

## Agenda Item Summary

### BACKGROUND

At the June 2018 meeting, the Oregon Fish and Wildlife Commission (Commission) directed Oregon Department of Fish and Wildlife (Department) staff to incorporate changes they discussed into the proposed Survival Guidelines for Marbled Murrelet (June 2018, Exhibit G, Attachment 4). Survival guidelines were not required when the species was first state-listed as Threatened under the Oregon Endangered Species Act (OESA) in May 1995 (the survival guidelines requirement became effective in July 1995). Although adopting guidelines at this point would only be advisory for the affected state land-owning and managing agencies, they do provide an outline to reflect upon in future management actions and planning efforts on state lands. Additionally, state land-owning and managing agencies are not required to formally, as outlined in OESA, consider their role in the conservation of murrelets or develop endangered species management plans. Once adopted, the survival guidelines would encourage (but not require) certain actions to protect the seabird on state-owned or leased lands. Compliance with the federal Endangered Species Act remains required on all lands independent of the Commission's decision.

Survival guidelines are quantifiable and measurable guidelines that the Commission considers necessary to ensure the survival of individual members of the species (ORS 496.182(2)(a); OAR 635-100-0100(13)). They may include take avoidance and protecting resource sites such as nest sites or other sites critical to the survival of individual members of the species (ORS 496.182(2)(a)). The proposed Advisory Survival Guidelines for Marbled Murrelet (Attachment 3) only apply to actions proposed on lands owned or leased by the state, or for which the state holds a recorded easement (OAR 635-100-0135(1)); they do not apply to private lands (ORS 496.192(1)) or other non-state public lands.

### PUBLIC INVOLVEMENT

This exhibit is a continuation of the discussion from the June 2018 Commission meeting. In June, the public provided direct written comment and testimony on the proposed Survival Guidelines for Marbled Murrelet (OAR 635-100-0137). Those draft rules have been updated here and include track changes highlighting the revisions. The public is encouraged to provide written comment on the proposed Advisory Survival Guidelines for Marbled Murrelet by 4 pm, Wednesday, August 1, 2018, to assure consideration by the Commission as they continue their discussion of the issue at the August 3, 2018 meeting.

### ISSUE 1

#### Development of Advisory Survival Guidelines for Marbled Murrelet

### ANALYSIS

The proposed revisions to the new rules from the June 2018 meeting are primarily to:

1. Modify language throughout proposed rule to reflect that the Survival Guidelines for Marbled Murrelet are legally considered as advisory because of the listing history of the species.

2. Remove language related to endangered species management plans, and phase-in of enhanced survey requirements, which are no longer applicable.
3. Simplify the section seeking to minimize duplication and overlap of state and federal laws and regulations pertaining to listed species.
4. Modify the definition of suitable habitat as discussed by the Commission in June. The proposed definition is: “suitable habitat” for state lands generally means old-growth, mature, coniferous forest stands that include multiple platform trees, and occur within 35 miles (56 kilometers) of the Pacific Coast.

It is important to recognize that the proposed suitable habitat definition is a simplified generalization. Recent U.S. Fish and Wildlife Service (USFWS) Biological Opinions pertaining to murrelets in Oregon included a definition of suitable habitat for conifer-dominated stands that are generally 80 years old or older and/or with trees greater than 18 inches diameter at breast height. The USFWS definition further describes potential nesting structure to include platform characteristics. Additionally, the Oregon Department of Forestry’s current State Forests Division Marbled Murrelet Operational Policies, which are intended to reduce the risk of liability for unpermitted “take” of Marbled Murrelets, have a definition of “potentially suitable habitat” that includes younger coniferous forests that have platforms. Specific survey zones with age, conifer species, and platform criteria are also included in the State Forest Division’s Operational Policies and have been developed as a result of review and advice from USFWS. While most Marbled Murrelet nests in Oregon have been found in old-growth stands, nesting has been documented in mature or younger stands with structural elements (deformities or dwarf mistletoe infestations) characteristic of older trees.

The Department recommends that state agencies consult directly with the USFWS to ensure compliance with the federal ESA; advisory survival guidelines are necessarily preempted by any more restrictive requirements under the federal ESA.

**OPTIONS**

1. Adopt staff recommendations
2. Amend staff recommendations

**STAFF  
RECOMMENDATION**

Option 1

**DRAFT MOTION**

I move to amend OAR Chapter 635, Division 100, to include new Section 0137 as proposed by staff.

**EFFECTIVE DATE**

Upon Filing