

Addendum to Exhibit E
Advisory Survival Guidelines
August 3, 2018
(Edits in Red)

Item	Page(s)	Edit
Attachment 3: Draft Oregon Administrative Rules OAR 635-100-0137	1	<p>Replace last sentence in OAR 635-199-0137(1) beginning on line 11, with new sentence to read: “These survival guidelines are advisory for actions proposed on lands owned or leased by a state agency, or where a state agency holds an easement, except road access easements across private lands.”</p>
	1, 2, 3, 5	<p>Insert “Advisory” as a descriptor before seven occurrences of “Survival Guidelines”; specifically on pg. 1, line 15; pg. 2, lines 14, 17, 22; pg. 3, line 4; pg. 5, lines 12, 17.</p>
	7	<p>Replace the listed Statutory Authority and Stats Implemented with new insertion of: Statutory Authority: 496.138 Stats Implemented: 496.012, 496.138</p>

DIVISION 100
WILDLIFE DIVERSITY PLAN

635-100-0137

Advisory Survival Guidelines for Marbled Murrelet

(1) ORS 496.182(2) states that the Commission shall, at the time ~~of listing a species is added to the list of threatened or endangered species,~~ adopt by rule quantifiable and measurable guidelines that the Commission considers necessary to ensure the survival of individual members of the species. ~~These survival guidelines are advisory for actions proposed on lands owned or leased by a state agency, or where a state agency holds an easement, except road access easements across private lands. These survival guidelines shall apply only to actions proposed on lands owned or leased by a state agency, or where a state agency holds an easement, except road access easements across private lands.~~

(2) These ~~advisory~~ survival guidelines focus on measures to minimize potential for unauthorized take of Marbled Murrelets. "Take" is defined in section ~~(1211)~~(m) of this rule.

~~(3) Pursuant to OAR 635-100-0140, a Commission-approved endangered species management plan for the Marbled Murrelet developed by an affected state agency shall supersede these survival guidelines.~~

~~(5)~~(3) While the survival guidelines described in ORS 496.182(2) apply to individual members of the species and resource site protection, the Commission finds that:

(a) State agencies can contribute to Marbled Murrelet recovery by increasing ~~platform trees in~~ suitable habitat on state lands.

(b) Marbled Murrelets require sufficient prey resources in the marine environment for survival and successful reproduction. Protections for the murrelet prey base of small schooling fish and invertebrates have been strengthened through

1 adoption of Oregon's Forage Fish Management Plan in state waters and similar
2 actions by the Pacific Fishery Management Council and National Marine
3 Fisheries Service in federal waters. Additionally, the Department established a
4 series of Marine Reserves and Marine Protected Areas which provide for
5 conservation and scientific benefits including restrictions on the removal of
6 marine life and prohibition on ocean development.

7 (c) Predation, particularly by corvids (jays, crows, and ravens), is a common cause
8 of Marbled Murrelet nest failure. State agencies can help to reduce nest
9 predation risk by limiting wildlife access to human-supplied food sources in and
10 around murrelet nesting areas which may otherwise lead to greater predator
11 numbers.

12 (d) Large oil spills remain a serious threat and could kill hundreds of Marbled
13 Murrelets in Oregon. State agencies with such responsibility should emphasize
14 strategies that prevent spills of oil and other hazardous materials and commit
15 adequate resources to planning, training, coordination with other government
16 agencies and industry, and effective response in the event of a spill.

17
18 (6)(4) Consistent with ORS 496.182(1), these **advisory** survival guidelines seek to minimize
19 duplication and overlap of state and federal laws and regulations pertaining to listed
20 species:

21 (a) Pursuant to ORS 496.172(4), these **advisory** survival guidelines **shall** not
22 apply if the state agency is operating in compliance with, and has on file with the
23 Department, an Incidental Take Permit for the Marbled Murrelet issued by the
24 U.S. Fish and Wildlife Service (USFWS) under the federal ESA.

25 (b) **State agencies that propose to implement projects that have the potential to take**
26 **Marbled Murrelets should consult with the USFWS. These **advisory** survival**
27 **guidelines shall** be preempted by any more protective measures required
28 **by the federal ESA.**

29 **(c) Actions not consistent with protection requirements in these survival guidelines**
30 **shall be allowed if the state agency can demonstrate to the Department that it is**

1 complying with the federal ESA through an ongoing process of consultation with
2 the USFWS, and is acting in alignment with USFWS advice.

3 ~~(d)~~ Protection requirements contained in these survival guidelines may be changed
4 for reasons of forest health or public safety with written approval from the
5 Department. Actions not consistent with these protection requirements should
6 prevent, reduce, or alleviate the forest health or public safety conflict or hazard
7 while meeting the intent of protection to the maximum extent possible.

8 ~~(e)~~(c) In cases of emergency, such as wildfire and search and rescue situations,
9 nothing in these advisory survival guidelines is intended to delay the necessary
10 response to secure human life and property.

11 ~~(f)~~(d) State agencies shallshould document and retain information and other data
12 related to survey results, protection of Marbled Murrelet occupied sites, and
13 associated decision-making.

14 ~~(g)~~ The Department may schedule periodic meetings with other state agencies. At
15 these meetings, state agencies will review projects and activities that occurred
16 under these survival guidelines, and determine whether changes to these
17 requirements are needed.

18
19 ~~(7)~~(5) Prior to implementing a project that removes trees and has the potential to take
20 Marbled Murrelets, approved surveys of the project area shallshould be conducted for
21 a minimum of two consecutive years to determine if it is occupied by murrelets. "Take"
22 is defined in section (1211)(m) of this rule.

23 ~~(a)~~ An approved survey shall be used when surveying for Marbled Murrelets.

24 ~~(b)~~ Notwithstanding section (6)(a) of this rule, approved survey requirements will be
25 phased-in to minimize potential operational and fiscal impacts. As of June 30,
26 2020, and thereafter, all projects in final state agency plans that remove trees
27 and have the potential to take Marbled Murrelets shall have at least two years of
28 approved surveys.

29

1 ~~(8)~~(6) State agencies ~~shall~~~~should~~ designate and protect occupied sites and associated
2 buffers on state-owned, managed, and leased lands. Occupied sites and buffers exclude
3 adjacent private and non-state public lands.

4 (a) If subcanopy behaviors are detected or if a nest site is found, then all continuous
5 suitable habitat in a project area ~~shall~~~~should~~ be designated as an occupied site.

6 (b) If ~~during consultation~~, the USFWS agrees ~~in writing~~ that a different extent or
7 configuration adequately delineates the designated occupied site and buffer,
8 section (76)(a) of this rule ~~shall~~~~would~~ not apply.

9 (c) Projects that remove trees ~~shall~~~~should~~ be prohibited in occupied sites and
10 buffers to the extent that habitat function is changed for Marbled Murrelets.
11 Exceptions to this rule may be allowed after ~~prior consultation with and~~
12 ~~approval by the Department, or~~ prior review and approval by the USFWS.

13 (d) Forest management activities, such as manual release operations and pre-
14 commercial thinning to maintain the growth and survival of conifer
15 reforestation in buffers, ~~is~~~~should~~ only ~~be~~ allowed September 16 – March 31, or
16 with daily timing restrictions (between two hours after sunrise and two hours
17 before sunset) from August 6 - September 15 ~~depending on consultation with the~~
18 ~~USFWS.~~

19 (e) Removal of downed or standing trees that present imminent safety hazards to
20 persons or property, or that obstruct existing roads, trails, utility corridors, and
21 rights-of-way ~~is~~~~may~~ be allowed ~~through consultation with the USFWS.~~

22
23 (7) The following projects and activities that have the potential to take Marbled Murrelets
24 in occupied sites ~~are~~~~should~~ be prohibited (“Take” is defined in section (1211)(m) of
25 this rule):

26 (a) Use of chainsaws and heavy equipment within the buffer of an occupied site
27 from April 1 - August 5. These activities ~~are~~~~would~~ be allowed from August 6 -
28 September 15, between two hours after sunrise and two hours before sunset.

29 (b) Burning within 0.25 mile (0.40 kilometer) of an occupied site from April 1 -
30 September 15.

1 (c) Use of explosives within 1.0 mile (1.6 kilometers) of an occupied site from April 1
2 - September 15.

3 (d) Established public uses and maintenance of existing infrastructure, including
4 but not limited to, roads, trails, campgrounds, picnic/day use areas, and
5 buildings ~~are-would~~ not ~~be~~ subject to section (87)(a) and (87)(b) of this rule.

6
7 (8) State agencies shallshould provide information and outreach to the public to prevent
8 the intentional and unintentional (e.g., unattended food, food trash) feeding of wildlife.
9 Food-related trash shallshould be secured in wildlife proof containers at established
10 public recreation areas such as parks, campgrounds, picnic/day use areas, trailheads,
11 and associated parking areas within or immediately adjacent to suitable habitat.

12
13 (9) State agencies shallshould consider protection of Marbled Murrelet occupied sites in
14 fire management, including wildfire prevention, preparedness, and response. Fire
15 management should identify occupied sites as high-value natural resources.

16
17 (10) For all other projects and activities not described in these advisory survival
18 guidelines with potential to take Marbled Murrelets, state agencies shallshould notify
19 and consult with the ~~Department-USFWS~~ to determine conservation measures
20 appropriate to the situation. "Take" is defined in section (1211)(m) of this rule.

21
22 (11) For the purposes of implementing these advisory survival guidelines, the following
23 definitions apply:

24 (a) "Approved survey" refers to a method accepted by the ~~Department-or~~USFWS
25 for surveying Marbled Murrelets in forests.

26 (b) "Buffer" means, at a minimum, a 328-foot (100 meter) wide protected zone
27 around the perimeter of an occupied site. Buffers exclude adjacent private and
28 non-state public lands.

29 (c) "Continuous" means no gaps in suitable habitat wider than 328 feet (100
30 meters).

- 1 (d) “Forest stand” means an aggregation of trees that are sufficiently uniform in
2 species composition, size, age, and condition as to be distinguished from adjacent
3 aggregations.
- 4 (e) “Nest site” means a location with an active nest or evidence of a prior Marbled
5 Murrelet nest, including eggs, eggshell fragments, or a downy chick.
- 6 (f) “Occupied site” means a continuous area of suitable habitat in a project area
7 where Marbled Murrelets have been observed exhibiting subcanopy behaviors
8 or in which a nest site has been found. Occupied sites exclude adjacent private
9 and non-state public lands.
- 10 (g) “Platform” means a flat surface on a tree limb, which is generally ≥ 4 inches (10
11 centimeters) in diameter, and capable of hosting a Marbled Murrelet nest.
12 Platforms can be created by a wide bare branch, moss or lichen covering a
13 branch, mistletoe, other deformities, or structures such as squirrel nests.
- 14 (h) “Platform tree” means any tree having one or more platforms that are generally
15 ≥ 33 feet (10 meters) high in a live coniferous tree.
- 16 (i) “Project area” refers to the geographic extent that will be directly affected by
17 the proposed action, plus all continuous suitable habitat within 0.25 mile (0.40
18 kilometer) of the proposed action boundaries. Project areas exclude private and
19 non-state public lands.
- 20 (j) “State land-owning or managing agency” means an agency (or program within
21 an agency) identified in OAR 635-100-0140(1)(a)-(n).
- 22 (k) “Subcanopy behaviors” refers to Marbled Murrelet behaviors occurring at or
23 below the forest canopy, and that strongly indicate the site has some importance
24 for breeding. Subcanopy behaviors include flying through the canopy, circling
25 below the canopy, landing, and stationary calling.
- 26 (l) “Suitable habitat” for state lands generally means old-growth, mature,
27 coniferous forest stands that ~~are generally greater than 60 years old,~~ include at
28 least onemultiple platform trees, and occur within 35 miles (56 kilometers) of the
29 Pacific Coast.
- 30 (m) “Take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture,
31 or collect or attempt to engage in any such conduct”, following the federal ESA

1 (16 U.S.C. 1532(19)). Through federal regulations, “harm” is defined as “an act
2 which actually kills or injures wildlife. Such an act may include significant
3 habitat modification or degradation where it actually kills or injures wildlife by
4 significantly impairing essential behavioral patterns, including breeding,
5 feeding, or sheltering.” “Harass” is defined as “an intentional or negligent act or
6 omission which creates the likelihood of injury to wildlife by annoying it to such
7 an extent as to significantly disrupt normal behavioral patterns which include,
8 but are not limited to, breeding, feeding, or sheltering” (50 CFR 17.3).

9
10 Statutory Authority: ~~496.138 496.004, 496.171, 496.172, 496.182, 496.192, 498.026~~

11
12 Stats Implemented: ~~496.012, 496.138 496.004, 496.171, 496.172, 496.182, 496.192, 498.026~~

