DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2008–0079]

[**92210–1117–0000–FY08–B4]**

RIN 1018–AW84

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Marbled Murrelet

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are revising designated critical habitat for marbled murrelet (*Brachyramphus marmoratus marmoratus*) pursuant to the Endangered Species Act of 1973, as amended (Act). On May 24, 1996, we designated 3,887,800 ac (ac) (1,573,340 hectares (ha)) as critical habitat for the marbled murrelet in Washington, Oregon, and California. We are revising the designated critical

habitat for the marbled murrelet by removing approximately 189,671 ac (76,757 ha) in northern California and southern Oregon from the 1996 designation, based on new information indicating that these areas do not meet the definition of critical habitat. The areas being removed from the 1996 designation in northern California are within Inland Zone 2, where we have no historical or current survey records documenting marbled murrelet presence. Intensive surveys in southern Oregon indicate the inland distribution of the marbled murrelet is strongly associated with the hemlock/tanoak habitat zone, rather than distance from the coast. Accordingly, the areas being removed in southern Oregon are limited to those areas not associated with the hemlock/tanoak zone. The areas being removed are not considered essential for the conservation of the species. Approximately 3,698,100 ac (1,497,000 ha) of critical habitat is now designated for the marbled murrelet. In this rule, we are also finalizing the taxonomic revision of the scientific name of the marbled murrelet from *Brachyramphus marmoratus marmoratus* to *Brachyramphus marmoratus*.

DATES: This rule becomes effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: The final rule and map of critical habitat will be available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/wafwo/*. Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available at *http://www.regulations.gov* or for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Washington Fish

and Wildlife Office, 510 Desmond Drive SE, Suite 102, Lacey, WA 98503–1273, telephone 360–753–9440, facsimile 360-753–9008.

FOR FURTHER INFORMATION CONTACT: Ken Berg, Field Supervisor, U.S. Fish and Wildlife Service, at the above address, (telephone 360–753–9440, facsimile 360–753–9008); Paul Henson, Field Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266, telephone 503–231–6179, facsimile 503–231–6195; or Nancy Finley, Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521, telephone 707–822–7201, facsimile 707–822–8411. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

A final rule designating critical habitat for the marbled murrelet was published in the **Federal Register** on May 24, 1996 (61 FR 26256), and is available under the "Supporting Documents" section for this docket in the Federal eRulemaking Portal: *http://www.regulations.gov* at Docket Number FWS–R1–ES–2008–0079. It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat for the marbled murrelet in this final rule.

Species Description, Life History, Distribution, Ecology, and Habitat

The marbled murrelet is a small seabird of the Alcidae family. The marbled murrelet's breeding range extends from Bristol Bay, Alaska, south to the Aleutian Archipelago; northeast to Cook Inlet, Kodiak Island, Kenai Peninsula, and Prince William Sound; south along the coast through the Alexander Archipelago of Alaska, British Columbia, Washington, and Oregon; to northern Monterey Bay in central California. Birds winter throughout the breeding range and occur in small numbers off southern California. Marbled murrelets spend most of their lives in the marine environment where they forage in near-shore areas and consume a diversity of prey species, including small fish and invertebrates. In their terrestrial environment, the presence of platforms (large branches or deformities) used for nesting in trees is the most important characteristic of their nesting habitat. Marbled murrelet habitat use during the breeding season is positively associated with the presence and abundance of mature and old-growth forests, large core areas of old-growth, low amounts of edge habitat, reduced habitat fragmentation, proximity to the marine environment, and forests that are increasing in stand age and height.

Taxonomy

Two subspecies of the marbled murrelet were previously recognized, the North American murrelet (*Brachyramphus marmoratus marmoratus*) and the Asiatic murrelet

(*B. marmoratus perdix*). New published information suggests that the Asiatic murrelet is a distinct species (Friesen *et al*. 1996, 2005), and the American Ornithologists' Union officially recognized the long-billed murrelet (*B. perdix*) and the marbled murrelet (*B. marmoratus*) as distinct species in the "Forty-first Supplement to the Checklist of North American Birds" (American Ornithologists' Union 1997). Therefore, in this rule we are revising 50 CFR 17.11 to adopt the taxonomic clarification for the marbled murrelet to reflect the change from *Brachyramphus marmoratus marmoratus* to *Brachyramphus marmoratus*.

Previous Federal Actions

For additional information on previous Federal actions concerning the marbled murrelet, refer to the final listing rule published in the **Federal Register** on October 1, 1992 (57 FR 45328), the final rule designating critical habitat published in the **Federal Register** on May 24, 1996 (61 FR 26256), and the proposed rule published in the **Federal Register** on July 31, 2008 (73 FR 44678). In the 1996 final critical habitat rule, we designated 3,887,800 ac (1,573,340 ha) of critical habitat in 32 units on Federal and non-Federal lands. On September 24, 1997, we completed a Recovery Plan for the marbled murrelet in Washington, Oregon, and California (Service 1997). On January 13, 2003, we entered into a settlement agreement with the American Forest Resource Council and the Western Council of Industrial Workers, whereby we agreed to review the marbled murrelet critical habitat designation and make any revisions deemed appropriate after a revised consideration of economic and any other relevant impacts of designation.

On April 21, 2003, we published a notice initiating a 5-year review of the marbled murrelet (68 FR 19569), and published a second information request for the 5-year review on July 25, 2003 (68 FR 44093). The 5-year review evaluation report was finished in March 2004 (McShane et al. 2004), and the 5-year review was completed on August 31, 2004.

On September 12, 2006, we published a proposed revision to critical habitat for the marbled murrelet, which included adjustments to the original designation and proposed several exclusions under section 4(b)(2) of the Act (71 FR 53838). On June 26, 2007, we published a notice of availability of a draft economic analysis (72 FR 35025) related to the September 12, 2006, proposed critical habitat revision (71 FR 53838). On March 6, 2008, we published a notice in the **Federal Register** (73 FR 12067) stating that the critical habitat for marbled murrelet should not be revised due to uncertainties regarding Bureau of Land Management (BLM) revisions to its District Resource Management Plans in western Oregon, and this notice fulfilled our obligations under the settlement agreement.

On July 31, 2008, we published a proposed rule to revise currently designated critical habitat for the marbled murrelet by removing approximately 254,070 acres (ac) (102,820 hectares (ha)) in northern California and Oregon from the 1996 designation (73 FR 44678). A revised 5-year review was completed on June 12, 2009. On January 21, 2010, in response to a petition to delist the marbled murrelet, we published a notice in the **Federal Register** (75 FR 3424) determining that removing the murrelet from the

Endangered Species List was not warranted. We also found that the Washington/Oregon/California population of the murrelet is a valid distinct population segment (DPS) in accordance with the discreteness and significance criteria in our 1996 DPS policy (61 FR 4722; February 7, 1996) and concluded that the species continues to meet the definition of a threatened species under the ESA.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed revised designation of critical habitat for the marbled murrelet in a proposed rule published on July 31, 2008 (73 FR 44678). During the comment period, which closed on August 30, 2008, we received 42 comments from organizations or individuals directly addressing the proposed critical habitat designation. Through template campaigns sponsored by The Wildlife Society and Conservation Northwest, we received an additional 2,825 comments.

The comment period was reopened on February 11, 2009 (74 FR 6852), and closed on March 13, 2009, during which we received 14 comments, which included 4 peer reviewers, 1 Federal agency, and 9 organizations or individuals. Nearly all commenters opposed the revision or reduction of some aspects of the designation of critical habitat for the marbled murrelet.

Several comments we received were outside the scope of the proposed rule, which

was limited to (1) the proposed removal of approximately 191,000 ac (77,295 ha) of critical habitat in northern California and southern Oregon based on the very low likelihood of marbled murrelet occurrence as is discussed in further detail below; (2) the proposed removal of approximately 63,000 ac (25,495 ha) of critical habitat in Douglas and Lane Counties, Oregon, that were designated farther than 35 miles inland, based on criteria identified in the 1997 Recovery Plan for the Marbled Murrelet (Washington, Oregon, and California Populations); and (3) the proposed taxonomic revision of the scientific name of the marbled murrelet. Examples of comments outside of the scope of the proposed rule included:

(a) Requests that we remove approximately 1,840 ac (744.6 ha) of existing critical habitat designated at Naval Radio Station Jim Creek in Washington pursuant to section 4(a)(3)(B)(i) of the Act;

(b) Requests that we designate additional critical habitat in certain areas (e.g., southwestern Washington, northwestern Oregon, Olympic Adaptive Management Area, Siskiyou and Six Rivers National Forests, Redwood National Park, and other areas);

(c) Requests that we designate marine areas as critical habitat;

(d) Claims of inconsistency with statutory requirements (e.g., occupancy at the time of listing, definition of occupied habitat, reliance on 1996 primary constituent elements (PCEs));

(e) Disagreement with the suitable marbled murrelet habitat acreage estimates in Oregon, Washington, and California;

(f) Recommendations to exclude critical habitat from all Federal lands including Wilderness areas and Congressionally withdrawn lands in general based on the

conservation adequacy of existing management plans;

(g) Requests for the exclusion of Federal lands in northern California based on approved management plans;

(h) Requests that we eliminate overlapping protections for Wilderness Designations and Congressional Withdrawal areas in northern California; and

(i) Requests that we update land status records related to critical habitat boundaries.

These comments are beyond the scope of the proposed rule, and some would require separate rulemaking to be considered. Accordingly, we have not specifically responded to these comments in this final rule.

Comments within the scope of the proposed rule have been addressed in the following summary and have been incorporated into the final rule as appropriate. We did not receive any requests for a public hearing.

Peer Review

In accordance with our policy published in the **Federal Register** on July 1, 1994, (59 FR 34270), we solicited opinions from nine knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from four of the peer reviewers who were solicited. We reviewed all comments received from the

peer reviewers for substantive issues and new information regarding murrelet critical habitat. We have addressed peer review comments in the following summary and have incorporated them into this final rule as appropriate.

Several comments refer to inland zone 1 and inland zone 2, which are based on the Forest Ecosystem Management Assessment Team (FEMAT) murrelet zone lines. For clarification, inland zone 1 extends 10–40 miles (mi) (16–64 kilometers (km)) inland from the marine environment, depending on the particular geographic area involved. The majority of murrelet occupied sites and sightings occur in this zone. Inland zone 2 includes areas further inland from the eastern boundary of inland zone 1, and is characterized by relatively low numbers of murrelet sightings, which is partially a function of few inventories. Specific distances for inland zone 2 vary by geographic area (Thomas et al 1993 (FEMAT), pp. IV-23–24).

Peer Reviewer Comments

Comment 1: Each of the four peer reviewers concurred with the proposed reclassification of the marbled murrelet to full species status. They stated the reclassification of the marbled murrelet to full species status is supported by the literature, and that the American Ornithologists' Union (the authoritative source for taxonomy and nomenclature of birds in North America) recognizes the marbled murrelet as a distinct species.

Our Response: We agree and note there is no disagreement in the literature or by

the experts on the reclassification of marbled murrelet to full species status. We are finalizing the taxonomic revision of the scientific name of the marbled murrelet from *Brachyramphus marmoratus marmoratus* to *Brachyramphus marmoratus* in this rule.

Comment 2: One reviewer stated that the surveys used to determine occupancy in the areas proposed for revision were conducted under earlier survey protocols requiring fewer visits than the currently recognized protocol (Mack et al. 2003, pp. 12–16). Accordingly, the results contain a level of uncertainty that, although not egregious, should be recognized before a final decision is made. In areas of low detections it is difficult for audio/visual surveys to detect single birds, whereas the current protocol may have detected additional murrelets.

Our Response: The 2003 Marbled Murrelet Inland Survey Protocol (Mack et al. 2003) recommends five survey visits in each of 2 years to determine occupancy with an 85.3 percent probability of detecting occupancy in a given year. The 2-year intensive survey protocol accounts for years where breeding effort is low, resulting in fewer or no detections in otherwise occupied stands (Mack et al. 2003, p. 13). The probability of detecting occupancy decreases from 85.3 percent to 79.2 percent in any given year when conducting one less site visit per year, which increases the level of uncertainty associated with the survey results by approximately 6.1 percent (Mack et al. 2003, p.13). The studies we relied on in the areas proposed for revision in California, Hunter et al. (1998) and Schmidt et al. (2000), reported on surveys conducted across large landscapes in northern California's inland zone 2, using the Ralph et al. (1994) murrelet survey

protocol. This protocol recommended only four survey visits in each of 2 years to determine occupancy. We acknowledge the studies we relied on used a survey protocol requiring fewer visits than is the current standard. However, given the large combined number of surveys (2,218) conducted in these studies, the additional/associated project-level surveys that have occurred since with no detections, the absence of historical records of murrelet presence in inland zone 2 in California based on U.S. Forest Service (USFS) and BLM records, and the apparent climatic differences between inland zone 2 areas and the closest known occupied murrelet sites within inland zone 1, we conclude from the best available scientific information that there is a very low likelihood of murrelet occupancy within inland zone 2 in California.

In southern Oregon, Federal agencies undertook a comparable evaluation of the probability of marbled murrelet inland habitat use as forest types shift from the hemlock/tanoak vegetation zone to the mixed-conifer/evergreen vegetation zone (Alegria et al. 2002, pp. 1–44). This evaluation was based on survey results from the Medford District BLM, and the Siskiyou and Rogue River National Forests from 1988 to 2001 that documented the inland distribution of marbled murrelets to be strongly associated with the hemlock/tanoak habitat zone, which ranges from 13 to 37 mi (20.9 to 59.5 km) inland from the Pacific Ocean. The distribution of survey sites with murrelet presence or occupancy occur farther inland where the hemlock/tanoak zone extends farther inland, which suggests that forest type influences murrelet occurrence, rather than absolute distance from the coast (Alegria et al. 2002, p. 15).

For the purposes of the analysis, marbled murrelet survey areas were categorized as western hemlock-tanoak (the primary range of the marbled murrelet), a 6.5-mile transition zone east of the primary range, and the far inland zones. The statistical modeling evaluated the hypothesis that marbled murrelets would be present on no more than 3 percent (95 percent confidence) of the habitat in the far inland zones. The final analyses concluded, with 95 percent confidence, that an even smaller proportion (1.2 percent) of the landscape may have murrelet presence that was not actually detected. The analysis of 9,795 survey visits suggests that murrelets are not present in more than 98 percent of the sampled units in the far inland zones (Alegria et al., 2002, pp. 13–15). Only one distant auditory detection in 4,634 survey visits occurred within the area more than 6.5 mi (10.4 km) inland of the hemlock/tanoak vegetation type (Alegria et al. 2002, p. 16). Accordingly, our interpretation of the most recent data supports a determination that, in southern Oregon, murrelet use is strongly associated with tanoak/hemlock forest, rather than a 35 miles (56 kilometers) distance from the Pacific Ocean. The 35-mile (56-km) distance identified in the 1997 Marbled Murrelet Recovery Plan was based on the best available information before the Service at that time. Therefore, based on the best available scientific information, we conclude that there is a very low likelihood of murrelet occurrence in the area we are removing from critical habitat designation in southern Oregon, and, accordingly, impacts to the species in this area would be negligible.

Comment 3: One reviewer asked if radar studies were conducted and if so, suggested that we document the results.

Our Response: We are unaware of any ornithological radar surveys conducted in or near the areas proposed for revision in Oregon. In California, Schmidt et al. (2000), used ornithological radar instruments to survey for murrelets at three sites beyond their study area where murrelets had been previously detected far inland. These sites include Onion Mountain and Notice Creek within the eastern portion of inland zone 1, and Indian Creek within inland zone 2. However, murrelets were detected only at the Notice Creek site using this method. Previous audio-visual detections at Indian Creek have not been validated using either audio-visual surveys or ornithological radar. Cooper and Blaha (2005, 2006) used ornithological radar to survey five sites along Pine Creek on the western boundary of the Hoopa Valley Indian Reservation in California (inland zone 1), to confirm murrelet presence that had been documented in previous audio-visual surveys. Marbled murrelets were detected at two of the sites, approximately 7 miles west of the inland zone 2 boundary. Although the number of ornithological radar surveys in California in or near inland zone 2 is limited, the available data are consistent with the results of other surveys. Those surveys failed to detect murrelet presence within inland zone 2 or the easternmost portion of inland zone 1.

Comment 4: Two of the four reviewers who commented on the proposed removal of critical habitat in Douglas and Lane Counties in Oregon considered the rationale behind the revisions to be unsupported by the literature or information presented in the proposed rule. One reviewer suggested that a more thorough analysis of existing surveys be conducted before revising the inland boundary of critical habitat in these areas.

Another reviewer requested more documentation that a majority of occupied sites occur within inland zone 1, and recommended that the critical habitat designation in Douglas and Lane Counties in Oregon not be revised until all of the existing data are thoroughly analyzed and additional systematic surveys have been conducted.

Our Response: Based on peer review and public comments, we have concluded that the proposed revision of critical habitat in Douglas and Lane Counties, Oregon, is not adequately supported by the literature and that currently available scientific information is inadequate to support a revision of critical habitat in this area. Accordingly, critical habitat in Lane and Douglas Counties, Oregon, remains designated as critical habitat, based on the best available scientific information.

Comment 5: One peer reviewer questioned whether the areas proposed for removal are within or outside of the currently occupied area, and stated that the failure to detect murrelets does not mean that they do not use an area, given the difficulty of surveying this secretive species.

Our Response: See response to peer reviewer Comment 2. Based on the detailed statistical analysis of the survey data, and the similarity of the areas not surveyed to the areas surveyed immediately to the north and south, there is low likelihood that murrelets occupy the areas proposed for removal from critical habitat designation in southern Oregon and northern California.

Comment 6: One reviewer pointed out that the habitat proposed for removal from critical habitat designation may act as a buffer of sorts for currently occupied habitat, particularly where it abuts the eastern edge of obviously occupied habitat. Increases in timber harvest or recreation in these areas would potentially bring edge effects (especially increased numbers of nest predators) closer to occupied habitat, and may reduce the suitability of the currently occupied habitat. The reviewer stated that maintenance of a buffer is essential to the conservation of murrelets in currently occupied habitat.

Our Response: In northern California, critical habitat remains designated over an area that ranges from 15 mi (24 km) to 20 mi (32 km) wide, between the west side of inland zone 1 within the redwood vegetation type (which contains more than 95 percent of the known occupied murrelet sites), and the revised eastern boundary of inland zone 1 within the Douglas-fir/tanoak vegetation type. In southern Oregon, critical habitat remains designated within a 6.5-mi-wide (10.5-km-wide) area between large amounts of known occupied murrelet habitat within the hemlock/tanoak vegetation type west of inland zone 1, and the break in vegetation to the mixed-conifer/evergreen vegetation type to the east. On a large landscape scale, these areas are generally managed to protect the PCEs of murrelet critical habitat (see **Primary Constituent Elements** below), although they have not been intensively surveyed. As a result, there is a significant distance between the eastern-most known occupied murrelet sites and the areas being removed from critical habitat designation in northern California and southern Oregon. These areas, while not "buffers," may help maintain the suitability of known nesting habitat by decreasing the potential for indirect impacts related to timber harvest activities or

increased predation.

Comment 7: One reviewer stated that it is essential to conserve a wide range of habitat to increase the chances that a species will be able to adapt to dynamic changes in the habitat. In his view, the areas proposed for removal from critical habitat represent small and large habitat remnants that may provide future refuges from warm temperatures, violent coastal storms, disease, invasive competitive species or predators, or extensive fire. He stated that both large and small fragments of mature, structurally complex forest located away from human activity may provide useful nesting habitat that is essential to conservation.

Our Response: On May 24, 1996, we designated 3,887,800 ac (1,573.340 ha) of critical habitat on Federal and non-Federal lands in Washington, Oregon, and California (61 FR 26256). While this revision will remove approximately 189,671 acres (76,760 ha) from the designation in Oregon and California, it only affects areas that are not essential to the conservation of the species based on the best scientific information available (see response to peer review comment 2). Accordingly, we do not believe the areas that are being removed would provide future nesting habitat, refuges from warm temperatures, violent coastal storms, disease, invasive competitive species or predators, or extensive fire, since these areas are not likely to be used by murrelets. The remaining critical habitat designation encompasses a wide range of habitat distributed throughout the range of the marbled murrelet from the Canadian border through California, and inland from the coast, which represents large and small fragments of mature, structurally complex

forest that are located away from human disturbance.

Comment 8: One reviewer noted that, if critical habitat designation is removed, it is likely the areas affected will be harvested for timber or receive greater recreational use, either of which will reduce the suitability as nesting habitat. Another reviewer commented that there is a strong correlation between murrelet population size and the amount of nesting habitat adjacent to the birds, and there is reason to believe that further loss of adjacent habitat could result in population decline.

Our Response: The critical habitat areas being removed in southern Oregon and northern California are outside of known nesting habitat, not likely to be occupied by murrelets, and not essential to the conservation of the species (see response to Peer Review *Comment 2*).

Comment 9: One reviewer commented that there appeared to be little reason to revise the critical habitat designation, which in the reviewer's view would limit the conservation options for murrelets. The reviewer noted that the proposal did not articulate any economic or security issues, and suggested that, in uncertain times, it is prudent to be conservative and "hedge your bets when the consequences of loss are high, especially when the costs are low."

Our Response: We disagree that future conservation options will be limited by this revision. Marbled murrelets remain protected as a listed species wherever they

occur, regardless of a critical habitat designation. Federal agencies have an independent responsibility under section 7(a)(1) of the Act to use their authorities to carry out programs for the conservation of endangered and threatened species, and a requirement under section 7(a)(2) of the Act to ensure that their actions do not jeopardize listed species. The take of listed species is prohibited by section 9 of the Act without a permit under sections 10(a)(1)(A) or 10(a)(1)(B) of the Act, or an incidental take statement under section 7(b)(4)(C) of the Act.

The Marbled Murrelet Recovery Plan states that recovery actions in southern Oregon and northern California should be focused on preventing the loss of occupied nesting habitat, minimizing the loss of unoccupied but suitable habitat, and decreasing the time for development of new suitable habitat (Service 1997, p. 128). Recovery task 4.1.4 in the Recovery Plan states: (1) a definition of suitable marbled murrelet habitat should be developed for each Conservation Zone to better determine and map appropriate areas for murrelet recovery; (2) the components of suitable marbled murrelet habitat are generally known but a description of suitable marbled murrelet habitat for each zone is lacking; and (3) once definitions are developed, mapping marbled murrelet habitat can be accomplished with greater accuracy (Service 1997, p. 149). Recovery task 4.1.6 states that intensive surveys should be conducted to identify nesting areas and delineate the inland boundary of nesting habitat (Service 1997, p. 150).

Intensive surveys to determine murrelet presence in southern Oregon indicate that the inland distribution of marbled murrelets is strongly associated with the

hemlock/tanoak habitat zone, and not the distance from the coast. This is probably due to the maritime climate that provides milder, wetter conditions that favor development of larger trees and more abundant moss cover. The hemlock/tanoak zone transitions relatively rapidly to the mixed-conifer/mixed-evergreen zone that has hotter, drier climate. This rapid transition to less favorable conditions for murrelets may explain why they aren't detected beyond the hemlock/tanoak vegetation zone (Alegria et al. 2002, pp. 15–16).

There are no historical or current survey records documenting murrelet presence in inland zone 2 in California (Hunter et al., 1998; Schmidt et al., 2000). Studies conducted by Hunter et al. (1997, p. 20), indicate that the northern Inner North Coast Ranges of California are not within the current range of the marbled murrelet, which could be influenced by several factors, including habitat structure, elevation, predator abundance, distance inland, and climatic conditions. Daily maximum summer temperatures were significantly higher within the zone 2 study area than at inland sites documented with murrelets closer to the coast (Hunter et al. 1998); summer temperature is often inversely correlated with humidity and cloud cover (Anthes et al., 1975); in California, the vast majority of murrelet records are from redwood-dominated stands (E. Burkett, pers. com); and the historical inland extent of redwood forests in California closely matches the inland extent of marine air influences and summer fog (Major 1977) (in Schmidt et al., 2000, pp. 21–22). This evidence, combined with the distance from the closest known occupied murrelet sites within inland zone 1 (9 mi (14 km) west and 15 mi (25 km) west; Schmidt et al. 2000, p. 11; Hunter et al. 1997, p. 7) indicates a very low

likelihood of murrelet occupancy within inland zone 2 in California. Accordingly, the areas designated as critical habitat in 1996 in southern Oregon that are not within the hemlock/tanoak habitat zone, and the areas within inland zone 2 in California, are not considered suitable habitat for marbled murrelet recovery.

The biological criteria used to identify critical habitat in the final rule (61 FR 26265; May 24, 1996) include suitable nesting habitat, survey data, proximity to marine foraging habitat, large contiguous blocks of nesting habitat, and rangewide distribution. Based on the best available information, there is no biological rationale to support retaining marbled murrelet critical habitat in areas that are neither presently used (i.e., unoccupied), nor likely to be used in the future by the species (i.e., unsuitable). Consequently, we believe the removal of critical habitat from areas that are not essential to the conservation of the species in southern Oregon and northern California is appropriate. Removing critical habitat from these areas will allow Federal agencies to focus their conservation efforts on the areas that currently provide murrelet habitat and have a greater likelihood of providing habitat into the future. The designation of critical habitat in Douglas and Lane Counties in Oregon is not affected by this revision, and these lands will continue to provide a conservation benefit to the species.

Public Comments

Comment 10: Commenters stated the murrelet recovery plan identifies the Northwest Forest Plan (NWFP) reserves as the backbone of the recovery effort, but Late-

Successional Reserves (LSRs) are administrative designations that can be removed. In addition, the Evaluation Report for the 5-Year Status Review for the Marbled Murrelet (McShane et al. 2004; p 4–76) indicates there are problems with placing too much reliance on the NWFP. Commenters also stated that if the NWFP remains in effect and is not altered substantially from its current form, the projected acreage of USFS and BLM lands in the Pacific Northwest that support stands older than 200 years (200 years defines the lower limit of old-growth forest) is expected to increase substantially by the year 2050. They also commented that the Recovery Plan for the Marbled Murrelet states "it will take 50 to 100 years or more to develop new suitable nesting habitat within most reserve areas," however, the NWFP is being dismantled before it has had a chance to succeed. Other commenters stated that the LSRs need critical habitat designation to ensure they are managed for long-term recovery of the species.

Our Response: Based on the best available scientific information related to survey data, there is a very low likelihood that murrelets occupy the areas being removed from critical habitat designation in southern Oregon and northern California (see responses under *Peer Reviewer Comments* above). The areas being removed are no longer considered suitable habitat. Accordingly, these areas are not essential to the conservation of the species, and murrelet recovery would not be affected by the management of these specific areas. This revision of critical habitat will help Federal agencies focus their conservation efforts on the areas that currently provide habitat for murrelets, and areas that have a greater likelihood of providing habitat into the future. Based on the best available scientific information, the areas that were designated as

critical habitat in Lane and Douglas Counties, Oregon, in 1996 have been determined to contain the physical or biological features essential to the conservation of the species and are not being revised.

Comment 11: One commenter stated that the Service must present a balanced economic analysis, including benefits of old-growth habitat conservation and restoration, and that an economic analysis must be prepared if BLM lands are designated in order to address consequences to communities and counties.

Our Response: Section 4(b)(2) of the Act requires that the Service consider economic impacts when "specifying any particular area as critical habitat." Characterizing the potential economic benefits of critical habitat designation can provide context to the potential economic cost estimates, where that information is available. However, since this final rule removes critical habitat that was previously "specified," and we are not removing these areas under Section 4(b)(2) on economic grounds, we have determined that a new economic analysis is not required.

Comment 12: Some commenters stated that the proposal to revise critical habitat should be withdrawn and replaced with a delisting proposal, and the Service should not designate critical habitat for a species that no longer warrants ESA protection.

Our Response: We disagree. The marbled murrelet DPS in Washington, Oregon, and California continues to warrant protection under the Act, for the reasons described in

the *12-month Finding on a Petition to Remove the Marbled Murrelet from the List of Endangered and Threatened Wildlife*, published in the **Federal Register** on January 21, 2010 (75 FR 3424). That finding determined that the DPS continues to meet the definition of a threatened species based on the species' population size and trajectory, in light of the scope and magnitude of existing threats.

Comment 13: Commenters stated there is no need to modify critical habitat in areas that are currently designated as LSRs, and there is little or no incremental cost to conserve marbled murrelet critical habitat in LSRs and riparian reserves, because these areas are already established for the purpose of conserving late successional wildlife.

Our Response: Section 3(5)(A) of the Act defines critical habitat as (1) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with section 4 of this Act, on which are found those physical or biological features (a) essential to the conservation of the species, and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination that such areas are essential for the conservation of the species. The survey data for southern Oregon and northern California, along with the quality and quantity of habitat in this area, indicate there is a very low likelihood that murrelets occupy the LSRs or the other areas being removed from the 1996 critical habitat designation, and are unlikely to occupy these areas in the future (see responses under *Peer Reviewer Comments*). Accordingly, based on the best

available scientific information, we have determined that these areas are not essential to the conservation of the species; therefore, requiring Federal agencies to enter into section 7 consultation with the Service on effects to critical habitat in these areas would be inconsistent with the Act. However, critical habitat in Lane and Douglas Counties, Oregon, will remain as designated in 1996, since those areas are occupied and essential to the conservation of the species.

Federal Agency Comments

Comment 14: The BLM suggested (a) adding language to the final rule that clearly articulates that the PCEs must be present on the lands within the mapped critical habitat units for the area to meet the statutory definition of critical habitat; (b) that the final rule clarify that activities proposed to occur on lands that do not contain PCEs within the mapped critical habitat units will not be subject to a destruction or adverse modification determination because such lands, by definition, are not critical habitat; and that (c) the proposed rule provide better guidance in regard to the functionality of forest stands in support of a critical habitat designation, particularly as related to the issue of fragmentation. BLM also expressed a concern that outdated land status information was used to prepare the proposed rule in northern California. They indicated that this is problematic in two key areas: Lacks Creek west of and adjacent to the Hoopa Reservation; and Gilman Butte east of the King Range National Conservation Area and south of Humboldt Redwoods State Park. The BLM also requested that we remove critical habitat from all areas not in the western hemlock/tanoak vegetation on the Grants

Pass and Glendale Resource Areas of the Medford District. The agency commented that this area lacks murrelet recovery habitat, and historical observations and recent protocol surveys have not documented murrelet occupancy. The areas described include the southeasternmost 2 square miles of CHU OR-07-g, and the northeasternmost 24 square miles of CHU OR-07-f.

Our Response: (a) Areas outside of the geographical area occupied by a species at the time it is listed under the Act (i.e., unoccupied habitat) can be designated as critical habitat if the areas are essential to the conservation of the species; unoccupied areas considered essential may not necessarily contain the PCEs of physical or biological features. However, for the marbled murrelet, each of the areas designated as critical habitat is within the geographical area occupied by the species at the time it was listed under the Act, and contains those physical or biological features essential to the conservation of the species, which may require special management considerations or protection. Accordingly, each of the areas delineated and mapped in this final rule meet the definition of critical habitat.

(b) The marbled murrelet PCEs include individual trees with potential nest platforms and forest lands of at least one half site-potential tree height regardless of contiguity, within 0.8 km (0.5 mi) of individual trees with potential nesting platforms and that are used or potentially used by the marbled murrelet for nesting or breeding. Activities that occur within or adjacent to lands designated as critical habitat may still have an effect on PCEs, depending on the particular aspects of the Federal action

involved. The preamble to the 1996 final critical habitat rule (61 FR 26265; May 24, 1996), states that "within the boundaries of designated critical habitat, only those areas that contain one or more primary constituent elements are, by definition, critical habitat. Areas without any primary constituent elements are excluded by definition." However, this language is not in the final critical habitat rule itself and is no longer accurate. The potential effects of Federal actions that may affect any area within the boundaries of designated critical habitat will need to be evaluated on a project-specific basis during the section 7(a)(2) consultation process.

(c) The removal, modification, or fragmentation of forested areas can directly impact nesting structures, nesting substrate, and the vertical and horizontal cover provided by the surrounding forest. Fragmentation of forested areas can result in habitat isolation and increased edge, which can negatively impact the quality of the remaining nesting habitat primarily through increased predation, modification of the microclimate, and potential windthrow of nest trees. Examples of Federal actions that may affect marbled murrelet nesting habitat include timber harvest, salvage logging, hazard tree removal, road construction, recreational or other developments, fuels reduction projects, and indirect harvest-related effects such as windthrow. The key factor related to an adverse modification determination is whether, with implementation of a proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or retain those physical or biological features that relate to the ability of the area to periodically support the species. The role of critical habitat is to support the life-history needs of the species and provide for conservation. Activities

that may destroy or adversely modify critical habitat are those that would alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the marbled murrelet.

The areas referred to by BLM within CHU OR–07–g and CHU OR–07–f occur within the 6.5-mile area designed to support murrelets that might use the area between the western hemlock/tanoak and mixed-conifer/evergreen vegetation zones. These areas were not considered for removal because of their proximity to occupied habitat (see response to Comment 6 under *Peer Reviewer Comments*).

Comments from States

We did not receive any comments from any State in response to the proposed rule.

Summary of Changes from the Proposed Rule

In preparing this final rule, we reviewed and fully considered comments from the public and peer reviewers that we received in response to the proposed rule published in the **Federal Register** on July 31, 2008 (73 FR 44678).

Based on the comments received, we have determined that the proposed removal of 63,000 ac (25,495 ha) of critical habitat designated in Douglas and Lane Counties in

Oregon is not supported by the best available scientific information and would not be appropriate. Based on the best available scientific information, these areas contain the physical or biological features essential to the conservation of the species, and will continue to be designated as critical habitat. Therefore, we have removed instructions to remove the following critical habitat units from this final rule: OR–03–c, OR–03–e, OR–04–f, OR–04–g, OR–04–i, OR–04–j, and OR–06–d.

Systematic surveys such as those conducted by Hunter et al. (1998), Schmidt et al. (2000), and Alegria et al. (2002) were not conducted in a relatively small area (approximately 71,000 ac) in northern California located between the Klamath River and the Oregon border, and between the much larger areas surveyed by Hunter et al. (1998), Schmidt et al. (2000), and Alegria et al. (2002). However, based on the similarity of mixed-conifer habitat surveyed to the north and south, the lack of detections from the areas immediately north and south, and the lack of historical detections, we believe there is a very low likelihood that murrelets occur within inland zone 2 and the far eastern portions of inland zone 1 located between the Klamath River and the Oregon border in northern California. In light of what the current data indicate regarding the forest types that murrelets use for nesting (see response to Comment 9), we conclude that it is unlikely that murrelets will occupy these areas in the future. Accordingly, we have revised the critical habitat boundary in this area.

The critical habitat revision in southern Oregon and northern California is appropriate, based on the best available scientific information, which indicates the likely

distribution of nesting birds is not as far inland as was delineated in 1996. We have no historical or current survey records documenting murrelet presence in the areas being removed in northern California, and the best available information indicates the inland range of the murrelet from the Pacific Ocean is delimited by the hemlock/tanoak habitat zone, rather than specific distance from the coast. Accordingly, we are revising the designation of critical habitat for the marbled murrelet from the 1996 critical habitat designation (61 FR 26254; May 24, 1996) to reflect the removal of approximately 189,700 ac (76,700 ha) of area from critical habitat designation in 8 units in southern Oregon and northern California. The critical habitat units affected by the revision are depicted in Table 1 and Table 2. The remaining critical habitat units that were designated in the May 24, 1996, final rule are not affected by this revision. Approximately 3,698,100 ac (1,497,000 ha) of critical habitat is now designated for the marbled murrelet.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection;

and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even

in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time of listing must contain the physical or biological features which are essential to the conservation of the species and which may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat), focusing on the principal biological or physical constituent elements (primary constituent elements, or PCEs) within an area that are essential to the conservation of the species (such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type). PCEs are the elements of physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential for the conservation of the species.

Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its

range would be inadequate to ensure the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States

and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. Substantive comments received in response to proposed critical habitat designations are also considered. A five-year review summarizing the biological, ecological, and population information on the marbled murrelet was completed on June 12, 2009 (Service 2009). That report also evaluated current threats and how they may have changed since the species was listed. This information was considered in the completion of this revised designation, as was information from the 12-month Finding on a Petition to Remove the Marbled Murrelet from the List of Endangered and Threatened Wildlife (75 FR 3424; January 21, 2010). We also reviewed the scientific data and other information used to finalize the 1996 critical habitat designation, which included research published in peer-reviewed articles, agency reports, unpublished data, and various Geographic Information System (GIS) data layers (e.g., land cover type information, land ownership information, topographic information). We reviewed the conservation needs of the marbled murrelet described in the recovery plan (Service 1997), and considered new scientific information and data available from State, Federal, and tribal agencies, as well as academia and private organizations.

Habitat is dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery

of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to designate as critical habitat, we consider those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological

requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific elements of physical or biological features required for the marbled murrelet from its biological needs as described in the "Background" section of the final rule designating critical habitat for the marbled murrelet. The PCEs identified in the May 24, 1996, final critical habitat designation (61 FR 26254) have not been revised and remain applicable to this final revision of critical habitat for the marbled murrelet.

Criteria Used To Identify Critical Habitat

The criteria used to identify critical habitat areas described in the May 24, 1996, **Federal Register** remain applicable to this final revision of critical habitat for the marbled murrelet. These include suitable nesting habitat, information on presence/absence and occupancy, proximity to marine foraging habitat, large contiguous blocks of nesting habitat, rangewide distribution, and adequacy of existing protection and management (61 FR 26265).

Final Revised Critical Habitat Designation

In our 1996 designation of marbled murrelet critical habitat, we considered several factors in determining whether particular units met the definition of critical habitat, including available survey data, the proximity to marine foraging habitat, and the presence of large contiguous blocks of suitable nesting habitat. The physical or biological features associated with marbled murrelet critical habitat focused on individual trees with potential nesting platforms, and forested areas within 0.8 kilometers (0.5 miles) of individual trees with potential nesting platforms that had a canopy height of at least one-half the site potential tree height (SPTH) (the average maximum height for trees given local growing conditions). We determined that these features were essential because they provided suitable nesting habitat for successful reproduction. On a landscape basis, we believed that forests with canopy height of at least one-half the SPTH were more likely to be occupied, and hence were more likely to contribute to the conservation of the marbled murrelet (61 FR 26264; May 24, 1996).

For the 1996 critical habitat designation, we used survey results (including those showing the lack of detections) as indicators of the presence or absence of marbled murrelets in specific areas. However, survey efforts were minimal in many areas, coverage of areas surveyed was discontinuous, and information was of limited use in designating critical habitat in some portions of the range (61 FR 26274; May 24, 1996). The original delineation of zone 2 was based on relatively few far-inland marbled murrelet records, and considered the lack of comprehensive inland surveys throughout its range. Because of this paucity of survey data, the actual inland range and distribution of this species were unknown (Hunter et al. 1998, p. 93). We stated in the 1996 final rule

that we would continue to monitor and collect new information, and may revise the critical habitat designation in the future if new information supports a change (61 FR 26272; May 24, 1996).

We have reassessed the 1996 critical habitat designation in southern Oregon and northern California, after considering the results of extensive surveys in these areas. Although the best available information in 1996 indicated a high probability of occupancy after applying the critical habitat methodology, new information collected from site-specific surveys has since confirmed that marbled murrelets do not use these areas. Recovery task 4.1.4 in the 1997 Marbled Murrelet Recovery Plan recommends that a definition of suitable marbled murrelet habitat be developed for each conservation zone to determine and map appropriate areas for marbled murrelet recovery with greater accuracy (Service 1997, p. 149), and task 4.1.6 recommends intensive surveys to identify nesting areas and delineate the inland boundary of murrelet nesting habitat (Service 1997, p. 150). Intensive surveys that have been conducted since 1997 have given us a more comprehensive understanding of the species biological needs, and the specific areas that are essential for the recovery of the species. Those are the areas that should be the focus of collective recovery efforts, rather than areas that may experience infrequent or occasional use at low levels.

Accordingly, we have determined that the areas being removed are not essential to the conservation of the species and do not meet the definition of critical habitat. Zone 2 includes areas from 35 mi (56.3 km) to 50 mi (80.5 km) from marine environments,

depending on geographic location (Thomas 1993 (FEMAT), p. IV–24). In zone 2 in northern California and southern Oregon, 189,671 ac (76,757 ha) are being removed where extensive surveys have demonstrated marbled murrelets are very unlikely to be found (Hunter et al. 1997, pp. 16–25; Schmidt et al. 2000, pp. 16–22). Both of these studies acknowledge that it is possible that marbled murrelets may occasionally use some portion of the study areas; however, if the species does occur, the number of individuals is probably very low. Accordingly, the habitat in these areas does not contain elements of the physical or biological features in an appropriate quantity and spatial arrangement that are essential for the conservation of the species.

We are, therefore, revising the 1996 final designation of critical habitat for the marbled murrelet to reflect the removal of three critical habitat units (CA–10–a, CA–11–c, and CA–11–d) and the revision of five critical habitat units (CA–01–d, CA–01–e, CA–11–b, OR–07–d, and OR–07–f) in northern California and southern Oregon. No other critical habitat units designated in the May 24, 1996, final rule are affected by this revision. Each of the designated areas are within the geographical area occupied by the species at the time of listing, contain the physical or biological features essential to the conservation of the species, and may require special management considerations or protection.

The critical habitat areas described below reflect the best available scientific information regarding areas that no longer meet the definition of critical habitat for the marbled murrelet in Zone 2, because they are not essential to the conservation of the

species.

TABLE 1.—Critical habitat for the marbled murrelet designated in 1996 and removed in 2011 by State.

State	Areas Removed from Designated Critical Habitat	
	Acres	**Hectares**
California	143,487	58,068
Oregon	46,184	18,690
Washington	0	0
TOTAL	189,671	76,758

TABLE 2.—Critical habitat for the marbled murrelet designated in 1996 and removed in 2011 by unit and ownership.

Critical Habitat Unit	Ownership	Acres Removed	Hectares Removed
CA–01–d	USFS	19,363	7,836
CA–01–e	USFS	28,168	11,400
CA–10–a	USFS	35,935	14,543
CA–11–b	USFS	8,540	3,456
CA–11–c	BLM	2,644	1,070
CA–11–d	USFS	61,558	24,912
OR–07–d	USFS	26,528	10,736
OR–07–f	BLM	2,109	853
OR–07–f	USFS	4,825	1,953
OR–07–f	State[1]	1	<1
	TOTALS	189,671	76,758

[1]Small linear strip through BLM lands.

California: The units or portions thereof that are not essential to the conservation of the marbled murrelet (i.e., they no longer meet the definition of critical habitat) include CA–01–d (portion), CA–01–e (portion), CA–10–a (entire), CA–11–b (portion), CA–11–c (entire), and CA–11–d (entire).

Oregon: The units or portions thereof that are not essential to the conservation of the marbled murrelet (i.e., they no longer meet the definition of critical habitat), where they

extend into Oregon include CA–01–e (entire), CA–10–a (entire), OR–07–d (portion), and OR–07–f (portion).

Washington: No revisions to the 1996 critical habitat designation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the Fifth and Ninth Circuit Courts of Appeals have invalidated our regulatory definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service, 378 F.3d* 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action

is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq*.) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's

discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the Adverse Modification Standards

The analytical framework described in the Director's December 9, 2004, memorandum regarding application of the "destruction or adverse modification" standard is used to complete section 7(a)(2) analysis for Federal actions affecting marbled murrelet critical habitat. The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species or retain those PCEs that relate to the ability of the area to support the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the marbled murrelet.

Generally, the conservation role of marbled murrelet critical habitat units is to support nesting, roosting, and other normal behaviors (61 FR 26256). To recover the species, it is also necessary to produce and maintain viable marbled murrelet populations that are well distributed throughout the respective Conservation Zones (Service 1997 p.

116). The range of the marbled murrelet has been subdivided by the Recovery Plan into six Marbled Murrelet Conservation Zones (Service 1997, pp. 125–130), based on the need for potentially different recovery actions in various portions of the marbled murrelet's range, and the need to maintain well-distributed populations. These zones include Puget Sound (Zone 1), Western Washington Coast Range (Zone 2), Oregon Coast Range (Zone 3), Siskiyou Coast Range (Zone 4), Mendocino (Zone 5), and the Santa Cruz Mountains (Zone 6). Marbled murrelets within the conservation zones are likely to interact across zone boundaries at some level.

Specific goals are described in the Recovery Plan, but generally include maintaining occupied sites and suitable nesting habitat for marbled murrelets. Because it will take 50 or more years to develop new nesting habitat, the short-term focus is on retaining and/or increasing terrestrial habitat (Service 1997 p. vi). For a wide-ranging species such as the marbled murrelet, where multiple critical habitat units are designated, each unit has a Conservation Zone role and range-wide role in contributing to the conservation of the species. The basis for an adverse modification opinion would be whether a proposed action appreciably reduces the ability of critical habitat to remain functional to serve its identified conservation role at the Conservation Zone and range-wide levels. In evaluating the effect of a proposed action, the Service will analyze the impacts to individual units in light of their overall contribution to the conservation of murrelets in the conservation zone described previously, and the overall range of the marbled murrelet in Washington, Oregon, and California. Thus, an adverse modification determination would be based upon a broader inquiry than an assessment of adverse

effects at the local unit level.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the marbled murrelet. These activities include, but are not limited to: (1) forest management activities that greatly reduce stand canopy closure, appreciably alter the stand structure or reduce the availability of nesting sites; (2) land disturbance activities such as mining, sand and gravel extraction, construction of hydroelectric facilities and road building; and (3) harvest of certain types of commercial forest products (e.g. moss).

These activities may have the following effects on marbled murrelet critical habitat:

(1) Removal or degradation of individual trees with potential nesting platforms, or the nest platforms themselves, that results in a significant decrease in the value of the trees for future nesting use. Moss may be an important component of nesting platforms in some areas.

(2) Removal or degradation of trees adjacent to trees with potential nesting platforms that provide habitat elements essential to the suitability of the potential nest tree or platform, such as trees providing cover from weather or predators.

(3) Removal or degradation of forested areas with a canopy height of at least one-half the site-potential tree height and, regardless of contiguity, within 0.8 km (0.5 mi) of individual trees containing potential nest platforms. This includes removal or degradation of trees currently unsuitable for nesting that contribute to the structure/integrity of the potential nest area (i.e., trees that contribute to the canopy of the forested area). These trees provide the canopy, stand conditions, and protection from predators important for marbled murrelet nesting.

For a proposed action to result in destruction or adverse modification of critical habitat, it must affect the designated critical habitat to an extent that the affected unit(s) no longer serves its intended conservation role for the species or no longer retains its current ability for the PCEs to support the species. Proposed actions requiring a section 7 consultation must be evaluated individually, in light of the baseline condition of the critical habitat unit and Conservation Zone, unique history of the area, and effect of the impact on the critical habitat unit relative to its regional and range-wide role in the conservation of the species.

All of the units designated as critical habitat contain physical or biological features essential to the conservation of the marbled murrelet. All units are within the

geographic range of the species, were occupied or were likely to have been occupied by the species at the time of listing, and are likely used by the marbled murrelet. Federal agencies already consult with us on activities in areas occupied by the marbled murrelet or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of the marbled murrelet.

Activities that have little to no effect to one critical habitat unit or Conservation Zone may result in serious effects in another, due to differences in existing conditions and the conservation function of critical habitat. Therefore, the Service cannot provide a detailed description of the threshold for future actions that would result in the destruction or adverse modification of critical habitat that would be applicable throughout the range of the designated critical habitat in this final rule.

Actions that impact forest stands that are not within 0.5 mile (0.8 km) of individual trees with potential nesting platforms would probably not adversely modify critical habitat, even if they occur within the boundaries of the area designated as critical habitat. Activities that do not affect the PCEs or the ability for the PCEs to support the species are unlikely to be affected by the designation. However, even though an action may not adversely affect or modify critical habitat, it may still affect marbled murrelets (e.g., through disturbance) and may, therefore, still be subject to consultation under section 7 of the Act.

Activities conducted according to the standards and guidelines for LSRs, as

described in the Record of Decision for the Northwest Forest Plan, would be unlikely to result in the destruction or adverse modification of marbled murrelet critical habitat. Activities in these areas would be limited to manipulation of young forest stands that are not currently marbled murrelet nesting habitat. These forest management activities would be conducted in a manner that would not slow the development of these areas into future nesting habitat, and should speed the development of some characteristics of older forest.

If you have questions regarding whether specific activities may constitute destruction or adverse modification of critical habitat, contact a Field Supervisor listed under **FOR FURTHER INFORMATION CONTACT**.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws. The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

Although we did receive comments from the U.S. Navy related to their INRMP at Naval Radio Station Jim Creek in Washington, we are unaware of any lands owned or managed by the DOD within the specific areas that were being considered for removal

from the 1996 critical habitat designation, as identified in the proposed rule (73 FR 44678; July 31, 2008). Therefore, this final rule will not have any effect on DOD lands subject to section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific and commercial data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. However, since this action involves removing critical habitat from the existing designation, rather than designating critical habitat in new areas, section 4(b)(2) of the Act is not applicable, given the narrow scope of the action described in the proposed rule.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order (E.O.) 12866. OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.*)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq*.), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility

analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Regulatory Enforcement Fairness Act amended the Regulatory Flexibility Act to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

This revision will result in an approximate 189,671-acre (76,757-ha) reduction in the critical habitat acreage designated in the May 24, 1996, final rule (61 FR 26256). No additional critical habitat is being designated by this revision, and the areas being removed from the 1996 critical habitat designation occur exclusively on Federal lands (with the exception of an approximate one-acre linear strip of State land within CHU OR-07-f). Accordingly, we are certifying that the revised designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.*)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq*.), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that would impose an enforceable duty upon State, local, or Tribal governments with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments lack authority to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect

is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor does critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(2) This revision results in an approximate 189,671-ac (76,757-ha) reduction in the critical habitat acreage that was designated in the May 24, 1996, final rule (61 FR 26256). With the exception of a small linear strip of State-owned land in Unit OR-07-f, all of the acres being removed from the 1996 designation are on Federal lands. Accordingly, we do not believe that this rule will significantly or uniquely affect small governments because small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. This revision would remove a portion of the designated critical habitat, removing the need to consult on effects to critical habitat for those removed areas. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of this revised designation of critical habitat for the marbled murrelet in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this revised designation of critical habitat for the marbled murrelet does not pose additional takings implications for lands within or affected by the original 1996 designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this final revised critical habitat designation with appropriate State resource agencies in California, Oregon, and Washington. During the public comment periods, we did not receive any comments from any State agency (see **Summary of Comments and Recommendations** section). We believe that the revised designation of critical habitat for the marbled murrelet will have

little incremental impact on State and local governments and their activities, since the removal of approximately 189,671 ac (76,757 ha) of currently designated critical habitat would impose no additional restrictions beyond any that may already be in place.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are revising the critical habitat designation in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the elements of physical or biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of the marbled murrelet.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.*)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

This revision will result in an approximate 189,671-ac (76,757-ha) reduction in the critical habitat acreage that was designated in the May 24, 1996, final rule (61 FR 26256). None of the areas being removed are on tribal lands, and we did not receive any comments from tribal entities in response to the proposed rule.

National Environmental Policy Act (42 U.S.C. 4321 et seq.*)*

It is our position that, outside the jurisdiction of the United States Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as

defined by the National Environmental Policy Act (42 U.S.C. 4321 *et seq*.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the United States Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared to not taking the regulatory action under consideration. We do not expect this final rule to significantly affect energy supplies, distribution, or use, since it would involve removing approximately 189,700 ac (76,700 ha) of critical habitat from the existing critical habitat designation. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this rulemaking is available online at *http://www.fws.gov/wafwo/* or upon request from the Manager, Washington Fish and

Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are staff from the Pacific Region Ecological Services Offices.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17–[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h), by revising the entry for “Murrelet, marbled” under “BIRDS” in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						

* * * * * * *

BIRDS

* * * * * * *

Murrelet, marbled	Brachyramphus marmoratus	U.S.A. (AK, CA, OR, WA), Canada (B.C.)	U.S.A. (CA, OR, WA)	T	479	17.95(b)	NA

* * * * * * *

3. In § 17.95(b), amend the entry for "Marbled Murrelet" as follows:

a. Revise the heading to read as set forth below;

b. Revise paragraph 3 to read as set forth below;

c. Remove the index map for Oregon ("General configuration of final critical habitat in Oregon") and replace it with the map titled "Critical Habitat for the Marbled Murrelet *(Brachyramphus marmoratus)* in Oregon", as set forth below;

d. Remove the index map for California ("General configuration of final critical habitat in California") and replace it with the map titled "Critical Habitat for the Marbled Murrelet *(Brachyramphus marmoratus)* in California", as set forth below;

e. Remove the critical habitat description and map for Unit OR–07–d and add in its place new text and a new map for Unit OR–07–d as set forth below;

f. Remove the critical habitat description and map for Unit OR–07–f and add in its place new text and a new map for Unit OR–07–f as set forth below;

g. Remove the critical habitat description and map for Unit CA–01–d and add in its place new text and a new map for Unit CA–01–d as set forth below;

h. Remove the critical habitat description and map for Unit CA–01–e and add in its place new text and a new map for Unit CA–01–e as set forth below;

i. Remove the critical habitat description and map for Unit CA–10–a;

j. Remove the critical habitat description and map for Unit CA–11–b and add in its place new text and a new map for Unit CA–11–b as set forth below;

k. Remove the critical habitat description and map for Unit CA–11–c; and

l. Remove the critical habitat description and map for Unit CA–11–d.

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds*.

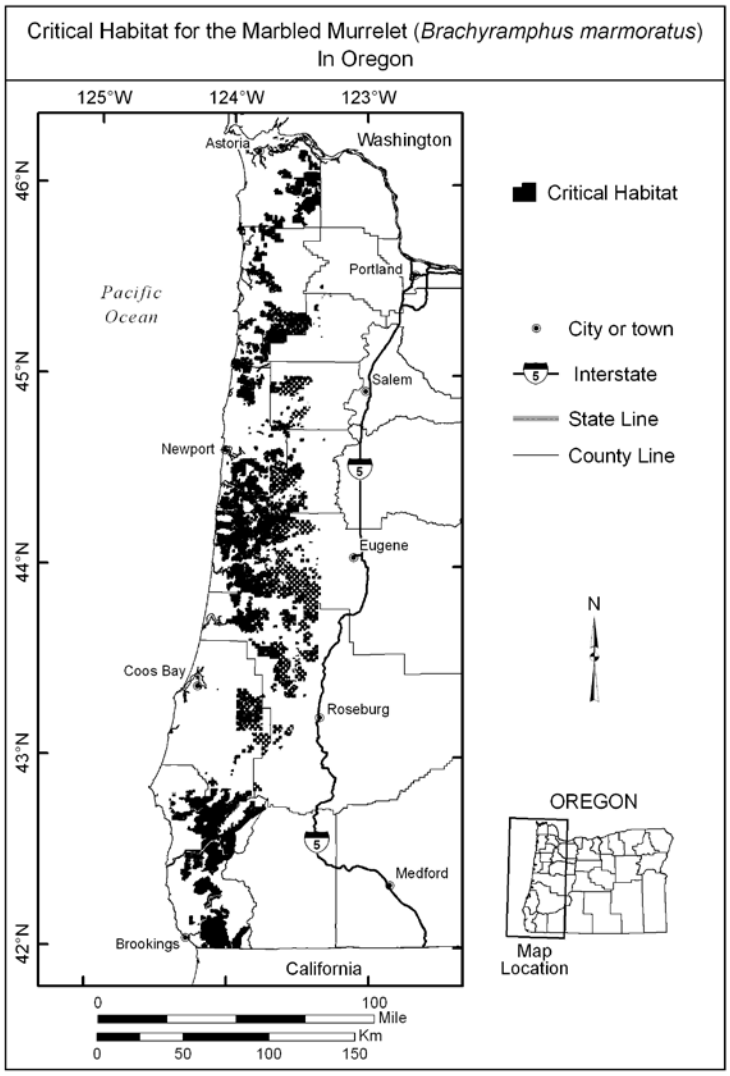
* * * * *

Marbled Murrelet (*Brachyramphus marmoratus*)

* * * * *

3. A description of the critical habitat units follows. Where a critical habitat unit includes Federal lands within the boundaries of a Late Successional Reserve (LSR) established by the Northwest Forest Plan, the areas included within the LSR boundaries as they existed on May 24, 1996, remain designated as critical habitat. Critical habitat units do not include non-Federal lands covered by a legally operative incidental take permit for marbled murrelets issued under section 10(a) of the Act.

* * * * *


Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
In Oregon
125°W
124°W
123°W
46°N
45°N
44°N
43°N
42°N
Astoria
Washington
Portland
Pacific
Ocean
Salem
Newport
Eugene
Coos Bay
Roseburg
Medford
Brookings
California
Critical Habitat
City or town
Interstate
State Line
County Line
N
OREGON
Map
Location
0
100
Mile
0
50
100
150
Km

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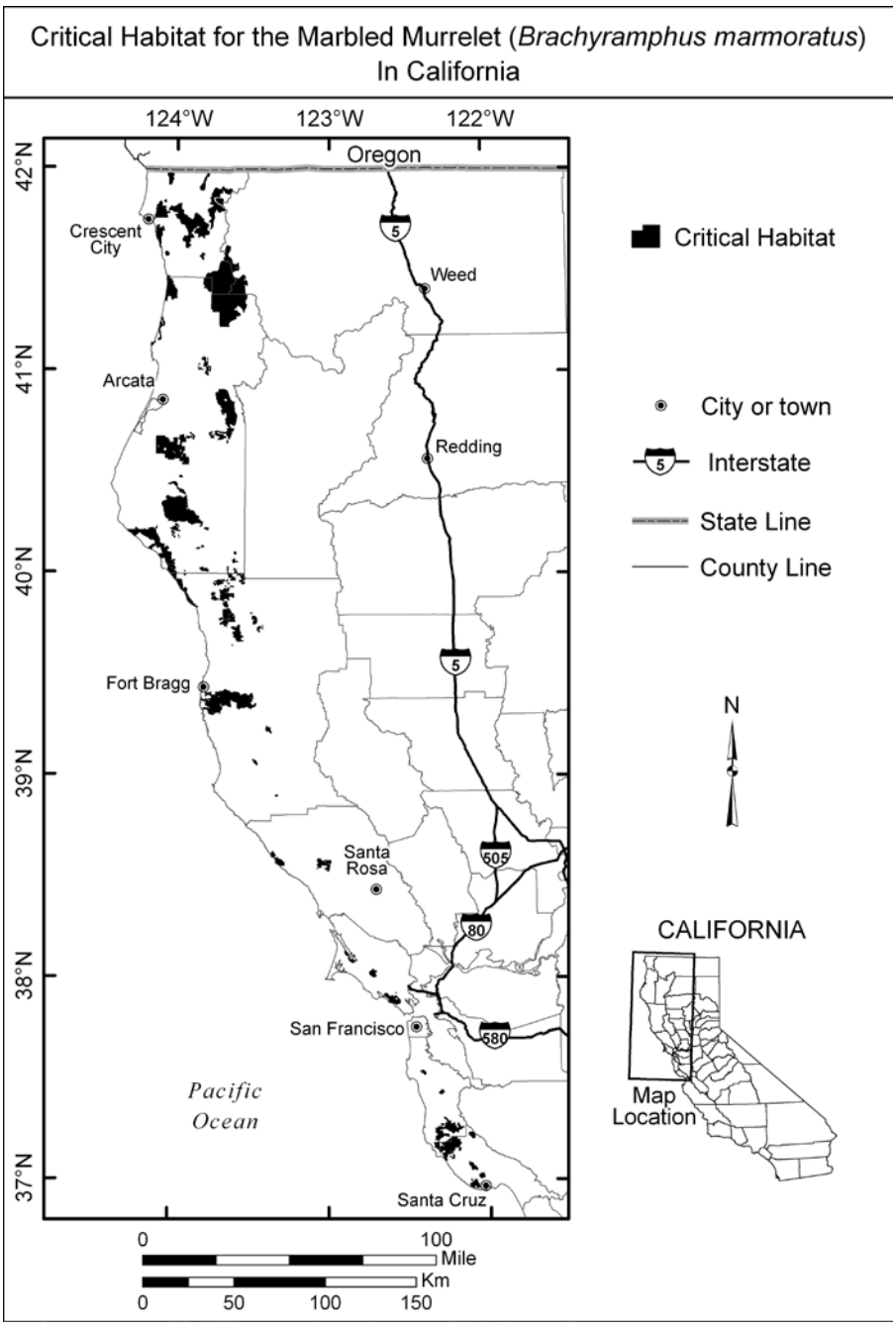

Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
In California
124°W
123°W
122°W
42°N
41°N
40°N
39°N
38°N
37°N
Oregon
Crescent City
Weed
Arcata
Redding
Fort Bragg
Santa Rosa
San Francisco
Santa Cruz
Pacific Ocean
5
505
80
580
Critical Habitat
City or town
Interstate
State Line
County Line
N
CALIFORNIA
Map Location
0
100
Mile
Km
0
50
100
150

* * * * *

Unit OR–07–d: Curry and Josephine Counties, Oregon. From United States Fish and Wildlife Service 1:100,000 map; Gold Beach and Grants Pass, Oregon; 1995.

Critical habitat includes only Federal lands designated as Late Successional Reserves described within the following areas:

T.38S., R.11W. Willamette Meridian: S 1/2 SE 1/4, NE 1/4 SE 1/4, SE 1/4 NE 1/4 Section 31.

T.39S., R.11W. Willamette Meridian: SW 1/4, SW 1/4 SE 1/4 Section 4; S 1/2, 1/2 NW 1/4 Section 5; E 1/2, E 1/2 W 1/2 Section 6; Section 7 except NW 1/4 NW 1/4; Section 8 except SW 1/4 SW 1/4; Section 9; W 1/2 W 1/2, E 1/2 SW 1/4 Section 10; NW 1/4, SW 1/4 SW 1/4 Section 15; Section 16 except NW 1/4 SW 1/4, SW 1/4 NW 1/4; N 1/2 NE 1/4, SE 1/4 SW 1/4, S 1/2 SE 1/4 Section 17; Section 18 except N 1/2 NE 1/4; Sections 19-20; Section 21 except SE 1/4 SE 1/4; W 1/2 NW 1/4 Section 22; NW 1/4 NW 1/4, W 1/2 SW 1/4, SE 1/4 SW 1/4, SW 1/4 SE 1/4 Section 29; Sections 30-32; SW 1/4, S 1/2 NW 1/4, W 1/2 SE 1/4 Section 33.

T.39S., R.12W. Willamette Meridian: S 1/2 S 1/2 Section 1; S 1/2 S 1/2, N 1/2 SE 1/4 Section 2; S 1/2 Section 3; Section 10 except SE 1/4 SE 1/4; Section 11 except S 1/2 SW 1/4; Section 12; Section 13 except SW 1/4, SW 1/4 NW 1/4; NE 1/4 NE 1/4 Section 14; W 1/2, W 1/2 E 1/2, E 1/2 SE 1/4 Section 19; S 1/2, E 1/2 NE 1/4 Section 20; Section 21; S 1/2 S 1/2, NW 1/4 SW 1/4, W 1/2 NW 1/4, NE 1/4 SE 1/4 Section 22; S 1/2, S 1/2 N 1/2 Section 23; Sections 24-36.

T.39S., R.13W. Willamette Meridian: Section 33.

T.40S., R.10W. Willamette Meridian: SE 1/4, S 1/2 SW 1/4, E 1/2 NE 1/4 Section 2; S 1/2 SW 1/4 Section 3; SE 1/4 SE 1/4 Section 4; SE 1/4, S 1/2 NE 1/4 Section 8; Section 9 except N 1/2 NW 1/4; Section 10; Section 11 except E 1/2 NW 1/4, NE 1/4 SE 1/4, S 1/2 SE 1/4; NW 1/4 NW 1/4 Section 14; Section 15except SE 1/4 SE 1/4; Section 16; Section 17 except N 1/2 NW 1/4, SW 1/4 NW 1/4; Section 19 except NW 1/4, NW 1/4 SW 1/4, NW 1/4 NE 1/4; Section 20; Section 21except SE 1/4 SE 1/4; N 1/2 NW 1/4, SW 1/4 NW 1/4 Section 22; N 1/2 NW 1/4, SW 1/4 NW 1/4 Section 28; Section 29; Sections 30-31; Section 32 except SE 1/4 SE 1/4.

T.40S., R.11W. Willamette Meridian: N 1/2 NW 1/4, SW 1/4 NW 1/4, NW 1/4 NE 1/4 Section 4; Sections 5-8; W 1/2 NW 1/4, S 1/2 SE 1/4, SW 1/4 Section 9; Section 16 except E 1/2 E 1/2; Sections 17-21; E 1/2 SE 1/4, SW 1/4 SE 1/4 Section 25; Section 27 except E 1/2, NE 1/4 NW 1/4; Sections 28-33; W 1/2 Section 34; SE 1/4 SE 1/4, SE 1/4 NE 1/4 Section 35; Section 36.

T.40S., R.12W. Willamette Meridian: Sections 1-30; Section 31 except W 1/2 SW 1/4, SW 1/4 NW 1/4; Sections 32-36.

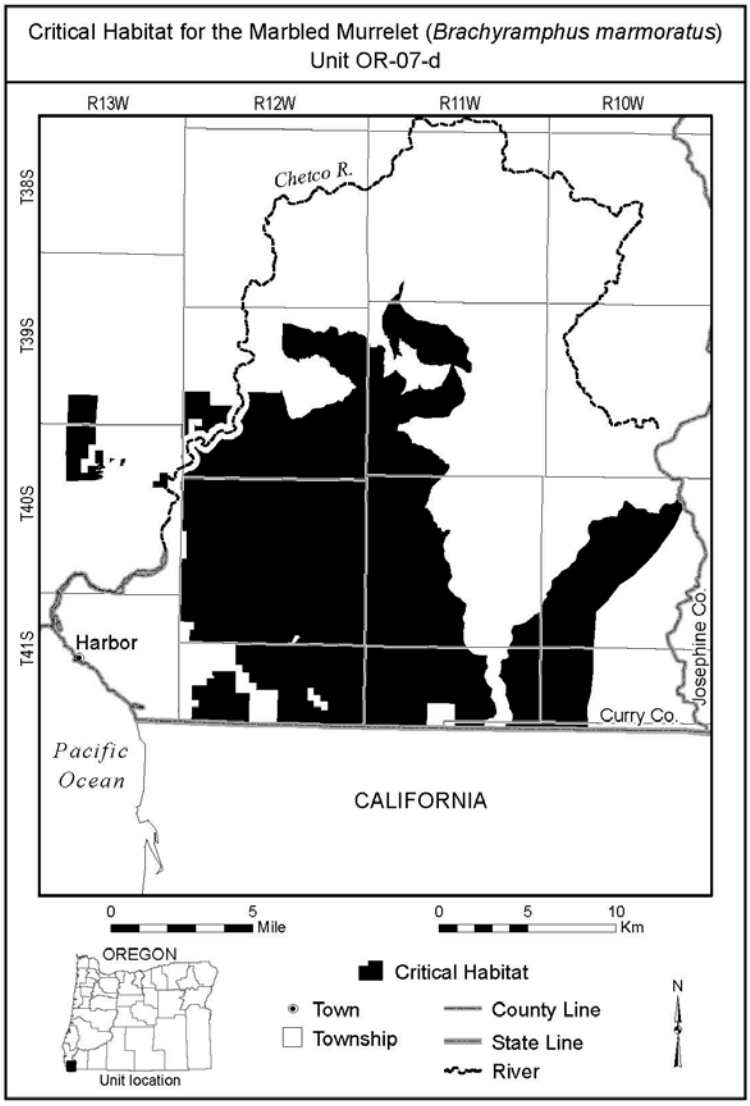
T.40S., R.13W. Willamette Meridian: Section 4 except SE 1/4 SE 1/4; W 1/2, NW 1/4 NE 1/4, S 1/2 SE 1/4, NE 1/4 SE 1/4 Section 9; W 1/2, NE 1/4 Section 10; SE 1/4 SW 1/4 Section 12; N 1/2 NW 1/4 Section 13.

T.41S., R.10W. Willamette Meridian: Section 5 except E 1/2 E 1/2; Sections 6-7; Section 8 except E 1/2 E 1/2; Section 17 except E 1/2 E 1/2; Section 18.

T.41S., R.11W. Willamette Meridian: Section 1; Section 2 except NW 1/4 NE

1/4, NE 1/4 NW 1/4; Sections 3-15; Sections 17-18.

T.41S., R.12W. Willamette Meridian: Sections 1-4; Section 5 except W 1/2, SW 1/4 SE 1/4; Section 7 except NW 1/4, W 1/2 SW 1/4, NW 1/4 NE 1/4; W 1/2, S 1/2 SE 1/4 Section 8; Section 9 except S 1/2 S 1/2, NW 1/4 SW 1/4; Section 10; Section 11 except SE 1/4 SW 1/4, W 1/2 SW 1/4; Sections 12-13; Section 14 except NE 1/4 NW 1/4, NW 1/4 NE 1/4; Section 15; Section 17; Section 18 except W 1/2 W 1/2.


Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
Unit OR-07-d
R13W
R12W
R11W
R10W
T38S
T39S
T40S
T41S
Chetco R.
Harbor
Josephine Co.
Curry Co.
Pacific Ocean
CALIFORNIA
0
5
Mile
0
5
10
Km
OREGON
Unit location
Critical Habitat
Town
Township
County Line
State Line
River
N

* * * * *

Unit OR–07–f: Curry and Josephine Counties, Oregon. From United States Fish and Wildlife Service 1:100,000 map; Port Orford, Canyonville, Gold Beach and Grants Pass, Oregon; 1995.

Critical habitat includes only Federal lands designated as Late Successional Reserves described within the following areas:

T.32S., R.09W. Willamette Meridian: Section 34.

T.32S., R.10W. Willamette Meridian: Section 25; E 1/2, NE 1/4 NW 1/4, SE 1/4 SW 1/4 Section 26; Section 35 except W 1/2 NW 1/4; Section 36 except SE 1/4 SW 1/4, SW 1/4 SE 1/4 .

T.33S., R.09W. Willamette Meridian: NW 1/4 SW 1/4 Section 2; Sections 3-4; Section 5 except SE 1/4 NW 1/4, E 1/2 SW 1/4; Section 6 except SE 1/4; Section 7 except E 1/2 NW 1/4, W 1/2 NE 1/4; Section 8 except NE 1/4 NW 1/4; Section 9 except S 1/2 SE 1/4; NW 1/4 NE 1/4, N 1/2 NW 1/4, SW 1/4 NW 1/4 Section 10; NW 1/4, N 1/2 NE 1/4, SW 1/4 NE 1/4, N 1/2 SW 1/4 Section 17; Section 18; NW 1/4 NE 1/4, N 1/2 NW 1/4, SW 1/4 NW 1/4 Section 19.

T.33S., R.10W. Willamette Meridian: Section 1 except NE 1/4, N 1/2 SW 1/4, S 1/2 NW 1/4; Section 2 except NE 1/4 SE 1/4; Section 3 except NW 1/4, N 1/2 NE 1/4, SW 1/4 SW 1/4, N 1/2 SW 1/4; Section 9 except W 1/2, N 1/2 NE 1/4, SW 1/4 SE 1/4; Section 10; Section 11 except NE 1/4 NW 1/4; Section 12 except NW 1/4, SE 1/4 NE 1/4; Sections 13-14; Section 15 except W 1/2 SW 1/4; Section 21 except W 1/2; Sections

22-23; Section 24 except S 1/2 SE 1/4, SE 1/4 SW 1/4; Section 26 except SE 1/4, E 1/2 NE 1/4, SE 1/4 SW 1/4; Section 27; Section 28 except N 1/2 NW 1/4; Section 29 except NW 1/4 SW 1/4; SE 1/4 SE 1/4 Section 30; Section 31 except W 1/2, W 1/2 SE 1/4; Sections 32-33;Section 34 except SE 1/4, SE 1/4 NE 1/4, SE 1/4 SW 1/4.

T.34S., R.10W. Willamette Meridian: NW 1/4, NW 1/4 NE 1/4, NW 1/4 SW 1/4 Section 4; Section 5; Section 6 except NW 1/4 NE 1/4, N 1/2 NW 1/4, SW 1/4 NW 1/4; Section 7; NW 1/4, NW 1/4 NE 1/4, NW 1/4 SW 1/4 Section 8; N1/2 NW 1/4, NW1/4 NE 1/4, SW 1/4 NW 1/4 Section 18.

T.34S., R.10 1/2 W. Willamette Meridian: S 1/2 Section 7; Section 18 except NW 1/4 NW 1/4; Section 19; N1/2 NW 1/4, W 1/2 SW 1/4 Section 30; W 1/2 NW1/4, SW 1/4 Section 31.

T.34S., R.11W. Willamette Meridian: E 1/2 SE 1/4, SE 1/4 NE 1/4 Section 11; Section 12 except E 1/4; Section 13 except NE 1/4; E 1/2 E 1/2, SW 1/4 SW 1/4 Section 14; SE 1/4 SE 1/4 Section 15; Section 21 except N 1/2, E 1/2 SE 1/4, NW 1/4 SW 1/4; Section 22 except NW 1/4, W 1/2 NE 1/4, NW 1/4 SE 1/4, N 1/2 SW 1/4, SW 1/4 SW 1/4; Section 23 except NE 1/4 NW 1/4, NW 1/4 NE 1/4; Sections 24-28; S 1/2 NE 1/4, SE 1/4 Section 31; Section 32 except N 1/2 NW 1/4; Sections 33-36.

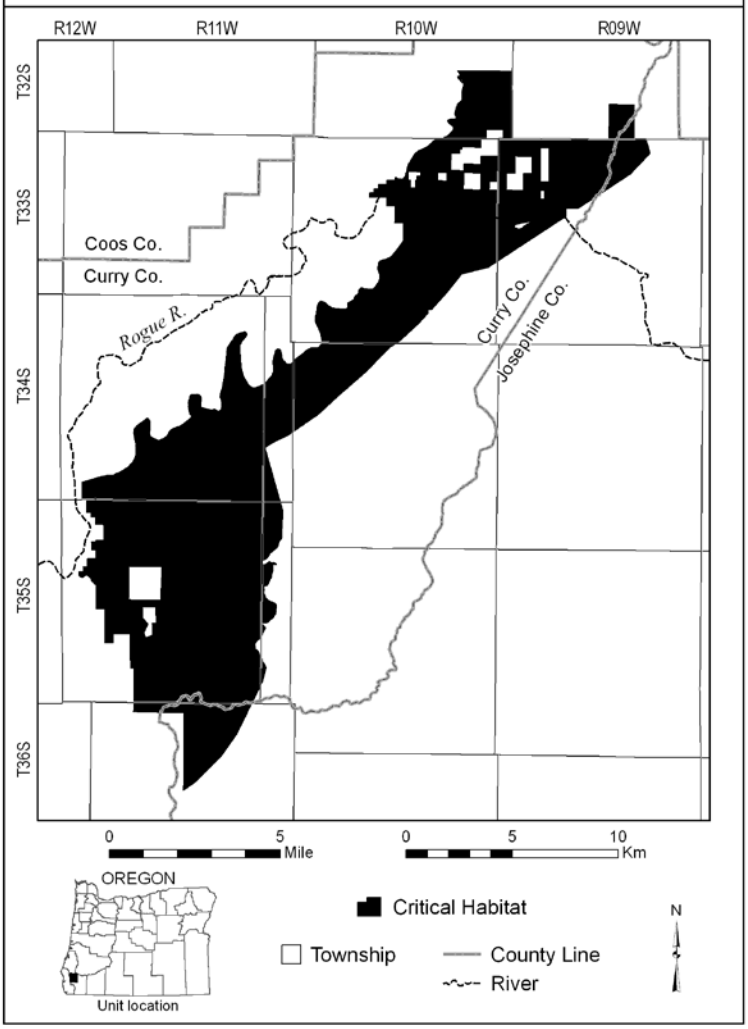
T.35S., R.10 1/2 W. Willamette Meridian: Section 6 except E 1/2 E 1/2; Section 7 except E 1/2 E 1/2, W 1/2 SE 1/4, NE 1/4 SW 1/4; Section 18 except E 1/2, E 1/2 SW 1/4; NW 1/4, W 1/2 SW 1/4, NW 1/4 NE 1/4 Section 19; W 1/2 SW 1/4 Section 30.

T.35S., R.11W. Willamette Meridian: Sections 1-4; Section 5 except SW 1/4 SW 1/4; E 1/2 NE 1/4 Section 6; E 1/2 E 1/2 Section 7; Sections 8-15; Section 17; E 1/2 NE

1/4, NW 1/4 NE 1/4 Section 18; Section 20 except SW 1/4 NW 1/4, W 1/2 SW 1/4; Section 21 except SW 1/4 NE 1/4; Sections 22-28; NE 1/4 NW 1/4, E 1/2 E 1/2 Section 29; Section 33 except W 1/2 SW 1/4; Section 34-36.

T.36S., R.11W. Willamette Meridian: NW 1/4, NW 1/4 NE 1/4, N 1/2 SW 1/4, SW 1/4 SW 1/4 Section 2; Section 3; N 1/2 N 1/2, SE 1/4 NE 1/4, E 1/2 SE 1/4 Section 4; NE 1/4 NW 1/4, N 1/2 NE 1/4 Section 5; E 1/2 E 1/2 Section 9; Section 10 except S 1/2 SE 1/4, NE 1/4 SE 1/4; NW 1/4 NW 1/4 Section 11; NW 1/4 NW 1/4 Section 15; E 1/2 NE 1/4 Section 16.

Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
Unit OR-07-f



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Unit CA–01–d: Siskiyou County, California. From United States Fish and Wildlife Service 1:100,000 map; Happy Camp California; 1995.

Critical habitat includes only Federal lands designated as Late Successional Reserves described within the following areas:

T.18N., R.04E. Humboldt Meridian: SE 1/4 SW 1/4, SW 1/4 SE 1/4 Section 33; E 1/2 SE 1/4 Section 35; SW 1/4, SW 1/4 SE 1/4, S 1/2 NW 1/4 Section 36.

T.18N., R. 05E. Humboldt Meridian: S 1/2 SW 1/4 Section 31.

T.17N., R.03E. Humboldt Meridian: NE 1/4, E 1/2 SE 1/4 Section 24; E 1/2 NE 1/4, SE 1/4, Section 25; N 1/2, E 1/2 SE 1/4 Section 36.

T.17N., R.04E. Humboldt Meridian: Section 1 except SW 1/4, SW 1/4 NW 1/4; Section 2 except NE 1/4 NE 1/4, N 1/2 NW 1/4, E 1/2 SE 1/4; Section 3 except N 1/2 N 1/2; Section 4; SE 1/4 NE 1/4, SE 1/4 Section 5; Section 8 except NW 1/4; Sections 9–10; NE 1/4, NW 1/4, NW 1/4 SW 1/4 Section 11; NE 1/4 Section 12; Sections 16–17; W 1/2, W 1/2 E 1/2 Section 20; SE 1/4, NE 1/4 SW 1/4 Section 21; S 1/2, S 1/2 N 1/2 Section 22; S 1/2, S 1/2 N 1/2 Section 23; W 1/2 SW 1/4 Section 24; W 1/2 NW 1/4, NW 1/4 SW 1/4 Section 25; Section 26; Section 27 except SW 1/4; NE 1/4, SW 1/4, SW 1/4 SE 1/4 Section 28; Section 29 except E 1/2 NE 1/4; SW 1/4, W 1/2 SE 1/4 Section 32; Section 33; N 1/2 NE 1/4, SW 1/4, SE 1/4 Section 34; N 1/2, N 1/2 SE 1/4, SW 1/4 SW 1/4 Section 35.

T.17N., R.05E. Humboldt Meridian: W 1/2 except NE 1/4 NE 1/4 Section 4;

Section 5; Section 6 except NE 1/4 NE 1/4; Sections 7-8; W 1/2 NW 1/4 Section 9.

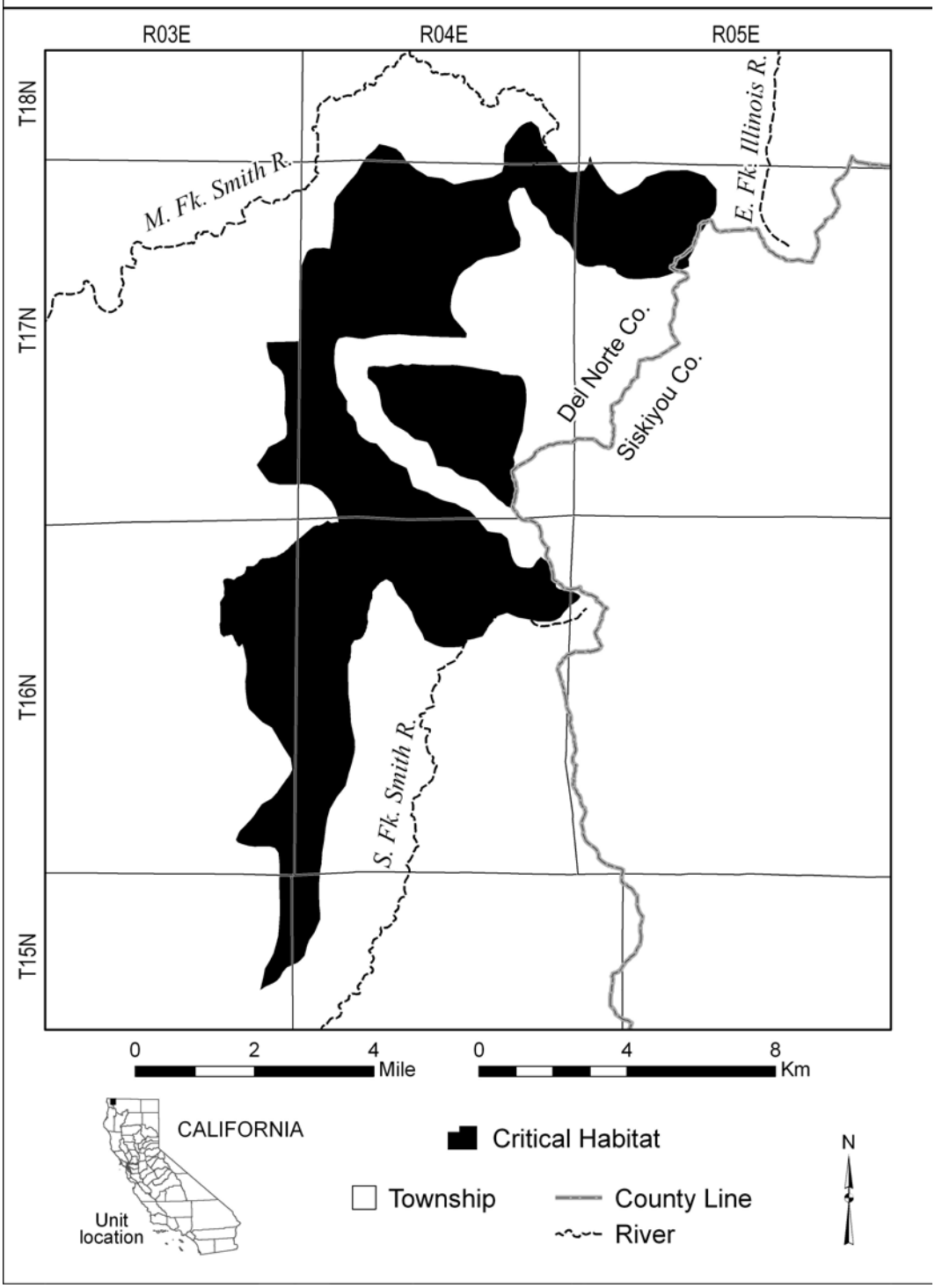
T.16N., R.03E. Humboldt Meridian: S 1/2 SW 1/4, SE 1/4, NE 1/4 SW 1/4 Section 1; E 1/2 E 1/2 Section 11; Section 12; Section 13 except W 1/2 SW 1/4, SW 1/4 NW 1/4; NE 1/4, E 1/2 NW 1/4, E 1/2 SE 1/4 Section 24; SE 1/4, SE 1/4 NE 1/4 Section 25; Section 36 except SW 1/4, NW 1/4 NW 1/4, W 1/2 SE 1/4.

T.16N., R.04E. Humboldt Meridian: S 1/2 SW 1/4, W 1/2 SE 1/4 Section 1; Section 2 except NE 1/4; Sections 3–4; Section 5 except N 1/2 NW 1/4; Section 8; W 1/2 W 1/2, NE 1/4 NE 1/4 Section 9; Section 10 except W 1/2 SW 1/4; Section 11 except SE 1/4, S 1/2 SW 1/4; S 1/2 Section 12; E 1/2 E 1/2 Section 17; E 1/2 E 1/2 Section 20; Section 29 except SE 1/4, E 1/2 NE 1/4; W 1/2 Section 32.

T.15N., R.03E. Humboldt Meridian: E 1/2 E 1/2 Section 1; E 1/2, SE 1/4 Section 12.

T.15N., R.04E. Humboldt Meridian: W 1/2 Section 6; W 1/2 NW 1/4 Section 7.

Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
Unit CA-01-d



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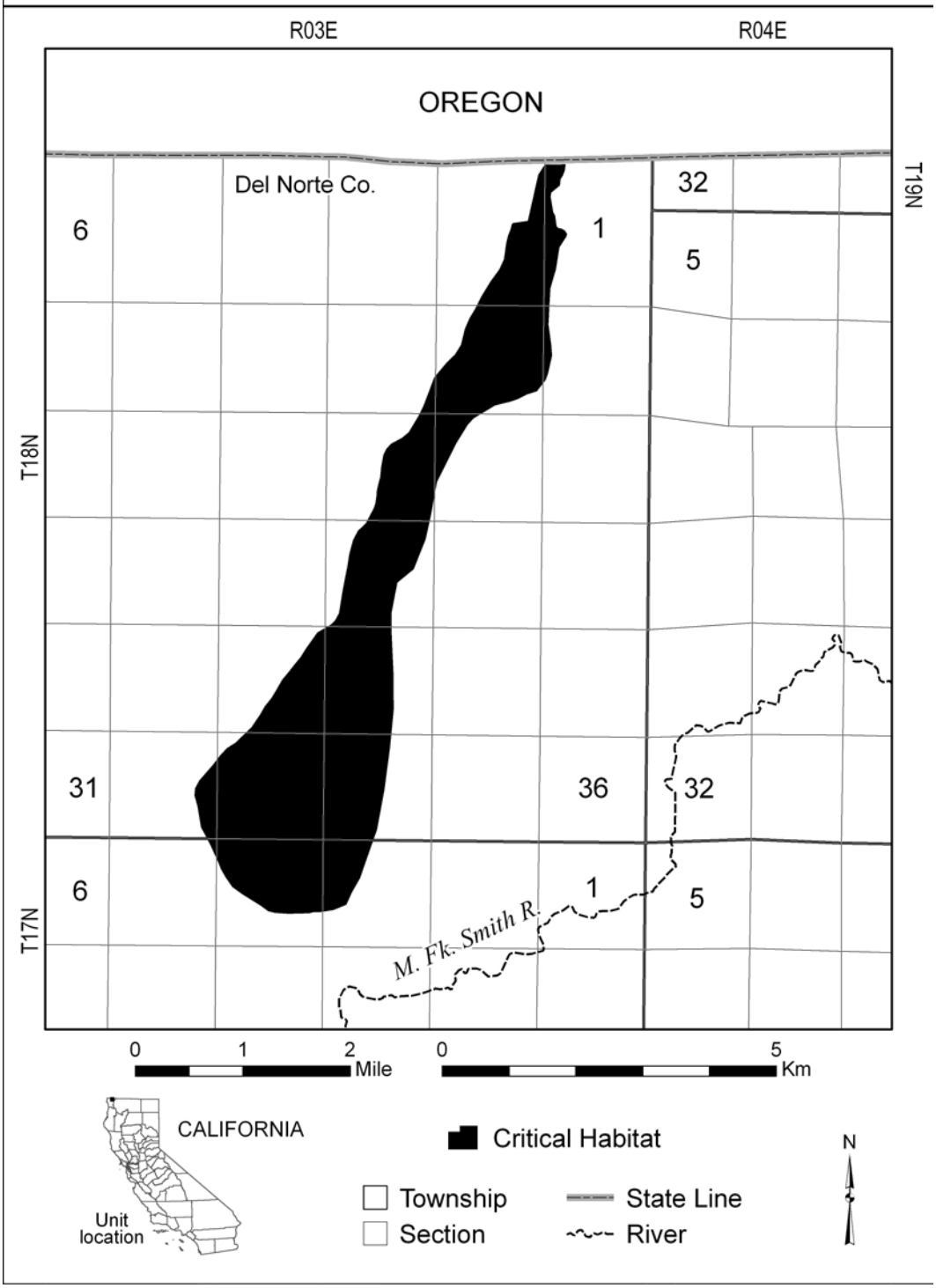
Unit CA–01–e: Del Norte County, California. From United States Fish and Wildlife Service 1:100,000 map; Grants Pass, Oregon; Happy Camp, California; 1995.

Critical habitat includes only Federal lands designated as Late Successional Reserves described within the following areas:

T.18N., R.03E. Humboldt Meridian: W 1/4 Section 1; SE 1/4, E 1/2 NE 1/4, NE 1/4 NE 1/4, SE 1/4 SW 1/4 Section 2; SE 1/4 SE 1/4 Section 10; Section 11 except NW 1/4 NW 1/4; W 1/2 NW 1/4 ; NW 1/4 SW 1/4 Section 12; W 1/2 NW 1/4 Section 14; E 1/2, E 1/2 SW 1/4 Section 15; W 1/2, NW 1/4 SE 1/4, N 1/2 NE 1/4, SW 1/4 NE 1/4 Section 22; W 1/2 Section 27; SE 1/4, S 1/2 NE 1/4, NE 1/4 NE 1/4, E 1/2 SW 1/4 Section 28; E 1/2 SE 1/4, SE 1/4 NE 1/4 Section 32; Section 33; W 1/2 Section 34.

T.17N., R.03E. Humboldt Meridian: NW 1/4, NW 1/4 SW 1/4 Section 3; Section 4 except S 1/2 S 1/2, NW 1/4 SW 1/4; NE 1/4 NE 1/4 Section 5.

Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
Unit CA-01-e



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Unit CA–11–b: Humboldt County, California. From United States Fish and Wildlife Service 1:100,000 map; Hayfork, California; 1995.

Critical habitat includes only Federal lands designated as Late Successional Reserves described within the following areas:

T.03N., R.02E. Humboldt Meridian: SE 1/4 NE 1/4, SW 1/4 NW 1/4, N 1/2 N 1/2 Section 1; NE 1/4, E 1/2 NW 1/4, N 1/2 SE 1/4 Section 2.

T.03N., R.03E. Humboldt Meridian: N 1/2 NE 1/4, SE 1/4 NW 1/4, NE 1/4 SW 1/4, W 1/2 SE 1/4, Section 6.

T.03N., R.04E. Humboldt Meridian: W 1/2 NE 1/4, NW 1/4 Section 1; Section 2 except SE 1/4 SE 1/4; E 1/2 NE 1/4, SE 1/4 SW 1/4, SE 1/4 Section 3; W 1/2 NE 1/4, NW 1/4 Section 5; E 1/2 NE 1/4 Section 6.

T.03N., R.05E. Humboldt Meridian: NE 1/4, N 1/2 SE 1/4 Section 6; SW 1/4 NW 1/4, N 1/2 SW 1/4, SW 1/4 SW 1/4 Section 7; NW 1/4 NW 1/4 Section 18.

T.04N., R.02E. Humboldt Meridian: S 1/2 SE 1/4 Section 25.

T.04N., R.03E. Humboldt Meridian: S 1/2 NW 1/4, NW 1/4 SE 1/4, SE 1/4 SE 1/4 Section 31.

T.04N., R.04E. Humboldt Meridian: NE 1/4 Section 1; E 1/2 E 1/2 Section 12; S 1/2 Section 25; SE 1/4 NW 1/4, NW 1/4 SW 1/4, SE 1/4 Section 26; S 1/2 NE 1/4, NW 1/4, N 1/2 SE 1/4 Section 27; N 1/2, S 1/2 S 1/2, NE 1/4 SW 1/4, NE 1/4 SE 1/4 Section 28; SW 1/4 NW 1/4 Section 29; S 1/2 NE 1/4, SW 1/4, W 1/2 SE 1/4 Section 30; W 1/2

NE 1/4, NW 1/4, N 1/2 SE 1/4, NW 1/4 SW 1/4 Section 31; SE 1/4 NW 1/4, SW 1/4 Section 32; N 1/2 N 1/2, SE 1/4 NE 1/4, SE 1/4 NW 1/4, NE 1/4 SE 1/4 Section 33; Section 34 except N 1/2 NE 1/4, S 1/2 SW 1/4; Section 35 except N 1/2 N 1/2.

T.04N., R.05E. Humboldt Meridian: NW 1/4, W 1/2 SW 1/4, NE 1/4 SW 1/4, Section 3; Sections 4-7; S 1/2 S 1/2 Section 8; Section 9; W 1/2 NW 1/4, NW 1/4 SW 1/4, Section 10; NE 1/4 NW 1/4, NW 1/4 NE 1/4 Section 16; NW 1/4 SW 1/4 Section 17; N 1/2, N 1/2 SE 1/4 Section 18; Section 19 except W 1/2 W 1/2; Section 20; NE 1/4 NW 1/4, SW 1/4 Section 21; NW 1/4 NW 1/4 Section 28; Section 29 except S 1/2 NE 1/4, N 1/2 SE 1/4, SE 1/4 SE 1/4; Section 30; Section 31 except SW 1/4 SW 1/4; NW 1/4, W 1/2 SW 1/4 Section 32.

T.05N., R.04E. Humboldt Meridian: Sections 1–3; E 1/2 NE 1/4 Section 4; NE 1/4, N 1/2 NW 1/4, E 1/2 E 1/2 Section 10; Sections 11–13; Section 14 except SW 1/4, SW 1/4 NW 1/4; Section 23 except W 1/2 SW 1/4, W 1/2 SE 1/4; Section 24; N 1/2 NW 1/4, S 1/2 SE 1/4 Section 25; E 1/2 NW 1/4 Section 26.

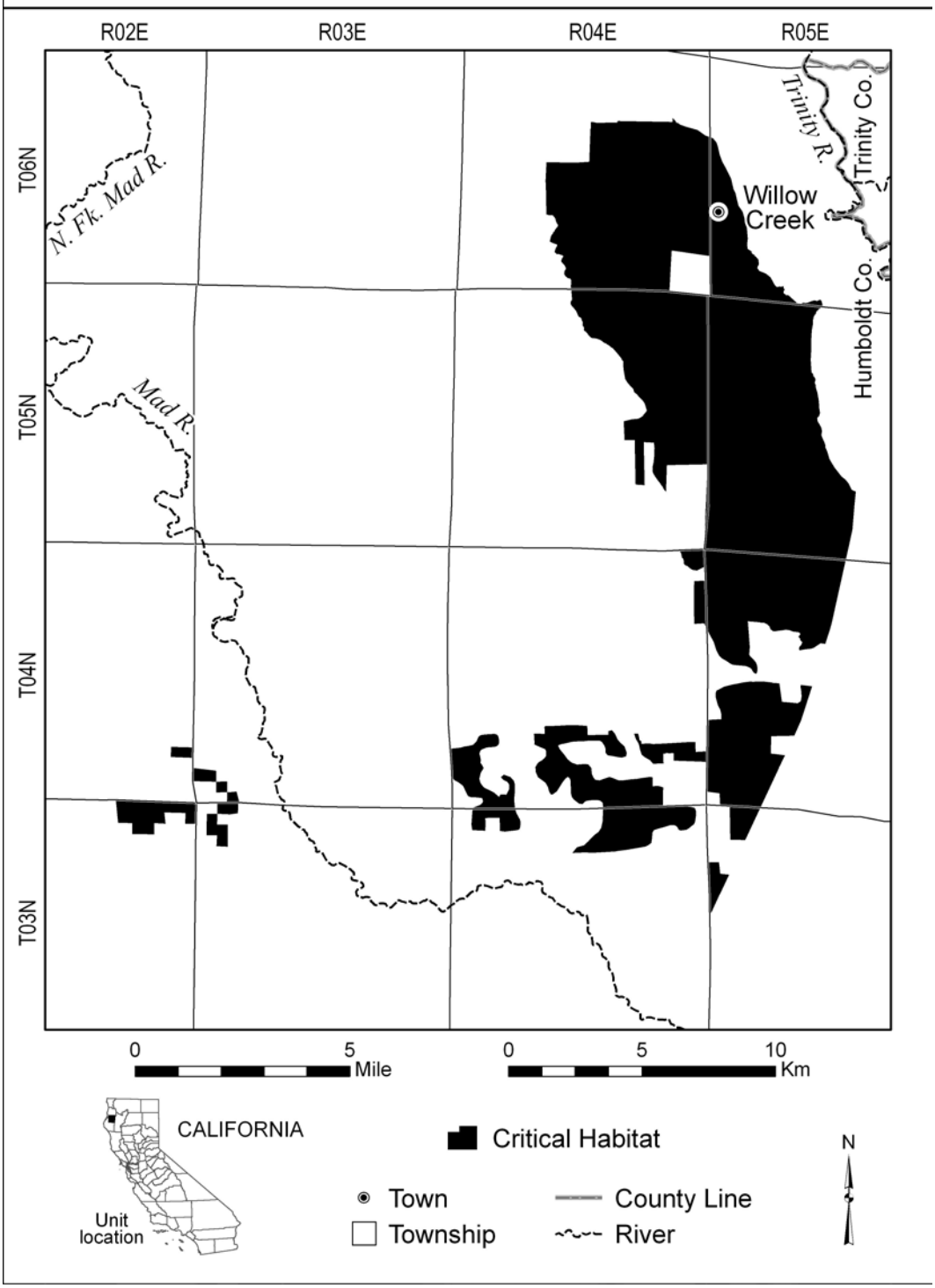
T.05N., R.05E. Humboldt Meridian: Section 4 except E 1/2; Sections 5–8; Section 9 except E 1/2; Section 16 except E 1/2 E 1/2; Sections 17–20; Section 21 except E 1/2 NE 1/4; W 1/2 SW 1/4 Section 22; Section 27, except NE 1/4 NE 1/4, E 1/2 SE 1/4; Sections 28-33; Section 34 except E 1/4.

T.06N., R.04E. Humboldt Meridian: Sections 13–15; Sections 21–27; Section 28 except SW 1/4 NW 1/4, NW 1/4 SW 1/4; Section 33 except W 1/2 NW 1/4, SW 1/4; Sections 34–35.

T.06N., R.05E. Humboldt Meridian: W 1/2, W 1/2 SE 1/4 Section 18; Section 19

except E 1/2 NE 1/4; SW 1/4 SW 1/4 Section 29; Sections 30– 31; Section 32 except NE 1/4, NE 1/4 SE 1/4, NE 1/4 NW 1/4.

Critical Habitat for the Marbled Murrelet (*Brachyramphus marmoratus*)
Unit CA-11-b



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Dated: Sep 20 2011_____

/s/ Rachel Jacobson_____

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310–55–P