

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

[Docket No. FWS-R1-ES-2020-0050; FF09E21000 FXES1111090FEDR 223]

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:** Final rule; withdrawal and revision.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), revise the designation of critical habitat for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (ESA or Act), by withdrawing the January 15, 2021, final rule that would have been effective December 15, 2021, and which would have excluded approximately 3.4 million acres (1.4 million hectares) of designated critical habitat for the northern spotted owl (January Exclusions Rule); and instead as we proposed on July 20, 2021, we now exclude approximately 204,294 acres (82,675 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. **DATES:** As of November 10, 2021, FWS is withdrawing the final rule published January 15, 2021, at 86 FR 4820, delayed on March 1, 2021, at 86 FR 11892, and further delayed on April 30, 2021 at 86 FR 22876. This rule is effective December 10, 2021.

**ADDRESSES:** This final rule is available on the internet at <https://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0050 and at <https://www.fws.gov/oregonfwo>.

- Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at <https://www.regulations.gov> under Docket No. FWS-R1-ES-2020-0050.
- The coordinates from which the Service generated the maps are included in the decision file for the rulemaking and are available at <https://www.regulations.gov> at Docket No. FWS-R1-ES-2020-0050 and at <https://www.fws.gov/oregonfwo>.
- The Geographic Information System data reflecting the revised critical

habitat units can be downloaded at <https://ecos.fws.gov/ecp/species/1123#crithab> under the heading Critical Habitat Spatial Extents.

**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:

##### Executive Summary

*Why we need to publish a rule.* We need to publish a rule in order to exclude areas from northern spotted owl designated critical habitat under section 4(b)(2) of the Act.

*What this rule does.* This rule revises the designation of critical habitat for the northern spotted owl by withdrawing the exclusion of approximately 3.4 million acres as set forth in the January Exclusions Rule, and excluding instead approximately 204,294 acres (82,675 hectares).

*Basis for this rule.* Under section 4(b)(2) of the Act, the Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she 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. This revision to critical habitat excludes 204,294 acres (82,675 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.

The Service is excluding lands that are within the Harvest Land Base land-use allocation described by the U.S. Department of the Interior Bureau of Land Management (BLM) in two recently revised resource management plans (RMPs) for areas it manages in Oregon: 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). The BLM consulted with the Service on the effects of those RMPs, and in our resulting Biological Opinion, we found the BLM's proposed harvest over time of those areas allocated to the Harvest Land Base would not result in destruction or adverse modification of

northern spotted owl critical habitat (FWS 2016, pp. 626–703). We are also excluding lands that were previously managed by the BLM under the RMPs but were subsequently transferred in trust to certain Indian Tribes pursuant to Federal legislation.

#### 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. 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-RJL (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 Court of Appeals reversed and remanded, and the case remained pending before the district court.

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, and the case dismissed. Under the terms of the settlement agreement, the Service agreed to submit a proposed revised critical habitat rule to the **Federal Register** that identified proposed exclusions under section 4(b)(2) of the Act by July 15, 2020, and to submit to the **Federal Register** a final revised critical habitat rule on or before December 23, 2020, or withdraw the proposed rule by that date if we determined not to exclude any areas from the designation under section 4(b)(2) of the Act. We delivered a proposed rule to the **Federal Register** on July 15, 2020, which was published on August 11, 2020 (85 FR 48487), proposing to exclude 204,653 acres (82,820 hectares) within 15 counties in Oregon under section 4(b)(2) of the Act. We opened a 60-day comment period on the August 11, 2020, proposed rule, which closed on October 13, 2020. On January 15, 2021, we published in the **Federal Register** the January Exclusions Rule (86 FR 4820), excluding approximately 3,472,064 acres (1,405,094 hectares) within 45 counties in Washington, Oregon, and California under section 4(b)(2) of the Act. Our August 11, 2020, proposed rule (85 FR 48487) and the January Exclusions Rule met the stipulations of the settlement agreement.

The initial effective date of the January Exclusions Rule was March 16, 2021. On March 1, 2021, we extended the effective date of the January Exclusions Rule to April 30, 2021 (86 FR 11892). At that time, we also opened a 30-day comment period, inviting comments on the impact of the delay of the effective date of the January Exclusions Rule, as well as comments on issues of fact, law, and policy raised by that final rule. After considering comments received in response to our March 1, 2021, final rule delaying the effective date, on April 30, 2021, we again extended the effective date of the January Exclusions Rule to December 15, 2021 (86 FR 22876).

On July 20, 2021, we published in the **Federal Register** a proposed revised critical habitat rule in which we proposed to withdraw the January Exclusions Rule, and to exclude 204,797 acres (82,879 hectares) within 15 counties in Oregon (86 FR 38246). The lands proposed for exclusion are the same lands we proposed for exclusion on August 11, 2020, with minor corrections in the number of acres.

For the convenience of the reader, the list below provides some **Federal Register** citations of prior rulemaking documents pertaining to the northern spotted owl. This list is not a comprehensive list of all pertinent prior rulemaking documents; instead, it contains only those documents that are referenced frequently in this final rule:

- Final rule to revise the designation of critical habitat: December 4, 2012, 77 FR 71876
- Proposed rule to revise the designation of critical habitat: August 11, 2020, 85 FR 48487
- Final rule to revise the designation of critical habitat: January 15, 2021, 86 FR 4820 (January Exclusions Rule)
- Final rule to delay the effective date of the January Exclusions Rule and to request comments: March 1, 2021, 86 FR 11892
- Final rule to further delay the effective date of the January Exclusions Rule: April 30, 2021, 86 FR 22876
- Proposed rule to revise the designation of critical habitat: July 20, 2021, 86 FR 38246

#### **Summary of Factors Affecting the Northern Spotted Owl**

Habitat loss was the primary factor leading to the listing of the northern spotted owl as a threatened subspecies in 1990 (55 FR 16114, June 26, 1990), and it continues to be a stressor on the subspecies due to the lag effects of past habitat loss, continued timber harvest, wildfire, and a minor amount from

insect and forest disease outbreaks. The most recent rangewide northern spotted owl demographic study (Franklin *et al.* 2021, entire) found that nonnative barred owls are currently the stressor with the largest negative impact on northern spotted owls through competition for resources. The study emphasized the importance of addressing barred owl management and also the importance of maintaining habitat across the range of the northern spotted owl regardless of occupancy to provide areas for recolonization and dispersal (Franklin *et al.* 2021, p. 18). The study also found a significant rate of population decline in northern spotted owls, a rate of 6 to 9 percent annually on 6 demographic study areas, and 2 to 5 percent annually on 5 study areas. Populations dropped to or below 35 percent of historical population numbers on 7 of the study areas, and to or below 50 percent on the remaining 3 areas over a 22-year period (1995–2017).

On non-Federal lands, State regulatory mechanisms have not prevented the continued decline of nesting, roosting and foraging habitat of the northern spotted owl; the amount of northern spotted owl habitat on these lands has decreased considerably over the past two decades, including in geographic areas where Federal lands are lacking. On Federal lands, the Northwest Forest Plan has reduced habitat loss and allowed for the regrowth of northern spotted owl habitat; however, the combined effects of climate change, high-severity wildfire, and past management practices are changing forest ecosystem processes and dynamics.

#### **Summary of Comments and Recommendations**

In our July 20, 2021, proposed rule (86 FR 38246), we requested that all interested parties submit written comments by September 20, 2021. We also contacted appropriate Federal, State, and local agencies, and other interested parties and invited them to comment on the proposed rule. A newspaper notice inviting general public comment was published in The Oregonian on July 25, 2021, in the Eureka Times-Standard on July 30, 2021, and in The Olympian on August 6, 2021. We did not receive any requests for a public hearing. We noted in the proposed rule that comments previously submitted in response to our August 11, 2020, proposed revision to critical habitat for the northern spotted owl (85 FR 48487) did not need to be resubmitted, as we would consider them in producing this final rule. We also noted that parties who wanted

comments they submitted in response to our March 1, 2021, rule extending the effective date of the January Exclusions Rule considered in this final rule should resubmit their comments.

During the comment period, we received 48 new public comment submissions addressing the proposed withdrawal of the January Exclusions Rule and revised critical habitat designation, in addition to the 572 public comments submitted in response to our original August 11, 2020 proposal to exclude approximately 204,653 acres (82,820 hectares). In addition, one commenter resubmitted their comments in response to our March 1, 2021, rule. Among the submissions on the July 20, 2021, proposed rule were letters from organizations signed by thousands of individuals expressing general support for our proposed rule. Many comments were nonsubstantive in nature, expressing either general support for or opposition to our proposal to withdraw the January Exclusions Rule and exclude 204,797 acres (82,879 hectares), with no supporting information or analysis, or expressing opinions regarding topics not covered within the proposed revised critical habitat rule. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed revised rule.

Below, we summarize and respond to: The substantive comments on the July 20, 2021, proposed rule that were received by the September 20, 2021, deadline; substantive comments we received in response to the August 11, 2020, proposed rule; and resubmitted comments in response to our March 1, 2021, rule. Additionally, we provide explanations when our responses to comments received on our August 11, 2020, proposed rule differ substantially from responses we provided to those same comments in the January Exclusions Rule. Comments received were grouped into general categories and are addressed in the following summary.

#### **Comments on the Withdrawal of the January Exclusions Rule**

In order to facilitate the ability to cross-reference our previous responses to comments in the January Exclusions Rule, new and resubmitted comments received by September 21, 2021, on the proposed withdrawal of the January Exclusions Rule and the March 1, 2021, rule delaying the effective date of the January Exclusions Rule until April 30, 2021, are identified alphabetically; comments received on the proposed exclusions and other issues received in

response to both the August 11, 2020, proposed rule and new comments received for the July 20, 2021, proposed rule are identified numerically and follow the same relevant grouping of issues as in the January Exclusions Rule. We did not receive comments concerning the proposed withdrawal of the January Exclusions Rule from Federal agencies, the States, or Tribes.

#### Comments From Counties

Jackson County (Oregon) submitted a comment letter expressing their support and concurrence with the comment letter submitted by the Association of O&C Counties (AOCC); see *Comment (B)* for a summary of those comments.

Douglas County (Oregon) submitted a comment letter incorporating the American Forest Resource Council (AFRC)'s September 20, 2021, comment letter by reference and provided additional comments urging the Service not to rescind the January Exclusions Rule. Issues raised by Douglas County are incorporated and grouped with similar comments within this rule.

Harney County (Oregon) submitted a comment letter urging the Service not to rescind the January Exclusions Rule. Issues raised by Harney County are incorporated and grouped with similar comments within this rule.

Lewis and Skamania Counties (Washington) submitted a comment letter incorporating the September 20, 2021, comment letter of the AFRC by reference and provided other comments that are incorporated and grouped with similar comments within this rule.

Klickitat County (Washington) submitted a comment letter incorporating Lewis and Skamania Counties' comment letter by reference and provided other comments that are incorporated and grouped with similar comments within this rule.

#### Public Comments

*Comment (A):* Commenters that opposed any exclusions from critical habitat stated that retaining and expanding critical habitat and conserving mature forests will provide significant economic benefits to communities by providing ecosystem services such as: Clean water, climate stability, fire resilience, fish and wildlife, recreation, and other services that serve as a stabilizing force for community development.

*Our response:* While the designation of critical habitat for the northern spotted owl does not, in and of itself, change the land-use allocation for the areas designated (which is ultimately the decision of the entity managing the land, such as the BLM), we agree that in

addition to its benefits for the northern spotted owl, conserving mature forests may provide economic benefits to communities through the ecosystem services described by the commenter. Although the final economic analysis (FEA) of the critical habitat designation for the northern spotted owl (IEc 2012) did not quantify these economic benefits, it qualitatively described the ancillary benefits of conservation measures that may be implemented to avoid the destruction or adverse modification of critical habitat. These benefits include public safety benefits, such as timber management practices that reduce the threat of catastrophic wildfire, drought, and insect damage; improved water quality that may reduce water treatment costs and provide human or ecological health benefits; aesthetic benefits of a more natural forest landscape that results in increased recreational use or increases the value of neighboring properties; and carbon storage that may ameliorate the impacts of climate change.

*Comment (B):* The AOCC, representing the interests of counties in western Oregon, as well as other commenters, submitted comments opposing the withdrawal of the January Exclusions Rule, citing the following rationales:

*(i):* The AOCC and others commented that the 2012 critical habitat designation negatively impacted the ability of BLM to manage certain former railroad grant lands in Oregon vested to the United States in 1916 (O&C lands) for their statutory purposes under the Oregon and California Revested Lands Sustained Yield Management Act of 1937, Public Law 75-405 (O&C Act) and reduced timber harvest and associated receipts shared with counties. They asserted that the 2012 designation caused BLM to manage these lands under their revised RMPs for the benefit of the northern spotted owl instead.

*Our response:* The BLM developed its 2016 RMPs considering a variety of authorities and requirements, including the O&C Act, which addresses the management of O&C lands vested to the Federal Government under the Chamberlin-Ferris Act of 1916 (39 Stat. 218) and other authorities. As discussed further in response to *Comment 12*, we acknowledge that there is ongoing litigation regarding BLM's authorities and obligations under the O&C Act and the Endangered Species Act. Once that litigation is finally resolved, BLM will have to determine what, if any, changes to make to its management of the O&C lands under applicable law. Until that time, however, the BLM will, where appropriate, utilize its authorities in

furtherance of the purposes of the Endangered Species Act. See also our response to *Comment (6)*. See our response to *Comments (21)* and *(22)* for a discussion on the economic impacts of the designation on timber harvest.

*(ii):* The AOCC commented that the designation of critical habitat on O&C lands is contrary to recent rulings that recognize the statutory requirement that timber on O&C lands is to be "sold, cut and removed" according to sustained yield principles and cannot be allocated to reserves, and that section 7 consultation requirements under the Act do not apply to the nondiscretionary obligation of BLM to manage these lands under the principles of sustained yield.

*Our response:* See our responses to *Comments (6)*, *(12)*, and *(25b)* below.

*(iii):* The AOCC commented that the 2012 critical habitat designation was flawed in that it did not identify or "actually" map habitat and that the methods used resulted in vast areas being designated as critical habitat that do not currently have the attributes of northern spotted owl habitat and therefore do not meet the statutory requirements for designation as critical habitat.

*Our response:* This and similar comments that directly address concerns about our final rule designating critical habitat in 2012 were raised and addressed in the rulemaking for the 2012 rule, and we refer to our responses to such issues in that rulemaking, see e.g., *Public Comments on the Modeling Process* at 77 FR 71876, December 4, 2012; p. 72020. We address here only those comments relevant to the revisions proposed in July 20, 2021.

*(iv):* The AOCC commented that the designation of critical habitat in 2012 created preserves that prevent sustained yield management and that actively managing critical habitat to support species recovery is not the equivalent of sustained yield management under the O&C Act, further citing the court ruling in *Headwaters, Inc. v. BLM, Medford Dist.*, 914 F.2d 1174 (9th Cir. 1990) holding that withdrawing lands from sustained yield timber production for the benefit of wildlife is not a use recognized in the O&C Act and is inconsistent with sustained yield management. On this basis, the commenter seeks additional exclusions from the designated critical habitat.

*Our response:* Critical habitat designations do not establish specific land-management standards or prescriptions, nor do designations affect land ownership or establish a refuge, wilderness, reserve, preserve, sanctuary, or any other conservation area where no active land management occurs. See our

responses to *Comments (6), (12), and (25b)* below.

(v): The AOCC commented that “creative sustained yield management” can contribute substantially to the habitat needs of the northern spotted owl without the limitations imposed by a critical habitat designation and that sustained yield management to meet both the subspecies’ needs and the O&C Act requirements has not been considered in BLM and U.S. Department of Agriculture, Forest Service (USFS) management plans, northern spotted owl recovery plans, and critical habitat designations. They provided examples of sustained yield strategies that could be considered should the BLM be required to revise their RMPs due to a pending court ruling and suggested that removing critical habitat is a necessary first step.

*Our response:* As indicated by the comment, complying with and achieving the goals of the O&C Act and the Endangered Species Act can be an extraordinarily complicated task in the forest management arena. The BLM and USFS are responsible for managing O&C lands, and they do so by adopting land management plans that provide guidance and direction for subsequent management actions on those lands. Recovery plans under the Endangered Species Act provide recommendations for management actions that meet the recovery needs of listed species; they are not intended to guide compliance with other statutory requirements. Critical habitat designations, similarly, are focused on the needs of the species but take economic and other impacts into consideration.

The Service expressly considered the role of the O&C lands when revising critical habitat in 2012, but did not consider excluding them at that time because we concluded they were essential to the conservation of the subspecies (77 FR 71876, December 4, 2012; p. 72007).

We expressly consider in this rule excluding the O&C lands (outside of the BLM’s Harvest Land Base lands) from the designation based on requests from the commenter and others, but for the reasons discussed in our weighing analysis, have determined not to do so (see Consideration of Impacts Under Section 4(b)(2) of the Act).

We note, however, that the BLM and USFS have proposed harvests from O&C lands within designated critical habitat, consulting with the Service on those actions. To date, we have reviewed such proposals on thousands of acres and have not found that the proposals result in the destruction or adverse

modification of that habitat under the Act.

The critical habitat designation benefits the northern spotted owl as a landscape-scale conservation strategy that identifies areas on the landscape that may require special management considerations or protection. In addition, the designation informs management practices that contribute to the recovery needs of the subspecies. In both the critical habitat designation, and in site-specific consultations, the Service has supported active forest management, where appropriate, to provide for some timber harvest while also conserving habitat for the northern spotted owl and reducing the risk of wildfire.

(vi): The AOCC commented that all O&C lands should be excluded from the critical habitat designation because the benefits of exclusion outweigh the costs and that there is no benefit to including these lands in the designation because the O&C Act “mandates for sustained yield production control over the ESA section 7(a)(2) consultation.” Additionally, they commented that the designation has had significant adverse economic impacts on the counties, affecting their ability to provide public services and has resulted in mill closures and job losses.

*Our response:* As described elsewhere in this document, some timber harvest does occur within critical habitat, and total annual timber harvest levels on Federal lands in the range of the northern spotted owl have actually increased since the revision of critical habitat in 2012; see our response to *Comments (21b and 25a)*. See also our responses to *Comments (6 and 25)* concerning O&C lands and our weighing of the benefits of including O&C lands in the critical habitat designation versus excluding them in Consideration of Impacts Under Section 4(b)(2) of the Act.

(vii): The AOCC commented that the economic impact of the critical habitat designation has not been properly evaluated by the Service and that these impacts are not solely attributable to the listing decision.

*Our response:* See our response to *Comment (20)* below concerning our review of the FEA (IEc 2012) and our regulation on how economic analyses are conducted.

*Comment (C):* The AFRC submitted comments in support of the January Exclusions Rule and expressed support for the Service’s proposal to exclude the BLM’s Harvest Land Base lands and lands transferred in trust to the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians

(CTCLUSI) and the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI). The AFRC resubmitted comments they previously provided on our 2007, 2008, and 2012 critical habitat rules. We previously responded to those comments in our final respective critical habitat rules; see 73 FR 47326, August 13, 2008, and 77 FR 71876, December 4, 2012. The AFRC’s comments on our August 11, 2020, proposed rule (85 FR 48487), our March 1, 2021, rule delaying the effective date of the January Exclusions Rule (86 FR 11892), and our July 20, 2021, proposed rule (86 FR 38246) are summarized below. Comments submitted by AFRC that were similar to comments received on the August 11, 2020, proposed rule have been incorporated into the comment sections following this section. Several counties incorporated AFRC’s comments by reference. In some instances, other commenters submitted comments similar to the comments submitted by AFRC; we include those comments in the following summarized comments.

(i): The AFRC commented that the August 11, 2020, proposed revised critical habitat rule gave notice to the public that additional areas may be excluded in the final rule and that the Service (and Secretary) preserved broad discretion to make additional exclusions such that there was no “logical outgrowth” problem in the change from the proposed to final exclusions in the January Exclusions Rule.

*Our response:* We requested comments in our August 11, 2020, proposed rule on the following: Additional areas, including Federal lands and specifically National Forest System 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. We also requested comments on 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.

While our request indicated that we might consider additional exclusions, the scale of the final exclusions was much larger and broader than what the public could reasonably anticipate. In our proposed rule, we identified 204,653 acres (82,675 hectares) across 15 counties and 26 critical habitat subunits in Oregon for potential exclusion; the January Exclusions Rule increased the acres excluded by nearly 17-fold. The final rule included extensive areas that were not mentioned in the proposed rule, and for which no

details were provided in the January Exclusions Rule, within the States of Washington and California, 45 counties across the range, and 55 critical habitat subunits across the designation.

In response to our March 1, 2021, rule delaying the effective date of the January Exclusions Rule, we received many comments that the January Exclusions Rule was not a logical outgrowth of the August 11, 2020, proposed rule, including comments from natural resource agencies in Washington and California opposing the exclusions and expressing that they were not aware that exclusions were being considered in their respective States. Additionally, the Washington Department of Fish and Wildlife comments expressed surprise at the 765,175 acres (309,655 hectares) excluded in their State under the January Exclusions Rule. Further, the California Department of Fish and Wildlife commented in response to the March 1, 2021, rule that the January Exclusions Rule did not identify lands excluded in their State with enough specificity to provide a meaningful analysis and comment. Conservation groups and other members of the public commented in response to the March 1, 2021, rule that they were not given the opportunity to present arguments and facts contrary to the vast increase in exclusions as presented in the January Exclusions Rule.

Additionally, the January Exclusions Rule also included new rationales for the exclusions that were not identified in the August 11, 2020, proposed revised critical habitat rule (85 FR 48487). These included generalized assumptions about the economic impact of both the listing of the northern spotted owl and the subsequent designation of areas as critical habitat; the stability of local economies and protection of the local custom and culture of counties; the presumption that exclusions would increase timber harvest and result in longer cycles between harvest; that timber harvest designs resulting from the exclusions would benefit the northern spotted owl, and that the increased harvest would reduce the risk of wildfire; and that northern spotted owls may use areas that have been harvested if some forest structure was retained. The public did not have an opportunity to review or comment on these new rationales.

Further, the January Exclusions Rule failed to reconcile a change in our prior findings regarding areas managed under the O&C Act. In our 2012 rule revising the critical habitat designation for the owl, we found that areas managed under the O&C Act were essential to the

conservation of the subspecies and that not including some of these lands in the critical habitat network resulted in a significant increase in the risk of extinction. Commenters stated that the exclusion of these lands in the January Exclusions Rule also conflicted with our December 15, 2020, finding that the northern spotted owl warrants reclassification to endangered status given the exacerbation of the threats it faces. We maintain that the public should have had an opportunity to comment on the expanded critical habitat exclusions made in January in light of the information included in the December 15, 2020, finding and supporting species report (85 FR 81144, FWS 2020, p. 83), which were published just 3 weeks before the January Exclusions Rule.

In summary, it is clear from the public comment record that not being afforded an opportunity to review and provide comment on the much larger and broader areas excluded and the rationale for those exclusions, particularly in light of the December 15, 2020, finding that the northern spotted owl warranted reclassification to endangered status, was considered by the public a lack of transparency and inability to participate in the public process as required under the Administrative Procedure Act. While our proposed August 11, 2020, rule and exclusions did signal the potential that the final rule could be different, on reconsideration we find that it is more prudent and transparent to conclude that an updated proposed rule and an additional opportunity to comment would be warranted were we to seek to put the January Exclusions Rule into effect.

(ii): The AFRC commented that the Service's modeling of extinction risk in the 2012 critical habitat designation discounted millions of acres of potentially suitable habitat in national parks and designated wilderness that are not included in the designation and assert that our section 4(b)(2) analysis is flawed because the benefits these areas provide was not considered. The AFRC further commented that our assertion that these areas are relatively small and widely dispersed across the range of the northern spotted owl is inaccurate as these lands cover over 7 million acres (2.8 million hectares).

*Our response:* We included Congressionally Reserved Lands (e.g., designated wilderness and national parks) in our modeling analyses of the critical habitat network and extinction risk based on the assumption that habitat quality in these areas would be retained whether they were designated as critical habitat or not (Dunk *et al.*

2012, pp. 19, 57). Our section 4(b)(2) analysis in the 2012 critical habitat rule considered the benefits of including these lands within the critical habitat designation and found that these areas are essential to the conservation of the northern spotted owl. However, unlike other Federal and State lands that have multiple use mandates that include commercial harvest of timber in the range of the spotted owl, such as National Forests, State Forests, and public-domain forests managed by the BLM, these reserved natural areas are unlikely to have uses that are incompatible with the purposes of critical habitat because the primary habitat threat to spotted owl critical habitat—commercial timber harvest—is generally prohibited on these lands. These natural areas are managed under explicit Federal laws and policies consistent with the conservation of the northern spotted owl, and there is generally little or no timber management beyond the removal of hazard trees or fuels management to protect structures, roads, human safety, and important natural attributes.

Accordingly, we found that a critical habitat designation of these reserved areas in the range of the spotted owl would provide no additional regulatory benefits beyond what is already on these lands due to their permanent status as protected lands and, importantly, the fact that commercial timber harvest is generally not permitted on these lands under Federal and State law and policy. Further, we found that the designation of these reserve areas would confer little additional educational benefits associated with the conservation of the spotted owl, as these educational messages are already being communicated in many of these areas under existing programs. In sum, although national parks and designated wilderness were excluded under section 4(b)(2) of the Act from the 2012 critical habitat designation, the conservation value of these lands was considered in our analysis and modeling of which lands were essential to the conservation of the northern spotted owl and in the design of a critical habitat network.

Regarding the size and distribution of national parks and designated wilderness, we initially identified and proposed to include approximately 2.6 million acres (1 million hectares) of these lands in the 2012 proposed critical habitat revision because they contained northern spotted owl habitat and were found to be essential to the conservation of the subspecies. These 2.6 million acres (1 million hectares), which we identified as habitat essential to the conservation of the northern spotted

owl, are the areas we describe as relatively small and widely dispersed, versus the entire 7 million acres (2.8 million hectares) as asserted by the AFRC. However, as we noted at the time of listing the northern spotted owl in 1990, many of these areas are also typically high-elevation lands and it is unlikely that the owl populations would be viable if their habitat were restricted to these areas alone (55 FR 26114, June 26, 1990; p. 26177). Additionally, as we stated in our July 20, 2021, proposed revision, some of these areas are widely dispersed and cannot be relied on to sustain the subspecies unless they are part of and connected to a wider reserve network as provided by the 2012 critical habitat designation (77 FR 71876, December 4, 2012).

(iii): The AFRC commented that we stated that the barred owl is not the primary threat to northern spotted owls and that this is contradicted by the best available science. The AFRC and several counties stated that there is little to no benefit of including areas occupied by barred owls because the two species cannot coexist and the presence of barred owls makes these areas unsuitable for northern spotted owls. The AFRC commented that our conclusion that habitat availability is as important as managing the threat of barred owls is inaccurate.

*Our response:* In our July 20, 2021, proposed rule, we stated that the large additional exclusions made in the January Exclusions Rule were premised on inaccurate assumptions about the status of the owl and its habitat needs particularly in relation to barred owls. The large additional exclusions were based in part on an assumption that barred owl control is the fundamental driver of northern spotted owl recovery, when in fact the best scientific data indicate that protecting late-successional habitat also remains critical for the conservation of the spotted owl (FWS 2020, p. 83). We did not intend this statement to be read to mean that the barred owl is not the primary threat to northern spotted owls. We meant that recovery of the northern spotted owl will require management of the barred owl as well as continued habitat protections. See our response to *Comment (13)* below for a discussion on the threat of barred owls to northern spotted owls and the importance of maintaining habitat in light of competition with barred owls. Although the northern spotted owl does not coexist well with the invasive barred owl and the two species have a high degree of overlap in their habitat preferences (Wiens *et al.* 2021, p. 2), their presence does not alter the

suitability of the habitat to support northern spotted owls. In fact, the availability of suitable forest conditions and addressing habitat loss is needed to work in concert with barred owl management to reduce population declines of northern spotted owls (Wiens *et al.* 2021, pp. 1, 2).

(iv): The AFRC commented that the Service's rationale for withdrawing the January Exclusions Rule based on the need for biological redundancy is flawed because critical habitat exacerbates the wildfire threat to the northern spotted owl and communities by inhibiting active forest management (other commenters, including several counties, reiterated this assertion that critical habitat conflicts with active management aimed at reducing wildfire risk). Specifically, the AFRC states that forest treatments that remove canopy cover to such an extent that habitat is "downgraded" (e.g., habitat that supports nesting, roosting, and foraging is removed and the area can only support dispersal) are avoided or deferred due to regulatory constraints such as section 7 consultation requirements on critical habitat for projects that would reduce the risk of wildfire in dry forest ecosystems. The AFRC provided examples of projects that they assert were altered due to the critical habitat designation or litigated and delayed due to issues related to critical habitat.

*Our response:* See our response to *Comment (27a)* regarding perceived conflicts between the critical habitat designation and active forest management to address risk of wildfire in the dry forest ecosystem. See also our response to *Comment (9)* regarding the need for biological redundancy within the critical habitat designation. In regard to the specific prescriptions for forest management treatments in dry forest ecosystems within critical habitat, in the section on Special Management Considerations or Protection, the 2012 critical habitat rule referred to the guidance discussed in the Revised Recovery Plan for the Northern Spotted Owl (Recovery Plan) (FWS 2011, pp. III-11 to III-39). The Recovery Plan recommended active forest management with the goal of maintaining or restoring forest ecosystem structure, composition, and processes that would be sustainable and provide resiliency under current and future climate conditions. The Recovery Plan acknowledged that short-term impacts to northern spotted owls and their habitat may occur due to these actions, but they may be beneficial in the long-term if they reduce future losses from disturbance events, such as wildfire, and improve resiliency to

climate change (FWS 2011, p. III-14). Further, the Revised Recovery Plan for the Northern Spotted Owl states that "tradeoffs that affect spotted owl recovery will need to be assessed on the ground, on a case-by-case basis with careful consideration given to the specific geographical and temporal context of a proposed action" and that specific prescriptions to meet the goals of the recovery plan vary across forest types and the landscape (FWS 2011, p. III-14). Section 7 consultations conducted on forest management actions within critical habitat provide the avenue for these assessments and are one of the benefits of designating these areas.

In response to projects being altered due to the 2012 critical habitat designation, the examples that AFRC provided were for projects that were consulted on prior to the critical habitat designation but had not yet been implemented when the designation was finalized. Project modifications and additional time to address the effects to the physical and biological features of critical habitat and to consider the special management recommendations and protections discussed in the recently published critical habitat designation is a reasonable expectation for such projects. In response to projects being avoided or deferred within critical habitat, contrary to AFRC's assertion, projects to reduce the risk of wildfire continue to be consulted on with positive outcomes for the subspecies and the ecosystem while allowing for timber harvest that meets Federal agency timber production purposes; see our response to *Comment (27a)* for a discussion of recent consultations. The decision on whether to propose an action that will need to undergo section 7 consultation, however, is under the purview of the Federal land management agencies. As we noted in the 2012 critical habitat rule, specifically prescribing such management is beyond the scope or purpose of the critical habitat designation, but should instead be developed by the appropriate land management agency at the appropriate land management scale (e.g., National Forest or BLM District) (USDA 2010, entire; Fontaine and Kennedy 2012, p. 1559; Gustafsson *et al.* 2012, pp. 639-641, Davis *et al.* 2012, entire) through the land managing agencies' planning processes and with technical assistance from the Service, as appropriate (77 FR 71876, December 4, 2012; p. 71882).

In response to the comment that litigation associated with critical habitat designations demonstrates that the designation conflicts with forest

management, we note that historically Federal forest management projects are frequently the subject of litigation regardless of whether they occur within critical habitat or not. Litigation on these projects does not necessarily indicate that critical habitat conflicts with forest management. There are myriad reasons and issues that parties seek to litigate Federal forest management actions; because they do so is not a basis to conclude that the critical habitat designation is flawed.

(v): The AFRC commented that northern spotted owl critical habitat restricts timber harvest, citing the USFS' recent Bioregional Assessment (USFS 2020), which states that timber production and restoration often conflict with habitat protection objectives and provides an example of reduced timber harvest on USFS matrix lands due to critical habitat designation. AFRC further commented that critical habitat has the effect of altering management direction on USFS matrix lands based on the USFS recommendation in the Bioregional Assessment to align their reserve allocations with the 2012 critical habitat designation. AFRC asserts that a conflict in management of USFS forest lands exists such that managing hazardous fuel loads that improve forest health and resilience to wildfire conflicts with maintaining vegetative cover that is needed for northern spotted owls.

*Our response:* The USFS Bioregional Assessment (Assessment) (USFS 2020) is one of the initial steps the USFS has taken to address management plans that need to be updated. Most of the land management plans in the area analyzed under the Assessment were written about 30 years ago and need to be updated to reflect current science and social, economic, and ecological challenges across this area (USFS 2020, p. 10). The Assessment focuses on the most compelling issues across the landscape that need updating, including species' habitat needs and the need to address climate change, severe wildfire risk, and forest health. The Assessment indicates that timber harvest is no longer emphasized on USFS matrix lands that were designated as critical habitat and expresses the need to align their reserve allocations with the 2012 critical habitat designation (USFS 2020, pp. 60, 63). However, the Assessment further states that "better realignment of the late-successional reserve network with critical habitat could adjust the matrix lands available for ecological treatments, which might provide additional timber outputs" (USFS 2020, p. 74). Additionally, the Assessment states that "[b]etter alignment is needed

between designated critical habitat for spotted owls and the late-successional old-growth portion of the late-successional reserve network; this could help simplify management direction and better protect high-quality habitat for owls and other old growth-dependent species, such as marbled murrelet. In addition to protecting these habitats, management direction that allows active management to restore and improve ecosystem resilience could help conserve and develop northern spotted owl habitat in the long term" (USFS 2020, p. 63).

The Assessment expresses an urgent need to update their land management plans to modify desired conditions associated with dry forest ecosystems and to allow for active management in fire-prone areas to restore ecological integrity and habitat (USFS 2020, pp. 63, 71, 76); active management to address these needs aligns with both the Recovery Plan for the Northern Spotted Owl and the 2012 critical habitat designation. Finally, the Assessment recognizes that "social values related to land management have begun to shift toward recognition of the broad benefits associated with our natural resources and the importance of balancing resource protection with timber production" (USFS 2020, p. 62).

We acknowledge that the designation of critical habitat on USFS matrix lands can inform where timber harvest is emphasized as the USFS considers the special management considerations and protections discussed in the 2012 critical habitat designation. Education and providing information are important functions of critical habitat designations, especially when designing and implementing forest management projects on public lands. However, the Service continues to advocate for active management of forests to reduce wildfire risks as described in our 2012 critical habitat rule and the Recovery Plan. We designated USFS matrix lands as critical habitat where they contain habitat that is essential to the subspecies' conservation (77 FR 71876, December 4, 2012; p. 71895).

See our response to *Comment (27a)* regarding perceived conflicts between the critical habitat designation and active forest management to address the risk of wildfire in the dry forest ecosystem.

(vi): The AFRC commented that our July 20, 2021, proposed revised critical habitat rule fails to consider the contribution that management plans have in addressing connectivity across the landscape and the current level of connectivity provided by management since the NWFP was adopted. The

AFRC stated that the Service acknowledged in the Recovery Plan that the NWFP provides direction to address connectivity and that both the reserve and matrix land-use allocations would contribute to connectivity. AFRC further stated that the USFS maintains dispersal habitat across their land-use allocations, that dispersal is not a limiting factor, and that there is far more dispersal habitat than is needed.

*Our response:* See our response to *Comment (9)* regarding the need for biological redundancy within the critical habitat designation and our responses to *Comments (25c-e)* regarding our consideration of management plans. We evaluate effects of Federal actions on northern spotted owl dispersal habitat during the section 7 consultation process at a larger scale than effects of the action to nesting, roosting, and foraging habitat. This approach is to ensure that dispersal habitat is providing for connectivity across the landscape between large blocks of nesting, roosting, and foraging habitat that reproducing northern spotted owls prefer when available in an area. The amount of dispersal habitat varies across the designation and is limited in some geographic areas such as between the Coast Range and Cascade Range in southern Oregon (FWS 2020, pp. 28–32). The biological redundancy included in the design of the critical habitat network allows for some timber harvest and was included to address the unpredictability of the extent of natural disturbances such as wildfire.

(vii): The AFRC commented that "mere connectivity is not an element of habitat or critical habitat, and effects only on connectivity cannot constitute 'adverse modification' in violation of the ESA," citing *Def's. of Wildlife v. Zinke*, 856 F.3d 1248, 1262 (9th Cir. 2017) and that areas that provide only connectivity, therefore, cannot be designated as critical habitat.

*Our response:* We do not agree with the commenter's interpretation of the cited case, which involved effects of a proposed Federal action to the desert tortoise. There, the project effects challenged were not to designated critical habitat, but rather to habitat that provided connectivity between designated critical habitat units. The Service concluded that although the project affected connectivity habitat for the tortoise, those effects did not adversely modify critical habitat. Plaintiffs asserted that the Service was obligated to evaluate the effect of that connectivity loss as an "adverse modification" to critical habitat. The Service appropriately considered the effects of the potential loss of

connectivity in examining whether the Federal action jeopardized the species, but reasonably concluded that alterations to habitat that is not designated as critical habitat did not “adversely modify” that critical habitat.

The court simply affirmed this rational approach; the court’s decision does not stand for the proposition that designated critical habitat cannot include the characteristics of connectivity. To the contrary, the court recognized the well-established scientific principles of connectivity (“[C]onnectivity is the “degree to which population growth and vital rates are affected by dispersal” and “the flow of genetic material between two populations.”). Connectivity promotes stability in a species by “providing an immigrant subsidy that compensates for low survival or birth rates of residents” and “increasing colonization of unoccupied” habitat,” *Def. of Wildlife v. Zinke* at 1254. This case is distinguishable from the circumstances of the northern spotted owl in that the Service has expressly designated “connectivity” habitat as critical habitat, *i.e.*, the dispersal habitat.

For the northern spotted owl, a project that proposes significant impacts to designated critical dispersal habitat that impedes connectivity between large blocks of designated critical habitat used for nesting, roosting, or foraging could result in a conclusion that the action would destroy or adversely modify critical habitat. Although habitat that allows for dispersal may currently be marginal with insufficient characteristics to support nesting, roosting, or foraging, it provides an important linkage function among blocks of higher-quality habitat both locally and over the northern spotted owl’s range that is essential to its conservation. Juvenile dispersal is a highly vulnerable life stage for northern spotted owls and enhancing the survivorship of juveniles during this period could play an important role in maintaining stable populations of northern spotted owls.

Dispersal habitat is habitat that both juvenile and adult northern spotted owls use when looking to establish a new territory. Both dispersing subadults and nonterritorial birds (often referred to as “floaters”) are present on the landscape and require suitable habitat to support dispersal and survival until they recruit into the breeding population; this habitat requirement is in addition to that already used by resident territorial owls. Successful dispersal of northern spotted owls is essential to maintaining genetic and demographic connections among

populations across the range of the subspecies and population growth can occur only if there is adequate habitat in an appropriate configuration to allow for the dispersal of owls across the landscape; therefore, the Service included dispersal habitat as part of the critical habitat designated for the northern spotted owl.

(viii): Comments submitted by AFRC (and incorporated by others) include assertions that the Service included within the 2012 critical habitat designation areas that are not “habitat” for the northern spotted owl, in contravention of the Supreme Court’s subsequent ruling in 2018 that critical habitat designated under the Act must be habitat for the species in the first instance (*Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) (“*Weyerhaeuser*”). These commenters assert that areas that are not “habitat” for the owl within the critical habitat designation should be excluded by the Secretary under section 4(b)(2).

*Our response:* As we explain in more detail in the *Background* section below, we reviewed our 2012 critical habitat rule for consistency with our new regulation defining “habitat” following the *Weyerhaeuser* decision, and demonstrate why all of the designated critical habitat is habitat for the northern spotted owl. We also respond to comments seeking a wide variety of exclusions based on general assertions that areas are not “habitat” for the northern spotted owl presently, explaining why the assumptions underlying these assertions are incorrect as matter of fact or law; see responses to *Comments (26–28)*.

*Comment (D):* The AFRC and several counties commented on several other issues pertaining to our March 1, 2021, delay rule; April 30, 2021, delay rule; and proposed withdrawal of the January Exclusions Rule as summarized below:

(i): Commenters stated that the Service predetermined to issue a further delay rule prior to publishing the March 1, 2021, delay rule.

*Our response:* As described in the March 1, 2021, delay rule, the Service was concerned about the potential effects of the January 2021 exclusions to impede conservation of the northern spotted owl, and sought comments on the issues of fact, law, and policy regarding the January Exclusions Rule. We noted that an additional delay of the effective date might be warranted and expressly sought comment. As the first delay rule would expire by April 30, and it can take some time to develop and obtain publication of rules in the **Federal Register**, it was appropriate for the Service to prepare a draft of such a

second rule while the first was being published. That the Service took steps to do so is not a “predetermination.” Agencies frequently prepare drafts of rules and change them based on internal and public comments. Any decision to move forward with a second delay rule is not final until authorized by the Service and published in the **Federal Register**.

(ii): Commenters stated that the delay rule is unlawful and contrary to the Administrative Procedure Act and failed to effect a valid amendment of the January Exclusions Rule, which was due to go into effect on March 16, 2021. Commenters stated that the Service’s issuance of the March 1, 2021, delay rule without providing an opportunity for public notice and comment was in violation of the Administrative Procedure Act. Commenters further stated that the April 30, 2021, rule delaying the effective date of the January Exclusions Rule until December 15, 2021, was issued after the first delay rule expired and the January Exclusions Rule had gone into effect.

*Our response:* As the commenter noted, issues concerning the lawfulness of the delay rule are the subject of litigation brought against the Service on these topics in which they are plaintiffs, see *American Forest Resource Council v. Williams*, No. 1:21-cv-00601-RJL (D.D.C.). The Service has responded to these assertions in briefs before the court. In summary, the Service’s decision to delay the implementation of the January Exclusions Rule and ultimately to allow for this additional rulemaking to withdraw it, was consistent with all applicable laws. For further details, please see our responsive briefs in that litigation, available in our record for this rulemaking.

(iii): Commenters stated that we cannot withdraw a rule that has been published; it must instead be repealed, rescinded, or amended. Based on this rationale, commenters stated that we must redesignate in a new rulemaking the acres that were excluded in the January Exclusions Rule if we are to retain them in the critical habitat designation and that we must complete a new economic analysis for those redesignated lands.

*Our response:* Whether or not the Service uses the term “withdraw, repeal, or rescind” does not alter the result of this final rule—the exclusions finalized (but not in effect) in the January rule are “withdrawn, repealed, or rescinded” by this final rule. Because this final rule to take this action was developed with notice and comment rulemaking, “repeal” would be



consistent with the language used in the Administrative Procedure Act for the notice and comment rulemaking here. However, as the January Exclusions Rule was final, but never went into effect, “withdraw” is similar to situations in which a rule is developed but never went into effect as cited by the commenters. In any event, as the January Exclusions Rule never went into effect, the Service was not obligated to “re designate” the critical habitat areas already designated and unchanged since the 2012 critical habitat rule.

(iv): Commenters stated that withdrawing the January Exclusions Rule violates the terms and intent of the settlement agreement in *Carpenters Industrial Council et al. v. Bernhardt et al.*, No. 13–361–R/L (D.D.C.) (retitled *Pacific Northwest Regional Council of Carpenters et al. v. Bernhardt et al.* with the substitution of named parties before being dismissed).

*Our response:* The commenter does not dispute that the Service completed the production of a proposed and final rule per the timeline in the settlement agreement, as extended. Rather, the commenter asserts that because of the alleged flaws in the delay rules, the withdrawal of the January Exclusions Rule violates the settlement agreement terms and intent. The Service addresses the assertions regarding the delay rules above. As to the “intent” of the settlement agreement, the Service is here finalizing a revision to the 2012 critical habitat rule excluding additional areas under authority of section 4(b)(2). This final rule is not the broad exclusions that the commenters sought, but this does not mean the Service violated either the intent, let alone the terms, of the settlement agreement with the litigating parties. The Service did not (nor could it have) pre-committed in a settlement agreement to ultimately determine a set of exclusions in advance of public notice and comment rulemaking.

*Comment (E):* Douglas County commented that exclusion of O&C lands would not result in extinction of the northern spotted owl and that exclusion of these areas would result in a stronger partnership with local forest managers.

*Our response:* See our consideration of the benefits of partnerships and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (F):* Commenters stated that our reevaluation of the exclusions in the January Exclusions Rule is counter to the finding the Secretary made in 1992 that “overall effects on the Northwest timber industry and to some counties in particular, were potentially severe and

that further consideration should be given to excluding additional acreage from the final designation to reduce the overall economic impacts that may result from the designation of critical habitat.”

*Our response:* Under section 4(b)(2) of the Act, the Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she 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 that determination, the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor; this discretion is not limited by previous determinations such as we made in 1992. In this rulemaking, the Secretary has exercised her discretion to exclude certain areas and not others from the critical habitat designation after weighing these benefits.

*Comment (G):* Conservation groups commented that to the extent the January Exclusions Rule relied on economic impacts, recent research (Ferris and Frank 2021) shows that the economic impacts of the 2012 critical habitat designation have been overstated and are instead consistent with what the Service found at that time.

*Our response:* Ferris and Frank (2021) discuss the impact that the 1990 listing of the northern spotted owl and subsequent critical habitat designation in 1992 had on employment in the Lumber and Woods Products Sector between 1984 and 2000. The authors found that the impacts to employment in this sector were similar to what the government projected at the time of listing of the northern spotted owl and were not as large as projected in industry studies. Their study, however, did not focus on the incremental impacts of designating critical habitat for the northern spotted owl above those impacts attributed to listing, which is how the Service assesses the economic effect of critical habitat designations.

### Comments Specific to Exclusions

#### Comments From Federal Agencies

*Comment (1):* The USFS stated that, as critical habitat in southern Oregon and northern California becomes more fire prone, as evidenced by the 2020 fire season, the USFS continues to be concerned for the persistence of the northern spotted owl in the Pacific Northwest. The USFS encouraged connectivity between existing critical

habitat units. In particular, the USFS commented that the Service should consider the probability of wildfire events, the effect of climate change, and projected wildfire behavior as tools for determining where critical habitat designations should be revised throughout the range of the northern spotted owl. Additionally, on December 15, 2020, after the comment period closed on our August 11, 2020, proposed rule, we received a comment letter from the Under Secretary, Natural Resources and Environment, Department of Agriculture, supporting Interior’s efforts to revise the northern spotted owl critical habitat designation because of difficulties encountered by the USFS in achieving its statutory mission for managing the National Forests. The letter discussed the devastation to the spotted owl habitat and to other property caused by wildfire in general, using the 2020 wildfire season as an example. The letter requested that the USFS and the Service work together in protecting the northern spotted owl and lowering the risks of catastrophic wildfire.

*Our response:* In response to the comment submitted by the Department of Agriculture, it is important to note that the Service works closely with the USFS and other land managers to both recover the northern spotted owl and lower the risk of catastrophic wildfire. For example, the Service has completed multiple consultations under section 7 with Federal agencies on fuels reduction, stand resiliency, and pine restoration projects in dry forest systems within the range of the northern spotted owl. Those actions have included treatment areas that reduce forest canopy to obtain desired silvicultural outcomes, lower potential wildfire severity, and meet the need for timber production. They also promote ecological restoration and are expected to reduce future losses of spotted owl habitat and improve overall forest ecosystem resilience to climate change. We have concluded in these consultations that the actions do not destroy or adversely modify critical habitat as defined under the Act and our implementing regulations. Thus, in our experience, Federal agencies are able to plan and implement active forest management, including commercial timber harvests, to reduce wildfire risk in northern spotted owl designated critical habitat.

In addition, the Service considered the potential impacts of wildfire in our 2012 critical habitat designation (77 FR 71876, December 4, 2012). The 2012 critical habitat rule represented an increase in the total land area identified

from previous designations in 1992 and 2008. This increase in area was due, in part, to the need to provide for essential biological redundancy in northern spotted owl populations and habitat in fire-prone landscapes (Noss *et al.* 2006, p. 484; Thomas *et al.* 2006, p. 285; Kennedy and Wimberly 2009, p. 565). Please see our response to *Comment (9)* concerning the impact of the 2020 wildfires.

In response to these and similar comments from others asserting that excluding areas from critical habitat would lead to a reduction in wildfire risks, the January Exclusions Rule acknowledged that Federal land managers could conduct active management in areas of designated critical habitat without violating the adverse modification prohibition of section 7 of the Act. The January Exclusions Rule went further, however, and inferred that the exclusion of areas from designated critical habitat would increase the potential for Federal land managers to include more lands in the Harvest Land Base, and allow longer cycles between timber harvests to provide many environmental benefits, including reductions in wildfire risk. It is certainly true that longer cycles between timber harvests, *i.e.*, allowing trees to become older before they are removed, can have environmental benefits for species dependent on mature forests such as the northern spotted owl. However, it is speculative to conclude that Federal land managers would change their approach to allow for longer rotations if lands are excluded from the northern spotted owl critical habitat designation. There also remains scientific uncertainty about the conclusion that harvest of timber always lessens risks for catastrophic wildfire as compared with, for example, a focus on fuel reduction treatments targeted to restore more sustainable ecological processes. While the efficacy of standalone treatments such as thinning is uncertain and site-dependent, there exists widespread agreement that combined effects of thinning plus prescribed burning consistently reduce the potential for severe wildfire across a broad range of forest types and conditions (Prichard *et al.* 2021, Fule *et al.* 2012, Kalies *et al.* 2016, Stephens *et al.* 2021).

In response to the USFS comments concerning spotted owl habitat connectivity, providing connectivity while also supporting other uses of forest lands is consistent with the critical habitat designation. For example, we found in our 2016 Biological Opinion on the revised BLM RMPs that the spatial configuration of

“reserve” land use allocations identified in the RMPs provide for northern spotted owl connectivity across the landscape. Reserve land-use allocations are areas in which BLM prioritizes management for resources other than commercial timber production, although active management such as harvest may occur in some reserves in order to achieve management objectives. The Harvest Land Base land-use allocation describes areas where BLM prioritizes commercial timber production. The BLM’s management of the Late-Successional Reserve for northern spotted owl habitat and other reserves for non-timber objectives, along with the management and scheduling of timber sales within the Harvest Land Base, are 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), while also allowing BLM to meet its timber harvest goals.

#### *Comments From States*

Section 4(b)(5)(A)(ii) of the Act requires the Service to give actual notice of any designation of lands that are considered to be critical habitat to the appropriate agency of each State in which the species is believed to occur, and invite each such agency to comment on the proposed regulation. Section 4(i) of the Act states, “the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s comments or petition.” We notified the States of Washington, Oregon, and California of the proposed additional exclusions in Oregon. We did not receive comments from any State or State agency on the August 11, 2020, or July 20, 2021, proposed rules, only comments regarding the January Exclusions Rule; see our response to *Comment (Ci)*.

#### *Comments From Counties*

We received comments from Klickitat, Lewis, and Skamania Counties in Washington; from Douglas, Jackson, and Harney Counties in Oregon; and from Siskiyou County in California. Most comments from counties pertained to either economic analysis or exclusions; see Economic Analysis Comments and Exclusions Comments below for County comments and our responses. Other comments from the counties are addressed in the section above titled Comments on the Withdrawal of the January Exclusions Rule and the section below titled Comments on July 20, 2021, Proposed Rule.

#### *Comments From Tribes*

We received comments from the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; the Cow Creek Band of Umpqua Tribe of Indians; and the Coquille Indian Tribe.

*Comment (2):* The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Cow Creek Band of Umpqua Tribe of Indians commented in support of the proposed exclusion of lands recently transferred to them in trust. The Cow Creek Band of Umpqua Tribe of Indians expressed concern, however, that the proposed rule did not consider Tribal management plans and objectives for Indian forest land as a basis for the exclusions. The Coquille Tribe similarly commented in general that the rule should include a statement that recognizes the dominant purpose of the Coquille Forest to generate sustainable revenues sufficient to support the Coquille Tribal government’s ability to provide services to Coquille Tribal members, and ensure that the resulting critical habitat designation avoids burdening the Coquille Forest’s dominant purpose.

*Our response:* No Indian lands were designated in the December 4, 2012, critical habitat rule (77 FR 71876). Since 2012, Federal lands managed by the BLM were transferred in trust to the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Cow Creek Band of Umpqua Tribe of Indians pursuant to the Western Oregon Tribal Fairness Act (Pub. L. 115–103). This revised rule excludes those recently transferred lands from critical habitat designation. We considered Tribal management plans in our analysis of these exclusions as requested by the commenters; see Consideration of Impacts Under Section 4(b)(2) of the Act.

We have not designated critical habitat within the Coquille Forest. Should we consider revisions to the critical habitat designation in the future, the Service will coordinate with the Coquille Tribe to address effects to the Forest and its dominant use as managed by the Tribe.

#### *Public Comments*

Public Comments on Critical Habitat Boundaries

*Comment (3):* Commenters expressed concern that areas we proposed for exclusion in our August 11, 2020, proposed rule and our July 20, 2021, proposed rule provide important connectivity between the Coast Range, Cascades, and Klamath/Siskiyou Mountains populations of northern

spotted owls, and that exclusion could reduce colonization and gene flow, cause further isolation, and increase the probability of extinction of the owl. Commenters further stated that we should not rely on outdated plans that assume that northern spotted owls can successfully disperse in low-quality habitat, and that the distribution of reserves on National Forests alone will not meet the subspecies' need for well-connected habitat.

*Our response:* The BLM updated their RMPs in 2016; we found in our 2016 Biological Opinion on the revised BLM RMPs that the spatial configuration of reserves, the management of those reserves for the retention, promotion, and development of northern spotted owl habitat, and the management and scheduling of timber sales within the Harvest Land Base land use allocation are all expected to provide adequate opportunities 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). Thus, by excluding areas within the Harvest Land Base, we are not diminishing or altering connectivity functions of the remaining designated critical habitat to any significant degree. Additionally, regarding the reliance on reserves alone to facilitate connectivity, this revised designation retains USFS matrix lands that are essential to the conservation of the subspecies in addition to reserve lands. Please see our response to *Comment (9)* concerning the impact of the 2020 wildfires and *Comment (26b)* concerning the quality of dispersal habitat.

In response to this comment, the January Exclusions Rule concluded that connectivity would remain protected without the critical habitat designation because Federal actions that “may affect” northern spotted owls would still require consultation under section 7 of the Act to evaluate whether the action jeopardizes the continued existence of the subspecies. On further review, we conclude that assumption was overstated as a basis to exclude these lands. It is true that Federal actions that “may affect” northern spotted owls, including actions that impact northern spotted owl habitat even if not designated as “critical,” would still undergo section 7 consultation (whether informal or formal, depending on the effects, see our response to *Comment 7*, below). The critical habitat designation, however, benefits the northern spotted owl as a landscape-scale conservation network that connects large blocks of habitat that

are able to support multiple clusters of northern spotted owls. The designation identifies areas on the landscape that may require special management considerations or protection.

The section 7 consultation on effects to critical habitat ensures these considerations occur and evaluates the post-project functionality of the network to provide for connectivity at the subunit, unit, and designation scales. Evaluating habitat at multiple scales in a consultation on critical habitat ensures the landscape continues to support the habitat network locally, regionally, and across the designation.

These considerations are not necessarily involved to the same degree when considering the effects to northern spotted owl habitat that is not designated as critical as part of the jeopardy analysis in a section 7 consultation. A consultation on effects to the species (including effects resulting from changes to the non-designated habitat of the species) as part of the “jeopardy” prong looks primarily at how the project affects individuals, populations, and the species rangewide. Consultation on the effects to the designated critical habitat (the “critical habitat” prong of the consultation) focuses on that habitat network. This reflects Congress’s clear articulation of two limits on Federal actions in section 7: A prohibition against jeopardizing the species, and a prohibition against destroying or adversely modifying its designated critical habitat. While we do evaluate the effects of landscape level impacts to habitat as part of the jeopardy analysis, this does not mean that the analysis of impacts to critical habitat are no longer necessary; the two analyses are not necessarily interchangeable.

Additionally, many of the lands that were excluded in the January Exclusions Rule are reserves or matrix lands that provide habitat that we found in our 2012 critical habitat rule were essential to the conservation of the northern spotted owl (77 FR 71876; p. 71895). See our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act. The Harvest Land Base lands that we exclude here in this final rule represent only a small portion (less than 2 percent) of the critical habitat designation and represent only 7 percent of the land base managed by the BLM under the 2016 RMPs, with the remaining lands largely managed as reserves. We evaluated the effects of future harvest on the Harvest Land Base lands in our 2016 biological opinion on

the BLM’s revised RMPs (BLM 2016a, b) and found that recovery of the northern spotted owl would not be impeded and that the critical habitat units would continue to provide connectivity and sufficient habitat across the landscape (FWS 2016). Therefore, additional section 7 consultation on critical habitat within the Harvest Land Base as currently described in the 2016 RMPs would provide no incremental conservation benefit as the management direction under the RMPs already provides a conservation strategy consistent with recovery of the northern spotted owl and will not appreciably diminish the conservation value of the critical habitat designation.

The January Exclusions Rule, in response to this comment, also stated that “some of the areas used by the northern spotted owl for migration are secondary growth forests” and that “excluding such areas from critical habitat will not change their characteristics as secondary growth forests” and they will continue to be used for “migratory purposes.” On further review we find it is accurate that northern spotted owls may use areas of secondary growth forest; however, their use of these areas is dependent on the age, diversity, and condition of those forests. See also our response to *Comment (26)* below. An increase in the areas available for timber harvest, which was identified as a benefit of excluding the 3.4 million acres (1.4 million hectares) in the January Exclusions Rule, could occur if these lands were excluded from the critical habitat designation and land management agencies were no longer required to consider the special management considerations of critical habitat and subsequently amended their management approach or land management plans to allow for more harvest. The resulting increase in timber harvest could significantly alter the ability of these stands to provide for dispersal. While these changes in management and any resulting projects would not be immediate if these areas were excluded from the designation, over time expanded timber harvest would reduce connectivity of these areas to older, more complex forests that provide nesting, roosting, and foraging habitat for populations of northern spotted owls. Conserving or enhancing connectivity between populations to facilitate dispersal and subsequent colonization of large blocks of habitat that can support clusters of reproducing northern spotted owls was a key feature in the design of the critical habitat network.

Additionally, the January Exclusions Rule assumed that the reduced regulatory burden in the process of Federal planning and implementation of timber management would result in increased harvest. Increased harvest at the scale of exclusions in the January Exclusions Rule would reduce the overall connectivity and suitability of the critical habitat network. That reduction in connectivity under the January Exclusions Rule was, in hindsight, quite significant because of the expansive elimination of critical habitat designated in areas of the northern spotted owl range, with some critical habitat subunits being reduced by up to 90 percent. The much smaller exclusions we finalize here eliminate only portions of critical habitat units that overlap with the Harvest Land Base allocation, which, as we already determined in our 2016 biological opinion, could be harvested without affecting the conservation value, including connectivity, of that designated critical habitat. See also our response to *Comment (9)* concerning the impact of the 2020 wildfires.

*Comment (4):* Commenters noted that the lands proposed for exclusion in our August 11, 2020, proposed rule and July 20, 2021 proposed rule, in particular Federal lands, met the definition of critical habitat for the northern spotted owl and were determined to be essential in our 2012 critical habitat designation (77 FR 71876), and so questioned how those lands could now be appropriate for exclusion from designation. Additionally, commenters questioned how the exclusion of these lands will not result in extinction.

*Our response:* Areas that are found essential to the conservation of the species may be considered for exclusion from a critical habitat designation under section 4(b)(2) of the Act. The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she 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.

We found the areas we designated in 2012 to be essential to the conservation of the northern spotted owl. However, the BLM revised their RMPs in 2016, amending their conservation strategy for the northern spotted owl and related land use allocations (BLM 2016a, 2016b). We found in our 2016 Biological Opinion on the BLM RMPs (FWS 2016, p. 700) that, even with the projected timber harvest in the Harvest Land Base

land use allocation, the management direction implemented under the RMPs is consistent with the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and would not appreciably diminish the conservation value of, or adversely modify, critical habitat (FWS 2016, p. 702). Because we had this updated information and analysis, we reconsidered whether exclusion of these areas was appropriate. We have determined that the benefits of exclusion of the Harvest Land Base land outweigh the benefits of including these areas, and that exclusion of these lands will not result in the extinction of the northern spotted owl. See our exclusion and extinction analyses for Harvest Land Base lands under Consideration of Impacts Under Section 4(b)(2) of the Act.

The January Exclusions Rule, which excluded all areas managed by the BLM under the O&C Act, including reserves as well as the Harvest Land Base, states that excluding the 3.4 million acres (1.4 million hectares) identified in that rule will not cause the extinction of the northern spotted owl. As discussed in our proposed rule, on reconsideration we find that conclusion is not supported by the science of conservation biology, the current population trend of the northern spotted owl, nor the purpose of the Act. See our analysis in the Withdrawal of the January Exclusions Rule section of this rule for a more detailed discussion.

*Comment (5):* A commenter stated that smaller blocks of northern spotted owl critical habitat, such as those areas in the Harvest Land Base proposed for exclusion, are also important for the following reasons: They are migration/dispersal corridors linking larger habitat blocks; they link the Coast Range province with the Cascade Range province; and they provide migration corridors that allow a species to adapt to climate (and habitat) change by relocating to higher quality habitat.

*Our response:* See our response to *Comment (3)*. Additionally, the BLM manages the Harvest Land Base acres in accordance with the management direction of the BLM RMPs (BLM 2016a, 2016b). In our 2016 Biological Opinion on the BLM RMPs (FWS 2016), we found that, even with the projected timber harvest in the Harvest Land Base, the area would continue to function for the dispersal of northern spotted owls and would provide connectivity between large blocks of habitat designed to support clusters of reproducing northern spotted owls.

*Comment (6):* Commenters stated we failed to explain why the Service no longer believes that Oregon and

California Railroad Revested Lands (O&C lands) make a significant contribution toward meeting the conservation objectives for the northern spotted owl and that we cannot attain recovery without them. Other commenters expressed concern about excluding lands in southwest Oregon where the majority of O&C lands occur.

*Our response:* 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, Public Law 75-405 (O&C Act) addresses the management of O&C lands. The O&C Act identifies the primary use of revested timberlands for permanent forest production. The Harvest Land Base lands that we exclude in this revision are mostly on O&C lands managed by the BLM under the 2016 RMPs. However, portions of O&C lands, outside of the Harvest Land Base, that are managed by either the BLM or the USFS that provide essential habitat and are located in a spatial configuration that provides connectivity across the designation are still important to northern spotted owl conservation and are retained as critical habitat in this revision. As we noted above, we found in our 2016 Biological Opinion on the BLM RMPs (FWS 2016, p. 700) that, even with the projected timber harvest in the Harvest Land Base land use allocation, the management direction implemented under the RMPs is consistent with the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and would not appreciably diminish the conservation value of, or adversely modify, critical habitat (FWS 2016, p. 702). Thus, for the reasons explained in Consideration of Impacts Under Section 4(b)(2) of the Act, we have excluded the Harvest Land Base from the critical habitat designation. This conclusion is based in part on the expectation that these lands and the remaining designated critical habitat in other land use allocations will be managed consistent with the BLM's 2016 RMPs.

The January Exclusions Rule, because it excluded all O&C lands, provided a different response to this comment: "The O&C Act provides, and the courts have confirmed, that the primary use of these revested timberlands is for permanent forest production on a sustained yield basis. The Supreme Court has additionally determined that the ESA does not take precedence over an agency's mandatory (non-discretionary) statutory mission. Based on these court rulings, we have determined that exclusion of the O&C

lands as critical habitat is proper in this case.” 86 FR 4820, January 15, 2021, p. 4822.

Though not stated explicitly, this response implied (and has been interpreted by some commenters to mean) that the O&C Act removes any discretion the BLM may have in how to manage the O&C lands on a sustained-yield basis such that the Endangered Species Act does not apply to the BLM’s management of those lands at all. We take this opportunity to correct that implication. Courts reviewing the BLM’s management of O&C lands have found that the BLM retains discretion as to how to achieve sustained yield timber production. See *AFRC v. Hammond*, 422 F.Supp. 3d 184 at 190–91 (D.D.C. 2019); see also *Swanson Grp. Mfg. LLC v. Salazar*, 951 F. Supp. 2d 75, 82 (D.D.C. 2013), *vacated on other grounds sub nom. Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235 (D.C. Cir. 2015); *Portland Audubon Soc. v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).

None of these courts—including *AFRC v. Hammond*, that found legal infirmities in the BLM’s adoption of its 2016 RMPs—has held that the O&C Act precludes the BLM from considering opportunities to conserve threatened and endangered species when authorizing actions on O&C lands. Indeed, that district court decision narrowly ruled only that BLM lacks the authority to designate reserves on O&C lands because it violates the mandate to manage those lands for sustained yield timber harvest. It expressly stated that BLM had discretion in the management of those lands, and certainly did not hold that BLM lacks such discretion altogether. To the extent the January Exclusions Rule relied on the assumption to the contrary, it was incorrect. In short, “reserves” are not the same as designated critical habitat.

In any case, as we discuss further in Consideration of Impacts Under Section 4(b)(2) of the Act, we conclude that the exclusion of some O&C lands from the designation as critical habitat is appropriate, but the exclusion of all O&C lands is not.

Public Comments Regarding the Northwest Forest Plan (NWFP) or the BLM Revised Resource Management Plans (RMPs)

*Comment (7):* Commenters expressed concern that exclusions would allow BLM to harvest timber without project-specific consultation under section 7 of the Endangered Species Act. Commenters also expressed concern that the Service no longer considers habitat fitness when assessing project effects and incidental take in section 7

consultations. Commenters further assumed that section 7 consultations would be required only if surveys confirm northern spotted owl presence, which commenters considered problematic because they conclude we cannot reliably detect northern spotted owls when barred owls are present. Thus, critical habitat provides a benefit through section 7 review likely resulting in the retention of the physical and biological features needed by northern spotted owls, which cannot be addressed otherwise through section 7 consultations.

*Our response:* We completed a programmatic section 7 consultation on the BLM RMPs in 2016, under the assumption that BLM will implement actions consistent with the RMPs’ specific management direction over an analytical timeframe of 50 years (FWS 2016, p. 2). This approach allowed us to evaluate at a broad scale BLM’s plans to ensure that the management direction and objectives are consistent with the conservation of listed species. We found that the BLM’s plans, at the programmatic scale, were not likely to jeopardize the continued existence of the northern spotted owl, or destroy or adversely modify the owl’s designated critical habitat (FWS 2016).

In our July 20, 2021, proposed revision to the critical habitat designation, we explained that Federal actions in the Harvest Land Base that may affect designated critical habitat require section 7 consultation at the project-level scale. As discussed further below in Consideration of Impacts Under Section 4(b)(2) of the Act, based on our experience in project consultations since the BLM 2016 RMPs were implemented, addressing effects to designated critical habitat in the Harvest Land Base provides no incremental conservation benefit over the conservation already provided for in the BLM RMPs (2016a, 2016b) and project-level consultations that still occur regardless of the presence of critical habitat. Thus, continuing to require BLM to include an analysis of effects to designated critical habitat in the Harvest Land Base within otherwise triggered, project-level consultations is not contributing to the conservation and recovery of the subspecies, nor is it an efficient use of limited consultation and administrative resources.

With the exclusions finalized here, actions within the Harvest Land Base that affect northern spotted owl habitat (even if that habitat is no longer designated as critical) will still be subject to section 7 consultation to ensure that actions are not likely to jeopardize the continued existence of

the subspecies, but we are removing the regulatory burden to consult under section 7 to address designated critical habitat by excluding the Harvest Land Base. We have consulted on the program of timber harvest planned under the RMPs, which will occur primarily in the Harvest Land Base. We already determined in that consultation (FWS 2016) that harvest in the Harvest Land Base will not appreciably diminish the value of the critical habitat for the conservation of the northern spotted owl and that BLM’s management approach provided under the RMPs will sustain critical habitat over time. Northern spotted owls are expected to continue to be able to disperse across the landscape due to the habitat conditions and protections in the Late-Successional Reserves and Riparian Reserves, the stand retention incorporated into the management direction for timber harvest in the Harvest Land Base, and because any detrimental effects to northern spotted owl dispersal capability will be spread over 50 years during which time ingrowth in the reserves will also be occurring. The BLM’s revised 2016 RMPs included approximately 177,000 additional acres (71, 630 hectares) of reserved lands compared to lands originally reserved under the NWFP in 1994; these acres contribute additional dispersal capability across the management area. These factors represent a significant improvement in the capability of the landscape to provide for spotted owl movement and dispersal. Given these provisions and assurances, in conjunction with all of the other considerations discussed in Consideration of Impacts Under Section 4(b)(2) of the Act, we conclude that the benefits of including these Harvest Land Base areas as designated critical habitat are relatively minor when compared to the benefits of excluding them.

The commenter is incorrect in stating that we do not consider habitat fitness in our evaluations of effects in section 7 consultations for the subspecies in the absence of affected designated critical habitat. We consult on Federal actions that have effects to northern spotted owl habitat even if it is not designated as critical habitat, regardless of whether the subspecies currently occupies that habitat, and consider this information in our analysis of whether the action is likely to jeopardize the continued existence of the subspecies. The commenter may be confusing the question of “occupancy” for consideration of whether “incidental take” of the species will occur. Even if we conclude that a Federal action that

adversely affects habitat does not result in a “jeopardy” finding for the species, we must still assess whether the Federal action will result in the incidental take of the species. Because “take” of the species is dependent in part on the Federal action proximately causing actual injury to the species, information about the presence or absence of the animal during the proposed activity (often referred to in the terminology of “occupied” versus “unoccupied”) is particularly relevant. In order to evaluate whether a Federal action affecting northern spotted owl habitat will incidentally “take” that subspecies, we consider a number of factors, including habitat effects and survey results for the presence of the owl. As a result, in some cases we may find that adverse effects to northern spotted owl habitat (not designated as critical habitat) will occur, but we are unable to conclude with reasonable certainty that the habitat effects will result in incidental “take” of the owl. See *Arizona Cattlegrower’s Assn. v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001).

The commenter is correct that detectability of northern spotted owls is reduced when barred owls are present, which led us to endorse an updated protocol for surveying for northern spotted owls to take this into account (FWS 2012), a protocol that has been upheld on review by the courts (*Cascadia Wildlands v. Thraikill*, 49 F. Supp. 3d 774, 779–80 (D. Or. 2014), *aff’d*, 806 F.3d 1234 (9th Cir. 2015)). Our jeopardy analysis considers the effects to habitat regardless of occupancy. With the exclusions finalized today, Federal agencies will no longer have the obligation to consult on the effect of their actions to (formerly) designated critical habitat in the areas excluded. They will still be required to consult with us if their discretionary actions result in effects to northern spotted owl habitat that remains, and they will be precluded from jeopardizing the subspecies as a result of that habitat modification. We will also still continue to evaluate whether the Federal actions affecting habitat, even if they do not jeopardize the subspecies, result in the incidental take of northern spotted owls, and if so, will identify reasonable and prudent measures and terms and conditions to minimize that incidental take.

*Comment (8):* Commenters expressed concern that wildlife provisions in the BLM RMPs do not apply in the Harvest Land Base and that the exclusion of critical habitat would remove overlapping protections.

*Our response:* According to the 2016 BLM RMPs for western Oregon, the management objectives and management direction described for resource programs (including wildlife) apply across all land-use allocations, unless otherwise noted (BLM 2016a, p. 47, BLM 2016b, p. 47). Regarding overlapping protections, see our response to *Comment (7)* for our rationale for excluding these lands from critical habitat for the northern spotted owl.

*Comment (9):* Commenters stated that we should consider the impact of recent wildfires that have occurred in Washington, Oregon, and California on the northern spotted owl and its habitat since the 2016 BLM RMPs were finalized, and that recent events make the modeling and analyses in the RMPs ineffective and obsolete. Commenters noted that the number of acres burned has exceeded the number of acres affected by wildfire that were modeled for the first decade in the BLM RMPs. Commenters further stated that excluding lands from critical habitat will lead to more regeneration logging, which will lead to increased fuels and uncharacteristic wildfire and that additional critical habitat should be designated in order to protect forests from regeneration harvest and further the objectives of the final recovery plan to provide habitat redundancy and avoid fire hazard.

*Our response:* In September 2020, several major wildfires burned across portions of the range of the northern spotted owl in Washington, Oregon, and California affecting habitat conditions. The fires impacted multiple ownerships, including Federal lands managed by the BLM and USFS, State lands, and private lands. Although the wildfires that occurred during the fall of 2020 had significant impacts to some critical habitat units at the local level, the longer term impacts to spotted owl conservation will vary depending on fire severity (see our discussion in *Comment (27b)* regarding the use of previously burned habitat). Although some subunits have experienced a partial and/or temporary reduction in connectivity in places, overall the critical habitat units and the rangewide network designated in 2012 will continue to provide demographic support and connectivity to the northern spotted owl as intended in the 2012 critical habitat designation.

The 2012 critical habitat rule was an increase in designated area compared to previous designations, in part to provide for biological redundancy in northern spotted owl populations and habitat by maintaining sufficient habitat on a

landscape level in areas prone to frequent natural disturbances, such as the drier, fire-prone regions of its range (Noss *et al.* 2006, p. 484; Thomas *et al.* 2006, p. 285; Kennedy and Wimberly 2009, p. 565). The historical range of the northern spotted owl within Oregon, Washington, and California is about 57 million acres (23 million hectares), including both Federal and non-Federal (33 million) acres (USDA–USFS and DOI–BLM 1993, p. 23). The Northwest Forest Plan area, which was explicitly identified in 1994 to encompass the range of the northern spotted owl on Federal lands, is approximately 25 million acres (10 million hectares) in size and included 19 National Forests, 7 BLM Districts, and other Federal lands. The 2012 designation of 9.6 million acres (3.9 million hectares) of critical habitat (reduced in this revision to approximately 9.4 million acres (3.8 million hectares)) is a parsimonious and scientifically appropriate identification of only those lands within these 25 million acres (10 million hectares) that are critical to the conservation and recovery of the spotted owl.

The 2012 designation is based upon almost three decades of scientific research on the spotted owl. Estimating actual historical forested habitat within this range is difficult, but during our evaluation of whether to list the northern spotted owl, we concluded the best available information was that some 17.5 million acres (7 million hectares) of “suitable” habitat were available to the owl historically, before the advent of significant timber harvesting of old growth forests (55 FR 26114, June 26, 1990; p. 26151). When we initially designated critical habitat for the owl in 1992, we estimated that only 7.2 million acres (2.9 million hectares) of this “suitable” habitat (in this context meaning the types of older, more mature stands preferred by the northern spotted owl for nesting, roosting, and foraging when available in an area) remained on Federal lands, and most of it (60 percent) was in land allocations available for harvest (57 FR 1796, January 15, 1992; p. 1799). We found in the 1992 critical habitat designation that the best available information was that it could all be removed within 25–30 years (57 FR 1796, January 15, 1992; p. 1800). The critical habitat revision in 2012 was built upon this scientific work, while also incorporating the best available updated scientific information and taking into account more recent concerns such as the barred owl invasion, climate change, and the

increasing impacts associated with severe wildfire.

In the development of habitat conservation networks generally, the intent of spatial redundancy is to increase the likelihood that the network and populations can sustain habitat losses by inclusion of multiple populations unlikely to be affected by a single disturbance event. This redundancy is essential to the conservation of the northern spotted owl because disturbance events such as fire can potentially remove large areas of habitat with negative consequences for northern spotted owls. The evaluation process used by the Service incorporates the recommendations of the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) by addressing spatial redundancy at two scales: By (1) making critical habitat subunits large enough to support multiple groups of owl sites, and (2) distributing multiple critical habitat subunits within a single geographic region. This was particularly the case in the fire-prone Klamath and Eastern Cascades portions of the range.

In summary, we acknowledge that the recent wildfires had negative impacts on some local northern spotted owl populations and critical habitat subunits and that future fires are likely to have additional negative impacts. However, the additional exclusions we make here represent a relatively small area compared with the designated areas that remain, and they do not appreciably diminish the conservation value of the designation to the northern spotted owl. These areas that remain in the designation will be managed in the long term for northern spotted owl conservation under the Northwest Forest Plan (NWFP) (USFS and BLM 1994a, USFS and BLM 1994b) and BLM RMPs (BLM 2016a, BLM 2016b) and are expected to provide an adequate amount of habitat at the listed-entity scale to withstand periodic natural disturbances such as wildfire.

Regarding the comment that exclusions will lead to regeneration harvest and subsequent increased fuel load and uncharacteristic wildfire, we assume the Harvest Land Base will continue to be managed consistent with the management direction defined in the 2016 RMPs. As previously stated, we found in our 2016 Biological Opinion on the BLM RMPs (FWS 2016, p. 700) that, even with the projected timber harvest in the Harvest Land Base land use allocation, the management direction implemented under the RMPs is consistent with the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and would not appreciably diminish the conservation value of, nor

adversely modify, critical habitat (FWS 2016, p. 702).

The January Exclusions Rule considered that one benefit of exclusion could be a lessening of the regulatory burdens for discretionary Federal decisions when considering management practices to protect forested lands from catastrophic wildfire. See our responses to *Comments (1) and (27a)* regarding section 7 consultation and the recommendations in our 2012 critical habitat rule for fuels management and dry forest restoration projects.

*Comment (10):* A commenter expressed concern that habitat for the northern spotted owl will not grow as projected in the Recovery Plan and the BLM RMPs due to climate change and the combined effects of increased fire, insects, disease, storms, and carbon enrichment. Commenters stated that the exclusions will lead to more logging and greenhouse gas emissions and that mitigating the risks of climate change requires greater conservation of northern spotted owl habitat, particularly older forests that store significant amounts of carbon; therefore, these additional exclusions should not be made.

*Our response:* As mentioned earlier, the 2012 spotted owl critical habitat designation was enlarged from previous designations, in part to provide increased redundancy in the face of climate change. We analyzed climate change and its potential impact on spotted owl recovery in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011). We noted the combined effects of climate change and past management practices are altering forest ecosystem processes and dynamics (including patterns of wildfires, insect outbreaks, and disease) to a degree greater than anticipated in the NWFP. The Recovery Plan encourages land managers to consider this uncertainty and how best to integrate knowledge of management-induced landscape pattern and disturbance regime changes with climate change when making spotted owl management decisions. The Recovery Plan further recommended an adaptive management approach to reduce scientific uncertainties. Recovery Action 5 in the Recovery Plan for the Northern Spotted Owl states: “Consistent with [Secretarial] Order 3226, as amended, the Service will consider, analyze and incorporate as appropriate potential climate change impacts in long-range planning, setting priorities for scientific research and investigations, and/or when making major decisions affecting the spotted

owl” (FWS 2011, p. III–11). The Recovery Plan acknowledged the uncertainty associated with estimating rates of habitat recruitment (FWS 2011, p. B–8).

The BLM RMPs state that if the need for adaptive management to address changes in the climate would so alter the implementation of actions consistent with the RMPs that the environmental consequences would be substantially different than those anticipated in the Proposed RMP/Final Environmental Impact Statement, then the BLM would engage in additional planning steps and procedures under the National Environmental Policy Act (NEPA) (BLM 2016a, p. 111). Additionally, the effects of climate change will be considered in the development of forest management actions and analyzed in future NEPA analyses and section 7 consultations at the project level.

The BLM may also apply adaptive management by taking additional planning steps and NEPA procedures based on information found through the monitoring questions (Appendix B) (BLM 2016a, p. 111; BLM 2016b, p. 133). The late-successional and old-growth ecosystems effectiveness monitoring program characterizes the status and trend of older forests to answer the basic question: Is implementation of the BLM RMPs maintaining and restoring late-successional and old-growth forest ecosystems to desired conditions on Federal lands in the planning area? (BLM 2016a, p. 116; BLM 2016, p. 138). Effectiveness monitoring reports will also include analysis of whether the BLM is achieving desired conditions based on effectiveness monitoring questions and, where possible, inform adaptive management (BLM 2016a, p. 111; BLM 2016b, p. 139). As discussed further in our response to *Comment (33)*, we established benchmarks in our biological opinion on the BLM’s RMPs for evaluating the effectiveness of their program.

In sum, BLM’s RMPs are consistent with the Recovery Plan recommendations for addressing uncertainty, and provide the tools for adaptive management if needed to address effects from climate change. The Harvest Land Base exclusions finalized here will not impair that adaptability.

*Comment (11):* Commenters asserted that our statement in the proposed rule that the proposed exclusion provides “no incremental conservation benefit over what is already provided for in the RMPs” conflicts with the Service’s prior finding that the owl “fared very poorly”

on reserves within the NWFP compared to designated critical habitat.

*Our response:* The statement concerning “reserves faring very poorly” in the 2012 critical habitat rule was in reference to a modeling scenario where we tested population performance of a potential critical habitat designation based on only NWFP reserves. Our 2012 designation was not based on this modeling scenario. The critical habitat designation retains northern spotted owl habitat in reserve land-use allocations, and retains northern spotted owl habitat in the matrix and some non-Federal public lands that we found essential to the conservation of the subspecies. The designation of these lands was supported by our statement in the 2012 critical habitat rule: “In some areas, for example the O&C lands, our modeling results indicated that those Federal lands make a significant contribution toward meeting the conservation objectives for the northern spotted owl in that region, and that we cannot attain recovery without them. Likewise, in addition to our modeling results, peer review of both the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) as well as our proposed rule to revise critical habitat, suggested that retention of high-quality habitat in the matrix is essential for the conservation of the subspecies. Population performance based on reserves under the NWFP, for example, fared very poorly compared to this final designation of critical habitat. As described in the section Changes from the Proposed Rule, we tested possible habitat networks without many of these matrix lands, which resulted in a significant increase in the risk of extinction for the northern spotted owl.” (77 FR 71876, December 4, 2012; p. 72007).

We are excluding the portion of O&C lands (approximately 172,712 acres (69,894 hectares)) allocated by the BLM to the Harvest Land Base. The remaining O&C lands under USFS and BLM management (1,209,229 acres (489,357 hectares)) are retained within the critical habitat designation in this final rule. We have determined that the benefits of exclusion of the Harvest Land Base land outweigh the benefits of including these areas, and that exclusion of these lands will not result in the extinction of the northern spotted owl. See our discussion of the benefits of exclusion versus inclusion of Harvest Land Base lands in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (12):* Commenters expressed concern that the BLM RMPs that we rely

on for our basis for exclusions could be vacated due to current litigation and that the protection in place under the 2016 RMPs would no longer apply.

*Our response:* A district judge in the U.S. District Court for the District of Columbia found that the BLM 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, American Forest Resource Council et al. v. Hammond*, 422 F.Supp.3d 184 (D.D.C. 2019). Although a decision as to remedy has not yet been issued, depending on the final outcome of that litigation, the Harvest Land Base might change through court order or land use planning by BLM. We have excluded lands based on the BLM RMPs as they are, not as they may be modified in the future. See also our response to *Comment 25(b)*, below, and our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

#### Public Comments on Competition From Barred Owls

*Comment (13):* Commenters expressed the importance of preserving mature and old-growth forest for spotted owls in light of competition with barred owls and stated that the Service has not fully explored how much more habitat needs to be conserved to mitigate for northern spotted owl habitat occupied by barred owls. Commenters stated that reducing critical habitat will increase the probability of competitive exclusion and that we should not reduce critical habitat without a barred owl management plan in place.

*Our response:* In addition to the effects of historical and ongoing habitat loss, the northern spotted owl faces a significant and complex threat in the form of competition from the congeneric (referring to a member of the same genus) barred owl (FWS 2011, pp. 1–7 to 1–8). Franklin *et al.* (2021) found that spotted owl populations declined 6 to 9 percent annually on 6 demographic study areas and 2 to 5 percent annually on 5 study areas. Applying the annual rates of decline, populations dropped to or below 35 percent of the historical population on 7 of the study areas, and to or below 50 percent on the remaining 3 areas over a 22-year period (1995–2017). The presence of barred owls on spotted owl territories was the primary factor negatively affecting apparent survival, recruitment, and thus the population change, and was a

contributing factor in our recent determination that the subspecies warranted reclassification to endangered status.

An analysis of occupancy based on northern spotted owl and barred owl detections supported the conclusion that barred owl presence has a negative effect on northern spotted owls, increasing territorial extinction and decreasing territorial colonization of spotted owls. While barred owl occupancy was the dominant negative effect on spotted owl territory occupancy and population trend, other factors such as habitat condition had a weaker, but positive, effect on occupancy and trend. These other factors such as habitat were insufficient to reverse the negative trend, but suggest the importance of maintaining spotted owl habitat on the landscape, even if it is unoccupied, in the face of competitive exclusion by barred owls, as noted by Dugger *et al.* 2011. The authors in Franklin *et al.* (2021) noted that maintenance of habitat across the landscape would (1) provide areas available for recolonization by northern spotted owls should management actions allow for reduction of barred owl populations and (2) facilitate connectivity by dispersing northern spotted owls among occupied areas, citing to Sovern *et al.* 2014. The authors stated, “Our analyses indicated that northern spotted owl populations potentially face extirpation if the negative effects of barred owls are not ameliorated while maintaining northern spotted owl habitat across their range.” (Franklin *et al.*, 2021, p. 19)

The Service conducted experimental removal of barred owls to test its efficacy in improving spotted owl demographic performance on four study areas spread across the northern spotted owl range in Washington, Oregon, and northern California. Peer-reviewed analysis of the experiment (Wiens *et al.* 2021) showed a strong, positive effect of barred owl removal on survival of spotted owls in the treated areas and a weaker but positive effect on spotted owl dispersal and recruitment. The estimated mean annual rate of population change for spotted owls stabilized in areas with removals (0.2 percent decline per year), but continued to decline sharply in areas without removals (12.1 percent decline per year). Barred owl removal had a strong positive effect on spotted owl survival, which was the primary factor in stabilizing the populations. Barred owl removal also demonstrated a weaker, though still positive, effect on recruitment of new spotted owls to the territorial populations. This weaker



response is probably due to the depressed reproduction in recent years and the subsequent limited availability of new recruits. The experiment demonstrated that barred owl removal can achieve rapid results in improving the persistence of northern spotted owls, though effects on reproduction and long-term population trend will take a longer period of management effort.

These two analyses (Wiens *et al.* 2021, and Franklin *et al.* 2021) indicate that, while barred owl presence was the primary and strongest driver of spotted owl population trend leading to the rapidly decreasing spotted owl populations, habitat availability and quality were important components of managing for the survival and recovery of spotted owls in the future. The Service is in the process of developing a barred owl management strategy, using the information from both of these studies.

Similar to our response above to the comment suggesting the need for increased habitat redundancy in the face of catastrophic wildfire, we find that the critical habitat designation, which includes more area than what was previously designated in 1992 and 2008, is consistent with the Revised Recovery Plan for the Northern Spotted Owl (2011) and provides for the conservation of northern spotted owls as they face growing competition from barred owls. The exclusions we finalize here are not of a scale to appreciably affect that approach. See also our discussion of our analysis in the biological opinion on BLMs RMPs and their approach to barred owl management in our responses to *Comments (15, 18, and 33)*.

#### Other Public Comments

*Comment (14):* Commenters asked why regulatory oversight of critical habitat is no longer necessary in light of the Service's previous position that old-growth reserves of the Northwest Forest Plan "are plan-level designations with less assurance of long-term persistence than areas designated by Congress. Designation of Late-Successional Reserve) as critical habitat complements and supports the Northwest Forest Plan and helps to ensure persistence of this management directive over time" as well as the Service's prior statements that critical habitat has significant additional value to listed species separate from any value provided by land management plans. Commenters further stated that our previous position is in contrast to our statement in the proposed rule that these exclusions are to "clarify the primary role of these lands in relation to northern spotted owl

conservation," and "eliminat[e] any unnecessary regulatory oversight."

*Our response:* In this final rule, we are not excluding lands within reserve land use allocations from the critical habitat designation. Our exclusion of the Harvest Land Base lands managed by BLM is based on new information since the December 4, 2012, critical habitat designation (77 FR 71876), *i.e.*, the 2016 BLM RMPs and our evaluation of those RMPs through the section 7 consultation process. As described earlier, the lands we exclude in this final rule were already reviewed for their value to long-term spotted owl conservation in the 2016 Biological Opinion on the BLM RMPs, and the RMPs provide a robust long-term conservation strategy that is consistent with the goals of the 2011 Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and the 2012 critical habitat designation.

The January Exclusions Rule, in justifying the exclusion of 3.4 million acres (1.4 million hectares), stated that even on excluded lands, all discretionary Federal actions and decisions on areas that are occupied by the subspecies will be required to undergo section 7 consultation if such action or decision "may affect" the northern spotted owl and that such consultation will ensure that the continued existence of the northern spotted owl is not jeopardized. See our further review of these statements in our response to *Comment (3)* and our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (15):* Commenters stated that when the critical habitat designation was originally established, it was understood that much of the old forest reserves would require considerable time to recover old-growth characteristics and support northern spotted owl reproduction, having been subject to logging prior to 1990 and that critical habitat should not be reduced until the reserve system is fully restored. The commenters asserted that much of the occupied habitat in the Harvest Land Base would need to be left unlogged during the intervening time, to assure an ecologically sustainable continuity of old-growth forest, with no significant net loss.

*Our response:* In our 2016 Biological Opinion on the BLM RMPs, we concluded that there will be a net increase in habitat for northern spotted owls during the life of the RMPs due to forest ingrowth outpacing harvest, and the RMPs containing more reserve acres

and habitat than the NWFP (FWS 2016, p. 5). During the first 5 to 8 years of the RMPs, the BLM will implement measures to avoid take of northern spotted owls until implementation of a barred owl management program has begun. In addition, subsequent effects to northern spotted owls would be meted out over time in the Harvest Land Base and minimized in other land use allocations. These measures in the RMPs will minimize near-term negative effects to occupied northern spotted owl habitat in the Harvest Land Base as habitat continues to further develop late-successional characteristics in the reserve land use allocations.

*Comment (16):* Commenters stated that our proposal to exclude the Harvest Land Base lands ignores the northern spotted owl Recovery Plan recommendation to protect older, complex forests on Federal lands west of the crest of the Cascades range.

*Our response:* We relied on the recovery criteria set forth in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) to determine what is essential to the conservation of the subspecies and identified a critical habitat designation that ensures sufficient habitat to support stable, healthy populations across the range and within each of the 11 recovery units.

The Revised Recovery Plan for the Northern Spotted Owl relies on the NWFP's Late-Successional Reserve network as the foundation for northern spotted owl recovery on Federal lands (FWS 2011, p. III-41). 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" (FWS 2011, p. II-3). BLM's 2016 revision of its RMPs fully considered the 2011 Recovery Plan recommendation.

The BLM RMPs provide protection to older, complex forests through the system of reserves. Reserve land use allocations (Late-Successional Reserve, Congressionally Reserved Lands and National Conservation Lands, District-Designated Reserves, Riparian Reserve) comprise 74.6 percent (1,847,830 acres (747,790 hectares)) of the acres of BLM land within land use allocations (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 Late-Successional Reserve, 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 Late-Successional Reserve are designed to promote older, structurally complex forest and to promote or maintain habitat for the northern spotted owl and marbled murrelet (*Brachyramphus marmoratus*). In this final rule, we are not excluding lands within reserve land use allocations from the critical habitat designation.

The January Exclusions Rule stated that “the correct analysis for purposes of section 4(b)(2) is whether the Secretary concludes that the specific exclusion of these areas of critical habitat will result in the extinction of the species.” We agree with this statement; however, see our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (17):* Commenters expressed concern that excluding critical habitat will impede recovery of the northern spotted owl and that we should not exclude areas that contain sites with a history of northern spotted owl reproduction.

*Our response:* In our 2016 Biological Opinion on the 2016 Revised BLM RMPs, we found that the conservation needs of the northern spotted owl will continue to be met because the BLM’s plan is consistent with the guidance of the northern spotted owl Recovery Plan, at the landscape scale over 50 years, as follows:

- The BLM RMPs will conform to the northern spotted owl Recovery Plan, including the location and function of large blocks of habitat for reproducing spotted owls and the ability of the landscape to support spotted owl movement between those blocks.

- The BLM RMPs will include approximately 177,000 more acres (71,629 hectares) of Late-Successional Reserve and Riparian Reserves than in the NWFP, which will be managed for the retention and development of large trees and complex forests across the RMP landscape.

- The BLM RMPs will improve the amount, quality, and distribution of nesting habitat on BLM lands over the first 50 years modeled under the RMPs through management of these increased reserves.

- The BLM RMPs will facilitate and improve northern spotted owl dispersal capability across the landscape through the management of the increased reserves.

Given the management, spatial configuration, and projected improvement of habitat in the reserves, we find that excluding the Harvest Land Base lands will not preclude recovery of the northern spotted owl if the 2016 RMPs are implemented as described. In addition, the Indian lands excluded herein represent only 0.21 percent of the overall designation; we have found that we can achieve the conservation of the northern spotted owl by limiting the designation to other lands.

The January Exclusions Rule determined that the exclusion of 3.4 million acres (1.4 million hectares) from the critical habitat designation outweighed the benefits of inclusion, and that, based upon the best scientific and commercial data available, it did not conclude that exclusion of those areas will result in extinction of the subspecies. See our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (18):* Commenters expressed concern that the downward trend in northern spotted owl populations has continued since the 2016 BLM RMPs were finalized, and that we should evaluate the 2020 meta-analysis (demographic analyses that are performed every 5 years under the NWFP) prior to making changes in the critical habitat designation. Commenters further expressed concern that we should be conserving more habitat in light of the Service’s recent finding that the northern spotted owl warrants reclassification to endangered status.

*Our response:* The most recent meta-analysis, Franklin *et al.* (2021), found that the northern spotted owl continues to suffer a significant population decline across its range, due primarily in recent years to increasing competition from the invasive and aggressive barred owl. Unless barred owls are proactively managed while also maintaining northern spotted owl habitat across the range, northern spotted owls are likely to become extirpated across portions of their range (Franklin *et al.* 2021, pp. 18–19).

We find the BLM RMPs provide an approach that minimizes negative impacts to spotted owls and offsets these impacts with proactive positive actions providing for the long-term survival and recovery of the northern spotted owl. When considered in its

entirety, implementation of the BLM RMPs will have both negative and positive effects on the northern spotted owl. Negative impacts will primarily be due to resource utilization such as timber harvest on less than one-quarter of the BLM land base, and other resource programs. Positive effects of the plan will accrue due to the following: An increase in the total area of protected forest reserves on BLM lands (approximately 80 percent of BLM ownership); BLM’s management of forest habitat to increase the rate of development of late-successional conditions; and BLM’s support for, and cooperation in, the barred owl removal experiment and a potential barred owl management program (see our response to *Comment (13)* regarding the completion of the barred owl removal experiment and the development of a barred owl management program). When aggregating these negative and positive impacts with the environmental baseline, it is our conclusion that the impact of the BLM RMPs will be a net conservation gain for the northern spotted owl during the next 50 years under the plans.

Over the 50-year life of the BLM RMPs (BLM 2016a, BLM 2016b), there will also be a significant net gain over current levels in spotted owl habitat largely within reserves that will be managed to maintain and produce high-quality spotted owl habitat of the kind preferred by owls for nesting, roosting, and foraging when available in an area. This increase will provide large blocks of habitat of Federal land capable of supporting more than 25 spotted owl pairs. Spotted owl dispersal through these areas also will continue to be facilitated and is expected to improve over time under BLM’s management.

Although impacts to spotted owl habitat in the Harvest Land Base were anticipated, wherever possible those impacts will be spread out over time to minimize site abandonment as a barred owl management strategy is implemented. Given this, and the landscape of reserves providing for blocks of habitat and northern spotted owl movement consistent with the recovery needs of the spotted owl, we concluded the BLM RMPs will not appreciably diminish the ability of the BLM lands to provide for a well-distributed population of owls.

Because of the expected retention and improvement of northern spotted owl populations on BLM lands, the Service concluded that implementation of the BLM RMPs would not represent an appreciable reduction in the likelihood of survival and recovery of the northern spotted owl in the wild due to

reductions in reproduction, numbers, or distribution (FWS 2016, p. 624). BLM's commitment to participate in and support a barred owl management strategy, combined with the RMPs' allocation of reserves, is projected to result in a significant improvement in the northern spotted owl population's trend, and in the reproduction, numbers, and distribution over projected baseline conditions with no barred owl management and no timber harvest.

*Comment (19):* Commenters stated that the BLM and Service cannot avoid their duties under the ESA simply because the area in question involves O&C lands and that section 4(b)(2) exclusions should not be used as a tool to circumvent section 7 consultation recommendations.

*Our response:* Our rationale for excluding the Harvest Land Base is not to circumvent section 7 consultation, nor because the area in question involves O&C lands. Rather, we have concluded based on our programmatic review in our Biological Opinion on the BLM 2016 RMPs, and our experience in project consultations since the BLM 2016 RMPs were implemented, that addressing effects to designated critical habitat in the Harvest Land Base provides no incremental conservation benefit over the conservation already provided for in the BLM RMPs (2016a, 2016b) and project-level consultations that still occur regardless of the presence of critical habitat. Thus, continuing to designate critical habitat in order to require BLM to include effects to critical habitat designated in the Harvest Land Base within otherwise triggered, project-level consultations is not contributing to the conservation and recovery of the subspecies, nor is it an efficient use of limited consultation and administrative resources.

The January Exclusions Rule stated because there will continue to be section 7 consultations for discretionary actions in areas where the spotted owl occurs, we have concluded that the additional regulatory requirement related to review for adverse modification is outweighed by other relevant factors. See our response to *Comment (3)* concerning section 7 consultations and our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

## Economic Analysis Comments

### Comments From Counties

*Comment (20):* Several counties requested that the Service undertake a new economic analysis to reconsider the economic impacts of the 2012 designation on local communities and natural resource-based economies.

*Our response:* We reviewed the FEA (IEc 2012) conducted for the December 4, 2012, critical habitat designation (77 FR 71876) as well as additional information submitted during the public comment period. We also conferred with the economists who prepared the FEA regarding the additional information submitted (IEc 2020). See our response to *Comment (21)* below for further detail. In general, we found that the commenters disagree with the Service's incremental methodology used to analyze the economic effects of the critical habitat designation for northern spotted owl, although that approach was the Service's policy at the time and has since been codified in its regulations; see 50 CFR 424.19(b)). In addition, because the January Exclusions Rule has not gone into effect and we are only excluding (*i.e.*, removing) additional areas from critical habitat, the economic impact will be further reduced from that analyzed in 2012 and a new economic analysis is not necessary. Even if the January Exclusions Rule were to go into effect, an entirely new economic analysis would not be required for this final rule because (1) this rule does not designate any new areas that were not included in the 2012 critical habitat designation and analyzed in the 2012 FEA; (2) the 2012 FEA estimated potential incremental economic impacts of the 2012 designation over a 20-year timeframe, which has not yet ended as of the date of this final rule; and (3) the Service has considered the updated economic-impact information provided by commenters, as discussed more fully below. The Service has fully considered the economic impacts of this final rule, consistent with the requirements of ESA Section 4(b)(2).

The January Exclusions Rule stated that our FEA completed in 2012 (IEc 2012) in combination with a new report prepared by the Brattle Group (2020) (Brattle Report) continue to be the best scientific and commercial data available; we no longer find this to be the case as discussed in our response to *Comment (21)* addressing IEC's review of and our concerns with information contained in the Brattle Report (IEc 2020, IEC 2021).

*Comment (21):* The AFRC (AFRC 2020; AFRC 2021) provided public comments requesting that the Service

exclude at least 2,515,491 additional acres (1,017,983 hectares) in addition to the 204,653 acres (82,820 hectares) proposed for exclusion. The AFRC provided the Brattle Report critiquing our FEA and a supplement to the Brattle Report (Brattle supplement) responding to our responses to comments in the January Exclusions Rule (The Brattle Group 2021). The Brattle Report included updated estimates of the economic impacts of the 2012 rule using more recent data and/or different assumptions. The Oregon Farm Bureau and Oregon Cattlemen's Association; California Farm Bureau Federation; Lewis, Skamania, and Klickitat Counties in Washington; and Douglas County in Oregon also cited the Brattle Report and/or supplement in their comment letters as justification for additional exclusions. We summarize AFRC and other comments pertaining to economic analysis issues in the following:

(a) A focus of the Brattle Report and supplement (referred to as reports here) is a review of our analysis of potential timber harvest losses attributable to northern spotted owl critical habitat designation in 2012. The Brattle reports follow the same analytic approach for measuring timber harvest impacts as employed in the economic analysis for the critical habitat designation (IEc 2012), but use alternative assumptions or updated inputs. These adjustments yield the following differences when compared to the results of the FEA (see IEC 2020 for more details):

- The number of acres where incremental harvest impacts may occur is higher;
- The baseline annual harvest potential is higher;
- The potential reductions in harvest volumes due to the impact of critical habitat are larger; and
- The estimated stumpage values are lower.

As described by IEC in their review of this information (IEc 2020, 2021), the effect of these changes in inputs by the Brattle reports is a higher measure of the negative annualized timber harvest impacts across the affected acres, *i.e.*, a projection of greater economic effects. The Brattle reports assert that, across 1.7 million acres (687,966 hectares), the critical habitat designation greatly diminishes harvest and causes losses to the market of between \$66.4 million and \$77.2 million (or between \$66.4 million and \$85.4 million per the supplement) on an annualized basis, and between \$753 million and \$1.18 billion (or between \$869 million and \$1.31 billion per the supplement) over 20 years on a net present value (NPV) basis. AFRC and others suggest the results of the

Brattle reports support their request for exclusion of additional acres based on economic impacts.

*Our response:* We find several issues with the analysis provided in the Brattle reports, specifically the assumptions or data used to produce the estimate of negative annualized timber harvest impacts due to the critical habitat designation, and we do not agree with their ultimate conclusions.

First, the Brattle reports state that the higher number of acres where incremental impacts may occur is based upon a review of GIS files and other related information. Their estimated acreage of lands affected changed considerably between the Brattle Report and supplement. However, the supplement provides no clear basis for this increase. We asked IEC to review the Brattle reports, and they concluded that they could not replicate the result, but determined that the magnitude of differences in the acreages identified in the reports versus those identified in our FEA are unlikely to substantially alter the ranking of potential impacts by subunit. The Brattle reports provide retrospective impacts by subunit, but do not provide a composite ranking. In contrast, our FEA included an analysis of acreages by subunit where impacts may occur, scored these areas by the potential extent of impact, and then ranked each subunit according to a composite score against all other subunits (see Section 4.3 of IEC 2012).

Second, the Brattle reports assume a much higher baseline annual harvest potential on USFS and BLM lands (a more than five-fold increase) than the best available information indicates is likely. We understand that the reports relied on average yields from a short time period of harvest data (2018–2020) on lands managed by BLM for moist and dry forests and then translated these harvest levels into estimates of long-term annual yields across the acres where the reports assume incremental impacts may occur. Based on comments from AFRC, the reports also assume similar yields on BLM and USFS lands, a standard rotation age of 100 years where one percent of the land would be regeneration-harvested, and one percent would be thinned. The assumptions are at best hypothetical and not widely applicable. The BLM and USFS are unlikely to have similar yields generally for a variety of reasons, including that there is no standard of a 100-year rotation age or one percent regeneration harvest used by either agency for all of their managed lands. The USFS and BLM apply “uneven-aged” stand management, rather than “even-aged” stand rotations, on many of these areas

to meet multiple use goals such as wildfire risk reduction, recreation, forest restoration, and biodiversity conservation, especially in drier portions of the range. In contrast, we based our yield rates on actual harvest data provided by the BLM and USFS over an extended period (IEC 2012). For lands managed by BLM, the FEA used data BLM provided on 30 years of planned timber harvest by land allocation type (reserve/matrix), forest conditions (nesting/roosting habitat, predominantly younger forests), and harvest type (thinning, regeneration) at the critical habitat subunit level. For lands managed by USFS, our FEA used projected yield rates provided by the USFS for each critical habitat unit.

Third, the Brattle reports assume an 80 percent reduction in harvest volumes due to the critical habitat designation versus the 20 percent used in the FEA high-impact scenario. The reports indicate that the assumption of an 80 percent reduction in harvest volumes is based on discussions with AFRC and unspecified comments provided by the USFS and BLM on the 2012 economic analysis. As a result, it is unclear on what basis the Brattle reports assume an 80 percent reduction in harvest volumes. The most likely cause is by improperly conflating the impact that the listing of the northern spotted owl in 1990 and other economic and logistical factors had on timber harvest with the incremental effect of the subsequent designation of critical habitat, particularly in areas that are currently unoccupied by the subspecies.

The Brattle Report also noted that it “cannot model the timber markets that influence the demand for timber in the Pacific Northwest” to test the reasonableness of its assumption concerning timber harvest effects (The Brattle Group 2020, p. 17). The potential incremental effect of critical habitat on harvest levels was a point of significant debate for the 2012 critical habitat designation (see section 4.4.2 of the FEA). As IEC notes in its assessment of the Brattle Report, “Various land managers, Service experts, and other commenters concluded that the direction and magnitude of effect due to critical habitat was uncertain, noting that harvest levels could be higher or lower depending on a variety of land management considerations and harvest factors. In addition, the implementation of timber harvest in critical habitat occurs within a complex set of factors, including volatility in global demand for wood products, general timber industry transformation, and existing regulatory and statutory requirements, among other factors.” The FEA used

three separate scenarios, along with additional sensitivity analysis to capture this uncertainty and the concerns of multiple stakeholders, including BLM and USFS. “The Brattle report does not endeavor to model markets or other factors that influence the demand for timber in the Pacific Northwest” (IEC 2020). The Brattle Report did not include a sensitivity analysis to address the uncertainty of effects associated with critical habitat.

Fourth, concerning estimated stumpage values, as IEC noted in their review, our FEA “recognized that prices vary across forest, land manager, and year, and that future prices were uncertain. The analysis captured annual average prices from Federal timber sales on BLM and USFS managed lands between 2000 and 2011. The low-end price (\$100 per thousand board feet (mbf)) was similar to more recent prices (as of 2012) from Federal timber sales, which had been below historical averages. The higher end was selected to purposely capture the highest price received since the year 2000. This high price, therefore, served as a conservative approach, meaning it would yield the highest negative impacts from any constraints on timber harvest volumes due to critical habitat designation. Beyond this range, the 2012 economic analysis conducted a further sensitivity analysis based upon a comment received from AFRC. In this scenario, an even higher price of \$350 per mbf was analyzed for its effect and included in the economic analysis. Thus, the original range and further sensitivity analysis captured a reasonable upper and lower bound of the role of timber prices on potential impacts. In contrast, the Brattle report uses similar average stumpage prices from similar sources, but only from 2018 to 2020, a much shorter time frame. In addition, its price range of \$83 to \$191 per mbf is consistent with the price range used in the 2012 report, especially when considering the passage of eight years and the general market volatility of lumber prices.” (IEC 2020).

In sum, the Brattle reports and associated commenters concluded that the total effect of these alternative inputs is a higher measure of negative annualized timber harvest impacts across the total of potentially affected acres compared to what was estimated in the FEA (IEC 2012) (\$66 to \$77 million estimated in the Brattle Report, \$66 to \$85 million in the supplement, versus \$6.5 million in the FEA). As noted above, the Brattle supplement added the distribution of its overall measure of impacts across the designation’s subunits. Understanding

relative impacts by discrete areas of critical habitat is a necessary aspect of an accurate benefits-weighting process. We note that the Brattle reports include additional conclusions, such as effects on Gross Domestic Product and employment. However, these conclusions are based on the assumptions we discuss above, which are misapplied or cannot be confirmed with the methods provided. Therefore, for the reasons discussed above, we do not consider the Brattle reports to be the best scientific and commercial data available, and we do not agree with the conclusions of the Brattle reports and the comments that rely on them. More specific analysis of the Brattle reports can be found in our record on this rulemaking (IEc 2020, 2021).

The January Exclusions Rule considered the negative economic impacts on rural communities of the critical habitat designation and the listing of the northern spotted owl in its weighing of the benefits of excluding 3.4 million acres against the benefits of inclusion and concluded that the benefits of exclusion outweighed the benefits of inclusion. We do not now find these conclusions to be appropriate; see our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts under Section 4(b)(2) of the Act.

(b) The Brattle Report included information on annual timber harvest levels on Federal lands in 18 counties within California, Oregon, and Washington, from 2002 through 2018. The report concluded that these data demonstrate that timber harvest in these counties declined as a direct consequence of the 2012 critical habitat designation.

*Our response:* We acknowledge that the listing of the northern spotted owl in 1990, in addition to other social and economic factors, affected timber industry employment and establishments (Ferris and Frank 2021, p. 12). However, we have reviewed the information in the Brattle Report and found significant errors and unsubstantiated assumptions.

First, 4 of the 18 counties cited in the analysis (Calaveras, Riverside, and Mono in California, and Morrow in Oregon) are located outside of the range of the northern spotted owl and do not contain designated northern spotted owl critical habitat, so the designation would not have impacted timber harvest in these counties. The Brattle supplement states that this information was provided for context, although it does not explain how referencing this

context aids in assessment of impacts from the northern spotted owl. In fact, the data from these counties document that timber harvest and related economic patterns were concurrently volatile in rural counties outside the range of the spotted owl, suggesting larger market forces were impacting timber markets both within and outside the range of the owl.

Second, of the remaining 14 counties cited in the report that contain some spotted owl critical habitat, the Brattle reports describe timber harvest declines occurring in 7 counties somewhere around (*i.e.*, proximally before and after) the year 2012, stable or flat trends in 3 counties, and increased harvest levels in 4 counties. Of the declines highlighted by the commenter, several began prior to the designation in December 2012, casting doubt on the potential direct impact of the 2012 designation. Almost all of these counties also show large fluctuations in harvest levels between years going back to 2002, indicating that there are likely other confounding economic and logistical factors influencing these dynamic timber harvest levels aside from the 2012 critical habitat designation, as described in our response to *Comment (22)*.

Third, the analysis provided charts of harvest decline in specific counties within the critical habitat designation. A rapid assessment of the same data source cited by the commenter, but evaluating a random number of additional counties in Oregon, Washington, and California in the range of the northern spotted owl, revealed no discernible pattern in timber harvest declines that could reasonably be attributed to the 2012 critical habitat designation. Some counties experienced general increases in timber harvest after 2012, some declined, and some were relatively flat when compared to long-term trends. A similar pattern of fluctuation exists for individual counties located outside of the range of the spotted owl but within Oregon, Washington, and California, as well as in other western States. Most of these counties showed wide fluctuations in timber harvested on Federal lands, both before and after 2012, again indicating the influence of factors other than the designation of critical habitat.

Using the same data source cited by this commenter (with 2019 data from BLM and USFS on timber volume offered for sale), we reviewed Federal land harvest data in Oregon counties that are within the northern spotted owl critical habitat designation. The annual average harvest from 2002 through 2012 on all BLM lands in the range of the spotted owl was approximately 159

million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on BLM lands located in the range of the spotted owl from 2013 through 2019, after the 2012 critical rule was published, was 235 million board feet; the total in 2020 was 249 million board feet offered for sale (BLM 2021a). Thus, rather than suffering a decline, annual harvest appears to have increased substantially subsequent to the 2012 designation of critical habitat.

Likewise, the annual average harvest from 2002 through 2012 on USFS lands located within the range of the spotted owl was approximately 196 million board feet per year prior to the 2012 critical habitat designation. The annual average harvest on USFS land from 2013 through 2019, after the 2012 critical rule was published, was 288 million board feet. We also reviewed Federal harvest data in Oregon counties outside the range of the spotted owl (and therefore in counties with no spotted owl critical habitat or obligation for Federal agencies to consult under ESA section 7) and saw harvest volume fluctuations similar to those in counties located within critical habitat. Based on these data it does not appear that designation of critical habitat in 2012 had a significant incremental depressive effect on subsequent Federal timber harvest.

*Comment (22):* Douglas County requested that the Service exclude all land within Douglas County from the critical habitat designation due to severe and disproportionate economic impacts. The County provided a 2007 report that discusses the negative economic impacts of reduced harvest on Federal lands. Additionally, Douglas County asserted that our FEA is flawed with respect to Douglas County and should be revised. Among other exclusions that are addressed in *Comments (25–28)*, Douglas County requested that all private and State lands, and county lands specifically in Oregon, be excluded.

*Our response:* The report provided by Douglas County focuses on the impact that termination of “safety net” payments under the Secure Rural Schools and Community Self-Determination Act would have on counties in western Oregon. The report discusses reductions in harvest on Federal lands in the O&C counties attributable to a range of factors, resulting in a loss of revenue sharing that limited county budgets and rapid contractions of the wood products sector as logging declined and mills closed or reduced shifts. The report, prepared in 2007, does not discuss impacts of the critical habitat

designation but describes general pressures on the timber industry.

In addition, during this same time period, timber-related tax revenue flowing to Oregon counties has declined due to large reductions in State and local property and severance taxes on private timber lands. According to one in-depth analysis, half of Oregon's 18 western counties lost more revenue due to tax cuts on private lands than they did due to reductions in Federal timber harvest levels (Younes and Schick 2020). It is unclear if the Brattle analysis incorporated this data into its analysis of net declines in timber revenue to local economies.

Our FEA (IEc 2012) addressed the incremental effects of critical habitat within the area proposed for designation for the northern spotted owl. Consistent with our practice at the time (now codified in regulations) the FEA quantifies the economic impacts that may be directly attributable to the designation of critical habitat, comparing scenarios both "with critical habitat" and "without critical habitat." Our incremental analysis did not consider the economic impact of changes other than from the proposed revised critical habitat designation, and did not evaluate the economic condition or status of the timber industry at large. Rather, it addressed the effects related to the impacts to Federal agencies and their activities, because Federal agencies are the only entities directly subject to the requirement to evaluate and consider effects of their actions on designated critical habitat.

Nonetheless, we acknowledged that, "[m]ultiple forces have contributed to the recent changes in the Pacific Northwest timber industry. In general, the timber industry is characterized as being highly competitive; there is a relatively low degree of concentration of production among the largest producers and there is essentially a single national price for commodity grades of lumber. In recent decades, competition has intensified with increased harvesting in the U.S. South and interior Canadian Provinces. New technologies and increased mechanization have led to mill closures; generally, less efficient mills located near Federal forests have been closed in favor of larger, more advanced facilities closer to major transportation corridors or private timberlands. In addition, other forces such as endangered species protections, fluctuations in domestic consumption, shifts in international trade, and changes in timberland ownership, have all contributed to changes in the Pacific Northwest timber industry" (IEc 2012, p. 3–17).

We acknowledge that Douglas County has experienced significant economic strain, but we conclude that the economic impacts analysis we conducted with the 2012 critical habitat designation remains an accurate assessment of the incremental economic effects of the designation of critical habitat, and does not provide a basis from which to exclude all of the areas of critical habitat currently designated in the county.

Regarding Douglas County's request that we exclude private, State, and county lands, there are no private lands designated as critical habitat for the northern spotted owl; we primarily relied on Federal lands, with a small amount of State and local government lands, to meet the conservation needs of the northern spotted owl. We did not designate any county lands in Oregon as critical habitat. We did designate areas on some State lands in Washington, Oregon, and California where Federal lands are not sufficient to meet the conservation needs of the northern spotted owl. In our final 2012 designation, we excluded State parks and natural areas and lands in Washington covered by a habitat conservation plan. See our *Process for Exercising Discretion to Conduct an Exclusion Analysis* in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (23):* One commenter noted that a 2012 economic analysis from the Sierra Institute, "Response to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl by Industrial Economics" (Kusel and Saah 2012), was not fully considered in the 2012 designation and that a new economic analysis should be conducted.

*Our response:* The Service fully considered the content of the Kusel and Saah report and found a great deal of overlap between that economic analysis and the FEA contracted by the Service and written by Industrial Economics (IEc 2012), even incorporating a summary of the Kusel and Saah report (2012) (see our response to *Comment (201)* in the December 4, 2012, critical habitat rule (77 FR 71876, p. 72040)). The Service maintains that the FEA conducted for the 2012 critical habitat designation (IEc 2012) is the most accurate reflection of the potential economic impacts of that designation (77 FR 71876). We have reviewed the FEA (IEc 2012) and determined that because we are proposing only to exclude (*i.e.*, remove) additional areas from critical habitat and are not adding any new areas not included in the 2012 designation, the economic impact will

be further reduced and a new analysis is not necessary.

#### Environmental Analysis Comments

*Comment (24):* Commenters expressed that the Service must conduct a NEPA analysis and evaluate the exclusions in a biological opinion before finalizing exclusions.

*Our response:* It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit (see *Catron County Board of Commissioners, New Mexico v. U.S. Fish and Wildlife Service*, 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).

Other than a small amount of Indian lands (which were previously managed by the BLM), the Service is only excluding lands identified for timber harvest under the 2016 BLM RMPs. These RMPs underwent rigorous NEPA review, including public comment on the identification of the Harvest Land Base lands. The Service then completed a Biological Opinion on these RMPs, which included an analysis of the effects of proposed timber harvest in designated critical habitat, and concluded that timber harvest under the plan would not adversely modify the critical habitat. Therefore, consistent with the ruling in *Douglas County*, conducting a NEPA analysis and a biological opinion on the proposed exclusions would be redundant, and an inefficient use of limited government resources. As we are withdrawing the exclusions finalized in the January Exclusion Rule, we make no assessment of whether or not a NEPA analysis and biological opinion on those exclusions would have been required.

#### 4(b)(2) Exclusions Comments

The Secretary has discretion whether to conduct an exclusion analysis under section 4(b)(2) in accordance with our regulations at 50 CFR 17.90(c). The Secretary will conduct an exclusion analysis when the proponent of excluding a particular area (including but not limited to permittees, lessees or others with a permit, lease, or contract on federally managed lands) has presented credible information regarding the existence of a meaningful economic or other relevant impact

supporting a benefit of exclusion for that particular area. We provide our evaluation of whether commenters requesting the exclusions below have provided this credible information in Consideration of Impacts Under Section 4(b)(2) of the Act under the section entitled *Process for Exercising Discretion to Conduct an Exclusion Analysis*.

*Comment (25):* Commenters variously requested that we exclude all O&C lands; all USFS matrix lands; all USFS and BLM lands; BLM lands outside the Harvest Land Base; and specifically, all Douglas County lands.

We respond separately to each reason provided for these suggested exclusion requests first (except for assertions of economic impacts, which are addressed above in response to *Comments (20–23)*), and then provide a collective summary:

(a) Commenters asserted that critical habitat conflicts with BLM and USFS management direction and constrains timber harvest, including salvage harvest, on O&C lands and matrix lands.

*Our response:* We determined in our section 7 consultation on the BLM RMPs that BLM's management direction was consistent with the Endangered Species Act and that the actions proposed within the plans, including timber harvest in the Harvest Land Base on O&C lands over a 50-year timeframe, did not result in adverse modification of the designated critical habitat.

Similarly, our consultations under section 7 with the USFS for its harvest actions carried out under the NWFP on matrix and O&C lands since the 2012 designation of critical habitat have resulted in determinations that the actions did not adversely modify critical habitat or jeopardize the continued existence of the northern spotted owl. Thus, these agencies have not been precluded from implementing timber harvests within designated critical habitat; they can and do implement harvest actions within critical habitat consistent with their management plans. As described in previous responses to comments, average annual timber harvest on these lands has actually increased after the 2012 designation. Additionally, as an example, in response to the 2020 wildfire season, we recently consulted on salvage harvest projects in critical habitat in the areas of the Archie Creek and South Obenchain wildfires to allow the BLM and the USFS to recover the economic value of trees proposed for removal. Critical habitat did not impede these projects from going forward nor did it require additional project changes to the actions the agencies proposed.

(b) There are conflicting principles between the O&C Act and the Endangered Species Act, and the Service should consider the pending court remedy on O&C lands. One commenter suggested that we wait for the outcome of that proceeding before revising critical habitat; another commenter indicated the court ruling, even without the remedy order, supported the exclusion of all O&C lands from designated critical habitat.

*Our response:* We note that there is ongoing litigation challenging BLM's management of O&C lands under the 2016 RMPs (BLM 2016a, 2016b). As we described in the proposed rule, one district court has upheld the RMPs in challenges asserting non-compliance with the Endangered Species Act, a conclusion affirmed by an appellate court (see *Pac. Rivers v. U.S. Bureau of Land Mgmt.*, No. 6:16-cv-01598- JR, 2019 WL 1232835 (D. Or. Mar. 15, 2019), *aff'd sub nom. Pac. Rivers v. Bureau of Land Mgmt.*, 815 F. App'x 107 (9th Cir. 2020)). In a separate proceeding a district judge on the U.S. District Court for the District of Columbia found that the BLM 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, *American Forest Resource Council et al. v. Hammond*, 422 F.Supp.3d 184 (D.D.C. 2019). The parties briefed the court on the appropriate remedy, but the court has not yet issued an order. We considered this information in developing the proposed rule, and sought comment specifically on how we should address this information in the rule.

This final rule is based on the 2016 RMPs as they are, and not as they may be modified in the future. The ultimate litigation outcome challenging the BLM's management of O&C lands is not certain. We acknowledge the potential for future reductions in the BLM reserve land-use allocations and changes in the Harvest Land Base. We will continue to monitor the litigation and once it has concluded (including any land-use planning if undertaken) will assess whether revisions to this designation are appropriate to propose. See also our response to *Comment (6)*.

(c) Commenters asserted that O&C lands managed by the BLM and lands managed by the USFS should be excluded because the NWFP and RMPs should guide management on Federal lands since they are consistent with the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011).

*Our response:* The Service agrees the NWFP and RMPs guide management on Federal lands, as informed by other plans, laws, designations and input. Federal land managers are skilled at incorporating a wide variety of required inputs and feedback when planning and carrying out land management actions, including public comment under the National Environmental Policy Act, recommendations from listed species' recovery plans, input from the Service and National Marine Fisheries Service through the section 7 consultation process, growth and yield models, and critical habitat designations, to name just a few. The BLM RMPs have undergone section 7 consultation recently, in 2016, with the 2012 spotted owl critical habitat rule in place and were found to be consistent with the Endangered Species Act, including our determination that the management direction of the plans is consistent with the critical habitat designation.

In contrast, we have not conducted an updated programmatic review of USFS land management plans as was done with BLM plans in 2016. All USFS actions carried out under the NWFP since the 2012 designation of critical habitat that may affect that habitat have undergone section 7 consultation on a project-by-project basis and have been found to be consistent with the Endangered Species Act. Our January Exclusions Rule comment response stated that these consultations were sufficient to support exclusion of the USFS land areas because it supported the then-Secretary's determination that extinction would not result. However, without a programmatic-scale look at USFS land management plans we lack the updated broad-scale information and assessment of the effects of harvest within designated critical habitat that would be necessary to sustain additional exclusions of all USFS O&C lands, whether they are located in reserves or in areas targeted for timber harvest. See our response to *Comment (11)* concerning the remaining O&C lands in the final critical habitat designation. See also our reconsideration of the weighing of the benefits of inclusion versus the benefits of excluding these lands and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

(d) Commenters stated that non-O&C BLM lands should be excluded for ease of administration.

*Our response:* We are excluding lands within the BLM Harvest Land Base and certain Indian lands in this rulemaking, including some non-O&C lands managed by BLM. Over 90 percent of

the Harvest Land Base occurs on O&C lands, but we also included the portion of the Harvest Land Base that does not occur on O&C lands in this exclusion. See responses to *Comments (11)* and *(16)* for an explanation of why additional lands managed by BLM are essential to the conservation of the northern spotted owl and are thus not being excluded.

*(e):* Commenters stated that our reliance on the management under the BLM RMPs (BLM 2016a, 2016b) as a rationale for excluding the Harvest Land Base in those plans should also be applied to considering all O&C lands addressed in those plans, and that we should also rely on a similar rationale for excluding O&C lands and matrix lands managed by the USFS under the protections of the NWFP for exclusions.

*Our response:* See our response to *Comment (25c)* above. Additionally, we acknowledge the continuing concern over the inclusion of O&C lands in the designation of critical habitat for the northern spotted owl. Since the mid-1970s, scientists and land managers have recognized the importance of forests located on portions of O&C lands for 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. 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 providing for other uses of these lands.

In 2016, the BLM revised their RMPs providing direction for the management of approximately 2.5 million acres (1 million hectares) of BLM-administered lands, which includes most of the O&C 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; BLM 2016b, p. 20). The BLM RMPs revised

the land-use allocations of BLM-managed lands in western Oregon. We noted in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011, p. II-3) that the functionality of the critical habitat designation on BLM-managed lands and rangewide was anticipated to improve, in part as the land management agencies updated their land management plans to incorporate the Recovery Plan's recommendations.

The total Harvest Land Base land use allocation on BLM lands, a portion of which is critical habitat and is now being excluded from critical habitat, comprises 19 percent (469,215 acres (189,884 hectares)) of the overall land use allocations described in the RMPs and is where the majority of programmed timber harvest will occur (FWS 2016, p. 9; BLM 2016a, pp. 59–63). Approximately 172,712 acres (69,779 hectares) of the Harvest Land Base being excluded herein is O&C lands. Our analysis of the impacts to the habitat within the Harvest Land Base recognized that this land use allocation was not intended to be relied upon for demographic support of northern spotted owls (FWS 2016, p. 553). Thus, through our analysis conducted for the section 7 consultation for the 2016 RMPs, we have evaluated the role that these lands have in the recovery of the northern spotted owl. Based on that, we reconsidered the relative value of including them in a critical habitat designation.

The O&C lands that remain within the critical habitat designation with this final rule are composed primarily of Late-Successional Reserve on BLM and USFS lands, and some forest “matrix” lands in National Forests where timber harvest was programmed to occur under the 1994 NWFP. Our modeling results for the 2012 critical habitat designation indicated that the O&C lands make a significant contribution toward meeting the conservation objectives for the northern spotted owl. As described in the section, *Changes From the Proposed Rule*, in the December 4, 2012, critical habitat rule (77 FR 71876; p. 71888), we tested possible habitat networks without many of the BLM (now Harvest Land Base) and USFS matrix lands, which resulted in a significant increase in the risk of extinction for the northern spotted owl (Dunk *et al.* 2012, pp. 57–59; Dunk *et al.* 2019, Figure 8). Likewise, in addition to our modeling results, peer review of both the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) as well as our proposed rule to revise critical habitat in 2012 indicated that retention of high-quality habitat in portions of the matrix

is essential for the conservation of the subspecies. Thus, while the exclusion of the Harvest Land Base acreage as described will not jeopardize the subspecies (as assessed in our Biological Opinion on the 2016 RMPs), the O&C lands and USFS matrix lands that remain within the designation remain essential to the conservation of the northern spotted owl.

*Comment (26):* Commenters requested that we exclude: Areas of younger forests; all critical habitat subunits that have 50 percent or more younger forests; areas that are not currently occupied by northern spotted owls; all unoccupied areas; unoccupied USFS matrix and adaptive management area lands; “habitat capable” lands; stands under 80 years old; and low-quality habitat; and areas described as dispersal habitat. We respond separately to these exclusion requests below:

*(a)* Commenters asserted that younger forests, including stands under 80 years old, areas that are not currently occupied by northern spotted owls, and “habitat capable” lands do not currently provide habitat to the northern spotted owl. Commenters assert that an area is not habitat if modification or natural growth is required before it could actually support the subspecies. Comments stated that areas of younger forests and subunits dominated (greater than 50 percent) by younger forests should be excluded and that the benefits of including these areas is negligible. Some commenters provided a report and data showing areas within the critical habitat designation that had been harvested, experienced severe wildfire (see our response to *Comment 27*), or are smaller fragmented parcels (see our response to *Comment 28*) (Mason, Bruce and Girard 2021 in AFRC 2021, appendices A–D). Commenters stated that even with these exclusions there would still be protections for the subspecies due to section 7 obligations.

*Our response:* Younger forests are typically the result of past timber harvest, wildfire, or some other form of disturbance. Areas of younger forest in the critical habitat designation are part of the forest mosaic essential for the northern spotted owl. The fact that some younger forests may contain few habitat characteristics preferred by owls does not mean that such areas are not habitat for the owl—some areas may be, others may not be, depending on the site-specific characteristics. Nor does the Act preclude designation of areas that currently function as habitat for the northern spotted owl but are dynamic, such as a forested environment in which younger trees naturally grow over time and the area thereby transitions from



functioning primarily as dispersal or foraging habitat to the subspecies' preferred roosting and nesting habitat consisting of older stands. The Service's rule does not describe or anticipate modifications or natural changes to the designated areas for them to qualify as critical habitat or represent current habitat for the subspecies; indeed, the regulation explicitly indicates that "[n]othing in this rule requires land managers to implement, or precludes land managers from implementing, special management or protection measures." 50 CFR 17.95 (entry for northern spotted owl at paragraph 4).

As to "occupied" versus "unoccupied" habitat, the commenter may be confusing the use of the term "occupied" as used when designating critical habitat, with the concepts of presence or absence of a species in section 7 consultations, which can also refer to the "occupancy" of the species at the time of the consultation. The two are not the same. The Service is required to designate critical habitat based on the occupied habitat "at the time of listing" which in the case of the northern spotted owl was 1990. After 1990, whether or not the species "occupies" that specific habitat does not dictate whether the area is critical habitat. Rather, in our evaluation in a section 7 consultation for effects of a Federal action on specific designated critical habitat, we evaluate the effects to the physical and biological features of critical habitat and the post-project functionality of the network to provide for connectivity at the subunit, unit, and designation scales to ensure the landscape continues to support the habitat network locally, regionally, and across the designation. This evaluation is not conditional on critical habitat being currently occupied. Rather, "occupancy" at the time of a specific action resulting in a section 7 consultation is generally most relevant for assessing whether the proposed Federal action will "jeopardize" the species, or incidentally "take" the species. See also our response to *Comment (3)*.

As was explained in the 2012 critical habitat designation, although some areas of younger forests may not have been used as nesting habitat by northern spotted owls at the time of listing, younger forests are often used by owls for dispersal or foraging behavior, both of which are essential life functions, and thus are considered as "occupied" for the purposes of critical habitat designation. Including these areas within the designation is beneficial because they provide the physical and biological features that currently

support owl life functions (e.g., dispersal) and contain the habitat elements conducive to developing the physical or biological features of the higher-quality nesting and roosting habitat (they are of suitable elevation, climate, and forest community type over time). While some areas may not be used for nesting by spotted owls and may be lacking some element of the physical or biological features, such as large trees or dense canopies that are associated with the higher quality nesting habitat, these areas contain the dispersal and foraging habitat to support movement between adjacent subunits and are therefore essential to provide population connectivity for the northern spotted owl. In addition, northern spotted owls are regularly reproductively successful in home ranges that comprise a mosaic of habitat, including older and younger forest. Northern spotted owls have in fact been found occupying lower quality habitat consisting of younger forested stands, particularly when higher quality habitat is not available in the area (Glenn *et al.* 2004). The critical habitat designation included younger forests that are in proximity to older forests to contribute to northern spotted owl occupancy and reproduction.

In response to "habitat capable" lands, see our response to *Comment (29c)* below. In response to continuing section 7 obligations, see our response to *Comment (3)*.

(b) Commenters stated that the description of dispersal habitat is unclear and that the Recovery Plan for the Northern Spotted Owl (FWS 2011) states that dispersal needs have not been thoroughly evaluated and therefore dispersal habitat is not determinable. Commenters further stated that habitat that does not meet a minimum threshold of 11 inches (in) (28 centimeters) (cm) diameter at breast height (dbh) does not meet the definition of dispersal habitat.

*Our response:* There are sufficient data and scientific information to include dispersal habitat as a habitat type for northern spotted owl critical habitat. Ideally, dispersal habitat consists of higher-quality nesting, roosting, and foraging habitat, but in cases where the landscape does not support those habitat types, spotted owls will disperse through younger habitat as described in the 2012 critical habitat rule (FWS 2012, p. 71907). The Service focused on defining the lower limit for forest stands that support the transient phase of northern spotted owl dispersal as stands "with adequate tree size and canopy closure to provide protection from avian predators and

minimal foraging opportunities" (FWS 2011, p. A–8). Corridors that contain these minimum characteristics for dispersal habitat, such as forested corridors through fragmented landscapes, serve primarily to support relatively rapid movement through such areas, rather than colonization (FWS 2012, p. 71901). In general, these areas contain trees with at least, but not limited to, 11 in (28 cm) dbh and a minimum 40 percent canopy cover. For instance, northern spotted owls will also disperse through non-forested areas, such as clearcuts, although they use them less than expected based on availability (Miller *et al.* 1997, p. 145).

The risk of dispersing through a landscape of minimum or lower quality dispersal habitat is not well understood. Buchanan (2004, p. 1341) evaluated this risk, concluding that "strategies for management of spotted owl dispersal habitat may not produce conditions preferred by spotted owls and may result in dispersal-related mortality (due to starvation or predation) or other consequences that negatively influence juvenile recruitment." The relative effect to spotted owls dispersing through a lower-quality stand and landscape is the issue that has not been "thoroughly evaluated or described" (FWS 2011, p. vi), as opposed to the value of dispersal habitat generally for northern spotted owls. Mortality rates of juvenile dispersal exceed 70 percent in some studies, with known or suspected causes of mortality during dispersal including starvation, predation, and accidents (FWS 2011, p. A–7).

In addition to assisting with dispersal in support of northern spotted owl life functions, young stands also assist in addressing the long-term viability and recovery of the owl. Habitat loss and degradation were identified as major threats to the northern spotted owl at the time of listing, and conservation and recovery of the subspecies are dependent in part on the development of currently low-quality habitat into high-quality habitat to allow for population growth and recovery (77 FR 71876; p. 71917). Younger forests that meet the dispersal characteristics described in the 2012 designation provide for this environment as the stands age and develop the complex structural components of that higher quality habitat. To summarize, there is a clear biological need for young forests to contribute to spotted owl recovery both as dispersal habitat and as future breeding habitat to support population growth and recovery. Ideally, dispersal habitat consists of a large percentage of older habitat on the landscape, but younger stands also support movement

and are necessary where older habitat is lacking. Additionally, dispersal habitat is a biological need of the subspecies due to the need for successional development to supply additional older, higher-quality habitat to address past and future habitat loss within critical habitat.

*Comment (27):* Commenters requested that we exclude all California lands, areas of high or moderately high fire hazard risk or fire-prone forests, entire subunits in fire-prone areas, dry forest in California, dry forest in the Eastern Washington Cascades, areas that have experienced high-severity wildfire, and previously burned Late-Successional Reserve, citing the following rationale:

(a) Commenters stated that a conflict exists between critical habitat and management objectives for fuels reduction and active management, and that wildfire suppression costs are immense. They asserted that exclusion of certain lands would facilitate density management, dry forest restoration, and fuels reduction on the most vulnerable acres and prevent loss of northern spotted owl habitat.

*Our response:* In the 2012 critical habitat rule, the Service accounted for the drier provinces and parts of the range and recognized that forest management needs to be tailored to the forest type and climatic conditions, including the dry forests in California and the Eastern Washington Cascades. As part of the critical habitat rule, the Service expressly encouraged land managers to consider implementation of active forest management, using “ecological forestry” practices, to restore natural ecological processes where they have been disrupted or suppressed (e.g., natural fire regimes). This flexibility is provided to reduce the potential for adverse impacts associated with commercial timber harvest when such harvest is planned within or adjacent to critical habitat and consistent with land-use plans (77 FR 71876; p. 71877).

On page 71908 of the December 4, 2012, critical habitat rule (77 FR 71876), we stated that, in drier, more fire-prone regions of the owl’s range, habitat conditions will likely be more dynamic, and more active management may be required to reduce the risk to the essential physical or biological features from fire, insects, disease, and climate change, as well as to promote regeneration following disturbance.

The Service recognizes that land managers have a variety of forest management goals, including maintaining or improving ecological conditions where the intent is to provide long-term benefits to forest

resiliency and restore natural forest dynamic processes (FWS 2011, III–45).

The Service has consulted under section 7 with Federal agencies on their fuels reduction, stand resiliency, and pine restoration projects in dry forest systems within the range of the northern spotted owl. For example, we have consulted with the BLM and the USFS on such actions in the Klamath Province of southern Oregon. The proposed actions may include treatment areas that reduce forest canopy to obtain desired silvicultural outcomes and meet the purpose and need of the project, including timber production. They can also promote ecological restoration and are expected to reduce future losses of spotted owl habitat and improve overall forest ecosystem resilience to climate change. We have to date concluded in these consultations that the actions do not adversely modify critical habitat. Thus, active management to reduce wildfire risk can and has been undertaken in designated critical habitat.

In the 2012 critical habitat rule, we repeatedly reference the need for and appropriateness of conducting forest health treatments in spotted owl habitat, including designated critical habitat. Likewise, the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) encourages application of active forest management within spotted owl habitat to address forest health, wildfire risk, and impacts of climate change. Lastly, the 2016 Biological Opinion on the BLM’s 2016 RMPs generally supports this need as well.

In sum, there are almost always conflict and tradeoffs when conducting silvicultural projects that disturb existing forest stands. Spotted owl habitat conservation is just one of these tradeoffs; others include water quality, recreation, carbon sequestration, aesthetic values, economic opportunity, safety, and fire risk, to name a few. The 2012 critical habitat rule and other documents prepared by the Service both before and after 2012 provide support for evaluating these tradeoffs and, where appropriate, proceeding with fuels management projects within critical habitat (Henson *et al.* 2013). The commenters’ assertion that critical habitat conflicts with management objectives for fuels reduction and active management is overstated; therefore, we find this rationale does not support consideration of exclusion of additional lands.

(b) Commenters requested the exclusion of burned areas to allow reforestation and fuels treatments to occur, stated that fire-dependent landscapes should be excluded because

critical habitat does not benefit conservation or forest management in these areas. Commenters also stated that areas that have experienced high-severity burns no longer provide habitat for the northern spotted owl.

*Our response:* Northern spotted owls use previously burned areas for foraging and nesting/roosting depending on the habitat conditions post-fire (Gaines *et al.* 1997, King *et al.* 1998, Bond *et al.* 2002, Jenness *et al.* 2004; Clark 2007; Bond *et al.* 2009, Clark *et al.* 2011; Roberts *et al.* 2011; Lee *et al.* 2012; Clark *et al.* 2013; Bond *et al.* 2016; Jones *et al.* 2016; Bond *et al.* 2016; and Eyes *et al.* 2017). For example, in southwestern Oregon, spotted owls used areas that burned at all levels of burn severity, although they preferred areas that were unburned or burned at low to moderate severity (Clark 2007, pp. 111–112). Spotted owls use all burn severities and fire-created edges at different spatial scales, although the use may change over time and be dependent on proximity to existing high-quality nesting, roosting, and foraging habitat where protective cover and structural complexity were not as affected by fire.

In addition, the critical habitat rule provides the flexibility to conduct fuel treatments and reforestation activities, whose contribution to northern spotted owls will be amplified when conducted consistent with Recovery Action 12 (FWS 2011, p. III–49): “In lands where management is focused on development of spotted owl habitat, post-fire silvicultural activities should concentrate on conserving and restoring habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood).”

Additionally, natural disturbance processes, especially in drier regions, likely contribute to a pattern in which patches of habitat in various stages of suitability shift positions on the landscape through time. Sufficient area to provide for these habitat dynamics and to allow for the maintenance of adequate quantities of suitable habitat on the landscape at any one point in time is, therefore, essential to the conservation of the northern spotted owl. The recent loss of older habitat due to the 2020 and 2021 wildfires underscores the need for biological redundancy in the critical habitat designation to accommodate these habitat changes over time. We do not remove these areas from the designation when these changes occur, we anticipated this shift in suitability in the overall design of the critical habitat network.

Because northern spotted owls use burned areas, and because management

activities such as reforestation may still occur within designated critical habitat, we do not agree with the commenter and find there is not sufficient credible information and rationale to support consideration of exclusion of burned areas from the designation.

Additionally, the conservation of the northern spotted owl relies on a forested landscape that is provided for in the critical habitat designation and the designation of these areas benefits the subspecies by ensuring that the special management considerations identified in the 2012 critical habitat rule are considered in the design and implementation of forest management actions. We recognize that some areas may decrease or increase in habitat quality over time based on disturbance events and natural growth. These habitat changes are inherent to a forest mosaic and were considered in our overall critical habitat designation.

(c) Commenters asserted that “habitat capable” lands do not meet the definition of critical habitat.

*Our response:* We did not include lands described as “habitat capable” in the final critical habitat designation (77 FR 71876). We did include areas that contain dispersal and foraging habitat to support movement between adjacent subunits that we determined are essential to provide population connectivity. Many of these areas are also anticipated to develop into older and more complex habitat preferred by nesting pairs in the future. We note that various agencies may refer to “capable habitat,” but we did not describe or designate “capable habitat” in the designation. We used the term “capable” in several portions of the 2012 designation to describe habitat areas that are already providing some function to support spotted owl life history (e.g., dispersal), but that are also capable and likely to develop into higher quality habitat that northern spotted owls prefer for additional life functions, such as nesting, roosting, or foraging, over time.

*Comment (28):* Commenters requested that we exclude areas of less than 3,000 contiguous acres (1,214 hectares) and smaller, fragmented parcels because areas these small cannot support northern spotted owls.

*Our response:* Northern spotted owl home ranges (also referred to as home territories) vary in size across the range of the subspecies from about 3,000 acres (1,214 hectares) in the southern part of the range to more than 9,000 acres (3,642 hectares) in Washington. Northern spotted owl home ranges comprise forested landscapes that are generally a mix of high-quality habitat

with other forest types, disturbed areas, and openings. Data from southern Oregon indicate that northern spotted owl productivity and survival is at its zenith when the home range comprises less than 100 percent mid- and late-seral forests and is mixed with some early-seral and non-forest (Olson *et al.* 2004, p. 1050), and northern spotted owls can reproduce successfully in home ranges that contain well less than 100 percent nesting and roosting habitat. This finding indicates northern spotted owl occupancy relies on a mix of forests and age classes within their home ranges.

Recovery Action 10 in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) recommends prioritizing known and historical northern spotted owl sites for reproducing owls when the site condition includes greater than 40 percent high-quality nesting/roosting habitat in the provincial home range (e.g., 1.3-mile radius) and greater than 50 percent high-quality nesting/roosting habitat within the core home range (e.g., 0.5-mile radius) (FWS 2011, p. III-44). In addition, critical habitat is designed to provide for the maintenance of habitat conditions to support northern spotted owl occupancy over time, so areas that today contain less than an entire home range of contiguous high-quality habitat increasingly provide value as they develop more complex and high-quality characteristics over time. The areas of less than 3,000 contiguous acres (1,214 hectares) and smaller, fragmented parcels that are designated critical habitat are generally located in close, if not adjacent, proximity to other habitat within and outside the designation and in a spatial configuration that provides for dispersal across the landscape. Given the topographic, geologic, and microclimatic variation in these landscapes, it is normal for there to be some diversity of fragmented and heterogeneous habitat conditions with these critical habitat areas. These areas also provide the redundancy built into the critical habitat designation that is necessary given the threats of wildfire and insect losses, particularly in the dry forest provinces.

In sum, these areas provide a sufficient amount of habitat to support northern spotted owl home ranges, and dispersal. Because we find that areas of less than 3,000 contiguous acres and the smaller, fragmented areas designated are able to support northern spotted owls, we are not considering excluding these areas. See also Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (29):* Commenters requested that we exclude the White Pass Ski Area

in Washington to avoid any ambiguity because this acreage does not function as northern spotted owl habitat.

*Our response:* We addressed ski areas in the December 4, 2012, rule under *Comment (186)* (77 FR 71876; p. 72035): Although ski areas are found on a very small proportion of the Federal forested lands in the Pacific Northwest, our analysis found the lands associated with some ski areas can provide essential northern spotted owl habitat to the critical habitat network. Because of the value of the habitat found around ski areas on Federal lands, impacts to northern spotted owl habitat in these areas are currently subject to the section 7 consultation process for effects to northern spotted owls. Our experience shows that ski area development actions generally tend not to conflict with northern spotted owl and critical habitat conservation needs, so we do not anticipate any significant regulatory burden associated with the continued designation of these lands as critical habitat. Removing lands managed under ski area special use permits would increase fragmentation of the critical habitat network and potentially continuous tracts of northern spotted owl habitat. Therefore, there is a greater benefit to the subspecies associated with retaining habitat located around and adjacent to ski areas in the critical habitat designation.

Additionally, as noted in the 2012 critical habitat rule (77 FR 71876; p. 72052), critical habitat does not include: (i) Humanmade structures (such as buildings, aqueducts, runways, roads, other paved areas, or surface mine sites) and the land on which they are located. We interpret this to mean that the developed portion of ski areas would fall within this exception.

The January Exclusions Rule found that the benefit of excluding the White Pass Ski Area due to economic impacts outweighed the benefit of inclusion. However, we noted in the FEA (IEC 2012, p. 1–7) completed for the 2012 critical habitat rule that ski area development actions generally tend not to conflict with spotted owl and critical habitat conservation needs, and thus, upon reconsideration, we do not anticipate any significant regulatory burden associated with the designation of these lands as critical habitat (IEC 2012). No information or evidence was presented by the commenters to indicate that the critical habitat designation does or will impair the ski area’s current operations, nor that it will unreasonably restrict any future expansion of the ski area given the small footprint and potential impacts within critical habitat. In sum, developed ski areas meet the

definition of areas narratively excepted from critical habitat designation as described above; if in the future the ski area proposes to expand into critical habitat areas, we will continue to work with the USFS and the ski area to efficiently address special management considerations in the operation of the ski area.

*Comment (30):* Certain Tribes requested that Federal lands within 5 miles (8 kilometers) of Indian land be excluded from critical habitat due to economic impacts, the need to maintain road infrastructure to access Indian land in checkerboard ownership, and to provide greater management flexibility to maintain forest health and prevent wildfires.

*Our response:* The Service recognized in the 2012 critical habitat rule the need to actively manage forests, particularly in the drier provinces, to increase their resiliency to wildfires, including ladder fuels reduction, uneven age management, and prescribed burning. This recognition includes the forests that are within 5 miles (8 kilometers) of Indian lands. Existing roads are not considered critical habitat; thus, the designation should not hinder road maintenance anywhere, including access across Federal lands. Likewise, the Service concludes potential incremental economic impacts remain very low, as discussed in previous responses to comments, above. In sum, the critical habitat designation does not preclude active management or road maintenance of the lands adjacent to Indian lands, and we find that the commenter did not provide credible information to support consideration of exclusion of additional Federal lands adjacent to Indian land.

*Comment (31):* Commenters requested that we exclude Adaptive Management Areas and Experimental Forests because placing additional constraints on actions in these areas will limit the ability to conduct scientifically credible work and address wildfire risks.

*Our response:* The opportunities for scientific research and management experimentation associated with experimental forests and Adaptive Management Areas lend themselves to putting into practice the types of timber management the critical habitat rule recommends, thereby serving as a type of field laboratory to try new and alternative approaches that could prove useful in applying those approaches across a greater landscape. Additionally, there is enough flexibility built into the recommendations in the critical habitat rule that experimental forests and Adaptive Management Areas can continue to conduct their valuable work

on their landscapes. We have completed section 7 consultations on actions carried out on Adaptive Management Areas since the 2012 designation of critical habitat that may affect that habitat and found those actions to be consistent with the Act. Additionally, our evaluation in the 2012 critical habitat rule found that the seven experimental forests included in the designation contain high-value occupied habitat for northern spotted owls within their borders. In many cases, the habitat in these experimental forests represents essentially an island of high-value habitat in a larger landscape of relatively low-value habitat; this is especially true in the Coast Range, a region where peer reviewers particularly noted a need for greater connectivity and preservation of any remaining high-quality habitat. See our response to *Comment (27a)* regarding perceived conflicts between the critical habitat designation and active forest management that addresses the risk of wildfire.

*Comment (32):* Commenters asserted that because the barred owl is now widespread and competes with the northern spotted owl, the designated critical habitat lacks the biological features necessary to restore northern spotted owl breeding populations and recover the subspecies and thus should be excluded. Commenters stated that it is unlikely the Service will have the financial and logistical capacity to effectively manage barred owls on all designated critical habitat.

*Our response:* Although Franklin *et al.* (2021, p. 15) found that barred owl competition is the dominant negative effect on northern spotted owl populations, the authors recognized that habitat loss due to harvest, wildfire, and climatic changes may also continue to negatively affect populations. They emphasized the importance of addressing barred owl management and maintaining habitat across the range of the northern spotted owl regardless of current occupancy to provide areas for recolonization and dispersal (Franklin *et al.* 2021, p. 18). Although the January Exclusions Rule emphasized barred owls as the primary threat to the northern spotted owl, addressing both the threat of competition with barred owls and habitat loss is important to the survival and recovery of the northern spotted owl. The Service is currently developing a barred owl management strategy to help reduce the effect of barred owls on northern spotted owls. But, a successful barred owl management strategy will be possible only if sufficient habitat for the northern

spotted owl remains available for recovery.

Forest conditions that support northern spotted owls remain important even when those areas are also occupied by barred owls. Some northern spotted owls continue to occupy their traditional sites even in areas of dense barred owl populations, although they may modify their use of the area and expand their territories. Therefore, habitat remains vital to support these individuals.

The essential physical or biological features in terms of forest condition remain present even if not being used currently by territorial spotted owls because of the presence of barred owls. See the primary constituent elements listed in the December 4, 2012, revised critical habitat rule for a description of the physical or biological features that are essential to the conservation of the northern spotted owl (77 FR 71876; p. 72051).

Concerning the capacity to effectively manage barred owls, management actions will likely be shared by several Federal agencies as all Federal agencies have a responsibility in the recovery of listed species. Thus, any barred owl management will not be dependent solely on the financial and logistical capacity of the Service alone.

#### **Comments on July 20, 2021, Proposed Rule**

We have incorporated comments received on the July 20, 2021, proposed rule in the preceding comments sections where comments were similar to comments received on the August 20, 2020, proposed rule. In this section, we summarize and respond to the remaining comments received on the July 20, 2021, proposed rule.

*Comment (33):* Conservation groups commented that we should not exclude the Harvest Land Base lands given that recent annual demography reports indicate that management under the 2016 RMPs is not reversing the downward trend in northern spotted owl populations and that the RMPs have yet to demonstrate results.

*Our response:* The Harvest Land Base lands represent a very small fraction of the total designated critical habitat (approximately two percent), and the harvest that is anticipated to occur on these lands is expected to have a relatively small incremental impact on long-term northern spotted owl recovery for several reasons. In the near term, direct take of spotted owls will be minimized or avoided. In the long term, harvest on these lands will be meted out over several decades. During this timeframe we expect habitat conditions

on BLM's reserve lands to continue improving through natural recruitment and recovery. Thus, at a landscape level and over the decades, the remaining critical habitat on BLM and neighboring USFS lands will provide for spotted owl recovery.

In our July 20, 2021, proposed rule, we stated that “[m]onitoring 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).” Effectiveness monitoring under the RMPs occurs every 5 years in conjunction with the effectiveness monitoring program established under the NWFP. The most recent demographic meta-analysis (Franklin *et al.* 2021) provided trend data for northern spotted owl populations from 1993 through 2018 (see the results summarized in *Comment (13)*), and the effectiveness monitoring report for northern spotted owl habitat is due to be released later this year. Thus, Franklin *et al.* (2021) captures only 2 years of RMP implementation, and this is not a meaningful timeframe over which to evaluate the effectiveness of the BLM's implementation of the RMPs. We established benchmarks in our biological opinion on the RMPs for evaluating effectiveness of their program; these benchmarks are based on three triggers for reinitiation of the consultation on the RMPs: If a barred owl management strategy and monitoring program does not begin on BLM lands by year 8 of the RMP implementation; if decadal limits for northern spotted owl territorial abandonment are exceeded; and if certain benchmarks for the rate of northern spotted owl population change on BLM lands are not met. The first benchmark for evaluating whether the plan has met the population change trigger will occur in 2029 when the first demographic analysis will be completed following implementation of a barred owl management strategy.

*Comment (34)*: Conservation groups commented that we should not exclude the Harvest Land Base because critical habitat benefits the northern spotted owl as an essential tool for recovery that mandates a higher habitat conservation standard in section 7 consultation and provides guidance on the location of areas that are essential to the conservation of the northern spotted owl. They provided scientific literature (Taylor *et al.* 2005) that supports the effectiveness of critical habitat and found that species with a critical habitat

designation are less likely to decline and more likely to recover than species without a critical habitat designation.

*Our response*: We agree with the commenters that critical habitat provides these benefits to the northern spotted owl, and we have considered these benefits in our weighing of the benefits of inclusion versus the benefits of exclusion of the Harvest Land Base lands. See our reconsideration of the weighing of these benefits and our extinction analysis in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (35)*: Conservation groups, in expressing opposition to our exclusion of the Harvest Land Base lands, commented that our 2016 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act directs the Service to prioritize the designation of critical habitat on Federal lands because of the affirmative conservation mandate Federal agencies have to utilize their authorities in furtherance of the purposes of the Act and to insure that any actions they authorize, fund, or carry out do not destroy or adversely modify critical habitat; and that exclusions from critical habitat are to focus on non-Federal lands. Commenters further stated that the Service failed to explain how these exclusions will not result in a significant increase in the risk of extinction.

*Our response*: Although the 2012 critical habitat designation preceded the 2016 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, we prioritized Federal lands in our designation: 97 percent of the 9.5 million acres (3.8 million hectares) designated are on Federal lands. The policy states that we would focus our exclusions on non-Federal land, but the policy did not preclude us from excluding Federal lands. As we stated in response to a comment on this issue in the 2016 policy, in most cases the benefits of inclusion will outweigh those of exclusion on Federal lands but there may be cases where that is not the case and exclusions of Federal land would be the outcome of the exclusion analysis. In any case, in adopting new regulations regarding section 4(b)(2) in December of 2020, we eliminated the presumption that we will not generally exclude Federal lands from critical habitat, and added provisions in support of considering such exclusions under 50 CFR 17.90(d)(1)(iv). See 85 FR 55398 at 55402 and 85 FR 82376 at 82382. Although the Department of Interior proposed to rescind those regulations on October 27, 2021 (86 FR 59346), they remain in effect until the

Service takes final action on the proposal. We provide our exclusion analysis and analysis of the risk of extinction regarding exclusion of the Harvest Land Base lands in our Consideration of Impacts Under Section 4(b)(2) of the Act.

It is important to note that, in proposing this exclusion, the Service considered the very specific circumstances of the 2016 RMPs developed by BLM pursuant to its authorities and responsibilities, including under the O&C Act, as well as our commitment to consider exclusions in the settlement of litigation regarding the 2012 critical habitat rule. Therefore, the Service does not consider the exclusion of Federal lands in this final rule to set precedent for other Federal lands.

*Comment (36)*: Conservation groups commented that the Service did not support the conclusion that the Harvest Land Base lands provide a relatively low level of short-term conservation value that is not similar or equal to that of the Late-Successional Reserve and that section 7 consultation would provide no incremental conservation benefit over what the RMPs themselves provide. Additionally, commenters suggested that our statement that maintaining critical habitat in the Harvest Land Base sends a confusing message to the public is arbitrary and capricious because Congress did not intend for the Service to ignore the purpose of the Act to avoid confusion.

*Our response*: The Harvest Land Base land use allocation is where the majority of BLM's programmed timber harvest will occur. Harvest in this area is meted out over time and minimized in other land-use allocations in order to minimize near-term negative effects to northern spotted owl habitat in the Harvest Land Base as habitat continues to further develop late-successional characteristics in the reserve land use allocations. Our analysis conducted for the section 7 consultation for the 2016 RMPs recognized that this land-use allocation, contrary to the reserves, was not intended to be relied upon for demographic support of northern spotted owls (FWS 2016, p. 553). Based on that, we reconsidered the relative value of including them in a critical habitat designation. See also our response to *Comment (19)*. As a result, we do not agree with the commenter's assertion that our discussion about clarifying public understanding about the difference in conservation value provided by the Harvest Land Base versus the reserves is arbitrary and capricious.

*Comment (37):* Commenters stated that the Service failed to give weight to economic impacts in our section 4(b)(2) analysis because we stated that we are not excluding areas due to economic impacts.

*Our response:* Our July 20, 2021, proposed rule stated, “we are not now proposing to exclude any areas solely on the basis of economic impacts.” This statement was referring to the proposed exclusions of the BLM’s Harvest Land Base and lands transferred to be held in trust for the Tribes. However, we requested comments on 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. We have considered those impacts in Consideration of Impacts Under Section 4(b)(2) of the Act.

*Comment (38):* Commenters asserted that exclusions to critical habitat would eliminate the need for land management agencies to improve habitat.

*Our response:* The BLM will continue to manage the Harvest Land Base according to the management direction in their RMPs. See our response to *Comments 16–17* above for a discussion of how the RMPs are consistent with the recovery of the northern spotted owl and provide needed habitat management.

*Comment (39):* A commenter requested that we not exclude specific areas of Harvest Land Base lands in critical habitat Unit 2 that are adjacent to or near a particular grove of old-growth trees in Late-Successional Reserve stating that any harvest in that area would damage the grove.

*Our response:* We appreciate the commenter’s commitment to the conservation of this particular forest grove. However, as stated earlier, the Harvest Land Base will continue to be managed according to the management direction of the BLM’s RMPs even if excluded from critical habitat. We encourage the commenter to provide public comment through the BLM’s NEPA process if forest management projects are planned for this area.

### Summary of Changes From Proposed Rule

This final rule incorporates changes to our proposed rule based on the comments and information we received, as discussed above in the Summary of Comments and Recommendations. All changes made were included accordingly in the document, tables, and maps. As a result, the final designation of critical habitat reflects

the following changes from the July 20, 2021, proposed rule (86 FR 38246):

1. We corrected acreage calculation errors and considered updated boundaries for Harvest Land Base lands from the BLM in the acreages of lands proposed for exclusion in Subunits NCO 4, NCO 5, ORC 1, ORC 2, ORC 3, ORC 5, ORC 6, WCS 1, WCS 2, WCS 3, WCS 4, WCS 5, WCS 6, ECS 1, ECS 2, K LW 1, K LW 2, K LW 3, K LW 4, K LW 5, K LE 1, K LE 2, K LE 3, K LE 4, K LE 5, K LE 6. As a result, the exclusions in this final rule are 359 acres (145 hectares) more than what was included in the proposed rule.

2. We corrected the coordinates or plot points from which the maps were generated. The information is available at <https://www.regulations.gov> under Docket No. FWS–R1–ES–2020–0050, and from the Oregon Fish and Wildlife Office website at <https://www.fws.gov/oregon>.

### Withdrawal of the January Exclusions Rule

In our March 1, 2021, final rule (86 FR 11892) extending the effective date of the January Exclusions Rule, we acknowledged that the additional areas excluded in that final rule (more than 3.2 million acres (1.3 million hectares)) and the rationale for the additional exclusions were not presented to the public for notice and comment. We noted that several members of Congress expressed concerns regarding the additional exclusions, among other concerns, which they identified in a February 2, 2021, letter to the Inspector General of the Department of the Interior seeking review of the January 15, 2021, final rule. We also noted we received at least two notices of intent to sue from interested parties regarding allegations of procedural defects, among other potential defects, with respect to our rulemaking for the final critical habitat exclusions.

We received a number of comments in response to our March 1, 2021, final rule wherein we invited public comment on: (1) Any issues or concerns about whether the rulemaking process was procedurally adequate; (2) whether the Secretary’s conclusions and analyses in the January Exclusions Rule were consistent with the law, and whether the Secretary properly exercised his discretion under section 4(b)(2) of the Act in excluding the areas at issue from critical habitat; and (3) whether, and with what supporting rationales, the Service should reconsider, amend, rescind, or allow to go into effect the January Exclusions Rule. Commenters identified potential defects in the January Exclusions Rule—both

procedural and substantive. We summarized these comments in our April 30, 2021, final rule delaying the effective date of the January Exclusions Rule until December 15, 2021 (86 FR 22876).

Based on these comments and concerns, and comments we received on our July 20, 2021, proposed rule (86 FR 38246) (see Summary of Comments and Recommendations section above), we reconsidered the rationale and justification for the large exclusion of critical habitat identified in the January Exclusions Rule. As a result, the Service concludes that there was insufficient rationale and justification to support the exclusion of approximately 3,472,064 acres (1,405,094 hectares) from critical habitat for the northern spotted owl, an exclusion that removed an additional approximately 3.2 million acres (1.3 million hectares) from designation as compared with the August 2020 proposed rule. Our reexamination of the January Exclusions Rule identified defects and shortcomings, which we summarize in the following paragraphs. We received additional comments addressing these asserted defects and shortcomings in response to our July 20, 2021, proposed rule, and addressed those above, see responses to *Comments A–G*.

We provided an insufficient opportunity for the public to review and comment on the changes made from the proposed to final exclusions in the January Exclusions Rule, which would have necessitated additional notice and an opportunity to comment. The January Exclusions Rule, had it gone into effect, would have excluded substantially more acres (36 percent of designated critical habitat versus the 2 percent proposed in the August 11, 2020, proposed revised rule). The January Exclusions Rule also excluded critical habitat in a much broader geographic area than proposed, including adding exclusions in Washington and California when only exclusions in Oregon had been included in the proposed rule. The January Exclusions Rule also included new rationales for the exclusions that were not identified in the August 11, 2020, proposed revised critical habitat rule (85 FR 48487). These included generalized assumptions about the economic impact of both the listing of the northern spotted owl and the subsequent designation of areas as critical habitat; the stability of local economies and protection of the local custom and culture of counties; the presumption that exclusions would increase timber harvest and result in longer cycles between harvest, that timber harvest

designs would benefit the northern spotted owl, and that the increased harvest would reduce the risk of wildfire; and that northern spotted owls may use areas that have been harvested if some forest structure was retained. The public did not have an opportunity to review or comment on these new rationales. Further, the public did not have an opportunity to comment on the expanded critical habitat exclusions made in the January Exclusions Rule in light of the information included in the December 15, 2020, finding, with supporting species report (85 FR 81144, FWS 2020), that the northern spotted owl warrants reclassification to endangered status that was published just 3 weeks before the January Exclusions Rule.

Additionally, the January Exclusions Rule excluded all of the O&C lands managed by BLM and USFS including those allocated to reserves. In our January Exclusions Rule, we failed to reconcile our prior finding that areas designated on O&C lands were essential to the conservation of the subspecies. The Service previously concluded in our 2012 critical habitat rule (77 FR 71876) that the O&C lands and portions of other lands managed as “matrix” lands for timber production significantly contribute to the conservation of the northern spotted owl, that recovery of the owl cannot be attained without the O&C lands, and that our analysis showed that not including some of these O&C lands in the critical habitat network resulted in a significant increase in the risk of extinction.

In response to our March 1, 2021, rule (86 FR 11892) extending the effective date of the January Exclusions Rule, some commenters stated that we provided sufficient notice and an opportunity for the public to be aware of the potential for the expansion of the exclusions from the proposed to final rules. Industry groups asserted that the August 11, 2020, proposed revised critical habitat rule (85 FR 48487) made clear that additional exclusions were being considered, in part, based on our request for information on additional exclusions we should consider (AFRC 2021, pp. 5–6). In contrast, many other commenters objected to a lack of notice and opportunity to comment on the significant changes. These included comments from the newly impacted State fish and wildlife agencies (Washington Department of Fish and Wildlife 2021, California Department of Fish and Wildlife 2021). In addition, the exclusion of all “matrix” lands managed by the USFS amounted to over 2 million acres in areas of the National Forests in

three States, with limited analysis of the effects of such exclusions on the conservation of the northern spotted owl and in hindsight, minimal supporting rationale. If we had decided to implement the January Exclusions Rule, in order to ensure a robust opportunity for public input on the changes, we would have erred on the side of transparency and would have opened a public comment period on that rule and considered that feedback before deciding to implement the rule. Based on our review, we proposed instead to withdraw the January Exclusions Rule, prior to its implementation, due to a number of concerns that the exclusions would be inconsistent with the conservation purposes of the Act, which we summarize below and affirm in this final rule.

First, the large additional exclusions made in the January Exclusions Rule were premised on inaccurate assumptions about the status of the owl and its habitat needs. The large additional exclusions were based in part on an assumption that barred owl control is the primary requirement for northern spotted owl recovery, when in fact the best scientific data indicate that protecting late-successional habitat also remains critical for the conservation of the spotted owl as well (FWS 2020, p. 83; Franklin *et al.* 2021, p. 18). Although they require different management approaches, both actions are fundamental to the spotted owl’s recovery.

In addition, in concluding that the exclusions of the January Exclusions Rule will not result in the extinction of the northern spotted owl (a finding necessary for any section 4(b)(2) exclusions), the January Exclusions Rule relied, in part, upon a large-scale barred owl removal program that is not yet in place. The Service is in the process of developing a barred owl management strategy, but the specific features of any such program and where they may be applied are yet to be determined, and the Service will engage public review and comment before deciding. As discussed above, our experimental removal of barred owls showed a strong, positive effect of that removal on the survival of spotted owls, but considerable economic, logistical, social, and regulatory issues remain before large-scale non-experimental removal of barred owls could occur.

Since completion of the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011), the Service has worked closely with Federal and State land managers to minimize or avoid impacts to extant spotted owls due to

timber harvest, while at the same time carrying out the barred owl removal experiment (Wiens *et al.* 2021) and initiating development of a barred owl management program. This approach has allowed for timber harvest to proceed under State and Federal land management plans (*e.g.*, BLM’s 2016 Resource Management Plans in western Oregon (BLM RMPs)) while minimizing impacts to long-term spotted owl recovery prospects. Potential timber harvest in the areas that would be excluded from critical habitat in the January Exclusions Rule would far exceed the level of impact to spotted owls that the Service anticipated in those land management plans. Thus, it is premature to rely solely on an anticipated barred owl management program to offset the potential loss of millions of acres of spotted owl critical habitat over time or to conclude that the loss would not result in the extinction of the subspecies.

Second, the January Exclusions Rule undermined the biological redundancy of the critical habitat network by excluding large areas of critical habitat across the range of the northern spotted owl. The 2012 critical habitat designation (77 FR 71876) increased in size compared to previous designations, in part to account for the likelihood of habitat loss due to more frequent wildfires. This increase provided for biological redundancy in northern spotted owl populations and habitat by maintaining sufficient habitat on a landscape level in areas prone to frequent natural disturbances, such as the drier, fire-prone regions of its range (Noss *et al.* 2006, p. 484; Thomas *et al.* 2006, p. 285; Kennedy and Wimberly 2009, p. 565). We will continue to monitor habitat impacts due to wildfire and other disturbances and evaluate the integrity of the spotted owl’s critical habitat network.

As stated earlier, in the development of habitat conservation networks generally, the intent of spatial redundancy is to increase the likelihood that the network and populations can sustain habitat losses by inclusion of multiple populations unlikely to be affected by a single disturbance event. This redundancy is essential to the conservation of the northern spotted owl because disturbance events such as fire can potentially affect large areas of habitat with near-term negative consequences for northern spotted owls. This redundancy can also allow for a relatively small amount of human-caused disturbance such as timber harvest without jeopardizing the subspecies or adversely modifying its critical habitat, provided that

disturbance is carefully planned and evaluated within the appropriate temporal and spatial context such as projects consistent with BLM's 2016 RMPs. The evaluation process used by the Service in our 2012 final critical habitat rule (77 FR 71876) addresses spatial redundancy at two scales: By (1) making critical habitat subunits large enough to support multiple groups of owl sites; and (2) distributing multiple critical habitat subunits within a single geographic region. This approach was particularly the case in the fire-prone Klamath and Eastern Cascades portions of the range. This increased habitat redundancy also provides for the conservation of northern spotted owls as they face growing competition from barred owls.

The January Exclusions Rule also failed to consider the needs for connectivity between critical habitat units, particularly in southern Oregon where dispersal habitat is already limited in areas that were excluded in the January Exclusions Rule. Successful dispersal of northern spotted owls is essential to maintaining genetic and demographic connections among populations across the range of the subspecies (FWS 2020, p. 24). As stated previously, some critical habitat subunits that were designated to provide this support were reduced in the January Exclusions Rule by up to 90 percent. If these exclusions were implemented and management actions or plans were amended to allow for increased harvest at the scale of these exclusions, these subunits would no longer provide the demographic support for which they were designated. Again, as described above, the Service anticipates and plans for some amount of human-caused and natural disturbance in these critical habitat units, meted out over space and time in a manner that supports recovery over the long term. The January Exclusions Rule could facilitate timber harvest that could greatly accelerate those impacts well beyond what was anticipated in the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and various land management plans.

The January Exclusions Rule also overstates the conservation value of areas not designated as critical habitat for the owl on other Federal lands, such as national parks and designated wilderness areas. These Federal lands do contain habitat for the northern spotted owl and are generally protected from proposed Federal activities that would result in significant removal of that habitat, and so they do provide areas that can serve as refugia for northern spotted owls. These protected

areas, however, are relatively small and widely dispersed across the range of the owl. As we noted above, these areas are also typically high-elevation lands, and it is unlikely that the owl populations would be viable if their habitat were restricted to these areas (55 FR 26114, June 26, 1990; p. 26177). They are disjoint from one another and cannot be relied on to sustain the subspecies unless they are part of and connected to a wider reserve network as provided by the 2012 critical habitat designation (77 FR 71876, December 4, 2012). As discussed above, that network would have been greatly diminished and fragmented by the January Exclusions Rule if implemented. See also our response to *Comment (Cii)*.

Third, under section 4(b)(2) of the Act, the Secretary cannot exclude areas from critical habitat if he or she finds, "based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." The January Exclusions Rule relied upon a determination that the exclusions will not result in the extinction of the northern spotted owl based in part on a faulty interpretation of the science relevant to spotted owl conservation. Specifically, the then-Director in her memo to the Secretary of January 7, 2021 (FWS 2021a) overestimated the probability that the northern spotted owl population would persist into the foreseeable future if a large portion of critical habitat was removed and subsequent timber harvest were to occur on those lands. The then-Director excluded 3,472,064 acres (1,405,094 hectares) from the total of 9,577,342 acres (3,875,812 hectares) designated as critical habitat in 2012, or 36 percent of the total. Most of this exclusion is concentrated in Oregon and, due to its geographic location and habitat quality, it represents a significant portion of the subspecies' most important remaining habitat. The O&C lands, for example, encompass 37 percent of the lands that were covered under the NWFP in Oregon and provide important habitat for reproduction, connectivity, and survival in the Coast Range and portions of the Klamath Basin and provide connectivity through the Coast Range and between the Coast Range and western Cascades (Thomas *et al.* 1990, p. 382, BLM 2016c, p. 17).

The best scientific information indicates that the northern spotted owl population is in a precipitous decline, and the Service recently concluded that the subspecies warranted reclassification to endangered status under the Act (85 FR 81144, December

15, 2020). The subspecies is essentially extirpated from British Columbia, rapidly declining to near extirpation in Washington and parts of Oregon, and is in the earlier stages of similar declines in the rest of its range. Northern spotted owls are declining at a rate of 5.3 percent across their range, and populations in Oregon and Washington have declined by over 50 percent, with some declining by more than 75 percent, since 1995 (Franklin *et al.* 2021). As the statutory definition of "endangered" states, the subspecies is in "danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(5)(A)(6). Significant changes to habitat conservation of the type that were assumed by the January Exclusions Rule would greatly exacerbate this decline by working synergistically with the impacts from barred owl.

The Director's memo failed to recognize that (1) spotted owl populations are declining precipitously due to a combination of historical habitat loss and more recent competition with the barred owl; and (2) the only way to arrest this decline and have a high probability of preventing extinction (in any timeframe) is to both manage the barred owl threat *and* conserve adequate amounts of high-quality habitat distributed across the range in a pattern that provides acceptable levels of connectivity as well as protection from stochastic events. This conclusion is supported by the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011), as well as more recent peer-reviewed and published scientific research (Weins *et al.* 2021, Franklin *et al.* 2021). Franklin *et al.* (2021, p. 18) emphasizes the importance of maintaining northern spotted owl habitat, regardless of occupancy, in light of competition from barred owls to provide areas for recolonization and connectivity for dispersing northern spotted owls.

The 2012 critical habitat designation—including the relatively minor exclusions (approximately two percent) proposed here on BLM land in the Harvest Land Base—preserves the habitat conservation portion of this goal. The much larger exclusion of 36 percent proposed in the January Exclusions Rule thwarts this goal, given its large size and its disproportionate concentration in high-quality habitat in Oregon. The Service finds that the January Exclusions Rule would have resulted in the northern spotted owl's extinction even though spotted owls are long-lived and are widely dispersed over a large geographic range. Individual spotted owls can live up to 20 years, and they



are widely distributed at low densities across three States. Extinction due to removal of large areas of critical habitat would not be immediate, but it is still a reasonable scientific certainty. For example, if the bulk of the northern spotted owl's habitat were to be removed on Federal lands except for the portion that exists in national parks, one could reasonably conclude the subspecies would not go extinct immediately, say within 1 to 5 years. Individual northern spotted owls remaining in those parks scattered across the range might persist for one or a few generations (that is, greater than 20 years). However, the subspecies is still likely to go extinct over a longer time period in this scenario. Basic conservation biology principles and metapopulation dynamics predict that those remnant and now isolated northern spotted owl subpopulations would likely die off without regular genetic and demographic interaction with northern spotted owls from neighboring subpopulations.

Forces working against the persistence of these isolated subpopulations include genetic inbreeding and catastrophic stochastic events such as wildfire. Therefore, it is a reasonable scientific conclusion that the subspecies would go extinct under such conditions, but this extinction process will occur over decades as these forces manifest themselves and as long-lived individuals die off. The extinction would not occur immediately, as it might with rarer and more short-lived species, but eventual extinction remains a scientifically predictable outcome with a high likelihood of certainty. Yet by the time it becomes apparent that extinction were imminent, it would likely be too late to provide sufficient protected habitat. This was one of the issues that led to the listing of the northern spotted owl in the first place—the loss of old-growth habitat at such a rapid pace that it was predicted to disappear from federally managed forested habitats within several decades (55 FR 26114, June 26, 1990; p. 26175). The Act requires us to use the best available science when applying the discretion afforded in section 4(b)(2), and this includes making a reasonable and defensible scientific interpretation of extinction risk that is relevant to the species under consideration. In this final rule, we correct the previous misapplication of section 4(b)(2) extinction risk analysis, which would not meet the Act's purpose of conserving listed species and the ecosystems on which they depend.

In sum, substantial issues were raised that the January Exclusions Rule would

preclude the conservation of the northern spotted owl, a subspecies we recently found warrants reclassifying as an endangered species in danger of extinction throughout its range (85 FR 81144, December 15, 2020). Upon review and reconsideration as described above, the Service withdraws the January Exclusions Rule and instead excludes 204,294 acres (82,675 hectares) within 15 counties in Oregon as explained further below. This relatively small exclusion represents only 2 percent of the total designated critical habitat, in contrast to the 36 percent proposed in the January Exclusions Rule, and it is consistent with the long-term recovery and conservation goals of the northern spotted owl.

### 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). Our regulation at 50 CFR 424.02 also now defines the term "habitat" for the purposes of designating critical habitat only, as the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species. This new definition of "habitat" applies by its terms to new critical habitat designations only (see 85 FR 81411, December 16, 2020), and since this final rule excludes areas from critical habitat (rather than designating them) the new regulation does not apply to this rule. Nonetheless, given the

number of comments received asserting that some areas we designated as critical habitat in 2012 are not "habitat" and seeking exclusions from the designation pursuant to section 4(b)(2) on that basis, we take this opportunity to review the existing critical habitat designation for conformance with the new regulatory definition. In summary, as explained further below, all the areas within the designation of critical habitat for the northern spotted owl are within the geographical area occupied by the species at the time of listing and encompass forested areas with specific characteristics which are the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of the species.

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. Under our implementing regulations, this means the Federal action cannot directly or indirectly appreciably diminish the value of critical habitat as a whole for the conservation of the listed species, see 50 CFR 402.02, definition of "destruction or adverse modification." 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 is not required to abandon the proposed activity, nor to restore or recover the species; instead, the Federal action agency must implement “reasonable and prudent alternatives” to avoid destruction or adverse modification of critical habitat, or obtain an exemption from the Act’s prohibitions under the relevant implementing regulations (see 50 CFR part 451).

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, critical habitat designations identify, to the extent known and 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 specific areas occupied by the species at the time of listing, we focus on the 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 may 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 only consider unoccupied areas to be essential where 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 forested landscape, and the distribution of known owl sites at the time of listing. In addition, we noted that parts of most units and subunits contain a forested mosaic that includes younger forests that may not have been occupied at the time of listing. Even though we had reasonable certainty based on modeling that such areas were occupied at the time of listing, because we did not have complete survey data, we also evaluated these areas under the “unoccupied” standard, and found they were essential to the conservation of the species (77 FR 71876; p. 71971). Because the forest habitat is dynamic, we also noted the value of the younger forests in being the source of continued growth to develop more fully into the high-quality habitat preferred by owls for nesting, roosting, and foraging (77 FR 71876; p. 71971).

These “younger forest” stands that are part of the forest mosaic within the critical habitat units may not contain all of the high-quality characteristics of the habitat preferred by owls for nesting and roosting, but they contain the resources and conditions necessary to support one or more life processes and are, thus, “habitat” for the northern spotted owl. 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. 72051–72052, for a full description of the PBFs). 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 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 (PBFs 2, 3, or 4) (77 FR 71876, December 4, 2012, p. 71908). The younger forest areas are habitat for the owl and were included in the designation to provide, at a minimum, connectivity (physical and biological feature (PBF) (4)-dispersal habitat) between occupied areas, room for population growth, and the ability to provide sufficient habitat on the landscape for the owl in the face of natural disturbance regimes (*e.g.*, fire). In some portions of the owl’s range, younger forests can provide for additional life processes, including nesting if they contain some structural features of older forests, as well as foraging depending on prey availability (77 FR 71876; p. 71905).

Some continue to assert that a few sentences in the 2012 critical habitat rule, or in memoranda developed in support of the economic analysis are proof that the Service inappropriately designated “non-habitat” in the 2012 rule. We acknowledge that we may have been imprecise in our language in places in the 2012 critical habitat preamble, and/or in other places in the large rulemaking record, but as we explain and reaffirm here, the designated critical habitat for the northern spotted owl as described in the regulation itself at 50 CFR 17.95(b) (the entry for “Northern Spotted Owl (*Strix occidentalis caurina*)”) is all habitat for the northern spotted owl. In particular, the memoranda developed for the FEA was never intended to address the scientific question of whether particular areas function as current habitat for the northern spotted owl. Rather, as explained more fully below, for purposes of estimating the incremental economic impact of the designation over those caused by the listing of the species as threatened, the FEA identified areas of younger forest in the proposed designation that might not be currently occupied by the northern spotted owl. In such areas, Federal land managers might determine that proposed projects may result in “no effect” on northern spotted owls and are thereby the projects would not be subject to an ESA Section 7 consultation premised on federal agencies’ obligation to avoid jeopardy to the species. The economic-impact assumption was that projects in those areas therefore might only be subject to the additional regulatory cost of an ESA Section 7 consultation if designated as critical habitat. This was a simplifying and conservative

assumption from the standpoint of the economic analysis, but is interpreted by some as meaning that the Service determined that these areas of younger forest are not spotted owl habitat. That interpretation is incorrect, for all of the reasons explained above and below.

While all of the critical habitat units designated consist of habitat for the owl, some areas within these units and subunits will at times not be used by individual northern spotted owls due to a variety of reasons, whether they may be human activity (e.g., timber harvest), catastrophic wildfire, displacement by competition with the nonnative barred owl, or due to natural and localized population fluctuations. This does not mean, however, that the areas are no longer designated critical habitat.

Individual owls live for over twenty years, and during these two decades an individual owl may experience multiple disturbance events (e.g., a fire or a windstorm) within its large home range that renders portions of this range temporarily reduced in habitat quality. A catastrophically burned area of critical habitat, for example, may affect multiple owl home ranges and create diminished habitat conditions (e.g., reduced cover or nesting structure) that might not be used by the owl for all life functions in the near term (Jones *et al.* 2020, entire). But even with reduced usage or temporary avoidance many burned areas still provide some habitat value such as foraging or dispersal, and this value tends to rebound as the forest conditions naturally begin recovering soon after the fire. We take this ecological process into account in reviewing federal actions during the section 7 consultation process because even severely burned forest habitat often retains patchy habitat clumps within the burned area, and the burned areas regrow over time. Although there are multiple ecological factors that influence how quickly forests recover after a fire, such as whether the landscape is in the drier or moister portions of the range, this recovery usually begins immediately after the fire. The quality of the habitat—and its relative value to spotted owl conservation—increases over time as forest succession occurs. In summary, ecosystems are not static, and a critical habitat designation must incorporate this dynamism of the owl's habitat into its design if the designation is to provide for the conservation of the species.

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 are not and 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; p. 72052). In our experience, Federal agencies undertaking section 7 consultation with us and evaluating impacts to designated critical habitat do not have difficulty discerning the non-habitat that we narratively excluded, nor do they have difficulty discerning the physical and biological characteristics that qualify stands as critical habitat. In any case, if anyone seeking to apply the critical habitat rule to any particular areas has questions about how to apply the rule, the Service is available to provide technical assistance.

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 we are determining which areas should be designated as critical habitat, our primary source of information is generally the information 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. We recognize that critical habitat designated at a particular point in time may not include all of the habitat 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 subspecies. 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 exclusion of 204,294 acres (82,675 hectares) within 15 counties in Oregon as described in this document does not change the December 4, 2012, final rule currently in effect with two exceptions: The only sections of the rule that published at 77 FR 71876 (December 4, 2012) that would change with this revision are table 8 in the Exclusions discussion (pp. 71948–71949), the subunit maps related to the exclusions (pp. 72057–72058, 72062, 72065–72067), and the index map of Oregon (p. 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; 85 FR 81411, December 16, 2020; 85 FR 82376, December 18, 2020). Our December 4,

2012, designation of critical habitat for the northern spotted owl and the revisions in this rule are in accordance with the requirements of the revised critical habitat regulations, 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 subspecies, and they may require special

management considerations or protection.

**Final Revised Critical Habitat Designation**

Consistent with the standards of the Act and our regulations, 9,373,676 acres (3,793,389 hectares) are now identified in 11 units and 60 subunits as meeting the definition of critical habitat for the northern spotted owl. The 11 units are: (1) North Coast Olympics, (2) Oregon Coast Ranges, (3) Redwood Coast, (4) West Cascades North, (5) West Cascades Central, (6) West Cascades South, (7) East Cascades North, (8) East Cascades South, (9) Klamath West, (10) Klamath East, and (11) Interior California Coast Ranges. Land ownership of the designated critical habitat includes

Federal, State, and local government lands. No Indian or private lands were included in the critical habitat designation in 2012; lands formerly managed by the BLM that were designated as critical habitat subsequently were transferred into trust for two Tribes, which meant that subsequently these Indian lands were within the critical habitat designation; we have excluded those lands with this final rule. The approximate area of each subunit and excluded area within critical habitat subunits is shown in table 1. Only the units and subunits that we have revised in this rule are described below; see the 2012 critical habitat rule for descriptions of the units and subunits that remain unchanged.

TABLE 1—AREAS EXCLUDED, BY CRITICAL HABITAT UNIT

Unit	Specific area	Areas meeting the definition of critical habitat, in acres (hectares) <sup>1</sup>	Areas excluded, in acres (hectares)	Rationale for exclusion
1	NCO 4	124,124 (50,231)	1,838 (744)	BLM Harvest Land Base.
1	NCO 5	198,320 (80,258)	8,482 (3,433)	BLM Harvest Land Base.
2	ORC 1	110,580 (44,750)	1,279 (518)	BLM Harvest Land Base.
2	ORC 2	261,220 (105,712)	7,900 (3,197)	BLM Harvest Land Base/Indian Lands.
2	ORC 3	204,036 (82,571)	4,907 (1,986)	BLM Harvest Land Base/Indian Lands.
2	ORC 5	176,276 (71,337)	15,070 (6,099)	BLM Harvest Land Base.
2	ORC 6	81,856 (33,126)	4,188 (1,695)	BLM Harvest Land Base/Indian Lands.
6	WCS 1	92,528 (37,445)	880 (356)	BLM Harvest Land Base.
6	WCS 2	151,319 (61,237)	1,087 (440)	BLM Harvest Land Base.
6	WCS 3	318,161 (128,756)	1,922 (778)	BLM Harvest Land Base.
6	WCS 4	378,744 (153,273)	6 (2)	BLM Harvest Land Base.
6	WCS 5	356,447 (144,249)	2 (1)	BLM Harvest Land Base.
6	WCS 6	99,436 (40,241)	18,120 (7,333)	BLM Harvest Land Base.
8	ECS 1	125,473 (50,777)	16,458 (6,660)	BLM Harvest Land Base.
8	ECS 2	66,039 (26,725)	2,379 (963)	BLM Harvest Land Base.
9	KLW 1	147,154 (59,551)	15,316 (6,198)	BLM Harvest Land Base/Indian Lands.
9	KLW 2	149,857 (60,645)	19 (8)	BLM Harvest Land Base.
9	KLW 3	146,005 (59,086)	1,685 (682)	BLM Harvest Land Base.
9	KLW 4	158,710 (64,228)	785 (318)	BLM Harvest Land Base.
9	KLW 5	31,062 (12,571)	<1 (<1)	BLM Harvest Land Base.
10	KLE 1	242,713 (98,223)	30 (12)	BLM Harvest Land Base/Indian Lands.
10	KLE 2	100,374 (40,620)	29,998 (12,140)	BLM Harvest Land Base/Indian Lands.
10	KLE 3	112,709 (45,612)	48,398 (19,586)	BLM Harvest Land Base.
10	KLE 4	255,888 (103,555)	1 (1)	BLM Harvest Land Base.
10	KLE 5	38,222 (15,468)	12,166 (4,923)	BLM Harvest Land Base.
10	KLE 6	167,715 (67,872)	11,376 (4,604)	BLM Harvest Land Base.

<sup>1</sup> Acreages differ slightly from those in 77 FR 71876 due to updated GIS analysis.

This revision excludes from critical habitat areas identified by BLM as allocated to the Harvest Land Base land use in the 2016 RMPs. Under the BLM RMPs, some land-use allocations, such as Riparian Reserve, require identification of features on the ground. The BLM typically determines the location of such features as part of implementing actions and subsequently corrects land-use allocation boundaries consistent with the direction in the RMP. Therefore, some areas within the 2012 critical habitat designation that are

currently mapped as Riparian Reserve in the RMPs are corrected on site-specific review to be mapped as Harvest Land Base. These corrections are expected to be minor in scope and reflect the most accurate information. As such, we assume such corrected acreage in the Harvest Land Base would be excluded by this final rule. The Late-Successional Reserve, where the majority of critical habitat overlaps BLM-managed lands, is not subject to these boundary adjustments.

We used GIS data provided by BLM that identified land use allocations under their 2016 revised RMPs and lands transferred to be held in trust for Tribes under the Western Oregon Tribal Fairness Act to identify areas for exclusion in this final rule (BLM 2021b).

**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 the Secretary 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.

We finalized a new regulation regarding the application of section 4(b)(2) exclusion analyses on December 18, 2020 (85 FR 82376). Although the new regulation superseded our 2016 Policy and prior regulation regarding exclusion analyses, the new regulation “primarily adopts and deepens the provisions contained in the previous policy and rule” (85 FR 82376). By its terms, that new regulation applies to “critical habitat designations or revisions that FWS proposes after the effective date of this rulemaking action.” *Id.* at 82376. As the revision to the 2012 critical habitat designation we finalize here was initially proposed in our proposed rule of August 11, 2020 (85 FR 48487), we could reasonably conclude that the new regulation does not apply to the reproposal we made of the same in July of this year. To avoid any uncertainty, however, we will consider the exclusions pursuant to the new regulation.

Thus, we considered the best information available regarding economic, national security, and other relevant impacts. “Economic impacts” may include, but are not limited to, the economy of a particular area, productivity, jobs, and any opportunity costs arising from the critical habitat designation (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation) as well as possible benefits and transfers (such as outdoor recreation and ecosystem services). “Other relevant impacts” may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), Federal lands, and conservation plans, agreements, or partnerships. We describe below the process that we

undertook for taking into consideration each category of impacts and our analyses of the relevant impacts.

#### *Process for Exercising Discretion To Conduct an Exclusion Analysis*

The Secretary has discretion whether to conduct an exclusion analysis under section 4(b)(2) in accordance with our regulations at 50 CFR 17.90(c). The Secretary will conduct an exclusion analysis when the proponent of excluding a particular area (including but not limited to permittees, lessees, or others with a permit, lease, or contract on federally managed lands) has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area. The Secretary may also otherwise decide to exercise discretion to evaluate any particular area for possible exclusion.

We received requests to exclude many areas within the critical habitat designation for the northern spotted owl. In determining whether we would conduct an exclusion analysis, we first evaluated whether the proponent of those exclusions presented credible information of a meaningful impact supporting benefits of excluding these areas. We found several requests did not meet this standard as described below (similar requests have been grouped into categories).

We received requests from several commenters to exclude younger forests; subunits with greater than 50 percent younger forests; low-quality habitat; stands under 80 years old; habitat-capable lands; areas for dispersal or connectivity; areas occupied by barred owls; parcels of less than 3,000 acres (1,214 hectares); smaller, fragmented parcels; previously burned Late-Successional Reserve; areas that have burned at high severity; and all “uninhabited” lands. All of these requests for exclusion rely on assertions that the areas either do not meet the definition of habitat for the northern spotted owl and must, therefore, not be designated as critical habitat, or that these areas should not be designated because they are currently “unoccupied” by owls. We did not conduct an exclusion analysis for these areas because the requests were based on the assertion that these areas are not habitat or that they cannot be essential to the recovery of the northern spotted owl because they are not currently occupied. These requests are not subject to an exclusion analysis because they are premised on incorrect conclusions regarding whether areas are “habitat” for the northern spotted owl in the first

instance, misapprehend the concept of “occupied at the time of listing” which is the basis for critical habitat designation, or simply seek to re-argue elements of the critical habitat designation in 2012 that were determined in that rulemaking. See also our responses to *Comments (26–28)*. Additionally, the Secretary did not otherwise decide to exercise discretion to evaluate these particular areas for possible exclusion. We note, however, there is some overlap with some of these requests for exclusions and the areas within the O&C lands and USFS matrix lands for which we did conduct an exclusion analysis, below. Our decision to conduct an exclusion analysis on the O&C lands and USFS matrix lands was not based on whether or not they met the definition of habitat, but rather on credible information that a meaningful impact may support benefits of exclusion of those lands.

We received comments seeking exclusions of areas of moderate to high fire risk; fire-prone forests or specific subunits in fire-prone areas; and areas of dry forest in California and the eastern Washington Cascades; and stating that all California lands because the critical habitat designation is asserted to conflict with active forest management designed to reduce the risk of wildfire and lead to subsequent fire suppression costs and reduced revenue. We did not conduct an exclusion analysis for these areas because the requests are based on the assertion that the critical habitat designation impedes active forest management and the asserted costs and lost revenue are based on this misunderstanding.

We find this assertion to be unfounded as described in our responses to *Comments (Civ)* and (27a) and explain how the critical habitat rule encourages and does not conflict with active forest management to reduce the risk of high-severity wildfire. Thus, we find that the commenters have not provided credible information that a meaningful impact may support benefits of excluding these areas. Additionally, the Secretary did not otherwise decide to exercise discretion to evaluate these particular areas for possible exclusion.

We received requests to exclude adaptive management areas and experimental forests based on the assertion that critical habitat places additional constraints on actions in these areas that will limit the ability to conduct scientifically credible work; that they are not suitable habitat due to the age-class of certain stands or as evidenced by a lack of current occupancy; that their designation has economic impacts; and an assertion that

the critical habitat designation conflicts with active forest management designed to reduce the risk of wildfire. We find that the commenter's assertion about constraints due to critical habitat are not credible and find there is enough flexibility built into the recommendations in the critical habitat rule that experimental forests and Adaptive Management Areas can continue to conduct their valuable work on their landscapes. We did not conduct an exclusion analysis for these particular areas because the requests were based on the assertion that these areas are not habitat and that the critical habitat designation impedes active forest management. We do not agree with these assertions as described in our responses to *Comment (31)*. Additionally, commenters did not provide information on economic impacts to these specific areas, and they requested exclusion of these areas in combination with USFS matrix lands but only provided economic impacts related to USFS matrix lands. Therefore, we find the commenters did not provide credible information that a meaningful impact may support benefits of excluding these areas. We have conducted an exclusion analysis of the USFS matrix lands below.

We received requests from Douglas County to exclude several areas, including all USFS and BLM lands; private and State lands; county lands in Oregon; all lands in Douglas County; and BLM lands that are not O&C lands. They asserted various reasons for these requests, including: Reducing government processes ("red tape"), a need to provide management flexibility and ease of administration, economic impacts, and other reasons included in the requests described above. We did not conduct an exclusion analysis for these areas based on government process requirements or ease of administration because the commenters did not provide information pertaining to these areas that there are meaningful impacts related to these issues that may support benefits of excluding these areas. We do not agree with the assertion that the critical habitat designation conflicts with a need to provide management flexibility as described in our responses to *Comments (B-C), (6), (12), (25a), and (27a)*; thus, we did not consider this to be credible information that these are meaningful impacts. We also did not conduct an exclusion analysis for these areas based on economic impacts because we found that Douglas County did not provide economic information for the exclusion requests listed here. Douglas County

also requested exclusion of all O&C lands and USFS matrix lands, and provided information on economic impacts related to unoccupied matrix lands, which we have evaluated in our exclusion analysis for those lands below.

We received requests from Lewis and Skamania Counties, Washington, to exclude the White Pass Ski Area. While the counties provided information pertaining to the economic benefits the ski area provides to the local community, they did not provide information regarding the impact of the critical habitat designation beyond the need to conduct section 7 analyses for critical habitat. No information or evidence was presented to indicate that the critical habitat designation does or will impair the ski area's current operations, nor that it has or will unreasonably restrict any future expansion of the ski area given the small footprint and potential impacts within critical habitat. And, as noted in our response to *Comment (29)*, developed portions of ski areas are functionally excluded from critical habitat although the mapping may overlap some of the ski area footprint. Thus, we did not conduct an exclusion analysis for the ski area because the commenters did not provide credible information that there are meaningful impacts related to critical habitat, beyond the minor administrative or transactional costs to complete section 7 consultation that may support benefits of excluding these areas.

The Secretary conducted exclusion analyses when the proponent of excluding a particular area (including but not limited to permittees, lessees, or others with a permit, lease, or contract on federally managed lands) presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area. These include requests for the exclusion of Indian lands, BLM Harvest Land Base lands, O&C lands and USFS matrix lands, and Douglas County lands. These exclusion analyses are below in Exclusions Based on Other Relevant Impacts.

#### *Process for Consideration of 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). We may also consider the educational benefits of mapping essential habitat for recovery of the listed species, benefits that may result from a designation due to State or Federal laws that may apply to critical habitat, and other benefits such as outdoor recreation or ecosystem services. In situations where economic benefits are relevant, we generally describe two broad categories of benefits of inclusion of particular areas of critical habitat: (1) Those associated with the primary goal of species conservation and recovery, and (2) those that derive from the habitat conservation measures to achieve this primary goal.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in economic benefits through creating or preventing the elimination of jobs, avoiding project delays or impediments that affect community interests, increased public health and safety, reduction of environmental risks (such as increased risk of wildfire or pest and invasive species management), and maintenance or fostering of partnerships that provide existing conservation benefits or may result in future conservation actions. The Secretary can consider the existence of conservation agreements and other land management plans with Federal, State, private, and Tribal entities when making decisions under section 4(b)(2) of the Act. The Secretary may also consider relationships with landowners, voluntary partnerships, and conservation plans, and weigh the implementation and effectiveness of these against that of designation to determine which provides the greatest conservation value to the listed species.

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 need for conservation, including 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.

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. We weigh the benefits of including or excluding particular areas according to the following principles pursuant to 50 CFR 17.90(d):

(1) We analyze and give weight to impacts and benefits consistent with expert or firsthand information in areas outside the scope of the Service's expertise unless we have knowledge or material evidence that rebuts that information. Impacts outside the scope of the Service's expertise include, but are not limited to, nonbiological impacts identified by federally recognized Indian Tribes; State or local governments; and permittees, lessees, or contractor applicants for a permit, lease, or contract on Federal lands.

(2) We analyze and give weight to economic or other relevant impacts relative to the conservation value of the area being considered. We give weight to those benefits in light of the Service's expertise.

(3) When weighing areas covered by conservation plans, agreements, or partnerships that have been authorized by a permit under section 10 of the Act, we consider: Whether the permittee is properly implementing the conservation plan or agreement; whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and whether the conservation plan or agreement 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.

(4) When weighing areas that are covered by conservation plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act, we consider: The degree to which the record supports a conclusion that designation would impair the realization of the benefits

expected from the plan, agreement, or partnership; the extent of public participation in the development of the conservation plan; the degree to which agency review and required determinations have been completed; whether NEPA reviews or similar reviews occurred, and the nature of any such reviews; the demonstrated implementation and success of the chosen mechanism; the degree to which the plan or agreement provides for the conservation of the physical or biological features that are essential to the conservation of the species; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, then the Secretary will exclude the area under section 4(b)(2) unless, based on the best scientific and commercial data available, the failure to designate the area as critical habitat will result in the extinction of the species.

Under section 4(b)(2) of the Act, we must consider all relevant impacts of the designation of critical habitat, including economic impacts. In addition to economic impacts (discussed in the Economic Analysis section, below), we considered a number of factors in a section 4(b)(2) analysis. We considered whether Federal or private landowners or other public agencies have developed management plans, habitat conservation plans (HCPs), or Safe Harbor Agreements (SHAs) for the area or whether there are conservation partnerships or other conservation benefits that would be encouraged or discouraged by exclusion from critical habitat in an area. We also considered other relevant impacts that might occur

because of the designation. To ensure that our final determination is based on the best available information, we also considered comments received on economic, national security, or other potential impacts resulting from the 2012 designation of critical habitat from governmental, business, or private interests and, in particular, any potential impacts on small businesses. Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we evaluated whether certain lands in the proposed revised critical habitat were appropriate for exclusion from this final designation pursuant to section 4(b)(2) of the Act.

**Exclusions**

Based on the information provided by entities supporting exclusions from critical habitat designation, as well as any additional public comments we received, we evaluated whether the areas proposed for exclusion were appropriate to exclude from the final designation under section 4(b)(2) of the Act. Our analysis indicated that the benefits of excluding these lands from the final designation outweigh the benefits of including the lands as critical habitat; therefore, the Secretary exercises her discretion to exclude these lands from the final designation. Accordingly, we exclude the areas identified in Table 8 Addendum under section 4(b)(2) of the Act from the critical habitat designation for the northern spotted owl. Table 8 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 are excluding, at least in part; the approximate areas (ac, ha) of lands involved; and the ownership of the excluded areas. 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.71948–71949).

TABLE 8 ADDENDUM<sup>1</sup>—LANDS EXCLUDED FROM THE FINAL REVISED DESIGNATION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL 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	10,320 .....	4,177
	ORC	OR	BLM Harvest Land Base	27,774 .....	11,240

TABLE 8 ADDENDUM <sup>1</sup>—LANDS EXCLUDED FROM THE FINAL REVISED DESIGNATION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL UNDER SECTION 4(B)(2) OF THE ACT—Continued

Type of agreement	Critical habitat unit	State	Land-owner/ agency	Acres	Hectares
	WCS	OR	BLM Harvest Land Base	22,017 .....	8,910
	ECS	OR	BLM Harvest Land Base	18,837 .....	7,623
	KLW	OR	BLM Harvest Land Base	13,987 .....	5,660
	KLE	OR	BLM Harvest Land Base	91,198 .....	36,906
Indian lands .....	ORC	OR	CTCLUSI <sup>2</sup>	5,571 .....	2,254
	KLE	OR	CCBUTI <sup>3</sup>	10,772 .....	4,359
	KLW	OR	CCBUTI	3,818 .....	1,449
Total additional lands proposed for exclusion under section 4(b)(2) of the Act.				204,294 .....	82,675

<sup>1</sup> This table is an addendum to table 8 of the December 4, 2012, final rule (77 FR 71876); table 8 appears at 77 FR 71948–71949.

<sup>2</sup> CTCLUSI is the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians.

<sup>3</sup> CCBUTI is the Cow Creek Band of Umpqua Tribe of Indians.

These exclusions are based on new information that has become available since the December 4, 2012, critical habitat designation for the northern spotted owl (77 FR 71876), including BLM’s 2016 revision to its RMPs for western Oregon (BLM 2016a, 2016b) 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 excluded under section 4(b)(2) of the Act.

**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 excluding any areas solely on the basis of economic impacts. The FEA 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 subspecies because of its listed status under the Act and because of the measures provided under the NWFP (USFS and 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 reinitiated section 7 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 areas where owls are not currently present within designated 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 adopting in this rule. See the December 4, 2012, final rule for a summary of the FEA and our consideration of economic impacts (77 FR 71876; pp. 71878, 71945–71947, 72046–72048). Our critical habitat regulations require that at the time of publication of a proposed rule to designate critical habitat, the Secretary make available for public comment a draft economic analysis of the designation (85 FR 82376, December 18, 2020). We reviewed the FEA (IEc 2012) as well as comments and additional

information received on the proposed rule, and determined that because we were proposing only to exclude (*i.e.*, remove) areas from critical habitat and are not adding any areas not included in the 2012 designation and already analyzed in the 2012 economic analysis, the economic impact of the original designation would be further reduced and an entirely new economic analysis was not necessary. Instead, we have considered the 2012 economic analysis in conjunction with additional new information as described above and below.

Further, we have determined that the exclusion of the Harvest Land Base lands from critical habitat for the northern spotted owl would not itself result in changes in management or conservation outcomes for those lands. The BLM considered the critical habitat designation in revising its RMPs in 2016, and the design and implementation of future projects will follow the RMP management direction for each land-use allocation. We analyzed the RMPs and concluded that the land-use allocations and the management direction—including carefully designed timber harvest within the Harvest Land Base—would not jeopardize the owl’s continued existence, nor destroy or adversely modify its designated critical habitat. With the exclusions of the Harvest Land Base areas from critical habitat finalized



here, the RMP land-use allocations and management directions will continue to apply. The change in section 7 consultation as a result of these exclusions will be that BLM will no longer have to address whether its actions in the excluded Harvest Land Base areas result in the destruction or adverse modification of critical habitat.

We note that during the public comment period on our prior proposed revised critical habitat rule (85 FR 48487, August 11, 2020), the American Forest Resource Council (AFRC 2020) and other commenters provided a new report prepared by The Brattle Group (2020) (Brattle Report) critiquing the 2012 critical habitat FEA (IEc 2012) and also provided a supplemental report prepared by The Brattle Group (2021) (Brattle supplement) in response to the July 20, 2021, proposed rule (86 FR 38246). The Brattle Report and supplement included updated estimates of the economic impacts of the 2012 rule using more recent data and/or different assumptions. We contracted with IEC to review the Brattle Report and provided a response to the report in the January 15, 2021, final rule (86 FR 4820; pp. 4825–4827). We also contracted with IEC to review the Brattle supplement and have provided a response to the supplement in this rule. We incorporated our review and consideration of this information in our response to comments above (See *Comments* (20–23)). The Brattle Report and supplement do not alter our assessment that because we are removing areas from designation (rather than adding them), no new economic analysis is needed. 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, logically also do not meet this threshold.

### 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 under section 4(a)(3) of the Act (77 FR 71876; pp. 71944–71945). We did not receive any comments or additional information on the impacts of the proposed revised designation on national security or homeland security. Therefore, we are not excluding any additional areas on the basis of impacts on national security.

### 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, or candidate conservation agreements with assurances, 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 and partnerships and consider the government-to-government relationship of the United States with Tribes. Consistent with our regulations (see 50 CFR 17.90(d)(1)), we consider impacts identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service's expertise, giving weight to those benefits consistent with the expert or firsthand information, unless we had knowledge or material evidence that rebuts that information.

### Indian Lands

Several Executive Orders, Secretarial Orders, and policies concern our working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Indian 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, Secretarial Order 3206, American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: “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 always consider exclusions of Indian lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

In this final designation, the Secretary has exercised her discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation certain Indian lands (lands held in trust) for two federally recognized Tribes: 14,590 acres (5,808 hectares) for the Cow Creek Band of Umpqua Tribe of Indians (CCBUTI) and 5,571 acres (2,254 hectares) for the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (CTCLUSI). See table 1 for the unit and subunit locations of these Indian lands.

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 Indian lands. No Indian lands were designated in our 2012 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 two Tribes and transferred 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, 20,161 acres (8,062 hectares) are located within designated critical habitat for the northern spotted owl. We considered this new information, as well as comments received on this proposed exclusion of these lands, and we are now excluding these Indian lands under section 4(b)(2) of the Act, as explained below.

### Benefits of Inclusion—Indian Lands

Federal agencies, in consultation with the Service, must ensure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat of such species. The difference in the outcomes of the jeopardy analysis and the adverse modification analysis represents the regulatory benefit and costs of critical habitat. A critical habitat designation requires Federal agencies to consult on

whether their activity would destroy or adversely modify critical habitat to the point where recovery could not be achieved.

Another possible benefit is that the designation of critical habitat can serve to educate landowners and land managers and the general public regarding the potential conservation value of an area, and this may contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. The designation of critical habitat, by providing information about the northern spotted owl and its habitat that reaches a wide audience, including other parties engaged in conservation activities, is considered of broad conservation value.

Designation of critical habitat may also increase awareness of the conservation importance of the area when activities are addressed under other Federal laws that require consideration of the potential environmental effects of proposed projects. Designated critical habitat signals the presence of important habitat that can trigger additional environmental review under these laws, and can help to reinforce careful consideration of the effects of actions on the environment. For example, significant effects to designated critical habitat (even if not resulting in destruction or adverse modification under the Act) could lead to additional environmental review under the National Environmental Policy Act, or other Federal laws.

Finally, there is the possible benefit that additional funding could be generated for habitat improvement by an area being designated as critical habitat. Some funding sources may rank a project higher if the area is designated as critical habitat. Thus, as Tribes compete for grants and other funding sources, wildlife-related conservation proposals that address areas of designated critical habitat may be more likely to be funded than projects not addressing critical habitat.

#### Benefits of Exclusion—Indian Lands

The benefits of exclusion of Indian lands from designated critical habitat are significant, and are tied to our commitment to support Tribal self-determination. We generally defer to Tribes to develop and implement conservation and natural resource management plans for their lands and resources, which includes benefits to the northern spotted owl and its habitat that might not otherwise occur. The CCBUTI and CTCLUSI are the governmental entities best situated to

manage and promote the conservation of the northern spotted owl on their trust land consistent with the principles and policies indicated in Secretarial Order 3206; Executive Order 13175; and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2). Our deference to these Tribes for their management of their trust lands enhances our existing effective working relationships, and allows us to support the Tribes in the manner they consider most useful as they lead efforts for the conservation of the northern spotted owl and its habitat on these lands.

We find that other conservation benefits are provided to the affected critical habitat subunits and the northern spotted owl and its habitat by excluding these lands from the designation. For example, the Continuous Forestry Management Approach adopted by the CCBUTI in their forest management plan takes proactive prevention, control, and recovery actions to mitigate damage and loss of forest values from wildfire, insects, and disease and other events. Additionally, the CTCLUSI has committed to coordination with the Service in developing its approach to conservation of listed species for these newly acquired lands. Both Tribes supported these exclusions in their comment letters in response to the proposed rule. For these reasons, we have determined that excluding these recently transferred lands from the designation of critical habitat for the northern spotted owl is of substantial benefit in aid of the unique relationship between the Federal Government and Tribes and in support of Tribal self-governance.

#### Benefits of Exclusion Outweigh the Benefits of Inclusion—Indian Lands

The benefits of including Indian lands in the critical habitat designation are limited to the incremental benefits gained through the regulatory requirement to consult under section 7 and consideration of the need to avoid adverse modification of critical habitat, agency and educational awareness, potential additional grant funding, and the reinforcing review of environmental effects under other laws. While these regulatory benefits are important, in the context here, the Tribes' commitment to continue to coordinate with us in conserving habitat for the northern spotted owl in these newly acquired areas as they manage the landscape is also important. Consistent with principles of self-determination and the unique Federal-Tribal relationship, we conclude that these Tribally led efforts

will be more effective if these lands are excluded from the designation. We view this as a substantial benefit because we have developed a cooperative working relationship for the mutual benefit of endangered and threatened species, including the northern spotted owl. Because the Tribes will implement habitat conservation efforts on these newly acquired lands, and are aware of the value of their lands for northern spotted owl conservation, the educational benefits of a northern spotted owl critical habitat designation are less important than they would otherwise be. For these reasons, we have determined that designation of critical habitat would have few, if any, additional benefits beyond those that will result from the presence of the subspecies.

In summary, the benefits of these Indian lands in critical habitat are limited to some enhanced regulatory processes. The benefits of excluding these areas from designation as critical habitat for the northern spotted owl are significant, and include encouraging the continued development and implementation of special management measures that the Tribes plan for the future or are currently implementing. These activities and projects will allow the Tribes to manage their natural resources to benefit the northern spotted owl. This approach is consistent with the government-to-government nature of our working relationship with the Tribes, and also consistent with our published policies on Native American natural resource management. The exclusion of these areas will likely also provide additional benefits to the species that would not otherwise be available to encourage and maintain cooperative working relationships with the Tribes. We find that the benefits of excluding this area from critical habitat designation outweigh the benefits of including this area.

#### Exclusion Will Not Result in Extinction of the Subspecies—Indian Lands

We have determined that exclusion of these Indian lands will not result in extinction of the subspecies. Firstly, as discussed under Effects of Critical Habitat Designation Section 7 Consultation in the 2012 critical habitat rule (77 FR 71876, December 4, 2012, p. 71937), if a Federal action or permitting occurs, the known presence of northern spotted owls or their habitat would require evaluation under the jeopardy standard of section 7 of the Act, even absent the designation of critical habitat, and thus will protect the subspecies against extinction. Secondly, the Tribes are committed to protecting and

managing these lands and species found on those lands according to their Tribal and cultural management plans and natural resource management objectives, which provide conservation benefits for the northern spotted owl and its habitat. Thirdly, the Indian lands we are excluding represent a very small percentage (0.0021 percent) of the critical habitat designation, and excluding these lands will not affect the overall function of critical habitat at the critical habitat-unit level or rangewide. Accordingly, we have determined that the 20,161 acres (8,062 hectares) of Indian lands are excluded under subsection 4(b)(2) of the Act because the benefits of exclusion outweigh the benefits of inclusion and will not cause the extinction of the subspecies.

#### *Federal Lands*

The Secretary has broad discretion under the second sentence of section 4(b)(2) on how to weigh the impacts of designation. In particular, “[t]he consideration and weight given to any particular impact is completely within the Secretary’s discretion.” (H.R. Rep. No. 95–1625, at 17 (1978)). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act”; see section 2(c)(1). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Specific to critical habitat, the only direct consequence of its designation is the Act’s requirement that Federal agencies ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. While the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under sections 2 and 7 of the Act.

Accordingly, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands. Thus, if a project for

which there is discretionary Federal involvement or control is likely to adversely affect the critical habitat, a formal section 7 consultation would occur and the Services would consider whether the project would result in the destruction or adverse modification of the critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: (1) The additional administrative or transactional costs associated with the consultation process, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat.

Thus, in any exclusion analysis for Federal lands, we will consider not only the transactional costs associated with section 7 consultation with a Federal agency, but also any potential costs to affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases, contracts), that would stem from any project modifications that may be required to avoid destruction or adverse modification of critical habitat. While we agree that the transactional costs of section 7 consultation with Federal agencies tend to be a relatively minor cost, we do not wish to foreclose the potential to exclude areas under Federal ownership in cases where the benefits of exclusion outweigh the benefits of inclusion. Consideration of other Federal agency transactional costs and other costs, including those to a permittee or lessee, are considered on a case-by-case basis.

#### *BLM Harvest Land Base Lands*

In this final designation, the Secretary has exercised her discretion under section 4(b)(2) of the Act to exclude from this critical habitat designation 184,133 acres (74,613 hectares) of Harvest Land Base lands that are described and managed pursuant to the BLM RMPs revised in 2016 (BLM 2016a, 2016b). See table 1 for the unit and subunit locations of these exclusions.

*2016 BLM RMP Revisions*—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” (FWS 2011, p. II–3). In 2016, BLM revised its RMPs for western Oregon, resulting in two separate plans (BLM 2016a, 2016b). BLM’s 2016

revision of its RMPs considered the 2011 Recovery Plan recommendations as well as the revised critical habitat designation made in 2012. 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 BLM 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 BLM RMP revisions assigned land-use allocations across BLM-managed lands in western Oregon; the land-use allocations define areas where specific activities are allowed, restricted, or excluded. The BLM land-use allocations include Late-Successional Reserve, Congressionally Reserved Lands and National Conservation Lands, District-Designated Reserves, and Riparian Reserve (collectively considered “reserve” land use allocations) and Eastside Management Area and Harvest Land Base (BLM 2016a, pp. 55–74).

Reserve land-use allocations comprise 74.6 percent (1,847,830 acres (747,790 hectares)) of the acres of BLM land under the RMPs (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 Late-Successional Reserve, 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 for Late-Successional Reserve are designed to promote older, structurally complex forest and to promote or maintain habitat for the northern spotted owl and the marbled murrelet (listed as threatened under the Act), although some timber harvest of varying intensity is allowed. The Revised Recovery Plan for the Northern

Spotted Owl relies on the Late-Successional Reserve network as the foundation for northern spotted owl recovery on Federal lands (FWS 2011, p. III-41).

The Harvest Land Base allocation comprises 19 percent (469,215 acres (189,884 hectares)) of the overall land use allocations and is where the majority of programmed timber harvest occurs (FWS 2016, p. 9; BLM 2016a, pp. 59–63). Of these acres, 39 percent (184,133 acres (74,613 hectares)) are located within the 2012 critical habitat designation for the northern spotted owl. Over 90 percent of these acres that are allocated to the Harvest Land Base and within designated critical habitat (172,712 acres (69,779 hectares)) are located on O&C lands. Under the management direction for the Harvest Land Base, timber harvest intensity varies based on the suballocation (moderate-intensity timber area, light-intensity timber area, or uneven-aged timber area) within the Harvest Land Base (BLM 2016a, pp. 59–63).

The management direction specific to the northern spotted owl (BLM 2016a, p. 100) applies to all land-use allocations designated in the BLM 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.

Based on new information provided in the revised BLM RMPs (BLM 2016a, 2016b), we are excluding from critical habitat 184,133 acres (74,613 hectares) of BLM lands where programmed timber harvest is planned to occur, *i.e.*, the Harvest Land Base as described in the 2016 RMPs. Approximately 172,712 acres (69,779 hectares) of this Harvest Land Base are O&C lands.

#### Benefits of Inclusion—BLM Harvest Land Base

As discussed above, the primary effect of designating any particular area as critical habitat is the Act's prohibition against the destruction or adverse modification of such habitat, which is evaluated in consultation with the Service under section 7 of the Act. Absent critical habitat designation, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence.

In general, this obligation to consult regarding effects to critical habitat remains a conceptual benefit of inclusion of the Harvest Land Base lands in the designated critical habitat. However, we completed a programmatic

section 7 consultation on the BLM RMPs in 2016 that specifically addressed the impact of the BLM's plans to undertake timber harvest in the Harvest Land Base, including the effects on designated critical habitat. In consultation, the Service found that the management actions, including the level of timber harvest anticipated under these RMPs over the 50-year proposed timeline, was not likely to jeopardize the subspecies or destroy or adversely modify critical habitat (FWS 2016, pp. 700–703).

The programmatic approach of our section 7 consultation on the BLM RMPs 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 framework for site-specific consultation at the stepped-down, project-level scale. As individual projects are proposed under these RMPs, BLM consults at the project-specific level with the Service as necessary under section 7 to ensure that the site-specific actions will not jeopardize the subspecies, or destroy designated critical habitat. The stepped-down consultations also provide an opportunity for BLM to further minimize impacts to northern spotted owls as on-the-ground actions are designed and implemented.

As described in our Biological Opinion issued to the BLM (FWS 2016, pp. 4–5) and compared to a status quo without the BLM RMPs in place, 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 Harvest Land Base recognized that, while this land-use allocation was not intended to be relied upon for demographic support of northern spotted owls, the management direction under the BLM RMPs includes provisions that would contribute to the further development of late-successional habitat, including additional critical habitat features over time (FWS 2016, p. 553; 77 FR 71876, December 4, 2012, pp. 71906–71907). Although late-successional habitat currently existing within the Harvest Land Base may not remain on the landscape for the long term, the presence of northern spotted owl habitat within the Harvest Land Base 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 high-quality physical and biological features over time in reserved land-use allocations (FWS 2016, p. 553; 77 FR 71876, December 4, 2012, pp. 71906–71907).

Several aspects of the RMPs are 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 even with the expected focus of harvest in the Harvest Land Base (FWS 2016, p. 698): 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 Harvest Land Base. 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 Late-Successional Reserve 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 2016 RMPs, 15 percent of critical habitat is designated on the Harvest Land Base and 85 percent is designated on other land-use allocations. We determined that the Harvest Land Base portion of the BLM landscape will 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).

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. Effectiveness monitoring will assess status and trends in northern spotted owl populations and habitat to evaluate whether the implementation of the BLM RMPs is reversing the downward trend of populations and maintaining and

restoring habitat necessary to support viable owl populations (BLM 2016a).

In sum, the revised BLM RMPs provide for the conservation of the essential PBFs throughout the reserve land-use allocations and distribute the impacts to northern spotted owl habitat in the Harvest Land Base over time while the habitat conditions in the reserve land-use allocations improve. Based on our analysis in the Biological Opinion on the BLM RMPs (FWS 2016, pp. 700–703) and the BLM's conclusions in its records of decision 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 Harvest Land Base areas are designated as critical habitat for the northern spotted owl.

The Harvest Land Base areas provide a relatively low level of short-term conservation value for northern spotted owls. Retaining them as designated critical habitat, which suggests that they have a conservation value similar or equal to that of the reserve lands, sends a confusing message to the public and local land managers. Also, Federal actions in the Harvest Land Base that may affect designated critical habitat require section 7 consultation to address the effect on the designated habitat. Our experience in section 7 consultations to date indicates that these consultations provide little incremental conservation benefit over what is already provided for in these updated BLM RMPs and the section 7 consultations for activities that may affect the northern spotted owl for review of whether the activities jeopardize the subspecies. Section 7 consultations require considerable efforts by the involved BLM and Service biologists to identify and assess the effects to the designated critical habitat acres and increases the transactional time and effort spent on consultations, even though the conclusion by the Service has to date been consistently that no adverse modification has resulted. Thus, continuing to consult on adverse modification of critical habitat for actions in the Harvest Land Base is not an efficient use of limited consultation and administrative resources, given the thorough section 7 consultation already conducted on the 2016 RMPs and in the project-specific consultations conducted since the 2016 RMPs. The benefits of continuing to include Harvest Land Base areas within critical habitat for the northern spotted owl are, therefore, limited.

Another benefit of including lands in a critical habitat designation is that it generally serves to educate landowners, land managers, State and local

governments, and the public regarding the potential conservation value of an area. Identifying areas of high conservation value for the northern spotted owl can help focus and promote conservation efforts by other parties. Any additional information about the needs of the northern spotted owl or its habitat that reaches a wider audience can be of benefit to future conservation efforts. This function is being achieved with the retention of critical habitat in the reserve land-use allocations. As discussed in the benefits of exclusion, however, this is not the case for the BLM Harvest Land Base lands.

#### Benefits of Excluding—BLM Harvest Land Base

There are appreciable benefits that will be realized by excluding Harvest Land Base 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 Harvest Land Base lands from the northern spotted owl critical habitat designation reduces the burden of additional section 7 consultation beyond any requirements to consult on effects to the subspecies for these lands that serve primarily to meet BLM's timber sale volume objectives (see our response to *Comment (3)* for an explanation of the distinction between analyses completed for critical habitat versus the subspecies under section 7). As stated above, critical habitat in the Harvest Land Base has been determined to have relatively lower conservation value when compared to reserve areas, and there is a benefit to communicating this distinction to the public and land managers. Retaining them as designated critical habitat, which suggests that they have a conservation value similar or equal to that of the reserve land-use allocation lands, may send a confusing message to the public and local land managers, especially given that we confirmed in our biological opinion that the 2016 RMPs would not destroy or adversely modify this critical habitat. Therefore, excluding these Harvest Land Base lands from the critical habitat designation would provide some incremental benefit by clarifying that these lands (as compared with those in the reserve allocations) do not play a primary role in relation to northern spotted owl conservation, and by eliminating any unnecessary regulatory oversight.

In addition, a benefit of exclusion of these lands is that it signals our support

for the BLM's consideration of the conservation needs of the northern spotted owl in its resource management planning efforts. By incorporating and addressing those needs at the planning level, including engaging with the Service to help ensure a productive and robust network of reserves for the northern spotted owl, the BLM was able to develop RMPs and land-use allocations that also provide for timber production consistent with the conservation of the subspecies. This allows the Service to exclude areas to lessen regulatory burdens while conserving the northern spotted owl.

#### Benefits of Exclusion Outweigh the Benefits of Inclusion—BLM Harvest Land Base

The biological and regulatory benefits of including the BLM Harvest Land Base in critical habitat are minimal given the management objective for this land-use allocation, which is to provide a sustained yield of timber. As we determined in our section 7 consultation with BLM regarding the RMPs, such management when considered with the other elements of habitat management in the RMPs provide for the conservation of the owl. Although these lands provide some short-term conservation value, we already determined that timber harvest of these areas will not result in the destruction or adverse modification of critical habitat as that term is defined in our implementing regulations under the Act. We have also conducted numerous site-specific consultations with the BLM regarding the effects of projects on designated critical habitat since the 2016 RMPs went into effect, and we have not found any actions that would destroy or adversely modify critical habitat.

Section 7 consultations to address adverse modification of critical habitat for activities within the Harvest Land Base going forward would provide no incremental conservation benefit over the conservation already provided for in the BLM RMPs. Consultations to address effects to designated critical habitat in the Harvest Land Base would not be an efficient use of limited consultation and administrative resources that could be better utilized to address other forest-related issues, such as consultations on critical habitat for forest treatments in Late-Successional Reserve that improve the quality of northern spotted owl nesting, roosting, and foraging habitat or reduce susceptibility to disturbances, such as wildfire. Informational benefits of including the BLM Harvest Land Base in critical habitat is minimal, and retaining

these areas as designated critical habitat, which suggests that they have a conservation value similar or equal to that of the Late-Successional Reserve, may be confusing to the public.

In contrast, the benefits derived from excluding the Harvest Land Base outweigh the minimal benefit of including these lands in the designation. Excluding these areas clarifies the distinction between the management direction for reserves versus the Harvest Land Base. Additionally, excluding the Harvest Land Base reduces the unnecessary regulatory burden of additional section 7 analysis that will provide no additional conservation beyond what is already provided in the BLM RMPs and section 7 consultations for the owl under the “jeopardy” prong and may redirect limited resources towards section 7 consultations on actions that would improve critical habitat in the Late-Successional Reserve. Thus, the Secretary has determined that the benefits of excluding the BLM Harvest Land Base described in the 2016 BLM RMPs from the designation of critical habitat for the northern spotted owl outweigh the benefit of including these areas in critical habitat.

#### Exclusion Will Not Result in Extinction—BLM Harvest Land Base

We find that excluding the Harvest Land Base acres from the critical habitat designation, as finalized in this document, will have only a minor impact on the long-term conservation of the northern spotted owl and its habitat assuming that the conservation measures in the BLM RMPs are implemented as planned. Our 2016 Biological Opinion on the BLM RMPs found that the management actions anticipated under the RMPs, including harvest anticipated in the designated critical habitat in the Harvest Land Base, would not jeopardize the subspecies or destroy or adversely modify critical habitat (FWS 2016, pp. 700–703). Additionally, the Harvest Land Base lands represent only a small portion (less than 2 percent) of the overall critical habitat designation and represent only 19 percent of the land base managed by the BLM under the 2016 RMPs, with the remaining lands largely managed as reserves that provide demographic support of northern spotted owls. Therefore, and when considering that the remaining 98 percent of designated critical habitat is being retained on the landscape, we find that these exclusions will not result in extinction of the subspecies.

#### O&C Lands and Northwest Forest Plan Matrix Lands

The January Exclusions Rule determined that the benefits of exclusion of all O&C lands and NWFP matrix lands from the critical habitat designation outweighed the benefits of inclusion. We have reconsidered the benefits of inclusion and exclusion and the weighing of these benefits in this rule. As stated above, the Secretary has very broad discretion under the second sentence of section 4(b)(2) on how to weigh the impacts of a critical habitat designation.

The O&C lands we address here are those O&C lands within the designation, about 1.2 million acres (485,623 hectares), that are located on lands managed by the BLM outside the BLM’s Harvest Land Base land-use allocation as determined in the 2016 RMPs, as well as O&C lands managed by the USFS. Collectively, these lands (all in Oregon) comprise other land-use allocations, the majority (77 percent) of which are Late-Successional Reserve and Riparian Reserve, and occur on lands managed by both the BLM (about 970,723 acres (392,837 hectares)) and USFS (about 237,561 acres (96,137 hectares)). The USFS matrix lands altogether (in three States) included in the 2012 critical habitat designation total about 2.1 million acres and (849,840 hectares) are managed by the USFS under the NWFP generally for timber harvest. The USFS manages some lands within the designated critical habitat that overlap, *i.e.*, areas that are both O&C lands and allocated as “matrix” (about 75,818 acres (30,682 hectares)).

*Background on O&C Lands*—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, Pub. L. 75–405 (O&C Act), 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. The intermingled private lands are largely industrial timberlands managed primarily for timber production; as such, these private lands contain very little high-quality habitat for the northern spotted owl (and no designated critical habitat). Most of the O&C lands (82 percent) are administered by BLM (FWS 2019, p. 1) pursuant to its RMPs. BLM’s RMPs identify certain revested timberlands for commercial timber harvest. 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 (55 FR 26114, June 26, 1990), 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. 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 providing for other uses of these lands.

*Background on USFS Matrix Lands*—The USFS matrix lands are managed under the 1994 NWFP amendments to forest plans and support timber production while also retaining some biological legacy components important to old-growth obligate species that would persist into future managed timber stands. Matrix lands occur across the range of the northern spotted owl in Washington, Oregon, and California. This land-use allocation was first identified in 1994. In 2012, we designated as critical habitat a subset of USFS matrix lands—those matrix lands that contain the features essential to the conservation of the subspecies and function as highly valuable northern spotted owl habitat. These areas are essential to providing for demographic support and successful dispersal of the

northern spotted owl and for buffering competition with the barred owl.

Although we work closely with the USFS to incorporate northern spotted owl conservation considerations into the USFS's ongoing land management actions through the section 7 consultation process, the USFS has not yet revised its forest plans and applied the recommendations of the 2011 Revised Recovery Plan nor expressly taken into consideration the 2012 critical habitat designation into these plans as has the BLM with their 2016 RMPs. The USFS has, however, initiated efforts to update the individual forest plans in the range of the northern spotted owl and is expected to complete this process in coming years. We will continue to work closely with the USFS to address the conservation needs of the northern spotted owl as the agency updates its various forest plans.

#### Benefits of Inclusion—O&C Lands and Matrix Lands

As discussed above, the primary effect of designating any particular area as critical habitat is the requirement for Federal agencies to consult with us under section 7 of the Act to ensure actions they carry out, authorize, or fund do not destroy or adversely modify designated critical habitat. Absent critical habitat designation, Federal agencies remain obligated under section 7 of the Act to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. The January Exclusions Rule stated that the benefits of including the O&C lands and matrix lands are small because agencies would still be required to ensure that discretionary actions they fund, authorize, or carry out would not jeopardize the continued existence of the subspecies, regardless of whether those lands are designated as critical habitat. Upon reconsideration, we find that the section 7 consultations on critical habitat provide significant benefits as described below.

The critical habitat designation benefits the northern spotted owl as a rangewide conservation strategy and network that connects large blocks of habitat that are able to support multiple clusters of northern spotted owls. Both the O&C lands and USFS lands included in the designation provide connectivity and habitat areas in a spatial configuration that is essential to the conservation of the northern spotted owl. The O&C lands, for example, encompass 37 percent of the lands that were covered under the NWFP in Oregon and provide important habitat for reproduction, connectivity, and

survival in the Coast Range and portions of the Klamath Basin; they provide connectivity through the Coast Range; and they provide connectivity between the Coast Range and western Cascades (Thomas *et al.* 1990, p. 382, BLM 2016c, p. 17). Similarly, USFS matrix lands within the designation provide 2.14 million acres of important habitat and connectivity across all three States. Our 2012 final critical habitat designation reduced the amount of matrix lands from what we proposed to ensure that only essential habitat was designated (77 FR 71876; 71889). Our evaluation in the 2012 critical habitat rule found that we cannot achieve recovery of the northern spotted owls without the majority of O&C lands and remaining matrix lands currently designated as critical habitat. Additionally, recent scientific findings and our December 15, 2020, finding (and supporting species report) that the northern spotted owl warrants reclassification to endangered status emphasize the importance of maintaining habitat in light of competition with barred owls (Wiens *et al.* 2021, pp. 1, 2; Franklin *et al.* 2021, p. 18; 85 FR 81144; FWS 2020, p. 83).

The critical habitat designation also identifies areas on the landscape that may require special management considerations or protection. These considerations are of even more importance given the statutory purpose of the O&C lands and the management direction for USFS matrix lands that focus primarily on commercial timber harvest (see *Special Management Considerations and Protection* in our 2012 critical habitat rule (77 FR 71876; p. 71908)). Through the critical habitat designation and the section 7 consultation process, the Service is able to work collaboratively with the USFS and the BLM to help design how timber harvest can occur in these areas while also minimizing impacts to spotted owl recovery.

Conserving extant, high-quality habitat and addressing the threat from barred owls are key components of the special management considerations in our 2012 critical habitat rule as well as our biological opinion on the BLM's 2016 RMPs. Because the barred owl is present throughout the range of the northern spotted owl, special management considerations or protections may be required in all or many of the critical habitat units and subunits to ensure the northern spotted owl has sufficient habitat available to withstand competitive pressure from the barred owl (Dugger *et al.* 2011, pp. 2459, 2467; Franklin *et al.* 2021, p. 18; 85 FR 81144; FWS 2020, p. 83; Wiens *et al.* 2021, pp. 1, 2). In particular, studies by

Dugger *et al.* (2011, p. 2459) and Wiens (2012, entire) indicated that northern spotted owl demographic performance is better when additional high-quality habitat is available in areas where barred owls are present.

Additionally, scientific peer reviewers of the 2011 Revised Recovery Plan for the Northern Spotted Owl (FWS 2011, entire) and Forsman *et al.* (2011, p. 77) recommended that we address currently observed downward demographic trends in northern spotted owl populations by protecting currently occupied sites, as well as historically occupied sites, and by maintaining and restoring older and more structurally complex multilayered conifer forests on all lands (FWS 2011, pp. III-42 to III-43).

The types of management or protections that may be required to achieve these goals and maintain the physical or biological features essential to the conservation of the owl in occupied areas vary across the range of the subspecies. Some areas of northern spotted owl habitat, particularly in wetter forest types, are unlikely to be enhanced by active management activities, but instead need protection of the essential features; whereas other forest areas would likely benefit from more proactive forestry management. For example, in drier, more fire-prone regions of the owl's range, habitat conditions will likely be more dynamic, and more active management may be required to reduce the risk to the essential physical or biological features from fire, insects, disease, and climate change, as well as to promote regeneration following disturbance. The designation of these areas as critical habitat benefits the subspecies by ensuring that the special management considerations identified in the 2012 critical habitat rule are considered in the design and implementation of timber harvest projects in these areas.

The additional analysis required for critical habitat in a section 7 consultation requires action agencies to evaluate the effects of their actions on the critical habitat components that support the life history of the northern spotted owl regardless of whether the area is currently occupied by northern spotted owls; these are identified in the critical habitat rule as the physical and biological features (or primary constituent elements) that provide for nesting, roosting, foraging, and dispersal. In our consultations, the Service evaluates how those actions affect the conservation value of the critical habitat subunit to provide those features, and the analysis is then scaled up to evaluate those effects at the

critical habitat unit scale and the critical habitat designation as a whole. Evaluating habitat at multiple scales in consultations on timber harvest actions in critical habitat ensures the landscape continues to support the habitat network locally, regionally, and nationwide.

We previously concluded in a Biological Opinion that the BLM's 2016 RMPs provide adequate contributions for the recovery of the spotted owl, and thus the exclusion of the Harvest Land Base lands from critical habitat and some harvest of these lands is likewise consistent with recovery. In reconciling the sometimes conflicting goals of spotted owl recovery with providing a reliable timber harvest from Federal lands, we worked with BLM in their 2016 RMPs to greatly minimize impacts to spotted owls. We conclude that the relatively small amount of impact to spotted owls from timber harvest on these BLM lands is offset by the increase in conservation of extant forest on BLM lands, the recruitment of improved habitat in the future on those lands, and the BLM's commitment to help manage barred owls.

In contrast, we do not yet have an updated programmatic Biological Opinion on USFS land management plans that addresses critical habitat for the northern spotted owl, although the USFS completes section 7 consultation with us at the project level on actions that affect critical habitat for the subspecies. To date, our review in section 7 consultations has 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. These consultations on critical habitat provide a benefit to the northern spotted owl in that they provide an opportunity for the Service to review projects that will occur within critical habitat to ensure the function of the network will remain intact. We conclude that review of projects proposed in critical habitat on USFS matrix lands and O&C lands through the ongoing section 7 consultation processes under current land management plans continues to be an appropriate way to evaluate effects of USFS and BLM actions on critical habitat function and is an important benefit of including these lands in the critical habitat designation.

Another benefit of including lands in a critical habitat designation is that it generally serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area.

Identifying areas of high conservation value for the northern spotted owl can help focus and promote conservation efforts by other parties. Any additional information about the needs of the northern spotted owl or its habitat that reaches a wider audience can be of benefit to future conservation efforts. There is a benefit to communicating to the public and land managers that despite the O&C lands and matrix lands designations, the habitat areas found on these lands are essential to the conservation of the northern spotted owl.

We work closely with both the BLM and USFS in our coordinated section 7 consultation processes, and have a keen understanding of the agencies' mission and mandates. Our local biologists meet regularly to discuss upcoming and ongoing Federal projects and their effects to both the subspecies and its critical habitat, and to address any concerns about the section 7 consultation process. Additionally, we meet regularly with local and regional forest managers with both agencies. This process and partnership, established under the NWFP, has been effective for many years. We conclude that this collaborative approach, which includes reviewing projects and discussing how they affect the physical and biological features of critical habitat for the northern spotted owl, is a benefit of including these lands in the critical habitat designation.

#### Benefits of Exclusion—O&C Lands and Matrix Lands

There would be benefits realized by excluding O&C lands and USFS-managed matrix lands 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 O&C lands and USFS-managed matrix lands from the northern spotted owl critical habitat designation would reduce the burden of additional section 7 consultation beyond any requirements to consult on effects to the subspecies for these lands (see our response to *Comment (3)* for an explanation of the distinction between analyses completed for critical habitat versus the species under section 7). The January Exclusions Rule stated that eliminating the requirement to complete section 7 consultation on critical habitat, in effect lessening one of the regulatory hurdles, could lead to increased timber production in support of the management of the O&C lands for

the production of timber. The January Exclusions Rule further stated that, because land management plans or amendments would undergo programmatic section 7 consultation to ensure that management actions do not jeopardize the continued existence of the subspecies, consulting on critical habitat is not an efficient use of limited consultation and administrative resources.

Upon reconsideration, however, we find greater value in continuing to consult programmatically and at the project level under section 7 on critical habitat on O&C lands outside of those allocated by BLM to the Harvest Land Base, and on USFS-managed matrix lands. The benefits derived in these section 7 consultations to address effects to critical habitat ensure special management considerations are taken into account when designing and implementing landscape-scale management programs and subsequent timber harvest projects within critical habitat. The consultations allow the Service to evaluate the effects on the functionality of the critical habitat network, and ensure that functionality is not significantly impaired. Since the implementation of the 2016 RMPs, we have the benefit of several years of experience in section 7 consultations with the BLM regarding the effect of proposed actions on the O&C lands. We find that focusing our consultation and administrative capacity on section 7 consultations in the O&C lands outside of the BLM's Harvest Land Base lands is a priority given that the majority of this area is designated as Late-Successional Reserve and Riparian Reserve that contribute essential habitat for the northern spotted owl. Likewise, we find that focusing our resources on consultations in the USFS-managed matrix lands is also a priority given that programmatic consultation has not occurred for critical habitat on these lands.

Additionally, as stated above, the O&C lands outside of the BLM Harvest Land Base allocation, and USFS-managed matrix lands included in the critical habitat designation, provide areas of higher-quality habitat that owls prefer for nesting, roosting, and foraging behavior and lower-quality habitat to provide for dispersal for northern spotted owls. Excluding them as designated critical habitat, which suggests that they have a conservation value that is less than that of the reserve land-use allocation lands, may send a confusing message to the public and local land managers. Therefore, the benefit of excluding the O&C lands and



USFS matrix lands from the critical habitat designation is reduced.

Based on our FEA (IEc 2012), we found that the most potential for economic impacts from the critical habitat designation would occur in relation to “unoccupied matrix lands” (at the time of the 2012 designation, BLM’s Harvest Land Base lands were also considered matrix lands under the NWFP), which is where the difference between habitat being designated as critical, or not, would likely make the most difference. “Unoccupied matrix lands” in the FEA means areas of forested habitat (generally of less high quality relative to northern spotted owl needs) that at the time of the proposed project being consulted on under section 7 would not have resident northern spotted owls.

In the absence of a critical habitat designation, the Federal agency would have to first evaluate whether or not the proposed habitat modification would have an effect on northern spotted owls. Generally speaking, if there are no resident owls present and the habitat is not of particularly high quality nor designated as critical, Federal actions that would modify that habitat are less likely to create an adverse effect on the owl at an individual, let alone species level. And, in some cases, especially if the habitat to be modified is of marginal quality for the owl, the Federal agency may determine there is no effect on the species at all, in which case no section 7 consultation with the Service is required. If, on the other hand, the habitat being modified by the Federal action is designated as critical habitat, the current presence or absence of owls in the area is less relevant because the effect being analyzed is to that habitat, and the effect of the modification on the conservation value of the habitat for the species has to be considered. Thus, the critical habitat designation could require the Federal agency to undertake consultation with the Service and be precluded from adverse modification of the designated critical habitat, in an area where, absent that designation, the Federal agency might not have to consult at all because of the absence of effects to the species.

However, the FEA 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 subspecies because of its listed status under the Act and because of the measures provided under the NWFP (USFS and BLM 1994) and other conservation programs (IEc 2012, pp. 4–32, 4–37). The incremental effects

included: (1) An increased workload for action agencies and the Service to conduct reinitiated section 7 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 areas where owls are not currently present within designated critical habitat.

The FEA (IEc 2012) evaluated three scenarios to capture the full range of potential economic impacts of the designation. The first scenario contemplates that minimal or no changes to current timber management practices will occur, thus the incremental costs of the designation would be predominantly administrative. The potential additional administrative costs due to critical habitat designation on Federal lands range from \$185,000 to \$316,000 on an annualized basis for timber harvest. The second scenario posits that Federal agencies may choose to implement management practices that yield an increase in timber harvest relative to the baseline (current realized levels of timber harvest). For this scenario, baseline harvest projections were scaled upward by 10 percent, resulting in a positive impact on Federal lands ranging from \$893,000 to \$2,870,000 on an annualized basis for timber harvest. The third scenario considers that action agencies may choose to be more restrictive in response to critical habitat designation, resulting in a decline in harvest volumes relative to the baseline. To illustrate the potential for this effect, baseline harvest projections were scaled downward by 20 percent, resulting in a negative impact on timber harvest on Federal lands ranging from \$2,650,000 to \$6,480,000 on an annualized basis.

The USFS and BLM suggested certain alterations to the baseline timber harvest projections, based on differing assumptions regarding northern spotted owl occupancy in matrix lands and projected levels of timber harvest relative to historical yields. The FEA presents the results of a sensitivity analysis considering these alternative assumptions, which widen the range of annualized potential impacts to Federal timber harvest relative to the scenarios described above (IEc 2012b, pp. 4–37 to 4–39). This sensitivity analysis contemplated a situation in which 26.6 percent of northern spotted owl habitat on BLM matrix lands is unoccupied, and a 20 percent increase in baseline

timber harvest in USFS Region 6 relative to historical yields. The range of incremental impacts under these alternative assumptions widens to a potential annualized increase of \$700,000 under Scenario 2, and an annualized decrease of \$1.4 million under Scenario 3, relative to the results reported above.

The January Exclusions Rule states that, recognizing the expertise of locally elected governments in areas relating to economic stability, exclusion of the O&C and matrix lands would benefit local counties and communities by supplying jobs and county revenues for schools and roads, and protecting the local tax base. In our reconsideration of that rule, we agree that economic benefits to the counties may ultimately accrue if O&C lands and matrix lands were excluded from the critical habitat designation because there would be a potential increase in timber harvest in some areas where, but for the critical habitat designation, the habitat modification would not be precluded via the Act otherwise. However, our 2012 FEA identified a range of potential outcomes due to the designation, including positive and negative effects. The analysis identified those counties that may be more sensitive to future changes in timber harvests, industry employment, and Federal land payments. Potential timber harvest changes related to critical habitat designation, whether positive, negative, or neutral, are one potential aspect of this sensitivity. The counties identified as relatively more sensitive to future changes in timber harvests, employment, and payments were Del Norte and Trinity Counties, California; Douglas and Klamath Counties, Oregon; and Skamania County, Washington. With regard to jobs, increases or decreases in timber harvests from Federal or private lands could result in positive or negative changes in jobs, respectively. The FEA notes that many factors affect timber industry employment (IEc 2012, Chapter 6). The scope of our analysis was limited to the incremental effects of critical habitat within the area proposed for designation by the northern spotted owl. The FEA did not consider potential changes in timber activities outside the proposed critical habitat designation, and did not evaluate the potential effects related to the timber industry as a whole.

We also considered information concerning economic impacts submitted by commenters, including AFRC and several counties, in the Brattle Report and Brattle supplement. See our responses to *Comments (20–23)* addressing several issues with the

analysis provided in the Brattle reports, specifically the assumptions or data used to produce the estimate of negative annualized timber harvest impacts due to the critical habitat designation. As discussed in our responses to *Comments (20–23)*, we do not agree with their ultimate conclusions and find that the FEA provides the best available information on the incremental impacts of the 2012 critical habitat designation, as supplemented by the additional information provided by IEC (IEC 2020, 2021). Commenters also provided comments referring to Sierra Institute for Community and Environment and Spatial Informatics Group, titled “Response to the Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl by Industrial Economics.” We addressed this report in our 2012 critical habitat rule; see our responses to *Comments (201–213)* in that rule (77 FR 71876; 72040–72043).

The January Exclusions Rule stated that making more lands available for timber harvest could lead to longer cycles between harvests or to harvests designed to benefit the northern spotted owl and reduce the risk of catastrophic wildfire, and that northern spotted owls can use second-growth timber that leaves a few snags or old trees on the harvested land. Upon reconsideration, we find there is much uncertainty about the potential that harvest cycles would be extended were the O&C lands and USFS matrix lands excluded. Rotation ages of federally managed lands are determined by the BLM and USFS considering a wide range of information and responsibilities, not just related to the northern spotted owl, or even the Act. In addition, the assumption in the January Exclusions Rule that excluding the O&C lands and USFS matrix lands would improve the management of Federal forested lands to reduce wildfire risks rests on an incorrect assumption that the critical habitat designation generally precludes habitat management to reduce wildlife risk. As stated throughout the 2012 critical habitat rule, active management of forests is encouraged, where appropriate, to reduce the risk of catastrophic wildfire.

We agree that while northern spotted owls may use second-growth forests, this is not their preferred habitat for meeting all of their life history needs. Their use of these areas is dependent on the age, diversity, and condition of those forests as well as on their proximity to large blocks of habitat that provide for reproduction and population growth. Scientific peer reviewers of the 2011 Revised Recovery Plan for the Northern Spotted Owl (FWS 2011, entire) and Forsman *et al.* (2011,

p. 77) recommended that we address currently observed downward demographic trends in northern spotted owl populations by protecting currently occupied sites, as well as historically occupied sites, and by maintaining and restoring older and more structurally complex multilayered conifer forests on all lands (FWS 2011, pp. III–42 to III–43).

#### Benefits of Inclusion Outweigh the Benefits of Exclusion—O&C Lands and Matrix Lands

When weighing the benefits of inclusion and the benefits of exclusion of areas, we analyze and give weight to impacts and benefits consistent with expert or firsthand information in areas outside the scope of the Service’s expertise unless we have knowledge or material evidence that rebuts that information. Impacts outside the scope of the Service’s expertise include, but are not limited to, nonbiological impacts identified by federally recognized Indian Tribes; State or local governments; and permittees, lessees, or contractor applicants for a permit, lease, or contract on Federal lands. We also analyze and give weight to economic or other relevant impacts relative to the conservation value of the area being considered. We give weight to those benefits based on the Service’s expertise.

We considered economic information submitted from commenters in the Brattle Report and supplement; however, the 2012 FEA (IEC 2012) and subsequent review of the report and supplement by IEC rebuts the information in those reports (IEC 2020, 2021). We acknowledge there is uncertainty over whether economic impacts will occur and to what extent, as well as uncertainty over whether exclusion of the O&C lands and matrix lands would result in economic benefits to the counties and communities where critical habitat is designated. We also acknowledge that the economic impacts, depending on the analysis and assumptions used, are not insignificant. However, even assuming the high end of the economic impacts identified in our economic analysis, or the higher economic impacts suggested by some commenters, such as AFRC and counties, based on the Brattle Report and supplement, ultimately we give greater weight to the conservation value of the O&C lands and USFS matrix lands than to potential economic benefits of excluding these lands, for the following reasons.

First, these areas are of significant conservation value to the spotted owl given the geographical location of the

O&C lands and USFS matrix lands and the essential habitat they provide for the northern spotted owl. Our evaluation of the O&C lands and matrix lands in our 2012 critical habitat rule, and that of peer reviewers who reviewed the rule, demonstrates their importance to the conservation of the northern spotted owl. Additionally, our evaluation of a habitat network with reduced areas of high-value habitat on O&C lands and USFS matrix lands indicated a significant increase in extinction risk to the subspecies.

Second, our evaluation of the best available information on the status of the subspecies resulted in our recent finding that the northern spotted owl’s status has declined such that we would be warranted in concluding that is now an “endangered” species under the Act, and not just “threatened,” *i.e.*, it is in danger of extinction throughout all or a significant portion of its range and warrants reclassification, but that such “uplisting” is precluded by other priorities (such as work to evaluate whether to list a species not already on the list). This “warranted but precluded” finding, which was made just prior to the January Exclusions Rule, reinforces the importance of ensuring essential habitat remains across the landscape conservation network provided by the designation.

Third, subsequent to this “warranted but precluded” finding, the most recent demographic meta-analysis (Franklin *et al.* 2021) found that northern spotted owls are declining at an accelerated rate (5.3 percent across their range), and populations in Oregon and Washington have declined by over 50 percent, with some declining by more than 75 percent, since 1995.

Fourth, the requirement for the USFS and BLM to consult with the Service concerning proposed impacts to critical habitat in the O&C lands outside of the BLM’s Harvest Land Base and on the USFS matrix lands provides for meaningful coordination between the Service and the agencies regarding actions they are proposing and the needs of the northern spotted owl, providing a conservation benefit to owl recovery in Oregon, California, and Washington. The benefits derived in these section 7 consultations ensure special management considerations are taken into account when designing and implementing timber harvest projects within critical habitat and provide an opportunity to evaluate the effects those projects have on the functionality of the critical habitat network given the nature of projects that are likely to occur in these areas.

Fifth, designation of these areas as critical habitat clearly and unambiguously communicates to the public their disproportionate conservation value to spotted owl recovery, while excluding them from critical habitat would serve to confuse the public about their importance.

In sum, we find that the benefits of retaining as critical habitat the areas of O&C lands (outside of BLM's Harvest Land Base) and the currently designated USFS matrix lands outweigh the benefits of excluding these areas from critical habitat.

#### Exclusion Will Result in Extinction—O&C Lands and Matrix Lands

Under section 4(b)(2) of the Act, the Secretary cannot exclude areas from critical habitat if she finds, "based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." We find, contrary to the January Exclusions Rule, that even were we to conclude that the benefits of exclusion of the O&C Act lands and the USFS matrix lands outweighed the benefit of their inclusion, their exclusion would result in the extinction of the northern spotted owl, and so such exclusion is prohibited under the Endangered Species Act. See also our analysis in Withdrawal of the January Exclusions Rule above.

There are large areas of important high-quality northern spotted owl habitat located on O&C lands and USFS matrix lands that were designated as critical habitat in 2012. Lower-quality habitat also occurs within these lands that provide for connectivity between areas of higher-quality habitat and nesting and roosting when higher-quality habitat is not available in a particular location. The 2012 critical habitat designation included northern spotted owl habitat in reserve land-use allocations, O&C lands, and the matrix that we found essential for the conservation of the subspecies based on our modeling results, expert biological opinion, and peer review. We determined that we cannot attain recovery of the northern spotted owl without conserving the habitat on these lands and that excluding them significantly increased the risk of extinction. Peer reviewers of both the Revised Recovery Plan for the Northern Spotted Owl (FWS 2011) and our proposed rule to revise critical habitat in 2012 supported this finding.

The January Exclusions Rule stated that, because competition with barred owls is the largest negative contributing factor to the decline of northern spotted

owls, barred owl management must occur in order to protect the northern spotted owl from extinction. Upon reconsideration, we agree that barred owl management is necessary to prevent extinction of the northern spotted owl but also find that a reduction in habitat conservation (through exclusions from designated critical habitat) at the scale of all O&C lands and USFS matrix lands, in concert with the impacts from the barred owl, will result in the extinction of the northern spotted owl. As discussed in our recent 12-month finding and supporting documentation, the subspecies is in precipitous decline and warrants reclassification as endangered (85 FR 81144, December 15, 2020)—that is, the subspecies is in danger of extinction throughout all or a significant portion of its range. The northern spotted owl has experienced rapid population declines and potential extirpation in Washington and parts of Oregon, is functionally extirpated from British Columbia, and continues to exhibit similar declines in other parts of the range. Northern spotted owls are declining at a rate of 5.3 percent across their range, and populations in Oregon and Washington have declined by over 50 percent, with some declining by more than 75 percent, since 1995 (Franklin *et al.* 2021). Franklin *et al.* (2021, p. 18) emphasizes the importance of maintaining northern spotted owl habitat, regardless of occupancy, in light of competition from barred owls to provide areas for recolonization and connectivity for dispersing northern spotted owls. Exclusion of large areas of critical habitat undermines this principle.

The January Exclusions Rule stated that, although 3.4 million acres (1.4 million hectares) were excluded in that rule, the conservation provided to northern spotted owls in national parks and designated wilderness areas would ensure that the subspecies would not become extinct. See our reconsideration of the conservation value provided by these lands in our response to *Comment (Cii)*. As we stated in our July 20, 2021, proposal, some of these areas are widely dispersed and cannot be relied on to sustain the subspecies unless they are part of and connected to a wider reserve network as provided by the 2012 critical habitat designation (77 FR 71876).

The January Exclusions Rule further stated that section 7 consultations on the subspecies would ensure the exclusion of the lands would not result in extinction of the northern spotted owl. As we discussed previously, section 7 consultations regarding whether or not a Federal action that adversely affects the species will

ultimately jeopardize the continued existence of the species is an important tool for protecting a species even in absence of a critical habitat designation. Upon further review, however, that protection against "jeopardy" is not a complete stand-in for an analysis of effects to important habitat necessary for the subspecies, particularly when considering the difference in scale between the January Exclusions Rule and what we exclude in this final rule.

In this final rule, we are excluding about two percent of the designated critical habitat based on a programmatic consultation that considered the long-term effects of removal of that habitat by timber harvest and found it would not adversely modify the critical habitat, nor jeopardize the subspecies. We have since then conducted a number of evaluations in consultation on site-specific projects removing habitat in the Harvest Land Base and have again concluded, based on the best scientific information, that the actions will not result in the adverse modification of the value of the critical habitat to the subspecies nor result in jeopardy to the subspecies. These together give us confidence in the appropriateness of the exclusions we finalize today.

The January Exclusions Rule, on the other hand, would have excluded nearly 36 percent of the current designated critical habitat, without benefit of a programmatic approach by the relevant Federal land-managing agencies and a section 7 consultation to confirm the effects would not adversely modify the critical habitat for the subspecies nor would jeopardize it. Neither do we have the experience of several years of consultations at a project-specific level to consider the effects of removal of this habitat from the landscape and affirm it would not jeopardize the subspecies. To the contrary, based on the information we have, we conclude that such exclusions would result in the extinction of the owl. In such an instance, reliance on the section 7 "jeopardy" standard in future consultations alone is not a sufficient basis to affirm the benefits of exclusion.

The NWFP and the BLM RMPs provide adequate landscape-scale conservation for the northern spotted owl while allowing for relatively small areas of critical habitat to be harvested over time. Exclusion of all the O&C lands (including currently allocated to reserves) and all the USFS matrix lands could enable subsequent land management plan changes that would support habitat removal in areas that are essential to the conservation of the northern spotted owl. Exclusion of these O&C lands and USFS matrix lands

would not only preclude the recovery of the northern spotted owl (as we determined in 2012), but given the most recent and best available information we also find it would result in the subspecies' extinction. Given that northern spotted owls are long-lived and widely dispersed over a large, geographic range, extinction would not be immediate but would result if these lands were excluded.

#### 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).

Habitat conservation plans in support of applications for incidental take permits under section 10(a)(1)(B) of the Act must be consistent with the long-term recovery needs of the species. When we undertake a discretionary section 4(b)(2) exclusion analysis, we consider areas covered by an HCP that have been authorized by a permit under section 10 of the Act, and generally exclude such areas from a designation of critical habitat if three conditions are met: (1) Whether the permittee is properly implementing the conservation plan or agreement; (2) whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and (3) whether the conservation plan or agreement 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 and any section 10 permitting decisions by the Service will not be completed prior to the publication of this document; thus, we are not able to assess all of the above criteria. As a result, we are not excluding additional State lands from the critical habitat designation for the northern spotted owl.

#### Available Conservation Measures

In publishing final rules to carry out the purposes of the Act, we include a description of any conservation measures available under the rule. As

this rule is a revision to critical habitat excluding certain areas from that designation, there are no particular conservation measures specifically available under this rule. Rather, the conservation measures already in place and available to the entities managing the excluded lands (the BLM, the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians, and the Cow Creek Band of Umpqua Tribe of Indians) remain available and unaffected by this rule.

#### Determinations of Adverse Effects and Application of the "Adverse Modification" Standard

In publishing final rules to revise critical habitat, we are, to the maximum extent practicable, required to include a brief description and evaluation of those activities (whether public or private) that might occur in the area, and which, in the opinion of the Secretary, may adversely modify such habitat or be affected by such designation. As this revision to critical habitat is exclusions from critical habitat, the exclusions will, by definition, eliminate the requirement for consideration of adverse modification of the excluded habitat. Our discussion in the 2012 critical habitat rule (77 FR 71876; pp. 71938–71944) still adequately addresses actions that may adversely modify critical habitat or be affected by the areas of critical habitat that remain designated.

#### Required Determinations

##### *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. OIRA has identified this rulemaking action as not significant.

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 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 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 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 as understood in the light of 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. Consequently, it is our position that only Federal action agencies would be directly regulated by this revised 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 the revised critical habitat designation will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

*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 FEA 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. Any administrative costs due to the designation of critical habitat would be reduced because we are excluding additional lands from the designation in this final rule. 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 final rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.”

These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or Tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or Tribal governments “lack authority” to adjust accordingly. 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 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 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 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. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because we are only excluding areas from the northern

spotted owl’s critical habitat designation; we are not designating additional lands as critical habitat for the subspecies. 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 designating critical habitat for 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 the revised designation of critical habitat for northern spotted owl, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this final rule does not have significant federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this revised critical habitat designation with, appropriate State resource agencies. 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, this final 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 decision set forth in this document removes areas from the designation.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation with the Federal agency 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 excluding areas from the northern spotted owl's critical habitat designation; we are not designating additional lands as critical habitat for the subspecies.

*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 are revising critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the northern spotted owl, the December 4, 2012, final rule (77 FR 71876) identifies the elements of physical or biological features essential to the conservation of the subspecies, and we are not proposing any changes to those elements in this document. The areas we are excluding 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 <https://www.fws.gov/oregonfwo> and at <https://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 Indian lands are not subject to the same controls as Federal public lands, to remain sensitive to Tribal 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 and the Confederated Tribes of Coos, Lower

Umpqua, and Siuslaw Indians, which both manage Indian land within the areas designated as critical habitat for the northern spotted owl.

**References Cited**

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

**Authors**

The primary authors of this final 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.

**Regulation Promulgation**

Accordingly, for the reasons discussed above in the preamble, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

- 1. Revise the authority citation to part 17 to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

- 2. In § 17.95(b), amend the entry for “Northern Spotted Owl (*Strix occidentalis caurina*)” by revising paragraph (7), the second map in paragraph (9), and paragraphs (10), (14), (16), (17), and (18) to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*

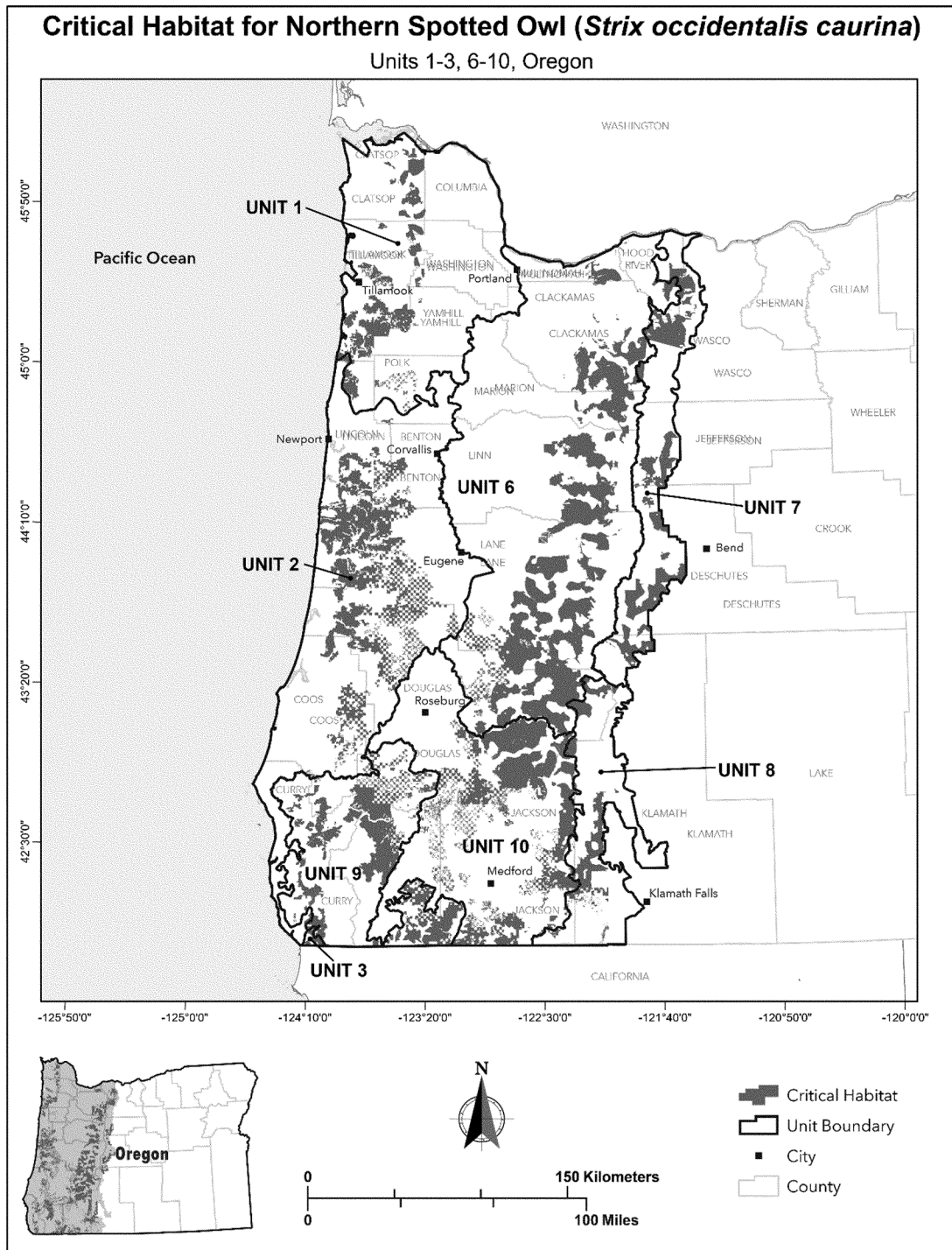
(b) *Birds.*

\* \* \* \* \*

Northern Spotted Owl (*Strix occidentalis caurina*)

\* \* \* \* \*

(7) *Note:* Index map of critical habitat units for the northern spotted owl in the State of Oregon follows: Figure 2 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph (7)



\* \* \* \* \*

(9) Unit 1: North Coast Ranges and Olympic Peninsula, Oregon and

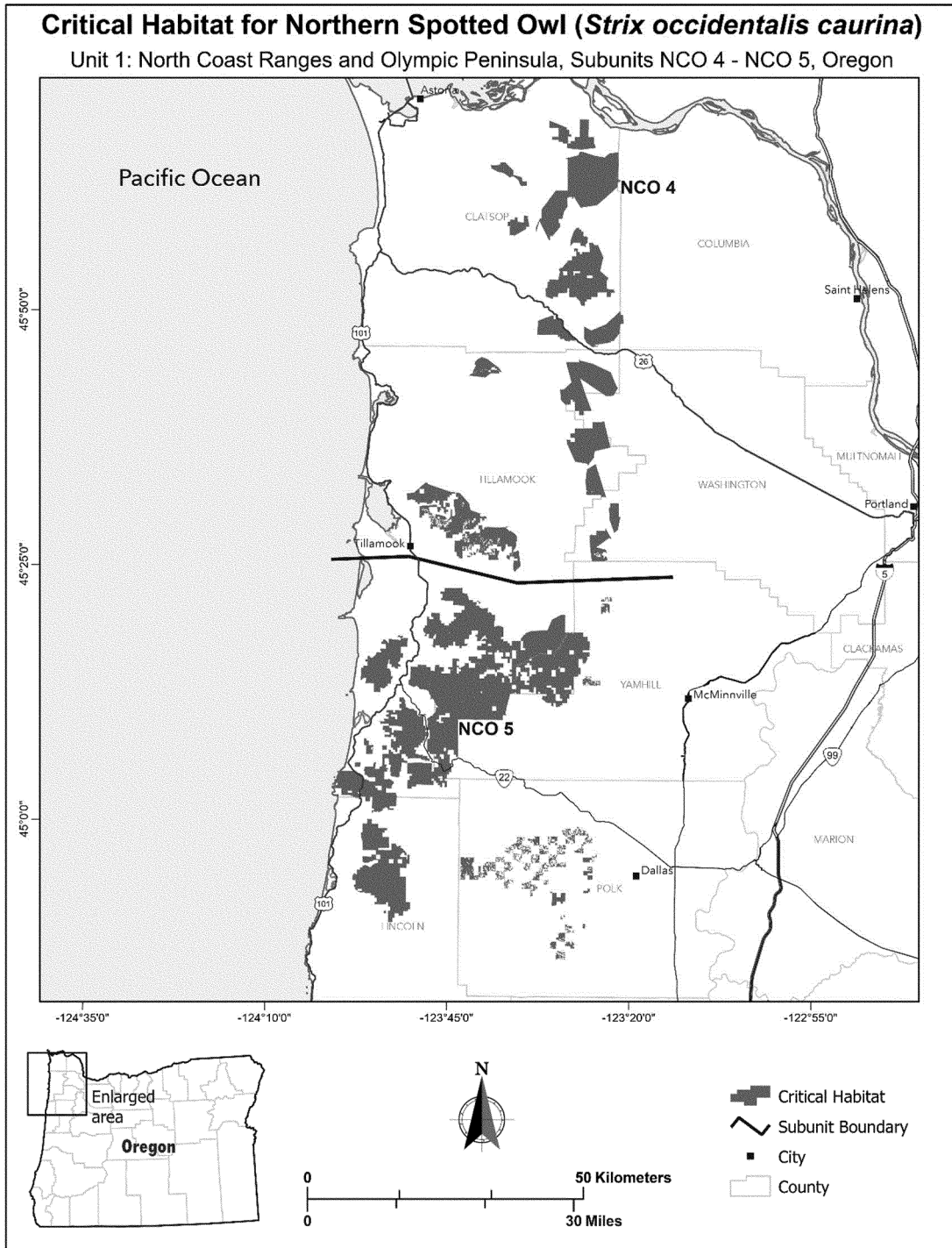
Washington. Maps of Unit 1: North

Coast Ranges and Olympic Peninsula, Oregon and Washington, follow:

\* \* \* \* \*

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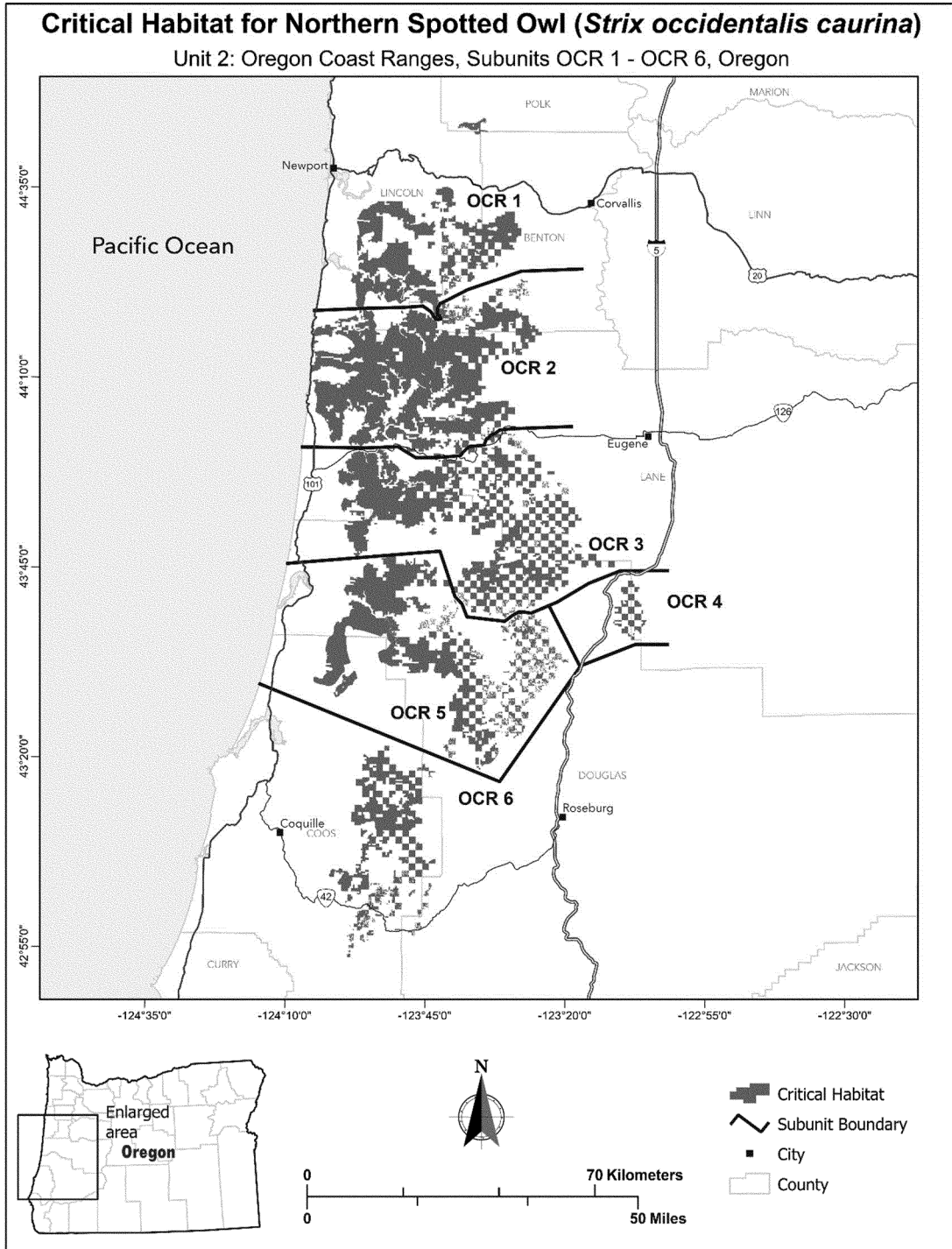
Figure 5 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph (9)



(10) Unit 2: Oregon Coast Ranges, Oregon. Map of Unit 2, Oregon Coast Ranges, Oregon, follows:



Figure 6 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph (10)

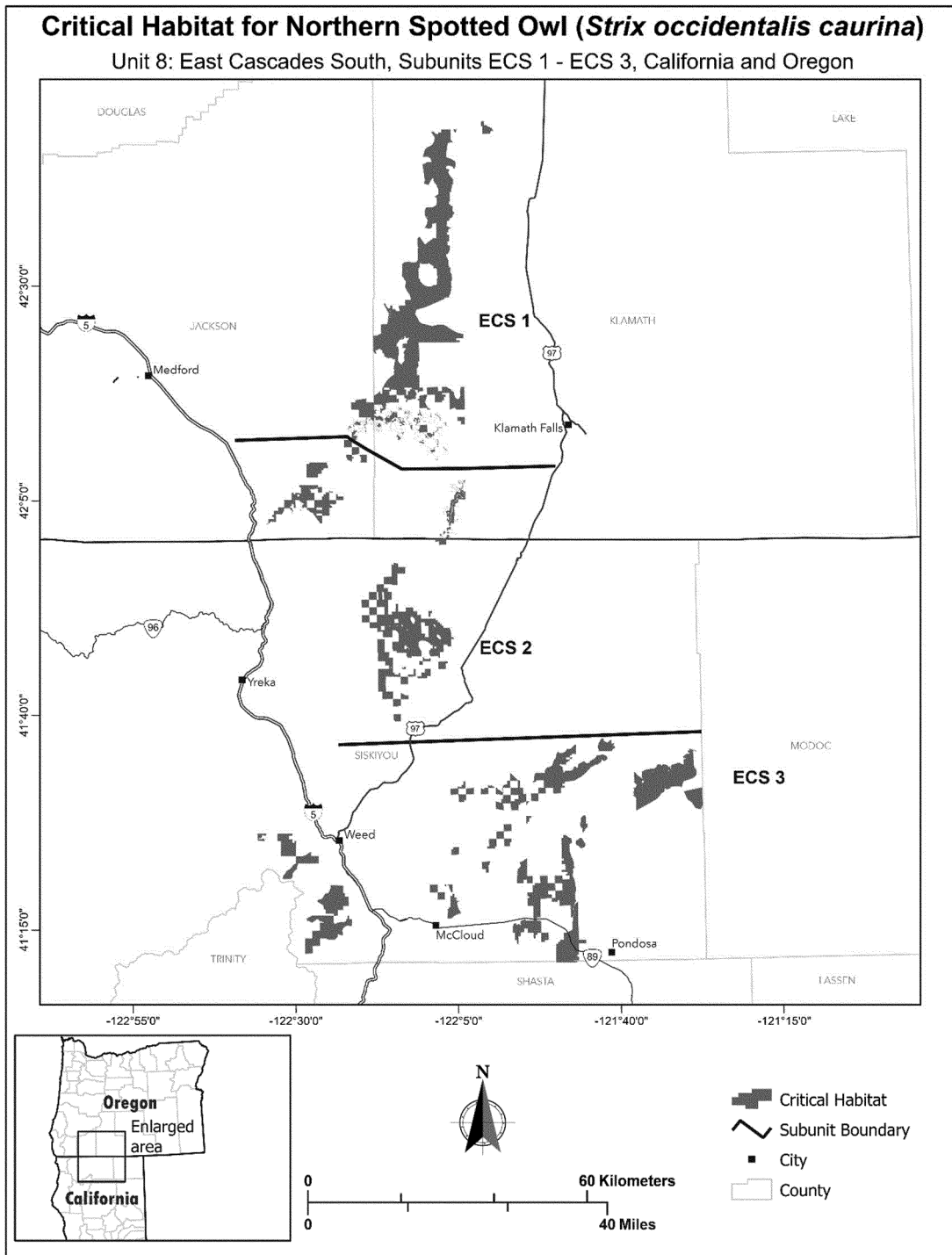


\* \* \* \* \*

(14) Unit 6: West Cascades South, Oregon. Map of Unit 6, West Cascades South, Oregon, follows:

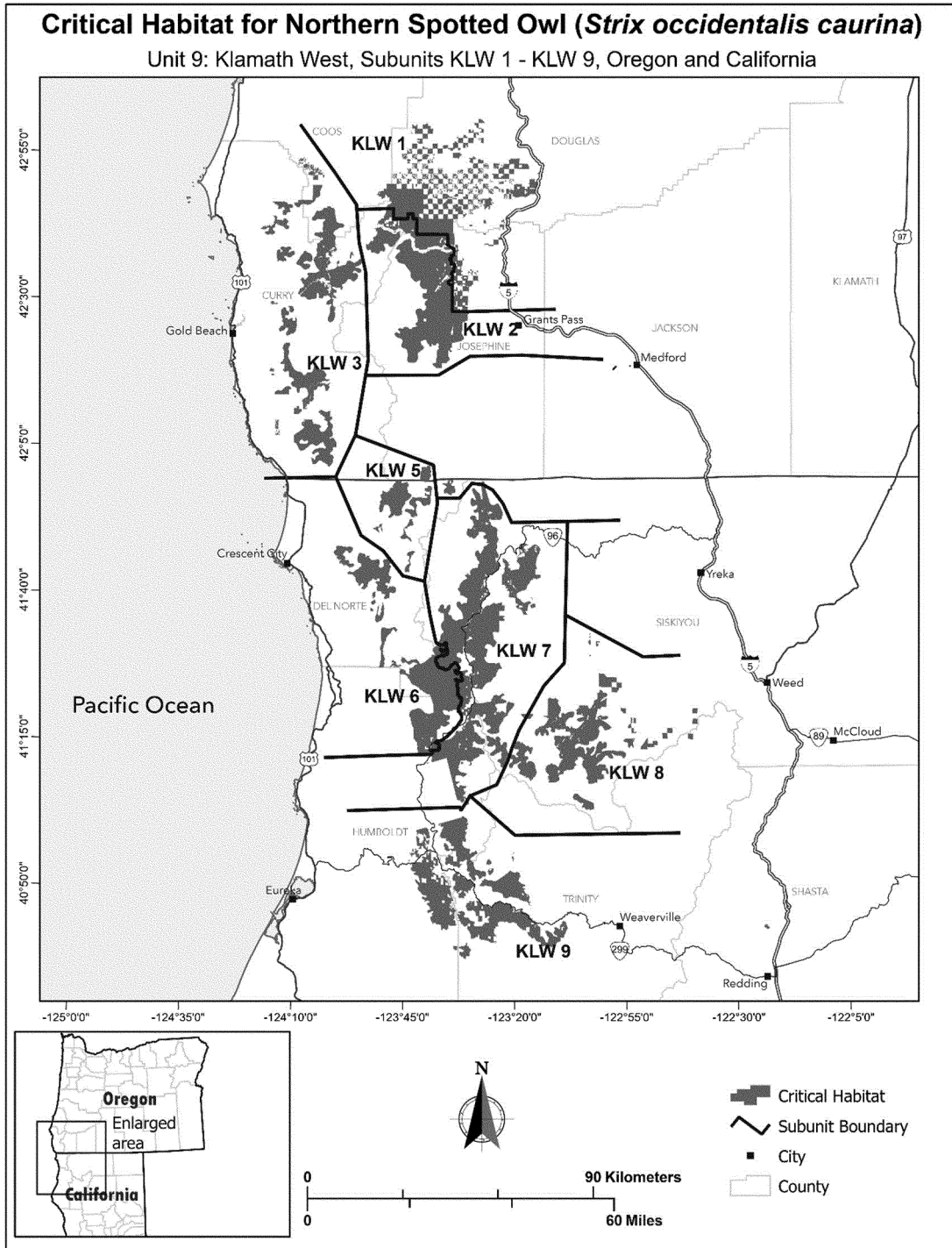


Figure 13 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph (16)



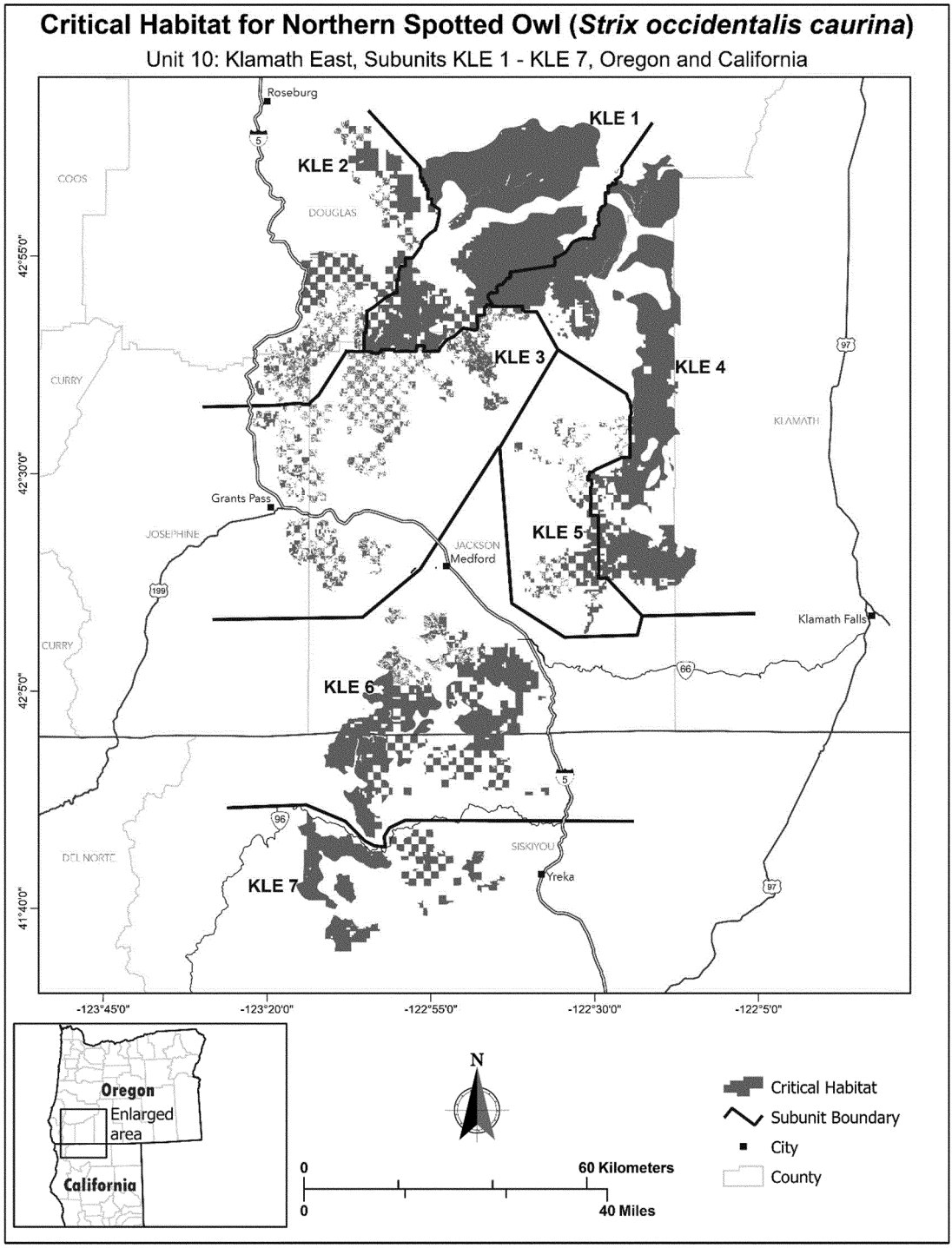
(17) Unit 9: Klamath West, Oregon and California. Map of Unit 9: Klamath West, Oregon and California, follows:

Figure 14 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph



(18) Unit 10: Klamath East, California and Oregon. Map of Unit 10: Klamath East, California and Oregon, follows:

Figure 15 to Northern Spotted Owl (*Strix occidentalis caurina*) paragraph



\* \* \* \* \*

**Martha Williams,**  
 Principal Deputy Director, Exercising the  
 Delegated Authority of the Director.  
 [FR Doc. 2021-24365 Filed 11-9-21; 8:45 am]  
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