



Alaska Oil and Gas Association
121 W. Fireweed Lane, Suite 207
Anchorage, AK 99503-2035
Phone: (907) 272-1481
www.aoga.org



Petroleum Association of Wyoming
951 Werner Court, Suite 100
Casper, WY 82601-1351
Phone: (307) 234-5333
paw@pawyo.org

February 6, 2012

VIA Federal eRulemaking Portal
(<http://www.regulations.gov>)

Public Comments Processing
Attn: FWS-R9-ES-2011-0073
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, PDM-2042
Arlington, VA 22203

**Re: Supplemental Comments on Proposed Revisions to the Regulations for Impact
Analyses of Critical Habitat, FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01**

To Whom It May Concern:

This letter provides the supplemental comments of the Alaska Oil and Gas Association (“AOGA”) and the Petroleum Association of Wyoming (“PAW”) (collectively, the “Associations”) in response to the joint proposal of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively the “Services”) published at 77 Fed. Reg. 51,503 (Aug. 24, 2012) (the “Proposed Rule”). *See* 77 Fed. Reg. 66,946 (Nov. 8, 2012) (re-opening public comment period for Proposed Rule). We appreciate this opportunity to provide these additional comments in response to the Proposed Rule. This letter supplements our original comment letter dated October 23, 2012.

As set forth in our original comment letter, the Proposed Rule, if adopted, would establish a regulatory framework for implementing ESA Section 4(b)(2) that (i) renders the Services’ consideration of the economic impacts of critical habitat designations illusory, and (ii) unlawfully resolves a split in authority between the Ninth and Tenth Circuit Courts of Appeal. As to the first point – the focus of these supplemental comments – Section 4(b)(2) plainly states that the Services must consider the “economic impact” of a proposed critical habitat designation before designating the critical habitat. 16 U.S.C. § 1533(b)(2). The Services’ current practice, which the Services propose to continue, narrowly interprets “economic impact” as the

administrative costs incurred when the Services consider a federal action's impact on critical habitat in the Section 7 consultation process and discounts to zero virtually all other economic impacts because they are supposedly too speculative or unquantifiable. However, Section 4(b)(2) does not limit the economic impact analysis in this way and, instead, unconditionally charges the Services with considering "the economic impact" of their proposed critical habitat designations. *Id.* Our original comments provided many examples, supported by documentary evidence, in which economic impacts that are solely attributable to critical habitat designation (not the listing of a species) are routinely not considered under the Services' approach. The examples provided below further illustrate this point.

It is well-established that other, non-ESA regulatory processes mandate certain local, state, or federal agency decisions, including the imposition of heightened mitigation requirements, based on the presence or absence of federally designated critical habitat in an action area. For example, when issuing a Section 404 permit pursuant to the Clean Water Act, the U.S. Army Corps of Engineers ("Corps") must consider the impacts of the proposed action on designated critical habitat and increase compensatory mitigation ratios based on the Corps' assessment of those impacts. *See* 33 C.F.R. § 332.3(c) and 332.3(f)(2). Applying these requirements, the Corps' Alaska District issued a Regulatory Guidance Letter ("RGL") that specifically identifies "areas of critical habitat" as those that "will require" compensatory mitigation. *See* Alaska District, RGL No. 09-01, page 8, table 2. Under RGL No. 09-01, impacted wetlands that are located in critical habitat must be mitigated for as "Category I" wetlands (the highest value wetlands) regardless of the physical, chemical, and biological characteristics of the wetlands. *See id.*, Appendix A (wetlands that provide a "life support function for threatened or endangered species that has been documented [i.e., designated as critical habitat]" are classified as "Category I" wetlands).

Recently, the Corps' Alaska District applied these guidelines when evaluating the Section 404 permit for ExxonMobil's Point Thomson project, located approximately 60 miles east of Prudhoe Bay. In so doing, the Alaska District designated many of the wetlands to be impacted by the project as Category I wetlands because they are located within previously designated polar bear critical habitat.¹ As a result, the Alaska District required mitigation ratios higher (and more costly) than would have otherwise applied to these wetlands. In this instance, the designation of critical habitat resulted in higher mitigation costs to the permittee. However, under the Services' proposed approach, this economic impact would not be considered at all at the time of designation because it is not an "incremental Section 7 administrative cost." Indeed, the increased wetland mitigation impacts for the Point Thomson project were not considered by the

¹ The Fish and Wildlife Service's designation of polar bear critical habitat has since been vacated and remanded by the federal district court for the District of Alaska. *See Alaska Oil and Gas Association et al. v. Salazar et al.*, Case No. 3:11-cv-0025-RRB, Dkt. 96 (Jan. 11, 2013).

Fish and Wildlife Service when it designated critical habitat for the polar bear. The increased wetland mitigation costs for Point Thomson appear to equal or exceed the Services' total projected economic impact of the polar bear critical habitat designation for the next 30 years.

As another example, the Corps often expressly excludes areas designated as critical habitat from coverage under the terms of general permits issued pursuant to the Clean Water Act NPDES program. *See, e.g.*, NPDES Permit No. AK-G52-4000, Offshore Seafood Processors in Alaska (March 1, 2010), available at: <http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits> (visited on January 25, 2013); NPDES Permit No. AK-G70-1000, Log Transfer Facilities in Alaska (December 1, 2008), available at [http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits/\\$FILE/AKG701000-Post-85-FP.pdf](http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits/$FILE/AKG701000-Post-85-FP.pdf) (visited on January 25, 2013). The result is that applicants seeking to obtain a permit to discharge in areas designated as critical habitat must pursue an individual permit or implement an operational change to avoid the need for an individual permit. Again, the applicant in this instance will incur additional costs that would otherwise not be incurred in the absence of designated critical habitat.

As a final example, forest management activities in Washington State are regulated based on a four-tier categorization scheme. Forest management activities (including harvest) that are categorized as Class I, II, or III are excluded from review under the State Environmental Policy Act ("SEPA"). *See* WAC 222-16-050(3)-(5). However, forest management activities categorized as Class IV must undergo review under SEPA. Forest management activities that occur in areas designated as critical habitat are presumptively categorized as Class IV. WAC 222-16-050(1)-(2) and 222-16-080. Consequently, applicants for forest management activities that occur in critical habitat in Washington State must complete a costly SEPA process, and comply with other administrative requirements, solely because of the federal designation of critical habitat.

The above-described examples are a few of many instances in which federal, state, or local regulatory programs may impose different (and more costly) requirements for permit applicants whose projects occur in federally designated critical habitat. Importantly, in all of the examples described above (and in our original comment letter), the additional economic impact would not occur in instances in which listed species are present but for which no critical habitat has been designated. These impacts exist precisely and only because critical habitat has been designated.

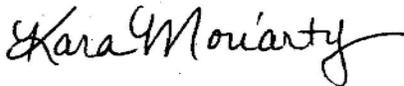
Our purpose here is not to debate whether other regulatory programs can or should take into account federally designated critical habitat, but rather to emphasize the uncontroverted fact that the designation of critical habitat has costly regulatory ramifications beyond the ESA Section 7 process. Under the Services' current and proposed approach, none of these regulatory costs are considered by the Services before the designation of critical habitat because they are either dismissed as not related to the Section 7 process or as otherwise "speculative." In this

respect, the Proposed Rule and the Services' current practice are not consistent with ESA Section 4(b)(2)'s mandate that the Services consider the full "economic impact" of critical habitat designations. It is also not consistent with Congress' express intent, when creating Section 4(b)(2), to "take into consideration more accurately the development needs of the nation" and to "recognize that there are human considerations to be dealt with and people are an important factor in [the ESA] equation." H.R. Rep. No. 95-1757, at 801, 837.

Finally, we reiterate our support for the Services' proposal to publish draft economic impact analyses at the same time that proposed designations of critical habitat are made available for public comment. This regulatory change will allow for the public to meaningfully consider and comment on the Services' economic impact analyses in a timely fashion and, moreover, this change gives meaning to the ESA's clear directive that the Services designate critical habitat "after taking into consideration the economic impact." 16 U.S.C. § 1533(b)(2) (emphasis added).

We appreciate your consideration of these supplemental comments, as well as the comments set forth in our letter dated October 23, 2012.

Sincerely,



Kara Moriarty
Executive Director
Alaska Oil and Gas Association



Bruce Hinchey
President
Petroleum Association of Wyoming