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The Office of Advocacy (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule *Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse*.¹

Advocacy is providing the following comments to assist FWS in its compliance with its Regulatory Flexibility Act (RFA)² obligations, the February 2012 Presidential Memorandum,³ and Executive Order 13563.⁴

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 SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ 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.⁶ The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁷

¹ 78 Fed. Reg. 37328 (June 20, 2013).

² 5 U.S.C. § 601 et seq.

³ *Presidential Memorandum for the Secretary of the Interior: Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens* (Feb. 28, 2012).

⁴ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (January 21, 2011).

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

⁶ 5 U.S.C. § 603, 605.

⁷ Small Business Jobs Act of 2010 (PL 111-240) § 1601. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these

Background

On June 20, 2013, FWS proposed critical habitat for the New Mexico Jumping Mouse. FWS is proposing to designate approximately 14,561 acres as critical habitat in several counties in New Mexico, Colorado, and Arizona. FWS has indicated that special management considerations may be necessary to reduce the impact of grazing, development, coal methane production, and highway construction in the proposed critical habitat areas may be necessary.

The Endangered Species Act (ESA) requires that Federal agencies insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of a listed species.⁸ The ESA also directs FWS to determine critical habitat for listed species and prohibits the adverse modification or destruction of critical habitat.⁹ While FWS is prohibited from considering economic impacts in its listing decision,¹⁰ it is required to consider the economic impacts of designating an area as critical habitat and is given authority to exclude areas from critical habitat designations where the costs of designating the area outweigh the benefits.¹¹

On February 28, 2012, President Obama issued a memorandum entitled, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*¹² (Presidential Memorandum), which directed FWS to take several steps to improving designations of critical habitat. On August 24, 2012, in response to the Presidential Memorandum, FWS published the proposed rule *Revisions to the Regulations for Impact Analyses of Critical Habitat* (Impact Analysis Regulation).¹³

On January 19, 2013, Advocacy held a roundtable discussion regarding the proposed August 24, 2012 rule which representatives of FWS, NOAA and small businesses from various industries attended.

The Designation of Critical Habitat Imposes Costs Directly on Small Businesses and These Costs Must Be Properly Evaluated as Required by the RFA

The Regulatory Flexibility Act requires that agencies perform regulatory flexibility analyses or certify that their proposed rules will not have a significant economic impact on a substantial number of small entities.¹⁴ This analysis is required only for small

written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

⁸ 16 U.S.C. §1636(2).

⁹ Id.

¹⁰ 16 U.S.C. §1533(b)(1)(A).

¹¹ Id. § 1533(b)(2).

¹² Presidential Memorandum, *supra* note 3.

¹³ *Revisions to the Regulations for Impact Analysis for Critical Habitat*, 77 Fed. Reg. 51503 (August 24, 2012).

¹⁴ 5 U.S.C. §601, et.seq.

entities that are directly affected by the regulations.¹⁵ The Service asserts that a regulatory flexibility analysis is not required for this proposed rule because federal agencies are the only entities affected by this rule.¹⁶

FWS makes a similar argument in most of its proposed designations for critical habitat.¹⁷ FWS frequently cites *American Trucking Associations, Inc., v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), as the basis for this determination. In *American Trucking*, the Environmental Protection Agency (EPA) established a primary national ambient air quality standard (NAAQS) for ozone. EPA certified that the rule would not have a significant economic impact on small entities; the basis of the EPA's certification was that the NAAQS only regulated small entities indirectly through state implementation plans. EPA was *required* to approve any state plan meeting the standards and could not reject a plan based upon its view of the wisdom of a state's choices.¹⁸ The states had broad discretion to determine how to achieve compliance with the NAAQS.¹⁹ Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would be indirect.²⁰

Critical habitat designations are distinguishable from the regulation at issue in *American Trucking*. First, *American Trucking* dealt with federal regulations requiring states to act and giving the states broad discretion regarding how to implement goals. The court noted that state plans could avoid imposing impacts on small businesses and it was the state's decision and only the state's decision whether or not to impose such impacts.²¹ Critical habitat regulations are implemented through *federal agencies* which, in many cases, will only be taking action because a third party small entity is requesting a permit. Once a small entity has requested a permit from a federal agency that agency is required to consult with FWS.²² The resulting FWS actions are governed by a 315-page handbook promulgated by FWS detailing the procedures that the federal agencies are to follow in order to obtain FWS's permission to issue a permit to the small entity requesting a permit.²³ The agencies contemplate that the third party applicant will be involved in this process and impacted by its decisions during the process, as the handbook discusses the

¹⁵ See *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985); *American Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. 1999).

¹⁶ 77 Fed. Reg. at 51509.

¹⁷ See, e.g., *Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat*, 77 Fed. Reg. 73770,73806 (December 11, 2012).

¹⁸ *Id.* at 1044.

¹⁹ *Id.*

²⁰ *Id.* at 1045.

²¹ *Id.* at 1044.

²² 16 U.S.C. §1536(a)(2); Endangered Species Consultation Handbook at 2-6 available at http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (March 1998) (last visited January 23, 2013) ("The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program)").

²³ Endangered Species Consultation Handbook at 2-6.

applicant's role, rights and responsibilities.²⁴ Moreover, the handbook specifically notes that modifications to the applicant's proposed projects may be necessary in order to obtain FWS's written concurrence for the federal agency to issue a permit.²⁵ The handbook also states that FWS has a great deal of say in the decision regarding which modifications are acceptable.²⁶

Unlike the states in *American Trucking*, any federal agency that stands between FWS and the applicant has very little discretion. FWS is essentially arguing that it, a federal agency, is not regulating small entities because another federal agency, which is required to consult with FWS and obtain FWS's consent to action, stands as an intermediary in the process. However, FWS retains the final decision as to what modifications are reasonable and prudent and therefore adequate in order to refrain from running afoul of the ESA.²⁷ Since these decisions directly impact small entities, the RFA requires FWS to perform regulatory flexibility analyses or certify that their proposed rules will not have a significant economic impact on a substantial number of small entities.

Economic Analyses Should Include a Full Accounting of the Impact of Critical Habitat Designations on Small Businesses

FWS currently uses an incremental analysis to determine the costs to small businesses of critical habitat designations. An incremental economic analysis, or "but for" analysis, seeks to compare a hypothetical world in which the designation is operative, to a hypothetical world in which the designation is not operative.²⁸ The Presidential Memorandum stressed the importance of FWS taking into account the economic impact of critical habitat designations and cited to Executive Order 13563 which directed federal agencies to, among other things, "use the best available techniques to quantify anticipated

²⁴ *Id.* at 2-12. "[Users of public resources] who are party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later consultation or re-initiation when a new species is listed or new critical habitat is designated) may participate as applicants in the section 7 process."

²⁵ *Id.* at 3-6 ("Conflict resolutions during informal consultation may involve changes in construction scheduling, engineering design, pesticide formulation or application method, location, emission or discharge levels and many other changes"), 3-12 ("Since concurrence depends upon implementation of the modifications, the concurrence letter must clearly state any modifications agreed to during informal consultation. If agreement cannot be reached, the agency is advised to initiate formal consultation.").

²⁶ *Id.* at 4-44 ("The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains that the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities to implement reasonable and prudent alternatives.")

²⁷ Endangered Species Consultation Handbook at 2-6 ("The Services will, in most cases, defer to the action agency's expertise and judgment as to the feasibility of an alternative. When the agency maintains that the alternative is not reasonable or not prudent, the reasoning for its position is to be provided in writing for the administrative record. The Services retain the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, the Services may question the agency's view of the scope of its authorities to implement reasonable and prudent alternatives.")

²⁸ 77 Fed. Reg. at 51507.

present and future benefits and costs as accurately as possible.”²⁹ The Impact Analysis Regulation, if finalized as proposed, would codify the use of incremental analysis.³⁰

Advocacy and other public commenters have previously noted that FWS’s practice of using an incremental analysis of the economic impacts from critical habitat designations leads to an underestimation of the impact of those designations.³¹ In addition, several U.S. senators have written to FWS urging the abandonment of incremental analysis.³² The commenters instead urge the use of coextensive analysis which would account for all of the costs that small businesses incur as a result of a critical habitat designation and would be in keeping with the Endangered Species Act’s directive that “the economic impact and any other relevant impact, of specifying a particular area as critical habitat.”³³ Advocacy urges FWS to adopt the use of coextensive analysis for this economic analysis and all future economic analyses.³⁴

FWS Has Not Properly Considered the Costs of the Proposed Critical Habitat Designation.

FWS has indicated that special management considerations may be needed to reduce the effects of grazing, development, coal methane production, and highway construction in the proposed critical habitat areas. FWS is required to give small businesses in these industries that may be affected by this critical habitat designation a full and fair accounting of the potential costs that will be incurred from this designation. Advocacy encourages FWS to publish an Initial Regulatory Flexibility Analysis in compliance with the RFA.

²⁹ See EO 13563, *supra*, note 3.

³⁰ *Supra*, note 12.

³¹ See Endangered and Threatened Wildlife and Plants: Revisions for Impact Analyses of Critical Habitat, Docket Id. No. FWS-R9-ES-2011-0073-0001: Letter from Winslow Sargeant, Chief Counsel, Small Business Administration Office of Advocacy to Daniel Ashe, Director, Fish and Wildlife Service and Jane Lubchenco, Administrator, National Oceanic and Atmospheric Administration (January 31, 2013); Letter from Joseph Nelson, Counsel to the National Endangered Species Act Reform Coalition to the U.S. Fish and Wildlife Service (October 23, 2012); Letter from Edward Poitevent, Attorney for Poitevent Landowners to Daniel Ashe, Director, U.S. Fish and Wildlife Service (October 22, 2012); Letter from David P. Tenny, President, National Alliance of Forest Owners to U.S. Fish and Wildlife Service (October 23, 2012); Letter from Kathy Mannion, Legislative Advocate, Regional Council of Rural Counties to U.S. Fish and Wildlife Service (November 21, 2012).

³² Letter from twenty-three U.S. Senators to Daniel Ashe, Director, U.S. Fish and Wildlife Service and Jane Lubchenco, Administrator, National Oceanic and Atmospheric Administration (February 1, 2013); Letter from Senator David Vitter, Ranking Member Senate Committee on Environment and Public Works to the Office of Management and Budget (June 24, 2013).

³³ Endangered Species Act, § 4(b)(2), 16 U.S.C. § 1533(b)(2) (2003)

³⁴ FWS often points to *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010) to support its use of the incremental analysis method. The *Arizona Cattle Growers* decision addressed only whether or not FWS could properly apply the incremental analysis approach. The court found that it was possible to do so but reaffirmed that use of the regulatory definition of ‘adverse modification or destruction’ was contrary to law. In contrast in *New Mexico Cattle Growers Ass’n vs. FWS*, 248 F.3d 1277 (10th Cir. 2001), court determined that “Congress intended that FWS conduct a full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes.” The Tenth Circuit opinion has not been overturned, at best setting up a split amongst the circuits and still calling into question the use of the incremental analysis approach.

Conclusion

Critical habitat designations have direct effects on small businesses which should be reflected in FWS's regulatory flexibility analyses. Advocacy encourages FWS to adopt the use of coextensive economic analyses in its designations of critical habitat. Please contact me or Kia Dennis at (202) 205-6936 if you have any questions or require additional information.

Sincerely,

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