.

1 There is no scientific or regulatory basis for the assertion that a CMZ only exists for
2 fishbearing streams. The regulatory definition contains no such distinction, and the 64-page
3 Board Manual Chapter 2 contains no reference to fish presence or water typing. The purpose of
4 the CMZ rule is to protect riparian function, which includes water quality, and exists in both
5 fish bearing streams and Np headwater streams. That is particularly true here, where the
6 streams are all directly above homes, drinking water sources, and fish-bearing waters.

7 The application must be denied for a deficient CMZ analysis and for allowing unlawful
8 logging in the CMZ and RMZ.

9 **2. Unlawful logging on alluvial fans**

10 Timber harvest is forbidden on alluvial fans. This is a flat prohibition. WAC 222-30-
11 021(2)(b)(vi) (“No timber harvest is permitted within an alluvial fan”). The Icicle Creek
12 Engineers (ICE) report attached to the application concedes that the proposed road crosses
13 what it characterizes as three alluvial fans, and that harvest is proposed on an alluvial fan.
14 These concessions require denial of the application.

15 The applicant and ICE assert that the proposal complies with Forest Practices Rules
16 because there is only timber harvest proposed on an alluvial fan that ICE describes as “relict.”
17 These arguments fail for at least three reasons.

18 First, there is timber harvest proposed across all the alluvial fans. The proposal
19 concedes that there would be timber harvest to facilitate road construction across the alluvial
20 fans. Page 5 of the FPA describes “Unit 2” as for the “ROW” (right of way) and includes
21 harvest of 15 mbf of timber. This proposed timber harvest would be on all the alluvial fan areas
22 identified by the Applicant. Such timber harvest on alluvial fans is prohibited. There is no
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1 provision or basis for the Applicant’s attempt to “mitigate” the risk of timber harvest and road
2 construction across the alluvial fans. The permit application must be denied.

3 Second, as explained in the McShane report, the asserted alluvial fan 2 is really a part
4 of alluvial fan 3. Together they are one alluvial fan as defined under WAC 222-16-010. As
5 explained in Mr. McShane’s report and not refuted in the revised ICE memo, there is no
6 regulatory or scientific basis for the attempt to segregate off a portion of the alluvial fan for
7 timber harvest.

8 Third, there is no scientific or regulatory basis for the assertion that logging may be
9 permitted on a “relict” alluvial fan. The ICE report explains that they are referring to a sentence
10 in the regulatory definition, which reads that “[a]lluvial fan does not include features that were
11 formed under climatic or geologic conditions which are not currently present or that are no
12 longer dynamic.” ICE reads that provision far too broadly to suggest that any temporary
13 stability of a feature means it is “relict” and not an alluvial fan. To the contrary, the regulatory
14 definition refers to long-term processes of climate and geology. In order to not qualify as an
15 alluvial fan, the land feature must not have been dynamic for a period of time that is significant
16 in a climatic or geological sense. These areas have been dynamic and had major movement as
17 recently as November of 2022, following logging and heavy rains.

18 Mr. McShane has documented a dynamic landscape with very recent and recurring
19 debris flows and LiDAR evidence of swales and channels that suggest recent active channels.
20 This evidence confirms that the alluvial fan is dynamic. The ICE report fails to rebut these
21 documented examples. Instead, the ICE report relies on the assertion that the stream channel is
22 incised. This argument fails because the relatively modest incision identified does not evidence
23 different “climatic or geological conditions.” As noted by Mr. McShane, the Forest Practices

1 Board Manual states that “[t]he degree of channel incision at the fan head is not a reliable
2 indicator of the lack of channel shifting potential, as infrequent but large flood events or debris
3 flows can rapidly fill the channel.” (page M2-37 of Manual). This guidance is applicable to and
4 supported by the documented conditions on the landforms at issue, and there is no basis to
5 deviate from the Board Manual’s guidance.

6 For all the reasons stated above, the application must be denied for violation of WAC
7 222-30-021(2)(b)(vi).

8 **3. Improper Identification as a Small Forestland Owner Under RCW 76.09.450**

9 The FPA identifies Timberline Logging, Inc., as a “small forestland owner” for
10 purposes of RCW 76.09.450. This distinction affects the requirements regarding marbled
11 murrelet surveying and road maintenance and abandonment. Incorrect identification as a small
12 forestland owner is a procedural error that requires invalidation of the permit approval.

13 Here, as documented in the attached comment letter on FPA No. 2819518, Timberline
14 Logging, Inc., is owned and operated by the Nielsen brothers. They also own and operate
15 West Side Logging, LLC, as well as the larger Nielsen Brothers, Inc.

16 RCW 76.09.450 makes clear that it applies in this instance to the person with
17 underlying ownership, not a corporation—the term “means an owner of forestland who, at the
18 time of submission of required documentation to the department, has harvested from his or her
19 own lands in this state no more than an average timber volume of two million board feet per
20 year....”

21 RCW 76.09.020 and WAC 222-16-010 further provides that a forest landowner “means
22 any person in actual control of forest land, whether such control is based either on legal or
23 equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or

1 all of the timber on such land in any manner. However, any lessee or other person in
2 possession of forest land without legal or equitable title to such land shall be excluded from the
3 definition of "forest landowner" unless such lessee or other person has the right to sell or
4 otherwise dispose of any or all of the timber located on such forest land.”²

5 This broad definition encompasses “any person in actual control.” Here, that is the
6 Nielsen brothers, not their corporation, Timberline Logging, Inc. The Nielsen brothers, acting
7 through their various corporations, are not small forestland owners.

8 The purpose of the “small forestland owner” exceptions is to account for the reduced
9 resources of true small landowners, and the fact that they may not have flexibility to harvest
10 other areas if their small forest holdings are encumbered by regulations. That purpose would
11 be completely flouted by allowing large landowners to transparently manipulate the rules and
12 form an LLC to gain the benefits of the small forestland owner status. The Legislature found
13 as follows:

14 (1) The legislature finds that chapter 4, Laws of 1999 sp. sess. strongly
15 encouraged the forest practices board to adopt administrative rules that were
16 substantially similar to the recommendations presented to the legislature in the
17 form of the forests and fish report. The rules adopted pursuant to the 1999
18 legislation require all forestland owners to complete a road maintenance and
19 abandonment plan, and those rules cannot be changed by the forest practices
20 board without either a final order from a court, direct instructions from the
21 legislature, or a recommendation from the adaptive management process. In the
22 time since the enactment of chapter 4, Laws of 1999 sp. sess., **it has become
clear that both the planning aspect and the implementation aspect of the
road maintenance and abandonment plan requirement may cause an
unforeseen and unintended disproportionate financial hardship on small
forestland owners.**

21 (2) The legislature further finds that the commissioner of public lands and the
22 governor have **explored solutions that minimize the hardship caused to small
forestland owners by the forest road maintenance and abandonment**

23 ² The statute refers to a “forestland owner,” while the regulation refers to a “forest landowner” but there
is no reason to believe the difference in spacing is significant.

1 **requirements of the forests and fish law, while maintaining protection for**
2 **public resources.** This act represents recommendations stemming from that
process.

3 **(3) The legislature further finds that it is in the state's interest to help small**
4 **forestland owners comply with the requirements of the forest practices rules**
5 **in a way that does not require the landowner to spend unreasonably high**
6 **and unpredictable amounts of money to complete road maintenance and**
7 **abandonment plan preparation and implementation.** Small forestland owners
provide significant wildlife habitat and serve as important buffers between urban
development and Washington's public forestland holdings."

7 The true forestland owners are Robert and David Nielsen, not Timberline Logging, Inc. The
8 FPA approval is based on incorrect information and must be reversed.

9 **Fourth**, in addition to those specific allegations above, Appellants allege violations of
10 Chapter 222-24-010 et seq., on knowledge and belief that the proposed road construction poses
11 undue threat of delivery to typed waters, risk to slope stability, and risk to public safety.

12 **C. Emergency Stay Requested**

13 WAC 223-08-087 provides injunctive relief that applies to forest practices appeals
14 heard by the Pollution Control Hearings Board, based on prior authority given to the Forest
15 Practices Appeals Board.

16 Pursuant to WAC 223-08-087(4):

17 In emergency situations, a stay in whole or in part may be granted by the
18 presiding officer without a conference and/or briefing, only if it clearly
19 appears from specific facts shown by affidavit that immediate and irreparable
20 injury, loss, or damage will result to the moving party before any adverse
21 party can be heard in opposition. A stay granted without briefing shall be
22 embodied in a written order and shall expire by its terms within such time
23 after entry, not to exceed fourteen days, as provided therein unless within the
time so fixed the order, for good cause shown, is extended for a like period or
unless the party against whom the order is directed consents that it may be
extended for a longer period.

1 Such an emergency situation is presented here because the logging and road construction, once
2 undertaken, cannot be reversed. Logging by definition causes immediate and irreparable
3 injury, loss, and damage. The request for a stay is supported by the contents of this appeal, the
4 Declaration of Wyatt Golding, and the attached exhibits.

5 The risk of injury is heightened by the location of the logging. The slopes at issue are
6 directly above private homes and drinking water. There have been recent damaging floods and
7 landslides. The report of Mr. McShane documents how logging and road construction increase
8 the risk of alluvial fan movement, and channel migration. These processes would likely cause
9 devastating impacts downslope. The proposal is particularly dangerous because there has been
10 significant rain, with highly saturated soils, and the upcoming months promise more rain and
11 snow as fall and winter set in.

12 To the extent a security is required, Lake Cavanaugh Trust requests a nominal bond.
13 Appellants seek to vindicate public rights and protect the public interest, and as a non-profit
14 corporation, have very limited resources. The requested stay is only until the parties have time
15 to complete an expedited briefing schedule for a preliminary injunction or on the merits.

16 **6. Relief Sought:**

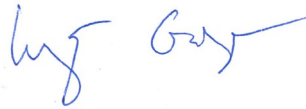
17 Appellant respectfully requests the Board:

- 18 1. Enter an emergency stay of FPA 2819518 with a nominal security and convene
19 the parties to set a reasonable briefing schedule for a preliminary injunction or
20 on the merits.
- 21 2. Reverse the Department of Natural Resources, Forest Regulation Division's
22 Decision to approve FPA 2819518 for violation of SEPA and the Forest
23 Practices Act.

3. Invalidate the SEPA Determination of Significance on appeal.
4. Declare that the proposed logging and road construction violates the Forest Practices Act, State Environmental Policy Act, or is otherwise unlawful.
5. To the extent forest practices are carried out prior to a stay or injunction, require appropriate mitigation or order DNR to determine and require appropriate mitigation.
6. Grant and order such other and further relief related to the above as the Board may deem just and appropriate.

Dated this 1st day of October, 2024.

ZIONTZ CHESTNUT



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