

January 27, 2003

Via Facsimile and First-Class Mail

The Honorable Gale A. Norton
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Florida Manatees; Incidental Take During Specified Activities (67 Fed. Reg. 69,078, November 14, 2002).

Dear Secretary Norton:

We are writing to comment on the U.S. Fish and Wildlife Service's ("the Service") Notice of Proposed Rulemaking, *Florida Manatees; Incidental Take During Specified Activities*. The proposed rule would impose conditions upon construction activity in a majority of Florida counties that the Service believes could indirectly result in the deaths of Florida manatees and prohibits similar construction activity in 12 other Florida counties under the Marine Mammal Protection Act ("MMPA"). The Office of Advocacy's ("Advocacy") comments are limited to the Service's compliance with the Regulatory Flexibility Act ("RFA").

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent entity within the Small Business Administration ("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 of 1996 ("SBREFA"), gives small entities a voice in the rulemaking process. The RFA requires Federal agencies, such as the Service, to consider alternatives to avoid overly burdensome regulation of small entities.¹ Advocacy is also required by Section 612 of the RFA to monitor agency compliance with the RFA.²

1 Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601-612).

2 5 U.S.C. § 612.

I. Certification under the Regulatory Flexibility Act

The RFA requires regulatory agencies to estimate the impacts of proposed rules upon small entities. For each proposed rule, an agency must complete an Initial Regulatory Flexibility Analysis (“IRFA”),³ unless the head of the agency can certify that the rule would not have “a significant economic impact upon a substantial number of small entities,” and provide the factual bases for the decision. The agency head must publish the certification and the factual bases for the certification in the *Federal Register*.⁴

Advocacy strongly recommends that the Service closely scrutinize comments from affected small entities in determining whether a factual basis exists for certification of the proposed rule under the RFA. For the reasons stated below, Advocacy believes that the Service may be required by the RFA to complete and publish an IRFA for public comment prior to publishing a final rule.⁵ If, upon reviewing small entity comments, the Service determines that certification of the final rule is appropriate, Advocacy recommends that the Service address the issues outlined below in its factual basis for certification of the final rule.

A. *The Service must provide a factual basis to support its determination that the proposed rule would not have significant impacts to small firms.*

The Service has certified that the proposed rule would not have a significant economic impact upon a substantial number of small entities. The Service stated that the proposed rule’s impacts upon small entities would not be “significant.”⁶ The Service determined that the proposed rule would burden marine recreation and construction firms in 12 Florida counties in which it would not allow watercraft access facilities construction. The Service then estimated the dollar amount of small entity burden for both marine recreation and construction and determined the significance of the burden through a measure of percentage reduction of gross sales (“percentage-of-sales test”).

Assuming that a percentage-of-sales test is appropriate for a determination of significant impact with regard to the Service’s proposed rule,⁷ Advocacy believes that the Service must revise its analysis to reflect what appear to be two significant methodological flaws. The RFA requires agencies to restrict their measurement of regulatory burden to the class

3 5 U.S.C. § 603 (“Initial regulatory flexibility analysis”).

4 5 U.S.C. § 605(b).

5 Courts have held that an agency may not progress to a final rule supported by a FRFA directly from a proposed rule which has been certified. See *Southern Offshore Fishing Ass’n. v. Daley*, 995 F. Supp. 1411, 1436-37 (M.D. Fla. 1998) (granting summary judgment against National Marine Fisheries Service due to improper publication of a final rule with a FRFA following a proposed rule with a certification, stating “NMFS could not possibly have complied with § 604 [of the RFA] by summarizing and considering comments on an IRFA that NMFS never prepared.”)

6 67 *Fed. Reg.* at 69100-101.

7 Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 2002, at 17 (“However, the economic impact does not have to seriously erase profit margins for an impact to be significant.”)

of regulated small entities as opposed to the universe of all small entities.⁸ In determining whether the proposed rule would have a significant impact, as measured by a percent reduction in gross sales, the Service has included in its analysis two classes of entities that would not be regulated under the proposed rule, namely: (1) construction firms which do not engage in watercraft access facility construction within the affected counties, and (2) firms within general statistical data that are not being regulated.

First, in determining the significance of the percentage-of-sales for construction firms in the 12 counties of the Southwest Stock of manatees, the Service indicated that it divided the economic impact for affected construction firms by total construction sales for entire state of Florida. Such an approach does not comply with the RFA, as it does not demonstrate a factual basis for the Service's determination that the regulated small entities will not face significant impacts.⁹ Accordingly, Advocacy recommends that the Service restrict its analysis to include only those marine construction firms performing regulated construction work within the 12 counties where the Service believes the proposed rule would restrict construction.¹⁰

Second, the Service also included in the percentage-of-sales test impacts on retail, food, and lodging establishments. Advocacy recommends that the Service limit its analysis to the affected industries. For example, in determining the number of sporting goods establishments which would be affected, the Service uses U.S. Census Bureau data on North American Industry Classification System (NAICS) code 451. NAICS code 451 includes "Sporting Goods, Hobby, Book, and Music Stores." The Census description of this NAICS code states:

Industries in the Sporting Goods, Hobby, Book, and Music Stores subsector are engaged in retailing and providing expertise on use of sporting equipment *or other specific leisure activities, such as needlework and musical instruments. Book stores are also included in this subsector.*¹¹

Census data for NAICS code 451 is not limited to establishments that could be subject to the proposed rule. The over-inclusive effect of this market data expands the universe of entities in the denominator of the Service's percentage-of-sales division. Advocacy recommends that the Service refine its analysis to reflect the true effects of its regulation

⁸ See, e.g., *North Carolina Fisheries Ass'n. v. Daley*, 27 F. Supp. 2d 650, 659-661 (E.D. Va. 1998) (finding agency certification illegal and remanding rule because agency improperly considered entities not affected by rule in determining whether action was "significant").

⁹ See *North Carolina Fisheries Ass'n. v. Daley*, 27 F. Supp. 2d at 660-661. (finding National Marine Fisheries Service' RFA certification amounted to "willful blindness" because agency expanded universe of regulated entities to include much larger set of flounder fishing permit holders, even though most flounder permit holders would not be affected by rules since they did not actively fish flounder).

¹⁰ However, as discussed below, the Service may determine additional impacts should be considered in analyzing the proposed rule as to the other three population stocks, in which case the Service would be required to include these stocks only to the extent that the specifically considered impacts would affect the counties. For example, Advocacy does not recommend that the Service include the Southwest Stock small entities within its determination of affected entities for the purpose of finding whether the proposed rule would have a significant impact through mitigation costs, as they would not incur such costs.

¹¹ U.S. Census Bureau, *2002 NAICS Codes and Titles* (accessed at <http://www.census.gov/epcd/naics02/def/NDEF451.HTM#N451>) (emphasis added).

by limiting the denominator of its percentage-of-sales test to only those establishments that would be affected by watercraft access facility construction restrictions. If the Service encounters difficulties with available data, Advocacy encourages the Service to explain its ultimate results and methodology to the public by publishing a supplemental notice in the *Federal Register* and soliciting comment on small entity burdens.

B. The Service’s RFA analysis must consider the proposed rule’s economic impacts on small entities in manatee population stocks other than the Southwest Stock.

Advocacy also believes that the proposed rule will have significant economic impacts upon small entities that the Service does not appear to have taken into account in its certification. For instance, the proposed rule allows the Service to grant “Letters of Approval” (“LOAs”) to firms constructing watercraft access facilities in the Northwest, Upper St. Johns River, and Atlantic population stocks,¹² authorizing construction within these three manatee population stocks.¹³ The Service limited its RFA analysis to the Southwest Stock. However, the Service’s proposed LOAs would likely impose economic effects upon small entities, namely: (1) costs associated with preparing biological analysis, (2) mitigation costs (such as project modification), and (3) ongoing monitoring costs. Advocacy therefore recommends that the Service determine whether the proposed LOA requirements would have significant economic impact upon a substantial number of small entities in the three population stocks not covered by the current analysis.

C. The Service should identify the economic benefits of the proposed rule to affected small entities.

Advocacy also recommends that the Service include potential benefits to small entities in its RFA analysis. The Service states that the purpose of the proposed rule is to allow incidental take of Florida manatees in circumstances where the action would have a negligible impact on the stock, but absent the proposed rule would constitute an illegal incidental take. Small entities have indicated to Advocacy that they are not currently subject to MMPA incidental take restrictions when engaged in watercraft access facility construction.¹⁴ Advocacy encourages the Service to outline its current evaluation of the proposed rule’s economic benefits to small entities in the different affected population stocks.¹⁵ Advocacy advises the Service to pay particular attention to ensuring that

12 For reference, these stocks appear to account for the remaining coastline of Florida.

13 67 *Fed. Reg.* at 69104 (proposed 50 C.F.R. § 18.136, “What does a Letter of Authorization allow”).

14 On Friday, January 24, 2003, the Service submitted a proposed settlement agreement to the District Court for the District of Columbia in *Save the Manatee Club, et al. v. Ballard, et al.*, Civ. No. 1:00CV00076. Under a section titled, “Section 7 Consultation,” the proposed settlement agreement makes reference to a Service memorandum of January 22, 2003, titled, “Consultation Procedures to be Followed for All Watercraft-related Access Activities Occurring within Peninsular Florida.” Advocacy notes that the Service has not yet had the opportunity to reference this new policy document or provide its new consultation policies or the proposed settlement for public comments as it relates to the this proposed rule.

15 Advocacy refers the Service to Advocacy’s guidance to agencies, where Advocacy outlines its understanding of the RFA as allowing agencies to minimize burdens upon small entities by providing analysis of beneficial impacts, as supported by the legislative history of the RFA and precedent under similar statutory regimes. *2002 Implementation Guide*, at 21.

economic benefits to one particular group of small entities are not used to defray otherwise significant impacts the proposed rule would impose upon another, distinct group of small entities.

II. Conclusion

Advocacy appreciates the opportunity to comment on the Service's proposed rule on watercraft access facility construction in Florida. Thank you for your consideration and please do not hesitate to contact Michael See at (202) 205-6533 or Michael.See@sba.gov.

Sincerely,

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