



August 2, 2006

Via Electronic Mail

Ms. Gail Carmody
Field Supervisor
U.S. Fish and Wildlife Service
1601 Balboa Avenue
Panama City, Florida 32405

Re: Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages (71 Fed. Reg. 32,746).

Dear Ms. Carmody:

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; Proposed Designation of Critical Habitat for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages*.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

¹ *Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Five Endangered and Two Threatened Mussels in Four Northeast Gulf of Mexico Drainages*, 71 Fed. Reg. 32,746 (June 6, 2006).

² 5 U.S.C. §§ 603, 605.

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 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 June 6, 2006, FWS proposed to designate approximately 1,200 miles of river and stream channels in the Southeast as critical habitat for seven species of freshwater mussels protected under the Endangered Species Act. The proposed critical habitat includes portions of the Econfina Creek Drainage in Florida; the Apalachicola-Chattahoochee-Flint River drainage in Alabama, Florida and Georgia; the Ochlockonee River drainage in Florida and Georgia; and the Suwannee River drainage in Florida. The public comment deadline for this proposed rule closes on August 7, 2006. However, FWS states that it will not publish an IRFA or certification of the proposed rule until November 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. 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.”⁴

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.

FWS’s Deferral Harms Small Business

³ 5 U.S.C. §§ 603(a), 605(b).

⁴ 71 *Fed. Reg.* 32,766.

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 not being allowed to participate adequately in the agency's regulatory practices.⁵

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 IRFA's 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 in a supplemental notice of proposed rulemaking and extending the comment deadline accordingly. 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

⁵ Advocacy notes that FWS published another notice of proposed critical habitat designation for the Piping Plover in the *Federal Register* on June 6, 2006, without publishing an IRFA or certification. The comment deadline for this rule is August 11, 2006, and FWS stated that it does not expect to release the regulatory flexibility analysis until October. *See*, 71 *Fed. Reg.* 33,703 (June 12, 2006).