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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

CASCADIA WILDLANDS, et al.,

Plaintiffs,

v.

JOHN KITZHABER, et al.,

Defendants,

and

**OREGON FOREST INDUSTRIES
COUNCIL, et al.,**

Defendant- Intervenors.

Case No.: 3:12-cv-00961-AA

**Plaintiffs Cascadia Wildlands, Center for
Biological Diversity, and Audubon Society
of Portland's**

**MOTION FOR A PRELIMINARY
INJUNCTION**

REQUEST FOR ARGUMENT

Plaintiffs hereby respectfully request that the Court issue a Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65 to enjoin eleven timber sales, totaling approximately 840 acres, on the Tillamook and Elliott State Forests, and to enjoin any further logging activities in known occupied marbled murrelet sites on the Tillamook, Clatsop, and Elliott State Forests. Pursuant to Local Rule 7-1(a), counsel for Plaintiffs contacted counsel for Defendants and made good faith attempts to resolve this dispute before filing this motion. As a result of these efforts, Plaintiffs and Defendants were able to reach an agreement that avoided the need for a temporary restraining order in this matter. The agreement is as follows:

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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- a. Defendants agreed to suspend the auction dates of three timber sales – Moon Creek in the Tillamook State Forest, and Mister Millipede and Sullivan Succotash in the Elliott State Forest – until the Preliminary Injunction motion is resolved;
- b. Defendants agreed to suspend logging operations on three timber sales – Double Fish, Millicoma Lookout, and Comados in the Elliott State Forest – until the PI motion is resolved;
- c. Plaintiffs agreed that operations on the South Fork Split timber sale in the Clatsop State Forest and the Flying Fish timber sale in the Elliott State Forest can continue and that neither a temporary restraining order nor a preliminary injunction would be sought for these sales;
- d. Plaintiffs agreed to file their motion for a preliminary injunction by Friday, June 29, 2012; and
- e. The Plaintiffs and Defendants agreed to work toward an efficient and timely resolution of the preliminary injunction motion.

Counsel for Plaintiffs also conferred with counsel for Defendant-Intervenors who oppose this motion.

Plaintiffs move the Court for a preliminary injunction to enjoin the logging of timber sales and the award of timber sale contracts for several timber sales. This case was filed on May 31, 2012 and alleges that Defendants are violating the Endangered Species Act by authorizing logging practices and making forest management decisions that “take” – harm, harass, injure, and kill – seabirds called marbled murrelets that are threatened with extinction under the federal Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). Marbled murrelets rely upon old-growth

and mature forests near the ocean for nesting, and the loss of this habitat is the primary reason for the birds' continued population decline. Plaintiffs respectfully request that the Court enjoin the logging of forest areas that are occupied by marbled murrelets – *i.e.*, areas that the birds are using for nesting, breeding, feeding their young, and sheltering – pending resolution of this case on the merits.

Specifically, Plaintiffs seek an order enjoining the logging of eleven timber sales on Oregon state forest lands: the Moon Creek Timber Sale on the Tillamook State Forest; and the Comados, Double Fish, Leaping Larson, Marlow Millicoma Divide, Millicoma Lookout, Mister Millipede, Otter Pop, Shohorn, Sullivan Succotash, and Three Buck Joe Timber sales on the Elliott State Forest.

Plaintiffs further seek to halt the award of contracts for: the Moon Creek Timber Sale on the Tillamook State Forest; and the Leaping Larson, Marlow Millicoma Divide, Mister Millipede, Otter Pop, Shohorn, Sullivan Succotash, and Three Buck Joe Timber timber sales on the Elliott State Forest.

Plaintiffs also respectfully request that the Court enjoin Defendants from approving or implementing any and all further logging or road building activities in “occupied marbled murrelet habitat,” as explained in the supporting memorandum and as authorized by Defendants’ marbled murrelet “take avoidance” policy.

The questions to be decided by this motion are as follows:

1. Are Plaintiffs likely to succeed on the merits of their claim that Defendants’ authorization of logging in occupied marbled murrelet habitat is harming, harassing, injuring, and/ or killing threatened marbled murrelets in violation of section 9 of the Endangered Species Act?

2. Are Plaintiffs likely to suffer irreparable harm in the absence of preliminary relief?

This motion is supported by a memorandum of points and authorities and the declarations of Dr. Richard Golightly; Nicholas Cady; Curtis Bradley; Francis Eatherington; Margaret Ruby; David Greenwald; and Elizabeth Mitchell and their accompanying exhibits.

Respectfully submitted this 29th day of June, 2012,

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**Plaintiffs Cascadia Wildlands, Center for
Biological Diversity, and Audubon Society
of Portland's**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF THEIR
MOTION FOR A PRELIMINARY
INJUNCTION**

REQUEST FOR ARGUMENT

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INTRODUCTION

Plaintiffs respectfully request that the Court issue a preliminary injunction (PI) enjoining eleven timber sales,¹ totaling approximately 840 acres, on the Tillamook and Elliott State Forests, and enjoining any further logging activities in known occupied marbled murrelet sites² on the Tillamook, Clatsop, and Elliott State Forests. A PI is necessary to prevent irreparable harm to Plaintiffs' interests in marbled murrelets and their unique forest habitat, and to preserve the *status quo* while this case is pending. While Plaintiffs' Complaint alleges several ways in which Defendants are unlawfully causing "take" of murrelets, Plaintiffs have elected, in an attempt to keep this motion as narrowly tailored as possible, to focus their request for preliminary relief on those logging activities that directly destroy or degrade habitat that is known to be occupied by murrelets for nesting, breeding, and sheltering.

The marbled murrelet is a highly imperiled seabird that nests on the thick mossy branches of mature and old-growth trees. 75 Fed. Reg. 3425 (Jan. 21, 2010). Marbled murrelets are listed as a threatened species under the Endangered Species Act ("ESA" or "the Act"), 16 U.S.C. § 1531 *et. seq.*, and continue to experience a significant and rapid population decline, caused primarily by the loss of mature forest habitat used for nesting, breeding, and sheltering. 57 Fed. Reg. 45,328, 45,330 (Oct. 1, 1992). Every year, the number of murrelets in the continental United States drops by an estimated 2.4 to 4.3 percent, which equates to a nineteen to thirty-four percent population decline between 2000 and 2008 alone. 75 Fed. Reg. at 3425. Additionally,

¹ The names of these timber sales, discussed more fully below *infra* at 18-23, are: Moon Creek, Comados, Double Fish, Otter Pop, Leaping Larson, Marlow Millicoma Divide, Millicoma Lookout, Mister Millipede, Shoehorn, Sullivan Succotash, and Three Buck Joe.

² "Occupied site" is defined by the Pacific Seabird Group's "Methods for Surveying Marbled Murrelets in Forests: a Revised Protocol for Land Management and Research." Cady Decl. Ex. 2 at 8 (PSG Protocol).

between 1996 and 2006, Oregon lost approximately 33.4 percent of the remaining marbled murrelet habitat on state and private lands. Cady Decl. Ex. 1 at 2 (Raphael, *et al.*).

Defendants are regularly planning and approving timber sales in occupied marbled murrelet habitat on the Tillamook, Clatsop, and Elliott State Forests, thereby harming, harassing, injuring, and otherwise causing “take” of murrelets in violation of the ESA. Defendants’ actions are significantly disrupting and impairing essential behavioral patterns such as breeding, nesting, feeding, and sheltering, and are likely to cause injury and even death. *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067-68 (9th Cir. 1996). Defendants continue to plan and authorize these actions without a Habitat Conservation Plan and “incidental take permit” pursuant to section 10 of the ESA, 16 U.S.C. § 1539, in violation of federal law. Instead, Defendants rely upon a self-proclaimed “take avoidance” policy that is leading to the take of marbled murrelets.

For the reasons explained below, Plaintiffs are likely to succeed on the merits of their claim that Defendants are unlawfully “taking” marbled murrelets, and Plaintiffs will suffer irreparable harm in the absence of preliminary relief. Having made these showings, and as this case involves harm to a threatened species under the ESA, the balance of equities and the public interest both favor issuance of an injunction. *Wash. Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005). The motion for preliminary injunction should be granted.

I. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION

Typically, a plaintiff seeking a PI “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 20 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). In cases brought under the Endangered Species Act, however,

Congress has already determined that the balance of equities and public interest favor an injunction. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities”) (*TVA v. Hill*).

As the Ninth Circuit explained, “Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.” *Wash. Toxics Coal.*, 413 F.3d at 1035; *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F. 3d 782, 793-4 (9th Cir. 2005) (“[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests”). Moreover, “[c]ourts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (“[w]e may not use equity’s scales to strike a different balance”).

Thus, while Plaintiffs continue to have the burden of establishing the first two prongs under *Winter* – a likelihood of success on the merits and a likelihood of irreparable harm – Congress has already determined that the balance of the equities and the public interest favor the issuance of an injunction in cases involving threatened and endangered species. *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Engineers*, 817 F. Supp. 2d 1290, 1302 (D. Or. 2011) (continuing to apply the modified ESA injunction standard after *Winter*); *Or. Natural Desert Ass’n v. Kimbell*, No. 07-1871-HA, 2009 WL 1663037 *1 (D. Or. June 15, 2009) (same); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d 1029, 1033 (D. Ariz. 2011) (same).

Additionally, courts may apply a “sliding scale” approach in their consideration of the success and harm factors. *Alliance for Wild Rockies*, 632 F.3d at 1131-32 (continuing to apply

the sliding scale approach after *Winter*). Under this approach, “[f]or example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits.” *Id.* Plaintiffs, therefore, need only raise “serious questions going to the merits,” so long as they can demonstrate that the balance of hardships tips sharply in their favor. *Id.* at 1135 (“the ‘serious questions’ approach survives *Winter* when applied as part of the four-element *Winter* test”); *Humane Soc’y of U.S. v. Bryson*, 3:12-CV-00642-SI, 2012 WL 1952329, *3 (D. Or. May 30, 2012) (applying “serious questions going to the merits” test in a case under the ESA); *Audubon Soc’y of Portland v. Nat’l Marine Fisheries Serv.*, No. 03:11-CV-00494-HU, 2011 WL 3273139, *15 (D. Or. July 29, 2011) (same).

II. SUMMARY OF ARGUMENT

Defendants are unlawfully causing “take” of marbled murrelets by planning and authorizing logging projects that destroy and degrade occupied marbled murrelet sites. “An occupied site is where murrelets have been observed exhibiting subcanopy behaviors, which are behaviors that occur at or below the forest canopy and that strongly indicate that the site has some importance for breeding.” Cady Decl. Ex. 2 at 8, 27 (PSG Protocol). “Occupied sites include nest sites, but an occupied site also can be used for purposes other than nesting that are essential for the complete life history of the bird.” *Id.* at 27. Importantly, if a single occupancy behavior is detected within a block of contiguous habitat, the entire contiguous stand is classified as occupied. *Id.* at 27, 28. Logging in an occupied site causes “take” of marbled murrelets by significantly impairing breeding, feeding, and sheltering, and increasing the likelihood of attack by predators on the adults and young. *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1365-67 (N.D. Cal. 1995); *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68.

Defendants have conducted surveys for marbled murrelets in and around each of the eleven challenged timber sales. In every example, surveyors documented the presence of marbled murrelets and subcanopy behavior that classify the site as occupied. Defendants are nonetheless allowing logging to occur in these occupied sites, and are thereby disrupting the birds' essential behavioral patterns to such an extent as to cause "take" under the ESA.

First, in several timber sales, Defendants have arbitrarily reserved only a small portion of the occupied site for marbled murrelets, designating what Defendants call a Marbled Murrelet Management Area ("MMMA"), and then authorizing logging in the remainder, and sometimes the majority, of the occupied site. In other instances, Defendants have directed their staff to "verify" survey results that document marbled murrelet occupancy, and have authorized logging in occupied sites if these "verification surveys" do not confirm the original findings, which is directly contrary to well-accepted scientific methods of surveying for the birds. Finally, in a few examples, Defendants have located murrelets in a stand, designated MMMA's in the occupied site, and then authorized logging and habitat destruction within the MMMA itself. As described more fully below, all of these actions result in the destruction and modification of known occupied murrelet sites and harms the birds. Plaintiffs are likely to succeed on the merits of their claim because the Ninth Circuit has already affirmed that this type of habitat destruction causes "take" of marbled murrelets. *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68.

III. LEGAL BACKGROUND

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. at 180. Its fundamental purposes are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such

endangered species and threatened species” 16 U.S.C. § 1531(b). An endangered species is one “in danger of extinction throughout all or a significant portion of its range,” and a threatened species is one “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20). Once a species is listed, the ESA is designed to ensure not only the species’ continued survival, but also its ultimate recovery. 16 U.S.C. § 1532(3) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”).

A. Section 9 of the ESA Prohibits “Take” of Listed Species.

Under section 9(a)(1)(B) of the ESA, it is illegal to engage in any activity that “takes” an endangered species. 16 U.S.C. § 1538(a)(1)(B). Regulations adopted by the United States Fish and Wildlife Service (FWS), the federal agency that implements the ESA for terrestrial species, apply the take prohibition to threatened species, including marbled murrelets. 50 C.F.R. § 17.31 (applying section 17.21 to threatened species); *id.* § 17.21 (making it “unlawful for any person . . . to commit, to attempt to commit, to solicit another to commit or to cause to be committed . . . take”); 57 Fed. Reg. 45,328 (listing the marbled murrelet as threatened).

“Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Congress intended “take” to be defined in the “broadest possible manner to include every conceivable way” that a person could harm or kill wildlife. S. Rep. No. 93-307, at 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995; *see also* H.R. Rep. No. 93-412, at 11 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989 (“‘[t]ake’ is defined broadly. It includes harassment, whether intentional or not”).

The ESA's implementing regulations define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. "Harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." *Id.* "Take" includes direct as well as indirect harm and need not be purposeful. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 (1995); *see also Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994).

The "take" prohibition applies to all "persons," including any "officer, employee, agent, department, or instrumentality of . . . any State." 16 U.S.C. § 1532(13). The Act expressly authorizes citizens to file suits "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision" of the ESA. *Id.* § 1540(g)(1)(A). Therefore, courts have repeatedly held that governmental officers may be liable for violating the take prohibition by authorizing activities undertaken by others. *See Pac. Rivers Council v. Brown*, No. 02-243-BR, 2002 WL 32356431, at *12 (D. Or. Dec. 23, 2002) (Oregon State Forester may be held liable under the ESA for approving logging operations on private lands by private timber companies); *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997) (holding state officials liable under the ESA for licensing commercial fishermen to use gillnets and lobster pots in a manner that was likely to take endangered whales); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180–81 (M.D. Fla. 1995) (county's authorization of vehicular beach access during turtle mating season let to take of the turtles).

B. Courts Have Previously Held that Logging in Occupied Habitat Causes Take of Marbled Murrelets.

Courts in the Ninth Circuit have previously held that logging in occupied habitat causes take of marbled murrelets. *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1365-67; *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68. In *Marbled Murrelet v. Pac. Lumber Co.*, Judge Bechtel held that logging in occupied habitat would “harm” marbled murrelets because it “will significantly impair the marbled murrelets’ breeding behavior and decrease the chances of successful nesting,” “will likely cause returning marbled murrelets to become disoriented and significantly decrease the likelihood that they will be able to successfully nest and raise their young to fledgling,” and “will increase the likelihood of avian predation upon the remaining marbled murrelets who achieve nesting, their eggs, and their young.” 880 F. Supp. at 1366. The court further held that logging occupied nesting habitat would “harass” marbled murrelets because it “creates the likelihood of injury to marbled murrelets by annoying them to such an extent that it will significantly disrupt their normal behavioral patterns.” *Id.* at 1367.

The Ninth Circuit upheld this decision in *Marbled Murrelet v. Babbitt*. 83 F.3d at 1067-68. In a unanimous opinion authored by Judge Thompson, the Ninth Circuit reaffirmed that “habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to ‘harm’ under the ESA.” *Id.* The court then held that plaintiffs had properly carried their burden of proof when they established that logging activities “would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young.” *Id.* The Ninth Circuit also upheld the district court’s issuance of an injunction, reaffirming that “a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of

the ESA.” *Id.* at 1066 (citing *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th Cir. 1995); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000)).

C. Section 10 of the ESA Allows the United States Fish and Wildlife Service to Issue Permits for the “Incidental Take” of Listed Species.

A non-federal landowner can avoid liability under the ESA by obtaining a permit from FWS for taking that is “incidental to, and not the purpose of . . . an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). In order to obtain an incidental take permit, the applicant must prepare a Habitat Conservation Plan (“HCP”) demonstrating that the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild,” among other criteria. *Id.* §§ 1539(a)(2)(A), (B)(iv). The HCP must also “minimize and mitigate the impacts of such taking” to “the maximum extent practicable” *Id.* § 1539(a)(2)(B)(ii). Defendants do not have an HCP or incidental take permit for the Tillamook, Clatsop, or Elliott State Forests.

IV. FACTUAL BACKGROUND

A. Marbled Murrelets

Marbled murrelets (*Brachyramphus marmoratus*) are small sea birds in the *Alcidae* family. 75 Fed. Reg. 3425. Murrelets are found only on the west coast of North America, from Alaska to Santa Cruz, California. Cady Decl. Ex. 2 at 6 (PSG Protocol). Murrelets spend most of their lives offshore, foraging for small fish and invertebrates, but fly inland to nest in mature and old-growth forests. 75 Fed. Reg. at 3425; Golightly Decl. ¶ 11. Murrelets do not build nests, but instead rely on thick, flat tree branches with natural depressions and a blanket of moss on which to lay their eggs. *Id.* The presence of these naturally occurring platforms “is the most important characteristic of their nesting habitat.” *Id.* Marbled murrelets are thus “closely associated with old-growth and mature forests for nesting.” Cady Decl. Ex. 2 at 6.

Marbled murrelets do not always nest every year, 57 Fed. Reg. at 45,329, but when they do they have high “site fidelity,” meaning they return again and again to the same forest stand and even the same nest tree. Cady Decl. Ex. 2 at 28; Golightly Decl. ¶ 11. Nesting occurs between mid-April and September, and nests can be as far as 80 kilometers (50 miles) from the ocean. 57 Fed. Reg. at 45,328-29. The female lays a single egg and the male and female incubate the egg switching shifts once a day while the other bird flies back and forth to the ocean to feed, typically at dawn or dusk. *Id.* at 45,329. The adults feed the chick at least once per day, carrying fish back from the ocean. *Id.*

1. The Loss of Old-Growth and Mature Forests is the Principal Threat to the Survival and Recovery of Marbled Murrelets.

In 1992, marbled murrelets in Oregon, Washington, and California were listed as a threatened species because of “the loss and modification of nesting habitat (older forests) primarily due to commercial timber harvesting.” 57 Fed. Reg. at 45,328. “The principal factor affecting the marbled murrelet in the three-state area, and the main cause of population decline has been the loss of older forests and associated nest sites.” *Id.* at 45,330; Golightly Decl. ¶ 12. Extensive logging over the past 150 years has resulted in the loss of “at least 82 percent of the old-growth forests existing in western Washington and Oregon.” Cady Decl. Ex. 3 at 5.

Murrelets are also significantly affected by forest fragmentation. 57 Fed. Reg. at 45,329 (“[s]tand size is also an important factor for marbled murrelets”). This is because murrelets depend on large blocks of interior forest habitat—*i.e.*, habitat that is far from forest edges—for protection from predators, changes in microclimate, and windthrow of nest trees. 76 Fed. Reg. 61,604 (Oct. 5, 2011); 75 Fed. Reg. at 3425 (nesting habitat 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”).

Fragmentation from logging reduces the “interior or core habitat” and “increases the amount of forest edge, isolates remaining habitat patches, and creates ‘sink’ habitats.” Cady Decl. Ex. 3 at 6. Impacts from habitat fragmentation include “effects on population viability and size, local or regional extinctions, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.” *Id.* Predation and nest failure are substantial threats to marbled murrelets. *See* 75 Fed. Reg. at 3432 (“Nest failure rates of 68 to 100 percent due to predation in real nests, and 81 to 95 percent in artificial nests have been reported”); Golightly Decl. ¶ 12. Murrelet predation “increases with the fragmentation of older-aged forests” and nest success “is lower in small forest fragments” 57 Fed. Reg. at 45,334 (internal citations omitted). Due to these risks, it is highly recommended that marbled murrelet habitat is maintained “in relatively large contiguous blocks.” Cady Decl. Ex. 4 at 3.

2. The Population of Marbled Murrelets Continues to Decline Rapidly as Does the Amount of Suitable Habitat on Nonfederal Lands.

Recent research shows that the population of marbled murrelets is rapidly declining. 75 Fed. Reg. at 3433 (noting a “significant population decline” documented in 2008 and since monitoring began in 2000); *id.* at 3425 (2007 and 2008 monitoring results were the lowest population estimates since 2000). Population data from 2000 to 2008 shows a 2.4 percent annual decline in the marbled murrelet population, and data from 2001 to 2008 shows a 4.3 percent decline. *Id.* at 3425. This equates to a loss of 490 to 870 birds per year, or an overall population decline of nineteen to thirty-four percent in the nine-year study period. *Id.* The population of marbled murrelets in Oregon, Washington, and California “continues to be subject to a broad

range of threats, such as nesting habitat loss, habitat fragmentation, and predation.” *Id.* at 3424.

“Data on nest success from radio telemetry studies and from adult [to] juvenile ratios at sea, as an index of breeding success, continue to confirm that murrelet reproduction in Washington, Oregon, and California is too low to sustain populations.” *Id.* at 3426 (internal citation omitted).

At the same time, there continues to be a significant reduction in forest habitat that is suitable for marbled murrelet nesting. Cady Decl. Ex. 1 at 2. Using habitat models to estimate the amount of suitable murrelet nesting habitat that existed in 1996, a recent study estimated that between 1996 and 2006 Oregon lost 16.7 percent of higher suitability habitat – *i.e.*, habitat with a high score for providing mature and old-growth forest for murrelet nesting and breeding activities. *Id.* at 3. The loss of higher suitability habitat “was greatest on nonfederal lands” in Oregon and was primarily (95 percent) due to logging. *Id.* Between 1996 and 2006, 33.4 percent of the higher suitable habitat in Oregon on nonfederal lands was lost. *Id.* at 2. By comparison, 8.1 percent of higher suitable habitat on nonfederal lands was lost in California during the same period, and 30.3 percent was lost in Washington. *Id.*

B. Surveying for Marbled Murrelets and Identifying Occupied Habitat

Marbled murrelets are elusive and their nests are “extremely difficult to find.” Cady Decl. Ex. 2 at 25 (PSG Protocol). When marbled murrelets were first listed as a threatened species in 1992, only twenty-three nests had been located in all of North America. 57 Fed. Reg. 45,329. As of 2002, only 300 nests had been found. Cady Decl. Ex. 2 at 6. This is in large part because marbled murrelets blend well with the surrounding forest environment, and “may only show activity near its nest one time per day, and may do so under low light conditions.” 57 Fed. Reg. 45,329. As a result, the scientific community has developed “a set of behavioral criteria to determine if potential habitat is likely to be occupied by murrelets.” Cady Decl. Ex. 2 at 25.

These criteria are incorporated into a protocol for identifying potential nesting habitat and conducting surveys called the Pacific Seabird Group's (PSG) "Methods for Surveying Marbled Murrelets in Forests: a Revised Protocol for Land Management and Research," known also as the "PSG Protocol." Cady Decl. Ex. 2. "Federal agencies, research institutions and private industry developed this protocol because the behavior of marbled murrelets makes it difficult for human observers to locate actual murrelet nests." *Nw. Forest Res. Council v. Pilchuck Audubon Soc'y*, 97 F. 3d 1161, 1167 (9th Cir. 1996); Golightly Decl. ¶ 14. As the Ninth Circuit explained, the PSG Protocol is "the generally accepted scientific methodology employed to determine whether marbled murrelets are located in, or making use of, a particular inland forested site for nesting purposes." *Id.* (citing *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1350-51, n.15). Given its "nearly universal acceptance by the scientific community and public agencies charged with enforcing the ESA" the PSG Protocol "fulfills the requirements set forth by the Supreme Court in *Daubert*." *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1351 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).³

When logging is planned in potential marbled murrelet nesting habitat, the PSG Protocol requires that surveys be conducted in the timber sale area and in all contiguous potential nesting habitat within a minimum of one-quarter mile (402 meters) of the project area boundary. Cady Decl. Ex. 2 at 11. "Contiguous potential habitat is that which contains no gaps in suitable forest cover wider than 100 m (328 feet)." *Id.* at 8. Topographical features, specifically ridgelines, are also used to define the survey area. *Id.* at 11. Surveying the contiguous habitat outside of a project area boundary is "important" because (1) "more than one pair of birds are usually found

³ In *Northwest Forest*, the Ninth Circuit highlighted evidence that "indicates that the determinations under the protocol are 95-100% accurate in predicting nesting behavior." 97 F. 3d at 1169. The court also noted that "according to the agencies' experts, there is no other reliable scientifically accepted and tested method for identifying nest stands." *Id.*

in a single, continuous forest” and interactions of murrelets in a single stand is “important for social and breeding purposes;” (2) “murrelets could be nesting at different times – and therefore different places – in the same stand;” and (3) “murrelets might use more than one nest tree or use different parts of a stand for nesting.” *Id.*

The surveys are “designed to determine probable absence or presence of murrelets at a specific site, document occupancy, monitor murrelet activity levels at specific sites (*e.g.*, for a pre-harvest inspection), locate nests, and establish murrelet use patterns.” *Id.* at 10.⁴ Survey stations are distributed throughout the survey area and often in multiple survey sites. *Id.* at 12, 16. Because marbled murrelets may not nest every year, surveys must occur for two consecutive years to determine whether the stand is occupied with any degree of confidence. *Id.* at 17-18. Surveys are conducted between May 1 and August 5, and take place in the two-hour period from forty-five minutes before sunrise to seventy-five minutes after sunrise. *Id.* at 22-23. A minimum of five and as many as nine surveys must be conducted at each survey site, and the surveys within a site should be separated by a minimum of six and a maximum of thirty days. *Id.* at 12.

“An occupied site is where murrelets have been observed exhibiting subcanopy behaviors, which are behaviors that occur at or below the forest canopy and that strongly indicate that the site has some importance for breeding.” *Id.* at 8; *see also id.* at 27. Subcanopy behaviors include those “below, through, into, or out of the forest canopy within or adjacent to potential habitat.” *Id.* at 25; *see also id.* at 27. “This includes birds flying over or along roads, young stands, or recently-harvested areas adjacent to potential habitat.” *Id.* at 27. Occupied behavior also includes perching, landing, or attempting to land on branches, or calling from a stationary location within the stand. *Id.* “In addition to direct flights to nests, murrelets can

⁴ The surveys determine marbled murrelet presence but only “probable absence” because of the difficulties in detecting the birds onshore.

engage in ‘fly-bys’ before and after visits to the nest, where a nesting bird flies past the nest tree below the canopy at nest height.” *Id.* at 25. “While an observer may not be aware of a nest, these flights lend support for the association of subcanopy flights with nesting.” *Id.*

“Occupied sites include nest sites, but an occupied site also can be used for purposes other than nesting that are essential for the complete life history of the bird.” *Id.* at 27. For example, “the places where birds engage in courtship or other breeding- related activities might not be in the exact same area or stand as a nest, but these areas are just as important as nesting sites for the birds’ life history.” *Id.* at 28; Golightly Decl. ¶ 14. Importantly, detecting occupancy behavior does not indicate where the nest is located within that stand. *Id.* at 25, 27; *id.* ¶ 14. Thus, if occupancy behavior is detected at one site within a larger block of contiguous habitat, the entire contiguous stand is classified as occupied. *Id.* at 28.

For example, if a block of continuous potential habitat is divided into three contiguous survey sites, and *one of those three sites yields subcanopy detections, the entire survey area is considered occupied*, not just that one site, because all the sites form one large piece of continuous habitat.

Id. (emphasis added); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1351 (“if a surveyor detects marbled murrelets during a survey visit and observes ‘occupied behavior,’ the entire stand is classified as ‘occupied’”). Because marbled murrelets are so difficult to detect, a site is occupied if even a single occupied behavior occurs. Cady Decl. Ex. 2 at 27 (“an occupied sites is a site where at least one of the following subcanopy behaviors or conditions occurs”). Because of the importance of occupied nesting habitat and the birds’ fidelity to specific nesting sites, an occupied site is treated as such indefinitely. *Id.* at 29.

C. Oregon’s Coastal State Forests

The three State Forests at issue in this case, the Tillamook, Clatsop, and Elliott, are all near the coast and within the range of the marbled murrelet. The Tillamook and Clatsop State

Forests are 364,000 and 154,000 acres respectively, located in Oregon's Coast Range directly east and north of Portland, Oregon. Cady Decl. Ex. 5 at 2. These forests provide important nesting habitat for marbled murrelets, including mature and old-growth forest stands, because murrelet populations in northeastern Oregon are "especially" on the decline. Cady Decl. Ex. 6 at 5. Defendants have recognized that murrelets will also nest in what they term "marginal habitats" in these forests. *Id.* at 7.

The Elliott State Forest is approximately 93,000 acres directly south of the Umpqua River and southeast of Reedsport, Oregon. Cady Decl. Ex. 7 at 2. The portions of the Elliott that have not already been logged were mostly burned during severe fire events in the mid-1800s. *Id.* at 6. Today, these areas are typically mature forest that is between 120 to 140 years old with remnant patches of forest that are much older. These stands are excellent habitat for marbled murrelets. Cady Decl., Ex. 8 at 5 (documenting 85 known murrelet sites on the Elliott State Forest).

1. Management of the Tillamook, Clatsop, and Elliott State Forests

The Oregon Department of Forestry (ODF) and the Oregon Board of Forestry have primary authority over management of most of the Tillamook and Clatsop State Forests. Cady Decl. Ex. 5 at 2-3. The Elliott State Forest is mostly overseen by the Oregon Department of State Lands and the State Land Board. Cady Decl. Ex. 7 at 2. These entities, however, have an agreement with ODF and the Board of Forestry that allows the latter to plan and authorize logging activities and annual operations plans in the Elliott State Forest.

All three State Forests are managed under a three-tiered management scheme. The State first develops broad forest management plans (FMPs), which are meant to guide management for 40 or more years. Cady Decl. Ex. 7 at 3. These forest management plans are followed by ten-

year district implementation plans (IPs). *Id.* The districts then develop annual operations plans (AOPs) in conjunction with the State Forester and members of the Oregon Board of Forestry. *Id.*

2. Defendants' Abandonment of the HCP Process and Decision to Try to Avoid Take Instead, and Defendants' Decisions to Increase Logging.

Defendants recently abandoned their efforts to develop Habitat Conservation Plans for the Tillamook, Clatsop, and Elliott State Forests. Cady Decl. Ex. 9 at 3; Cady Decl. Ex. 7 at 4. These HCPs, if approved, would have allowed Defendants to obtain an incidental take permit for marbled murrelets, but would have required Defendants to also put measures in place to help conserve the species. *See supra* at 9 (discussing section 10 of the ESA).

Instead, Defendants are following their own self-described "take avoidance policy," comprised of the Marbled Murrelet Guidance Document, Marbled Murrelet Operational Policies, and the Marbled Murrelet Operational Procedures. Cady Decl. Ex. 10 (Guidance Document); Cady Decl. Ex. 11 (Operational Policies); Cady Decl. Ex. 12 (Operational Procedures). Under this policy, Defendants are supposed to conduct surveys pursuant to the PSG Protocol and when an occupied behavior is documented create a forest reserve called a Marbled Murrelet Management Area or MMMA. Cady Decl. Ex. 11 at 3-5.

At the same time, Defendants approved new forest management plans for all three State Forests that significantly increase the amount of logging that will occur. Cady Decl. Ex. 5; Cady Decl. Ex. 7. In 2010, the Forest Management Plan for the Tillamook and Clatsop State Forests was revised to lower the goals for long-term retention of complex structure (*i.e.*, older forests) from 40-60 percent of the landscape to 30-50 percent. Cady Decl. Ex. 9 at 3. The 2009 Implementation Plan for the Tillamook District contemplates 800 to 3,150 acres of clearcutting per year, and between 850 and 3,450 acres of partial cutting per year. Cady Decl. Ex. 13 at 2. In 2011, Defendants approved a new forest management plan for the Elliott State Forest that will

increase logging from 25 million to 40 million board feet of timber per year, including 850 acres of clearcutting and 250 acres of partial cutting annually. Cady Decl. Ex. 14 at 2. The new forest management plan also allows logging in areas that were previously protected for endangered wildlife. Eatherington Decl. ¶ 28.

While increasing the amount of logging that is occurring across the forests, and having rejected the opportunity to obtain incidental take permits, Defendants are also significantly decreasing the size of the reserves (MMMA) that are set aside for marbled murrelets when surveys reveal that a site is occupied. On the Elliott State Forest, for example, the average size of MMMA designated in the 1990s was more than 400 acres. Cady Decl. Ex. 8 at 9-23. The seventeen MMMA designated since 2007 on the Elliott, however, average less than 40 acres apiece, a reduction of more than ninety percent. Eatherington Decl. ¶ 28. Many new MMMA on the Elliott are even smaller, including Deer Molar (23 acres), Cougar Mouth (21 acres), Millicoma Strawberry (22 acres), Little Bob (20 acres), and Middle Roberts (16 acres). *Id.*

D. The Eleven Challenged Timber Sales

Plaintiffs seek to enjoin eleven timber sales, totaling approximately 840 acres, on the Tillamook and Elliot State Forests. In each of these sales, Defendants have documented marbled murrelet presence and occupancy but have authorized logging in the occupied habitat anyway. In each of these sales, Defendants have departed from, and in many ways directly contravened, the standards set forth in the PSG Protocol.

For example, **Millicoma Lookout timber sale** will clearcut 54 acres of mature forest habitat in the Elliott State Forest. Cady Decl. Ex. 15 at 1. Surveys for marbled murrelets were conducted between 2007 and 2010 and resulted in 100 separate detections of murrelet behavior, “including subcanopy observations indicating occupancy.” *Id.* at 4-8. Defendants did not

designate the site as occupied as directed by the PSG Protocol, but instead reserved only 22 acres, a very small portion of the occupied site, in what is now called the Millicoma Strawberry MMMA. Cady Decl. Ex. 16 at 2; Bradley Decl. Ex. 5. Defendants then proceeded to authorize the timber sale in much of the remaining occupied site. *Compare* Cady Decl. Ex. 15 at 13 (sale area map), *with id.* at 16 (original murrelet survey site map); Bradley Decl. Ex. 5. The Millicoma Lookout timber sale directly borders the Millicoma Strawberry MMMA on two sides and is located within the same contiguous, occupied habitat. *Id.*; Golightly Decl. ¶29. It was sold to Seneca Sawmill Company in 2011. Cady Decl. Ex. 17 at 2.

Then in 2012, Defendants authorized the 69-acre **Three Buck Joe timber sale** on the Elliott State Forest. Cady Decl. Ex. 18 at 9. This sale will clearcut nearly all of the remaining occupied habitat within the same occupied site as the Millicoma Lookout timber sale, all but surrounding the tiny Millicoma Strawberry MMMA with clearcuts. Cady Decl. Ex. 18 at 1 (clearcut prescription); *compare id.* at 11 (topo map), *with id.* at 13 (map of murrelet survey site); Ex. 8 to Bradley Decl. (map showing the two sales and MMMA). In total, the Millicoma Lookout and Three Buck Joe timber sales will reduce an approximately 150-acre stand of known occupied murrelet habitat to an isolated 22-acre patch that is surrounded by clearcuts. *Id.*; Golightly Decl. ¶¶ 23, 32. Additionally, both of these sales border the Joe Buck MMMA, where numerous detections of occupied behavior were documented in surveys conducted in 1992, 1993, 1994, 1999, and 2006. Cady Decl. Ex. 8 at 15.

The **Marlow Millicoma Divide timber sale** in the Elliott State Forest will clearcut 79 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 19 at 1. Surveys in this stand were conducted between 2008 and 2010, and resulted in 204 separate detections, “including subcanopy observations indicating occupancy.” *Id.* at 3-6. In response, Defendants

added acreage to the existing Marlow Bottom MMMA, Cady Decl. Ex. 16 at 3, but authorized logging in much of the remainder of the occupied site. *Compare* Cady Decl. Ex. 19 at 9 (timber sale map), *with id.* at 10 (map of murrelet survey site); Bradley Decl. Ex. 4 (map of MMMA and sale area); Golightly Decl. ¶ 28. The timber sale borders the Marlow Bottom MMMA, where numerous detections of occupied behavior were documented in 1999, 2000, 2001, 2003, 2006, and borders the East Marlow MMMA. Bradley Decl. Ex. 4; Cady Decl. Ex. 8 at 18-19.

The **Mister Millipede timber sale** in the Elliott State Forest will clearcut 75 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 20 at 1. Surveys were conducted between 2008 and 2011, and resulted in 58 separate detections, including occupied behavior. *Id.* at 4-12. In response, Defendants added 36 acres to the Trout Mouth MMMA, but released much of the occupied site for sale. Cady Decl. Ex. 8 at 23; *compare* Cady Decl. Ex. 20 at 15 (sale map), *with id.* at 16 (murrelet survey site map); Bradley Decl. Ex. 6 (map); Golightly Decl. ¶ 30. The timber sale is in the same contiguous site as the Trout Mouth MMMA, where numerous detections of occupied behavior were documented in 1995 and 2001, and Area 1 of the Comados timber sale (discussed below). Bradley Decl. Ex. 6; Cady Decl. Ex. 8 at 23.

The **Comados timber sale** in the Elliott State Forest will clearcut 85 acres of mature forest habitat. Cady Decl. Ex. 21 at 1. Area 1 of the sale is in the same contiguous, occupied site as the Mister Millipede timber sale. Bradley Decl. Ex. 1. Area 2 is in the same contiguous site as the occupied Elk Forks MMMA, where numerous detections of occupied behavior were documented in 1993, 1995, 2001, and 2003. Bradley Decl. Ex. 1 (map); Cady Decl. Ex. 8 at 12. Surveys were conducted in 2008 and 2009, and resulted in 28 detections of murrelet presence. Cady Decl. Ex. 21 at 4-7. It was sold to Scott Timber Company in 2010, Cady Decl. Ex. 17 at 2.

The **Double Fish timber sale** in the Elliott State Forest will clearcut 114 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 22 at 1. Surveys in this stand were conducted in 1994 and resulted in 56 separate detections, including occupied behavior. *Id.* at 5. Additional surveys were conducted between 2008 and 2009, and resulted in 12 separate detections, including occupied behavior. *Id.* at 4-7. In response, Defendants added 23 acres to the Knife Forks MMMA, but released much of the remaining occupied site for sale. Cady Decl. Ex. 16 at 3; *compare* Cady Decl. Ex. 22 at 8 (timber sale map), *with id.* at 13 (murrelet survey site map); Golightly Decl. ¶ 26. The timber sale is in the same occupied site as the Knife Forks MMMA, where numerous detections of occupied behavior were observed in 1993 and 1994. Bradley Decl. Ex. 2 (map); Cady Decl. Ex. 22 at 8 (sale area topo map); Cady Decl. Ex. 8 at 16. It was sold to Scott Timber Company in 2010. Cady Decl. Ex. 17 at 2.

The **Sullivan Succotash timber sale** in the Elliott State Forest will clearcut 103 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 23 at 1. Surveys in this stand were conducted between 2009 and 2010, and resulted in 17 separate detections, including occupied behavior. *Id.* at 4-7. The timber sale borders the Sullivan Headwaters MMMA, where numerous detection of occupied behavior were observed in 1993 and 1994. Bradley Decl. Ex. 7; Cady Decl. Ex. 8 at 22. The sale also involves logging of a road corridor within the Sullivan Headwaters MMMA. Cady Decl. Ex. 23 at 5, 8.

The **Moon Creek timber sale** in the Tillamook State Forest includes 48 acres of logging inside the Moonstone Marble MMMA, which was confirmed as occupied by surveys conducted in 2009 and 2010. Cady Decl. Ex. 24 at 1; *Id.* at 4-8. The MMMA abuts marbled murrelet habitat on Bureau of Land Management lands at the southern end of the Tillamook State Forest. *Id.* at 14. Previous surveys by the BLM in 1992 documented marbled murrelets on four

occasions landing in trees near the State-BLM boundary. *Id.* at 4-5. Surveys in 2009 and 2010 resulted in 26 murrelet detections, including occupied behavior. *Id.* at 4-8. A Biological Assessment was prepared for the sale, which found “a high likelihood that this stand is used by marbled murrelets for nesting in at least some years.” Cady Decl. Ex. 24 at 19.

The **Otter Pop timber sale** in the Elliott State Forest will clearcut 47 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 25 at 1. Surveys were conducted between 2010 and 2011, and resulted in 15 separate detections, including occupied behavior. Cady Decl. Ex. 26 at 3; Cady Decl. 27 at 1. The timber sale is in the same site as the Joe Buck MMMA, where numerous detections of occupied behavior were observed in 1992, 1993, 1994, 1999, and 2006. Cady Decl. Ex. 25 at 7; Cady Decl. Ex. 8 at 15.

The **Shoehorn timber sale** in the Elliott State Forest will clearcut 21 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 28 at 1. Surveys were conducted in 2010 and 2011, and resulted in 20 detections, including occupied behavior. Cady Decl. Ex. 26 at 3; Cady Decl. Ex. 27 at 1. Defendants added 5 acres to the Schumacher Headwaters MMMA, but the remaining area was released for sale. Cady Decl. Ex. 27 at 1. The sale also includes logging of a road corridor inside the Schumacher Headwaters MMMA. Cady Decl. Ex. 28 at 9.

The **Leaping Larson timber sale** in the Elliott State Forest will clearcut 117 acres of mature forest habitat in an occupied murrelet site. Cady Decl. Ex. 29 at 1. Surveys were conducted in 2010 and 2011 and resulted in 127 detections, including occupied behavior. Cady Decl. Ex. 26 at 3; Cady Decl. Ex. 27 at 2. In response, Defendants created the 25-acre Larson Ridge MMMA in 2010, added 51 acres to the Larson Ridge MMMA in 2011, and added 26 acres to the Palouse Larson MMMA, but released much of the remaining occupied site for sale. *Id.*; *compare* Cady Decl. Ex. 29 at 17 (sale area map), *with id.* at 19, 20 (murrelet survey site maps).

The timber sale is in the same site as the occupied Larson Bottom MMMA, where numerous detections of occupied behavior were observed in 2005 and 2006, and Palouse Larson MMMA, where numerous detections of occupied behavior were observed in 2002. Cady Decl. Ex. 29 at 17 (topo map); Cady Decl. Ex. 8 at 16, 20.

V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

As illustrated above, Defendants are regularly planning and authorizing the destruction and degradation of known occupied marbled murrelet sites. These actions harm and harass marbled murrelets by impairing the breeding, nesting, and sheltering of the birds, injuring or killing chicks in nest trees or causing loss of eggs, and increasing the risk of predation on adults and young. Golightly Decl. ¶¶ 13, 18-24, 15. Logging in occupied habitat has already been found to cause unlawful take of marbled murrelets under the ESA. *See Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68 (upholding a district court's imposition of a permanent injunction against a logging project where at trial it was shown that marbled murrelets were detected at the site and occupied behavior was documented pursuant to the PSG Protocol). Plaintiffs are likely to succeed on the merits of their claim because Defendants are authorizing precisely the same kind of conduct that was enjoined by the Ninth Circuit in *Marbled Murrelet v. Babbitt*. *Id.*

Courts have recognized that “[a]ny taking and every taking – even of a single individual of the protected species – is prohibited by the Act” and thus the “threat of even a single taking is sufficient to invoke the authority of the Act.” *Loggerhead Turtle*, 896 F. Supp. at 1180 (citing *Swan View Coal., Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992)). Here, Defendants are taking marbled murrelets by authorizing the eleven listed timber sales and by implementing their purported “take avoidance policy” that allows logging in known occupied marbled murrelet sites.

A. Logging in Occupied Habitat Causes “Take” of Marbled Murrelets and Violates Section 9 of the ESA.

Logging in occupied habitat causes “take” of marbled murrelets. As the Ninth Circuit has explained, “habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to ‘harm’ under the ESA.” *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68; 50 C.F.R. § 17.3 (“harm” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering”).

This case is very similar to *Marbled Murrelet v. Pac. Lumber Co.*, where environmental groups challenged a plan to partially log 137 acres of a 440-acre occupied murrelet site in northern California. 880 F. Supp. at 1344-45. There, like here, field surveys resulted in multiple detections of marbled murrelets, including occupied behavior. *Id.* at 1360. Also like here, the defendant in *Marbled Murrelet v. Pac. Lumber Co.* failed to designate the entire contiguous stand as occupied, and instead planned to log a portion of the site. *Id.* at 1366. The court found that the proposed logging in occupied habitat would “harm” marbled murrelets because it “will significantly impair the marbled murrelets’ breeding behavior and decrease the chances of successful nesting,” “will likely cause returning marbled murrelets to become disoriented and significantly decrease the likelihood that they will be able to successfully nest and raise their young to fledgling,” and “will increase the likelihood of avian predation upon the remaining marbled murrelets who achieve nesting, their eggs, and their young.” *Id.*

The court found that “removing more than half of the trees in the 137 acre harvest area will result in the loss of a substantial portion of the nesting opportunities for marbled murrelets returning to the harvest area,” and that “the harvest of any one part of the stand will degrade the suitability of the entire stand as nesting habitat for marbled murrelets.” *Id.* The Ninth Circuit

affirmed that plaintiffs had met their burden of proof by demonstrating that logging activities “would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young.” *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68.

Defendants here are taking murrelets in very much the same way. Like in *Marbled Murrelet v. Pac. Lumber Co.*, Defendants here have authorized logging in occupied marbled murrelet habitat, and this logging will harm and harass marbled murrelets by impairing breeding, nesting, and sheltering, injuring or killing chicks in nest trees or causing loss of eggs, and increasing the risk of predation. Golightly Decl. ¶¶ 13, 18-24, 15. Take will occur from the direct impacts of logging while the birds are inland breeding or nesting, which impairs murrelets’ essential nesting, breeding, and sheltering behaviors by flushing the birds from their nests, causing nest abandonment, death or injury to the chick, loss of the egg, and stress and accompanying biological impacts. *Id.* Take also occurs through the removal of the forest stand the birds use for nesting and courtship, impairing their ability to shelter and successfully breed and nest in the stand, and increasing the risk of predation. *Id.* Murrelets have high site fidelity and return to the same site to nest. *Id.* ¶¶ 13, 11. The birds also visit their inland nesting areas outside the breeding season. *Id.* ¶ 11. Birds that return to their nest site to find it gone (sometimes over the course of several years due to high site fidelity) can fail to breed or nest that season and possibly for several seasons to come. *Id.* ¶ 13.

Defendants are departing from the well-established and scientifically accepted management standards set forth in the PSG Protocol, and are thereby taking murrelets in known occupied marbled murrelets sites, in at least three ways. First, Defendant’s are arbitrarily protecting only small portions of known occupied sites and then allowing the remainder of the

occupied sites to be logged. Second, Defendants are directing their staff to “verify” positive survey results, and Defendants are authorizing logging if occupied behavior is not detected again in these “verification surveys.” Third, Defendants are logging and building roads and landings directly inside designated MMMAs, which Defendants have already designated as occupied.

1. Defendants are Arbitrarily Protecting only Small Portions of Known Occupied Sites.

In many of the challenged timber sales, Defendants have confirmed murrelet occupancy, protected only a small portion of the stands in MMMAs, and then authorized logging in the remainder of the occupied site. The PSG Protocol clearly states, however, that if a marbled murrelet is observed at a site engaging in occupied behavior, then the entire “forest stand” must be classified as occupied. Cady Decl. Ex. 2 at 28 (PSG Protocol); *Marbled Murrelet*, 880 F. Supp. at 1360 (“[u]nder the PSG Protocol . . . if a surveyor detects marbled murrelets during a survey visit and observes ‘occupied behavior,’ the *entire stand is classified as ‘occupied’*”) (emphasis added); Golightly Decl. ¶ 14. A “forest stand” or “contiguous stand” is one in which the habitat contains no gaps in suitable forest cover wider than 328 feet. Cady Decl. Ex. 2 at 8.

Protecting the entire contiguous stand is important because “more than one pair of birds are usually found in a single, continuous forest,” “the interaction of murrelets in a single stand seems important for social and breeding purposes,” and “over several years, murrelets might use more than one nest tree or use different parts of a stand for nesting.” Cady Decl. Ex. 2 at 11. Further, “occupied sites include nest sites, but an occupied site also can be used for purposes other than nesting that are essential for the complete life history of the bird.” *Id.* at 27. The PSG Protocol explains, “the places where birds engage in courtship or other breeding- related activities might not be in the exact same area or stand as a nest, but these areas are just as important as nesting sites for the birds’ life history.” *Id.* at 28. Finally, detecting occupancy

behavior does not indicate where the nest is located within that stand, and classifying the entire stand as occupied is the only way of assuring that the nest itself is protected. *Id.* at 25-28.

The FWS has made it clear that the logging of “surveyed suitable murrelet habitat could likely result in ‘take’ of a listed species which is a violation of section 9 of the ESA” where “there is no apparent type break of age class or structure between . . . lands that are known to be occupied by murrelets and parcels” slated for logging. Cady Decl. Ex. 30. Defendants themselves have acknowledged that that take “may occur” through forest management “as a result of any activity that kills or injures birds, impairs essential breeding behavior by adversely affecting occupied or unsurveyed suitable breeding habitat, or causes significant disturbance of breeding birds that leads to reduced reproductive success.” Cady Decl. Ex. 8 at 3.

As explained previously, *supra* at 18-23, nine of the challenged timber sales will result in the destruction and degradation of known occupied murrelet sites because of Defendants’ failure to properly classify the site as occupied. Golightly Decl. ¶¶ 11-35. These timber sales include: Mister Millipede (58 detections, including occupied behavior); Marlow Millicoma Divide (204 detections, including occupied behavior); Comados (28 detections and contiguous with the occupied Elk Forks MMA); Millicoma Lookout and Three Buck Joe (100 detections, including occupied behavior); Double Fish (56 detections, including occupied behavior); Sullivan Succotash (17 detections, including occupied behavior); Shohorn Timber Sale (20 detections, including occupied behavior); and Leaping Larson (127 detections, including occupied behavior). All of these sales authorize clearcutting in known occupied murrelet sites. For the reasons discussed above, and as outlined in *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1366, this habitat destruction will harm, harass, and otherwise cause “take” of marbled murrelets.

2. Defendants' Reliance on "Verification Surveys" is Improper.

In at least three instances, Defendants have received survey results documenting murrelet occupancy, directed their staff to conduct one or more additional "verification surveys," and then authorized logging when these additional surveys fail to confirm the original findings. Under the PSG Protocol, however, even a single detection of occupancy behavior classifies the site as occupied. Cady Decl. Ex. 2 at 27 ("an occupied site is a site where at least one of the following subcanopy behaviors or conditions occurs. . ."); Golightly Decl. ¶14. This is because marbled murrelets are "extremely difficult to find," blend well with the surrounding forest environment, and "may only show activity near its nest one time per day, and may do so under low light conditions." Cady Decl. Ex. 2 at 25; 57 Fed. Reg. at 45,329; Golightly Decl. ¶ 11.

Due to the secretive nature of the birds, it is highly *unlikely* that any single verification survey will detect murrelets – let alone occupied behavior. Indeed, because murrelets are difficult to detect and may not be present at a site at any given time or even every year, the PSG Protocol specifically requires that multiple surveys be conducted at several sites spaced regularly over the course of several weeks for two consecutive years. Cady Decl. Ex. 2 at 17-21. Surveys must be conducted this way to achieve a high degree of accuracy. *Id.* at 19 ("surveys should be planned within a two-year time frame with a minimum of 5 survey visits, and an expectation of 9 survey visits, in each year to determine occupancy").

Surveys were conducted for the Sullivan Succotash timber sale in 2009 and 2010, and resulted in 17 separate detections of marbled murrelets and one subcanopy detection. Cady Decl. Ex. 26 at 2; Cady Decl. Ex. 23 at 4-5. Four additional surveys were then conducted, which did not verify the original findings, and the site was classified as "non verified - released for sale." *Id.* Similarly, surveys were conducted for the Otter Pop and Shoehorn timber sales in 2010 and

2011, and resulted in 15 and 20 detections of marbled murrelets respectively, including at least one subcanopy detection in each sale. Cady Decl. Ex. 27 at 1. Additional surveys were then conducted in each sale, which did not verify the original findings, and the sites were both classified as “non verified - released for sale.” *Id.*

Defendants’ practice of refuting documented occupied behaviors with “verification surveys” runs directly afoul of the PSG Protocol and is likely to harm marbled murrelets. Golightly Decl. ¶¶ 19, 14. Defendants actions result in the destruction and modification of occupied murrelet sites, which may remove nest trees, increase the risk of predation, and otherwise impairing breeding, feeding, and sheltering. *Id.* ¶¶ 13, 15, 19, 25, 33, 34.

3. Defendants are Authorizing Logging in Marbled Murrelet Management Areas.

In at least three examples, Defendants have documented murrelet occupancy in a stand, designated a portion of that stand as an MMMA, and then authorized logging inside the MMMA itself. Areas are designated as MMMA’s because prior surveys have identified occupied behavior in these forest stands. Cady Decl. Ex. 8 at 10-23. Despite acknowledging that MMMA’s are used by marbled murrelets, Defendants have authorized logging within the MMMA’s and have done so without an incidental take permit from the FWS.

The three timber sales that authorize logging in MMMA’s are: Moon Creek (48 acres of logging within the Moonstone MMMA, Cady Decl. Ex. 24 at 1, 5); Sullivan Succotash (logging of a new road corridor and construction of an open logging landing within the Sullivan Headwaters MMMA, Cady Decl. Ex. 23 at 5, 8); and Shohorn (logging a new road corridor in the Schumacher Headwaters MMMA, Cady Decl. Ex. 28 at 9). Not only have multiple detections of marbled murrelets occurred at these sites, but occupied behaviors have also been documented. *See supra* at 21-22 (noting 26 detections in the Moonstone MMMA, including

occupied behavior, 17 detections around and several more inside the Sullivan Headwaters MMMA, including occupied behavior, and 20 detections around the Schumacher Headwaters MMMA)).

As the District Court found in *Marbled Murrelet v. Pac. Lumber Co.*, logging “will result in the destruction and degradation of occupied habitat, such that marbled murrelets will actually be killed or injured by the logging operations, or through significant impairment of their essential behavioral patterns.” 880 F. Supp. at 1366. The removal of occupied habitat “will significantly impair the marbled murrelets’ breeding behavior and decrease the chances of successful nesting.” *Id.* By authorizing logging of occupied habitat in Marbled Murrelet Management Areas defendants are violating the Endangered Species Act. Golightly Decl. ¶¶ 13,15.

B. Defendants’ Regular Practice of Authorizing Logging in Occupied Marbled Murrelet Habitat Necessitates An Order Enjoining Any Future Such Authorizations.

As the eleven timber sales discussed above demonstrate, Defendants routinely authorize logging in areas that are occupied by marbled murrelets. Such authorizations are highly likely to re-occur in the future. They are a direct result of defendants’ take avoidance “policy,” which has not been subject to scientific peer review or scrutiny by any court. As illustrated above, this policy allows Defendants to regularly authorize the destruction of occupied murrelet sites in a manner that has already been enjoined by the Ninth Circuit. Further, the ESA provides only one avenue to avoid liability for take, and that is to develop an approved Habitat Conservation Plan and obtain an incidental take permit under section 10. Defendants have rejected this opportunity and are therefore liable under section 9 for the “takes” of murrelets that are resulting from their repeated and ongoing actions. Because Defendants policies are highly likely to cause take in the

future, Plaintiffs request that the Court enjoin Defendants from authorizing any further logging in known occupied marbled murrelet habitat pending the resolution of this case on the merits.

VI. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF AND THE BALANCE OF HARMS TIPS IN THEIR FAVOR.

A. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief.

Plaintiffs will suffer irreparable harm in two significant ways if an injunction is not issued. First, the unauthorized taking of marbled murrelets – a species that is already threatened with extinction and which continues to rapidly decline year after year – is clearly irreparable. *See Or. Natural Desert Ass’n v. Tidwell*, No. 07-1871-HA, 2010 WL 5464269, at *3 (D. Or. Dec. 30, 2010) (“habitat modification that is reasonably certain to injure an endangered species establishes irreparable injury” (citing *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000))); *see also Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 975 (N.D. Cal. 1990), *aff’d*, 929 F.2d 1449 (9th Cir. 1991) (“for those species now threatened with extinction, the harm may be irreparable in the most extreme sense of that overused term”); *Ctr. for Biological Diversity v. Fish and Wildlife Serv.*, No. C-08-1278 EMC, 2011 WL 6813200, at *4 (N.D. Cal. Dec. 28, 2011) (“[a]lthough Defendants argue that harm to the species as a whole is required, Ninth Circuit case law does not support this proposition”); *Nat’l Wildlife Fed’n*, 23 F.3d at 1512, n.8 (recognizing that threat of extinction is not required before an injunction may issue under ESA, as that would be “contrary to the spirit of the statute”); *Fund for Animals v. Turner*, No. 91-2201(MB), 1991 WL 206232, at *26 (D.D.C. Sept. 27, 1991) (“[i]n light of this Congressional mandate, the loss even of the relatively few grizzly bears that are likely to be taken . . . is a significant, and undoubtedly irreparable, harm”).

While harm to a threatened species in general is significant and irreparable, harm to marbled murrelets is especially so. Though listed as a threatened species since 1992, the population of murrelets continues to experience a rapid decline. *Supra* at 1. Studies “continue to confirm that murrelet reproduction in Washington, Oregon, and California is too low to sustain populations.” 75 Fed. Reg. at 3426 (internal citations omitted). The primary threat to the species continues to be the historic and ongoing loss of mature forest habitat. 57 Fed. Reg. at 45,328, 45,330; 75 Fed. Reg. at 3430. Further take of marbled murrelets caused by the Defendants’ authorization of logging in occupied marbled murrelet habitat will contribute to and exacerbate the well documented decline of an already imperiled species. Golightly Decl. ¶¶ 11-35.

Second, the loss of mature and old-growth forest habitat, which Plaintiffs themselves use and enjoy and which, by definition, cannot grow back within Plaintiffs’ lifetimes, is irreparable. *See Alliance for Wild Rockies*, 632 F.3d at 1135 (logging causes “actual and irreparable injury” to environmental plaintiffs’ ability to view, experience, and utilize forested areas in their natural state, even when other areas nearby would remain unlogged); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (“[c]ourts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of” law); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994).

As explained above, *supra* at 23-31, Defendant’s actions are likely to result in the “take” of threatened marbled murrelets. Plaintiffs have demonstrated a real and profound interest in the health and recovery of marbled murrelets in Oregon and throughout their range, and how Defendants’ actions will irreparable harm these interests. Eatherington Decl. ¶¶ 6, 26; Mitchell Decl. ¶ 16; Greenwald Decl. ¶¶ 12-14 ; Ruby Decl. ¶ 20. Plaintiffs’ members include murrelet experts and active bird watchers. Mitchell Decl. ¶¶ 3-12 ; Ruby Decl. ¶¶ 2, 11-18; Greenwald

Decl. ¶¶ 3-8. Plaintiffs spend a significant amount of time in Oregon’s coastal state forests and at Oregon’s coast looking for marbled murrelets, sometimes with success, and have plans to do so in the future. Mitchell Decl. ¶¶ 13-16; Ruby Decl. ¶¶ 8-10, 14-15, 19-21; Greenwald Decl., ¶¶ 9-14; Eatherington Decl. ¶¶ 6, 26, 27, 28, 20. Plaintiffs have very real and substantial concerns that the logging proposed by Defendants has been and will continue to prevent them from seeing, experiencing, and otherwise enjoying marbled murrelets on state forest lands. Mitchell Decl. ¶ 14; Eatherington Decl. ¶¶ 26, 27; Ruby Decl. ¶¶ 19-21; Greenwald Decl. ¶¶ 13-14.

Plaintiffs also use, recreate in and enjoy the specific areas that are being logged and destroyed by Defendants’ actions. Eatherington Decl. ¶¶ 7, 11, 29; Greenwald Decl. ¶¶ 9-12. Plaintiffs have specifically been to the challenged timber sales in the Tillamook and Elliott State Forests to hike, camp, photograph, and view wildlife. Eatherington Decl. ¶¶ 13-25; Greenwald Decl. ¶¶ 9-12. Plaintiffs intend to continue to do so in the future. Eatherington Decl. ¶ 30; Greenwald Decl. ¶¶ 10-14. Plaintiffs will not be able to use and enjoy these areas if and when they are logged. Eatherington Decl. ¶ 29; Mitchell Decl. ¶¶ 14-15; Greenwald Decl. ¶¶ 11-12, 14; Ruby Decl. ¶¶ 20-21.

B. The Balance of Harms Tips in Plaintiffs’ Favor.

Having demonstrated they will suffer irreparable without injunctive relief, Plaintiffs need not demonstrate that the balance of the equities tips in their favor because “Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.” *Wash. Toxics*, 413 F.3d at 1035; *Nat’l. Wildlife Fed’n.*, 422 F. 3d at 793 (“[i]n cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests”). As discussed previously, *supra* at 3-4, after the Supreme Court’s decision in *Winter*, courts have

continued to follow the Supreme Court's ruling in *TVA v. Hill* in ESA cases. *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Engineers*, 817 F. Supp. 2d at 1302; *Or. Natural Desert Ass'n*, 2009 WL 1663037 at *1; *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 820 F. Supp. 2d at 1033. As Judge Haggerty recently explained, "[b]ecause Congress has determined that listed species are to be afforded the highest of priorities, this court finds that plaintiffs have also shown that the balance of equities tips in their favor, and that an injunction is in the public interest." *Or. Natural Desert Ass'n*, 2009 WL 1663037 at *1 (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

Even if other factors are considered here, they weigh heavily in favor of an injunction. Plaintiffs' requested relief is narrowly tailored the most egregious logging practices Defendants are authorizing and eleven timber sales, which represent which total only about 840 acres. The requested injunction is temporary and does not affect *hundreds* of other timber sales that Defendants have planned or approved on the Tillamook, Clatsop, and Elliott State Forests. Cady Decl. Ex. 17 (listing more than 200 timber sales currently planned or approved). Combined, Defendants' current list of timber sales involves 22,122 acres of clearcutting and 26,012 acres of partial cutting. A temporary injunction would impact a very small portion of these totals.

Moreover, marbled murrelets are highly vulnerable and continuing to suffer significant annual population declines. The public has a significant interest in preventing species from going extinct. Any economic harm to Defendants or Defendant-Intervenors does not outweigh the irreparable harm to a threatened species and its habitat. *TVA v. Hill*, 437 U.S. at 194 ("Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities"); *Alliance for the Wild Rockies*, 632 F.3d at 1138-39 ("the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were

likely to succeed on the merits of their underlying claim”). Nor do Defendants’ other legal obligations somehow negate their need to comply with the ESA.

Once cut, the forests at issue here will not be suitable for murrelets for nearly a century. Given Congress’ clear direction in cases involving threatened species, given how vulnerable marbled murrelets are in particular, and given how destructive and irreparable Defendant’s actions are, the public interest and the balance of equities clearly favor an injunction.

VII. NO BOND SHOULD BE REQUIRED

It is well established that in public interest environmental cases the plaintiffs need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. *See, e.g., People ex rel. Van de Kamp v. Tahoe Reg’l Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond); *Wilderness Soc’y v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), *rev’d on other grounds*, 918 F.2d 813 (9th Cir. 1990) (\$100 bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *W. Va. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (\$100 bond); *Sierra Club v. Block*, 614 F. Supp. 488 (D. D.C. 1985) (\$20 bond).

CONCLUSION

For all of the reasons above, Plaintiffs respectfully request that the Court enjoin any logging or road building in the Moon Creek, Comados, Double Fish, Leaping Larson, Marlow Millicoma Divide, Millicoma Lookout, Mister Millipede, Otter Pop, Shoehorn, Sullivan Succotash, and Three Buck Joe timber sales, and enjoin any further logging of occupied murrelet habitat until this matter is resolved on the merits or until further order of the Court.

Respectfully submitted this 29th day of June, 2012.

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CERTIFICATE OF COMPLAINT WITH LR 7-2

I certify that the foregoing brief complies with LR 7-2 because it does not exceed 35 pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and certificate of counsel.

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