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SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

SEATTLE AUDUBON SOCIETY, and the  
OLYMPIC FOREST COALITION,

Plaintiffs,

v.

WASHINGTON STATE BOARD OF  
NATURAL RESOURCES; WASHINGTON  
STATE DEPARTMENT OF NATURAL  
RESOURCES; PETER GOLDMARK,  
Commissioner of Public Lands and Chair of the  
Board of Natural Resources; and LOREN  
TORGERSON, the SEPA Responsible Official.

Defendants,

and

AMERICAN FOREST RESOURCE COUNCIL  
and WAHKIAKUM COUNTY,

Defendant-Intervenors.

NO. 12-2-19053-4SEA

**PLAINTIFFS' OPENING BRIEF**

**TABLE OF CONTENTS**

I. INTRODUCTION .....	1
II. STATUTORY FRAMEWORK.....	2

1	A. Endangered Species Act (“ESA”).....	2
2	B. State Environmental Policy Act (“SEPA”).....	3
3	III. STATEMENT OF FACTS .....	5
4	A. Marbled Murrelet Biology and Conservation .....	5
5	B. The DNR Trust Lands Habitat Conservation Plan .....	7
6	C. The May 1, 2012 Amendment .....	8
7	D. Plaintiffs’ Opposition to the May 2012 Amendment.....	9
8	1. The Amendment transfers the consequences of DNR’s delay to the	
9	marbled murrelet.....	9
10	2. The reclassified, higher quality habitat has established conservation	
11	value to marbled murrelets.....	11
12	3. DNR’s reliance on flawed and stale marbled murrelet surveys.....	13
13	4. DNR’s reliance on the 2008 Science Report to log “reclassified”	
14	habitat without adopting or committing to the Report’s conservation	
15	recommendations .....	14
16	5. The Amendment precludes and undermines the SEPA and NEPA review	
17	DNR is conducting for the long-term strategy.....	15
18	IV. JURISDICTION AND SEPA STANDARD OF REVIEW .....	16
19	A. Writ of Review.....	16
20	B. SEPA.....	17
21	V. ARGUMENT .....	17
22	A. DNR’s Threshold Analysis Was Clearly Erroneous Because the Logging of	
23	Reserved Marbled Murrelet Habitat Has Probable Significant Adverse	
24	Environmental Impacts .....	17
25	1. The Amendment will have a significant adverse environmental impact	
26	because it allows extensive logging of mature forests specifically	
	reserved under DNR’s HCP for their potential conservation value.....	18

1 a. The impacts of logging are intense because they are severe  
and irreversible.....19

2

3 b. Because the impacts will occur in the context of specifically reserved  
habitat for a threatened species, the impacts are significant.....19

4

5 2. The threshold analysis is clearly erroneous because it relies on outdated,  
obsolete, and agency-confirmed inaccurate surveys.....22

6

7 3. DNR’s threshold determination is clearly erroneous because it segments  
the Amendment from DNR’s intention to soon adopt a long-term  
conservation strategy .....25

8

9 4. DNR failed to consider the impact of the Amendment as a precedent for  
future actions with significant effects .....27

10 B. DNR’s Determination of Non-significance Was Clearly Erroneous Because DNR  
Impermissibly Balanced the Benefits and Adverse Impacts of the Proposal .....28

11

12 VI. CONCLUSION.....33

13 **TABLE OF AUTHORITIES**

14 **CASES**

15

16 *Alpine Lakes Prot. Soc’y v. Washington State Dept. of Natural Res.*,  
102 Wash. App. 1, 979 P.2d 929 (1999).....29, 30

17

18 *Cheney v. City of Mountlake Terrace*,  
87 Wash. 2d 338, 552 P.2d 184 (1976).....26

19

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156 Wash. App. 274, 232 P.3d 1154 (2010).....16, 18, 29, 31

21

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915 F.2d 1308 (9th Cir. 1990) .....19

23

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82 Wn.2d 475, 513 P.2d 36 (1973).....3

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4 373 F. Supp. 2d 1069 (E.D. Cal. 2004).....24

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6 140 Wash.2d 200, 995 P.2d 63 (2000).....3

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8 143 Wash. App. 644, 179 P.3d 844 (2008).....16

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10 395 F.3d 1019 (9th Cir. 2005) .....22

11 *Leschi Imp. Council v. Washington State Highway Comm'n*,  
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15 8 Wn. App. 844, 509 P.2d 390 (1973) .....3

16 *Murden Cove Preservation Ass'n v. Kitsap County*,  
17 41 Wash.App. 515, 704 P.2d 1242 (1985).....26

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19 84 Wash.2d 416, 526 P.2d 897 (1974).....18

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87 Wn.2d 267, 552 P.2d 674 (1976).....5, 17, 18, 32

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840 F.2d 714 (9th Cir. 1988) .....17

*Seattle Audubon Soc. v. Espy*,  
998 F.2d 699 (9th Cir. 1993) .....22

1		
2	<i>Seeds, Inc. v. State,</i>	
	98 Wash. App. 1022 (1999).....	30, 31
3		
4	<i>Silverton Snowmobile Club v. U.S. Forest Service,</i>	
	433 F.3d 772, (10th Cir. 2006) .....	20
5	<i>Swift v. Island County,</i>	
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	753 F.2d 754 (9th Cir. 1985) .....	25
8		
9	<i>Trout Unlimited v. Morton,</i>	
	509 F.2d 1276 (9th Cir. 1974).....	26
10		
	<b>STATUTES</b>	
11	16 U.S.C. § 1532(20) .....	2
12	16 U.S.C. § 1538(a) .....	1
13	16 U.S.C. § 1538(a)(1)(B) .....	2
14	16 U.S.C. § 1539(a) .....	1
15	16 U.S.C. § 1539(a)(1)(B) .....	3
16	16 U.S.C. § 1539(a)(2)(A) .....	3
17	16 U.S.C. § 1539(a)(2)(B) .....	3
18	RCW 43.21C.010.....	4
19	RCW 43.21C.020.....	3
20	RCW 43.21C.030(c) .....	5
21		
	<b>REGULATIONS</b>	
23	50 C.F.R. § 17.3 .....	2
24	50 C.F.R. § 17.31 .....	2
25	77 Fed. Reg. 23743 .....	15, 28
26		

**RULES**

1

2 WAC 197-11-060(b)(ii) .....26

3 WAC 197-11-330(e)(iv) .....27

4 WAC 197-11-330(1)(a)-(c).....4, 29

5 WAC 197-11-330(5).....5, 29

6 WAC 197-11-400(2).....5

7 WAC 197-11-408.....15

8 WAC 197-11-444.....4, 19

9 WAC 197-11-768.....4, 29, 31

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12 WAC 197-11-960.....4

13 WAC 222-12-090(14).....23

14

15

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1           **I.       INTRODUCTION**

2           Plaintiffs challenge the Washington Department of Natural Resources’ decision to log  
3 12,120 acres of high quality marbled murrelet habitat, as well as the agency’s determination that  
4 logging that 12,120 acres of habitat will not have a significant environmental impact. The  
5 forests at issue in this case are in Southwest Washington, a geographic area where the protection  
6 and recovery of the murrelet hinges on protecting the State’s mature forests. Up until May 1,  
7 2012, the State was obligated to protect those 12,120 acres to comply with a Habitat  
8 Conservation Plan (“HCP”) it developed to ensure the State’s compliance with the Federal  
9 Endangered Species Act. *See* 16 U.S.C. §§ 1538(a), 1539(a). Under the HCP, the 12,120 acres  
10 of habitat was completely off-limits to DNR timber harvest pending DNR’s adoption of a long-  
11 term conservation strategy for the murrelet.  
12

13           But on May 1, 2012, the Board of Natural Resources (“BNR”) approved an amendment  
14 (“Amendment”) to DNR’s HCP pertaining to the logging of high quality marbled murrelet  
15 habitat. The Amendment authorized DNR to commence logging on 12,120 acres of DNR-  
16 identified high quality marbled murrelet habitat in Southwest Washington. The BNR authorized  
17 this logging one week after DNR had issued a “Determination of Non-Significance” (“DNS”) for  
18 the Amendment under the State Environmental Policy Act (“SEPA”). This lawsuit challenges  
19 DNR’s DNS as “clearly erroneous,” asserts the BNR acted arbitrarily and capriciously in relying  
20 on the DNS in approving the Amendment, and requests the Court to overturn the DNS and order  
21 DNR to prepare an Environmental Impact Statement (“EIS”) for its major deviation from  
22 existing law and policy.  
23

24           DNR’s DNS for the Amendment was clearly erroneous for at least four reasons. First,  
25 the logging of 12,120 acres of forest specifically reserved under DNR’s HCP for its potential  
26

1 conservation value to marbled murrelets has significant adverse environmental impacts, because  
2 logging fundamentally changes the forest ecosystem and eliminates trees murrelets use for  
3 nesting. Second, DNR’s conclusion that this logging will not impact murrelets erroneously relies  
4 on surveys that are outdated, based on an obsolete protocol, and proven inaccurate. Conclusions  
5 based on invalid data are inherently arbitrary. Third, the Amendment constitutes illegal  
6 piecemeal review under SEPA because DNR admits that the Amendment is the first step in  
7 implementing its long-term conservation strategy, because the Amendment and its long-term  
8 conservation strategy are inextricably related or connected, and because the Amendment will  
9 preclude the inclusion of the 12,120 acres of “reclassified” habitat in the long-term conservation  
10 strategy. Fourth, DNR violated fundamental SEPA “threshold determination” principles by  
11 *balancing* the beneficial and adverse impacts of the proposal, rather than considering only the  
12 proposal’s *absolute* adverse impacts.  
13  
14

## 15 **II. STATUTORY FRAMEWORK**

### 16 **A. Endangered Species Act (“ESA”)**

17 The ESA forms the backdrop for the agency action at issue in this case. Under the ESA,  
18 it is unlawful to “take” an endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B); 50  
19 C.F.R. § 17.31. The term “take” includes “significant habitat modification or degradation where  
20 it actually kills or injures wildlife.” 50 C.F.R. § 17.3. A “threatened species” is defined as “any  
21 species which is likely to become an endangered species within the foreseeable future throughout  
22 all or a significant portion of its range.” 16 U.S.C. § 1532(20). The United States Fish and  
23 Wildlife Service (“USFWS”) listed marbled murrelets as threatened in 1992. AR-14494-14503.  
24

25 Section 10 of the ESA allows the USFWS to issue an “incidental take permit” that allows the  
26 taking of listed species “if such taking is incidental to, and not the purpose of, the carrying out of

1 an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). To obtain such a permit, Section 10(a)  
2 of the ESA requires preparation and approval of an HCP. *Id.* § 1539(a)(2)(A). The Services  
3 may approve an HCP only after finding that the applicant will minimize and mitigate the impacts  
4 of harm to the species to the maximum extent practicable and that the plan will not appreciably  
5 reduce the likelihood of the survival and recovery of the species in the wild. *Id.* § 1539(a)(2)(B).  
6 Because logging permitted by DNR likely causes “take” of the marbled murrelet and other listed  
7 species, DNR submitted an HCP to USFWS regulating logging on 1.6 million acres of State  
8 forest, and USFWS issued an incidental take permit in 1997. AR-676, HCP.

### 10 **B. State Environmental Policy Act (“SEPA”)**

11 The declared purpose of SEPA is to encourage productive and enjoyable harmony  
12 between man and his environment; to promote efforts which will prevent or eliminate damage to  
13 the environment; to stimulate the health and welfare of man; and to enrich the understanding of  
14 the ecological systems and natural resources important to the state and nation. RCW  
15 43.21C.010. The act makes it the continuing responsibility of State agencies to use all  
16 practicable means and measures to carry out the policy of restoring and maintaining a quality  
17 environment. RCW 43.21C.020; *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 847, 509 P.2d  
18 390 (1973). To fulfill these policies, SEPA requires state agencies to consider environmental  
19 and ecological factors to the “fullest extent possible” to ensure that the environment will be  
20 shaped “by deliberation, not default.”<sup>1</sup> *Eastlake Community Council v. Roanoke Associates, Inc.*,  
21 82 Wn.2d 475, 490, 513 P.2d 36 (1973).  
22  
23  
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25 <sup>1</sup> Because SEPA is in large part identical to the National Environmental Policy Act (“NEPA”), Washington courts  
26 often look to federal case law for cross-jurisdictional interpretation and the use of precedents. *Eastlake Cmty.  
Council v. Roanoke Associates, Inc.*, 82 Wash. 2d at 488, n. 5; *Kucera v. Dep’t of Transp.*, 140 Wash.2d 200, 224,

1 An agency, like the DNR here, must initially under SEPA make a “threshold  
2 determination” of a proposed decision’s potential environmental impact. A proposed agency  
3 action or decision creates significant adverse impacts “whenever [the action or proposal has]  
4 more than a moderate effect on the quality of the environment is a reasonable probability.”  
5 WAC 197-11-794(1). The future impacts need only be probable, not certain to occur. *King*  
6 *County v. Washington State Boundary Review Bd.*, 122 Wash.2d 648, 663, 860 P.2d 1024  
7 (1993). Because impacts vary under different circumstances and in different locations, the  
8 agency’s calculation of a proposal’s “significance” must take into account both the intensity and  
9 context of the impact. WAC 197-11-794(2). Intensity depends on the magnitude and duration of  
10 an impact. *Id.* Context varies with the physical setting. *Id.* Impacts include a broad-range of  
11 impacts to the natural and built environments, including air, water, soil, wildlife, and wildlife  
12 habitat. WAC 197-11-444.

15 An agency making the threshold determination follows a three-step inquiry. WAC 197-  
16 11-330(1)(a)-(c). First, the agency must prepare a SEPA “checklist” for the proposal, WAC 197-  
17 11-960, and use that checklist to analyze the proposal. WAC 197-11-330(1)(a). Second, the  
18 agency determines what the adverse impacts of the proposal are likely to be, and whether those  
19 impacts would be significant. WAC 197-11-330(1)(b). Third, the agency determines whether  
20 the agency has mitigated the potential environmental impacts so that they are no longer  
21 significant. WAC 197-11-330(1)(c); WAC 197-11-768. The result of the threshold  
22 determination is either a determination of significance (“DS”), determination of non-significance  
23 (“DNS”), or a mitigated determination of non-significance (“MDNS”). Where the agency makes  
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25  
26 995 P.2d 63 (2000); William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 Wash. L. Rev. 33, 34 (1984).

1 a DS, it must prepare an environmental impact statement (“EIS”) detailing the adverse  
2 environmental impacts of the proposal and reasonable alternatives to the proposal, including  
3 mitigation measures that would avoid or minimize adverse impact. RCW 43.21C.030(c); WAC  
4 197-11-400(2).

5  
6 While the agency may consider mitigation that reduces the specific adverse impacts of  
7 the proposal, SEPA’s regulations expressly *prohibit* the agency from taking into account  
8 *independent* benefits of the project as part of the threshold determination. WAC 197-11-330(5).  
9 That balancing function is a larger policy decision that requires consideration of a variety of  
10 alternative proposals in an environmental impact statement. *Norway Hill Preservation &*  
11 *Protection Ass’n v. King County Council*, 87 Wn.2d 267, 272-73, 552 P.2d 674 (1976). For that  
12 reason, even projects with likely net overall benefits, such as sewage treatment plants or  
13 pollution control permits, may require an EIS. WAC 197-11-330(5).  
14

### 15 **III. STATEMENT OF FACTS**

#### 16 **A. Marbled Murrelet Biology and Conservation**

17 The marbled murrelet is a black and white dove-sized and shaped seabird.<sup>2</sup> The murrelet  
18 is a true Pacific Northwest icon because it raises its young in large stands of mature conifer  
19 forests and dives for fish in the cold, rich waters of the Pacific Ocean and Puget Sound. Marbled  
20 murrelets fill a narrow biological niche within their rugged habitat. The adult female lays a  
21 single egg on a mossy branch near the very top of a Douglas fir, western hemlock, Sitka spruce,  
22 or western red cedar tree. AR-7002, Nelson and Wilson 2002. Once the egg has hatched, the  
23 parents take turns protecting the egg and flying up to fifty miles from the nest to marine waters to  
24

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<sup>2</sup> For photographs of the marbled murrelet nesting and at sea, please see AR-2618 and AR-6555.

1 gather food for the chick. To catch fish and marine life, the marbled murrelet flies under water  
2 like a penguin. To complete its round trip journey, short, strong wing beats power the bird at  
3 speeds up to one hundred miles an hour. Murrelet chicks are no less impressive. Their feet  
4 literally never touch the ground—after molting, they leap from the nesting platform and either  
5 crash to the forest floor far below or successfully take flight, bound for the salt water. The  
6 marbled murrelet is entirely dependent upon large stands of mature forests, aged seventy years or  
7 greater for nesting habitat. AR-18934, Pacific Seabird Group Protocol 2003.

9         Logging of old forests eliminates this habitat. When the USFWS listed marbled  
10 murrelets as threatened in 1992, it concluded that “[t]he principal factor affecting the marbled  
11 murrelet...and the main cause of population decline has been the loss of older forests and  
12 associated nest sites. Older forests have declined throughout the range of the marbled murrelet  
13 as a result of commercial timber harvest.” AR-14496. When USFWS rejected Intervenor  
14 American Forest Resource Council’s petition to remove the marbled murrelet from the  
15 endangered species list in 2010, the agency confirmed that “[h]istoric and ongoing loss and  
16 fragmentation of remaining suitable nesting habitat for murrelets continues to be a threat  
17 throughout most of the forested range.” AR-14489, USFWS 2010. A DNR report similarly  
18 concluded that the “greatest threat identified to marbled murrelets in Washington” is “loss of  
19 habitat-containing quality nesting sites” and “an increase in forest fragmentation which is  
20 thought to increase predation and decrease nesting success.” AR-2564, Raphael et. al 2008.

23         Logging adversely affects marbled murrelets in many ways, including decreasing the  
24 proportion of marbled murrelets able to find nest sites, fragmenting blocks of habitat (which  
25 allows greater depredation by corvids), forcing murrelets into lower-quality habitat with negative  
26 consequences for nest success, and packing murrelets into remaining habitat and increasing

1 depredation. AR-8715, DNR Presentation. The noise disturbance created by heavy logging  
2 machinery also adversely impacts murrelets. AR-7889, USFWS memo 2006.

3 Commercial timber harvest has decimated marbled murrelet populations. Across its  
4 range, murrelets lost nearly 30 percent of their remaining non-Federal habitat (State and private  
5 forests) in the decade between 1996 and 2006. AR-6348, Falxa 2011. Between 2000 and 2010,  
6 marbled murrelet populations declined by 29 percent. *Id.* at 6345.

7  
8 The decline has been even more severe in southwest Washington, where the majority of  
9 remaining marbled murrelet habitat is on state land. AR-1498, EIS. Between 2000 to 2010, the  
10 murrelet population in southwest Washington declined by 6.5 percent annually, AR-7159,  
11 Pearson et al. 2011, for a cumulative ten-year decline of approximately 46 percent. AR-9280,  
12 WDFW Comments. If populations decline by half every ten years, marbled murrelets will be  
13 extirpated from the region well before the end of the century.

#### 14 15 **B. The DNR Trust Lands Habitat Conservation Plan**

16 When DNR obtained its HCP, neither the USFWS nor DNR knew much about the  
17 biology or habitat of the reclusive murrelet. In order to develop the necessary information to  
18 conserve the species, DNR agreed to implement a 5-step “interim strategy” over the next four  
19 years, culminating in the development and adoption of a science-based long-term conservation  
20 strategy. DNR developed two interim strategies: one for Southwest Washington, where habitat  
21 was scarce and murrelets especially threatened, and one for elsewhere. AR-875, HCP.

22  
23 The express purpose of DNR’s interim strategy in Southwest Washington was to identify  
24 the most important murrelet habitat on the landscape and to preserve this habitat for potential  
25 inclusion in a science-based long-term conservation strategy. *Id.* The strategy dove-tailed with  
26 the Federal Recovery Plan, which recommends “[i]mproving the distribution of nesting habitat”

1 in Southwest Washington to develop “recruitment habitat” and “buffer existing populations  
2 against poor breeding success and catastrophic loss” to “facilitate[] gene flow among separated  
3 populations.” AR-19157-60, USFWS Recovery Plan 1997.

4 DNR’s interim strategy worked as follows. First, DNR agreed to identify the forests that  
5 were within 50 miles of marine waters and which contained 5 contiguous acres and two nesting  
6 platforms<sup>3</sup> per acre. AR-874, 876-77, HCP. Second, DNR would prepare a “habitat relationship  
7 study,” to determine the habitat in which it expected 95% of the murrelets to nest, and preserve  
8 those areas, termed “higher-quality, reclassified habitat.” Third, DNR could only log in the areas  
9 expected to have only 5 percent of the murrelet nests, termed “marginal habitat.” Fourth, DNR  
10 was required to survey the higher-quality reclassified habitat for marbled murrelet occupancy  
11 and document all of the occupied sites. Finally, based on this data, the HCP required DNR to  
12 develop and adopt a long-term conservation strategy for Southwest Washington. DNR could  
13 only log the “reclassified” habitat after DNR had prepared and adopted a USFWS-approved  
14 long-term conservation strategy. *Id.* at 875. The long-term strategy must make a contribution to  
15 the recovery of the species. *Id.* at 879.

### 18 **C. The May 1, 2012 Amendment**

19 In February of 2012, DNR proposed the Minor Amendment to the HCP along with a  
20 SEPA checklist and “determination of non-significance.” As detailed in the checklist, the  
21 Amendment allows logging in 12,120 acres of previously-protected reclassified habitat. AR-3-4,  
22 SEPA Checklist; AR-161, Addendum. The Amendment also restricts logging of young forests  
23  
24

25 \_\_\_\_\_  
26 <sup>3</sup> A nesting platform a horizontal branch that is at least 7 inches in diameter and 50 feet above the ground. AR-876.

1 in other conservation areas, *id.*, and characterizes those restrictions as mitigation for the impact  
2 of logging in reclassified habitat. AR-3, SEPA Checklist.

3 DNR received extensive critical public comments from Plaintiffs Seattle Audubon  
4 Society and Olympic Forest Coalition; as well as from the non-profit bird conservation  
5 organization Columbia River Alliance for Nurturing the Environment (“CRANE”). The  
6 Washington Department of Fish and Wildlife (“WDFW”) also submitted comments expressing  
7 serious concerns, with particular focus on the accuracy and consistency of DNR’s surveys, the  
8 inadequacy of buffers around occupied habitat, and the lack of specific information about  
9 mitigation. AR-9280-81.

10  
11 In April 2012, DNR issued an addendum to the SEPA determination, along with a  
12 “modified determination of non-significance.” DNR included an analysis from a staff wildlife  
13 biologist, Scott Horton. Mr. Horton answered a narrow field of prepared questions but never  
14 addressed whether the Amendment would have a significant adverse environmental impact. He  
15 concluded only that shifting the relatively small amount of logging that would occur inside of  
16 some conservation areas to *other areas* would cause a *less* overall, long-term impact to marbled  
17 murrelets than would otherwise have occurred from those sales. AR-111, Addendum.

#### 18 19 **D. Plaintiffs’ Opposition to the May 2012 Amendment**

20 This section details DNR’s errors and the role those errors played in the DNS.

##### 21 22 **1. The Amendment transfers the consequences of DNR’s delay to the marbled murrelet.**

23 Because DNR’s HCP required it to complete its long-term conservation strategy by  
24 approximately 2001, DNR is currently 11 years behind schedule. AR-1883, USFWS Biological  
25 Opinion, 1997. In 2003, DNR convened its first science advisory group for the development of  
26

1 the strategy, and committed to USFWS that it would complete this process by January 2005.  
2 AR-10715, DNR Presentation, 2004. But DNR did not meet that deadline. In 2006, DNR and  
3 USFWS published notice that it was developing a long-term conservation strategy and conceded  
4 that a long-term conservation strategy would have a significant adverse impact on the  
5 environment by initiating a NEPA and SEPA process to develop an EIS. 71 FR 54515-02.  
6 However, DNR abandoned the proposal. DNR now promises to complete the long-term strategy  
7 by the end of 2014. AR-3, SEPA Checklist.

9 In 2004, DNR issued its “Sustainable Harvest” calculation, which planned the amount of  
10 logging allowed over the next decade. DNR’s calculation assumed that DNR would have  
11 completed its long-term marbled murrelet conservation strategy by 2007. AR-3950, SHC EIS.  
12 DNR further assumed that reclassified habitat would be available in Southwest Washington as a  
13 result. *Id.* at 3950. But DNR did not conduct environmental review for the promised logging,  
14 instead stating that thorough environmental review would occur when the reclassified habitat  
15 was made available in 2007. *Id.* at 3657, 3678. DNR has not yet completed the long-term  
16 strategy, and with 2014 rapidly approaching, DNR now believes it must allow logging of  
17 reclassified habitat in order to meet its 2004 projections. AR-103, Addendum. Consequently,  
18 DNR issued the Amendment allowing it to log the reserved habitat without a long-term  
19 conservation strategy or thorough environmental review under SEPA or NEPA.

22 DNR’s inability to meet the 2004 sustainable harvest calculation and use of the  
23 Amendment to gain access to reclassified habitat in Southwest Washington arise from DNR’s  
24 failure to implement its HCP. DNR has acknowledged that approximately 240,000 acres of non-  
25 habitat are available for logging in Southwest Washington. AR-167 (Addendum).

1                   **2. The reclassified, higher quality habitat has established conservation value to**  
2                   **marbled murrelets.**

3                   In order for marbled murrelets to survive and recover, it is imperative that each segment  
4 of the species' range be managed to maintain viable populations. AR-1498, EIS. Southwest  
5 Washington is particularly well-positioned for marbled murrelets because its forests provide  
6 habitat easily accessible from coastal waters. AR-2575, Raphael et al. 2008. The region is  
7 surrounded by the Pacific Ocean, the mouth of the Columbia River, Willapa Bay, and Puget  
8 Sound. AR-173, Amendment map. Sea surveys, the most reliable method for surveying for  
9 murrelets, AR- 6609 (McShane et al. 2004), have documented marbled murrelets in each of these  
10 bodies of water. AR-9196, sea survey map 2011. According to the USFWS, Southwest  
11 Washington is also critical for recovery of the species as a whole because it connects the  
12 relatively dense populations of the Olympic Peninsula to Oregon and California, allowing the  
13 well-dispersed population necessary for recovery of the species. AR-1498, EIS; AR-19141,  
14 USFWS Recovery Plan 1997.  
15

16                   State lands in Washington provide “essential nesting habitat” that “are critical for  
17 improving the distribution of both the population and suitable habitat, especially in southwest  
18 Washington.” AR-19147, USFWS Recovery Plan 1997. In Southwest Washington,  
19 conservation of the marbled murrelet is heavily dependent on the State’s abundant forests  
20 because there are no federal forests, AR-1925 (USFWS Biological Opinion 1997), and intensive  
21 industrial logging on private lands in the area over the past century has mostly destroyed or  
22 severely compromised long-standing murrelet habitat. AR-6689, McShane et al. 2004; AR-  
23 10335, USFWS Critical Habitat 1996. A DNR study reached the same conclusion in a Report  
24 published in 2008: “DNR managed-forestlands in this landscape provide a significant and vital  
25  
26

1 opportunity for maintenance of local breeding populations and are crucial to meeting []  
2 biological goals.” AR-2667, Raphael et al. 2008.

3 While State forests in Southwest Washington are generally important to murrelet  
4 conservation, DNR’s implementation of the first four steps of the interim strategy specifically  
5 established the conservation value of the reclassified habitat at issue in this case. DNR carried  
6 out “habitat relationship” studies over a two-year period to determine the best habitat in the  
7 region. In these studies, DNR sampled 110 research sites in the planning units that include  
8 Southwest Washington, and recorded dozens of variables and their correlation to marbled  
9 murrelet occupancy. AR-8968, 8995-96, Escene 1999; AR-8758-60, DNR Presentation 2003.  
10 These variables and correlations match the conclusions of studies by highly-regarded scientists in  
11 the Pacific Northwest. AR-7447, Raphael et. al 1995; AR-7013 Nelson and Wilson 2002. After  
12 all of the narrowing and refining, DNR set aside only 20,215 prime acres as “higher-quality  
13 reclassified habitat.” AR-162, Addendum (table with habitat totals). This final area constitutes  
14 less than 4 percent of the 550,992 acres of State forestland in Southwest Washington. *Id.*

15  
16  
17 In the past, both USFWS and DNR have acknowledged the conservation value of these  
18 stands, both in the present and for possible inclusion in the long-term conservation strategy. The  
19 environmental impact statement developed with the HCP explained in reference to Southwest  
20 Washington that “[s]urvival of populations in these areas may be completely dependent on a few  
21 remaining patches of suitable habitat. Harvest of any of these remaining sites may greatly reduce  
22 the likelihood that local populations would persist over time in these areas. [The] long-term plan  
23 should address the issue of providing suitable but unoccupied habitat to replace habitat loss to  
24 natural disturbances or specifically plan to develop suitable habitat.” AR-1512-13, EIS.  
25  
26

1                   **3. DNR’s reliance on flawed and stale marbled murrelet surveys.**

2                   As set forth above, after identifying areas containing “higher-quality” habitat, DNR’s  
3 HCP required it to conduct surveys for murrelets in those areas. In the DNS, DNR relied on the  
4 fact that the agency surveyed the areas newly open to logging and found no murrelets occupying  
5 nest sites. AR-3, SEPA Checklist; AR-111, Addendum. DNR carried out these surveys in  
6 Southwest Washington from 1998 to 2002 under the Pacific Seabird Protocols in place at the  
7 time. AR-8738, DNR Presentation 2003.

8  
9                   But when conducting these surveys, DNR’s definition of the term “occupied” was  
10 narrower than that employed on all other forests in Washington—private forests, Federal lands,  
11 and WDFW lands. AR-3997, SHC EIS; AR-16880, Anthony et. al 2003. Consequently, the  
12 USFWS and WDFW “strongly advised” DNR to survey with more stringent survey methods.  
13 AR-16906, Anthony et. al 2003. The Pacific Seabird Group, moreover, significantly improved  
14 the survey protocol in 2003. AR-6692, McShane et al. 2004. At least ten years have passed  
15 since DNR conducted its murrelet surveys. The 2003 Pacific Seabird Protocol explicitly warns  
16 that surveys only “reflect the breeding status of sites for the time period during which surveys  
17 were conducted.” AR-18934, Pacific Seabird Protocol 2003. The protocol also recommends  
18 that surveys older than five years, particularly those carried out under old protocols, be  
19 considered stale and the habitat resurveyed. *Id.* at 18934-35.

20  
21                   DNR’s use of an obsolete survey protocol and its narrow definition of “occupied”  
22 predictably produced inaccurate results. In 2003, for example, WDFW found that:  
23

24                   Of the 36 DNR survey areas (33 ‘presence’ and 3 ‘no detection’) that WDFW  
25 exclusively surveyed, 28 (**78%**) **were found to be ‘occupied.’** Had these areas  
26 not been re-surveyed and found to be ‘occupied,’ they would have been ‘cleared’  
for harvesting, and likely would have been harvested under the interim HCP  
strategy.

1 AR-16909-16910 (emphasis added), Anthony et. al 2003. The “cost” of this failure  
2 would have been 1,783.3 acres of occupied marbled murrelet habitat. *Id.* at 16910. DNR  
3 initiated a joint study with WDFW to further study survey errors, but after WDFW prepared a  
4 draft study, DNR removed the funding and has not made the draft available to the public or  
5 included it in the record for this case. AR-9280, WDFW Comments.  
6

7 **4. DNR’s reliance on the 2008 Science Report to log “reclassified” habitat**  
8 **without adopting or committing to the Report’s conservation**  
9 **recommendations.**

10 In 2004, DNR convened a team of distinguished wildlife professionals with marbled  
11 murrelet expertise to develop a published report for DNR to consider when developing a long-  
12 term conservation strategy for DNR-managed forestlands. AR-2548, Raphael et al. 2008. The  
13 resulting 2008 Science Report is a holistic, long-term strategy to be applied across the landscape  
14 for decades. The Science Report rated each habitat area within Southwest Washington according  
15 to its conservation value and, after taking into account “the financial impacts on beneficiaries of  
16 Pacific County and Wahkiakum County,” *id.* at 2578, selected some areas for recommended  
17 conservation in blocks of developing habitat termed “Marbled Murrelet Management Areas”  
18 (“MMMA’s”). *Id.* at 2577.  
19

20 Contrary to the Science Report’s recommendations, between 2008 and 2012 DNR  
21 continued to log MMMA’s on the Olympic Peninsula and in Southwest Washington. *See, e.g.,*  
22 AR-18146, OFCO comment letter opposing timber sale. This continued logging threatened to  
23 preclude the possibility of adopting the Science Report, resulting in warnings from USFWS in  
24 January 2010 and June 2011 that DNR was possibly in violation of the HCP. AR- 10243-44,  
25 Jan. 2010 USFWS Letter; AR-41-46, June 2011 USFWS Letter. In the 2012 Amendment, DNR  
26

1 selectively takes advantage of one aspect of the Science Report, which would allow logging in  
2 reclassified habitat, while refusing to fully implement the Report’s protections within MMMA’s,<sup>4</sup>  
3 AR-25 (DNR Response to Comments), and explicitly “refusing to endorse or adopt any of its  
4 contents.” AR-2, SEPA Checklist.

5  
6 **5. The Amendment precludes and undermines the SEPA and NEPA review  
DNR is conducting for the long-term conservation strategy.**

7 Literally the day *before* it adopted the Amendment, DNR convened its first public  
8 meeting to develop a long-term conservation strategy. The purpose of the meeting was to elicit  
9 public comment on the “scope” of the environmental impact statement that will accompany the  
10 long-term conservation strategy. 77 FR 23743-4. The purpose of scoping is for the agency to  
11 evaluate a variety of alternatives for the proposed action and to assess the environmental impacts  
12 of the respective alternatives. WAC 197-11-408.

13  
14 DNR’s process for adopting a long-term conservation strategy continues today. But if the  
15 Amendment goes forward, much of the reclassified habitat in reserve will be logged by the time  
16 the long-term conservation strategy is adopted. Plaintiffs thus contend the Amendment’s cut-  
17 first and ask questions later strategy makes a mockery of the long-term conservation strategy’s  
18 environmental review process.  
19  
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23

24 \_\_\_\_\_  
25 <sup>4</sup> For example, the buffer areas surrounding occupied nest sites in the MMMA’s are approximately half as large in  
26 the Amendment as suggested in the Science Report. AR- 9282, WDFW comments.

1           **IV. JURISDICTION AND SEPA STANDARD OF REVIEW**

2           **A. Writ of Review**

3           Upon writ of review,<sup>5</sup> the Court has the constitutional and inherent power to review  
4 illegal or manifestly arbitrary and capricious action that violates fundamental rights. *Leschi Imp.*  
5 *Council v. Washington State Highway Comm'n*, 84 Wash. 2d 271, 278, 525 P.2d 774, 781  
6 opinion corrected, 84 Wash. 2d 271, 804 P.2d 1 (1974). An action contrary to statutory  
7 authority violates fundamental rights and must be reversed upon review under a writ of  
8 certiorari. *Id.* at 279; *see also Lake Union Drydock Co., Inc. v. State Dept. of Natural Res.*, 143  
9 Wash. App. 644, 651, 179 P.3d 844, 848 (2008).

11           **B. SEPA**

12           In order to determine whether DNR’s action is contrary to the statutory authority of  
13 SEPA, the court reviews DNR’s determination of non-significance for the Amendment under the  
14 “clearly erroneous” standard of review. *Chuckanut Conservancy v. Washington State Dept. of*  
15 *Natural Res.*, 156 Wash. App. 274, 286-87, 232 P.3d 1154, 1159-60 (2010); *Boundary Review*  
16 *Bd.*, 122 Wash.2d 648, 661, 860 P.2d 1024 (1993). Under this standard, a decision must be  
17 reversed and remanded when “the reviewing court on the entire evidence is left with the definite  
18 and firm conviction that a mistake has been committed.” *Chuckanut Conservancy*, 156 Wn.  
19 App. At 286-87. The ‘clearly erroneous’ standard provides a broader review than the ‘arbitrary  
20 or capricious’ standard because it mandates a review of the entire record and all the evidence  
21 rather than just a search for substantial evidence to support the administrative finding or  
22  
23  
24

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25 <sup>5</sup> This Court has the inherent power in article IV, section 6 of the Washington State Constitution to review  
26 administrative decisions. The Parties have stipulated that jurisdiction is proper via constitutional writ of certiorari. See Sept. 24, 2012 Stipulation and Order on Case Management. Plaintiffs submit accompanying standing declarations in the event the Court independently considers the standing issue.

1 decision. *Swift v. Island County*, 87 Wash. 2d 348, 357, 552 P.2d 175, 181 (1976). The scope of  
2 review is broad and must include consideration of the public policy of SEPA, which is the full  
3 disclosure and consideration of environmental values. *Norway Hill*, 87 Wn. 2d at 275. This  
4 searching standard is in keeping with federal NEPA case law, in which a plaintiff need only raise  
5 “substantial questions” regarding whether the proposed action may have a significant effect upon  
6 the human environment in order to reverse a finding of no significant impact. *Save the Yaak*  
7 *Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

## 9 V. ARGUMENT

10 DNR’s conclusion that the Amendment would not have a probable significant adverse  
11 environmental impact was clearly erroneous because DNR ignored the conservation value of  
12 reclassified, higher quality habitat, relied on invalid survey data, ignored the Amendment’s  
13 implications for the pending long-term conservation strategy, and failed to consider the  
14 independent adverse impacts of the Amendment.  
15

### 16 A. DNR’s Threshold Analysis Was Clearly Erroneous Because the Logging of 17 Reserved Marbled Murrelet Habitat Has Probable Significant Adverse 18 Environmental Impacts.

19 DNR’s DNS is clearly erroneous because logging 12,120 acres of forest is clearly an  
20 adverse environmental impact. The impact is compounded because DNR is significantly  
21 deviating from its existing HCP policies to permit clearcutting of 12,120 acres of high-quality  
22 suitable marbled murrelet habitat in an area where murrelets and their habitat are rapidly  
23 declining and which has been identified by DNR as potentially important to the marbled  
24 murrelet’s survival and recovery. Eliminating any suitable habitat of a threatened species, let  
25 alone 12,120 acres including mature stands of older forest in reserved status, has a probable  
26 significant effect on the quality of the environment.

1 To measure the environmental impact of an action or proposal under SEPA, courts must  
2 first determine its environmental “baseline.” *Chuckanut Conservancy*, 156 Wash. App. at 284  
3 n.8. “Baseline,” a term borrowed from NEPA jurisprudence, refers to the “existing uses in the  
4 area.” *Norway Hill*, 87 Wash.2d at 277 (quoting *Narrowsview Preserv. Ass’n v. Tacoma*, 84  
5 Wash.2d 416, 423, 526 P.2d 897 (1974)). “Existing uses” includes the continuation of existing  
6 agency policies. *Chuckanut*, 156 Wn. App. at 285. *Chuckanut* demonstrates how the court  
7 assesses a “baseline” for purposes of evaluating a proposal’s impact. In *Chuckanut*, DNR  
8 proposed a new logging management plan. The court held that the baseline was the forestry  
9 DNR was permitted to conduct under “the entire regulatory and policy system governing forestry  
10 on state lands.” *Id.* at 290.

12 Here, the baseline is the logging permitted by the “interim strategies” set forth in DNR’s  
13 HCP, namely that DNR is prohibited from logging *any* higher-quality reclassified habitat in  
14 Southwest Washington until it adopts a long-term science-based conservation strategy. AR-875,  
15 HCP. Because DNR has not yet adopted a long-term conservation strategy, the baseline against  
16 which impacts must be determined is *no* logging in reclassified habitat. We now turn to analyze  
17 the deviations from the baselines caused by the Amendment.

19 **1. The Amendment will have a significant adverse environmental impact**  
20 **because it allows logging of mature forests specifically reserved under DNR’s**  
21 **HCP for their potential conservation value.**

22 DNR’s threshold determination must take into account both the intensity and context of  
23 the impact. WAC 197-11-794(2). Intensity depends on the magnitude and duration of an  
24 impact. *Id.* The context may vary with the physical setting. *Id.* Here, DNR must consider the  
25 impacts of the logging of 12,120 acres of higher-quality, reclassified habitat. The impacts of  
26 logging those 12,120 acres including mature, older forest are significant because logging is

1 inherently intense—the impact is both severe and of at least seventy-year duration—and the  
2 context of the forests is that of rare habitat for a threatened species in a biologically critical  
3 region.

4 **a. The impacts of logging are intense because they are severe and**  
5 **irreversible.**

6 Logging causes severe impacts—it completely alters an ecosystem through the removal  
7 of all or most of the trees. Under the terms of the HCP, DNR may remove all but 8 trees per acre  
8 of forest. AR-4857, SHC EIS. That means that a forested area approximately the size of a  
9 football field can be left with only 8 trees.<sup>6</sup> Each clearcut can be up to 100 acres, *id.*,  
10 approximately the size of 62 city blocks. Federal courts have repeatedly recognized that logging  
11 has complete and irreversible impacts. *Neighbors of Cuddy Mountain v. United States Forest*  
12 *Service*, 137 F.3d 1372, 1382 (9th Cir.1998); *City of Tenakee Springs v. Clough*, 915 F.2d 1308,  
13 1314 (9th Cir.1990). Those impacts affect the entire ecosystem and extend well beyond the  
14 removal of trees. Logging degrades water quality, allows increased erosion, and creates  
15 significant noise pollution. Additional impacts include the building and maintenance of logging  
16 roads, prescribed burning of slash piles, increased likelihood of landslides, and widespread  
17 application of herbicides to control regrowth of non-coniferous species. AR-4866-67, 4946-47,  
18 4930, SHC EIS 2006; *See also* WAC 197-11-444 (defining broad range of impacts under SEPA).

19 **b. Because the impacts will occur in the context of specifically reserved**  
20 **habitat for a threatened species, the impacts are significant.**

21 Not only will the Amendment permit DNR to log 12,120 acres of forests it cannot  
22 otherwise log but the logging allowed by the Amendment will occur in mature forests already  
23  
24

25 \_\_\_\_\_  
26 <sup>6</sup> DNR's HCP restricts logging in riparian buffers and on steep and unstable slopes. Those restrictions in some instances require greater tree retention.

1 determined to provide suitable murrelet habitat, in a biologically critical region where marbled  
2 murrelets are declining at 6.5 percent annually. These impacts are greater because of their  
3 location both in extent and duration. Because habitat is entirely eliminated for at least 70 years,  
4 *see* AR-18934, Pacific Seabird Protocol 2003, and marbled murrelets are projected to be  
5 extirpated in Southwest Washington by that time if their rate of decline persists, the impact of  
6 DNR’s proposed logging is *permanent*.  
7

8 DNR based its DNS on the premise that reclassified habitat lacks conservation value  
9 unless there are marbled murrelets nesting there. To the contrary, reclassified habitat provides  
10 habitat for the murrelet to recover and also provides insurance in case other stands are  
11 destroyed. AR-19157, USFWS Recovery Plan 1997. Because reclassified habitat has  
12 conservation value regardless of murrelet occupancy at any given time, logging that habitat  
13 constitutes an adverse environmental impact. *See, e.g., Silverton Snowmobile Club v. U.S.*  
14 *Forest Service*, 433 F.3d 772, 783-84 (10th Cir. 2006).  
15

16 USFWS, DNR, and WDFW have all emphasized the conservation value of unoccupied  
17 reclassified habitat in Southwest Washington. For example:

- 18 • In the 1997 Recovery Plan, USFWS explicitly called for the protection of unoccupied  
19 older-aged stands on State land because such stands are “the most immediate source of  
20 new habitat and may be the only replacement for existing habitat lost to disturbance (e.g.,  
21 timber harvest, fires, etc.) over the next century...Such stands should not be subjected to  
22 any silvicultural treatment that diminishes their capacity to provide quality nesting habitat  
23 in the future.” AR-019158 (emphasis added).
- 24 • The fundamental premise of the HCP’s interim strategy in Southwest Washington was to  
25 retain all reclassified habitat, including the unoccupied habitat, until development of a  
26

1 long-term conservation strategy that would ensure survival and recovery of the species.  
2 AR-875, HCP.

- 3 • In the EIS for the HCP, USFWS and DNR starkly laid out the importance of these stands  
4 in Southwest Washington: “Survival of populations in these areas may be completely  
5 dependent on a few remaining patches of suitable habitat...[The] long-term plan should  
6 address the issue of providing suitable but unoccupied habitat to replace habitat loss to  
7 natural disturbances or specifically plan to develop suitable habitat.” AR-1512-13.
- 8 • The 2008 Science Report calculated that many of the areas outside of MMMA that DNR  
9 proposes to log, such as the “Capitol” and “Lebam” areas, have at least “moderate”  
10 conservation value. AR-9258, Raphael et. al 2008.
- 11 • The State’s expert agency on wildlife advised that “given the limited availability of  
12 marbled murrelet habitat in the southwest Washington landscape, alteration or permanent  
13 loss of marbled murrelet habitat may negatively affect the species.” AR-9279-80,  
14 WDFW Comments.

15  
16  
17 In sum, it is clear that the reclassified habitat outside of MMMA proposed to be logged  
18 by the Amendment, even if unoccupied, has important potential conservation value to murrelet  
19 protection and recovery. Because eliminating areas with conservation value for a threatened  
20 species creates intense impacts in a fragile context and precludes conservation options, those  
21 impacts are significant. Accordingly, DNR’s DNS was clearly erroneous and the Court should  
22 order DNR to prepare an EIS for the Amendment.  
23  
24  
25  
26

1                   **2. The threshold analysis is clearly erroneous because it relies on outdated,**  
2                   **obsolete, and agency-confirmed inaccurate surveys.**

3                   DNR’s DNS is also clearly erroneous because the agency relied on outdated, obsolete,  
4 and inaccurate data as a basis for its determination. Courts must reverse and remand a  
5 determination of non-significance when the determination relies on inaccurate information. *See,*  
6 *e.g., Kettle Range Conservation Group v. Washington Dept. of Natural Res.*, 120 Wash. App.  
7 434, 465, 85 P.3d 894, 909 (2003). In *Kettle Range*, the court remanded DNR’s mitigated  
8 determination of non-significance for a “watershed analysis” because the analysis relied on  
9 inaccurate sediment models. *Id.* A long line of federal courts have similarly held that agency  
10 reliance on survey data that is stale or inaccurate invalidates environmental review. *Northern*  
11 *Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9<sup>th</sup> Cir. 2011)(ten-  
12 year old survey data for wildlife “too stale” thus reliance on it in EIS was arbitrary and  
13 capricious); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six year-old survey  
14 data for cutthroat trout was “too outdated to carry the weight assigned to it” and reliance on that  
15 data violated NEPA); *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (reliance  
16 on “stale scientific evidence” regarding owl population data without adequate discussion of  
17 scientific uncertainty violated NEPA). In sum, the quality of data must be proportional to the  
18 weight the agency assigns to it in its analysis.  
19

20  
21                   DNR’s placed great weight on the surveys, AR-3 (SEPA Checklist) and AR-111  
22 (Addendum), but that reliance was clearly erroneous for four reasons. First, even under DNR’s  
23 own survey methodology the survey results have long been stale. DNR relies on outdated  
24 Pacific Seabird Group protocols to support ten- to fifteen-year old surveys, but the Seabird  
25 Group’s most recent protocol recommends resurveying documented unoccupied sites “if a  
26

1 significant time lag (>5 years) occurs between the completion of protocol surveys and the  
2 implementation of activities that would modify suitable habitat,” especially where, as is the case  
3 here, the protocol has changed over that time period. AR-18934-35, Pacific Seabird Protocol  
4 2003; *see also* WAC 222-12-090(14) (SEPA regulations citing the 2003 Protocol as  
5 authoritative). DNR conducted murrelet surveys in Southwest Washington between 1998 and  
6 2002. AR-8738, DNR Presentation 2003. Those survey results cannot possibly support DNR’s  
7 conclusion that the 12,120 acres of high quality habitat at issue in this case are unoccupied in  
8 2012.

10 Second, WDFW has carefully reviewed DNR’s surveys and documented a 78 percent  
11 error rate in those surveys. AR-16909-16910, Anthony et. al 2003. Plaintiffs submitted this  
12 study to DNR in its comments but DNR ignored it. AR-28, DNR Response to Comments.  
13 Instead, DNR cited an appendix of the Science Report. *Id.*; AR-133, Addendum. Contrary to  
14 DNR’s argument, the Science Report’s appendix *confirms* that survey error was rampant.  
15 Indeed, the Science Report found that the DNR missed approximately 15 percent of the marbled  
16 murrelet sites in Southwest Washington solely based on DNR’s use of an archaic survey  
17 protocol. AR-155. In its comments to the Amendment, WDFW reiterated its concerns and  
18 asked DNR to commit to allow WDFW to review the adequacy of the surveys. AR-9280. DNR  
19 refused that request, AR-28 (DNR Response to Comments), and that alone justifies a remand of  
20 DNR’s DNS in this case. *See Swift v. Island County*, 87 Wash. 2d 348, 358-61, 552 P.2d 175,  
21 182 (1976) (DNS clearly erroneous where conclusions contradicted by State Department of  
22 Game).

25 Finally, recent data suggests that marbled murrelets *do* live in the forests DNR claims are  
26 unoccupied. A 2010 Northwest Forest Plan Report documented marbled murrelets in South

1 Puget Sound, in close proximity to the reclassified areas DNR proposes to log. AR-173,  
2 Amendment Maps (showing areas to be logged near the South Sound); *see also* AR-6352  
3 (Northwest Forest Plan survey showing marbled murrelets living in the South Sound). Marbled  
4 murrelets marine observations almost always correspond to blocks of suitable forest nesting  
5 habitat. AR-18574, USFWS Critical Habitat 1996. Accordingly, detecting marbled murrelets in  
6 South Puget Sound strongly suggests that marbled murrelets may be utilizing forest stands in  
7 nearby Southwest Washington.  
8

9 For each and all of the above reasons, DNR's surveys were flawed and reliance on them  
10 renders DNR's DNS clearly erroneous. A recent case involving logging based on flawed bird  
11 surveys is directly on point. In *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F.  
12 Supp. 2d 1069, 1081 (E.D. Cal. 2004), the U.S. Forest Service proposed a 975-acre timber sale  
13 within an area recognized as potentially providing northern spotted owl ("NSO") habitat. In  
14 making a finding of no significant impact (the federal equivalent of a DNS), the Forest Service,  
15 like DNR, relied on surveys that were not up to current protocols and which were ten years old.  
16 The court rejected reliance on this unreliable and stale data, concluding that "Without updated  
17 NSO survey data, the Forest Service has no knowledge regarding whether it plans to conduct  
18 timber harvest in areas where NSO's are currently nesting." *Id.* DNR's threshold determination  
19 presents an even more extreme scenario: instead of 975 acres in *Klamath-Siskiyou*, the  
20 Amendment allows logging of 12,120 acres of area previously recognized to provide habitat to  
21 marbled murrelets, and instead of simply stale data, DNR has been provided with a reliable study  
22 demonstrating their surveys to be highly inaccurate. Just as in *Klamath-Siskiyou Wildlands*,  
23 DNR has no reliable basis on which to make its DNS, rendering that decision clearly erroneous.  
24  
25  
26

1 A decision resting on demonstrably unreliable data 78 percent of the time lacks a legal  
2 foundation under SEPA. DNR relies on data that is “too outdated to carry the weight assigned  
3 to it.” *Lands Council*, 395 F.3d at 1031. This reliance is irrational and “must leave this Court  
4 with the definite and firm conviction that a mistake has been committed.” *Boundary Review Bd.*,  
5 122 Wash.2d at 661 (citations omitted). To make an informed decision as required by SEPA,  
6 DNR must resurvey any areas proposed for logging. “Preparation of an EIS is mandated where  
7 uncertainty may be resolved by further collection of data or where the collection of such data  
8 may prevent speculation on potential effects.” *National Parks & Conservation Ass’n v. Babbitt*,  
9 241 F.3d 722, 731-32 (9th Cir. 2001) (citations omitted).

11 **3. DNR’s threshold determination is clearly erroneous because it segments the**  
12 **Amendment from DNR’s intention to soon adopt a long-term conservation**  
13 **strategy.**

14 DNR’s DNS is also clearly erroneous because the Amendment is functionally tied and  
15 related to DNR’s pending long-term conservation strategy yet DNR failed to acknowledge or  
16 consider that in its SEPA checklist. SEPA and NEPA prohibit “piecemeal” environmental  
17 review in order to prevent agencies from “dividing a project into multiple ‘actions,’ each of  
18 which individually has an insignificant environmental impact, but which collectively have a  
19 substantial impact.” *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985). This divide and  
20 conquer method of environmental review is known as “segmentation,” and runs contrary to the  
21 core principle of SEPA because it allows governments to both dilute impacts over time and to  
22 delay consideration of impacts until they have been made inevitable. The resulting after-the-fact  
23 analysis violates SEPA’s core requirement that government agencies “look before they leap.”  
24 *See* Kenneth S. Weiner, *Nepa and State Nepas: Learning from the Past, Foresight for the*  
25 *Future*, 39 *Envtl. L. Rep. News & Analysis* 10675, 10678 (2009); *see also* *Boundary Review Bd.*,

1 122 Wash.2d at 659. Rather than delaying consideration of impacts until they are inevitable,  
2 SEPA requires “consideration of environmental factors at the earliest possible stage to allow  
3 decisions to be based on complete disclosure of environmental consequences.” *Boundary*  
4 *Review Bd.*, 122 Wash. 2d at 663.

5  
6 Actions that are “closely related” to the larger proposal “shall be discussed in the same  
7 environmental document.” WAC 197-11-060(b)(ii). Actions are “closely related” for purposes  
8 of a segmentation analysis when the initial proposal “depend[s] on the larger proposal as their  
9 justification.” WAC 197-11-060(b)(ii). The pertinent issue is mutual dependency: two proposals  
10 constitute one interrelated plan that must be considered in one environmental document where  
11 the first phase is “dependent upon subsequent phases” and constitute separate plans if “the first  
12 phase of the project is independent of the second.” *Murden Cove Preservation Ass'n v. Kitsap*  
13 *County*, 41 Wash.App. 515, 526, 704 P.2d 1242 (1985). “Dependency” is “such that it would be  
14 irrational, or at least unwise, to undertake the first phase if subsequent phases were not also  
15 undertaken.” *See Cheney v. City of Mountlake Terrace*, 87 Wash. 2d 338, 345, 552 P.2d 184,  
16 189 (1976) (citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir.1974)).

17  
18 DNR violated these fundamental anti-segmentation SEPA principles because it  
19 considered the impacts of the Amendment, which it acknowledges “is needed prior to the  
20 completion of the long-term conservation strategy,” in isolation *without* considering the impacts  
21 of the pending long-term conservation strategy. AR-2, SEPA Checklist. There is no question  
22 that the Amendment is dependent on and justified by the long-term strategy. In the SEPA  
23 checklist, DNR repeatedly stated that the purpose of the Amendment is to “maintain future  
24 options for the long-term strategy.” *Id.* at 3, 15. The timing of the actions further reinforces that  
25 they are two steps in one proposal: DNR proposes that the Amendment will remain effective  
26

1 “only until the long-term conservation strategy is completed.” *Id.* at 3. Moreover, the very  
2 functions of the Amendment and long-term conservation strategy are inter-dependent.

3         The Amendment proposes to log reclassified habitat but reserves young forests *within*  
4 MMMA’s out of recognition that the MMMA’s could be important for long-term conservation if  
5 allowed to grow for decades into habitat. *Id.* at 3. But the function of protecting MMMA’s is  
6 only served if, in the long-term strategy, DNR continues to protect the same young forests.  
7 Therefore, it is “at least unwise, to undertake the first phase if subsequent phases were not also  
8 undertaken,” *City of Mountlake Terrace*, 87 Wash. 2d at 345, and the two phases are connected  
9 and must be considered in one environmental review.  
10

11                 **4. DNR failed to consider the impact of the Amendment as a precedent for**  
12                 **future actions with significant effects.**

13         DNR also must consider the preclusive effect of the Amendment on the long-term  
14 conservation strategy. SEPA regulations require the agency to consider the impact of a proposal  
15 establishing “a precedent for future actions with significant effects.” WAC 197-11-330(e)(iv).  
16 Even if adverse environmental effects are discovered later, the inertia generated by the initial  
17 government decisions (made without environmental impact statements) may carry the project  
18 forward regardless. When government decisions may have such snowballing effect, decision  
19 makers need to be apprised of the environmental consequences before the project picks up  
20 momentum, not after.” *Boundary Review Bd.*, 122 Wash. 2d at 664.  
21

22         SEPA’s implementing regulations set forth a simple test: in order to require consideration  
23 of preclusive effects, the initial action must establish a precedent, and the later action must have  
24 expected “significant effects.” WAC 197-11-330(e)(iv). Here, DNR’s SEPA checklist states  
25 that the Amendment “is needed prior to the completion of the long-term conservation strategy.”  
26

1 AR-2, SEPA Checklist. WDFW expressed concerns about DNR eliminating any suitable  
2 habitat, advising that it is “critically important” to “preserve as many conservation options as  
3 possible for use in DNR’s pending long-term conservation strategy.” AR-9279, WDFW  
4 Comments. These statements confirm that the Amendment has a precedential effect on a later  
5 action. And, by initiating scoping and an EIS for that long-term strategy, DNR acknowledges  
6 that the later action will have “significant effects.” 77 FR 23743. Because the Amendment sets  
7 a precedent for—and potentially limits—the long-term conservation strategy, DNR was required  
8 to consider the impacts of that strategy in its threshold analysis. The failure to do so is a  
9 violation of statutory authority and therefore clearly erroneous.  
10

11           Even if this court finds that DNR could lawfully consider the phases separately, DNR  
12 failed to consider the precedential impacts of the Amendment. While DNR claims that  
13 environmental review including the entire proposal is “not currently possible” because the long-  
14 term strategy is not yet developed, AR-2 (SEPA Checklist), that objection speaks more to the ill-  
15 conceived timing of the Amendment than its amenability for environmental review. If DNR  
16 truly cannot yet determine what alternative long-term strategies may develop and their impacts,  
17 then it should not be attempting to gain an advance credit borrowing against those strategies.  
18 And if DNR wants to start the long-term conservation strategy now, it can do what all agencies  
19 must do when considering an uncertain future: prepare an EIS, hypothesize a range of reasonable  
20 alternatives, and consider the impacts of those alternatives on the environment.  
21

22  
23           **B. DNR’s Determination of Non-significance Was Clearly Erroneous Because DNR  
24           Balanced the Benefits and Adverse Impacts of the Proposal.**

25           Finally, DNR’s DNS is clearly erroneous because DNR illegally balanced the beneficial  
26 and adverse impacts of the proposal rather than considering only the absolute adverse impacts.

1 After considering all impacts to the environment, an agency may determine whether mitigation  
2 measures render those impacts non-significant. WAC 197-11-330(1)(c). However, in the  
3 threshold SEPA determination, the agency may *not* balance the adverse impacts of independent  
4 environmental benefits in the same proposal. WAC 197-11-330(5); *Boundary Review Bd.*, 122  
5 Wash.2d at 666 n. 11. Rather, the agency must consider “the absolute quantitative adverse  
6 environmental effects of the action itself.” *Chuckanut Conservancy*, 156 Wash. App. at 285.  
7 “[T]he threshold determination is not the proper occasion to set-off a proposal’s favorable  
8 environmental effects and other social and economic benefits against its independently  
9 significant adverse environmental impact.” *Settle, The Washington State Environmental Policy*  
10 *Act: A Legal and Policy Analysis*, 109 (1987 & Supp.1992). As a result, “even proposals  
11 intended to protect or improve the environment may require an EIS.” *Alpine Lakes Prot. Soc’y v.*  
12 *Washington State Dept. of Natural Res.*, 102 Wash. App. 1, 15, 979 P.2d 929, 936 (1999).

15 While balancing involves consideration of independent benefits, mitigation requires  
16 reduction of the specific adverse impact caused by the proposal. WAC 197-11-768 defines  
17 mitigation as:

- 18 (1) Avoiding the impact altogether by not taking a certain action or parts of an  
19 action;
- 20 (2) Minimizing impacts by limiting the degree or magnitude of the action and its  
21 implementation, by using appropriate technology, or by taking affirmative steps to  
22 avoid or reduce impacts;
- 23 (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected  
24 environment;
- 25 (4) Reducing or eliminating the impact over time by preservation and  
26 maintenance operations during the life of the action;
- (5) Compensating for the impact by replacing, enhancing, or providing substitute  
resources or environments; and/or

1 (6) Monitoring the impact and taking appropriate corrective measures.  
2

3 In short, mitigation consists of activities that reduce the deviation from the baseline of a  
4 specific impact. To the extent that another aspect of the proposal may be generally beneficial to  
5 the impacted resource, it is irrelevant in the threshold analysis.  
6

7 Several cases are on point. In *Boundary Review Board*, the city of Black Diamond  
8 annexed an area from King County, which would allow significant future development. The  
9 city determined that the annexation would have an environmental benefit of including the area in  
10 the city sewer system, and issued a DNS. The court reversed the DNS because the  
11 environmental good would have independent adverse effects, such as increased development,  
12 and likely increased pressure on the sewer system. Again, the court determined that the best  
13 place to balance such benefits and adverse impacts is in an EIS. *King County v. Washington*  
14 *State Boundary Review Bd. for King County*, 122 Wash.2d at 666-667. In *Seeds, Inc. v. State*,  
15 98 Wash. App. 1022 (1999), the Plaintiff challenged a DNS on a rule that would limit the  
16 burning of grass by farmers. The agency had concluded that the rule would reduce emissions by  
17 limiting burning, while increasing emissions by increasing wind erosion and tilling of fields.  
18 The court upheld the analysis because the agency did not consider the impacts of the overall  
19 emissions reduction, but rather considered the adverse impacts independently. Similarly, in  
20 *Alpine Lakes Prot. Soc'y*, 102 Wash. App. at 15, the court reviewed a determination of non-  
21 significance for a “watershed analysis.” The court rejected DNR’s argument that the analysis  
22 warranted a DNS merely because the analysis potentially benefitted the environment.  
23  
24

25 Here, DNR proposes a major action with significant adverse impacts—the elimination of  
26 12,120 acres of DNR-identified marbled murrelet habitat. But rather than reduce those impacts

1 through mitigation *in* the 12,120 acres (such as conducting murrelet-compatible forestry  
2 practices within them), DNR considered the independent benefit of not logging young forests  
3 that one day may grow into habitat in entirely separate areas. Like in *Seeds v. State*, those  
4 benefits are separate because they occur at different times, in a different location, and perform a  
5 different function than the impact curtails. While the impact is the elimination of currently  
6 suitable habitat, the benefit is the preservation of non-habitat for two purposes: to hopefully grow  
7 into future suitable habitat, and to provide buffers to occupied areas, reducing the impacts of  
8 fragmentation. These benefits are useful, but because they are different in time, place, and kind,  
9 do not “avoid,” “minimize,” “rectify,” “reduce,” “compensate for,” or “monitor” the impacts.  
10 WAC 197-11-768. As such the benefits do not comprise mitigation and comprise independent  
11 benefits that may not be weighed in the threshold determination.  
12

13  
14 DNR’s balancing is further evidenced by DNR’s use of a relative analysis in the  
15 threshold determination: DNR’s checklist relies on the conclusion that “reclassified areas outside  
16 of MMMA’s are of *less* long-term value to marbled murrelet conservation and could be released  
17 if habitat within the proposed MMMA’s was managed for marbled murrelets.” AR-3, SEPA  
18 Checklist (emphasis added). The Addendum to the DNS concludes that “re-directing some of  
19 that harvest to areas outside the MMMA’s also would result in *lesser impacts* relative to that  
20 harvest remaining within them, because of the *lesser importance* of the area outside to murrelet  
21 conservation” and that logging the reclassified habitat “would have substantially reduced impacts  
22 *relative to similar harvests* within MMMA’s.” AR-168, Addendum (emphasis added). These  
23 comparisons balance overall impacts rather than independently evaluate adverse impacts.  
24

25 DNR violated SEPA’s prohibition against balancing independent impacts because DNR  
26 failed to conduct an *absolute* analysis of the impacts of logging reclassified habitat. *Chuckanut*

1 *Conservancy*, 156 Wash. App. at 285. Moreover, DNR judged the impacts based upon a  
2 hypothetical, straw man alternative which violates current law and policy. DNR weighed the  
3 proposal against the possibility of extensively logging within MMAs, when USFWS had  
4 already twice directed the agency that such logging could be in violation of DNR's federal  
5 permit. AR-10244, Jan. 2010 USFWS Letter; AR-41-46, June 2011 USFWS Letter. The  
6 analysis is based on an artificial premise because DNR likely would not be permitted to log in  
7 the areas it casts as the alternative.  
8

9         The distinction between mitigation and weighing independent benefits has an important  
10 policy basis. Options for mitigation are appropriate for consideration in a threshold  
11 determination because they are relatively limited and straightforward. The impact is known and  
12 the agency takes steps to reduce that specific impact. In contrast, there are many possible ways  
13 in which an agency can provide independent benefits, with a variety of environmental  
14 consequences. This open-ended analysis is better suited for an EIS, because that process is "the  
15 basis upon which the responsible agency and officials can make the balancing judgment  
16 mandated by SEPA between the benefits to be gained by the proposed 'major action' and its  
17 impact upon the environment." *Norway Hill*, 87 Wn. 2d at 272-73.  
18

19         The benefits of an EIS are particularly relevant to this case because there are a range of  
20 alternatives available to DNR. For instance, if DNR must log more to meet obligations to timber  
21 companies and trust beneficiaries, its EIS could consider an alternative in which it meets those  
22 economic obligations by logging some of the approximately 240,000 acres in Southwest  
23 Washington that all parties agree is non-habitat. AR-167, Addendum. Such an alternative is  
24 nowhere in the record, and the public is left to guess as to why DNR opted to attempt to offset  
25 the adverse environmental impacts of the Amendment in the manner it did.  
26

