



August 8, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Deb Haaland  
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 Experimental Populations (87 Fed. Reg. 34625).**

Dear Secretary Haaland,

On June 7, 2022, the U.S. Department of the Interior's Fish and Wildlife Service (the Service) proposed a rule to remove language that restricts introduction of experimental populations of endangered and threatened species outside of the species' "historical range." The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on the proposal. Advocacy does not believe the rule is necessary to accomplish the Service's intended objectives, as these provisions already exist within the statute. If, however, the Service wishes to proceed, the Service must conduct a proper Regulatory Flexibility Act analysis of the proposed rule that considers the impacts on small entities. The Service should also consider modifications to the proposed rule that would eliminate uncertainty and ambiguity for regulated entities.

**I. Background**

**A. The Office of Advocacy**

Congress established the Office of Advocacy under 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). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility

Act (RFA),<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</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, the RFA requires federal agencies to assess the impact of the proposed rule on small entities 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>3</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>4</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>5</sup>

## **B. The Proposed Rule**

Congress enacted the Endangered Species Act (ESA) in 1973 to conserve species likely to become endangered. The ESA defines endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range."<sup>6</sup> The ESA also extends to those species deemed to be threatened.

In 1982, the Act was amended to identify and include additional circumstances where government regulations were needed to protect species conservation. Among those amendments was the addition of Section 10(j) concerning experimental populations.<sup>7</sup> This section outlined circumstances in which the Secretary of the Interior may authorize the release of populations of endangered or threatened species outside of the current habitat range of that species. The Secretary may do so if she determines that the release will further the conservation of that species.<sup>8</sup> This is known as an "experimental population". The Secretary may designate habitat as an experimental population only after determining based on the best available data and science that such population is essential to the continued existence of a particular species.<sup>9</sup>

In implementing this portion of the act, the Service has considered the introduction of a particular species outside of its current range, but within its probable historic range.<sup>10</sup> At the time that these regulations were adopted, the Service states that it did not anticipate the impact of

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<sup>1</sup> 5 U.S.C. §601 et seq.

<sup>2</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>3</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>4</sup> *Id.*

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

<sup>6</sup> 16 U.S.C. § 1532(6).

<sup>7</sup> 16 U.S.C. § 1539 (j). *See also* 50 C.F.R. §17.81.

<sup>8</sup> 16 U.S.C. § 1539 (j) (2) (A).

<sup>9</sup> 16 U.S.C. § 1539 (j) (2) (B).

<sup>10</sup> 15 C.F.R. §17.81 (a).

climate change on a particular species' habitat. The Service states that these changing circumstances have necessitated the introduction of species to habitats outside of their historical range.<sup>11</sup>

In response to these changing circumstances, on June 7, 2022, the Service proposed a rule to modify when it would introduce experimental populations. Specifically, the Service stated that it intends to remove references to “historical range” to allow for the introduction of experimental populations of species outside of areas where they are historically found.<sup>12</sup> The Service proposed several additional edits, the most significant of which include the following:

Where the regulations currently read,

“The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into **suitable natural habitat** outside the species' current natural range (but **within its probable historic range**) ...”<sup>13</sup>

The Service is proposing to modify this language to strike “suitable natural habitat” from this paragraph and replace it instead with “habitat that is necessary to support one or more life stages.” The Service would also strike “within its probable historic range”. The text would therefore read,

“The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into **habitat that is necessary to support one or more life history stages** outside the species' current range. . .”<sup>14</sup>

## II. Advocacy's Small Business Concerns

On July 20, 2022, Advocacy held a small business roundtable to discuss the proposed rule and its impacts on small business.<sup>15</sup> During the roundtable, Advocacy heard from numerous agricultural businesses and representatives from the mining and logging industries. These small businesses expressed significant concerns with the proposed rule, both in terms of the uncertainty that it creates, as well as with how it may impact future experimental population proposals, given their history and experience with current populations. Advocacy recommends that the Service provide a small business analysis that would consider alternative approaches to the Service's proposal.

### A. The Service should make modifications to the proposed rule to ensure that it is not ambiguous and an overreach of agency authority.

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<sup>11</sup> Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations, 87 Fed. Reg. 34625 (June 7, 2022).

<sup>12</sup> *Id.*

<sup>13</sup> 15 C.F.R. § 17.81 (a). *Emphasis added.*

<sup>14</sup> 87 Fed. Reg. 34625 at 34628. *Emphasis added.*

<sup>15</sup> See Office of Advocacy Endangered Species Roundtable (July 20, 2022), <https://advocacy.sba.gov/2022/07/11/endangered-species-roundtable-july-20-2022/>.

While Advocacy appreciates the Service’s attempt to codify regulatory practices pertaining to experimental populations, these revisions are overly broad, unspecific, and unnecessary. They create significant uncertainty for small businesses. The Service already has the authority to authorize the transportation and release of a species outside of its current range if such release furthers conservation of the species.<sup>16</sup> This proposed rule would seemingly extend that authority beyond what Congress intended and may allow the Service to introduce a species to a habitat that is unsuitable, or that creates harmful implications for other species, for the community, and for businesses in the area. Should the Service continue with finalizing the proposed rule, Advocacy has the following additional comments and suggestions to reduce ambiguity. For additional small business recommendations, Advocacy encourages the Service to read and respond directly to the comments of small businesses.<sup>17</sup>

**1. The Service should provide the circumstances in which it will look to introduce a species outside of its historical range.**

Within the preamble of the proposed rule, the Service lists circumstances in which it would allow the introduction of a species into experimental populations outside of their historical range.<sup>18</sup> These circumstances are not mentioned anywhere in the actual proposed rule text. The Service provides no clear guidance as to the circumstances in which the Service may exercise this discretion. Small businesses have indicated that this creates unnecessary regulatory uncertainty and has the potential to create significant economic hardship in situations where an invasive species is introduced to a habitat in which it has not historically resided. The Service should therefore provide a supplemental notice in which it clarifies and provides specific circumstances in which it would allow for the introduction of a particular species outside of its historic range within the rule text.

**2. The Service should clarify what is meant by “one or more life history stages.”**

The Service is proposing to remove “suitable natural habitat” from the regulations, and instead replace it with “necessary to support one or more life stages.”<sup>19</sup> The Service does not offer additional language clarifying what is meant by one or more life stages. Furthermore, the replacement of “suitable natural habitat” with “one or more life stages” is itself problematic. The introduction of a species into a suitable habitat should be based on the ability of the species to survive through multiple life stages. For example, in situations where a species requires different

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<sup>16</sup> 16 U.S.C. § 1539 (j) (2) (A).

<sup>17</sup> *See, for example*, Comments from the National Endangered Species Act Reform Coalition (NESARC) filed on August 8, 2022, Docket No. FWS-HQ-ES-2021-0033.

<sup>18</sup> 87 Fed. Reg. 34625. The preamble states that such circumstances include “instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, or is undergoing, irreversible decline or change, rendering it unable to support one or more life history stages for the species, thereby leading to the need to establish the species in habitat in areas outside the historical range.”

<sup>19</sup> *Id.*

habitats throughout different stages of its life, simply stating that the habitat in question supports one life stage is insufficient. The Service should therefore provide a supplemental notice for public comment that clearly outlines what is meant by “habitat that is necessary to support one or more life stages.”

**3. The Service must analyze the potential harms that arise from introducing a species to a habitat outside of its historical range, clarifying that the rule does not promote the introduction of an invasive species to such habitats.**

Advocacy heard numerous comments from small businesses whose businesses were otherwise destroyed or who suffered severe economic hardship because of the introduction of species that are predatory, invasive, or both<sup>20</sup> to areas outside of their historical range. Some of these species have caused significant disruptions to ecological relationships between native species in those areas and have hurt small businesses. Some examples include livestock losses due to the Mexican Gray Wolf and grizzly bear.

To avoid causing undue ecological impacts and significant burdens to small entities, the Service should limit the introduction of an experimental population to a habitat outside of its historical range only when there are extreme circumstances that warrant doing so. In such circumstances, the Service should engage with impacted stakeholders through pre-rule proposal methods including public hearings, published requests for information, and advance notices of proposed rulemakings. The Service should then publish the findings of its outreach efforts as well as its scientific data and justification for notice and comment. This will allow the Service to determine what impacts such actions may have, and to work with stakeholders to find suitable regulatory alternatives prior to the publication of a proposed rule.

The Service should also clarify that this proposed rule is not intended to allow the Service to introduce an otherwise invasive species to a habitat in which the species would not exist. The Service should analyze whether a predatory species has the potential to become invasive and present those findings to the public for notice and comment.

**4. The Service should not strike language pertaining to the overlap between critical habitat and nonessential experimental populations.**

The Service proposes to strike the following language from the regulatory text, “No designation of critical habitat will be made for nonessential experimental populations.” The existing regulatory text further states that in situations where an experimental population overlaps with a natural population of the species during certain periods of the year, critical habitat shall not be

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<sup>20</sup> See U.S. Fish and Wildlife Service “Invasive Species” available at <https://www.fws.gov/program/invasive-species>. By its own admission, the Service states that, “An invasive species is any plant or animal that has spread or been introduced into a new area where they are, or could, cause harm to the environment, economy, or human, animal, or plant health. Their unwelcome presence can destroy ecosystems and cost millions of dollars.”

designated for the area of overlap.<sup>21</sup> This crucial language ensures that the Service is not designating areas as critical habitat when a species is part of a nonessential population. It ensures that the Service will not engage in unnecessary regulatory actions. The Service itself indicated in a previous final rulemaking that this was a necessary clarification and that it should be retained.<sup>22</sup> Advocacy and small businesses agree with the Service's previous position.

**B. The Service must conduct a proper RFA analysis of the rule, and any future designations resulting from this proposal.**

In its proposed rule, the Service asserts that it is the only entity directly affected by the proposed rule because it is the only entity that would apply these regulations.<sup>23</sup> The Service states that no external entities including small businesses would face impacts from the rulemaking. Advocacy believes any designation of critical habitat, or in this instance experimental populations, has a direct economic impact on small entities.<sup>24</sup> This proposed rule has the potential to allow the Service to introduce invasive and predatory species to habitats in which they do not reside. This may limit or inhibit small business operations by posing a safety concern to agricultural small businesses and delaying new development projects due to lengthy permitting reviews.

As stated previously, species introduced in experimental populations are threatened species and are therefore subject to certain protections under the ESA. Such protections may include the necessity of a permit to continue operations. These delays can be costly and disproportionately impact small businesses. One stakeholder from the National Rural Electric Cooperative (NRECA) noted that a critical electrical transmission line project was delayed for two years and resulted in over \$270,000 in added costs despite multiple biological surveys indicating that the species was not present, and that the area was uninhabitable by the species.

Experimental populations have a particularly burdensome effect on small businesses because they include the introduction of potentially predatory and/or invasive species into areas where they are typically not found. This leaves small businesses with little to no recourse. One such example is the introduction of the Mexican Gray Wolf to areas including Arizona and New Mexico. In a recent rulemaking concerning the nonessential experimental population of the

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<sup>21</sup> 50 C.F.R. § 17.81 (f).

<sup>22</sup> Endangered and Threatened Wildlife and Plants; Experimental Populations, 49 Fed. Reg. 33885 (August 27, 1985) at 33894.

<sup>23</sup> *Id.* at 34627.

<sup>24</sup> *See, for example*, Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604) (filed December 2, 2013). *See also*, Comments of SBA Office of Advocacy, Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse (78 Fed. Reg. 37328) (filed July 15, 2013), Comments from SBA Office of Advocacy, Revisions to the Regulations for Impact Analysis for Critical Habitat (77 Fed. Reg. 51503) (filed January 31, 2013), Comments of SBA Office of Advocacy, Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (76 Fed. Reg. 50542) (filed October 11, 2011).

Mexican Gray Wolf, the Service estimated there are approximately 12,334 small cattle ranches in these counties that may be impacted by the rule.<sup>25</sup>

Small business representatives from New Mexico and other regions mentioned the harm that the wolves have had on local ranchers once introduced to the area as part of an experimental population. The Service has conducted analyses of some effects from the presence of the wolves in their rulemakings, but these costs may be underestimated and unrepresentative of the large impacts that some ranchers experience. Yet while the Service admits that some ranches might experience more than one depredation, the reality is far more unequal. Representatives have indicated that some ranchers experienced such large, localized impacts that they were forced to close their ranches and move away.<sup>26</sup>

The Service also appears to underestimate the impact of the wolves beyond depredation. Although the Service acknowledges that the presence of wolves can harm the livestock, they reference only weight loss and assume only a tiny fraction of livestock would be impacted. However, according to information from small business stakeholders, the presence of these wolves had many more effects on livestock, including loss of body condition, birthing weak calves, premature calf births, immune suppression, decreased pregnancy rates, increased susceptibility to disease, and more aggressive demeanor.

In this rulemaking, the Service must consider the overall impacts the rule would have on small entities. As required under the economic analysis portion of the ESA, the Service must do a proper RFA analysis for each experimental population as required by statute so that it is not underestimating these impacts. The Service should also acknowledge the overall economic impact that critical habitat and experimental population designations have on regulated small businesses, and specifically what impacts this proposal will have, rather than simply stating that the impacts are only felt by the agency.

These designations are also a matter of equity under Executive Order (EO) 13985.<sup>27</sup> Under this EO agencies must consider the impacts of their rulemakings and agency actions on underserved communities including rural and low-income communities. Compliance with this EO goes hand in hand with RFA compliance, as many small agricultural businesses are in rural and lower-income communities and have been historically overburdened by the introduction of experimental populations into the areas in which they operate.

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<sup>25</sup> Endangered and Threatened Wildlife and Plants; Revision to the Nonessential Experimental Population of the Mexican Gray Wolf, 87 Fed. Reg. 39348 (July 1, 2022) at 39369.

<sup>26</sup> See, for example Montana Department of Livestock, Livestock Loss Board, available at <https://liv.mt.gov/Attached-Agency-Boards/Livestock-Loss-Board/index>. See also Albert P. Sommers, Charles C. Price, Cat. D. Urbigkit, Eric M. Peterson, *Quantifying Economic Impacts of Large- Carnivore Depredation on Bovine Calves*, Journal of Wildlife Management, available at <https://www.jstor.org/stable/40801500> (2010).

<sup>27</sup> Exec. Order No. 13985, 86 Fed Reg. 7009 (January 25, 2021).

### **III. Conclusion**

Advocacy appreciates the opportunity to comment on the Service's proposed rule to modify definitions and provisions concerning experimental populations. Advocacy believes that these updates are otherwise unnecessary as the agency already has discretionary authority to decide where to introduce a particular species. If the Service decides to finalize this rulemaking, it should do so only after revising its RFA analysis, and making additional modifications as outlined above to remove uncertainty and reduce the burden to small businesses.

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  
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator  
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