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

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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.

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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

for this species is ongoing despite the protection afforded by these laws and corresponding regulations." 77 FR 43917-18. In reality, each of the industries profiled in the proposed listing are effectively regulated by a comprehensive network of overlapping Federal and State laws.

Coal: Clean Water Act ("CWA") Section 401 requires West Virginia to certify that a proposed coal mine will comply with the Clean Water Act and meet all applicable water quality standards. 33 U.S.C. §1341, CWA §401. Precipitation flowing from coal mining operations is regulated through water discharge permits, called National Pollution Discharge Elimination System ("NPDES") permits. 33 U.S.C. §1342, CWA §402. Coal mines in Appalachia monitor and report the amounts of total suspended solids ("TSS") and metals discharged to the West Virginia Department of Environmental Protection. To ensure that harmful levels of sediment and metals are not discharged, coal mines use water retention ponds designed to allow suspended sediment to settle out of the water before it is discharged into downstream waters. Chemical treatment in these settlement ponds causes many dissolved metals to precipitate out of the water and prevents them from entering waters downstream. Additionally, section 404 of the Clean Water Act forbids waters of the United States from being directly dredged or filled without a permit from the Army Corps of Engineers. The Corps only issues section 404 permits after determining that the project will have no unacceptable adverse impact to the environment. Therefore, the current regulatory framework is comprehensive and is well suited to prevent coal mining operations from discharging harmful levels of sediment, metals, and other pollutants into the mainstem of the Elk River.

Oil and Gas: The Clean Water Act, in combination with the WV Pollution Control Act, the West Virginia Oil and Gas Act, the West Virginia Horizontal Well Act, and the West Virginia Abandoned Well Act all create a very thorough environmental regulatory program designed to protect the state's natural resources, including the Diamond Darter. To ensure that harmful levels of sediment and metals are not discharged, the WV Department of Environmental Protection has an Erosion and Sediment Control Manual and program that is specifically designed with protection of water quality as its primary goal. Additionally, section 404 of the Clean Water Act forbids waters of the United States from being directly dredged or filled without a permit from the Army Corps of Engineers. The Corps only issues section 404 permits after determining that the oil and gas project will have no unacceptable adverse impact to the environment. Therefore, the current regulatory framework is well suited to prevent oil and gas operations from carrying harmful levels of sediment, metals, and other pollutants into the mainstem of the Elk River.

Timbering: The Clean Water Act, in combination with the WV Pollution Control Act and the West Virginia Logging and Sediment Control Act all create a very thorough environmental regulatory program designed to protect the state's natural resources, including the Diamond Darter. To ensure that harmful levels of sediment and metals are not discharged, the WV Department of Forestry has implemented numerous Best Management Practices (BMPs) that is specifically designed with protection of water quality as its primary goal. Additionally, section 404 of the Clean Water Act forbids waters of the United States from being directly dredged or filled without a permit from the Army Corps of Engineers. The Corps only issues section 404 permits after determining that the oil and gas project will have no unacceptable adverse impact to the environment. Therefore, the current regulatory framework is well suited to prevent timbering

operations from carrying harmful levels of sediment, metals, and other pollutants into the mainstem of the Elk River.

The only evidence the proposed rule cites in support of its claim that current regulatory mechanisms are failing to protect the Diamond Darter is the fact that few Diamond Darters currently exist in the Elk River. This fact alone, however, does not support the notion that existing regulatory mechanisms are failing the species, because no evidence exists that a sizeable Diamond Darter population has ever existed in the Elk River or any other river in West Virginia or surrounding states. The Diamond Darter was not discovered in the Elk River until 1980, and in the thirty-two (32) years since, fewer than fifty (50) individuals have been observed. Without evidence of a once thriving population of Diamond Darters in the Elk River, the proposed rule's conclusion that existing regulatory mechanisms are to blame for the species' low population is unsupported.

Available evidence actually suggests that the existing regulatory mechanisms are effectively protecting the Diamond Darter's habitat and water quality. The proposed rule goes to great lengths to characterize the level of industrial activity in the Elk River watershed. The rule notes that watershed contains 13,000 acres of actively mined areas, including 3,339 acres of valley fills, 362 miles of haul roads, 473 NPDES permits, and 1,519 acres of abandoned mine lands. Id. at 43912. For timbering, the proposed listing states that 1,328 acres of forest in the watershed were being actively timbered in 2004 and that 11 sawmills operated in the area as of 2008. The watershed also contains 5,800 oil or gas wells. The lower section of the Elk River, which currently contains the diamond darter, has the highest concentration of both active and total wells in the watershed, with over 2,320 active wells and 285 abandoned wells. Id. at 43913.

Despite such extensive industrial activity, the Elk River – the only part of the watershed suited to the Diamond Darter – is listed as a "high quality stream" by the West Virginia Division of Natural Resources and has been found by the West Virginia Department of Environmental Protection to produce healthy benthic macroinvertebrate scores. Id. Under the protection of existing environmental laws, more individual Diamond Darters have been collected in the last five years than were collected since1936 when formal surveys of the Elk River began. The increased frequency with which Diamond Darters are being observed suggests that the population, while still admittedly small, is benefiting from, rather than being failed by, the environmental laws currently in place.

The proposed rule explains that one of the biggest threats to small, isolated populations is loss of genetic diversity, which increases the likelihood of inbreeding depression and reduced individual fitness. Id. at 43919. The Diamond Darter population in the Elk River was so small that it evaded detection until 1980. Since then less than 50 individuals have been found despite numerous surveying expeditions. This suggests that the adverse effects of inbreeding and small population size are not merely an ongoing threat to the Diamond Darter, but have likely been affecting this small population for many decades. This factor alone may explain why the Diamond Darter population has not dramatically increased over the past thirty years despite the relatively high water quality in the mainstem of the Elk River. Until the genetic robustness of the Diamond Darter population is properly evaluated, the Fish and Wildlife Service's claim that

existing regulatory mechanisms are failing the Diamond Darter is unsupported and is therefore arbitrary and capricious.

Specific water quality requirements for the Diamond Darter are unknown

The proposed rule concedes that "there are insufficient data available to quantitatively define the standards for water quantity or quality that are suitable to support the species" and that "specific water quality requirements (such as temperature, dissolved oxygen, pH, and conductivity) for the species have not been determined . . . ." Id. at 43925. Nevertheless, the rule claims water quality conditions preferred by the Crystal Darter, a "sister species" of the Diamond Darter found exclusively in the Southeastern United States, should be maintained in order to protect the Diamond Darter.

The use of the Crystal Darter "sister species" to determine the Diamond Darter's water quality needs, especially for conductivity, is unjustified for several reasons. First, the two species are genetically distinct and neither their current ranges nor their historical ranges overlap in any way. Id. at 43908. Second, a Diamond Darter population still exists in Elk River and more individuals are being collected now that at any point in history. Rather than using a separate species from Arkansas to determine the Diamond Darter's water quality needs, the FWS should simply observe the water quality in which the remaining population currently exists. Finally, conductivity is a water quality parameter whose general composition varies from region to region due to the different ionic constituents that make up conductivity. The primary ions composing conductivity vary from region to region so that data on the potential effects of conductivity in one region of the country should not be applied to other regions. Different eco-regions also have different confounding factors that co-occur with conductivity. If the final rule recommends an ideal conductivity range for the Diamond Darter, it should be based on sampling in the Elk River or direct testing of the Diamond Darter rather than applying the preferred conductivity of a different species from a different eco-region of the country.

The scientific studies cited do not demonstrate that conductivity impacts the Diamond Darter

The proposed rule claims that elevated conductivity resulting from coal mines and oil and gas operations represent a threat to the Diamond Darter. Id. at 43912-13.

None of the scientific studies cited in the proposed rule relating to conductivity conclude that conductivity, independent of the dissolved metals and sediment that were also noted at the test sites, caused the observed scarcity of fish. Rather, these studies merely observed general correlations between elevated levels of conductivity and dissolved metals and the scarcity of certain fish. The studies' failure to distinguish the effects caused by dissolved metals as opposed to conductivity is significant, because water quality standards exist for metals that are commonly discharged into water.

Currently, there is no scientific evidence that conductivity, in isolation from dissolved metals or sediment that sometimes co-occur with conductivity, *causes* impairment to fish species or the macroinvertebrate food sources on which fish such as the Diamond Darter rely. As written,

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,

Tom Boggs/KGB

Tom Boggs
Vice President
West Virginia Chamber of Commerce

cc: Dan Naatz, IPAA