



March 11, 2010

Via Electronic Submission

The Honorable Ken Salazar
Secretary
U.S. Department of the Interior
1849 C. Street, N.W.
Room 3156
Washington, DC 20240

Re: Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Bull Trout in the Coterminous United States¹

Dear Secretary Salazar:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) is pleased to submit these comments to the U.S. Fish and Wildlife Service (FWS) on behalf of the small entities affected by the proposed designation of critical habitat for the Bull Trout under the Endangered Species Act (ESA). Advocacy has reviewed the Initial Regulatory Flexibility Analysis (IRFA) published with the Draft Economic Analysis for this proposed rulemaking and commends FWS for providing small entities with an opportunity to comment on the proposal during the early stages of the rulemaking process. Advocacy is providing the following comments in order to assist FWS in its compliance with the Regulatory Flexibility Act (RFA)² as this rulemaking moves forward.

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 the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ 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.

¹ 75 Fed. Reg. 2270 (January 14, 2010); RIN 1018-AW88.

² 5 U.S.C. § 601 et seq.

³ *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.) (*SBREFA*).

Background

Prior to the current proposal for a revised Bull Trout critical habitat designation (Bull Trout CHD), FWS designated 20,980 miles of streams, 591,577 acres of lakes, reservoirs and marshes, as well as 985 miles of marine shoreline as critical habitat for Bull Trout.⁴ The current proposal would replace the previous designation and designate 22,679 miles of streams and marine shoreline in the Olympic Peninsula and the Puget Sound area, as well as 533,426 acres of lakes and reservoirs as Bull Trout critical habitat.⁵

Because conservation measures for endangered salmon, steelhead, Klamath suckers, and other protected fish are already in place within the designated areas, FWS has concluded that the incremental economic impact of the proposed Bull Trout CHD will be small.⁶ FWS indicates that the most significant economic impact will occur within the areas of proposed critical habitat that are not currently occupied by Bull Trout, but are necessary for the conservation of the species. Specifically, the proposed CHD would include 929 miles of streams that are outside of the geographical area occupied by the species at the time it was listed.⁷

As required by the RFA, FWS prepared an IRFA for the proposed Bull Trout CHD and has asked the small business community for feedback regarding the estimated impact of the proposal on small entities, particularly regarding the economic impact of designated previously unoccupied areas as critical habitat.⁸ FWS estimates that 97 percent of the potentially affected entities operating within the proposed CHD are small entities.⁹ The IRFA also concludes that the proposed CHD will have annual impacts between \$4.97 and \$7.13 million.¹⁰ Small entities are also expected to bear between 93 and 100 percent of the estimated impacts.¹¹ It is unknown whether the economic impacts will be evenly distributed among affected entities or whether only a small proportion of affected entities will bear the majority of the costs of the proposed CHD.

Advocacy's Comments

Advocacy appreciates the efforts FWS has made to encourage small entities to participate in this rulemaking through the public comment process and through public meetings. Pursuant to the RFA, if an agency finds that it cannot certify that a proposed rule will not have a significant economic impact on a substantial number of small entities it must prepare an IRFA. FWS has prepared an IRFA for this proposed CHD, in compliance with the RFA.

Advocacy notes that several small entities have submitted public comments to FWS regarding the proposed CHD. Several of these comments have been filed by county

⁴ *Supra* note 1 at 2273, Table 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2303.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

governments and other small municipal bodies. Advocacy strongly encourages FWS to conduct outreach with these commenters in order to further examine the economic impact of the proposed CHD and determine whether any reasonable alternatives exist that would accomplish FWS's conservation goals while providing needed regulatory relief to small entities. Through these discussions, FWS might find that it can exclude particular areas from its final CHD under Section 4(b)(2) of the Endangered Species Act. Advocacy would be pleased to assist FWS reaching out to potentially affected small entities.

Following review of the public comments submitted by small entities, the RFA also requires that FWS prepare a Final Regulatory Flexibility Analysis (FRFA) for its final rule if FWS cannot certify the rule under the RFA. This FRFA largely mirrors the IRFA, but should also include a discussion of significant issues raised by small entities during the comment period as well as a discussion of any changes to the rule that resulted from small entity feedback. The FRFA that FWS prepares for its final rule should also describe the steps FWS has taken to minimize the economic impact on small entities, including a statement of the legal, factual, and policy reasons for selecting the alternatives adopted, and a discussion of the reasons why other alternatives were not adopted. Advocacy would be pleased to assist FWS with preparing its FRFA for the final rule.

Conclusion

Advocacy appreciates the timely manner in which FWS has asked for small entity input on its proposed Bull Trout CHD. Following the public comment period, Advocacy strongly encourages FWS to conduct further outreach with small entities to discuss the economic impacts of the rule and possible alternatives for reducing burdens on small entities before it prepares a FRFA for its final rule.

Sincerely,

//signed//

Susan M. Walthall

Acting Chief Counsel for Advocacy

//signed//

Jamie Belcore Saloom

Assistant Chief Counsel for Advocacy

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs
Douglas Krofta, Branch Chief, Endangered Species, U.S. Fish and Wildlife Service