United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: Deputy Secretary
Assistant Secretary – Fish Wildlife and Parks
Director, U.S. Fish and Wildlife Service

From: Solicitor

Subject: The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act

Under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, the Secretary, when listing a species as threatened or endangered, must also "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). Notwithstanding the fact that critical habitat is defined as habitat that is, or has features that are, "essential to the conservation of the species," *id.* § 1532(5)(A), section 4(b)(2) of the ESA grants the Secretary authority to exclude from a designation "any area" where, in his judgment, "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." Section 4(b)(2) states:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) 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.

Id. § 1533(b)(2). Not surprisingly, the Secretary's exercise of this exclusion authority is controversial and continues to spawn litigation thirty years after the authority was granted to him. The purpose of this memorandum is to explain the legal considerations that should guide the Secretary's exercise of his exclusion authority.

I. BACKGROUND

A. Overview

1. Statutory framework

The subject of this opinion, section 4(b)(2), is a part of section 4 of the ESA, which generally governs the listing and delisting of species and designation of critical habitat, as well as related issues including recovery planning and post-delisting monitoring. As relevant here, section 4(a)(1) imposes the duty to list species, and section 4(a)(3) imposes the duty to designate critical habitat. Section 4(b)(1) provides guidance as to the information relevant to making listing determinations under section 4(a)(1), and section 4(b)(2) provides guidance as to the information relevant to making critical habitat designations under section 4(a)(3). Section 4(b)(2) also authorizes the Secretary to exclude areas from critical habitat designations. Section 4(b)(3) sets up a process for interested persons to petition the Secretary to list or delist a species or revise a critical habitat designation. Sections 4(b)(4)–(7) set forth the procedural requirements for rulemaking to list, delist, or designate critical habitat, and section 4(b)(8) provides substantive requirements for the preambles of those rules.

"Critical habitat" is defined in section 3(5) of the ESA. The regulatory impact of designated critical habitat under the ESA derives solely from section 7. Under that section, federal agencies, in consultation with the Secretary, must ensure that their actions are not likely to jeopardize the continued existence of a listed species or result in the "destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2).

The implementing regulations for designating critical habitat are found at 50 C.F.R. part 424.

2. Legislative and regulatory history

The original text of the ESA in 1973 introduced the concept of critical habitat with little explanation: Congress mandated that federal agencies insure that their actions did not "result in the destruction or modification of habitat [of a listed species] which was determined by the Secretary, after consultation with the affected States, to be critical." Pub. L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892. Other than requiring consultation with the affected States, Congress did not provide any guidance with respect to or limitation on what areas should be designated as critical habitat.

The first formal effort at providing guidance regarding critical habitat was in the Fish and Wildlife Service's (FWS's or Service's) first regulations implementing the interagency coordination procedures of the ESA.[1] These regulations, promulgated in 1978, defined "critical

[1] Much of the Secretary's authority for implementing the ESA has been delegated to the FWS, but the authority to designate critical habitat has been delegated only so far as the Assistant Secretary for Fish and Wildlife and Parks.

habitat" as "any air, land, or water area . . . or any constituent thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to[,] physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air." 43 Fed. Reg. 869, 874–75 (Jan. 4, 1978) (codified at 50 C.F.R. § 402.02 (1978)). The elements were all related to the biological needs of the listed species. In designating critical habitat, no consideration was to be given to the impacts of such designation on human activities. In fact, FWS expressly rejected the inclusion of "socioeconomic or cultural factors unrelated to the biological needs of a listed species" within the criteria for designation. 43 Fed. Reg. at 872.

Soon after this rule was issued, the Supreme Court issued its historic decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), enjoining construction of the Tellico Dam because it would have jeopardized the endangered snail darter and destroyed its critical habitat. Responding quickly, Congress amended the ESA in 1978 to make five significant changes in the law governing critical habitat, all of which are important to an understanding of the Secretary's exclusion authority.

First, Congress provided a statutory definition of critical habitat that was narrower than the FWS's regulatory definition. It defined critical habitat in relation to areas or features "essential to the conservation of the species," rather than as areas "the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species." The definition of "critical habitat" in the 1978 amendments is the same as it is today:

> (i) the specific areas within the geographic area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential to the conservation of the species.

Pub. L. 95-632, § 2, 92 Stat. 3751 (1978) (codified at 16 U.S.C. § 1532(5)(A)).

Second, Congress explicitly required the Secretary, when making a designation, to do so only "after taking into consideration the economic impact, and any other relevant impact of making the designation." *Id.* at § 11(7), 92 Stat. at 3766 (now codified at 16 U.S.C. § 1533(b)(2)). As explained below, Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize

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potential future conflicts between species conservation and other relevant priorities at an early opportunity.

Third, Congress authorized the Secretary to exclude an area from critical habitat upon a determination that the benefits of such exclusion outweighed the benefits of inclusion, unless the Secretary determined that such exclusion would result in extinction of the species. *Id.* Congress continued to recognize that listing must be based on biological factors, but wanted the Secretary to have the "discretion" and "flexibility" to consider relevant nonbiological factors, specifically including, but not limited to, economic factors, in deciding which areas to exclude from critical habitat. H.R. Rep. No. 95-1625, at 17 (1978); reprinted in 1978 U.S.C.C.A.N. 9467.

Fourth, Congress imposed a deadline for designation, requiring it to take place concurrently with listing. Pub. L. 95-632, § 11(1), 92 Stat. at 3764 (now codified at 16 U.S.C. § 1533(a)(3)(A)). However, the amendments made this deadline applicable only "to the maximum extent prudent," *id.*, giving the Secretary "the discretion to decide not to designate critical habitat concurrently with the listing when it would not be in the best interest of the species to do so." H.R. Rep. No. 95-1625, at 16.

Fifth, Congress created an exemption procedure under which an Endangered Species Committee could grant federal agencies permission to proceed with a proposed project or activity even though it would likely jeopardize the continued existence of the species or result in the "destruction or adverse modification" of critical habitat. The committee authorized to grant such an exemption is required to find, among other things, that there are "no reasonable and prudent alternatives to the agency action," and that the "benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat." Pub. L. 95-632, § 3, 92 Stat. at 3758 (codified at 16 U.S.C. § 1536(h)(1)(A)). Thus, Congress provided two different mechanisms by which the government could avoid having critical habitat create a repeat of the Tellico Dam situation, in which survival of a particular species trumped all other considerations regardless of how costly the impact of listing or designation of critical habitat might be on human activities. First, in section 4(b)(2), Congress gave the Secretary authority to exclude areas from critical habitat, even though by definition either such areas or the features that they contain are deemed essential to the conservation of the species. Second, even if an area was designated as critical habitat, in section 7(h), Congress gave the committee the authority to permit projects to proceed, even though the project was likely to result in the destruction or adverse modification of critical habitat.

In 1980, FWS amended its regulations to conform to the 1978 ESA amendments. The amended regulations required FWS, in considering an area for designation, to "identify the significant activities that would . . . affect an area considered for designation . . . and consider the reasonably probable economic and other impacts of the designation upon such activities." 45 Fed. Reg. 13,010, 13,023 (Feb. 27, 1980) (codified at 50 C.F.R. § 424.12(c)). The regulations incorporated the statutory language authorizing FWS to exclude an area from critical habitat if it determined that the benefits of exclusion outweighed the benefits of inclusion. *Id.* Finally, they adopted the

provision that critical habitat shall be designated "to the maximum extent prudent," and set forth two conditions under which designation would not be prudent: (1) designation would increase an existing threat to the species, such as taking or other human activity; or (2) designation would not benefit the species. *Id.* (codified at 50 C.F.R. § 424.12(a)).

Congress revisited the ESA again in 1982, in part because of unintended consequences of the 1978 amendments. By requiring the Secretary to designate critical habitat at the same time he listed a species, and by requiring the Secretary to consider the economic impacts of designation, these amendments had unintentionally "indirectly introduced economic considerations into the listing process." S. Rep. No. 97-418 (1982) at 4. As a result of the 1982 amendments, the Secretary was required to designate critical habitat concurrently with listing only if designation was both prudent and determinable; if designation was not determinable at the time of listing, the Secretary was allowed an additional year to obtain the information needed to complete the designation based on the best information available. Pub. L. 97-304, § 2(a)(1), 96 Stat. 1411 (1982) (now codified at 16 U.S.C. § 4(a)(3)(A)). The 1982 amendments also specified that listing decisions must be made "*solely* on the basis of the best scientific and commercial data available," *id.* § 2(a)(2), 96 Stat. 1411 (1982) (now codified 16 U.S.C. § 4(b)(1)(A)) (emphasis added),[2] making it clear that the *listing decision* must be based on "biological information alone." H.R. Rep. No. 97-567, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 2812. The 1982 amendments did not change the criteria for designating critical habitat, however, and the legislative history demonstrates Congress's intent to reaffirm the existing requirements for prudency determinations, *see, e.g.*, H.R. Rep. No. 97-567, at 20, and consideration of economic factors in designation, *see id.* at 20–21.

In 1984, FWS amended its regulations to conform to the 1982 amendments, thereby bringing the regulations into their current form. The amended regulations added the provision that critical habitat should be designated to the maximum extent "prudent and determinable." 49 Fed. Reg. 38,900, 38,909 (Oct. 1, 1984); 50 C.F.R. § 424.12(a). As with the statutory amendments, the regulatory amendments left intact the concepts of prudency, consideration of economic and other non-biological impacts, and the option to exclude based on a balancing of benefits, but reinforced their importance and clarified their application in the preamble. 49 Fed. Reg. at 38,909, 38,912; *see also id.* at 38,903–04, 38,906–07; 50 C.F.R. §§ 424.12, 424.19.

In 2003, as part of the National Defense Authorization Act, Congress amended the critical habitat provisions of ESA section 4 in two ways. First, it amended section 4(a)(3) to bar the Secretary

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[2] In full, that provision now reads:

> (b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

from designating critical habitat on Department of Defense lands that are subject to an "integrated natural resource management plan" (INRMP), if the Secretary determines that the INRMP provides a benefit to the species. Pub. L. 108-136, § 318(a), 117 Stat. 1433 (2003). The conference report on the bill explained that this provision "would allow for a balance between military training requirements and protection of endangered or threatened species." H.R. Conf. Rep. 108-354, at 668 (2003), reprinted in 2003 U.S.C.C.A.N. 1446. The report stated that the conferees expect the Secretary to "assess an INRMP's potential contribution to species conservation" and to "establish criteria that would be used to determine if an INRMP benefits the listed species." *Id.*

Second, Congress amended the first sentence of section 4(b)(2) to insert "the impact on national security" after "the economic impact." Pub. L. 108-136, § 318(b). The conference report offered no elaboration on this language.

II. THE SECRETARY'S DISCRETION UNDER THE SECOND SENTENCE OF SECTION 4(b)(2) IS BROAD

A review of the ESA, the legislative history, the applicable regulations, and the relevant case law reveals that Congress intended to grant the Secretary broad discretion regarding exclusion of areas from critical habitat.

A. Statutory Language

The second sentence of section 4(b)(2) governs exclusion of particular areas from critical habitat. That sentence sets forth one prerequisite for exclusion (the benefits of exclusion must outweigh the benefits of inclusion), and one exception that applies even when the prerequisite is met (the exclusion cannot result in extinction). These are the only obvious limitations on the discretion of the Secretary found in section 4(b)(2) itself. Moreover, when those limitations do not apply, Congress, by use of the word "may," made the decision to exclude completely optional; the Secretary always has the discretion not to exclude an area. Thus, the language of the statute appears to give the Secretary broad discretion in determining whether to exclude areas, fettered by only two substantive limitations.

B. Legislative History

The relevant legislative history strongly supports the conclusion that the Secretary has broad discretion in making exclusion decisions. The key discussion is found in the report of the House Merchant Marine and Fisheries Committee on the 1978 amendments, which provided exclusion authority to the Secretary. That report used sweeping terms to describe the Secretary's discretion.

> Up until this time, the determination of critical habitat has been a purely biological question. With the addition of the new paragraph, the determination of

> critical habitat for invertebrate [sic][3] takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat for invertebrates. *The consideration and weight given to any particular impact is completely within the Secretary's discretion.*
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> . . . . The result of the committee's proposed amendment would be *increased flexibility* on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely biological criteria. *In some situations, no critical habitat would be specified.*

H.R. Rep. No. 95-1625, at 17 (emphases added). In fact, at least one representative was taken aback by the amount of discretion that the bill leading to the 1978 amendments would leave with the Secretary:

> The bill is an improvement over the current situation, but I am concerned about the discretion we are giving those individuals who manage this office and that such discretion is going to be exercised so as to result in the kind of . . . decision which we cannot live with.

124 Cong. Rec. H12876 (daily ed. Oct. 14, 1978) (statement of Rep. Johnson). Representative Johnson's view was apparently not shared, and the bill was signed into law with the Secretary's broad discretion intact.[4]

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[3] The initial bill would have authorized exclusion solely for invertebrates. By the time that the amendments were passed, that limitation had been dropped.

[4] The legislative history indicates that use of the word "may" in the second sentence of section 4(b)(2) accurately reflects the intent of Congress that exclusions are never required. In the debate on the House bill that led to the adoption of the exclusion language, a number of representatives made statements suggesting their understanding that although the bill would mandate consideration of impacts, it would not limit the Secretary's authority to designate critical habitat. *See* 124 Cong. Rec. H12872 (daily ed. Oct. 14, 1978) (statement of Rep. Buchanan) ("I believe that the Congress should state specifically that the Secretary of the Interior should at least consider the economic impact of the designation of any area as critical habitat."); *id.* at H12873 (statements of Rep. Bevill and Buchanan) ("[Q:] On the invertebrate animal amendment that the gentleman has introduced, am I correct that this amendment does not limit the Secretary's power to designate critical habitat? [R:] Yes, that is correct . . . . That is that the Secretary of the Interior is required to consider economic impact in the designation of a critical habitat. However, the amendment does not encroach upon the Secretary's authority to designate critical habitat for any species . . . ."); *id.* at H12898

C. Regulations

The implementing regulations essentially repeat the second sentence of section 4(b)(2), and therefore leave undisturbed the broad discretion granted by the statute. *See* 50 C.F.R. § 424.19. The preamble to the precursor to the current regulations emphasized that the Services decided not to promulgate more specific rules governing the consideration of impacts, and intended to apply a case-by-case analysis. 45 Fed. Reg. 13,010, 13,015 (Feb. 27, 1980). Similarly, the preamble to the current regulations noted that the procedures for addressing impacts "must vary according to the specific area under review. Impacts should not be expected to remain static or to apply uniformly in all cases." 49 Fed. Reg. 38,900, 38,907 (Oct. 1, 1984). The sort of case-by-case analysis contemplated by the regulations inherently maximizes the discretion of the decision maker. The preamble also emphasized that exclusions are optional: "It should be noted that this provision is permissive rather than prescriptive, and does not *require* exclusion of an area from critical habitat under any given set of circumstances." *Id.*

D. Case Law

The conclusion that Congress intended to grant the Secretary broad discretion under section 4(b)(2) is supported by *Bennett v. Spear*, 520 U.S. 154 (1997). That case did not involve an exclusion from critical habitat. However, the Court, in discussing the procedural requirements for designation of critical habitat, contrasted the "shall" in the first sentence of section 4(b)(2) with the "may" in the second sentence. The court noted: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures for rulemaking." *Id.* at 172. Thus, the Supreme Court has expressly recognized the discretionary nature of ultimate decisions whether or not to exclude an area from critical habitat. In addition, most district courts that have addressed exclusions from critical habitat have emphasized the wide discretion Congress bestowed on the Secretary. *See Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, 344 F. Supp. 2d 108, 126–27 (D.D.C. 2004) ("While economics must play a role, the Service has discretion when it comes time to decide whether to exclude areas from a critical habitat designation."); *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 2006 U.S. Dist. LEXIS 80255, *66 (E.D. Cal. Nov. 2, 2006) ("'The consideration and weight given to any particular impact is completely within the Secretary's discretion.' . . . [D]ecisions not to exclude certain tracts based on economic or other considerations . . . are . . . committed to agency discretion."); *id.* at *94 (section 4(b)(2) "permits the FWS to conduct a discretionary analysis of its exclusions"); *Trinity County Concerned Citizens v. Babbitt*, 1993 U.S. Dist. LEXIS 21378, *14–15 (D.D.C. Sept. 20, 1993) ("While there is no doubt that exclusion of certain lands will affect the economic balancing process, this argument does not, in itself, undercut the reasonableness of such an

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(statement of Rep. Buchanan) (speaking in support of successful amendment to expand the exclusion authority to all species, not just invertebrates: "I would simply eliminate this double standard and say that always the Secretary must consider economic impact. We do not limit his ability to make a decision; we only say, you shall look at the economic impact, not just in the case of invertebrates . . . .").

exclusion, where the Secretary is permitted by statute to exercise his discretion."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 2008 U.S. Dist. LEXIS 12783, *48–49 (D. Ariz. Feb. 4, 2008) ("[T]he Service has wide discretion in determining whether to exclude particular areas. . . . This discretion is limited only to the extent that the Service may not exclude areas from a designation if it determines that 'failure to designate such area as critical habitat will result in the extinction of the species.'").

III. LIMITATIONS ON THE SECRETARY'S DISCRETION

A. Substantive Limitations

The substantive legal considerations that should guide the Secretary's exercise of his exclusion authority are best understood by discussing them in the context of the six separate steps that lead to an exclusion decision. A detailed description of these steps will, therefore, elucidate the limitations on the Secretary's discretion to exclude areas. The first step is mandatory in every critical habitat designation. The next five steps are required only if the Secretary chooses to exercise his discretion to consider exclusions.

1. Step 1 – Comply with first sentence of section 4(b)(2)

Section 4(b)(2) contains two sentences. The first sentence sets forth standards and requirements with which the Secretary must comply in every designation of critical habitat made pursuant to section 4(a)(3). The second sentence contains the Secretary's exclusion authority. The ultimate designation is the combination of the process required by the first sentence of section 4(b)(2), which I refer to below as the "first-sentence decision," and the exclusions, if any.

While a first-sentence decision can and should stand alone and does not need to include an exclusion analysis to be complete, an exclusion analysis will likely be triggered by and rely on the information gathered by the Secretary in making his first-sentence decision. For that reason, it is important to understand how first-sentence decisions are to be made as a predicate to any exclusion analysis. The language in the first sentence raises two important questions that must be answered to gain a correct understanding of the exclusion authority contained in the second sentence: what impacts the Secretary must consider, and what that consideration entails. I address each of those issues in turn, as well as the relevance of the best-data-available language in the first sentence of section 4(b)(2).[5]

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[5] It is outside the necessary scope of this opinion to address the biological underpinnings of critical habitat designations and the definition of "critical habitat" itself. I note, however, that prior to identification and consideration of impacts, the Secretary must identify the areas that meet the definition of critical habitat and propose them for designation (unless doing so is not prudent, *see* 16 U.S.C. § 1533(a)(3)(A)), then reconsider the biology based upon public comment in making a final determination. The discussion in Part III.A.1.a. of this memorandum addresses the aspects of a final critical habitat designation beyond mere identification of areas that meet the definition.

a. Identification of impacts

The first question is what "impacts" the Secretary must take into consideration in making a first-sentence decision to "specify[] a particular area as critical habitat." The statute identifies the impacts that must be considered: economic, national security, and "any other relevant impact." Unfortunately, the ESA does not expressly answer two important questions. First, it does not answer the fundamental question of what it is that the impacts must be affecting in order to trigger the requirement that the impact be considered. Is it the impacts on the area, the impacts on the species that inhabit the area, the impacts on human activities (or some subset of human activities) that are being conducted or are planned to be conducted in the area, or some combination of these? Knowing the subject of the impacts is the only way of identifying what impacts must be considered. Second, the statute does not answer the question of what makes an "other" impact "relevant" in the context of a first-sentence decision.

The regulations that speak to the required impact analysis in a first-sentence decision give some helpful guidance, but arguably also leave some unanswered questions. As a first step, the regulations require the Secretary to identify "any significant activities" that would either:

1) affect an area considered for designation for critical habitat; or

2) likely be affected by the designation of such an area.

Thus, the first step suggests that the Secretary must consider both the impacts that "significant activities" would have on the area and the impacts that designating the area would have on the "significant activities."

As a second step, the Secretary is required, after proposing designation of an area, to "consider the probable economic and other impacts of the designation upon the proposed or ongoing activities." This suggests that the Secretary only consider impacts "upon the proposed or ongoing activities." Unfortunately, the regulations do not define what constitutes an "activity."

While the ESA does not speak directly to the question of what it is that the impacts must be affecting in order to trigger the requirement that the impact be considered, I conclude for the reasons explained below that the impacts that must be considered are the impacts of the designation upon ongoing or potential activities that are either carried out by the federal government, or that are funded or authorized by the federal government. If there are no such activities either ongoing or potential in the area being considered for designation, then there are no impacts that must be considered in making a first-sentence decision.

Under the ESA, the only legal consequence of a critical habitat designation is found in section 7, which applies directly only to the actions of federal agencies (including actions of the Bureau of Indian Affairs pursuant to the Indian trust responsibility). There is no direct legal consequence to the actions of private parties or State and local governments (although they are often indirectly

affected by the federal action to which section 7 applies, as discussed below). Section 7 requires that federal agencies, in consultation with the Secretary, "insure that any action authorized, funded or carried out by such agency ... is not likely to ... result in the destruction or adverse modification" of the critical habitat. If such a federal "action" would result in "destruction or adverse modification," then it may not be carried out, unless there is a "reasonable and prudent alternative" way of carrying it out that would avoid the prohibited result.

As the only legal consequence under the ESA of critical habitat designation is on activities that are authorized, funded, or carried out by federal agencies, it is reasonable to conclude that it is the impacts of designation on those actions that the Secretary must take into consideration when deciding whether to designate an area as critical habitat. To the extent that the actions of private parties, State or local governments, or Indian tribes are affected by the impact on a federal action (for example, if section 7 consultation with respect to critical habitat results in a federal agency denying a private party a permit or modifying an activity planned on trust or restricted Indian lands), those impacts must also be considered. However, it would make no sense to read the ESA as requiring the Secretary to consider other impacts of the designation on the actions of private parties, or of State or local governments, because under the ESA there would be no such impacts.[6]

The legislative history strongly supports this reading of the language requiring that certain impacts be taken into consideration in a first-sentence decision. The language was added to the ESA in response to the Supreme Court's decision in *TVA v. Hill*, which required TVA to halt construction of the Tellico Dam in part because it would result in the destruction of critical habitat of the snail darter. The decision demonstrated to Congress that "section 7 can potentially have an enormous impact on Federal activities," and that, as written, the ESA gave "the continued existence of endangered species priority over the primary missions of Federal agencies," regardless of cost. H.R. Rep. No. 95-1625, at 10.

Before determining what, if anything, to do in light of *TVA v. Hill*, the authorizing committee "conducted the most extensive set of oversight hearings ever held on the operation of the Endangered Species Act," the focus of which was to determine "the likelihood of future conflicts between listed species and federally authorized [not private or State or local government] activities." *Id.* at 12. As a result of the hearings, the committee became convinced "that some flexibility is needed in the act to allow consideration of those cases where a Federal action [not a private or State or local government action] cannot be completed or its objectives cannot be met without directly conflicting with the requirements of section 7." *Id.* at 13. It then amended the ESA as described in the Background section above, giving the Secretary the authority in section 4(b)(2) to exclude areas from a critical habitat designation, and failing that, giving the

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[6] Similarly, no consideration of the positive impacts of designation is required in making a first-sentence decision. That being said, if the Secretary engages in the optional exclusion process under steps two through six, *infra* pp. 16-24, the Secretary must consider all of the benefits of inclusion or exclusion that the Secretary, in his discretion, finds to be relevant to that decision. Those benefits can include secondary regulatory benefits of inclusion and exclusion with respect to private and State or local government activities.

Endangered Species Committee the authority in section 7(h) to exempt certain federal activities from the requirements of section 7 altogether, even if doing so would result in the extinction of the species. It is thus clear that the focus and purpose of the amendment to section 4(b)(2) was on avoiding conflicts between the requirements of the ESA and ongoing or potential federal activities, and that it is the impacts to those activities that must be taken into consideration in a first-sentence decision under section 4(b)(2). Identifying those impacts is the cornerstone of both the section 4(b)(2) exclusion authority and the section 7(h) exemption authority.[7]

With this understanding of the language in mind, it is now possible to understand what is meant by the phrase "any other relevant impacts." Other "relevant impacts" are impacts to ongoing or potential "federal actions" (i.e., actions authorized, funded, or carried out by a federal agency) that are not of an economic or national security nature. The Secretary has broad discretion in determining what such impacts might be. The preamble to the 1980 regulations explained that it would be impossible to list in advance all the other impacts that might qualify for consideration, and left the identification of those impacts to the exercise of the Secretary's discretion on a case-by-case basis:

> In amending the Act to provide for [such] analysis, Congress specifically referred to economic impacts. Other types of impacts, which may take many forms, will depend upon the specific circumstances surrounding a critical habitat designation, and are to a considerable extent unpredictable at this time. As a result, the Services have not adopted rule language on these other impacts. However, the Services intend to consider all identifiable relevant impacts on a case-by-case basis.

45 Fed. Reg. at 13015; *see id.* ("Since the rules comprehensively include all economic and other impacts for consideration, the detailed application of this standard to particular factors is better left to a case-by-case analysis rather than being placed in these general rules.")

The case law on the issue of what impacts must be considered in a first-sentence decision, while not directly on point in all respects, supports the interpretation given here. As a general matter, the cases are of limited relevance in determining the scope of the requirements under the first sentence of section 4(b)(2) because they do not expressly distinguish between the consideration of impacts under the first sentence of section 4(b)(2) and the weighing of benefits under the second sentence of section 4(b)(2). Therefore, some of the following discussion is of more relevance to the question of what benefits can be weighed in the exclusion process, even though the cases refer to "relevant impacts."

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[7] Again, as noted elsewhere, the Secretary has broad discretion as to what benefits to weigh in making an ultimate exclusion decision under the second sentence of section 4(b)(2), but impacts on federal agency actions must be considered under the first sentence of section 4(b)(2).

Most relevant is *Douglas County v. Babbitt*, 48 F.3d 1495 (9 Cir. 1996). In this case concerning applicability of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA), to designation of critical habitat and that discussed the operation of section 4(b)(2), the Ninth Circuit took a narrow view of what impacts the Secretary may consider under section 4(b)(2). Reversing the district court in part, the Ninth Circuit held that NEPA did not apply to FWS's designation of critical habitat for the northern spotted owl because (1) imposing NEPA's procedural requirements would not further the ESA's or NEPA's purposes, and (2) NEPA does not apply to actions that do not alter the natural environment. The district court had reasoned that NEPA and the ESA were not inconsistent, because section 4(b)(2)'s requirement that the Secretary consider "any other relevant impact" could allow consideration of the "wide range of impacts required to be analyzed in preparing a NEPA documentation." *Id.* at 1507. The Ninth Circuit rejected this broad interpretation of "any other relevant impact," explaining:

> The other impacts that the Secretary may consider must be "relevant" to the designation process. The purpose of the ESA is to prevent extinction of species, and Congress has allowed the Secretary to consider economic consequences of actions that further that purpose. But Congress has not given the Secretary the discretion to consider environmental factors, other than those related directly to the preservation of the species. The Secretary cannot engage in the very broad analysis NEPA requires when designating a critical habitat under the ESA.

Id.[8]

This view is consistent with my conclusion in footnote 6, *supra*, that the first sentence of section 4(b)(2) does not *require* the Secretary to conduct a broad NEPA-like analysis by considering the positive environmental impacts of the designation. However, *Douglas County* was a NEPA case, and did not involve an actual exclusion under the second sentence of section 4(b)(2); it should not be read to limit the broad discretion of the Secretary in weighing the benefits of inclusion and exclusion in the optional exclusion analysis under the second sentence of section 4(b)(2), discussed in steps 2 through 5 below.

Thus, notwithstanding *Douglas County*, a district court in the Ninth Circuit agreed that it was appropriate for FWS to weigh the benefit that excluding San Carlos Apache tribal lands would have on FWS's relationship with that tribe. *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1105 (D. Ariz. 2003). Although the court's analysis referred to the "relevant impact" language of the first sentence, the court was evaluating an exclusion under the second sentence of section 4(b)(2), and is better viewed as addressing the scope of the benefits that the Secretary may weigh under the second sentence. *See also Home Builders Ass'n of Northern*

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[8] The Tenth Circuit and one district court have disagreed with *Douglas County* and held that NEPA does apply to designation of critical habitat. *Catron County Bd. of County Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429 (10 Cir. 1996); *Cape Hatteras Access Pres. Alliance v. U.S. Dept. of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004). An analysis of NEPA's application to designation of critical habitat is beyond the scope of this memorandum.

California v. U.S. Fish & Wildlife Serv., 2006 U.S. Dist. LEXIS 80255, *66 (E.D. Cal. Nov. 2, 2006) (rejecting argument that existence of management plans cannot be considered in balancing).

b. Consideration of impacts

The second question raised by the first sentence is how the Secretary, in making a first-sentence decision, fulfills his duty to "take into consideration" the relevant impacts of designation. The ESA does not expressly define "after taking into consideration," and there is no case law under the ESA interpreting this phrase. "Consideration" is typically defined as "careful thought" or "deliberation," or "something that is considered as a ground of opinion or action." Webster's Third New International Dictionary 484 (1993). "Consider" is defined as to "reflect on" or "think about with a degree of care or caution." *Id.* at 483. These dictionary definitions do not resolve the ambiguity inherent in this phrase. *See United States v. Medeiros*, 710 F. Supp. 106, 108 (M.D. Pa. 1989) ("It is not entirely clear to us what the phrase 'adequately taken into consideration' means."). Taken in isolation, the requirement of the first sentence that the Secretary designate critical habitat after taking into consideration relevant impacts could be read to suggest that those impacts, like the best scientific data available with respect to the biology of the species at issue, should be used by the Secretary to determine what areas to designate as critical habitat. Thus, were there only one sentence in section 4(b)(2), one might conclude that the Secretary is required in every designation to balance the various impacts of a critical habitat designation, adjust the area to be designated as the Secretary deems appropriate given the impacts, and justify the ultimate decision of what area is designated based on that balancing.

But there is a second sentence in section 4(b)(2), and that sentence provides the context for interpreting the mandate of the first sentence. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Learach*, 523 U.S. 26, 36 (1998) (a statute is to be interpreted in all its parts when construing any one of them); *Vialpando v. Shea*, 475 F.2d 731, 734 (10 Cir. 1973) ("The phrase 'take into consideration' is flexible and by itself does not require a particular treatment of employment expenses. However, when considered in the statutory framework of 42 U.S.C. § 602(a)(7), these words assume a particular meaning."). The second sentence clarifies the meaning of the first sentence in two ways. First, it narrows the Secretary's discretion by providing specific guidance as to how the information considered under the first sentence may be used to adjust the area to be designated. Because the second sentence sets a standard for how critical habitat can be adjusted, it clarifies that the first sentence does not provide the Secretary with an independent authority to reduce the amount of critical habitat designated (which it would if there were no second sentence). Any reductions of the area to be designated must be made pursuant to the exclusion process of the second sentence. While the Secretary must "take into consideration" the costs of his decision, he must base his designation of critical habitat on the criteria set forth in 50 C.F.R. § 424.12, which focus on the biological and physical needs of the species, and not on the costs that will be imposed on human activities by the designation.

Second, the second sentence reduces the burden on the Secretary by expressly separating the

mandatory consideration of impacts in a first-sentence decision from the discretionary balancing required in an exclusion decision. Balancing is only required if the Secretary exercises the option of excluding an area. Thus, the second sentence clarifies that no balancing is required in fulfilling the mandate of the first sentence.

What, then, must the Secretary do to comply with the mandate to take the impacts of the designation into consideration? In the context of section 4(b)(2), the logical purpose of the mandate is to ensure that the Secretary has the information necessary to decide whether to explore further the option of excluding areas; it is to document the costs that will be imposed on human activities by the designation. This purpose is achieved through two distinct steps. In the first step, the Secretary must gather the available information about the costs that would be imposed by his decision. If he subsequently chooses to engage in an exclusion analysis, the avoidance of these costs will be the principal benefit of exclusion. Although, as discussed above, the Secretary has considerable discretion in determining what impacts are relevant, the Secretary may not simply speculate as to impacts without gathering available information. *See Davis v. Coleman*, 521 F.2d 661, (9 Cir. 1975) ("Thus, we think 'consider' in this context [a requirement to consider impacts of highway construction] means to investigate and analyze, not merely to speculate on the basis of information that is already available, however incomplete.").

In the second step, the Secretary must give careful thought to the relevant information in the context of deciding whether or not to proceed with the optional exclusion analysis. *See Penry v. Lynaugh*, 832 F.2d 915, 923–24 (5 Cir. 1987) (in criminal sentencing context, requirement that sentencing court "consider" mitigating factors requires allowing presentation of evidence and that sentencing court must not be precluded from "listening to and acting on" evidence).

This two-step process is consistent with the implementing regulations. Those regulations require that the Secretary "identify any significant activities that would either affect an area considered to be critical habitat or likely to be affected by the designation." 50 C.F.R. § 424.19. This requirement corresponds to the first step listed above. The regulations also require the Secretary to "consider the probable economic and other impacts of the designation upon proposed or ongoing activities." *Id.* This requirement corresponds to the second step listed above. Note that neither of these steps requires any balancing, or even identification of the benefits of designation. Those benefits become relevant only if the Secretary decides to consider particular exclusions. Note also that the regulations clarify that the statutory language applies to the "probable" impacts on "proposed or ongoing activities." While, as discussed below, the Secretary can choose to cast a broader net to identify inputs in any ultimate balancing analysis under the second sentence, the mandate of what must be considered under the first sentence is relatively narrow: the Secretary need only identify (and give careful thought to) the probable impacts on significant potential or ongoing activities.[9] The activities in question are of two kinds: (1) they are the federal activities

[9] Note, however, that existing regulations do not place a "certainty requirement" found on other provisions of the regulations on what potentially falls within the scope of 4(b)(2). Therefore, requiring a standard that "other relevant impacts" must be "reasonably certain to occur" would not be appropriate. Hence, it is enough that a potential future activity is under consideration. In addition, "ongoing activities" may include those that have occurred in the area in

that, if the designation is made, would be subject to the section 7 requirement that they be conducted in such a way as to avoid placing the species in jeopardy or destroying or adversely modifying critical habitat; and (2) they are the non-federal activities that would be affected by the section 7 constraints on the federal activities. The Secretary need not consider improbable impacts on those activities, impacts on those activities that are not significant, or impacts on activities that are neither potential nor ongoing. Moreover, although the Secretary should clearly state the relevant impacts identified under the first sentence of section 4(b)(2), the "careful thought" that the Secretary must give to those impacts need not be memorialized in detail. *Cf. U.S. v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (noting, in context of use of "consider" in sentencing guidelines, that courts "have refrained from imposing any rigorous requirement of specific articulation" of the consideration given or detailed findings as to the relevant factors); *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 947 (1 Cir. 1991) (requirement that an independent educational evaluation must be considered by agency did not require that there be "substantive discussion" of the evaluation).

Overall, the first sentence of section 4(b)(2) does not impose a heavy burden. The law governing fishing quotas provides an analogous situation. Under regulations implementing the Magnusson Act, 16 U.S.C. § 1801 *et seq.*, a fisheries council must "consider current stock assessments, catch reports, and other relevant information" in setting quotas. In a challenge to such a quota, a court described the low bar set by this language:

> This instruction to "consider" such information as is "relevant" can hardly be read as a strict dictate. "Consider" means "examine" or "inspect." Black's Law Dictionary 306 (6th ed. 1990). "Relevant," as all lawyers know, is not a firmly fixed term, but involves subjective judgments. This does not mean that the Council has carte blanche to ignore plainly relevant information. But it does suggest that the Council has some discretion in recommending the quota.

J.H. Miles & Co. v. Brown, 910 F. Supp. 1138, 1156 (E.D. Va. 1995).

c. Best scientific data available

One last provision in the first sentence that may bear on exclusion decisions is the requirement that designations be based on the "best scientific data available." Because exclusions under the second sentence of section 4(b)(2) can in part define the designation, this data availability standard is best read to apply not just to the first-sentence decision, but also to any exclusions. Therefore, it provides a limitation of sorts on the Secretary's discretion—the Secretary cannot exclude an area without having weighed the best available data on the benefits of exclusion and inclusion. This could be relevant with respect to both steps 3 and 4, discussed below. As a practical matter, this is more of a procedural than a substantive limitation. As long as the Secretary considers the proper data, the Secretary retains discretion as to the ultimate decision,

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question in the recent past and are likely to occur there again, depending upon the particular factual circumstances.

although the data will necessarily inform the Secretary's exercise of that discretion. But failure to weigh the available relevant data may result in reversal. *See Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1149–50 (N.D. Cal. 2006) ("in relying on an unsubstantiated assumption that was critical to its exclusion decision, the Service did not rely on the 'best available scientific and commercial data available' as required by the ESA").[10]

2. Step 2 – Decide whether to consider excluding an area from critical habitat

Having identified the critical habitat of the species and the relevant impacts of designating it, the Secretary is equipped to decide whether to consider excluding any portion of the habitat from the designation. Presumably, if he deems the impacts of the designation severe enough, he will proceed with an exclusion analysis under section 4(b)(2). It is important to note, however, that he is not required to perform an exclusion analysis, no matter how severe the impacts of a designation might be. This conclusion follows from the use of the word "may" in the phrase "the Secretary may exclude any area from critical habitat." Moreover, a decision not to exclude any areas is not reviewable in the courts; it is a decision that is committed entirely to the Secretary's discretion and, as such, need not be explained. *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 2006 U.S. Dist. LEXIS 80255, *66.

It is important to note here that the Secretary may consider excluding "any particular area." This phrase is used in the first sentence, but is also referred to in the second sentence as the unit of exclusions. Neither the ESA nor the regulations define or provide any guidance regarding "area" or "particular area." The scale of designations and possible exclusions can vary radically depending on the circumstances: the range of listed species can vary from less than a single acre to a mountain range, a state, or the entire country; impacts of designation may be localized or diffuse; the habitat of the species may be functionally divisible at different scales, depending on the life history of the species, the geography of the areas involved, patterns of land-ownership, and available information regarding impacts of designation. Therefore, the Secretary, on a case-by-case basis, may assess impacts (and weigh benefits) at any scale that the Secretary deems appropriate, and this language does not impose a limitation on the Secretary's discretion. The Secretary should, however, clearly explain the basis for the choice of scale. Moreover, a necessary implication of the "any particular area" language is that decisions to exclude areas should be separately analyzed and explained, with each exclusion supported by the record.

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[10] The courts' interpretation of similar language in another part of section 4 is likely equally applicable to section 4(b)(2). It has been held that the phrase "best available scientific and commercial data" in section 4(b)(1)(A) "merely prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on. Even if the available scientific and commercial data were quite inconclusive, he may—indeed must—still rely on it at that stage." *City of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989). Under this standard, "the Secretary has no obligation to conduct independent studies." *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

3. Step 3 – Identify benefits of excluding the area

If the Secretary decides to proceed with an exclusion analysis, he must identify the benefits of excluding the area under consideration. For the most part, these benefits will be the avoidance of the impacts or costs of designation identified under Step 1, as they relate to the particular area being considered for exclusion. There are two important issues to address in more detail here, although they are also relevant with respect to identifying the benefits of inclusion under Step 4, below.

a. Incremental versus co-extensive benefits

Since 2001, the courts have taken various views as to whether the Secretary should properly consider the "co-extensive" or "incremental" benefits of excluding an area as critical habitat. The court in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Service*, 248 F.3d 1277 (10 Cir. 2001), ruled that a "co-extensive" analysis was required. In that case, Plaintiffs had challenged the Secretary's designation of critical habitat for the southwestern willow flycatcher. The Secretary's economic analysis of the designation had employed an "incremental" approach, in which an impact was not attributed to critical habitat unless the designation would result in a cost above the "baseline" costs attributable to listing the species. *Id.* at 1283. The Secretary contended that, under the regulatory definitions of "jeopardize" and "adverse modification," all actions that would result in adverse modification of critical habitat would also jeopardize the species; therefore those actions would be prohibited even in the absence of designation of critical habitat, and designation of critical habitat would have no incremental impact. *Id.* Plaintiffs contended that the economic analysis should have considered all economic impacts, regardless of whether they were caused by critical habitat alone, or were co-extensive with the costs attributable to listing. *Id.*

The Tenth Circuit identified the "root of the problem" as "FWS's long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary." *Id.* The court noted that "[t]he statutory language is plain in requiring some kind of consideration of economic impact," yet economic analysis using the Secretary's "baseline" model is "rendered essentially without meaning" by the regulatory definitions that treat jeopardy and adverse modification as equivalent. *Id.* at 1285. The court did not rule, however, on the validity of those regulatory definitions, stating that the question was not before the court. *Id.* at 1283. Instead, the court concluded that, in order to give effect to Congress's directive that economic impacts be considered, the Secretary must "conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether these impacts are attributable co-extensively to other causes." *Id.* It seems evident that the court reached this conclusion only because of the Secretary's contention that the standards for jeopardy and adverse modification were equivalent.

Immediately following *New Mexico Cattle Growers*, several district courts approved the co-extensive approach to economic analyses of critical habitat. *See Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1225–30 (E.D. Cal.

2003) (approving *New Mexico Cattle Growers*' approach to economic analysis, in light of FWS's policy position that there is no difference between jeopardy and adverse modification); *Natural Resources Defense Council v. U.S. Dept. of the Interior*, 275 F. Supp. 2d 1136, 1142 (C.D. Cal. 2002) (granting FWS's motion for voluntary remand of critical habitat rules for new economic analysis, and finding *New Mexico Cattle Growers*' rejection of "baseline" approach persuasive); *Building Industry Legal Def. Found. v. Norton*, 231 F. Supp. 2d 100, 103–04 (D.D.C. 2002) (granting FWS's motion for remand of critical habitat rule for co-extensive cost analysis); *Home Builders Ass'n of N. Cal. v. Norton*, 293 F. Supp. 2d 1, 3–4 (D.D.C. 2002) (approving consent decree to remand designation for new economic analysis consistent with *New Mexico Cattle Growers*, rejecting intervenor's objections that *New Mexico Cattle Growers* was contrary to the ESA, and deferring to the Department of the Interior's judgment to undertake a co-extensive analysis); *Nat'l Ass'n of Home Builders v. Evans*, 2002 U.S. Dist. LEXIS 27450, *7–10 (D.D.C. April 30, 2002) (approving consent decree to remand designation for new economic analysis consistent with *New Mexico Cattle Growers*, finding *New Mexico Cattle Growers* persuasive, and deferring to judgment of agency); *see also Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 5208, *16 (E.D. Cal. Jan. 24, 2007) (declining to instruct FWS not to consider co-extensive costs on remand of critical habitat rule).

However, after the Ninth Circuit in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9 Cir.), *modified*, 387 F.3d 968 (9 Cir. 2004), invalidated the regulatory definition of "adverse modification," most district court decisions have rejected co-extensive economic analyses. The first of these decisions, *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), involved a challenge to the Secretary's designation of critical habitat for the wintering piping plover. The Secretary had decided that the economic impact of designation was not significant enough to warrant exclusion of certain areas, because no significant costs were expected above the "baseline" costs caused by listing the species. *Id.* at 127. The court first rejected the Secretary's position that the standards for adverse modification and jeopardy were functionally equivalent. Citing the Ninth Circuit's ruling in *Gifford Pinchot* and the Fifth Circuit's ruling in *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434, 441–42 (5 Cir. 2001), both of which rejected the notion that the adverse modification and jeopardy standards were equivalent, the court concluded that "[t]he Service's regulations and practices that embrace functional equivalence have been confusing for too long," and ordered the Secretary to clarify or modify its position on remand. *Id.* at 131.

However, the court also rejected the Tenth Circuit's reasoning in *New Mexico Cattle Growers*:

> Apparently hamstrung by its inability to consider the validity [of the regulatory definition of "destruction or adverse modification"], the Tenth Circuit found another way to require the Service to perform a more rigorous economic analysis. This is an instance of a hard case making bad law.

Id. at 129–30. The court concluded that:

> [t]he baseline approach is a reasonable method for assessing the actual costs of a particular critical habitat designation. To find the true cost of a designation, the world with the designation must be compared to the world without it. ... In order to calculate the costs above the baseline, those that are the "but for" result of designation, the agency may need to consider the economic impact of listing and other events that contribute to and fall below the baseline.

Id. at 130.

The court in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d at 1152, also found the reasoning in *New Mexico Cattle Growers* unpersuasive, and instead followed *Cape Hatteras* to reject exclusions under section 4(b)(2) that relied on co-extensive cost analysis in a critical habitat designation for the Peirson's milk-vetch. The court noted that *Cape Hatteras* was "particularly instructive" because it rested on a careful review of *Gifford Pinchot* and *Sierra Club v. U.S. Fish & Wildlife Service*, while *New Mexico Cattle Growers* was issued prior to *Gifford Pinchot*. *Id.* at 1152.

The court in *Arizona Cattle Growers' Association v. Kempthorne*, 2008 U.S. Dist. LEXIS 12783 (D. Ariz., Feb. 4, 2008), also chose to follow *Cape Hatteras* rather than *New Mexico Cattle Growers*, holding that section 4(b)(2) "deals exclusively with critical habitat designation and its command to consider economic impacts is similarly constrained." *Id.* at *58. The court concluded that, by invalidating the regulatory definition of "adverse modification," *Gifford Pinchot* had eliminated the "functional equivalence" problem that the Tenth Circuit confronted in *New Mexico Cattle Growers*; hence there was no longer a reason to require a co-extensive economic analysis. *Id.* at *55–56. [11]

I find the reasoning in the *Cape Hatteras* line of cases persuasive for the proposition that "to find

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[11] *See also Trinity County Concerned Citizens v. Babbitt*, 1993 U.S. Dist. LEXIS 21378 (D.D.C. Sept. 20, 1993), which preceded *New Mexico Cattle Growers*. The Service's economic analysis of critical habitat for the northern spotted owl had considered only the incremental impact of critical habitat, and excluded costs that were attributable to listing alone. Plaintiffs argued that balancing under section 4(b)(2) should have been based on the costs incurred at the time of listing, regardless of whether the critical habitat designation occurred later. The court rejected plaintiffs' argument:

> [U]nder plaintiffs' interpretation, the Secretary would be required to include in the consideration of economic costs certain costs that might have already been incurred as a result of the *listing* of the species, for example, through the ESA's jeopardy and take provisions. Under § 1533(b)(1)(A), the Secretary is expressly forbidden from considering such economic costs in making the decision to list a species. The Court thus finds plaintiffs' interpretation contrary to the language of § 1533(b)(2).

Id. at *13 (citations omitted); *see also Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 2007 U.S. Dist. LEXIS 5208, *18–19 (E.D. Cal. Jan. 24, 2007) (*Gifford Pinchot* "does undercut the reasoning that the *Cattle Growers* court used to invalidate the baseline approach, [but] it does *not* require the conclusion that a coextensive analysis is legally improper" (emphasis in original)).

the true cost of a designation, the world with the designation must be compared to the world without it." *Cape Hatteras*, 344 F. Supp. 2d at 130. The purpose of excluding an area from critical habitat is to avoid the impacts of the designation, or to realize the benefits that the Secretary determines will flow from that exclusion. Benefits of exclusion are often in the form of avoiding a cost imposed by the designation. By definition, when impacts are completely "co-extensive," such that they will occur even if the area is not designated, any "cost" imposed by the designation will not be avoided if the area at issue is excluded. Therefore, exclusion of the area based on such costs would serve no purpose.

This is not to say that gathering and analyzing information regarding the broader costs of protecting habitat for the species is prohibited, as long as it does not influence the listing decision. This information may be of use to the public or policy-makers for a variety of purposes. The first sentence of section 4(b)(2), however, does not require it to be considered in designating critical habitat, and avoidance of purely co-extensive costs of the designation should not be identified as a benefit of exclusion to be weighed under the second sentence of section 4(b)(2).

My conclusion is not affected by section 4(a)(3)(A) and the case law thereunder. Section 4(a)(3)(A) sets forth the requirement of designation of critical habitat. It states: "The Secretary, by regulation . . . *to the maximum extent prudent and determinable* . . . shall, concurrently with [listing], designate any habitat of such species which is then considered to be critical habitat . . . ." 16 U.S.C. § 1533(a)(3)(A) (emphasis added). A related provision, section 4(b)(6)(C), elaborates on the role the concepts of "prudence" and "determinability" play in designation of critical habitat.

Courts have invalidated a number of FWS determinations that designation of critical habitat was not prudent. In doing so, courts have emphasized that it is rare that designation of critical habitat will not be prudent, and stated that the ESA does not allow "nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection." *Natural Resources Defense Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1127 (9 Cir. 1997) ("*NRDC*"). Moreover, in the leading case, *NRDC*, the Ninth Circuit cited section 4(b)(2) in faulting the Service for not considering, in making its not-prudent determination, whether the benefits of designation outweigh the increased threat caused by designation. *Id.* at 1125.

Plaintiffs in several cases have argued that the holding of *NRDC* applies to decisions to exclude areas from critical habitat under 4(b)(2). In particular, they have cited the language quoted above as prohibiting the Secretary from considering other mechanisms of protecting habitat when identifying the benefits of inclusion and the benefits of exclusion. In doing so, they were in effect arguing that section 4(a)(3) requires a co-extensive rather than incremental analysis. I conclude, however, that the *NRDC* line of cases is limited to the statutory provision at issue in those cases, section 4(a)(3). The only court to directly address the issue reached the same conclusion.

> By contrast, the relevant provision of the ESA here is § 4(b)(2), which permits the FWS to conduct a discretionary analysis of its exclusions. Thus, the Environmental Groups have not cited any authority that would preclude the FWS from considering the existence of other management schemes in deciding whether to exclude land from its critical habitat designation.

Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv., 2006 U.S. Dist. LEXIS 80255, *94; *see also NRDC*, 113 F.3d at 1128 (O'Scannlain, J., dissenting) (majority improperly relied on section 4(b)(2), not the provision governing prudency determinations). To conclude otherwise, and read the case law under section 4(a)(3) as applying to exclusion determinations under section 4(b)(2) would be directly contrary to the wide discretion that Congress intended to afford the Secretary under section 4(b)(2), discussed in detail in Part II, *supra*.

b. Secondary regulatory benefits of exclusion or inclusion

As mentioned above, the only restriction that the ESA imposes with respect to designated critical habitat is the requirement that federal agencies ensure that their actions are not likely to result in destruction or adverse modification of critical habitat. However, some other federal and state laws and policies expressly address critical habitat designated under the ESA; therefore, there may be secondary benefits of exclusion or inclusion beyond those stemming directly from the ESA itself. Although a full evaluation of potentially relevant legal provisions is beyond the scope of this opinion, I provide several examples below to illustrate the potential costs and benefits that specifying a particular area as critical habitat may produce due to other statutes or regulations.

- A regulation of the Department's Office of Surface Mining, Reclamation and Enforcement governing performance standards for coal exploration indicates critical habitat cannot be disturbed during coal exploration. 30 C.F.R. § 815.15.
- No activity can be authorized under a Nationwide Permit (NWP) under the Clean Water Act if the activity will destroy or adversely modify critical habitat under the ESA. 33 C.F.R. § 330.4(f).
- The U.S. Department of Agriculture is authorized to acquire conservation easements to protect environmentally sensitive lands, including critical habitat for threatened or endangered species. 16 U.S.C. § 3839.
- The Natural Resources Conservation Service (NRCS) can provide a priority for emergency watershed protection funding to areas designated as critical habitat that may be adversely modified without emergency attention. 7 C.F.R. § 650.22.
- Numerous state laws disallow certain activities in designated critical habitat. *See, e.g.*, Wash. Admin. Code § 173-304-130(2)(j) (LEXIS through Apr. 2, 2008) (prohibition on municipal solid waste disposal sites in ESA critical habitat); Idaho Code § 39-7407(2)(b) (LEXIS through 2008 Regular Session) (same).

Relevant secondary costs and benefits of designation that may result from authorities other than the ESA should be described and weighed in the balancing process for any possible exclusions from critical habitat.

4. Step 4 – Identify benefits of including the area

The Secretary must also identify the benefits of including the area as critical habitat, which will relate principally to the conservation of the species. Little, if any, of this information will have been developed in identifying impacts under Step 1, although some of it may be derived from the information that formed the basis for identifying areas that meet the definition of critical habitat. In addition, contributing to the conservation of the species at issue, the benefits of inclusion may include ancillary benefits such as conservation of other species, improvements to air or water quality, enhancing recreational opportunities, and related economic benefits.

In identifying the benefits of inclusion, the Secretary must take into account the likely regulatory effect of a designation of critical habitat and how it relates to the recovery of the species. (Of course, the regulatory effect of designation must be equally addressed in determining the benefits of exclusion pursuant to Step 3, *supra.*) In *Gifford Pinchot*, *supra*, the court invalidated the Service's regulatory definition of "destruction or adverse modification" at 50 C.F.R. § 402.02 on the grounds that it permitted a finding of adverse modification only if an action would cause an appreciable diminishment of the value of critical habitat for *both* survival and recovery. The court reasoned that, because the Act defines "critical habitat" to include areas that are "essential to the conservation of the species," and defines "conservation" to include all methods that can bring listed species to the point at which the Act's protection is no longer necessary, "Congress intended that conservation and survival be two different (though complementary) goals of the ESA. . . . [T]he purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery." 378 F.3d at 1070; *see also Sierra Club v. U.S. Fish & Wildlife Serv.*, *supra*, (invalidating "adverse modification" definition on similar grounds). Thus, the designation of critical habitat may provide a benefit to the species greater than that provided by listing alone because it may require certain federal actions that adversely impact critical habitat to be modified in a manner that would not be necessarily required under the jeopardy standard.

Since *Gifford Pinchot,* two courts have set aside critical habitat rules for failure to consider the recovery benefit. *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 2006 U.S. Dist. LEXIS 80255, *90; *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d at 1146. Hence, in deciding whether to exclude a particular area under the second sentence of section 4(b)(2), the Secretary should take into account the extent to which application of the adverse-modification standard to actions involving a federal nexus in that area would provide a benefit to the species above that provided by the jeopardy standard. In addressing the recovery benefit of critical habitat, the Secretary should take into account any recovery plan in place for the species.

5. Step 5 – Decide which set of benefits outweighs the other

Once both sets of benefits have been identified, the Secretary must determine which set of benefits outweighs the other. If the benefits of exclusion outweigh the benefits of inclusion, then he has the authority to make the exclusion, subject to the limitation explained in Step 6. It is important to note that even in this circumstance, the Secretary is not required to make the exclusion. It is still a discretionary decision. Of course, if the Secretary determines that the benefits of inclusion are equal to or outweigh the benefits of exclusion, the Secretary may not make an exclusion.

The key issue here is how the Secretary is to determine whether one set of benefits outweighs the other. If the Secretary determines that the benefits on both sides of the equation are purely economic and can be measured in dollars, determining which side outweighs the other is a simple matter of choosing the side with the higher dollar amount. But if, as is typically the case, the benefits of designating critical habitat are primarily biological or otherwise non-economic, while the benefits of exclusion are primarily economic, then the meaning of "outweigh" is more difficult to define. When the relative benefits of inclusion and exclusion are not directly comparable in terms of dollars, the Secretary's discretion to determine which benefits outweigh others is necessarily quite broad, as long as the Secretary exercises it based on a rational articulation of the various benefits. *See* H. Rep. 95-1625 at 17 (1978) ("The consideration and weight given to any particular impact is completely within the Secretary's discretion.").

Moreover, the Secretary must weigh whatever benefits of exclusion or inclusion he identifies as relevant in an even-handed and logically consistent way. For example, in weighing economic benefits (which are always relevant under section 4(b)(2)), the Secretary must address both benefits of exclusion and benefits of inclusion according to the same standard. Thus, in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, the court invalidated exclusions of certain public lands because FWS weighed as a benefit of exclusion avoiding the negative economic effects of closing areas to the public, but failed to recognize as a benefit of inclusion the positive economic effect of reducing demands on federal law enforcement and staff. "By only analyzing the loss of revenue and jobs associated with closures, and failing to analyze the concomitant public costs savings, the [final economic analysis] provided an unbalanced assessment of the 'economic impact and any other relevant impact of specifying any particular areas as critical habitat.'" *Id.* at 1153.

In addition, the balancing conducted by the Secretary must be explained in the critical habitat rule itself and must be supported by the administrative record. The approach used to balance benefits of exclusion and the benefits of inclusion for a particular area must be logically consistent with the approach used for other areas. Thus, the court in *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*, 2006 U.S. Dist. LEXIS 80255, initially held that the Secretary's balancing of impacts under section 4(b)(2) with respect to several areas of critical habitat was arbitrary and capricious because it appeared to the court that the *absolute* cost of inclusion was the foundation for exclusion, whereas other parcels excluded from the critical

habitat were evaluated in *relative* comparison with other tracts of land.[12]

Note that as habitat of a species is lost (or is made more vulnerable to loss due to exclusion), the remaining habitat may become more important to the conservation of the species, and the benefit of inclusion may increase. Thus, as the scope of the exclusions contemplated increases, the benefit of inclusion may increase in a more-than-linear manner, requiring a proportionately greater benefit of exclusion to outweigh it. The preamble to the 1980 exclusion regulations makes this point. 45 Fed. Reg. 13,010, 13,015 (Feb. 27, 1980).

6. Step 6 – Insure that exclusion will not result in extinction

If exclusion of a particular area will cause extinction of the species, the Secretary cannot exclude that area. Put another way, if, in the absence of designating a particular area, the species would go extinct, but the designation of that area would prevent that extinction, the Secretary must designate the area. Because the meaning of this provision is straightforward, no court has addressed it. But I note that the threshold for triggering this exception is high. First, it speaks of actual extinction, as opposed to a threat of extinction or jeopardizing the continued existence of the species, *see* ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Second, in contrast to other provisions in the ESA, Congress here chose to use the word "will," instead of referring to probabilities, *see* ESA § 3(20), 16 U.S.C. § 1532(20) (definition of "threatened species": "likely" to become endangered); ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (consultation to ensure that agency action not "likely" to jeopardize continued existence of species); *see also* ESA § 3(6), 16 U.S.C. § 1532(6) (definition of "endangered species": "in danger of extinction" as opposed to, for example, "will become extinct absent listing"). Therefore, this provision only prohibits exclusion if extinction would be virtually certain to result from the exclusion of that particular area.

7. Application to common fact patterns

In considering exclusions to designations, the Secretary faces a number of common fact patterns in which to apply the principles discussed above. Because of their importance, I am providing some general comments that cut across these common fact patterns, and more specific comments on issues relating to tribal lands, federal lands, lands covered by habitat conservation plans (HCPs) prepared under section 10(a)(1)(B) of the ESA, 16 U.S.C. § 1539(a)(1)(B), and consideration of partnerships and voluntary conservation efforts on private lands.

In making decisions under section 4(b)(2), the Secretary has considered the degree to which the existence of (1) conservation agreements with private, state, federal, or tribal land managers, (2) other land-management plans, HCPs, and voluntary partnerships, or (3) the intention to create

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[12] After considering the home builders' motion for reconsideration, the court amended its order and held that FWS had, in fact, adequately supported the exclusions based on relative costs. Nonetheless, the court did not alter its remand of the exclusion decision on the grounds that FWS had failed to consider recovery benefits. *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*, 2007 U.S. Dist. LEXIS 5208, *25–28.

such a plan or enter into one of those relationships may be affected by the designation of an area as critical habitat or the exclusion of an area from designation. The Secretary may properly find any of these considerations to be relevant impacts under section 4(b)(2). However, the defensibility of exclusions based on these considerations may depend upon a number of issues relating to the plan or relationship, such as: the degree to which the record supports a conclusion that a critical habitat designation would impair realization of benefits expected from the plan; the extent of public participation; the rigor of agency review and required determinations; NEPA compliance; and the demonstrated implementation and success of the chosen mechanism.

For example, HCPs are subject to public notice and review, and are normally accompanied by NEPA documentation and a biological opinion prepared under section 7 of the ESA. They also contain provisions for monitoring and reporting through which the efficacy and implementation of the HCP can be assessed. Issuance of incidental take permits, issued in conjunction with HCPs, is also governed by strict statutory and regulatory criteria. Most importantly for the purpose of section 4(b)(2), the benefits associated with HCPs are clearly defined and supported by an administrative record. Development, approval, and implementation of federal land-management plans often require the same or similar rigor and documentation. On the other hand, conservation agreements and partnerships are not necessarily governed by statutory or regulatory requirements, might not involve public participation, often will not require NEPA compliance, may be more speculative with respect to benefits, and can be voluntary, if not enforceable under their own terms.

For these reasons, the burden placed on the Secretary by reviewing courts to demonstrate the benefit of exclusion (or reduced benefits of inclusion) may be greater for mechanisms like voluntary partnerships than for HCPs. When considering HCPs, draft land-management plans, and draft conservation agreements, the Service can consider the certainty of implementation, or the lack thereof, especially if there are no established procedures to ensure that the final instrument will produce the anticipated benefits. This is particularly true if the administrative record does not demonstrate an existing relationship with FWS, a track record of prior success, or on-going benefits that will continue.

When the Secretary examines the appropriateness of excluding areas governed by land-management plans, HCPs, and other conservation plans, the effectiveness of a plan to conserve the species, or the physical and biological features at issue, must be discussed in detail and at a geographic scope that is commensurate with the scope of the relevant plan. The Secretary should also examine the likelihood that exists with respect to the plan's future implementation. Finally, the Secretary should also consider the broad public benefits that are derived from encouraging collaborative efforts and encouraging private and local conservation efforts. These broad benefits are important considerations.

Regardless of the particular fact patterns involved, the Secretary may consider a wide variety of applicable documents and analyses in determining what relevant impacts and benefits may be at issue for a particular critical habitat designation. These documents include: discussion in the

preamble of the critical habitat rule pursuant to section 4(b)(8), discussed above; NEPA documentation, if any; analyses with regard to other required regulatory determinations (Regulatory Flexibility Act, 5 U.S.C. § 3601 *et seq.*, etc.); and relevant recovery plans.

Tribal Lands. The court in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d at 1105, found it was appropriate for the Secretary to consider the damage that designation of critical habitat on tribal lands would do to FWS's relationship with a tribe. The court based its rationale, in part, on the fact that the "relationship results in the implementation of beneficial natural resource programs, including species preservation." *Id.* Consistent with the Secretary's broad discretion in identifying relevant impacts, in addition to conservation-related impacts with respect to tribal lands, the Secretary may weigh relative benefits of exclusion and inclusion with respect to effects on tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. I note that such consideration would be consistent with the Secretarial Order 3206 (June 5, 1997), which also requires evaluation of "the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands." Secretarial Order 3206, App. § 3(B)(4).

Federal lands. The court in *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*, *supra*, held that the Secretary's exclusion under section 4(b)(2) of an area within a national monument managed by the Bureau of Land Management was reasonable because the monument had a draft management plan for vernal-pool species that would become final less than a year after the final designation. The draft management plan outlined the management for the long-term conservation and recovery of the species at issue in the critical habitat designation. The court noted that:

> The FWS did not merely defer to the Bureau of Land Management's authority; instead, it incorporated the nature of oversight by the Bureau of Land Management into its weighing of the benefits of inclusion versus exclusion and its determination of whether the species would become extinct absent inclusion. The FWS was also responding to comments that critical habitat designation in the Carrizo Plain National Monument would "hinder essential voluntary conservation efforts."

Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service, 2006 U.S. Dist. LEXIS 80255, *95 (citation omitted). The court also found the Secretary reasonably determined that lands within national wildlife refuges and within a Service hatchery complex can be excluded under section 4(b)(2). The court found the agency adequately explained the rationale behind its decision—the Secretary explained the fact that refuges were developing plans that would provide for protection of all trust resources including federally listed species and sensitive natural habitats, and that for one refuge, a management plan had been completed and an associated biological opinion concluded its implementation would not jeopardize the continued existence of the species at issue. *Id.* at *98.

Habitat Conservation Plans. The court in *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, *supra*, found that it was appropriate to exclude an area covered by an HCP that addressed the species at issue. The court noted that the Secretary examined the HCP at issue to determine how it should be weighed, and also examined how the HCP would "address[] the primary conservation needs of the species by protecting the ecosystem upon which it relies . . . [and] provide for the longer term conservation of this pool and vernal fairy shrimp." *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Service*, 2006 U.S. Dist. LEXIS 80255, *98–99. The court also noted that the Secretary found that the HCP provided more protection than can be provided by a critical habitat designation and that the HCP addressed all areas containing vernal-pool habitat (including areas without a federal nexus). *Id.* These analyses, along with an observation that partnerships with local jurisdictions and project proponents can be adversely affected by a critical habitat designation because critical habitat imposes duplicative regulatory burdens on the people involved, were found by the court to be a reasonable exercise of discretion. *Id.*

Partnerships and Voluntary Conservation Efforts with Private Landowners. No court has addressed whether impacts to a voluntary partnership to conserve species by a private landowner would be an appropriate basis for exclusion under section 4(b)(2), although as discussed above the court in *Center for Biological Diversity v. Norton*, *supra*, found it was appropriate for the Secretary to consider the damage that designation of critical habitat on tribal lands would do to its relationship with a tribe. Given the broad benefits of encouraging partnerships and voluntary conservation efforts by private landowners, and consistent with the Secretary's broad discretion to identify relevant impacts, it is my opinion that the Secretary can and should consider the effects on partnerships in making exclusion decisions. However, in assigning weight to this benefit, as well as considering the degree to which partnerships may reduce the incremental benefit of designating critical habitat, the Secretary should be mindful of the general comments discussed at the beginning of this section.

B. Limitations Based on Procedural Requirements of the ESA

The ESA imposes several purely procedural requirements on rulemaking, including the designation of critical habitat. These requirements include obligations to provide notice to various entities, the timing and content of *Federal Register* notices, and the holding of a public hearing, if requested. *See* 16 U.S.C. § 1533(b)(5)–(8). These generic rulemaking requirements apply to critical habitat designations, but do not impose any requirements particular to designations (or exclusions from designations).

The procedural requirements of section 4(b)(5)–(8) are repeated and elaborated on in the ESA's implementing regulations. *See* 50 C.F.R. §§ 424.16–424.20. One section of the regulations, 50 C.F.R. § 424.19, specifically addresses section 4(b)(2). The substantive aspects of this section are addressed above, but it does have one purely procedural aspect: it requires the Secretary to consider the impact of designation "*after* proposing designation" of an area. As a result, the Secretary should not, in a proposed critical habitat designation, state that an area is being

excluded, although the Secretary may announce that he is considering excluding a particular area in the final rule.

The Secretary complies with the ESA procedural requirements as a matter of course in promulgating regulations to designate critical habitat, of which any exclusions form a part. But the Secretary's discretion is limited in the sense that the Secretary may not, except as set forth in section 4(b)(7) regarding emergencies, dispense with these procedures.

C. Limitations Based on Administrative Procedures Act Rulemaking Requirements

The ESA requires that the Secretary designate critical habitat by regulation promulgated in accordance with the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.* ESA § 4(a)(3), (b)(4), 16 U.S.C. § 1533(a)(3), (b)(4).[13] Because exclusions under section 4(b)(2) define in part the scope of the designation, any exclusion must be set forth in the preamble to the final rule designating critical habitat. Thus, exclusion of areas in the final rule must not render the designation as a whole inconsistent with the relevant principles of informal APA rulemaking, so the Secretary's discretion with respect to exclusions is limited to that extent.

The APA requires federal agencies to publish notice of proposed rules in the *Federal Register*, give the public an opportunity to submit comments, and consider those comments in formulating final rules. 5 U.S.C. § 553. In contrast to the highly deferential standard a court applies to review of an agency's substantive decisions, a court's review of an agency's procedural compliance with APA rulemaking requirements is "exacting, yet limited." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9 Cir. 2006).[14]

In order to give the public a meaningful opportunity to comment, the agency must identify and make available the technical studies and data upon which a proposed rule rests. *Id.* This does not, however, mean that an agency cannot use information received after publication of a proposed rule. "The public is not entitled to review and comment on every piece of information utilized during rule making." *Id.* In formulating a final rule, the agency may use supplementary data that expands on and confirms information contained in the proposed rule, so long as no prejudice is shown. *Id.* Hence, when FWS obtained new data after seeking public comment on a proposal to list the Buena Vista Lake shrew as endangered, but the data merely supplemented existing data, the agency was not required to provide an additional opportunity for public comment. *Id.* at 1078; *see also Bldg. Indus. Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2002) (new comment period not required on proposal to list fairy shrimp under ESA when new study confirmed existing data).

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[13] Section 4(b)(7) of ESA does, however, permit the Secretary to bypass APA rulemaking requirements in an emergency.

[14] The Department of the Interior's Departmental Manual at 318 DM 5 provides detailed guidance on rulemaking procedures.

On the other hand, when new information that was unavailable to the public during a comment period is not merely supplemental, but provides critical support for the final rule, the agency must provide another opportunity for comment. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1403 (9 Cir. 1995). In *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1105–07 (D. Ariz. 2003), the court ruled that FWS violated the APA's notice requirements when it excluded an area from critical habitat on the basis of a tribal management plan that was not available to the public during the comment period on the rule. Hence, if a final decision to exclude an area from critical habitat under section 4(b)(2) rests on information received after the close of a public comment period, a new comment period is required.

Another question that sometimes arises in connection with exclusions under section 4(b)(2) is the extent to which a final critical habitat rule may deviate from what was announced in the proposed rule. Courts interpreting the APA's rulemaking requirements have consistently held that, as long as a final rule is the "logical outgrowth" of the proposed rule, an agency need not seek additional public comment.

> A final rule which contains changes from the proposed rule need not always go through a second notice and comment period. An agency can make even substantial changes from the proposed version, as long as the final changes are in character with the original scheme and a logical outgrowth of the notice and comment. The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. [The Court] must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing.

Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 824 F.2d 1258, 1283 (1 Cir. 1987); *accord Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276, 1287–88 (9 Cir. 1990).

Two district courts have rejected challenges to section 4(b)(2) exclusions on this procedural ground, concluding in both cases that the final rules were the logical outgrowth of the proposed rules. In *Home Builders Ass'n of Northern California v. U.S. Fish & Wildlife Serv.*, 2006 U.S. Dist. LEXIS 80255, *96 n.26, the court rejected plaintiffs' argument that FWS had failed to provide adequate notice of the final rule's exclusion of a BLM-administered national monument from critical habitat for 15 vernal-pool species. The court found it sufficient that the FWS had indicated in the proposed rule that it was soliciting comments on whether any areas should be excluded, and the BLM had submitted a comment requesting exclusion of the monument. Similarly, in *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, the court rejected plaintiffs' argument that a final critical habitat rule for the Peirson's milk-vetch violated APA notice-and-comment requirements because it excluded over 60 percent of proposed critical habitat for economic reasons with no mention of such an intention in the proposed rule. The court observed that FWS had provided notice that it might exclude areas depending on the results of the economic analysis, and concluded that the elimination of 60

percent of the proposed area "approaches, but does not exceed, the limit of what can be considered a 'logical outgrowth' of the proposed rule." *Id.* at 1156; *see also In re Operation of the Missouri River System*, 363 F. Supp. 2d 1145, 1174 (D. Minn. 2004) (final critical habitat rule was logical outgrowth of proposed rule), *aff'd on other grounds*, 421 F.3d 618 (8 Cir. 2005).

Thus, although general language in the proposed critical habitat rule regarding the possibility of exclusion in the final rule should in most circumstances be sufficient to comply with the APA, I advise that the best practice is to give the public as much notice as possible regarding potential exclusions from critical habitat prior to the close of the last comment period. Doing so will minimize the risk of a procedural challenge under the APA, and may also elicit more useful comments from the public.

IV. CONCLUSION

The Secretary has broad discretion to exclude areas under section 4(b)(2). There are some limitations on that discretion, and the Secretary must comply with the relevant procedural and substantive requirements of the ESA and its implementing regulations. If the Secretary fails to do so, any exclusion may be subject to review under the ESA. In any case, the Secretary's conclusions will be subject to review under traditional APA principles. Although this review is generally deferential, and may be particularly so with respect to certain issues given the intent of Congress as expressed in the legislative history, chances of exclusions being upheld will be maximized to the extent that the Secretary's reasoning is clear and supported by the record.

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