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MEMORANDUM

DATE: February 27, 2018

TO: Members of the Washington State Legislature

FROM: Peter Goldman, Director

RE: Unconstitutionality of Proposed Budget Proviso in SB 6032 (§ 308 (23))

Executive Summary

The Legislature created the DNR in 1957 and assigned to it many responsibilities with regard to the management of the state forests. The DNR consists of the Board of Natural Resources (BNR), the Commissioner of Public lands and the agency DNR, and a DNR supervisor. RCW 43.30.030. Included in the powers of the BNR is "establishing 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 consistent with laws applicable thereto." RCW 43.30.215 (2). The Board also serves as trustees and must balance the inter-generational equities of its forest management decisions.

But in a blatant usurpation of agency authority, the budget proviso in SB 6032 Section 308(23) seeks to undermine the substantive authority of the Board of Natural Resources (BNR) and the Department of Natural Resources (DNR) to manage the State Forests in a manner that achieves compliance with state and federal law and which promotes sustainable long-term management of these forests. Specifically, the proviso directs DNR to submit Alternative B, in addition to Alternative D, to the U.S. Fish and Wildlife Service (USFWS) as the "preferred alternative" for DNR's habitat conservation plan (HCP), which gives DNR a 70-year "incidental take permit" under the federal Endangered Species Act (ESA).

As a matter of principle, using a budget proviso to repeal or modify an agency's statutory authority is poor public policy. The proposed proviso has not undergone any hearing or public process and it seeks to reverse and micro-manage five years of hard work of a statutory board and a natural resources agency which have given extensive consideration to the law, science, and public policy relative to the management of state forests. The proviso will also prevent the BNR

from making forest management decisions relative to the State Forests and the State's federal HCP that the BNR has deemed to be in the interest of "all the People,"[1] the explicit language in the State Constitution governing these lands.[2] This raises the issue whether the Legislature is running afoul of the trusts governing management of state forests. *See Skamania v. State*, 102 Wn.2d 127, 685 P. 2d 576 (1992).

In addition, for the reasons set forth below, the proviso runs afoul of the State Constitution.

Analysis

The budget proviso, SB 6032 Section 308(23), states as follows:

> Within existing appropriations, the department shall submit Alternative B as outlined in the draft environmental impact statement for the marbled murrelet long-term conservation strategy dated December 2016, to the United States fish and wildlife service, if the service allows more than one alternative to be submitted. Alternative B shall be submitted for evaluation to determine if the alternative meets the requirements of the 1997 Washington state lands habitat conservation plan and other applicable federal law in a manner consistent with the department's legal and fiduciary obligations to trust beneficiaries.

The DNR and the USFWS have been developing the marbled murrelet long-term conservation strategy in some fashion for at least five years. The two agencies published a draft environmental impact statement (EIS) evaluating a range of alternatives, the least protective of which is Alternative B. In comments, federal (EPA) and state agencies (WDFW), as well as numerous conservation groups, opined that Alternative B does not meet required federal and state legal and science requirements. DNR thus selected a more conservation-oriented alternative, Alternative D, as the "preferred alternative."

Under the anticipated process, DNR and USFWS will complete a final EIS and the analysis of additional environmental and economic impacts, and based on that analysis, the BNR will select an alternative for DNR to submit to USFWS as an application for a habitat conservation plan amendment. The proviso would pre-determine that process and mandate that, in addition to an additional alternative, DNR must submit Alternative B to USFWS for consideration.

The proposed proviso likely violates the Washington State Constitution, article II, § 19 (title in subject and single subject rules) as well as article II, § 37 (barring unidentified amendment of a statute). The proviso also potentially forces DNR to violate the DNR's compliance with the ESA and, in so doing, violate DNR's fiduciary obligations.

[1] Const. art. XVI, § 1.

[2] The author of this Memorandum does not, in any way, argue or concede that Alternative D satisfies federal or state law. This Memorandum argues only that the Legislature should not, and cannot, amend a substantive law using a budget proviso.

State Law

DNR manages state lands pursuant to the authority delegated by the Legislature in the Public Lands Act, RCW 79.02. *See also* RCW 43.30.30 (creating DNR); RCW 43.12.010 (granting authority to commissioner of public lands). The BNR determines public lands management policy. RCW 43.30.215.

DNR must also comply with the State Environmental Policy Act, RCW 43.21c.010 *et seq.* (SEPA). SEPA imposes affirmative responsibilities on State agencies to protect the environment, RCW 43.21C.020, and agencies must consider environmental impacts and a range of alternatives before taking "major actions significantly affecting the quality of the environment." RCW 43.21c.030. DNR acknowledges that the selection of a long-term strategy is such an action, and is preparing an EIS prior to BNR's selection of an alternative.
The budget proviso would pre-emptively partially determine the outcome of DNR's SEPA analysis by mandating that DNR submit both Alternative B and an additional alternative to USFWS, regardless of public comment or the agency's consideration of environmental impacts. The proviso would create an exemption from SEPA by mandating that DNR select "Alternative B" prior to the completion of the SEPA process. The proviso would also substantively shape BNR's land management decisions, which is otherwise subject to BNR's discretion or codified law.

Const. art. II, § 19 Violation

Under the subject in title requirement of Const. art. II, § 19, the subject of the bill must be adequately expressed in its title. The purpose of this requirement is to guarantee notice of the subject matter of the bill. "To be constitutionally adequate, a title need not be 'an index to the contents [of the bill], nor must it provide details of the measure.'" The title of the bill need only provide sufficient notice to inform voters and legislators of the subject matter of the bill. "The title satisfies the subject in title requirement 'if it gives notice that would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.'" *Wall v. State*, No. 46641-4-II, 2015 Wash. App. LEXIS 2067, at *10-11 (Ct. App. Aug. 26, 2015) (summarizing case law, citations omitted); *Wash. State Grange v. Locke*, 153 Wn.2d 475, 497, 105 P.3d 9 (2005).

Here, the appropriations bill is titled "AN ACT Relating to fiscal matters; amending…" and lists many statutes. However, the proviso does not relate to SEPA or the Public Lands Act nor does it reference those statutes by name; instead, the proviso has a substantive impact on the authority of existing statutes and does not relate to any fiscal matters. In fact, the proviso only mentions RCW 79.105.150, which pertains to aquatic lands. As a result, the bill likely violates the subject in title rule.

Art. II, § 19 also prevents "the practice of combining two bills, neither of which would pass on its own, but when the proponents of the measures combine their interests both can be enacted," and prevents "the attachment of an unpopular bill to a popular one on an unrelated subject in order to guarantee the passage of the unpopular provision." *Wash. State Grange*, 153 Wn.2d at 491. This prohibition has a dual purpose: (1) to prevent "logrolling" or pushing legislation through by attaching it to other necessary or desirable legislation, and (2) to assure that the

members of the legislature and the public are generally aware of what is contained in proposed new laws. *Flanders v. Morris*, 88 Wash. 2d 183, 187, 558 P.2d 769, 774 (1977).

Const. art. II, § 37 Violation

The proposed budget proviso also violates Const. art. II, § 37. Const. art. II, § 37 provides that "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." "Appropriations bills exist simply for the purpose of implementing general laws. As such, we hold that the general law cannot be suspended by provisions in appropriations bills which are in conflict." *Flanders v. Morris*, 88 Wash. 2d at 190. Stated simply, a budget proviso may not constitutionally amend a substantive law. While the proviso does, on its face, only requires the DNR to submit Alternative B if the USFWS allows for the submission of two preferred alternatives, the proviso *forces* the Board to find that Alternative B meets the purposes and need of the HCP, a finding the Board has, to date, declined to make.

The Washington Supreme Court has set forth a three part test to determine whether a budget measure amends substantive law: "where the policy set forth in the budget has been treated in a separate substantive bill, its duration extends beyond the two-year time period of the budget, or the policy defines rights or eligibility for services, such factors may certainly indicate substantive law is present." *Wash. State Legislature v. State*, 139 Wn.2d 129, 147, 985 P.2d 353 (1999).

The proviso here appears to meet at least the second two criteria and therefore constitutes an amendment to substantive law. For example, the duration of the alternative selected and resulting HCP amendment is likely to be approximately 60 years, and the policy defines and limits public rights to impact agency discretion in managing public lands. While a proviso proponent may argue that the proviso does not amend SEPA but only creates a non-discretionary duty that is not subject to SEPA, that argument is unlikely to be successful due to the ongoing SEPA process considering exactly the same issues. As a result, it is likely that the budget proviso violates the single subject rule and the prohibition against silent amendments.

The proviso also raises serious questions regarding the State's constitutional obligation to manage public lands. Article XVI, § 1 ("All the public lands granted to the state are held in trust for all the people…"). There is debate regarding the scope of the State's trust obligations. However, regardless of the scope of the trust duty, a prudent trustee must fully consider all relevant information before deciding how to manage the trust asset. Pre-selecting an alternative based on the lobbying of an industry group raises concerns that the State is determining its trust obligations according to the desires of a private interest, which is barred by *County of Skamania v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984).

Put simply, the BNR is charged with making forest management decisions that serve "all the People." A budget proviso cannot, and should not, diminish or assert bias in the BNR's authority to make this complex decision.

Federal Law

Implementation of the budget proviso could further compel DNR officials to violate federal law. While the proviso requires submittal of Alternative B only "if the service allows more than one alternative to be submitted," the submittal would necessitate either a single application for an HCP amendment with two alternatives, which is not authorized by the DNR Trust Lands HCP or the ESA, or the dual submittal of two applications, which raises concerns that DNR would be required to submit incorrect information to the Services.

The Incidental Take Permit and the Implementation Agreement for the HCP require full implementation of the DNR Trust Lands HCP. The HCP explicitly sets forth a multi-step interim process to develop long-term conservation strategies for each planning unit, and calls for development of "a" long-term conservation strategy as the culmination of the interim process. *See* HCP IV 39-40. Similarly, ESA Section 10(a)(2)(A) states in part: "No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) unless the applicant therefor submits to the Secretary a conservation plan that specifies…." 16 U.S.C. § 1539(a)(2)(A) (emphasis added). While the Service has significant discretion in administration of the HCP, the amendment process must adhere to the ESA in the same manner as an application for a new permit, 50 C.F.R. § 13.23(a), and neither the HCP nor the ESA authorizes USFWS to consider an application with two alternatives. It appears that the only pathway for DNR to comply with the budget proviso may be to submit simultaneous applications proposing different HCP amendments.

If the Service considers two simultaneous applications for different HCP amendments, there is high likelihood that the process would require DNR to submit conflicting applications. ESA Section 10(a)(2)(A)(iii) requires that an application for an HCP include, among other things, a description of "what steps the applicant will take to minimize and mitigate such impacts" and "what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized." 16 U.S.C. § 1539(a)(2)(A)(iii). In order for the Service to approve an application, it must determine that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking." 16 U.S.C. § 1539(a)(b)(ii).[3]

As part of an application, the applicant must sign a certification that includes the following statement: "I further certify that the information submitted in this application for a permit is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to suspension or revocation of this permit and to the criminal penalties of 18 U.S.C. 1001." *See* 50 C.F.R. § 13.12(a)(5).

The requirement for DNR to submit two proposals would potentially force a state official to violate federal law, because DNR would submit two conflicting applications—one would explain why DNR selects Alternative B and why that alternative provides minimization and mitigation to "the maximum extent practicable," while a simultaneous application would explain why DNR

[3] Indeed, if the Service received two applications, both of which DNR represents as "practicable," the Service must by law approve the application with greater minimization and mitigation of take. The budget proviso has no reasonable likelihood of gaining approval of Alternative B, but rather appears designed solely to exert political pressure.

selects the preferred alternative and does not choose Alternative B. This would necessitate either knowingly providing incorrect information in one application, or not submitting complete applications.

While the proviso may not facially violate the ESA, it requires DNR to take steps not envisioned by the HCP or ESA, and potentially requires DNR to submit false information to the USFWS. This would raise legal concerns both under federal law and regarding DNR's fiduciary obligations.

Conclusion

The budget proviso is poor public policy because it seeks to undermine the difficult, open, and transparent work the BNR and DNR have been doing, in consultation with various forest stakeholders, to prepare and submit a long-term conservation strategy. The proviso is likely in clear violation of the Washington State constitution, article II, §§ 19 and 37. The proviso also raises serious implementation concerns and adversely impacts DNR's ability to manage public lands according to its constitutionally imposed trust obligations.