



**DATE:** October 24, 2019

**TO:** Tim Romanski, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office

**FROM:** The Marbled Murrelet Coalition

**Re:** Comments on the Final Environmental Impact Statement for Amending the 1997 Washington State Trust Lands Habitat Conservation Plan to Include a Marbled Murrelet Long-Term Conservation Strategy (FWS-R1-ES-2019-N109)

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Dear Mr. Romanski,

Thank you for considering the following comments on the Final Environmental Impact Statement (FEIS) and Final Habitat Conservation Plan Amendment (Amendment) for the Marbled Murrelet Long-Term Conservation Strategy (LTCS) on lands managed by the Washington Department of Natural Resources (DNR). These comments supplement the comments we made on the LTCS DEIS on March 9, 2017 and on the RDEIS and draft Amendment on December 6, 2018. The following comments on the FEIS and Amendment break-down into two categories: scientific and legal.

#### **A. Scientific Comments**

With respect to the FEIS and Amendment, our concerns remain about the ability of the LTCS to “help meet the recovery objectives of the U.S. Fish and Wildlife Service...and make a significant contribution to maintaining and protecting marbled murrelet populations in western Washington over the life of the HCP” (p. IV-44) and to meet all ESA Section 10(a)(1)(B) incidental take permit issuance criteria, specifically:

- The applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking
- The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild

We fundamentally disagree with DNR's interpretation of these Endangered Species Act (ESA) and HCP requirements. We maintain that DNR's HCP commitment to make a "significant contribution" to murrelet populations far exceeds the minimal level of mitigation being proposed in the Amendment. By designing the Amendment with this minimal level of conservation, the population viability model predicts that on average, after 50 years the number of female murrelets DNR-managed lands will support is *fewer* than they currently support, whereas the strongest Alt. analyzed (F) predicts an *increase* of over 100 female murrelets, a 20% increase<sup>1</sup>. Furthermore, these figures were derived from an optimistic scenario which is not expected to play out as the murrelets' forest and marine ecosystems respond to our shifting climate in unpredictable ways, meaning the LTCS will likely perform worse than this after 50 years, further reducing the murrelets' likelihood of survival and recovery. As demonstrated by Alt. G or F or our Coalition's Conservation Alternative<sup>2</sup>, DNR-managed lands have *much greater* potential to support the dwindling murrelet population, and a much stronger LTCS is badly needed to help avoid extirpation of the species from our state. Other HCPs commonly mitigate for take at higher ratios than an even offset. For example, the Fruit Growers Supply Company HCP was designed to mitigate 55% and take 18% of the total conservation value in northern spotted owl activity centers, a 3:1 ratio. LTCS Alt. F approximates a 3:1 ratio and is most likely to meet the population biological goals needed to support recovery.

Unfortunately, the population benefits of the Amendment are overstated and misleading. For example, DNR reports that under all four PVA modeling scenarios the Amendment "would decrease quasi-extinction probabilities and increase the size of the population at the end of the 1997 HCP's initial 70-year term, *compared to either the modeling baseline or DNR continuing to operate under the Interim Strategy* (Appendix C, Attachment C- 2)" (emphasis added). We found this was not true in all cases, the quasi-extinction probability decreases are very small and insignificant, and all but two Alt. (B and H-no meter) show this relative population increase. Instead, looking at the change in population size over time, the Amendment doesn't 'break even' from decade 0 to decade 5 under *any* set of modeling assumptions. In contrast, Alt. F and G consistently show the lowest quasi-extinction probabilities and largest population sizes among alternatives. Furthermore, using the 'baseline' scenario (i.e., a static amount of raw habitat over time) as a comparison is biologically unrealistic and results in an artificially low population size which *most* alternatives exceed in performance.

We strongly disagree that the Amendment "appears to best meet USFWS' need and purpose for taking action on a permit decision", given as part of the reason USFWS identified Alt. H as its preferred alternative in the FEIS (p. 2-59). Specifically, as the agency responsible for murrelet recovery actions, USFWS' purpose is that "the HCP amendment achieve long-term species and ecosystem conservation objectives at ecologically appropriate scales." While the DNR limited the conservation objectives of the LTCS to "provide forest conditions in strategic locations on forested trust lands that minimize and mitigate incidental take of marbled murrelets resulting from DNR forest management activities" their 1997 HCP committed to "help meet the recovery objectives of the U.S. Fish and Wildlife Service." Based on the predicted population

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<sup>1</sup> Population Viability Analysis (PVA) Table 2, DNR-enhancement

<sup>2</sup> See our DEIS comments

performance, it is clear the Amendment will fail to sufficiently help meet the USFWS’ recovery objectives “to stabilize and then increase the population size, changing the current downward trend to an upward (improving) trend throughout the listing range” and “to provide conditions in the future that allow for a reasonable likelihood of continued existence of viable populations.”<sup>3</sup> An increase of merely 4,000 acres from the Interim Conservation Strategy (Alt. A) to the final LTCS amounts to a <1% increase in LTFC and a 12% increase in MM-specific acres and does not constitute a significant contribution.

Besides selecting a much stronger alternative as the final Amendment, there are a number of other improvements that should be made to the Amendment. First on this list would be to ‘meter’ or delay the harvest of *all* current habitat for the first decade of LTCS implementation. The Amendment states DNR will meter only 15,000 out of the 38,000 acres of habitat they intend to harvest, meaning 23,000 acres of habitat may be harvested in the first ten years. DNR has announced that a total of 100,000 acres of lands they manage will be ‘released’ or made available for harvest when the LTCS is adopted, meaning 77,000 acres of non-habitat will become available to harvest, which seems to be an ample area to enable metering of all murrelet habitat for at least ten years. Maintaining as much habitat capacity as possible would provide extra support to stabilize the murrelet population when it is badly needed in the near-term. “Population viability analyses...indicate that metering will slightly improve projected (modeled) viability of the murrelet population on DNR-managed lands, and will prevent the short-term decline in nesting carrying capacity that otherwise would occur during the first decade of the Long-term Strategy” (Amendment, section 6.3.4). At a minimum, DNR should meter all high quality habitat, especially in the three strategic location landscapes, as it once stated was its intention (Table 1). Unfortunately, now “the specific location and quality of habitat to be metered will be *at DNR’s discretion*” (FEIS, p. 4-59, emphasis added).

**Table 1.** Estimated acres of habitat released for harvest in the analysis area by the end of the planning period for the Amendment (Alt. H raw acres; FEIS Table 4.6.2)

Landscapes	Low-quality habitat loss to harvest (P-stage value 0.25–0.36)	High-quality habitat loss to harvest (P-stage value 0.47–0.89)	Total habitat
Southwest Washington strategic location	5,264	174	5,438
OESF and Straits (West of the Elwha River) strategic location	6,419	1,241	7,660
North Puget strategic location	10,869	2,194	13,063
Other high value landscape	8,948	1,312	10,260
Marginal landscape	1,530	97	1,627
Subtotal habitat	33,030	5,017	38,047

<sup>3</sup> 1997 Recovery Plan, p. 112

Other needed improvements in the Amendment, are its treatment of forest management related noise disturbance. First, in our RDEIS comments, we argued that disturbance take needs to be accounted for in the total take estimate. Unfortunately, in the FEIS it appears DNR still did not quantitatively discount the estimated average 11,384 adjusted acres of habitat disturbed annually or *546,432 total adjusted acres* over the next 48 years<sup>4</sup>. We agree with DNR's response that the effects of noise disturbance are not equivalent to habitat removed or degraded by timber harvest or road construction, and most habitat areas exposed to noise disturbance are *also* likely to be degraded by edge effects from roads and timber harvest. Unlike DNR, we take this to mean *both* sources of disturbance should be accounted for in the analytical framework, not just one or the other. While the conservation measures should help *reduce* disturbance impacts to murrelets, they should also *mitigate* for these widespread and potentially significant impacts on murrelet reproductive success and population performance. DNR did not adequately address this concern in its response to our comments.

Second, we also remain concerned about the inclusion of pre-commercial thinning (PCT) and minor road maintenance in Group 1 activities, which total 9,200 *adjusted* acres of disturbance per year<sup>5</sup>. Both activities require the use of loud, heavy machinery and neither qualify as "low-intensity activities," especially <100 m from a nest (within an occupied site buffer width). Per the Amendment<sup>6</sup>, road reconstruction or maintenance is allowed *in occupied sites and buffers* "outside of the nesting season *when feasible* or must follow limited operating periods during the nesting season," and PCT *in occupied site buffers* "must follow limited operating periods if carried out during the nesting season." In these areas most crucial to successful murrelet reproduction, these activities should either not be allowed or only be allowed outside of the nesting season, because murrelets are active at their nests during the limited operating periods (from two hours after sunrise to 2 hours before sunset) for incubation and chick rearing. As noted in our DEIS comments, the USFWS reported "due to the large proportion [31-46%] of feeding that occurs during the middle of the day (from two hours after sunrise until two hours before sunset) in some areas, we cannot assume that implementation of [limited operating periods] will avoid adverse effects to murrelets, eggs, or chicks."<sup>7</sup> If the Amendment is not strengthened in this regard, the resulting nest disturbance from forest management activities could effectively undermine all of the other LTCS conservation measures designed to support the murrelet population and could prevent it from stabilizing.

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<sup>4</sup> FEIS Table 4.6.14

<sup>5</sup> FEIS Table 4.6.14

<sup>6</sup> Table A-4, emphases added

<sup>7</sup> U.S. Fish and Wildlife Service. 2012. Marbled Murrelet Nesting Season and Analytical Framework for Section 7 Consultation in Washington. Washington Fish and Wildlife Office, Lacey, Washington. 10 pp.

## B. Legal Comments

We will not repeat here the legal comments we provided on the 2017 DEIS nor on the 2018 RDEIS. But we do wish to comment on several of the responses to our comments in the FEIS.

### 1. Arbitrary and Undocumented Rejection of the Practicability of More Conservation-Oriented Alternatives.

The FEIS acknowledged that many comments on the RDEIS urged the Services and DNR to consider and select an alternative (i.e., Alt. F, G, or the Conservation Alternative) that provided more protection and recovery habitat for the murrelet. FEIS, App. S, at S-20-21. But the USFWS and the DNR rejected the feasibility of these more protective alternatives on the grounds that they were “economically infeasible” and because they compromised DNR’s fiduciary duty to the trusts. FEIS, App. S, at S-21. This reasoning is misplaced.

The USFWS (Service) seems to have arbitrarily accepted DNR’s statement on what is and what is not “economically feasible” for DNR. But the objective *practicability* of proposed ESA Section 10 minimization and mitigation, not subjective feasibility measured by the permit applicant, is the core Section 10 issuance requirement. Courts have generally interpreted “maximum extent practicable” with the emphasis on “practicable.” Practicable means “reasonably capable of being accomplished.” Black’s Law Dictionary (10th ed. 2014). Proposed mitigation measures must be the maximum that can be reasonably required of the applicant. *Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d 1274, 1293 (E. D. CA). An applicant may do something less than fully offset the impacts of the take through minimization and mitigation only where to do more would not be practicable. *Nat’l Wildlife Fed’n v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004). For example, a record should show “not just that the chosen mitigation fee and land preservation ratio are practicable, but that a higher fee and ratio would be impracticable.” *Babbitt*, 128 F. Supp. 2d at 1292. The Service, not the applicant, determines whether alternatives providing greater minimization and mitigation are impracticable. *Gerber v. Norton*, 294 F.3d 173, 178-184 (D.C. Cir. 2002). If the Service determines that the applicant rejected another alternative that provided more benefits to the species either by providing more mitigation or causing less harm, and the Service determined that this alternative was feasible, then the Service cannot approve the permit under the less protective alternative. *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1158 (S.D. Cal. 2006), *appeal dismissed and remanded*, 409 F. App’x 143 (9th Cir. 2011).

In the case of DNR’s Amendment (Alt. H), we are concerned the USFWS may not have made an independent effort to determine whether the conservation provided is the “maximum extent practicable.” Instead, the USFWS may have relied only on DNR’s interpretation of it. USFWS cannot simply allow DNR to ignore the vast earnings DNR has made and will make from logging on its lands and make its ESA Section 10 decision based on the applicant’s definition of what’s “practicable.” See FEIS, App. S, at S-125

(“Alternative H most closely meets the direction provided by the Board of Natural Resources to DNR staff to minimize impacts...”); FEIS, App. S, at S-145 (Alternative H is based on direction from the Board of Natural Resources to DNR staff...). This Board/DNR-dictated limit ignores that DNR’s timber sale program yields about \$120 million a year to the beneficiaries and, over the years, the Legislature has provided funding for DNR to transfer some of its lands into a more protected status. It also ignores the important differences between numerically offsetting take and jeopardizing recovery. Given the extraordinary monetary value of DNR-managed lands and the fact that schools and other institutions have been, and can be, funded partially through legislative appropriation, it *is* “practicable” for DNR to provide a greater and much needed level of conservation to marbled murrelets.

## **2. Conflation of Minimization of Take with Providing a Significant Contribution to Recovery**

The FEIS responses repeat the erroneous conclusion that DNR’s attempt to minimize and mitigate its take of marbled murrelets provides the significant contribution to recovery promised in DNR’s HCP and required by a core ESA Section 10 criteria (“take will not appreciably reduce the likelihood of survival and recovery of the species in the wild”). See FEIS, App. S-144. This is simply wrong. In multiple comments on the RDEIS, we explained why, given the current and ongoing downward trend of Washington’s murrelet population, DNR’s proposed 38,000 acres of take is not sufficiently offset by the mitigation provided by its proposed LTCS. Furthermore, the Amendment impermissibly relies on 567,000 acres of “existing conservation acres” as pseudo-mitigation for DNR’s proposed take. Specifically, the FEIS unfairly excludes LTFC for some considerations (take/mitigation analysis) but includes LTFC for other considerations (Section 10 practicability analysis). As such, it is impossible for the USFWS to conclude that DNR is making a significant contribution to recovery or that DNR is not appreciably reducing the likelihood of survival and recovery of the species.

## **Conclusion**

Despite its HCP commitment to make a significant contribution to murrelet conservation and to help meet recovery objectives, the LTCS Amendment as written fails to do so. Among the alternatives analyzed, the preferred path forward will produce the second highest level of trust revenue, but it performs the second *worst* for the murrelet population. To our knowledge, there are essentially no other major opportunities to address the ongoing decline of murrelets in Washington in the near term than to strengthen the Amendment. Thank you for considering our comments and concerns in making this important, long-term permitting decision.

Sincerely,



Kara A. Whittaker, PhD  
Senior Scientist & Policy Analyst  
Washington Forest Law Center



Peter Goldman  
Director & Managing Attorney  
Washington Forest Law Center

*On behalf of the Marbled Murrelet Coalition:*

Conservation Northwest  
Defenders of Wildlife  
Olympic Forest Coalition  
Seattle Audubon Society  
Washington Environmental Council  
Washington Forest Law Center