



August 3, 2007

Via Electronic Mail

David M. Verhey
Acting Assistant Secretary for Fish
and Wildlife and Parks
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Comments to Proposed Critical Habitat Designation for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages (72 Fed. Reg. 34,215)

Dear Mr. Verhey:

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, *Revised Critical Habitat Designation Proposed for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages and Release of Economic Analysis*.¹

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 SBA; therefore 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 the President and Congress on FWS’s compliance with the Regulatory Flexibility Act (RFA).³

¹ *Revised Critical Habitat Designation Proposed for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages*, 72 Fed. Reg. 34,215 (June 21, 2007).

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 (a).

On August 13, 2002, President George W. Bush signed Executive Order 13272,⁴ 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 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.

Advocacy is concerned that FWS's Initial Regulatory Flexibility Analysis ("IRFA") for this critical habitat designation ("CHD") does not provide sufficient analysis to satisfy the requirements of the RFA. Advocacy recommends that FWS issue a supplemental IRFA with more thorough analysis of the economic impacts of this CHD on small entities and significant alternatives. To assist FWS in its analysis, Advocacy has solicited input from small entities, reviewed their recommendations and prepared these comments outlining the impacts and available alternatives.

I. Background

On June 6, 2006, FWS proposed to designate 1,158 river miles as critical habitat for seven species of mussels.⁵ Subsequently, FWS revised the proposed designation, by increasing the CHD to 1,185 river miles.⁶ The proposed rule divides the CHD into eleven units, spanning 45 counties in Georgia, Alabama and Florida.⁷ The rivers primarily affected are the Flint and the Appalachicola.⁸ Other areas include Lake Blackshear, Lake Lanier, West Point Lake, Spring Creek, Jim Woodruff Dam and Walter F. George Reservoir.⁹

On June 21, 2007, FWS published the revised proposed CHD as well as a notice of availability of the draft economic impact analysis for the CHD in the Federal Register, and reopened the public comment period.¹⁰ The IRFA was included in the appendix of the economic analysis.¹¹

⁴ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53,461.

⁵ *Endangered and Threatened Wildlife and Plants; Critical Habitat for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages*, 71 *Fed. Reg.* 32,746 (June 6, 2006).

⁶ 72 *Fed. Reg.* at 34,215.

⁷ *Id.*

⁸ *Id.* at 34,217.

⁹ *Id.* at 34,216-34,218.

¹⁰ *Id.* at 34,215.

¹¹ FWS, *Draft Economic Analysis of Critical Habitat Designation for the Fat Threeridge, Shinyrayed Pocketbook, Gulf Moccasinshell, Ochlockonee Moccasinshell, Oval Pigtoe, Chiploa Slabshell, and Purple Bankclimber* (June 9, 2007) (*Draft Economic Analysis*).

II. Advocacy Recommends that FWS's IRFA Consider Further Economic Impacts on Small Business

The RFA requires agencies to consider the economic impact and prepare an IRFA, if necessary, to assess the necessary impact of a proposed action on small entities.

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 which 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. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable. The RFA requires the agency to publish the IRFA or a summary of the IRFA in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule.¹²

FWS has identified the maintenance of water levels and constant water flow as important elements for the conservation of the seven mussel species in this critical habitat designation (CHD).¹³ Under this CHD, FWS will reduce the availability of water to a number of industries such as agriculture, recreation and hydro-electric power facilities. FWS' IRFA fails to provide sufficient data and estimates for the compliance costs to these small entities in these industries. Advocacy recommends that FWS provide a supplemental IRFA to address these comments and provide revised estimates of the impact on small entities.

A. Irrigation

FWS's economic analysis understates the impact of this rule on farmers, who will be required to reduce their water intake and utilize alternative irrigation methods. Farmers in Units 5 and 7 (in the Upper and Lower Flint Rivers of Georgia) would have to convert 1,470 to 1,640 acres of irrigated cropland to dryland farming, or grow crops without supplemental water at a reduced yield.¹⁴

FWS's economic analysis and IRFA do not specify the number of small entities that would be affected by this CHD, but rather provide two widely divergent and equally costly scenarios. In the first scenario, four farms in this region will bear all of the impact or 55 to 91 percent of their revenue. In this scenario, these farms will go out of business.

¹² 5 U.S.C § 603.

¹³ *Draft Economic Analysis*, at ES-1.

¹⁴ *Id.*, at B-7.

In the second scenario, all of the 1,096 farmers will bear the economic impacts and will incur a reduction of five percent of their revenue.¹⁵ Advocacy recommends that FWS revise its IRFA and its economic analysis to accurately quantify the numbers of small businesses that will be affected and the impacts to these entities.

According to Mark H. Masters, Agricultural Economist & Director for Flint River Water Planning & Policy Center, a major discrepancy exists between the acreage that FWS says will be affected by water use restrictions and what would be necessary under the Flint River Basin Regional Development and Conservation Plan (FRBRDC Plan).¹⁶ The FWS assumes in their model that only areas with full capacity use of irrigation will be affected, resulting in 20,000 affected acres, while the FRBRDC Plan calculates that the usage restrictions would impact 90,000 acres in order to meet criteria for water flow characteristics in the rule.¹⁷

B. Recreation

The proposed rule will affect up to 5,100 regional small businesses, including boating dealers, grocery stores, sporting goods stores, hotels and other local businesses catering to users of the lake. If the impact was spread evenly across the board, each small business would bear an estimated \$2,700 reduction in revenue each year.¹⁸ Advocacy believes that FWS should not aggregate every small business in the recreation industry and average these costs, as it dilutes the estimated impacts of this critical habitat designation. Small entities in some sectors may incur greater costs.

FWS's draft economic impact analysis does not consider all the relevant variables involved in the diverse topography of the reservoirs affected by Unit 8's CHD. These reservoirs consist of Lake Lanier, West Point Lake, Walter F. George Reservoir and Jim Woodruff Dam, also referred to as the Appalachian-Chipola-Flint River Basin (ACF Basin).

FWS presents Lake Lanier as the template for West Point and W.F. George Reservoirs.¹⁹ Although Lake Lanier holds 65% of the water stored in the ACF basin, its characteristics are quite different from the other reservoirs in Unit 8. Specifically, Lake Lanier is located in the mountains and its topography has very steep slopes on the bank. Conversely, West Point Lake, has very shallow topography that forms its lake. This factor is crucial to estimating loss of revenue because removing a foot of water from Lake Lanier has much less impact on the shoreline and recreational interest level than

¹⁵ *Id.*

¹⁶ Comment letter from Mark H. Masters on behalf of Flint River Water Planning & Policy Center to the Fish and Wildlife Service 3-4 (July 10, 2007).

¹⁷ *Id.*

¹⁸ FWS, *Economic Analysis of Critical Habitat Designation for the Fat Threeridge, Shinyrayed Pocketbook, Gulf Moccasinshell, Ochlockonee Moccasinshell, Oval Pigtoe, Chipola Slabshell, and Purple Bankclimber B-2 (Economic Analysis)* (June 21, 2007) available at http://www.fws.gov/panamacity/hottopics/7mussels%20dEA%20June_2007.pdf.

¹⁹ *Id.* at 3-15 (FWS's analysis uses parameters that are based on the "implicit [assumption] that these reservoirs have similar characteristics to Lake Lanier").

removing a foot of water from West Point Lake, which will lose much more acreage and reduce more severely the number and types of boats that operate on the lake. FWS states that all RV parks businesses (59) are small entities. Each lake must be analyzed independently to produce a realistic estimate. Because of these differences, there may be many more small businesses affected in a more significant manner than stated by FWS.

Advocacy is concerned that FWS's analysis does not attribute any economic value to shoreline use. According to FWS's economic analysis, there were roughly 6.9 million visits to Lake Lanier in 1995, and the total travel expenditures were \$378 million in that year.²⁰ Given the importance of Lake Lanier to the economy, any impacts on shoreline use could carry a large cost to recreation users. FWS disregards the shoreline's value based on two assumptions. First, FWS assumes that non-boater visitation is not affected by changes in lower lake levels; second, FWS assumes that the value of boater and non-boater trips to the lake does not decline as lake levels drop. Joe Maltese, an Assistant to the City Manager for Special Projects in La Grange, GA disputes these assumptions, stating that expanded "beaches" on West Point Lake have prompted visitor complaints.²¹ FWS assumes that boaters are the only individuals who get any value from the use of the lake; however, data shows that 50% of the lake users are non-boaters who obtain use value at the shoreline.²²

The revised figures for the recreation industry and shoreline value in Unit 8 that were initially discounted should be reviewed. By analyzing the affects on Unit 8 using each lake's own unique topographical features, Advocacy believes the costs will be significantly higher than initially predicted in the economic analysis.

C. Hydro-electric power

FWS's economic analysis does not consider the potential impact of this rule on hydro-electric power and municipal and industrial water use by small entities in Unit 6, which is in the Middle Flint River. The proposed rule requires a minimum water level and water flow for the seven mussels, which will effectively deprive reservoirs of the water needed to produce the hydro-electric power.

The analysis identifies one small entity, Crisp County Power Commission, which will be affected by the rule. FWS expects the Commission to incur costs of \$5,900 per year for mussel conservation efforts. However, the Commission will also have to purchase expensive natural gas for their peak energy needs, and its ability to pass these costs through its customers may be limited. As demonstrated in the economic analysis discussion on Unit 8 hydro-electric power operations, replacement costs can be quite costly and inflate the economic impacts.²³ Hydro-electric power and other water use

²⁰ *Economic Analysis*, at 3-15

²¹ Jennifer Shrader, *Leaders Testify Against Lake Plan*, LaGrange Daily News, July 11, 2007 at A1.

²² *Economic Analysis*, at 3-15, n. 77.

²³ *Id.* at 4-5. FWS uses hydro-electric power revenues per megawatt hour for 2005 and 2006 (\$34.83 and \$40.64) and offers a projected replacement cost of \$47.85. Based on the megawatt hours used on p. 4-6 and the difference in energy costs, the replacement costs could range from \$8-15 million dollars the first year.

costs should be factored in to an economic impact analysis. These costs should be considered in a supplemental IRFA for Unit 6 and any other areas affected by the rule.

III. Recommended Small Business Alternatives

Pursuant to Section 603(c) of the RFA, Advocacy recommends that FWS consider regulatory alternatives which could reduce this rule's impact to small entities. The Endangered Species Act (ESA) also 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.²⁴ Some commentators have already suggested alternatives such as excluding Units 5, 7 and 8 given their significant economic impacts; others have suggested lowering the required critical flow level so the impact on surrounding water reservoirs and lakes will not be as severe. Advocacy believes a reassessment of the proposed rule's impact on small entities could prove helpful in identifying possible alternatives.

IV. Conclusion

Advocacy believes that, with further consideration of the economic impact on the 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. Advocacy recommends that FWS issue a supplemental IRFA with more thorough analysis of the economic impacts of this CHD and consider other alternatives that would lessen the impact on small entities, focusing on the Units which: a) have the largest concentration of impact on small businesses, and b) meet the justification for the 4(b)(2) exception under the ESA. Advocacy is pleased to submit these comments on behalf of small businesses and looks forward to working with FWS on this rule. Thank you for your consideration, and please do not hesitate to contact Janis Reyes with any further questions at (202) 619-0312 or Janis.Reyes@sba.gov.

Sincerely,

//signed//

Thomas M. Sullivan
Chief Counsel for Advocacy

//signed//

Hubbel R. Relat
Office of Advocacy Mercatus Fellow

cc: The Honorable H. Dale Hall, Director, U.S. Fish and Wildlife Service
The Honorable Susan Dudley, Administrator, Office of Information and Regulatory Affairs

²⁴ Endangered Species Act, 16 U.S.C. § 1533(4)(b)(2) (2003).