



**Advocacy: the voice of small business in government**

October 3, 2006

**Via Electronic Mail**

Lori Nordstrom  
Field Supervisor  
Montana Ecological Services Field Office  
U.S. Fish and Wildlife Service  
585 Shepard Way  
Helena, Montana 59601

**Re: Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx (71 Fed. Reg. 53,355)**

Dear Ms. Nordstrom:

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; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx (Lynx canadensis)*.<sup>1</sup>

Congress established Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the federal government.<sup>2</sup> Advocacy is an independent office within the 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 Regulatory Flexibility Act (RFA).<sup>3</sup>

<sup>1</sup> *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 71 Fed. Reg. 53,355 (Sept. 11, 2006).

<sup>2</sup> Pub. L. No. 94-305, 90 Stat. 663, §§ 201 et seq. (codified at 15 U.S.C. §§ 634a-g).

<sup>3</sup> 5 U.S.C. § 612(a).

On August 13, 2002, President George W. Bush signed Executive Order 13272,<sup>4</sup> 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.

Advocacy is concerned that FWS's Initial Regulatory Flexibility Analysis (IRFA) does not provide sufficient analysis to satisfy the requirements of the RFA and recommends that FWS issue a supplemental IRFA with more thorough analysis of the economic impacts of this critical habitat designation (CHD) to small entities and significant alternatives. To assist FWS in its analysis, Advocacy has solicited input from small entities, reviewed their recommendations and prepared these comments reviewing the impacts and available alternatives.

## **I. Background**

On November 9, 2005, FWS proposed to designate 26,935 square miles of land as critical habitat for the Canada Lynx.<sup>5</sup> On February 16, 2006, FWS revised this proposed designation, by decreasing the CHD to 18,031 square miles or 11.5 million acres of land.<sup>6</sup> The proposed CHD includes Federal, State, tribal and private lands in Maine (10,633 square miles), Minnesota (3,546 square miles), Washington (303 square miles) and in the states of Idaho and Montana (3,549 square miles).<sup>7</sup> This proposed CHD excludes land in Washington (1,693 square miles) and in the states of Idaho and Montana (7,211 square miles).<sup>8</sup>

On September 11, 2006, FWS published the notice of availability of the draft economic impact analysis and draft environmental assessment for the critical habitat designation in the *Federal Register*, and reopened the public comment period.<sup>9</sup> The IRFA was included in the appendix of the economic analysis.<sup>10</sup>

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<sup>4</sup> Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53,461 (Aug. 16, 2002).

<sup>5</sup> *Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 70 *Fed. Reg.* 68,294, 68,304 (Nov. 9, 2005).

<sup>6</sup> *Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Contiguous United States Distinct Population Segment of the Canada Lynx*, 71 *Fed. Reg.* 8258 (Feb. 16, 2006).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> 71 *Fed. Reg.* 53,355.

<sup>10</sup> FWS, *Economic Analysis of Critical Habitat Designation for the Canada Lynx*, Appendix C-6, C-7 (*Economic Analysis*) (Aug. 24, 2006), available at <http://mountain-prairie.fws.gov/species/mammals/lynx/econanalysis.htm>.

## **II. Advocacy Recommends that FWS's IRFA Consider Further Economic Impacts on Small Business**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Pursuant to the RFA, the agency is required to prepare an IRFA to assess the economic impact of a proposed action on small entities.

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 which 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. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable. The RFA requires the agency to publish the IRFA or a summary of the IRFA in the *Federal Register* at the time of the publication of general notice of proposed rulemaking for the rule.<sup>11</sup>

Advocacy recommends that FWS revise its IRFA to include further economic analysis on two of the required elements of an IRFA: (1) the estimated number and types of entities to which the proposed rule will apply; and (2) a description of the impact of the proposed rule on small entities.

### **1. Number of Small Entities to Which the Proposed Rule will Apply**

FWS's IRFA identifies 1,544 small entities in the timber industry that might be affected due to this CHD, and further describes the particular sectors affected, such as timber tract operations, logging and pulp mills.<sup>12</sup> FWS does not perform the same analysis to assess the number of small entities affected in the development industry, "due to the absence of information regarding how development may be affected by the lynx designation."<sup>13</sup>

FWS's IRFA only looks to one type of small entity in the development industry that could be affected, i.e., landowners. FWS's proposed rule states that there are estimates of 38 landowners in Maine, 53 landowners in Minnesota, and 110 landowners in Montana that could be affected by this CHD.<sup>14</sup> The proposed rule states that it is "possible that a portion of these affected landowners could be small businesses in the residential and commercial land development industry," and asked for comments from potential small

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<sup>11</sup> 5 U.S.C § 603.

<sup>12</sup> *Economic Analysis*, at C-9, C-10, C-11.

<sup>13</sup> *Id.* at C-7.

<sup>14</sup> 71 *Fed. Reg.* at 53,359.

entities affected. FWS also requested comments from other potentially affected small entities in the development industry, such as builders and developers.<sup>15</sup>

Advocacy recommends that the FWS obtain additional data on the numbers of entities affected by utilizing U.S. Census Bureau data. For example, 80 percent of the developable land in this CHD is located in Northeast Minnesota.<sup>16</sup> According to U.S. Census Bureau data on Minnesota, there are 647 small construction firms that may be affected in Cook County, Lake County, and St. Louis County.<sup>17</sup>

Advocacy also recommends that FWS issue a supplemental IRFA with more thorough analysis of the numbers of small entities that are affected in the development industry based on comments from small entities. In addition, Advocacy recommends that FWS conduct outreach to small entities affected by this CHD, consistent with Section 609 of the RFA.<sup>18</sup>

## **2. Economic Impact of Compliance Requirements to Small Entities**

FWS's economic analysis does not include any data on the impacts of this CHD on small entities in the development industry.<sup>19</sup> Instead, the analysis only looks at the effect of this CHD to landowners, by estimating changes in land values from the CHD. Using this analysis, FWS concludes that the loss in total development value of the areas proposed for designation is approximately \$2.26 billion.<sup>20</sup> FWS indicates that there might be additional mitigation costs from the CHD, such as land use restrictions and increased costs of development.<sup>21</sup>

Potential restrictions in land development due to the CHD affect not only landowners and land values in these areas, but these restrictions also impact developers, builders and many other small entities by increasing development costs and reducing revenues for these entities. The analysis employed by FWS considers the impacts of the CHD on only the raw land values, while ignoring the impacts to the other important factors that produce value in a completed development project. For example, the value of a development reflects improvements to land by developers and builders, including re-zoning, planning, clearing, construction, and landscaping.

Advocacy spoke to small businesses in Maine that were also concerned that FWS's economic analysis only lists 10,157 acres of developable land out of the more than 6 million acres of land in the CHD.<sup>22</sup> The analysis only factors in currently zoned areas as developable land in its economic impact, and does not account for potential changes in

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<sup>15</sup> *Id.*

<sup>16</sup> *Economic Analysis*, at 4-2.

<sup>17</sup> U.S. Census Bureau, *2004 County Business Patterns (NAICS)-Minnesota*, available at <http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl>.

<sup>18</sup> 5 U.S.C § 609.

<sup>19</sup> *Economic Analysis*, at C-7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4-1.

<sup>22</sup> *Id.* at 4-3.

future zoning.<sup>23</sup> FWS acknowledges that the development potential in Maine is uncertain, and significant levels of re-zoning may be necessary to accommodate development pressure on areas located along the shores of lakes.<sup>24</sup> For example, a news report indicates that there are plans to rezone over 400,000 acres of property in the CHD to create two resorts and nearly 1,000 house lots.<sup>25</sup> Any restrictions in this development will have an economic impact on builders, loggers and other small entities in this area.

Advocacy is concerned about the economic impacts to small entities in the timber industry in Maine, where 95 percent of the timberlands are privately owned and more than 6 million acres are included in this CHD.<sup>26</sup> The CHD has restrictions on pre-commercial thinning activities, which affect sectors of the timber industry that are made up almost exclusively of small businesses, such as timber tract operations, logging, support activities for forestry, wood products manufacturing and pulp mills.<sup>27</sup>

In Maine, FWS estimates that the mitigation cost of CHD activities is estimated to be \$10.8 million, or 5.6 percent of the total forestry related earnings of small entities in the timber industry.<sup>28</sup> FWS's IRFA points out that this estimate does not include other economic impacts such as "decreased employment, decreased number of businesses, or foregone revenue or profit per business."<sup>29</sup> Based on conversations with representatives from the timber industry in Maine, small timber entities are concerned that these restrictions will result in higher economic impacts than the costs listed in this IRFA. These small entities are also worried that further regulatory restrictions from state and local government will add costs and pressures on this important sector of Maine's economy.

Advocacy recommends that FWS issue a supplemental IRFA with more thorough analysis of the economic impacts to small entities, based on the comments received from small entities and further outreach to affected small entities. Advocacy would like to offer its assistance in connecting FWS with affected small entities.

### **III. Recommended Small Business Alternatives**

Pursuant to the Section 603(c) of the RFA, Advocacy recommends that FWS consider regulatory alternatives which could reduce this rule's impacts to small entities.<sup>30</sup>

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<sup>23</sup> *Id.* at 4-11.

<sup>24</sup> *Id.* at 4-6.

<sup>25</sup> John Richardson, *Landowners fight lynx habitat designation*, Portland Press Herald, Sept. 25, 2006, available at: <http://pressherald.maintoday.com/news/state/060925lynx.html>.

<sup>26</sup> *Economic Analysis*, at 3-5.

<sup>27</sup> *Id.* at C-9.

<sup>28</sup> *Id.* at C-2.

<sup>29</sup> *Id.* at C-14.

<sup>30</sup> One of the most important requirements of an IRFA is the description of any significant alternatives to the proposed rule that accomplish the stated objectives of the applicable statutes and that minimize the rule's economic impact on small entities. Section 603(c) of the RFA recommends types of alternatives that may minimize impacts on small entities, such as the establishment of differing compliance or reporting requirements or the exemption for certain or all small entities from coverage of the rule. 5 U.S.C. § 603(c).

For instance, a regulatory alternative discussed in FWS's economic analysis, "Scenario 1," would be less costly for small businesses in the timber industry than under "Scenario 2." Under Scenario 1, timber companies would continue to implement their ongoing lynx conservation efforts or pay a fee per acre for lynx management. Scenario 2 adds restrictions to pre-commercial thinning activities.<sup>31</sup> The estimate of compliance costs from Scenario 2 implementation to private timberlands in Maine is approximately \$240 million, while the cost of Scenario 1 is only \$31 million.<sup>32</sup>

There is another regulatory alternative proposed by the Maine Forest Products Council, which would require the timber industry to continue approved critical habitat conservation plans, and these areas covered by these plans would be excluded from the CHD. The Maine Forest Products Council has submitted a conservation plan for the timber community in Maine that would require these entities to utilize forestry practices to maintain lynx habitat, to monitor and report to FWS and to implement lynx research.<sup>33</sup>

The Endangered Species Act also allows FWS to exclude an area from critical habitat designation if it determines that the benefits of excluding the area outweigh the benefits of including the area, provided that the exclusion will not result in the extinction of the species.<sup>34</sup>

Advocacy strongly supports FWS's proposal to exclude areas in Montana, Idaho and Washington from the CHD.<sup>35</sup> The inclusion of these 8,904 square miles or 5.6 million acres of land would adversely affect numerous small businesses and create a large economic impact to these small entities with little benefit to the protected species. Further, Advocacy recommends that the agency carefully consider small entity comments on the exclusion of areas in Maine and Minnesota that are most likely to impose significant regulatory burdens on the timber and development industry.

Advocacy believes that, with further consideration of the economic impact of this proposed CHD on small entities, FWS will be able to find an alternative regulatory solution that will minimize the overly burdensome economic impacts of the rule on small entities.

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<sup>31</sup> *Economic Analysis*, at C-6.

<sup>32</sup> *Id.* at 3-14.

<sup>33</sup> Patrick J. Strauch, Maine Forest Products Council, *Conservation Strategy for the Canada Lynx in Maine* (April 28, 2006).

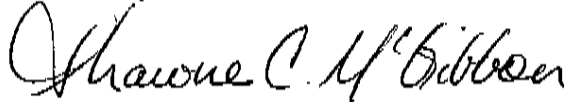
<sup>34</sup> 16 U.S.C. § 1533(b)(2).


<sup>35</sup> 71 *Fed. Reg.* 8258.

#### IV. Conclusion

Advocacy recommends that FWS issue a supplemental IRFA with more thorough analysis of the economic impacts of this CHD and significant alternatives for small entities. Advocacy is pleased to submit these comments on behalf of small businesses and looks forward to working with FWS on this 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](mailto:Janis.Reyes@sba.gov).

Sincerely,

  
for 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