

July 29, 2013

Susan Jewell  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive  
Arlington, VA 22203

**Re: National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service.<sup>1</sup>**

Dear Ms. Jewell:

The Office of Advocacy of the U.S. Small Business Administration respectfully requests that the Department of the Interior (Interior) extend the public comment period for its proposed rule *National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service*.

**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),<sup>2</sup> 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.<sup>3</sup> The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup>

**Request for an Extension of the Comment Period**

Advocacy has heard from several small businesses concerned with the potential effects of the proposed categorical exclusion from the National Environmental Policy Act (NEPA). Many have indicated a desire for more time to thoroughly review the consequence of a categorical exclusion for the Fish and Wildlife Service (FWS) from preparing

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<sup>1</sup>78 Fed. Reg. 39307 (July 1, 2013).

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

<sup>3</sup> 5 U.S.C. § 603, 605.

<sup>4</sup> 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 written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Environmental Assessments or Environmental Impact Statements with their proposals to list species under the Lacey Act. Advocacy notes that Interior proposed the rule on July 1, 2013 with only a thirty-day comment period. Small entities have expressed that this is insufficient time to prepare written comments to a proposal that they feel could have far reaching effects.

One of the issues that small entities have raised in conversations with Advocacy is that this categorical exclusion will remove much needed transparency and checks and balances from the process of Lacey Act listings. Advocacy notes that small entities noted inconsistencies and unreliable science in the Environmental Assessment for the proposed rule *Injurious Wildlife Species: Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles* (Snakes Listing).<sup>5</sup> FWS subsequently listed fewer species as a result of public comments which pointed out these problems.

Small businesses have expressed confusion regarding Interior's reasoning for proposing a categorical exclusion with respect to Lacey Act listings. Interior states in the notice proposing a categorical exclusion from NEPA that such an exclusion is allowed where "the agency identifies classes of actions that under normal circumstances will not have a potentially significant environmental impact, either individually or cumulatively...."<sup>6</sup> However, when FWS determines that listing certain wildlife would be prudent and permissible under the Lacey Act it has necessarily found that the listing will have a significant environmental impact as the Act allows only that wildlife that is "injurious to humans, the interests of agriculture, horticulture, forestry or to wildlife or the wildlife resources of the U.S."<sup>7</sup> It is unclear why Interior would propose a categorical exclusion for FWS's listings under the Lacey Act based upon the premise that those listings will have no environmental impact when by statute all wildlife that is proposed to be listed under the Lacey Act must be shown to have an injurious environmental impact.

Small entities also expressed concern regarding certain statements made in this notice. For example, Interior states that Lacey Act listings merely maintain the status quo, keeping out species that would be injurious if introduced into of areas where they do not naturally occur.<sup>8</sup> However, FWS and Interior list wildlife that has already made it to our shores and into commercial trade. In these circumstances, a listing would not be maintaining the status quo and may in fact impact small businesses. In the 2010 Snakes Listing, Interior proposed to list animals that are already here in the U.S. and are held as pets and sold in commercial trade. The baseline for the environmental impact assessment under these circumstances should not begin with the presumption that the non-native wildlife proposed for listing is not currently in the U.S. but rather whether the proposed wildlife as found in the U.S. environment is actually causing injury "to humans, the

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<sup>5</sup> 78 Fed. Reg. 75 (March 12, 2010); see e.g. Letter from Association of Zoos & Aquariums to U.S. Fish and Wildlife Service dated May 10, 2010.

<sup>6</sup> 78 Fed. Reg. at 39308.

<sup>7</sup> 18 U.S.C. §42

<sup>8</sup> 78 Fed. Reg. at 39308. "Thus, prohibiting a nonindigenous injurious species from being introduced into an area in which it does not naturally occur cannot have a significant effect on the human environment."

interests of agriculture, horticulture, forestry or to wildlife or the wildlife resources of the U.S.”<sup>9</sup>

Given the significant small business interest in the outcome of this proceeding; Advocacy respectfully requests that Interior extend the public comment period for another sixty days and encourages Interior to consult with interested small businesses in order to clarify the purpose and necessity of this action.

For additional information or assistance, please contact me or Kia Dennis at (202) 205-6936 or [Kia.Dennis@sba.gov](mailto:Kia.Dennis@sba.gov).

Sincerely,

/s/ Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

/s/ Kia Dennis  
Assistant Chief Counsel

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<sup>9</sup> 18 U.S.C. §42