

October 11, 2011

Daniel Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (76 Fed. Reg. 50542, August 15, 2011)

Dear Mr. Ashe:

The Office of Advocacy (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule Designation of Revised Critical Habitat for Southwestern Willow Flycatcher. Advocacy is concerned that FWS has not published an Initial Regulatory Flexibility Analysis (IRFA) nor certified that the proposed rule is not expected to have a significant economic impact on a substantial number of small entities. As a result of this failure, Advocacy believes that FWS has not complied with its obligations as required by the Regulatory Flexibility Act (RFA).

Background on 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 the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),¹ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),² 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.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.³ 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

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.).

³ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Regulatory Flexibility Act Requirements

The RFA states that “[w]henever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis, or a summary, shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.”⁵ Section 605(b) of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency decides to certify, the certification must be published in the Federal Register at the time of publication of the general notice of proposed rulemaking or at the time of publication of the final rule, along with a statement providing the factual basis for such certification.⁶ If, at the time of the publication of the proposed rulemaking the agency knows it will be certifying, it should publish the certification with the general notice of proposed rulemaking. Section 608 of the RFA permits agencies to waive or delay completion of an IRFA if the agency makes a written finding that the rule is being promulgated in response to an emergency.⁷

FWS Has Not Complied with the Regulatory Flexibility Act

FWS has failed to publish an IRFA or certification with the publication of the proposed rule as required by the RFA. FWS has made no finding of an emergency nor given any indication that it is relying upon section 608 as a basis for failing to publish an IRFA or certification; therefore section 608 is not applicable with respect to the proposed rule.

FWS states in the preamble to the proposed rule that, at this time, it lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. 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.⁸

⁴ Id.

⁵ 5 U.S.C. §603.

⁶ 5 USC § 605.

⁷ 5 USC § 608.

⁸ S. Rep. No. 96-878 (1980), reprinted in 1980 U.S.C.C.A.N. 2788.

Advocacy also notes that FWS proposes to publish a draft economic impact analysis and IRFA or certification at some unstated later date and reopen the comment period, notwithstanding the RFA requirement that an IRFA or certification be made at the time of publication of a proposed rule. Advocacy believes that postponing the analysis harms small businesses and is a violation of the RFA. A small business wishing to comment on both the scope of the proposed rule and the economic analysis has to prepare two separate comments, one during the current comment period for the proposed rule and another, several months from now, when the RFA analysis is published. This dual comment period imposes an unnecessary and undue burden upon small entities.

Moreover, Advocacy notes that FWS has in the past reopened the comment period for the economic impact analysis and RFA determinations for only 30 days.⁹ Such a short comment period gives small entities very little time to propose alternatives and to adequately respond to analyses that could show significant impacts. The 30-day time period also increases the likelihood that a small entity will not have the time to prepare thorough comments or may be unaware when the comment period is reopened.

Conclusion

Advocacy is concerned that FWS has neither published an IRFA nor certified that the proposed rule will not have a significant economic impact on a substantial number of small entities. However, Advocacy remains committed to helping FWS comply with its RFA obligations and publish the IRFA at the time of publication of the critical habitat designation. If my office can be of any further assistance, please contact Kia Dennis, Assistant Chief Counsel at (202) 205-6936. Thank you for your attention to this matter.

Sincerely,

//s//

Winslow Sargeant, Ph.D.
Chief Counsel
Office of Advocacy

//s//

Kia Dennis
Assistant Chief Counsel
Office of Advocacy

⁹ 30 days is half of the time given for comments when the proposed rule is issued. See e.g., *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Sonoma County Distinct Population Segment of the California Tiger Salamander*, 76 Fed. Reg. 2863 (January 18, 2011); *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear in the United States*, 75 Fed. Reg. 24545 (May 5, 2010); *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Wintering Population of the Piping Plover*, 71 Fed. Reg. 33703 (June 12, 2006).