

Testimony of

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Before the

Subcommittee on Rural Enterprise, Agriculture, and
Technology

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Committee on Small Business

for

“Endangered Farmers and Ranchers: Unintended
Consequences of the Endangered Species Act”

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Chairman Graves and Members of the Subcommittee:

Good afternoon and thank you for the opportunity to appear before you today to describe the U.S. Fish and Wildlife Service's (the Service) recent compliance with the Regulatory Flexibility Act (RFA) in its designations of critical habitat for endangered species under the Endangered Species Act (ESA).

My name is Thomas Sullivan and I am Chief Counsel for Advocacy at the U.S. Small Business Administration. Pursuant to our statutory authority, the Office of Advocacy actively solicits input from small entities to assist our office in setting policy priorities and identifying rules that will affect them. The Office of Advocacy's comments on recent designations of critical habitat by the Service are the result of those outreach activities. Please note that my office's views expressed here independently represent the views of small business and do not necessarily reflect the views of the Administration or the U.S. Small Business Administration.

The Chief Counsel for Advocacy is required by the RFA and Executive Order (E.O.) 13272 to monitor Federal agency compliance with the RFA and report to Congress. I will give you a brief overview of my office's responsibilities under the RFA and E.O. 13272 as background to the Service's treatment of the RFA in its critical habitat designations.

In 1980, Congress enacted the RFA after finding that Federal regulations imposed disproportionate economic hardship on small entities. The RFA required agencies to consider ways to reduce regulatory burdens on small entities. This laudable goal was accomplished by requiring Federal agencies to consider the potential economic impact of federal regulations on small entities and to examine regulatory alternatives that achieve the agencies' public policy goals while minimizing small entity impacts.

The RFA was unenforceable, however, and many agencies were indifferent to the RFA, avoiding its purposes by improperly certifying rules as not requiring a regulatory flexibility analysis, claiming the rules did not have a significant economic impact on a substantial number of small entities. Then, in 1996, Congress amended the RFA with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Importantly, SBREFA established the right of small businesses to seek judicial review for Federal agencies' failure to comply with the RFA.

President Bush further committed the Federal government to compliance with the RFA with E.O. 13272 signed on August 13, 2002. E.O. 13272 requires agencies to implement policies protecting small entities when writing new rules and regulations. In addition, E.O. 13272 instructs agencies and Advocacy to work closely together as early as possible in the regulation writing process to address disproportionate impacts on small entities and reduce their regulatory burden. E.O. 13272 directs agencies to consider the Office of Advocacy's written comments on rules and compelling them to publish a response in the *Federal Register*.

Executive Order 13272 also requires the Office of Advocacy to provide training to agencies on compliance with the RFA. To accomplish that task, we have hired an outside contractor to assist us in developing a formal training program. A pilot program is currently being developed that will involve the U.S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration. These agencies will provide feedback to assist in the development of the government-wide training. The pilot training is scheduled for July 23 and 24, and will form the basis for Advocacy to provide training for all agencies.

As part of our mandate to monitor agency compliance with the RFA, Advocacy has reviewed recent rulemakings by the Service. My staff has had regular contacts with representatives from both the Department of Interior and the Service on critical habitat rulemakings. In fact, my deputy chief counsel and legal team are currently working with Assistant Secretary Manson's office to discuss ways to improve the Service's compliance

with the RFA, while protecting both endangered species and small ranchers and farmers. The Office of Advocacy looks forward to working closely with the Department of Interior in its efforts to train the Service's regulatory staff on the requirements of the RFA.

My testimony focuses on shortcomings in the Service's past RFA compliance, namely, (1) the Service's failure to conduct meaningful outreach to potentially affected small farmers and ranchers and incorporating this outreach into its actions prior to proposing rules, and (2) the Service's recent imposition of critical habitat requirements on small farmers and ranchers without affording them the right to participate in the rulemaking process as provided by law. I will use the example of the recent proposed rule designating critical habitat in Arizona for the pygmy owl which my office recently submitted comments on to illustrate these points.

I. Incorporating Small Business Concerns into Rulemaking

As I mentioned above, the RFA requires regulatory agencies to estimate the impacts of proposed rules on small entities. An agency must complete an Initial Regulatory Flexibility Analysis (IRFA) for a proposed rule and a Final Regulatory Flexibility Analysis (FRFA) for a final rule. However, the agency head may certify under the RFA's Section 605(b) and not publish an IRFA or FRFA if the rule would not have "a significant economic impact on a substantial number of small entities," and the agency publishes the factual basis for the decision to certify along with the certification in the *Federal Register*.

Performing an IRFA and FRFA requires the agency to consider whether regulation of small entities is needed to achieve the regulatory goals they have announced. Upon completion of a public comment period, and a public hearing in the case of critical habitat designations, the Fish and Wildlife Service must articulate clear legal, policy, and factual reasons for any decision to introduce regulatory burdens on small entities. Without conducting this analysis of regulatory burdens and less-burdensome alternatives, agencies

risk over-regulating small entities, when their regulatory goals can usually be achieved without imposing excessive burdens on small entities.

Recently, small businesses have expressed concerns to my office that the Service has provided economic analyses which do not accurately capture regulatory impacts. The Office of Advocacy has publicly commented three times this year that the Service's economic analyses appeared insufficient to serve as the factual basis for certifications of proposed rules.

One example is the proposed designation of critical habitat for the pygmy owl published by the Service on November 27, 2002. My office conducted outreach after the proposal, in part through our Regional Advocate in Arizona, Michael Hull, who met with affected small businesses directly and attended the Service's public hearing on the rule in Tucson. From our outreach, we learned that the Service had not incorporated the concerns of small ranchers, miners, home builders, and others into its threshold analysis as to whether the rule would affect small businesses. Small cattle ranchers expressed concern that the proposed critical habitat designation would restrict their ability to protect themselves against wildfire risks through prescribed burns, install necessary watering facilities for cattle in dry conditions, rotate grazing sections, and increase the size of their herds to normal levels once the current major drought has lifted. The Fish and Wildlife Service did not address these concerns in its proposed rule or supporting economic analysis.

My office informed the Service in January of 2003 that our preliminary discussions with various small business representatives indicated that the factual basis relied upon by the Service to certify under the RFA may have been inadequate, and an IRFA was likely required. At that time, we encouraged the Service to conduct small business outreach on the determination that the rule would not have a significant economic impact on a substantial number of small entities. On June 27 of this year, the Office of Advocacy submitted formal comments on the proposed rule. In our comments, we informed the Service that the Office of Advocacy believed the Service was required by the RFA to publish an IRFA for the proposed rule due to the insufficiency of the factual basis for

their certification. The Service has not published an IRFA to date, and I believe that, under the RFA, this rule does not comply with the RFA and cannot proceed to a final rule without the publication of an IRFA for public comment.

President Bush delivered on his commitment to small business when he signed his Executive Order requiring agencies to incorporate small business concerns into rules. Unfortunately, small businesses have expressed the concern that the extensive amount of litigation over critical habitat designations has discouraged the Service from conducting small business outreach. I welcome the opportunity to work with the Service to correct this situation.

As I mentioned above, I believe small entity outreach to be the necessary first step in compliance with the RFA. Through effective small business outreach, the Service has an opportunity to improve its consideration of impacts on small entities, and my office stands ready to assist it. Specifically, the Service should seek input from the small business community during initial policy discussions, just as other Federal agencies do. Most importantly, this input must be taken into account when the Service develops rules that impact small businesses.

II. Imposing Critical Habitat Without Rulemaking

A second major concern I would like to mention is that the Service has recently introduced critical habitat restrictions without affording small entities notice and an opportunity to comment as required by the Administrative Procedure Act (APA) and the RFA. I am concerned that the Service may exclude the public from its policy making process by foregoing rulemaking entirely, imposing survey and mitigation requirements on the public during consultations with other Federal agencies. The benefit of establishing critical habitat through rulemaking is that it provides affected small entities the opportunity to participate through comments on the proposal, and the rulemaking process ensures the thoughtful analysis of small business impacts provided by the RFA. Recent court cases have held that the Service must undertake informal rulemaking to

establish critical habitat before imposing survey and consultation requirements or use restrictions on land that is not occupied by endangered species.

For instance, on the rule to designate critical habitat for the pygmy owl in Arizona, the Service acted to impose critical habitat restrictions during the public comment period on the proposed rule. In March of this year, a local Fish and Wildlife Service biologist field supervisor, Steven Spangle, issued a “guidance” memorandum to the Army Corps of Engineers’ Nationwide Permit program which imposed survey, consultation, and mitigation requirements for land comprising most of Arizona from north of Phoenix down to the Mexican border. This would affect ranchers or farmers who use the Nationwide Permit program. Small ranchers have also informed the Office of Advocacy that the Service may assert jurisdiction over unoccupied land in Arizona under the ESA’s Section 7 consultation requirements, imposing survey, consultation, and mitigation burdens on small ranchers as ranchers attempt to secure grazing permits from the U.S. Forest Service and the Bureau of Land Management.

I believe that the APA and RFA require the Fish and Wildlife Service to afford the public an opportunity to review potential regulatory actions and provide meaningful comment. I look forward to working with Assistant Secretary Manson’s office to ensure that affected small entities are given this chance.

In essence, the RFA asks agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency’s goal while minimizing the burden on small entities. The concept underlying this analytical requirement is that agencies will revise their decision-making processes to take account of small entity concerns in the same manner that agency decision-making processes were modified subsequent to the enactment of the National Environmental Policy Act (NEPA). The RFA then acts as a statutorily mandated analytical tool to further assist agencies in

meeting the rational rulemaking standard set forth in the APA through a regulatory flexibility analyses, just as NEPA was intended to rationalize decisions concerning major federal actions that would affect the environment through the required environmental impact statement.

It was the designed purpose of the RFA over twenty years ago, and my desire now, to help government base decisions on a full and open understanding of how regulations will affect small business. The Office of Advocacy stands ready to assist the Subcommittee and Assistant Secretary Manson to achieve these goals.

Thank you for the opportunity to testify today. I am happy to answer any questions you may have about my testimony.