



May 26, 2009

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 Proposed Designation of Critical Habitat for the California Red-Legged Frog (*Rana aurora Draytonii*)¹

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 businesses affected by the proposed designation of critical habitat for the California red-legged frog under the Endangered Species Act (ESA).

Advocacy has reviewed the Initial Regulatory Flexibility Analysis (IRFA) published with the Draft Economic Analysis for this rulemaking and provides the following comments to assist FWS in meeting its obligations to designate critical habitat for the red-legged frog while providing much needed flexibility for the small businesses affected by the rule.

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 Regulatory Flexibility Act (RFA),² 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

¹ 74 *Fed. Reg.* 19,184 (Tuesday, April 29, 2009); RIN 1018-AV90.

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*).

by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

Background

On April 13, 2006 FWS designated 450,000 acres of critical habitat for the red-legged frog. In April of the following year, the U.S. District Court for the Northern District of California issued a consent decree requiring a revised critical habitat designation (CHD) for the red-legged frog as a result of a challenge to the initial designation by the Center for Biological Diversity.⁴ On September 16, 2008, FWS published a proposed revised designation of approximately 1.8 million acres of critical habitat and announced its intention to publish its economic analysis and IRFA for the proposed rule at a later date.⁵ On April 28, 2009, FWS published its draft economic analysis and IRFA for public comment.⁶

The ESA provides FWS with considerable discretion to consider economic impacts when making a final designation of critical habitat for an endangered species. Under Section 4(b)(2) of the ESA, the Secretary of the Interior may exclude any area of proposed critical habitat from a final CHD if he or she determines that the benefits of such an exclusion would outweigh the benefits of inclusion.⁷ FWS has used its discretion to exclude areas from critical habitat in many instances, particularly in light of significant impacts to small entities affected by critical habitat.

Advocacy's Comments

FWS must prepare a Final Regulatory Flexibility Analysis (FRFA)

The IRFA provided by FWS for the proposed CHD indicates that the rule may have a significant economic impact on a substantial number of small entities.⁸ As such, the RFA requires that FWS prepare and publish a Final Regulatory Flexibility Analysis (FRFA) when it finalizes the CHD for the red-legged frog. Among other requirements, the FRFA for the final CHD must include a description of the steps FWS has taken to minimize the significant impact on small entities, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final CHD, as well as an explanation for why each significant alternative was rejected or adopted by the agency.⁹

Recommended Alternative to the Proposed CHD

As discussed in its IRFA for the proposed CHD, FWS has the option to exclude areas from a final CHD if the benefits of excluding those areas would outweigh the benefits of including them, as long as the exclusion will not result in the extinction of the species

⁴ *Center for Biological Diversity v. Kempthorn, et al.*, Case No. C-07-6404-WHA.

⁵ 73 *Fed. Reg.* 53492 (September 16, 2008).

⁶ *Supra* note 1.

⁷ 16 U.S.C. § 1533(b)(2).

⁸ *Economic Analysis of Critical Habitat Designation for the California Red-legged Frog* (March 3, 2009), available at www.regulations.gov, RIN 1018-AV90.

⁹ 5 U.S.C. § 604 (a)(5).

concerned.¹⁰ Advocacy notes that the IRFA prepared by FWS identifies 499 small farms that will be significantly affected by the proposed CHD.¹¹ The IRFA also concludes that 16,725 acres of farmland owned by small farming operations would be taken out of production if the CHD is finalized as proposed.¹² FWS estimates that taking that farmland out of production would cost each of the 499 affected small farms between \$313,000 and \$338,000, with the total impact on small farms estimated between \$156 million and \$169 million.

Advocacy recommends that FWS consider excluding the 16,725 acres of small business-owned farmland that would be taken out of production as a result of this CHD. Because the size of this exclusion would be very small compared to the 1.8 million acres proposed for designation as critical habitat, it appears unlikely that excluding these areas would result in the extinction of the species. Excluding these lands would provide the opportunity for the 499 small farms affected by the proposed CHD to continue their operations, while allowing for sufficient critical habitat to promote the recovery of the red-legged frog.

If the proposed designation is finalized without exclusions for these small farms, the designation will result in significant economic losses for the small farms identified in the IRFA, many of which have been owned and operated by California families for generations. Unlike their larger counterparts, small farming operations cannot easily absorb the loss of productive acreage. The average median small farm size affected by the proposed CHD is only 64 acres;¹³ this means that 50% of the small farms affected by the CHD are comprised of 64 or fewer acres. For a 64-acre farm, the loss of only one productive acre is a 1.6% loss of productive acreage, and represents a directly proportional profit loss.¹⁴ As it is, the data in the IRFA suggests that some, if not most, small farms affected by the proposed CHD will lose substantially more than one acre of productive farmland.¹⁵ Clearly, the proposed CHD will have a profoundly negative impact on these very small farming operations if FWS does not exclude the 16,725 acres of small business-owned farmland from its final CHD.

Conclusion

Advocacy submits that FWS can achieve its goals of species recovery for the red-legged frog while providing greater flexibility for small businesses affected by the proposed

¹⁰ *Supra* note 7.

¹¹ *Initial Regulatory Flexibility Analysis*, *supra* note 8 at A-7.

¹² *Id.* at A-8. (A stipulated injunction issued by the U.S. District Court for the Northern District of California will restrict pesticide application in the designated critical habitat, so the IRFA prepared by FWS assumes that the affected lands will be taken out of production).

¹³ This average was reached by summing the median farm size per county, as identified in the IRFA, and dividing by the number of counties in the sample.

¹⁴ This calculation assumes that all “productive” acres on a given farm are equally profitable.

¹⁵ The IRFA states that 16,725 acres of farmland belonging to 499 small farming operations, will likely be taken out of production because of this CHD. *Supra* note 8 at A-7. Therefore, it can be assumed that some, if not most, of these small farms will have to take substantially more than one acre of farmland out of production.

CHD. Given the significance of the economic impact the proposed CHD will have on small farmers in California, Advocacy recommends that FWS exercise its discretion under Section 4(b)(2) of the ESA to exclude the 16,725 acres of farmland owned by small farms that are expected to be taken out of production as a result of the CHD. Adopting this alternative would result in the exclusion of a relatively small area of land from the final CHD, and provide much needed relief to small farms impacted by the CHD.

Advocacy is pleased to forward the comments and concerns of small businesses to the Department of the Interior and the U.S. Fish and Wildlife Service. Please feel free to contact me or Jamie Belcore Saloom at (202) 205-6890 (Jamie.Belcore@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

//signed//

Jamie Belcore Saloom
Assistant Chief Counsel for Advocacy

cc: Dale Hall, Director, U.S. Fish and Wildlife Service
Douglas Krofta, Chief, Endangered Species, U.S. Fish and Wildlife Service
Kevin Neyland, Acting Administrator, Office of Information and Regulatory Affairs