

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R1-ES-2008-0095]

[92220-1113-0000-C5]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Remove the California, Oregon, and Washington Population of the Marbled Murrelet (Brachyramphus marmoratus) from the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the California, Oregon, and Washington population of the marbled murrelet (Brachyramphus marmoratus) from the Federal List of Endangered and

Threatened Wildlife (List) under the Endangered Species Act of 1973, as amended (Act).

We find that the petition presents substantial information indicating that the petitioned action may be warranted. Therefore, with the publication of this notice, we are initiating a status review of the marbled murrelet, which will also serve as our 5-year status review for the species. Concurrent with making our 12-month finding on the petition and conducting a 5-year status review, we intend to review the rangewide status of the species, and if necessary, the configuration and status of any distinct population segments. To ensure a comprehensive review, we are soliciting scientific and commercial data and other information on the marbled murrelet relevant to its listing status under the Act. At the conclusion of our status review, we will issue a 12-month finding on the petition.

DATES: We made the finding announced in this document on [INSERT FEDERAL REGISTER PUBLICATION DATE]. To allow us adequate time to conduct this review, we request that we receive information on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit information by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R1-ES-2008-0095; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all information received at <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Information Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Ken Berg, Manager, Western Washington Fish and Wildlife Office, U.S. Fish and Wildlife Service, 510 Desmond Drive SE, Suite 102, Lacey, WA 98503; telephone 360-753-6039; facsimile at 360-753-9405. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Information Solicited

When we make a finding that a petition presents substantial information to indicate that listing, delisting, or reclassifying a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the

status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the marbled murrelet. We request information from the public, other concerned governmental agencies, Native American tribes, the scientific community, agricultural and forestry groups, conservation groups, industry, or any other interested parties concerning the status of the marbled murrelet, including but not limited to information on:

(1) Discreteness and significance of the marbled murrelet in California, Oregon, and Washington in light of our distinct population segment (DPS) policy (61 FR 4722; February 7, 1996).

(2) Discreteness, significance, and status of other portions of the marbled murrelet's range.

(3) Differences or similarities in regulatory protection for marbled murrelets in the United States and Canada.

(4) The status, distribution, or population trends of the marbled murrelet throughout all or significant portions of its range.

(5) Ongoing conservation measures for the species and its habitat.

(6) Threats to the marbled murrelet and its habitat throughout all or a significant portion of its range.

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act (16 U.S.C. 1531 et seq.) directs that a determination as to whether any species is a threatened or endangered species must be made “solely on the basis of the best scientific and commercial data available.” At the conclusion of the status review, we will issue the 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act. We will base our 12-month finding on a review of the best scientific and commercial data available, including all relevant information received in response to this 90-day finding. Concurrent with our 12-month finding, we may also propose changes to the status of the marbled murrelet rangewide, within DPSs, or within significant portions of its range.

You may submit your information concerning this finding by one of the methods listed in the ADDRESSES section. We will not consider submissions sent by e-mail or fax, or to an address not listed in the ADDRESSES section.

If you submit information via <http://www.regulations.gov>, your entire submission - including your personal identifying information - will be posted on the website. If your submission is made via hardcopy that includes personal identifying information, you may

request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and materials we receive, as well as supporting documentation we used in preparing this finding, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Western Washington Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT).

## Background

Section 4(b)(3)(A) of the Act requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files at the time we make the determination. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the Federal Register.

Our process for making a 90-day finding under section 4(b)(3)(A) of the Act and

our regulations in the Code of Federal Regulations (CFR) at 50 CFR 424.14(b) is limited to a determination of whether the information in a petition meets the “substantial scientific or commercial information” threshold. Our regulations provide a standard for determining what constitutes substantial information with regard to a 90-day petition finding: “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted” (50 CFR 424.14(b)). In making this finding, we consider whether the petition: (1) Clearly indicates the administrative action recommended; (2) contains a detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)). If we find that the petition presents substantial scientific or commercial information, we are required to promptly commence a review of the status of the species and publish the results of that status review in a 12-month finding.

The factors for listing, delisting, or reclassifying species are described at 50 CFR 424.11. We may delist a species only if the best scientific and commercial data available substantiate that it is neither endangered nor threatened. Delisting may be warranted as a result of: (1) Extinction; (2) recovery; or (3) a determination that that the original data

used for classification of the species as endangered or threatened were in error.

### Petition

On May 28, 2008, we received a petition from the American Forest Resource Council; the Carpenters Industrial Council of Douglas County, Oregon; and Ron Stuntzner requesting that we delist the California/Oregon/Washington distinct population segment (DPS) of marbled murrelet (*Brachyramphus marmoratus*). The petition clearly identified itself as a petition and included the identification information for the petitioners, as required in 50 CFR 424.14(a). The petitioners claim that the currently listed entity (the marbled murrelet in California, Oregon, and Washington) is not a discrete entity based on biological considerations or differences in regulatory mechanisms across an international boundary, and therefore is not listable as a DPS under the Act. In support of their petition they cite the Service's 5-year review of the marbled murrelet (USFWS 2004; available at:

<http://www.fws.gov/pacific/ecoservices/endangered/recovery/5yearcomplete.html>),

which found that the currently listed population of the marbled murrelet was not discrete.

The petitioners also cite information contained in a U.S. Geological Survey (USGS) report commissioned by the Service on the status and trends of the marbled murrelet in Alaska and British Columbia (Piatt et al. 2007). The USGS report also included information on the marbled murrelet in California, Oregon, and Washington.

In response to the May 28, 2008, petition, we sent a letter to the petitioners dated June 11, 2008, acknowledging receipt of the petition. This notice constitutes our 90-day finding on the May 28, 2008, petition to delist the California/Oregon/Washington DPS of the marbled murrelet.

### Species Information

The marbled murrelet is a small seabird of the Alcidae family. The species' breeding range extends from Bristol Bay, Alaska, south to northern Monterey Bay in central California. Birds winter throughout the breeding range (McShane et al. 2004, pp. 3–7) and also occur in small numbers off the coast of southern California (McShane et al. 2004, pp. 3-12).

Marbled murrelets spend most of their lives in the marine environment; however, they have been found occasionally on rivers and inland lakes (Carter and Sealy 1986, p. 473). In addition to foraging, marbled murrelets also aggregate, sleep, preen, and copulate on the water.

Throughout the forested portion of their breeding range, marbled murrelet nesting habitat use is positively associated with the presence and abundance of mature and old-growth forests, large core areas of old-growth, low amounts of edge and fragmentation, proximity to the marine environment, and increasing forest age and height (McShane et

al. 2004, pp. 4-39; Binford et al. 1975, pp. 315-316; Hamer and Nelson 1995, pp. 72-75; Ralph et al. 1995, p. 4). In the northern portion of their breeding range (Alaska, British Columbia, and Washington) some marbled murrelets lay their eggs on bare talus slopes or mossy cliff edges (Piatt et al. 2007, p. 2; DeGrange 1996, pp. 21-30; Bradley and Cooke 2001, p. 53; Bloxton and Raphael 2008, p. 7).

Additional information on the biology and distribution of the marbled murrelet within the continental United States is available in the original listing document (57 FR 45328; October 1, 1992) and in our 5-year status review (USFWS 2004) (both available online at <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?scode=B08C>).

Information commissioned by the Service on the status and trends of the species in Alaska and British Columbia (Piatt et al. 2007) is available online from the U.S. Geological Survey at <http://pubs.usgs.gov/of/2006/1387/pdf/ofr20061387.pdf>.

#### Distinct Population Segment Policy

Section 3(15) of the Act defines a “species” to include “...any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” The National Marine Fisheries Service (NMFS) and the Service published a joint policy defining the phrase “distinct population segment” on February 7, 1996 (61 FR 4722) (referred as “DPS policy” in the remainder of this document). According to the DPS policy, two elements must be satisfied in order

for a population segment to qualify as a DPS: discreteness of the population segment in relation to the remainder of the species and significance of the population segment to the species. If a population segment qualifies as a DPS, the conservation status of that DPS is evaluated to determine whether it is threatened or endangered.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

If a population is found to be discrete then it is evaluated for significance under the DPS policy on the basis of its importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following: (1) Persistence of the discrete population segment in an ecological setting unusual or unique to the taxon, (2) evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon, (3) evidence that the population represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside of its historical range, or (4) evidence that the population differs markedly from other populations of the species in its genetic characteristics.

If a population segment is discrete and significant (i.e., it is a DPS) its evaluation for endangered or threatened status is based on the Act's definitions of those terms and a review of the factors listed in section 4(a) of the Act. According to our DPS policy, it may be appropriate to assign different classifications to different DPSs of the same vertebrate taxon.

### Finding

We have reviewed the petition and literature cited in the petition, and evaluated that information to determine whether the sources cited support the claims made in the petition. We also reviewed reliable information that was readily available in our files to clarify and verify information in the petition. Based on our evaluation of the information and the criteria specified in 50 CFR 424.14(b)(2), we find the petition presents substantial information indicating that the California, Oregon, and Washington population of the marbled murrelet may not be discrete, and therefore may not meet the criteria for a DPS. As such, we find that the petitioned action may be warranted. The petitioners have essentially reiterated the Service's own conclusion based on our 5-year review; thus we agree that a status review is warranted.

The Service completed a 5-year review of the marbled murrelet's status under the Act on September 1, 2004. That review found that the currently listed entity did not

satisfy the discreteness prong of the DPS policy, and therefore was not a valid DPS. The review based this conclusion on data indicating there were no marked physical, physiological, ecological, or behavioral differences at the international border, and a determination that there were no significant differences between the legal protection provided to the species under Canada's Species at Risk Act and that provided under the Endangered Species Act in the United States.

The Service now believes that the discreteness analysis in the 5-year review was flawed, because it compared *current* levels of legal protection across the international border, rather than levels of protection that would exist if the marbled murrelet were not listed in the United States. The Service believes that the latter approach is more rational in the context of a 5-year review, because it analyzes discreteness in the same manner as the Service would in an initial listing determination. Nonetheless, because the 2004 5-year review did conclude that the population was not a valid DPS, and because the Service has not formally revisited that conclusion since then, a reasonable person could conclude that the petitioned action may be warranted.

It is important to note that the "substantial information" standard for a 90-day finding is in contrast to the Act's "best scientific and commercial data" standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is

not made until we have completed a thorough status review of the species, which is conducted following a 90-day finding that finds that a petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted (“substantial 90-day finding”). Because the Act’s standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not necessarily mean that the 12-month finding will find that the petitioned action is warranted.

With this substantial 90-day finding we are initiating a rangewide status review of the species, and, once it is completed, we will make a finding on whether delisting the California, Oregon, and Washington population of the marbled murrelet is warranted. Our status review will also consider whether alternative DPS configurations are warranted or whether any additional changes to the status of the species throughout its range or within significant portions of the species’ range are warranted.

Because our next 5-year status review will be due around the time our 12-month finding is due, and because the 12-month finding and 5-year status review serve a similar purpose (i.e., to determine the appropriate classification of a species under the Act), the results of our 12-month finding will be adopted for our 5-year status review.

This finding fulfills the Service's obligation under 16 U.S.C. 1533(b)(3)(A) and its implementing regulations at 50 CFR 424.14(b). It also fulfills our obligation to

publish a notice in the Federal Register announcing our active review of the status of the marbled murrelet in accordance with 50 CFR 424.21.

#### References Cited

A complete list of all references cited is available upon request from the Western Washington Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT above).

Author

The primary authors of this document are staff members of the Western Washington Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT above).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: 9/15/2008

H. Dale Hall

Director, Fish and Wildlife Service

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