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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

CASCADIA WILDLANDS, an Oregon non-profit corporation; OREGON WILD, an Oregon non-profit corporation; AUDUBON SOCIETY OF PORTLAND, an Oregon non-profit corporation; and the CENTER FOR BIOLOGICAL DIVERSITY, a New Mexico non-profit corporation,

Petitioners,

vs.

OREGON BOARD OF FORESTRY, an agency of the State of Oregon,

Respondent.

Case No.

PETITION FOR REVIEW

(Administrative Procedure Act - Petition for Review of an Agency Order)

INTRODUCTION

1.

Petitioners Cascadia Wildlands, the Center for Biological Diversity, and the Audubon Society of Portland (“Petitioners”) bring this Petition for Review against the Oregon Board of Forestry (“Board” or “Respondent”) under the provisions of the Oregon Administrative Procedure Act (“APA”).

2.

Petitioners bring this Petition for Review seeking to rectify more than twenty years of inaction by the Board of Forestry with regard to its nondiscretionary legal duties to enact

1 regulatory protections for marbled murrelet, a state-listed threatened species, on state and
2 private forestlands.

3 3.

4 Specifically, Petitioners seek a declaration that the Board acted outside the range of
5 discretion delegated to the agency by law and acted contrary to statute when it denied
6 Petitioners' Petition to Initiate Rulemaking and Identify Resource Sites to Establish an
7 Inventory and Protect Existing Marbled Murrelet Sites ("Rulemaking Petition") to inventory
8 murrelet sites and develop rules to protect those sites. Additionally, Petitioners seek a
9 declaration that the Board's denial of the Rulemaking Petition is unsupported by substantial
10 evidence in the record because addressing marbled murrelet sites is not on the Board's work
11 plan. Alternatively, Petitioners seek court intervention on the grounds that the Board's nearly
12 three-decade long failure to act regarding murrelets is an unreasonable failure to act or delay in
13 action under ORS 183.490. A copy of the Rulemaking Petition and its denial are attached
14 hereto.

15 4.

16 Petitioner CASCADIA WILDLANDS is an Oregon non-profit corporation
17 headquartered in Eugene, Oregon. Founded in 1998, Cascadia Wildlands represents over
18 10,000 members and supporters, and has a mission to educate, agitate, and inspire a movement
19 to protect and restore Cascadia's wild ecosystems. Cascadia Wildlands envisions vast old-
20 growth forests, rivers full of salmon, wolves howling in the backcountry, and vibrant
21 communities sustained by the unique landscapes of the Cascadia Bioregion. Cascadia
22 Wildlands is devoted to the conservation of the Cascadia Bioregion, which extends from
23 northern California to southeastern Alaska. Cascadia's principal business office is in Eugene,
24 Oregon in Lane County.

25 5.

26 Cascadia Wildlands uses a combination of education, organizing, outreach, litigation,
27 advocacy, and collaboration to defend wild places and promote sustainable, restoration-based
28 forestry. The organization has long advocated for improved management of forests, the

1 protection of older forests, and for the recovery of imperiled species dependent on older forests
2 such as the marbled murrelet. For over a decade, Cascadia Wildlands has focused on the
3 recovery of the marbled murrelet and protections for the species habitat.

4
5 6.

6 Petitioner OREGON WILD is a charitable, non-profit corporation headquartered in
7 Portland, Oregon with approximately 16,000 members and supporters who share our mission to
8 protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy. We seek to
9 protect the state's remaining old-growth forests and roadless areas, and restore fully-
10 functioning ecosystems and watersheds with a full complement of native species. Oregon Wild
11 has a campaign to reform Oregon's forest practice rules that apply to state and private lands
12 with a goal to protect water quality, fish & wildlife habitat, and rural communities, reduce the
13 use of toxic chemicals, increase carbon storage, and maintain Oregon's quality of life.

14
15 7.

16 Petitioner CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a New Mexico
17 non-profit corporation dedicated to the preservation, protection and restoration of biodiversity,
18 native species, and ecosystems. The Center has offices in Tucson and Phoenix, Arizona; Silver
19 City, New Mexico, Washington, D.C., San Francisco, Los Angeles, and Joshua Tree,
20 California; and Portland, Oregon. The organization has long advocated on behalf of the
21 marbled murrelet and sought to strengthen protections for the bird and its habitat. The Center,
22 for example, submitted comments to the U.S. Fish and Wildlife Service supporting continued
23 protection for the marbled murrelet in response to a 90-day finding on a petition to remove the
24 species from the list of endangered and threatened wildlife (Federal Register: Volume 73,
25 Number 192, October 2, 2008). The Center also submitted comments on a proposed revision
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1 of critical habitat and has intervened in several lawsuits by timber industry organizations
2 seeking to remove or weaken protections for the murrelet.

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4 8.

5 The Center's Oregon office and Endangered Species Program has long followed and
6 advocated for additional protections for old-growth forest lands in Oregon by attending and
7 testifying at Board of Forestry and State Land Board meetings, advocating for stronger
8 protections for imperiled wildlife on state and private timber lands, and participating in
9 litigation to provide greater protections for imperiled species on Oregon's forests. The Center
10 has more than 48,500 members, including many who reside in Oregon and enjoy exploring
11 Oregon's forests and observing, detecting, and attempting to photograph marbled murrelets.

12
13 9.

14 Petitioner AUDUBON SOCIETY OF PORTLAND is an Oregon non-profit corporation
15 with a mission to promote the enjoyment, understanding and protection of native birds, other
16 wildlife and their habitats. Audubon Society of Portland currently has approximately 16,000
17 members, including many who use Oregon's coastal forests for a wide variety of recreational
18 purposes.

19
20 10.

21 In the late 1980s, Audubon Society of Portland commissioned a study by wildlife
22 biologist David B. Marshall, concerning the health and viability of marbled murrelet
23 populations on the West Coast. Based on the results of this study, in January 1988, Audubon
24 Society of Portland formally petitioned the U.S. Fish and Wildlife Service to list the marbled
25 murrelet under the Federal Endangered Species Act.

26
27 11.

28 After initiating these petitions, Audubon Society of Portland continued to advocate for
federal and state protection and designation of critical habitat for the species. In April 1991,

1 Audubon Society of Portland filed suit in Federal District Court in Seattle, in order to compel
2 the Fish and Wildlife Service to discharge its mandatory duty under the Endangered Species
3 Act by listing the murrelet as a threatened species. The Fish and Wildlife Service ultimately
4 complied with this request in September 1992. Audubon Society of Portland continued to
5 litigate in order to compel the Fish and Wildlife Service to designate critical habitat for the
6 marbled murrelet. In recent years, Portland Audubon has intervened in two lawsuits attempting
7 to delist the marbled murrelet to ensure the threatened listing remains in place.
8

9 12.

10 Audubon Society of Portland also owns and manages the 216-acre Ten Mile Creek
11 Sanctuary on the Oregon Coast, which provides habitat for marbled murrelets within the
12 Marbled Murrelet Important Bird Area. Audubon Society of Portland holds annual survey
13 trainings for marbled murrelets and contributes data to inland survey efforts. The organization
14 also sponsors educational, scientific research activities that involve study of marbled murrelets
15 and other birds and their natural habitat.
16

17 13.

18 Respondent OREGON BOARD OF FORESTRY (“BOF”) is an agency of the State of
19 Oregon. The BOF is responsible for protecting, managing, and promoting stewardship of
20 Oregon's forests to enhance environmental, economic, and community sustainability. Included
21 within this general mission is the statutory responsibility to promulgate rules which “shall
22 provide for the overall maintenance of...fish and wildlife resources.” ORS 527.710(2)(d).
23 Specifically, the Board is required to “collect and analyze the best available information and
24 establish inventories of...resources sites needing protection” for both federally and state listed
25 endangered or threatened wildlife species” and promulgate rules to protect these resource sites
26 if they would be negatively impacted by forestry activities. ORS 527.710(3).
27

28 **THE NATURE OF PETITIONERS’ INTERESTS**

14.

1 Petitioners have organizational interests in the inventorying and protecting of marbled
2 murrelet sites. Petitioners have interests in the proper and lawful management of forestlands in
3 Oregon, and in Respondent's compliance with Oregon laws surrounding the protection of
4 threatened and endangered species. By this action, Petitioners seek to further interests that the
5 legislature expressly wished to have considered.

6 15.

7 Petitioners are all registered non-profit corporations with charitable missions that
8 include protecting and restoring Oregon's environment, wildlife, and biological diversity.
9 Petitioners have a specific and particular interest in the recovery of the marbled murrelet.
10 Oregon's state and private forestlands play a unique and important role in the ongoing recovery
11 of the marbled murrelet.

12 16.

13 The marbled murrelet, *Brachyramphus marmoratus*, is a forest-nesting seabird that has
14 been protected as a threatened species under the Oregon Endangered Species Act since 1987,
15 and the Federal ESA since 1992. Under Oregon law, the Board is required by statute to "collect
16 and analyze the best available information and establish inventories of resource sites of either
17 federally listed or state listed endangered or threatened wildlife species." ORS
18 527.710(3)(a)(A). If the Board determines that forest practices conflict with resource sites in
19 the inventory, the Board must adopt rules to protect those resource sites after considering
20 consequences and appropriate levels of protection. ORS 527.710(3)(b), (c).

21 17.

22 As elaborated upon above, Petitioners have for years dedicated substantial time, money,
23 and resources toward the conservation of the marbled murrelet. Petitioners all have staff
24 members in Oregon who work on murrelet issues and the reform of forest management in
25 Oregon. Petitioners have hosted and continue to host public outreach and educational events
26 about the marbled murrelet, including presentations by experts, outdoor excursions, and other
27 events. The marbled murrelet is regularly featured in their newsletters and on their websites.

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Under Oregon law, “any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form.” ORS 183.480(1). On June 21, 2016, Petitioners filed a rulemaking petition with the Board of Forestry requesting the inventory and development of rules to protect marbled murrelet sites. On July 20, 2016, the Board held a meeting considering the petition. On August 1, 2016, the Board denied the rulemaking petition on the grounds that the matter was already within the Board’s work plan and will be considered at a later time. The Board named Petitioners as parties to this rulemaking proceeding. Accordingly, Petitioners are parties to this agency proceeding and are adversely affected or aggrieved by the denial of the rulemaking petition.

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23 23.

The court shall set aside, modify or remand the rulemaking petition to the agency if the court finds that the agency has erroneously interpreted a provision of law or was outside the range of discretion delegated to the agency by law and that a correct interpretation compels a particular action or if the court finds the agency order is violation of a statutory provision. ORS 183.484. If the rulemaking petition denial was within the agency’s legal discretion, but not supported by substantial evidence in the record, the Court shall set aside or remand the order. ORS 183.484(5)(c). Finally, the court has authority under ORS 183.490 to “compel an agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision.” ORS 183.490.

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28 24.

The Board of Forestry is required to promulgate rules which “shall provide for the overall maintenance of...fish and wildlife resources.” ORS 527.710(2)(d). The Board “shall collect and analyze the best available information and establish inventories of ... resources sites needing protection” for both federally and state listed endangered or threatened wildlife species.” ORS 527.710(3)(a)(A). Upon a determination that forest practices would conflict with

1 resource sites, ORS 527.710(3)(b), the Board “shall” adopt rules to protect resources sites, after
2 considering the consequences and appropriate levels of protection. ORS 527.710(3)(b), (c).

3 **FACTUAL BACKGROUND**

4 25.

5 In 1987, the marbled murrelet was listed as threatened under the Oregon Endangered
6 Species Act. On June 21, 2016, Petitioners petitioned the Oregon Department of Fish and
7 Wildlife to uplist the marbled murrelet from threatened to endangered, based upon recent
8 scientific information related to the species status. On September 2, 2016, the Oregon
9 Department of Fish and Wildlife accepted this petition and has commenced rulemaking.

10 26.

11 Federally, the marbled murrelet was listed under the Endangered Species Act in 1992.
12 16 USC §§1531 - 1544. 57 Fed Reg 45328 (Oct 1, 1992); 50 CFR §17.11 (1993). Since that
13 listing, marbled murrelets have been protected pursuant to the Northwest Forest Plan on federal
14 lands in Oregon.

15 27.

16 The primary reason marbled murrelets are listed as a threatened species is the loss of
17 older coastal forests that provide marbled murrelet nesting and breeding habitat. The primary
18 cause of forest loss and resulting marbled murrelet population declines is commercial timber
19 harvest and related wind throw or blow down of trees, fire, and other natural events. In
20 addition to the direct removal of marbled murrelet nesting habitat, logging also fragments
21 marbled murrelet nesting habitat and increases edge effects, which leads to the increased risk of
22 nest predation and tree blow down.

23 28.

24 While it has done so for other listed species, the Board, to date, has not considered the
25 best available information and conducted a resource site inventory for marbled murrelets.

26 29.

27 On June 21, 2016, Petitioners submitted the Rulemaking Petition to the Board. The
28 thirty-three-page Rulemaking Petition cites and discusses the scientific literature in detail, and

1 deals extensively with biology and ecology, population status, conflicts with forestry practices,
2 and the inadequacies of the current regulatory regime. The Rulemaking Petition asks the Board
3 to consider the best available information and conduct a resource site inventory for marbled
4 murrelets. The Rulemaking Petition describes in detail how Oregon’s forest practices conflict
5 with the protection of marbled murrelet sites. The Rulemaking Petition requests the Board
6 initiate a rulemaking process to develop protections for the inventoried murrelet sites.

7 30.

8 To summarize the Rulemaking Petition, the most urgent conservation measure required
9 for the murrelet to persist is the conservation of suitable habitat, especially habitat on state and
10 private lands. The recently released twenty year monitoring report for the marbled murrelet
11 cited the urgent need to “arrest the loss of suitable habitat on all lands, especially on non-
12 federal lands in the relatively near term.” (Falxa & Raphael 2016). However, Oregon has not
13 taken sufficient measures to protect the species and its habitat, and a recent study concluded
14 that between 1996 and 2006, 33.4 percent of the higher suitable habitat in Oregon on
15 nonfederal lands was lost.

16 31.

17 The Petition requested the board (1) collect and analyze the best available information
18 on marbled murrelets; (2) conduct a resource site inventory; and (3) adopt rules to protect
19 resource sites and to develop a process to identify new sites in the future pursuant to ORS
20 527.710(3). The Petition proposed specific rulemaking language regarding marbled murrelet
21 sites and protection requirements.

22 32.

23 On August 1, the Board provided a written Denial of Petition for Rulemaking. The
24 Board denied the petition “because the specified resource sites topic is already on the Board’s
25 work plan and many of the issues raised in the petition will be considered at a later time as the
26 Board progresses on its work plan.” The designation of murrelet resource sites is not on the
27 Board’s 2015-2017 work plan.

1 **FIRST CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**
2 **(Review of an Agency Order)**

3 33.

4 Petitioners incorporate by reference all preceding paragraphs.

5 34.

6 Oregon statute imposes a non-discretionary duty on the Board to implement provisions
7 regarding inventory and designation of marbled murrelet resource sites and rules to protect
8 these sites if forestry practices conflict with the protection of these sites. ORS 527.710(3).

9 35.

10 On June 21, 2016, Petitioners submitted the Rulemaking Petition to the Board
11 requesting the inventory and designation of marbled murrelet resource sites, detailing out how
12 Oregon's forestry practices conflict with the protection of these sites and proposed rules to
13 protect these sites.

14 36.

15 On August 1, 2016, the Board denied the Rulemaking Petition.

16 37.

17 By denying the Rulemaking Petition, the Board acted outside the range of discretion
18 delegated to the agency by law and otherwise in violation of the Oregon law, specifically ORS
19 527.710.

20 **SECOND CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**
21 **(Review of an Agency Order)**

22 38.

23 Petitioners incorporate by reference all preceding paragraphs.

24 39.

25 On August 1, 2016, the Board denied the Rulemaking Petition "because the specified
26 resource sites topic is already on the Board's work plan and many of the issues raised in the
27 petition will be considered at a later time as the Board progresses on its work plan."

28 40.

1 The designation of resource sites for marbled murrelets is not on the Board's 2015-2017
2 work plan.

3 41.

4 The Board's denial of the Rulemaking Petition on the grounds that the topic was
5 already on the Board's work plan is not supported by the substantial evidence in the record and
6 must be set aside or remanded pursuant to ORS 183.484(5).

7 **THIRD CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**
8 **(Review of an Agency Order)**

9 42.

10 Petitioners incorporate by reference all preceding paragraphs.

11 43.

12 In 1987, the Oregon Department of Fish and Wildlife listed the marbled murrelet as a
13 threatened species. This listing created a nondiscretionary, statutory duty upon the Board to
14 inventory sites and develop rules to protect the marbled murrelet upon a finding that forestry
15 practices conflict with the protection of murrelet sites.

16 44.

17 The Board's failure to act upon these nondiscretionary legal duties to inventory for and
18 enact regulatory protections for marbled murrelet on state and private forestlands for nearly
19 thirty years is an unlawful refusal to act or unreasonable delay in taking action pursuant to ORS
20 183.490.

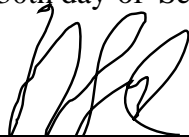
21 **PETITIONERS' PRAYER FOR RELIEF**

22 Petitioners respectfully request that this Court:

- 23 1. Declare that the Board violated state laws, specifically ORS 527.710(3) and the Oregon
24 APA, in denying Petitioners' Rulemaking Petition;
- 25 2. Set aside the order or remand the order to the agency and direct them to make an order
26 in compliance with ORS 527.710(3);
- 27
- 28

- 1 3. Compel the Board to inventory and develop rules to protect marbled murrelet sites as
2 the Board has unreasonably delayed this action for nearly twenty years pursuant to ORS
3 183.490;
- 4 4. Award Petitioners their reasonable fees, costs and expenses associated with this
5 litigation pursuant to ORS 183.497 or other authority; and
- 6 5. Grant Petitioners such other and further relief as the Court deems just and equitable.

7 Respectfully submitted and dated this 30th day of September, 2016.

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