



OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

June 27, 2003

Via Facsimile and Electronic Mail

Mr. Steven Spangle
Field Supervisor
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Re: Designation of Critical Habitat for the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl (*Glaucidium brasilianum cactorum*) (67 Fed. Reg. 71,032, November 27, 2002).

Dear Mr. Spangle:

We are writing to comment on the U.S. Fish and Wildlife Service's (the Service) Notice of Proposed Rulemaking, *Designation of Critical Habitat for the Arizona Distinct Population Segment of the Cactus Ferruginous Pygmy-owl*. The proposed rule would impose conditions on construction and other activities with Federal nexus across 1.2 million acres of land in the state of Arizona by designating this land as "critical habitat" for the pygmy owl.

The Office of Advocacy (Advocacy) believes the Service's proposed rule is not in compliance with the Regulatory Flexibility Act (RFA). Advocacy believes the Service should not have certified under section 605(b) of the RFA because the rule will significantly impact a substantial number of small entities in a number of industries. Advocacy also believes the Service has not complied with additional RFA requirements and Executive Order 12866 because the Service did not establish concrete goals for the pygmy owl in the proposed rule and has provided no information to the public which would allow meaningful comment on less burdensome regulatory alternatives which could achieve the same biological benefits. Finally, Advocacy urges the Service to cease efforts to enforce critical habitat restrictions before completion of the critical habitat rulemaking.

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 office within the U.S. 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 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.¹ Advocacy is also required by Section 612 of the RFA to monitor agency compliance with the RFA.²

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.³ Executive Order 13272 instructs 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.⁴ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must 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.⁵

I. Small Entity Outreach

The RFA requires Federal agencies engaged in rulemaking to conduct outreach to affected small entities.⁶ Advocacy encourages Federal agencies to conduct meaningful outreach to affected small entities to determine whether a proposed rule can be properly certified.⁷ Advocacy believes that the Service has not conducted necessary outreach to small entities, and as a result, the Service lacked adequate information on which to form a factual basis to support certification of the proposed rule.⁸

II. Certification Under the Regulatory Flexibility Act

The RFA requires regulatory agencies to estimate the impacts of proposed rules on small entities. Agencies must complete an Initial Regulatory Flexibility Analysis (IRFA) for proposed rules⁹ unless the head of the agency can certify that the rule would not have “a

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601-612).

² 5 U.S.C. § 612.

³ Exec. Order No. 13,272 § 1, 67 *Fed. Reg.* 53,461 (Aug. 13, 2002) (“E.O. 13272”).

⁴ E.O. 13272, at § 2(c), 67 *Fed. Reg.* at 53,461.

⁵ *Id.* at § 3(c), 67 *Fed. Reg.* at 53,461.

⁶ 5 U.S.C. § 609(a). Executive Order 12866 also requires agencies to give affected entities an opportunity to participate in the rulemaking process prior to publication of a proposed rule. Exec. Order No. 12,866, at § 6(a), 58 *Fed. Reg.* 51,735 (Sep. 30, 1993).

⁷ Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, at 8-9 (May 2003) (available on the Internet at <http://www.sba.gov/advo/laws/rfaguide.pdf>) (hereinafter referred to as the “RFA Guide”).

⁸ The Service must publish an Initial Regulatory Flexibility Analysis (IRFA) for any proposed rule which cannot be certified. 5 U.S.C. § 603. Courts have held that an agency may not progress to a final rule supported by a Final Regulatory Flexibility Analysis 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).

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

significant economic impact on a substantial number of small entities,” and publishes the factual basis for the decision to certify in the *Federal Register*.¹⁰

The economic analysis for the proposed rule estimates that the rule would affect a small number of small entities. The Service cites this analysis as the factual basis for its certification under the RFA. However, Advocacy believes that the economic analysis underestimates the economic impact of the proposed rule and overlooks potentially affected small entities. Advocacy believes that the Service is required by the RFA to publish an IRFA for public comment prior to publishing a final rule.¹¹

A. *Residential development and construction*

Advocacy believes the economic analysis conducted by the Service, which led to the decision to certify under the RFA, is insufficient to serve as the factual basis for certification. Although the Service relies on an estimate of 1.3-3.3 consultations required every year by home builders, Advocacy contacted representatives of small home builders and reviewed Pima County building permit data to arrive at an initial estimate that a minimum of seven and a maximum of 47 consultations could occur in *one portion* of the critical habitat designation alone, with more occurring elsewhere. Therefore, the Service may not be justified in relying upon its initial estimate of a small number of home builder consultations as the factual basis for certification.

To calculate the rule’s impact on home builders, the Service began by employing the Pima Association of Governments’ forecast for housing trends to estimate an average of 500 homes would be built each year through 2030.¹² The Service then *assumed* that project sizes for each home building project would be 150-375 units.¹³ Next, the Service divided its project size range of 150-375 units into its average number of units constructed within the critical habitat to arrive at a final estimate of 1.3-3.3 home building projects per year, all of which the Service estimated would incur consultation costs.¹⁴

Advocacy’s contacts with small homebuilder representatives and review of building permit data for critical habitat sections in Northwest Tucson casts doubt on the Service’s estimate of 1.3 to 3.3 annual consultations. In 2002, there were 160 building permits issued for single-family homes, 120 of which were in seven subdivisions. The largest subdivision consisted of 73 homes, and no subdivision project in the proposed critical

¹⁰ 5 U.S.C. § 605(b).

¹¹ Courts have held that an agency may not progress to a final rule supported by a 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) (granting summary judgment against National Marine Fisheries Service due to improper publication of a final rule with a FRFA following a proposed rule with a certification, stating “NMFS could not possibly have complied with § 604 [of the RFA] by summarizing and considering comments on an IRFA that NMFS never prepared.”)

¹² *See* Draft Economic Analysis, at 3-4.

¹³ *See id.* at 3-5. The Service offered no support for this assumption, and Advocacy believes that the Service has made no attempts to confirm the assumption with home builders or permitting authorities.

¹⁴ *See id.* at 3-6.

habitat area for Northwest Tucson approached the low-end assumption made by the Service of 150 homes. In fact, the remaining 40 single-family home construction permits were all for single home projects.¹⁵

All seven subdivisions would likely have required a consultation and each of the 40 single-unit projects may have also required separate informal or formal consultations, depending on lot size and Federal permitting requirements. Thus, home construction projects in Northwest Tucson alone may have required a minimum of seven to perhaps as many as 47 consultations, a number which could increase significantly when other areas within the proposed critical habitat are included in consideration. It is Advocacy's belief that, just one year's consultation rates could easily surpass the Service's estimate of 13 to 33 total consultations by 2013.

Because the annual rate of consultations could be so high, carrying with it increased costs, Advocacy believes that a substantial number of small entities will be affected by the proposed rule. The SBA size standard for home builders is \$28.5 million per year in revenues.¹⁶ Based on U.S. Census Bureau County Business Patterns data, virtually all of the 376 single-family home builders in Pima County, Arizona, where the Northwest Tucson area lies, are small businesses.¹⁷ Thus, it is likely that all of the builders of the projects discussed above in the Northwest Tucson proposed critical habitat zone would qualify as small businesses if their main source of revenue were these projects.

Advocacy advises Federal agencies that "it is very important that agencies use the broadest category, 'more than just a few,' when initially reviewing a regulation before making the decision to certify or do an initial regulatory flexibility analysis."¹⁸ Since a high number of small builders account for such a significant percentage of the industry are likely to feel the economic impacts of the proposed rule, Advocacy believes that the Service does not possess a factual basis for certification of the proposed rule under the RFA. Advocacy urges the Service to complete an IRFA to accompany the proposal as required by the RFA.¹⁹

B. *Commercial development and construction.*

Advocacy believes that the Service's factual basis for certification also does not properly consider the rule's economic impacts on small commercial construction companies. The Service does not account for the costs of consulting and project modification to

¹⁵ See Pima County Department of Transportation, Technical Services, GIS Library (county statistics on building permits for fiscal 2002, file name "perm_mrg") (available online at <http://www.dot.co.pima.az.us/gis/data/contents/>, last accessed on June 24, 2003) ("Pima County Data"). In response to the proposed rule, Dr. Andrew Holliday from the National Association of Home Builders overlaid the proposed critical habitat designation on publicly available permitting data for one section of Northwest Tucson to restrict outlying properties and provided the results to Advocacy.

¹⁶ *Small Business Size Standards*, 67 Fed. Reg. 56944 (Sep. 6, 2002)

¹⁷ County Business Patterns (1997 NAICS code 23321).

¹⁸ RFA Guide, at 19-20 (outlining legislative intent not to use an "overwhelming" percentage as the basis for "substantial", found at 126 Cong. Rec. S10,941 and 10,942, Aug. 8, 1980).

¹⁹ In completing an IRFA, Advocacy reiterates its appeal to the Service to conduct any necessary additional outreach to small entities and their representatives before publishing proposed rules in the *Federal Register*.

commercial development and construction in its proposed rule or in the economic analysis accompanying the proposed rule. Commercial development and construction activities are likely to occur in conjunction with residential development throughout the foreseeable future. In fiscal 2002, there were five new commercial construction permits inside the critical habitat designation in Northwest Tucson which Advocacy believes could have been required to consult with the Service.²⁰ Advocacy urges the Service to include consideration of commercial construction in an IRFA.

C. *Mining.*

The Service states in its economic analysis that the rule would cause only 0.6 mining companies of any size to incur consultation and mitigation costs annually, and 88% of these would be small entities.²¹ Advocacy has conducted preliminary outreach which demonstrates that a substantially higher number of small business mining and mineral development companies may face significant economic impacts from the rule. One company contacted by Advocacy possesses copper mining claims in Unit 4 and will immediately face consultation and mitigation costs which would foreclose any profitable recovery of minerals, resulting in more than \$1 million in losses.²² Another small mining claim development company informed Advocacy that should critical habitat be declared on the eastern boundary of Ironwood National Monument, the company would face immediate unprofitability on this claim from anticipated consultation delays and costs and would be forced to suspend operations on it.²³ These preliminary responses from small businesses indicate that the Service has failed to account for a larger universe of affected small entities as a direct result of a failure to conduct meaningful outreach.²⁴ Advocacy encourages the Service to review small mining company comments and conduct any necessary additional outreach to ensure economic impacts are accurately analyzed in an IRFA for the proposed rule.

III. Efforts taken to minimize small business impacts

Advocacy believes that the RFA and Executive Order 12866 require the Service to set biological benefit goals for the proposed rule and enable the public to determine whether alternative designations of critical habitat would yield the same biological benefits while minimizing costs. Also, section 4(b)(2) of the Endangered Species Act (ESA) authorizes the Service “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

²⁰ Pima County Data (file name “perm_mrg”).

²¹ 67 Fed. Reg. at 71049.

²² Memorandum from Glynn Burkhardt, Administrator, Cobre Valley Mineral Recovery, to U.S. Small Business Administration (June 19, 2003) (attached).

²³ Personal communication with Jim Briscoe, President and CEO of JABA (June 20, 2003) (located vein of copper in Silver Bell mining district within Unit 4).

²⁴ The economic analysis provided as support for the certification cites to “personal communication[s] with Biologist, Tucson Ecological Services Field Office” as the indirect source for the Service’s assumption that the proposed rule would require only six consultations over the next ten years. *Draft economic analysis*, at 5-24, 5-25.

habitat.”²⁵ The Service has not provided any discussion of alternative regulatory approaches or their relative biological benefits or economic costs to the public. Advocacy recommends that the Service include this discussion in the supplemental publication of notice of availability for an IRFA discussed above.

IV. Imposing Critical Habitat Without Rulemaking

Advocacy believes that the Service is also in violation of the RFA because it is proceeding to enforce critical habitat strictures found within the proposed rule through the use of a memorandum from the Service’s field office when the proposed critical habitat rule has not yet completed notice and comment rulemaking as required by the Administrative Procedures Act (APA).²⁶ Advocacy advises the Service that the RFA’s requirements are triggered whenever an agency is required by section 553 of the APA to engage in notice and comment rulemaking.

Small business representatives have informed Advocacy that the Service has adopted measures during the comment period for the proposed critical habitat rule which introduce critical habitat mitigation on development projects across most of Southern Arizona. Advocacy is concerned that the Service is proceeding without the benefit of informed comments, specifically those from small business interests.

²⁵ Endangered Species Act of 1973, § 4, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. § 1531 et seq.).

²⁶ Letter from Steven Spangle, Field Supervisor, U.S. Fish and Wildlife Service, to Dr. Fari Tabatabai, Acting Chief, Regulatory Branch, Los Angeles District of the U.S. Army Corps of Engineers (March 7, 2003) (available on the Internet at <http://arizonaes.fws.gov/Documents/DocumentsBySpecies/CactusFerruginousPygmyOwl/Concurrence.pdf>) (attached).

V. Conclusion.

In conclusion, Advocacy urges the Service to: (1) conduct any necessary additional outreach after the close of the comment period for the proposed rule to determine the extent of the rule's impacts on small entities, (2) prepare and publish an IRFA examining regulatory alternatives in the *Federal Register* for public comment, (3) clearly state the biological benefits the Service hopes to achieve through the establishment of critical habitat for the pygmy owl, and (4) cease efforts to impose consultation and mitigation requirements prior to full compliance with the APA, RFA, and Executive Orders 12866 and 13272.

Advocacy appreciates the opportunity to comment on the Service's proposed designation of critical habitat for the cactus ferruginous pygmy owl in Arizona. Thank you for your consideration and please do not hesitate to contact Michael See at (202) 619-0312 or Michael.See@sba.gov.

Sincerely,

/s
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Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and the Budget
Steven A. Williams, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior