

WEST VIRGINIA OIL AND NATURAL GAS ASSOCIATION

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Public Comments Processing
Attn: FWS-R5-ES-2012-0045
Division of Policy and Directives Management
US Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

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

Comments on the proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) (77 Fed. Reg. 43906 (July 26, 2012)), the draft economic analysis (DEA) of the proposed designation of critical habitat and the amended required determinations section of the proposal (78 Fed. Reg. 19172 (March 29, 2013)).

Dear Sir or Madam:

The West Virginia Oil and Natural Gas Association (WVONGA) would like to take this opportunity to offer the following comments related to the proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) (77 Fed. Reg. 43906 (July 26, 2012)), the draft economic analysis (DEA) of the proposed designation of critical habitat and the amended required determinations section of the proposal (78 Fed. Reg. 19172 (March 29, 2013)). WVONGA has over 200 companies as members that represent a wide cross-section of the oil and gas industry covering exploration and drilling, and transmission. The WVONGA membership's involvement in the oil and gas industry can be seen on many fronts to include educating the public, working with legislative and regulatory bodies, developing new avenues for natural gas usage and creating employment opportunities. The Independent Petroleum Association of America (IPAA) joins WVONGA in its comments and concerns specifically related to the oil and gas industrial activities in the Elk River watershed.¹

Proposed listing and designation of critical habitat – Unsupported Claims

The WVONGA reinstates herein its previously filed comments of September 28, 2012 relating to proposed rule's unsupported claims 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. The West Virginia Department of Natural Resources (WVDNR)

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 well, produce 54 percent of American oil and produce 85 percent of American natural gas.

reports that sampling for the Diamond Darter is difficult because it buries itself in the sand, raising significant question about the population figures in this proposal. The WVDNR also comments that there would be little change to the regulatory program for protection of habitat because the existing program is very protective of this high quality stream. The West Virginia Department of Environmental Protection (WVDEP) reports that the demise of the Diamond Darter is more particularly related to the historical impoundment of streams. Focus upon industrial activities is misguided. WVDEP also comments the currently regulatory programs are protective of water quality and aquatic life. These observations should inform the agency about the West Virginia program and its quality. Initiation of a protected species and protected habitat at this stage with little real understanding of the species and impacts upon West Virginia regulated activities is improper at this time. We urge delay of this action.

Draft Economic Analysis –

Potential impacts on the energy industry.

Pursuant to Executive Order No. 13211, “Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution or Use” issued on May 18, 2001, Federal agencies must prepare and submit a “Statement of Energy Effects”. This draft document states, “As discussed in Section 4.2.1. of this report, we do not anticipate the proposed critical habitat designation to impact coal mining, oil extraction, or drilling activities taking place in the study area. Thus, none of these outcomes are anticipated.” P. A-10. What these statements do not address is the adverse outcome of increased regulatory actions that will impact the construction of stream crossings. At a point in time where the energy industry is working to provide access to downstream users of natural gas, increased regulatory burdens designed to protect a species that is not well understood creates an adverse outcome with little understanding as to the benefits, that limits energy marketing, production and consumption in West Virginia, particularly Kanawha County the location of significant historical downstream chemical industry infrastructure.

Fails to consider the economic effects on Kanawha County

Section 4(b)(2) of the Endangered Species Act requires that designation of critical habitat be based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. The U.S. Fish and Wildlife Service seeks comment concerning: ... “Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation...” 78 Fed. Reg. 19172 (March 29, 2013). With regard to economic impacts, the February 27, 2013 draft economic analysis (DEA) of the proposed designation of critical habitat of the proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) fails to even consider the potential economic effect on Kanawha County, West Virginia, because it “does not meet the definition of small government.” DEA p. ES-9. Kanawha County, West Virginia has a population of only 192,179 people (2012 estimate). See, U.S. Department of Commerce, United States Census Bureau State and County QuickFacts, *available at*, <http://quickfacts.census.gov/qfd/states/54/54039.html>. The basis for the conclusion that impact

upon Kanawha County is not relevant is missing from the agency's analysis. Kanawha County has experienced a 7.2 % decline in private nonfarm employment in the past ten years according to the U.S. Department of Commerce. Failure to consider the economic effects of the proposed listing and designation of critical habitat for the diamond darter (*Crystallaria cincotta*) on Kanawha County, which is already suffering the effects of declining economy, despite being home to the capitol of West Virginia, is arbitrary and capricious. Additionally, Kanawha County represents a location unique in the world relative to its historical experience in the downstream use of natural gas for manufacturing. Development of a program that has little understanding of the diamond darter combined with an equal lack of study of the potential adverse impact on the transportation of natural gas raw product to manufacturing sources lacks clear thought. Again, we urge you to delay this proposal to allow for additional review and analysis on both a biological level and an economic level.

Fails to consider the economic effects on the coal mining and oil and natural gas industries

The DEA responds to concerns from the coal mining and oil and natural gas industries "as written...the proposed rule could theoretically imperil a regulated activity from acquiring the necessary permits" due to delays in the permitting process resulting from the designation of critical habitat by stating: "[i]n this analysis, we do not forecast such impacts to resource extraction activities. To the extent that such impacts may occur, the impacts would be attributable to the listing of the diamond darter and co-occurring mussel species, and therefore not be an incremental cost of the proposed critical habitat designation." See DEA at p. 3-13. Failure to quantify the likely impacts to the regulated community particularly relative to coal mining and oil and natural gas production and manufacturing industries is arbitrary and capricious. The offering of circuitous rationale asserting that habitat is not the issue of impact on the economy, rather species listing is the point of reference for economic analysis is an effort to avoid the economic question. Stated in a more direct manner, designation for protection creates a presumption of the need for enhanced regulation. It is disingenuous to assert the presumption is not quantifiable and therefore there is no economic impact.

This DEA fails to appropriately consider future impacts from this proposal. The best example is the handling of the oil and natural gas exploration and drilling industries. The DEA in its Key Issues and Conclusions of the Incremental Analysis states: "[w]e do not anticipate impacts to oil and natural gas exploration and drilling, based on the level of consultations and Corps-permitting over the last five years." Failure to consider future impacts to oil and natural gas exploration and drilling is arbitrary and capricious given the surge in oil and natural gas exploration and drilling the region is currently experiencing.

The regulated community has a the concern that the listing of a species and designation of critical habitat will drive a mythical problem (hypothetical impact on the Diamond Darter) that will frustrate efforts at natural resource development and business development over or along the Elk River. Businesses, landowners, and mineral owners will be significantly impacted by these proposed actions.

Fails to appropriately quantify the economic effects on small businesses

The DEA appears to suggest since there are very few small businesses, sacrificing their economy is sound public policy to secure the habitat for a small and unreliable count of Diamond Darters. We strongly urge a less cavalier assessment of the actual population of Diamond Darters and of the small businesses in the region.

Amended Required Determinations – Fails to Appropriately Consider the Impact to Small Business

The amended determinations certifies that, “if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.” This amended determination, which is based upon the flawed DEA, should be reconsidered to adequately consider the complete economic impact on small businesses as required under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*) Both West Virginia counties affected by the proposed rules are rural in nature and depend upon small businesses for a significant portion of the economy. Failure to appropriately consider all economic impacts on the small business entities in these two counties is unsupported by law.

Conclusion

WVONGA 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. Small businesses, some of which are representative of the 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. Energy businesses stand to sustain difficulties in marketing its capabilities when encumbered by an ESA designation with such ill-defined bases. Even the environmental community is convinced that this listing may be premature as evidenced by the fact the Nature Conservancy intends to conduct its own watershed assessment in 2013. 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.

Sincerely,



Corky DeMarco, Executive Director
West Virginia Oil and Natural Gas Association²

² The IPAA endorses these comments concerning oil and gas issues. 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.