

Cascadia Wildlands

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Sent Via Certified Mail, Return Receipt Requested

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Re: Notice of Violations of the Endangered Species Act

Dear Governor Kitzhaber, State Land Board and Board Members, Oregon Department of Forestry and Mr. Decker, Department of State Lands and Ms. Solliday, Board of Forestry and Board Members, Coos District and Mr. Young, Tillamook District and Mr. Goody, Forest Grove District and Mr. White, and Astoria District and Mr. Savage:

On behalf of Cascadia Wildlands, the Center for Biological Diversity, and Audubon Society of Portland, we hereby provide notice, pursuant to 16 U.S.C. § 1540(g), that Governor Kitzhaber, the State Land Board and its Board Members, Oregon Department of Forestry and State Forester Mr. Decker, Department of State Lands and its Director Ms. Solliday, the Board of Forestry and its Board Members, Coos District and District Forester Mr. Young, Tillamook District and District Forester Mr. Goody, Forest Grove District and District Forester Mr. White, and Astoria District and District Forester Mr. Savage (collectively “the State”) have violated and are continuing to violate the Endangered Species Act (“ESA”) and its implementing regulations, by killing, injuring, harming, harassing, and otherwise causing “take” of threatened marbled murrelets on state-managed forest lands in the Elliott, Clatsop, and Tillamook State Forests.

The marbled murrelet is a federally threatened seabird that is experiencing significant annual population declines. The threatened status of the species and the continuing population declines are caused in large part by the loss of old-growth and mature coastal forests that provide murrelet nesting habitat. The State of Oregon is responsible for some of the most environmentally destructive and irresponsible forest practices within the range of marbled murrelet. The State’s forest practices annually result in the loss of hundreds, sometimes thousands, of acres of suitable murrelet habitat. In the past few years in particular, the State has not only abandoned the development of a Habitat Conservation Plan for murrelets on the Elliott, Tillamook, and Clatsop State Forests, but it has also amended its Forest Management Plans to greatly increase logging of mature and older forest habitat on these coastal State Forests.

The State is actively causing “take” of marbled murrelets on the Elliott, Tillamook, and Clatsop State Forests by deciding to increase logging and authorizing that logging to occur in occupied sites and by fragmenting marbled murrelet habitat. More specifically, the State is: (1) authorizing logging within occupied areas specifically reserved for marbled murrelets called marbled murrelet management areas or MMMA’s; (2) authorizing logging of occupied marbled murrelet habitat by arbitrarily creating MMMA’s that fail to include all the contiguous occupied habitat; (3) failing to designate MMMA’s where occupied behavior has been documented; (4) fragmenting marbled murrelet habitat by creating MMMA’s that are too small or irregularly shaped to provide the interior habitat necessary for marbled murrelets; and (5) fragmenting occupied and suitable habitat on state forest lands to such a degree as to cause death, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.

We hereby request that the State take immediate action to correct the violations of law that are described herein. Unless corrective action is taken within the next 60 days, we intend to commence legal action to compel compliance with the ESA.

BACKGROUND

A. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b).

To achieve these objectives, the ESA directs the Fish and Wildlife Service (FWS) to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list. 16 U.S.C. § 1533. An “endangered” species is one “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become endangered in the near future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20). Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but also its ultimate recovery. “Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities.” *Hill*, 437 U.S. at 155.

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of an endangered species. 16 U.S.C. § 1538(a). This take prohibition also applies to threatened species such as the marbled murrelet. *Id.* § 1533(d); 50 C.F.R. § 17.31.

The term “take” is defined broadly, and includes to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so. 16 U.S.C. § 1532(19). The FWS has further defined “harass” to include “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, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including state agencies and/or state officials in their official capacity, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person, including state agencies and/or state officials, to “cause to be committed” the take of a species. 16 U.S.C. § 1538(g). Governmental entities are therefore liable under section 9 of the ESA where those entities authorize a third party’s conduct that results in, or is likely to result in, take of members of a listed species. *Strahan v. Cox*, 127 F.3d

155 (1st Cir. 1997); *Pac. Rivers Council v. Brown*, No. 02-243-BR, 2002 U.S. Dist. LEXIS 28121, 2002 WL 32356431 (D. Or. Dec. 23, 2002); *Seattle Audubon Soc’y. v. Sutherland*, No. 06-1608MJP, 2007 WL 1300964 (W.D. Wash. May 1, 2007); *Animal Prot. Inst. v. Holsten*, 541 F. Supp. 2d 1073 (D. Minn. 2008).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] . . .” 16 U.S.C. § 1540(g). Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take. *National Wildlife Fed’n v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994). The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness’ fees. 16 U.S.C. § 1540(g)(4).

Under section 10 of the ESA, a non-federal entity such as the State of Oregon can avoid potential liability for taking a threatened species by obtaining an incidental take permit (“ITP”). 16 U.S.C. § 1539(a)(1)(B). In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that “conserv[es]” – *i.e.*, facilitates the recovery of – the species. *Id.* §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ *speaks to the recovery of a threatened or endangered species*” (emphasis added)). This plan is called a Habitat Conservation Plan (“HCP”) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts . . .” 16 U.S.C. § 1539(a)(2)(A).

B. Marbled Murrelets

The marbled murrelet (*Brachyramphus marmoratus*) is a small sea bird and the only tree nesting bird in the alcid family. Burger, 2009. Marbled murrelets spend most of their time at sea feeding on fish but nest inland in mature and older forests. Long, 1998. Murrelets do not build nests but rely on large tree branches with natural depressions and moss in which to lay their egg. 75 Fed. Reg. 3,425 (Jan. 21, 2010). Nesting habitat consists of “large core areas of old-growth” or mature forest and “low amounts of edge habitat, reduced habitat fragmentation, proximity to the marine environment, and forests that are increasing in stand age and height.” *Id.*

The birds do not nest every year. When marbled murrelet nesting occurs it takes place between mid-April and September. The birds have high site fidelity, returning to the same tree or stand to nest. Murrelets do not nest in colonies but nest solitarily. Typically, marbled murrelets do not usually nest in the same tree as one another, but they will nest in the same stands of trees. Nelson, 1995a. The female lays one egg and the male and female incubate the egg in shifts while the other bird feeds in the ocean. *Id.* Typically, they switch shifts at dawn or dusk. *Id.* Predominately due to the risk of predation, marbled murrelets tend to be very secretive when entering and leaving their nest sites making it difficult to detect the birds while nesting. Nelson, 1995.

The primary reason marbled murrelets are listed under the ESA is because of the extensive logging “of late-successional and old-growth forest . . . over the past 150 years” which has resulted in the loss of “at least 82 percent of the old-growth forests existing in western Washington and Oregon” USFWS, *Marbled Murrelet Five-Year Status Review*, at 29 (2009). In addition to directly removing marbled murrelet habitat, logging also results in the fragmentation of murrelet nesting habitat, which “reduces the amount and heterogeneous nature of the habitat, reduces the forest patch sizes, reduces the amount of interior or core habitat, increases the amount of forest edge, isolates remaining habitat patches, and creates ‘sink’ habitats.” *Id.* at 30. “The ecological consequences of these habitat changes to murrelets can include effects on population viability and size, local or regional extinctions, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.” *Id.*

The increased risk of predation from habitat fragmentation is a significant threat to murrelet “demographic rates.” 75 Fed. Reg. at 3,432. “Nest failure rates of 68 to 100 percent . . . due to predation in real nests, and 81 to 95 percent in artificial nests . . . have been reported.” *Id.*

The key elements affecting nest predation rates appeared to be proximity to humans, abundance of avian predators, and proximity to, and type of, forest edge. The best available information indicates that murrelets are highly vulnerable to nest predation and confirms the importance of nest predation in limiting murrelet nest success throughout the [distinct population segment], particularly in areas where murrelet habitat is in close proximity to humans (e.g., parks).

Id. Due to these risks, it is highly recommended that marbled murrelet habitat is maintained “in relatively large contiguous blocks.” USFWS, *Marbled Murrelet Recovery Plan*, at 50 (1997).

Current research on marbled murrelet populations in the Pacific Northwest shows that populations are rapidly declining. 75 Fed. Reg. at 3,433 (noting a “significant population decline” documented in 2008 and since monitoring began in 2000); 75 Fed. Reg. at 3,425 (2007 and 2008 monitoring results were the lowest population estimates since 2000); Falxa, 2011 (noting an average annual decline in the CA, OR, WA population from 2001 to 2010 of 3.7%). “The 2000-2008 data represent an estimated 2.4 percent annual decline, while the 2001-2008 data represent an annual decline of about 4.3 percent” *Id.* This equates to an “estimated average annual decline” of “490 birds per year (standard error: 241 birds) based on the 2000-2008 data, or about 870 birds per year (standard error: 129 birds) based on the 2001-2008 data” *Id.*

The population of marbled murrelets in Oregon, Washington, and California “continues to be subject to a broad range of threats, such as nesting habitat loss, habitat fragmentation, and predation.” 75 Fed. Reg. 3,424. “Data on nest success from radio telemetry studies and from adult [to] juvenile ratios at sea, as an index of breeding success, continue to confirm that murrelet reproduction in Washington, Oregon, and California is too low to sustain populations” 75 Fed. Reg. at 3,426.

C. Forest Practices on Oregon State Lands.

The Elliott, Clatsop, and Tillamook State Forests are all situated within the range of the marbled murrelet and contain suitable and occupied marbled murrelet habitat. Marbled murrelets travel inland as much as 30 to 60 kilometers to nest in Oregon, Washington, and California. Hamer, 1995. The State currently manages these forests without a Habitat Conservation Plan or Incidental Take Permit for murrelets, and is instead implementing what it calls a “take avoidance policy.” This policy includes operational policies and procedures and a murrelet guidance document from 2010.

To manage these forests, the State first develops broad forest management plans, district implementation plans, and then annual operation plans. The Tillamook and Clatsop forests are managed together initially under the Northwest Forests management plan, while the Elliott is managed under the Elliott management plan.

1. The Elliott State Forest.

The Elliott State Forest is approximately 93,000 acres and is located in the Coos District, directly south of the Umpqua River near the Pacific Coast in Coos and Douglas Counties. Much of the Elliott is “Common School Fund Land,” and is therefore under the management authority of the Oregon Department of State Lands (“DSL”) and the State Land Board (“SLB”). The DSL and SLB, however, have an agreement with ODF and the Board of Forestry (“BOF”) that allows ODF and the BOF to plan and authorize logging activities and annual operating plans in the Elliott State Forest.

The portions of the Elliott that have not already been logged are typically 120 to 140 years old, due to severe fire events in the mid-1800s, though there are some remnant patches of forest that are much older. ODF plans, and the BOF, DSL, and SLB approve, between 500 and 1,000 acres of clearcutting in the Elliott State Forest each year. This clearcutting occurs most often in mature and old-growth forest stands that have never before been logged, including in occupied and suitable marbled murrelet habitat.

The Elliott was covered by an HCP and ITP for murrelets from 1995 through 2001. When the HCP and ITP for murrelets expired in 2001, the State began the process to apply for a new HCP, while continuing to log on the Elliott, but largely avoided the northwestern half of the forest and set aside large MMAs to protect murrelets when occupied sites were discovered. The State recently abandoned its plans for a multi-species HCP and ITP on the Elliott and is employing a “take avoidance” strategy instead. Pursuant to this strategy, the State is authorizing logging in occupied sites and fragmenting murrelet habitat to the detriment of marbled murrelets. The State is also engaging in a trend of continually reducing the size of MMAs around known occupied sites.

ODF, BOF, DSL, and SLB have recently approved a new forest management plan for the Elliott that significantly increases the amount of logging that will be allowed on the forest. Under the new forest management plan, logging on the Elliott will increase from approximately 25 million board feet to 40 million board feet cut per year. In order for the new volume targets

to be met, timber sales will have to be planned in the areas previously avoided under the HCP in the northwestern Elliott. To implement the management plan, the Coos District recently adopted a new implementation plan. There is currently no Habitat Conservation Plan or Incidental Take Permit that allows take of any murrelets on the Elliott State Forest.

2. The Tillamook and Clatsop State Forests.

The Clatsop and Tillamook State Forests are comprised of the Astoria, Tillamook, and Forest Grove Districts of Oregon's northern coast. The ODF and BOF have primary authority over management of most of these forests, although approximately two percent of the Clatsop is Common School Fund lands that are managed by DSL and SLB. These forests are managed under Oregon's Northwest Forests Management Plan.

In 2010, the Board of Forestry adopted revisions to the Northwest Forests Management Plan, which lowered the goals for long-term complex structure on the forests from 40-60 percent of the landscape to 30-50 percent¹ and directed ODF to increase revenues (generated by logging) from the northwest state forests by five to fifteen percent within the next decade. The revised plan also removes references to the planned HCP for these forests and puts in place a "Species of Concern" policy. Pursuant to the Plan and policy, an additional 15 percent of the landscape that would otherwise provide habitat for murrelets will be lost. After amending the Northwest Forests Management Plan, the State also revised the implementation plans for the three districts. It is anticipated that a twenty percent increase in logging on both the Clatsop and Tillamook forests will occur.

The Clatsop State Forest consists of 154,000 acres within the Astoria District, and was significantly logged while in private ownership in the early 1900s. In 2010, ODF approved twelve timber sales, yielding 58.6 million board feet (MMBF) of timber. ODF, *Astoria District 2010 Annual Report*, at 7 (2011). In the last three years on the Astoria District, ODF has auctioned one timber sale in a Marbled Murrelet Management Area (MMMA), one sale located within a quarter mile of an MMMA, and two sales resulting in the creation of MMMA's in close proximity to a sale. At least ten sales in the past three years have included potentially suitable habitat for the marbled murrelet. The Clatsop State Forest does not have a Habitat Conservation Plan or an Incidental Take Permit to allow for take of any murrelets.

The Tillamook State Forest is approximately 364,000 acres, and was largely burned by wildfires in the early- and mid-1900s. The Tillamook and Forest Grove Districts manage the Tillamook State Forest under the Northwest Forest Management Plan, adopted in 2001, and revised in 2010. Recently, ODF approved timber sales on the Tillamook District that dramatically increase the amount of board feet resulting from logging: 35.5 MMBF in 2008 (ODF, *Tillamook District 2008 Annual Report*, at 11 (2009)) to 51.8 MMBF in 2010 (ODF, *Tillamook District 2010 Annual Report*, at 8 (2011)). Forest Grove District timber sales also illustrate an upward trend in harvests: 2008: approximately 65 MMBF (ODF, *Forest Grove District 2008 Annual Report*, at 9 (2009)); 2009: approximately 68 MMBF (ODF, *Forest Grove*

¹ The 2011 Implementation Plan for the Astoria District notes that this District has a 30 percent long-term old structure goal.

District 2009 Annual Report, at 8 (2010)); 2010: approximately 90.4 MMBF (ODF, *Forest Grove District 2010 Annual Report*, at 9 (2011)).

Thirty MMMA's are located within the Tillamook State Forest. Within the past three years, ODF approved one timber sale within a marbled murrelet management area and five timber sales that have resulted or will result in actual logging or associated activity occurring within a quarter mile of a marbled murrelet management area. The Tillamook State Forest does not have a Habitat Conservation Plan or an Incidental Take Permit allowing for take of marbled murrelets.

NOTICE OF VIOLATIONS

A. The State's Forest Practices Are Causing Take Of Marbled Murrelets on the Elliott, Clatsop, and Tillamook State Forests.

The State's forest practices on the Elliott, Clatsop, and Tillamook State Forests are violating the ESA by killing, harming, harassing, and otherwise causing "take" of marbled murrelets. Specifically, the State is taking marbled murrelets by: (1) authorizing logging within MMMA's; (2) authorizing logging of occupied marbled murrelet habitat by arbitrarily creating MMMA's that fail to include all the contiguous occupied habitat (which is then included within timber sales); (3) failing to designate MMMA's where occupied behavior has been documented; (4) fragmenting marbled murrelet habitat by creating MMMA's that are too small or irregularly shaped to provide the habitat necessary for marbled murrelets; and (5) fragmenting occupied and suitable habitat on state forest lands to such a degree as to cause death, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival. This take is also occurring as a direct result of the State's recent decisions to increase logging on the Elliott, Tillamook, and Clatsop state forests and its decisions to approve a new management plan for the Elliott, to amend the management plan for the Northwest forest, to update or revise the implementation plans for the relevant districts, and to write new annual operating plans. The State's abandonment of the HCP and ITP process exposes the State to liability for all of the instances of take described herein.

Each different category of "take" discussed below includes a non-exhaustive list of actions and timber sales that have caused or will cause take of murrelets. In addition to the examples listed in each of these sections, numerous timber sales planned and/or approved by the State in 2009, 2010, 2011, and 2012 will result in the take of murrelets unless enjoined. Some of these sales include: South Fork Split (logging in a MMMA), Three Buck Joe (adjacent to a small MMMA), Dear Headwaters (logging in occupied habitat), Comodos (adjacent to an MMMA), North and South Middle Ridge (logging adjacent to a small MMMA), Loose Shoes, Flying Fish (logging within an MMMA), Kelly Slim Cougar (adjacent to an MMMA), Marlow Millicoma Divide, Sullivan Succotash (logging activities in an MMMA), Millicoma Lookout (logging adjacent to a small MMMA) and Mister Millipede (logging in occupied habitat). The State should halt to these unlawful activities and respond with immediate action to correct these violations of law.

1. The State is Causing Take of Marbled Murrelets by Authorizing Logging in Occupied Nesting Sites, Including in MMMAs.

The State is causing take of marbled murrelets by authorizing logging in occupied sites. Logging in occupied sites actually kills murrelets, and injures and annoys murrelets to such a degree as to disrupt and significantly impair essential behavioral patterns, including breeding, feeding, and sheltering. Logging in occupied murrelet sites causes death, displacement, fewer nesting attempts, failure to breed, nest failure, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival. The State is causing occupied sites to be logged by: (1) authorizing logging operations in known MMMAs; (2) arbitrarily and inadequately designating MMMAs to exclude significant portions of known occupied stands that are then included in timber sales; and (3) failing to acknowledge stands as occupied even when occupied behavior is documented. By deciding to increase logging on these forests, the State is increasing the instances in which occupied sites are logged.

The State's practice of continually planning and approving logging activities within established MMMAs leads to take of murrelets. MMMAs are known occupied sites, where field surveys conducted by the State have documented occupied/nesting behavior. Examples of MMMAs that have been logged include, but are not limited to: the West Coal Creek MMMA on the Tillamook logged pursuant to the Two Coals and the Coal Creek Thinagain timber sales; the Moonstone MMMA logged pursuant to the Moon Creek Sale on the Tillamook; the West Tidewater MMMA and the former Music Road MMMA logged pursuant to the Rip Tide timber sale on the Clatsop; the Simmons Ridge MMMA logged pursuant to the Simmons Ridge Combination timber sale on the Clatsop; the West Tidewater MMMA proposed for logging pursuant to the South Fork Split timber sale on the Clatsop; Fish Knife MMMA proposed for logging pursuant to the Flying Fish timber sale on the Elliott; and the Sullivan Headwaters MMMA in which road construction is proposed pursuant to the Sullivan Succotash timber sale on the Elliott.

In addition to authorizing logging in designated MMMAs, the State is also taking marbled murrelets by authorizing the logging of occupied habitat with similar consequences to those described above. When an occupied behavior is detected during a marbled murrelet survey, instead of designating the entire survey area or entire stand of trees as an MMMA, the State is arbitrarily designating MMMAs to include only a small portion of the survey area or occupied stand. The rest of the survey area or occupied stand is then offered as a timber sale. The Pacific Sea Bird Group's marbled murrelet survey protocol is clear that "when a survey area is divided into more than one site, the outcomes at the sites, collectively, determine the status of the survey area." PSG, 2003 at 23. Likewise, an occupied stand includes not only those sites where occupied behavior has been documented but the entire contiguous habitat included within the survey areas. *Id.* at 6. By authorizing logging activities in habitat that is contiguous with where the occupied behavior was detected, the State is taking marbled murrelets. These timber sales include, but are not limited to: Mister Millipede; Deer Headwaters; Millicoma Lookout, Three Buck Joe, and Sullivan Succotash. Again, by deciding to increase logging on the Elliott, Tillamook, and Clatsop state forests, the State is only increasing the instances in which it will authorize logging of occupied sites.

Additionally, the State is causing take of murrelets by failing to declare stands as occupied even where occupied behavior is documented. Given the unique behavior of murrelets, and according to the accepted murrelet survey protocol, a site is presumed occupied when there is a single detection of occupied behavior. PSG, 2003 at 23-24. The site should remain classified as “occupied” even if a follow-up survey does not detect occupied behavior. The State is not following the survey protocol, and is declaring stands to be unoccupied on the basis of non-protocol surveys even where occupied behavior has been documented. As a result, the State is logging in occupied sites and, for the reasons explained above, causing take of murrelets.

2. Severe Fragmentation of State Forest Lands and Logging Of Suitable Habitat Around Marbled Murrelet Management Areas Is Causing Take.

The State is further causing take of murrelets by authorizing logging around occupied habitat and fragmenting the landscape to such a degree as to cause death, injury, annoyance, and significant impairment and disruption of essential behavioral patterns. Fragmentation and logging in suitable habitat leads to edge effects, habitat loss, predation, and disturbance of murrelets in marbled murrelet management areas. Prior examples of the State’s practice of authorizing logging of suitable habitat near and around marbled murrelet management areas includes: the Modified Green timber sale in the Clatsop that is adjacent to the West Green Mountain MMMA; the Helloff Point timber sale in the Tillamook that is adjacent to the Helloff Creek MMMA; the Double Fish timber sale in the Elliott that is adjacent to the Knife Forks MMMA; the South Kelly Ridge timber sale in the Elliott that is adjacent to the Fish Knife MMMA; the West Fork Headlands timber sale in the Elliott that is adjacent to the West Fork Headlands and Kentucky Ridge MMMA; and the South Marlow Switch timber sale in the Elliott that is adjacent to the Marlow Bottom MMMA, Elkhorn Ranch sale in the Elliott that is adjacent to the Elkhorn Ranch MMMA

By logging in areas near or adjacent to MMMA’s and other occupied sites, the State is reducing interior forest area and making previously protected areas prone to edge effect. These effects will be worsened by the State’s decision to increase logging on the Elliott, Tillamook, and Clatsop state forests. Several studies show a relationship between the distance from the forest edge and murrelet nest success. Authorizing logging adjacent to and within suitable habitat also increases the loss of existing habitat from windthrow. The State’s practice of authorizing timber sales in this manner is harming marbled murrelets by significantly disrupting and impairing essential behavioral patterns including breeding, feeding and sheltering.

The impact of this fragmentation is exacerbated by the State’s practice of designating MMMA’s that are far too small and irregularly shaped. Between 1992 and 1994, the State created 31 MMMA’s on the Elliott State Forest, totaling 5,320 acres and averaging more than 170 acres apiece. The average size of an MMMA created on the Elliott between 2005 and 2009 was a mere 32 acres, and many of the new reserves are irregularly shaped and do not provide sufficient interior forest habitat to support successful nesting and adequately conceal the murrelet and its nest from predators. Examples of these small MMMA’s on the Elliott include, but are not limited to: Marlow Bottom (10 acres), Deer Molar (23 acres), Little Bob (20 acres), South Scholfield

(16 acres), Middle Roberts (16 acres), and Millicoma Strawberry (22 acres), Elkhorn Ranch (54 acres, including an open campground).

The State has also designated MMMAs on the Clatsop and Tillamook that fail to provide sufficient interior forest habitat. Examples on the Clatsop and Tillamook include, but are not limited to: Moonstone (20 acres); Moon Creek (29 acres); South Fork Klaskanine (13.4 acres); California Elk (23 acres); and Hug Point (25.3 acres).

Overall, the State's practices will result in significantly less habitat and more highly fragmented habitat over time. Given the sheer amount of logging proposed annually by the State in the Elliott, Tillamook, and Clatsop State Forests, the murrelet population cannot and will not be sustained.

3. The State's Recent Decisions To Increase Logging On State Forests Will Only Increase Take Of Murrelets.

As previously discussed, the State's recent decision to increase logging on the Elliott, Tillamook, and Clatsop State Forests will only lead to further take of marbled murrelets. The State is already authorizing logging within occupied marbled murrelet habitat including in marbled murrelet management areas, and is leaving too little protected habitat where birds are detected under its "take avoidance" strategy. Increasing logging in Oregon's coastal forests will only result in more violations of the ESA. Thus, the State's recent decisions to approve new or amended forest management plans, implementation plans, and annual operating plans are also causing take of marbled murrelets.

Additionally, under the new Elliott Management Plan, logging will now be authorized in the northwestern portion of the forest that was previously set aside for murrelets and owls. The revised Northwest Forests Management Plan (that covers the Tillamook and Clatsop) raises serious concerns for the continued viability of murrelets in these forests. During the next 30 years, these forests will have a dearth of older forest habitat and the State will authorize "thinning" and other practices within old and mature forest stands. The net result of the recent forest management plan revisions and changes is an increase in forest fragmentation and resulting take of murrelets on the Elliott, Tillamook, and Clatsop State Forests.

B. An HCP and ITP Are Necessary For Oregon's Forest Management In Coastal Forests Used By Marbled Murrelets.

One way in which the State can shield itself from ESA liability and the expense of ESA take lawsuits, is to prepare an HCP and obtain an incidental take permit. In 1995, the State did just that for marbled murrelets and northern spotted owls on the Elliott State Forest. After the permit for murrelets expired in 2001, the State gave up on the mitigation commitments it made in the 1995 HCP/ITP for murrelets and continued logging operations by largely avoiding the northwestern half of the Elliott and setting aside large MMMAs when murrelets were discovered. However, the State has continually reduced the size of these reserves and now seeks to dramatically ramp up logging on the Elliott, including in the northwestern half of the forest.

In 2008 in anticipation of increasing logging on all state lands, the State drafted a new HCP for the Elliott State Forest that would cover murrelets, Coho salmon, and northern spotted owls. The new HCP was never finalized.

Around the same time period, the State also began drafting an HCP for northwest and southwest coastal forests in Oregon. This draft was also a multi-species HCP. That plan was never finalized and the references to it were deleted from the revised Northwest Forest Management Plan 2010. Without an adequate plan to protect murrelets, the State is liable for its take of this threatened species under the ESA.

CONCLUSION

The State has violated and continues to violate section 9 of the ESA. Pursuant to the citizen suit provision of the ESA, 16 U.S.C. §§ 1540(g)(1)(A), (2)(A), Cascadia Wildlands, the Center for Biological Diversity, and Audubon Society of Portland are providing you with 60 days notice of our intention to commence a civil action challenging the State's practice of approving logging operations on the Elliott, Tillamook, and Clatsop State Forests that take marbled murrelets.

Unless the State remedies the legal violations discussed in this letter within 60 days, we will bring legal action and seek an injunction against any and all activities responsible for the take of marbled murrelets on the Elliott, Clatsop, and Tillamook State Forests. We will further seek an award for any costs and fees associated with the litigation, including reasonable attorney and expert fees. If you have any questions about this notice, please do not hesitate to contact us.

Sincerely,

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Ken Salazar, Secretary, Department of Interior
Paul Henson, State Director, FWS Oregon Office
Eric Holder, U.S. Attorney General

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