



August 10, 2006

Via Electronic Mail

Mr. Pete Benjamin
Field Supervisor
Raleigh Fish and Wildlife Office
P.O. Box 33726
Raleigh, North Carolina 27636-3726

Re: Endangered and Threatened Wildlife and Plants; Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover (71 Fed. Reg. 33,703).

Dear Mr. Benjamin:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule, *Endangered and Threatened Wildlife and Plants; Amended Designation of Critical Habitat for the Wintering Population of the Piping Plover*.¹ Advocacy is concerned that FWS has not complied with the Regulatory Flexibility Act (RFA) because it has not published either an Initial Regulatory Flexibility Analysis (IRFA) or certified that the rule is not expected to have a significant impact on a substantial number of small entities.²

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within 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 (SBREFA), gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives. Moreover, on August 13, 2002, President Bush signed Executive Order 13272, which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule

¹ 71 Fed. Reg. 33,703 (June 12, 2006).

² 5 U.S.C. §§ 603, 605.

submitted by Advocacy. Further, 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.

Background

On July 10, 2001, FWS designated 137 areas along the coasts of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Texas as critical habitat for the wintering piping plover. In February 2003, two North Carolina counties and a beach access group filed a lawsuit challenging FWS's designation of four units of critical habitat on the Cape Hatteras National Seashore (approximately 1,827 acres). The court vacated and remanded the designation for these units for FWS to reconsider. On June 12, 2006, FWS proposed to amend the critical habitat for the wintering population of the piping plover for these units. These units cover the same general areas as those vacated by the court but have been refined in several ways: a) they exclude areas that do not contain the primary constituent elements (PCEs); b) they exclude areas that require special management or protection; and c) they reflect mapping techniques conducted in compliance with the court order. The public comment deadline for this proposed rule closes on August 11, 2006. However, FWS states that it will not publish an IRFA or certification of the proposed rule until October 2006.

FWS Must Prepare an IRFA or Certify the Rule at the Time it Publishes a Notice of Proposed Rulemaking

The RFA requires agencies to publish an IRFA or a certification that the proposed rule will not have a significant impact on a substantial number of small entities at the same time as the publication of a proposed rule in the *Federal Register*.³ Section 608(a) of the RFA permits agencies to waive or delay completion of an IRFA if the agency makes a written declaration that an emergency exists.⁴ In its notice of proposed critical habitat designation for this rule FWS stated, “[a]t this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to 4(b)(2) of the [Endangered Species] Act and E.O. 12866.”⁵

The agency has made no finding of an emergency; therefore, failure to prepare an IRFA or provide a factual basis to certify the rule was improper. Advocacy recognizes FWS's commitment to publishing a notice of availability of the draft economic impact analysis of the proposed designation in the future and reopening the comment period. However, Advocacy cautions that by postponing this analysis there is less opportunity for FWS to collect information from public comments that arise from the publication of the regulatory flexibility analysis and to consider flexibilities for small business carefully.

³ 5 U.S.C. §§ 603(a), 605(b).

⁴ *See*, 5 U.S.C. § 608.

⁵ 71 *Fed. Reg.* 33,715 (June 12, 2006).

FWS's Deferral Harms Small Business

Advocacy is concerned with FWS's continued practice of delaying the release of RFA analyses for public comment and believes that small business is negatively affected by the FWS's failure to abide by RFA requirements.⁶

The IRFA is critical to the rulemaking process as it puts small businesses on notice and provides them with information necessary to prepare public comments. Timely IRFAs ensure that the agency remains flexible and does not solidify its regulatory approaches prior to receiving small business input and alternatives. FWS's delay in complying with the express terms of the RFA frustrates this essential purpose of the law.

Conclusion

Advocacy appreciates the opportunity to comment on this proposed rule and recommends that FWS comply with the RFA by either preparing and publishing an IRFA or certifying that the rule will not have a significant impact on a substantial number of small entities at the same time as it publishes a notice of proposed rule. Advocacy believes that delay in complying with its statutory obligations denies the public an opportunity to participate meaningfully in FWS rulemakings.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

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

⁶ Advocacy notes that FWS published another notice of proposed critical habitat designation for seven species of freshwater mussels in the *Federal Register* on June 6, 2006, without publishing an IRFA or certification. The comment deadline for this rule was August 7, 2006, and FWS stated that it did not expect to release the regulatory flexibility analysis until November. See, 71 *Fed. Reg.* 32,746 (June 6, 2006).