October 9, 2014

VIA FedEx and eRulemaking Portal

Re: Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 79 Fed. Reg. 27052 (May 12, 2014)

Dear U.S. Fish & Wildlife Service and the National Marine Fisheries Service:

The National Mining Association (NMA), the American Exploration & Mining Association (AEMA), the Industrial Minerals Association – North America (IMA-NA), the Idaho Mining Association and the Utah Mining Association (collectively Commenters) appreciate the opportunity to comment on the proposed policy describing how the United States Fish & Wildlife Service and the National Marine Fisheries Service (collectively Services) will implement Section 4(b)(2) of the Endangered Species Act of 1973 (ESA or Act), *see* 79 Fed. Reg. 27052 (May 12, 2014).

These comments are one part of a three-part package announced by the Services that materially restructure the means by which critical habitat will be designated and then determined if proposed activity destroys or adversely modifies it under the ESA. The Commenters are timely filing comments on all three Federal Register notices and each of these comments are incorporated herein by reference.[1]

[1] The three-part package includes (1) a proposed rule modifying the current regulatory definition of "destruction or adverse modification" of critical habitat under 50 C.F.R. § 402.02, *see* Interagency Cooperation – Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 79 Fed. Reg. 27060 (May 12, 2014); (2) a proposed rule addressing a revision of the current rule that guides the designation of critical habitat under 50 C.F.R. § 402.12 and new definitions under 50 C.F.R. § 402.02, *see* Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to Regulations for Designating Critical Habitat; 79 Fed. Reg. 27066 (May 12, 2014); and (3) a new proposed policy by which the United States Fish & Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively Services) will determine exclusions of areas from designation as critical habitat under ESA Section 4(b)(2), *see* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 79 Fed. Reg. 27052 (May 12, 2014).

I. IDENTITY AND INTEREST OF COMMENTERS

A. Identity of Commenters

The National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members' activities frequently require them to obtain permits or approvals from a federal agency, such as the Army Corps of Engineers or the Environmental Protection Agency. Similarly, NMA members often undertake activities in designated critical habitat areas that may be deemed to result in the destruction or adverse modification of habitat. In these instances, our members are faced with increased costs attributed to project mitigation, delay, modification, or even prohibition in the name of species protection.

American Exploration & Mining Association (AEMA) (*formerly Northwest Mining Association*) is a 2,400 member national association representing the minerals industry with members residing in 42 states, seven Canadian provinces or territories, and 10 other countries. AEMA represents the entire mining life cycle, from exploration to reclamation and closure, and is the recognized national voice for exploration, the junior mining sector, and maintaining access to public lands. The broad-based membership of AEMA includes many small miners and exploration geologists as well as junior and large mining companies, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. More than 80% of AEMA's members are small businesses or work for small businesses. Most of AEMA's members are individual citizens.

The Industrial Minerals Association – North America (IMA-NA) represents producers and processors of industrial minerals in North America and associate members providing goods and services to the industrial minerals sector. Membership is comprised of companies that are leaders in the ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, magnesia, mica, soda ash (trona), talc, wollastonite and other industrial minerals industries. Industrial minerals are critical to the manufacturing processes of many of the products used every day, including glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, and cosmetics. They also are used in foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products and specialty fillers. IMA-NA is the principal trade association representing the industrial minerals industry in North America.

The Idaho Mining Association has over 60 members and represents mining companies engaged in mineral exploration, development, processing and reclamation throughout the state of Idaho as well as companies that provide products and services to the industry.

The Utah Mining Association (UMA) is a 99 year old, 118 member, non-profit, non-partisan trade association representing the interests of the mining industry in Utah. UMA members are actively involved in exploration and mining operations on public and private lands throughout the state. UMA's diverse membership includes every facet of the mining industry, including geology, exploration, mining, engineering, power generation, equipment manufacturing, legal and technical services, and sales of equipment and supplies.

B. Interest of Commenters

The Commenters strongly support the conservation and recovery goals of the ESA. They understand that the ESA was not designed to add species to the protected list but to protect species and their habitat so they never warrant listing as a threatened or endangered species.

Well before these proposed rules and policy pertaining to the designation of critical habitat and amending the definition of destruction or adverse modification were announced by the Services, the membership comprising the Commenters' associations had developed sustainable land management practices into their business models and had dedicated themselves to the principles of sustainable land stewardship. This commitment to land stewardship principles simultaneously advances the business models of their members and helps to conserve and recover candidate and listed species and the habitat upon which they depend.

However, as members of the regulated community under the ESA, the Commenters also have a strong interest in regulatory certainty with respect to their obligations under the Act and stability in their business planning. The process by which critical habitat is designated – including consideration of certain lands to be *excluded* by the Services – is extremely important because it impacts the scope and shape of the Commenters' proposed actions on Federal lands and well as flexibility on non-federal lands subject to conservation commitments. The Commenters are economically impacted by federal agency actions under the ESA.

II. INTRODUCTION AND SUMMARY OF COMMENTS

The two proposed rules and the announced policy by the Services represent unbridled regulatory expansion of the ESA. The adjustments proposed by the Services for determining how critical habitat will be designated in conjunction with the listing of species and the determination of bounds of acceptable activity in designated critical habitat under the ESA represents a potential full-circle, full-scale federalization of land use throughout the United States.

III. LEGAL CONTEXT

Under Section 4(b)(2) of the ESA, the Services may exclude areas from critical habitat designation as long as "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." 16 U.S.C. § 1533 (b)(2). The full section reads as follows:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary *may* exclude any area from critical habitat *if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat*, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. (emphasis added). Section 4(b)(2) of the ESA is consistent with the statutory scheme put in place by Congress for the designation of critical habitat in that it provides the opportunity to cabin the reach and scope of the designation.

At an irreducible minimum, critical habitat, as set forth in the ESA, is habitat that is *essential* to the conservation of the species in question. *See* 16 U.S.C. § 1532(5)(A). When Congress provided this and other provisions addressing critical habitat designation, the clear vision was that at the time a species was listed as threatened or endangered under the Act, the Services would identify specific areas of habitat that were vital, or *essential*, to the species' survival,[2] and that such designation would be limited.

Moreover, Congress required the Services to carefully assess the potential economic and other impacts of designating particular areas as critical habitat and would *exclude* any areas from the designation if the impacts of excluding such areas outweighed the benefits to the species of including these areas. In this way, the social and economic impacts of protecting listed species in its native habitat would be weighed in balance. The opportunity Congress afforded the Secretaries to exclude certain lands from critical habitat designation under Section 4(b)(2) is consistent with the overall structure of a process designed to designate only habitat that is, in the words of the statute, "*critical*," as well as absolutely "*essential*" to the conservation of the species. Exclusion of habitat furthers these Congressional purposes.

IV. COMMENTS

A. General Comments

To those in the regulated community represented by the Commenters, it is important that the Services understand they are obligated to make decisions on whether to exclude areas under ESA Section 4(b)(2) that rely upon a robust and credible economic analyses that fully address the direct and indirect impacts of critical habitat designation. It is a non-discretionary, statutory requirement of the Services under Section 4(b)(2) of the ESA to examine the economic impacts of critical habitat designation and to exclude any geographical area from a designation if the benefits of exclusion outweigh the benefits of inclusion.

Likewise, and notwithstanding the statutory directive by Congress that the Secretaries "may" exclude any area from critical habitat designation, it is certainly not an expectation by the regulated community that there be placed a heavy burden on those who may be advocates for reasonable exclusion of certain areas from critical habitat designation. Indeed, rather than focus through the lens of efficient and limited critical habitat designation, the Services err on the side of overreach through apathy: "Most significant is that the decision to exclude is always completely discretionary, as the Act states that the Secretaries ''may'' exclude areas. *In no circumstance is exclusion required under the second sentence of section 4(b)(2).*" 79 Fed. Reg. at 27054/1 (emphasis added); *see also id.* ("In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.").

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[2] The term "essential" is not defined in the text of the ESA. As a practical matter, it is defined as "of the utmost importance; basic, indispensable, necessary." See http://www.merriam-webster.com/dictionary/essential (last visited October 3, 2014).

The Services' overemphasis on their complete and unfettered discretion, which they believe Congress afforded them with respect to not excluding specific areas from critical habitat designation, reflects a bias disfavoring exclusion that will render an important component of the ESA obsolete. For non-federal interests represented by the Commenters, and as will be discussed below, the bar to successfully engage the Services in voluntary conservation planning–designed to avoid either a listing in the first instance or inclusion into critical habitat–will be impossible to achieve.

B. Specific Comments on the Policy: The Services Proposed Policy Is Contrary to the Well-Established Voluntary Non-Federal Conservation Commitments to Avoid Inclusion in Critical Habitat

Throughout the proposed policy, the Services cling mightily to the discretion they believe they are afforded under the ESA *not to* exclude various areas from critical habitat designation if unwarranted. Indeed, the general theme permeating throughout this policy is that there is a presumption *against* excluding certain areas that may otherwise fit well within the statutory framework for exclusion.

An example of this is the seeming antithesis–perhaps hostility–to exercising exclusion under ESA Section 4(b)(2) is the discussion as to what the Services will expect of non-federal parties who decide to participate in voluntary habitat conservation. Under the potential to consider "any other relevant impact," 16 U.S.C. § 1532(5)(A), maintaining productive working relationships between non-federal volunteer participants and future habitat maintenance, could fall squarely within the Congressional command of Section 4(b)(2) to consider the beneficial impacts of voluntary conservation.

The Services focus on three existing voluntary conservation tools in the policy: Candidate Conservation Agreements with Assurances (CCAAs), Safe Harbor Agreements (SHAs), and Habitat Conservation Plans (HCPs), each of which has been proven to be beneficial to habitat protection and maintenance if they are excluded from formal designation. Although the Services describe a potential for "continued ability to maintain existing partnerships and seek new partnerships with potential plan participants," 79 Fed. Reg. at 27055/1, the Services then indicate that they "generally will not exclude those areas from a designation of critical habitat" for CCAAs, SHAs, and HCPs that are still under development. "If a CCAA, SHA or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships. … [H]owever, promises of future conservation actions in draft CCAAs, SHAs and HCPs will be given little weight in the discretionary exclusion analyses, even if they may directly benefit species for which critical habitat designation is proposed." *Id*. at 27055/2.

With this pronouncement, the Services taketh with one hand and giveth away with the other. The failure to recognize the timeframe by which all these types of voluntary conservation plans take to develop, negotiate and approve is conspicuous by its absence in the discussion. In some instances, these types of plans take decades to finalize, and such time frames cannot be replicated with the eminence of potential species being under consideration by the Services for listing and

concurrent critical habitat designation.[3] Indeed, the specific factors (listed below) that the Services consider in determining the effectiveness of conservation plans, may take significant time and resources to complete:

1. The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement or partnership;

2. The extent of public participation in the development of the conservation plan;

3. The degree to which there has been agency review and required determination;

4. Whether National Environmental Policy Act (NEPA) compliance was required;

5. The demonstrated implementation and success of the mechanism;

6. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species;

7. Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan agreement will be implemented; and

8. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

79 Fed. Reg. at 27054/1-2. One factor alone, NEPA compliance, may take several years to complete. Another factor, the demonstrated implementation and success of the chosen mechanism, could require several years of performance and accompanying data before the Services would deem the conservation mechanism sufficient for exclusion in a critical habitat designation. In short, with one broad stroke of the policy pen, voluntary conservation efforts have been effectively eliminated from any practical consideration in the critical habitat exclusion analysis.

As a recent example, the Lesser Prairie-Chicken Interstate Working Group's Lesser Prairie-Chicken Range-Wide Conservation Plan, originally designed to avoid the listing of the lesser prairie-chicken altogether, was ultimately determined by the United States Fish and Wildlife Service to be insufficient to escape a listing of the species as threatened.[4] However, the

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[3] Participants to voluntary conservation planning often are motivated to protect their interests in a pre-, and post-listing context: "Candidate conservation agreements with assurances (CCAAs) and safe harbor agreements (SHAs) are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands." 79 Fed. Reg at 27054/3.

[4] *See* 79 Fed. Reg. 19974, 19980 (April 10, 2014):

> At this time, the measures in the rangewide plan do not allow the Service to conclude that the lesser prairie-chicken no longer meets the Act's definition of a threatened or endangered species.

underlying conservation plan did form the basis of a special rule under Section 4(b) of the ESA. See 79 Fed. Reg. 20074 (April 10, 2014).

Accordingly, and notwithstanding huge financial and other resources poured into the conservation plan by the participants, such commitments to conservation did not fulfill the ultimate goal of the conservation plan, which was a "not warranted" listing determination under Section 4 (b)(3)(B)(i), 15 U.S.C. § 1533 (b)(3)(B)(i). Additionally, a 60-day notice provided by opponents to the ultimate listing determination indicates that such commitments now and in the future will be judicially challenged notwithstanding the scope, the funding, and other resource commitments made in this context by the participants to these types of conservation plans.[5]

To the degree an *approved* CCAAs/SHAs/HCPs can appropriately be excluded, the Services expect:

1. Full implementation of the commitments and provisions in the voluntary conservation plans, implementing agreement and permit;

2. The precise species for which the critical habitat is being designated is covered by the voluntary conservation plan; and

3. That the voluntary conservation plan *specifically* addresses that species' habitat and does not just provide guidelines.

79 Fed. Reg. at 27054/3-55/1 (emphasis added). In other words, the Services will expect precision in scope, perfection in implementation, and specificity of habitat in order for existing conservation plans to qualify for exclusion as critical habitat under Section 4(b)(2). There may be no existing voluntary conservation plans which meet this standard, and perhaps none that can be designed with such exactitude and timeliness in advance of the Services' consideration of species listing and critical habitat designation.

The degree of difficulty in the multiple years spent negotiating voluntary conservation plans coupled with the overbearing scrutiny of performance of approved voluntary conservation plans means that such efforts to bring the tool of non-federal conservation into the species conservation mix will become irrelevant due to this proposed policy.

V. CONCLUSION

The candor of the Services in expressing their unwillingness to limit their discretion *not* to exclude habitat that might otherwise qualify under ESA Section 4(b)(2) is an indicator of the heavy burden that will placed on those who hope to avoid being ensnared in a critical habitat

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> Additionally, due to the flexibility that is necessarily built into the implementation of the rangewide plan, there is uncertainty about when and where impacts and offsets will occur.

[5] *See* http://www.biologicaldiversity.org/news/press_releases/2014/lesser-prairie-chicken-04-10-2014.html (last visited October 3, 2014) (announcing that "[t]he Service has increasingly relied on Section 4(d) of the Endangered Species Act to create exemptions that allow continued habitat destruction and the incidental take of species listed as "threatened," weakening protections. The special exemptions for the lesser prairie chicken allow participants in a state organized conservation plan or other voluntary plans, to kill lesser prairie chickens and destroy their habitat.")

designation. Notwithstanding its support of voluntary conservation embodied in programs such as CCAAs, the Services place a burden of perfection on agreement participants that may never be met both in terms of the construct of the habitat protection measures and its performance.

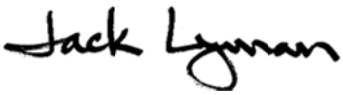
With this proposed policy, the opportunity for future determinations by the Services that the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat" under Section 4(b)(2) will render the statutory language defunct.

Sincerely,

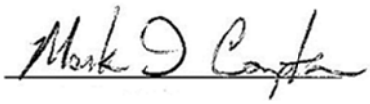
Adam Eckman
Associate General Counsel
National Mining Association

Laura Skaer
Executive Director
American Exploration & Mining Association

Mark G. Ellis
President
Industrial Minerals Association - North America



Jack Lyman
Executive Vice President
Idaho Mining Association



Mark D. Compton
President
Utah Mining Association