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Public Comments Processing
ATTN: Docket No. FWS-HQ-ES2012-0096
Division of Policy and Directives Management
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive – Suite 222
Arlington, Virginia 22203

RE: Docket No. FWS-HQ-ES2012-0096; Implementing Changes to the Regulations for Designating Critical Habitat.

The following comments are submitted on behalf of the Kansas Independent Oil & Gas Association (KIOGA). KIOGA represents over 1,400 independent oil and natural gas explorers and producers, as well as service and supply industries that support their efforts in Kansas. The oil and natural gas industry in Kansas supports over 67,000 jobs in Kansas, over $3 billion in family income, and over $1.4 billion in state and local tax revenue. The oil and natural gas industry is an important part of the livelihoods of Kansans throughout the state – folks who will be significantly affected by this proposed change to rules governing the designation of critical habitat. KIOGA respectfully requests that the proposed changes to the rules governing the designation of critical habitat in "unoccupied areas" be withdrawn because they exceed the authority granted to the U.S. Fish & Wildlife Service and the National Marine Fisheries Service ("the Services") by the Endangered Species Act (ESA).

The Services have proposed to amend their regulations that govern the designation of critical habitat. In related action, the Services have also proposed to amend the definition of "destruction or adverse modification", which applies to critical habitat, and to adopt a policy pertaining to the exercise of their authority under section 4(b)(2) of the ESA to exclude certain

areas from a critical habitat designation. Because of the significance of these issues to its members, KIOGA is also filing comments on those dockets as well.

KIOGA's comments in this docket focus on the proposed changes to 50 CFR 424.12(b) and (e), which deal with the criteria for designating critical habitat "outside the geographical area occupied by a listed species at the time it is listed" ("the unoccupied areas").

The Proposed Changes Would Vastly Expand The Services' Authority To Designate Unoccupied Area As Critical Habitat

In the Services' discussion of their proposed changes to 50 CFR 424.12(b) and (e), they state that they "anticipate that … in the future [they] will likely increasingly use the authority [in the Endangered Species Act] to designate" unoccupied areas as critical habitat. This is based on their view that, "as the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important." To deal with these anticipated effects from climate change, they are proposing changes to their regulations that would vastly expand their authority to designate unoccupied areas.

Section 424.12(e) currently states that the Services may designate unoccupied areas as critical habitat "only when a designation limited to its present range would be inadequate to ensure the conservstion of the species." In other words, they may designate unoccupied areas only when the occupied areas presently lack, to one degree or another, "those physical and biological features . . . essential to the conservation of the species." Under the proposed regulations, however, this restriction would be eliminated; the Services state that the proposed language in section 424.12(b)(2) would "subsume and supersede section 424.12(e) of the existing regulations."

The proposed language in section 424.12(b)(2) states that "the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." By that language, the Services are claiming for themselves two new authorities under the ESA that they have not previously claimed were present there.

First, they are claiming, in direct conflict with their current regulations, the authority to designate unoccupied areas as critical habitat even if the occupied areas that have been designated are currently sufficient to provide for the conservation of the species.

Second, they are claiming the authority to designate such areas even if they do not presently, and may never, "have the [physical and biological] features essential to the conservation of the species." According to the Services, to be designated, such areas will need only to have the potential to develop or provide those features (or other features deemed "essential" by the Services) at some point in the future, depending on the Services' predictions about the effects of climate change. Under the proposed language, the Services state that they

will be able to designate "areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species." The Services state further that, under the proposed language, if "it is reasonable to infer from the record that [specific unoccupied areas] will eventually become … necessary to support the species' recovery," the Services may "find that such areas are essential for the conservation of the species," and designate them as critical habitat.

Thus, by changing a few words in a regulation, the Services are proposing to radically alter the role that the designation of unoccupied areas has historically played in the ESA regulatory scheme. They are proposing to go from a standard that allowed the designation of unoccupied areas only to the extent necessary to supplement the present lack of essential "physical and biological features" in occupied areas to a standard that would allow the designation of unoccupied areas if they have the potential to develop certain features in the future that may (or may not) become essential to the conservation of the species, depending on the anticipated effects of climate change. They are seeking, in effect, to constitute themselves a National Zoning Commission, with authority to peer long into the future and set aside areas as critical habitat that are not essential presently to insure the conservation of a species, but that may become so at some unspecified date in the future, depending on a variety of factors. In the meantime, any person proposing to conduct an activity in such an area pursuant to a federal permit will have to insure that its activities are not likely to destroy or adversely modify the potential of the area to develop or provide certain features in the future, even if those features will never develop or will never actually be needed.

As explained below, such a vast expansion of the Services' authority cannot be justified under the ESA.

The Proposed Changes Exceed The Services' Authority Under the ESA

Whatever one may think of the Services' concern for the effects that climate change may have on critical habitat, their proposed changes to 50 CFR 424.12 to deal with those effects exceed their authority under the ESA and must therefore be withdrawn.

First, the ESA only grants the Services the authority "to designate any habitat of [a species that has just been listed] which is then considered to be critical habitat". It does not grant them the authority to designate habitat which "is [not] then considered to be critical habitat," but that may become critical habitat at some point in the future, depending on the effects of climate change. The ESA provides the Services with the authority to deal with changes that may occur in the critical habitat of a species in the future by authorizing them to make changes in their designation as it becomes clear what those changes are; the ESA states that the Services "may, from time-to-time thereafter [i.e., after the designation of habitat that is critical habitat at the time of listing] as appropriate, revise such designation." What the ESA does not grant them is the authority to predict what changes may be necessary in the future and to designate habitat as critical now that is not presently needed but that may (or may not) be needed in the future.

Second, the ESA grants the Services the authority to designate unoccupied as critical habitat only if those areas are "essential for the conservation of the species." Logically, an unoccupied area cannot be "essential for the conservation of a species" if the occupied area is adequate to insure its conservation. Thus, contrary to the Services' claim, they must necessarily first determine whether the occupied areas are adequate to insure the conservation of a species before they can determine whether unoccupied areas are "essential" to the achievement of that purpose. It is simply not possible to say that an unoccupied area is "essential for the conservation of a species" without knowing how the species would fare if the unoccupied area were not designated.

Third, the Services' attempt to justify their proposed changes, not by reference to any substantive grant of authority in the ESA, but by the inferences that they claim can be drawn from their newly-discovered reading of the statutory definition of "critical habitat." However, the inferences that the Services' draw leads to absurd results and must therefore be rejected. As the Supreme Court has recently stated, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate" in new and significant ways, "we typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. V. E.P.A.,* 134 S. Ct. 2427, 2444 (2014). Such skepticism is certainly justified here.

Under the Services' new reading of the definition of "critical habitat," they assert that Congress, by defining "critical habitat" in the way it did – i.e., by defining unoccupied areas as critical habitat if they were deemed "essential" to the conservation of the species by the Services – intended to grant them a largely unbridled authority to designate unoccupied areas as critical habitat, one that is far broader than they have previously recognized and that is also far broader than the authority Congress granted them for the designation of occupied areas.

This assertion is contradicted by the legislative history of the definition of critical habitat. As the Solicitor explained in his October 3, 2008 M-Opinion, the ESA as originally passed in 1973 did not contain a definition of "critical habitat." As a result, the term was first defined by regulation 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." Concerned about the issues raised by the snail darter case, *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978), Congress adopted its own definition of "critical habitat" in 1978, which remains the definition today. As the Solicitor noted, "Congress provided a statutory definition of critical habitat that was narrower than the FWS's regulatory definition"; it changed the definition from a focus on "constituents," the loss of which would "appreciably decrease the likelihood of the survival and recovery of a listed species," to a focus on "physical and biological features" that are "essential to the conservation of a species." The Services' now purport to read "essential," however, in a way that would broaden the definition of "critical habitat" far beyond that contained in the Services' original definition that was rejected by Congress. They read "essential" as encompassing potential features, the loss of which (if the features actually develop) may (or may not) at some unspecified point in the future reduce the likelihood of the

survival and recovery of the species by some unspecified degree, depending on the accuracy of their predictions about the effects of climate change.

In addition to being in conflict with the legislative history, the Services' claim that "essential" may be read that broadly cannot be squared with the rest of the language in the definition. Even a cursory reading of that language reveals that Congress in defining "critical habitat" in the way it did in 1978 was deeply concerned about the amount of habitat, even in occupied areas, that would be deemed critical and sought to carefully limit it, not grant a broad new authority to designate it.

In the definition, Congress placed three limitations on the amount of occupied areas that could be designated. First, it limited critical habitat to those occupied areas that presently have "those physical and biological features … essential to the conservation of the species." But even that was not limitation enough. So it added a second limitation. It defined critical habitat in such a way that only those areas with the requisite features that also required "special management considerations or protection" could be designated. Finally, to make sure that its intent to limit the amount of occupied habitat that could be designated was clear, it stated that "except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

Against that statutory background of careful limitations, the Services are now asserting that the very same Congress that was so concerned about the amount of occupied habitat that would be designated had essentially no concern about the amount of unoccupied habitat that would be designated. They are claiming that Congress, without explicitly saying so and without explaining why, intended by the way they defined "critical habitat" to give the Services a free hand to designate as much unoccupied habitat as they determine might be "essential" to the conservation of the species in some unspecified way at some unspecified date in the future, even if the habitat does not presently have (and may never have) the "physical and biological features essential to the conservation of the species," and even though the currently designated occupied habitat may be adequate to presently insure the conservation of the species. And, as noted, the Services are claiming this vast new authority, not on the strength of some substantive grant of authority in the ESA, but on the inferences that they now claim can be drawn from the 1978 definition of "critical habitat." However, in the words of the Supreme Court, "we expect Congress to speak clearly if it wishes to assign" such a sweeping authority to an agency. *Util. Air Regulatory Grp.,* 134 S. Ct. at 2444. It is obvious that Congress has not spoken clearly when the Services must rely, as they do here, on inferences that they claim can be drawn from the definition of "critical habitat" – inferences which they themselves did not discover for almost forty years.

The Services' proposed changes to their regulations based on their new reading of the definition of "critical habitat" are quite simply an unsupportable overreach that is driven, not by the text of the ESA, but by their policy goal of acquiring authority to deal now with what they believe may be the future ramifications of climate change. Whether such authority is necessary

or appropriate is a matter for Congress to decide; it is most certainly not an authority that currently exists in the ESA.

The Effects of the Proposed Changes Must be Examined in an EIS

The adoption of regulations is an action whose effects are often categorically excluded from review under the National Environmental Policy Act. Such an exclusion should not apply here, as the amendments that are being proposed would "establish a precedent for future action or represent a decision in principle about future action with potentially significant environmental effects," "involving unique or unknown environmental risks," and would "have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on Critical Habitat for those species."

Moreover, as explained above, the proposed changes would vastly expand the authority of the Services to designate unoccupied areas as critical habitat. Such designations could result in significant restrictions on the activities that can be conducted in those areas. For that reason, the adoption of the proposed changes is a major federal action whose effects must be reviewed in an environmental impact statement prior to adoption.

Edward Cross, President
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