



February 14, 2011

Via Electronic Submission

Rowan W. Gould
Acting Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: Designation of Critical Habitat for the Sonoma County Distinct Population Segment of California Tiger Salamander¹

Dear Acting Director Gould:

The Office of Advocacy (Advocacy) at the U.S. Small Business Administration (SBA) respectfully submits these comments to the U.S. Fish and Wildlife Service (FWS) regarding its proposed designation of critical habitat for the Sonoma County Distinct Population Segment of California Tiger Salamander. Advocacy recognizes and supports protecting the environment. Advocacy notes that Sonoma businesses have, for several years, been involved with FWS's efforts to protect the Tiger Salamander and conserve its habitat. Advocacy supports FWS's efforts to include the voices of small business in the critical habitat designation process and to avoid unnecessary burdens on small businesses.

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 the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA)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.³

¹ 76 Fed. Reg. 2863 (2011).

² 5 U.S.C. § 601 et seq.

³ Id.

Background

On August 4, 2004, FWS listed the Central California population of the California Tiger Salamander as a threatened distinct population segment.⁴ On August 19, 2009, FWS published a proposed rule designating approximately 74,000 acres of critical habitat.⁵ On January 18, 2011, FWS published a revised proposed rule designating approximately 50,855 acres as critical habitat and announcing the availability of the draft economic analysis and initial regulatory flexibility analysis (IRFA).⁶

Advocacy has concerns that the IRFA does not adequately capture the economic impacts of the proposed rule on small businesses. Additionally, the IRFA does not discuss significant alternatives to the proposed rule, as required by the RFA.

The IRFA does not adequately describe the impacts of the proposed rule on small entities

Advocacy believes that the IRFA published with this proposed rule does not provide an accurate analysis of the economic impacts of the proposed rule on small entities. FWS makes no effort to describe the revenue or income profile of small building construction companies that may be affected by the critical habitat designation. Instead, FWS compares the estimated increase in cost from critical habitat designation for the building construction industry to SBA's maximum size standard for building construction companies. This comparison is inappropriate. Undoubtedly, some of the building construction companies that will be affected by the proposed rule generate revenues and income below the maximum size standard. Thus, the comparison made in the IRFA underestimates the effect of the costs of critical habitat designation on small construction companies.

Advocacy suggests that FWS publish a supplemental IRFA which includes a comparison between the estimated costs and the approximate income and/or revenue of small building construction companies likely to be affected by the designation of critical habitat. Such an analysis should also include a discussion of the various sizes and differences in income and/or revenue of small businesses in the building construction industry as the smallest small businesses will experience a greater impact than larger small businesses. As is, the IRFA fails to give the public adequate facts upon which to gauge the impact of the proposed rule on actual building construction companies that may be affected by the rule.

Moreover, the IRFA only identifies building construction companies as small businesses that may experience significant economic impacts. However, public comments submitted in response to FWS's August 18, 2009 proposed rule designating critical habitat indicate that other industries could be significantly affected by the proposed rule. For example,

⁴ 69 Fed. Reg. 47211 (2004). This was followed by years of litigation over the listing as well as critical habitat designation. Several proposed and final rules arose out of this litigation. We have included only proposed and final rules that are relevant to this comment letter in this background section.

⁵ 74 Fed. Reg. 41662 (2009).

⁶ *Supra* note 1.

Sonoma has a thriving vineyard and wine industry which may be impacted by the proposed rule. Yet, the IRFA does not discuss impacts that may be felt by small vineyard and wine businesses. FWS should publish a supplemental IRFA that examines the economic impact of the proposed rule on small businesses in this industry.

The IRFA does not discuss significant alternatives to the proposed rule

The RFA requires that the agency promulgating the rule examine significant alternatives to the proposed rule.⁷ Under the RFA, significant alternatives must reduce the burden of the proposed rule on small entities while achieving agency goals.⁸ FWS has not examined significant alternatives to this rulemaking and has not provided the public with an opportunity to comment on such alternatives.

Conclusion

Advocacy is unaware of any judicial or legislative mandates that would allow FWS to move forward with this rulemaking without conducting a thorough analysis of the economic impacts of the rule on small entities as required by the RFA. Advocacy believes that the public has not been given this information and requests that FWS publish a supplemental IRFA expanding the scope of its analysis to address the issues discussed above. Please do not hesitate to contact me or Kia Dennis at (202) 205-6936 should you have any questions.

Sincerely,

/s/

Winslow L. Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Kia Dennis
Assistant Chief Counsel for Advocacy

Cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

⁷ 5 U.S.C. at § 603(c).

⁸ Id.