DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2011–0112]

[4500030114]

RIN 1018-AX69

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; availability of supplementary documents.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of a draft economic analysis of the proposed revised designation of critical habitat for the northern spotted owl *(Strix occidentalis caurina)* under the Endangered Species Act of 1973, as amended. Also, a draft environmental assessment of this proposed action will be made available to the public on June 4, 2012.

DATES: *Written Comments*: The public comment period on the proposal to revise critical habitat for the northern spotted owl has been extended to July 6, 2012. Please note comments submitted electronically using the Federal eRulemaking Portal (see ADDRESSES section, below) must be received by 11:59 p.m. Eastern Time on the closing date. If you are submitting your comments by hard copy, please mail them by July 6, 2012, to ensure that we receive them in time to give them full consideration. *Public Information Meetings*: As announced previously, we will hold public information meetings on the following dates and times:

- Redding, California, on June 4, 2012, from 3 p.m. to 5 p.m., and from 6 p.m. to 8 p.m.
- Tacoma, Washington, on June 12, 2012, from 3 p.m. to 5 p.m., and from 6 p.m. to 8 p.m.
- Portland, Oregon, on June 20, 2012, from 2 p.m. to 4 p.m. This meeting will precede the public hearing at the same location and on the same date.

In addition, we have added the following public information meetings:

- Roseburg, Oregon, on June 27, 2012, from 3 p.m. to 5 p.m., and from 6 p.m. to 8 p.m.

Public Hearing: We will hold a public hearing in Portland, Oregon, on Wednesday, June 20, 2012, from 6 p.m. to 8 p.m.

ADDRESSES: *Document availability:* You may obtain copies of the proposed revised rule, draft economic analysis, and draft environmental assessment at *http://www.regulations.gov* at Docket Number FWS–R1–ES–2011–0112, from the Oregon Fish and Wildlife Office's website (*http://www.fws.gov/oregonfwo/*—click on the link "Spotted Owl Main Information Site"), or by contacting the Oregon Fish and Wildlife Office directly (see FOR FURTHER INFORMATION CONTACT).

Comment Submission: You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: *http://www.regulations.gov*. Search for Docket No. FWS–R1–ES–2011–0112, which is the docket number for this rulemaking, and follow the directions for submitting a comment.

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2011–0112; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

(3) *At the public information meetings or the public hearing*: Written comments will be accepted by Service personnel at any of the seven scheduled public meetings or the public hearing.

We will post all comments received on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information). We request that you send comments only by the methods described above.

Public Information Meetings: The seven public meetings will be held at the following locations:

- *California:* Redding Convention Center, 700 Auditorium Drive, Redding, California 96001; 530–229–0036.
- *Washington:* University of Washington, Tacoma Campus, 1900 Commerce St., Jane Russell Commons, Tacoma, Washington; 253–692–4416.
- *Portland, Oregon:* Oregon Convention Center, Room C–120, 777 NE Martin Luther King Blvd., Portland, Oregon; 503–235–7575.
- *Roseburg, Oregon:* Douglas County Central Library, Ford Community Room, 1409 NE Diamond Lake Blvd, Roseburg, Oregon; 541-440-4305

Public Hearing: The public hearing will be held in Room C–120 at the Oregon Convention Center, 777 NE Martin Luther King Blvd., Portland, Oregon; 503–235–7575.

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266, by telephone (503–231–6179), or by facsimile (503–231–6195). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: On March 8, 2012, the U.S. Fish and Wildlife Service (Service) published in the Federal Register a proposal to revise the designated critical habitat for the northern spotted owl under the Endangered Species Act of 1973, as amended (Act). Consistent with the best scientific data available, the standards of the Act, our regulations, and agency practice, the Service initially identified, for public comment, approximately 13,962,449 acres (ac) (5,649,660 hectares (ha)) in 11 units and 63 subunits in California, Oregon, and Washington that meet the definition of critical habitat. In addition, however, the Act provides the Secretary with the discretion to exclude certain areas from the final designation after taking into consideration economic impacts, impacts on national security, and any other relevant impacts of specifying any particular area as critical habitat. The Service identified and is considering a number of specific alternatives in the proposed rulemaking based on potential exclusions from the final rule. First, of the total area identified, we propose to exclude from the final designation approximately 2,631,736 ac (1,065,026 ha) of National Park lands, Federal Wilderness Areas, and other Congressionally reserved natural areas, as well as 164,776 ac (66,682

ha) of State Park lands. Second, we propose to exclude from a final designation approximately 936,816 ac (379,116 ha) of State and private lands that have a Habitat Conservation Plan, Safe Harbor Agreement, conservation easement, or similar conservation protection. And third, we are considering exclusion of an additional 838,344 ac (339,266 ha) of other non-Federal lands from the final designation. These specific alternatives will be considered on an individual basis or in any combination thereof. In addition, the final designation may not be limited to these alternatives, but may also consider other exclusions as a result of continuing analysis of relevant considerations (both scientific and economic, as required by the Act) and the public comment process.

The comment period on the proposed rule had previously been extended to July 6, 2012, to allow all interested parties an opportunity to comment simultaneously on the proposed revised rule, the associated draft economic analysis, and draft environmental assessment. Comments previously submitted need not be resubmitted and will be fully considered in preparation of the final rule. We also previously announced our intent to hold a public hearing and several public information meetings on our proposed revised rule and associated documents; we announce two additional public information meetings here.

Presidential Memorandum

On February 28, 2012, the President issued a memorandum to the Secretary of the Interior regarding the proposed revised critical habitat for the northern spotted owl, specifically on minimizing regulatory burdens. In that memo, the President gave the following direction to the Secretary:

"In order to avoid unnecessary costs and burdens and to advance the principles of Executive Order 13563, consistent with the ESA, I hereby direct you to take the following actions:

(1) publish, within 90 days of the date of this memorandum, a full analysis of the economic impacts of the proposed rule, including job impacts, and make that analysis available for public comment;

(2) consider excluding private lands and State lands from the final revised critical habitat, consistent with applicable law and science;

(3) develop clear direction, as part of the final rule, for evaluating logging activity in areas of critical habitat, in accordance with the scientific principles of active forestry management and to the extent permitted by law;

(4) carefully consider all public comments on the relevant science and economics, including those comments that suggest potential methods for minimizing regulatory burdens;

(5) give careful consideration to providing the maximum exclusion from the final revised critical habitat, consistent with applicable law and science; and

(6) to the extent permitted by law, adopt the least burdensome means, including avoidance of unnecessary burdens on States, tribes, localities, and the private sector, of promoting compliance with the ESA, considering the range of innovative ecosystem management tools available to the Department and landowners."

To comply with this directive, the Service has taken the following steps:

1. We conducted and completed, as per our normal practice, an economic analysis on the probable impacts of the proposed revised critical habitat, specifically in the areas of timber harvest and linear projects, and included a consideration of potential impacts to jobs. In this document, we announce the availability of this draft economic analysis for public review and comment. As discussed in more detail below, we found that, depending on the decisions made and future directions taken by Federal action agencies, the incremental impacts of the proposed critical habitat revision will likely be minimal, or may even have a positive impact, if ecological forestry prescriptions are applied. This analysis will be refined and revised, based on information we receive during our comment period, and a final economic analysis will be made available at the time of publication of the final rule.

2. In our proposed rule (77 FR 14062; March 8, 2012), we proposed several options that we are considering for our final designation, three of which address the potential exclusion of private and State lands from the final critical habitat determination. In making the final determination, we will consider the best available scientific and commercial information, including information we receive during our public comment period. This information will be used in our evaluation process, described in section 4(b)(2) of the Act, which will examine the benefits of inclusion and the benefits of exclusion of specific areas from the final critical habitat designation, so that the Secretary may make informed decisions regarding exclusions.

3. In our proposed rule, we provided a description of ecological forestry

management actions that are compatible with both northern spotted owl recovery and timber harvest, as recommended in the Revised Recovery Plan for the Northern Spotted Owl (76 FR 38575; July 1, 2011), which, in some areas, may actually increase harvest relative to recent realized levels. While it is outside the purview of the Service to direct forestry management, we will consult with Federal action agencies and make recommendations on the best measures to provide protections for the owl and have minimal negative economic impacts.

4. It is the normal practice of the Service to solicit public review and comment on all rule-making actions, and, as noted above, we consistently follow the standard of using the best available scientific information in making critical habitat determinations. In our proposed rule (77 FR 14062; March 8, 2012), we requested specific information from all interested parties, and additionally have requested comment from expert peer reviewers. In this notice, we have added several additional specific questions for comment, including questions on the analytic framework and information in our draft economic analysis, and we will use all information received in our analysis and final determination.

5. In our March 8, 2012, proposed rule (77 FR 14062), we identified several options we are considering for the final designation which include the consideration of excluding private, State, and Congressionally Reserved lands within the proposed critical habitat. Additionally, we have solicited comments and information regarding any other areas that may be appropriate for exclusion. Again, the Secretary will consider all

appropriate exclusions, and use the best available scientific and commercial information to inform his evaluation in making any exclusions to the final designation, as provided by section 4(b)(2) of the Act.

6. The Service appreciates, and is sensitive to, the potential for regulatory burden that may result from our designation of critical habitat for the northern spotted owl under the Act. Our analysis indicates that the proposed revision of critical habitat, as informed by the Revised Recovery Plan for the Northern Spotted Owl (76 FR 38575; July 1, 2011), is anticipated to have little incremental effects above and beyond the conservation measures already required as a result of its threatened status, and thus is expected to impose minimal additional regulatory burden. The Service appreciates, and relies on the many partners we have in conservation, including private landowners, Tribes, States, and local governments, and strongly desires to promote conservation partnerships to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people.

Public Comments

We will accept written comments and information during this extended comment period on our proposed revised designation of critical habitat for the northern spotted owl that was published in the **Federal Register** on March 8, 2012 (77 FR 14062), our draft economic analysis, and draft environmental assessment of the proposed revised designation. We will consider information and recommendations from all interested

parties. We are particularly interested in comments concerning:

1. Specific information regarding:

a. The amount and distribution of northern spotted owl habitat;

b. What areas were occupied at the time of listing and contain features essential to the conservation of the species such that they should be included in the designation and why;

c. Whether these essential features may require special management considerations or protection and what special management considerations or protection may be needed in critical habitat areas we are proposing;

d. What areas not occupied at the time of listing are essential for the conservation of the species and why;

e. Whether we have identified any areas occupied at the time of listing, but that do not contain features essential to the conservation of the species, and that therefore should not be included in the designation; and

f. Whether we have identified any areas that may not have been occupied at the time of listing and that are not essential to the conservation of the species, such that they should not be included in the designation.

2. Land-use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

3. Our proposed approach to effects determinations for the purposes of conducting consultation under section 7(a)(2) of the Act, in particular the application of a 500-ac (200-ha) scale as a screen for a determination of not likely to adversely affect, as described in the section "Determinations of Adverse Effects and Application of the 'Adverse Modification' Standard" of the proposed rule.

4. Assistance in the identification of any private lands that are not expressly identified as intended for inclusion within critical habitat and that may have inadvertently been included within the designation, due to mapping and modeling limitations, as described in the section "Proposed Revised Critical Habitat Designation" of the proposed rule.

5. Information on the potential impacts of climate change on the northern spotted owl and proposed critical habitat, and whether special management needs or protections may be needed to address this issue in the critical habitat areas we are proposing.

6. Any probable economic, national security, or other relevant impacts of designating any area as critical habitat, and in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts. We particularly request information and comments on what activities may occur and the effects to those activities in the proposed revised critical habitat areas. Such information could include:

a. The extent of possible activities, including temporal and spatial scale, relative to the critical habitat area within which they occur.

b. The impact of possible activities on the habitat's likelihood of serving its intended conservation function or purpose.

c. The consistency of possible activities with the recommendations of the Revised Recovery Plan for the Northern Spotted Owl or other landscape-level conservation plans.

7. The potential economic impacts of the designation on timber harvest on private lands included in the proposed designation, especially on those lands which do not have habitat conservation plans (HCPs), safe harbor agreements (SHAs), or other conservation plans which are currently active or under development.

8. Have we identified all potential impacts to private landowners within the proposed critical habitat?

9. The conservation benefits that would result from the additional protections to northern spotted owl habitat, above and beyond all measures currently in place, that would be afforded by the proposed revised critical habitat designation.

10. Whether the benefits of excluding the private and State lands with active conservation agreements (HCPs, SHAs, and other formal agreements) and congressionally reserved natural areas (e.g., wilderness areas, national scenic areas, national parks) that are proposed for exclusion outweigh the benefits of including them in critical habitat.

11. We are considering the possible exclusion of non-Federal lands, especially areas in private ownership, in particular, and whether the benefits of exclusion may

outweigh the benefits of inclusion of those areas. However, we seek comment more broadly on whether the benefits of excluding any other particular area from critical habitat outweigh the benefits of including that area in critical habitat under section 4(b)(2) of the Act, after considering both the potential impacts and benefits of the proposed revised critical habitat designation. We, therefore, request specific information on:

a. The benefits of including any specific areas in the final designation and supporting rationale.

b. The benefits of excluding any specific areas from the final designation and supporting rationale.

c. Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation.

d. Whether any specific exclusions may result in the extinction of the species and why (see “Exclusions” section of the proposed rule).

e. For private lands in particular, we are interested in information regarding the potential benefits of including private lands in critical habitat versus the benefits of excluding such lands from critical habitat. This information does not need to include a detailed technical analysis of the potential effects of designated critical habitat on private property. In weighing the potential benefits of exclusion versus inclusion of private lands, the Service may consider whether existing partnership

agreements provide for the management of spotted owl habitat. We may consider, for example, the status of conservation efforts, the effectiveness of any conservation agreements to conserve the species, and the likelihood of the conservation agreement's future implementation. There may be broad public benefits of encouraging collaborative efforts and encouraging local and private conservation efforts, and these broad benefits are important considerations in our evaluation.

12. Our process used for identifying those areas that meet the definition of critical habitat for the northern spotted owl, including the assumptions incorporated into the habitat modeling process, as described more fully in the section "Criteria Used to Identify Critical Habitat" of the proposed rule and also in our supporting documentation (Dunk *et al.* 2012).

13. Information on the extent to which the description of potential economic impacts in the draft economic analysis is complete and accurate, specifically:

a. Whether there are incremental costs of critical habitat designation (e.g., costs attributable solely to critical habitat designation) that have not been appropriately identified or considered in our economic analysis, including costs associated with future administrative costs or project modifications that may be required by Federal agencies related to section 7 consultation under the Act, and in particular, any impacts on small entities.

b. Whether the draft economic analysis identifies all State and local costs. If not, what other costs should be included.

c. Whether our approach in the draft economic analysis of evaluating three possible scenarios of potential impacts to timber harvest in younger forests in the Matrix land-use designation, based on the possible future decisions made by Federal land managers, covers all reasonable scenarios, and makes sound and reasonable projections in the three possible outcomes. These three scenarios are:

i. Timber harvest volume does not change; thinning that is currently taking place will most likely continue.

ii. Timber harvest volume may increase due to the application of ecological forestry practices in some areas of critical habitat.

iii. Timber harvest volume may be reduced due to voluntary agency restriction in actions within designated critical habitat.

d. Whether there are additional incremental economic impacts associated with linear projects, including pipelines, that have not been identified or correctly characterized in the economic analysis, including any potential project modifications or delay costs that may result from consultations associated with critical habitat on such projects.

e. Whether the economic analysis correctly assesses the effect on regional costs and jobs associated with timber harvest and other activities that may that derive from the designation.

f. Are the estimates of job mulitpliers discussed in the draft economic analysis reasonable for the region and current? Please note that the scope of the analysis is limited to the incremental effects of critical habitat related to and within the geographic area of the proposed designation for the northern spotted owl. The analysis does not consider potential changes in timber activities on lands outside the proposed critical habitat designation. As such, this analysis cannot evaluate the potential effects related to the timber industry as a whole.

14. Whether the draft economic analysis makes appropriate assumptions regarding current practices and any regulatory changes that will likely occur as a result of the designation of critical habitat.

15. Whether the draft economic analysis identifies all Federal, State, and local costs and benefits attributable to the proposed revised designation of critical habitat, and information on any costs that may have been inadvertently overlooked.

16. Whether the draft environmental assessment adequately presents the purpose of and need for the proposed action, the proposed action and alternatives, and the evaluation of the direct, indirect, and cumulative effects of the alternatives. Specifically:

a. Have we properly identified the range of issues relevant to the designation of critical habitat for the northern spotted owl?

b. Have we made reasonable conclusions regarding the certainty or uncertainty of the impacts of the proposed action and alternatives?

c. Have we identified a reasonable range of alternatives to meet the purpose and need of the action, including alternatives considered, but not fully evaluated?

d. Have we identified all reasonably foreseeable actions that could contribute to the cumulative effects of the action?

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

18. Specific information on ways to improve the clarity of this rule as it pertains to completion of consultations under section 7 of the Endangered Species Act.

Our final determination concerning revised critical habitat for the northern spotted owl will take into consideration all written comments we receive during all comment periods, comments from peer reviewers, comments received during the public meetings, comments and public testimony received during the public hearing, and any additional information we receive in response to the draft economic analysis and draft environmental assessment. The comments will be included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determination.

On the basis of peer review and public comments, as well as any new information we may receive, we may, during the development of our final determination, find that areas within the proposed designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

If you previously submitted comments or information on this proposed rule, please do not resubmit them. We have incorporated them into the public record for this rulemaking, and will fully consider them in the preparation of our final determination.

You may submit your written comments and materials concerning this proposed rule by one of the methods listed in ADDRESSES. Verbal testimony may also be presented during the public hearing (see DATES and ADDRESSES sections). We will post your entire comment—including your personal identifying information—on http://www.regulations.gov. If you submit your comment via U.S. mail, you may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public review; however, we cannot guarantee that we will be able to do so.

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*, or by appointment, during normal business hours, at the U.S.

Fish and Wildlife Service, Oregon Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT).

Public Information Meetings and Public Hearing

We are holding seven public information meetings and one public hearing on the dates listed in DATES at the locations listed in ADDRESSES. We are holding the public hearing to provide interested parties an opportunity to present verbal testimony (formal, oral comments) or written comments regarding the proposed critical habitat designation and the associated draft economic analysis and draft environmental assessment. A formal public hearing is not, however, an opportunity for dialogue with the Service or its contractors; it is only a forum for accepting formal verbal testimony. In contrast to the hearing, the public information meetings allow the public the opportunity to interact with Service staff and contractors, who will be available to provide information and address questions on the proposed rule and associated documents. We cannot accept verbal testimony at any of the public information meetings; verbal testimony can only be accepted at the public hearing. Anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a written copy of their statement to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up at the hearing if they desire to make an oral statement. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Persons with disabilities needing reasonable accommodations to participate in the public hearing or public meetings should contact Paul Henson, Field Supervisor, Oregon Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT). Reasonable accommodation requests should be received at least 3 business days prior to the meeting or hearing to help ensure availability; at least 2 weeks prior notice is requested for American Sign Language or English as a second language interpreter needs.

Background

It is our intent to discuss only those topics directly relevant to the proposed revised designation of critical habitat for the northern spotted owl in this document. For more information on previous Federal actions concerning the northern spotted owl, refer to the proposed revised designation of critical habitat published in the **Federal Register** on March 8, 2012 (77 FR 14062), which is available online at *http://www.regulations.gov* (at Docket Number FWS–R1–ES–2011–0112) or from the Oregon Fish and Wildlife Office (see FOR FURTHER INFORMATION CONTACT).

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the

Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7(a)(2) of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency unless it is exempted pursuant to the provisions of the Act. See 16 U.S.C. 1536(e)-(n) & (p). Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consistent with the best scientific data available, the standards of the Act, and our regulations, we have initially identified, for public comment, approximately 13,962,449 acres (ac) (5,649,660 hectares (ha)) in 11 units and 63 subunits in California, Oregon, and Washington that meet the definition of critical habitat for the northern spotted owl. In addition, the Act provides the Secretary with the discretion to exclude certain areas from the final designation after taking into consideration economic impacts, impacts on national security, and any other relevant impacts of specifying any particular area as critical habitat.

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

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. In the case of the northern spotted owl, the benefits of critical habitat include public awareness of the presence of the northern spotted owl and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the northern spotted owl due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

When considering the benefits of exclusion, we consider, among other things,

whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. We also consider the potential economic or social impacts that may result from the designation of critical habitat.

We have identified, and are considering, a number of specific alternatives in this proposed rulemaking based on potential exclusions from the final rule. First, of the total area identified, we propose to exclude from the final designation approximately 2,631,736 ac (1,065,026 ha) of National Park lands, Federal Wilderness Areas, and other congressionally reserved natural areas, as well as 164,776 ac (66,682 ha) of State Park lands. Second, we propose to exclude from a final designation approximately 936,816 ac (379,116 ha) of State and private lands that have a Habitat Conservation Plan, Safe Harbor Agreement, conservation easement, or similar conservation protection. And third, we are considering exclusion of an additional 838,344 ac (339,266 ha) of other non-Federal lands from the final designation.

These specific alternatives will be considered on an individual basis or in any combination thereof. In addition, the final designation may not be limited to these alternatives, but may also consider other exclusions as a result of continuing analysis of relevant considerations (scientific, economic, and other relevant factors, as required by the Act) and the public comment process. In particular, we solicit comments from the public on the physical and biological features currently identified in this proposal as

being essential for the conservation of the species, whether all of the areas identified meet the definition of critical habitat, whether other areas would meet that definition, whether to make the specific exclusions we have proposed, and whether there are other areas that are appropriate for exclusion.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis and draft environmental assessment concerning the proposed critical habitat designation, which are available for review and comment (see ADDRESSES).

Existing Protections for the Northern Spotted Owl Absent Critical Habitat

A variety of Federal, State, and local protections currently apply to the northern spotted owl due to its status as a threatened species under the Act; these protections, and any costs associated with them, are not associated with the designation of critical habitat and are in place regardless of whether they are overlaid by critical habitat. Here we describe the existing protections for the northern spotted owl absent critical habitat.

Habitat Protections on Federal Lands

Approximately 86 percent (12,023,709 ac (4,864,823 ha)) of the proposed revised critical habitat designation is on Federal lands. These Federal lands already provide a variety of protections to the northern spotted owl and its habitat, regardless of the designation of critical habitat, including protections provided by the standards and guidelines of the Northwest Forest Plan (NWFP) and the protections provided by section 7 of the Act, as described more fully here. The NWFP adopted a series of reserves and management guidelines that were intended to protect spotted owls and their habitat. Currently, the guidelines for managing the large reserves of the NWFP are more restrictive than the recommendations for reserved lands in the Revised Recovery Plan for the Northern Spotted Owl. The protections to northern spotted owl habitat under the NWFP are in place regardless of the designation of critical habitat; critical habitat does not supersede or alter the standards and guidelines of the NWFP.

Since it was signed on April 13, 1994, the NWFP has generally guided the management of Federal forest lands within the range of the spotted owl (USDA and USDI 1994a, b). All U.S. Forest Service (Forest Service) and U.S. Bureau of Land Management (BLM) lands within the proposed revised designation of critical habitat for the northern spotted owl are managed under the NWFP. The NWFP was designed to protect large blocks of late-successional forest and provide habitat for species that depend on those forests, including the spotted owl, as well as to “produce a predictable and sustainable level of timber sales and non-timber resources that will not degrade or destroy the environment” (USDA and USDI 1994a). The NWFP includes land-use allocations

that would provide for population clusters of spotted owls (i.e., demographic support) and maintain connectivity between population clusters. Certain land-use allocations in the NWFP contribute to supporting population clusters: Late-Successional Reserves (LSRs), Managed Late-Successional Areas, and Congressionally Reserved Areas. Riparian Reserves, Adaptive Management Areas and Administratively Withdrawn Areas can provide both demographic support and connectivity/dispersal between the larger blocks, but are not necessarily designed for that purpose. "Matrix" land-use allocation areas are designed to support timber production while also retaining biological legacy components important to old-growth obligate species that would persist into future managed timber stands.

The proposed revised designation of critical habitat for the northern spotted owl includes 2,631,736 ac (1,065,026 ha) of Congressionally-reserved wilderness areas and National Park lands. In these land allocations, there is generally little or no timber management beyond, potentially, removal of hazard trees or fuels reduction to protect structures and road maintenance, in addition to fire-management activities. Such areas thus protect habitat for the northern spotted owl absent the designation of critical habitat.

In addition, we estimate that the vast majority of the proposed revised critical habitat on Federal lands is currently occupied by the northern spotted owl; therefore, these lands are already subject to consultation under section 7(a)(2) of the Act. Section 7(a)(2) provides that Federal agencies must, in consultation with the Service, ensure that

any action authorized, funded, or carried out by that Federal agency is not likely to jeopardize the continued existence of a listed species (this is referred to as the "jeopardy standard"); for the northern spotted owl, impacts to its habitat are considered as part of this analysis. The jeopardy standard applies to the northern spotted owl on all Federal lands occupied by the species within the proposed revised critical habitat, which, as noted above, constitutes the majority of the proposed designation. In areas where spotted owls occur, Federal agencies, such as the Forest Service and Bureau of Land Management, are already consulting with the Service on the potential effects of their proposed actions under the jeopardy standard, regardless of whether these lands are currently designated as critical habitat. The only additional requirement for these Federal agencies, subsequent to the designation of critical habitat, is that these agencies must additionally ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat.

Non-Federal Lands

The proposed revised designation of critical habitat includes 671,306 ac (271,558 ha) of State lands. Most of these State lands are either covered under a Habitat Conservation Plan (HCP) or are composed of State Parks or State Fish and Wildlife lands. Many of these lands have State regulations or guidelines in place that provide habitat protection for northern spotted owls, regardless of critical habitat. For example, in the State of Washington, timber harvest activities must comply with the State Forest

Practices Act and the Washington State Environmental Policy Act, and the management of State trust lands is guided by the State Forest Resource Plan, which requires the Washington Department of Natural Resources (DNR) to analyze and potentially modify the impacts of its activities on watersheds, wildlife habitat, special ecological features, wetlands, and other natural resources to maintain healthy forests for future generations. In addition to these State policies for Washington, all forest lands managed by the DNR and considered in the proposed rule are covered by a Habitat Conservation Plan designed to provide habitat for a number of species, including the northern spotted owl.

In Oregon, timber harvests on State lands in Oregon are guided by the Forest Practices Act and Forest Practices Rules. In California, timber harvests are regulated by the California Forest Practice Rules, which contain specific provisions for the protection of the northern spotted owl. The protections provided by these State regulations and guidelines on State lands included in the proposed revised designation are in place regardless of the designation of critical habitat.

The proposed revised designation additionally identifies 1,267,704 ac (512,279 ha) of private lands as potential critical habitat for the northern spotted owl. Of these lands, approximately 873,621 ac (353,541ha) (69 percent) are already subject to existing or proposed HCPs or Safe Harbor Agreements (SHAs). An additional 89,400 ac (36,179 ha) (7 percent) are subject to other existing conservation protections, such as conservation easements. Thus, only 306,869 ac (124,185 ha) of private lands are without

existing formal habitat protections for the northern spotted owl. However, these lands are still subject to applicable State regulations, such as State Forest Practice Rules. All of these protections are in place regardless of the designation of critical habitat.

Finally, State and private lands may also be subject to consultation under section 7(a)(2) of the Act if a "Federal nexus" exists, meaning the Federal government authorizes, funds, or carries out an activity on privately-held or State-owned property. For example, a Federal nexus may exist because a project involves Federal funding or requires a Federal permit, such as a Clean Water Act permit or an incidental take permit for another listed species that co-occurs with the northern spotted owl. In areas occupied by the northern spotted owl, the protections provided by consultation under the jeopardy standard for the northern spotted owl would apply regardless of critical habitat.

In addition to the protections afforded by the jeopardy standard of Section 7 of the Act, as discussed above, on all lands regardless of ownership the northern spotted owl also benefits from the protections of section 9 of the Act (which prohibits the "take" of listed wildlife species, defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct") and section 10 of the Act (under section 10(a)(1)(B), a landowner or local government may develop an HCP for a listed animal species to meet the conditions for issuance of an incidental take permit in connection with a land or water use activity or project). These protections are considered baseline protections attributable to the listed status of the species, and they are in place

regardless of the designation of critical habitat.

Section 4(b)(2) of the Act specifies that the Secretary [of the Interior] shall designate critical habitat "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." This consideration does not extend to revisiting the impacts associated with the listed status of the species. Thus, to understand the impacts attributable solely to the designation of critical habitat, it is first necessary to understand the baseline protections and costs that are already on the landscape, regardless of the critical habitat designation. The potential impacts of the proposed revised critical habitat for the northern spotted owl are, therefore, the economic costs and other relevant costs associated with the designation above and beyond those baseline protections and associated costs summarized above, and as described more fully in the draft economic analysis of our proposed revision of critical habitat for the northern spotted owl (see below). Because the northern spotted owl is already subject to existing protections throughout most of its range, due to its threatened status under the Act, the costs attributable to the additional designation of critical habitat over and beyond existing costs are estimated to be relatively modest.

Draft Economic Analysis

The purpose of the draft economic analysis is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the

northern spotted owl. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations and guidelines, as described above in the section “Existing Protections for the Northern Spotted Owl Absent Critical Habitat”). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. The incremental costs of critical habitat do not include baseline costs that are associated with the listed status of the northern spotted owl, since these costs are in place regardless of critical habitat. For a further description of the methodology of the analysis, see the section “Framework for the Analysis” in the draft economic analysis.

The draft economic analysis provides estimated costs of the potential economic impacts of the proposed revised critical habitat designation for the northern spotted owl. It identifies potential incremental costs as a result of the proposed critical habitat

designation; as described above, these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The draft economic analysis quantifies, to the extent possible, potential economic impacts of northern spotted owl conservation efforts associated with timber management and other activities, such as linear projects (e.g., pipelines), as well as potential impacts on jobs that may be attributable to the designation of critical habitat.

The draft economic analysis concludes that only a small fraction of the overall proposed revised designation could potentially result in more than minor, incremental administrative costs. Specifically, of the total acreage proposed for designation, the draft economic analysis concludes that changes in timber harvest practices attributable solely to the designation of critical habitat may occur on 1,389,787 ac (562,427 ha) of U.S. Forest Service and BLM land, or approximately 9 percent of the total area proposed. In addition, potential exists for the owners of 306,869 ac (124,185 ha) of private land to experience changes in harvest levels due to the designation of critical habitat (approximately 2 percent of total acres proposed). No changes in harvests are expected on State lands as a result of the designation.

There is uncertainty regarding the economic impacts due to the revised critical habitat for the northern spotted owl, especially regarding the extent to which critical habitat may lead to changes in forest management by land owners, in particular Federal land managers. In the past, it has generally been assumed that active forest management

and conservation of critical habitat were incompatible land management goals. However, the Revised Recovery Plan, as reiterated by the proposed critical habitat rule, encourages Forest Service and BLM to consider some active forest management, both in dry and moist forests, as they carry out their management responsibilities.

For the past two decades, Federal land managers have worked collaboratively with the Service to consult on actions occurring within spotted owl critical habitat. However, the current proposed revision of critical habitat is larger than the final designations of 1992 and 2008, and, given the uncertainty regarding possible future actions by Federal land managers, we believed it expedient to evaluate in the draft economic analysis three scenarios of potential impact on Federal timber harvest. No one scenario is a precise prediction of what might happen in the future. Rather, these scenarios serve to bracket potential outcomes, and thereby inform the Secretary and the Service in making the best decision.

Scenario 1 - Federal Land Managers Choose Prescriptions to Maintain Timber Harvest in Matrix Lands at Levels Similar to Recent Harvest

In this scenario, it is assumed that Federal land managers will continue to manage these Matrix forests in a manner similar to that done in recent years under the 1992 and 2008 critical habitat. Federal timber harvest has been planned under the Standards and Guidelines of the Northwest Forest Plan, with an emphasis on thinning and some

regeneration harvest. However, much of the regeneration harvest has been contentious, and has sometimes been legally challenged, based on a variety of environmental and social concerns (Baker 2011), whether it is within critical habitat or not. Therefore, in this scenario, it is assumed that harvest will continue to be mostly from thinning, and will continue at recent levels. This scenario results in little change in timber harvest from recent realized levels of harvest. The total annualized impacts to timber harvest operations under this scenario could range from $185,000 to $316,000.

Scenario 2 - Federal Land Managers Choose to Implement Ecological Forestry Prescriptions in Matrix Lands

In this scenario, Federal land managers implement ecological forestry prescriptions compatible with the considerations identified in the Revised Recovery Plan and the Standards and Guidelines of the Northwest Forest Plan. This approach may allow for some broader public support (i.e., reduced challenges) for variable retention harvest and thinning to meet long-term ecosystem management and restoration goals. Such an outcome should not result in harvest levels lower than Scenario 2 above, and may result in a net increase above recent levels of realized harvest. The recommendations of the Revised Recovery Plan may allow agencies to choose to thin in some areas of Matrix within critical habitat, where formerly they took a more cautious hands off approach, or in certain forest types within the Matrix, they may choose to conduct some variable retention harvest or other activities, as appropriate and consistent

with the recommendations of the Revised Recovery Plan. The total annualized increased revenue to timber harvest operations under this scenario could range from $1.23 million to $3.07 million.

Scenario 3 - Federal Land Managers Choose to Reduce Timber Harvest in Matrix Lands from Recent Levels

In this scenario, it is assumed that Federal land managers will choose to reduce their timber management by 20 percent from the realized harvest levels of the recent past. That is, they will conclude that some of their timber harvest activities would be incompatible with the goals of critical habitat, and they will decide to reduce or not plan timber harvest in some portion of the Matrix forests that are within proposed critical habitat. If the BLM or the Forest Service does reduce planned harvest due to critical habitat, it will likely be in those portions of the Matrix that they believe have greater value to spotted owl recovery and should not be subject to timber management. The total annualized impacts to timber harvest operations under this scenario could range from $2.46 million to $6.14 million, based on potential reductions in timber harvest on Federal lands.

Which of these scenarios, or combinations of these scenarios, comes to pass is largely dependent on the approaches undertaken by the land management agencies and the cooperative section 7 processes between the Forest Service or BLM and the Fish and

Wildlife Service. Both the Forest Service and the BLM manage their timberlands under the direction of the NWFP, which includes provisions for management both within and outside of reserved areas. Inside reserves, we believe the guidance for development of late-successional forest characteristics is consistent with our recommendations for implementing ecological forestry methods to benefit the retention and development of spotted owl habitat. In the non-reserved, or the Matrix, portion of the landscape which these agencies manage, the NWFP provides minimum levels and sizes of standing trees that must remain post-harvest, depending on specific location within the range of the species. The NWFP does not, however, mandate that retaining only these minimum levels of retained trees is necessary. Indeed, in the past decade, the BLM and Forest Service have shifted their timber management emphasis in the Matrix from a regeneration harvest dominated program to one more focused on thinning prescriptions that leave more trees per acre than the minimums allowed under the NWFP. Since both the BLM and Forest Service have a proven track record of planning and implementing these thinning sales, we believe there will be a smooth transition to designing and implementing timber sales that are consistent with the ecological forestry recommendations in the Revised Recovery Plan and the proposed critical habitat designation and with the green-tree retention levels of the NWFP.

The draft analysis also considers and provides a means of estimating potential employment impacts associated with the potential change in timber harvest under the above three scenarios. Increases or decreases in timber harvests from Federal or private

lands could result in positive or negative changes in jobs, respectively. As discussed in the daft economic analysis, a recent report published by the Pacific Northwest Research Station of the USFS states that in Oregon there were 9.4 direct jobs per MMBF of timber harvested in 2010, and 9.9 direct jobs per MMBF in Washington, for a weighted average of 9.61. Other studies focusing on specific geographic regions or earlier time periods estimate a broader range of jobs multipliers, suggesting the number of direct jobs affected in a specific geographic location could be smaller or larger, depending on the specific characteristics of the industry in that affected region (see discussion in draft economic analysis). Thus, increases or decreases in timber harvests from Federal or private lands could result in positive or negative changes in jobs, respectively. Scenario 1 does not forecast any reduction in harvest on Federal lands. Scenario 2 estimates an increase in timber harvest of 12 million board feet over the next 20 years on Federal lands. Scenario 3 estimates a reduction in timber harvest on Federal lands of 24 million board feet over the next 20 years. Please note that the scope of the analysis is limited to the incremental effects of critical habitat related to and within the geographic area of the proposed designation for the northern spotted owl. The analysis does not consider potential changes in timber activities on lands outside the proposed critical habitat designation. As such, this analysis cannot evaluate the potential effects related to the timber industry as a whole.

Finally, the draft economic analysis estimates potential impacts to linear projects may be from $10,800 to $19,400. Therefore, the total potential impacts under the three

scenarios for both timber industry and linear projects is estimated at from $196,000 to $335,000 under scenario 1, a net increase in revenue of from $0.89 million to $2.87 million under scenario 2, and a net impact of from $2.65 million to $6.48 million under scenario 3.

These outcomes, or variations and combinations of them, are primarily dependent on future policy decisions by the Federal agencies. For example, the Secretaries of Interior and Agriculture have expressed their support for active forest management to restore forest health and provide jobs to rural communities. The Service has also expressed support in the Revised Recovery Plan and the proposed critical habitat rule for some levels of active forest management within critical habitat as consistent with long term forest conservation and restoration goals. Of course, specific proposed actions must also be considered through the normal section 7 consultation process.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis and all aspects of the proposed rule. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if the Secretary determines that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Draft Environmental Assessment

Outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321 *et seq*., in connection with designating critical habitat under the Act, for the reasons outlined in a notice published 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 a challenge to the first rulemaking designating critical habitat for the northern spotted owl. *Douglas County* v. *Babbitt*, 48 F. 3d 1495 (9th Cir. 1995), *cert. denied* 416 U.S. 1042 (1996)). Nevertheless, the Service, as a matter of discretion and not as a legal requirement, is preparing a draft environmental assessment.

The draft environmental assessment will present the purpose of and need for critical habitat designation, the proposed action and alternatives, and an evaluation of the direct, indirect, and cumulative effects of the alternatives under the requirements of NEPA as implemented by the Council on Environmental Quality regulations (40 CFR 1500 *et seq*.) and according to the Department of the Interior's NEPA procedures.

The draft environmental assessment will assist the Service in deciding whether or not critical habitat will be designated as proposed; if the proposed action requires refinement, or if another alternative is appropriate; or if further analyses are needed through preparation of an environmental impact statement. The draft environmental

assessment will be available on June 4, 2012, at *http://www.regulations.gov* at Docket Number FWS–R1–ES–2011–0112, from the Oregon Fish and Wildlife Office's website (*http://www.fws.gov/oregonfwo/*—click on the link "Spotted Owl Main Information Site"), or by contacting the Oregon Fish and Wildlife Office directly (see FOR FURTHER INFORMATION CONTACT). We are soliciting comments from the public on our draft environmental assessment.

Required Determinations—Amended

In our March 8, 2012, proposed rule (77 FR 14062), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulations and Regulatory Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951).

However, based on the draft economic analysis data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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 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 forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this 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 following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected 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 insure that any action authorized, funded, or carried by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities,

the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis, we have conducted a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete examination of the incremental effects of this proposed rule in the context of the RFA. As discussed earlier in this notice and in more detail in our March 8, 2012, proposed rule (77 FR 14062) and our draft economic analysis, we believe that the incremental effects of this proposed designation to be relatively small due to the extensive conservation measures already in place for the species, due to its being listed under the Act and because of measures provided under the NWFP and other conservation programs.

Importantly, the incremental impacts of the rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small

entities are affected by the critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify. Because per-entity impacts are currently uncertain, our evaluation focused on the number of small entities potentially affected.

In our draft economic analysis (DEA), we determined that there may be third-party participants to consultations involved with timber harvest and linear projects. In estimating the potential number of entities involved with consultations on timber harvest, we used the projection of 1,000 consultations over the 20-year time horizon of the DEA related to timber harvest management, providing an assumption of 50 consultations per year. We predict that many of these consultations will not involve third parties, but data is lacking about third-party participation rates. For the sake of our evaluation, we assumed that third parties are involved with these consultations and that each party is a small entity, providing an annual estimate of 50 small entities that may be involved over the 20-year time horizon of the study. This is likely an over estimate of the number of third parties involved with timber management consultations and therefore an over estimate of the number of small entities involved as well. The DEA further explored the projection of small businesses in timber-related sectors in the geographic areas overlapping the critical habitat designation which differed depending on the specific data sets used, either 7,140 entities or 2,616 entities. Using our conservative estimate of 50 small entities involved annually, the proportion of entities potentially impacted by the

designation would be 0.70 percent and 1.9 percent, respectively, over the 20-year time horizon of the study. Based on these calculations, we have concluded that these proportions do not represent a substantial number of small business entities potentially affected in the timber management sector. Please refer to Appendix A of the DEA for further details of our evaluation.

Next we explored the potential impact to third parties that may be involved with consultations related to linear projects. On the basis of similar conservative assumptions explained in the DEA, we concluded that there may be a total of 11 projects in a given year that may involve third parties. If we similarly assume that each of these parties represent small entities, then we estimate that 11 small entities in a given year could be impacted by the designation. However, based on an evaluation of the relative proportion these 11 entities may represent of the specific sector, we believe that they are unlikely to represent a substantial number. Further, the projected impacts to third parties resulting from the consultations on linear projects are anticipated to be administrative in nature. Thus, based on our conservative estimates in identifying third parties in this sector that potentially may be impacted and the projected proportion of the number of entities and types of impacts, we conclude that the designation would not result in a significant impact to a substantial number of small business entities in this sector. Please refer to Appendix A of the DEA for further details of our evaluation.

In conclusion, we believe that, based on our interpretation of directly regulated entities under RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. However, though not necessarily required by the RFA, we chose to consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to the designation of critical habitat. As discussed above, we determined that there may be entities that would most likely be involved with consultations in two sectors - timber management and linear projects. However, based on our conservative evaluation of the number of entities in these sectors potentially impacted, the proportion of the effected entities to those representing the sector in the study area, and the types of impacts, we certify that, if promulgated, the proposed revised critical habitat designation would not have a significant economic impact on a substantial number of small business entities. As such, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Oregon Fish and Wildlife Office, Pacific Region, U.S. Fish and Wildlife Service.

Authority

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

Date: May 01 2012

Rachel Jacobson

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55