

| Commodity                                     | Parts per million | Commodity                                                                  | Parts per million | Commodity    | Parts per million |
|-----------------------------------------------|-------------------|----------------------------------------------------------------------------|-------------------|--------------|-------------------|
| Grape .....                                   | 0.2               | Soybean, hay .....                                                         | 200               | * * *        | * *               |
| Grass, forage, fodder and hay, group 17 ..... | 300               | Soybean, hulls .....                                                       | 100               | Tomato ..... | 0.10              |
| Guava .....                                   | 0.2               | Soybean, seed .....                                                        | 20                | * * *        | * *               |
| Herbs subgroup 19A .....                      | 0.2               | Spanish lime .....                                                         | 0.2               |              |                   |
| Hog, meat byproducts .....                    | 5.0               | Spearmint, tops .....                                                      | 200               |              |                   |
| Hop, dried cones .....                        | 7.0               | Spice subgroup 19B .....                                                   | 7.0               |              |                   |
| Horse, meat byproducts .....                  | 5.0               | Star apple .....                                                           | 0.2               | * * *        |                   |
| Llama .....                                   | 0.2               | Starfruit .....                                                            | 0.2               |              |                   |
| Imbe .....                                    | 0.2               | Stevia, dried leaves .....                                                 | 1.0               |              |                   |
| Imbu .....                                    | 0.2               | Strawberry .....                                                           | 0.2               |              |                   |
| Jackfruit .....                               | 0.2               | Sugar apple .....                                                          | 0.2               |              |                   |
| Jaboticaba .....                              | 0.2               | Sugarcane, cane .....                                                      | 2.0               |              |                   |
| Jojoba, seed .....                            | 0.1               | Sugarcane, molasses .....                                                  | 30                |              |                   |
| Juneberry .....                               | 0.2               | Sunflower, seed .....                                                      | 85                |              |                   |
| Kava, roots .....                             | 0.2               | Surinam cherry .....                                                       | 0.2               |              |                   |
| Kenaf, forage .....                           | 200               | Tamarind .....                                                             | 0.2               |              |                   |
| Kiwifruit .....                               | 0.2               | Tea, dried .....                                                           | 1.0               |              |                   |
| Lesquerella, seed .....                       | 0.1               | Tea, instant .....                                                         | 7.0               |              |                   |
| Leucaena, forage .....                        | 200               | Teff, grain .....                                                          | 5.0               |              |                   |
| Lingonberry .....                             | 0.2               | Ti, leaves .....                                                           | 0.2               |              |                   |
| Longan .....                                  | 0.2               | Ti, roots .....                                                            | 0.2               |              |                   |
| Lychee .....                                  | 0.2               | Ugli fruit .....                                                           | 0.5               |              |                   |
| Mamey apple .....                             | 0.2               | Vegetable, leafy, brassica, group 5 .....                                  | 0.2               |              |                   |
| Mango .....                                   | 0.2               | Vegetable, bulb, group 3 .....                                             | 0.2               |              |                   |
| Mangosteen .....                              | 0.2               | Vegetable, cucurbit, group 9 .....                                         | 0.5               |              |                   |
| Marmaladebox .....                            | 0.2               | Vegetable, foliage of legume, except soybean, subgroup 7A .....            | 0.2               |              |                   |
| Meadowfoam, seed .....                        | 0.1               | Vegetable, fruiting, group 8 .....                                         | 0.1               |              |                   |
| Mioga, flower .....                           | 0.2               | Vegetable, leafy, except brassica, group 4 .....                           | 0.2               |              |                   |
| Mustard, seed .....                           | 0.1               | Vegetable, leaves of root and tuber, group 2, except sugar beet tops ..... | 0.2               |              |                   |
| Noni .....                                    | 0.20              | Vegetable, legume, group 6 except soybean and pea, dry ...                 | 5.0               |              |                   |
| Nut, pine .....                               | 1.0               | Vegetable, root and tuber, group 1, except sugar beet ...                  | 0.2               |              |                   |
| Nut, tree, group 14 .....                     | 1.0               | Wasabi, roots .....                                                        | 0.2               |              |                   |
| Okra .....                                    | 0.5               | Water spinach, tops .....                                                  | 0.2               |              |                   |
| Olive .....                                   | 0.2               | Watercress, upland .....                                                   | 0.2               |              |                   |
| Oregano, Mexican, leaves .....                | 2.0               | Wax jambu .....                                                            | 0.2               |              |                   |
| Palm heart .....                              | 0.2               | Yacon, tuber .....                                                         | 0.2               |              |                   |
| Palm heart, leaves .....                      | 0.2               |                                                                            |                   |              |                   |
| Palm, oil .....                               | 0.1               |                                                                            |                   |              |                   |
| Papaya .....                                  | 0.2               |                                                                            |                   |              |                   |
| Papaya, mountain .....                        | 0.2               |                                                                            |                   |              |                   |
| Passionfruit .....                            | 0.2               |                                                                            |                   |              |                   |
| Pawpaw .....                                  | 0.2               |                                                                            |                   |              |                   |
| Pea, dry .....                                | 8.0               |                                                                            |                   |              |                   |
| Peanut .....                                  | 0.1               |                                                                            |                   |              |                   |
| Peanut, hay .....                             | 0.5               |                                                                            |                   |              |                   |
| Pepper leaf, fresh leaves .....               | 0.2               |                                                                            |                   |              |                   |
| Peppermint, tops .....                        | 200               |                                                                            |                   |              |                   |
| Perilla, tops .....                           | 1.8               |                                                                            |                   |              |                   |
| Persimmon .....                               | 0.2               |                                                                            |                   |              |                   |
| Pineapple .....                               | 0.1               |                                                                            |                   |              |                   |
| Pistachio .....                               | 1.0               |                                                                            |                   |              |                   |
| Pomegranate .....                             | 0.2               |                                                                            |                   |              |                   |
| Poultry, meat .....                           | 0.1               |                                                                            |                   |              |                   |
| Poultry, meat byproducts .....                | 1.0               |                                                                            |                   |              |                   |
| Pulasan .....                                 | 0.2               |                                                                            |                   |              |                   |
| Quinoa, grain .....                           | 5.0               |                                                                            |                   |              |                   |
| Rambutan .....                                | 0.2               |                                                                            |                   |              |                   |
| Rapeseed, seed .....                          | 20                |                                                                            |                   |              |                   |
| Rice, grain .....                             | 0.1               |                                                                            |                   |              |                   |
| Rice, grain, wild .....                       | 0.1               |                                                                            |                   |              |                   |
| Rose apple .....                              | 0.2               |                                                                            |                   |              |                   |
| Safflower, seed .....                         | 85                |                                                                            |                   |              |                   |
| Salal .....                                   | 0.2               |                                                                            |                   |              |                   |
| Sapodilla .....                               | 0.2               |                                                                            |                   |              |                   |
| Sapote, black .....                           | 0.2               |                                                                            |                   |              |                   |
| Sapote, mamey .....                           | 0.2               |                                                                            |                   |              |                   |
| Sapote, white .....                           | 0.2               |                                                                            |                   |              |                   |
| Sesame, seed .....                            | 0.1               |                                                                            |                   |              |                   |
| Sheep, meat byproducts .....                  | 5.0               |                                                                            |                   |              |                   |
| Shellfish .....                               | 3.0               |                                                                            |                   |              |                   |
| Soursop .....                                 | 0.2               |                                                                            |                   |              |                   |
| Soybean, forage .....                         | 100               |                                                                            |                   |              |                   |

14. Section 180.427 is amended by revising the heading and paragraph (a) to read as follows:

**§ 180.427 Tau-fluvalinate; tolerances for residues.**

(a) *General.* Tolerances are established for residues of the insecticide tau-fluvalinate [cyano-(3-phenoxyphenyl)methyl N-[2-chloro-4-(trifluoromethyl)phenyl]-D-valinate] in/on the following food commodities:

| Commodity   | Parts per million |
|-------------|-------------------|
| Honey ..... | 0.02              |

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[FWS-R1-ES-2008-0051; 92210-1117-0000-FY08-B4]

RIN 1018-AU37

**Endangered and Threatened Wildlife and Plants; Proposed Revised Designation of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed revised designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA) of the proposed revised critical habitat designation and an amended required determination section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revised rule, the associated

13. Section 180.368 is amended by alphabetically adding commodities to the table in paragraph (a)(1) to read as follows:

**§ 180.368 Metolachlor; tolerances for residues.**

(a) *General.* (1) \* \* \*

| Commodity           | Parts per million |
|---------------------|-------------------|
| * * *               | *                 |
| Dill .....          | 0.50              |
| * * *               | *                 |
| Grass, forage ..... | 10                |
| Grass, hay .....    | 0.20              |
| * * *               | *                 |
| Okra .....          | 0.50              |
| * * *               | *                 |
| Spinach .....       | 0.50              |

draft economic analysis, and the amended required determinations section. If you submitted comments previously, then you do not need to resubmit them because we have already incorporated them into the public record and we will fully consider them in preparation of our final rule.

**DATES:** We will consider comments received or postmarked on or before June 20, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: RIN 1018-AU37; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Matt Kales, Acting Project Leader, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE., 98th Ave., Suite 100, Portland, OR 97266; telephone 503-231-6179. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments**

We will accept written comments and information during this reopened comment period on our proposed revised critical habitat designation for the northern spotted owl published in the **Federal Register** on June 12, 2007 (72 FR 32450), the draft economic analysis of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of northern spotted owl habitat,

- What areas occupied at the time of listing that contain features essential for the conservation of the species we should include in the designation and why, and

- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Information on the extent to which any State and local environmental protection measures we reference in the DEA may have been adopted largely as a result of the species' listing.

(5) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed revised critical habitat designation, and information on any costs or benefits that we have overlooked.

(6) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes likely if we designate revised critical habitat.

(7) Information on whether the DEA identifies all costs that could result from the revised designation.

(8) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised critical habitat designation.

(9) The extent to which the description in the draft economic analysis of economic impacts to public land management and other activities is complete and accurate.

(10) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(11) Economic data on the incremental costs of designating any particular area as revised critical habitat.

(12) Information on any quantifiable economic or other potential benefits of the proposed revised designation of critical habitat. Factors which may be considered under the potential benefits of critical habitat designation may include, but are not limited to, aesthetic considerations, recreational use, biodiversity, aquatic resources, intrinsic values, and benefits to local communities.

(13) Any foreseeable economic, national security, or other relevant impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts. Other impacts in addition to economic effects that may be considered in the

designation of critical habitat may include, but are not limited to, social factors, ecological factors, impacts on forest management, impacts on fire management, and impacts on local communities. The proposed revised designation specifically requested public comment on whether "any areas should or should not be excluded from the revised designation under section 4(b)(2) of the Act and why" (72 FR 32450).

(14) The potential impact, if any, of the proposed revised designation on the receipt of Federal timber-based revenues by counties, including, but not limited to, counties receiving timber-based revenues under the O&C Lands Act of 1937. Such impacts may include, but are not limited to, effects to the stability of county programs due to fluctuating or uncertain timber revenues.

(15) Any foreseeable economic or other potential benefits resulting from the proposed revised designation. Factors which may be considered under the potential benefits of critical habitat designation may include, but are not limited to, aesthetic considerations, recreational use, biodiversity, aquatic resources, intrinsic values, and benefits to local communities.

(16) After considering the potential impacts and benefits of the proposed revised critical habitat designation, whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act.

(17) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

In addition, the Final Recovery Plan for the Northern Spotted Owl is now available. The public is invited to use this reopened comment period to provide comments on the revised critical habitat designation in light of the Recovery Plan or any other relevant information that has become available since the last comment period, such as the Scientific Review of the Draft Northern Spotted Owl Recovery Plan prepared by Sustainable Ecosystems Institute for the Service.

You may submit your comments and materials concerning our proposed revised rule, the associated DEA, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

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

You may obtain copies of the proposed revised rule and DEA by mail from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, or on our Web site at <http://www.fws.gov/oregonfwo/species/>. You may obtain copies of the Final Recovery Plan and Sustainable Ecosystems Institute report on the Internet at <http://www.fws.gov/pacific/ecoservices/endangered/recovery/NSORecoveryPlanning.htm>.

## Background

It is our intent to discuss only those topics directly relevant to the revised designation of critical habitat in this notice. For more information on the taxonomy and biology of the northern spotted owl, refer to the final listing rule published in the **Federal Register** on June 26, 1990 (55 FR 26114), and the proposed revised critical habitat rule published on June 12, 2007 (72 FR 32450).

We published the final rule to list the northern spotted owl as threatened in the **Federal Register** on June 26, 1990 (55 FR 26114), and designated critical habitat for the species on January 15, 1992 (57 FR 1796). On April 21, 2003, we published a notice of review initiating a 5-year review of the northern spotted owl (68 FR 19569), and on July 25, 2003, we published a second information request for the 5-year review (68 FR 44093). The 5-year review was completed on November 15, 2004, and concluded that the northern spotted owl should remain listed as a threatened species. On April 26, 2007, we published the notice of availability for the draft recovery plan for the northern spotted owl (72 FR 20865).

On January 13, 2003, we entered into a settlement agreement with the American Forest Resource Council, Western Council of Industrial Workers, Swanson Group Inc., and Rough & Ready Lumber Company to conduct a rulemaking to consider potential revisions to critical habitat for the northern spotted owl that includes a revised consideration of economic impacts and any other relevant aspects of designation. The dates for completion of this review were extended and called for the Service to submit a proposed revised critical habitat designation to the **Federal Register** by June 1, 2007, and to submit a final revised critical habitat designation to the **Federal Register** by June 1, 2008. We published the proposed revised designation of critical habitat for the northern spotted owl on June 12, 2007 (72 FR 32450), and reopened an additional comment period on the proposal on September 5, 2007 (72 FR 50929).

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

## Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any

other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed revised critical habitat designation based on our June 12, 2007, proposed rule to revise critical habitat for the northern spotted owl.

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for the northern spotted owl. The DEA quantifies the economic impacts of all potential conservation efforts for the northern spotted owl; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species; for example, under the Federal listing and other Federal, State, and local regulations. The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur after the proposed revised critical habitat is finalized. The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed revised critical habitat designation for the northern spotted owl over the next 20 years.

The current draft economic analysis estimates the foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs coextensive with listing. The analysis quantifies economic impacts of northern spotted owl conservation efforts associated primarily with the following activities: (1) Timber management, (2)

section 7 consultation, (3) survey and monitoring efforts, and (4) barred owl management.

The annualized pre-designation (1990 to 2007) impacts associated with species conservation activities for the northern spotted owl in area proposed for revised designation are \$563 million applying a 3 percent discount rate and \$600 million applying a 7 percent discount rate. These impacts are related to timber management, survey and monitoring efforts, barred owl management, and section 7 consultations. The post-designation impacts associated with species conservation were estimated over the period 2008 to 2027 for the same four categories of activities. The quantified post-designation baseline impacts (those estimated to occur in the absence of the critical habitat designation) are \$601.80 to \$602.21 million annualized applying a 7 percent discount rate, or \$601.77 to \$602.15 million annualized applying a 3 percent discount rate, over the 20-year period of analysis. Because these costs are projected to occur whether critical habitat is designated or not, they are not considered in our determination of whether the benefits of including an area as critical habitat outweigh the benefits of excluding the area.

Of the activities considered in the analysis, only administrative costs of actions taken under section 7 of the Endangered Species Act associated with the geographic area proposed as revised critical habitat for the northern spotted owl were determined to be incremental costs associated with the critical habitat designation, and therefore appropriate to consider in that designation. The DEA forecasts these incremental impacts associated with the proposed rulemaking to be \$132,000 to \$202,000 annualized over the next 20 years using a 7 percent discount rate, and \$122,000 to \$195,000 annualized using a 3 percent discount rate. The U.S. Forest Service (USFS) is expected to bear approximately 60 percent of the total anticipated upper-bound incremental impacts, while the Service is forecast to bear more than 30 percent of these impacts. The remaining incremental impacts (about 10 percent) are anticipated to be borne by the Bureau of Land Management (BLM).

Only the incremental costs of designating critical habitat, over and above the costs associated with species protection under the Act more generally, may be considered in designating critical habitat, therefore the methodology for distinguishing these two categories of costs is important. This is particularly true in the current case, where 99.97% of the total costs of

species conservation over the next 20 years are projected to be baseline costs, and 0.03% are projected to be incremental costs associated with the critical habitat designation. In the absence of critical habitat, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered species or threatened species—costs associated with such actions are considered baseline costs. Once an area is designated as critical habitat, proposed actions that have a Federal nexus in this area will also require consultation and potential revision to ensure that the action does not result in the destruction or adverse modification of designated critical habitat—costs associated with these actions are considered incremental costs. The DEA explains that incremental consultation which takes place as a result of critical habitat designation may fall into one of three categories: (1) Additional effort to address adverse modification in a new consultation; (2) re-initiation of consultation to address effects to critical habitat; and (3) incremental consultation resulting entirely from critical habitat designation (i.e., where a proposed action may affect unoccupied critical habitat). Based on historical data, the DEA estimates that there will be 28 incremental consultations annually in the first category, plus one additional re-initiation of consultation (category 2) for each affected National Forest or BLM district regarding its land or resource management plan. Because no unoccupied habitat is being proposed for designation, no consultations in category 3 are projected.

The DEA further projects that there will be no changes in management of any habitat resources that entail quantifiable costs resulting from these additional consultations over the 20-year period. This is because we believe that all costs of habitat management to protect northern spotted owls are already envisioned in the Northwest Forest Plan (NFWP) and the Western Oregon Plan Revisions (WOPR). As the DEA explains, “Both the NFWP and WOPR apply to lands within the current critical habitat designations, as well as in the proposed designation; however, neither plan was developed nor designed specifically in response to critical habitat” (DEA, p. 39). Thus, the roughly \$21 billion in historical and projected costs for protecting species in critical habitat areas are attributable solely to the plans (which were in turn developed partially in response to the

listing of the northern spotted owl) and not to either the current or proposed critical habitat designations. The Service notes that the majority of both current and proposed critical habitat areas are designated as Late Successional Reserves under the NFWP (which correspond roughly to Late Successional Management Areas under the WOPR), on which large scale harvesting of trees is generally not permitted, in order to protect late-successional and old-growth forests that are important to NSO preservation. However, we believe that the past and future management of these areas to protect northern spotted owls is a function solely of the plans, which did not result from, and will not be influenced in their future application by, the presence of critical habitat. Thus we project no incremental timber management costs as a result of the critical habitat designation.

Ideally, we would have distinguished in the DEA between management of land previously designated as critical habitat within each NWFP land use allocation (LUA) category and management of land not designated as critical habitat within the same category. If such an analysis found that there was no statistically discernable difference between timber harvest probabilities on critical habitat and non-critical habitat land within an LUA category, this would further support our conclusion that designation as critical habitat did not affect past management of habitat and therefore will be unlikely to have substantive costs in the future. Conversely, if such an analysis found that within a given LUA category, there was a lower probability of harvest on critical habitat land than on non-critical habitat land, this might have caused us to reassess that conclusion. However, we have been unable to find, and the Federal land managers that we have consulted have been unable to provide, timber harvest data that distinguishes between critical habitat and non-critical habitat land. As a result we have been able to quantitatively assess only baseline impacts, by looking at harvest probabilities by LUA category (but not by critical habitat) before the NFWP was implemented and after implementation of the NFWP (see Table 3–4 in the DEA). Lacking the relevant data for a statistical analysis of potential incremental impacts, we have instead relied on discussions with Service biologists and USFS and BLM land managers to assess incremental impacts. These discussions have confirmed that the anticipated impacts of the proposed designation on

timber management range from minimal to none (see Section ES-1 of the DEA).

We request comment on the accuracy of our methodology for distinguishing baseline and incremental costs, and the assumptions underlying it. We also request comment on alternative methodologies. Finally, we request comment on whether there is data available that could be used to distinguish harvest outcomes on critical habitat versus non-critical habitat land within each NWFP LUA category.

The DEA considers the potential economic effects of actions relating to the conservation of the northern spotted owl, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of revised critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the northern spotted owl in areas containing features essential to the conservation of the species. The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector. Finally, the DEA looks retrospectively at costs that have been incurred since the date we listed the northern spotted owl as threatened (June 26, 1990; 55 FR 26114), and considers those costs that may occur in the 20 years following the revised designation of critical habitat. Because the DEA considers the potential economic effects of all actions relating to the conservation of the northern spotted owl, including costs associated with sections 4, 7, and 10 of the Act and those attributable to the revised designation of critical habitat, the DEA

overestimates the potential economic impacts of the revised critical habitat designation.

As we stated earlier, we are soliciting data and comments from the public on this DEA, as well as on all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or its supporting documents to incorporate or address information we receive during this comment period. In particular, we may exclude an area from revised critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as revised critical habitat, provided the exclusion will not result in the extinction of the species.

#### Required Determinations—Amended

In our June 12, 2007, proposed revised rule (72 FR 32450), we said that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

#### Regulatory Planning and Review

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

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

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

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

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

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

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this revised designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the northern spotted owl would affect a substantial number of small entities, we considered the number of small entities affected within particular types of

economic activities. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement. The designation of critical habitat will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

Appendix B of the DEA evaluates the potential economic effects of the proposed revised designation on small entities, based on the estimated incremental impacts associated with the proposed rulemaking. The screening analysis is based on the estimated impacts associated with the proposed rulemaking as described in chapters 3 through 7 and Appendix A of the DEA. The analysis evaluates the potential for economic impacts related to several categories, including: (1) Timber management, (2) barred owl management and control, (3) northern spotted owl surveys and monitoring, (4) fire management, (5) linear projects (i.e., transportation, pipelines, and powerlines), (6) restoration, (7) recreation, and (8) administrative costs associated with Section 7 consultation. Of these activities, incremental impacts associated with the proposed revised critical habitat designation are anticipated only for the additive administrative costs of section 7 consultations and technical assistance requests (Appendix A of the DEA). The DEA concludes that as these incremental economic impacts will be borne entirely by Federal government agencies (USFS, BLM and the Service); the proposed rulemaking is not expected to affect any small entities.

In summary, we have considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities. Based on currently available information and as explained above, all incremental economic impacts of the proposed

revised designation are expected to be borne entirely by Federal agencies and no impacts on any small entities are anticipated. We therefore certify that, if promulgated, the proposed revised designation would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

#### **Executive Order 13211—Energy Supply, Distribution, and Use**

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The DEA finds none of these criteria relevant to this analysis (Appendix B of the DEA). Thus, based on information in the DEA, we do not expect northern spotted owl conservation activities within proposed revised critical habitat to lead to energy-related impacts. As such, we do not expect the proposed revised designation of critical habitat to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

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

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

(a) The rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal

Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except as (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

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

(b) We do not believe that the proposed designation will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The proposed revised designation of critical habitat imposes no obligations on State or local governments. The SBA does not consider the Federal Government to be a small governmental jurisdiction or entity. Consequently, we do not believe that the revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

#### **Executive Order 12630—Takings**

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the northern spotted owl in a takings implications assessment. This proposed revised critical habitat designation would only affect Federal lands and would not affect private property interests. Therefore, our takings

implications assessment concludes that the proposed revised designation of critical habitat for the northern spotted owl does not pose significant takings implications.

**Authors**

The primary authors of this notice are the staff of the Division of Endangered

Species, Pacific Region, U.S. Fish and Wildlife Service.

**Authority**

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

Dated: May 15, 2008.

**Lyle Lavery,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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