



July 5, 2012

Tina Campbell, Chief
Division of Policy and Directives Management
Public Comments Processing
Attn: FWS–R1–ES–2011–0112
Division of Policy and Directives Management,
U.S. Fish and Wildlife Service,
4401 N. Fairfax Drive, MS 2042,
Arlington, VA 22203

**Re: Comments by the North America Section of the Society for Conservation Biology¹
Regarding the Proposed Critical Habitat for the Northern Spotted Owl and its Accompanying
Environmental Assessment**

Dear Ms. Campbell;

On behalf of the Society for Conservation Biology's North America Section (SCB), we offer the following comments on the proposed critical habitat² of the Northern Spotted Owl (*Strix occidentalis caurina*) under the Endangered Species Act. SCB has significant concerns regarding multiple policy decisions contained within the proposed critical habitat designation, as they could potentially undermine the long-term effectiveness of the Endangered Species Act (ESA or Act) for all species. Specifically, we are concerned that the proposed critical habitat designation, which is required by Section 4(b)(2) of the ESA, contains many policy pronouncements regarding future consultations under Section 7 of the ESA. As far as we know, this is first time the Fish and Wildlife Service (FWS) has ever included such far-reaching policy decisions within a critical habitat proposal. These proposed policy changes are troubling because they do not appear to be supported by the best available science, which the ESA requires the Services to follow for decisions relating to both Section 4 and Section 7 of the Act.

Given the complexity of the critical habitat proposal for the Northern Spotted Owl (NSO), SCB is submitting two separate comment letters. This first set of comments focuses on the policy implications of the various proposals relating to critical habitat and consultations under Section 7 of the ESA. A second set of comments are being submitted regarding the Fish and Wildlife Service's economic analysis of the proposed critical habitat. In addition, a peer review of the science underlying the proposed critical habitat designation is being conducted by SCB, The Wildlife

¹ SCB is an international professional organization whose mission is to advance the science and practice of conserving the Earth's biological diversity, support dissemination of conservation science, and increase application of science to management and policy. The Society's 5,000 members include resource managers, educators, students, government and private conservation workers in over 140 countries.

² Revised Critical Habitat for the Northern Spotted Owl, 77 Fed. Reg. 14,062 (Mar. 8, 2012) (hereafter "REVISED CRITICAL HABITAT")



Society, and the American Ornithologists' Union. To preserve the scientific integrity of the peer review, the names of those scientists participating in the joint peer review by the three scientific societies have not been revealed to the SCB policy office, and their work product has not been coordinated with the SCB policy office. Finally, on June 6th, SCB submitted a letter with The Wildlife Society and the Ornithological Council regarding possible Barred Owl (*Strix varia*) removal experiments in the Pacific Northwest within the NSO's critical habitat.³

The comments offered here focus primarily on the policy proposals put forward by the FWS, not on the scientific methodologies or analytical methods used by the FWS to identify and delineate those areas that possess the essential physical or biological features essential to the conservation of the NSO. The critical habitat proposal outlines four possible alternatives regarding the final amount of critical habitat that should be designated. These alternatives are analyzed and discussed in an Environmental Assessment.⁴ For reasons explained in detail below, SCB supports Alternative B, which does not exclude any potential critical habitat based on social or economic grounds. Alternative B represents the only management approach for the NSO that is sufficiently precautionary to meet the long-term goal of the recovery of the NSO, a species that continues to decline throughout its range.

EXECUTIVE SUMMARY

Under Section 4(b)(2) of the ESA, the Fish and Wildlife Service is required to designate critical habitat to the maximum extent determinable within one year of a species being designated as threatened or endangered under the ESA.⁵ The NSO was listed as a threatened species in 1990,⁶ and 6.8 million acres of critical habitat was proposed for the owl in 1992.⁷ This first critical habitat designation was challenged by the timber industry in court, and the FWS entered into a settlement agreement to begin the process to revise the owl's critical habitat 2003. In 2007, the FWS proposed 5.8 million acres of critical habitat for the owl.⁸ The revised critical habitat designation was challenged again in Federal court in 2008. Shortly thereafter, the inspector general of the Department of Interior concluded that improper political interference had influenced the critical habitat review process.⁹ In the fall of 2010, the court remanded the 2008 critical habitat designation, and required FWS to issue a new proposed revised critical habitat.¹⁰ In other words, the designation of critical habitat for the owl has been anything but straightforward, nor has it been based on the best available science.

³ The joint letter by the Society for Conservation Biology, The Wildlife Society, and the Ornithological Council is available at: www.conbio.org/policy

⁴ The draft environmental assessment is available at:

http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/Documents/CH_DRAFTEnvAssmnt_6.1.12.pdf

⁵ 16 U.S.C. § 1533(b)(2)

⁶ *Determination of threatened status for the Northern Spotted Owl*, 55 Fed. Reg. 26,114 (Jun. 26, 1990).

⁷ *Determination of critical habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1,838 (Jan. 15, 1992).

⁸ *Proposed revised designation of critical habitat for the Northern Spotted Owl*, 72 Fed. Reg. 32,450 (Jun. 12, 2007).

⁹ *Investigative Report of The Endangered Species Act and the Conflict between Science and Policy*, Dept. of Interior Inspector General. Dec 2008.

¹⁰ *Carpenters' Industrial Council v. Salazar*, Case No. 1:08-cv-01409-EGS (D.D.C. Sept. 1, 2010)



SCB is concerned that the FWS's newest proposal for designating critical habitat contains several problematic policy decisions that are inconsistent with the function and purpose of the ESA, and which will likely lead to the same result from the 1992 and 2008 proposals—more litigation and delays—all of which may slow finalizing critical habitat for the owl several more years. Furthermore, these new policy actions have the potential for setting a dangerous precedent for other threatened and endangered species that have yet to receive critical habitat designations. Given that scientific research indicates a correlation between the designation of critical habitat and a listed species possessing an improving conservation status, the FWS's policy decisions are very troubling.¹¹

When the NSO was originally listed as threatened, leading owl researchers predicted that the species would continue to decline for several decades, even with habitat conservation, due to the continuing impacts of unsustainable forestry practices.¹² Given the time-scale that may be needed to recovery the owl, SCB urges the FWS to take a precautionary and patient approach to managing the NSO's critical habitat, despite the pressures to continue timber extraction from its habitats. In particular, SCB has identified the following four areas of concern regarding the critical habitat proposal:

- 1) The critical habitat proposal contains a detailed discussion of the “value” of designating critical habitat, suggesting that critical habitat provides few additional conservation benefits beyond that of protecting and conserving a species under the ESA. Studies show that designation of critical habitat does provide significant benefits for threatened and endangered species. SCB believes that the critical habitat proposal should be stripped of these policy discussions and simply contain the legally required elements of a standard critical habitat designation.
- 2) The FWS has identified 14 million acres of owl critical habitat based on lands that possess the essential biological and physical elements for the owl's survival and recovery; however, FWS is considering three alternatives to this designation, which would excluding between one to five million acres from the final critical habitat designation. These alternatives are analyzed in an Environmental Assessment pursuant to the National Environmental Policy Act. **SCB supports Alternative B, also known as Outcome 1, in the critical habitat proposal, the full 14 million acre designation without any exclusion.**
- 3) FWS states in the critical habitat proposal there may be “greater exclusions” from the proposed critical habitat based on vaguely defined economic concerns. While SCB will be submitting separate comments on the economics of critical habitat, we note here that if additional lands are identified for exclusion, FWS must provide a second comment period to allow the larger public to review where these exclusions might be. Without a second comment period, FWS will violate the fundamental principles of public notice and comment as required by the Administrative Procedures Act and the National Environmental Policy Act.
- 4) SCB is unaware of a critical habitat proposal that contained so many policy prescriptions relating to Section 7 consultations. The FWS proposal contains language suggesting that

¹¹ Taylor et al. 2005. *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, BioScience 55(4):360-367.

¹² Thomas et al. (1990, p. 5) and USDI (1992, Appendix C)



forest “treatments” less than 500 acres would not rise to the level of “destruction or adverse modification” of critical habitat. SCB believes that such statements have the potential of improperly influencing future consultation regarding activities in the owl’s critical habitat. All projects that may affect the spotted owl or its critical habitat must be evaluated on the merits during individual consultation process, not tiered off of a critical habitat designation in an invalid and unscientific manner. This proposal should be eliminated in the final critical habitat proposal.

- 5) The FWS appears to be embracing the concept of “active forestry” in the owl’s critical habitat without sufficient scientific validation. FWS’s apparent decision to move forward with untested “active management” of federally owned forest lands at the landscape level *prior* to validation through the scientific peer-review process represents a potentially serious lapse in the application of the scientific process. The decision to move forward with “active management” without a thorough environmental review may conflict with the mandates of the National Environmental Policy Act.

I. Critical Habitat Improves the Likelihood of Recovery of Threatened and Endangered Species. The Full 14 Million Acre Proposal Should be Finalized Without Exclusions to Ensure the Recovery of the Spotted Owl.

- A. The Purpose and Value of Critical Habitat Should Not be Discounted by the Fish and Wildlife Service.

SCB believes that for threatened and endangered species, critical habitat is, as its name implies, *critical*. Loss of habitat continues to be the primary threat to the vast majority of imperiled species in the United States and around the world, a fact that the Congress expressly noted when it passed the Endangered Species Act in 1973.¹³ Accordingly, the recovery of threatened and endangered species ultimately depends on sufficient habitat being managed, protected, and restored to ensure a species’ long-term viability. As Congress explained:

Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our civilization. On the other hand, *there are certain areas which are critical which can and should be set aside*. It is the intent and purpose of this legislation to see that our ability to do so, at least within this country is maintained.¹⁴

Protecting threatened and endangered species requires that critical habitats be protected and managed in a way such that human activities do not jeopardize the survival or recovery of these species. This is precisely the purpose of Section 7(a)(2) of the ESA, which requires *both* that no Federal agency action jeopardize the continued existence of any threatened or endangered species, *and* that no Federal agency action result in the “destruction or adverse modification” of critical habitat.¹⁵ In 1978, Congress defined the term “critical habitat” to include those areas:

¹³ Wilcove, D.S, et al. 1998. *Quantifying threats to imperiled species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease*. *BioScience* 48(8):607-615.

¹⁴ H.R. Rep. No. 93-412, at 4 (1973) (emphasis added).

¹⁵ 16 U.S.C. § 1536(a)(2).



- (i) ...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protect; and
- (ii) specific areas outside the geographical area occupied by the species...upon a determination...that such areas are essential for the conservation of the species.¹⁶

This is the basic framework for critical habitat, and as the FWS notes in the NSO critical habitat proposal, “the designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area...Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners.”¹⁷ Only when a landowner requests Federal funding, a permit, or other approval for some action does the Section 7 prohibition on the destruction or adverse modification of critical habitat come into play.

At some points in the past, the FWS has indicated that, because critical habitat has only one direct regulatory application via the Section 7 consultation process, that designating critical habitat was of little value. As the FWS explained in 1999, “we have long believed that, in most circumstances, the designation of ‘official’ critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources,” and that “separate protection of critical habitat is duplicative for most species.”¹⁸ But this belief was based on a legally invalid regulatory definition of the term “destruction or adverse modification,” which held that there was no substantive difference between the concept of jeopardy to a species and destruction or adverse modification of a species’ habitat.¹⁹ SCB hopes that the FWS has long since moved past this myopic view of critical habitat, and recognizes that there are many ancillary benefits that designation of critical habitat provides, in addition to a vital regulatory function.

The reality is that, in addition to the requirements of Section 7, critical habitat serves several additional purposes that help to further the implementation of the ESA. First, by its definition, the designation of critical habitat requires the Services to consider at the time of listing what habitats, and therefore what physical and biological features are essential for the conservation of the species, something that the FWS is otherwise not required to consider. Critical habitat *must* be designated within one year of the final action to protect a species under the ESA.²⁰ While recovery plans may contain discussions of the habitat needs of threatened and endangered species, recovery plans routinely take years, and even decades, to develop. Second, the FWS is required to provide a description and evaluation of activities which may adversely modify such habitat, thereby providing guidance for landowners and land-management agencies on ways they can avoid the take of endangered or threatened species, the adverse modification of critical habitat, and other impacts to

¹⁶ 16 U.S.C. § 1532(5)(A)

¹⁷ REVISED CRITICAL HABITAT at 14,081.

¹⁸ *Notice of Intent To Clarify the Role of Habitat in Endangered Species Conservation* 64 Fed. Reg. 31,871 (May 3, 1999).

¹⁹ See *N.M. Cattle Growers Ass’n v. U. S. Fish and Wildlife Serv.*, 248 F.3d 1277, 1283 (10th Cir. 2001); *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004)

²⁰ 16 U.S.C. § 1533(b)(6)(C)(ii).



endangered or threatened species prohibited by the ESA.²¹ This guidance typically addresses activities *not* likely to be viewed as prohibited “take,” but for which a landowners or government land management official may wish to seek.²² Third, the designation process provides information for Section 10 incidental take permits and habitat conservation plans on private lands regarding what features must be managed to protect listed species. Adequate knowledge of the habitat needs of the species in question is crucial to and underlies the process of HCP development and approval and is critical to achieving adequate HCPs.²³ Fourth, critical habitat provides additional information to Federal and State land management agencies on land acquisition decisions that could benefit endangered species. This activity was clearly contemplated by Congress when it passed the ESA,²⁴ and without such information, agencies will not know which parcels to prioritize for acquisition. Finally, the critical habitat designation process informs the development of recovery plans. Section 4(f) of the ESA requires the preparation of a recovery plan for each listed species.²⁵ Recovery plans provide guidance on what actions, including habitat maintenance and restoration, are necessary to recover a species. Here again, the designation of critical habitat can play an important role in providing the scientific knowledge of the habitat needs of a species and analysis of effects and impacts that is crucial to development of an effective recovery plan. Because the process entails specific requirements for designating critical habitat, it provides a sounder basis for recovery criteria. To summarize, the critical habitat designation process provides vital information on a variety of ESA implementation activities to land managers regarding what actions they should and should not take in order to protect threatened and endangered species. Without critical habitat, this knowledge may not be generated in a timely manner, if at all.

Because there are clear benefits of designating critical habitat on both public and private lands, SCB is confused by the pronouncement within the critical habitat proposal for the NSO that “there may be significant benefits to excluding private lands” from critical habitat designations.²⁶ The FWS has made *no attempt* to even explain whether it believes that there are any ancillary benefits from the designation of critical habitat, as SCB has done immediately above. Nor has FWS explained what actual *harm* comes from designating critical habitat on private lands. Since FWS has correctly concluded that “critical habitat designations do not provide additional regulatory protections for a species on non-Federal lands,” it is very difficult to imagine how there could be substantial benefits arising from excluding private lands from designation

SCB is certainly aware that Congress gave the FWS the discretion to exclude specific areas from a final critical habitat designation if it “determines *that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat*, unless...the failure to designate such area as critical habitat will result in the extinction of the species concerned.”²⁷ The ability to exclude particular areas of critical habitat may, in certain cases, be appropriate if there are substantial economic or other impacts that would result from the designation of a particular parcel

²¹ 16 U.S.C. § 1533(b)(8)

²² Congressional Research Service. 2005. *Designation of Critical Habitat Under the Endangered Species Act*, RS20263 (Apr. 11, 2005).

²³ *Id.*

²⁴ H.R. Rep. No. 93-412, at 4 (1973)

²⁵ 16 U.S.C. § 1533(f).

²⁶ REVISED CRITICAL HABITAT at 14,063.

²⁷ 16 U.S.C. § 1533(b)(2) (emphasis added).



of critical habitat. However, what FWS appears to be contemplating for the NSO is a blanket exclusion of *all* State lands and/or *all* private lands. If this were to occur, between one and five million acres of habitat that contains the physical and biological features essential to the survival and recovery of the species could be excluded. SCB fails to see what “benefit” such exclusion would provide to owl conservation given the clear informational and regulatory benefits of including State and private lands in the critical habitat designation.

And as a factual matter, there is considerable evidence that the designation of critical habitat can make a very real difference for listed species. A report analyzing FWS data on population trends of threatened and endangered species submitted to Congress by FWS found that species with critical habitat are nearly twice as likely to have an improving population trend as those listed species without critical habitat.²⁸ As another example, when a federal court vacated the 730,000 acre critical habitat designation for the endangered cactus ferruginous pygmy-owl²⁹ (which in turn was removed from the ESA list altogether) the U.S. Army Corps of Engineers and the Environmental Protection Agency responded by terminating Section 7 consultations with FWS on several major development projects within the former critical habitat area without mitigation. Before the court’s ruling, FWS had typically required developers seeking to build in the owl’s critical habitat to set aside eighty percent of their property as open space or to purchase four acres of owl habitat for every acre developed.³⁰ After the designation was vacated, this requirement no longer applied.

SCB can only conclude that the FWS feels that voluntary conservation is preferable to a regulatory approach with respect to habitat needs for threatened and endangered species. Whether or not this FWS’s feeling is accurate is difficult to evaluate given that lack of citation to any specific peer-reviewed literature. There is at least some scientific literature that demonstrates that voluntary conservation efforts are most effective where there are meaningful mandatory restrictions on private behavior if such voluntary efforts to conserve a resource fail.³¹ If mandatory restrictions are not sufficiently “burdensome,” then there will be few incentives for private individuals to take proactive, voluntary measures to avoid those mandatory restrictions. In other words, a program that only includes “carrots” is not nearly effective as one that includes “carrots” *and* “sticks.” Another recent paper argued that the likelihood that a private entity will undertake voluntary conservation efforts under the Endangered Species Act depends upon the “availability of assurances regarding future regulation, *as well as on the background threat of regulation* and the cost advantage of voluntary agreements.”³² Without *both* the “threat” of mandatory conservation requirements through regulation, *and* regulatory assurances that there are advantages to taking voluntary conservation actions early, voluntary conservation efforts will likely be inefficient.³³ Thus, the

²⁸ See Taylor et al. 2005. *The Effectiveness of the Endangered Species Act: A Quantitative Analysis* BioScience 55(4):360-367.

²⁹ *Nat’l Ass’n of Home Builders v. Norton*, 2001 WL 1876349 at *2 (D.Ariz. Sept. 21, 2001).

³⁰ Amy Sinden. 2004. *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designation*. Harvard Environmental Law Review 28:129.

³¹ See generally, K. Segerson, T.J. Miceli, *Voluntary environmental agreements: good or bad news for environmental protection?*, J. Environ. Econ. Manage. 36 (1998) 109–130.

³² C. Langpap, J. Wu. 2004. *Voluntary Conservation of Endangered Species: When Does no Regulatory Assurance Mean no Conservation?* Journal of Environmental Economics and Management 47:435–457.

³³ *Id.*



“benefit” of excluding critical habitat, meaning that there is no regulatory “stick” present, appears to lack a factual foundation.

B. Alternative B Provides the Habitat That More Closely Approaches the Conditions That Are Necessary to Allow for Recovery of the Spotted Owl in the Future Because Alternative B Does Not Exclude Critical Habitat Based on Unfounded Suppositions Regarding the Value of Critical Habitat.

SCB supports Alternative B, the full 13.9 million acre critical habitat designation for the NSO. The NSO was listed in 1990 because of the loss of old-growth habitat across its range and the inadequacy of existing regulatory mechanisms to support the species.³⁴ At the time of listing, the best available science suggested that the NSO “would continue to decline for several decades, even with habitat conservation, as the consequence of lag effects at both individual and population levels.”³⁵ Thus, it is understandable that despite the decline in the rate and intensity of timber harvesting on Federal lands since listing, the NSO continues to decline. As both the critical habitat proposal and the 2010 recovery plan³⁶ acknowledge, many populations of spotted owls continue to decline, especially in the northern parts of the subspecies’ range, even with extensive maintenance and restoration of spotted owl habitat in recent years. Some of these declines are also a result of competition from the congeneric Barred Owl (*Strix varia*).³⁷ It is important to recognize, as the FWS does, that the “loss of habitat has the potential to intensify competition with barred owls by reducing the total amount of resources available to the northern spotted owl and by increasing the likelihood and frequency of competitive interactions [with Barred Owls].”³⁸ Because habitat loss and degradation remains the primary, underlying cause of the NSO’s decline, the most precautionary approach for management is to designate all areas that the FWS has identified that contain the physical and biological features that are essential to the conservation of the NSO. In this case, that option is represented by Outcome 1 in the critical habitat proposal and Alternative B in the accompanying Environmental Analysis.

The FWS has proposed three other alternatives in the critical habitat proposal and environmental assessment. Alternative C (also known as Outcome 2 in the critical habitat proposal) would finalize the proposed critical habitat, but exclude all private and State lands with active conservation agreements, including Habitat Conservation Plans, Safe Harbor Agreements, and other formal conservation agreements. In this outcome, the final designation would be 13 million acres. While SCB supports Alternative B, Alternative C would still likely meet the requirements of the ESA because the only lands being proposed for exclusion would be those lands with active conservation agreements designed to protect and conserve the NSO. Each of these agreements has been reviewed by the FWS through the Section 10 of the ESA’s consultation and permitting processes. Given that there would likely be no or minimal management changes as a result of

³⁴ 55 Fed. Reg. 26,114 (June 26, 1990).

³⁵ REVISED CRITICAL HABITAT at 14,073.

³⁶ USFWS. 2010. Revised Recovery Plan for the Northern Spotted Owl (*Strix occidentalis caurina*) at vi (hereafter “Revised NSO Recovery Plan”) Available at: <http://www.fws.gov/oregonfwo/Species/Data/NorthernSpottedOwl/Recovery/Library/Documents/RevisedNSORecPlan2011.pdf>

³⁷ *Id.*

³⁸ REVISED CRITICAL HABITAT at 14,073.



critical habitat being designated in areas where existing conservation agreements are present, there would be few additional benefits or harms from inclusion in the final designation.

The remaining alternative/outcomes would not be consistent with the goal of NSO conservation and recovery because each remaining alternative excludes a broad swath of lands based on undefined “benefits” and without scientific support. In Alternative D (Outcome 3 in the critical habitat proposal) all California State park lands and some BLM and National Park Service lands would be excluded from the critical habitat rule. Given the current budget crisis in California and the possible closure of over 70 State Parks in the California State Park system,³⁹ there are simply no assurances that those lands will be managed for the long-term conservation objectives of the NSO. The FWS critical habitat proposal does not sufficiently discuss the possible conservation implications of large scale budget cuts to the California State Park system. While the exclusion of federal BLM and NPS wilderness areas, national scenic areas, and national parks is likely to have little negative impact on the NSO, SCB believes that the exclusion of critical habitat would likely have no measurable benefits compared to a precautionary approach of including these lands within the final critical habitat designation.

It is equally important to plan for the possibility, and indeed, likelihood, that Canada will reduce the protection afforded to NSO habitat indirectly but severely as it continues on its current course to reduce the scope and strength of its own federal laws that are the equivalent of our NEPA, ESA, and related laws protecting the small to medium sized streams that are prime fish habitat, particularly in the relatively pristine areas of British Columbia where most of the remaining NSOs in Canada reside.⁴⁰

Finally, SCB strongly opposes Alternative E (also known as outcome 4 in the critical habitat proposal) because it excludes all private lands and all State lands regardless of whether there are any conservation measures on those lands. In this outcome, the final designation would be only nine million acres of critical habitat. As stated above, SCB does not believe there is any factual support for the FWS’s assertion that “there may be significant benefits to excluding private lands” from the critical habitat designation. Since critical habitat is only directly implicated on State and private lands when a federal permit or federal funding is implicated, the regulatory burden is relatively low. However, critical habitat does insure that where such a nexus occurs, the conservation of the NSO is considered. And, there are significant ancillary benefits of designating critical habitat on State and private lands. Given the scale of the exemption being proposed here, FWS must provide additional information regarding how such an exclusion would fit into the larger recovery goals of the NSO.

³⁹ See *e.g.*, New York Times. California Cuts Mean 70 Parks Will be Closed, Page A14 (May 13, 2011).

⁴⁰ See, *e.g.*, <http://www.theglobeandmail.com/news/politics/ottawa-notebook/despote-dogged-opposition-tory-budget-bill-heads-for-final-vote/article4325299/>



C. Exclusions of Additional Critical Habitat Based on Economic Concerns as Contemplated By FWS Would Require Additional Notice and Comment Under Both the National Environmental Policy Act and the Administrative Procedures Act.

In addition to the four Alternatives described in the Environmental Assessment, the FWS has suggested that additional habitat could be excluded from the final critical habitat rule:

There is, of course, a Possible Outcome 5, which would involve greater exclusions than those identified in Possible Outcome 4....In considering the various possible outcomes, we will focus on the requirements of the Act and to the extent consistent with law, the requirements of Executive Order 13563 and in particular its emphasis on public participation, on imposing the least burden on society, and on maintaining flexibility and freedom of choice for the public.⁴¹

Thus under Outcome 5, additional lands not identified for exclusion in the previous four alternatives could be excluded in the final critical habitat designation. These exclusions could total one acre, a thousand acres, a million acres, or more, and there is simply no way to analyze the conservation implications of such exclusions. SCB has three concerns regarding the possibility that these additional un-identified areas will be excluded from the critical habitat designation. First, excluding these areas would represent a violation of the National Environmental Policy Act because it would represent an additional alternative that was not discussed in the presentation of alternatives. Second, excluding these areas would represent a violation of the Administrative Procedure Act because there would be no opportunity to comment on these specific exclusions. Most importantly for SCB, excluding these areas would make peer-review of those critical habitat exclusions impossible, thereby potentially undercutting the purposes of the ESA, namely to recover threatened and endangered species and to conserve the habitat on which they depend.

The National Environmental Policy Act (NEPA) has two overarching goals -- to require agencies to take a "hard look" at the consequences of a proposed action, and to provide the public with both information about the proposed action and an opportunity to provide its comments on the proposal.⁴² The primary means by which a Federal agency takes a hard look at a proposed action is by analyzing a range of alternatives to the proposed action, which the Council on Environmental Quality (CEQ) describes as the "heart of the environmental impact statement." Outcome 5 is not one of the alternatives considered in the Environmental Assessment prepared by the FWS. The Environmental Assessment does not even mention Outcome 5 or Executive Order 13562 *at all* in the 200+ page document. If the FWS proposes to exclude additional lands from the final critical habitat designation as Outcome 5 contemplates, then it must provide a supplemental Environmental Assessment in order to both provide the public with the opportunity to consider these exclusions and to ensure that FWS indeed took a "hard look" at the possible consequences of this Outcome. Given that the designation of critical habitat, is at its heart a scientific question, the failure to provide meaningful scientific review of these potential additional exclusions would represent a serious lapse in compliance with NEPA.

⁴¹ REVISED CRITICAL HABITAT at 14,068.

⁴² *Robertson v. Methow Valley Citizens Council*, 490 US 332, 356 (1989).



Second, “Outcome 5” would violate the notice and comment requirements of the Administrative Procedure Act (APA). Under the APA, the public must have a meaningful opportunity to comment on an agency’s proposed rulemaking, such as the designation of critical habitat. But, one cannot comment substantively if there is no notice of an agency’s proposed course of action. Under the APA, “notice is inadequate where an issue was only addressed in the most general terms in the initial proposal.”⁴³ An agency proposal must be sufficiently detailed that the parties affected by a final rule were put on notice that “their interests were at stake.”⁴⁴ In this case, the FWS notice is insufficiently vague regarding Outcome 5. The critical habitat proposal covers 14 million acres across three States. Yet, Outcome 5 provides no specifics regarding where lands might be excluded, how much acreage might be excluded, or what criteria will be used to evaluate these exclusions. The critical habitat proposal does not discuss how FWS will evaluate “freedom of choice,” “flexibility,” or “burden on society.” SCB requests that FWS provide additional information regarding how FWS will evaluate these criteria in a manner that involves meaningful “public participation.” Without these details, it is impossible for SCB, or any other member of the public, to weigh in on Outcome 5 other than in the most general terms. Again, as a scientific question, SCB is concerned that there is simply no way to assess the conservation implications of these possible additional exclusions without a second period of public comment. Therefore, the only proper remedy, if additional lands are excluded via Outcome 5 is for FWS to provide an additional period of public comment via the rulemaking process.

Finally, as a corollary of the above two points, peer review of lands excluded as a result of Outcome 5 is simply impossible given the lack of specificity. The purpose of the ESA and the critical habitat designation process is to recover threatened and endangered species. And as the ESA requires, critical habitat cannot be excluded if it would result in the “extinction of the species.” Whether or not an exclusion of lands under Outcome 5 would lead to the extinction of the owl simply cannot be evaluated without an additional period of time to allow for meaningful peer review. In 2009, President Obama issued a memorandum on Scientific Integrity stating that “science and scientific process must inform and guide decisions of my Administration on a wide range of issues, including...protection of the environment.”⁴⁵ Outcome 5 does not appear to be guided by any science, yet the designation of critical habitat is a scientific question. Because of the possible unprecedented consequences of Outcome 5, SCB strongly recommends that no acres of critical habitat be excluded based on either Executive Order 13563 or President Obama’s February 28th Memorandum on the NSO.

II. The FWS is Making Improper Policy Judgments Regarding the Future Impacts of Hypothetical Projects in Spotted Owl Critical Habitat Instead of Evaluating Projects Through the Consultation Process. These Policy Judgments Should be Stripped from the Final Critical Habitat Rule.

Section 4(b)(8) of the ESA requires the FWS to “include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken

⁴³ *American Medical Ass’n v. United States*, 887 F. 2d 760, 768 (7th Cir. 1989)

⁴⁴ *Id.*

⁴⁵ Mar 9, 2009 White House Memorandum for the Heads of Executive Departments and Agencies: Scientific Integrity. Available at: <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf>



may adversely modify such habitat, or may be affected by such designation.”⁴⁶ Thus, it is appropriate for FWS to consider the range of activities that, in the future, will likely trigger Section 7 consultations. However, SCB is concerned that the FWS is taking an unprecedented step by pre-judging the outcome of future Section 7 consultations regarding these activities within the critical habitat proposal. These policy decisions, which are not based “on the best scientific and commercial data available” as required by the ESA, undermine future consultations, and are thereby inconsistent with the structure and purpose of the ESA. SCB recommends that these prejudicial statements be stripped from the final critical habitat rule for the NSO.

A. The FWS May Not Set a 500-Acre Threshold, or any Acreage Threshold for Predetermining Whether Section 7 Consultations Will be Required in the NSO’s Critical Habitat. This Provision Must Be Eliminated From the Final Critical Habitat Rule.

In the draft critical habitat proposal for the spotted owl, the FWS proposes that for consultations under Section 7 of the ESA, that the FWS utilize a 500 acre scale “as a screen for a determination of not likely to adversely affect” NSO critical habitat.⁴⁷ This proposal would be in conflict with the spirit and purpose of the ESA. And, this proposed screen does not appear to have any support in the scientific literature as a valid analytical approach for conducting consultations under the ESA. The FWS explains its proposal as follows:

We believe an area roughly 500 ac (200 ha) in size is a reasonable core area metric for land managers to consider when assessing effects on critical habitat. This 500-ac (200-ha) metric is consistent with the methodology used to construct the habitat model described in Appendix C of the Revised Recovery Plan and for which areas were evaluated for possible designation. *We would anticipate that in most cases, restoration and thinning actions...at or below this size will likely not adversely affect a given critical habitat subunit;* however, such a determination would have to be made on a case-by-case basis, after careful consideration of the specific conditions of the proposed action.⁴⁸

Section 7(a)(2) of the ESA requires that Federal agencies consult with the FWS when a proposed action may jeopardize a listed species or result in the destruction or adverse modification of critical habitat. And, *each* consultation *must* be based on the “best scientific and commercial data available.”⁴⁹ SCB is concerned that the FWS may be attempting to short-circuit the consultations process regarding the critical habitat of the NSO by creating an “expectation” that a particular result will be reached in future consultations regardless of the facts on the ground.

SCB is concerned that this proposed 500-acre “screen” for deciding future consultations regarding NSO critical habitat is not based on the best available science. While the recovery plan for the NSO concluded that a pair of nesting required approximate 500 acres (200 hectares), there is no logically reason to conclude that individual actions that impact less than 500 acres could not

⁴⁶ 16 U.S.C. § 1533(b)(8).

⁴⁷ REVISED CRITICAL HABITAT at 14,072.

⁴⁸ *Id.* at 14,125.

⁴⁹ 16 U.S.C. § 1536(a)(2)



result in adverse modification of NSO critical habitat. Indeed it seems quite probable that if an NSO breeding pair required and were occupying a 500-acre core area, and a Federal agency action adversely modified 200 acres of that area, then that action could easily result in a failed breeding attempt or the loss of that pair of owls. Furthermore, this 500-ac screen does not address cumulative impacts from surrounding or nearby modifications of owl cores. Whether or not habitat changes that result in the loss of a breeding pair of NSO rises to the level of adverse modification is a scientific question *only*, and one that FWS states it will make on a “case-by-case” basis. Without a basis in the scientific literature for setting a 500-acre threshold for adverse modification findings under Section 7, there is no rational basis for making this generalized conclusion.

More broadly, if the second half of the quoted paragraph above is true, that for each proposed action FWS will make a case-by-case determination after evaluation of the specific conditions on the ground, then does the remainder of that paragraph have any substantive meaning? What does it mean for FWS to “anticipate” a particular outcome of a Section 7 consultation? If a Section 7 consultation is to be based on the best scientific information available, how can the FWS predict a particular outcome for a currently hypothetical action? SCB has identified at least six other times in the critical habitat proposal where FWS anticipates or expects that particular activities will not result in adverse modification of NSO critical habitat. SCB specifically requests that the FWS explain what effect, if any, the Service believes such statements within this critical habitat proposal should have on actual consultations.

Finally, the paragraph above states that each proposed action will be decided on a case-by-case determination, yet shortly thereafter, FWS suggests that these thinning and restoration activities, for the sake of efficiency, “could be evaluated under section 7 programmatically at the landscape scale (e.g., National Forest or BLM District).”⁵⁰ If each action must be evaluated on a case-by-case basis, what would the purpose be of a programmatic consultation? Would such a programmatic consultation replace an individual consultation, or would the individual consultation tier off of the programmatic consultation? Does the FWS anticipate or expect the results of such a programmatic consultation to conclude that no adverse modification of critical habitat will occur? SCB is deeply concerned that these expectations regarding the ultimate outcomes of consultations improperly prejudice the analytical integrity of future consultations. Because these statements are not a required component of a critical habitat rulemaking, indeed they seem to be an anomaly compared to the text of most other past critical habitat proposals for endangered species, SCB recommends that they be eliminated from the final rulemaking.

B. “Active Forestry” Must be Evaluated Under the National Environmental Policy Act Prior to any Commercial-Scale Activities within the NSO’s Critical Habitat, and Such Activities Must Further Undergo Section 7 Consultations Wherever Utilized.

Concurrently with the release of the critical habitat proposal, the White House released a Presidential Memorandum regarding the proposal. The Memorandum states: “areas identified as critical habitat should be subject to active management, including logging, in order to produce the variety of stands of trees required for healthy forests” and therefore orders the FWS to “develop clear direction, as part of the final rule, for evaluating logging activity in areas of critical habitat, in

⁵⁰ REVISED CRITICAL HABITAT at 14,126.



accordance with the scientific principles of active forestry management.”⁵¹ In response, the FWS states in its proposed critical habitat rule that the agency believes that:

critical habitat should not be a ‘hands off’ reserve in the traditional sense. Rather, it should be a ‘hands on’ ecosystem management landscape that should include a mix of active and passive actions to meet a variety of forest conservation goals that support long-term spotted owl conservation.

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special management considerations may be required in moist forests to enhance within-stand structural diversity...and may even require specific actions to maintain or develop suitable nest structures....In dry forest regions, where natural disturbance regimes and vegetation structure, composition, and distribution have been substantially altered...vegetation management may be required to retain spotted owl habitat on the landscape by altering fire behavior and severity, and potentially to restore a more natural balance between forest vegetation and disturbance regimes.⁵²

SCB is concerned that White House directive to move forward with untested “active forest management” of federally owned forest lands at the landscape level *prior* to validation through the scientific peer-review process is inconsistent with, and thus a likely violation of, the Endangered Species Act and the National Environmental Policy Act, and represents a potentially serious lapse in the application of the scientific process. That in turn my violate the one policy for which the Obama administration has received perhaps more credit across the board from the scientific community than any other – the Scientific Integrity Principles announced by the White House in early 2009 and now adopted in greater detail by the Department of Interior. Ironically, political interference with and blocking of the best available science in the work of the NSO recovery team by the Bush II Administration in favor of permitting more extensive and rapid logging was one of the most important cases that Scientific Integrity Principles were established to redress and prevent. SCB recognizes that the management of forests within the critical habitat of the NSO will be a complex task given the variety of habitats the NSO occupies across its range. However, instead of preparing an Environmental Impact Statement to lay out options for a science-based research program to better understand the complexities of future management in NSO habitat, the FWS is proposing to go ahead with untested management actions assuming that such impacts are short-termed but providing no scientific documentation to back this assumption.

The Presidential Memorandum accompanying the proposed critical habitat designation also noted: “on the basis of *extensive scientific analysis*, areas identified as critical habitat should be subject to active management, including logging in order to produce the variety of stands of trees required for healthy forests. The proposal rejects the more conservative view among conservation biologists that land managers should take a ‘hands off’ approach to such forest habitat in order to

⁵¹ Presidential Memorandum -- Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens, 77 Fed. Reg. 12,985, Feb. 28, 2012.

⁵² REVISED CRITICAL HABITAT at 14,065.



promote this species' health."⁵³ We are concerned that this memorandum overstates the quality and quantity of scientific research on the potential benefits of active forest management, especially in the Pacific Northwest on a federally threatened species. In particular, we are unaware of any substantial or significant scientific literature that demonstrates that active forest management enhances the recovery of spotted owls. SCB, together with The Wildlife Society and the American Ornithologists Union sent a letter to the Department of Interior on April 2, 2012 raising these concerns with this management proposal.⁵⁴

SCB believes that in order for FWS's proposals to be scientifically credible, the Service should prepare an independent EIS to evaluate active forestry management impacts on spotted owls, just as FWS has done with respect to its new efforts to evaluate barred owl control techniques. This EIS should identify a range of experimental forestry techniques, appropriate scientific methodologies to assess those techniques, and scientific process for evaluating impacts on spotted owls. At the end of a scientifically appropriate period of time, and after a full scientific peer-review of the data collected, the FWS and DOI would be able to make a fully informed decision regarding short- and long-term management of critical habitat. We believe that such an approach is clearly warranted given that the spotted owl is a closed canopy dependent species and active management may degrade habitat for the owl and encourage further expansion of the barred owl. Notably, recent evidence has shown spotted owl extirpation rates related to barred owl invasions are highest for spotted owls with low levels of old growth habitat in nesting areas or high levels of forest fragmentation.⁵⁵ Scaling up logging activities throughout the Pacific Northwest, particularly on BLM lands in western Oregon where "active management" is ostensibly going to be integral to pending resource management plan revisions, is therefore premature and not representative of the best available science.

On May 30, 2012, the FWS responded to SCB's April 2nd letter, denying our request to have "active forestry" scientifically evaluated through an environmental impact statement. Despite acknowledging that "there is not much direct research documenting the specific response of spotted owls to various types of vegetation management" and that "much uncertainty remains, both regarding the variance in many predictions and the potential short term impacts of ecosystem management of local spotted owls," the FWS appears to be set on a course that will *never* evaluate these activities in a scientifically rigorous manner. The FWS justifies this decision by stating that land management activities "are appropriately made at the land management unit level (e.g., National Forest or Bureau of Land Management District)" because those plans "undergo NEPA compliance."

Unfortunately, the FWS has failed to recognize the purpose of SCB's request that the agency evaluate "active forestry" through an independent NEPA process by preparing an environmental impact statement. The purpose of such an EIS would be to create and evaluate the result of a set of

⁵³ Presidential Memorandum – Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens, 77 Fed. Reg. 12,985, Feb. 28, 2012 (emphasis added).

⁵⁴ The SCB, TWS, AOU letter is available at www.conbio.org/policy

⁵⁵ Dugger, K.M., R.G. Anthony, and L.S. Andrews. 2012. *Transit dynamics of invasive competition: barred owls, spotted owls, habitat, and the demons of competition present*. Ecological Applications (2011) Volume: 21: 2459-2468.



scientifically valid experiments with the *sole* purpose of determining if “active forestry” does in fact benefit Northern Spotted Owls. The FWS’s entire habitat management scheme for the NSO simply amounts to a giant house of cards. The 2010 recovery plan recommends active forestry, but does not include a process for *evaluating its effectiveness in conserving and recovering the NSO*. The 2012 critical habitat proposal recommends active forestry, but does not include a process for evaluating its effectiveness. Now, we are faced with the prospect that land management plans for forests will employ active forestry because both the recovery plan and the critical habitat designation have recommended it, and there will be still be no guarantee that any particular management unit (national forest or BLM land unit) will ever evaluate its effectiveness. This approach is not precautionary or representative of the scientific method. Instead, FWS is gambling that active forestry will help to recover the spotted owl based on a scant few articles discussing the hypothetical benefits that such forestry techniques might provide. SCB supports efforts to restore degraded forest ecosystems, but these efforts must be guided by science at all stages. The current status of the NSO is simply too precarious to employ a more risky approach.

CONCLUSION

SCB supports the designation of 14 million acres of critical habitat, and urges FWS to adopt Alternative B (Outcome 1) in the final rulemaking. SCB is deeply concerned regarding the policy decisions relating to Section 7 consultations regarding active forestry in NSO critical habitat and the proposed 500-acre threshold. These policy decisions have no place in the final rule and should be eliminated. Finally we urge FWS to embark on a science-based research program to determine whether active management of critical habitat does indeed benefit the spotted owl, and SCB stands ready to assist FWS with this difficult task.

Sincerely,

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