



OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

March 29, 2005

Via Facsimile and Electronic Mail

The Honorable Craig Manson
Assistant Secretary for Fish, Wildlife, and Parks
U.S. Department of the Interior
1849 C Street, N.W.
Room 3156
Washington, DC 20240

Re: Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher (69 Fed. Reg. 60,706, October 12, 2004).

Dear Assistant Secretary Manson:

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 Designation of Critical Habitat for the Southwestern Willow Flycatcher*.¹ Advocacy believes that the proposed designation is likely to impose significant economic impacts on a substantial number of small entities and that some areas may be appropriate for exclusion under both the Regulatory Flexibility Act (RFA) and the Endangered Species Act (ESA), due to the higher costs their inclusion would likely entail. Advocacy therefore recommends that FWS complete an initial regulatory flexibility analysis (IRFA) incorporating the agency's work on the rule's economic analysis, and that this IRFA contain consideration of regulatory alternatives which exclude higher cost areas from the final critical habitat designation. Advocacy also urges FWS to cease its enforcement of critical habitat on Arizona small businesses until such time as the agency actually designates critical habitat. Finally, Advocacy is concerned about delays in the publication of FWS' analysis of the economic impacts of its proposed rules and questions whether the agency will be able to respond to public comments meaningfully.

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 Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the

¹ *Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher*, 69 Fed. Reg. 60706 (Oct. 12, 2004) (Proposed Rule).

² 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' compliance with the Regulatory Flexibility Act (RFA).³

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

I. Initial Regulatory Flexibility Analysis.

Section 603 of the RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities in an initial regulatory flexibility analysis (IRFA). 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 that 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.⁶ The IRFA must be published in the *Federal Register* for public comment "at the time of the publication of general notice of proposed rulemaking for the rule."⁷ Agency heads may avoid completing an IRFA only when they can certify that the rule would not have a significant economic impact on a substantial number of small entities, and publish in the *Federal Register* a factual basis sufficient to support this determination.⁸

³ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, §3(a) (1980) (codified as amended at 5 U.S.C. § 612).

⁴ Exec. Order. No. 13272, at § 1, 67 Fed. Reg. 53,461 (2002).

⁵ *Id.* at § 2(c).

⁶ 5 U.S.C. § 603.

⁷ 5 U.S.C. § 603(a) (IRFA); § 605(b) (any certification decision must be published "at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule"). As the RFA requires publication of the IRFA (or a certification) at the same time as the notice of proposed rulemaking, Advocacy believes that the public must be afforded a 60-day comment period, consistent with FWS' regulations. 50 C.F.R. 424.16(c)(2). The ESA requires consideration of both economic and scientific data in designating critical habitat. 16 U.S.C. § 1533(b)(2); *see also*, Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to Craig Manson, Assistant Secretary of the Interior for Fish, Wildlife, and Parks (Nov. 18, 2004) (available online at http://www.sba.gov/advo/laws/comments/fws04_1118.pdf).

⁸ 5 U.S.C. § 605(b).

II. FWS should complete an IRFA for the proposed rule.

Advocacy has consulted with a number of small businesses and their representatives, who inform Advocacy that including certain areas within the flycatcher critical habitat designation is likely to result in a significant economic impact on a substantial number of small entities. Therefore, Advocacy recommends that FWS complete an IRFA for its proposed rule to accompany its forthcoming draft economic analysis.

A. Small farmers.

Advocacy believes that a substantial number of small farms could be harmed by the designation of certain areas as critical habitat. Small farmer representatives inform Advocacy that farms along the banks of the Lower Colorado River are likely to incur significant economic impacts from a designation of critical habitat, as they would likely face increased FWS consultations and litigation liability under sections 7 (consultation requirement) and 9 (prohibition on “take”) of the Endangered Species Act (ESA).⁹ Of particular concern to Advocacy are the more than 500 small business farms in Yuma County, Arizona, a large number of which are located along the fertile banks of the Colorado River.¹⁰ These farms have a number of activities for which a designation of critical habitat could trigger costly consultation and mitigation requirements, including: EPA labeling requirements for pesticide use, Migratory Bird Act provisions on bird control measures during planting, and other Federal permits required for soil tillage and brush control.¹¹

Advocacy recommends that FWS complete an IRFA which analyzes impacts to small farmers and considers regulatory alternatives like eliminating the Lower Colorado River from its final designation of critical habitat. Small farm representatives have informed Advocacy that the exclusion of the Lower Colorado River banks from Martinez Lake south would exclude the vast majority of Yuma vegetable growers from critical habitat.¹²

⁹ Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884, §§ 7, 9 (codified as amended at 16 U.S.C. §§ 1536, 1538).

¹⁰ National Agriculture Statistics Service, USDA, *Census of Agriculture 2002* (available online at http://151.121.3.33:8080/Census/Pull_Data_Census). Yuma County, situated on the rich-soiled banks of the Colorado River, is one of the leading vegetable producers in the world. In 2002, Yuma County had around 230,000 acres of productive farmland, and agricultural users alone in Yuma County accounted for about a third of Arizona’s entire 2002 allocation of Colorado River water. University of Arizona, 2002 Yuma County Agricultural Statistics (available online at <http://cals.arizona.edu/crops/counties/yuma/farmnotes/2003/fn1103yumastats.html>).

¹¹ For example, Yuma’s farmers must follow EPA’s pesticide labeling requirements, and EPA would likely be required to consult with FWS and impose use restrictions once critical habitat is designated. 7 U.S.C. § 736j(a)(2)(G), 50 C.F.R. §§ 402.42(a)(5), 402.42(a)(9). Given that most farms in the area use pesticides, it is likely that hundreds of small farms face economic costs and lost productivity from limitations on their use of pesticides and herbicides. FWS must assess exactly what chemical use it intends to consult with EPA on and what the loss of such chemicals would cost small farmers.

¹² Advocacy notes that this area appears to already be covered by the Lower Colorado Rive Multi-Species Conservation Plan, in which Federal, state, local, and private entities have pledged \$620 million for habitat conservation over the next 50 years. Notice of Availability, *Final Environmental Impact Statement/Environmental Impact Report for Proposed Adoption of the Lower Colorado River Multi-Species Conservation Program, Final Lower Colorado River Multi-Species Habitat Conservation Plan, Final*

Thus, Advocacy urges FWS to consider this exclusion both under section 4(b)(2) of the ESA and as a small business regulatory alternative under the RFA.

B. Small cattle growers.

Advocacy has also been informed that small cattle growers throughout Arizona will be affected by the designation of critical habitat for the flycatcher. Cattle growers anticipate drastic reductions in the grazing the Forest Service allows (under permits) should they fall within a final critical habitat rule.

In advance of any final rule designating critical habitat, Forest Service and FWS have already imposed significant consultation and mitigation burdens on Arizona cattle growers grazing on land that is not occupied by the flycatcher. Advocacy believes that if FWS designates critical habitat in cattle grazing areas, FWS personnel will assert consultation jurisdiction over many high value water sources and drive marginal small businesses to failure. Currently, FWS personnel use criteria which restrict livestock activity near water through the use of section 7 consultations under the ESA.¹³ Between 1997 and 2002, more than a quarter of Arizona's cattle growers went out of business, and many more continue to follow suit.¹⁴

Advocacy believes that the designation of critical habitat and application of stricter ESA standards have the potential to seriously harm large numbers of small cattle growers. Therefore, Advocacy urges FWS to consider the costs to small cattle growers in its IRFA, and to analyze small business regulatory alternatives which have the ability to reduce those costs.

III. Imposing Critical Habitat without Rulemaking.

Advocacy believes that FWS may also be in violation of the RFA because it has implemented a policy of requiring critical habitat consultation and mitigation for cattle grazing permits on land which is not inhabited by the Southwestern Willow Flycatcher and for which the agency has not completed a critical habitat rule including the small business analyses required by the RFA.¹⁵

Biological Assessment, Incidental Take Permit Application, Draft Implementing Agreement, and Draft Funding and Management Agreement, 69 Fed. Reg. 75,556 (2004), MSCP, *Habitat Conservation Plan*, at 11-1 (available online at <http://www.lcrmscp.org/Files%20for%20low%20speed.html>) (HCP). Designation of this area as critical habitat may not produce significant incremental species benefits.

¹³ Letter and Biological Opinion from Steven Spangle, Field Supervisor, FWS, to Karl Sidertis, Forest Supervisor, Forest Service, at App. A-12 (Nov., 2004) (available online at http://arizonaes.fws.gov/Documents/BiologicalOpinions/2004/990300_R1_LGV.pdf).

¹⁴ In 1997, there were 3,721 cattle growers in Arizona. By 2002, that number had fallen to 2,838. National Agricultural Statistical Service, USDA, *2002 Census of Agricultural, Arizona*, at Table 12 (available online at http://www.nass.usda.gov/census/census02/volume1/az/st04_1_012_013.pdf).

¹⁵ Advocacy has previously commented on a rulemaking by the Arizona office of the FWS that whenever the agency is required to engage in notice and comment rulemaking, whether it does so or not, the agency triggers the public protections afforded by the RFA. Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to Steven Spangle, Field Supervisor, FWS (June 27, 2003). Federal courts agree

The “guidance” documents FWS has relied on to restrict small cattle operations appear to be legislative in nature because they bind agency enforcement personnel to implement a new policy regarding cattle grazing near rivers.¹⁶ Legislative rules are required by section 553 of the Administrative Procedure Act (APA) to undergo notice and comment rulemaking to ensure the public has meaningful participation.¹⁷ Since the rules are required to be promulgated through notice and comment rulemaking, they trigger the RFA’s small business protections.¹⁸ FWS has not completed notice and comment rulemaking, nor has the agency completed a certification or IRFA for its consultation “guidance.” Therefore, Advocacy believes that FWS has improperly imposed restrictions on Arizona cattle grazing permits for unoccupied lands, and recommends that the agency cease implementing such restrictions until the agency has completed both a notice and comment rulemaking designating critical habitat and the small business flexibility analysis required by the RFA.

IV. Timing of FWS’ Economic Analysis.

Advocacy recommends that FWS allow for 60 days of public comments on the economic impacts of the proposed designation of critical habitat for the Southwestern Willow Flycatcher. FWS’ own regulations require 60 days of notice and comments on proposed designations of critical habitat and the “summary of the data on which the proposal is based.”¹⁹ The ESA itself requires the Secretary to “tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”²⁰ Advocacy believes that these provisions require FWS to base its final decision on critical habitat designations at least in part on a meaningful consideration of economic impacts, and that FWS’ regulations require FWS to provide the public a 60 day opportunity for comment on the data that supports these considerations.

Advocacy is also concerned with recent delays in FWS’ releases of economic and RFA analyses for public comment. In a number of critical habitat rulemakings, FWS has declined to provide regulated small businesses with the estimated economic impacts of

with this conclusion. See *United States Telecom Association v. Federal Communications Commission*, ___ F. 3d ___, 2005 WL 562744 (D.C. Cir.).

¹⁶ See *Appalachian Power Co. v. U.S. EPA*, 208 F. 3d 1015, at 1020-21 (D.C. Cir. 2000) (legislative rules have “the force and effect of law” and an agency action is binding if “it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document”). Congress empowered FWS to designate critical habitat for the southwestern willow flycatcher, but required the secretary to do so through regulation. 15 U.S.C. § 1533(a)(3). FWS’ regulations define critical habitat in part as “specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.” 50 C.F.R. § 424.02(d).

¹⁷ Administrative Procedure Act, ch. 324, 60 Stat. 238 (1946) (repealed and reincorporated by Pub. L. 89-554, 80 Stat. 383 (1966)) (codified as amended at 5 U.S.C. § 553(b)).

¹⁸ 5 U.S.C. §§ 601(2), 603(a), 604(a), 605(b).

¹⁹ 50 C.F.R. § 424.16.

²⁰ 15 U.S.C. § 1533(b)(2).

proposed rules at the time they were proposed.²¹ The RFA requires agencies to publish a certification or IRFA at the same time as the publication of their proposed rules.²² Should FWS find itself unable to comply with the RFA due to an emergency which would prevent the agency from timely compliance, the RFA provides for delayed compliance through specific mechanisms.²³ However, FWS has not declared an emergency under the RFA. Advocacy believes that FWS is not entitled to delay its statutory obligations routinely, as such delays could deny the public an opportunity to participate in FWS rulemakings meaningfully.

²¹ See, e.g., *Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover*, 69 *Fed. Reg.* 75608, at 75635 (2004), *Proposed Designation of Critical Habitat for Astragalus lentiginosus var. coachellae* (Coachella Valley milk-vetch), 69 *Fed. Reg.* 74468, at 74480-81 (2004), *Proposed Designation of Critical Habitat for Brodiaea filifolia* (thread-leaved brodiaea), 69 *Fed. Reg.* 71284, at 71300-01 (2004), *Proposed Designation of Critical Habitat for Navarretia fossalis* (spreading navarretia), 69 *Fed. Reg.* 60110, at 60121-22 (2004).

²² 5 U.S.C. §§ 603(a), 604(a), 605(b).

²³ 5 U.S.C. § 608 (an agency may waive or delay compliance with section 603's IRFA requirement upon the publication of a written declaration of emergency that makes timely compliance impracticable).

V. Conclusion.

Small businesses have informed Advocacy that the proposed designation of critical habitat for the Southwestern Willow Flycatcher is likely to impose significant economic impacts on a substantial number of small entities. Therefore, Advocacy recommends that FWS consider these impacts in its upcoming draft economic analysis and also complete an IRFA for the proposed rule that allows for public comment on small business impacts and regulatory alternatives. In addition, Advocacy urges the FWS to refrain from imposing consultation and mitigation burdens on small entities for unoccupied areas prior to the publication of a final critical habitat designation. Finally, Advocacy encourages FWS to provide 60 days notice and comment on its analysis of the economic impacts of the proposed critical habitat designation, and to publish a certification or IRFA at the same time as the publication of a proposed rule. Thank you for your consideration and please do not hesitate to contact Michael See with any further questions at (202) 619-0312 or Michael.See@sba.gov.

Sincerely,

/s

Thomas M. Sullivan
Chief Counsel for Advocacy

/s

Michael R. See
Assistant Chief Counsel

cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs