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WEST VIRGINIA CHAMBER OF COMMERCE
The Voice of Business in West Virginia

September 24, 2012

Public Comments Processing
Attn: FWS-R5-ES-2012-0045
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Subject: **Docket No. FWS-R5-ES-2012-0045**

Comments on Proposed Rule for Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Diamond Darter and Designations of Critical Habitat

Dear Sir or Madam:

The West Virginia Chamber of Commerce would like to take this opportunity to offer the following comments related to the Proposed Endangered Status for the Diamond Darter and Designation of Critical Habitat (77 FR 43906). The West Virginia Chamber is the largest business and industry trade organization in the State of West Virginia. Its membership is broad and includes coal, oil and gas and timber businesses and businesses that rely upon those sectors for energy and wood products. The Independent Petroleum Association of America ("IPAA") joins the Chamber in its comments and concerns specifically related to the oil and gas industrial activities in the Elk River watershed.¹

The proposed rule claims, without providing appropriate support, that the important coal, timber, and oil and gas development industries in the Elk River all present a significant current and future threat to the Diamond Darter population.

Specifically, the proposed rule claims that coal mining in the Elk River watershed presents a significant ongoing threat to the Diamond Darter population in part because of the loads of sediment, metals, and conductivity discharged from mines. As written, the proposed rule underestimates the effectiveness of the existing regulatory mechanisms to control the impact of coal mining on downstream waters. Accordingly, language in the rule describing coal mining's threat to the Diamond Darter should be modified to reflect the reality that the modern coal mining industry is effectively regulated by various environmental laws that prevent sediment and

¹ IPAA represents the thousands of independent oil and natural gas producers and service companies across the United States. Independent producers drill 95 percent of domestic oil and natural gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas.

other pollutants from significantly affecting downstream water quality in the mainstem of the Elk River.

The proposed rule also claims that timbering activities in the Elk River watershed present a significant current and future threat to the Diamond Darter population in part because current laws that regulate nonpoint pollution are inadequate. The example given is that forestry operations do not have permitting requirements under the Clean Water Act because there is a silvicultural exemption as long as best management practices (BMPs) are used to help control nonpoint-source pollution. The proposal asserts that the West Virginia Logging and Sediment Control Act was developed to protect aquatic resources, but improper BMP implementation causes increased sediment loading into streams. The proposed rule cites a 2007 paper by Wang *et al.* to claim that compliance with timber harvesting best management practices (“BMPs”) averaged only 74 percent, but fails to note that the authors of that study found that BMP compliance rates in West Virginia were at historical highs and compared well to compliance rates in northeastern states. “Results indicate that more haul roads, skid trails, and landings are being properly reclaimed in West Virginia, improving both erosion control and aesthetics.” Wang *et al.* 2007, pp. 9,16. The proposed rule underestimates the effectiveness of the existing regulatory mechanisms to control the impact of nonpoint source regulated activities on downstream waters. Language in the rule describing the timber industry’s threat to the Diamond Darter is very broadly stated and warrants significant additional information about the operations of the industry and the effectiveness of the regulatory programs related thereto that significantly affect downstream water quality in the mainstem of the Elk River.

Finally, the proposed rule claims that oil and gas development activities in the Elk River watershed present a risk to the Diamond Darter in part because of “oil and other toxic spills.” The proposal also claims that oil and gas development contributes loads of sediment and conductivity to downstream waters. As written, the proposed rule underestimates the effectiveness of the existing regulatory mechanisms to control the impact of regulated activities on downstream waters. Language in the rule describing the oil and gas industry’s threat to the Diamond Darter is very broadly stated and warrants significant additional information about the operations of the industry and the historical and current regulatory programs related thereto that significantly affect downstream water quality in the mainstem of the Elk River.

The West Virginia Chamber of Commerce is also troubled by language in the rule that describes elevated conductivity as a threat to the Diamond Darter despite the fact that an appropriate conductivity range for the Diamond Darter has not been determined and no scientific studies have conclusively shown that elevated conductivity causes harm to fish species. Language characterizing elevated conductivity as a threat to the Diamond Darter should therefore either be amended to reflect the absence of scientific studies showing a causal relationship between conductivity and fish decline or should be removed from the proposed rule altogether.

There is no evidence that current laws regulating the coal, timber, and oil and gas industries are failing to protect the Diamond Darter.

The proposed rule claims “there are few Federal and State regulatory mechanisms that specifically protect the Diamond Darter or its aquatic habitat” and that “degradation of habitat

however, the proposed rule could theoretically imperil industrial operations from acquiring the necessary permits to begin operation if the operation would discharge no harmful levels of sediment or dissolved metals but would raise downstream conductivity by a marginal amount. Until a causal relationship between elevated conductivity and harm to fish species is scientifically established, conductivity should not be listed as a threat to the Diamond Darter and extractive industries should not face increased scrutiny based on conductivity.

Conclusion

The West Virginia Chamber of Commerce and the Independent Petroleum Association of America appreciates the opportunity to provide input on the potential listing of the Diamond Darter and the designation of the mainstem of the Elk River as critical habitat. Extractive industries such as coal mining, timbering, and oil and gas development have been an important source of jobs and progress in the Elk River watershed for well over a century. The agency is urged to move cautiously in advancing any such listing or designation and therefore must develop a more thorough record before finalizing this proposal. The agency has failed to meet the criteria for making this proposal.

Sincerely,

A handwritten signature in blue ink that reads "Tom Boggs" followed by the initials "KAB".

Tom Boggs
Vice President
West Virginia Chamber of Commerce

cc: Dan Naatz, IPAA