

BRIEFING NOTE FOR INFORMATION

DATE: August 14, 2023

PREPARED FOR: Honourable Nathan Cullen, Minister of Water, Land and Resource Stewardship

ISSUE: Legal action related to federal management of Marbled Murrelet nesting habitat in Fairy Creeks.13; s.16

KEY POINTS:

- The federal Recovery Strategy and provincial Implementation Plan for Marbled Murrelet (MAMU) are currently aligned in their description of *suitable* nesting habitat and objectives: they both allow for some harvest of suitable nesting habitat except on east Vancouver Island.
- Recently, a court case was launched to halt logging of MAMU habitat in Tree Farm Licence (TFL) 46 as it is alleged to destroy MAMU nests that are protected under the federal *Migratory Birds Convention Act* (MBCA) and *Species at Risk Act* (SARA).
- s.13; s.16

BACKGROUND:

- The B.C. Cabinet-approved MAMU Implementation Plan (2018) established the objective to halt population and habitat decline by 2032. To achieve this, regulatory objectives for habitat protection on Vancouver Island were approved in December 2021. Murrelet population sizes are difficult to estimate, but breeding population size and habitat area are closely associated, so there is confidence that population objectives will be met through habitat protection.
- Protests over logging of old growth forest in Fairy Creek and surrounding TFL 46 began in the summer of 2020 with a particular focus on habitat for species at risk including MAMU and Western Screech-Owl beginning in the spring of 2021. Old growth deferrals in the Fairy Creek watershed were announced on June 9, 2021, and have now been extended to February 1, 2025.
- In response to public protests and complaints, the federal government initiated 'compliance promotion' field site visits to TFL 46 in August 2021 and May 2022 to assess the likelihood that active nests were being destroyed. They could not conclude with certainty that harvest was non-compliant with the MBCA.
- TFL 46 contains one of the largest Wildlife Habitat Areas (WHAs) in BC for MAMU (605 ha), and habitat protection targets from the *Order for the Recovery of Marbled Murrelet* are close to being met. These measures restrict harvesting year-round as compared to the B.C. *Wildlife Act* and the federal MBCA which do not protect MAMU nests when outside of breeding season.
- Planning for additional WHAs is ongoing and provincial staff have met with the licensee to discuss options for expanding the existing WHA or expanding Old Growth Management Areas in TFL 46.
- A federal protection statement was issued in 2022 on the application of the MBCA as it relates to the nests of birds listed under Schedule 1 of SARA. The statement clarified that nests of migratory birds are protected under both pieces of legislation, but environmental groups (Wilderness Committee, Sierra Club) considered this an overly narrow interpretation of habitat protection for species at risk, including MAMU, because it failed to protect nesting stands.

- In April 2023 Ecojustice filed a federal lawsuit on behalf of the Friends of Fairy Creek that seeks a judicial order to prevent “indiscriminate destruction” of MAMU nests in TFL 46. The lawsuit alleges that population trends are declining at a rate that would exceed the aligned Recovery Strategy and Implementation Plan threshold of 30% over 30 years, based on an extrapolation of the estimated decline of 2.3% per year from 1996-2018 (Drever et al. 2021).

DISCUSSION:

- s.13; s.16
s.13; s.16 The currently shared MAMU CH definition is unusual in that it states that 70% of 2002 *suitable* habitat amounts meet this goal.
- s.13; s.16
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- The current rate of population decline is concerning and exceeds the thresholds set by the federal Recovery Strategy and the provincial Implementation Plan. Provincial staff are close to completing a final year of population monitoring towards a research goal of testing whether the rate of nesting habitat loss can be detected as a cause of population decline.

INDIGENOUS PEOPLES:

- The Pacheedaht, Ditidaht, and Huu-ay-aht First Nations requested the Old Growth Deferrals in the central Walbran and Fairy Creek watersheds that were subsequently established on June 9, 2021.
- The Pacheedaht First Nation have been engaged with spatial planning of the MAMU WHA Order within their territory since January 2023 and have requested an extension of Old Growth Deferrals until their Integrated Resource Management Planning is completed.

NEXT STEPS:

- WLRS staff are working closely with Environment and Climate Change Canada as part of a Technical Working Group that meets quarterly to provide a greater mutual understanding of new and emerging management issues.
- Provincial staff will continue to advance implementation of the MAMU WHA Order in TFL 46, by engaging with First Nations, licensees, and supporting the South Island Forest District.
- B.C.-led clarification on the definition of critical habitat in the development of a clear BC policy will be considered.

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REVIEWED BY:

	Initials	Date
DM	LH	August 14, 2023
A/ADM	BB	August 4, 2023
A/ ED	JW	July 19, 2023
DIR	CP	July 19, 2023