



December 1, 2008

*Via Federal eRulemaking Portal*  
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Public Comments Processing  
Attn: FWS-R1-ES-2008-0095  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

Re: Comments on the 90-Day Finding on a Petition to Remove the Washington, Oregon, and California Population of Marbled Murrelets From the List of Threatened Species—73 Fed. Reg. 57,314 (Oct. 2, 2008).

Greetings:

On October 2, 2008, the United States Fish and Wildlife Service (“FWS”) announced a positive 90-day finding on a petition from the American Forest Resource Council et al. (“AFRC”) to remove the Washington, Oregon, and California population of marbled murrelets (“tri-state population”) from the list of threatened species.<sup>1</sup> Please accept these comments on behalf of Earthjustice regarding the legal analysis of that 90-day finding.

A delisting of the tri-state population of marbled murrelets is not warranted. AFRC’s petition to delist is based entirely on the findings in the 2004 5-Year Status Review for the Marbled Murrelet (“5-Year Status Review”).<sup>2</sup> The findings in that 5-Year Status Review were tainted by political meddling from Department of the Interior officials and departed from expert scientific opinion that the tri-state population of marbled murrelets should remain listed under the Endangered Species Act. For at least the three reasons outlined below, this flawed 5-Year Status Review is invalid and would be an illegal basis for delisting the marbled murrelet.

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<sup>1</sup> 73 Fed. Reg. 57,314 (Oct. 2, 2008).

<sup>2</sup> 2004 5-Year Status Review for the Marbled Murrelet, available at <http://www.fws.gov/Pacific/ecoservices/endangered/recovery/Documents/Marbled%20murrelet.pdf> (last viewed Nov. 25, 2008).

1. Political Meddling Tainted the Conclusions in the 5-Year Status Review.

In 2002, AFRC sued over the tri-state marbled murrelet listing and critical habitat designation, in part challenging FWS's failure to conduct a five-year status review of the species.<sup>3</sup> FWS entered into a settlement with AFRC, agreeing to perform the 5-year status review for the marbled murrelet. To discharge its settlement obligation, FWS contracted with a private consulting firm to conduct a scientific evaluation regarding the status of the tri-state population. In March 2004, these independent scientists released a report (often referred to as the "EDAW Report") that attributed the decline in abundance of the marbled murrelet to the loss of old-growth forests that serve as primary nesting habitat:

Population declines appear to be related to the loss of nesting habitats due to logging and urbanization over the past 150 years. In most areas within the listed range, murrelets are left with small, isolated stands of older trees for nesting. At present and for the foreseeable future, these remnant populations are struggling to be self sustaining . . . . It is unrealistic to expect that the species will recover before there is significant improvement in the amount and distribution of suitable nesting habitat.<sup>4</sup>

The independent scientists determined that the tri-state population could be listed as a threatened species under the Endangered Species Act because it qualified as a distinct population segment ("DPS"):

Based on the review of available information on genetic, ecological, and behavioral differences within the breeding range, the global metapopulation of marbled murrelets should be considered to include at least 3 "distinct populations": (1) the Aleutian Islands or "northern" population; (2) the Alaska Peninsula to Puget Sound or "central" population; and (3) the California, Oregon, and western Washington or "southern" population.<sup>5</sup>

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<sup>3</sup> AFRC v. Dep't of Interior, No 02-6087-AA (D. Or.) (Complaint).

<sup>4</sup> Evaluation Report for the 5-Year Status Review of the Marbled Murrelet in Washington, Oregon, and California, at 6-34 (March 2004), available at [http://www.earthjustice.org/library/reports/MAMU\\_EDAW.pdf](http://www.earthjustice.org/library/reports/MAMU_EDAW.pdf) (last viewed Nov. 25, 2008); see also id. at 6-27 through 6-34.

<sup>5</sup> Id. at 6-17.

The report also concluded that, despite the current ESA protections for marbled murrelet, the tri-state population has continued to decline by approximately 4% to 7% per year.<sup>6</sup> Those conclusions were incorporated into the draft 5-year status review for the tri-state population that FWS's Regional Office in Portland, Oregon, sent to Washington, D.C., for finalization.<sup>7</sup>

However, officials in Washington D.C. decided to reverse course and issued a decision that the tri-state population of murrelets was not a DPS.<sup>8</sup> Documents obtained by Earthjustice on October 22, 2007, pursuant to a Freedom of Information Act request, indicate that this reversal was the result of political interference by Julie MacDonald, a now-retired official in the Department of Interior.<sup>9</sup> Specifically, as late as August 30, 2004, FWS was prepared to "affirm" that the tri-state population is a DPS.<sup>10</sup> However, on August 26, 2004, Ms. MacDonald requested materials relating to this decision and, on August 31, 2004, circulated a revised "lawyer-vetted version" of the status review.<sup>11</sup> In that revised version, FWS changed the answer to the question of whether the tri-state population's original listing satisfied the DPS Policy from "yes" to "no."<sup>12</sup> The revised status review was accompanied by a new draft press release, labeled "Julie's Draft," which announced FWS's new position that the tri-state population does not constitute a DPS.<sup>13</sup>

In April 2007, Ms. MacDonald was forced to resign from her position at Interior after she was implicated in systematically interfering with the science supporting Endangered Species Act decisions.<sup>14</sup> Her resignation came just one week before the House of Representatives was set to hold hearings on Ms. MacDonald's misconduct. In light of this history of political interference, Ms. MacDonald's decision to reverse course and conclude that the tri-state population was not a DPS is tainted with impropriety and cannot serve as a basis for delisting the tri-state marbled murrelet population.

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<sup>6</sup> Id. at 6-28.

<sup>7</sup> Draft Status Review at 17 (attached as Appendix 1).

<sup>8</sup> 2004 5-Year Status Review at 14-17.

<sup>9</sup> Earthjustice FOIA Documents, available at <http://www.earthjustice.org/library/references/murrelet-macdonald-foia-documents.pdf> (last viewed Nov. 25, 2008).

<sup>10</sup> Id. (Draft News Release 8/31/04).

<sup>11</sup> Id. (Jewett Email 8/26/07; Manson Email 8/31/04).

<sup>12</sup> Id. (Phifer Email 8/31/04).

<sup>13</sup> Id. (Draft Press Release 8/31/04).

<sup>14</sup> Department of the Interior, Report of investigation: Julie MacDonald, deputy assistance secretary – Fish, Wildlife, and Parks, (March 2007), available at <http://www.doioig.gov/upload/Macdonald.pdf> (last viewed Nov. 25, 2008).

2. The 5-Year Status Review's DPS Determination Was Wrong.

Ms. MacDonald's last minute decision to reverse course regarding the tri-state population's status as a DPS is unsupportable. In determining whether a population is "discrete," and therefore may constitute a DPS, the 1996 DPS Policy authorizes FWS to consider whether a population "is delineated by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exists that are significant in light of section 4(a)(1)(D) of the Act."<sup>15</sup> In attempting to reverse course and eliminate protections for the tri-state population, FWS officials misapplied this policy.

- a. FWS erred by comparing current levels of legal protection in the United States and Canada for marbled murrelets.

In the 5-Year Status Review, FWS concluded the tri-state population did not qualify as a DPS because Canada's 2003 enactment of the Species at Risk Act ("SARA") meant there were no significant differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms between the U.S. and Canada.<sup>16</sup> FWS's application of the DPS Policy with regard to this international boundary issue was inconsistent with FWS's very own status review guidance document:

In assessing whether the population is 'discrete' based on an international border across which there are significant differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms, the analysis should rest on any differences that would exist if the DPS were not listed under the ESA.<sup>17</sup>

Consistent with this policy, in June 2007, the Acting Regional Director for FWS Region 1 determined "that the conclusion reached by the Department on the [marbled murrelet] 5-year review was based on an incorrect 'discreteness' analysis under the DPS policy, as it compared current levels of legal protection in the United States (Endangered Species Act) and Canada (Species at Risk Act), rather than comparing the levels that would exist if the species were not

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<sup>15</sup> 61 Fed. Reg. 4,722, 4,725 (Feb. 7, 1996).

<sup>16</sup> 2004 Status Review at 15-16.

<sup>17</sup> FWS, 5-Year Review Guidance: Procedures for Conducting 5-Year Reviews Under the Endangered Species Act, at 1-6 n.4, available at [http://www.nmfs.noaa.gov/pr/pdfs/laws/guidance\\_5\\_year\\_review.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/guidance_5_year_review.pdf) (last viewed Nov. 25, 2008).

listed in the United States.”<sup>18</sup> Likewise, in the 90-day finding, FWS admitted that it erred by comparing current levels of legal protection, rather than comparing the protections that would exist if the species were not listed in the United States:

The Service now believes that the discreteness analysis in the 5-year review was flawed, because it compared current levels of legal protection across the international border, rather than levels of protection that would exist if the marbled murrelet were not listed in the United States. The Service believes that the latter approach is more rational in the context of a 5-year review, because it analyzes discreteness in the same manner as the Service would in an initial listing determination.<sup>19</sup>

- b. FWS erred by exaggerating the effectiveness of Canadian efforts to protect marbled murrelets.

FWS’s application of the DPS Policy in the 5-Year Status Review was also flawed because FWS overestimated the efficacy of Canada’s efforts to protect the marbled murrelet. In the draft status review for the tri-state population, FWS concluded that the tri-state population was a DPS because Canadian law would not provide protections to the marbled murrelet equivalent to those prescribed under the U.S. Endangered Species Act.<sup>20</sup> In a 2007 status review of the marbled murrelet, the United States Geological Service (“USGS”) also noted significant differences in habitat management practices between British Columbia and the United States despite enactment of Canada’s Species at Risk Act (“SARA”).<sup>21</sup>

This skepticism of Canadian efforts to protect marbled murrelets proved to be warranted; there is now considerable evidence that SARA and other Canadian wildlife laws do not provide protections comparable to those provided by the ESA. For example, SARA applies only to federal lands but approximately 80% of the Canadian nesting habitat for murrelets falls under provincial jurisdiction. Also, Canada has yet to promulgate a marbled murrelet recovery strategy despite a June 5, 2007, deadline; critical habitat for the marbled murrelet has not been identified in Canada; and SARA’s prohibitions against harming critical habitat are unenforceable.

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<sup>18</sup> See Letter from Acting Regional Director of FWS Region 1 to the Director of FWS at 2 (attached as Appendix 2).

<sup>19</sup> 73 Fed. Reg. at 57,317.

<sup>20</sup> Draft Status Review at 11-12 (attached as Appendix 1).

<sup>21</sup> USGS, Status Review of the Marbled Murrelet in British Columbia and Alaska, at 139 (2007), available at <http://pubs.usgs.gov/of/2006/1387/pdf/ofr20061387.pdf> (last viewed Nov. 25, 2008) (“2007 USGS Status Review”).

Canada's failure to protect its marbled murrelet population compounds the analytical errors in the 5-Year Status Review and demonstrates why protection of the tri-state population is essential.

3. A federal court and FWS have recognized that the tri-state region constitutes significant portion of the marbled murrelet's range.

Under the ESA, there are two situations in which FWS may list a population smaller than a taxonomic species or subspecies. First, as discussed above, a population may be listed if it qualifies as a DPS. Second, a population may be listed if it occupies a "significant portion of the range" of the species or subspecies.<sup>22</sup> In 1992, conservation groups petitioned for listing of the tri-state population of marbled murrelets. In a legal challenge stemming from that petition, the district court for the Western District of Washington, noting "uncontradicted findings" on the issue, concluded that "the marbled murrelet qualifies for listing as a threatened species throughout a significant portion of its range within the meaning of the ESA."<sup>23</sup> When FWS listed the tri-state population following the district court ruling, it confirmed that "[t]he three states encompass roughly one-third of the geographic area occupied by this subspecies, comprising a significant portion of its range."<sup>24</sup>

In the 5-year Status Review, FWS did not revisit the significant portion of the range issue. It had no reason to do so; the coasts of Washington, Oregon, and California constitute approximately 18% of the marbled murrelet's geographical range.<sup>25</sup> Because FWS has not reviewed or altered the significant portion of the range determination for the tri-state population, the 1992 listing remains valid regardless of the population's qualification as a DPS. This is yet another reason why the DPS finding in the 5-Year Status Review cannot serve as a legal basis for delisting the tri-state population.

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AFRC has presented no evidence that marbled murrelets in Washington, Oregon, and California no longer need protection; indeed, all the scientific evidence and reviews support continued ESA protection. AFRC's petition to delist the tri-state marbled murrelet population is

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<sup>22</sup> See, e.g., 16 U.S.C. § 1532(20) (defining "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"); see also Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 18-21 (D.D.C. 2002); Defenders of Wildlife v. Norton, 258 F.3d 1136, 1140-45 (9<sup>th</sup> Cir. 2001).

<sup>23</sup> Marbled Murrelet v. Lujan, No. C91-522R, slip op. at 11-12 (W.D. Wash. September 17, 1992).

<sup>24</sup> 57 Fed. Reg. 45,328 (Oct. 1, 1992).

<sup>25</sup> Evaluation Report for the 5-Year Status Review of the Marbled Murrelet in Washington, Oregon, and California, at 6-27 (March 2004), available at [http://www.earthjustice.org/library/reports/MAMU\\_EDAW.pdf](http://www.earthjustice.org/library/reports/MAMU_EDAW.pdf) (last viewed Nov. 25, 2008).

Marbled Murrelet Comment Letter  
December 1, 2008  
Page 7

based solely on the deeply flawed and politically motivated 5-Year Status Review. That status review—and its finding that the tri-state population of murrelets did not qualify as a DPS—is invalid. For the reasons discussed above, delisting based on the 5-Year Status Review would violate the Endangered Species Act.

Sincerely,



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