



October 9, 2014

Public Comments Processing

Attn: [Docket No. FWS-R9-ES-2011-0104]

Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

**Re: Comments of the Independent Petroleum Association of America**

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the American Exploration & Production Council (AXPC), Association of Energy Service Companies (AESC), the American Association of Professional Landmen (AAPL), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Stripper Well Association (NSWA), the Petroleum Equipment & Services Association (PESA), the Public Lands Advocacy (PLA), the US Oil & Gas Association (USOGA) and the following organizations:

Arkansas Independent Producers and Royalty Owners Association  
California Independent Petroleum Association  
Coalbed Methane Association of Alabama  
Colorado Oil & Gas Association  
East Texas Producers & Royalty Owners Association  
Eastern Kansas Oil & Gas Association  
Florida Independent Petroleum Association  
Illinois Oil & Gas Association  
Independent Oil & Gas Association of New York  
Independent Oil & Gas Association of West Virginia  
Independent Oil Producers Agency  
Independent Oil Producers Association Tri-State  
Independent Petroleum Association of New Mexico  
Indiana Oil & Gas Association  
Kansas Independent Oil & Gas Association  
Kentucky Oil & Gas Association  
Louisiana Oil & Gas Association  
Michigan Oil & Gas Association  
Mississippi Independent Producers & Royalty Association  
Montana Petroleum Association

National Association of Royalty Owners  
Nebraska Independent Oil & Gas Association  
New Mexico Oil & Gas Association  
New York State Oil Producers Association  
North Dakota Petroleum Council  
Northern Alliance of Independent Producers  
Northern Montana Oil and Gas Association  
Ohio Oil & Gas Association  
Oklahoma Independent Petroleum Association  
Panhandle Producers & Royalty Owners Association  
Pennsylvania Independent Oil & Gas Association  
Permian Basin Petroleum Association  
Petroleum Association of Wyoming  
Southeastern Ohio Oil & Gas Association  
Tennessee Oil & Gas Association  
Texas Alliance of Energy Producers  
Texas Independent Producers and Royalty Owners Association  
Utah Petroleum Association  
Virginia Oil and Gas Association  
West Virginia Oil and Natural Gas Association

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will be the most significantly affected by the proposed actions in these regulatory actions. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas. Many of the wells they develop and operate require federal permits because they involve activities that are regulated by federal law. As a result, those activities, if conducted in an area that has been designated as critical habitat, must be conducted so that they are not likely to result in the “destruction or adverse modification” of that habitat.

For the reasons explained in detail below, the Independent Petroleum Association of America (“IPAA”) and cooperating associations respectfully request that the draft “Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act,” as it pertains to the exclusion of federal lands from critical habitat designations, be withdrawn.

The United States Fish and Wildlife Service and the National Marine Fisheries Service (“the Services”) are proposing to adopt a policy that will govern the exercise of their authority under section 4(b)(2) of the Endangered Species Act, (“ESA”)<sup>1</sup>, to exclude certain areas from designation as critical habitat. In related actions, the Services have also proposed to amend the definition of “destruction or adverse modification” (Docket No. FWS-R9-ES-2011-0072), and to

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<sup>1</sup> 16 U.S.C. 1531 *et seq.*

amend the regulations that govern the designation of critical habitat (Docket No. FWS-HQ-ES-2012-0096). Because of the significance of the issue of critical habitat generally to its members, IPAA and the cooperating associations mentioned above are also filing comments in those dockets as well.

### **Purpose of Proposed Section 4(b)(2) Policy**

Section 4(b)(2) authorizes the Services to “exclude any area from critical habitat if [they] determine that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat.”<sup>2</sup> The Services are proposing to adopt a policy that will “provide predictability and transparency” to their exercise of that authority.<sup>3</sup> Independent producers generally support the Services’ effort to accomplish those goals. Independent producers welcome, for example, the Services’ recognition of the benefits that can be achieved by excluding from designation lands covered by private or other non-Federal conservation plans and partnerships, including plans related to permits under section 10 of the ESA. For the reasons explained below, however, independent producers believe that the draft policy as it pertains to the consideration that the Services will give (or, more accurately, not give) to the exclusion of federal lands from critical habitat designations should be withdrawn.

### **The Proposed Policy on Exclusion of Federal Lands**

The draft policy states that, with the exception of federal lands in which “national-security or homeland-security concerns” are involved, the Services will “focus [their] exclusions on non-Federal lands.”<sup>4</sup> While the meaning of that statement is not clearly explained in the preamble, it appears that the Services are taking the position that federal lands will not typically merit exclusion, and that the Services will therefore expend their available resources on considering whether non-federal lands should be excluded. The Services are, in effect, proposing to adopt, as a matter of policy, a de facto moratorium on considering federal lands for exclusion under their section 4(b)(2) authority. Indeed, the Services state that, rather than consider federal lands for exclusion, they will instead, “to the extent possible, ... focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands.”<sup>5</sup> As explained below, however, the draft policy is in direct conflict with the purpose of section 4(b)(2) and with the October 3, 2008 M-Opinion by the Solicitor that is cited in the preamble and that is entitled “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act” (“Opinion”).<sup>6</sup> The policy may not therefore be lawfully adopted.

### **The Solicitor’s Section 4(b)(2) Opinion**

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<sup>2</sup> *Id.* at 1533(b)(2).

<sup>3</sup> 79 FR 27053.

<sup>4</sup> *Id.* at 27057.

<sup>5</sup> *Id.* at 27056.

<sup>6</sup> *Id.* at 27053.

As the Solicitor explained in his Opinion, section 4(b)(2) was amended in response to the Supreme Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), which enjoined the construction of the Tellico Dam because of the effects that it would have on the snail darter and its critical habitat. Among other things, the amendments required the Services, when designating critical habitat, to consider, in addition to the needs of the listed species, the economic and other "relevant impacts" on human activities of making the designation. They also authorized the Services to exclude certain areas from a designation if the benefits of exclusion outweighed the benefits of inclusion.

The first sentence of section 4(b)(2) states that the Services may make a designation only "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."<sup>7</sup> This is often referred to as the "first sentence decision." The Services must identify these "impacts" and take them into consideration in making a designation, regardless whether they then proceed under the second sentence of section 4(b)(2) to consider, based on those "impacts," whether to exclude certain areas from the designation.

The regulations that implement section 4(b)(2) clarify that the "impacts" that must be taken into consideration under the first sentence decision are the impacts of "significant activities that would either affect an area considered for designation or be likely to be affected by the designation."<sup>8</sup> "Unfortunately," however, as the Solicitor pointed out, "the regulations do not define what constitutes an 'activity.'"<sup>9</sup> In his Opinion, the Solicitor explained that the "activities" that are referred to in the regulation are the "ongoing or potential activities that are either carried out by the federal government, or that are funded or authorized by the federal government."<sup>10</sup> Thus, "[i]f there are no such activities either ongoing or potential in the area being considered for designation, ... there are no impacts that must be considered in making a first-sentence decision."<sup>11</sup> After examining the statute, the regulations, and the legislative history, the Solicitor concluded that:

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 ... the section 4(b)(2) exclusion authority.<sup>12</sup>

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<sup>7</sup> 16 U.S.C. § 1533(b)(2).

<sup>8</sup> 50 CFR § 424.19.

<sup>9</sup> Opinion, p. 10.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at p. 12.

The Solicitor also explained that “the logical purpose of the mandate” in the first sentence of section 4(b)(2) to take the “impacts” on federal activities into consideration “is to ensure that the [Services have] the information necessary to decide whether to explore further the option of excluding areas” under the authority granted them in the second sentence.<sup>13</sup>

### **The Defects in the Proposed Policy on Federal Lands**

The draft policy is in direct conflict with the purpose of section 4(b)(2), as explained by the Solicitor; instead of focusing the Services’ efforts on determining whether they can and should avoid or reduce the impacts of a designation on ongoing or potential federal activities on federal lands (which is where most federal activities occur), it focuses the efforts of the Services on determining whether they can and should avoid or reduce the impacts of a designation on ongoing or potential private activities on non-federal lands. As a practical matter, the result of the policy will be that the Services will not “explore further the option of excluding” federal lands from a designation, regardless of the severity of the impacts such a designation would have on the “ongoing or potential federal activities” that are being, or will be, conducted on those lands. **If the policy is adopted, the Services will avoid, for the most part, having to come to grips with the very problem that section 4(b)(2) was intended to address—i.e., the impacts of designations on federal activities.**<sup>14</sup> Put another way, under the Services’ proposed policy, were the Tellico Dam being constructed today on federal lands, the Services would focus their attention elsewhere and would not consider whether the area of the dam should be excluded from the designation of critical habitat for the snail darter. It is clear that, in drafting their policy on the exclusion of federal lands, the Services have lost sight of the purpose of section 4(b)(2).

Moreover, the Services’ reasons for proposing the policy cannot withstand scrutiny. First, the Services underestimate the potential benefits of excluding federal lands from a designation. The only benefits of exclusion that the Services specifically identify are the “development of new conservation partnerships and [the] fostering [of] existing partnerships,” which, they conclude, “do not generally arise with respect to Federal lands.”<sup>15</sup> The Services do state that they “will ... consider [i.e., identify as part of the first sentence decision] the extent to which consultation [i.e., the requirement to conduct activities so that they will not result in “destruction or adverse modification”] would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.” Oddly, however, the Services do not state clearly that they would consider the avoidance of these impacts as a benefit of exclusion, or that they might be substantial. They thus make it sound like there is really very little to be gained by excluding federal lands. The benefits of avoiding such impacts, however, can be substantial; indeed, in some cases, activities may not even proceed unless they are relieved of the requirement to avoid destroying or adversely modifying critical habitat. The avoidance of such impacts on federal

<sup>13</sup> *Id.* at p. 15.

<sup>14</sup> While some activities on private lands will require federal permits and thus be considered federal activities, a substantial majority of the federal activities impacted by critical habitat designations take place on federal lands.

<sup>15</sup> 79 FR 27056.

activities are the very benefits that Congress wanted considered, and that it believed might in some instances outweigh the benefits of including an area in a designation. Yet, the Services are now proposing a policy in which the benefits of avoiding such impacts will, as a practical matter, never be weighed against the benefits of specifying a particular area of federal land as critical habitat.

Second, the Services overestimate the benefits of designating federal lands as critical habitat. They state, by way of comparison, that the benefits of designating federal lands are “typically greater than that the benefits of ... designation other lands.” This is because “there is a Federal nexus for any project on Federal lands that may affect critical habitat [unlike projects on non-federal lands, which may or may not have a federal nexus], so section 7 consultation would be triggered and an analysis under the destruction and adverse-modification standard would always be conducted.”<sup>16</sup> While that may be true in general, the comparison does not begin to tell the whole story about the benefits of including a particular federal land area in a designation. The conservation benefit of including a particular federal land area in a designation may be small, even insignificant. Yet, under the proposed policy, that fact will never see the light of day. Regardless of the insignificance of the conservation benefit that might be realized from the designation of a particular federal land area, and regardless of the severity of the other impacts that the designation might have on ongoing or potential federal activities, the Services will focus their attention elsewhere.

### **Conclusion**

As the Solicitor explained, “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.” In direct contravention of that purpose, and of the legal guidance provided by the Solicitor, the Services are now proposing, as a matter of policy, to avoid even considering whether such conflicts, if they occur on federal lands, could or should be avoided or reduced. The draft policy should therefore be withdrawn.

Thank you in advance for your consideration of these comments.

Sincerely,



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<sup>16</sup> *Id.*

**Dan Naatz**

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