

June 3, 2003

Via Facsimile and Electronic Mail

Mr. David Hankla
Field Supervisor
Jacksonville Field Office
U.S. Fish and Wildlife Service
Attn: Proposed Manatee Refuges
6620 Southpoint Drive, South
Suite 310
Jacksonville, FL 32216

Re: Establishment of Three Additional Manatee Protection Areas in Florida (68 Fed. Reg. 16,602, April 4, 2003).

Dear Mr. Hankla:

We are writing to comment on the U.S. Fish and Wildlife Service's ("the Service") Notice of Proposed Rulemaking, *Establishment of Three Additional Manatee Protection Areas in Florida*. The proposed rule would impose restrictions on watercraft travel and recreation through greatly reduced speeds in areas on the Caloosahatchee River, St. Johns River, and the Halifax/Tomoka River in order to protect manatees from collisions with boats. The Office of Advocacy's ("Advocacy") comments are limited to the Service's compliance with the Regulatory Flexibility Act ("RFA").

Advocacy believes the Service has incorrectly certified the proposed rule under the RFA as not having a significant economic impact on a substantial number of small entities. Advocacy recommends the Service publish an Initial Regulatory Flexibility Analysis ("IRFA") for public comment prior to publishing a final rule.¹

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent entity within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small

¹ Agencies may not progress to a final rule supported by a Final Regulatory Flexibility Analysis ("FRFA") directly from a proposed rule which has been certified. See *Southern Offshore Fishing Ass'n. v. Daley*, 995 F. Supp. 1411, 1436-37 (M.D. Fla. 1998) (ruling against National Marine Fisheries Service due to improper publication of a final rule with a FRFA following a certified proposed rule; "NMFS could not possibly have complied with § 604 [of the RFA] by summarizing and considering comments on an IRFA that NMFS never prepared.")

Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), gives small entities a voice in the rulemaking process. The RFA requires Federal agencies, such as the Service, to consider alternatives to avoid overly burdensome regulation of small entities.² Advocacy is also required by Section 612 of the RFA to monitor agency compliance with the RFA.³

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁴ Executive Order 13272 authorizes Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs of the Office of Management and Budget.⁵ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. The agency shall include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁶

I. Certification under the Regulatory Flexibility Act.

The RFA requires regulatory agencies to estimate the impacts of proposed rules on small entities. For each proposed rule, an agency must complete an IRFA,⁷ unless the head of the agency can certify that the rule would not have “a significant economic impact on a substantial number of small entities,” and provide the factual basis for the decision. The agency head must publish the certification and the factual basis for the certification in the *Federal Register*.⁸

In this rulemaking, the Service certified that the proposed rule would not have a significant economic impact on a substantial number of small entities.⁹ The Service determined that the proposed rule would burden marine recreation firms, fishing firms, and marine services firms in five Florida counties where speed restrictions would be implemented.¹⁰ However, the Service did not make an estimate of the actual burden anticipated due to the rule’s “no wake” and speed restrictions in marine recreation areas. Instead, the Service divided the total sales figures for the affected industries in the affected counties into the total revenues for *all* industries in the affected counties. The Service then concluded that the revenues of the affected industries did not constitute a “significant” percentage of the total revenues for all industries for the affected counties and used this determination as the statutorily required factual basis for RFA certification. This type of an analysis does not comply with the RFA.

² Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601-612).

³ 5 U.S.C. § 612.

⁴ Exec. Order. No. 13,272 § 1, 67 Fed. Reg. 53,461 (2002) (“E.O. 13272”).

⁵ E.O. 13272, at § 2(c), 67 Fed. Reg. at 53,461.

⁶ E.O. 13272, at § 3(c), 67 Fed. Reg. at 53,461.

⁷ 5 U.S.C. § 603 (“Initial regulatory flexibility analysis”).

⁸ 5 U.S.C. § 605(b).

⁹ 68 Fed. Reg. 16602, at 16617 (2003).

¹⁰ 68 Fed. Reg. at 16617-18; see also, Draft Environmental Assessment, at II(C)(4) (April 4, 2003).

The RFA requires agencies to measure the significance of their rulemaking to the affected entities.¹¹ The Service measured the significance of the regulatory burden on *unaffected* entities by including entities not affected by the proposed rule (e.g., movie houses, barbershops, manufacturers, etc.). Such an approach does not comply with the RFA, because it does not demonstrate a factual basis for the Service's determination that the affected small entities will not face significant impacts.¹² Advocacy believes that the Service must revise its analysis to focus exclusively on entities affected by the rule.¹³

II. Small entity economic impacts.

Advocacy has solicited input from affected small entities. The results of this preliminary outreach indicate to Advocacy that there are a substantial number of small entities that will face significant economic impacts from the rule.

The affected small entities include charter fishing companies, a ferry company, a boat builder, harbor facilities, restaurants, marine construction firms, and realtors. Charter fishing operations and the ferry operator have indicated that the proposed rules would add significant travel time to operations which would lead to lower demand for this recreational activity. Boat builders and marine construction firms have stated that slow speed zones will greatly reduce demand for recreational boating and drain revenues. Restaurant owners have informed Advocacy that with increased travel times from residential and recreational areas to the locations of their restaurants, demand would drop-off considerably. Finally, realtors have informed Advocacy that areas designated by the Service as birthing areas have experienced significant, measurable reductions in property value. Advocacy believes the RFA requires the Service to adequately address the concerns raised by these small entities in an IRFA and consider significant regulatory alternatives to minimize regulatory burdens imposed on small entities.

Consistent with Section 609 of the RFA, Advocacy recommends that the Service conduct outreach to affected small entities to obtain information on the potential impacts of the proposed rule and to solicit input on alternative regulatory approaches which would minimize small entity burdens.¹⁴ Advocacy would like to offer its assistance in connecting the Service with affected small entities.

¹¹ See, e.g., *North Carolina Fisheries Ass'n. v. Daley*, 27 F. Supp. 2d 650, 659-661 (E.D. Va. 1998) (finding agency certification illegal and remanding rule because agency improperly considered entities not affected by rule in determining whether action was "significant").

¹² See *North Carolina Fisheries Ass'n. v. Daley*, 27 F. Supp. 2d at 660-661. (finding National Marine Fisheries Service' RFA certification amounted to "willful blindness" because agency expanded universe of regulated entities to include much larger set of flounder fishing permit holders, even though most flounder permit holders would not be affected by rules since they did not actively fish flounder).

¹³ In fact, Advocacy has previously commented on this major analytical problem. See Letter from Chief Counsel Thomas M. Sullivan to Secretary Gale Norton (Jan. 27, 2003) (written comments on Service rule requesting Interior adjust economic analysis to correct the same methodological flaw arising in the current manatee speed zone rule) (attached, also available at http://www.sba.gov/advo/laws/comments/doi03_0127.html).

¹⁴ Regulatory agencies are also encouraged to conduct meaningful public outreach *prior* to issuance of notices of proposed rulemakings under Executive Order 12,866. See E.O. 12,866, at § 6(a). While the Service has conducted some public outreach since the publication of the proposed rule, the results of this outreach are not reflected in the NPRM published in the *Federal Register*, and as a result, the published proposed rule does not provide meaningful opportunity for public comment on actual small entity impacts.

III. Conclusion

Advocacy recommends that the Service take steps to bring this rulemaking into compliance with the RFA by publishing an IRFA in the *Federal Register* for comment. In preparing an IRFA, the Service may wish to consult Advocacy's RFA compliance guide, found online at <http://www.sba.gov/advo/laws/rfaguide.pdf>. My office stands ready to assist the Service in these efforts by connecting the Service with affected small businesses and helping the Service conduct an economic analysis compliant with the RFA. The Service's IRFA should reflect comments provided to date by affected small entities and information acquired through outreach on the rule's economic impacts and significant regulatory alternatives. By publishing an IRFA, the Service will provide small entities with the meaningful opportunity to participate in the rulemaking as intended by Congress and reiterated by President Bush's Executive Order 13272.

Advocacy appreciates the opportunity to comment on the Service's proposed rule on speed restrictions in Florida. Thank you for your consideration and please do not hesitate to contact Michael See at (202) 205-6533 or Michael.See@sba.gov if you need clarification of these comments.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Michael R. See
Assistant Chief Counsel for Advocacy

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs
The Honorable Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks, U.S.
Department of the Interior