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II. Planning Context

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Trust Duties

DNR has unique obligations in managing the lands covered by the HCP because they are trust lands. The majority of these lands were granted under the Enabling Act and the State Constitution when Washington became a state in 1889. The federally granted lands are to support certain designated beneficiaries in perpetuity. The beneficiaries include public institutions such as public schools, state universities, and charitable, educational, penal, and reformatory institutions.

The state also acquired land from several counties after tax foreclosures and tax delinquencies, as well as through purchases and gifts. The legislature has directed that these lands, known as Forest Board lands, be held in trust and administered and protected by DNR as are other state forest lands. There are 21 counties with Forest Board lands; 19 of them have Forest Board lands within the range of the northern spotted owl.

Out of approximately 3 million acres currently managed in these trusts, about 2.1 million are forest lands. (About 1.6 million acres of the forest lands are within the range of the northern spotted owl and are covered by the HCP. See Map II.1.)

A trust is a relationship in which one person, the trustee, holds title to property which it must keep or use for the benefit of another (Bogert 1987). The relationship between the trustee and the beneficiary is a fiduciary relationship, and it requires the trustee to act with strict honesty and candor and solely in the best interests of the beneficiary. A trust includes a trustee (the entity holding the title), one or more beneficiaries (entities receiving the benefits from the assets), and trust assets (the property kept or used for the benefit of the beneficiaries). In the case of Washington's trust responsibility, the trust assets are the trust lands and the permanent funds.

With the state as trustee, the legislature has designated DNR as manager of the federal grant and Forest Board trust lands. Statutorily, DNR consists of the Board of Natural Resources, the Commissioner of Public Lands as administrator, and the Department Supervisor (RCW 43.30.030). The Board of Natural Resources is required, by statute, to establish "policies to insure that the acquisition, management and disposition of lands and resources within the Department's jurisdiction are based on sound principles designed to achieve the maximum effective development and use of such lands and resources consistent with laws applicable thereto" (RCW 43.30.150). The Board is composed of six members: the Commissioner of Public Lands; the Governor (or a designated representative); the Superintendent of Public Instruction; the Dean of the College of Agriculture, Washington State University; the Dean of the College of Forest Resources, University of Washington; and an elected representative from a county that contains Forest Board land.

As a trust manager, DNR follows the common law duties of a trustee, which include: administering the trust in accordance with the provisions that

created it; maintaining undivided loyalty to each of the trusts; managing trust assets prudently; making the trust property productive while recognizing the perpetual nature of the trusts; dealing impartially with beneficiaries; and reducing the risk of loss to the trusts. The department must also comply with all laws of general applicability.

Some of the trust duties have been discussed by the courts specifically in the context of federal land grant trusts. By and large, however, Washington courts have not expounded upon the specifics of how the duties applicable to private trustees apply in the specific, and often unique, circumstances facing the state. A court's analysis of these issues would be informed by the specific trust terms found in the State Constitution and Enabling Act as interpreted in court decisions.

In 1984, the Washington State Supreme Court specifically addressed the state trust relationship in County of Skamania v. State of Washington, 102 Wn.2d 127, 685 P.2d 576. The Skamania decision explicitly addresses only two of a trustee's duties. It found that a trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests, and manage trust assets prudently. The Court also cited a series of cases in which private trust principles were applied to land grant trusts. While all but one of these cases are from other states with differently worded Enabling Acts, they generally indicate that a state's duty is to strive to obtain the most substantial support possible from the trust property while exercising ordinary prudence and taking necessary precautions for the preservation of the trust estate. This principle has often been generally referred to as the trust mandate. Although the trust mandate has not been more expressly addressed by the Washington courts, DNR strives to produce the most substantial support possible over the long term consistent with all trust duties conveyed on DNR by the state of Washington.

The 1992 Forest Resource Plan (see section later in this chapter for a discussion of the Forest Resource Plan) contains a succinct discussion of the trust mandate and the common law duties of a trustee as interpreted by DNR and approved by the Board. For example, Board policy indicates that all decisions are to be made with the beneficiaries' interest first and foremost in mind. Board policy also indicates prudence includes managing state lands so as to help prevent the listing of additional species as threatened or endangered.

Board policy indicates that DNR is to manage trust assets to ensure healthy forests that will be productive in perpetuity. Board policies also imply that it is important not to foreclose reasonably foreseeable future options for support. For these reasons, it is important to retain the capacity of the forest to sustain its components and biological relationships.

In short, any management plan for trust lands, including this HCP, should be consistent with the principles of trust management. The following excerpt from the Forest Resource Plan's discussion of DNR's interpretation of its duties as a trust manager helps explain how this HCP ties to trust management obligations:

> The Prudent Person Doctrine
> Trust managers are legally required to manage a trust as a prudent person, exercising such care and skill as a person of ordinary prudence would exercise in dealing with his or her own property. In the department's view, this means, among other things, avoiding undue risk, avoiding tortious acts, etc.

The beneficiaries need a predictable timber sales program that can be executed over several years. Constantly changing regulations often add to administrative overhead. Sales prepared under one set of regulations, for example, may be harvested under a different and more stringent set. These changes (between the time of preparation and the time of harvest) cause contract disputes with purchasers and may force the department to modify planning decisions, thus adding to administrative overhead and causing further delays.

The department believes it is in the best interest of the beneficiaries to manage the trusts in a manner that will avoid the type of controversy that has surrounded forest practices in the past few years. These types of controversies (such as the federal listing of the northern spotted owl as a threatened species) usually result in ever more restrictive regulations. In the department's opinion, public concerns regarding wildlife, fisheries and water quality are likely to escalate and may result in more stringent regulations if the public perceives that the department and other public land managers are not considering nontimber resources.

The department believes it is in the best interests of the trust beneficiaries over the long run to:

- Manage state forest land to prevent the listing of additional species as threatened or endangered.
- Prevent public demand for ever-increasing, restrictive regulations of forest practices.
- Avoid the resulting contract disputes and uncertainty (DNR 1992 p. B-1).

This Habitat Conservation Plan is expected to allow DNR to better fulfill its duties as a trust manager by:

(1) providing certainty and stability in complying with the Endangered Species Act while producing substantial long-term income for trust beneficiaries,

(2) allowing more predictable timber sales levels,

(3) ensuring future productivity of trust lands,

(4) keeping options open for future sources of income from trust lands,

(5) increasing management flexibility, and

(6) reducing the risk of loss to the trusts.

The Endangered Species Act

In 1973, Congress passed the Endangered Species Act (16 U.S.C. 1531 et seq.). The stated purposes of the Act are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species" (16 U.S.C. 1531(b)), and to act on specified relevant treaties and conventions.

Administration of the Endangered Species Act is overseen by the Secretary of the Interior, with the U.S. Fish and Wildlife Service acting on the Secretary's behalf. The Secretary of Commerce, acting through the National Marine Fisheries Service, is the listing authority for marine mammals and anadromous fish. The Act lists several factors that individually can be the basis for listing a species as endangered or threatened, including "the present or threatened destruction, modification, or curtailment of its habitat or range; . . . the inadequacy of existing regulatory mechanisms; [and] other natural or manmade factors affecting its continued existence" (16 U.S.C. 1533(a)(1)(A),(D),(E)).

Once either Secretary has listed a species of fish or wildlife as endangered, the Act lists several activities that are prohibited, including the "take of any such species" (16 U.S.C. 1538(a)(1)(B)). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532(18)). The U.S. Fish and Wildlife Service has further defined "harm" to mean "an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" (50 C.F.R. 17.3). Under Section 4 of the Act (16 U.S.C. 1533(d)), the listing Secretary may apply — and usually has applied — the same prohibitions of activities regarding endangered species to threatened species.

If a plant is listed as endangered, activities that are prohibited include to "remove, cut, dig up, or damage or destroy any such species on any [nonfederal] area in knowing violation of any law or regulation of any state" (16 U.S.C. 1538(a)(2)(B)).

In 1982, Congress amended the Endangered Species Act to allow taking of listed species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity" (16 U.S.C. 1539(a)(1)(B)). A nonfederal landowner may apply for an incidental take permit and is required to submit a conservation plan to the Secretary as part of the application. The Act uses the terms "conserve" and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary" (16 U.S.C. 1532(3)).

According to Section 10 of the Act (16 U.S.C. 1539(a)(2)(A)), a conservation plan must specify:

(1) the impact which will likely result from such taking;

(2) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;

(3) what alternative actions to such taking the applicant considered and the reasons such alternatives are not being utilized; and

(4) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

The permit can be issued if, "after opportunity for public comment," the Secretary finds that:

(1) the taking will be incidental;

(2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

(3) the applicant will ensure that adequate funding for the plan will be provided;

(4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and

(5) the measures, if any, required [by the Secretary] will be met (16 U.S.C. 1539(a)(2)(B)).

Because granting an incidental take permit is a federal action, a conservation plan is subject to a biological assessment and jeopardy analysis, as set forth in Section 7 of the Act (16 U.S.C. 1536(c) and (a)).

The U.S. Fish and Wildlife Service, acting on behalf of the Secretary of the Interior, has listed as threatened two forest-associated species that occur on DNR-managed land covered by this HCP. In July 1990, the northern spotted owl was listed; in October 1992, the marbled murrelet was listed. In addition, the U.S. Fish and Wildlife Service has listed several other species whose habitat occurs within the range of the northern spotted owl. Although the owl's range is the area covered by the HCP, these other listed species do not occur in great number on DNR-managed forest land. These species are the Oregon silverspot butterfly, the Aleutian Canada goose, the bald eagle, the peregrine falcon, the gray wolf, the grizzly bear, and the Columbian white-tailed deer.

Federal Plans and Rules for Recovery of the Northern Spotted Owl and Marbled Murrelet

Since the listings of the spotted owl and the murrelet, the federal government has published draft recovery plans that target conditions on federal and nonfederal lands for ecological recovery of the listed species. The federal government has also proposed a plan to restore viable populations on federal lands. Because these plans affect DNR's HCP, a brief discussion of the federal plans is included here. In addition, the Secretary of the Interior can issue regulations (called 4(d) rules) regarding conservation of listed species on nonfederal lands. Such a rule has been proposed for the spotted owl; because it would affect DNR-managed lands, a brief discussion of that draft 4(d) rule is included as well.

FINAL DRAFT RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL

The Endangered Species Act requires the Department of the Interior to prepare and implement recovery plans for all listed species, unless the Secretary of the Interior determines that the preparation of a recovery plan would not benefit a species (16 U.S.C. 1533 (f)). Recovery plans generally establish target conditions on federal and nonfederal land for the species or populations in question that would constitute ecological recovery of that species (Rohlf 1989 p. 87). Regulations implementing the Act's requirements for a biological assessment and jeopardy analysis define recovery as "improvement in the status of a listed species to the point at which listing is no longer required under the criteria set out in Section 4(a)(1) of the Act." (50 C.F.R. 402.02). In order to achieve such conditions, not only would the population need to be of satisfactory size, but the factors that led to the

species' listing would need to be reduced to the point where they no longer posed a threat to the species (Rohlf 1989 p. 101).

A Draft Recovery Plan for the northern spotted owl was issued in 1992 (USDI 1992a) and revised following the public comment period, but it has yet to receive final approval. As of the approval date of this HCP, the Department of the Interior had not published any further discussion of the Final Draft Recovery Plan, nor had the plan's official status been resolved.

Included in the Final Draft Recovery Plan is an extensive discussion of management recommendations for nonfederal landowners. These recommendations, developed by the federal Northern Spotted Owl Recovery Team, are based on an analysis of where habitat on federal lands alone would be insufficient to achieve recovery objectives for the spotted owl (USDI 1992b). Section A of Chapter IV on spotted owl mitigation contains an explanation of how DNR used the federal recovery team's recommendations in the formulation of DNR's spotted owl conservation strategies.

PRESIDENT'S FOREST PLAN

Because DNR's mitigation for incidental take of spotted owls is designed to complement recovery activities on federal land, a discussion of those activities as proposed in the President's Forest Plan is included here. In response to the controversy surrounding the management of federal forest lands in the Pacific Northwest, the federal government developed the Forest Plan for a Sustainable Economy and a Sustainable Environment, also known as the President's Forest Plan. The main issue leading to the development of the President's Forest Plan was the future of existing old-growth forests.

Since 1989, numerous lawsuits and several court injunctions have severely restricted new and existing timber sales on lands managed by the U.S. Forest Service and the Bureau of Land Management (USDA and USDI 1994). Federal district courts have ruled that these agencies failed to comply with federal law. In particular, separate court decisions have stated that the U.S. Forest Service failed to comply with the National Forest Management Act, the Endangered Species Act, and the National Environmental Policy Act, and that the Bureau of Land Management did not meet its obligations under the National Environmental Policy Act (Thomas et al. 1993; Forest Ecosystem Management Assessment Team 1993).

In western Washington, the U.S. Forest Service has jurisdiction over federal lands available for timber harvest. Since 1960, federal legislation has repeatedly directed the U.S. Forest Service to manage its lands in a manner conducive to healthy populations of fish and wildlife. And, since 1991, several separate rulings in federal courts have reaffirmed this directive.

In April 1993, President Clinton convened the President's Northwest Forest Conference in Portland, Oregon, in order to resolve the conflicting ecological, social, and economic issues surrounding forest management on federal forest lands in Washington, Oregon, and northern California (USDA and USDI 1994). As a result of the conference, the Forest Ecosystem Management Assessment Team, commonly known as FEMAT, was organized by the federal government to develop a management plan for federal lands within the range of the northern spotted owl. FEMAT was asked to identify management alternatives that would attain the greatest economic and social contributions from the forests and also meet the requirements of the applicable laws and regulations, including the Endangered Species Act, the National Forest Management Act, and the National Environmental Policy

Act. FEMAT was also instructed to develop alternatives for long-term management that would maintain or restore:

(1) habitat conditions for the northern spotted owl and marbled murrelet that would provide for the viability of each species,

(2) habitat conditions to support viable populations, well distributed across their current range, of species known to be associated with old-growth forests,

(3) rearing habitat on U.S. Forest Service, Bureau of Land Management, National Park Service, and other federal lands to support the recovery and maintenance of viable populations of anadromous fish species and other fish species considered "sensitive" or "at risk", and

(4) a connected old-growth forest ecosystem on federal lands within the region under consideration (FEMAT 1993).

The options considered varied in four main respects: (1) the quantity and location of land placed in some form of reserve, (2) the activities permitted in reserve areas, (3) the delineation of areas outside of reserves, and (4) the activities permitted outside of reserves.

FEMAT proposed dividing the landscape into different areas according to allowable management activities. They defined two types of reserves: Late successional Reserves and Riparian Reserves. Late successional Reserves encompass old-forest stands, and Riparian Reserves consist of protected-forest zones along rivers, streams, lakes, and wetlands. The Riparian Reserve acts as a buffer between water resources and timber harvest. (For the purposes of this HCP, congressionally reserved areas such as National Parks and Wilderness Areas are considered Late successional Reserves.) Most timber harvesting will occur in the area outside reserves, which is referred to as the Matrix. The forest conditions produced through harvesting are required to meet minimum specifications. Timber harvesting can also occur in Adaptive Management Areas, which are designated to encourage the development and testing of technical and social approaches to achieving desired ecological, economic, and social objectives.

The preferred alternative, known as Option 9, was approved by both the Secretary of the Interior and the Secretary of Agriculture (who oversees the U.S. Forest Service). The Record of Decision for the President's Forest Plan was issued on April 13, 1994, and was to take effect 30 days later. The plan was challenged immediately by both environmental groups and the timber industry. On December 21, 1994, U.S. District Court Judge William Dwyer ruled that the federal agencies responsible for the plan acted within the bounds of the law and that the President's Forest Plan was lawful (Seattle Audubon Society v. Lyons 871 F. Supp. 1291, W.D. Wash. 1994). As of the writing of this HCP, the decision is under appeal in the Ninth Circuit. Section A of Chapter IV on spotted owl mitigation discusses how DNR's conservation strategies relate to the President's Forest Plan.

DRAFT 4(D) RULE FOR THE NORTHERN SPOTTED OWL

Section 4(d) of the Endangered Species Act (16 U.S.C. 1533(d)) authorizes the Secretary of the Interior to issue regulations, commonly referred to as 4(d) rules, that are deemed necessary to provide for the conservation of an endangered or threatened species and can be applied on nonfederal lands. The Department of the Interior initiated the preparation of a 4(d) rule for conservation of the northern spotted owl on nonfederal lands when it

proposed FEMAT's Option 9 as the basis for the President's Forest Plan for federal forest lands (Holthausen et al. 1994, Appendix 1, p. 1).

The premise, on which the proposed rule is based, is that federal lands would bear most of the burden for recovery of the spotted owl and that only in a few key areas would contributions from nonfederal lands be needed. Therefore, relief from prohibitions on incidental take could be granted in some portions of the spotted owl's range (Federal Register v. 60, no. 33, p. 9484-9485). However, the U.S. Fish and Wildlife Service has proposed that in particular portions of the spotted owl's range supplemental support from nonfederal lands is still "necessary and advisable" for conservation of the species (Federal Register v. 60, no. 33, p. 9484-9485).

On February 17, 1995, the U.S. Fish and Wildlife Service published a draft 4(d) rule for the northern spotted owl that defines where incidental take restrictions would apply in Washington and California (USDI 1995). The public comment period for the proposed rule ended May 18, 1995.

The proposed 4(d) rule would establish six Special Emphasis Areas in Washington in which incidental take prohibitions would continue to apply. In addition to the lands within the Special Emphasis Areas, any nonfederal lands that fall within a spotted owl circle (see the section in Chapter III on spotted owls for an explanation of owl circles) surrounding a site center located on federal reserves established by the President's Forest Plan (USDA and USDI 1994) would also be subject to take restrictions for two years following adoption of the rule. This provision does not apply to nonfederal lands on the Olympic Peninsula. After two years, the U.S. Fish and Wildlife Service proposes to re-examine the need to maintain habitat on nonfederal lands within federally sited owl circles. All owners of land outside of Special Emphasis Areas and federal owl circles would be required to maintain only 70-acre cores of suitable habitat around spotted owl site centers. Under the proposed 4(d) rule, some DNR-managed trust lands would be included in every Special Emphasis Area. Those lands would not gain relief from current incidental take prohibitions.

However, the draft 4(d) rule also proposes several types of landowner exemptions and opportunities for other kinds of agreements. As a landowner with holdings of more than 5,000 acres of forest land in every Special Emphasis Area, DNR could adopt a habitat conservation plan authorized under Section 10 of the Endangered Species Act (16 U.S.C. 1539(a)(1)(B)) as an alternative to observing incidental take prohibitions. In fact, DNR had already begun preparation of this HCP prior to the publication of the proposed 4(d) rule. Because of the expectation that many large landowners will provide conservation through habitat conservation plans, the U.S. Fish and Wildlife Service is willing to be more lenient under the 4(d) rule (Federal Register v. 60, no. 33, p. 9485).

REANALYSIS REPORT FOR THE NORTHERN SPOTTED OWL ON THE OLYMPIC PENINSULA

There has been a long-standing concern about the viability of the spotted owl on the Olympic Peninsula because the sub-population there is isolated from sub-populations in the western Washington and Oregon Cascades (Thomas et al. 1990; USDA 1988; USDI 1992a). To obtain supporting information for the development of a 4(d) rule under the Endangered Species Act (see above), the U.S. Fish and Wildlife Service requested the analysis of the most recent information about spotted owls on the peninsula in order to assess whether and where it might be appropriate to relax incidental take restrictions on nonfederal lands. A group of six spotted owl ecologists, known as the Federal

Reanalysis Team, was assembled to review existing data and develop a population model to estimate the importance of contributions of varying amounts of habitat from nonfederal lands to the long-term existence of a spotted owl population on the Olympic Peninsula.

The Federal Reanalysis Team used the most current information available for the Olympic Peninsula on spotted owl habitat, population estimates, and demographic rates to re-examine the recommendations made in the Final Draft Recovery Plan (USDI 1992b). Specifically, the Team used these data in a spatially explicit (i.e., sensitive to location and space) spotted owl population model (McKelvey et al. 1992) to simulate the likelihood of persistence of owls on federal lands under various management scenarios and habitat configurations likely to result from the President's Forest Plan and different levels of contributions from nonfederal lands (Holthausen et al. 1994 p. 6).

The Final Draft Recovery Plan had recommended that nonfederal lands on the western side of the Olympic Peninsula be managed to provide demographic support to the population and to maintain connectivity between the coastal strip of the Olympic National Park and the core of federal land on the peninsula (USDI 1992b p. 103). The Final Draft Recovery Plan had also recommended that habitat and population connectivity between the western Washington Cascade Range and the Olympic Peninsula be re-established by providing habitat for breeding clusters of spotted owls in southwest Washington. The reasoning was that re-establishing population connectivity could reduce the risk of extirpation of the Olympic Peninsula sub-population (USDI 1992b p. 105).

The Federal Reanalysis Team made the following conclusions from its work (Holthausen et al. 1994 p. 1-2):

(1) "It is likely, but not assured that a stable population of owls would be maintained on portions of the Olympic National Forest and the core area of the Olympic National Park in the absence of contribution of habitat from nonfederal lands" (Holthausen et al. 1994 p. 1).

(2) It would be unlikely that spotted owls would be maintained on the western coastal strip of the Olympic National Park without a contribution of habitat from nonfederal lands.

(3) There will probably be fewer areas with high occupancy by owls in the Olympic National Forest and the core area of the Olympic National Park without a contribution of habitat from nonfederal lands.

(4) "Retention of nonfederal habitat could result in a biologically significant contribution to the maintenance of a stable spotted owl population distributed evenly across currently occupied portions of the Olympic Peninsula" (Holthausen et al. 1994 p. 1-2).

(5) Retention of nonfederal habitat, while making a significant contribution to the maintenance of the population, will not fully resolve the uncertainties surrounding the long-term persistence of spotted owls on the Olympic Peninsula.

(6) Retention of nonfederal habitat on the western side of the Olympic Peninsula would likely increase the chances of maintaining a population on the coastal strip of the Olympic National Park.

(7) Nonfederal lands may provide the majority of low-elevation habitat on the peninsula. Low-elevation habitat may be of higher quality than high-elevation habitat.

(8) A habitat connection across southwest Washington as suggested in the Final Draft Recovery Plan would have little effect on the status of the owl population on the peninsula if that population were already stable or nearly stable.

The Federal Reanalysis Team was careful to point out in their report that they used considerable professional judgement when drawing conclusions from the results of their modeling efforts. They emphasized that model results do not represent reality, but instead are "repeatable projections of a set of assumptions" (Holthausen et al. 1994 p. 45). The manner in which DNR used the Reanalysis Team's conclusions in the formulation of its spotted owl conservation strategies is discussed in Section A and Section E of Chapter IV. More specific information regarding the biological basis of the report is in Section A on the spotted owl in Chapter III.

DRAFT RECOVERY PLAN FOR THE MARBLED MURRELET

On August 1, 1995, the U.S. Fish and Wildlife Service announced the availability of the federal Draft Recovery Plan (USDI 1995) and a revised proposal for the designation of critical habitat for the marbled murrelet in Washington, Oregon, and California.

Recovery plans are required by Section 4 of the Endangered Species Act (16 U.S.C. 1533(f)) to recommend actions considered necessary to protect or recover species listed by the federal government as threatened or endangered. The Draft Recovery Plan for the Marbled Murrelet was developed by a scientific team established in February 1993, with expertise in seabird ecology, conservation biology, and forest ecology. Assisting the core team were representatives of the affected states and other federal agencies. The draft plan includes information on (a) the biology, including habitat needs, of the species, (b) reasons for population decline and current threats, (c) current management, and (d) recommendations for recovery efforts for Washington, Oregon, and California.

The objectives identified in the Draft Recovery Plan are (a) to stabilize the population at a sustainable level throughout its range, (b) to provide future conditions that support viable, self-sustaining populations, and (c) to gather the scientific information necessary to develop criteria for delisting the species.

The cornerstone of the strategy included in the Draft Recovery Plan is the President's Forest Plan, which specifically addresses marbled murrelets and their habitat on federal lands. The President's Forest Plan identifies and protects large reserve areas that should provide increased habitat for the murrelet over the next 50 to 100 years. Protection is also provided outside of the reserve areas around sites known to be occupied by marbled murrelets. The Draft Recovery Plan includes areas such as nonfederal lands that were not, or could not be, considered in the President's Forest Plan.

Actions identified as necessary to address the objectives of the plan include:

(1) establishing six marbled murrelet conservation zones with specific management strategies for each,

(2) identifying and protecting habitat in each zone through designation of critical habitat or other methods such as habitat conservation plans, and developing management plans for these areas,

(3) monitoring populations and habitat and surveying potential breeding habitat to identify occupied sites,

(4) implementing actions to stabilize and increase the population in the immediate future and increase population growth in the long-term, and

(5) initiating needed research and establishing a regional research coordination body.

PROPOSAL FOR DESIGNATION OF CRITICAL HABITAT FOR THE MARBLED MURRELET

The U.S. Fish and Wildlife Service designates as critical habitat areas that have the physical and biological features necessary for the conservation of a listed species and that require special management. A final rule for designating critical habitat for the marbled murrelet was published in May 1996 (Federal Register v. 61, no. 102, p. 26255-26320).

There are approximately 3.9 million acres of land identified in the final rule in Washington, Oregon, and California, of which 78 percent (3.0 million acres) are federal lands included in the President's Forest Plan. In areas where federal lands alone were thought to be insufficient to support a well distributed population, an additional 870 thousand acres (approximately) of state (812,200 acres), county (9,100 acres), city (1,000 acres), and private (48,000 acres) lands are identified.

The U.S. Fish and Wildlife Service continues to rely on previously existing regulations to protect the marine environment and did not include any marine environment in the final rule.

The final rule includes the following language regarding areas designated as critical habitat that are within an HCP: "Critical habitat units do not include non-federal lands covered by a legally operative incidental take permit for marbled murrelets issued under section 10(a) of the Act."

Other Wildlife Statutes and Regulations

There are other laws and regulations pertaining to wildlife that are applicable, such as the federal Migratory Birds Treaty Act and the federal Bald and Golden Eagle Protection Act. In addition, the state has statutes and regulations governing wildlife. The Washington Department of Fish and Wildlife oversees state listings of endangered and threatened wildlife. DNR's Natural Heritage Program oversees state listings of plants. The Forest Practices Board issues regulations regarding forest practices involving critical wildlife habitat of state-listed species. (See the section in this chapter on the Forest Practices Act.)

If the Washington Department of Fish and Wildlife determines that an animal species is seriously threatened with extinction in the state of Washington, then the agency director may request the State Fish and Wildlife Commission to designate that species as endangered (RCW 77.12.020(6)). The same authority is granted for designating animal species as threatened or sensitive (RCW 77.12.020 (5)). Species designated as endangered are listed under WAC 232-12-014, and those species designated as threatened, sensitive, or protected are listed under WAC 232-12-011. As of the drafting of this HCP, 24 species are listed as endangered and eight species as protected. The complete regulations governing the state listing, delisting, and management of animal species are given in WAC 232-12-297.

The Washington Department of Fish and Wildlife is charged with writing recovery plans for endangered and threatened species that include target population objectives and an implementation plan for attaining the objectives. Such recovery plans may consider various approaches to meeting the objectives, including regulation. To date, the agency has written three recovery plans, for the snowy plover (*Charadrius alexandrinus*) (WDFW 1995a), the upland sandpiper (*Bartramia longicauda*) (WDFW 1995b), and the pygmy rabbit (*Brachylagus idahoensis*) (WDWF 1995c), none of which affect this HCP. (See Section F of Chapter III and Section G of Chapter IV for discussion of plants in the area covered by the HCP.)

RCW 79.70.030 authorizes DNR to establish and maintain a natural heritage program that "shall maintain a classification of natural heritage resources," which, as defined in RCW 79.70.020, includes special plant species. The Natural Heritage Program assigns endangered, threatened, or sensitive status to plants that face varying risks of extinction. As of the drafting of this HCP, the most current list of vascular plants can be found in a report titled Endangered, Threatened & Sensitive Vascular Plants of Washington (DNR 1994). A plant listed by the Natural Heritage Program is not protected through regulations, although the Natural Heritage Program does work with landowners to encourage voluntary protection. (See Section F of Chapter III and Section G of Chapter IV for a discussion of plants in the area covered by the HCP.)

Environmental Laws

In addition to the Endangered Species Act, DNR is required to follow relevant laws of general applicability such as the federal Clean Air Act, the federal Clean Water Act and the state Shorelines Management Act. As part of the process for developing an HCP, DNR is required to adhere to both the National and State Environmental Policy Acts.

NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA, 42 U.S.C. 4321 et seq.) requires full public disclosure and analysis of the environmental impacts of proposed federal actions significantly affecting the quality of the human environment. The issuance of an incidental take permit is a federal action subject to NEPA compliance. Federal actions associated with DNR's proposal involve both the U.S. Fish and Wildlife Service on behalf of the Secretary of the Interior and the National Marine Fisheries Service on behalf of the Secretary of Commerce.

It is important to distinguish between the requirements for an incidental take permit as set forth in the Endangered Species Act (16 U.S.C. 1531 et seq., described earlier in this chapter) and the detailed analysis required under NEPA. To comply with the requirements for an incidental take permit as set forth in the Endangered Species Act, an HCP must explain the potential impacts on federally listed species, the planned measures to minimize and mitigate to the maximum extent practicable those impacts, and other measures as necessary. The HCP must also describe alternatives to the proposed taking and explain why those are not considered feasible. NEPA requires a broader analysis that examines additional environmental impacts of the proposal and considers all reasonable alternatives to the proposed action. As part of the evaluation of reasonable alternatives, the No Action (i.e., no change from current practices) alternative must be analyzed. In this case, the NEPA analysis will compare the effect of issuing the permit to what would occur without the permit (USFWS 1996 p. 45). Please refer to the Draft Environmental Impact Statement for this analysis.

WASHINGTON STATE ENVIRONMENTAL POLICY ACT

The Washington State Environmental Policy Act (SEPA, RCW 43.21C) sets forth requirements for state actions that are similar to those of NEPA for federal actions. These include an analysis of environmental impacts of the proposal and consideration of reasonable alternatives, along with a public disclosure process. DNR is complying with these requirements through the Draft Environmental Impact Statement, a thorough public review effort, and a Final Environmental Impact Statement.

ENVIRONMENTAL IMPACT STATEMENTS AND PUBLIC REVIEW

Both SEPA and NEPA allow a state agency to jointly prepare an environmental impact statement (EIS) with a federal agency. Federal NEPA regulations state that "[f]ederal, [s]tate, or local agencies, including at least one federal agency, may act as joint lead agencies to prepare an environmental impact statement" (40 C.F.R. 1501.5(b)). SEPA rules also allow for the combination of documents where appropriate to comply with both SEPA and NEPA (WAC 197-11-640). In order to improve efficiency, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and DNR have agreed to serve as joint lead agencies for the environmental review of DNR's HCP. The lead agencies have prepared a Draft EIS pursuant to NEPA regulations (40 C.F.R. 1500-1508) and SEPA regulations (WAC 197-11) to fully evaluate DNR's HCP.

To satisfy both federal and state environmental policy act requirements, the U.S. Fish and Wildlife Service and DNR conducted a joint scoping process for the preparation of the Draft EIS. Agencies, tribes and members of the public submitted comments. The Board of Natural Resources also held a series of special public meetings around the state to hear public input. The results of the public scoping process are described in the Draft EIS.

A period of public review and comment followed issuance of the draft HCP and Draft EIS. Another series of public meetings was held around the state. The lead agencies reviewed the comments and the federal agencies conducted a biological assessment and jeopardy analysis of DNR's HCP. A Final EIS and notice of availability were published in October 1995. The Board of Natural Resources considered all reasonable alternatives, benefits and impacts to the trusts, results of the review by the federal agencies, and public input prior to deciding to adopt DNR's HCP. Please refer to DNR's Draft EIS and Final EIS for further information and analysis of the reasonable alternatives examined.

The State Forest Practices Act

In addition to statutes and regulations discussed in previous sections, as a forest land manager, DNR must comply with the Forest Practices Act, Chapter 76.09 RCW, which regulates forest management activity in Washington. The Forest Practices Act expresses the legislature's recognition of the importance of the forest products industry to Washington while finding it in the public's interest that forests be managed in a manner that protects public resources. The legislative finding and declaration includes the statement: "The legislature hereby finds and declares that the forest land resources are among the most valuable of all resources in the state; . . . that coincident with maintenance of a viable forest products industry, it is important to afford protection to forest soils, fisheries, wildlife, water quantity and quality, air quality, recreation, and scenic beauty" (RCW 76.09.010(1)).

The Forest Practices Act created the Forest Practices Board. One of the Board's duties is to promulgate forest practices regulations necessary to implement the purposes, policies, and provisions of the Forest Practices Act. Rules that relate to water quality protection must also be promulgated by the Department of Ecology. One of the legislative findings for the Forest Practices Act is to afford protection to forest soils and public resources (water, fish, wildlife, and capital improvements of the state or its political subdivisions) (RCW 76.09.010(2)(b)). These rules constitute Chapter 222 WAC, which sets minimum standards for forest practices such as road construction, timber harvesting, precommercial thinning, reforestation, fertilization, and brush control. Also included are rules concerning forest practices and habitat for threatened and endangered species. (See WAC 222-16-050(1)(b) and 222-16-080.)

Habitat conservation plans have a special relationship to the forest practices rule regarding critical habitats. When applications for proposed forest practices are submitted, they are assigned to one of four classes established by rule by the Forest Practices Board. Forest practices classified as Class IV-Special are subject to environmental review under the State Environmental Policy Act, Chapter 43.21 RCW (SEPA). Certain practices on "critical wildlife habitats (state) and critical habitat (federal) of threatened and endangered species" require a Class IV-Special designation (WAC 222-16-050(1)(b), 080). However, such habitats are no longer considered critical if the forest practices are "consistent" with a "conservation plan and permit for a particular species [that has been] approved by the U.S. Fish and Wildlife Service" (WAC 222-16-080(7)(a)). Therefore, additional environmental review under SEPA would not be required.

DNR's Forest Resource Plan

In addition to following statutory regulations, DNR is guided in management of state trust lands by policies established by the Board of Natural Resources. (See RCW 43.30.1150(2).) The Forest Resource Plan, adopted by the Board in 1992, is the major policy document currently providing direction for management of forested trust lands.

The Forest Resource Plan reaffirms DNR's commitment to act as a prudent land manager in order to generate income from state forest land to support schools and other beneficiaries. Policies in the various sections of the plan require DNR to analyze and, if necessary, to modify the impact of its activities on watersheds, wildlife habitat, special ecological features, wetlands, and other natural resources to ensure healthy forests that will be productive for future generations. The plan contains general policies and priorities intended to be interpreted within the context of the whole plan, including the following vision statement:

> The department has a clear purpose in caring for state forest land based on stewardship, innovation, commitment and competence. Department employees manage state forest lands and resources in an exemplary manner. Forest land planning is based on early collaboration with land users, neighbors, governments, tribes and the public, with mutual recognition of obligations and responsibilities. When necessary, the trust beneficiaries are compensated for a variety of uses by public and private sources. The department aggressively markets timber and a wide array of nontimber products. The department uses the most appropriate tools and technology. The department recognizes that assets owned by the trusts include the entire ecosystem and manages each site with the entire

> ecosystem in mind. The requirements for the management of timber and nontimber resources are integrated in landscape planning. Finally, the department recognizes the value of its employees, promotes creative thinking at all levels and accepts risk as an element of decisions (DNR 1992 p.1).

The plan divides policies into four general categories: trust asset management, forest land planning, silviculture, and implementation. Trust asset management policies address issues such as forest land transactions, lands available for timber harvest, harvest levels, marketing of special forest products, forest health, fire protection, financial assumptions, and special ecological features. Forest land planning policies describe the process for converting the plan policies into objectives and on-the-ground activities. Silviculture policies set the "sideboards" for individual site prescriptions and activities that effect the establishment, composition, structure, and growth of state forests. Implementation policies describe public involvement, monitoring, research, and plan modification processes.

The HCP is viewed as the major element for complying with the Forest Resource Plan policy on endangered, threatened, and sensitive species on the 1.6 million acres of DNR-managed land that the HCP covers. This policy states:

> The department will meet the requirements of federal and state laws and other legal requirements that protect endangered, threatened and sensitive species and their habitats. The department will actively participate in efforts to recover and restore endangered and threatened species to the extent that such participation is consistent with trust obligations (DNR 1992 p. 39).

In addition, the HCP provides support and direction for applying other Forest Resource Plan policies in regard to riparian management zones, wetlands, landscape planning, wildlife habitat, silviculture, and the Olympic Experimental State Forest.

The Forest Resource Plan articulates the Board's goals and policies in regard to striving to make the trust lands productive while protecting resources. These goals and policies can be implemented in a variety of ways, of which this HCP is one. The HCP does not revisit fundamental decisions made in the Forest Resource Plan. Therefore, the HCP should not be seen as an alternative to the Forest Resource Plan, but rather as a way of providing more substance and detail to existing policies.