



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

July 14, 2005

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: Reopening the Comment Period on Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher (70 Fed. Reg. 39,227, July 7, 2005).

Dear Assistant Secretary Manson:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) *Reopening of the Comment Period on Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher*.¹ Advocacy believes that FWS has not yet addressed the legal concerns that Advocacy raised in response to the initial proposal to designate critical habitat for the Southwestern Willow Flycatcher.² Advocacy strongly recommends that FWS withdraw the certification of this rule and publish an initial regulatory flexibility analysis for public comment.

Congress established Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government.³ 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).⁴

¹ *Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher*, 69 Fed. Reg. 60706 (Oct. 12, 2004) (Proposed Rule).

² Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to the Honorable Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks, U.S. Department of the Interior (March 29, 2005).

³ Pub. L. No. 94-305, 90 Stat. 663, §§ 201 et seq. (codified at 15 U.S.C. §§ 634a-g).

⁴ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, §3(a) (1980) (codified as amended at 5 U.S.C. § 612).

On August 14, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁵ 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.⁶ It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

I. FWS has not responded to legal issues Advocacy raised regarding this designation of critical habitat.

On March 29, 2005, Advocacy submitted comments to this administrative record pointing out two main legal issues raised by the proposed rule. First, Advocacy said that the Endangered Species Act, the RFA, and the agency's own regulations require FWS to provide at least 60 days notice and opportunity for comment by regulated small entities on the agency's final draft economic analysis and RFA determinations. Second, Advocacy concluded that, given existing information on the extent of likely impacts of the designation to small business farmers and ranchers in Arizona, the rule should not be certified as not having a significant economic impact on a substantial number of small entities; but rather that the agency should complete an initial regulatory flexibility analysis pursuant to the RFA.

FWS published a notice on July 7 that provides 11 days for public comment on RFA determinations and has certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. The agency notice did not reference or respond to the RFA compliance comments previously submitted by Advocacy.

A. FWS must publish its RFA determination at the time of its notices of proposed rulemaking and must provide at least 60 days of public comment for critical habitat determinations.

It has been a pattern at FWS to issue a proposed rule, delay the RFA analysis pending further study, then certify that the rule will have no significant economic impact on a substantial number of small entities when the analysis is completed. The fact that this has become a pattern is troubling because it seems that FWS is not giving the appropriate consideration to the requirements of the RFA. The agency's certification seems little more than a rubber stamp or ex post validation of a policy decision. Moreover, such improper delays in conducting the necessary RFA analysis thwart the ability of affected small entities to provide meaningful comment on the proposal's impact. In fact, Advocacy believes there are a number of small entities likely to face harm from this proposal, and they deserve an adequate opportunity to review the agency's RFA analysis.

As Advocacy commented previously in this rulemaking:

⁵ Exec. Order. No. 13272, at § 1, 67 Fed. Reg. 53,461 (2002).

⁶ *Id.* at § 2(c).

The RFA requires agencies to publish a certification or [initial regulatory flexibility analysis] at the same time as the publication of their proposed rules. 5 U.S.C. §§ 603(a), 604(a), 605(b). Should FWS find itself unable to comply with the RFA due to an emergency which would prevent the agency from timely compliance, the RFA provides for delayed compliance through specific mechanisms. 5 U.S.C. § 608 (an agency may waive or delay compliance with section 603's IRFA requirement upon the publication of a written declaration of emergency that makes timely compliance impracticable). However, FWS has not declared an emergency under the RFA. Advocacy believes that FWS is not entitled to delay its statutory obligations routinely, as such delays could deny the public an opportunity to participate in FWS rulemakings meaningfully. Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to the Honorable Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks, U.S. Department of the Interior, at 6 (March 29, 2005).

In addition to Advocacy's previous concerns regarding the delay in FWS' RFA determinations, Advocacy believes that it is wholly inadequate to provide only 11 days of comment on its RFA determinations and analysis, as opposed to the 60 days that FWS' own regulations require for all critical habitat designation rulemakings.⁷ Therefore, Advocacy recommends that FWS extend or reopen the comment period on its RFA determinations for this critical habitat to provide at least 60 days opportunity for comment from regulated small entities.

B. FWS failed to respond to comments received on certifying the rule under the RFA.

FWS certified that the rule will not have a significant economic impact on a substantial number of small entities. Such a certification must be published in the *Federal Register*, accompanied by the factual basis supporting the certification.⁸

In response to the previous comment period, small entities and their representatives informed FWS and Advocacy that the rule was likely to have significant economic impacts on a substantial number of small entities. Advocacy provided comments that explained the economic harm the rule would likely cause small business farmers in the Yuma County, Arizona area and small business cattle growers across the state.⁹ Small farmers have commented to FWS that the rule would result in increased costs. A small

⁷ 50 C.F.R. § 424.16. On April 15, FWS posted a final draft economic analysis for this rule on its website. FWS, *Final Draft Economic Analysis of Critical Habitat Designation for the Southwestern Willow Flycatcher* (April 15, 2005) (available online at http://arizonaes.fws.gov/SWWF_Econ.htm). This economic analysis did not satisfy the RFA's requirements, as the RFA requires an RFA determination to be published in the *Federal Register* for public review, which the analysis was not, and the economic analysis neither certified the rule under the RFA nor discussed alternatives to reduce small entity burdens. 5 U.S.C. §§ 603(a), 605(b). FWS' RFA determination was published on July 7, 2005, at which time the agency opened an 11-day comment period. 70 *Fed. Reg.* 39227.

⁸ 5 U.S.C. § 605(b).

⁹ Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to the Honorable Craig Manson, Assistant Secretary for Fish, Wildlife, and Parks, U.S. Department of the Interior, at 3-4.

rancher representative commented that the flycatcher critical habitat designation would likely result in grazing restrictions on private land developed for agriculture or grazing.¹⁰

FWS' factual basis for certification does not mention the comments received by the agency and does not respond to the allegations contained in those comments, specifically, that the agency has not considered: (1) significant small farm costs stemming from pesticide use, bird protection measures, and soil tillage and brush control that are likely to be incurred by small farmers along the included areas of the Lower Colorado River, and (2) significant costs to cattle growers affected by restrictions on grazing on land designated by FWS as critical habitat.

Advocacy believes that publication of a final rule similar to the rule as proposed, accompanied by a certification under the RFA, would not meet the requirements of the RFA or E.O. 13272. Courts review claims of improper certification under the arbitrary and capricious standard,¹¹ which the D.C. Circuit has held to include instances where the agency "entirely fail[s] to consider an important aspect of the problem."¹² The Alameda whipsnake critical habitat designation appears similar to this rule. In that case, the court ruled that FWS had failed to consider economic impacts to regulated entities and vacated the rule.¹³ Advocacy is concerned that in failing to consider types of costs which have been raised in the administrative record, FWS may be violating the RFA in a manner similar to the above-referenced case.

¹⁰ Letter from Dennis Parker, Attorney for Eddie Johnson and Johnson Ranch, to Steve Spangle, Field Supervisor, FWS (Dec. 14, 2004).

¹¹ See *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650, 658 (E.D. Va. 1998).

¹² *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 81 F. Supp. 2d 1141, 1156 (D. N.M. 1999).

¹³ See *Home Builders Association of Northern California v. U.S. Fish and Wildlife Service*, 268 F. Supp. 2d 1197, 1230 (E.D. Ca. 2003).

IV. Conclusion.

FWS does not appear to have provided adequate opportunity for public comment on its estimates of the rule's burden to small entities. Also, Advocacy believes that FWS improperly certified the rule as not having a significant economic impact on a substantial number of small entities. Therefore, Advocacy recommends that FWS (1) withdraw its notice certifying this rulemaking under the RFA, (2) complete an initial regulatory flexibility analysis for the proposed rule, including an analysis of regulatory alternatives such as excluding geographic areas occupied by small entities from the designation, and (3) provide a public comment period of at least 60 days for the initial regulatory flexibility analysis. 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