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Proposed Rule Would Limit Extent of Economic Impacts Considered in ESA Critical Habitat Designations^[]**

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On February 6, 2013, the comment period on a significant proposed rule under the ESA will close.^[1] The rule, jointly proposed by the U.S. Fish and Wildlife Service ("USFWS") and NOAA Fisheries (together, the "Services"), would require the Services to publish a draft economic analysis for public comment at the time they propose critical habitat for listed species. It would also govern the analytical framework under which the Services consider economic impacts from critical habitat designations by formalizing the Services' adoption of the "baseline" approach, limiting the scope of economic impacts considered in that context to "incremental" impacts.

Statutory and case law background

Under the ESA, the Services may not consider purely economic impacts when making listing determinations.^[2] They must, however, consider economic, national security, and other impacts of critical habitat designation before designating habitat, and may exclude an area from designation if 1) the benefits of exclusion exceed the benefits of designation and 2) exclusion will not result in a species' extinction. ^[3]

Listing alone creates protections for species by, for example, activating the ESA's take prohibition and consultation requirements, requiring that federal agencies "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species."^[4] These protections often impose economic burdens on federal, state and local governments, as well as on private actors.

Once critical habitat is designated, federal agencies must also "insure that any action authorized, funded, or carried out by such agency ... is not likely to ... result in the destruction or adverse modification" of critical habitat.^[5] Parties have long argued in various contexts over whether the Services' economic analysis in the critical habitat stage must "attribute to the critical habitat designation economic burdens that would exist even in the absence of that designation."^[6] Generally, two approaches have been recommended, termed "baseline" and "coextensive."

Under the baseline approach, typically advocated by environmental groups and the Services, any economic impacts of protecting a species "that will occur regardless of the critical habitat designation-in particular, the burdens imposed by listing. . . -are treated as part of the regulatory 'baseline' and are not factored into the economic analysis of the effects of the critical habitat designation."^[7]

Under the coextensive approach, typically advocated by regulated entities and property rights groups, the Services "must ignore the protection of a species that results from the listing decision in considering whether to designate an area as critical habitat. Any economic burden that designating an area would cause must be counted in the economic analysis, even if the same burden is already imposed by listing the species and, therefore, would exist even if the area were not designated."^[8]

Over a decade ago, in *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) (rejected by, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010)), the Tenth Circuit held that the baseline approach violated the ESA. It reached this conclusion by relying on a USFWS regulation that defined the phrase "destruction or adverse modification" in ESA § 7 as "effectively identical to the standard for determining whether an agency action places a species in 'jeopardy.'"^[9] The Tenth Circuit decided that the approach

"rendered an economic analysis relying on the baseline approach 'virtually meaningless' because it allowed the agency, in all cases, to find no economic impact to the critical habitat designation." [10] Since the Tenth Circuit issued its decision in *New Mexico Cattle Growers*, however, the Ninth Circuit and several other courts invalidated the USFWS's definition of "adverse modification" as too narrow, deciding, inter alia, that the regulation "effectively eliminated the independent significance of critical habitat as a measure to protect endangered species" [11] by not triggering "the adverse modification threshold. . . until there is an appreciable diminishment of the value of critical habitat for both survival and recovery." [12]

Accordingly, when directly presented with a choice between analytical approaches in 2010, the Ninth Circuit explicitly rejected the Tenth Circuit's holding in *New Mexico Cattle Growers* as "relying on a faulty premise[.]" and held that the Service "may employ the baseline approach in analyzing the critical habitat designation." [13] *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010), cert. denied, 131 S. Ct. 1471, 179 L. Ed. 2d 300 (2011). Plaintiffs in *Arizona Cattle Growers* sought certiorari, and the U.S. Supreme Court denied the request last year. [14]

2012 Presidential memorandum and proposed rule

Following resolution of the *Arizona Cattle Growers* litigation, President Obama issued a memorandum to the Secretary of Interior directing him to revise the ESA regulations to require the USFWS to publish draft economic analyses at the time it proposes critical habitat for designation. [15] In response to that memorandum, on August 24, 2012, the Services proposed a rule that would mandate not just simultaneous publication of economic analyses, [16] but employment of the "baseline" approach that was rejected by the Tenth Circuit pre-Gifford Pinchot. The Services propose to add language to [50 C.F.R. § 424.19](#) to "clarify that impact analyses evaluate the incremental impacts of the designation"—also referred to as the "baseline approach." Thus, for purposes of economic impacts analysis under ESA § 4(b)(2), governing critical habitat, the incremental impacts would be:

those probable economic, national security, and other relevant impacts of the proposed critical habitat designation on ongoing or potential Federal actions that would not otherwise occur without the designation. Put another way, the incremental impacts are the probable impacts on Federal actions for which the designation is the "but for" cause. To determine the incremental impacts of designating critical habitat, the Services compare the protections provided by the critical habitat designation (the world with the particular designation) to the combined effects of all conservation-related protections for the species (including listing) and its habitat in the absence of the designation of critical habitat (the world without designation, i.e., the baseline condition). [17]

Pointing out that "no court outside of the Tenth Circuit has followed *New Mexico Cattle Growers* after the Ninth Circuit issued *Gifford Pinchot*[,] [18] the Services now propose to formalize their preferred analytical framework, endorsed by the Ninth Circuit and other courts, by rule.

The baseline approach in practice: Draft economic analysis of forthcoming spotted owl habitat designation

Arizona Cattle Growers pertained to the spotted owl, a totem ESA species in the Pacific Northwest. Since its listing in 1990, critical habitat for the bird was designated and subsequently challenged by the timber industry in extensive litigation. As a result of a 1993 forest conference, since 1994, the Northwest Forest Plan ("NWFP") has guided federal forest management relating to spotted owls in the region. [19] In 2008, the USFWS published a recovery plan for the owl and proposed critical habitat. Both were challenged in *Arizona Cattle Growers*. Under court order, the USFWS must designate critical habitat by final rule by November 15, 2012.

Earlier this year, the USFWS proposed to designate nearly 14 million acres in California, Washington and Oregon as critical habitat, and published a draft economic analysis for the revised proposal. [20] In its analysis, the Service identified activities affecting the northern spotted owl, which will in turn be affected by designation of critical habitat for the owl: primarily, timber and wildfire management, road construction and linear projects, and a variety of other forest and species management activities.

In accord with the OMB's guidelines for "best practices concerning the conduct of economic analysis of Federal regulations," the USFWS attempted to "measure the costs of a regulatory action against a baseline, which [OMB]

defines as the 'best assessment of the way the world would look absent the proposed action.'"[21]

Thus, the USFWS "(1) describes the baseline protections afforded the [northern spotted owl] absent critical habitat; and (2) quantifies the potential incremental impacts precipitated specifically by the designation." The baseline represents a heavily regulated landscape with significant existing economic impacts, as the northern spotted owl is already subject to a variety of Federal, State, and local protections throughout most of its range "due to its threatened status under the ESA and regardless of the designation of critical habitat." On federal lands, these protections include the standards and guidelines of the NWFP and ESA §§ 7, 9, and 10. Most state lands within the proposed designated habitat are either covered by a Habitat Conservation Plan ("HCP") or are state parks or state fish and wildlife lands. "Many of these lands have state regulations or guidelines in place that provide habitat protection for [the northern spotted owl], regardless of critical habitat. Finally, most private [lands] within the proposed designation are subject to existing or proposed HCPs, Safe Harbor Agreements. . . . or conservation easements." [22]

Under the baseline approach, the USFWS concluded in the northern spotted owl context that "only a fraction of the overall proposed revised designation will result in more than incremental, minor administrative costs." [23] That is, of the 13,961,684 acres proposed for designation, the USFWS considered only "potential incremental changes in timber harvest practices on 1,389,787 acres of USFS and BLM land, or approximately 10 percent of the total acres proposed. In addition, potential exists for the owners of 306,869 acres of private land to experience incremental changes in harvests (approximately 2 percent of total acres proposed). No incremental changes in harvests are expected on State lands." [24] The USFWS does not consider the broader regional context of overall ESA regulation of the bird for purposes of critical habitat analysis, but acknowledges in its draft report that Pacific Northwest timber jobs have been reduced by more than 50% over the past 20 years—a result, according to the Service, of both implementation of the ESA and protections for the spotted owl and other species, as well as market globalization and industrial modernization. [25]

Practical implications

The Services' proposed rule governing consideration of economic impacts in critical habitat designations will formalize their interpretation of the ESA and reiterate the Ninth Circuit's affirmation of that policy. Even if the baseline approach is codified by rule (to the exclusion of the coextensive approach), the results in application will vary, and the nuances of the particular baseline employed will have significant consequences for regulated entities. Isolating incremental effects caused by habitat designation from overall effects of ESA regulation may accord with Congressional purpose—which is, arguably, ambiguous in the statute. Regardless, a baseline approach will almost always ensure that the balance between economic harms caused by habitat designation, when weighed against species benefits provided by that same designation, tips in favor of species and against exclusion of certain areas from federal designation.

For more information or for assistance with your comments on the proposed ESA rule, contact Jessica **Ferrell** or another member of Marten Law's Natural Resource Practice Group.

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[FN1] Departments of Interior & Commerce, [Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat](#), 77 Fed. Reg. 51503 (Aug. 24, 2012); see also 77 Fed. Reg. 66946 (extending public comment period).

[FN2] See [16 U.S.C.A. § 1533\(a\)](#); see also [New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service](#), 248 F.3d 1277, 1282 (10th Cir. 2001).

[FN3] See [16 U.S.C.A. § 1533\(b\)](#).

[FN4] See *id.* §§ 1538, 1536.

[FN5] *Id.* § 1536(a)(2); see also [Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service](#), 378 F.3d 1059, 1069 (9th Cir. 2004), opinion amended, [387 F.3d 968](#) (9th Cir. 2004).

[FN6] [Arizona Cattle Growers' Ass'n v. Salazar](#), 606 F.3d 1160, 1172 (9th Cir. 2010), cert. denied, [131 S. Ct. 1471](#) (2011).

[FN7] *Id.*

[FN8] *Id.*

[FN9] *Id.* (quoting [New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service](#), 248 F.3d 1277, 1283-85 (10th Cir. 2001)).

[FN10] *Id.* at 1173 (citing [New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service](#), 248 F.3d 1277, 1283-85).

[FN11] See [Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service](#), 378 F.3d 1059 at 1065; see also [Arizona Cattle Growers' Ass'n v. Salazar](#), 606 F.3d 1160 (citing cases).

[FN12] [Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service](#), 378 F.3d at 1069.

[FN13] [Arizona Cattle Growers](#), 606 F.3d at 1173. The court reasoned:

The baseline approach is, if anything, more logical than the co-extensive approach. The very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made. Moreover, the practical relevance of the economic analysis under the ESA is to determine the benefits of excluding or including an area in the critical habitat designation: if there is no net benefit (such as a reduction in economic impacts) to excluding the area, the agency must designate it. See [16 U.S.C.A. § 1533\(b\)\(2\)](#). The baseline approach, in contrast to the co-extensive approach, reflects this purpose.

Id. (footnote omitted).

[FN14] [131 S. Ct. 1471](#) (U.S. 2011).

[FN15] Presidential Memorandum of February 28, 2012, [Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens Memorandum for the Secretary of the Interior](#) 77 Fed. Reg. 12985 (March 5, 2012).

[FN16] "NOAA already issues draft economic analyses concurrent with a proposed designation of critical habitat, so the proposed rule will codify an existing practice for the agency." NMFS press release (2012).

[\[FN17\]](#) [77 Fed. Reg. at 51507.](#)

[\[FN18\]](#) *Id.*

[\[FN19\]](#) *See* Industrial Economics for USFWS, Economic Analysis of Critical Habitat Designation for the Northern Spotted Owl at ES-5 (May 29, 2012).

[\[FN20\]](#) *Id.*

[\[FN21\]](#) *Id.* at ES-7 (citing OMB, "Circular A-4," September 17, 2003, *available at* <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>).

[\[FN22\]](#) *Id.*

[\[FN23\]](#) *Id.* at ES-9 & Ex. ES-3.

[\[FN24\]](#) *Id.* at ES-9 to ES-10.

[\[FN25\]](#) *See id.* at ES-6.

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