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Proposed Rule Changes and Draft Policy Change to the Endangered Species Act
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The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service announced in May two proposed rule changes and one draft policy change to the Endangered Species Act (ESA). These three related measures are open for public comment through July 11, 2014. KIOGA will be submitting comments and we welcome any input on how these rules could affect your operations.

Proposed Rule 1: A proposed rule to amend the existing regulations governing section 7 consultation under the ESA to revise the definition of "destruction or adverse modification" of critical habitat. Section 7 of the ESA requires federal agencies to ensure that their proposed actions will not result in the "adverse modification" of any "habitat" that has been designated "critical" for a listed species. The current regulations define "adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." In 2004, the 9th Circuit held that this definition was unlawful because it states, contrary to the ESA, that "adverse modification" to habitat takes place only when there is an "alteration that appreciably diminishes the value" of the habitat that is "critical" "for both the recovery and the survival of a listed species." In the 9th Circuit's view, defining "adverse modification" in this way "reads the 'recovery' goal out of the adverse modification inquiry; a proposed action 'adversely modifies critical habitat if, and only if, the value of the critical habitat for *survival* is appreciably diminished." This means, according to the 9th Circuit, that the "USFWS could authorize the complete elimination of critical habitat necessary only for recovery, … so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished." Since the decision of the 9th Circuit, the FWS has not relied on the regulatory definition of "adverse modification," but has relied, instead, on guidance issued in

December 2004 in making its "adverse modification" determinations. Now, the Obama Administration proposed a rulemaking that addresses the regulatory definition of "adverse modification." They propose the following:

"Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery."

In a letter to Secretary Salazar in March 2010, several highly litigious environmental organizations urged the Secretary to define "appreciably diminishes" "as any action that would destroy or degrade any primary constituent element [of the habitat] such that the habitat would be, measurably or perceptibly, of less value to the species." With this new proposal, the Services have not gone quite as far as the environmental community requested, but it is safe to say that these organizations will continue to push for a broad definition that would insure that almost no changes could be made to critical habitat without running afoul of the ESA.

Proposed Rule 2: A proposed rule to amend existing regulations governing the designation of critical habitat under section 4 of the Act. This proposed rule would revise 50 CFR part 424. Under the ESA, "Critical habitat" is: 1) the areas within the geographical area occupied by a species at the time it is listed on which are found biological and physical features that the Services determine are essential to the conservation of the species; and 2) the areas outside the geographical areas occupied by a species at the time it is listed that are determined by the Services to be essential for the conservation of the species. "Critical habitat" is supposed to be designated at or about the time a species is listed through a formal rulemaking process. However, it cannot be designated if the Service determines that the habitat is not "determinable" or if the Services determine that designating it would not be "prudent" – e.g., if designating it would encourage its destruction. An area can be excluded from a "critical habitat" designation if the Services determine that the economic benefits of excluding it outweigh the benefits of including it. In the past, the wildlife services called the designation of "critical habitat" "one of the most controversial and confusing aspects of the ESA." To date, "critical habitat" has been designated for only about 405 of listed species. Once habitat is designated as "critical," federal agencies may not "authorize, fund, or carry out" activities that will destroy or adversely modify the habitat. A "critical habitat" designation does not directly affect private landowners—i.e., they can conduct activities that destroy or adversely modify the habitat as long as their activities do not result in "take" of a listed species. Specifically, the Services propose to amend portions of their regulations to clarify procedures for designating and revising critical habitat. The proposed amendments revise the scope and purpose, add and remove some definitions, and clarify the criteria for designating critical habitat. This proposed rule would also revise the Services' regulations to be consistent with statutory amendments made in 2004 that make certain lands managed by the Department of Defense ineligible for designation as critical habitat. According to the Services, the amendments "are based on the Services' review of the regulations and are

intended to add clarity for the public, clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-designation process."

Policy Change: The Obama Administration has proposed a draft policy pertaining to exclusions from critical habitat and they consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, tribal lands, national security and homeland security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The draft policy also puts the Obama administration's gloss on how they intend to utilize the Secretary's discretion to exclude certain areas from critical habitat designation where they determine the benefits of exclusion outweigh the benefit of including such lands as critical habitat. As such, the draft policy articulates some important points that may merit comment from KIOGA. For example, the draft policy establishes that the Services will always consider areas covered by an approved CAA/SHA/HCP for potential exclusion from critical habitat, and generally exclude such areas from designation under certain conditions, which could be beneficial to parties who have entered into those agreements and also need federal permits in the future. In addition, the Administration also explains in its proposal that except for national security and homeland security concerns, on federal lands they will generally consider the benefits of including the lands within a critical habitat designation to be greater than the benefits of excluding such lands. Finally, the Services emphasize that when determining whether to exclude an area from critical habitat designation as a result of the probable incremental economic impacts, "it is the nature of those impacts," not necessarily a particular threshold, that will be relevant to the Services' determinations. Each of these points could be items that merit consideration.