

September 7, 2006

Via Facsimile and Electronic Mail

Mr. Rob Tawes
Field Supervisor
U.S. Fish and Wildlife Service
Daphne Fish and Wildlife Office
1208-B Main Street
Daphne, Alabama 36526

Re: Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Endangered Alabama Beach Mouse (71 Fed. Reg. 44,976).

Dear Mr. Tawes:

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) revised proposed rule, *Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Endangered Alabama Beach Mouse (Peromyscus polionotus ammobates)* (ABM).¹ Advocacy believes that the draft economic impact analysis prepared by FWS does not support a certification of the rule under the Regulatory Flexibility Act (RFA). Advocacy believes that FWS should complete an Initial Regulatory Flexibility Analysis (IRFA). 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.² 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 Administration. Further, Advocacy has a statutory duty to monitor and report to the President and Congress on FWS's compliance with the RFA.³

¹ *Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Endangered Beach Mouse (Peromyscus polionotus ammobates)* (ABM), 71 Fed. Reg. 44,976 (August 8, 2006).

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.

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.

I. Background

On February 1, 2006, FWS proposed to designate approximately 1,298 total acres of coastal land as critical habitat for the ABM.⁵ The proposed critical habitat designation (CHD) includes Federal, State and private lands in Baldwin County, Alabama. Affected areas include portions of the Fort Morgan peninsula, such as Fort Morgan, Little Point Clear, Gulf Highlands and Pine Beach.

On August 8, 2006, FWS published its draft economic impact analysis of the proposed designation in the *Federal Register*, increasing the critical habitat designation to 1,326 acres and reopening the public comment period for an additional 30 days.⁶

II. The Rule Will Have a Significant Impact on a Substantial Number of Small Entities

Under the RFA, when an agency proposes a rule, it must perform an IRFA, unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.⁷

When the original proposed rule was published in the *Federal Register* on February 1, 2006, 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.⁸ With the publication of its draft economic analysis in the *Federal Register* on August 8, FWS has still not clearly specified whether it is certifying or completing an IRFA. FWS appears to be making a certification statement, but does not utilize the necessary language that the rule “will not have a significant economic impact on a substantial number of small entities,” nor does the economic analysis provide a factual basis for such a certification.⁹

After reviewing FWS’s draft economic analysis and having discussed the proposed rule with representatives from the small business community, Advocacy concludes that: (1) a

⁴ Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53,461) (August 16, 2002).

⁵ *Endangered and Threatened Wildlife and Plants; Critical Habitat for the Endangered Beach Mouse (Peromyscus polionotus ammobates) (ABM)*, 71 Fed. Reg. 5516 (February 1, 2006).

⁶ 71 Fed. Reg. 44,976 (August 8, 2006).

⁷ 5 U.S.C. §§ 603, 605.

⁸ 71 Fed. Reg. 5532 (February 1, 2006).

⁹ 71 Fed. Reg. 44,976 (August 8, 2006).

substantial number of small entities may be affected; and (2) the rule will likely impose significant burdens on the affected small entities.

Advocacy recommends that FWS complete an initial regulatory flexibility analysis for the proposed rule and provide this analysis for public comment.

1. Substantial Number of Small Entities

Based on consultations with the small business community, Advocacy believes that the draft economic impact analysis provided by FWS for this CHD overlooks sectors of small entities in the private development industry that may be significantly affected, such as developers and builders.

FWS's draft economic impact analysis only examines the impact on one type of small entity in the private development industry that could be affected.¹⁰ The economic analysis states that there are potentially 137 landowners affected by this CHD, but assumes that "few are anticipated to be small entities."¹¹ FWS also assumes that these landowners are private citizens, and not developers.¹² FWS is concluding that a substantial number of small entities are not affected based on these assumptions about landowners, but these assumptions are not supported by data in FWS's economic analysis.

In addition to the small entities that could be landowners, Advocacy believes that there are other small entities in the private development industry that will be affected by this CHD such as developers and builders. Advocacy has spoken to representatives in the building industry, who have voiced their concerns that this CHD will add extra costs, delays and reduce the amount of housing that can be built on these developments. Based on FWS's economic analysis and discussions with representatives from the small business community, Advocacy believes a substantial number of small entities will be affected by this CHD.

2. Significant Economic Impact

Advocacy does not believe that FWS has provided a factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities.

Advocacy believes that developers, some of whom are small entities, have incurred significant costs due to Alabama Beach Mouse conservation in the past, and are estimated to incur significant future costs after the CHD is finalized. FWS's draft economic analysis found that the costs of past ABM conservation efforts associated with residential and commercial development are estimated at \$60.7 million within units proposed for

¹⁰ FWS, *Draft Economic Analysis of Critical Habitat Designation for the Alabama Beach Mouse*, Appendix B-3 (June 9, 2006) (*Draft Economic Analysis*) (available online at <http://www.fws.gov/daphne/abm/DraftABMEconAnalysis.pdf>).

¹¹ 71 *Fed. Reg.* 44,979 (August 8, 2006).

¹² *Id.*

CHD in undiscounted dollars. These costs largely result from mitigation activities on the properties (such as the creation of dune habitats, or setting aside land).¹³ FWS also assumes that the future costs of compliance for the developments are also limited to mitigation costs.¹⁴ FWS estimates that the future costs to development of ABM conservation efforts within the proposed CHD to development are \$18.1 million to \$51.2 million in undiscounted dollars over the next 20 years.¹⁵ Advocacy believes that the majority of these mitigation costs will accrue to small developers in the affected land and that these impacts are significant.

FWS's draft economic analysis also fails to consider other economic impacts. The economic analysis assumes that all planned development will be allowed to proceed after the CHD and does not take into account the impact of the reduction in scale and the scope of potential developments. Private and public entities with development interests in this area commissioned another economic analysis done by the Klages Group, and their report estimated that the total economic impacts of this critical habitat designation is over 10 billion dollars.¹⁶ This report was predicated on the assumption that the planned multi-family developments would be stopped on Beach Club West and the Gulf Highlands (which are estimated to develop 973 units), and would be significantly reduced in other areas because of the CHD.¹⁷ The change in market value from modifications in project scope is also not estimated by FWS, which assumes in its economic analysis that living units are fungible.¹⁸ The building industry has commented that this proposed CHD will result in large economic impacts to small entities such as builders and developers, from increased costs due to project delays and modification, to lost development opportunities due to projects that are terminated or reduced.¹⁹

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

While Advocacy commends FWS for preparing an economic analysis, the agency must develop additional economic data to satisfy the requirements of an IRFA. Advocacy believes that 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 any significant regulatory alternatives to the proposed rule that minimize significant economic impacts

¹³ *Draft Economic Analysis*, at 3-2.

¹⁴ *Id.* at 3-16.

¹⁵ *Id.* at 3-2.

¹⁶ Walter Klages, The Klages Group, *Economic Impact on Potential Multi Family and Single Family Development on fort Morgan Peninsula as Affected by the Proposed Re-Designation of Critical Habitat for the Alabama Beach Mouse* (March 2006).

¹⁷ Walter Klages, The Klages Group, *Talking Points on Industrial Economics, Inc.'s Draft Economic Analysis of Critical Habitat Designation for the Alabama Beach Mouse* (August 2006).

¹⁸ *Draft Economic Analysis*, at 3-15.

¹⁹ Public comment letter submitted by Susan Asmus, Staff Vice President, Regulatory Affairs, on behalf of the National Association of Home Builders, Proposed Revision of CH for the Alabama Beach Mouse, March 31, 2006.

on small entities while accomplishing the agency's objectives.²⁰ The IRFA must also be made available for public comment.

IV. Conclusion

Advocacy believes that FWS cannot certify 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 make it available for public comment before issuing the final 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,

Thomas M. Sullivan
Chief Counsel for Advocacy

Janis C. Reyes
Assistant Chief Counsel

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

²⁰ 5 U.S.C. § 603.