

United States Senate
WASHINGTON, DC 20510

February 1, 2013

Dan Ashe, Director
US Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Dr. Jane Lubchenco, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue, NW
Room 5128
Washington, DC 20230

RE: Revisions to Regulations for Impact Analyses of Critical Habitat Docket Nos. FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01

Dear Director Ashe and Administrator Lubchenco,

We write today to comment on the Administration's proposed revisions to critical habitat economic impact analyses under the Endangered Species Act (ESA). The proposed changes have the potential to dramatically impact both jobs and private property rights across the nation. Thorough economic impact analyses are an essential component of any critical habitat designation under the ESA and must be done in a manner that reflects the true costs of such a designation. While we appreciate the Administration's efforts to implement a "more efficient rule-making process," we are concerned that the proposed changes are an attempt to avoid public scrutiny of the true consequences of agency action and may provide for an incomplete representation of the economic impacts on private and state lands.

The proposed regulation adopts a baseline approach when considering the economic impacts of a critical habitat designation (i.e., the agencies would presumably include in the baseline the effects that follow from listing). Such an approach allows regulators to consider only the "incremental impacts" of a critical habitat designation above the impacts that resulted from the actual listing. This baseline approach results in a less than thorough economic analysis and can be limited to the administrative costs of designating critical habitat. By using an incremental approach, the economic hardships faced by private property owners and state governments whose lands are designated as critical habitat are greatly discounted. This limited analysis is neither fair nor a true accounting of the costs that come with a critical habitat designation and

can lead to designation of lands as critical habitat in areas where the true costs greatly exceed the actual or perhaps only theoretical benefits.

Rather than focusing on the “baseline” approach, we recommend the final rule use a coextensive approach for its economic impact analysis. Such an approach accounts for the full cost of a critical habitat designation, including those costs that are associated with the listing. The coextensive approach is a more realistic accounting of costs associated with a critical habitat designation and helps both regulators and the public understand the actual costs of designating lands as critical habitat. Because it is a more thorough analysis, it is also a more transparent approach that will force regulators to be accountable to the public when they seek to make critical habitat designations that would limit economic activity on large swaths of private property and state lands.

We recognize that the critical habitat designation is technically a different phase of the ESA than the initial listing. However, to consider the impacts of a critical habitat designation as entirely different from the actual listing is not within the intent of the ESA where the statute contemplated both actions (listing and designation of critical habitat) as occurring at the same time.

In addition to our concerns about the proposed rule’s preference for a baseline analysis, we are concerned that the proposed rule focuses on the need for an economic impact analysis as primarily a tool to inform regulators. While an economic impact analysis should be used to inform regulators about the costs of designating an area as critical habitat, it should also be considered as an important tool to inform individuals, state governments, and the public at-large who are directly impacted by such a designation. A final rule should emphasize the importance of giving the public a full accounting of the true costs of a critical habitat designation, particularly in light of the hundreds of species being reviewed by your agencies pursuant to settlement agreements in which neither private property owners nor states were given the opportunity for input.

Finally, we note that the proposed rule gives the Secretary great discretion in choosing not to exclude areas from a critical habitat designation. The proposed rule notes that “the Secretary may choose not to exclude an area even if the impact analysis and subsequent balancing indicates that the benefits of exclusion exceed the benefits of inclusion and such exclusion would not result in the extinction of the species.” Because of the tremendous economic costs a critical habitat designation may have, we hope that the final rule will clarify a strong preference for excluding private and state lands from such a designation when the costs of such a designation outweigh the benefits.

In conclusion, we emphasize our concern that the proposed rule's use of the baseline approach ignores the true costs of a critical habitat designation. Such an approach is in direct contrast to the intent of Congress when the requirement for an economic analysis was inserted into the ESA in 1978. It also runs contrary to the goal of a transparent government. We urge you to reject that approach in favor of a coextensive analysis when the regulators assess whether to designate lands as critical habitat.

Thank you for your prompt attention to our concerns. Please feel free to contact us should you have any questions.

Sincerely,

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