



June 29, 2020

VIA ELECTRONIC SUBMISSION

The Honorable David Bernhardt  
Secretary  
U.S. Department of the Interior  
Fish and Wildlife Service  
1849 C St. NW  
Washington, D.C. 20240

**Re: Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake (Docket No. FWS-R2-ES-2020-0011).**

Dear Secretary Bernhardt:

On April 28, 2020 the U.S. Department of the Interior's Fish and Wildlife Service (Service) published a revised proposed rule to designate critical habitat for the northern Mexican gartersnake and narrow-headed gartersnake.<sup>1</sup> The U.S. Small Business Administration's Office of Advocacy (Advocacy) commends the Service for revising its previous proposal, incorporating the best available scientific data and public comments. Such designations must be based on updated available scientific data and must consider public comments and economic impacts, as the Service has done in this rulemaking. Advocacy further urges the Service to consider the full scope of economic impacts and to conduct a proper and thorough Regulatory Flexibility Act analysis for its critical habitat rulemakings.

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<sup>1</sup> Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 85 Fed. Reg. 23608 (April 28, 2020).



## **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 the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</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.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> 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>5</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>6</sup>

## **Background**

Congress enacted the Endangered Species Act (ESA) in 1973 to conserve species likely to become endangered.<sup>7</sup> The Act defines endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range."<sup>8</sup> Section 4 of the Act requires the Service to designate critical habitat when a determination is made that a species is endangered or threatened.<sup>9</sup> A critical habitat designation is to be made based on the best available scientific data, and also take into consideration the economic impacts of the proposal, and any other relevant impact of designating a specific area as critical habitat.<sup>10</sup> Critical habitat is further defined as the specific areas within a geographic area occupied by the species at the time it is listed.<sup>11</sup> Critical habitat may include areas not currently occupied by the species when those areas are determined to be essential to the conservation of the species.<sup>12</sup> In determining

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<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. Sec. 601 note

<sup>7</sup> 16 U.S.C. § 1531 *et seq.*

<sup>8</sup> 16 U.S.C. § 1533 (a) (3) (A).

<sup>9</sup> 16 U.S.C. § 1532 (6).

<sup>10</sup> *See* 16 U.S.C. § 1533 (b) (2).

<sup>11</sup> *See* 16 U.S.C. § 1532 (5).

<sup>12</sup> *See id.*

geographic areas occupied by the species, the statute looks to physical and biological features essential to the conservation of the species that may require special management considerations.<sup>13</sup>

On July 10, 2013, the Service published a proposed rule to list the northern Mexican gartersnake and narrow-headed gartersnake as threatened species; and simultaneously in a separate but concurrent rulemaking designate critical habitat for the two species.<sup>14</sup> The proposal would designate approximately 421,423 acres for the northern Mexican gartersnake and 210,189 acres for the narrow-headed gartersnake in several counties of Arizona and New Mexico.<sup>15</sup> In the proposed rulemaking to designate critical habitat, the Service certified that the rule would not have a significant economic impact on a substantial number of small entities.<sup>16</sup> The Service accepted comments on both proposed rulemakings until September 9, 2013 but did not finalize the rule to designate critical habitat. On July 8, 2014, the Service published a final rule in which it added the northern Mexican gartersnake and the narrow-headed gartersnake to the list of threatened species. The rule went into effect on August 7, 2014.<sup>17</sup>

On April 28, 2020, the Service published a revised critical habitat designation for both species taking into consideration public comments that had been submitted in 2013 and updated scientific data for the species.<sup>18</sup> The revised designations would reduce the previously proposed areas to approximately 27,784 acres for the northern Mexican gartersnake, and 18,701 acres for the narrow-headed gartersnake. The Service is now accepting comment on this revised proposal to help inform a final critical habitat designation for the two species.

### **Small Entities Support this Designation**

Advocacy spoke with representatives from electrical cooperatives in Arizona and New Mexico with respect to the rulemaking. There are approximately six small electrical cooperatives in Arizona and fifteen in New Mexico in the counties that are affected by this habitat designation.<sup>19</sup> Electrical cooperatives have a specific interest in critical habitat designations as these designations have a direct effect on their ability to maintain and repair infrastructure, and invest in new infrastructure for power supply and generation. Of the cooperatives that Advocacy spoke with, and that have filed comment letters, these small entities support the revised critical habitat designation. They appreciated the Services' revisions, noting that the Service took into

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<sup>13</sup> *See id.*

<sup>14</sup> *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 78 Fed. Reg. 41549 (July 10, 2013). *See also* Endangered and Threatened Wildlife and Plants; Threatened Status for the Northern Mexican Gartersnake and Narrow-headed Gartersnake, 78 Fed. Reg. 41499 (July 10, 2013).

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> Endangered and Threatened Wildlife and Plants; Threatened Status for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 79 Fed. Reg. 38677 (July 8, 2014).

<sup>18</sup> Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Northern Mexican Gartersnake and Narrow-Headed Gartersnake, 85 Fed. Reg. 23608 (April 28, 2020).

<sup>19</sup> *See* Annual Electronic Power Industry Report, Form EIA-871 detailed data files (Released October 1, 2018) available at <https://www.eia.gov/electricity/data/eia861/>.

consideration public comments received on the previous proposal as well as updated scientific data to support the current findings.

### **Advocacy Comments and Recommendations**

- 1. The Service should continue to engage with stakeholders early in the process and consider public comments in making habitat designations.*

In the past, both Advocacy and various stakeholders noted that the Service did not adequately consult with industry before proposing and finalizing critical habitat designations.<sup>20</sup> By considering public comments in issuing this revision, the Service ensures transparency in the rulemaking process and more adequately weighs the relevant impact of the designation as required by the statutes.

Advocacy supports the revision of the critical habitat designation as a result of updated scientific data and public comment. Advocacy believes the revision reflects a commitment to the statutory objectives of the Service in providing necessary and appropriate conservation measures for threatened and endangered species, while recognizing the need for appropriate analysis, response to comment, and scientific information conducted by the Service.

Advocacy strongly encourages the Service to continue to engage early with stakeholders in considering future critical habitat designations. This will allow affected industries to comment ahead of a formal proposal, and in some instances provide necessary scientific and other data to inform a proposed designation. Advocacy believes that early engagement could help avoid unnecessary delays in the rulemaking process. Delays in critical habitat designation foster uncertainty for the regulated community who often begin taking conservation measures voluntarily the moment a species is listed, or a habitat designation is proposed. By engaging with these stakeholders early to see what conservation measures are already being implemented, and what data is available, the Service can ensure that it is proposing a designation that is as narrow as possible in scope while still meeting the statutory objectives, thus avoiding unnecessary uncertainty for the regulated community.

- 2. The Service should continue to include areas within the range of the species. Where areas outside the range are proposed, the Service should include scientific data to support why those areas are included.*

In this proposal, the Service revises its use of physical and biological features to exclude areas outside the range the species occupies. While the Service may consider areas outside the geographic area occupied by the species, they should do so only when those areas are shown to be essential to the conservation of the species.<sup>21</sup> Furthermore, the Service should not

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<sup>20</sup> See Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse, 78 Fed. Reg. 57604 (filed December 2, 2013).

<sup>21</sup> See 16. U.S.C. § 1532 (5) (A) (ii).

automatically include the entire geographical area that *can* be occupied by the species.<sup>22</sup> For example, in the previous rulemaking, the Service included areas not within the elevation range of the species. In this rulemaking, noting that some of those areas were listed in error, the Service not only corrects that error, but further narrows the scope to exclude areas outside the elevation range where the species occurs.<sup>23</sup> Advocacy supports this revision.

In addition to revising the elevation range, the Service also revised its definition of the terrestrial space along streams.<sup>24</sup> In its previous proposal the Service relied on data that reported gartersnake movement in a straight-lined distance of approximately 650 feet from a water location. This study was used to propose a 600-foot lateral extent of critical habitat for both species. Since issuing that proposal, however, the Service received updated data and public comment, and, in this revised proposal, has updated the lateral extent boundary of critical habitat to include “the wetland or riparian zone adjacent to a stream or lentic water body, whichever is greater.”<sup>25</sup> By revising this boundary to capture the area occupied by the species, the Service makes the boundary more accurate and employs a systematic approach founded in evidentiary science. Advocacy supports this revision and once again encourages the Service to engage with the public earlier in the rulemaking process so that such studies can be provided prior to the proposal when available.

3. *The Service should not rely solely on historically occupied areas in designating critical habitat when the last known record of occupancy is too far in the past to be relevant and more recent data is available.*

In the previous proposed designation, the Service designated an entire stream as occupied if it had at least one record of the species dated 1980 or later.<sup>26</sup> In designating critical habitat the Service should consider areas within the geographic area occupied by the species *at the time it is listed*.<sup>27</sup> In this revised rulemaking the Service has updated its previous reliance on occupancy records to state that a “stream, stream reach, or lentic water body” was occupied if there is a last known record of occupancy from 1998 or later.<sup>28</sup> This revision supports the requirement that the Service use the best available scientific data, and consider the area occupied by the species at the time of listing. By eliminating data older than 1998, the Service ensures that areas where the species has been extirpated are not included in this designation. Advocacy encourages the Service to continue the practice of ensuring that its scientific data is relevant and supports the conservation of the species.<sup>29</sup>

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<sup>22</sup> See 16 U.S.C. § 1532 (5) (C) (emphasis added).

<sup>23</sup> *Supra* note 1 at 23617.

<sup>24</sup> *Supra* note 1 at 23614.

<sup>25</sup> *Id.*

<sup>26</sup> *Supra* note 1 at 23617.

<sup>27</sup> *Supra* note 19 (emphasis added).

<sup>28</sup> *Supra* note 1 at 23619.

<sup>29</sup> See *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 202 L. Ed. 2d 269, 2018 U.S. LEXIS 6932, 48 ELR 20196, 86 ERC (BNA) 2999, 2018 WL 6174253. In which the Court held that in order to be considered “critical habitat”, an area must be “habitat” of the species in question.

4. *Despite small entities supporting this revised designation, the Service must still consider the full scope of impacts to small entities.*

While small entities are in favor of this designation, Advocacy strongly encourages the Service to examine the impact to small entities by identifying the entities affected and providing cost estimates where appropriate. Advocacy has disagreed with the Service's past assertions that the RFA did not apply to critical habitat designations and the Service's certifications that designations would not have an impact on small entities.<sup>30</sup> Advocacy has urged the Service to conduct thorough initial RFA analyses to consider the impacts of critical habitat designations on small entities. Many critical habitat designations have a direct and significant impact on small entities. In some instances, small entities have had to completely abandon potential projects due to a critical habitat designation because the permitting process was so costly and arduous, and the delay in time so lengthy that they would not have been able to recover these costs if and when the project did move forward.<sup>31</sup> Small entities are directly impacted by critical habitat designations, and these impacts should be accounted for in an economic analysis of the rule.

### **Conclusions and Recommendations**

Advocacy commends the Service in its efforts to revise its previously proposed critical habitat designation, taking into consideration updated scientific data and public comment. Advocacy further urges the Service to consider the full scope of economic impacts and to conduct a proper and thorough Regulatory Flexibility Act analysis for its critical habitat rulemakings.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,

/s/

Major L. Clark, III  
Acting Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

/s/

Prianka P. Sharma  
Assistant Chief Counsel  
Office of Advocacy  
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<sup>30</sup> See Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604) (filed December 2, 2013). See also several comments from the Office of Advocacy regarding the absence of RFA analyses in the rulemaking, and/or incorrect certifications of rules by the Service, available at: <https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters>

<sup>31</sup> See *id.*

Copy to: Paul Ray, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget