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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, PDM-2042
Arlington, VA 22203

Re: Comments on Proposed Revisions to the Regulations for Impact Analyses of Critical Habitat, FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01

To Whom It May Concern:

This letter provides the comments of the Alaska Oil and Gas Association ("AOGA"), the American Petroleum Institute ("API"), and the Petroleum Association of Wyoming ("PAW") (collectively, the "Associations") in response to the joint proposal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively the "Services") published at 77 Fed. Reg. 51,503 (Aug. 24, 2012) (the "Proposed Rule"). The Proposed Rule states that the Services intend to revise their regulations pertaining to economic analyses of proposed critical habitat designations under the Endangered Species Act ("ESA") so that the regulations are "consistent" with both the President's "Memorandum for the Secretary of Interior, Proposed Revised Habitat for the Spotted Owl; Minimizing Regulatory Burdens," published at 77 Fed. Reg. 12,985 (Mar. 5, 2012), and Executive Order 13563 ("Improving Regulation and Regulatory Review"), published at 76 Fed. Reg. 3,821 (Jan. 21, 2011) ("E.O. 13563").

For the reasons explained below: (1) the Associations welcome the Service's proposal to prepare and release draft economic analyses for proposed critical habitat designations in a timely manner; and (2) the Associations oppose the other regulatory changes proposed by the Service because (a) they conflict with the directives of the President stated in E.O. 13563, and (b) they unlawfully conflict with the requirements and underlying policies of the ESA. With regard to the

latter proposals, we respectfully submit that the Service's revisions are clearly *not* intended to reduce regulatory burdens on society, but instead are intended to render illusory the ESA requirement that the Services prepare and consider the economic impacts of designating critical habitat before finalizing a designation. The Proposed Rule accomplishes this intent by unlawfully limiting the scope of the analysis, and by dictating that the Services' consideration of economic impacts shall be discretionary, avoidable, and unreviewable.

I. CONTEXT

A. The Associations' Interests

AOGA is a business trade association located in Anchorage, Alaska. AOGA's sixteen member companies account for the majority of oil and gas exploration, development, production, transportation, refining, and marketing activities in Alaska. AOGA's members are the principal industry stakeholders that operate in Arctic Alaskan waters and the adjacent waters of the Outer Continental Shelf ("OCS"), as well as on the North Slope of Alaska, in areas currently designated as polar bear critical habitat. AOGA and its members are longstanding supporters of both responsible oil and gas leasing, exploration and development in Alaska, and wildlife conservation, management and research in the Arctic.

API is a national trade association representing over 500 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

As the largest and oldest petroleum industry trade association in Wyoming, PAW is the state's leading authority on petroleum industry issues and is dedicated to the betterment of the state's oil and gas industry and the public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and two-thirds of the crude oil produced in Wyoming. Through the Association's committee network, PAW monitors and responds to day-to-day activities vital to oil and gas involving public lands, exploration, production, transportation, coal bed methane, environmental issues, taxation, and legal and legislative issues. PAW's activities include active engagement in ESA listings, critical habitat designations and recovery planning affecting Wyoming, and in significant ESA regulatory reforms.

B. Critical Habitat and Economic Impacts – Statutory and Regulatory Background

In 1978, Congress amended the ESA to inject some "common sense" into the statute, and to better "balance environmental and development interest[s] . . . [and] take into consideration more accurately the development needs of the nation." H.R. Rep. No. 95-1757, at 801, 837; *see*

also id. at 837 ("The amendments . . . for the first time, recognize[d] that there are human considerations to be dealt with and people are an important factor in [the ESA] equation."). According to Congress, its amendments were intended to limit and guide agency action, and thus curb the Services' practice of designating "virtually all" of the habitat occupied by a species as "critical habitat." *Id.* at 817 ("[T]he Office of Endangered Species ha[d] gone too far in just designating territory as far as the eye can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of the species.").

In its 1978 Amendments to the ESA, Congress included a new provision – Section 4(b)(2) – that expressly requires the Services to consider economic and other factors that may weigh against designation of certain areas as "critical habitat":

> The Secretary shall designate critical habitat, and make revisions thereto ... on the basis of the best scientific data available and 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 Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2). Here, unlike the determination to list a species under Section 4(a) of the ESA, in which the Service may not consider the economic impact of the agency's action, Congress expressly directed that, in designating critical habitat, the Service must consider the economic and development impacts of its action and constrain the designation as appropriate. *See* H.R. Rep. No. 95-1757, at 801 ("[The 1973 ESA] was an attempt to balance environmental and development interests . . . . [I]t has not been successful in that regard, and . . . [f]or that reason, we have rewritten the legislation this year, and we have made a diligent effort to take into consideration more accurately the development needs of the nation."); *see also* 77 Fed. Reg. at 12,985 (express reliance and emphasis on "consideration of economic impact" in Section 4(b)(2) to support Presidential directive "to impose the least burden on society" in designating critical habitat).

Since enactment of the 1978 Amendments to the ESA, the Services have consistently pursued a regulatory strategy intended to minimize the burden on themselves when taking into consideration economic impacts by: (i) delaying their impact analysis as late as possible in the critical habitat designation process; (ii) minimizing the economic impacts to the greatest extent possible by attributing virtually all adverse economic impacts to the listing of a species and not

to designation of critical habitat; (iii) vastly underestimating the administrative costs of Section 7 consultation and discounting to zero virtually all other economic impacts because they are supposedly too speculative or unquantifiable; (iv) asking stakeholders and the public for information about possible exclusion areas, but then declining to exclude any areas without explanation, even when the identified costs outweigh the benefits; and (v) maintaining that their decisions not to consider any exclusions based upon economic and other relevant factors are unreviewable.

This series of strategies to render economic impact analysis meaningless for critical habitat designations arguably culminated in the Services' largest ever critical habitat designation, for the polar bear species, in 2010. That decision by the U.S. Fish and Wildlife Service – designating an area larger than the State of California that encompasses essentially all existing and foreseeable future oil and gas leasing, exploration and development areas within the Alaskan Arctic and in the adjacent OCS – was made even though the Service was "unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements."[1] Moreover, in designating this massive area as polar bear critical habitat, the Service declined to consider or explain any of the myriad common sense exclusions proposed by the State of Alaska, Alaska Native interests, and the oil and gas industry (e.g., areas from which polar bears are actively hazed away for the safety of bear and humans pursuant to federally authorized permits). In the polar bear designation, and in other similar designations, the Service's position continues to be that its decisions regarding consideration of economic impacts and exclusions are discretionary and unreviewable.

C. Presidential Directives to Minimize Regulatory Burdens

The Services state in the Proposed Rule that they are taking the proposed actions "consistent" with the requirements of the President's February 28, 2012 Memorandum and E.O. 13563. Both of these Presidential directives address the need to improve regulatory programs, to the extent permissible and consistent with regulatory objectives, and to impose the least burden on states, municipalities, tribes, industry, and private citizens.

E.O. 13563 was issued by President Obama in January 2011 "in order to improve regulation and regulatory review." 76 Fed. Reg. at 3,821. Section 1 of this executive order establishes "General Principles of Regulation" that are to be followed by every federal agency to the extent feasible and as not otherwise contrary to applicable law. President Obama's directive includes the following among these "General Principles":

[1] *See* Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States, Final Report, pp. ES-5 – ES-6 (October 14, 2010) (Attached as Exhibit 1).

- Federal regulations must:
    - "promote predictability and reduce uncertainty";
    - use "the least burdensome tools for achieving regulatory ends"; and
    - "take into account benefits and costs, both quantitative and qualitative."
- Each federal agency must:
    - "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)";
    - "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations"; and
    - "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity)[.]"

Id.

Building from E.O. 13563, the President's Memorandum more specifically emphasizes the importance of "flexibility and pragmatism" and the need to consider ways to "reduce burdens" when implementing the critical habitat designation process under the ESA. 77 Fed. Reg. at 12,985. In so doing, the Memorandum is explicit in its direction, in the context of revising northern spotted owl critical habitat, that the Services must (i) genuinely take into consideration economic impact, (ii) balance the benefits of exclusion versus the benefits of inclusion, and (iii) "give careful consideration to providing the maximum exclusion" from critical habitat designation consistent with applicable law and science. *Id.* at 12,985-86.

Respectfully, as to those portions of the Service's proposal designed to establish that economic impact analysis in critical habitat designations is entirely discretionary and unreviewable, it is hard to imagine agency action that is less consistent with these Presidential directives. *Compare, e.g.,* E.O. 13563 (directing that "to the extent permitted by law, each agency must, among other things: (1) propose and adopt a regulation only upon a reasoned determination that its benefits justify its costs"), *with* 77 Fed. Reg. at 51,508 (under the proposed revisions, "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"). As set forth below, except for the Service's well-considered proposal to publish draft economic impact analyses at the same time as proposed critical habitat designations, the Associations

believe the Proposed Rule is unlawful, contrary to the President's directives, and a reflection of flawed policy choices.

II. DETAILED COMMENTS

A. Proposed Paragraph (a): Timing of a Draft Economic Impact Analysis

The Associations commend the Services' proposal to publish a draft economic impact analysis at the same time that a proposed designation of critical habitat is made available for public comment. It has never been consistent with the ESA and its underlying policies, or otherwise made sense, to do any differently.

B. Proposed Paragraph (b): Consideration of the Economic Impact of Proposed Critical Habitat Designations

The Services propose to adopt by regulation the "baseline" approach to their consideration of economic impacts associated with critical habitat designations. In this approach, the Services attribute essentially all of the regulatory burdens and economic costs arising under the ESA to the listing decision (the "baseline"), and then perform an incremental economic analysis that identifies only the marginal administrative costs (if any) solely attributable to the designation of critical habitat. The Ninth Circuit has validated the baseline approach, whereas the Tenth Circuit has held this methodology to be unlawful. *Compare New Mexico Cattle Growers Ass'n v. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) (baseline analysis unlawful), with *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (baseline analysis lawful).

In *New Mexico Cattle Growers*, the Tenth Circuit required the U.S. Fish and Wildlife Service to consider *all* costs flowing from a critical habitat designation – not just the *de minimis* administrative expenses associated with future ESA section 7 consultations. Specifically, the Tenth Circuit construed the meaning of the phrase "economic impact," as expressly stated in Section 4(b)(2), and held the Service's baseline approach to be contrary to the statute and unlawful. In so doing, the court explained that the "root of the problem lies in the FWS's long-held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary." *Id*. at 1284. The court further reasoned that "[t]he fact that the FWS says that no real impact flows from the [critical habitat designation] does not make it so." *Id*.

In rejecting the baseline approach, the Tenth Circuit acknowledged that the ESA "clearly bars economic considerations from having a seat at the table when the listing determination is being made," but found that "Congress clearly intended that economic factors were to be considered in connection with the [critical habitat designation]." *Id*. at 1285 (citing 16 U.S.C. 1533(b)(2)); *see also id*. ("The statutory language is plain in requiring some kind of consideration of economic impact in the [critical habitat designation] phase."). The court concluded that it was "compelled by canons of statutory interpretation to give some effect to the

congressional directive that economic impacts be considered at the time of critical habitat designation." *Id*. To support this conclusion, the court reasoned as follows:

> Requiring that the FWS comply with the intent of the legislative body by considering economic impacts at a point subsequent to listing does not inject economic considerations into the listing process, but rather, situates those considerations in precisely the spot intended by Congress. Moreover, should this ruling result in certain areas being excluded from future [critical habitat designations], it will not undermine congressional intent that economic factors be excluded from the listing decision. The listing of the species will remain in effect and the significant protections afforded a species by listing will not be undermined. Indeed, if the FWS's position that the protections afforded by a [critical habitat designation] are subsumed by the protections of listing is accepted, this ruling will result in no decreased protection for endangered species or their habitat.

As found by the Tenth Circuit, the Services' baseline approach renders Section 4(b)(2)'s economic impact requirement entirely meaningless. Through the use of this approach, the Services have concluded, on numerous occasions, that major critical habitat designations, which cover vast expanses of private and public lands and waters and that impose real and substantial regulatory burdens, have no economic impacts other than the *de minimis* incremental administrative costs associated with future Section 7 consultations. The following examples are just a few of the decisions in which the Services have broadly designated critical habitat while also concluding, without any rational basis, that the designation has insignificant economic impacts:

- **The polar bear designation**: In 2010, the U.S. Fish and Wildlife Service designated a 187,157 square-mile area as critical habitat for the polar bear – the largest critical habitat designation in ESA history. Despite the unprecedented size of the designation, and despite the submittal of detailed comments from the State of Alaska, Alaska Natives, and the oil and gas industry documenting projected economic impacts in the tens of millions to billions of dollars, the Service implausibly concluded that the designation would have *total* potential incremental costs over 30 years ranging from only $67,000 to $1,210,000 in present value. As a result, the Service did not engage in any meaningful process to evaluate potential exclusions pursuant to Section 4(b)(2).
- **The Canada lynx designation:** In 2009, the U.S. Fish and Wildlife Service designated a 39,000 square-mile area within the contiguous United States as critical habitat for the Canada lynx – the then-largest designation for a terrestrial species – and concluded that the rule would result in *total* potential incremental

costs of only $1,490,000 in present value. 74 Fed. Reg. 8,616, 8,628 (Feb. 25, 2009). After specifically requesting comment on whether to exclude lands managed by existing conservation plans, and after receiving numerous comments detailing the substantial economic impacts of the proposed designation well in excess of the Service's estimate, the Service denied all requests to exclude federal lands despite its simultaneous acknowledgement that the designation resulted only in nominal educational benefits.

- **The Steller sea lion designation**: In 1993, the National Marine Fisheries Service designated critical habitat for the Steller sea lion, concluding that there would be *no* adverse economic effects from the designation. 58 Fed. Reg. 45,269, 45,272 (Aug. 27, 1993). Despite this finding, subsequent regulatory actions, such as vast closures of major groundfish fisheries in critical habitat areas in Alaskan waters, have demonstrated that the designation has resulted, and will continue to result, in impacts estimated to be in the hundreds of millions of dollars. *Compare* 58 Fed. Reg. at 45,272 (sea lion critical habitat designation citing environmental assessment finding of no adverse economic effects), *with* 75 Fed. Reg. 77,535 (Dec. 13, 2010) (finding adverse modification and closing fisheries *in critical habitat areas*).
- **The spectacled eider designation**: The U.S. Fish and Wildlife Service concluded that a 38,992 square-mile designation "will not have a notable economic impact," even though it is likely to result in increased Section 7 consultations, permitting delays, and the preclusion of development. 66 Fed. Reg. 9,146, 9,166 (Feb. 6, 2001); *see id.* (dismissing public comment on grounds that economic effects will be "nonexistent").[2]

In each of the cases mentioned above, the Services issued a critical habitat designation that has had or unquestionably will have substantial consequences and related economic impacts for regulated industries. However, in each case, the Services concluded at the time of designation that only *de minimis* economic impacts will result from the designation. The

[2] Insofar as we are aware, the Services have not engaged in any meaningful analysis of economic information beyond Section 7 administrative costs through application of the baseline approach in any critical habitat decision to date. In the Proposed Rule, the Services propose to incorporate vague language intended to continue this trend and to further "clarify" that the scope of the information considered and the manner of the analysis are matters of agency discretion. *See, e.g.*, 77 Fed. Reg. at 51,506 ("[t]he Secretary will consider impacts at a scale that the Secretary determines to be appropriate"). Accordingly, if the baseline approach is adopted, the Service's untenable (and unlawful) position is that it has complete discretion to disregard any and all types of information relevant to impacts above the baseline from its Section 4(b)(2) analysis.

consequence of these findings was that no meaningful exclusions were implemented or even considered, and Section 4(b)(2) was rendered entirely irrelevant. In short, because the baseline approach by definition does not require the Service to consider *all* of the economic impacts of a critical habitat designation, it is contrary to the ESA and unlawful.[3]

As just one practical example showing that critical habitat designations have economic consequences other than Section 7 "incremental" costs, we understand that the U.S. Army Corps of Engineers has indicated that wetlands that fall within designated polar bear critical habitat will automatically be treated as "Category I" wetlands, regardless of their quality. This will result in wetlands that might otherwise qualify as Category II, III, or IV wetlands being presumptively labeled as Category I wetlands *solely because they happen to be within designated polar bear critical habitat*. As a consequence, permittees' compensation obligations for these wetlands – which translates directly into dollars – will be significantly increased for no reason other than the critical habitat designation. The resulting economic impact to a single project could significantly exceed the Fish and Wildlife Service's *total* projected economic impact (estimated at approximately $677,000 for 30 years for all affected parties) of the entire polar bear critical habitat designation.

Additionally, it is well-established that courts – not agencies – are the final arbiters of statutory interpretation and that federal agencies are "bound to follow the law of the Circuit."[4]

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[3] Attached to this letter are a variety of materials demonstrating the Services' failure to properly consider relevant economic impacts, and requests for exclusions, in prior critical habitat designations. *See* Exhibits 1-22. The Associations request that all of these materials, along with this letter, be included in the administrative record for the present rulemaking process and fully considered as part of this process.

[4] *Local 144, Hotel, Hospital, Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218, 221 (2nd Cir. 1993); *see Neal v. United States*, 516 U.S. 284, 290-96 (1996) (court must adhere to an earlier interpretation of an unambiguous statute even if the agency promulgates a new rule); *id.* at 295 ("Absent … compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes.") (citation omitted); *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) ("Administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit, unless the [agency] has a good faith intention of seeking review of the particular proceeding by the Supreme Court."); *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) ("A decision of a panel of [a circuit] court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of [the] court or a superseding contrary decision of the Supreme Court.") (addressing a circuit split on statutory construction); *Osario v. Mayorkas*, 2012 U.S. App. LEXIS 20177, at *21 (9th Cir. Sept. 26, 2012) ("The existence of a circuit split does not itself establish ambiguity in the text of the [statute].").

As relevant here, the Ninth and Tenth Circuits' divergent holdings regarding the consideration of economic impacts under Section 4(b)(2) are clearly the result of conflicting interpretations of the plain language and intent of the ESA. *See New Mexico Cattle Growers*, 248 F.3d at 1283 ("crux of the *statutory dispute* is in determining the meaning of 'economic impact'") (emphasis added), 1285 ("we conclude that *Congress intended* that the FWS conduct a full analysis of all the economic impacts of a critical habitat designation") (emphasis added); *Arizona Cattle Growers*, 606 F.3d at 1173 (interpreting congressional intent); *Home Builders Ass'n of Northern Cal. v. U.S. Fish & Wildlife Serv*., 616 F.3d 983, 992 (9th Cir. 2010) ("the *plain language of the ESA* directs the agency to consider only the impacts caused by the designation itself") (emphasis added). Accordingly, with respect to Section 4(b)(2), two different circuits have interpreted the ESA in two distinctly different ways.

With the Proposed Rule, the Services have expressly stated their intent to resolve the existing split between the Ninth and Tenth Circuits. In so doing, the Services have rejected the law as established in the Tenth Circuit and accepted the law as it stands in the Ninth Circuit. However, as set forth above, federal agencies have no authority to resolve circuit court splits involving matters of statutory interpretation and construction. *See supra* footnote 4. The Services' attempt to do so here is beyond the legal authority of the agency and unlawful.[5]

In sum, the baseline approach adopted by the Proposed Rule fails to account for all of the economic impacts of a critical habitat designation and, accordingly, is contrary to the ESA and congressional intent. For this reason alone, this aspect of the Proposed Rule should be withdrawn. Aside from its incompatibility with the ESA, the Proposed Rule is also unlawful because it represents an improper attempt by the Services to resolve a circuit split involving a matter of statutory interpretation. This is a job for the courts, not the Services.

C. Proposed Paragraph (c): Exclusion of Areas Based Upon Balancing of the Benefits

Section 4(b)(2) provides that, after taking into account the economic impact of a critical habitat designation, the Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the

[5] In the Proposed Rule, the Services attempt to distinguish *New Mexico Cattle Growers* on the basis that the Tenth Circuit's holding in that case relied upon a supposedly outdated construction of the Service's ESA Section 7 regulations. However, as set forth above, the court's reasoning and conclusion was fundamentally based on its interpretation of the *statute*, not a regulation. *See New Mexico Cattle Growers*, 248 F.3d at 1283 (Section 7 "regulatory definitions are not before us today"). Additionally, despite touting the supposed differences in the regulatory definitions for "jeopardy" and "adverse modification," the Services have yet to propose any new regulations that modify the existing regulatory definitions to clarify the Services' supposed intent.

critical habitat." 16 U.S.C. § 1533(b)(2). The Proposed Rule would permit any Section 4(b)(2) determination to be sustained so long as the agency gave any consideration – no matter how perfunctory, incomplete, unexplained, or irrational – to economic impacts. Moreover, the Services contend that their decisions not to exclude certain areas are entirely unreviewable – even if the Services find that the economic impacts of a proposed designation far outweigh the benefits. *See* 77 Fed. Reg. at 51,508 ("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").

Respectfully, the Services' narrow view of Section 4(b)(2) renders the economic impact provisions of the critical habitat process simultaneously meaningless and unreviewable. A primary purpose of the Services' consideration of the economic impacts of a critical habitat designation under Section 4(b)(2) is to inform the Services' decision whether to exclude certain areas from the designation. If, as proposed, the Services (i) need only consider *de minimis* economic impacts, (ii) may decline to issue any Section 4(b)(2) exclusions regardless of the results of the economic impact analysis, and (iii) can make these decisions free of the prospect of any legal challenge, then Section 4(b)(2)'s requirement that the Services "consider" economic impacts and associated exclusions has no purpose or function.[6]

In addition, the ESA plainly requires the Services to decide, based upon their economic impact analyses, whether or not exclusion is warranted before they actually elect to exclude or not exclude a specific area pursuant to Section 4(b)(2). Under well-established Administrative Procedure Act ("APA") standards, this threshold decision must be supported by a rational explanation based on the record evidence. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of the decisionmaking."). Accordingly, the process through which the Services arrive at their Section 4(b)(2) decisions is subject to the APA standard of review, which is not dependent upon application of any separate substantive standard. The Services' proposal to render their Section 4(b)(2) determinations unreviewable is therefore contrary to the APA and unlawful.[7]

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[6] To "consider" means "to think about carefully … especially with regard to taking some action; to take into account." *Merriam-Webster Dictionary* (available at: http://www.merriam-webster.com/dictionary/consider). "Consider" plainly means something more than to merely recite, identify, or catalogue. *See Newton-Nations v. Betlach*, 660 F.3d 370, 381 (9th Cir. 2011) ("Stating that a factor [is] considered is not a substitute for considering it.").

[7] The ESA and APA plainly (i) require the Services to make Section 4(b)(2) determinations, and to respond to all requests for exclusions, for each and every critical habitat designation, and (ii) provide that those determinations are subject to judicial review. Although the statutory language is sufficient to establish the Services' obligation in this respect (as well as

(continued . . .)

III. CONCLUSION

The Services have proposed to codify by regulation an interpretation of the ESA that is fundamentally inconsistent with statutory plain language, established case law, congressional intent, and Presidential directives requiring agencies to minimize regulatory and economic burdens on society. None of these authorities supports an approach to critical habitat designations in which the Services may disregard the bulk of the economic impacts caused by their designations, may decline to grant any exclusions even when economic impacts far outweigh any benefits of the designation or when there are no benefits at all, and may do so without being subject to any form of judicial oversight. Section 4(b)(2) of the ESA could literally not exist and the consequences for the regulated community would be no different. Congress clearly did not intend this result when it took action to require the Services to "take into consideration more accurately the development needs of the nation" and "recognize that there are human considerations to be dealt with and people are an important factor in [the ESA] equation." Accordingly, we respectfully request that the Services reconsider paragraphs B and C of the Proposed Rule.

We appreciate your consideration of these comments.

Sincerely,

Kara Moriarty
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Richard Ranger
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Bruce Hinchey
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(. . . continued)
the availability of judicial review), the Services and the public would be better served if the Proposed Rule provided some additional standards to further interpret the scope of the economic impact assessment as well as the factors considered in the Section 4(b)(2) exclusion analysis.

AOGA, API and PAW
INDEX OF EXHIBITS