AMERICAN FOREST
RESOURCE COUNCIL

June 27, 2018

Board of Natural Resources
c/o Commissioner Hilary Franz – Chair
MS 47000
Olympia, WA 98504-7000

Re: Actions During Consideration of Alternatives for Marbled Murrelet LTCS

Dear Commissioner Franz and Board Members:

This responds to the May 30 letter you received from the Washington Forest Law Center (WFLC) on behalf of the Marbled Murrelet Coalition. In the May 30 letter, WFLC asserts that DNR is prohibited from commencing "any timber sales on any lands that could be included within *any* of the LTCS alternatives that DNR is currently considering…" We write to clarify that the prohibition on action applies only to *reasonable* alternatives.[1]

Alternative F is not a reasonable alternative. It sets aside three times the acres of any other alternative, even though all the other alternatives, according to the DEIS, would satisfy the ESA. Because Alternative F is not reasonable and has no prospect of adoption, it should be dropped from detailed consideration in the final RDEIS. Formally taking this unreasonable alternative off the table will allow DNR to immediately pursue Trust objectives on approximately 94,000 acres without negatively affecting its obligations under the HCP or other environmental laws. Continuing to tie up these acres exposes the Board to immediate risk of breaching its fiduciary duties to the Trust beneficiaries.

The Prohibition on Interim Actions Applies Only to Reasonable Alternatives

SEPA regulations generally prohibit action before issuing a final EIS that would "[l]imit the choice of reasonable alternatives."[2] A reasonable alternative is one "that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation."[3] Thus, SEPA regulations clarify that "[t]he word 'reasonable' is intended to limit the number and range of alternatives, as well as the amount of detailed analysis

[1] We assume for the sake of argument that the prohibition applies during preparation of the LTCS EIS. However, it is not certain that the prohibition applies to development of the LTCS since it is covered by the original EIS. *See, e.g., ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1138 (9th Cir. 1998) (holding actions could proceed pursuant to governing land management plan).
[2] WAC 197-11-070(1)(b).
[3] WAC 197-11-786.

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for each alternative."[4] The Washington Supreme Court has confirmed that "[r]easonable alternatives, for this purpose, are limited."[5] An EIS is only required to "[d]evote sufficiently detailed analysis to each *reasonable* alternative to permit a comparative evaluation of the alternatives including the proposed action."[6]

DNR would be prohibited from taking action on any of the acres contemplated within the boundaries of Alternative F if, and only if, the Board and DNR determined Alternative F to be reasonable.

Alternative F is not a Reasonable Alternative

Under Washington law, Alternative F is clearly *not* a reasonable alternative for at least three reasons. First, and most importantly, an alternative that does not meet a proposal's purpose, in this case the Trust mandate, is on its face not reasonable.

This is because "[t]he stated goal of a project necessarily dictates the range of 'reasonable' alternatives."[7] Thus DNR is "under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives."[8] Alternative F is neither likely to be implemented or consistent with DNR's basic policy objective and legal obligation of undivided loyalty to the Trust beneficiaries. **Simply put, any alternative that would require DNR and the Board to knowingly and willingly violate its fiduciary obligation and Trust mandate to the beneficiaries is not reasonable.**

Second, Alternative F is not a reasonable alternative because there is no suggestion or evidence that its features are required under the HCP, implementation agreement, or otherwise under the ESA. Unless the Board has received information from DNR staff or the U.S. Fish and Wildlife Service previously undisclosed to the public, Alternative F far exceeds mitigation required for the approval of DNR's amendment to the HCP.

Third, Alternative F is not a reasonable alternative because, pragmatically, it is an extreme outlier. There are currently eight alternatives under consideration for the Long-Term

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[4] WAC 197-11-440(5)(b)(i).
[5] *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 100 (2017).
[6] WAC 197-11-440(5)(c)(v) (emphasis added).
[7] *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Because SEPA is modeled after the federal National Environmental Policy Act (NEPA), decisions interpreting NEPA can be useful in SEPA matters. *Pub. Util. Dist. No. 1 of Clark Cty. v. Pollution Control Hearings Bd.*, 137 Wn. App. 150, 158 (Div. II 2007).
[8] *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014) (quoting *Seattle Audubon Soc'y v. Moseley,* 80 F.3d 1401, 1404 (9th Cir.1 996)). In *Seattle Audubon*, the Ninth Circuit similarly approved dropping of a no-harvest alternative that was inconsistent with the Forest Service's governing statute. 80 F.3d at 1404.

Conservation Strategy.[9] The range between Alternatives A-E and H is 47,000 acres of murrelet-specific conservation, from 10,000 to 57,000 acres.[10] Alternative F goes way beyond that, adding 94,000 additional acres of "murrelet-specific conservation."[11] In other words, Alternative F sets aside *three times* the acres of even the most restrictive other alternative, confirming its position as an extreme outlier.

Alternative F Should be Immediately Dropped from the RDEIS

For the reasons stated above, the Board can and should drop Alternative F from detailed consideration and should free the 94,000 acres above any other alternative for timber harvest. Such a decision is not only legal, but rightly focuses the analysis and public dialogue on the alternatives being seriously vetted by the Board, DNR, and its stakeholders. Moreover, dropping Alternative F would immediately unencumber DNR Trust lands – currently deferred administratively – that are required to be managed for the Trust beneficiaries.

There is nothing in SEPA or NEPA holding that when an agency determines a particular alternative to be an *unreasonable* outlier, such as Alternative F, the agency must continue to ensure that no actions limit the choice of that unreasonable alternative. We strongly encourage you to take immediate action and drop Alternative F from detailed consideration in the final RDEIS. Because Alternative F blatantly conflicts with the Trust mandate, we believe the Board is legally obligated to drop the alternative to comply with its fiduciary responsibility to the Trust beneficiaries.

Sincerely,

Travis Joseph
President/CEO
American Forest Resource Council

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[9] Comparable figures have not been made available for Alternative G. If its murrelet-specific conservation exceeds the range of A-E and H, then Alternative G is not reasonable and should not be given detailed consideration in the RDEIS.

[10] DEIS at 2-7, Table 2.2.1; Presentation of Andrew Hayes to the Board of Natural Resources, June 5, 2018 at 16.

[11] DEIS at 2-7, Table 2.2.1.