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Board of Natural Resources (via bnr.wa.gov)
Commissioner of Public Lands Hilary Franz (via hilary.franz@dnr.wa.gov)
Angus Brodie (via angus.brodie@dnr.wa.gov)
Andy Hayes (via andy.hayes@dnr.wa.gov)

Re: Process Concerns Regarding Board Approval of Marbled Murrelet Long-term Conservation Strategy

Dear Board Members, Commissioner Franz, Mr. Brodie and Mr. Hayes:

The Washington Forest Law Center is writing as legal counsel for the Marbled Murrelet Coalition.

We are writing to share with DNR and the Board of Natural Resources (Board) our concern with the proposed process relative to DNR's submission to the federal government of a proposed Amendment to DNR's Habitat Conservation Plan (HCP) for marbled murrelets. In light of the recent release of the final environmental impact statement (FEIS), we believe it would violate principles of the State Environmental Policy Act (SEPA) if the Board does not take a post-FEIS vote on the specific long-term conservation strategy (LTCS) alternative proposed in the Amendment before this proposed Amendment is considered by the U.S. Fish and Wildlife Service (USFWS) under the ESA and NEPA.

In November 2017, the Board selected Alt. H as its "preferred alternative" and directed DNR to draft a permit Amendment consistent with this alternative. But this decision was made before the RDEIS was released in September 2018 and before the FEIS was released on September 20, 2019. This means that the Board's 2017 vote for Alternative H preceded the FEIS, RDEIS, the comments, and the agencies' responses to the comments on the DEIS and RDEIS. Yet these documents and comments contain important scientific, legal, economic, and policy arguments. Nor has the Board held a post-FEIS meeting to confer on whether and how the FEIS affects or requires reconsideration of the proposed Amendment.

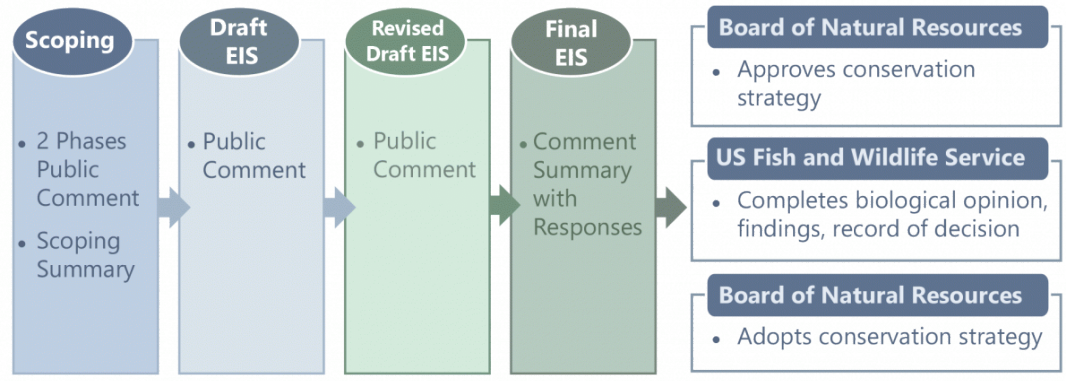
In our view, the State's submission of the proposed Amendment to the USFWS should have been an important post-FEIS decision because this submission interprets the Board's duties under state and federal law and because the decision has potential environmental and legal consequences. The State's pre-FEIS submission also narrows the scope of the submitted amendment and it could impermissibly build momentum in favor of this version of the Amendment if it is ultimately approved by the USFWS.

For these and the other reasons discussed below, we believe SEPA and the APA require the Board to formally reconsider, prior to USFWS review, the proposed Amendment in light of the FEIS, public comments, and state and federal law and public policy.

Background:

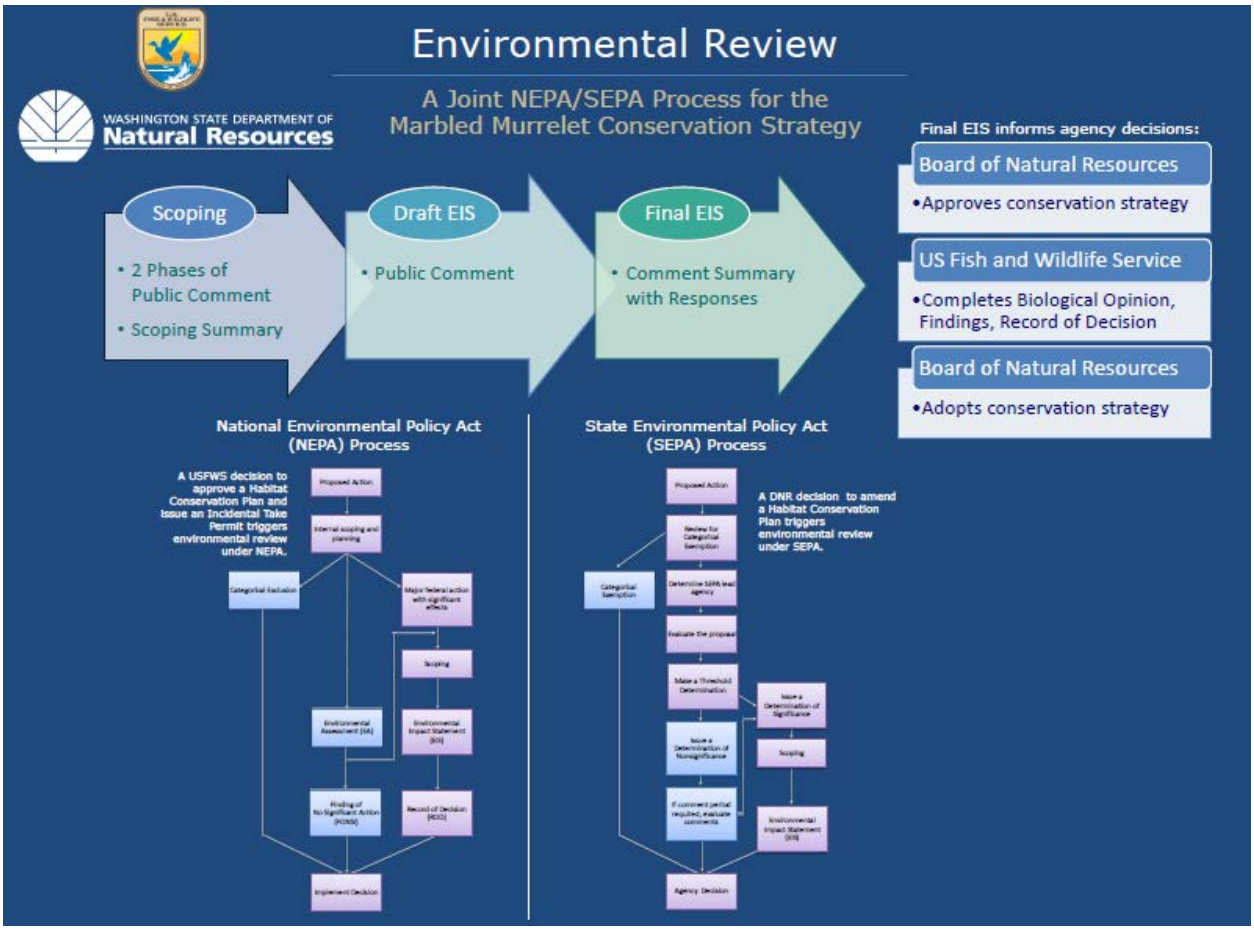
We briefly explain the timing of this letter: in short, our Coalition reasonably believed that the joint NEPA-SEPA process would entail future Board consideration of the Amendment in light of the FEIS before DNR submitted it to the USFWS for review under applicable ESA standards.

Two DNR-prepared slides gave us the impression that the Board would make two decisions on the Amendment, one to "approve" it and the other to "adopt" it, both of which follow the FEIS. The first appears on DNR's website as of today (https://www.dnr.wa.gov/mmltcs).



The two Board boxes on the right that sandwich the USFWS's review suggest two decisions: approval and adoption of the conservation strategy after the FEIS. The second DNR slide similarly reflects two sequential Board approvals, one before and one after USFWS review.[1]

[1] We acknowledge there are documents reflecting otherwise. The September 2018 RDEIS states that the federal decision will precede the Board's adoption of the proposed LTCS, RDEIS, at 1-14, and at its November 17, 2017 meeting, the Board authorized DNR to present the "preferred alternative" to the USFWS. https://www.dnr.wa.gov/publications/em_bc_bnr_110717_minutes_final.pdf?e9oix7 (meeting minutes at pg.8). At its June 2018 meeting, DNR also reported to the Board that it (DNR) intended to submit the Amendment to the Board but only after the federal government has acted on the permit. https://www.dnr.wa.gov/publications/em_bc_bnr_060518_minutes_final.pdf?lq859. But for the reasons stated in this letter, these statement do not relieve the Board from its obligation to comply with SEPA.



See https://www.dnr.wa.gov/publications/frc_hcp_mm_env_review_poster.pdf?wmj6y4.

Regardless of the clarity of the process, whether or not DNR intended to seek the Board's reconsideration of the Amendment in light of the FEIS and its comments is not for us the salient issue. For the following reasons, we think SEPA and state law require the Board to review and re-vote on the federal Amendment submission before the USFWS formally reviews it.

Concerns Relative to SEPA and Its Interface with the Proposed Amendment

We first wish to make clear that this letter is directed to DNR and the Board, not the USFWS. We do not question that the USFWS will eventually review DNR's proposed permit Amendment under federal law upon receipt of a finalized amendment that would be acceptable to the Board. This letter addresses DNR's threshold duties and responsibilities under SEPA and State law before it submits its proposed Amendment to the USFWS.[2]

Our SEPA concern stems from the fact that the specific LTCS alternative that the Board proposes to the USFWS in the proposed Amendment is an important and consequential decision.

[2] This letter addresses a discrete concern regarding the Board's compliance with SEPA. It does not address or waive any different or additional legal arguments relative to the proposed Amendment to DNR's HCP relative to marbled murrelets.

What the State "offers" in this proposed Amendment is effectively the Board's interpretation of state and federal law. The submission also effectively governs and limits the scope of the federal review of the State's proposed amendment to its HCP and take permit.

For example, the Board's decision on the conservation strategy mirrors the ESA Section 10 decision: whether, in the Board's view, the proposed conservation strategy "mitigates and minimizes take to the maximum extent practicable" and whether the State's trust duties permit or require the Board to "offer" more or fewer conservation measures. The Board is also making a decision on what its federal HCP requires it to propose and whether the proposal is consistent with sound environmental policy. The Board makes these important decisions under its authority to make policy decisions affecting the public lands. RCW 43.30.315 (2) (Board has authority and duty to "establish policies to ensure that the acquisition, management, and disposition of all lands and resources within the department's jurisdiction are based on sound principles designed to achieve the maximum effective development and use of such lands and resources consistent with laws applicable thereto.").

DNR acknowledges that the Board will eventually vote to adopt (or not adopt) the federally-reviewed LTCS alternative, or a variation of it. DNR, however, believes this vote can be deferred until after the USFWS has approved the Amendment under ESA Section 10 and has drafted a biological opinion analyzing "jeopardy," as required by ESA Section 7. We disagree with this analysis.

One thing is not in question: the USFWS will receive a final permit amendment from the State of Washington for its review under federal law. But prior to proposing a permit amendment to the federal government, the State must comply with its duties and responsibilities under SEPA and State law. In our view, it violates SEPA for the Board to have pre-authorized the DNR's submittal of the Alt. H-patterned Amendment to the USFWS before the release of the FEIS and before the Board's re-considers its preferred LTCS alternative in light of the FEIS and applicable state and federal law.

Our SEPA analysis begins with the identification of the "proposal." The SEPA "proposal" at issue is the Board's selection of an alternative for a long-term conservation strategy. In effect, the Board is "actively preparing to make a decision on one or more alternative means of accomplishing that goal, and the environmental effects can be meaningfully evaluated." WAC 197-11-784 (definition of "proposal.").

To preserve the integrity of the SEPA alternatives process, an agency may not take an "action" that in some manner prejudices the integrity of the SEPA alternatives process prior to the issuance of the FEIS. Before the FEIS is released, the agency cannot take "action" that "limits the choice of alternatives." WAC 197-11-070 (1(b); *ILWU v. Seattle*, 176 Wn. App. 512, 523, 176 P. 3d 512 (2013). While an agency may take non-binding "preliminary" steps before the FEIS issues, *ILWU*, 176 Wn. App. at 521, the agency cannot take actions before the FEIS if the "action" is binding and could have environmental consequences or limit the agency's consideration of the alternatives. *ILWU*, 176 Wn. App. at 523. An agency takes an "action" on a project under SEPA review when the agency's action is binding on future pending decisions or "limits or controls future decisions relating to the project." *ILWU*, 176 Wn. App. at 522-23.

In *ILWU*, the court held that the City of Seattle did not take a pre-FEIS "action" when it approved a Memorandum of Understanding (MOU) outlining the EIS process for evaluating the proposed Seattle arena in the Sodo neighborhood of that city. The court reasoned that the MOU merely formalized a preliminary SEPA and city review process for the Sodo arena proposal and did not by its own terms prevent the City from choosing a different location for the arena. In contrast, in *Columbia River Keeper v. Port of Vancouver*, 189 Wn. App. 800, 357 P. 3d 710 (2015), the court held that the Port of Vancouver *did* take "action" under SEPA when it entered into a lease agreement with an oil company for an oil terminal prior to obtaining approval of the project under SEPA. Although it ultimately held the lease did not violate SEPA because the State had the final say on the energy facility, the court reasoned that the Port's decision would have been "binding" on the Port if the project was approved by state. *Columbia River Keeper*, 189 Wn. App. at 815.

Here, the Board voted in 2017 to select Alt. H as the "preferred alternative" and, concurrently, authorized DNR to submit the Alt. H-patterned Amendment to the USFWS upon completion of the FEIS. It appears that DNR has already made this submission. But this vote took place two years before the FEIS was released and one year before the RDEIS was issued. As set forth above, the Board's authorization of DNR's submittal of the Amendment is an action that will have important environmental and legal consequences because it effectively limits the federal review of the range of alternatives and because the amendment takes effect when approved by the USFWS. The Board should reconsider the proposed alternative in light of the FEIS and other post 2017 documents before the USFWS formally considers the proposed Amendment.

Skipping a Board vote on the submitted Amendment presents the risk of "snowballing," a SEPA principle addressed by the court in *Columbia Riverkeeper.* "Snowballing" an alternative under evaluation in an EIS occurs when an agency takes a pre-FEIS "action" that effectively precludes consideration of other alternatives by creating a "snowball" or momentum effect in favor of a preferred alternative. "An agency violates SEPA by shaping the details of a project before completing an EIS, effectively turning administrative approval into a "yes or no" vote on that project as detailed, rather than allowing for the development and consideration of alternatives after the EIS is completed. *See Lands Council v. Wash., State Parks Recreation Comm'n,* 176 Wash.App. 787, 806–07, 309 P.3d 734 (2013). Similarly, if the initial agency action has a coercive effect on final approval such that it will likely limit the range of alternatives the approving agency will consider, this may also violate SEPA. *Cf*. ILWU, 176 Wn. App. at 524-25." *Columbia Riverkeeper*, 189 Wn. App. at 819.

Here, the Board's pre-authorized submission of the Alt. H Amendment before the FEIS potentially builds momentum in favor of Alt. H when the Board takes it up after federal review and approval. This is because, when the Amendment returns to the Board from the USFWS, there will be strong pressure on the Board to adopt it to avoid the delay of further federal review. That the Board reserved the right to adopt (or not adopt) the Amendment until after federal review does not vitiate the "snowballing" effect of the federal approval on the Board's decision-making process.

Consistency with NEPA and the ESA

Our concern that the Board did not take a post-FEIS vote on the Amendment to be submitted to the USFWS is not in any way inconsistent with the ESA or NEPA. We acknowledge DNR's view, shared with us at meetings and in phone calls, that this review and approval sequence is a product of the joint NEPA-SEPA process.

There is no dispute that the federal government will receive a State-approved application before it begins its review. HCP Handbook, at 14.2. But we ask you to reconsider the argument that the joint NEPA-SEPA process prevents DNR from seeking the Board's authorization (or reauthorization) for the submission after the release of the FEIS. The "major amendment" section of DNR's Implementation Agreement (IA) provides that proposed major amendments to DNR's HCP will become effective upon approval by the federal government; there is no provisional approval-like language in DNR's IA.[3] And the ESA provides that the federal government shall issue the permit *if* it meets the Section 10 issuance criteria without any provisional approval procedures;[4]the ESA makes no reference to provisional approvals of HCP amendments. Contrary to DNR's position on this issue, the ESA and NEPA appear to require a final proposed Amendment, not a provisionally-valid one.

The Board's approval of the Amendment submission, moreover, advances the federal interest in finality because it ensures the USFWS does not waste its valuable time reviewing an Amendment that might not be ultimately acceptable to the Board under state law. A new board vote on the Amendment in light of the FEIS will ensure that the federal government has received a final State-approved proposed amendment.

Conclusion

SEPA and state law require the Board to reconsider and re-authorize the DNR's submission of the Alt. H-patterned Amendment to the federal government in light of the FEIS and the comments submitted on the two earlier draft EISs. We do not believe this request will slow down the anticipated process because this is something that can be accomplished during the next few Board meetings. Adhering to our request will ensure the federal government has before it an Amendment that is consistent with State law and SEPA and one which the Board is prepared to accept if approved by the Federal government.

[3] DNR HCP Implementation agreement ¶ 25.3 b.

[4] ESA, Section 10 (a)(2)(B).

Very truly yours,

Peter Goldman
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Washington Forest Law Center
Submitted on behalf of the Marbled Murrelet Coalition

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Marbled Murrelet Coalition