

Marbled Murrelet Specified Resource Sites

A Progress Report to the Board of Forestry

March 2017

Introduction

In July 2016, the Board of Forestry (Board) received a petition¹ to initiate rulemaking and identify resource sites to establish an inventory and protect existing marbled murrelet sites. The Board considered the petition during their meeting on July 20, during which they received a staff report and took public comment. Acting within its authority under the Administrative Procedures Act, the Board denied the petition. In September 2016, the petitioners submitted a Petition to Review an Agency Order through the Lane County Circuit Court to request that the court compel rulemaking.

In November 2016, the Board of Forestry met to reconsider their decision to deny the petition for rulemaking. After consultation with the Oregon Department of Justice, the Board voted to withdraw and reverse its previous decision on the rulemaking petition. The decision included the following direction to the Department of Forestry (Department):

- Collect and analyze the best available information using, as a starting point, the petition. The department should determine whether the petition satisfies the requirements for a technical review paper, and if it does, commence a review of the paper
- Establish inventories of resource sites relating to marbled murrelets
- Use the procedures outlined in ORS 527.630-671 and OAR 629, Division 680 to evaluate the merits of the petition.
- Report back on progress and near term plans at the March, 2017 meeting

In response to the Board's decision, the petitioners withdrew their Petition for Review with the Lane County Circuit Court.

This report summarizes work done to date on this project. Included are:

- 1) Background Information:
 - a. Description of the current process used for addressing marbled murrelets under the Forest Practices Act (FPA).
 - b. Description of the required process for considering rule-making for Threatened or Endangered species.
- 2) Preliminary evaluation of the petition—does the petition satisfy the requirements for a technical review paper.

¹ Cascadia Wildlands, Center for Biological Diversity, Coast Range Forest Watch, Oregon Wild, The Audubon Society of Portland, and Oregon Chapter of the Sierra Club. 2016. Petition to initiate rulemaking and identify resource sites to establish an inventory and protect existing marbled murrelet resource sites.

- 3) Establishing an inventory--summary of the existing ODF datasets for known sites for marbled murrelet
- 4) Summary and next steps

BACKGROUND INFORMATION

Current Process for marbled murrelets under the FPA

Although there are no rules specific to marbled murrelets in the FPA, the department has data for known murrelet sites. Proposed operations near these sites are addressed through the notification and written plan processes. Marbled murrelet protections are addressed under FPA rules for written plans for species on federal or state threatened and endangered species (T&E) lists. OAR 629-605-0170 (5)(d) requires statutory written plans for operations within 300 feet of nesting or roosting sites of threatened or endangered species. OAR 629-605-0190 (2) requires non-statutory written plans for operations near habitat sites of any state-listed threatened or endangered species. OAR 629-605-0180 describes the process for addressing T&E resource sites in written plans.

Each situation is evaluated on a case by case basis to determine if the proposed operation will pose a conflict to the murrelet site. If a conflict is not likely, then a written plan is not needed. If a conflict is likely, then a written plan must be submitted. The written plan must describe reasonable measures to resolve the conflict in favor of the resource. There are no guidelines to use to evaluate written plans to determine if conflicts are likely. In general, written plans are evaluated to determine 1) if they are complete, 2) if they describe actions to be taken to protect murrelets. In general, conflicts are considered likely for operations within ¼ mile of murrelet sites, however local conditions such as topography, timing of the operation, and other factors are also considered. Comments are provided to the operator on the written plan and the operator is notified that the murrelet is protected under the Federal Endangered Species Act and that compliance with the FPA does not ensure compliance with the ESA.

Enforcement authority is very limited for operations near marbled murrelet sites. Enforcement can only be taken if a complete written plan is not submitted. There is no ability for the Department to take enforcement action if written plans are not followed during operations. Prior to 2003, when the Department had the authority to approve or deny written plans, the Department had greater ability to require specific protection standards on the ground and could take enforcement authority for an operator not following their written plan.

Summary of Information to be Considered for T&E Species Rule Reviews

Requirements in statute and Division 680 Rules

When a species is added to either the federal or state Endangered Species Act lists, protection rules under the FPA may be warranted. However, every listed species may not warrant development of FPA rules. Instead, the focus is on species that occur in forestland and that are sensitive to forest practices. The process to evaluate T&E listed species for possible rule-making under the FPA is laid out in statute (ORS 527.710) and in administrative rule (OAR 629-680).

The criteria for a species to qualify for rules under the FPA include (from ORS 527.710 and OAR 629.680):

- 1) The species must be on state or federal T&E Lists
- 2) One or more forest practices must conflict with the sites used by the species

Forest Practice in this context can be any kind of operation regulated under the FPA such as harvest, road construction, application of chemicals, etc. (see OAR 629-605-0050 (27)). Conflict would occur if the resource site is abandoned, or if productivity at the site is reduced (e.g., nest failure) (OAR 629-600-0050 (13)). In most cases, the nexus of forest practices and conflict for a resource site is from habitat modification (e.g., harvest near a site) or disturbance during key periods of use such that a resource site is abandoned or that patterns of use are impaired to the extent that survival or reproductive success is impacted.

In 1990, shortly after the specified resource site statutes were established, the Board of Forestry created administrative rules which established the process for specified resource site rulemaking (OAR 629, Division 680). These rules include the details on information to be considered and the steps to be used to review a T&E species for possible rules under the FPA (OAR 629-680-0100).

The Board's evaluation is to be based on best available information summarized in a technical review paper. The report must be written by those proposing protection; this could be the Department, another agency, or an organization or person. The technical review paper must demonstrate how the resource sites used by the species are sensitive to forest practices. The technical review paper is to include the following information:

- 1) Identify the resource sites used by the species
- 2) Identify the forest practices that conflict with the resource sites
- 3) Evaluate the biological consequences of the forest practice conflicts identified in #2
- 4) Propose protection requirements and exceptions for the resource sites

When a species is proposed for rule-making, the Department is responsible for conducting its own review of the submitted technical report. As part of the Department's review, an external review of the technical report must be conducted using experts chosen by the Department. The Department's review and report will summarize the outcome of the external review, include an evaluation of the literature used in the technical report and summarize outcome from consultation with technical experts.

Once the Department has completed its review of the technical paper, the report is presented to the Board. The Board will review the technical report and the Department's report, and must either accept or reject the information. If accepted, the Board would then commence development of rules for the species. As part of this process, the Board must

- Identify the resource sites to be protected,
- Identify the forest practices that conflict with the sites,
- Determine the protection requirements for the resource sites; and approaches to achieving protection, and

- Determine any exception criteria

The Division 680 rules that lay out the process for rule development for specified resource sites were developed in the late 80's. Since that time, other statutes and rules have been enacted that also affect the Board of Forestry's process for developing any new rules under the FPA. This includes:

Consultation with Other Agencies: ORS 527.710 (4) indicates that prior to adopting new rules, the Board shall consult with other agencies that have programs affected by forest operations. For Threatened and Endangered Species, the primary agency for consultation is Oregon Department of Fish and Wildlife (ODFW).

527.714 Analysis: Statute was enacted in 1995 requires a review and determination that new rules not be adopted unless certain standards are met. The standards that pertain to possible rule making for a wildlife species include:

- There must be evidence that degradation of the resource is likely.
- The scientific or biological status of a species has been documented using best available information.
- The proposed rule reflects available scientific information, the results of relevant monitoring, and as appropriate adequate field evaluation at representative locations in Oregon.
- The objectives of the proposed rule are clearly defined and the restrictions placed on forest practices as result of adoption of the proposed rule are to prevent harm or provide benefit to the resource site being protected.
- Alternatives, including non-regulatory alternatives, must be considered and the alternative chosen must be the least burdensome to landowners and timber owners while still achieving the desired protection.
- The benefits to the resource to be achieved by the proposed rule must be in proportion to the degree that forest practices in the aggregate are contributing to the issue.

In addition, an economic impact analysis must be conducted as a part of the 527.714 analysis.

Measure 49 and ORS 195.305

Voters in Oregon approved two ballot measures that modified land use laws to require compensation for real estate value lost due to new land use regulations, or waiver of regulations. Ballot Measure 37 was approved by voters in 2004. In 2007, voters approved Ballot Measure 49 which modified statutes created under ballot measure 37. ORS 195.305 provides for compensation to landowners in some cases where land use regulations enacted after January 1, 2007 result in a reduction of the fair market value of property. Claimants may request compensation equal to the reduction in fair market value, or a waiver of the pertinent land use regulations. There are exceptions under ORS 195.305 for state regulations that are enacted to implement federal laws (e.g., the Clean Water Act). In addition, only landowners who own land at the time of the new regulation are eligible for an exemption or compensation. If the land is sold, the new landowner is not eligible for an exemption or compensation. The implications of Ballot Measure 49 will need to be considered during any rule-making process for marbled murrelets.

PRELIMINARY EVALUATION OF THE PETITION

This review focuses on whether or not all of the required components of a technical report, as specified in OAR 629-680 (1)(a) are included. It is NOT meant to be a complete review, but is an initial examination of the technical report to help evaluate what the next steps should be in the process.

The petition submitted for rule-making includes information on the ecology of marbled murrelets. It has sections titled Biology and Ecology, Population Status, Potential Conflict of Forestry Practices with Resource Sites and Inadequacy of Current Regulatory Regime. It also contains a section titled Rulemaking Request which contains proposed rule language. It is not clear if the petition submitted was meant to meet the requirements of a technical report as described in ORS 629-680-0100(a) as the petition is not organized in a manner to specifically address the required topic areas. Below is a preliminary assessment of the petition as it relates to the requirements for a technical report.

As previously mentioned, the technical report submitted for the purposes of rule-making must include the following information:

- 1) Identify the resource sites used by the species.
- 2) Identify the forest practices that conflict with the resource sites.
- 3) Evaluate the biological consequences of the forest practice conflicts identified in #2.
- 4) Propose protection requirements and exceptions for the resource sites.

Does the petition identify the resource sites used by marbled murrelets?

No: The resource sites used by murrelets are not specifically identified and defined in the petition. However, the petition does include information on the habitat needs of the species. The types of resource sites the petitioners believe are important to murrelets can be drawn from this information. The resource sites discussed in the petition occur at a variety of scales and include:

- Nesting Platform—vertical branch at least 4” wide and 33’ above the forest floor (page 6). The petitioners claim that the presence of nesting platforms is the most important factor in nesting habitat choice.
- Nest Tree—Old growth trees with platforms or mistletoe-infected trees in Sitka spruce/ western hemlock forests are identified as the types of trees used for nesting (page 5 & 6).
- Stand Type—The petitioners indicate that murrelets nest in old growth stands, or younger stands (60-80 years) that include remnant trees with platforms or mistletoe platforms in Sitka spruce/ western hemlock forest types (page 6).
- Other Factors—Petitioners indicate that murrelets nest within 55 miles of the coast and that murrelets are associated with presence of old growth and mature forests, large core areas of old growth, low amounts of edge, reduced habitat fragmentation, proximity to marine environment, and forests that are increasing in stand age.

Based on information provided in the petition, the resource site(s) are not clearly identified. However, it appears from the proposed rule language that it is the intent of the petitioners that potential habitat is

the resource site they are identifying for protection. It is not clear if potential habitat in general, as opposed to specific sites such as nest trees, are eligible for protection under the specified resource site statutes and rules. Current resources protected for other species include active nest trees and roost trees. Furthermore, OAR 629-680-0020 (2) states that for threatened and endangered species, the place from which distances [for purposes of a hearing] are the active nest tree, roost tree, or watering place. Thus it appears the intent of the rules are to protect specific sites known to be used by the species, and not potential habitat.

The petition does not include discussion of another possible type of resource site: location of occupied detections from protocol audio-visual surveys. Occupied detections occur when a murrelet is observed exhibiting a behavior considered indicative of possible nesting. These include flying below the forest canopy, stationary calling, landing in a tree, etc. Occupied detections are used to trigger identification of a site or forest stand as “occupied”. An occupied site is considered likely to be used for nesting, thus occupied detections are somewhat of a proxy for nesting. However, the relationship between the location of an occupied detection and actual nests has not been well studied.

Does the petition identify the forest practices that conflict with the resource sites?

Partially: The petition is not organized in a manner that clearly identify specific forest practices, such as operations, road construction, etc., that conflict with resource sites. However the petition does include information on amounts and trends for older forest stand ages and potential nesting habitat. It also discusses effects of forest fragmentation. From this information, it appears that the petition focuses on the following potential conflicts.

- 1) Logging/ forest operations. Petition does not specifically identify this is a conflict, but it can be extrapolated that this is intended to be an identified conflict from the discussion in the petition. From the discussion in the petition, it can be presumed that forest operations may result in loss of nesting sites, known nesting habitat, and potential nesting habitat. May also increase forest fragmentation.

The petition does not include a full discussion of forest practices that may conflict with resource sites. This may be directly related to the way resource sites themselves were discussed. Other forest practices likely have potential for conflicts, in particular to nesting birds. Additional forest practices not included in the discussion are road construction and reconstruction, use of aircraft, and disposal of slash.

Does the petition evaluate the biological consequences of the identified forest practice conflicts?

Partially: Biological consequences are identified in the petition for loss of murrelet habitat and fragmentation. Because they were not identified as conflicts, biological consequences of other forest practices were not addressed. For example, the potential for forest practices that only create disturbance are not addressed in the petition. Some noise-producing activities such as road construction, use of heavy equipment for non-logging work, or use of aircraft may create a disturbance that could impact use of nesting sites or nesting success, and thus have a biological consequence.

Forest Harvest—Loss of Habitat: The petition discusses the loss of habitat on murrelets, but the focus is on effects at the population scale (not individual sites). Loss of habitat on federal versus nonfederal lands is discussed. Direct biological consequences are not discussed, but loss of habitat is thought by the petitioners to have resulted in population level effects, presumably from loss of productivity (number of young successfully fledged).

Forest harvest—Fragmentation and Edge Effects: Fragmentation and creation of edges is identified as a potential conflict (resulting from harvesting of trees). The biological consequences of fragmentation identified by the petitioners include “negative effects on murrelet population viability and size, local or regional extirpation, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation rates, and reduction in adult survival” (page 16).

Does the petition propose protection requirements and exceptions for the resource sites?

Partially: The petition includes proposed rule language for protection requirements, but not exceptions. The proposed protection has four parts:

- 1) Require private landowners who have forests sixty years or older to not be able to harvest without authorization from ODF.
- 2) Require the Department to conduct protocol surveys for marbled murrelets prior to authorizing harvest on private lands sixty years or older, and to submit results of surveys to the USFWS and ODFW.
- 3) Where surveys result in occupied detections, the Department shall not authorize logging and encourage the landowner to obtain an Incidental Take Permit from the United States Fish and Wildlife Service (USFWS).
- 4) If prior surveys resulted in occupied detections, the Department shall not authorize logging and report the logging plan to the USFWS.

In addition to the proposed rule language, the petitioners also identify other actions that could be taken such as working with ODFW and private landowners to identify the remaining high quality habitat on private lands and to identify measures to survey for and protect the species, using mitigation and compensation.

Although the petition includes possible protection requirements, much of what is proposed is outside the authority of the Board and the Department. The Department does not have authority to authorize or to withhold authorization of forest operations. Oregon does not use a permit system for administration of the FPA. A notification system is used. Thus, landowners and operators do not apply for a permit, but instead notify the Department prior to conducting forest operations. Administration and enforcement of the FPA is outcome based.

The Department cannot require landowners or operators to conduct surveys for wildlife. The Department could not conduct surveys on private land without the authorization of the landowner. As previously mentioned, the department cannot deny a landowner their ability to harvest or conduct other operations and thus cannot require that surveys are conducted as a condition prior to operating.

This section of proposed rule language appears to relate to the Department’s mandate to maintain an inventory of protected resource sites. The Specified Resource Site statutes (527.710) direct the department to establish and maintain an inventory of resource sites. The statute is silent on how those inventories are to be established, however the House legislative document for House Bill 3396 provides information on this topic². The legislative intent document states, “It is the intent of this subsection that the board not collect any new data, but rather use information already gathered by others. This information can come from interest groups, county land use inventories, and existing agency data. It is the intent that the board will rely upon those agencies with fish and wildlife expertise in gathering this information.” For all species protected under the FPA, inventories are developed and maintained using existing datasets from within ODF and from other state and federal agencies.

In rule clause #3, it indicates that landowners should obtain an Incidental Take Permit (ITP) in situations when an occupied detection is observed in a proposed logging area. To our knowledge, the USFWS does not issue ITPs for individual operations and especially not when a listed species is known to occur. ITP’s are a tool available in association with larger-scale USFWS programs such as the Habitat Conservation Plan or Safe Harbor Plan.

DEVELOPMENT OF A MARBLED MURRELET RESOURCE SITE INVENTORY

Summary of existing ODF data for marbled murrelets

The Board directed the Department to move forward with developing an inventory of marbled murrelet sites. The Private Forest Program has data collected from other sources that can serve as an initial inventory. This data is what is currently used to screen notifications. The existing data contains known locations of nest sites and locations of occupied detections from 1) results from ODF State Forests Program marbled murrelet surveys and research studies, and 2) additional sites from unknown sources compiled from ODF district level resource site maps. These data includes locations of occupied detections on BLM lands.

The distribution of existing marbled murrelet sites in the data is summarized below in relation to land ownership classes (Table 1). Of the 797 sites below, the large majority represent points on the ground where occupied behaviors were observed. Also included are 38 known nest trees; all located in the Public—State category.

Because the data summarized below is mostly from ODF-sponsored surveys, the distribution by land ownership class is biased towards the Public—State category. Thus the values below are not likely representative of the actual distribution of murrelet sites across the state.

Table 1. Distribution of marbled murrelet sites in the ODF database by landownership class.

² Achterman, Gail L. 1987. Letter to members of the House of Representatives from Gail Achterman, assistant to the Governor for natural resources. Letter includes a document titled, Statement of Intent for House Bill 3396 to amend land use laws, Board of Forestry composition, and Forest Practices Act. Letter dated June 16, 1987.

Landownership Class	Number of Sites	Percentage of Sites
Public—Federal	48	6
Public—State	712	89
Public—city, county, etc.	5	< 1
Private	32	4
Total	797	

The data in Table 2 shows the number of sites in the current dataset that are within ½ mile of various landownership classes. The ½ mile distance is used to screen notifications for possible FPA conflicts, thus this data gives a picture of how many of the sites have potential to trigger possible FPA review.

Table 2. Number of marbled murrelet resource sites located “near” various landownership class.

Landownership Class	Number of Sites within ½ mile of landownership class
Public--State	763
Public—city, county, etc.	11
Private	125

Board Action Needed Prior to Development of a Resource Site Inventory

Before the Department can develop an inventory of resource sites used by marbled murrelets, the Board of Forestry will need to determine exactly what should be considered the resource site for this species. Because of their secretive nature and difficulty in finding nest sites, there have been relatively few nests located. The standard method of surveying the species relies on observation of murrelets flying under the canopy, or other key behaviors, to indicate that the area where these behaviors is observed is likely occupied by the species. An actual area that is considered occupied by murrelets is typically determined by the land management agency or landowner who is conducting the surveys. However, methods used to determine the extent of occupied stands is not necessarily consistent between landowners.

Because of these challenges, the marbled murrelet is different than many other species including those that already have rules (i.e., bald eagle, osprey, great-blue heron, spotted owl) because the resource site to be protected is not clear. Because nest sites are notoriously difficult to locate, nest trees may not be the appropriate resource to use as the center of protection. For this reason, the decision regarding a definition of the resource site for marbled murrelets needs to be made before the Department can begin work to establish an inventory.

Notwithstanding the decision to be made regarding resource sites for marbled murrelets, the Department can begin the work to reach out to other state and federal agencies to determine what other data exists for marbled murrelets.

SUMMARY

The rulemaking petition submitted to the Board summarizes population status, habitat associations, and ecology of marbled murrelets using many citations from marbled murrelet research. However, the information submitted is not comprehensive. It is the department's conclusion that a more thorough review of best available information is needed to help inform policy decisions for marbled murrelets. This review should not only summarize the full breadth of information available on marbled murrelets, but focus on the key questions to be addressed in a technical report, as defined in rule (OAR 629-680-0100(a)).

It is the Department's conclusion that the petition submitted for rule-making for marbled murrelets does not contain all of the information needed for a technical report. Additional information will be needed to help inform the Board of Forestry rule making process.

The Department recommends that a complete technical report be developed, using the petition as a starting point. The technical report will not replace the petition, but will instead focus on filling in gaps of information. The technical report will include additional background information on ecology and habitat use of marbled murrelets, as well as explicitly address the required elements relating to resource sites, conflicts, and consequences of conflicts. In addition, a range of general protection strategies for this species will be identified to help set the framework for further discussion. The technical report will provide the basis of information for subsequent steps and to inform the Board throughout this process.

The Department will need direction from the Board regarding the definition of a resource site for marbled murrelets relatively early in the process. As previously discussed, because nest trees are difficult to locate for this species, use of nest trees alone to define resource sites is not likely to be sufficient. OAR 629-680-0020(2) states that for threatened or endangered bird species, the resource site [for purposes of a hearing] is the active nest tree. This would seem to limit the decision space, but despite this rule, there is a precedent set for the Board developing rules that expand the definition of a resource site beyond a nest tree for a listed species. For spotted owls, the nesting site is defined as *"...includes the tree, when known, containing a spotted owl nest, or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determinations must be supported by repeated observation of the owls in close proximity or observation of nesting behavior."* Thus, it appears that the Board does have authority to define the resource site. This will be one of the first key decisions needed to be made prior to development of any protection measures for the species.

NEXT STEPS

The Department will develop the Technical Report for marbled murrelets. The Department intends to use a similar process for the Marbled Murrelet Technical report as used for the Bald Eagle Technical Report that was recently developed as part of the process for the rule review for this species. While Department staff will develop the report, review and input will be sought from other agencies (i.e.,

ODFW and USFWS), from Department staff, and from stakeholders. Review and input at this stage will focus on technical information on the species. To the extent possible, ODFW's status review and the USFWS 5-year status review will be used as a basis for the technical report—both of these reviews are currently in progress. Once completed, the Technical Review Paper will be shared with the Board.

As per the process set forth in the Division 680 rules, an expert review of the Technical Review Paper will be conducted. The Department will choose the members of the expert review panel and will share the Department's technical report, along with the original petition as a part of the expert review.

Following the expert review, the Department will develop a Department Report to summarize the information gathered to date. At this point in the process, it is likely that the Department will break down the rest of the process into smaller steps. One of the first items that will need to be addressed is the definition of the resource site for the marbled murrelet. This needs to be completed before other issues can be addressed, such as protection of resource sites, whether regulatory or voluntary.

Checklist of Next Steps

- Department to develop Technical Report on Marbled Murrelets
- Technical Report presented to the Board
- Department to initiate an expert review of the Technical Report
- Results of expert review shared with the Board
- Department Report to be developed that will summarize information gathered to date and recommendations for the remainder of the process. Department likely to ask for a decision on the definition of a resource site at this point in the process.