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Public Comments Processing, Attn [FWS-R6-ES-2008-0026]  
Division of Policy and Directive Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

**RE: Comments on U.S. Fish and Wildlife Service's Revised Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx. Proposed Rule. 73 Fed. Reg. 62,450 (October 21, 2008)**

Please accept the following comments on behalf of our respective organizations<sup>1</sup> in response to the U.S. Fish and Wildlife Service (FWS) Proposed Rule for Critical Habitat for the Contiguous United State Distinct Population Segment of the Canada lynx. These comments supplement an initial letter submitted to FWS dated April 28, 2008<sup>2</sup>. We appreciate the additional opportunity to provide comment.

These supplemental comments are organized as follows:

1. Comments in support of lynx critical habitat designation in Maine;
2. Comments regarding the inadequacy of voluntary conservation agreements for lynx recovery in Maine;
3. Comments in support of expanding lynx critical habitat in Maine and in northern New Hampshire and Vermont.

**1. Comments in support of lynx Critical Habitat designation in Maine**

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<sup>1</sup> Maine Audubon, Center for Biological Diversity, Endangered Species Coalition, Environment Maine, Friends of Merrymeeting Bay, Natural Resources Council of Maine, RESTORE: The North Woods, Sierra Club (Maine Chapter), Geri Vistein, Wildlife Alliance of Maine

<sup>2</sup> Letter to FWS from Endangered Species Coalition, et al., "Support for Designation of Lands in Maine as Critical Habitat for Canada Lynx," April 28, 2008.

The benefits of critical habitat designation for the recovery of a species have been scientifically documented. Furthermore, the law is clear regarding the obligation of the FWS to designate adequate critical habitat to recover and delist threatened and endangered species.

**a. Critical habitat provides significant conservation benefits.**

Hagen and Hodges 2006<sup>3</sup> (submitted under Exhibit A) summarize the latest publications regarding why species are at risk today and the key role critical habitat designation plays in species recovery. Some key findings and conclusions include:

- (i) Habitat loss and adverse modification are the leading causes of species endangerment in North America as evidenced by the fact that more than 85% of ESA-listed species in the United States are affected by habitat-related threats.
- (ii) The majority of recovery plans identify threats to habitat as the significant factor endangering species.
- (iii) The last 6 FWS biennial reports to Congress (through 2001-2002) have documented that species with critical habitat designated for two or more years were more than *twice as likely* to have increased in the 1990's than species without critical habitat<sup>4</sup>.
- (iv) In the most recent FWS report to Congress available at the time, designated critical habitat helped populations improve, increased knowledge about population trends and contributed to recovery goals.
- (v) Critical habitat confers unique protection for listed species even if the area included in the designation also has other protective regulations in place such as habitat reserves or use of "umbrella species" for management.
- (vi) Legally, critical habitat provides two major benefits that are distinct from other protections under the ESA: unoccupied habitats can be protected and the adverse modification of habitat by actions that are federally conducted, funded, or authorized is prohibited.

**b. The legal requirements for critical habitat designation.**

Section 7 of the Endangered Species Act contains two distinct mandates. First, it requires that all federal agencies insure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Second, it mandates that agencies refrain from taking actions likely to "result in the destruction or adverse modification of habitat" that has been determined by the Secretary of the Interior to be critical.<sup>5</sup>

According to the current definition of "jeopardy," the first mandate prohibits only those actions which threaten the survival of an entire species. In contrast, the ESA defines critical

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<sup>3</sup> Hagen, A.N. and K.E. Hodges. 2006. *Resolving Critical Habitat Designation Failures: Reconciling Law, Policy, and Biology*. Conservation Biology, Vol. 20, No. 2, 399–407.

<sup>4</sup> Taylor, M.F.J., K.F.Suckling & J.J Rachlinski. 2005. *The Effectiveness of the Endangered Species Act: A quantitative Analysis*. BioScience Vol. 55. No. 4 pp 360-367.

<sup>5</sup> 16 U.S.C. § 1536(a)(2)

habitat as an area essential to the recovery of a species. Thus, the 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.

Critical Habitat is defined by the Endangered Species Act as:

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

(I) essential to the conservation of the species and

(II) that may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by a species at the time it was listed, upon a determination that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A), ESA § 3(5)(A); see also 50 C.F.R. § 424.02(d).

“Conservation” is the “use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which measures provided pursuant to this chapter are no longer necessary” (16 U.S.C. § 1532(3), ESA § 3(3); see also 50 C.F.R. § 424.02(c)), meaning all actions necessary to fully recover and delist a species.

The clear purpose of critical habitat designation is to facilitate species recovery, and the ESA requires that the Secretary designate adequate occupied and unoccupied habitat to recover and delist threatened and endangered species.

The prohibition against the adverse modification or destruction of designated habitat is central to the ESA’s objective of recovering listed species. Yet despite this significant protection specifically crafted by Congress and the courts repeated confirmation of this purpose, FWS continues to undervalue or dismiss entirely the role critical habitat plays in securing the species’ habitat and ultimate recovery by equating “jeopardy” and “adverse modification” determinations.<sup>6</sup>

Critical habitat establishes a different protective standard than that of “jeopardy.” As stated by one federal court, “the proper definition of ‘destruction or adverse modification’ is: ‘a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for either the survival or recovery of a listed species.’”<sup>7</sup>

Therefore, critical habitat designation is meant to protect the functional integrity of habitats that are necessary for the conservation and recovery of listed species, not merely to ensure the survival of individuals within a landscape of unsuitable or degraded habitat. Several court rulings have affirmed that critical habitat must be managed to promote recovery and not merely to avoid extinction: *Conservation Council for Hawai’i et al. v. Bruce Babbitt et al.*, 2 F. Supp. 2d 1280 (D. Haw. 1998), *Sierra Club vs. U.S. Fish and Wildlife Service and National Marine Fisheries Service*, Civ. No. 00-30117 [2001], *Gifford Pinchot Task Force et*

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<sup>6</sup> 71 Fed. Reg. at 66042

<sup>7</sup> *Center for Biological Diversity v. Bureau of Land Management*, U.S. Dist. LEXIS 30857 (N.D. Cal., 2004)

al. v. United States Fish and Wildlife Service, 378 F.3d 1059, 1066 (9th Cir. 2004). As such, critical habitat establishes a higher protective standard than is available to species without critical habitat.

Congress clearly intended that critical habitat do more than other sections of the ESA devoted to preventing 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 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.<sup>8</sup>

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.'<sup>9</sup>

The court further noted that 14 courts have rejected the Service's argument that other provisions of the ESA provide equivalent protection to critical habitat.<sup>10</sup>

According to the Tenth Circuit:

[C]ritical habitat designations serve to protect species vulnerable to extinction. Without a designated critical habitat, the ESA's requirement that "[e]ach Federal agency shall ...insure that any [of its actions] is not likely to ... result in the destruction or adverse modification of [critical] habitat," 16 U.S.C. § 1536(a)(2), becomes unenforceable.<sup>11</sup>

Designation of critical habitat adds a level of protection not otherwise available to species like the lynx that are threatened by habitat destruction or modification. As noted by the Norton opinion, "FWS ha[s] been repeatedly told by federal courts that the existence of other habitat protections does not relieve Defendant from designating critical habitat". Therefore, these species are protected by provisions that apply to all listed species, but are further protected by a set of provisions that apply only to designated critical habitat. According to the Service:

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<sup>8</sup> 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.").

<sup>9</sup> See Center for Biological Diversity et. al. v. Norton, 240 F. Supp. 2d 1090, 1101 (D. Ariz. 2003) (citation omitted).

<sup>10</sup> Id. at 1102

<sup>11</sup> See Forest Guardians v. Babbitt, 174 F.3d 1178, 1185-86 (10th Cir. 1999) (pet 2004r for rehearing and rehearing en banc denied). Center for Biological Diversity et. Al. v. Norton, 240 F. Supp. 2d at, 1100

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 the listed species. Such designations alert Federal Agencies, States, the public, and other entities about the importance of an area for the conservation of a 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.<sup>12</sup>

## **2. Comments regarding the inadequacy of voluntary conservation agreements for lynx recovery in Maine**

We support voluntary conservation plans, but *not* to the exclusion of designated critical habitat in Maine. Conservation plans currently proposed hinge on excluding critical habitat designation, and FWS has failed to fully weigh the benefits of designating critical habitat demonstrated in peer-reviewed journal articles and as required by the courts. Our groups reject the exclusion of critical habitat for lynx in Maine as scientifically unsound, detrimental to the recovery of the species, and unsupported by law or policy.

### **a. Benefits of excluding Maine Forest Products Council lands *do not* outweigh the benefits of designation**

The FWS' own criteria for weighing the benefits of exclusion include:

“whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective...”<sup>13</sup>

For FWS to exclude any area from critical habitat designation, there must be compelling evidence that such exclusion will have meaningful conservation benefits and not rely on speculative or untested benefits that lynx may or may not receive in the future. The current plans or agreements that are being proposed remain untested in determining their ability to recover lynx populations in Maine. Before any private land is excluded from designation under any specific plan, there needs to be an assessment of the success of these plans. Critical habitat designation and development of agreements aimed at recovery can and should exist side-by-side until we can determine whether or not the proposed management regimes are achieving recovery goals. This prudent approach is the most appropriate for a species like the Canada lynx that is at risk of extinction in Maine.

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<sup>12</sup> See Determination of critical habitat for the Northern spotted owl (57 Federal Register 1796).

<sup>13</sup> 73 Fed. Reg. at 62450

Also, there is no guarantee that voluntary agreements would actually be followed. This is of particular concern in Maine where there has been a pattern of disregarding voluntary agreements to protect certain wildlife habitats such as deer wintering areas (see below), resulting in significant loss of this habitat.

(i) The MFPC proposed voluntary agreement is undermined by a history of poor compliance with Maine's regulatory framework by Plum Creek.

Compliance with Maine's land use regulations by Plum Creek, the landowner with the largest ownership within the membership of the Maine Forest Products Council (MFPC), can only be described as troubling. The history of disregard for Maine's laws that protect wildlife and wildlife habitat should be weighed heavily when deciding if there can be any benefit whatsoever to a voluntary agreement even if it were exceptional, which it is not (see comments below). Given Plum Creek's extensive ownership, the problems with compliance are particularly relevant. The Natural Resources Council of Maine has completed a report detailing these infractions<sup>14</sup> and the findings are summarized here.

#### (I) Forest Practices Act and Water Quality Violations

Plum Creek violated Maine's Forest Practices Act (FPA), which resulted in by far the largest civil monetary penalty since the FPA rules were passed in 1990. The Maine Forest Service (MFS) first discovered these violations in West Middlesex Canal Grant in 2002, at the same time it discovered the numerous violations that resulted in water quality violations. Plum Creek violated the FPA by harvesting too much, and it did so without appropriate plans and failed to notify MFS of extensive clearcuts, as required by law. Initially, MFS imposed only a \$9,000 fine on Plum Creek for these violations, on the condition that the company do an extensive survey to document and correct other similar areas that failed to comply with the FPA throughout its ownership.

As a result of Plum Creek's surveys and MFS verification inspections, MFS found that Plum Creek had violated the FPA throughout its ownership and that many of the violations could not be remedied. Therefore, MFS assessed Plum Creek the maximum monetary penalty allowed under the 2003 settlement agreement: \$57,000. Combined with the \$9,000 penalty in 2002, MFS assessed Plum Creek a total of \$66,000 in penalties for FPA violations. The next largest penalty for FPA violations was \$19,500 (Don Mansius, MFS. pers. comm.)

#### (II) Voluntary Agreements for Protecting Deer Wintering Areas have Failed

IF&W Commissioner Roland Martin has said that Maine's deer yards are in "crisis"<sup>15</sup>. With the drastic changes in forest ownership that have occurred over the past eight years, the voluntary agreement strategy seems to be failing. According to Maine IF&W biologists, no major landowner in the state has a worse record of protecting deer yards than Plum Creek. In an email dated January 20, 2006, Eugene Dumont, an IF&W wildlife biologist, stated that

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<sup>14</sup> [http://www.nrcm.org/documents/FOAA\\_pc\\_report.pdf](http://www.nrcm.org/documents/FOAA_pc_report.pdf)

<sup>15</sup> *The Maine Sportsman*. Capitol Report by George Smith. P. 3. September, 2006

Plum Creek had a “feeble and dismal history to protect important DWAs<sup>16</sup>. Probably the worse [sic] record of any major landowner in the State.”

Examples of this poor record occurred in the following locations:

- *Upper Pierce Pond/Dead River*: In a June, 2005 memo, Charles Hulsey, IF&W’s Regional Biologist for Region D, described Plum Creek’s destruction of the deer yard between the Upper Pierce Ponds and the Dead River: “Five years ago MDIFW began negotiations with Plum Creek. At the time I met with a senior forester to show him a map of an important historic DWA between the Upper Pierce Ponds and the Dead River. Heavy browse lines, old records, firsthand observations [by] Gary Cobb (Pierce Pond Camps) proved this was once a very important DWA... I asked Plum Creek to defer harvesting in this area until either an agreement was made between MDIFW and Plum Creek, or formally rejected. Plum Creek ignored this request and cut the area so heavily it will not be a functional DWA for another 30 years”<sup>17</sup>.
- *Indian Stream Deer Yard Cut*: In October 2005, IF&W biologists discovered that Plum Creek was harvesting in a deer yard in Indian Stream Township. Again, Charles Hulsey wrote concerning this harvesting:

They are harvesting in the core area. This was surprise to me. I was very clear with Plum Creek that MDIFW needed a written plan for this area, that both parties could agree on, before any harvesting was to be done. This summer I even received calls from both Rocco and Mark Doty [Plum Creek employees] to see if they could harvest that area as they had equipment across the road. I told them not until there was a plan. They agreed...I met twice with Rocco in the field, and once at their Greenville office on August 31... I believed I left Greenville with Plum Creek accepting of the 30% [volume of removal]. We both agreed that the volume removal would be entirely from hardwood species.

- *Lexington Township Deer Yard Cut*: In Lexington Township, Plum Creek again refused to listen to IF&W requests to limit cutting of critical deer yards. Plum Creek cut a deer yard in this township in the winter of 2005 - 2006. Describing harvesting on the different parts of the parcel, IF&W biologist Charles Hulsey wrote:

The operator did a very good job in the PFW<sup>18</sup> 9 portion. [T]here is no longer any viable winter shelter remaining in the MGN<sup>19</sup> portion. By way of this operation, Plum Creek knowingly and contrary to my request, eliminated this shelter by removing 60-65% of the volume (eyeball estimate), almost entirely

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<sup>16</sup> “Deer Wintering Area” (DWA) is used interchangeably with “deer yard.”

<sup>17</sup> *The Maine Sportsman*. Capitol Report by George Smith. P. 3, September 2006.

<sup>18</sup> PFW stands for “Fish and Wildlife Protection Subdistrict” which includes deer yards; this designation requires landowners to limit cutting.

<sup>19</sup> MGN stands for General Management subdistrict and does not require the same limits to timber harvesting as deer yards zoned PFW.

from dominant hemlock and spruce. Not only was valuable winter shelter lost but the long term effect of this harvesting will be to convert these softwood dominated stands to hardwood dominated stands. The difference in the two treatments in parcel 2 is so stark that one could use it as an effective teaching tool to show the difference between very good DWA management (PFW area) and extremely poor DWA management.

**b. MFPC proposed agreement fails to address the greatest threat to lynx habitat: permanent loss due to future development**

One MFPC member, Plum Creek, has engaged in a level of real estate development never before seen in Maine, and others are sure to follow. Preliminary approval was recently granted to rezone 16,000 acres of forest land owned by Plum Creek, to allow development of resorts, second homes, and commercial infrastructure, including at least 2,300 “housing units” scattered across thousands of acres of lynx habitat. These developments threaten the recovery of Canada lynx. Beyond the loss of habitat are the risks associated with increased traffic, including mortality from collision as well as habitat fragmentation which occurs as traffic volume increases and animals avoid crossing roads (see Exhibit B: Risk of mortality of Canada lynx on Roads in Northern Maine).

Development activity poses a significant threat to lynx and requires special management. The FWS includes “commercial, residential or recreational area development” among the “actions that would increase traffic volume and speed on roads that divide critical lynx habitat” and “cause permanent conversion of the boreal forest.”<sup>20</sup> A risk assessment of the potential impacts of the Plum Creek development alone was conducted using estimates of traffic volume based on standard methodologies (See Exhibit C and C (1)) and incorporating recreation destinations [See Exhibit C (3)] within lynx habitat and with documented sightings of lynx [See exhibit C (2)]. This analysis resulted in identifying a substantial threat to the continued existence of the species within the Moosehead region and a significant loss of critical habitat due to fragmentation. The risk of lynx mortality on roads from the Plum Creek proposal was estimated using a model adapted from a study of wolf mortality in Wisconsin which has been used by FWS to create a Biological Opinion for a highway project in Maine<sup>21</sup>. Using this model along with the traffic estimates [Exhibit B (2)], we were able to identify a dramatic six-fold increase in the risk of lynx mortality from a baseline risk of 1.63 lynx killed on roads in the project area to 10.63 lynx killed (Exhibit B, Table 2).

**c. MFPC proposed agreement contains numerous deficiencies that will not protect or recover Canada lynx**

The current draft agreement is deficient in several important ways:

- Commitment to habitat management for lynx under this agreement relies on overly vague language of “continuous improvement” with no discussion of key management considerations such as rotations, decade by decade reviews, tying results to

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<sup>20</sup> 73 Fed. Reg. at 10876

<sup>21</sup> USFWS Maine Ecological Services Field Office. March 13, 2007. Biological Opinion of Route 161 Reconstruction and widening project. Cross Lake, T17 R4, Aroostook County, Maine.

certification or how this particular agreement varies from the FWS recommended guidelines and why.

- Threats to lynx from development are completely absent from this agreement and must be addressed, particularly regarding the threat of roads built for and used in residential, commercial, and recreational development.
- Monitoring of lynx populations under the agreement seems to be primarily the responsibility of the University of Maine's Cooperative Forestry Research Unit (CFRU). However, there is no determination of the costs and whether CFRU is either willing to accept these, or would otherwise have the resources to carry out this task over a meaningful time frame, such as for ten years with the possibility of adding 5-year increments.
- At least one landowner<sup>22</sup> admittedly engages in pre-commercial thinning, a practice which "may render habitat unsuitable for hares and, thus for lynx."<sup>23</sup> Specifically, the FWS found that among activities that may adversely affect critical habitat are "actions that would reduce or remove understory vegetation within boreal forest stands. Such activities could include, but are not limited to, pre-commercial thinning or fuels treatment of forest stands."<sup>24</sup> Rather than offering to discontinue that practice, Plum Creek proposes to wait until further scientific study has confirmed its effects.
- Financial support by some MFPC members is currently given to CFRU for a variety of research projects. Continuous monitoring of Canada lynx would be an additional cost that could take away support for current projects.
- Direct funding by industry for research to determine the effectiveness of proposed management guidelines creates an inherent conflict of interest.
- There is no commitment by the MFPC members to actually *implement* management guidelines, only create them sometime in the future.

**d. The importance of critical habitat designation on private lands; voluntary conservation agreements can and should co-exist with the regulatory requirements of critical habitat**

In Maine, more than 90% of currently occupied lynx range is privately owned. Voluntary conservation agreements are desirable and important to lynx recovery; however, critical habitat designation adds an important and unique layer of protection to the species and for the benefit of its recovery. Future threats to lynx include activities such as large-scale residential and commercial development that will require federal review. Critical habitat designation triggers analysis of impacts to lynx habitat where there is a federal nexus. Conservation agreements would provide no such requirement for analysis.

There is no reason why critical habitat designation and voluntary conservation agreements should be mutually exclusive. The FWS does not mention any conflicts or provide any evidence that lynx critical habitat and conservation agreements in Maine cannot operate in tandem. There are potential benefits to lynx to be realized from

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<sup>22</sup> The landowner is Plum Creek, which owns almost a half million acres of the proposed critical habitat

<sup>23</sup> PR 68301 (citing Ruediger et al. 2000; Hoving et al. 2004).

<sup>24</sup> PR 68306

implementation of conservation agreements (though as yet, those agreements are untested and the benefits uncertain); there are also clear benefits from designating critical habitat.

### **3. Comments in support of expanding lynx critical habitat in Maine and in northern New Hampshire and Vermont**

Another important aspect of critical habitat is that it allows for the designation of unoccupied areas determined to be essential to the conservation of the species. The ESA imposes the mandatory requirement that the FWS shall designate critical habitat “on the basis of the best scientific data available.”<sup>25</sup> Unfortunately, the FWS has chosen to not designate habitat outside Maine in the Northeast. Nor has the FWS even proposed critical habitat for all the known area used by lynx in Maine in the last decade (see Exhibit D: map of Occurrences of Canada Lynx.)

Instead, FWS limits its designation of critical habitat to areas that are already occupied by lynx, then concludes that the FWS must identify what additional habitat, beyond “currently occupied habitat” is necessary for recovery of the lynx. (And again, the FWS’ determination of the area currently occupied by lynx is suspect at best. See below). To limit lynx protections to its current range is to risk perpetuating its threatened status, and perhaps even to risk the species’ decline, as part of what makes many species vulnerable to extinction is the limited extent of current range. Critical habitat designation should be grounded in a habitat-based population viability analysis, enabling an idea of how many lynx are needed to achieve recovery, and then the amount of habitat necessary to support that number of lynx. This proposal does not provide such an analysis.

Instead, FWS limits its designation of critical habitat to areas that are already occupied by lynx, then asserts that currently occupied lynx habitat is sufficient to support a recovered lynx population in the lower 48. The FWS’ justification for this is a cursory discussion filled with unsupported assertions:

“... we have determined that occupied areas are sufficient for the conservation of the species because these areas adequately address the concepts of representation, resiliency, and redundancy necessary for conservation of a species...”<sup>26</sup>

The FWS arbitrarily and without supporting evidence applies these concepts, borrowed from its own regulations concerning what constitutes a “significant portion of range” for a species to be considered for listing under the Endangered Species Act. The FWS does not identify, according to the best available science, what constitutes a recovered lynx population in the lower 48 and the areas of habitat necessary to support this population.

The 2005 Recovery Outline for lynx shows a preliminary map for recovery areas. Included in the Core Area for the northeast United States is all of northern Maine and a portion of northern New Hampshire. Peripheral areas are in northern Vermont and the Adirondacks of New York, as well as eastern Maine. None of the peripheral areas and a good portion of the

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<sup>25</sup> 16 U.S.C. § 1533(b)(2)

<sup>26</sup> 73 Fed. Reg. at 10871

Core Area in the Northeast are not proposed for critical habitat, despite recent evidence that areas of northern New Hampshire and northeast Vermont are used by lynx. (The FWS acknowledges in its 2005 Recovery Outline that northern New Hampshire is included in an area with verified evidence of current lynx populations).<sup>27</sup>

**a. Evidence of lynx in areas outside proposed critical habitat.**

In 2007, Vermont and New Hampshire state wildlife biologists documented lynx tracks in northeast Vermont.<sup>28</sup> Later that year, a farmer shot a lynx in his chicken coop.<sup>29</sup> Within this region of northeast Vermont there is a 26,000 acre wildlife refuge that could serve as lynx habitat and also abundant state land. There have been several other probable occurrences of lynx in the state in the last few years.

A 2006 Forest Service Monitoring Report for the White Mountain National Forest describes a lynx record made just outside the Forest boundary in January of that year. DNA testing of a scat confirmed a female pure lynx. More lynx tracks were found about 10 miles north of the previous occurrence.<sup>30</sup> A map produced by Maine IF&W biologists in 2006 shows lynx occurrences since 1995 in portions of west central Maine that are omitted from proposed critical habitat.<sup>31</sup> In addition to the White Mountain National Forest in New Hampshire and Maine, the area of northern New Hampshire and western Maine contains the Umbagog National Wildlife Refuge and significant state lands and private conservation lands.

These sightings and records of lynx have been increasing in recent years, despite the fact that in neither Vermont nor New Hampshire is there a systematic survey program in place to search for evidence of their presence.

Areas of northern Vermont and New Hampshire as well as west-central Maine are already supporting lynx, at least in low numbers. The FWS should expand the area of critical habitat to include these portions of the northeast United States, in order to provide the regulatory protections of critical habitat designation and secure these habitats for lynx population growth and to facilitate lynx recovery. The presence of substantial federal lands in northern Vermont, New Hampshire, and western Maine provides one highly compelling reason to extend critical habitat to these areas. The designation will provide specific protections for lynx habitat on federal land that are directed at conserving and recovering the species.

**Conclusion**

Critical habitat is a highly effective tool for moving threatened and endangered species towards recovery. The intent of the law with regards to the designation of critical habitat is clear in statute and in the judicial record. The FWS should designate lynx critical habitat in

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<sup>27</sup> FWS 2005. Recovery Outline: Contiguous United States Distinct Population Segment of the Canada Lynx, p. 5. Available at <http://www.fws.gov/mountain-prairie/species/mammals/lynx/recovery.htm>.

<sup>28</sup> See <http://vtecostudies.blogspot.com/2007/02/lynx-found-in-northeast-kingdom.html> and VT F&W 2007 Furbearer newsletter at [http://www.vtfishandwildlife.com/wildlife\\_furbearer.cfm](http://www.vtfishandwildlife.com/wildlife_furbearer.cfm).

<sup>29</sup> <http://pressherald.mainetoday.com/story.php?id=156200&ac=PHnws>

<sup>30</sup> USFS 2006. Monitoring and Evaluation Report, White Mountain National Forest.

<sup>31</sup> See Exhibit D

Maine based on best available science and the needs of the species.

Voluntary agreements may be beneficial, but they do not substitute for the concrete, regulatory benefits of designating critical habitat. Further, the FWS cannot exclude critical habitat without showing clearly and convincingly that the benefits of voluntary agreements outweigh the benefits of critical habitat. The FWS has not shown this in the case of proposed agreements for Maine, including the MFPC draft agreement. Neither has the FWS shown why the MFPC agreement could not exist in tandem with a critical habitat designation.

In Maine, members of the MFPC have a long track record of disregarding voluntary agreements to protect wildlife habitat. There is little reason to believe this situation would be different in the future, and there are many reasons, including current proposals for extensive real estate development on MFPC member lands, to think the situation would be worse. The FWS would be acting irresponsibly to accept a voluntary agreement in lieu of the tangible and enforceable habitat protections conferred by critical habitat designation.

Finally, for the sake of lynx recovery, the proposal must be expanded to include so-called “unoccupied” habitat in Maine, and northern New Hampshire and Vermont. Much of this area is in actuality already occupied by lynx, and holds the potential for further growth of a population of lynx in the northeast United States. This, in turn, will facilitate the ultimate goal of the ESA, to bring about full recovery and delisting of the species.

Thank you for your consideration of our comments.

Sincerely,



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