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4 On Behalf of:  
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11 **U. S. DEPARTMENT OF COMMERCE**

12 **NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

13 **In Re**

14 **50 CFR Part 226**

15 **ENDANGERED AND THREATENED**  
16 **SPECIES: DESIGNATION OF CRITICAL**  
17 **HABITAT FOR 7 EVOLUTIONARILY**  
18 **SIGNIFICANT UNITS OF PACIFIC**  
19 **SALMON AND STEELHEAD IN**  
20 **CALIFORNIA**

21 **and**

22 **ENDANGERED AND THREATENED**  
23 **SPECIES: DESIGNATION OF CRITICAL**  
24 **HABITAT FOR 13 EVOLUTIONARILY**  
25 **SIGNIFICANT UNITS OF PACIFIC**  
26 **SALMON AND STEELHEAD IN**  
27 **WASHINGTON, OREGON, AND IDAHO**

**DOCKET NO. 041123329-4329-01**

**RIN NO. 0648-AO04 (California)**

**DOCKET NO. 030716175-4327-03**

**RIN No. 0648-AQ77 (Washington, Oregon,**  
**and Idaho)**

**COMMENTS ON PROPOSED RULES**

28 **I.**  
**INTRODUCTION**

Environmental Commons objects to NOAA's proposed 80 percent reduction in lands designated as critical habitat for 20 endangered species of Pacific salmon and steelhead in the

1 states of California, Washington, Oregon, and Idaho.<sup>1</sup> Environmental Commons supports  
2 NOAA's original designation of critical habitat lands for these species as decided February 16,  
3 2000, and as augmented on September 27, 2000, before any court challenge.

4 That original designation complied with NOAA's well-established procedures, the  
5 provisions and underlying policy considerations of the Endangered Species Act, and well-  
6 reasoned federal case law concerning economic impact analysis.<sup>2</sup> The full designation was  
7 consistent with NOAA's responsibility to facilitate the continued survival and recovery of these  
8 species.

9  
10 Environmental Commons disapproves of NOAA's decision to compromise its  
11 stewardship responsibilities to accommodate environmentally insensitive plaintiffs. Specifically,  
12 Environmental Commons disagrees with NOAA's agreement to vacate its original critical habitat  
13 designation solely to settle a lawsuit brought by National Association of Home Builders, a group  
14 of real estate developers who have little respect or concern for NOAA's mandate.<sup>3</sup>

15  
16 NOAA's initial 2000 assessment of the critical habitat needs of recovering salmon and  
17 steelhead was its best assessment. NOAA's newly proposed 80 percent retraction of previously  
18 designated lands will severely threaten these species' continued survival. It will also set a  
19 regrettable precedent for sorely inadequate critical habitat designations for other endangered  
20 species. For the protection and benefit of all species, NOAA should reinstate its original salmon  
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24 <sup>1</sup> For the sake of simplicity, all proposed rules, decisions and other actions issued or taken by the National Marine  
25 Fisheries Service are referred to herein as those of NOAA, because National Marine Fisheries Service is a division  
26 of NOAA.

27 <sup>2</sup> See *Trinity County Concerned Citizens v. Babbitt*, Civil Action No. 92-1194, 1993 WL 650393 (D.D.C. September  
28 20, 1993); *The Cape Hatteras Access Preservation Alliance v. United States Department of the Interior*, 344  
F.Supp.2d 108 (November 1, 2004).

<sup>3</sup> *National Association of Home Builders, et al v. Evans*, Civil Action No. 00-2799, 2002 WL 1205743 (D.D.C.  
April 30, 2002). That choice by NOAA has already resulted in a successful challenge by another group of real  
estate developers to other critical habitat designations. See *Home Builders Associations of Northern California, et  
al. v. Norton*, 293 F.Supp.2d 1 (D.D.C. November 6, 2002). Therefore, rather than reduce environmental litigation,  
NOAA's compromise has actually promoted more litigation—and further critical habitat cutbacks.

1 and steelhead critical habitat designations without regard to the objections or litigiousness of  
2 profit-motivated special interest groups.

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4 **II.**  
**COMMENTS**

5 **A. NOAA’s proposed 80 percent reduction in salmon and steelhead critical habitat**  
6 **designations is not required by the Court’s order in *National Association of Home***  
7 ***Builders v. Evans***.

8 By its own declaration, NOAA “is dedicated to protecting and preserving our nation’s  
9 living marine resources through scientific research, management, enforcement and the  
10 conservation of marine mammals and other protected marine species *and their habitat*.”<sup>4</sup> Yet,  
11 NOAA voluntarily offered to withdraw its original critical habitat designations for 20 species of  
12 salmon and steelhead to avoid a court battle initiated by National Association of Home Builders  
13 in the U. S. District Court for the District of Columbia.<sup>5</sup>

14  
15 In so doing, NOAA implicitly conceded that its long-established baseline approach to  
16 economic analysis was deficient and that the new pre-listing approach argued by the real estate  
17 developers was acceptable.<sup>6</sup> NOAA apparently made no effort whatsoever to defend its original  
18 critical habitat designations or its long-standing methodology, even though a U. S. District Court  
19 judge for the District of Columbia had previously issued an opinion supporting NOAA’s baseline  
20 methodology.<sup>7</sup> Instead, NOAA eagerly joined the real estate developers in persuading the U. S.  
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25 <sup>4</sup> NOAA RO2-111, March 11, 2002, p. 2 (emphasis added); *see also* NOAA04-R175, November 30, 2004, p. 2  
26 (“NOAA Fisheries is dedicated to providing and preserving the nation’s living marine resources and their habitat  
through scientific research, management, and enforcement”).

27 <sup>5</sup> *See National Association of Home Builders, et al v. Evans*, Civil Action No. 00-2799, 2002 WL 1205743 (D.D.C.  
April 30, 2002), at \*5 (paragraph 1).

28 <sup>6</sup> *Id.* at \*4.

<sup>7</sup> *See Trinity County Concerned Citizens v. Babbitt*, Civil Action No. 92-1194, 1993 WL 650393 (D.D.C. September  
20, 1993).

1 District Court to close the case, based on NOAA’s agreement to vacate its prior critical habitat  
2 designations and to engage in “new rulemaking consistent with all applicable federal laws.”<sup>8</sup>

3 Quite reasonably, the U. S. District Court presumed that NOAA’s reason for withdrawing  
4 its prior critical habitat designations was that they were based on a “flawed process” and that  
5 NOAA intended to adjust them based on the methodology proposed by the real estate  
6 developers.<sup>9</sup> The U. S. District Court even opined that it found the real estate developers’ case  
7 authority more persuasive than the case law supporting the NOAA’s baseline approach.<sup>10</sup> But  
8 nothing in the Court’s order required NOAA to abort its baseline approach or to adopt the real  
9 estate developers’ preferred methodology.  
10

11 To the contrary, the consent decree underlying the Court’s order specifically stated that  
12 NOAA’s agreement to settle the case was “without any admission of fact or law.”<sup>11</sup>  
13 Accordingly, NOAA’s proposed 80 percent reduction of its original critical habitat designations  
14 for salmon and steelhead is not required—or even suggested—by the terms of the Court’s order.  
15 Rather, the only apparent reason to propose such a substantial reduction is avoid further  
16 litigation.  
17

18 NOAA should not succumb to such pressure by environmentally insensitive special  
19 interest groups. Rather, NOAA should reinstate its original critical habitat designations, without  
20 reduction, and should defend its long-established baseline methodology wherever and whenever  
21 necessary.  
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23  
24 **B . NOAA’s proposed 80 percent reduction in salmon and steelhead critical habitat  
25 designations is not required by applicable law.**

26 <sup>8</sup> See *National Association of Home Builders, et al v. Evans*, Civil Action No. 00-2799, 2002 WL 1205743 (D.D.C.  
27 April 30, 2002) at \*3 & \*5 (paragraph 1).

28 <sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*2-\*3.

<sup>11</sup> *Id.* at \*5 (“WHEREAS, Plaintiffs and NMFS have agreed to a settlement of this Action, without any admission of  
fact or law . . .”).

1 NOAA is not required to follow the 10<sup>th</sup> Circuit Court of Appeal’s opinion in *New*  
2 *Mexico Cattle Growers Association v. U. S. Fish and Wildlife Service*.<sup>12</sup> Indeed: “Binding  
3 precedent for all is set only by the Supreme Court, and for the district courts within a circuit,  
4 only by the court of appeals for that circuit.”<sup>13</sup> Therefore, NOAA may and should follow its  
5 well-established baseline methodology unless and until the Supreme Court decides otherwise.  
6

7 Unfortunately, NOAA and other U. S. Government agencies have volunteered to replace  
8 their baseline critical habitat designations with new ones based on the *New Mexico* opinion. Not  
9 long after NOAA agreed to withdraw its baseline salmon and steelhead critical habitat  
10 designations, the Department of Interior agreed to withdraw its baseline red-legged frog critical  
11 habitat designations—also under pressure of litigation by a group of real estate developers.<sup>14</sup> In  
12 that case, the U. S. District Court acknowledged that the government’s decision to follow the  
13 *New Mexico* methodology was voluntary—not legally mandated:  
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16 Clearly, the Department of Interior, in its expertise, has *decided* to adopt the  
17 economic impact methodology of *New Mexico Cattle Growers* and apply it to all  
18 critical habitat determinations nationwide.<sup>15</sup>

19 NOAA’s decision to adopt the *New Mexico* methodology is indefensible, based on  
20 subsequent case law. On November 1, 2004, the U. S. District Court of Appeal for the District  
21 of Columbia thoroughly analyzed all existing case law on critical habitat economic impact  
22 methodology in *The Cape Hatteras Access Preservation Alliance v. U. S. Department of the*  
23 *Interior, et al.*<sup>16</sup> The Court found that, although the *New Mexico* opinion is “correct that the ESA  
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26 <sup>12</sup> 248 F.3d 1277 (10<sup>th</sup> Cir. (N.M.) 2001).

27 <sup>13</sup> [In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1176 \(D.C.Cir.1987\)](#).

28 <sup>14</sup> *See Home Builders Associations of Northern California, et al. v. Norton*, 293 F.Supp.2d 1 (November 6, 2002).

<sup>15</sup> *Id.* at 4 (emphasis added).

<sup>16</sup> 344 F.Supp.2d 108 (D.D.C. 2004).

1 requires some economic analysis, *it is wrong when it holds the baseline approach violates the*  
2 *language of the statute.*<sup>17</sup>

3 The *Cape Hatteras* Court expressly validated NOAA’s long-standing critical habitat  
4 baseline approach: “The baseline approach is a reasonable method for assessing the actual costs  
5 of a particular critical habitat designation.”<sup>18</sup> The Court’s reason for approving the baseline  
6 approach was sound:  
7

8 To find the true cost of a designation, the world with the designation must be  
9 compared to the world without it. This is precisely the advice that the Office of  
10 Management and Budget gives to federal agencies conducting impact analysis:  
11 “Identify a baseline. Benefits and costs are defined in comparison with a clearly  
12 stated alternative. This normally will be a ‘no action’ baseline: what the world  
13 will be like if the proposed rule is not adopted.” In order to calculate the costs  
14 above the baseline, those that are the “but for” result of designation, the agency  
15 may need to consider the economic impact of listing or other events that  
16 contribute to and fall below the baseline. *The Service, however, must not allow*  
17 *the costs below the baseline to influence its decision to designate or not designate*  
18 *areas as critical habitat. That would be inconsistent with the ESA’s prohibition*  
19 *on considering economic impacts during the species listing process.*<sup>19</sup>

20 NOAA should heed this well-reasoned validation of its long-standing baseline approach  
21 and, accordingly, should reinstate its prior salmon and steelhead critical habitat designations,  
22 without reduction.  
23

### 24 **III.** 25 **CONCLUSION**

26 As the Court wisely observed in *Cape Hatteras*, “the world with the designation must be  
27 compared to the world without it.”<sup>20</sup> Five years ago, NOAA determined that our world needed  
28 baseline critical habitat designations to protect 20 endangered salmon and steelhead species from  
29 extinction. No evidence has been presented to undermine that conclusion. Rather, the only

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30 <sup>17</sup> *Id.* at 129 (emphasis added).

<sup>18</sup> *Id.* at 130.

<sup>19</sup> *Id.* (emphasis added; citations omitted).

<sup>20</sup> *Id.* at 130.

1 reason to eliminate 80 percent of the previously designated critical habitat lands is to avoid  
2 future litigation.

3 SUBMITTED: March 14, 2005.

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5 On behalf of:  
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