



EXCLUSIONS OF CRITICAL HABITAT UNDER §4(B)(2)

As the Fish and Wildlife Service (FWS) finalizes the critical habitat proposal for the Northern Spotted Owl, and considers exclusions of habitat from the final designation based on Section 4(b)(2) of the Endangered Species Act (ESA), it is critical that Service follow the parameters set forth in the Department of Interior Solicitors' Memorandum on exclusions of critical habitat:

- 1) The FWS *must* identify the benefits of inclusion, including how **inclusion relates to the recovery of the species**. The designation of critical habitat may provide a benefit to the species greater than by listing alone because some federal actions could adversely impact critical habitat while not triggering jeopardy under Section 7.
- 2) Once *both* sets of benefits have been identified, the FWS *may* make an exclusion from the critical habitat designation *only* if the benefits of exclusion are greater than inclusion. The FWS must weigh whatever benefits of exclusion or inclusion in an even-handed and logically consistent way. The balancing conducted by the FWS must be explained in the critical habitat rule itself and **must be supported by the administrative record**.
- 3) As habitat of a species is lost, the remaining habitat may become more important to the conservation of the species, and the benefit of inclusion will likely increase. Therefore, as the scope of the exclusions increases, the benefit of inclusion may increase non-linearly, **requiring a proportionately greater benefit of exclusion to outweigh inclusion**.
- 4) Exclusions based on the presence of a Habitat Conservation Plan (HCP) may be appropriate if the HCP focuses on the species at issue and provides greater conservation benefit than the designation of critical habitat would provide. However, the exclusions of all HCPs without completing specific benefits-balancing does not meet the requirements of Section 4(b)(2).

The FWS's economic analysis demonstrates that the benefits of exclusion are not likely to exceed the benefits of inclusion under any rational standard:

- 1) The economic analysis estimates that under a "high impact" (*i.e.*, worst case) scenario, critical habitat designation would result in lost timber harvests amounting to \$6.5 million per year. This minor economic loss does not outweigh the conservation benefits of including all of the proposed critical habitat.
- 2) The ecosystem services provided by *intact* critical habitat are an additional benefit to society, beyond that provided directly to the Northern Spotted Owl, which vastly outweighs any projected economic benefits deriving from the exclusion of such habitat.

Finally, to the extent that the FWS excludes *substantial* additional areas not identified under the proposed rule (Outcome 5) an additional comment period under the APA is recommended to as it is best practice to give the public as much notice as possible regarding potential exclusions from critical habitat prior to the close of the last comment period.