

July 6, 2006

**Via Facsimile and Electronic Mail**

Mr. Steve Spangle  
Field Supervisor  
Arizona Ecological Services Field Office  
2321 W. Royal Palm Road  
Suite 103  
Phoenix, AZ 85021

**Re: Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Spikedace (*Meda fulgida*) and Loach Minnow (*Tiaroga cobitis*) (71 Fed. Reg. 32,496).**

Dear Mr. Spangle:

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) proposed rule, *Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Spikedace (*Meda fulgida*) and Loach Minnow (*Tiaroga cobitis*)*.<sup>1</sup> Advocacy believes that the economic impact analysis prepared by FWS does not support its decision to certify the rule under the Regulatory Flexibility Act (RFA). Advocacy believes that FWS should complete an Initial Regulatory Flexibility Analysis (IRFA) as the evidence indicates the rule may have a significant economic impact on a substantial number of small entities. As part of the IRFA, FWS must consider less burdensome regulatory alternatives for small business.

Congress established Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the federal government.<sup>2</sup> Advocacy is an independent office within the U.S. Small Business Administration (SBA); therefore the views expressed by Advocacy do not necessarily reflect the views of the SBA or the

<sup>1</sup> *Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for the Spikedace (*Meda fulgida*) and loach minnow (*Tiaroga cobitis*)*, 71 Fed. Reg. 32496 (June 6, 2006).

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

Administration. Further, Advocacy has a statutory duty to monitor and report to Congress on FWS's compliance with the RFA.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule.

## **I. Background**

On December 20, 2005, FWS proposed to designate approximately 633 stream miles for the spikedace and loach minnow as critical habitat.<sup>6</sup> This proposed critical habitat designation (CHD) includes Federal, State, Tribal and private lands in Arizona and New Mexico. Affected areas include portions of the Gila, San Francisco, Blue, Black, Verde, and Lower San Pedro rivers and some tributaries in Apache, Graham, Greenlee, Navajo, Pinal and Yavapai counties in Arizona, and Cantron, Grant and Hidalgo counties in New Mexico.

When the original proposed rule was published in the *Federal Register* on December 20, 2005, FWS noted that it did not have sufficient economic information to provide an adequate factual basis to either certify the rule or prepare an IRFA under the RFA.<sup>7</sup> On June 6, 2006, FWS published its draft economic impact analysis of the proposed designation in the *Federal Register* and reopened the public comment period for an additional 30 days.<sup>8</sup>

## **II. The Economic Analysis Provided by FWS Indicates the Rule Will Have a Significant Economic Impact on a Substantial Number of Small Entities**

Under the RFA, when an agency proposes a rule, it must determine whether the rule will have a significant economic impact on a substantial number of small entities. Based on the findings of this threshold analysis, the agency must either certify that the rule will not have a significant impact on a substantial number of small entities or perform an IRFA that carefully accounts for the rule's impacts. The certification decision must be based on a factual basis that clearly demonstrates that there will not be a significant impact on a

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<sup>3</sup> 5 U.S.C. § 612.

<sup>4</sup> Exec. Order. No. 13272, at § 1, 67 *Fed. Reg.* 53,461 (2002).

<sup>5</sup> *Id.* at § 2(c).

<sup>6</sup> 71 *Fed. Reg.* 32498 (June 6, 2006).

<sup>7</sup> 70 *Fed. Reg.* 75569 (December 20, 2005).

<sup>8</sup> 71 *Fed. Reg.* 32496 (June 6, 2006).

substantial number of small entities. In its revised proposed rule FWS found that it had an adequate factual basis to certify the rule.

Advocacy recognizes FWS's efforts in revising the original proposed rule to include its factual basis for supporting the certification. Advocacy also acknowledges FWS for reopening the comment period to allow interested parties an opportunity to comment on, and request changes to, the proposed CHD and the draft economic analysis and commends its commitment to curing any deficiencies. Advocacy believes, however, that a more expansive view of the data on small entity impacts demonstrates that certification of this rule is inappropriate. After reviewing the agency's materials provided in support of this rulemaking, Advocacy concludes that: (1) a substantial number of small entities may be affected; and (2) the rule will likely impose significant burdens on the affected small entities.

### **A. Substantial Number of Small Entities**

The draft economic impact analysis conducted by FWS indicates that economic impacts due to implementation of the Spikedace and Loach Minnow CHD conservation activities may affect small entities engaged in water management and use, livestock grazing, recreation, and residential and related development. After review of FWS's analysis, as well as through input from the small business community, Advocacy believes that a substantial number of small entities in the farming, development and recreational industries will be affected.

FWS's draft economic impact analysis indicates that less water will be available for agriculture use in order for the listed species to have adequate water supply; as a result, farmers in the CHD areas will experience a reduction in crop production.<sup>9</sup> However, FWS's estimates that only one to five farms, out of 1,884 total in the affected counties, will be affected.<sup>10</sup> This was determined by dividing the number of impacted acres, 6,310, by the average farm sizes of 1,300 to 8,000, respectively.

However, a different view of the data shows that the average farm size may not be the best input in determining the number of affected farms. For example, Yavapai, the county with the greatest number of affected acres (4,895), has a total of 575 farms on 730,362 acres.<sup>11</sup> Dividing the number of acres by the number of farms yields an average of 1,253 acres, which falls on the low end of FWS's estimate. A deeper look into the farm size data reveals that FWS's average acreage is high due to the inclusion of the few very large (non-small business) farms. Alternatively, the median farm size in Yavapai County is 41 acres, and 516 of the 575 farms are less than 1,000 acres. Using the median farm size to determine the number of farms impacted on the 6,310 affected acres, shows that 154 farms would be affected. Because of the discrepancy between one to five farms

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<sup>9</sup> FWS, *Economic Analysis of Critical Habitat Designation for the Spikedace and Loach Minnow*, Appendix B, at B-4 (May 24, 2006) (*Draft Economic Analysis*) (available online at [http://www.fws.gov/arizonaes/Documents/SpeciesDocs/SD\\_LM/SDLM\\_Econ\\_5.24.06.pdf](http://www.fws.gov/arizonaes/Documents/SpeciesDocs/SD_LM/SDLM_Econ_5.24.06.pdf)).

<sup>10</sup> *Id.* at B-5.

<sup>11</sup> 2002 Census of Agriculture, available online at [www.nass.usda.gov](http://www.nass.usda.gov).

in FWS's analysis and a different view that 154 farms will be affected, the determination of the number of impacted farms should be revisited to determine the number of impacted small entities.

Small ranching operations will also be affected by the CHD. According to the FWS's draft economic analysis, 76 ranching operations will be required to implement species conservation requirements for grazing activities, and 72 ranching operations may experience a reduction in revenues.<sup>12</sup> Advocacy believes that these numbers demonstrate a substantial number of impacted small entities.

FWS's analysis also shows that real estate development in the CHD will be economically impacted as a result of conservation activities. However, FWS's analysis would be clearer if it noted how many developers will be affected. By determining the number of affected developers, FWS will be better able to make an unambiguous determination as to whether there is a substantial number affected in the CHD. Advocacy believes that the impacts to each developer are likely to be significant and that FWS's analysis would be enhanced if further research is conducted on this industry.

The FWS economic impact analysis also finds that the proposed CHD will not have an effect on a substantial number of small businesses that may be affected from the loss of recreational activities because angler trips are likely to be redistributed to other streams and are not lost.<sup>13</sup> However, FWS also notes that "[t]he future impact of proposed CHD on the stocking regimes in the area is unknown as is the reduction in fishing activity that would occur if stocking is curtailed."<sup>14</sup> FWS's analysis would be stronger if it provided data on the impact of the CHD on small entities that thrive on the area's recreational activities. To collect such information, Advocacy suggests that FWS seek public input on the reduction in fishing activity if stocking is curtailed.

## **B. Significant Economic Impact**

Advocacy believes that draft economic impact analysis provided by FWS for this CHD does not support the conclusion that the rule's economic impacts will not be significant to regulated small entities.

FWS's draft economic impact analysis finds that as a result of the CHD, farmers will have to use less water for agricultural purposes in order to provide an adequate water supply to the species. This will result in reductions in crop production, the retirement of certain land from agricultural production, and a decrease in land value associated with transitioning irrigated cropland to pastureland.<sup>15</sup> Losses in land value associated with the reduction of cropland could be as much as \$6,190 per acre; a total of 6,310 acres of cropland are likely to rely on surface water from the designation.<sup>16</sup> Eighty-two percent of

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<sup>12</sup> *Draft Economic Analysis*, at B-6, B-7.

<sup>13</sup> 71 *Fed. Reg.* at 32501.

<sup>14</sup> *Draft Economic Analysis*, at B-8.

<sup>15</sup> *Id.* at B-4.

<sup>16</sup> *Id.*

the farms located across the five affected counties have annual sales of less than \$100,000, and are therefore designated as small entities.<sup>17</sup>

Advocacy believes that the loss in land value alone is a significant economic impact because any farm within the impacted acreage will suffer the above per-acre losses across its total acreage, which would be especially substantial for the smallest farms.<sup>18</sup> In addition, revenue losses from decreased crop production were not considered and are likely to have a significant economic impact. The loss in land value only reflects the decreased market value of the land for sale due to the fact that certain property rights, e.g. crop production, will be proscribed by the rule. However, most farmers will not (and in all likelihood could not) sell the affected acreage, and thus, will realize decreased revenues from having to retire productive acreage from crop production. Based on the FWS assumption that all farms located in the 6,310 acre zone will be affected across all irrigated lands, that means that many of these farms could be forced to go out of business. As Advocacy showed above, the number of affected farms that may be forced out of business may be over 150.

The draft economic impact analysis also shows that approximately 76 ranching operations that hold Federal grazing allotment permits may experience an economic impact as a result of the designation.<sup>19</sup> These ranches may be required to pay as much as \$9,200 per ranch to implement species conservation requirements for the grazing activities.<sup>20</sup> The average revenue of a ranch in the proposed CHD region is \$166,700.<sup>21</sup> Thus ranchers may suffer losses as great as 5.5 percent of total revenue, which is certainly a significant impact when one considers that this is a much larger percentage of after-tax profits. Advocacy believes that because FWS chose to use the average revenues of all operations within the county, including both large and small businesses, it is likely skewed to the upper end by a few large ranches. A different perspective shows that the impact on smaller ranches will be much greater than 5.5 percent of revenue.

In addition, 72 beef cattle ranching and farming operations may lose revenues, and average revenues per ranch among the affected counties are less than \$70,000.<sup>22</sup> However, FWS did not provide data on the impacts to the beef cattle ranching operations, therefore, it is difficult to determine whether there will be a significant impact on this industry. Additional information on this category would enhance FWS's analysis.

FWS's economic analysis also addresses the impact of the proposed CHD on residential and commercial development along the Verde River segment. In this area there is a large amount of private land and significant expected population growth over the next 20 years.<sup>23</sup> Developers will experience costs from fencing, scientific studies, surveying and

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<sup>17</sup> *Id* at B-5.

<sup>18</sup> Again using the median farm in Yavapai County, 41 acres, as an example, the total land value loss for such a typical farm at \$6,190 per acre would be \$253,790. This is clearly a significant economic impact.

<sup>19</sup> *Id* at B-6..

<sup>20</sup> *Id*.

<sup>21</sup> *Id*.

<sup>22</sup> *Id* at B-7.

<sup>23</sup> *Id*.

monitoring requirements, and mitigation for habitat set-asides.<sup>24</sup> FWS estimated that costs will range from \$3.1 million to \$4.8 million per large development (\$3,900 to \$5,900 per housing unit) and that 1,646 housing units in Yavapai County could be built on 2,880 privately owned acres within the proposed designation over the next 20 years.<sup>25</sup> The majority of the mitigation costs will accrue to the developers of the affected land in the form of lost sales revenues.

Advocacy believes that there will be a significant economic impact on the residential and commercial development industry because the impacts to developers, namely consultation and mitigation costs, of CHD, have traditionally been quite significant. FWS suggests that only the eventual landowner is the bearer of land value impacts which Advocacy believes would be true if the CHD occurred after land was developed and homeowners had taken possession. However, because the land value declines and mitigation activities will occur before sale to the homeowner, Advocacy believes that it is the developers who will likely face most of the costs. Generally, all newly constructed homes will be close substitutes for one another, which argues in favor of a high elasticity of demand across competing developments. Because of this, developers will not be able to roll the land value and mitigation costs into home prices, the eventual homeowners on the affected developments will pay less for the properties because of the CHD restrictions, and developers will absorb the costs.

Recreation is another area where Advocacy believes that the analysis shows a significant economic impact. If the stocking of rivers is curtailed, fishing activity will decrease. Angling trips are valued at approximately \$8.6 million over 20 years and the vast majority of all recreational fishing trips are provided by small entities.<sup>26</sup> Small food and beverage stores, restaurants, sleeping accommodations, transportation, and sporting goods stores generate approximately \$829 million in total sales for the Yavapai and Cantrion Counties<sup>27</sup> which will be significantly impacted by the CHD.

### **III. The Rule Should Be Accompanied By An Initial Regulatory Flexibility Analysis (IRFA)**

Under the RFA, an IRFA is required when a rule will impose a significant economic impact on a substantial number of small entities.<sup>28</sup> While Advocacy commends FWS for preparing a factual analysis, further research through the preparation of an IRFA will provide more detailed information on the impact of the proposed CHD on small entities. The IRFA must describe the impact of the proposed rule on small entities and importantly, any regulatory alternatives to the proposed rule that minimize significant

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<sup>24</sup> *Id.* at B-8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at B-9.

<sup>28</sup> 5 U.S.C. § 603.

economic impacts on small entities while accomplishing the agency's objectives.<sup>29</sup> The IRFA must also be made available for public comment.

The Endangered Species Act (ESA) also requires FWS to consider the economic and other relevant impacts before making a final decision on what areas to designate as critical habitat.<sup>30</sup> The agency may revise the proposal to incorporate or address new information received during the comment period.

#### **IV. Recommended Small Business Alternatives**

The ESA allows FWS to exclude an area from critical habitat designation if it determines that the benefits of excluding the area outweigh the benefits of including the area, provided that the exclusion will not result in the extinction of the species.<sup>31</sup> Therefore, Advocacy recommends excluding areas that FWS identifies as most likely to impose significant regulatory burdens on small farm and ranch operations and home builders.

The data shows that counties such as Yavapai and Pinal have a large amount of land with a high concentration of small entities that will be directly impacted by the proposed CHD and should be considered for exclusion. If not to exclude the entire county, Advocacy suggests that FWS consider excluding the areas within the counties that have the highest concentration of small entities that are economically affected by the CHD.

Small farm and ranch operations in the proposed CHD areas will lose land value and crop production as a result of losing irrigation water to protect the species. Advocacy recommends that FWS also consider easing water irrigation restrictions in areas that contain a high concentration of small entities that depend on a sufficient irrigation system to successfully operate their farms.

The RFA requires agencies to publish with their final rules a final regulatory flexibility analysis, which includes, among other things:

[A] description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. 5 U.S.C. § 604(a)(5).

Advocacy believes that, with further consideration of the economic impact of this proposed CHD on small entities, FWS will be able to find an alternative regulatory solution that will minimize the overly burdensome economic impacts of the rule on small entities.

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<sup>29</sup> *Id.*

<sup>30</sup> 16 U.S.C. § 1533(b)(2).

<sup>31</sup> 16 U.S.C. § 1533(b)(2).

**V. Conclusion**

Advocacy believes that FWS improperly certified this proposed rule under the requirements of the RFA and that further review of the data on small entity impacts and alternative regulatory solutions is necessary. Advocacy urges FWS prepare an IRFA and to make it available for public comment before issuing the final rule. Thank you for your consideration and please do not hesitate to contact Sarah Wickham with any further questions at (202) 205-6972 or [sarah.wickham@sba.gov](mailto:sarah.wickham@sba.gov).

Sincerely,

/s \_\_\_\_\_

Thomas M. Sullivan  
Chief Counsel for Advocacy

/s \_\_\_\_\_

Sarah Wickham  
Regulatory and Legislative Counsel for Regional Affairs

cc: The Honorable Dale Hall, Director, U.S. Fish and Wildlife Service  
Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs