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Audubon Society of Portland

**American Lands Alliance * Audubon Washington * Center for Biological Diversity
* Cascadia Wildlands Project * Conservation Northwest * Earthjustice * EPIC *
Friends of the San Juans * Gifford Pinchot Task Force * Klamath Forest Alliance *
Klamath-Siskiyou Wildlands Center * National Audubon's Ten Mile Sanctuary *
Seattle Audubon * Sierra Club * Siskiyou Regional Education Project * The
Wilderness Society * Umpqua Watersheds ***

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Greetings:

Please accept the following comments submitted on behalf of the above eighteen organizations Sanctuary on the U.S. Fish and Wildlife Service's ("FWS" or "Service") proposed revision of Marbled Murrelet critical habitat published in the Federal Register at 71 Fed. Reg. 53838 (Sept. 12, 2006). These comments supplement additional comments that may be submitted by individual signatories. For further information on specific marbled murrelet biology, survival, and habitat needs, we incorporate by reference the comments you will soon receive from the Pacific Seabird Group.

The current proposal for critical habitat, covering the Washington, Oregon, and northern California population of marbled murrelets originally listed as endangered in 1996, see 61 Fed. Reg. 26256 (May 24, 1996), sprang from a settlement agreement in a federal lawsuit brought by the American Forest Resources Council. Under the settlement agreement, a final revised critical habitat designation is due August 30, 2007.

Critical habitat provides significant benefits to listed species like marbled murrelets because: 1) it is an essential tool for species recovery; 2) it mandates a higher habitat conservation standard during ESA § 7 consultations; and 3) it provides detailed, practical guidance on the location of areas essential to the conservation of listed species. Critical habitat has proven to be a very effective conservation tool: species with critical habitat are less likely to be declining, and over twice as likely to be recovering, as those without.¹

The proposed reduction of critical habitat by over 3.6 million acres is neither legal nor prudent. The Endangered Species Act is broadly purposed to recover species to the point at which protection

¹ Taylor et al. 2005. The effectiveness of the Endangered Species Act: A Quantitative Analysis, *Bioscience*, 55(4):360-367.

under the Act is no longer necessary. To this end, it requires designation of areas essential to the conservation of a species as critical habitat, which includes areas necessary for survival or recovery. Protection of habitat is particularly important for the murrelet, which is primarily threatened by loss of the mature and old-growth forests it relies on for nesting. Indeed, a recent status review of the murrelet, contracted by FWS, concluded: "It is unrealistic to expect that the species will recover before there is significant improvement in the amount and distribution of suitable nesting habitat."² The current proposal runs contrary to the scientific findings in that review and other credible published scientific research on the marbled murrelet's survival needs.

In proposing to exclude the vast majority of area essential to the conservation of the murrelet, FWS failed to consider substantial information from the five year status review, recovery plan and other scientific publications, which demonstrate the murrelet is continuing to decline and is at substantial risk of extinction. This failure reflects the Bush administration's lack of concern for the murrelet and other wildlife, as evidenced by the Department of Interior's (DOI) stated intent to delist the murrelet in contradiction to the scientific findings of FWS biologists and the Pacific Northwest Regional Office.

The murrelet is just one of many examples where the DOI is ignoring their own experts and the weight of scientific evidence. An October 30, 2006, *Washington Post* article titled, "Bush Appointee Said to Reject Advice on Endangered Species" documented that Julie MacDonald, Deputy Assistant Secretary of Fish, Wildlife and Parks "has rejected staff scientists' recommendations to protect imperiled animals and plants under the Endangered Species Act at least six times in the past three years." and that "staff complaints that their scientific findings were frequently overruled or disparaged at the behest of landowners or industry have led the agency's Inspector General to look into the role of Julie MacDonald." The article can be found at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900776_2.html. Clearly, the current proposed reduction of critical habitat for the murrelet and intended delisting are suitable subjects for investigation by the Inspector General.

Reducing critical habitat by over 94% from the current designation will dramatically increase the murrelet's risk of extinction, and substantially impede recovery. We ask the Service to abandon these revisions. We also ask that the Service reconsider their decision not to include any marine habitat in designation of critical habitat. Marine areas are essential for feeding and threatened by multiple factors, including risk of oil and gas spill, disturbance to the seafloor from trawling and other fishing operations, climate changes, and direct disturbance to feeding murrelets from boat traffic.

In sum, the proposed critical habitat designation with exclusions is not based on the best available science, is arbitrary and capricious, and characteristic of an administration that has consistently taken every opportunity to weaken or avoid protection of our nation's wildlife.

² McShane, et al. March 2004, Evaluation Report for the 5-Year Status Review of the Marbled Murrelet in Washington, Oregon and California.

I. FWS IGNORED THE GOAL OF RECOVERY IN DETERMINING THE SCOPE OF ELIGIBLE CRITICAL HABITAT.

The fundamental underpinning of the ESA is to restore species facing extinction to self-sustainability. Recognizing that habitat loss is the primary threat to 85% of all endangered species, Congress amended the ESA in 1978 to require the designation of mapped critical habitat areas for all listed species. The Act's stated policy is to "conserve" threatened and endangered species, 16 U.S.C. § 1531(c)(1), and "conservation" is defined as the use of "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [under the ESA] are no longer necessary." *Id.* § 1532(3). The clearest expression of that goal is through the designation of critical habitat, which Congress explicitly defined in terms of "conservation." *Id.* § 1532(5)(A).

Congress envisioned critical habitat as a *recovery tool*, requiring that it encompass all lands and water essential to the recovery of listed species. See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004). Congress clearly intended that critical habitat do more than simply prevent extinction. Critical habitat is first and foremost a recovery tool:

It is the Committee's view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence.... If the protection of the endangered and threatened species depends in large measure on the preservation of the species' habitat, then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.

House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 887, 94th Cong. 2nd Sess. at 3 (1976). See also 124 Cong. Rec. S21, 575 (daily ed. July 19, 1978) ("[T]he designation of critical habitat is more important than the designation of an endangered species itself.").

The courts have reached similar conclusions:

[T]he designation of critical habitat serves as 'the principal means for conserving an endangered species, by protecting not simply the species, but also the ecosystem upon which the species depends.'

Center for Biological Diversity v. Norton, 240 F. Supp.2d 1090, 1101 (D. Ariz. 2003) (citation omitted). The court further noted that three other courts had rejected the Service's argument that other provisions of the ESA provide equivalent protection to critical habitat. *Id.* at 1102-03. According to the Ninth Circuit:

The ESA was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted. See 16 U.S.C. § 1532(3) (defining conservation as all methods that can be employed to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary"). The ESA also defines critical habitat as including "the specific areas . . . occupied by the species . . . which are . . . essential to the *conservation* of the species" and the "specific areas outside the

geographical area occupied by the species . . . that . . . are essential for the *conservation* of the species . . .” 16 U.S.C. § 1532(5)(A) (emphases added). By these definitions, it is clear that Congress intended that conservation and survival be two different (though complementary) goals of the ESA. *See* 16 U.S.C. § 1533(f)(1) (“The Secretary shall develop and implement plans . . . for the *conservation* and *survival* of endangered species and threatened species.”) (emphasis added). Clearly, then, the purpose of establishing “critical habitat” is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.

Gifford Pinchot, 378 F.3d at 1070. (internal citations omitted).

Designation of critical habitat adds a level of protection not otherwise available to the species. According to FWS itself,

The designation of critical habitat...is one of several measures available to contribute to the conservation of a species. Critical habitat helps focus conservation activities by identifying areas that contain essential habitat features (primary constituent elements) regardless of whether or not they are currently occupied by a species. Such designations alert Federal Agencies, States, the public, and other entities about the importance of an area for the conservation of listed species. Critical habitat can also identify areas that may require special management or protection. Areas designated as critical habitat receive protection under Section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal Agency which are likely to adversely modify or destroy critical habitat. The added protection of these areas may shorten the time needed to achieve recovery.

See Northern Spotted Owl Critical Habitat Designations, 57 Fed. Reg. 1796 (Jan. 15, 1992).

In sum, the ESA’s Section 7 mandate prohibiting destruction or adverse modification of critical habitat forbids any agency actions that are likely to threaten either the survival or the recovery of listed species. In its critical habitat proposal, however, FWS did not determine either: (1) how much habitat murrelets need to recover; or (2) a date by which murrelet recovery should occur. Without this information, FWS’s critical habitat revision efforts were fatally compromised from the start.

While FWS is free to consider, as § 4(b)(2) states, “other impacts,” it cannot do so to the detriment of the governing survival and recovery mandate of critical habitat. See Gifford Pinchot, 378 F.3d at 1070 (The ESA “was enacted not merely to forestall the extinction of species (i.e., promote a species survival), but to allow a species to recover to the point that it may be delisted.”). FWS cannot use its exclusions to undermine the very purpose Congress established for designating critical habitat. See Center for Biological Diversity, 240 F. Supp.2d at 1108 (determining that exclusion of “essential” unoccupied lands was arbitrary and capricious).

Further, the obvious implication of FWS excluding critical habitat down to an extinction threshold is that what little critical habitat remains must, by itself, meet the demand of recovering murrelets when part of a section 7 consultation. Even if the excluded lands benefit from protections that are considered equivalent to that of the ESA (which is rarely, if ever, the case), FWS cannot use non-designated land to evade ESA compliance. The Ninth Circuit unequivocally rejected a similar previous

attempt, dismissing the argument that the protections of the Northwest Forest Plan were relevant in determining whether logging would adversely modify critical habitat:

If we allow the survival and recovery benefits derived from a parallel habitat conservation project . . . that is not designated critical habitat to stand in for the loss of designated critical habitat in the adverse modification analysis, we would impair Congress' unmistakable aim that critical habitat analysis focus on the actual critical habitat.

Gifford Pinchot, 378 F.3d at 1076.

The FWS recognized this fact when it excluded land on economic grounds from the critical habitat designation for the Northern Spotted Owl:

The above exclusions increase the importance of the remaining critical habitat and associated consultation processes to the conservation of the owl and place a greater dependence on other processes for recovery. The exclusions may reduce the biological buffer, in some areas, thus reducing the Service's flexibility under section 7. Deleting or dropping areas from the designation also changes the value of the remaining units, thereby affecting how these areas should be reviewed under section 7.

57 Fed. Reg. at 1808.

By proposing to exclude vast amounts of eligible habitat, FWS has both refused to meet its legal obligations and ignored the practical benefits of critical habitat. These failings have resulted in a fatally flawed proposed rule that will not assist the statutory goal of murrelet recovery.

II. DESPITE RECOGNIZING THAT MURRELETS REQUIRE LARGE BLOCKS OF SUITABLE HABITAT AND THAT HABITAT IS CONTINUING TO DECLINE, FWS IS REDUCING HABITAT PROTECTION.

The Service recognizes that maintenance and development of large blocks of critical habitat and contiguous forest cover are important to the long term recovery of the species. 71 Fed. Reg. at 53845. Yet, the Service proposes drastically reducing protected areas, even as the amount of habitat available to marbled murrelets continues to decline. The Service attempts to "sugar coat" the continued decline in suitable murrelet habitat by suggesting that the *rate* of decline has decreased. Id. at 53846. Nonetheless, murrelet habitat loss continues and suitable habitat is becoming less and less available. The lack of existing habitat has, both previously and presently, been identified as a significant limiting factor on the population. Remedying this loss of habitat is no easy task, but likely will take hundreds of years and more land protection, not less. Clearly, removing over 3,600,000 acres from critical habitat runs counter to the need to protect habitat for the murrelet's survival and recovery, is not supported by the best available science, is arbitrary and capricious and runs counter to law.

III. SOCIAL AND ECONOMIC COSTS OF DESIGNATION

The Service suggests that the protection provided by critical habitat comes at a "significant social and economic cost." 71 Fed. Reg. at 53839. But the discussion on social costs is incomplete.

There is a significant social cost resulting from the Service's repeated failures to properly implement a vitally important law. The social cost comes from the damage to and loss of threatened and endangered species to biological diversity, costs in time and money by members of the public to ensure the government does its job, and in public confidence. These costs are particularly high in the present case, where the Service is now incurring expenses to change an existing rule and is acting outside of its expertise by relying primarily on reasons other than science to justify the change.

The Service complains that the process of designating critical habitat is expensive and time consuming. In this instance, the process of designating critical habitat was **completed in 1996** and therefore, costs of designating it are not really relevant to *this* rule. To the extent that the process is time consuming and expensive, for purposes of this rule, these costs would apply toward the proposed exclusion of existing habitat and, if relevant at all to the rulemaking, should be weighed in favor of *not* excluding land already designated as critical habitat.

In this proposal, FWS has not presented an economic analysis, see 71 Fed. Reg. at 53862, and has stated that a draft economic analysis will be available at a later date for public review and comment. The undersigned will submit more detailed economic comments at such time; however, we include with these comments an economic report by ECONorthwest entitled "The Economic Benefits of Old-Growth Forests in the Pacific Northwest," October 2006. This report presents an overview of the economic benefits of old-growth forest protection that should be considered in any economic analysis of protection of murrelet critical habitat.

IV. LITIGATION AND EXPENSE

The Service complains of "excessive litigation" and that it has been "inundated with lawsuits" related to critical habitat designations and asserts that such litigation diverts funds from other activities:

"The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, our own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed." 71 Fed. Reg. at 53839.

This statement is not accurate for several reasons and should be removed from the final rule. Since 2002, Congress has placed a subcap on the listing budget limiting the amount of funds that can be spent on critical habitat, ensuring that spending on critical habitat designation does not capture funding for listing new species. In part because of this subcap, FWS has had more money for listing species than ever before, yet has been listing the fewest number of species since the Act was passed.³ Thus, it is plainly false for FWS to claim that they are not listing species because of critical habitat.

³ Greenwald, D. Noah, K. F. Suckling, M. Taylor Factors. 2005. The Listing Record. In *The Endangered Species Act at thirty: renewing the conservation commitment*, edited by Dale Goble, J. Michael Scott, and Frank Davis, Island Press.

In the past, FWS has either neglected to designate critical habitat or illegally determined designation was not prudent, resulting in a large backlog of critical habitat designations. Likewise, FWS has often failed to meet statutory requirements for responding to petitions to list new species. In the last ten years, FWS has repeatedly been taken to court to meet these statutory requirements and in nearly all cases, the courts have found that FWS did indeed fail in their duty and ordered them to either make a listing determination or designate critical habitat. These court actions have resulted in all recent listings of species and most critical habitat designations. Thus the courts, in most case, are simply ordering FWS to comply with the statutory requirements of the Act by taking action to protect and conserve threatened and endangered species. Accordingly, FWS can hardly claim that these funds were misspent.

Above and beyond carrying out conservation activities required by the Act, such as listing species and designating critical habitat, there is little support for FWS's claims that they expend substantial resources defending lawsuits. Indeed, figures from a 2002 General Accounting Office (GAO) report show that only roughly 2.7% of the listing and consulting budget are expended on litigation support independent of required conservation activities.⁴ This is largely because the majority of litigation costs come from the Department Of Justice's (DOJ) budget. For these and other reasons, FWS should remove language claiming that litigation is the cause of their failure to meet their statutory requirements under the Act.

As noted above, FWS had already designated critical habitat for the murrelet and thus the majority of costs for designation relate to FWS's decision to exclude the majority of the previous designation. FWS was not ordered to redesignate critical habitat, but rather elected to settle a timber industry lawsuit likely because of the Service's own interest in undermining protections for the murrelet. In this context, these FWS claims are particularly egregious and should be stricken from the final rule.

V. FWS MISUSES THE DEFINITION OF CRITICAL HABITAT.

ESA § 3(5)(A) defines critical habitat as the specific areas with the physical and biological features (i) essential to the conservation of the species, and (ii) which may require special management protection. 16 U.S.C. § 1531(5)(A). In the proposed revision of murrelet critical habitat, FWS has taken this definition and used it to improperly narrow the starting point for considering critical habitat. 71 Fed. Reg. at 53851. FWS identifies several areas where it believes no special management is needed for murrelets. See id. at 53852-54. However, there is no basis in the ESA for narrowing areas in the critical habitat definition because other plans may be in place. See Center for Biological Diversity, 240 F. Supp.2d at 1099 (rejecting argument that lands can be omitted from critical habitat designation where they are managed under separate management plans - "The fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is 'critical.'"). As the court in Center for Biological Diversity stated very clearly, the ESA considers the designation of critical habitat wherever special management consideration "may" be warranted, and

⁴ GAO. 2002. Endangered Species Program: Information on how funds are allocated and what activities are emphasized. United States General Accounting Office, Report to the Chairman, Committee on Government Reform, House of Representatives. GAO-02-581.

specifically contemplated that more than one method of habitat protection would be utilized for any given habitat. Id. (“**So long as they are useful, the more protections the better.**”). (emphasis added).

VI. PROPOSED EXCLUSIONS IN THE PROPOSED RULE ARE ILLEGAL.

A. General Comments

The statutory basis given for the proposed exclusions is 16 U.S.C. § 1532(b)(2), which calls for the Secretary to take “into consideration” the economic and other impacts of designation, and authorizing the Secretary to exclude any area from critical habitat designation where “the benefits of such exclusions outweigh the benefits of” including it. See also 50 C.F.R. § 424.19. Regardless of any benefits, exclusion is statutorily impermissible where the failure to designate critical habitat will result in the extinction of the species concerned. Id.

However, the proposal to exclude a sweeping and significant portion of the Northwest landscape from the designation does not appear to be based on an honest balancing of the positive and negative impacts of designation. Indeed, there is scant information on the benefits provided at all, a defiance of law. See NRDC v. U.S. Dept. of the Interior, 113 F.3d 1121, 1125 (9th Cir. 1997) (FWS acted illegally because it “never weighed the benefits of designation against the risks of designation”). Moreover, FWS appears to believe that § 1532(b)(4) authorizes it to exclude areas from designation simply where there is a plan in place to provide some, largely unspecified, benefits to marbled murrelets. FWS can cite to nothing in the ESA, its governing regulations, or case law that would support this outcome. In fact, the courts have already specifically stated that such exclusions are not appropriate.

In NRDC, FWS had excluded potential critical habitat for the California Gnatcatcher based on the existence of a voluntary state habitat management program that provided some benefits to the species. 113 F.3d at 1126. The Ninth Circuit found such exclusion unlawful.

Neither the Act nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection... In any event the [state-run] alternative cannot be viewed as a functional substitute for critical habitat designation. Critical habitat designation triggers mandatory consultation requirements for federal agency actions involving critical habitat. The [] alternative, in contrast, is a purely voluntary program that applies only to non-federal land-use activities.

Id. at 1127 (emphasis in original, footnote omitted); see also Conservation Council for Hawai’i v. Babbitt, 2 F. Supp.2d 1280, 1287 n.10 (D. Hawai’i 1998) (separate legal protections for listed species “may not serve as a basis for a decision not to designate critical habitat”); Center for Biological Diversity, 240 F. Supp.2d at 1099 (rejecting the argument that lands can be omitted from critical habitat designation where they are managed under separate management plans - “The fact that a habitat is already under some sort of management for its conservation is absolute proof that such habitat is ‘critical.’”). After FWS refused to designate critical habitat for the Mexican Spotted Owl on the basis of existing alternative management plans, the district court in Arizona struck down the action and expressed its frustration at the agency’s defiance of well-established legal standards.

Based upon the foregoing, Defendant, as well as FWS, knew or should have known that their decision not to designate critical habitat in Arizona or New Mexico on the basis that it would only provide “additional” protection was unlawful. Indeed, Defendant and FWS have been told by no fewer than three federal courts, including the Ninth Circuit, that its position is untenable and in contravention of the ESA. Nevertheless, with apparent disregard of the courts, Defendant decided not to designate critical habitat on [Forest Service] lands or those of the Navajo Nation and Mescalero Apache in Arizona and New Mexico on the basis that “adequate” plans were already in place and “additional” protection was unnecessary. This argument has already failed three times. It fails yet again here.

Id. at 1102-03. We regret that FWS has chosen to adopt yet again an approach to critical habitat designation “with apparent disregard of the courts.” Id.⁵

B. Northwest Forest Plan Exclusion

FWS has proposed excluding a vast amount of land subject to federal jurisdiction or oversight from the proposal. The asserted justification for this exclusion is that the Northwest Forest Plan provides benefits to listed species and “critical habitat designation for the marbled murrelet in areas within the Northwest Forest Plan would provide a relatively low level of additional regulatory conservation benefit to the species....” 71 Fed. Reg. at 53861.

The Northwest Forest Plan is not a substitute or surrogate for critical habitat. FWS can present no evidence that Congress intended to waive the obligation to designate critical habitat where other management plans were in place. Rather, the ESA provides a narrow window for withholding designation in appropriate areas upon a specific and supported explanation that the benefits of exclusion outweighed the benefits of inclusion.

The proposal to eliminate critical habitat protections from federal lands and for federal projects also undercuts the clear policies of the ESA. In enacting the ESA, Congress stated that it was the policy of the United States that all federal agencies ensure that they were taking steps to protect and recover listed species. 16 U.S.C. §1531(c)(1). Under FWS’s interpretation of the law, however, it should not take steps to address critical habitat simply because a separate agency is doing something that may meet its own ESA obligations. That is contrary to law. Center for Biological Diversity, 240 F. Supp.2d at 1100; Middle Rio Grande Conservancy District v. Babbitt, 206 F. Supp.2d 1156, 1169 (D.N.M. 2000) (ESA “compels the designation despite other methods of protecting the species the Secretary . . . might consider more beneficial.”).

Indeed, it is entirely appropriate for FWS to place a disproportionate amount of the conservation burden (such as critical habitat designation) on federal lands because the costs (and benefits) of habitat

⁵ In the Federal Register notice, FWS explains that length its argument that critical habitat does not actually benefit threatened and endangered species, a position that runs contrary to the will of Congress expressed in the plain language of the statute, federal court decisions, and implicitly, the timber industry, as timber groups have long fought designation of critical habitat and its restrictions (i.e., murrelet protections) on logging.

protection will be more widely shared. The public lands are the best place to conserve fish habitat and water quality, because both the costs and the benefits are borne by the public. The Ninth Circuit has also acknowledged that Congress, “in its effort to stem the tide of species extinction,” required “more of federal agencies than private entities.” Sierra Club v. Babbitt, 65 F.3d 1502, 1512 (9th Cir. 1995). However, under the current proposal, only non-federal land will be designated, turning these priorities upside-down.

The Northwest Forest Plan was adopted in April 1994 to protect terrestrial and aquatic habitat in order to address the decline of the Northern Spotted Owl, Marbled Murrelet, Pacific salmonids, and other aquatic species across the federal forest landscape. The range covered by the plan is vast, approximately 57 million acres or about 89,000 square miles in Washington, Oregon, and California. Extensive portions of the Northwest Forest Plan area are currently designated as critical habitat for marbled murrelets.

In 1996, FWS asserted that the 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 LSRs [late-successional reserves] as critical habitat compliments and supports the Northwest Forest Plan and helps to ensure persistence of this management directive over time.” 61 Fed. Reg. at 26265.

FWS now asserts, without explanation, that it “has a reasonable expectation that the Northwest Forest Plan will continue to be implemented, or if revised, that the revised plans will continue to provide for marbled murrelets.” 71 Fed. Reg. at 53861. This assertion is immediately undermined by the Service itself, noting that BLM is currently revising its land use plans for Western Oregon and over the next several years, National Forests in the region will be reviewing and revising their land management plans. Id. Contrary to FWS’s assertion, a reasonable expectation is that the Northwest Forest Plan will be revised in many ways that will undermine protection for marbled murrelet habitat.

Salmon and steelhead protections under the Northwest Forest Plan provide a useful, real-world example. On March 22, 2004, the Departments of Agriculture and Interior signed the Record of Decision by which the Aquatic Conservation Strategy (the portion of the Northwest Forest Plan directed at protecting salmon and steelhead) was amended in such a way that further erodes its ability to meet the conservation needs of listed fish, in order to allow implementation of federal forest projects that are known to adversely affect aquatic habitat. 69 Fed. Reg. 22486 (April 26, 2004). This amendment has been challenged in court, but the model for weakening Northwest Forest Plan protections has clearly been outlined.

Indeed, historically, the Forest Service, BLM, and other agencies have not managed critical habitat within the Northwest Forest Plan area for recovery, as required by law. Instead, the agencies have equated adverse modification of critical habitat to the jeopardy standard, an approach now clearly illegal in light of the Gifford Pinchot decision. Moreover, the Service, in the last several years, has reorganized its staff to reduce the number of employees and employee time dedicated to monitoring implementation of the Northwest Forest Plan. Similarly, the multi-agency Regional Ecosystem Office has in recent years been vastly reduced in both size and scope of its activities. This office previously was responsible for insuring proper implementation and coordination between various agencies tasked with implementing the Northwest Forest Plan. In light of the reduced staffing, monitoring, and agency

coordination in implementation of the plan, FWS's assertions that the Northwest Forest Plan can take the place of designated critical habitat are unsupported.

In the proposed critical habitat rule, FWS makes the following statement: "We believe that a critical habitat designation for the marbled murrelet in areas within the Northwest Forest Plan would provide a relatively low level of additional regulatory conservation benefit to the species and its PCEs beyond what is already provided by existing section 7 consultation requirements due to the physical presence of the species." 71 Fed. Reg. at 53861. The statement is neither supported, nor supportable. In fact, there will be significant conservation benefit from designating critical habitat within the forests covered by the Northwest Forest Plan. Consultation to ensure consistency with the recovery standard will allow FWS experts to help the Forest Service and BLM conduct projects that will help rather than hurt murrelet habitat. Logging, road construction, ski areas, and various restoration projects have the potential to adversely affect murrelet habitat, and the Northwest Forest Plan is not sufficient by itself to ensure conservation and recovery.

FWS must designate critical habitat on federal lands covered by the Northwest Forest Plan because such areas contain "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." ESA §3(5) & §4(a)(3).⁶ It is clear that federal lands exhibit the features essential to the conservation of the species and may need special management. FWS has completely failed to demonstrate that the benefits of excluding the Northwest Forest Plan area from the designation will outweigh the benefits of including it. In fact, the federal register notice completely fails to disclose the added value of designating critical habitat and consultation and fails to balance those benefits against the alleged benefits of exclusion. The "added value" of critical habitat is represented by:

1. Forcing federal agencies to openly consider the impact of their actions not just on survival but on the conservation and recovery of marbled murrelets.
2. In unoccupied habitat, consultation may not occur without the designation of critical habitat. To the extent that little or no unoccupied habitat is proposed for designation, that question needs to be revisited.
3. Ensuring that the long-term benefits of restoration clearly outweigh the short-term adverse impacts that can occur.

C. Non-Federal Lands Exclusions

For several years, FWS has asserted that critical habitat designation offers little benefit on private lands. Those assertions have been repeatedly rejected by the courts, and are not supported or

⁶ In several instances, particularly when discussing Wilderness Areas, National Park lands, and the Headwaters Forest Reserve at pages 53852 -54, the Service concludes that these lands do not meet the definition of critical habitat because they are already managed properly. The Service provides no explanation to support its proposal to reverse the existing critical habitat rule in each instance where the laws and management regimes used to support the Service's proposal to exclude critical habitat were in place when the critical habitat designations were originally made. As discussed previously, the presence of other protective statutory provisions cannot justify an exclusion of critical habitat.

supportable. Congress could have, but did not, exclude private lands from designation of critical habitat. There are several benefits to such designation that have evidently been ignored here. See Conservation Council, 2 F. Supp.2d at 1286 (“[T]here are significant substantive and procedural protections that result from the designation of critical habitat outside of the consultation requirements of Section 7.”). Section 7 applies to all federal actions without regard to whether they take place on federal or private lands. Federal agencies take a variety of actions that can harm murrelets on non-federal land. Those actions are subject to § 7 and would benefit from the additional protections offered by critical habitat designation. As the courts have consistently affirmed, and as we have repeatedly stated, the “adverse modification” standard imposed by Section 7 can provide an additional level of protection by ensuring that federal actions do not interfere with the recovery of listed species.

Moreover, there is no indication why plans directed to a particular activity, such as a Habitat Conservation Plan (“HCP”), should result in a wholesale exemption from critical habitat designation. While the HCP may address one particular habitat degrading activity such as logging, landowners should not, as a result, gain the ability to adversely modify habitat – and impede murrelet recovery – through any other means.

There are several benefits to critical habitat designation on private lands outside those specifically tethered to the Section 7 regulatory process. These benefits have also been regularly reaffirmed by the courts. For example, the designation “informs the public as well as state and local governments” about the importance of specific areas to the survival and recovery of listed species. See Conservation Council, 2 F. Supp.2d at 1286. Such information may prove useful to people who do not understand the importance of their land and activities, but who wish to ensure that they are not harming murrelets out of goodwill or out of concern for violations of other sections of the ESA. 16 U.S.C. § 1538 (prohibiting “take” of listed species); see also Middle Rio Grande, 206 F. Supp.2d at 1169 (“ESA neither requires nor suggests that private land containing the constituent elements necessary to a protected species’ survival be excluded from designation”). In short, designation of critical habitat helps species and people in the region by focusing attention on the habitats where protection is most important.

Existing management plans, including HCPs, should not be used as a reason to justify excluding currently designated critical habitat. Besides the fact that critical habitat provides an additional benefit above and beyond conservation measures provided in HCPs and thus must be designated, there are a number of problems with HCPs. In particular, one provision of HCPs called “no surprises” assures landowners that they will not be required to take additional action to protect species above what is specified in a plan, even if new information comes to light. This could have negative consequences for the murrelet in a number of ways. Murrelet’s moving into an area of an HCP would have no protection and any new information concerning murrelet conservation needs would not be incorporated, thereby limiting conservation options that may be necessary in the future. This is particularly problematic for long term plans, such as the Washington Department of Natural Resources’ (WA DNR) incidental take permit, that go so far into the future that it is impossible to predict species needs during the duration of the permit or the changes to the landscape that might occur (for example, from wild fires, global warming, etc). Short term plans also pose problems, particularly for a species such as the murrelet, which requires old growth habitat. The proposed rule goes so far as to exempt lands included in a land management plan on the Makah Indian Reservation that expires in three years. This short term is described by the Service itself as having adverse affects on murrelets. 71 Fed. Reg. at 53857.

Most HCPs and management plans also allow permit holders to unilaterally back out of an agreement, again leaving the land exposed to many or all of the risks of future land management, but without the protection offered by critical habitat. As the Service has pointed out repeatedly, its limited resources make it unrealistic to expect the Service to then step in and issue a new critical habitat rule. Management plans and permits should not be used to justify exclusion from critical habitat if the plans include provisions allowing the landowner to opt out of the plan.

The Service claims its resources could “be better used to implement conservation measures on the ground.” The Service, however, does not reveal what projects it is referring to or even whether the unnamed “on the ground” projects would benefit murrelets. Among the units of land where the Service uses this rationale are the Elliot State Forest, the Pacific Lumber HCP, the Willapa National Wildlife Refuge, Nature Conservancy Lands, and WDNR lands. The Service states that it addresses the habitat needs of species, in part, through the Section 9 prohibitions against “take” of marbled murrelets. The Section 9 prohibitions are among the measures that may “make the difference between extinction and survival for many species.” 71 Fed. Reg. at 53839. The Service includes Section 9 in the portion of its proposed rule that describes the role of critical habitat in actual practice. We ask the Service to include in its final rule or in a revised proposed rule, a discussion of specific examples of use of the enforcement provisions in Section 9 to protect murrelets. Has the Service issued any notice of violations alleging take of murrelets since the species has been listed as threatened? Has the United States filed any complaints alleging take of murrelets? Have these cases been resolved? This information would help us better understand the extent the Service is using tools other than critical habitat to protect marbled murrelets. We believe enforcement is particularly important, since it is the primary incentive for many forest landowners to seek permits mitigating and minimizing the harm logging causes to murrelets now and in the future.

We believe the Service’s reliance on HCPs and management plans is misguided for other reasons as well. It is our understanding that it is rare that the Service or independent third parties approved by the Service monitor compliance with HCPs. The Service points out one HCP in its proposed rule that does include provisions for independent monitoring, the PALCO HCP. We would like to know if the monitoring has found violations of the HCP, and whether the Service has taken formal enforcement actions to remedy these violations. Beyond this one HCP, we ask that the Service identify other HCPs and management plans that authorize the Service to monitor compliance as it applies to marbled murrelets, to include compliance reports in the record, and provide a discussion of the Service’s findings. It is our understanding that there is very limited oversight by the Service once most management plans are in place. Landowners of course, are unlikely to report their own violations and, as discussed above, we are unaware of efforts by the Service to enforce the ESA when unauthorized actions occur on lands covered by HCPs. All of these factors become relevant when the Service relies upon sections 7, 9 and 10 of the ESA to justify its decision to vastly reduce the current critical habitat designation.

1. WA Conservation Strategy and Elliott State Forest HCP

The Service identifies the Washington DNR HCP as lacking a final conservation strategy for marbled murrelets. The Elliot State Forest HCP is only in draft form. These and other conservation plans that are not complete should not be used to justify excluding land from critical habitat. We feel the Service should not pre-judge a plan that is not yet final, and the public should not be cut out of an

opportunity to comment on how the final plan impacts critical habitat. There is no track record demonstrating the effectiveness of these plans in preserving suitable habitat for murrelets.

2. *Murrelet Conservation in Oregon*

In Oregon, there is no state-wide conservation plan in place and the parties with control of much of the forest land in the state have expressed hostility toward protective measures. The Oregon Forest Resource Council has previously urged the State of Oregon not to enter into a conservation plan with the Service, reasoning that the Service has virtually no record of enforcing the Section 9 prohibition against “take” of forest species.

The Oregon Department of Forestry (“ODF”) is now considering plans to increase logging in State forests. Given that and ODF's past history of compliance with the ESA, we are provided with little encouragement for compliance in the future. State forests in the North Coast of Oregon are now managed pursuant to a “conservation agreement” with the Service that was borne from Service allegations that ODF violated the ESA by logging forest land needed by another threatened species, the Northern Spotted Owl. ODF, in response to another lawsuit alleging its practices were leading to take of threatened salmon, chose to reduce its regulatory authority rather than conserve threatened and endangered salmon. ODF has also failed in its mandate under state law to define “special resource site” protections for the murrelets and recently has used its limited resources to begin the process of convening a committee charged with, among other things, questioning whether it should ever implement such legislatively-mandated resource site protections for marbled murrelets and other threatened and endangered species. We do not believe ODF has a record of stewardship both in its management of State Forests and in its oversight of private lands that warrants any reduction of critical habitat in Oregon. We ask that in the final rule, the Service does not exclude any land in Oregon that is presently designated as critical habitat.

3. *Land Ownership – Partnerships and Conservation Agreements*

Land ownership throughout the range of the marbled murrelet is dramatically different than the one example of “partnership” described in the proposed rule and found at page 53856 of the Federal Register -- a situation on the island of Lanai in Hawaii where one landowner owned 99% of an island and the species covered by the agreement had substantially different conservation and management needs than the murrelet. The discussion of the agreement the Service entered into in Lanai is so out of place in the context of murrelets that it appears it was simply lifted from other documents prepared by the Service and copied into the proposed rule. We suggest the Service remove from the final rule discussion of the agreement on Lanai.

We believe the Service is incorrect in characterizing management plans discussed in the proposed rule as “partnerships.” None of the agreements the Service refers to in its proposed rule were developed through the Service’s non-regulatory “Partners” program. While the undersigned value the partnerships that may form and maintain a dedicated membership of people who, as the Service says, “derive satisfaction in contributing to endangered species recovery,” 71 Fed Reg. at 53856, the agreements discussed in the proposed rule were entered into specifically to seek exemptions from the prohibitions in the ESA. They would not qualify for the Partners program, and we are confident that a review of the background documents and negotiations leading to the agreements discussed in the proposed rule, including the agreement in Hawaii, originated because landowners sought regulatory

relief. Without the regulatory protections offered to species by the ESA, many of the landowners would likely have not sought to enter into conservation agreements with the Service.

The Service provides little or no evidence to support its conclusion that the designation of critical habitat is a deterrent to conservation agreements. 71 Fed. Reg. at 53857. We believe that the designation of critical habitat is in most instances neutral or beneficial in promoting such agreements. We recommend the Service look specifically at the documents underlying each of the conservation agreements discussed in its proposed rule. While reviewing these documents, we ask that you examine whether the landowners sought regulatory relief in exchange for the conservation measures they proposed and consider whether the landowners would have offered to implement the conservation measures if they were not concerned about actual or potential regulations. We suggest that without the possible regulatory prohibitions, the landowners would not have entered into conservation discussions or an agreement. The Service, in weighing the benefits of critical habitat, completely fails to consider this perspective. We ask you to consider this perspective prior to issuance of a final rule.

The Service also suggests that by preemptively excluding lands from critical habitat, it will help it preserve “current partnerships and encourage additional conservation actions in the future.” 71 Fed. Reg. at 53857. It appears the Service is simply writing conclusions to fit an outcome, as it presents no evidence to support this perspective. Agreements discussed in the proposed rule were entered into after critical habitat was designated, supporting our view that the designation was neutral or positive in leading to agreements and certainly critical habitat designated prior to an agreement would not now jeopardize the same agreement.

D. FWS Failed To Consider the ESA’s Precautionary Principle.

The ESA is designed to give endangered species the “benefit of the doubt.” H.R. Conf. Rep. No. 96-697 at 12 (1979). As the Supreme Court has recognized, Congress, in passing the ESA, made “it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’” TVA v. Hill, 437 U.S. 153, 194 (1978); see H.R. Rep. No. 93-412 at 4-5 (1973) (“The institutionalization of that caution lies at the heart of H.R. 37”). Courts invoke the precautionary principle when interpreting “the best scientific and commercial data available” clause in the context of listing decisions under ESA § 4. See Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 681 (D.D.C. 1997) (rejecting the Fish and Wildlife Service’s use of “scientific certainty” as the standard for its decision not to list the lynx as a threatened species).

While the critical habitat section of the ESA tempers the demand for the “best scientific data” with the inclusion of economic considerations, this should not compromise the overall resolve to protect species from the threat of extinction. See 16 U.S.C. § 1533(b)(6)(C)(ii) (within a year of listing, Secretary must designate habitat “to the maximum extent prudent” based “on such data as may be available at that time”). Notably, Congress observed that the value of the “genetic heritage” of endangered species is “incalculable.” H.R. Rep. No. 93-412 at 4-5 (1973). At the same time, it was keenly aware of the vital role habitat played in the preservation of species. See 16 U.S.C. § 1531(b) (One purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved[.]”); S. Rep. No. 93-307 at 2 (1973) (“The two major causes of extinction are hunting and destruction of natural habitat.”).

The precautionary principle is built into the overall purpose and structure of the ESA, and any evaluation as to the benefits of exclusion requires a healthy margin of error. This margin would provide a safeguard given the imperfect nature of scientific information and the need to preserve diverse habitat in light of unanticipated degradation, including catastrophic events. FWS properly recognized its role under the ESA in 1996 but abandoned its statutory responsibilities in 2006.

VII. FWS SHOULD DESIGNATE AND PROTECT THE MURRELET'S MARINE HABITAT.

There is no marine habitat currently designated as critical habitat for the marbled murrelet. The Service justifies its failure to designate marine areas by asserting that it is "unable to define specific areas essential to the conservation of the species." This statement is not only unsupported, but is directly contradicted in other sections of the proposed rule. After stating its conclusion, the Service immediately identifies marine habitat characteristics needed by murrelets. 71 Fed. Reg. at 53840. The Service then proceeds to identify specific locations that fit these characteristics and that are particularly important for maintaining and improving the current distribution of marbled murrelets. *Id.* at 53841-42. We request the Service reassess marine areas and protect all areas essential to the conservation of the species as critical habitat.

CONCLUSION

Providing suitable nesting habitat is critical to the survival of the marbled murrelet. The preferred habitat is unfragmented, late seral, coniferous coastal forests. Population numbers positively correlate with late-seral habitat numbers.⁷ The independent status review, completed in March 2004, found that the murrelet population is still in decline and continues to need federal protection. The review also found that:

- 91% of marbled murrelet habitat is on federal lands.
- The report predicts continued murrelet population declines in Washington, Oregon, and California due to loss of nesting habitat from logging and urbanization.
- Population trend models cited in the report predict that marbled murrelets may disappear from all of their native Pacific Northwest range within 100 years.
- In California, predicted probability of extinction is 100% within the next 40 years.
- The report states: "The continued protection of nesting habitat on Federal land could be severely compromised if the Northwest Forest Plan is altered."
- The Washington, Oregon, and California murrelet population is a genetically Distinct Population Segment (DPS) from the murrelet populations that are faring better in Alaska.
- The report concludes: "It is unrealistic to expect that the species will recover before there is significant improvement in the amount and distribution of suitable nesting habitat."

FWS's proposed revision to murrelet critical habitat fundamentally conflicts with the scientific findings of the status review. We ask the Service to reconsider and withdraw the proposed revision of murrelet designated critical habitat. Not only would the proposal violate federal law, we fear that these

⁷ Raphael, M.G., 2006. Conservation of the marbled murrelet under the Northwest Forest Plan. *Conservation Biology* 20:297-305

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proposed reductions could lead to the extinction of the marbled murrelet in Washington, Oregon, and northern California. Federal, state, and private lands should all be contributing to the survival and recovery of the murrelet, for these threatened birds need habitat now more than ever. If questions arise from these comments, please don't hesitate to contact Susan Ash at (503) 292-6855 or sash@audubonportland.org.

Sincerely,

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