

STAFF REPORT

Agenda Item No.:	06
Work Plan:	Private Forests Work Plan
Topic:	Forest Practices Act (FPA) Rule Policy Review
Presentation Title:	Rule Process Relating to Marbled Murrelet Sites
Date of Presentation:	March 8, 2017
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SUMMARY

The Board of Forestry (Board) will receive an update on progress made on work relating to the rule process for marbled murrelets. This work is related to the Petition to Initiate Rulemaking under specified resource site rules for the marbled murrelet, received in June, 2016 (Attachment 2). The department will summarize work conducted to date and discuss next steps.

CONTEXT

The Board's 2011 Forestry Program for Oregon strives to conserve diverse native plant and animal populations and protect and improve their habitats in Oregon's forests (Goal E). The Board's *2011 Forestry Program for Oregon* supports an effective, science-based, and adaptive FPA as a cornerstone of forest protection on private lands in Oregon. The Board also promotes a variety of non-regulatory tools, such as landowner recognition, incentives, easements, exchanges, and technical assistance, to help implement the forest-related elements of the Oregon Conservation Strategy (Objective E-4).

BACKGROUND

In June 2016, the Board received a Petition to Initiate Rulemaking under specified resource site rules for the marbled murrelet. 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, the petitioners submitted a Petition to Review an Agency Order through the Lane County Circuit Court to request the court compel rulemaking. In November, the Board of Forestry held a public meeting and accepted public comment 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:

- 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 to Review an Agency Order with the Lane County Circuit Court.

ANALYSIS

The Department has prepared a report that summarizes work conducted to date (Attachment 1).

The process to consider a listed species for rule-development under the Forest Practices Act are laid out in Oregon Administrative Rules, (OAR) 629-680-0100. These administrative rules were adopted in 1990 with the intended purpose to set criteria to inventory and protect special resources described in Oregon Revised Statutes (ORS) 527.710 (3)(a) on forestlands regulated by the Forest Practices Act. Subsequent to the development of the Division 680 rules, other changes in forest policy have occurred that will need to be considered. These include, creation of the ORS 527.714 statutes which set requirements for review prior to development of new rules under the Forest Practices Act and Measure 49 which allows for waivers or requires compensation for new rules that result in an economic impact to private landowners.

The Department reviewed the petition to initiate rulemaking to determine if it contained the information needed to satisfy the requirements of a technical report as described in OAR 629-680-0100 (1)(a). The Department concluded that the petition submitted for marbled murrelets does not contain all of the required information, specifically identification of the resource site. The Board needs a technical report, including best available information, to help inform policy decisions for marbled murrelets.

The Department will develop the technical report on marbled murrelets, using the petition as a starting point. 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 the definition of resource sites and identification of potential forest practices conflicts and the consequences of those conflicts (OAR 629-680-0100)(1)(a)). 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 seek input on the draft technical report, including input from stakeholders and technical experts.

Work on establishing an inventory of marbled murrelet resource sites cannot begin until the Board defines what types of sites are to be included in an inventory. Unlike many other birds, marbled murrelet nest sites are very difficult to locate due to the birds secretive nature and the fact that they often nest high in the canopy. Alternate methods exist to survey for and identify murrelet areas that are likely "occupied" by the species, however the nature of the relationship between the bird behaviors that identify an area as "occupied"

and actual nesting are not well studied. Existing data that ODF has on marbled murrelet sites is summarized in the report.

In November, the Board asked the Department to identify the full list of possible species on state and federal Endangered Species Act (ESA) lists and to consider how these species will be addressed by the department. The full list of fish and wildlife species that occur in Oregon's forests is shown in Attachment 3. As per ORS 527.710, further work is needed to consider threatened and endangered species.

RECOMMENDATION

The department recommends that the Board also direct the department to develop a technical report as per OAR 629.680.0100, and to bring a checklist for accomplishing this work to the next Board meeting.

NEXT STEPS

Based on Board discussion, the department will initiate work on the technical report for marbled murrelet resource sites.

ATTACHMENTS

1. Specified Resource Sites for Marbled Murrelets—A Progress Report.
2. Petition to Initiate Rulemaking and Identify Resource Sites to Establish an Inventory and Protect Existing Marbled Murrelet Sites.
3. List of fish and wildlife species on state and federal ESA lists that occur in Oregon's forestlands.