

November 20, 2008

BY ELECTRONIC SUBMISSION

The Honorable Dale Hall
Director, Fish and Wildlife Service
4401 Fairfax Drive
Arlington, Virginia 22203
Electronic Address: www.regulations.gov (RIN 1018-AV78)

Re: Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx, 70 Fed. Reg. 62450 (October 21, 2008).

Dear Director Hall:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) submits these comments regarding the Fish and Wildlife Service's (FWS) proposed critical habitat designation (CHD) for the Canada Lynx (lynx). Advocacy appreciates that FWS is considering excluding areas of critical habitat from its final designation for the lynx, and that such exclusions may alleviate the burden of the proposed designation on small entities. Advocacy continues to have concerns that FWS has underestimated the impacts that the proposed designation would have on small entities.

The 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. Advocacy has a statutory duty to monitor and report to the President and Congress on FWS's compliance with the Regulatory Flexibility Act (RFA).¹ The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act,² gives small entities a voice in the rulemaking process. For all rules that are

¹ 5 U.S.C. § 601 et seq.

² Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

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.

On August 13, 2002, President Bush signed Executive Order 13272,³ 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

Advocacy has followed the CHD for the lynx for several years. When FWS last revised the Lynx CHD in 2006, Advocacy submitted public comments noting the expected economic impacts of the proposed designation on small entities and urging FWS to consider burden-reducing alternatives to the proposed designation.⁴ In particular, Advocacy cited significant burdens on privately owned timber lands as a result of the pre-commercial thinning restrictions that would result from CHD.⁵ FWS ultimately designated 1,841 square miles of land for lynx critical habitat.⁶

On February 28, 2008, FWS published a proposal to revise its critical habitat designation for the Canada Lynx.⁷ The proposed designation would increase the total area of lynx critical habitat by 40,913 square miles (26,184,320 acres).⁸ Advocacy did not file comments with FWS during the initial comment period for this proposed rule because FWS did not provide an updated Initial Regulatory Flexibility Analysis (IRFA) or economic analysis with its proposed rule. Instead, FWS provided estimates of impacts to small business based on the 2005 draft economic analysis of the lynx CHD. Notably, FWS stated that the 2005 draft economic analysis forecasted total impacts to timber activities in the range of \$117 million to \$808 million over 20 years.⁹

On October 21, 2008, FWS published a revised proposed critical habitat designation, reopening the comment period and announcing the availability of a new draft economic analysis, including an updated IRFA examining the impacts of the proposed CHD on

³ *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

⁴ Comments from the Office of Advocacy, “*Re: Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*”, October 3, 2006, http://www.sba.gov/advo/laws/comments/fws06_1003.html .

⁵ *Id.* at 4.

⁶ 73 *Fed. Reg.* 10860 (February 28, 2008).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 10878.

small entities.¹⁰ The IRFA estimated the potential impacts on timber activities to be much lower than previously estimated, forecasting only \$226,000 in costs stemming from the proposed CHD over the next 20 years.¹¹ On the basis of its IRFA FWS has also signified its intent to certify that the final CHD will not have a significant impact on a substantial number of small entities.¹²

In the current proposal, FWS discusses possible areas for exclusion from the final critical habitat under section 4(b)(2) of the Endangered Species Act (ESA), which allows the Secretary of the Interior to exclude an area from critical habitat if the benefits of excluding an area outweigh the benefits of including them. The areas FWS is considering for exclusion consist mostly of privately owned timber lands in Maine and Montana, as well as tribal lands across the entire designation.¹³

Advocacy's Comments

FWS cannot certify its lynx CHD under the RFA without providing a factual basis

Advocacy reminds FWS that, under the RFA, it may either certify that a rule will not have a significant economic impact on a substantial number of small entities, or it must complete an IRFA.¹⁴ Under the RFA, a certification must include a factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.¹⁵ FWS's certification and underlying factual basis are subject to judicial review.¹⁶ If FWS publishes an IRFA with a proposed rule, as it has done here, it must complete a Final Regulatory Flexibility Analysis (FRFA) for its final rule, unless FWS has a factual basis to certify that the final rule will not have a significant economic impact on a substantial number of small entities.

Advocacy notes that FWS has both prepared an IRFA for this proposed rule and signified its intent to certify the CHD under the RFA once it is finalized. Advocacy is concerned that information contained in FWS's IRFA is inadequate to provide a factual basis for a certification that the proposed CHD will not have a significant impact on a substantial number of small entities for several reasons.

First, the IRFA for the proposed CHD does not provide sufficient information to adequately forecast costs associated with consultations under Section 7 of the ESA as a result of the proposed CHD. Section 7 requires small entities to consult with FWS for all

¹⁰ *Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 70 Fed. Reg. 62450 (October 21, 2008).

¹¹ *Id.* at 62458.

¹² *Id.*

¹³ *Id.* at 62454.

¹⁴ *Supra* note 1.

¹⁵ Under 5 U.S.C. § 605(b), an agency must provide a factual basis for any certification that a proposed rule will not have a significant economic impact on substantial number of small entities, and that factual basis is subject to judicial review. *See North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

¹⁶ *Id.*

activities funded, permitted or authorized by Federal agencies to ensure that (1) such actions do not jeopardize the continued existence of a protected species, and (2) such actions do not to destroy or adversely modify critical habitat.¹⁷ Therefore, if FWS finalizes the proposed CHD, Section 7 consultations initiated by small entities to avoid jeopardy to the lynx, must then be re-opened to account for newly designated critical habitat.

To calculate the economic impacts of the proposed designation on small entities, FWS only considered the *administrative* costs of re-opening past consultations undertaken pursuant the jeopardy provisions of Section 7.¹⁸ FWS's IRFA does not attempt to quantify the costs small entities could face if required to modify projects in order to avoid adverse modification or destruction of critical habitat following the re-opening of Section 7 consultations.

Advocacy believes that the failure to examine the potential costs of post-designation project modification is a serious omission, as project modification is often the most costly aspect of the Section 7 consultation process. For example, if a Section 7 consultation resulted in FWS restricting pre-commercial thinning on a given timber tract, that restriction could have significant economic impacts insofar as it could cause a decrease in timber yield, or an increased risk of disease and crop loss. Therefore, FWS cannot certify that the proposed CHD will not have a significant impact on a substantial number of small entities unless it can provide a factual basis supporting the conclusion that project modification costs are expected to be insignificant.

Second, the IRFA for the proposed CHD incorrectly assumes that no new Section 7 consultations will occur as a result of the proposed CHD, and thus underestimates the burden of the proposed CHD on small entities. In its IRFA, FWS assumes that no new Section 7 consultations will be initiated post-designation because the critical habitat designation only covers areas that are currently occupied by the species.¹⁹ Therefore, FWS reasons, all Section 7 consultations regarding federal activities that could affect lynx and its habitat have already occurred and must only be re-opened to account for Critical Habitat.²⁰

Advocacy is concerned that FWS has not offered an explanation as to why it does not expect future consultations to occur as a result of the CHD. It is possible, and even likely, that new consultations will be opened post-designation. The proposed designation covers over 25 million acres of land. Over one quarter of the proposed designation would cover privately owned land, 5 million acres of which is situated in the state of Maine. It is probable that many Maine landowners who have not yet engaged in consultations with FWS will do so in the future. FWS should not certify under the RFA unless it can also provide an adequate factual basis for the assumption that no further Section 7

¹⁷ *Supra* note 13 at 62453.

¹⁸ *Id.* at 62454.

¹⁹ *Id.* at 62454.

²⁰ *Id.*

consultations will be initiated post-designation, or that the costs of such further consultations will be insignificant.

Finally, Advocacy believes that FWS may not certify the proposed CHD under the RFA because it has not provided any estimates as to the number and cost of future consultations with private landowners under Section 10 of the ESA as a result of this CHD. Section 10 of the ESA requires small entities to consult with FWS to obtain a permit in all cases where their activities (federal or otherwise) will result in the incidental take of a protected species.²¹ The definition of “take” includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.²² Obtaining an incidental take permit can be very costly and requires businesses seeking permits to develop Habitat Conservation Plans that mitigate the effects of their projects on protected species.

Private landowners have informed Advocacy that they are often unaware of the presence of endangered species habitat on their land until critical habitat has been designated. The likelihood that landholders will independently engage with FWS to acquire an incidental take permit before a CHD is low, unless those private landowners are consulting with FWS under Section 7 of the ESA with another federal agency because they are seeking federal funding or permitting. For example, most timber operations in Maine are conducted on privately owned land and operate without a federal nexus that would require pre-designation consultation under the ESA.

Rather than the initial listing of the lynx, it is the proposed CHD that will effectively put such landowners on notice of the presence of lynx habitat on their land, in which case they must consult with FWS to avoid legal liability for incidental take of the lynx under Section 10 of the ESA. This is especially true given that FWS declined to designate critical habitat for the lynx on much of the privately owned land in Maine that is included in the proposed designation. FWS cannot certify the proposed CHD unless it can show that designating critical habitat will not result in substantial costs associated with further consultations under Section 10 of the ESA. Advocacy believes that FWS has incorrectly attributed these costs to the “baseline” in its IRFA.

FWS should complete a Final Regulatory Flexibility Analysis for its lynx CHD.

For the above reasons, Advocacy believes that FWS cannot certify that its proposed CHD will not have a significant impact on a substantial number of small entities. Therefore, FWS must prepare a FRFA if it finalizes the lynx CHD.²³

In its FRFA, FWS should provide further analysis of potential project modification costs stemming from any post-designation Section 7 consultations. FWS should also address the question of whether further Section 7 consultations will be initiated post-designation,

²¹ 16 U.S.C. § 1539(a)(1)(B).

²² 50 CFR § 17.3 .

²³ *Supra* note 1.

and if so, the FRFA should provide estimates of the impacts to small entities resulting from such consultations. Finally, the FRFA should include some discussion of potential impacts to small entities resulting from post-designation consultations under Section 10 of the ESA, as well as a complete discussion of alternatives explaining the FWS's decision to adopt the final rule as published.

Advocacy encourages FWS to exclude certain areas from its final Lynx CHD.

Section 4(b)(2) of the ESA allows the Secretary of the Interior to exclude areas of proposed critical habitat from a final designation if the benefits of excluding such areas outweigh the benefits of including them, provided the exclusions will not result in the extinction of the species.²⁴ Advocacy believes that FWS can justify excluding several areas from its final lynx CHD because the conservation benefits to the species without critical habitat will be greater than the conservation benefits realized with critical habitat in these areas if FWS adopts voluntary conservation agreements with stakeholders in the proposed CHD units. Furthermore, Advocacy believes that the economic benefits of excluding these areas justify exclusion from the final CHD.

In its Notice of Proposed Rulemaking (NPRM), FWS stated that the conservation value of designating lynx critical habitat on private lands without a federal nexus is limited to increasing public awareness of lynx presence and the importance of habitat protection.²⁵ FWS also stated that only a few projects on privately owned lands have had a federal nexus triggering consultation under Section 7 of the ESA.²⁶ Thus, the benefits of designating critical habitat on privately owned timber lands may be minimal. FWS has received draft conservation partnership agreements from parties in Units 1 (Northern Maine) and 3 (Northern Rocky Mountains) that, if adopted, appear to provide far greater benefits to the lynx in terms of public education and research value than what can be achieved with a CHD. Advocacy encourages FWS to adopt these agreements and work together with the stakeholders in these regions to promote lynx conservation, instead of adopting regulations that appear to provide limited benefits to the lynx.

Additionally, as addressed earlier, Advocacy is concerned that the impact of the proposed CHD on small entities in Maine will be significant given that the majority of land proposed for designation is privately owned by small timber operations that have not previously had to modify their projects to accommodate lynx habitat. FWS has admitted that it is uncertain as to how the proposed designation will impact the forest products industry in Maine, which relies on timber production to make its products. Members of the forest products industry in Maine have contacted Advocacy and expressed their concern regarding the economic impact such uncertainty will have on their industry, which, according to the Maine Forest Products Council, contributes \$11.5 billion to the Maine economy. Because of this, Advocacy encourages FWS adopt the draft conservation agreement submitted by the Maine Forest Products Council and exclude private timber lands in Maine from its final CHD.

²⁴ *Supra* note 10 at 62451-62452.

²⁵ *Id.*

²⁶ *Id.*

Finally, FWS has stated that the consultations it has already conducted with Federal agencies on Federal lands have provided for sufficient lynx habitat protection for the recovery of the species.²⁷ Given the success of past consultations in providing for lynx recovery, Advocacy believes that FWS has sufficient reason to conclude that it may exclude areas of critical habitat from its final designation without causing the extinction of the species.

Conclusion

Advocacy commends FWS for giving serious consideration to excluding certain timber lands from its final CHD and working with stakeholders to provide continued protection for the Canada Lynx. However, Advocacy encourages FWS to revisit its IRFA for this proposed CHD and further examine whether it can ultimately certify the proposed rule under the RFA after evaluating the incremental impacts of the proposed CHD on small entities in light of our comments above. Advocacy is pleased to forward the comments and concerns of small businesses. Please feel free to contact me or Jamie Belcore Saloom at (202) 205-6890 (Jamie.Belcore@sba.gov) if you have any questions or require additional information.

Sincerely,

//Signed//
Shawne C. McGibbon
Acting Chief Counsel for Advocacy

//signed//
Jamie Belcore Saloom
Assistant Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs

²⁷ *Id.*