

July 5, 2012

**VIA ELECTRONIC SUBMISSION**

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

***Re: Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl; Proposed Rule and Availability of Supplementary Documents<sup>1</sup>***

Dear Mr. Ashe:

The Office of Advocacy (Advocacy) submits these comments on the U.S. Fish and Wildlife Service's (FWS) proposed rule and economic analysis on the Revised Critical Habitat for the Northern Spotted Owl.<sup>2</sup>

Advocacy is providing the following comments to assist FWS in its compliance with the Regulatory Flexibility Act. Advocacy is concerned that FWS does not have an adequate factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities.

Advocacy encourages FWS to reevaluate the economic impacts of its critical habitat designation on small businesses, so the agency can better analyze regulatory alternatives that may minimize the impact of this rulemaking. For example, FWS has outlined the alternative of excluding private lands from the critical habitat designation. Advocacy supports the exclusion of these and other areas that are the most costly to the small business community.

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<sup>1</sup> FWS, *Revised Critical Habitat for the Northern Spotted Owl, Proposed Rule, Availability of documents*, 77 Fed. Reg. 32483 (June 1, 2012); Docket Number No. FWS-R1-ES-2011-0112.

<sup>2</sup> Industrial Economics (prepared for U.S. Fish and Wildlife Service), *Economic Analysis of Critical Habitat Designation of the Northern Spotted Owl* (May 29, 2012) (FWS Econ.Analysis).

Advocacy also applauds the Administration for its recent Presidential Memorandum that encourages FWS to conduct a more timely and robust economic analysis of the impacts of this critical habitat designation and to minimize the regulatory burdens by adopting potential exclusions.<sup>3</sup>

### **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 Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> 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.<sup>6</sup> The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>7</sup>

### **Background**

In 1992, FWS designated critical habitat for the Northern Spotted Owl (NSO) on over 6 million acres of Federal lands in California, Oregon, and Washington. In 1994, the Northwest Forest Plan (NWFP) was adopted to guide Federal forest management and endangered species protection in the region. In 2008, FWS finalized a revised critical habitat designation of over 5 million acres of federal lands. This 2008 critical habitat designation was challenged in court and the court ordered FWS to submit a new proposed revised critical habitat for public comment.<sup>8</sup>

On February 2012, in response to that court order, FWS proposed a revised critical habitat designation.<sup>9</sup> In conjunction with this release, President Obama issued a Presidential Memorandum to the Secretary of Interior entitled, “Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens.”<sup>10</sup>

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<sup>3</sup> *Presidential Memorandum for the Secretary of the Interior –Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens* (Feb. 28, 2012).

<sup>4</sup> 5 U.S.C. § 601 et seq.

<sup>5</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>6</sup> 5 U.S.C. § 603, 605.

<sup>7</sup> 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.

<sup>8</sup> See *FWS Econ. Analysis*, at Section 1-2.

<sup>9</sup> FWS, *Revised Critical Habitat for the Northern Spotted Owl, Proposed Rule*, 77 Fed. Reg. 14062 (March 8, 2012).

<sup>10</sup> See Footnote 3.

On June 1, 2012, FWS released an economic analysis on the NSO critical habitat designation. FWS has certified that the proposed critical habitat will not have a significant economic impact on a substantial number of small entities. FWS does not believe that small entities are being directly regulated by this rule, but estimates that small entity impacts “are limited to administrative costs on the order of a few thousand dollars.”<sup>11</sup>

Under the Regulatory Flexibility Act (RFA), an agency must either certify that a rule will not have a significant impact on a substantial number of small entities, or it must complete an Initial Regulatory Flexibility Analysis (IRFA).<sup>12</sup> An agency’s certification must include a factual basis for certifying a rule. A certification, at a minimum, must include a description of the affected entities and the impacts that clearly justify the certification. An agency’s certification and the underlying factual basis are subject to judicial review.<sup>13</sup>

### **FWS Has Not Provided an Adequate Factual Basis for its Certification of this Rule**

Advocacy is concerned that FWS does not have an adequate factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities.

#### *Small Businesses Are Being Directly Regulated by Critical Habitat Designation*

First, FWS certifies this rule based on the assertion that small businesses are not being directly regulated by this critical habitat designation.<sup>14</sup> Advocacy disagrees with this legal interpretation, and does not believe that this argument provides an adequate factual basis for the certification.

Despite this assertion that the effects are indirect, FWS’ economic analysis states that critical habitat designations will directly affect small businesses that have federally funded or permitted activities on federal or private land, such as small businesses that participate in timber sales or timber management projects.<sup>15</sup>

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<sup>11</sup> FWS Econ. Analysis, A-1 to A-8, RFA/SBREFA Analysis.

<sup>12</sup> 5 U.S.C. § 603, 605.

<sup>13</sup> SBA Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 10 (June 2010).

<sup>14</sup> FWS Econ. Analysis, A-1 to A-8, RFA/SBREFA Analysis.

<sup>15</sup> FWS Econ. Analysis, B-7 to B-8, Incremental Effects Memorandum. The regulatory mechanism through which critical habitat protections are realized is section 7 of the ESA, which requires Federal agencies, in consultation with FWS, to insure that “any action authorized, funded or carried out by such agency” is not likely to adversely modify critical habitat.<sup>15</sup> Small entities with this “federal nexus” will have to incur administrative costs in the Section 7 consultation process with FWS, and costs due to the implementation of any conservation efforts required by FWS as a result of Section 7 consultation.<sup>15</sup>

FWS' economic analysis states that these private landowners may be directly affected through federal permits on their land that trigger Section 7 consultations. This also includes permits under Section 10 of the ESA, which requires small entities to consult with FWS to obtain a permit in all cases where their activities will result in the incidental take of the species.<sup>16</sup>

#### *FWS' Certification Lacks an Adequate Factual Basis*

A certification, at a minimum, must include: (1) a description of the affected entities and (2) a description of the impacts that clearly justify the certification. FWS has not provided an adequate factual basis for certifying this rule because it has not examined the economic impacts of this rule on small businesses, nor has it adequately described the small businesses subject to the requirements of the rule.

FWS' RFA section incorrectly analyzes the universe of small businesses affected by the critical habitat designation. FWS counts only the estimated number of consultations required by the critical habitat designation. FWS should have estimated the numbers of all small businesses impacted by these consultations.

Advocacy believes FWS' economic analysis underestimates the economic impact of this rule on the timber industry and private landowners. To calculate the economic impacts of the proposed designation on this industry, FWS only considered the administrative costs of Section 7 consultations. FWS does not attempt to quantify the costs the timber industry and landowners could face if required to modify projects in order to avoid adverse modification of critical habitat; project modification is often the most costly aspect of the Section 7 consultation process.

#### **Advocacy Encourages FWS to Exclude Proposed Areas from its Critical Habitat Designation**

The Endangered Species Act section 4(b)(2) allows the Secretary of Interior to exclude areas from critical habitat designation if the benefits of excluding an area outweigh the benefit of including them. FWS has proposed areas for exclusion from this critical habitat designation, such as private lands.<sup>17</sup> Advocacy supports the exclusion of these and other areas that are the most costly to the small business community.

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<sup>16</sup> *Id.* at B-17.

<sup>17</sup> 77 Fed. Reg. at 32,484.

## **Conclusion**

Advocacy is concerned that FWS does not have an adequate factual basis for certifying that this rule will not have a significant economic impact on a substantial number of small entities. Advocacy recommends that FWS provide an adequate factual basis for its certification in its final rule, or release a supplemental IRFA. Advocacy is available to help FWS in its compliance with the RFA. Please contact me or Janis Reyes at (202) 205-6533 ([Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov)) if you have any questions or require additional information.

Sincerely,



Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy



Janis C. Reyes  
Assistant Chief Counsel

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