



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

November 18, 2004

Via Facsimile and Electronic Mail

The Honorable Craig Manson
Assistant Secretary for Fish, Wildlife, and Parks
U.S. Department of the Interior
1849 C Street, N.W.
Room 3156
Washington, DC 20240

Re: Notice of Availability of the Draft Economic Analysis on the Proposed Critical Habitat for the Riverside Fairy Shrimp (69 Fed. Reg. 61,461, October 19, 2004).

Dear Assistant Secretary Manson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits this comment on the U.S. Fish and Wildlife Service's (FWS) *Notice of Availability of the Economic Analysis on the Proposed Critical Habitat for the Riverside Fairy Shrimp*.¹ Advocacy believes that the FWS must provide the public with an opportunity for public comment on the agency's determinations of the economic effects of proposed critical habitat designations. The above-referenced notice allows for less than the sixty-day comment period that FWS' own regulations require for critical habitat designations. Therefore, Advocacy recommends that FWS reopen the comment period on this notice of economic analysis for an additional thirty days.

Congress established Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government.² Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Further, Advocacy has a statutory duty to monitor and report to Congress on FWS' compliance with the Regulatory Flexibility Act (RFA).³

On August 14, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new

¹ *Notice of Availability of the Economic Analysis on the Proposed Critical Habitat for the Riverside Fairy Shrimp*, 69 Fed. Reg. 61461 (Oct. 19, 2004).

² Pub. L. No. 94-305, 90 Stat. 663, §§ 201 et seq. (codified at 15 U.S.C. §§ 634a-g).

³ 5 U.S.C. § 612.

rules and regulations.⁴ This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.⁵ It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

Section 603 of the RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities in an initial regulatory flexibility analysis (IRFA). The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.⁶ Agency heads may avoid completing an IRFA only when they can certify that the rule would not have a significant economic impact on a substantial number of small entities, and publish in the *Federal Register* a factual basis sufficient to support this determination.⁷

I. Consideration of economic impacts under the Regulatory Flexibility Act and the Endangered Species Act.

As discussed above, Advocacy is charged with monitoring agency compliance with the RFA, and the RFA requires agencies to make a threshold analysis of economic impacts of rules to small entities and propose ways to reduce that impact if the rule is not certified. Reduced consideration of the economic impacts of regulations on small businesses is not consistent with the RFA.

Advocacy has previously commented that FWS may not limit the comment period on economic impacts from the designation of critical habitat to less than sixty-days, consistent with its own regulation.⁸ The Endangered Species Act (ESA) provides that the Secretary of Interior “shall designate critical habitat, and make revisions thereto...on the basis of the best scientific data available *and after taking into consideration the economic impact*, and any other relevant impact” of including an area within a critical habitat

⁴ Exec. Order. No. 13,272, at § 1, 67 *Fed. Reg.* 53,461 (2002).

⁵ *Id.* at § 2(c).

⁶ 5 U.S.C. § 603.

⁷ 5 U.S.C. § 605(b).

⁸ Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to Jim Bartel, FWS Field Supervisor (Oct. 12, 2004). FWS does not here cite to its emergency rulemaking authority found in the ESA as supporting a delayed comment period. Further, that rulemaking authority does not authorize FWS to waive or shorten the comment period for critical habitat designations, merely delay such comments by up to 240 days. 16 U.S.C. § 1533(b)(7).

designation.⁹ Advocacy notes the importance of the Secretary's consideration of economic impacts of inclusion within critical habitat, because section 4(b)(2) of the ESA both empowers the Secretary to designate habitat and to exempt specific areas from critical habitat based on the economic impacts the Secretary is required to consider in making a decision.¹⁰

FWS' regulations require a sixty-day comment period for proposed critical habitat designations.¹¹ Advocacy believes the clear language of section 4(b)(2) of the ESA authorizes the FWS to designate critical habitat only after weighing the benefits of including particular areas within the designation against the economic costs of including those areas. The ESA does not authorize the FWS to exclude either the scientific benefits or the economic costs of including areas within critical habitat from its considerations.¹² Further, the RFA requires the agency to consider the economic impacts of its rules to small entities. By soliciting comments on the economic impacts of a rule separately in a shorter comment period after the comment period on the biological benefits of the rule, FWS does not properly balance the economic impacts of its rulemaking in making its final policy determinations, as contemplated by the ESA and the RFA.

Advocacy acknowledges that FWS has limited its proposed designation to reduce its economic burden. However, this rule still has the potential to inflict harm on small businesses. The proposed critical habitat covers more than 5,000 acres of land.¹³ FWS describes much of this land as developable, and estimates that the economic impact of the critical habitat designation as proposed at more than \$40 million.¹⁴ Also, FWS has identified another 12,535 acres of suitable habitat that was not included in the proposed critical habitat designation, but which FWS could ultimately decide to include in its final designation. This additional land could raise the total cost of the rule to \$358 million.¹⁵

⁹ 16 U.S.C. § 1533(b)(2) (emphasis added).

¹⁰ 16 U.S.C. § 1533(b)(2) (“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...”).

¹¹ 50 C.F.R. 424.16(c)(2).

¹² The RFA also requires FWS to consider the impacts of proposed designations of critical habitat on small businesses. 5 U.S.C. §§ 603 (initial regulatory flexibility analysis), 605 (avoidance of duplicative or unnecessary analyses).

¹³ *Proposed Designation of Critical Habitat for the Riverside Fairy Shrimp (Streptocephalus woottoni)*, 69 *Fed. Reg.* 23,024 (April 27, 2004).

¹⁴ FWS, *Economic Analysis of Critical Habitat Designation for the Riverside Fairy Shrimp*, at ES-4 (Sep. 15, 2004).

¹⁵ *Id.*

II. Conclusion.

Since FWS has provided less time for comments on the economic impacts of its proposed rule and the policy implications of those economic impacts under the ESA, Advocacy believes that the proposed rule does not satisfy the agency's duties under the RFA and its own regulations to provide sixty days' notice and opportunity to comment on proposed designations of critical habitat. Therefore, Advocacy recommends that FWS reopen the comment period for comments on the economic analysis of the Riverside fairy shrimp referenced in the notice of availability for an additional thirty days on the close of the original comment period to ensure an equal amount of time is provided for comment. Advocacy further recommends that FWS consider economic impacts of its proposed rules concurrently with biological benefits and use this information in its determinations.

Thank you for your consideration and please do not hesitate to contact Michael See with any further questions at (202) 619-0312 or Michael.See@sba.gov.

Sincerely,

/s

Thomas M. Sullivan
Chief Counsel for Advocacy

/s

Michael R. See
Assistant Chief Counsel

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs
Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service