

# HOUSE BILL REPORT

## SHB 1022

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### As Amended by the Senate:

**Title:** An act relating to the department of natural resources.

**Brief Description:** Prohibiting the department of natural resources from entering into certain agreements with the federal government without prior legislative and gubernatorial approval.

**Sponsors:** By House Committee on Natural Resources (originally sponsored by Representatives Buck, Johnson, Mitchell, McMorris, Talcott, Hickel, Chandler, Mastin, Lambert, Sheldon, Schoesler, Hatfield, Kessler, Mulliken, Honeyford, Thompson, Koster, DeBolt, D. Sommers, Carrell, L. Thomas, Dunn, Mielke, Clements, O'Brien and Doumit.)

### Brief History:

#### Committee Activity:

Natural Resources: 1/21/97 [DPS].

#### Floor Activity:

Passed House: 1/27/97, 66-30.

Senate Amended.

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### HOUSE COMMITTEE ON NATURAL RESOURCES

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Buck, Chairman; Sump, Vice Chairman; Thompson, Vice Chairman; Alexander; Chandler; Hatfield; Pennington and Sheldon.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Regala, Ranking Minority Member; Butler, Assistant Ranking Minority Member; and Anderson.

**Staff:** Linda Byers (786-7129).

### Background:

The Endangered Species Act.

The Federal Endangered Species Act (ESA) makes it unlawful for a person subject to the jurisdiction of the United States to "take" any endangered species of fish or

wildlife. By federal regulation, the Secretary of the Interior has extended this prohibition on take— to threatened species of fish or wildlife. The act defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." By regulation, the U.S. Fish and Wildlife Service has defined the term "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."

The northern spotted owl was listed as a threatened species under the ESA in 1990. The marbled murrelet was listed as a threatened species in 1992. A number of salmon species are currently under review for possible listing under the act. Faced with these listings and the potential for additional listings in the future, forest land managers have struggled to determine what harvesting and other forest management activities are permissible without violating the take— prohibition of the ESA.

#### Habitat Conservation Plans.

The ESA itself offers land managers a conservation planning option as a way to be in compliance with the act. A provision in the ESA allows the Secretary of the Interior (Secretary of Commerce, for salmon species) to allow a person to violate the take— prohibition of the act if the taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity. In order to allow for this taking of a listed species, the secretary issues an incidental take permit. The secretary may not issue a permit unless the person seeking the permit provides the secretary with a conservation plan that specifies: 1) the impact that will result from the taking of the species; 2) the steps the applicant will take to minimize and mitigate these impacts, and the funding that will be available to implement those steps; 3) the alternatives the applicant considered and the reasons why those alternatives were not selected; and 4) any other measures that the secretary requires. The plan supplied to the secretary by the applicant is called a habitat conservation plan (HCP).

An applicant for an incidental take permit negotiates an agreement with the U.S. Fish and Wildlife Service and with the National Marine Fisheries Service, if salmon species are involved in the proposed plan. It is the applicant, rather than one of the federal agencies, who initiates development of an HCP. The applicant chooses the land base to be included in the plan as well as the species to be included. An HCP can be developed for a single species or a number of species, including unlisted species. Including conservation planning for as-yet-unlisted species can insulate a land manager from disruptions in operations if a species is listed in the future. A number of private and public forest land managers in the Pacific Northwest have developed, or are in the process of developing, HCPs.

#### Proposed Habitat Conservation Plan for State Forest Lands.

Currently the DNR is pursuing the adoption of a habitat conservation plan and the related agreements and permits. The land base in the proposed plan is approximately 1.6 million acres of state-owned forest lands and covers the state-owned forest lands that fall within the range of the northern spotted owl. The plan addresses conservation measures for nine listed species and a number of other unlisted species, including salmonid species under review for possible listing. The HCP includes special provisions for northern spotted owl and marbled murrelet habitats, for riparian habitat, and for certain special habitats such as cliffs and springs. The plan seeks to provide habitat for the listed and unlisted species through the above habitat conservation efforts and also provides species-specific measures when such measures are deemed necessary. Separate plans are included for the Olympic Experimental State Forest. The department would receive its incidental take permits at the time the various agreements are signed. The DNR must incorporate the commitments of the HCP into timber sales sold on or after January 1, 1999; the agency may choose to incorporate HCP commitments into earlier sales. An implementation agreement for the HCP addresses issues such as termination of the agreement by the department, what happens if the ESA is amended or repealed, land transfers and exchanges, and a process for making major and minor amendments to the permits and the HCP. The term of the proposed agreement is 70 years, with the option to renew up to three times for up to 10 years each time.

**Summary of Bill:** The DNR may not enter into a habitat conservation plan and its related incidental take permits, or enter into other agreements or commitments intended to induce the issuance of a permit from the federal government unless the department obtains express approval of the agreement or commitment from the Legislature and the Governor. This prohibition applies to agreements or commitments affecting more than 10,000 acres of public and/or state forest land for five or more years. The expressed approval from the Legislature and the Governor must be in the form of duly enacted legislation. Prior to seeking this approval, the department must provide to the Legislature and the Governor, copies of all proposed plans, agreements, and commitments, as well as an analysis demonstrating that the proposal is in the best interest of the trust beneficiaries. If the department has entered into a habitat conservation plan or any other similar agreement or commitment under the Endangered Species Act, the department must immediately exercise the provision in the habitat conservation plan implementation agreement or other similar agreement terminating that agreement and plan.

**EFFECT OF SENATE AMENDMENT(S):** The Senate amendment removes the provision prohibiting the department from entering into an HCP and the provision directing the department immediately to terminate such an agreement and plan if the department has entered into one. The Senate amendment instead directs the Legislature to review the existing HCP for state forest lands and to determine if the plan and implementation agreement are in compliance with the state's fiduciary responsibilities and are in the best interests of the trust beneficiaries. If, by March

15, 1998, the Legislature has not stated that the HCP and the implementation agreement are in the best interests of the trust beneficiaries, the department must immediately terminate the agreement and the plan.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** (This testimony was given jointly on HJM 4001 and HB 1022.)

The Legislature is the trustee of these lands, with the responsibilities all trustees should have. Normally a plan of this magnitude would come to the Legislature as a major policy decision. Given the questions that have been brought up, the Legislature as trustee, has no choice but to look into this and say yes or no to this plan. In September, 1996, the 21 timber counties voted unanimously to not support the HCP. The counties asked the board to look at issues raised by the University of Washington, but the board went ahead with the HCP. The county member voted in favor of the plan and not with the counties. The state seems to be growing old growth timber. A 60-year rotation is not being implemented. DNR management costs are higher than those in private industry, and DNR adds costs on top of the management costs. The revenue received is sometimes the only discretionary money counties have for many purposes. We are not against the concept of HCPs, but we need to be more pragmatic and have more information. The department has not provided an explanation of the differences in asset value for the sustainable yield calculations presented in January and October. The sustainable harvest calculations and revenue projections show that some trusts are disadvantaged by the plan. The Attorney General opinion says that trusts that are disadvantaged may not be included in the proposal. The issue has not been resolved about the baseline for the HCP and no-change options. The shut-down in the Hoh-Clearwater block is partly due to the listings and partly due to the DNR policy. The issue is not how many people testify but rather the trust mandate and the paramount duty under the state constitution; the proposed HCP fails both. The HCP will impact the viability of Port Angeles. It is important to note that the two deans on the board objected to the HCP. The concerns raised by these trustees need to be analyzed. There needs to be an adequate economic review and active oversight by the Legislature. The department has not provided assurances that income is maximized under this HCP. The court says that state lands must provide income to the trusts, so this is a trust responsibility issue, rather than a partisan issue. There is concern with the information hyping the HCP versus what is really on the page, especially with regard to the implementation agreement. The HCP does not contain a statement about the primary trust responsibility of generating income. An alternative plan was presented to the board a month before they voted. Studying is useless if you miss the point. This is not micro-managing; this is the Legislature's responsibility. The Legislature needs to consider the business

management aspects of managing a \$10 billion asset. It is important to note that the two deans on the board did not vote for the plan, and they are on the board to provide expertise. The beneficiaries have requested information and have been denied that information. A University of Washington report suggests The DNR could recover more income than predicted by the HCP, and the DNR refuses to accept the study. Timber purchasers and others, repeatedly suggested various analyses and the need to bullet-proof– the plan from litigation and were ignored. Now an environmental group has filed a notice of intent to sue the agency. A State Investment Board study found that average return on investment for private forest lands is 7.5 percent, versus 2.5 percent for the DNR. Since an HCP will dictate trust land management for the next 100 years, it is worth doing it right the first time. Concerns raised in response to the draft environmental impact study about size and distribution of riparian reserves have not been responded to in the final environmental impact study. It is only sensible that all of the questions raised should be answered, supporting the concept of legislative review. The wetlands protection measures in the HCP have an enormous hidden cost. The elimination of road building and certain yarding equipment will take thousands of timber acres out of production. The stream protection zones go beyond state regulations and appear to be a state agency enforcing federal regulations. Private forest land owners will have to implement HCP requirements on their lands in order to obtain a road use permit to access their lands. The existing state forest practices rules have been dismissed as an alternative HCP. The federal agencies will be able to add land management restrictions to the HCP based on best science–, so there is no certainty of timber harvest offered. With regard to the termination option in the agreement, the mitigation requirements will be so costly that termination will not be a viable alternative. The only certainty offered by the HCP is of a massive reduction in harvest, revenue, and jobs. The HCP is in a partnership with the federal government, and the federal government has proven to be an unreliable partner. The timber promised under Option 9 has still not materialized. The DNR may not be able to provide a steady timber supply. The people who have to live with these decisions are uncertain of the impact the HCP has on their communities. If trust revenues fall from average current levels, the Legislature will be responsible for making up the difference. The Legislature should have the final say on this, and should make sure that all reasonable alternatives have been explored. Further economic analysis should be conducted, and the basic assumptions behind the proposal should be explored. We have participated in every effort to keep this HCP from becoming a reality. The Legislature should have responsibility for oversight.

**Testimony Against:** (This testimony was given jointly on HJM 4001 and HB 1022.) This bill will apply to more decisions than just the decision about the HCP, such as leases, sales, condemnation proceedings, and purchases. The trusts may not be well served by the extra time it would take to run all these decisions through the legislative process. Board members currently devote about a week per month over a long period of time to make these kinds of decisions. It may be impractical for the Legislature to serve as the trust manager as well as the trustee. The Legislature should make sure

that the current Board of Natural Resources structure is not working before changing it. The board has had a number of independent reviews on its management of state trust lands, and the reviews have been positive. The listings of the owl and the murrelet had a major impact on timber sales from state lands. There is no question that there will be salmon listings, affecting almost every area of the state. After the first two listings, the board determined it would not be meeting its fiduciary responsibility if it just sat and waited for another listing, so the board explored the HCP option. The [State] Supreme Court recently reviewed the HCP and the implementation agreement, and declined to tell the agency to start over. The Legislature needs to think carefully about the impacts of these measures to the trusts, especially with the listing of salmon. The DNR's HCP effort will provide regulatory certainty, economic stability, and provide fish and wildlife protection. The Conservation Commission hopes to use the plan as a precedent to help private landowners do their own HCPs. The salmon listings are a great concern. HCPs may offer a path for economic sustainability for ranchers and farmers. There is an impact from the ESA on the trusts over which the state has no control, and it is unlikely that the act will be softened. The state should use whatever legal means are available in the act to increase the productivity of the trusts, which means the HCP. With the current listings, and the pending listing of salmon, the multi-species approach in the HCP is very important. Given the impact of current listings, there is concern about the acreage that would be off-base with the salmon listings, possibly large riparian set-asides. The State will benefit from the federal no surprises- policy. The volume of material involved with the HCP is immense, and the Legislature faces the challenge of dealing with all the information that comes across their desks in two-hour time blocks. The Legislature should have a thoughtful, well-balance, reasoned debate about how much authority it wants to delegate to the Board of Natural Resources before acting on this question.

**Testified:** Rep. Jim Buck, sponsor. Jennifer Belcher, Commissioner of Public Lands; Scott Merriman (concerns). Larry Swift, Washington State School Directors' Association; Steve Meyer, Washington State Conservation Commission (con). Glenn Aldrich, Lewis County Commissioner; Bob Dick, Northwest Forestry Association; Harry Bell, Green Crow Tree Farm; George Kirkmire, Washington Contract Loggers Association; Harriette Buchmann, North Olympic Timber Action Committee; Glenn Beckman, Port of Port Angeles Commissioner; Phillip Kitchel, Clallam County Commissioner; Pat Hamilton, Pacific County Commissioner; Glenn Wiggins, Merrill & Ring, Inc.; and Timothy J. Smith, City of Port Angeles (all pro).