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August 8, 2007

First Class Mail

The Honorable Dirk Kempthorne
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington D.C. 20240

Mr. H. Dale Hall
Director
U. S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

**Re: Notice of Intent to Sue Over the U.S. Fish and Wildlife Service's
Actions Regarding the Canada Lynx**

Dear Secretary Kempthorne and Director Hall:

On behalf of Defenders of Wildlife, Humane Society of the United States, Center for Biological Diversity, Conservation Northwest, Oregon Wild, Friends of the Clearwater, The Lands Council, Wyoming Outdoor Council, American Wildlands, Friends of the Wild Swan, HOWL: Help Our Wolves Live, Natural Resources Council of Maine, RESTORE: The North Woods, Animal Welfare Institute, Wildlife Alliance of Maine, Center for Native Ecosystems, Sinapu, San Luis Valley Ecosystem Council, Colorado Wild, Biodiversity Conservation Alliance and Mark Skatrud (collectively "Defenders"), we hereby provide notice pursuant to section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("FWS" or "Service") is in violation of sections 3 and 4 of the ESA, 16 U.S.C. §§ 1532(5)(A), 1533(a)(3), and 1533(b), with respect to its Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 71 Fed. Reg. 66008 (Nov. 9, 2006), and its failure to list the lynx as an endangered species under the ESA. 72 Fed. Reg. 1186 (Jan. 10, 2007) (Clarification of Significant Portion of Range for the Contiguous United States Distinct Population Segment of the Canada Lynx).

Despite the significant threats to the lynx's continued existence, the Service refuses to take the steps mandated by the ESA to ensure that the species and its habitat are adequately protected. Defenders has been forced to engage in a nearly fifteen-year legal battle to prompt meaningful action by FWS, resulting in multiple court rulings reprimanding

FWS for its failure to comply with the requirements of the ESA. As a result of Defenders' actions, the Service listed the Canada lynx as a "threatened" species under the ESA in 2000. Listing the lynx as "threatened" rather than "endangered," however, impermissibly deprives the lynx of the full protection of the Act and significantly impedes the species' recovery.

FWS has also resisted complying with the ESA's mandate to designate "critical habitat" for the lynx sufficient to fulfill the Act's fundamental goal that the species recover to the point where the protections of the Act are no longer necessary. Only when confronted with two federal court orders commanding that critical habitat be designated promptly did the Service act, but the end result fell well short of the mandates of the ESA and the needs of the species. Indeed, it is clear that in crafting the critical habitat designation for the lynx, the Service, in particular through the actions of former Deputy Assistant Secretary Julie MacDonald, placed political considerations ahead of the biological needs of the lynx. *See* Memorandum from Regional Director, Region 6, Fish and Wildlife Service, to Director, Fish and Wildlife Service (July 21, 2007) ("MacDonald Memo") (Attached). Specifically, although FWS proposed over 18,000 square miles as critical habitat in November 2005, Ms. MacDonald ordered that the proposal not encompass any Forest Service lands, where much of the species' remaining habitat and populations in the contiguous United States are found. *See id.* at 2. Subsequently, the Service's final rule in November 2006 omitted over 90 percent of lands proposed for designation in its already-inadequate proposed rule, formally designating only 1,800 square miles as critical habitat, in large part because of the exclusions of private lands orchestrated by Ms. MacDonald.¹ *Id.*

The Endangered Species Act

As the Supreme Court has emphasized, the "plain intent of Congress in passing the [Endangered Species Act] was to halt and reverse the trend toward extinction, *whatever the cost.*" *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (citations omitted) (emphasis added). A species receives protection under the ESA once it has been listed as either "endangered" or "threatened." The Act defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16); *see also* 50 C.F.R. § 424.02(k). A species is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, 16 U.S.C. § 1532(6), while a species is "threatened" if it is likely to become "endangered" within the foreseeable future. 16 U.S.C. § 1532(20).

Congress further understood that the loss of habitat was a primary factor driving many species toward extinction, and therefore designed the ESA to "provide a means

¹ The most recent revelations on the impact Ms. MacDonald had on decisions impacting imperiled species follows on the heels of an in-depth report on her potentially "unethical" behavior including "bull[ying], insult[ing], and harass[ing] the professional staff of [FWS] to change documents and alter biological reporting regarding the Endangered Species Program" completed by the Department of Interior's Office of Inspector General. U.S. Dept. of Interior, OFFICE OF INSPECTOR GENERAL, REPORT OF INVESTIGATION OF JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS (attached).

whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To meet this objective, the ESA mandates that FWS designate "critical habitat" for all listed species based on the best scientific data available, after considering the economic and other relevant impacts of such a designation.² See 16 U.S.C. § 1533(b)(3). "Critical habitat" includes "the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features [] essential to the conservation of the species and [] which may require special management considerations or protection," 16 U.S.C. § 1532(5)(A)(i), and unoccupied habitat that is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation," in turn, is defined as the means necessary to bring a species to the point it no longer needs the protection of the ESA – *i.e.*, recovery. 16 U.S.C. § 1532(3). See 50 C.F.R. § 402.02 (defining "recovery"). The definition of critical habitat thus reflects Congress' intent that FWS not limit the designation to the minimum amount of habitat necessary for the species' survival, but rather must include enough area to allow the species to return to healthy population levels.³

In December 2002, the United States District Court for the District of Columbia found FWS to be in violation of the ESA for, among other things, failing to designate critical habitat for the lynx. *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002). The court found that by failing to comply with its nondiscretionary duty to designate critical habitat for the lynx, FWS has "undermined the purpose and function of the consultation process set forth in section 7(a)(2) of the ESA." *Id.* at 47. Despite the court's order to designate critical habitat promptly, FWS failed for more than a year even to begin the

² Specifically, when designating critical habitat, FWS must identify sufficient habitat to provide for the essential life cycle needs of the species, including, but not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. 50 C.F.R. § 424.12(b)(1)-(5). In addition, the Service must describe the "primary constituent elements" such as "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types." 50 C.F.R. § 424.12(b).

³ ESA section 7(a)(2) provides the principal regulatory means for implementing critical habitat protections, requiring all federal agencies to "consult" with FWS for actions carried out, funded, or authorized that may adversely affect listed species or designated critical habitat. 16 U.S.C. § 1536(a)(2). Through the consultation review, the federal action agency and FWS must ensure that the action does not result in the "destruction or adverse modification" of a species' designated critical habitat. *Id.* ESA regulations define destruction or adverse modification of critical habitat as

a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02. The Ninth Circuit recently ruled this definition illegal because it reads the recovery purpose of critical habitat out of the ESA. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004).

process and as a result was again found to be "flagrantly violat[ing] both the ESA and th[e] Court's order to 'undertake prompt rulemaking.'" *Defenders of Wildlife v. Norton*, No. 00-2996 (GK), Mem. Op. at 10 (Jan. 15, 2004).

FWS has also repeatedly failed to list the lynx as endangered under the ESA throughout some or all of its range in the contiguous United States, as is clearly warranted in light of the best available scientific evidence. 16 U.S.C. § 1532(6); *Defenders of Wildlife v. Norton*, 239 F. Supp.2d at 20 (setting aside and remanding for further consideration FWS's determination that the lynx is not "endangered."). In a July 3, 2003 finding, clarifying its decision to list the species as threatened, the Service once again failed to explain coherently why the lynx does not warrant protection as an endangered species. 68 Fed. Reg. 40076 (July 3, 2003). As a result, the District Court for the District of Columbia directed the Service to provide a rational explanation of its actions. *Defenders of Wildlife v. Kempthorne*, 2006 U.S. Dist. LEXIS 71137, *33-41 (D.D.C. 2006). In response, however, FWS's most recent "clarification" simply repackages its irrational and illegal justification for refusing to provide the level of protection to the lynx mandated by the ESA. 72 Fed. Reg. at 1186-91.

The Service's Final Critical Habitat Rule Violates the Endangered Species Act

It has been apparent for over two decades that the loss and fragmentation of Canada lynx habitat are the primary threats to the species' continued existence in the contiguous United States. The lynx's range in the United States includes areas in New England, the Great Lakes, the Rocky Mountains and the Pacific Northwest, with small populations of lynx remaining in Maine, Minnesota, Montana, Vermont and Washington; small numbers of lynx recently verified in Michigan, Wisconsin and Wyoming; and a reintroduced population in Colorado. Throughout its range, direct and indirect impacts from logging, road building, fire suppression, recreation and other anthropogenic and natural pressures threaten the species' continued existence.

In November 2005, FWS released its Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 70 Fed. Reg. 68294 (Nov. 9, 2005) ("Proposal"), outlining its intent to establish critical habitat in four separate areas: Maine, Minnesota, Idaho and Montana, and Washington. *See id.* at 68294. FWS stated that "[t]he area proposed for designation as critical habitat provides boreal forest habitat for breeding, non-breeding, and dispersing lynx in metapopulations across the species' range in the contiguous United States." *Id.* at 68299. While the Proposal was an important and long-overdue step towards providing the lynx with meaningful habitat protections, FWS fell well short of meeting the mandate of the Act to provide protection for adequate habitat to ensure the recovery of the species. The Service's Proposal omitted extensive areas of occupied and unoccupied habitat that plainly meet the ESA's definition of critical habitat, including essential lynx habitat areas, particularly on federal lands, within the Rocky Mountains (Colorado and Wyoming), and the Midwest (Wisconsin and Michigan). Moreover, even within areas proposed as critical habitat, FWS employed an impermissibly narrow interpretation of critical habitat and improperly relied on additional factors not intended by Congress for consideration to constrict further the proposed designation.

In the final Rule, however, rather than fixing the Proposal's glaring infirmities, FWS slashed the designation from over 18,000 square miles on Federal, State, Tribal and private

lands to merely 1,841 square miles within three National Parks – Voyageurs National Park in Minnesota, Glacier National Park in Montana, and North Cascades National Park in Washington. *See* 71 Fed. Reg. at 66030, Table 1.

I. The Service's Critical Habitat Designation Violates Section 3(5)(A) of the Endangered Species Act

FWS's exclusion of both occupied and unoccupied lynx habitat from the critical habitat designation is unlawful in multiple respects. First, the designation does not include all of the "occupied" areas that should be designated as critical habitat. Second, FWS improperly excluded federal lands based on the existence of alternative management practices that may (or may not) account for lynx. Finally, FWS failed to assess the importance of unoccupied habitat to the recovery of the lynx and to designate those areas that are essential to the conservation of the species.

A. *The Service Failed to Designate Occupied Lynx Habitat That Contains the Biological and Physical Features That are Essential to the Lynx's Recovery*

Under the ESA, FWS must designate all occupied habitat which contains the biological and physical features essential to the conservation of a listed species and may need special management considerations or protections. 16 U.S.C. § 1532(5)(A)(i). In this instance, FWS failed to designate large portions of the lynx's range that meet the statutory criteria. The lynx currently "occupies" – *i.e.* lives in and utilizes – areas in the Northeast, western Great Lakes, northern Rocky and Cascade Mountains, and southern Rocky Mountains. 70 Fed. Reg. at 68302. However, FWS has avoided designating critical habitat in much of these areas by (1) only designating areas that contain the majority of recent lynx records, demonstrate evidence of breeding lynx populations, and are directly connected to lynx populations in Canada, and (2) by narrowly defining the "physical and biological features [] essential to the conservation" of the lynx, 71 Fed. Reg. at 66028, in contravention of the plain meaning of the ESA and the best available science.

The Service has failed to provide a rational explanation, based on the best available science, for its exclusion of the vast majority of the "occupied" lynx habitat from the final designation.⁴ FWS has narrowly drawn the critical habitat around areas containing only a few of the most abundant reproducing lynx populations, 71 Fed. Reg. at 66028, maintaining that other occupied lands are not "essential to the conservation of the species." *Id.* at 66013. This approach is inconsistent with the ESA, which mandates the designation of critical habitat in areas occupied by the species that contain the physical or biological features essential to the conservation of the species, 16 U.S.C. § 1532(5)(A)(i), and is wholly unsupported by the available evidence. Specifically, the Service's focus on areas containing

⁴ There is reason to believe that Ms. MacDonald may have played a significant role in these decisions, which resulted in the reduced protections for the lynx, because in a related situation Ms. MacDonald did not allow the biologists charged with defining "occupied" habitat to finalize the definition "until it was narrowed substantially," thereby leaving some lands to be considered unoccupied despite the fact that "thorough surveys had not been conducted or a long time had intervened since surveys were last conducted." MacDonald Memo, at 3.

the "majority of recent lynx records, evidence of breeding lynx populations, the boreal forest type that is currently occupied by lynx in that particular region and direct connectivity with lynx populations in Canada," 71 Fed. Reg. at 66028, arbitrarily and unlawfully selects a handful of the few remaining populations of this critically imperiled species to receive the full protections of the Act at the expense of other occupied areas.

While the areas singled out for protection will undoubtedly contribute to the conservation of the species, the proposal to designate these limited areas fails to recognize the indispensable role other occupied areas play in the conservation of the species. Indeed, given that lynx are "highly mobile" *id* at 66013, and rely on areas that "provide connectivity among patches of suitable habitat (e.g., patches containing abundant snowshoe hares), whose locations in the landscape shift through time" *id* at 66028, to limit critical habitat to the areas specified is arbitrary and capricious and not consistent with the best available science.⁵ *See* MacDonald Memo, at 3 ("Because lynx can move large distances, expand into new suitable habitat, and can be difficult to detect, the narrow definition may result in adverse effects or take of lynx occurring in lands no longer considered to be occupied."). Moreover, there are currently, as there were historically, lynx populations that are not geographically connected to Canada, such as those in Colorado and Wyoming, that are crucial to the continued presence of lynx in the contiguous United States. FWS's arbitrary refusal to designate the majority of the species' occupied habitat as critical habitat deprives the species of the fundamental protections of the Act which are designed to ensure the species' survival and recovery.

Further restricting the scope of the designation, FWS has improperly defined the "physical and biological features essential to the conservation of the species." 16 U.S.C. §1532(5)(A)(i); 50 C.F.R. § 424.12(b). Here, FWS defined these features to include only areas of boreal forest habitat which contain sufficient snowshoe hare populations and their preferred habitat conditions, deep and fluffy snow for extended periods of time, and abundant coarse woody debris to serve as suitable denning sites. 71 Fed. Reg. at 66025-27. By narrowly defining the so-called "Primary Constituent Elements" ("PCEs"), FWS discounts existing scientific evidence demonstrating that lynx use other habitat areas that do not possess all of the elements enumerated by FWS. Most notably the PCEs fail to account for occupied habitat which provides for "connectivity for travel within home ranges, exploratory movements, and dispersal," *id* at 68302, including important shrub-steppe habitat that provides not only dispersal corridors between high elevation habitats but also potentially essential sources of alternative prey items. *See* Ruediger, B. *et al* 2000, CANADA LYNX CONSERVATION ASSESSMENT AND STRATEGY. Given the important role dispersing lynx play in the continuing survival and potential recovery of the species, these areas are unquestionably essential for the conservation of the species. Moreover, the PCEs exclude alternative habitat types including known winter and spring habitats such as mixed conifer / deciduous forests, shrub swamps, and cedar-hemlock forest. *Id* at 6. Finally, FWS's PCEs

⁵ Rather than designating the appropriate occupied areas as critical habitat, FWS simply writes off the majority of occupied habitat, stating that "the relative lack of lynx records over time, and, in particular the lack of evidence of reproducing populations, *may suggest* that habitat (snowshoe hare densities, in particular) has not been adequate historically, nor is it currently adequate, to support reproducing lynx populations." 71 Fed. Reg. at 66030 (emphasis added).

exclude, anomalously, those areas essential to the species' recovery, but which currently do not contain the narrowly defined PCEs because they have been significantly degraded as a result of inadequate or nonexistent management. By failing to define the PCE broadly enough to encompass these types of areas, FWS excludes areas that if properly maintained could provide habitat essential to an expanding and recovering lynx population.

FWS's arbitrary exclusion of important "occupied" habitat areas and unreasonably narrow PCEs has resulted in the unlawful omission of significant habitat areas from the designation. For example, FWS failed to designate any critical habitat in the greater Yellowstone Area, notwithstanding the fact that lynx currently occupy this area, 71 Fed. Reg. at 66029, 70 Fed. Reg. at 68303, because, according to FWS, the habitat in the region is "naturally marginal" and "the Greater Yellowstone Ecosystem is disjunct from likely source populations." 71 Fed. Reg. at 66029 (*citing* 68 Fed. Reg. at 40076). Similarly, occupied lynx habitat in Colorado – which represents approximately eight percent of remaining lynx habitat in the contiguous United States – was also excluded despite the vital role this area will play in the recovery of the species. 71 Fed. Reg. at 66029 (recognizing that "Colorado's reintroduction effort is an important step toward the recovery of lynx"). Finally, FWS excluded suitable, occupied lynx habitat in the northeast, including areas in New Hampshire, Maine, as well as areas in the Pacific Northwest's Kettle Range in Washington. *Id.* By not designating these and other important habitat areas, FWS has failed to fulfill the ESA's mandate to protect sufficient habitat to both protect and recover the Canada lynx.

B. The Service Improperly Relied on Alternative Management Strategies to Exclude Occupied Lynx Habitat

FWS's critical habitat designation also violates the ESA because it does not include Federal lands which "contain features essential to the conservation of the lynx," based on FWS's unlawful assertion that these areas "are not, by definition, critical habitat" in that they "do not require special management or protection." 71 Fed. Reg. at 66032-35. The ESA dictates that critical habitat include the species' occupied habitat which contains the physical or biological features essential to the conservation of the species and "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). FWS's implementing regulations define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. § 424.02(j).

While the definition of critical habitat requires FWS to determine what occupied areas may "require special management," the provision does not allow the exclusion of areas simply because some alternative management prescriptions are already in place. *See Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003) ("CBD") ("FWS [has] been repeatedly told by federal courts that the existence of other habitat protections does not relieve [it] from designating critical habitat.").⁶ As the court in *CBD* explained, the

⁶ *See Natural Resources Defense Council v. United States Department of the Interior*, 113 F. 3d 1121, 1126 (9th Cir. 1997) ("Neither the [ESA] nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection.") (emphasis in original); *Middle Rio Grande Conservancy District v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000) (stating that the ESA "compels the designation despite other methods of protecting

position embraced here by FWS that critical habitat does not need to be designated on areas that it has determined "did not require *additional* special management according for [sic] the definition of critical habitat," 71 Fed. Reg. 66028 (emphasis added), is "knowingly unlawful" as it violates the plain meaning of the Act, "eliminate[s] a crucial part of the consultation requirements of the ESA, namely the 'adverse modification' prong [and is] in direct contravention of the express purpose of the ESA: to conserve 'the ecosystems upon which endangered species and threatened species depend.'" *Id.* at 1100-1102 (citation omitted).

Indeed, FWS cannot justify its failure to designate critical habitat on Forest Service and Bureau of Land Management ("BLM") lands, which it has become clear, was "a significant change substantially reduce[ing] the size of the areas proposed for designation" demanded by Ms. MacDonald a mere four days before the release of the proposed designation. McDonald Memo, at 2. This last minute alteration led the Regional Office for FWS Region 6 to acknowledge that "the majority of acres (Forest Service and BLM lands) were excluded [from the designation] under 3(5)(A) of the Act with little justification (*i.e.*, did not show that special management was supported by existing finalized plans) and thus *did not conform to the statutory definition of critical habitat.*" *Id.* (emphasis added).

In the final designation, FWS relies on the Lynx Conservation Assessment and Strategy ("LCAS") to negate the need for critical habitat on the majority of federal lands. 71 Fed. Reg. at 66033. However, even if the statute would allow for the existence of an alternative management mechanism to supplant the required critical habitat designation, which it does not, the LCAS is neither the functional equivalent of critical habitat, nor does it provide anywhere close to the same level of protections and therefore could not stand in the place of a critical habitat designation. The stated "overall goals of the LCAS are to *recommend* lynx conservation measures, *to provide a basis for reviewing* the adequacy of [the Forest Service] and [BLM] land and resource management plans with regard to lynx conservation, and *to facilitate conferencing and consultation* under section 7 of the Act." LCAS p. 1 (emphasis added); 71 Fed. Reg. at 66034. The LCAS is used by the federal land management agencies to both inform decisions on specific actions and to guide the revision of land management plans, but fails to provide meaningful protections for the lynx in either role. First, when used outside of the resource management plans, the LCAS is simply a voluntary guidance document that does not specifically prohibit any particular actions which may result in the destruction of lynx habitat. Second, even when the measures are incorporated into management plans, the measures adopted do not carry sufficient weight to prohibit harmful or adverse activities.⁷ In contrast, the ESA is designed to provide significant, concrete protections for the areas upon which listed species depend by prohibiting federal agencies

the species the Secretary [through FWS] might consider more beneficial."); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1286 (D. Haw. 1998) (stating that FWS decision not to designate critical habitat because it would offer little additional benefit is not rational.).

⁷ Moreover, the available information demonstrates that the Forest Service and BLM are not faithfully implementing the LCAS. For example, FWS notes that the Superior National Forest "excluded certain LCAS standards, guidelines and objectives," 71 Fed. Reg. 66035, and seven other National Forest have yet to incorporate any of the LCAS standards or guidelines into their management plans. *Id.* at 66033.

from taking or permitting an action that will destroy or adversely modify designated critical habitat.

Moreover, the advantages to the species of a critical habitat designation over alternative management practices are even more pronounced after *Gifford Pinchot*. Simply put, critical habitat has a mandatory recovery component not found in other management regimes, such as the LCAS. In fact, in this situation the LCAS and the federal land management plans that incorporate the standards, should complement – but not provide an excuse to avoid – the critical habitat designation. *CBD*, 240 F. Supp. 2d at 1100 ("So long as they are useful, the more protections the better The stated purpose [of the ESA] is not for some agencies and departments to conserve endangered species; all must do so. Thus, any and every protective method or procedure should be employed to further that purpose."). Indeed, the "Conservation Agreements," which commit the Forest Service and the BLM to abiding by the LCAS prior to the incorporation of the measures into resource management plans, discuss at length that notwithstanding compliance with the LCAS the federal land management agencies must comply with the requirements of the ESA. *See, e.g.*, Canada Lynx Conservation Agreement, U.S. Forest Service and U.S. Fish and Wildlife Service (2005) (attached). Therefore, at best, the LCAS is a useful tool which may "guide" federal land managers when making effects determinations pursuant to section 7 of the ESA, 71 Fed. Reg. at 66034, but even in this role, unless an area is designated as critical habitat, potentially harmful projects may be allowed to go forward because the only check that will be in place is the duty of the agency to avoid jeopardizing the species, the more lenient of the section 7 standards. *See* 16 U.S.C. § 1536(a)(2).

C. The Service's Failure to Designate Unoccupied Habitat Essential to the Conservation of the Species Violates the ESA

The Service has wholly failed to designate unoccupied habitat essential to ensure the species' recovery. Congress directed that critical habitat include "specific areas outside the geographical area occupied by the species . . . , [determined] by the Secretary [to be] essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Despite the best available science on the needs of the lynx, FWS failed to determine what currently unoccupied habitat is essential to the survival and ultimate recovery of the lynx. FWS avoids designating unoccupied habitat by first asserting that all lynx habitat is occupied, 71 Fed. Reg. at 66013, and then, as discussed above, determining that only those areas with the most robust populations of lynx will receive the protection. *Id.* at 66028. However, to ensure the conservation of the species, FWS must protect sufficient habitat to allow lynx to move between suitable habitat areas as population dynamics and habitat qualities change, thus necessitating the designation of some currently unoccupied habitat. Further, failure to protect currently unoccupied habitat that a recovering lynx population will need to expand its range will arbitrarily restrict the range of the lynx and not permit the species to recover.

The failure to determine what unoccupied habitat is essential to the conservation of the species is improper for several reasons. First, as FWS has stated previously the "[l]oss of suitable habitat for Canada lynx reduces the potential for population growth or recolonization of the lynx and further confines lynx to smaller, more isolated habitat units Isolation increases the susceptibility of the lynx to human-caused threats, natural stochastic events, and effects of genetic bottlenecks" 63 Fed. Reg. 36694, 37005 (July 8,

1998) (Proposal to List the Contiguous United States Distinct Population Segment of the Canada Lynx as a Threatened Species). FWS's approach to the critical habitat designation is directly at odds with this prior determination. Here FWS is doing little more than providing protections to a few of the remaining population centers. Rather, critical habitat must be established across a broad geographic range within each of the various regions that support lynx populations in order to reduce the threats of habitat fragmentation at the regional and local levels.

In addition, as a result of the patchiness and temporal nature of suitable lynx habitat, lynx populations require "large boreal forest landscapes to ensure that sufficient high-quality snowshoe hare habitat is available at any point in time and to ensure that lynx may move freely among patches of suitable habitat and among subpopulations of lynx." *Id.* at 68296-97; *Id.* at 68300 ("The overall quality of the boreal forest landscape matrix and juxtaposition of stands in suitable condition within the landscape is important for both lynx and snowshoe hares in that it can influence connectivity or movements between suitable stands, availability of food and cover and spatial structuring of populations or subpopulations") (citations omitted). Indeed, the naturally dynamic boreal forest landscape changes constantly as a result of natural or human-caused disturbances, such as fire, insect epidemics, wind, ice, disease, forest management and the present and growing impacts of global climate change. *Id.* at 68297. Thus, FWS must account for those areas of lynx habitat heavily influenced by both localized and broad scale habitat changes by designating areas that, while currently unoccupied, may be able to support lynx as conditions change.

Finally, lynx are long distance dispersers that can potentially travel up to six hundred miles in times of prey scarcity. FWS has previously stated that habitat which appears to support only dispersing lynx is important "because of the possibility lynx could establish a small, local population and contribute to the persistence of the metapopulation." 68 Fed. Reg. at 40075. Thus, FWS has in fact acknowledged that the protection of currently unoccupied habitat and dispersal habitat is essential to the conservation of the species.⁸ *See* 71 Fed. Reg. at 66027 (summary of the designation includes goal that areas included "provide habitat connectivity for travel within home ranges, *exploratory movements, and dispersal.*" (emphasis added)).

FWS's decision to not include unoccupied habitat that is essential to the conservation of the lynx is thus arbitrary and capricious and contrary to the best available science, in violation of the ESA.

II. The Service's Exclusion of All State and Private Lands from the Critical Habitat Designation Violates Section 4(b)(2) of the Endangered Species Act

Pursuant to section 4(b)(2) of the ESA, FWS excluded all non-federal land from the lynx critical habitat designation. 71 Fed. Reg. at 66036-51. The ESA requires that critical habitat must be designated on the basis of the best available scientific data after taking into

⁸ The final designation states that "[a] secondary consideration is that, in addition to supporting breeding populations, these areas provide connectivity among patches of suitable habitat (*eg.* patches containing abundant snowshoe hares), whose locations in the landscape shift through time." 71 Fed. Reg. at 66028.

account "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Under this provision, the Service may exclude an area from critical habitat if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat, unless the failure to designate the area will result in the extinction of the species. *Id.* FWS's implementing regulations specify that when conducting this analysis, the Service must "identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and . . . consider the probable economic and other impacts of the designation upon proposed or ongoing activities." 50 C.F.R. § 424.19.

Here, FWS utterly failed to conduct a meaningful comparison of the benefits of including or excluding the various areas of lynx habitat. Most notably, FWS grossly underestimated the conservation benefits of critical habitat, and over-estimated the patently speculative benefits that the species might receive from future actions taken by State and private entities if critical habitat is not designated. FWS's decision process on this issue appears to have been tainted by the improper political interference of former Deputy Assistant Secretary McDonald. An FWS employee working on the critical habitat rule reported that "the project team felt that to continue to move the package forward . . . , that Ms. MacDonald would want to hear that areas of habitat mapped and proposed as critical could be removed later if suitable lynx management plans were developed . . ." *Id.* The same employee "had the impression that if a large landowner (whether private or governmental) felt that Canada lynx critical habitat designation would adversely impact their current land use, a verbal promise to manage for Canada lynx was enough to have their land removed from the designation." *Id.* Consequently, FWS has not properly "balanced" the benefits of exclusion as compared to designation, rendering its 4(b)(2) exclusions unlawful.

FWS has unquestionably failed to consider objectively the recovery benefits of designating critical habitat. *See Gifford Pinchot*, 378 F.3d at 1070 ("[T]he 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."). Pursuant to section 7 of the ESA, each federal agency must insure that any action authorized, funded, or carried out by the agency "is not likely to . . . result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2). As noted above, the critical habitat provisions, and the associated prohibition against the adverse modification or destruction of designated habitat, are central to the Act's objective of recovering imperiled species. Yet, despite this significant protection, specifically crafted by Congress, FWS continues to ignore the plain language of the Act by undervaluing or dismissing entirely the role critical habitat plays in securing the species' habitat, and thus in assuring the species' ultimate recovery. Indeed, rather than fully exploring the conservation benefits of critical habitat, FWS limits its discussion of benefits to a perfunctory and vague discussion of educational benefits. 71 Fed. Reg. at 66037. This discussion does not evidence a lawful consideration of recovery benefits, as highlighted by FWS's claim that the benefits of a critical habitat designation are "limited." *See, e.g., id.* at 66039 (discussing the benefit of including lands managed for commercial forestry in Maine); *CBD v. BLM*, 422 F. Supp. 2d at 1146 ("[R]eferences to 'conservation' in the proposed and final rules cannot be squared with the reasoning in the final rule which essentially equates 'jeopardy' and 'adverse modification' determinations to conclude that the regulatory benefits of critical habitat in the excluded

areas was negligible."). The Service therefore has failed to properly consider the "benefits of specifying such areas as part of the critical habitat." 16 U.S.C. § 1533(b)(2).

Furthermore, it is untenable for FWS to provide a cursory acknowledgement of the conservation benefit of critical habitat – as emphasized in *Gifford Pinchot* – only to dismiss its importance in the species' recovery simply because consultation will occur even absent designation. *See Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1146 (N.D. Cal. 2006) ("*CBD v. BLM*"); *Home Builders Ass'n v. United States Fish & Wildlife Serv.*, 2006 U.S. Dist. LEXIS 80255, *89-93 (E.D. Cal. 2006). Here, FWS asserts that since there will be section 7 consultation on the impacts of any actions that may affect the species regardless of the designation of critical habitat, there would be "little additional conservation benefits realized through the regulatory burden of a critical habitat designation on these lands under section 7 of the Act because Federal actions are uncommon." 71 Fed. Reg. at 66042; *id.* at 66013-14 (FWS states that because consultation occurs "infrequently on private lands" exclusion of those lands was appropriate.). The court in *CBD v. BLM* declined to accept this exact reasoning, concluding "that by finding that there were no additional regulatory benefits to be gained by designating critical habitat in the areas ultimately excluded, *the Service improperly ignored the recovery goal of critical habitat.*" 422 F. Supp. 2d. at 1146; *Id.* at 1145 (emphasis added) ("Defendants' argument misses the point, however, because although they are correct that the critical habitat designation of the excluded areas would not increase the *number* of opportunities for Section 7 consultation, the *scope and nature* of these consultations would be affected, as would the extent of the protections afforded excluded areas.") (emphasis in original). The court went on to point out that in the absence of critical habitat designation, FWS "would not be required to insure that, with respect to these areas, the proposed action will not result in the destruction or adverse modification of the designated critical habitat . . . [and] the focus of those consultations will be on the species' survival, not recovery." *Id.*

Finally, FWS justifies its failure to designate critical habitat on private or state lands by asserting that excluding such lands will "preserve the partnerships that have been and *will be* developed to conserve habitat for the lynx." *See, eg.*, 71 Fed. Reg. at 66040 (discussing the benefits of excluding lands managed for commercial forestry in Maine) (emphasis added); *see also id.* at 66042 (same for excluding state lands). This, however, is simply a rationale manufactured by FWS to justify exempting private landowners from the designation. As FWS has noted, Ms. MacDonald met personally with representatives from Plum Creek Timber Company and the Maine Forest Products Council, and the "Washington Office verbally directed that critical habitat would not be designated on Plum Creek properties." MacDonald Memo, at 2. Once this decision had been handed down, the FWS field office delegated with crafting the designation determined that "[b]ecause of the inequity that would result if the only private commercial forest land excluded from the designation was Plum Creek property, . . . all private commercial forest lands should be excluded thereby maintaining cooperative working relationships with landowners." *Id.*

Furthermore, the potential benefits from future agreements with landowners are in no way a substitute for the concrete regulatory benefits of critical habitat. *Cf. Southwest Center for Biological Diversity v. Babbitt*, 939 F. Supp. 49 (D.C. 1996) (FWS's reliance on future actions by Forest Service does not comport with the language of statute that FWS base its listing decisions on "existing" regulatory mechanisms); *see also* 50 C.F.R. § 424.19 (FWS may

"consider the probable economic and other impacts of the designation upon *proposed or ongoing activities*." (emphasis added). As discussed above, alternative management regimes, including those on private and state lands, cannot substitute for critical habitat because they do not meet the recovery standards highlighted in *Gifford Pinchot*. For example, Habitat Conservation Plans ("HCPs") are particularly inappropriate substitutes for critical habitat because FWS explicitly states that HCPs are not required to meet a recovery standard in order to be approved by the Service. According to its 1996 "Habitat Conservation Planning Handbook," an HCP applicant must only "minimize and mitigate" the impacts of any "incidental taking" authorized by section 10 permits. Handbook at 3-20 (attached). FWS believes a section 10 permit "does not explicitly *require* an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan" and, as a result the Service does not ensure HCPs provide for, or are even consistent with, species recovery. *Id.* (emphasis in original); *see also id.* at 21 ("No explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to a species."). Yet, in this instance, FWS excluded land subject to HCPs, citing the "benefits [of] relieving landowners, communities, counties, and States of *any additional regulatory* burden that might be imposed by a critical habitat designation."⁹ 71 Fed. Reg. at 66038 (emphasis added).

III. The Service Failed to Use the Best Available Science

One of the express purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). In achieving this purpose, the Service must designate critical habitat based on the "best scientific data available." 16 U.S.C. § 1533(b)(1)(A). This standard, however, only requires that decisions be made on the basis of "best" information "available" and thus requires "far less" than conclusive proof. *See Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 680 (D.D.C. 1997). Above all else, however, particularly given the uncertainty that may exist when these types of decisions are made, *see Brower v. Evans*, 257 F.3d 1058, 1070 (2001), Congress intended that agencies give "the benefit of the doubt to the species." *Comer v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (*citing* H.R. Conf. Rep. No. 96-697). Yet, despite this clear mandate, in several instances in this designation FWS has ignored relevant information, unnecessarily restricted the use of available information, disregarded the views of its own peer reviewers, and failed to justify its decision with adequate information.

⁹ FWS's exclusions of private and state lands based on the speculative benefits of *uncompleted* HCPs or on the "ancillary" benefits the species may derive from HCPs designed to offset the impacts to *other species* are also patently unreasonable. *See, e.g.*, 71 Fed. Reg. at 66046 (Montana Department of Natural Resources and Conservation Forested Trust Land Habitat Conservation Plan, which was deemed sufficient to allow for the area's exclusion for critical habitat despite the fact the HCP has not been finalized); *see also id.* at 66016 ("Plum Creek lands are not included in the final designation in part because the company has demonstrated it is a willing partner in fish and wildlife conservation efforts, such as the Native Fish Habitat Conservation Plan, which provides some ancillary benefits to lynx."); *id.* ("Private lands [Plum Creek owned lands] in Montana are not included in the final designation [because the Service] believe[s] that preserving cooperative partnerships such as demonstrated with the Swan Valley Grizzly Bear Agreement, which provides some ancillary benefits to lynx, is essential for the conservation and recovery of lynx.").

For example, without adequate explanation FWS limited its analysis of "occupied" habitat to include only those areas that demonstrated the most robust and reproducing population, based only on "verified" sighting since 1995.¹⁰ 71 Fed. Reg. at 66028. Indeed, FWS specifically notes that peer reviewers "believed that our criteria (especially regarding *evidence of occupancy and reproduction*) for defining lynx critical habitat were too narrow and/or arbitrary, and resulted in us not including areas they consider important to lynx conservation." *Id.* at 66009 (emphasis added). In this instance, FWS's insistence on using only verified lynx sightings is unnecessarily restrictive, as it discounts available sighting information which may provide significant insight into the species' historic abundance and distribution. *Cf. Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679 ("The statute contains no requirement that the evidence be conclusive in order for a species to be listed. Application of such a stringent standard violates the plain terms of the statute, and therefore justifies reversal of the agency's decision."). Similarly, the seemingly arbitrary use of 1995 as the starting point for acceptable sighting data is highly dubious, as again it serves to limit the information available to the Service on the historic abundance and distribution of the species. *See* 50 C.F.R. § 424.12(b)(5) (when determining what areas are critical habitat, FWS is directed to consider [h]abitats that are . . . representative of the historic geographical and ecological distributions of the species."); *Ctr. for Biological Diversity v. Evans*, 2005 U.S. Dist. LEXIS 44984, *18 (N.D. Cal. June 14, 2005) ("Under the best available standard, Congress required the agency to consider the scientific information available at the time of consideration, giving the species the benefit of the doubt.").

As another example, FWS's assertions that the designation of critical habitat will chill landowners' willingness to continue to participate in programs aimed at the conservation of the lynx and its habitat are baseless. The studies cited by FWS simply do not support the conclusion that the "designation of critical habitat on private lands *significantly* reduces the likelihood that landowners will support and carry out conservation actions." 71 Fed. Reg. at 66037 (emphasis added). Rather, the studies referred to by the Service provide only generalized or anecdotal evidence of what *some* landowners *may* do when faced with the possibility of finding an endangered species on their lands. None of these sources present any actual data to support FWS's conclusion on any scale,¹¹ much less indicate what the landowners potentially affected by *this rule* would actually do.

¹⁰ FWS defines a "verified lynx record" as "(1) An animal (live or dead) in hand or observed closely by a person knowledgeable in lynx identification, (2) genetic (DNA) confirmation, (3) snow tracks only when confirmed by genetic analysis [] or (4) location data from radio- or GPS-collared lynx." 70 Fed. Reg. at 68299. Further, "[d]ocumentation of lynx reproduction consists of lynx kittens in hand, or observed with the mother by someone knowledgeable in lynx identification, or snow tracks demonstrating family groups traveling together, as identified by a person highly knowledgeable in identification of carnivore tracks." *Id.*

¹¹ The only resource cited by the Service that contained actual survey data concerned the reactions of landowners to listing of a species under the ESA. Brook, A., M. Zint, and R. De Young. 2003. LANDOWNERS' RESPONSES TO AN ENDANGERED SPECIES ACT LISTING AND IMPLICATIONS FOR ENCOURAGING CONSERVATION. *Conservation Biology*. Vol. 17, No. 6. pp 1638-1649. However, the use of this study is inappropriate in this context, because the paper studied the landowner reaction to the listing of the Predle's meadow jumping mouse as threatened under the ESA, not the designation of critical habitat for the species. Landowners may react differently to the listing of a

IV. The Service's Final Designation is Not a Logical Outgrowth of the Proposal Released for Public Comment

The significant changes from the Proposal to the final Rule deprived Defenders and the public of the opportunity to provide meaningful comments on the substance of the designation. Indeed, the final Rule is so dramatically different from the Proposal that it is not a "logical outgrowth" of what was initially presented for public comment and therefore must be withdrawn and re-submitted for public comment. *See Rybachek v. EPA*, 904 F.2d 1276, 1287-88 (9th Cir. 1990); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). Here, FWS did not "provide notice sufficient to fairly apprise interested persons of the subjects and issues before the Agency." *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988) (internal quotation omitted). Where, as here, "the proposal makes no mention of an important component of the final rule enacted, the final rule is not the 'logical outgrowth' of the proposal." *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005); *see also NRDC v. EPA*, 279 F.3d 1180, 1188 (9th Cir. 2002) (where the final rule is "not foreshadowed in proposals and comments advanced during the rulemaking, it will not be considered a logical outgrowth because it may catch interested parties by surprise.") (internal quotations omitted).

Nothing in the Proposal hinted at the possibility that FWS would rely on the mere existence, or the possible creation, of alternative management schemes to justify the removal of the vast majority of lands from the designation. Indeed, most of the FWS's specific invitations for comments concerned information supporting the Proposal or even increasing the amount of area included. *See* 70 Fed. Reg. at 68295. For example, FWS asked for comments on "[t]he reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including, but not limited to, whether the benefit of designation will outweigh any threats to the species due to designation"; and specifically on "[t]he adequacy of the[] management plans or the Conservation Agreement to provide special management and protection to lynx habitat [and whether] [a]ny of these lands [excluded because of the presence of existing management prescriptions] may, if appropriate, be included in the final critical habitat designation, even if not proposed for designation in this notice." *Id.* Moreover, FWS specifically noted that "there are currently no Habitat Conservation Plans (HCPs) for the lynx in the areas we are proposing as critical habitat" and as a result stated: "We anticipate no impact to national security, *partnerships, or HCPs from this*

species, which triggers the full range of ESA protection, than to the designation of critical habitat, which may not have any effect whatsoever on the use of their lands.

Moreover, the distinct nature of the two actions must be preserved when assessing the impacts and subsequent reactions when FWS is making its determinations on the "relevant impact[] of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). To conflate the two would allow the impacts related to the listing of the species to influence the designation of critical habitat, something the ESA specifically forbids. *Cf. Sierra Club*, 245 F.3d at 443 (5th Cir. 2001); *Trinity County Concerned Citizens v. Babbitt*, 1993 U.S. Dist. LEXIS 21378, *13 (D.D.C. Sept. 20, 1993) (holding that FWS cannot consider "costs that might have already been incurred as a result of the listing of the species" when designating critical habitat).

critical habitat designation." 70 Fed. Reg. at 68310. Therefore, Defenders and other commenters could not have reasonably foreseen the Service gutting its initial proposal and doing so in large part to "preserve[e] the partnerships that have been and will be developed to conserve habitat for the lynx." 71 Fed. Reg. at 66040. Indeed, it now appears that the FWS's abrupt reversal of direction in its final decision was because of last-minute political interference, rather than consideration of the information and public comments in the administrative record.¹²

FWS Has Again Failed to Adequately Explain Why the Lynx Is Not Being Listed as Endangered

In its January 10, 2007 Clarification, FWS once again refused to reclassify the Canada lynx as an "endangered" species in violation of Section 4 of the ESA. Pursuant to the ESA, a species is "endangered" when it is in "danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). To date, FWS has determined that "collectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS," and as a result FWS has refused to list the species as endangered. *See* 65 Fed. Reg. 16052, 16061 (Mar. 24, 2000); 71 Fed. Reg. at 1186. Despite the directives of two federal court rulings, FWS has failed to provide a reasoned explanation for this conclusion. *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 (D.D.C. 2002) (holding that FWS's determination is arbitrary, capricious, and contrary to the ESA); *Defenders of Wildlife v. Kempthorne*, 2006 U.S. Dist. LEXIS 71137, *33-41 (D.D.C. 2006) (rejecting the Service's explanation on remand (68 Fed. Reg. 40076)).

As noted above, lynx are found in the Northeast, the Great Lakes, the Southern Rocky Mountains, and the Northern Rocky and Cascades Mountains. In the original Final Listing Rule, FWS determined that the lynx population is very limited in three of these four regions and that, compared to the other three regions, the "Northern Rockies/ Cascades Region supports the largest amount of lynx habitat and has the strongest evidence of persistent occurrence of resident lynx populations." 65 Fed. Reg. at 16061. The federal district court for the District of Columbia held that "FWS's conclusion that these three, of the Lynx's four regions, are collectively not a significant portion of its range is counterintuitive and contrary to the plain meaning of the ESA . . ." *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d at 21. The court noted that although the ESA does not define the terms "significant" in this context, the common definition of "a noticeably or measurably large amount," *id.* (citing Webster's Ninth Collegiate Dictionary at 1096 (Merriam-Webster Inc. 1990)), makes it "difficult to discern the logic in the Service's conclusion that three large geographical areas, which comprise three-quarters of the Lynx's historical regions, are not a 'noticeably or measurably large amount' of the species' range." *Id.* Thus the court remanded the decision back to the agency to "[a]t a minimum, . . . explain such an interpretation that appears to conflict with the plain meaning of the phrase 'significant portion.'" *Id.*

¹² Notably, FWS has also acknowledged that the proposal contained "errors that were published in the Federal Register because [they] did not have time to make all of the necessary corrections to conform to Ms. MacDonald's [order to exclude federal lands] before the court deadline." MacDonald Memo, at 2.

In response, FWS returned with a "remanded determination" that did not even "attempt[] to defend the determination that the Court had found to be 'counterintuitive and contrary to the plain meaning of the ESA.'" *Defenders of Wildlife v. Kempthorne*, 2006 U.S. Dist. LEXIS 71137, *33. Rather, the Service "reconsidered the listing rule in its entirety" and provided only limited discussion of the court's question. *Id.* (internal quotation omitted). Despite the earlier rebuke, the Service again "defined 'significant to mean important' rather than 'noticeably or measurably large,'" which the Court had previously articulated as the appropriate starting point for the Service's analysis. *Id.* (quoting 68 Fed. Reg. at 40076-77 (July 3, 2003)). The Court, not surprisingly, found that limited discussion to be "wholly unsatisfactory." *Id.* As the court noted, FWS's actions remained "inconsistent with the language and purpose of the ESA and thus [were] an invalid exercise of statutory interpretation." *Id.*

The Service's most recent response again fails to heed the court's mandate. In its new "clarification," FWS *again* defines "significant" to mean biologically "important" to the species. See 72 Fed. Reg. at 1188. Using this definition, FWS determined that any area within the range of the lynx that is not capable of "supporting resident lynx populations because the habitat is naturally marginal . . . cannot be biologically 'significant' because . . . it could not support lynx populations or prevent the species from becoming extinct . . ." *Id.* at 1188. This "marginal" habitat, FWS continues, "no matter how large, is not a significant portion of the range of the lynx because it cannot, and has never been able to, support resident lynx populations for any length of time." *Id.*

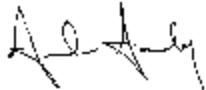
As the court's earlier decisions demonstrate, FWS's interpretation of the term "significant portion of its range" finds no support in the text or structure of the ESA. The conclusion that three quarters of the species' current range is not "significant" because some of the areas may not support the *most* robust lynx populations flies in the face of both the court's unambiguous statements on the appropriate standard for determining significance, based on the common definition of the term, and perhaps more importantly, the available evidence that lynx currently occupy many of the areas FWS has dismissed as marginal and insignificant.¹³ See 71 Fed. Reg. at 66010 (noting that the Kettle Range, Greater Yellowstone Ecosystem and Colorado are all currently occupied by lynx); *Id.* at 66039-46 (repeatedly asserting that areas in both the Northeast and Great Lakes are considered occupied lynx habitat). Given that the species is clearly in danger of extinction throughout the vast majority of its range, FWS must list the lynx as "endangered."

¹³ FWS attempts to avoid the implications of the fact that lynx historically have and continue to occupy a vast portion of the viable lynx habitat it has attempted to marginalize by narrowly reading the court's remand order and providing only an explanation of how the Service reached its initial conclusion in 2000. 72 Fed. Reg. at 1186 (referring to the Service's initial listing decision (65 Fed. Reg. 16052)). FWS goes as far as saying that the explanation may not "necessarily represent the Service's current views, given new information regarding the lynx . . ." *Id.* FWS thus states that it has undertaken an analysis which violates the ESA's mandate that the listing decision be made "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

CONCLUSION

This letter provides notice that we will take the necessary steps to compel FWS to lawfully designate critical habitat for the Canada lynx and to list the species as endangered, and thus meet its mandatory duties under the ESA, as well as its duties under the APA. Should FWS's violations of the ESA and APA remain uncorrected, the parties to this notice intend to file suit, following the expiration of the statutory sixty-day notice period.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Hawley". The signature is written in a cursive style with a large initial "A" and a long horizontal stroke.

Andrew Hawley
Staff Attorney

Robert G. Dreher
Vice President for Conservation Law