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Public Comments Processing
ATTN: Docket No. FWS-R9-ES2011-0072
Division of Policy and Directives Management
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive – Suite 222
Arlington, Virginia 22203

RE: Docket No. FWS-R9-ES2011-0072; Proposed changes to the definition of “destruction or adverse modifications”.

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 definitions. KIOGA respectfully requests that the proposed changes to the definition of “destruction or adverse modification” not be adopted.

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (“the Services”) have proposed to amend their definition of “destruction or adverse modification,” which is found at 50 CFR 402.02. In related action, the Services have also proposed to amend their regulations governing the designation of critical habitat, and to adopt a policy pertaining to the exercise of their authority 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 on the Services’ proposal to amend the definition of “destruction or adverse modification” focus on three issues: 1) the use of “conservation value” as the thing that must be protected from the “destruction or adverse modification;” 2) the attempt to clarify the

meaning of the phrase "appreciably diminishes," which appears in the first sentence of the proposed definition; and 3) the second sentence of the proposed definition, which states that "such alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery."

The ESA Does Not Authorize the Protection of the "Conservation Value" of Critical Habitat As That Term Is Defined

The current regulations, which were adopted in 1986, define "destruction or 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." As the Services explain, at least two appellate courts have found that:

The regulatory definition set too high a threshold for triggering adverse modification by its requirement that both recovery and survival be diminished before adverse modification would be the appropriate conclusion. The courts determined that the regulatory definition actually established a standard that would only trigger an adverse modification if the "survival" of the species was diminished, while ignoring the role critical habitat plays in the recovery of species.

To address this problem, one would have expected the Services to propose changing the first sentence of the definition of "destruction or adverse modification" to state as follows:

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the recovery of the species.

Instead, the Services are proposing to change the first sentence to read as follows:

"Destruction or adverse modification" means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species.

While this change, on its face, may perhaps address the courts' concern, it is apparent from the Services' explanation of the meaning they ascribe to the phrase "conservation value" that the change would also unlawfully expand the realm of things that are to be protected from "destruction or adverse modification."

The Services state that "conservation value, as used in the definition . . . is the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species. They state further that the "determination of conservation value [will be] based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further recovery support for conserving the species". Thus, under the proposed definition, the Services will be seeking to protect from "destruction and adverse modification," not only the habitat features that are currently present and that are essential to the conservation of the species, as provided by the ESA, but also features that could someday develop and become essential to the conservation of the species.

The ESA, however, does not provide the Services such broad authority. The ESA defines "critical habitat" in areas occupied by the species as the areas "on which are found those physical

and biological features ... essential to the conservation of the species and ... which may require special management considerations or protection.” Thus, the thing that makes habitat critical and that is to be protected against “destruction or adverse modification” are the essential “physical and biological features” that are presently found in the habitat, not the features that may be found there, depending on a variety of factors, at some point in the indefinite future. By seeking to protect those potential features from “destruction and adverse modification,” the Services are doing the very thing that they disclaim; they are seeking to impose on federal agencies (and the entities who conduct activities requiring a federal permit) “an affirmative duty ... to recover listed species” by refraining from doing anything that would adversely modify, not the present capacity of the habitat to aid in the recovery of a species, but the potential of the habitat to develop a feature in the future that might aid in the recovery of the species. They are seeking to require federal agencies not just to refrain from making the present condition of the habitat worse, but to refrain from doing anything that would prevent the condition of the habitat from getting better, or developing conservation features in the future. While this may be a desirable goal, it is not what the ESA requires or authorizes. Accordingly, the proposed definition should be re-written to make clear that it is only the essential “physical and biological features” present at the time of designation that must be protected from “destruction or adverse modification.”

The Services Fail to Clarify the Meaning of “Appreciably Diminishes”

The Services proposed definition states that “destruction or adverse modification” means any “direct or indirect alteration that appreciably diminishes the conservation value of critical habitat.”

While the phrase “appreciably diminishes” appears in the proposed definition, it also appears in the existing definition, which has been in place for almost 30 years. In both definitions, what it means to “appreciably diminish” is obviously of central importance to the meaning of “destruction or adverse modification.” Without a clear understanding of the meaning of that phrase, and how it will be applied in particular situations, it is impossible for the regulated community to know or to anticipate which alterations will be considered to “adversely modify” critical habitat, and which will not. Also, without a clear understanding of that phrase, and guidance to the Services’ field employees on its application in particular situations, there is a significant potential for inconsistency in the Services’ decisions about which activities are likely to result in “destruction or adverse modification” of critical habitat.

Accordingly, in their discussion of the proposed definition, the Services attempt what it means to “appreciably diminish.” Unfortunately, their attempt at clarification fails; it leaves important questions unanswered, and opens the door to highly subjective and inconsistent decisions on the issue of “adverse modification.”

The Services first note that “diminish” is defined by the dictionary as to “reduce, lessen or weaken.” Using that definition, they state that “the inquiry [then becomes] whether the reduction or diminishment is ‘appreciable’ to the conservation value of the critical habitat. In other words, the question becomes: To what degree does the conservation value of critical habitat have to be “reduced, lessened, or weakened” to be considered “adversely modified” within the meaning of the

ESA? As they appropriately noted, the Services do not want to set a standard “that is either too sensitive in light of particular circumstances, or not sensitive enough.”

The Services use “appreciably” to modify “diminish.” That word is intended to somehow communicate the degree of diminishment to critical habitat that will qualify as “adverse modification.” Ironically, however, the Services note that the actual dictionary definition of “appreciable” – i.e., “noticeable” or “measurable” – “is too simplistic”, and “would not add anything [by way of clarification] to the definition of ‘destruction or adverse modification.’” They therefore find it “unhelpful.” That being true, KIOGA wonders why it took the Services almost 30 years to figure that out, and why they would want to persist in the use of a word in their regulations whose own definition does not communicate the meaning that is intended by the Services. Accordingly, the Services should consider finding another word to replace “appreciable.”

Instead of relying on the definition of “appreciable” to define “appreciable,” the Services suggest that it is more “helpful to look at the definition of ‘appreciate’” to define “appreciable.” According to them, “appreciate” means to “recognize the quality, significance or magnitude” or “grasp the nature, worth, quality or significance.” Using this definition, they assert that “the relevant question, then, becomes whether [the Services] can recognize the quality, significance or magnitude of the diminishment.” If they can, then presumably the diminishment in question will be considered “appreciable,” and the alteration in question will be considered likely to cause “adverse modification.”

This attempt at clarification demonstrates that the Services have no clear idea about how to define the extent of diminishment that equates to “adverse modification.” Their attempt suffers from at least two serious problems. First, the standard it sets could easily be “too sensitive.” Just because the Services can “recognize the quality, significance, or magnitude” of a diminishment does not mean that the diminishment is of such a “quality, significance, or magnitude” as to warrant concern for purposes of the ESA. The significance could be slight or the magnitude small, but still recognizable. Further clarification is needed about what degree of significance or order of magnitude will equate to “adverse modification.” Without that added clarification, the standard the Services attempt to set by relying on the definition of “appreciate” to define “appreciable” is potentially no different than the one that was based on the definition of “appreciable” and that was specifically rejected by them. The standard could potentially identify any diminishment that is “noticeable” or “measurable” as “appreciable”.

The Services apparently try to address this issue, at least in part, by identifying one other criterion that must be met for an alteration to be considered an “appreciable diminishment” of the conservation value of critical habitat. “The question,” they explain, “is whether the ‘effects of the action’ will appreciably diminish the conservation value of the critical habitat as whole, not just in the area where the action takes place.” “The question would be, then, whether the adverse effect in that one part of critical habitat will diminish the conservation value of the critical habitat overall in such a manner that we can appreciate the difference it will have to the recovery of the listed species.” Such a limitation or qualification on the meaning of “appreciably diminishes” is highly significant, and should be included in the definition itself so that there is no misunderstanding or confusion on the matter, and so that the Services are bound to observe that limitation in every case.

The Services also suggest “some [other] factors to be considered” in determining whether the diminishment is of such a nature that they “can appreciate the difference it will have to the recovery of the listed species.” They are: 1) “will recovery be delayed?”; 2) “will recovery be more difficult?”; and 3) “will recovery be less likely?” Identifying these factors helps to address the second problem raised by the Services’ attempted clarification of the meaning of “appreciably diminishes” – i.e., its subjectivity. Standing alone, their clarification leaves it up to the personnel in the field who are writing the biological opinions to decide, without any objective criteria to refer to, whether “the quality, significance, or magnitude” of a particular diminishment rises to the level of “appreciable.” Identifying factors that need to be considered, however, and requiring that a finding of “appreciable diminishment” be explained in terms of those factors, would at least compel the personnel in the field to provide an objective basis for their finding. If such factors are to be used, however, it is essential that further guidance on their use be developed; such guidance could quantify, for example, the length of delay in a recovery that would be considered significant. The goal should be to come up with a definition of “adverse modification,” and with associated guidance, that would require the Service’ personnel to determine in objective terms what “difference” a proposed alteration to critical habitat would make in the ability of a species to recover, and then to explain why the “difference” is of such a quality that it needs to be avoided.

The Services’ own proposed definition suggests a standard that could be adopted. In its second sentence, the proposed definition states that “alterations” that “appreciably diminish” “may include ... effects that preclude or significantly delay.” “Preclude or significantly delay” is a much more workable standard than “appreciably diminish.”

Taking all of its comments into account, KIOGA urges the Services to consider the adoption of the following two-part definition of “destruction or adverse modification” in place of their proposed definition:

“Modification” means any direct or indirect alteration in the quantity and/or quality of the physical and/or biological features that: 1) were found in the habitat of a species at the time it was listed; 2) have been determined by the Services to be essential to the conservation of the species; and 3) may require special management considerations or protection to insure their continued existence.

“Destruction or adverse modification” means any “modification” that would preclude or significantly delay the ability of a listed species to recover in its critical habitat as a whole.

The ESA Does Not Protect Against the “Destruction or Adverse Modification” of Potential Conservation Features

The second sentence in the Services’ proposed definition states that “such alterations [i.e., alterations that may constitute “destruction or adverse modification”] may include, but are not limited to, [alterations] that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.” The Services state that the sentence “simply acknowledges that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality,” and then assert that “an action that would preclude or significantly delay the development or restoration of [such features] to

the extent that it appreciably diminishes the conservation value of critical habitat relative to that which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.”

In asserting this authority, the Services apparently reason as follows:

1. As long as an area occupied by a species at the time of listing “contains at least one ... of the physical or biological features that provide for some of the life-history needs of the listed species,” and is therefore designated as critical habitat, they have the authority to prohibit any action subject to the ESA in that area that would “preclude or significantly delay:” (a) the development of any physical or biological features that are “not already present” in the area, and (b) the restoration of any physical or biological features that are present in the area, but are in a degraded or “not yet fully functional” condition; and
2. Because an area outside of an occupied area can be designated as critical habitat even if there are no physical or biological features essential to the conservation of a listed species present in the area, they have the authority to prohibit any action subject to the ESA in that area that would “preclude or significantly delay:” (a) the development of any physical or biological features that are “not already present” in the area, and (b) the restoration of any physical or biological features that are present in the area, but are in a degraded or “not yet fully functional” condition.

In other words, the Services assert the authority, once an area is designated as critical habitat, to prohibit any action subject to the ESA that would “preclude or significantly delay” the reasonably foreseeable potential of the area to develop, through natural or man-aided processes, any physical or biological features that might “support the life-history needs of the species for recovery.”

The ESA, however, does not grant the Services such broad authority to control the activities in areas designated as critical habitat. With respect to occupied areas, the ESA defines “critical habitat” as those areas on which are found the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Thus, the grant of authority is clearly and only for the purpose of providing the special management considerations or protection necessary to preserve the essential features presently found in that area; it is not a license to protect the area generally in such a way as to insure that certain features might develop there in the future. The Services cannot bootstrap the authority to protect features that are present into authority to protect features that may someday be present.

The same is true with respect to the unoccupied areas. With respect to the designation of critical habitat in unoccupied areas, KIOGA notes that it disagrees with the Services’ contention that such areas are “not required to have physical or biological features present” in order to be designated as critical habitat. In KIOGA’s view, such areas may only be designated if they have such features and then only to the extent that the occupied areas are lacking in such features. (KIOGA has explained the basis for its disagreement with the Services on this point in comments filed in the related rulemaking at Docket No. FWS-HQ-ES-2012-0096: Implementing Changes to

the Regulations for Designating Critical Habitat.) Thus, it is only those features that may be protected from “destruction or adverse modification.” If the Services believe a broader authority is necessary, they must ask Congress for it.

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 features and characteristics of areas designated as critical habitat that would be subject to the prohibition against “destruction or adverse modification.” This, in turn, would significantly restrict the activities that can be conducted in those areas if they owned by the federal government or if the activities require federal permits. 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.



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