



Animal Welfare Institute

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BY ELECTRONIC MAIL

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Public Comments Processing
Attn: FWS-R9-ES-2011-0073
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

Dear Sir or Madame:

Re: Proposed Rule: Endangered and Threatened Wildlife and Plants: Impact Analyses of Critical Habitat (77. Fed Reg. 51503)

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on the above-referenced U.S. Fish and Wildlife Service and the National Marine Fisheries Service (hereafter the Services)'s proposal to revise regulations pertaining to impact analyses conducted for designations of critical habitat under the Endangered Species Act (ESA).

The intent of the ESA is to provide imperiled species and the ecosystems upon which they depend the protection necessary to prevent extinction and promote recovery.¹ The Services are required under section 4(b)(2) of the Endangered Species Act (ESA) to designate critical habitat on the basis of the best scientific data available and to consider the economic impacts, and any other relevant impacts, of specifying any particular area as critical habitat, when a species is listed.² The designation of critical habitat is essential to address habitat loss as a primary threat to most imperiled species and must be based on the best scientific evidence available. Critical habitat designation includes areas essential to the conservation of the species and all areas necessary to bring a species to the point at which the measures provided pursuant to the ESA are no longer necessary, i.e. the point of delisting.³

These comments are in response to the February 28, 2012, memorandum from the President directing the Secretary of the Interior to revise the regulations implementing the ESA to provide that a draft economic analysis be completed and made available for public comment at the same time as

¹ 16 U.S.C § 1531(b).

² § 1531 *et seq.* The Services may exclude any area from critical habitat if they determine that the benefits of excluding an area as critical habitat outweigh the benefits of specifying such area as part of the critical habitat, unless the exclusion of an area will result in the extinction of the species concerned. See *Revised Critical Habitat for the Northern Spotted Owl*, 77 Fed. Reg. 14,062 (Mar. 8, 2012); The White House. 2012. Memorandum for the Secretary of Interior. *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*. 77 Fed. Reg. 12,985 (Mar. 5, 2012).

³ § 1532(3).

the publication of a proposed rule designating critical habitat. AWI supports efforts proposed by the Services to improve transparency and encourage public participation where appropriate in implementing the ESA. In particular, an emphasis on considering the incremental impacts of critical habitat designation when considering economic impacts⁴ and allowing impacts to be qualitatively or quantitatively described is beneficial. It is also important that the regulatory proposal affirms that “Congress intended consideration of economic impacts to neither affect nor delay the listing of species” and “must be kept analytically distinct from, and have no effect on the outcome or timing of, listing determinations.”⁵

However, AWI has several suggestions to ensure that the proposed regulation is in accordance with the ESA. First, it is critical that economic analysis be conducted in isolation and not be combined with the critical habitat designation. The language in 4(b)(2) of the ESA and in the current implementing regulation ensure that areas providing essential habitat are identified as potential critical habitat prior to the completion of an economic analysis and based solely on the best available information. Conversely, the proposed revision allows for economic analysis to take place at the same time that critical habitat is designated, thus creating the potential to inappropriately interfere with the designation process. Thus, the rule should clarify how any scientific procedures used in identification and designation of critical habitat will be distinct from the economic impacts analysis, and, in accordance with the goal of transparency, all documentation associated with these processes made available to the public. Any exclusion of critical habitat must be supported by the record and this decision be made only at the final rulemaking stage.

Second, the Services must ensure that the proposed regulatory scheme does not introduce additional delays in the designation of critical habitat and decision to list species such that the agencies more frequently determine that designating critical habitat is indeterminable. This could reduce the effectiveness of the ESA and place imperiled species in jeopardy by excluding critical habitat from protection. The Services need to clarify what measures will be taken to ensure that the proposed revisions to the economic analysis process will not introduce additional delays in the designation of critical habitat.

Again, AWI supports increasing transparency and improving the economic analysis process with respect to critical habitat designations, but encourages the Services to do so in accordance with the ESA and the integrity of the best scientific evidence available. Thank you in advance for providing this opportunity to comment on this proposal. Please send information about this proposed status upgrade to: Tara Zuardo, Wildlife Legal Associate, Animal Welfare Institute, 900 Pennsylvania Ave., SE, Washington, DC 20003.

Sincerely,
Tara Zuardo, Wildlife Legal Associate

⁴ In *Arizona Cattle Growers v. Salazar*, 606 F.3d 1160, 1173 (2010), the Ninth Circuit firmly rejected the use of a "co-extensive" economic analysis approach that considered the impact of listing as well as critical habitat designation because the co-extensive approach is based on a faulty regulatory definition of "adverse modification." A subsequent Ninth Circuit decision similarly rejected another attempt to extend the economic analysis to include listing and other regulatory actions beyond the critical habitat designation at issue. *Home Builders Assn. of Northern California v. U.S. Fish and Wildlife Serv.*, 616 F.3d 983, 992-93 (2010).

⁵ CRITICAL HABITAT PROPOSAL, 77 Fed. Reg. at 51,506.