

February 5, 2019

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Re: SB 5547 / HB 1546 (Marbled Murrelet Conservation Strategy bill)

Dear Elected Officials:

We are writing on behalf of the Marbled Murrelet Coalition, which consists of Washington Environmental Council (WEC), Conservation Northwest (CNW), Olympic Forest Coalition (OFCO), Defenders of Wildlife, Seattle Audubon Society, and Washington Forest Law Center (WFLC). The Coalition wishes to express its serious concerns regarding SB 5547 / HB 1546, proposed legislation pertaining to DNR's development of an amendment to its 50-year federal habitat conservation plan for the older forest-dependent marbled murrelet.

These bills undermine our Coalition's collaborative efforts with the timber industry over the last year. For context, the Coalition worked hard and in good faith to reach agreement with the timber industry last year on HB 2285 as this bill moved through the legislative process. In addition, members of our Coalition negotiated the bill language and later participated in the HB 2285-mandated "Solutions Table." The Legislature created this table to encourage creative and compromising solutions for state owned or managed forests which are consistent with state and

federal law and that better support murrelet conservation, the beneficiaries, forest-dependent counties and communities.

As the agreed-to language in HB 2285 moved through the legislative process, we were confused and concerned that timber industry representatives questioned the bill language to which they had agreed. However, we remained committed to the collaborative language and participated, to this date, in the Solutions Table process. Ultimately, the legislature passed HB 2285 and the Solutions Table process began in 2018.

Three conservation professionals from our Coalition have been participating at the Solutions Table: Lisa Remlinger (WEC), Paula Swedeen (CNW), and Patricia Jones (OFCO). At these meetings, these representatives have consistently participated in conversations, proposed creative solutions that benefit the entire table, and have worked hard to be productive members of the group. The Solutions Table holds the promise of working toward solutions for conservation, for beneficiaries, and industry. SB 5547 / HB 1546 directly undermine HB 2285 and Solutions Table efforts to fulfill the legislative mandate and meet the needs of all stakeholders, as well as the Long-Term Conservation Strategy process.

With this background in mind, we now turn our attention to the deeply troubling legal and policy implications SB 5547 / HB 1546 could have on the Board of Natural Resources' (Board) ability to adopt a defensible Long-Term Conservation Strategy (LTCS) for the marbled murrelet, a commitment the DNR made in 1997. Our message is simple: SB 5547 / HB 1546 would deepen the divide and reduce our chances to develop win-win solutions for state forests and their management under federal and state law. The bills would also add legal uncertainty, causing potentially lengthy delays and DNR to prepare revised or supplemental environmental documents. This is unproductive and not in the best interest of the trusts or the public. Now is the time for us to come together. We urge you to reject these bills and to note the legal concerns set forth below.

- (1) SB 5547 / HB 1546 could put legal pressure on DNR to present sales within the footprint of Alts. F or G before the final EIS is published.

SB 5547 / HB 1546 does not necessarily require DNR to present sales within the footprint of Alts. F or G if DNR or the Board of Natural Resources (Board) conclude that doing so would legally compromise the LTCS process. But the Bills' exemption of the LTCS from WAC 197-070 (1)(b), a SEPA rule that prevents agencies from "limiting the choice of reasonable alternatives" pending a final EIS, will put pressure on DNR to advance such sales and could potentially allow a stakeholder to argue that DNR's failure to advance such sales is a violation of DNR's trust mandate. The bill, therefore, could prompt extensive timber industry-initiated litigation—and opposition to that litigation—in the middle of the years-long LTCS process. By creating legal sideshows and ill-will, therefore, SB 5547 / HB 1546 has the potential to substantially slow down and taint both the state and federal processes surrounding the LTCS.

- (2) SB 5547 / HB 1546 creates potential legal issues for the LTCS process after the Board adopts a LTCS after a final EIS.

As discussed at length in our comments on the RDEIS, NEPA and SEPA do not permit an agency to effectively “pre-ordain” the adoption of an alternative before an FEIS is completed or a final record of decision is entered. In fact, the entire purpose of NEPA and SEPA is to ensure that an agency be able to choose among the potentially-implementable alternatives discussed in the FEIS.

SB 5547 / HB 1546 effectively directs the Board and DNR to abandon Alts. F and G and paves the way for their logging before the FEIS. This exposes the Board’s final action adopting a LTCS to the argument that the Legislature effectively disregarded the SEPA process and forced the Board’s hand to disregard reasonable alternatives before the final EIS. This could affect the legality of the Board’s review of the alternatives. If the FEIS is overturned for that reason, it would require the Board to generate additional alternatives, analyze them in a new RDEIS, and identify substitute areas to compensate for the habitat logged as a result of SB 5547 / HB 1546. While it exempts the LTCS from WAC 197-11-070 (1)(b), SB 5547 / HB 1546 does not exempt the LTCS from SEPA or judicial review for violations of SEPA. For this reasons, SB 5547 / HB 1546 has the potential to create a legal challenge to the Board’s final adoption of an alternative. This adds unnecessary legal uncertainty to the entire LTCS NEPA and SEPA process.

- (3) SB 5547 / HB 1546 could jeopardize the USFWS’s review and consideration of the major amendment to DNR’s HCP.

Last year, Rep. Jaime Herrera-Beutler proposed a rider on the federal appropriations budget that sought to narrowly limit the components of the LTCS that USFWS could approve. In opposition to this rider, we wrote that tying the hands of the USFWS’s review of all of the alternatives could make the federal review of the Section 10 and NEPA decisions vulnerable to legal challenge.

SB 5547 / HB 1546 could have the same effect, which could lead to the USFWS suspending work on the LTCS HCP Amendment if the USFWS determined that the alternatives being analyzed are being logged during the review period and if the State has already made its mind up about the alternatives before the FEIS issues. This compromises and adds legal uncertainty to the NEPA process.

- (4) SB 5547 / HB 1546 demonstrates bad faith at the “Solutions Table.”

As discussed above, our Coalition came to Commissioner Franz’s Solutions Table to work across the board with all state forest stakeholders to help them reach their goals. To reciprocate, we expected all participants in the Solutions Table to develop viable ways to help conserve habitat that will not be conserved through the LTCS. SB 5547 / HB 1546 targets the very habitat (Alts. F and G) that the Solutions Table is seeking solutions to conserve. Stakeholders came together at the Solutions Table to find mutually agreeable

solutions that can be implemented consistent with existing law and regulations. Stakeholder-sought legislation that would allow logging of alternatives before the EIS review process has completed is, in our view, an act of bad faith and is counter-productive to the collaborative spirit of the Commissioner's Solutions Table.

- (5) SB 5547 / HB 1546's JLARC referral interferes with the Board's rigorous process for evaluating the alternatives.

Section 2 of SB 5547 / HB 1546 refers DNR's "preferred alternative," Alt. H, to the Joint Legislative Audit and Review Committee (JLARC) to analyze that alternative's "harvest volume and revenue impacts." This provision is ill-advised for numerous reasons. First, it is premature because it assumes that the Board will select Alt. H and that the USFWS would approve this alternative under Sects. 7 and 10 of the ESA. Second, Sect. 2 divorces the alleged economic impact of Alt. H from other considerations, such as the economic value to DNR of obtaining 50 more years of federal ESA assurances. Third, if SB 5547 / HB 1546 passes, it could slow down the Board and DNR's ongoing work on the final EIS and associated economic impact statements because it will compete for DNR's staff time to complete this analysis for the Legislature.

In summary, our Coalition strongly opposes SB 5547/HB 1546. These bills will obstruct and jeopardize the Board and DNR's long-sought goal of adopting a legally and scientifically-viable LTCS alternative and it will expose the Board's decision to legal arguments under NEPA and SEPA.

Very truly yours,

MARBLED MURRELET COALITION



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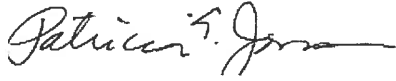
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