



January 31, 2013

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The Honorable Dr. Jane Lubchenco
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The Office of Advocacy (Advocacy) submits these comments on the National Oceanic and Atmospheric Administration's (NOAA) and the U.S. Fish and Wildlife Service's (FWS) proposed rule *Revisions to the Regulations for Impact Analyses of Critical Habitat*.¹

Advocacy is pleased that FWS will begin publishing economic analyses simultaneously with the publication of critical habitat designations. 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

¹ *Revisions to the Regulations for Impact Analysis for Critical Habitat*, 77 Fed. Reg. 51503.

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.).

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

Background

The Endangered Species Act (ESA) prohibits Federal agencies from engaging in activities that are likely to jeopardize the continued existence of species that have been listed as endangered or threatened.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

The Fish and Wildlife Service's current practice is to publish a proposed rule designating critical habitat without simultaneously publishing an economic analysis evaluating the economic impact that such designation will have on small businesses as required by the RFA. FWS does not publish the economic analysis and regulatory flexibility analysis and provides a thirty day comment period until after publication of the proposed designation of critical habitat. Advocacy has communicated to FWS that it must comply with the Regulatory Flexibility Act at the time of the publication of the proposed critical habitat designation.¹²

On February 28, 2012, President Obama issued a memorandum entitled, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*¹³ (the Memorandum), directing FWS to make its economic analysis available for public comment when the agency publishes a proposed rule to designate critical habitat. The Memorandum notes that simultaneous publication reduces regulatory uncertainty while promoting environmental safety and economic growth.¹⁴ On August 24, 2012, in response to the Presidential Memorandum, FWS published the proposed rule.

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 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 5 U.S.C. § 603 et.seq. The Regulatory Flexibility Act requires that agencies publish a notice of proposed rulemaking, they must also publish an Initial Regulatory Flexibility Analysis or certify that the regulation will not have a significant impact on a substantial number of small entities.

¹³ Presidential Memorandum, *supra* note 3.

¹⁴ Presidential memorandum, *supra* note .

On January 19, 2013, Advocacy held a roundtable discussion regarding the proposed 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.¹⁵ This analysis is required only for small entities that are directly affected by the regulations.¹⁶ The Service asserts that a regulatory flexibility analysis is not required for this proposed rule because NOAA and FWS are the only entities affected by this rule.¹⁷ FWS makes a similar argument in most of its proposed designations for critical habitat arguing that federal agencies are the only entities directly regulated by critical habitat designations therefore FWS can always certify critical habitat designations.¹⁸ FWS frequently cites *American Trucking Associations, Inc., v. EPA*¹⁹ 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. 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.²⁰ The states had broad discretion to determine how to achieve compliance with the NAAQS.²¹ Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would be indirect.²²

Critical habitat designations are distinguishable from the regulation at issue in *American Trucking*. First, *American Trucking* was dealing with federal regulations requiring states to act but 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.²³ 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 the small entity has requested a permit from a federal agency that agency is

¹⁵ 5 U.S.C. §601, et.seq.

¹⁶ 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).

¹⁷ 77 Fed. Reg. at 51509.

¹⁸ See, e.g., *Listing Four Subspecies of Mazama Pocket Gopher and Designation of Critical Habitat*, 77 Fed. Reg. 73770,73806 (December 11, 2012).

¹⁹ 175 F.3d 1027 (D.C. Cir. 1999).

²⁰ *Id.* at 1044.

²¹ *Id.*

²² *Id.* at 1045.

²³ *Id.* at 1044.

required to consult with FWS or NOAA.²⁴ FWS and NOAA actions are governed by a 315-page handbook promulgated by FWS and NOAA detailing the procedures that the federal agencies are to follow in order to obtain FWS's and NOAA's permission to issue a permit to the small entity requesting a permit.²⁵ 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 applicant's role, rights and responsibilities.²⁶ 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.²⁷ The handbook also states that FWS has a great deal of say in the decision regarding which modifications are acceptable.²⁸

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.²⁹ 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.

In addition, notwithstanding the above discussion, FWS's express commitment to the President's Memorandum in both this proposed rulemaking and the final Northern Spotted Owl (NSO) critical habitat designation support providing a robust RFA analysis. Referencing Executive Order 13563, the memorandum directs FWS to conduct a "full

²⁴ 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)").

²⁵ Endangered Species Consultation Handbook at 2-6.

²⁶ *Id.* at 2-12.

²⁷ *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.").

²⁸ *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.")

²⁹ 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.")

analysis of the economic impacts... give careful consideration to providing the maximum exclusion from the final revised critical habitat ... [and] to the extent permitted by law, adopt the least burdensome means, including avoidance of unnecessary burdens on States, tribes, localities, and the private sector.”³⁰ All of these presidential directives speak to providing a full analysis of impacts to small entities and a commitment to examining regulatory alternatives that lessen any disproportionate burdens to those entities.

Finally, Advocacy notes that NOAA complies with RFA requirements and has provided thorough analyses of economic impacts to small entities by economic and geographic sector, as well as a discussion of regulatory alternatives that expressly considers impacts to small entities. For example, in NOAA’s Final Regulatory Flexibility Analysis (FRFA) for the critical habitat designation of the North American Green Sturgeon, the agency presented annualized cost estimates for small entities by economic activity and geographic unit, including state and county level analyses.³¹ In addition, NOAA’s FRFA discusses regulatory alternatives and steps taken to minimize significant economic impacts to small entities. Importantly, this discussion expressly considers impacts to small entities in the context of its 4(b)(2) analysis.³² In other words, NOAA expressly considers 4(b)(2) critical habitat exclusions as a regulatory alternative for small entities.

Given that NOAA operates under largely the same statutory conditions as FWS in making critical habitat designations, Advocacy recommends that FWS adopt NOAA’s RFA approach in complying with the RFA. Doing so also supports not only the directives listed in the Presidential Memorandum, but also the principles of E.O. 13563 (encouraging consistency across the federal government) and the January 18, 2011 Presidential Memorandum (stressing the importance of considering regulatory impacts to small businesses).³³

The Term “Adverse Modification or Destruction of Critical Habitat” Must Be Defined to Allow for an Accurate Evaluation of Costs Attributable to the Designation

The Endangered Species Act does not allow the consideration of economic impacts when determining whether to list a species; however, FWS is given authority to exclude areas from critical habitat designations where the costs of avoiding adverse modification or

³⁰ Presidential Memorandum, *supra* note 2 at 2 (quoting from presidential directives (1), (5), and (6) in the memorandum).

³¹ See National Marine Fisheries Service, *Economic Analysis of the Impacts of Designating Critical Habitat for the Threatened Southern Distinct Population Segment of North American Green Sturgeon* at Appendix C (September 28, 2009) (*hereinafter* “NOAA RIA”).

³² *Id.* at C-35 (“The extent to which the economic impact to small entities would be reduced depends on how many, and which, units would be excluded... It is estimated that the exclusions as recommended in the ESA 4(b)(2) analysis report will result in reductions in annualized impacts per small entity.”).

³³ See EO 13563 *supra* note 3. (“In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization.”); *Presidential Memorandum for the Heads of Executive Departments and Agencies: Regulatory Flexibility, Small Business, and Job Creation* (January 18, 2011).

destruction of an area that would be designated as critical habitat outweigh the benefits.³⁴ When costs are incorrectly attributed to listing rather than critical habitat, the actual costs of designating an area as critical habitat are underestimated.

The 5th and 9th Circuit Courts of Appeal have invalidated the regulatory definition of “adverse modification or destruction,” finding that it was too narrow.³⁵ The Tenth Circuit, while not explicitly invalidating the definition of adverse modification or destruction of critical habitat also found that it was too narrow and that using the definition to determine costs of adverse modification of critical habitat in an incremental economic analysis necessarily rendered that analysis useless and ordered FWS not to use the method.³⁶

Since its invalidation FWS has been relying upon a policy guidance document to determine when adverse modification occurs.³⁷ FWS appears to be applying this guidance in exactly the same way as the invalidated definition, thereby continuing to underestimate the costs of critical habitat definitions and making economic analysis of the costs of avoiding adverse modification of an area that has been designated as critical habitat useless. Advocacy notes that the Endangered Species Consultation Handbook continues to use language almost identical to the language that the Circuit Courts invalidated.³⁸ As a matter of course, FWS finds that all the costs incurred by businesses occur as a result of the listing of a species and that no significant costs occur as a result of the mandate to avoid adverse modification or destruction of critical habitat.³⁹ Without a codified definition consistent with the ESA and the courts’ holdings it is difficult to pinpoint the

³⁴ *Id.* § 1533(b)(2).

³⁵ *Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059 (9th Cir. 2004); *Sierra Club v. FWS*, 248 F.3d 434 (2001).

³⁶ *New Mexico Cattle Growers Ass’n v. FWS*, 248 F.3d 1277, 1285 (10th Cir. 2001) (“...the regulation’s definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless”). 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. Notwithstanding the Ninth Circuit opinion, 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 in the absence of a valid regulatory definition of ‘adverse modification or destruction of critical habitat’.

³⁷ *Application of the “Destruction or Adverse Modification” Standard Under Section 7(a)(2) of the Endangered Species Act*, (Dec. 9, 2004), <http://www.endangeredspecieslawandpolicy.com/uploads/file/Adverse%20Modification%20Guidance.pdf> (last visited January 23, 2013).

³⁸ *Endangered Species Consultation Handbook*, supra note 24 at 4-35 (“In evaluating project effects on critical habitat, the Services must be satisfied that the constituent elements of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the survival *and* recovery of affected species would be appreciably reduced.”) (emphasis added).

³⁹ See e.g. *Revising Critical Habitat for Sonoma County Population of California Tiger Salamander*, 76 Fed. Reg. 54345 (August 31, 2011). 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. 77 Fed. Reg. at 51507.

dividing line between costs that can be considered under the ESA and costs that should not be considered under the ESA.

In addition, a formal definition of adverse modification also supports the underlying motivation for this proposed rulemaking. The proposed rule states that it attempts to address the directives of the Presidential Memorandum. In doing so, it quotes the Presidential Memorandum stating “[u]ncertainty on the part of the public may be avoided, and public comment improved, by simultaneous presentation of the best scientific data available and the analysis of economic and other impacts.”⁴⁰ For example, the National Association of Home Builders (NAHB) states in its public comments for this proposed rule, “[l]acking a regulatory definition for ‘adverse modification’ it is impossible for either the Service or the regulated community to predict whether a proposed land use activity occurring in an area designated as critical habitat will trigger an adverse modification threshold, and hence, if any costs may be accrued.”⁴¹ NAHB goes on to note these analyses lack clarity and transparency to the public as interested parties are forced to “cull through a number of recent economic analyses” in order to infer some sense of the incremental distance between jeopardy and adverse modification.⁴² Advocacy encourages FWS to define this important term via the regulatory process in order to provide much needed clarity and transparency in the economic analysis process and in keeping with the intent of Congress, the Presidential Memorandum, and Executive Orders 13563 and 12866.

Advocacy Encourages FWS to Establish a Process for Collecting Economic Data Earlier in the Critical Habitat Designation Process

In past proposed rules designating critical habitat, FWS discussed the difficulty of obtaining the economic information necessary to provide an adequate regulatory flexibility analysis at the time the agency proposes a critical habitat designation. Not having sufficient economic information to comply with the RFA does not excuse an agency from its obligations. Advocacy notes that the RFA was passed by Congress in response to agencies’ systemic failure to consider the economic impact on small businesses prior to promulgating rules. One of the purposes of the RFA is to require agencies to gather economic information, determine the impact of its rulemakings on small businesses prior to publishing the rule and to make this information and determination available to the public upon publication of the rule.⁴³

Small entities have suggested that the Service establish region-specific listserves which FWS would use to announce not only proposed rulemakings but also disseminate information such as settlement agreements, new litigation, listing workplans, new

⁴⁰ 77 Fed. Reg. at 51504 (quoting Presidential Memorandum, *supra* note 2 at 3).

⁴¹ National Association of Home Builders. *Request for Comment Period Extension*, FWS-R9-ES-2011-0073 at p. 3 (October 15, 2012) (*hereinafter* NAHB comments). See also, Idaho Governor’s Office of Species Conservation, *Comments on Proposed Changes to Critical Habitat Regulations*, FWS-R9-ES-2011-0073-0046 (October 23, 2012); Western Urban Water Coalition, *Comments on Proposed Revisions to the Regulations for Impact Analyses of Critical Habitat*, FWS-R9-ES-2011-0073-0042 (October 23, 2012).

⁴² *Id.*

⁴³ S. Rep. No. 96-878 (1980), reprinted in 1980 U.S.C.C.A.N. 2788.

petitions for listing and other pertinent information as it is being received. The listserv would be used to alert the public to information that may not be appropriate for publication in the Federal Register but nonetheless is important to the public. It would allow members of the public to send economic data relevant to the listserv announcements and to do so early in the process, improving the process for designation critical habitat and conducting economic analyses. It would also further FWS's attempts to streamline the process while keeping with the goals of public engagement, clarity and transparency in the regulatory process.

Advocacy Encourages FWS to Add More Specificity to the Proposed Standards for Conducting Economic Analyses

Small businesses are concerned that the proposed rule does not provide certainty as directed in the Presidential Memorandum. In particular, the proposed rule repeatedly emphasizes that the Secretaries of Commerce and the Interior have wide discretion to determine what costs to consider, the scale and impact of those costs, and what weight to attribute to the costs when determining whether they outweigh benefits. As written, it appears that the agencies are claiming discretion so broad as to leave small businesses without guidance as to what standards the agencies will be applying when conducting economic analyses. Advocacy encourages FWS to clearly state the procedural steps they will take in conducting economic analyses, and any conditions and standards that will be applied when deviating from those procedural steps.

Small entities have also stressed that the agencies must continuously make every effort to use the best economic information available. Advocacy commends FWS for taking the first step by committing to publish initial economic analyses at the time of publishing critical habitat designations. Advocacy also encourages the agencies to identify the substantive factors that will be used in determining (1) the scope of the economic analysis, (2) which industries and entities will be impacted, and (3) the manner in which costs and benefits will be determined and weighed. Currently, the proposed rule's only statement with respect to this issue is that FWS will evaluate "any significant activities."⁴⁴ However, the proposed rule does not define the term "significant" or give any guidance as to what activities FWS might deem to be significant. Providing some clarity as to the factors that FWS is going to consider when making a determination of "significant" will facilitate public comment and review of economic analyses.

Advocacy urges FWS to clarify that its economic impact analyses will objectively address both the benefits and the costs of critical habitat designations. The proposed rule states, "Finally, because its primary purpose is to facilitate the impact analysis and *the weighing of benefits*, the draft final economic analyses *should focus on the incremental economic benefits of the designation.*"⁴⁵ The economic analysis should not be weighted in favor of assessing benefits of critical habitat designations to the detriment of weighing the costs of such designations. Critical habitat designations may have benefits but they also impose economic costs. Section 4(b)(2) recognizes the potential for such costs and

⁴⁴77 Fed. Reg. at 51505.

⁴⁵ 77 Fed. Reg. at 51507.

allows for the exclusion of areas from a critical habitat designation if the impacts of the designation outweigh the benefits of the designation.⁴⁶ In fact, NOAA expressly recognizes that 4(b)(2) translates to cost benefit analysis, noting that ‘[c]onceptually, the ‘benefits of exclusion,’ which is the language used in section 4(b)(2) of the Endangered Species Act (ESA), are identical to the ‘costs of inclusion,’ and so estimates of these costs could be used in a benefit-cost framework.”⁴⁷ In order to accurately determine whether the costs of a designation outweigh the benefits, FWS must conduct a fair objective economic impact analysis that focuses on both the benefits and the costs of the designation.

Conclusion

Advocacy is pleased that FWS will begin publishing economic analyses simultaneously with the publication of critical habitat designations. However, critical habitat designations have direct effects on small businesses which should be reflected in FWS’s regulatory flexibility analyses. Advocacy encourages FWS to promulgate a rule defining the term ‘adverse modification and destruction of critical habitat’ in order to bring more clarity and transparency to the critical habitat designation process. Advocacy also encourages FWS to provide more specificity to its process and standards for conducting economic analyses and to establish a method for collecting economic information with sufficient time for conducting a robust regulatory flexibility analysis. Please contact me or Kia Dennis at (202) 205-6936 if you have any questions or require additional information.

Sincerely,

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/s/Kia Dennis
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Cc: Boris Bershteyn, Acting Administrator, Office of Information and Regulatory Affairs

⁴⁶ Public Law 93–205, Approved Dec. 28, 1973, 87 Stat. 884.

⁴⁷ NOAA RIA, *supra* note 31 at 1-2.