

### III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a CAA section 111(d)/129 submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and DDDD; and 40 CFR part 62, subpart A. With regard to negative declarations for designated facilities received by the EPA from states, the EPA's role is to notify the public of the receipt of such negative declarations and revise 40 CFR part 62 accordingly. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
  - Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant under Executive Order 12866;
  - Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
  - Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
  - Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
  - Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
  - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
  - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
  - Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
  - Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- This rule also does not have Tribal implications because it will not have a substantial direct effect on one or more

Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### List of Subjects in 40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: July 28, 2020.

**Kenley McQueen,**

*Regional Administrator, Region 6.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**[Docket No. FWS-R1-ES-2020-0050; FF09E21000 FXES11110900000 201]**

**RIN 1018-BF01**

#### **Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to revise the designated critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act). After a review of the best available scientific and commercial information, we propose to revise the species' designated critical habitat by newly excluding approximately 204,653 acres (82,820 hectares) in Benton, Clackamas, Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lane, Lincoln, Multnomah, Polk, Tillamook, Washington, and Yamhill Counties, Oregon, under section 4(b)(2) of the Act. These proposed exclusions are based on new information that has become available since our 2012 revised critical habitat designation for the northern spotted owl. This proposed rule focuses only on new exclusions under section 4(b)(2) of the Act in response to a stipulated settlement agreement; we are not proposing any other revisions to the

northern spotted owl's critical habitat designation.

**DATES:** We will accept comments received or postmarked on or before October 13, 2020. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by September 25, 2020.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS-R1-ES-2020-0050, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail: Public Comments Processing, Attn: FWS-R1-ES-2020-0050, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

*Availability of supporting materials:* For the proposed critical habitat exclusions, maps and the coordinates or plot points or both of the subject areas are included in the administrative record and are available at <http://www.fws.gov/oregonfwo> and at <http://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0050.

**FOR FURTHER INFORMATION CONTACT:** Paul Henson, Ph.D., State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Portland, OR 97266; telephone 503-231-6179. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible.

Therefore, we request comments or information from other governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The reasons why we should or should not exclude areas as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including information regarding:

(a) The related benefits of including or excluding specific areas;

(b) Whether the benefits of exclusion outweigh those of inclusion; and

(c) Whether the exclusion will not result in the extinction of the species.

(2) Any probable economic, national security, or other relevant impacts of the designation on areas that are being considered for exclusion.

(3) Any additional areas, including Federal lands, that should be considered for exclusion under section 4(b)(2) of the Act and any probable economic, national security, or other relevant impacts of excluding those areas.

(4) Specifically, any National Forest System lands managed by the U.S. Department of Agriculture’s (USDA’s) Forest Service (USFS) that should be considered for exclusion under section 4(b)(2) of the Act and any probable economic, national security, or other relevant impacts of excluding those areas.

(5) Any significant new information or analysis concerning economic impacts that we should consider in the balancing of the benefits of inclusion versus the benefits of exclusion in the final determination.

(6) Whether and how on-going litigation challenging the Bureau of Land Management’s (BLM) management of Oregon and California Railroad Revested Lands (O&C lands) should be addressed in our final rule. See the *BLM Harvest Land Base* section below for more information regarding this litigation.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, will not be considered in making a final determination, as section 4(b)(2) of the Act directs that designations or revisions to critical habitat must be made on the basis of the best scientific data available and after taking into consideration the economic

impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy 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 submissions on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>.

Because we will consider all comments and information we receive during the comment period, our final revision may differ from this proposal. Based on the new information we receive (and any comments on that new information), our final revision may not exclude all areas proposed. Or, it may exclude additional areas if we find that the benefits of exclusion outweigh the benefits of inclusion or may remove areas if we find that the area does not meet the definition of “critical habitat.” Any changes made in the final rule should be of a type that could have been reasonably anticipated by the public, and therefore a logical outgrowth of the proposal. Changes in a final revision would be reasonably anticipated if: (1) We base them on the best scientific and commercial data available and take into consideration the relevant impacts; (2) we articulate a rational connection between the facts found and the conclusions made, including why we changed our conclusion; and (3) we base removal of any areas on a determination either that the area does not meet the definition of “critical habitat” or that the benefits of excluding the area will outweigh the benefits of including it in the designation. You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

#### Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if

requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. For the immediate future, we will provide these public hearings using webinars that will be announced on the Service’s website, in addition to the **Federal Register**. The use of these virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

#### Previous Federal Actions

On December 4, 2012, we published in the **Federal Register** (77 FR 71876) a final rule designating revised critical habitat for the northern spotted owl and announcing the availability of the associated economic analysis and environmental assessment. For additional information on previous Federal actions concerning the northern spotted owl, refer to that December 4, 2012, final rule.

In 2013, the December 4, 2012, revised critical habitat designation was challenged in court in *Carpenters Industrial Council et al. v. Bernhardt et al.*, No. 13–361–R/JL (D.D.C.) (now retitled *Pacific Northwest Regional Council of Carpenters et al. v. Bernhardt et al.* with the substitution of named parties). In 2015, the district court ruled that the plaintiffs lacked standing. The D.C. Circuit reversed and remanded, and the case remained pending before the district court.

In December of 2019, the plaintiffs filed a motion with the district court seeking permission to file a supplemental brief regarding the United States Supreme Court’s decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) concerning the designation of critical habitat for the dusky gopher frog. The plaintiffs asserted that supplemental briefing on *Weyerhaeuser* would benefit the district court’s consideration of two of their arguments regarding the northern spotted owl critical habitat designation: That the Service unlawfully designated areas that are not northern spotted owl habitat, and that the Service failed to weigh the designation’s economic impacts and consider other relevant factors when excluding lands under section 4(b)(2).

On April 13, 2020, we entered into a stipulated settlement agreement resolving the litigation. The settlement agreement was approved and ordered by

the court on April 26, 2020. Under the terms of the settlement agreement, the Service agreed to submit a proposed revised critical habitat rule to the **Federal Register** that identifies proposed exclusions under section 4(b)(2) of the Act (16 U.S.C. 1531 *et seq.*) by July 15, 2020. This proposed rule meets the stipulations of the settlement agreement.

## Critical Habitat

### Background

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

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

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

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

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

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

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

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or

carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation also does not allow the government or public to access private lands, nor does designation require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, the Service identifies to the extent known, using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in occupied areas, we focus on the specific features that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied

by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will consider unoccupied areas to be essential only when a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

In our December 4, 2012, final rule (77 FR 71876), we determined that all units and subunits met the Act's definition of being within the geographical area occupied by the species at the time of listing. Our determination was based on the northern spotted owl's wide-ranging use of the landscape, and the distribution of known owl sites at the time of listing across the units and subunits designated as critical habitat. Each of these units and subunits consist of habitat occupied by the species at the time of listing. We recognize that, subsequent to listing, some areas within these units and subunits have at times not been used by individual northern spotted owls due to displacement by competition with the nonnative barred owl. However, we anticipate many of these areas will be used by individual northern spotted owls in the future, in some cases due to restoration actions.

At a finer scale within the occupied geographic area, within some of these units and subunits, the forest mosaic contains some areas of younger forest that may not have been occupied at the time of listing. These areas were included in the designation to provide connectivity (physical and biological feature (PBF) (4)—dispersal habitat) between occupied areas, room for population growth, and the ability to provide sufficient suitable habitat on the landscape for the owl in the face of natural disturbance regimes (*e.g.*, fire). These areas are essential for the conservation of the species.

Our December 4, 2012, final rule (77 FR 71876) includes four PBFs (formerly referred to as primary constituent elements, or PCEs) specific to the northern spotted owl. In summary, PBF (1) is forest types that may be in early-, mid-, or late-seral stages and that support the northern spotted owl across

its geographical range; PBF (2) is nesting and roosting habitat; PBF (3) is foraging habitat; and PBF (4) is dispersal habitat (see 77 FR 71876, December 4, 2012, pp. 77 FR 72051–72052, for a full description of the PBFs). In areas occupied at the time of listing, not all of the designated critical habitat contains all of the PBFs, because not all life-history functions require all of the PBFs. Some subunits contain all PBFs and support multiple life processes, while some subunits may contain only PBFs necessary to support the species' particular use of those subunits as habitat. However, all of the areas occupied at the time of listing and designated as critical habitat support at least PBF (1), in conjunction with at least one other PBF. Thus, PBF (1) must always occur in concert with at least one additional PBF (PBF 2, 3, or 4) (77 FR 71876, December 4, 2012, p. 77 FR 71908).

When determining critical habitat boundaries for the December 4, 2012, final rule, we made every effort to avoid including areas that lack physical or biological features for the northern spotted owl. Due to the limitations of mapping at fine scales, we were often not able to segregate these areas from areas shown as critical habitat on maps suitable in scale for publication within the Code of Federal Regulations. The following types of areas are not critical habitat because they cannot support northern spotted owl habitat, and are not included in the 2012 designation: Meadows and grasslands, oak and aspen (*Populus* spp.) woodlands, and manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas), and the land on which they are located. Thus, we included regulatory text in the December 4, 2012, final rule clarifying that these areas were not included in the designation even if within the mapped boundaries of critical habitat (77 FR 71876, December 4, 2012, p. 77 FR 72052).

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

with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When determining which areas should be designated as critical habitat, our primary source of information is the status analysis in the listing rule and other information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. Critical habitat designated at a particular point in time may not include all of the areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

The proposed exclusions described in this document do not change the majority of the December 4, 2012, final rule. The only sections that would change with this proposed revision are

Table 8 in the Exclusions discussion (77 FR 71876, December 4, 2012, pp. 77 FR 71948–71949), the subunit maps related to the proposed exclusions (77 FR 71876, December 4, 2012, pp. 77 FR 72057–72058, 72062, 72065–72067), and the index map of Oregon (77 FR 71876, December 4, 2012, p. 77 FR 72054). The regulations concerning critical habitat have been revised and updated since 2012 (81 FR 7414, February 11, 2016; 84 FR 45020, August 27, 2019). Our December 4, 2012, designation of critical habitat for the northern spotted owl and the revisions proposed in this rule are in accordance with the requirements of the revised critical habitat regulations (81 FR 7414, February 11, 2016; 84 FR 45020, August 27, 2019), with the exception of the use of the term “primary constituent element” (PCE) in the December 4, 2012, final rule; here, we use the term “physical or biological feature” (PBF), as noted above, in accordance with the updated critical habitat regulations. The primary constituent elements (PCEs) are, however, the physical and biological features (PBFs) as described in the revised regulations: They are essential to the conservation of the species, and they may require special management considerations or protection.

#### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he or she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

The first sentence in section 4(b)(2) of the Act requires that we take into consideration the economic, national security, or other relevant impacts of designating any particular area as critical habitat. We describe below the process that we undertook for taking into consideration each category of

impacts and our analyses of the relevant impacts.

#### *Consideration of Economic Impacts*

We did not exclude areas from our December 4, 2012, final critical habitat designation (77 FR 71876) based on economic impacts, and we are not now proposing to exclude any areas solely on the basis of economic impacts. Refer to the December 4, 2012, rule (77 FR 71876) for a description of the purpose and process of evaluating the economic impacts that may result from a designation of critical habitat. The final economic analysis of the 2012 critical habitat designation for the northern spotted owl found the incremental effects of the designation to be relatively small due to the extensive conservation measures already in place for the species because of its listed status under the Act and because of the measures provided under the Northwest Forest Plan (NWFP) (USDA USFS and U.S. Department of the Interior's Bureau of Land Management (BLM) 1994) and other conservation programs (IEc 2012, pp. 4–32, 4–37). Thus, we concluded that the future probable incremental economic impacts were not likely to exceed \$100 million in any single year, and impacts that are concentrated in any geographic area or sector were not likely as a result of designating critical habitat for the northern spotted owl. The incremental effects included: (1) An increased workload for action agencies and the Service to conduct re-initiated consultations for ongoing actions in newly designated critical habitat (areas proposed for designation that were not already included within the extant designation); (2) the cost to action agencies of including an analysis of the effects to critical habitat for new projects occurring in occupied areas of designated critical habitat; and (3) potential project alterations in unoccupied critical habitat.

Although we considered the incremental impact of administrative costs to Federal agencies associated with consulting on critical habitat under section 7 of the Act, economic impacts are not the primary reason for the exclusions we are proposing in this rule. See the December 4, 2012, final rule for a summary of the final economic analysis and our consideration of economic impacts (77 FR 71876, pp. 71878, 71945–71947, 72046–72048). We have reviewed the 2012 final economic analysis (IEc 2012) and determined that because we are only proposing to exclude (*i.e.*, remove) additional areas from critical habitat, the economic impact will be further reduced and a new analysis is not necessary. Because

the entire 2012 designation did not reach the threshold for economic significance under Executive Order 12866, these exclusions, which represent a reduction in the overall cost, also do not meet the threshold.

During the development of a final revised designation, we will consider any additional economic impact information we receive during the public comment period (see **DATES**), and therefore, additional areas not considered in this proposed rule may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

#### *Consideration of Impacts on National Security*

We did not exclude areas from our December 4, 2012, revised critical habitat designation based on impacts on national security, but we did exempt Joint Base Lewis-McChord lands based on the integrated natural resources management plan (INRMP) under section 4(a)(3) of the Act (77 FR 71876, pp. 71944–71945). In this document, we are not proposing to exclude any areas from the critical habitat designation on the basis of impacts on national security. However, during the development of a final designation we will consider any additional information received through the public comment period on the impacts of the proposed designation on national security or homeland security to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19.

#### *Consideration of Other Relevant Impacts*

When identifying the benefits of inclusion of an area as designated critical habitat, we primarily consider the additional regulatory benefits that that area would receive due to the protection from destruction or adverse modification as a result of actions with a Federal nexus (that is, an activity or program authorized, funded, or carried out in whole or in part by a Federal agency), the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation, or in the continuation,

strengthening, or encouragement of partnerships.

In the case of the northern spotted owl, the benefits of including an area as designated critical habitat include public awareness of the presence of northern spotted owls and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for northern spotted owls through the Act's section 7(a)(2) mandate that Federal agencies insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Additionally, continued implementation of an ongoing management plan for the area that provides conservation equal to or greater than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including, but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation management strategies, and actions contained in a management plan, will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation under section 4(b)(2) of the Act.

The final decision on whether to exclude any areas under section 4(b)(2) will be based on the best scientific data available at the time of the final designation, including information that we obtain during the comment period.

Based on any information provided by entities seeking exclusion, as well as any additional public comments we receive, we will evaluate whether certain lands in the critical habitat designation are appropriate for exclusion from the designation under

section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the designation outweigh the benefits of designating those lands as critical habitat, then the Secretary may exercise his discretion to exclude the lands from the designation.

**Proposed Exclusions**

We are proposing to exclude the following areas under section 4(b)(2) of the Act from the critical habitat designation for the northern spotted owl. Table 1, below, identifies the specific critical habitat units from the December 4, 2012, final rule (77 FR 71876), which is codified in title 50 of the Code of Federal Regulations (CFR) at

§ 17.95(b), that we propose to exclude, at least in part; the approximate areas (ac, ha) of lands involved; and a brief summary of the rationale for the area's proposed exclusion. The Table 8 Addendum that follows displays this same information but in the format used in Table 8 in the December 4, 2012, final rule (77 FR 71876, pp. 77 FR 71948–71949).

TABLE 1—AREAS PROPOSED FOR EXCLUSION BY CRITICAL HABITAT UNIT

Unit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares)	Areas proposed for exclusion, in acres (hectares)	Rationale for proposed exclusion
1	NCO 4	179,745 (72,740)	1,838 (744)	BLM Harvest Land Base.
1	NCO 5	142,937 (57,845)	8,774 (3,551)	BLM Harvest Land Base.
2	ORC 1	110,657 (44,781)	1,279 (518)	BLM Harvest Land Base.
2	ORC 2	261,405 (105,787)	2,946 (1,192)	BLM Harvest Land Base.
2	ORC 3	203,681 (82,427)	4,345 (1,758)	BLM Harvest Land Base.
2	ORC 5	176,905 (71,591)	14,987 (6,065)	BLM Harvest Land Base.
2	ORC 6	81,900 (33,144)	9,862 (3,991)	BLM Harvest Land Base/Tribal.
6	WCS 1	92,586 (37,468)	880 (356)	BLM Harvest Land Base.
6	WCS 2	150,105 (60,745)	1,082 (438)	BLM Harvest Land Base.
6	WCS 3	319,736 (129,393)	1,922 (779)	BLM Harvest Land Base.
6	WCS 4	379,130 (153,429)	6 (2)	BLM Harvest Land Base.
6	WCS 5	356,415 (144,236)	2 (<1)	BLM Harvest Land Base.
6	WCS 6	99,558 (40,290)	18,529 (7,498)	BLM Harvest Land Base.
8	ECS 1	127,801 (51,719)	16,610 (6,722)	BLM Harvest Land Base.
8	ECS 2	66,086 (26,744)	2,379 (963)	BLM Harvest Land Base.
9	KLW 1	147,326 (59,621)	11,058 (4,475)	BLM Harvest Land Base.
9	KLW 2	148,929 (60,674)	<1 (<1)	BLM Harvest Land Base.
9	KLW 3	143,862 (58,219)	1,655 (670)	BLM Harvest Land Base.
9	KLW 4	158,299 (64,061)	785 (318)	BLM Harvest Land Base.
9	KLW 5	31,085 (12,580)	<1 (<1)	BLM Harvest Land Base.
10	KLE 1	242,338 (98,071)	28 (11)	BLM Harvest Land Base.
10	KLE 2	101,942 (41,255)	33,764 (13,663)	BLM Harvest Land Base/Tribal.
10	KLE 3	111,410 (45,086)	48,295 (19,544)	BLM Harvest Land Base.
10	KLE 4	254,442 (102,969)	1 (<1)	BLM Harvest Land Base.
10	KLE 5	38,283 (15,493)	12,232 (4,950)	BLM Harvest Land Base.
10	KLE 6	167,849 (67,926)	11,393 (4,610)	BLM Harvest Land Base.

TABLE 8 ADDENDUM—ADDITIONAL LANDS PROPOSED FOR EXCLUSION FROM THE DESIGNATION OF CRITICAL HABITAT UNDER SECTION 4(b)(2) OF THE ACT

Type of agreement	Critical habitat unit	State	Land owner/agency	Acres	Hectares
Resource Management Plan	NCO	OR	BLM Harvest Land Base	10,612	4,294
	ORC	OR	BLM Harvest Land Base	27,845	11,268
	WCS	OR	BLM Harvest Land Base	22,420	9,073
	ECS	OR	BLM Harvest Land Base	18,989	7,684
	KLW	OR	BLM Harvest Land Base	13,498	5,462
	KLE	OR	BLM Harvest Land Base	91,112	36,871
	Tribal lands	ORC	OR	CTCLUSI <sup>1</sup>	5,575
KLE		OR	CCBUTI <sup>2</sup>	14,602	5,909
Total additional lands proposed for exclusion under section 4(b)(2) of the Act.			204,653	82,820	

<sup>1</sup> CTCLUSI is the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

<sup>2</sup> CCBUTI is the Cow Creek Band of Umpqua Tribe of Indians.

We specifically solicit comments on the inclusion or exclusion of these areas from the critical habitat designation for the northern spotted owl (77 FR 71876; December 4, 2012), codified at 50 CFR

17.95(b). These proposed exclusions are based on new information that has become available since the December 4, 2012, critical habitat designation for the northern spotted owl, including the

Bureau of Land Management's (BLM's) 2016 revision to its resource management plans (RMPs) for western Oregon (BLM 2016a, b) and the Western Oregon Tribal Fairness Act (Pub. L.

115–103). In the paragraphs below, we provide a detailed analysis of our consideration of these lands for exclusion under section 4(b)(2) of the Act.

#### *Exclusions Based on Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether there are permitted conservation plans covering the species in the area such as HCPs, safe harbor agreements (SHAs), or candidate conservation agreements with assurances (CCAAs), or whether there are other conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we consider any Tribal forest management plans (FMPs) and partnerships and consider the government-to-government relationship of the United States with Tribes. We also consider any social impacts that might occur because of the designation.

#### *Tribal Lands*

Several Executive Orders, Secretarial Orders, and departmental policies address how we engage with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control tribal lands, emphasize the importance of developing partnerships with tribal governments, and direct the Service to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both the Service and the National Marine Fisheries Service (NMFS) (“Services”), Secretarial Order 3206, “American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997) (S.O. 3206), affirms that Tribes may participate fully in the listing process, including designation of critical habitat. The appendix to S.O. 3206 also states: “In keeping with the trust responsibility, [the Services] shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species

can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal comments in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act’s definition of “critical habitat.” We are directed by the Act to identify areas that meet the definition of “critical habitat” (*i.e.*, areas occupied at the time of listing that contain the essential physical or biological features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries’ statutory authority.

In our December 4, 2012, final rule (77 FR 71876), we prioritized areas for critical habitat designation by looking first to Federal lands, followed by State, private, and Tribal lands. No Tribal lands were designated in our final rule because we found that we could achieve the conservation of the northern spotted owl by limiting the designation to other lands. However, on January 8, 2018, the Western Oregon Tribal Fairness Act (Pub. L. 115–103) was passed by Congress and signed by the President. This act mandated that certain lands managed by BLM be taken into trust by the United States for the benefit of the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI). In January 2020, BLM released its decision record (BLM 2020) transferring management authority of approximately 17,800 acres (7,203 hectares) to CCBUTI and 14,700 acres (5,949 hectares) to CTCLUSI. Of the transferred lands, 20,177 acres (8,165 hectares) are located within designated critical habitat for the northern spotted owl. We have considered this new information and are now proposing these lands for exclusion under section 4(b)(2) of the Act, as explained below.

Of the lands transferred in trust to the CCBUTI, 14,602 acres (5,909 hectares) are located within currently designated critical habitat. These lands will be managed under the tribe’s Forest Resource Management Plan (CCBUTI 2019) using a “continuous forest management” approach that provides

for a continued supply of timber, a steady stream of income, and a reduction in the risk of wildfire and disease. The Tribal land within the Cow Creek conveyance is in the Klamath Physiographic Province, an area disproportionately impacted by fire. The objectives in the Cow Creek FMP addresses fire risk and disease concerns to alleviate the risk of wildfire. Of the lands transferred to the CTCLUSI, 5,575 acres (2,256 hectares) are located within the critical habitat designation. The tribe is developing a management plan for these recently transferred lands (Andringa 2020, pers. comm.). We will continue to provide technical assistance to the tribes on the conservation of endangered and threatened species and on the development and implementation of their forest management plans; however, these plans are not the basis of our proposal to exclude these lands from the critical habitat designation.

In accordance with S.O. 3206 and other directives, we believe that fish, wildlife, and other natural resources on Tribal lands may be more appropriately managed under Tribal authorities, policies, and programs than through Federal regulation where Tribal management addresses the conservation needs of listed species. Supporting Tribal management strengthens the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of endangered and threatened species populations depend. Additionally, the Tribal lands proposed for exclusion represent only 0.21 percent of the current critical habitat designation. Although these lands contribute to the conservation of the northern spotted owl, we believe the conservation needs of the northern spotted owl can be achieved by limiting the designation to the other lands in the critical habitat designation. We also find that the benefit of our partnerships with these Tribal governments and our acknowledgment of Tribal sovereignty over managing these lands by excluding them from the critical habitat designation outweigh the conservation value of including these 20,177 acres (8,165 hectares) in the designation.

#### *Federal Lands*

*O&C Lands*—In general, our proposed exclusions of critical habitat for the northern spotted owl are focused on the Oregon and California Railroad Revested Lands (O&C lands), particularly those areas that have been identified primarily for commercial timber harvest under Federal resource management plans. The O&C lands were

revested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218). The Oregon and California Revested Lands Sustained Yield Management Act of 1937 (O&C Act; Pub. L. 75–405) addresses the management of O&C lands. The O&C Act identifies the primary use of revested timberlands for permanent forest production. These lands occur in western Oregon in a checkerboard pattern intermingled with private land across 18 counties. Most of these lands (82 percent) are administered by BLM (FWS 2019, p. 1) pursuant to its resource management plans (RMPs). BLM's RMPs identify certain revested timberlands for commercial timber harvest. The opening statement of the O&C Act provides that these lands be managed "for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities." The counties where O&C lands are located participate in a revenue sharing program with the Federal Government based on commercial receipts (e.g., income from commercial timber harvest) generated on these Federal lands.

Since the mid-1970s, scientists and land managers have recognized the importance of forests located on O&C lands to the conservation of the northern spotted owl and have attempted to reconcile this conservation need with other land uses (Thomas et al. 1990, entire). Starting in 1977, BLM worked closely with scientists and other State and Federal agencies to implement northern spotted owl conservation measures on O&C lands. Over the ensuing decades, the northern spotted owl was listed as a threatened species under the Act, critical habitat was designated (57 FR 1796; January 15, 1992) and revised two times (73 FR 47326, August 13, 2008; 77 FR 71876, December 4, 2012) on portions of the O&C lands, and a recovery plan for the owl was completed (73 FR 29471, May 21, 2008, p. 73 FR 29472) and revised (76 FR 38575; July 1, 2011). These and other scientific reviews consistently recognized the need for large portions of the O&C forest to be managed for northern spotted owl conservation while also allowing for other uses of these lands.

*BLM Harvest Land Base*—Based on new information available since the publication of the December 4, 2012, revised critical habitat designation (77

FR 71876), we are proposing to exclude from critical habitat 184,476 acres (74,654 hectares) of BLM lands where programmed timber harvest is planned to occur under the revised RMPs (BLM 2016a, b), i.e., the "Harvest Land Base" that we describe in detail further below. Approximately 172,430 acres (69,779 hectares) of this Harvest Land Base is O&C lands.

In 2011, the Service revised the northern spotted owl recovery plan (see 76 FR 38575; July 1, 2011), and the revised plan recommended "continued application of the reserve network of the NWFP until the 2008 designated spotted owl critical habitat is revised and/or the land management agencies amend their land management plans taking into account the guidance in this Revised Recovery Plan" (USFWS 2011, p. II–3). On December 4, 2012, the Service published in the **Federal Register** (77 FR 71876) a final rule revising the northern spotted owl critical habitat designation, and in 2016, BLM revised its RMPs for western Oregon, resulting in two separate plans (BLM 2016a, b). BLM's 2016 revision of its RMPs fully considered the 2011 recovery plan recommendation. These two BLM plans, the Northwestern Oregon and Coastal Oregon Record of Decision and Resource Management Plan (BLM 2016a) and the Southwestern Oregon Record of Decision and Resource Management Plan (BLM 2016b), address all or part of six BLM districts across western Oregon.

The RMPs provide direction for the management of approximately 2.5 million acres (1 million hectares) of BLM-administered lands, for the purposes of producing a sustained yield of timber, contributing to the recovery of endangered and threatened species, providing clean water, restoring fire-adapted ecosystems, and providing for recreation opportunities (BLM 2016a, p. 20). The management direction provided in the RMPs is used to develop and implement specific projects and actions during the life of the plans.

The RMP revisions assigned land use allocations (LUAs) across BLM-managed lands in western Oregon; the LUAs define areas where specific activities are allowed, restricted, or excluded. The BLM LUAs include Late Successional Reserves (LSR), Congressionally Reserved lands (CR), District Designated Reserves (DD), and Riparian Reserves (RR) (collectively considered "reserve" LUAs) and Eastside Management Area and Harvest Land Base (HLB) (BLM 2016a, pp. 55–74).

Reserve LUAs (LSR, CR, DD, RR) comprise 74.6 percent (1,847,830 acres (747,790 hectares)) of the acres of BLM

land within LUAs (FWS 2016, p. 9). These lands are managed for various purposes, including preserving wilderness areas, natural areas, and structurally complex forest; recreation management; maintaining facilities and infrastructure; some timber harvest and fuels management; and conserving lands along streams and waterways. Of these lands, 51 percent (948,466 acres (383,830 hectares)) are designated as LSR, 64 percent of which (603,090 acres (244,061 hectares)) are located within the critical habitat designation for the northern spotted owl (FWS 2016, p. 9). The management objectives on LSRs are designed to promote older, structurally complex forest and to promote or maintain habitat for the northern spotted owl and marbled murrelet (*Brachyramphus marmoratus*), although some timber harvest of varying intensity is allowed. The recovery plan for the northern spotted owl relies on the LSR network as the foundation for northern spotted owl recovery on Federal lands (FWS 2011, p. III–41). The Service found that the anticipated level of timber harvest in LSRs under these RMPs was not likely to jeopardize the species or destroy or adversely modify critical habitat (FWS 2016, pp. 700–703).

The HLB allocation comprises 19 percent (469,215 acres (189,884 hectares)) of the overall LUAs and is where the majority of programmed timber harvest will occur (FWS 2016, p. 9; BLM 2016a, pp. 59–63). Of these acres, 39 percent (184,476 acres (74,655 hectares)) are located within the critical habitat designation for the northern spotted owl. Over 90 percent of these acres (172,430 acres (69,779 hectares)) are located on O&C lands. Under the management direction for the HLB, timber harvest intensity varies based on the sub-allocation (moderate intensity timber area, light intensity timber area, or uneven-aged timber area) within the HLB (BLM 2016a, pp. 59–63).

The management direction specific to the northern spotted owl (BLM 2016a, p. 100) applies to all LUAs designated in the RMPs. This direction provides for the management of habitat to facilitate movement and survival between and through large blocks of northern spotted owl nesting and roosting habitat.

We completed a programmatic section 7 consultation on the RMPs in 2016, under the assumption that BLM will implement actions consistent with the RMPs over an analytical timeframe of 50 years (FWS 2016, p. 2). This approach allowed for the broad-scale evaluation of BLM's program to ensure that the management direction and objectives of the program are consistent with the



conservation of listed species, while also providing a reliable mechanism for site-specific consultation at the stepped-down, project-level scale. The adequacy of this approach for the conservation of listed species is further sustained by the requirement for the action agency to reinstate consultation under certain circumstances.

Reinitiation of the programmatic section 7 consultation may occur at any time during the course of program implementation if: (1) The amount or extent of incidental take is exceeded; (2) new information reveals that the effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action, consistent with our August 27, 2019, final rule revising portions of our regulations that implement section 7 of the Act (see 84 FR 44976, pp. 84 FR 45017–45018). The biological opinion on the RMPs also describes some additional specific conditions concerning northern spotted owl demographics and barred owl management implementation under which reinitiation of consultation will be necessary (FWS 2016, pp. 703–705).

BLM incorporated key aspects of the recovery plan for the northern spotted owl into its RMPs, consistent with its authorities and resources. Important features of BLM's approach include:

- Overall impacts to extant northern spotted owls are minimized. Take of northern spotted owl territorial pairs or resident singles from timber harvest will be avoided to the greatest possible extent during the first 5 to 8 years of the RMPs as the barred owl removal experiment (FWS 2013) is conducted and evaluated. Subsequent effects to northern spotted owls would be metered out over time in the HLB and minimized in other land use allocations.

- If the barred owl removal experiment leads to a longer-term barred owl management program, BLM will support such a program on the lands they manage. Barred owl management would help offset the adverse effects associated with the RMPs and is expected to result in a net positive impact on the recovery of northern spotted owls when considering the overall effect of the RMPs over the next 50 years.

- There will be a net increase in suitable habitat for northern spotted owls during the life of the RMPs due to

forest ingrowth outpacing harvest, and the RMPs contain more reserve acres and habitat than the NWFP.

- As individual projects are proposed under these RMPs, BLM will consult at the project-specific level with the Service as necessary, providing assurances that jeopardy and adverse modification will be avoided and an opportunity to further minimize impacts to northern spotted owls as on-the-ground actions are designed and implemented.

- BLM will reinstate section 7 consultation with the Service if the population projections for the northern spotted owl described in the biological opinion on the RMPs are not realized within the timeframes anticipated in the consultation.

For these reasons, as described in its biological opinion issued to the BLM (FWS 2016, pp. 4–5), the Service expects an overall net improvement in northern spotted owl populations on BLM lands under the RMPs, including when taking into account any take or adverse impacts to northern spotted owls due to timber harvest, fuels management, recreation, and other activities occurring under the RMPs. Our analysis of the impacts on the lands within the HLB recognized that while this LUA was not intended to be relied upon for demographic support of northern spotted owls, the management direction under the RMPs includes provisions that would contribute to the further development of late-successional habitat, including additional critical habitat PBFs, over time (FWS 2016, p. 553; 77 FR 71876, December 4, 2012, pp. 77 FR 71906–71907). Although late-successional habitat within the HLB may not remain on the landscape for the long term, the presence of northern spotted owl habitat within the HLB in the short term would assist in northern spotted owl movement (PBF 4) across the landscape and could potentially provide refugia from barred owls while habitat continues to mature into more complex habitat and develop additional PBFs over time in reserved LUAs (FWS 2016, p. 553; 77 FR 71876, December 4, 2012, pp. 77 FR 71906–71907).

The spatial configuration of reserves; the management of those reserves to retain, promote, and develop northern spotted owl habitat; and the management and scheduling of timber sales within the HLB are all expected to provide for northern spotted owl dispersal between physiographic provinces and between and among large blocks of habitat designed to support clusters of reproducing northern spotted owls (FWS 2016, p. 698). In particular, BLM refined their preferred alternative

management approach to minimize the creation of strong barriers to northern spotted owl east-west movement and survival between the Oregon Coast Range and Oregon Western Cascades physiographic provinces, and north-south movement and survival between habitat blocks within the Oregon Coast Range province, by augmenting its allocation to LSRs in those areas (BLM 2016c, p. 17). Therefore, BLM-planned timber harvest during the interim period while a barred owl management strategy is considered is not expected to substantially influence the distribution of northern spotted owls at the local, action area, or rangewide scales.

Of the designated critical habitat on BLM-managed lands in western Oregon addressed by the RMPs, 15 percent of critical habitat is designated on the HLB and 85 percent is designated on other LUAs. The HLB portion of the BLM landscape is expected to provide less contribution to northern spotted owl critical habitat over time, while the reserve portions of the BLM lands will provide the necessary contributions for northern spotted owl conservation (FWS 2016, p. 554). Although the loss of some or all the PBFs within northern spotted owl critical habitat within the HLB is an adverse effect and cannot be discounted, as we noted in the 2016 biological opinion on the RMPs (FWS 2016, p. 691), the protection, ingrowth, and further development of PBFs within northern spotted owl critical habitat in reserve LUAs are expected to improve the function of all critical habitat units within the areas covered by the RMPs, and have the additional advantage of improving critical habitat conditions in areas where barred owl management is most likely to be implemented. Barred owl management, if implemented, would be most likely to occur where we anticipate the future core of the northern spotted owl population to reside and where critical habitat can provide the greatest value.

Additionally, we noted that the functionality of the critical habitat network on BLM-managed lands and rangewide was anticipated to improve, in part as the land management agencies updated their land management plans to incorporate recommendations of the revised recovery plan (USFWS 2011, p. II–3). Accordingly, we found in our 2016 biological opinion on the RMPs (FWS 2016, p. 700) that, even with the projected timber harvest in the HLB, the management direction implemented under the RMPs is fully consistent with the revised recovery plan (USFWS 2011) and would not appreciably diminish the conservation value of, or adversely modify, critical habitat (FWS 2016, p.

702). The conservation measures put in place by BLM's 2016 RMPs, including management direction for the LUAs and commitments to support barred owl research and management, are expected to result in a net increase in northern spotted owl conservation compared to the status quo. Therefore, we find that excluding the HLB acres from the critical habitat designation, as proposed in this document, would not reduce the overall conservation of the northern spotted owl and its habitat provided that the conservation measures in the RMPs are implemented as planned. We thus find that these exclusions would not result in extinction of the species.

BLM will continue to rely on the effectiveness monitoring established under the NWFP for the northern spotted owl and late-successional and old growth ecosystems. Monitoring will assess status and trends in northern spotted owl populations and habitat to evaluate whether the implementation of the RMPs is reversing the downward trend of populations and maintaining and restoring habitat necessary to support viable owl populations (BLM 2016a).

In conclusion, the revised BLM RMPs provide for the conservation of the essential PBFs throughout the reserve LUAs and meters the impacts to northern spotted owl habitat in the HLB over time while the habitat conditions in the reserve LUAs improve through ingrowth. Based on our analysis in the biological opinion on the RMPs (FWS 2016, pp. 700–703) and the BLM's conclusions in its records of decision (RODs) adopting the RMPs, the conservation strategies in the RMPs are likely to be effective. These conservation measures will continue to be in effect regardless of whether the HLB areas are designated as critical habitat for the northern spotted owl. As described above, these HLB areas provide a relatively low level of short-term conservation value. Retaining them as designated critical habitat, which suggests that they have a conservation value similar or equal to that of the LSR lands, may send a confusing message to the public and local land managers. Also, all Federal actions in these HLB areas that may affect currently designated critical habitat would require section 7 consultation. These consultations provide no incremental conservation benefit over what is already provided for in the RMPs and thus would not be an efficient use of limited consultation and administrative resources. The benefits of including HLB areas within critical habitat for the northern spotted owl are, therefore, limited relative to the conservation

value provided by the RMPs. Additionally, areas within the HLB that are determined to be occupied by the northern spotted owl under current survey protocols will still be subject to section 7 consultation to insure that actions in those areas are not likely to jeopardize the continued existence of the species. Given these provisions and assurances, in conjunction with all of the other considerations discussed above, we conclude that the benefits of including these HLB areas in critical habitat are relatively negligible.

On the other hand, some appreciable benefit could be realized by excluding HLB areas from critical habitat. Executive Order 12866 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Excluding HLB lands from the northern spotted owl critical habitat designation reduces the burden of additional section 7 consultation for these lands that serve primarily to meet BLM's timber sale volume objectives. Therefore, excluding these HLB lands from the critical habitat designation would provide some incremental benefit by clarifying the primary role of these lands in relation to northern spotted owl conservation, and by eliminating any unnecessary regulatory oversight. These benefits of exclusion outweigh the relatively minimal benefit of retaining these lands as critical habitat.

We note that there is ongoing litigation challenging BLM's management of O&C lands under the 2016 RMPs. In 2018, a Federal magistrate judge in the U.S. District Court for the District of Oregon (D. Or.) issued a Findings and Recommendation that upheld the 2016 RMPs and rejected plaintiffs' challenge that the plans violated the purposes listed in the O&C Act (*Pacific Rivers v. Bernhardt* (No. 6:16-cv-01598-JR) (November 12, 2018)). The District Court subsequently adopted the magistrate's Findings and Recommendation, and the U.S. Court of Appeals for the Ninth Circuit recently affirmed that decision (see *Pacific Rivers v. BLM* (No. 19–35384) (Memorandum, May 15, 2020)). In a separate proceeding, the U.S. District Court for the District of Columbia (D.D.C.), in a consolidated set of cases, recently found that the RMPs violate the O&C Act because BLM excluded portions of O&C timberland from sustained yield harvest (*i.e.*, the BLM allocated some timberlands to reserves instead of the harvest land base); see, *e.g.*, *American Forest Resource Council et al. v. Steed* (No. 16–1599-RJL) (Memorandum

Opinion, November 22, 2019). The parties have briefed the court on the appropriate remedy, but the court has not yet issued an order.

We considered this information in developing this proposed rule. This proposed rule is based on the 2016 RMPs as they are, and not as they may be modified in the future. While the litigation outcomes of the cases challenging the BLM's management of O&C lands are not certain and we will not speculate on the ultimate outcomes of the litigation, we acknowledge the potential for future reductions in the BLM's reserves and changes in the HLB. As discussed above, in the consolidated D.D.C. cases, the court has already found that the BLM violated the O&C Act by excluding portions of O&C timberlands from sustained yield timber harvest. Consequently, the HLB might change as a result of this litigation by remedy order of the court either with, or without, land use planning undertaken by BLM.

*National Forest System Lands*—We evaluated whether exclusions from the critical habitat designation under section 4(b)(2) of the Act should be considered within the relatively small amount of O&C lands managed as National Forest System lands by USFS. Our preliminary analysis of potential areas to consider for exclusion revealed small areas of lower quality interspersed with higher quality habitat scattered across and imbedded within critical habitat subunits. Therefore, in coordination with USFS, we did not identify any National Forest System lands where we believed the benefits of exclusion outweighed the benefits of inclusion at the critical habitat unit mapping scale. In other words, our preliminary view is that formally excluding these lower quality areas from critical habitat would require significant mapping and analytical effort, and that it is unclear what economic or other administrative benefit might be derived from this process. To date, we have found all proposed timber harvest under the NWFP on National Forest System lands in critical habitat to: (1) Be compatible with northern spotted owl conservation, and (2) not destroy or adversely modify critical habitat. Therefore, we believe the ongoing section 7 consultation processes with USFS under its current land management plans continue to be the best way to evaluate effects of USFS actions on critical habitat function. We will continue to work closely with USFS to address the conservation needs of the northern spotted owl as the agency updates its various forest plans. We invite comments specifically

addressing National Forest System lands and the reasons why we should or should not exclude habitat on these lands as “critical habitat” under section 4(b)(2) of the Act. Comments should address the related benefits of including or excluding specific areas; whether the benefits of exclusion outweigh those of inclusion; and whether the exclusion will not result in the extinction of the species. Additionally, comments should address any probable economic, national security, or other relevant impacts of the designation on areas recommended for consideration for exclusion.

#### State Lands

We also evaluated whether additional exclusions from the critical habitat designation under section 4(b)(2) of the Act should be considered on State lands. In our December 4, 2012, critical habitat designation (77 FR 71876), we excluded State lands in Washington and California that were covered by HCPs and other conservation plans. In Oregon, State agencies are currently working on HCPs that will address State forest lands in western Oregon, including the Elliott State Forest (managed by the Oregon Department of State Lands) and other State forest lands in western Oregon (managed by the Oregon Department of Forestry).

HCPs necessary in support of incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, as a result of their commitments in the HCPs, incidental take permittees agree to provide more conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

When we undertake a discretionary section 4(b)(2) exclusion analysis, we consider areas covered by an approved HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

(1) The permittee is properly implementing the HCP and is expected to continue to do so for the term of the agreement. An HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the HCP, implementing agreement, and permit.

(2) The species for which critical habitat is designated is a covered species in the HCP, or very similar in its habitat requirements to a covered

species. The recognition that the Service extends to such an agreement depends on the degree to which the conservation measures undertaken in the HCP would also protect the habitat features of the similar species.

(3) The HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

The proposed State forest HCPs will not be completed prior to the publication of this document; thus, they do not yet fulfill the above criteria. As a result, we are not proposing additional State lands for exclusion from the critical habitat designation for the northern spotted owl. We may revisit consideration of 4(b)(2) exclusions on State lands when the HCPs have been adopted.

#### Required Determinations

##### *Clarity of the Rule*

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you believe that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

##### *Regulatory Planning and Review* (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has identified this proposed rule as a significant rule.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative,

and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

##### *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 of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, 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 whether 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.

Under the RFA, as amended, and consistent with recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. It follows that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, this revised critical habitat designation will not have a significant economic impact on a substantial number of small entities. Additionally, in this document, we are proposing to remove areas from the northern spotted owl’s critical habitat designation, thus reducing regulatory impacts for affected Federal agencies.

In summary, we have considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, this proposed revised critical habitat designation will not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

#### *Executive Order 13771*

This proposed rule is expected to be an E.O. 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) deregulatory action. The Office of Information and

Regulatory Affairs has identified this as a significant rule under E.O. 12866.

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

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis for the December 4, 2012, revised critical habitat designation for the northern spotted owl (77 FR 71876), we did not find that the critical habitat designation would significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

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

“would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

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

(2) We do not believe that this rule would significantly or uniquely affect small governments because we are proposing only exclusions from the northern spotted owl’s critical habitat designation; we are not proposing to designate additional lands as critical habitat for the species. Therefore, a Small Government Agency Plan is not required.

#### *Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of revising designated critical habitat for the northern spotted owl in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions

that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for this proposed revision of the designation of critical habitat for the northern spotted owl, and it concludes that, if adopted, this revised designation of critical habitat does not pose significant takings implications for lands within or affected by the designation. Again, the proposed decision here would remove areas from designation.

#### *Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. As noted above, the proposed decision here would remove areas from designation.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Further, in this document, we are proposing only exclusions from the northern spotted owl's critical habitat designation; we are not proposing to designate additional lands as critical habitat for the species.

#### *Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office

of the Solicitor has determined that the rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed revising designated critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the December 4, 2012, final rule (77 FR 71876) identifies the elements of physical or biological features essential to the conservation of the species, and we are not proposing any changes to those elements in this document. The areas we are proposing for exclusion from the designated critical habitat are described in this rule and the maps and coordinates or plot points or both of the subject areas are included in the administrative record and are available at <http://www.fws.gov/oregonfwo> and at <http://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0050.

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

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit (see *Catron Cty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10th Cir. 1996), we do not need to prepare environmental analyses pursuant to NEPA (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

#### *Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations

with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. To fulfill our responsibility under Secretarial Order 3206, we have consulted with the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) and the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI), who both manage Tribal land within the areas designated as critical habitat for the northern spotted owl. We will continue to work with Tribal entities during the development of a final rule for the revised designation of critical habitat for the northern spotted owl.

#### **References Cited**

A complete list of references cited in this rulemaking is available on the internet at <http://www.regulations.gov> and upon request from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authors**

The primary authors of this proposed rule are the staff members of the Oregon Fish and Wildlife Office.

#### **List of Subjects in 50 CFR Part 17**

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

**Authority:** This action is authorized under 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245.

#### **George Wallace,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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