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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 635
DEPARTMENT OF FISH AND WILDLIFE

FILED
06/15/2018 5:12 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Survival guidelines for Marbled Murrelet as a threatened species under Oregon ESA

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 08/03/2018 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
Roxann Borisch
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 08/03/2018

TIME: 8:00 AM - 5:00 PM

OFFICER: ODFW Commisson

ADDRESS: Oregon Department of Fish
and Wildlife

4034 Fairview Industrial Drive SE
Salem, OR 97303

NEED FOR THE RULE(S):

These rules are needed to establish survival guidelines for the Marbled Murrelet (*Brachyramphus marmoratus*). Survival guidelines are quantifiable and measureable guidelines that the Oregon Fish and Wildlife Commission considers necessary to ensure the survival of individual members of the species.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Draft rules are available from the division's rules coordinator, located at 4034 Fairview Industrial Drive SE, Salem, OR 97302. Rules are also available on the ODFW website at: <http://www.dfw.state.or.us/OARs/index.asp>.

FISCAL AND ECONOMIC IMPACT:

The Marbled Murrelet was previously petitioned for uplisting from "Threatened" to "Endangered" under the Oregon Endangered Species Act. If warranted, this would require the adoption of survival guidelines to protect the species on state-owned or leased lands. However, because the Oregon Fish and Wildlife Commission declined to reclassify the species, the survival guidelines proposed by the Oregon Department of Fish and Wildlife will only be advisory in nature. If adopted, these guidelines will encourage certain voluntary actions to protect the seabird on state-owned or leased lands, and direct habitat conservation on a voluntary basis.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The proposed rules will affect state agencies, units of local government and the public, respectively, as discussed below:

- a. Because of the advisory nature of the survival guidelines, there is no fiscal impact to individual state agencies. Any agency's voluntary implementation of the survival guidelines may affect that agency's expenditures, but those fiscal impacts cannot be estimated by ODFW.
- b. Units of local government are not expected to be affected by the advisory survival guidelines. Even with the voluntary implementation of these guidelines by state agencies, current and planned timber sales should not be affected by that implementation because compliance with the federal Endangered Species Act remains required on all lands.
- c. The public is not expected to experience any fiscal impact due to the implementation of the advisory survival guidelines.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

Any impacts to small businesses due to the advisory guidelines will be voluntary and cannot be estimated by ODFW. In the event of widespread voluntary implementation of the survival guidelines by state agencies and small businesses, we would expect a minimal impact on small businesses.

b. Projected reporting, record keeping and other administrative activities required for compliance, including costs of professional services:

No significant changes in these costs are expected for the small businesses subject to the rule.

c. Equipment, supplies, labor and increased administration required for compliance:

No significant changes in these costs are expected for the small businesses subject to the rule.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Not applicable

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

Department staff met with interested stakeholders and members of the public. Correspondence from and testimony by interested persons is accepted into record and is part of the rulemaking process.

ADOPT: 635-100-0137

RULE SUMMARY: Establish survival guidelines for the Marbled Murrelet (*Brachyramphus marmoratus*). Survival

guidelines are quantifiable and measurable guidelines that the Oregon Fish and Wildlife Commission considers necessary to ensure the survival of individual members of the species.

CHANGES TO RULE:

635-100-0137

Survival Guidelines for Marbled Murrelet

PLEASE NOTICE THE PROPOSED TEXT BELOW IS PRELIMINARY AND SUBJECT TO CHANGE. UP-TO-DATE VERSIONS OF THIS DRAFT RULE ARE AVAILABLE UPON REQUEST TO THE DEPARTMENT AND WILL BE POSTED ON THE COMMISSION WEBSITE AT LEAST NINE DAYS PRIOR TO COMMISSION MEETING.

(1) ORS 496.182(2) states that the Commission shall, at the time 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 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 survival guidelines focus on measures to minimize potential for unauthorized take of Marbled Murrelets. "Take" is defined in section (11)(l) of this rule.

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

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

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

(4) Consistent with ORS 496.182(1), these survival guidelines seek to minimize duplication and overlap of state and federal laws and regulations pertaining to listed species:

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

(b) These survival guidelines would be preempted by any more protective measures required by the federal ESA.

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

(d) State agencies should document and retain information and other data related to survey results, protection of Marbled Murrelet occupied sites, and associated decision-making.

(e) The Department may schedule periodic meetings with other state agencies. At these meetings, state agencies will review projects and activities that occurred under these survival guidelines, and determine whether changes are needed.

(5) Prior to implementing a project that removes trees and has the potential to take Marbled Murrelets, surveys of the project area should be conducted for a minimum of two consecutive years to determine if it is occupied by murrelets. Surveys should follow the most recent published Pacific Seabird Group protocol or other methodology accepted by USFWS for surveying Marbled Murrelets in forests. "Take" is defined in section (11)(l) of this rule.

(6) State agencies should designate and protect occupied sites and associated buffers on state-owned, managed, and leased lands. Occupied sites and buffers exclude adjacent private and non-state public lands. State agencies that propose to implement projects that have the potential to take Marbled Murrelets should consult with the USFWS.

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

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

(c) Projects that remove trees shall be prohibited in occupied sites and buffers to the extent that habitat function is changed for Marbled Murrelets. Exceptions to this rule may be allowed after prior review and approval by the USFWS.

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

(e) Removal of downed or standing trees that present imminent safety hazards to persons or property, or that obstruct existing roads, trails, utility corridors, and rights-of-way is allowed.

(7) The following projects and activities that have the potential to take Marbled Murrelets in occupied sites should be prohibited ("Take" is defined in section (11)(l) of this rule):

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

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

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

(d) Established public uses and maintenance of existing infrastructure, including but not limited to, roads, trails, campgrounds, picnic/day use areas, and buildings would not be subject to section (7)(a) and (7)(b) of this rule.

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

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

(10) For all other projects and activities not described in these survival guidelines with potential to take Marbled Murrelets, state agencies should notify and consult with the Department to determine conservation measures appropriate to the situation. "Take" is defined in section (11)(l) of this rule.

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

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

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

(c) "Forest stand" means an aggregation of trees that are sufficiently uniform in species composition, size, age, and condition as to be distinguished from adjacent aggregations.

(d) "Nest site" means a location with an active nest or evidence of a prior Marbled Murrelet nest, including eggs, eggshell fragments, or a downy chick.

(e) "Occupied site" means a continuous area of suitable habitat in a project area where Marbled Murrelets have been observed exhibiting subcanopy behaviors or in which a nest site has been found. Occupied sites exclude adjacent private and non-state public lands.

(f) "Platform" means a flat surface on a tree limb, which is generally 4 inches (10 centimeters) in diameter, and capable of hosting a Marbled Murrelet nest. Platforms can be created by a wide bare branch, moss or lichen

covering a branch, mistletoe, other deformities, or structures such as squirrel nests.¶

(g) "Platform tree" means any tree having one or more platforms that are generally e 33 feet (10 meters) high in a live coniferous tree.¶

(h) "Project area" refers to the geographic extent that will be directly affected by the proposed action, plus all continuous suitable habitat within 0.25 mile (0.40 kilometer) of the proposed action boundaries. Project areas exclude private and non-state public lands.¶

(i) "State land-owning or managing agency" means an agency (or program within an agency) identified in OAR 635-100-0140(1)(a)-(n).¶

(j) "Subcanopy behaviors" refers to Marbled Murrelet behaviors occurring at or below the forest canopy, and that strongly indicate the site has some importance for breeding. Subcanopy behaviors include flying through the canopy, circling below the canopy, landing, and stationary calling.¶

(k) "Suitable habitat" for state lands means old-growth, mature, coniferous forest stands that include at least one platform tree, and occur within 35 miles (56 kilometers) of the Pacific Coast.¶

(l) "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct", following the federal ESA (16 U.S.C. 1532(19)). Through federal regulations, "harm" is defined as "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." "Harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering" (50 CFR 17.3).

Statutory/Other Authority: ORS 496.004, ORS 496.171, ORS 496.172, ORS 496.182, ORS 496.192, ORS 498.026

Statutes/Other Implemented: ORS 496.004, ORS 496.171, ORS 496.172, ORS 496.182, ORS 496.192, ORS 498.026