



October 16, 2012

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RE: National Hydropower Association’s Comments on the Fish and Wildlife Service and National Marine Fisheries Service Proposed Rule – *Revisions to the Regulations for Impact Analyses of Critical Habitat* – Docket No. FWS-R9-ES-2011-0073 / NOAA-120606146-2146-01

Dear Ms. Alt & Ms. Nammack,

On August 24, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the “Services”) issued and requested comments on a proposed rule, *Revisions to the Regulations for Impact Analyses of Critical Habitat*. The National Hydropower Association (“NHA”)¹ is pleased to submit the following comments on the proposed rule.

I. Introduction

NHA welcomes the Services’ initiative to revise existing regulations related to critical habitat under the Endangered Species Act (“ESA”). Regulatory policies, such as the ESA and its implementation, can significantly affect the hydropower industry, both in terms of daily operations and in long-term management and planning.

As America’s leading renewable electricity resource, hydropower provides approximately 8 percent of our nation’s total electricity supply and two-thirds of America’s total renewable electricity. This results in hundreds of thousands of domestic jobs. NHA’s members and hydroelectric facility owners and operators are stewards of the rivers where their facilities are located, and value river resources and a diverse ecosystem. Every year, the industry spends hundreds of millions of dollars on environmental conservation, mitigation, and protection and enhancement measures for endangered or threatened species under the ESA.

¹ NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA’s membership consists of more than 180 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

Numerous recent studies have demonstrated tremendous growth potential in the tens of thousands of megawatts of clean, renewable power generation across the waterpower sector, including new conventional hydropower capacity. As the hydropower industry prepares for this growth, review of agency regulations and processes, such as this proposed rule, is welcomed and appreciated. NHA believes the Services can revise critical habitat regulations in a way that will benefit all stakeholders, maintains important protections for ESA-listed species and their habitat, and is responsive to the President's policies, memorandums and Executive Orders.

II. Executive Summary of Comments on Proposed Rule

NHA supports the Services' proposal to issue draft economic analyses for public comment at the same time as proposed critical habitat designations. We feel this change will result in informed decisions when designating critical habitat. However, the proposed rule attempts to clarify the critical habitat exclusion policies of the Services, and the hydropower industry is concerned that the Services' proposal of codifying an incremental impacts analysis, coupled with unchecked discretion when deciding whether to grant or deny exclusions under Section 4(b)(2) of the ESA, may lead to arbitrary decision-making and result in greater inconsistency and uncertainty.

NHA respectfully asks the Services to:

- Reconsider the use of the incremental impacts analysis method in favor of one that fairly characterizes the true economic impacts resulting from critical habitat designations.
- Develop and promulgate regulatory standards or criteria that would govern decisions to grant or deny critical habitat exclusion requests – favoring exclusion where settlement agreements, habitat conservation plans, and other conservation commitments already protect and enhance habitat – and develop an appeals process for final exclusion decisions.

III. Critical Habitat, Hydropower Licenses and Habitat Conservation Plans

Section 4(b)(2) of the ESA was added by Congress in 1978 with a goal of balancing species' needs against the needs of the nation. The statute provides that "[t]he Secretary shall designate critical habitat, and make revisions thereto ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." The ESA also gave the Services discretion to exclude any area from critical habitat if they determine that the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat ..."

Since 1978, the Services' discretion and Section 4(b)(2)'s exclusion has been applied inconsistently. This inconsistency has hindered ESA implementation, and ultimately species conservation, because it results in litigation over proposed 4(b)(2) exclusions and creates unpredictability (and thus increased burden) for the regulated community and the Services alike. To create certainty and reduce delay, NHA has outlined its recommendations above, and in the sections that follow.

The Services have the discretion to exclude areas from critical habitat designations where the habitat is already the subject of agreements or requirements to implement protection, restoration or enhancement measures. Hydropower licenses, and the multi-party settlement agreements upon which they are often based, include measures to "protect, mitigate and enhance" affected resources, including ESA-listed species, other fish, wildlife and plants, and habitat features (e.g., water quality and quantity) critical to such species. For example, hydropower licenses frequently include habitat enhancement funds or specific measures to protect and enhance species and their habitat. These conservation measures go beyond the consultation and impact minimization requirements of Section 7 of the ESA, and are *designed and implemented in consultation with the appropriate Service* and other resource agencies.

As such, NHA recommends the Services favor exclusion where habitat is subject to approved conservation measures that already provide substantial habitat protections. Section 4(b)(2) was added to the ESA by Congress to promote just this kind of commonsense approach to species protection.

Similarly, the Services should favor excluding habitat that is protected under a Habitat Conservation Plan ("HCP") authorized under Section 10 of the ESA. This exclusion should extend to the covered or "plan" species' habitat as well as to species not formally covered by an HCP but whose habitat is nonetheless protected by the measures agreed to in the HCP. HCPs are the result of years of cooperation among licenses, the Services, State agencies and local stakeholders. Where HCPs have been developed at hydropower projects, the Federal Energy Regulatory Commission ("FERC") incorporates the terms of those HCPs into its license terms.

An exclusion for HCPs and other approved voluntary conservation agreements would increase their use and cooperation among State agencies and stakeholders, would be a valuable tool for establishing early and significant conservation actions, and provide certainty to hydropower owners and operators regarding ESA compliance issues. Moreover, favoring exclusion in such instances would lessen the regulatory burden at relicensing and ensure that biological opinions for FERC licenses are not subject to reinitiation to consider impacts to newly listed critical habitat when the underlying activities have already been determined to

protect that habitat. Finally, recognizing and developing exclusions in these instances would be consistent with the U.S. Fish and Wildlife Service's recent Advanced Notice of Proposed Rulemaking on *Expanding Incentives for Voluntary Conservation Agreements under the ESA*, for which NHA submitted comments.² Specifically, by recognizing such conservation measures, the Services will encourage and expand their future use.

IV. Draft Economic Analysis

NHA supports the Services' proposal to issue draft economic analyses for public comment at the same time as proposed critical habitat designations. Traditionally, the Services issued draft economic analyses for comment when they issued final critical habitat designations. This new approach will reduce or avoid long-standing criticism that the Services' final critical habitat designations were being made without a complete understanding of the public's view and opinions.

This change supports the President's desire to modify, streamline and generally improve the regulatory process, reduce uncertainty and provide an opportunity for earlier and meaningful participation by the public. NHA appreciates the Services coordination on this change. However, as noted above and described in detail below, the Services' economic analysis itself – and the public's ability to comment on it – is only meaningful if the Services' analyses and decisions are guided by clear factors and fair standards.

V. Incremental Impacts & Agency Discretion

NHA believes the proposed rule and the use of the incremental impacts method would undermine the true purpose of economic impact analyses, lead to unbridled discretion when making critical habitat exclusion decisions, and stymie economic growth, innovation, competitiveness and job creation. The Services' approach downplays Congress' goal of balancing species' needs with the needs of the nation, and could ultimately lead to greater uncertainty and inconsistency under Section 4(b)(2) of the ESA.

A. *Incremental Impacts Analyses*

The Services define "incremental analysis" as a method for "determining the probable impacts of the designation that seeks to identify and focus solely on the impacts *over and above those caused by existing protections...*" (emphasis added). By choosing the incremental analysis method the Services are settling on a less rigorous economic analysis. This method will underestimate and minimize economic impacts and

² 77 Fed. Reg. 15,352 (March 15, 2012). See *National Hydropower Association Comments on the Fish and Wildlife Service's Advanced Notice of Proposed Rulemaking- Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act* (July 13, 2012). Docket No. FWS-R9-ES-2011-0099

result in larger areas being designated as critical habitat because the required balancing of economic and other impacts that accompany a thorough designation process is distorted. Further, this method discounts Congress' desire for the Services to give equal consideration and importance to economic and other impacts in designation.

Executive Order 13563 (January 18, 2011) directs agencies, when promulgating regulations, to use "the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." Settling on the incremental impacts method is questionable as the "best available technique" as it avoids having to conduct full economic impact analyses and balance those findings with the benefits of inclusion versus exclusion of critical habitat. In fact, there is a split in the federal appeals courts on how to assess economic impacts under current regulations. While the Ninth Circuit follows a "baseline approach" which allows the Services to consider only the incremental impacts of a designation above those impacts that arguably resulted from the species' listing under the ESA (*Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010)), the Tenth Circuit has held the "baseline approach" unlawful, and instead, requires the Services to consider the full economic impact of a proposed designation (*New Mexico Cattle Growers' Ass'n v. FWS*, 248 F.3d 1277 (10th Cir. 2001)). The Services' proposed rule would embrace the very approach found unlawful by the Tenth Circuit under the current regulations. The Tenth Circuit held the baseline approach unlawful because "Congress clearly intended that economic factors were to be considered in connection with [a critical habitat designation]." *Id.* at 1285.

The President's February 28, 2012 memorandum highlights the importance of cooperation among State and private landowners when deciding on species protections. The memorandum includes a strong preference for excluding state and private land from critical habitat in order to foster cooperation in land management, stating that "private and state lands are among the potential exclusions, based on a recognition that habitat typically is best protected when landowners are working cooperatively to promote forest health, and a recognition... that the benefits of excluding private and state lands may be greater than the benefits of including those in critical habitat." NHA believes that the President's desire for cooperation among State and private landowners will not be met under the incremental impacts method and combined with wide discretion (discussed below) will have a severe impact on private activities and reduce the flexibility in developing innovative land management solutions. However, NHA believes that greater cooperation would be achieved through the development of a policy favoring certain exclusions, as discussed above in Section III, and would go a long way towards achieving the President's goals.

NHA urges the Services to reconsider using the incremental analysis method and, instead, propose an approach that fairly characterizes the economic impact from designations, together with clear factors for evaluation and standards for decision making. Only then will the Services' impact analyses fulfill Congress' vision of a process that protects habitat where the benefits of doing so outweigh the benefits of exclusion, and promotes human and economic development in other cases.

B. *Agency Discretion*

Because the incremental impacts method may underestimate and minimize the true economic impacts of a designation, NHA questions whether the benefits of exclusion will also be minimized, leading to decisions made on the basis of something less than the best available data and resulting in unchecked discretion. Excessive discretion coupled with an incremental impacts analysis will arguably render the ESA requirement for an economic analysis illusory by resulting in overly narrow economic analyses, ignoring the results of economic analyses, or both. Converting the exclusion analysis into a wholly discretionary process is contrary to the plain intent of Section 4(b)(2). Although 4(b)(2) gives the Services discretion to grant or deny requests for exclusion, it is equally clear that it requires the Services to consider economic and other relevant impacts.

This level of discretion will make it extremely difficult for would-be challengers to show that the Services should have excluded a particular area from critical habitat due to its economic impacts. This is exactly the type of result that the President's Executive Orders are trying to prevent and would severely limit public participation and cooperation among private landowners, States, and the Federal Government.

Certainty is essential to industry and to species protection. Therefore, NHA respectfully recommends that the Services develop and promulgate regulatory standards and criteria, open for public review and comment, which would govern decisions to grant or deny critical habitat exclusion requests and develop an appeals process for final exclusion decisions. These processes would meet the President's goal of increasing transparency, promoting predictability, and reducing uncertainty in the regulatory system.

VI. Conclusion

NHA supports the Services' proposal to provide draft economic analyses for public comment at the same time as proposed critical habitat designations. However, this improvement to current regulations will be overshadowed by codification of an incremental analysis method together with unchecked discretion when making critical habitat exclusion decisions.

NHA and its members work closely with the Services' staff throughout the United States and together we are seeing tremendous results in managing, conserving, and recovering our valuable natural resources. Although our comments reflect our concern regarding aspects of the Services' critical habitat designations and proposed changes, we also want to recognize the dedication and hard work of the Services' staff.

NHA appreciates the opportunity to submit comments on this proposed rulemaking, and we commit to working with the Services and other stakeholders on creating a balanced approach to appropriately designating critical habitat under the ESA and relevant regulations that is consistent with Congressional intent and the President's policies.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocci".

Linda Church Ciocci
Executive Director
National Hydropower Association