



December 22, 2025

VIA ELECTRONIC SUBMISSION

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

The Honorable Howard Lutnick
Secretary
U.S. Department of Commerce
National Marine Fisheries Service
1401 Constitution Ave., NW
Washington, D.C. 20230

Re: Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants (Docket No. FWS-HQ-ES-2025-0029), Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat (Docket No. FWS-HQ-ES-2025-0048), Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations (Docket No. FWS-HQ-ES-2025-0044), Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat (Docket No. FWS-HQ-ES-2025-0039).

Dear Secretary Burgum and Secretary Lutnick:

On November 21, 2025, the Fish and Wildlife Service (FWS) published four proposed rules – two of them jointly with National Marine Fisheries Service (NMFS; together the Services)¹ – that would make multiple changes to Endangered Species Act (ESA) regulations. This letter constitutes the Office of Advocacy's (Advocacy) public comments on these proposed rules.

Permitting delays remain a major obstacle to timely infrastructure investment and small-business growth, with multi-year federal review timelines often determining whether projects can proceed

¹ Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations, 90 Fed. Reg. 52600 (Nov. 21, 2025); Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 90 Fed. Reg. 52607 (Nov. 21, 2025); Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52587 (Nov. 21, 2025); Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 90 Fed. Reg. 52592 (Nov. 21, 2025).

at all. ESA Section 7 consultation is frequently a key driver of multi-year delays. Under the principles of President Trump’s Executive Order 14303, *Restoring Gold Standard Science*², federal permitting and wildlife-protection decisions should rest on rigorous, transparent, and reliable scientific foundations.

Advocacy supports the Services’ proposed changes because they take meaningful steps toward improving federal regulation in these areas. Specifically, each of the proposed rules clarifies the ESA’s scope and reduces regulatory burdens on small entities by eliminating duplicative requirements. Especially, the scope of “effects of the action” is clarified with emphasis on “clear and substantial information.” Clear guardrails on critical habitat designation would be restored, particularly for areas not occupied by the threatened or endangered species.

Advocacy also recommends that, going forward, the FWS further protect small entities by conducting a full Regulatory Flexibility Act (RFA) analysis for new critical habitat designations.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy in 1976 under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent voice within the Executive Branch that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA, 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, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁴ If a rule is not expected to have a significant economic impact on a substantial number of small entities, agencies may certify it as such and submit a statement of the factual basis for such a determination that adequately supports its certification.⁵

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.”⁶

² 90 Fed. Reg. 22601 (May 29, 2025).

³ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁴ 5 U.S.C. § 603.

⁵ *Id.* § 605(b).

⁶ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁷ 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.⁸

B. The Services' Proposed Changes to ESA Regulations.

In 1973, Congress enacted the ESA to conserve species likely to become endangered. The Act defines endangered species as any species that is “in danger of extinction throughout all or a significant portion of its range.”⁹ The Secretaries of the Interior and Commerce share responsibilities for implementing most of the ESA. Generally, marine and anadromous species are under the jurisdiction of the NMFS, and all other species are under the jurisdiction of the FWS.

One of the ways the ESA protects species is through the designation of areas the species needs to survive as “critical habitat.” Once an area is designated as “critical habitat,” development and other economic activities are restricted within its boundaries. Section 4 of the Act requires the Services to designate critical habitat when a determination is made that a species is endangered or threatened.¹⁰ Section 7 requires that agencies ensure that their actions do not imperil the continued existence of endangered or threatened species.¹¹

Section 9 of the Act allows for specific prohibitions on activities and takings pertaining to species listed as endangered under the Act.¹² Section 4(d) of the Act allows for extensions of Section 9 prohibitions to species listed as threatened.¹³ It is these various provisions that are the subjects of the three proposed rules.

The Services made a series of changes to ESA regulations in 2023-2024 which Advocacy felt were “vague and open-ended” and could “erode the predictability small businesses need to understand and meet their regulatory responsibilities.”¹⁴ The current suite of proposed rules reexamines these changes. Specifically, the Services propose to:

- Revise when and how FWS determines whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat.¹⁵

⁷ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁸ *Id.*

⁹ 16 U.S.C. § 1532(6).

¹⁰ *Id.*

¹¹ *Id.* § 1536(a).

¹² *Id.* §1538(a).

¹³ *Id.*

¹⁴ U.S. Small Bus. Admin., Off. Of Advoc., Comment Letter on Updates to the Endangered Species Act (Aug. 22, 2023), <https://advocacy.sba.gov/2023/08/22/advocacy-files-comments-on-updates-to-the-endangered-species-act/>.

¹⁵ 90 Fed. Reg. 52592 (Nov. 21, 2025).

- Remove the FWS “blanket rule” option for treating newly listed threatened species as endangered.¹⁶
- Revise how federal agencies consult with FWS and NMFS on whether their proposed actions will jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.¹⁷
- Revise the procedures and criteria used by FWS and NMFS for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.¹⁸

Re-examining the various changes made to ESA regulations in 2024 complies with President Donald J. Trump’s Executive Order (EO) 14219, *Ensuring Lawful Governance and Implementing the President’s “Department of Governmental Efficiency” Initiative*,¹⁹ which instructs agencies to specifically identify “regulations that impose undue burdens on small business and impede private enterprise and entrepreneurship.”²⁰

II. Advocacy’s Small Business Issues

The ESA directly impacts small entities. Even the possible presence of an endangered species on a small business’ property can lead to additional regulatory responsibilities, prohibiting operations and deterring business activity. Additionally, small governments can be impacted by ESA-related regulatory obligations, causing delays and cost increases to construction projects within their jurisdictions.

Advocacy held a small entity roundtable on December 10, 2025, to discuss the Services’ proposed changes to ESA regulations. Additionally, Advocacy has repeatedly commented on the various impacts individual ESA critical habitat regulations have on small entities.²¹

¹⁶ 90 Fed. Reg. 52857 (Nov. 21, 2025).

¹⁷ 90 Fed. Reg. 52600 (Nov. 21, 2025).

¹⁸ 90 Fed. Reg. 52607 (Nov. 21, 2025).

¹⁹ 90 Fed. Reg. 10583 (Feb. 25, 2025).

²⁰ *Id.*

²¹ See, e.g., U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Critical Habitat for Gunnison Sage-Grouse (Dec. 2, 2013), <https://www.regulations.gov/comment/FWS-R6-ES-2012-0108-0636>. See also U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse (July 15, 2013), <https://www.regulations.gov/comment/FWS-R2-ES-2013-0014-0005>; U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Revisions to the Regulations for Impact Analysis for Critical Habitat (Jan. 31, 2013), <https://www.regulations.gov/comment/FWS-R9-ES-2011-0073-0085>; U.S. Small Bus. Admin., Off. of Advoc., Comment Letter on Proposed Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (Oct. 11, 2011), <https://www.regulations.gov/comment/FWS-R2-ES-2011-0053-0021>.

A. Increased Consideration of the ESA's Economic Impacts Will Benefit Small Entities.

The Services propose to remove language from ESA regulations prohibiting the consideration of economic impacts when listing, delisting, or reclassifying a species. Choosing whether a species should be protected under the ESA is a decision that can lead to economic impacts for small entities.

For example, Advocacy has previously explained the severe economic consequences of listing the Mexican Grey Wolf under the ESA.²² Specifically, Catron County, NM suffered \$50,000 in direct economic losses from livestock production.²³ This loss also negatively impacted the county's restaurants, lodging, grocery stores, and gas stations. The impacts from the wolves grew so severely that the county declared a state of emergency in April 2025.²⁴

At a hearing before the House Committee on Natural Resources on March 4, 2025, a cattle rancher testified that the wolf had caused \$320,000 in costs to their ranch in 2024.²⁵ Specifically, these costs included "extra trips to the mountain to check cattle when wolves are close to cattle, extra labor to haze wolves, decrease in calf weights at weaning time, decline in the number of cows re-breeding, and equipment depreciation from extra wear and tear."²⁶

Since initially informing the Department of the Interior earlier this year about the impacts of the Mexican Grey Wolf, Advocacy has spoken extensively to farmers and ranchers in Arizona and New Mexico. Through collaboration with those affected by the wolf, Advocacy is compiling data on the extensive damage that has been done to their businesses, communities, and families because of the wolf's status as an endangered species.

During Advocacy's December 10, 2025, roundtable, a rancher from New Mexico specifically noted that he does not think that the current ESA process considers the harm done by ESA listings to small farmers and ranchers. By allowing economic impacts to be considered during the listing process, the Services will help to address this concern by avoiding situations where all impacts are not fully considered, and small businesses end up experiencing significant regulatory costs.

Additionally, the FWS is proposing to revise how the agency determines when the benefits of excluding an area from critical habitat outweigh the benefits of including the area as critical

²² U.S. Small Bus. Admin., Off. Of Advoc., Comment Letter on U.S. Department of the Interior Request for Information on Regulatory Reform (June 20, 2025), <https://advocacy.sba.gov/wp-content/uploads/2025/06/Comment-Letter-DOI-Reg-Reform-Comments-Docket-No-DOI-2025-0005-1.pdf>.

²³ Testimony of Anita Hand, Catron Cnty., NM before the U.S. Small Business Administration Regulatory Fairness Board, Regulatory Fairness Hearing (Oct. 14, 2015) (on file with Advocacy).

²⁴ Silver City Daily Press, *Catron County Calls for Lethal Force Against Wolves* (Apr. 12, 2025), <https://www.scdailypress.com/2025/04/12/catron-county-calls-lethal-force-wolves/>.

²⁵ *Understanding the Consequences of Experimental Populations Under the Endangered Species Act Before the H. Com. On Nat. Res.*, 119th Cong. 5 (2025) (testimony of Dalton Dobson, Arizona Farm Bureau Rancher) <https://docs.house.gov/meetings/II/II15/20250304/117958/HHRG-119-II15-Wstate-DobsonD-20250304.pdf>.

²⁶ *Id.*

habitat. Choosing to protect a species (listing) has different effects than deciding upon a method by which that species should be protected (designating critical habitat). Specifically, the agency states that “economic impacts may include, for example, the economy of a particular area, productivity, and creation or elimination of jobs” as well as “opportunity costs potentially arising from critical habitat designation.”²⁷

Advocacy supports this change from the 2024 ESA revisions which directed habitat determinations to be made “without reference to possible economic or other impacts of such determination”²⁸ and noted that listing and delisting decisions under the ESA be made “solely upon biological criteria” and “economic considerations have no relevance to [listing and delisting] determinations.”²⁹ By properly considering the economic impacts of critical habitat determinations, the Services will better be able to evaluate the impacts of those decisions on small businesses.

B. Revising the Scope of “Foreseeable Future” Will Provide Small Entities with Increased Regulatory Clarity.

The ESA defines a “threatened species” as any species which is likely to become an endangered species within the “foreseeable future.”³⁰ However, the act does not define “foreseeable future.” In 2024, the Services considered the term “foreseeable future” to encompass “as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species’ responses to those threats.”³¹ When proposing this definition, the Services further described the concept of “foreseeable future” as a “temporal structure” in which they “do not need to have absolute certainty in the information we use.”³²

Advocacy expressed concern about this open-ended, confusing foreseeable future framework proposed by the Services.³³ There did not appear to be any boundaries or guideposts as to how decisions would be made under this concept. Using the language above, there could be scenarios where “foreseeable future” has no end point. Also, the undefined nature of “foreseeable future” could have easily led to a scenario where different district offices have vastly different concepts of what the term means.

In the current proposal, the Services redefine “foreseeable future” as “only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.”³⁴ This new language uses the term “likely” as a defined endpoint, providing small businesses with regulatory predictability and will help them understand when requirements begin, and more importantly, when they will end. Advocacy supports the Services’ change because it will help small businesses better understand the ESA’s scope.

²⁷ 90 Fed. Reg. 52592, 52594 (Nov. 21, 2025).

²⁸ 88 Fed. Reg. 40,764 (June 22, 2023).

²⁹ *Id.* at 40,765

³⁰ 16 U.S.C. § 1532(20).

³¹ 89 Fed. Reg. 24300, 24301 (Apr. 5, 2024).

³² 88 Fed. Reg. 40764, 40,766 (June 22, 2023).

³³ U.S. Small Bus. Admin., Off. of Advoc., *supra* note 14, at 8.

³⁴ 90 Fed. Reg. 52607, 52610 (Nov. 21, 2025).

C. The Services' Revised Approach to Designating Areas Unoccupied by the Species in Question as Critical Habitat Restores Adherence to Supreme Court Precedent.

The proposed rule revises the method by which areas not occupied by a species may be designated as critical habitat. Specifically, the rule states that unoccupied areas will only be considered “where a critical habitat designation limited to areas occupied would be inadequate to ensure the conservation of the species.”³⁵

This change is necessary because Congress “made clear that it intended for designation of unoccupied areas as critical habitat to meet a higher standard than designating occupied areas and that the Services should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species.”³⁶ Additionally, as the Services correctly note, “[t]o say that an area that is currently *uninhabitable* for a species at the time of listing is essential for the conservation of such species defies logic.”³⁷

On April 9, 2025, President Trump issued a memorandum³⁸ to all federal agencies requiring that existing regulations be reviewed in light of 10 specific Supreme Court decisions, including *Loper Bright Enterprises v. Raimondo*.³⁹ *Loper Bright* requires that agencies align regulations with the best meaning of the statute in question.⁴⁰

In this case, the best reading of the ESA is found in the Supreme Court’s *Weyerhaeuser v. U.S. Fish & Wildlife Service*⁴¹ decision. In *Weyerhaeuser*, the Court ruled that to be eligible for critical habitat designation, an area must be “habitat” for the listed species.⁴² For an area to be habitat, it must contain at least one feature necessary for the existence and survival of a species.

Advocacy supports the Services including the existence of features essential to the survival of a species, on the determination of unoccupied critical habitat. EO 12866 directs agencies to “tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities)” and to “draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.”⁴³

Without the Services proposed reforms, small entities would have no reasonable way to ascertain whether they are within an area which could possibly be impacted by ESA regulations. By requiring unoccupied areas to be “essential” to the survival of a species before designating them as critical habitat, the Services are adhering to EO 12866, *Weyerhaeuser*, *Loper Bright*, and

³⁵ *Id.* at 52,611.

³⁶ *Id.* at 52,612.

³⁷ *Id.*

³⁸ The White House, *Memorandum for the Heads of Executive Departments and Agencies, Directing the Repeal of Unlawful Regulations*, (Apr. 9, 2025), <https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/>.

³⁹ 603 U.S. 369 (2024).

⁴⁰ *Id.*

⁴¹ *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

⁴² *Id.*

⁴³ 58 Fed. Reg. 51735, 51736 (Oct. 4, 1993).

President Trump’s April 10, 2025 memorandum and giving small entities the regulatory predictability they need to comply with the ESA.

D. The Services’ Revisions to “Not Prudent” Determinations Restore Important Regulatory Guardrails on the ESA’s Scope.

An important limit on the ESA’s reach is the ability of the Services to find that in some circumstances it is “not prudent” to designate critical habitat.⁴⁴ In 2024, citing climate change, the Services removed regulatory language allowing for a determination that critical habitat is “not prudent” when threats to a species habitat are from causes which cannot be remedied through ESA-mandated management actions.⁴⁵

Advocacy expressed concern that this change would transform “critical habitat from a means by which regulated entities can alter their behavior to help reestablish a species into a regulatory burden with no goal or endpoint.”⁴⁶ If the purpose of critical habitat is to develop a plan by which a species can be preserved, then it stands to reason that critical habitat may “not be prudent” in instances where no such plan is achievable. The proposed rule reinstates language allowing the Services to determine that critical habitat is “not prudent” when the ESA’s tools do not offer any means of alleviating threats to a species.

Advocacy supports this change because it recognizes that small entities should not be held responsible for factors over which they have no control. In situations where conservation management actions cannot address the harm to the species, including as anticipated impacts to climate change and disease, it is not appropriate to designate critical habitat as it would not provide any further benefit to the species.

E. Repealing the “Blanket Rule” Reduces Unnecessary Regulatory Burdens on Small Entities.

The ESA’s “blanket rule” allows threatened species to be treated as if they are already endangered.⁴⁷ The “blanket rule” was repealed in 2019⁴⁸ and reinstated in 2024.⁴⁹ Rather than identifying particular threatened species which require additional protection and crafting rules to create species-specific plans, the “blanket rule” adopts a “one-size-fits-all” approach for all threatened species instead. While this may be easier from an administrative point of view, it creates additional burdens for the regulated public, including small businesses.

When the FWS proposed reinstating the “blanket rule” in 2023, Advocacy pointed out that its approach had been used in less than half of the species considered in the past three administrations.⁵⁰ This shows that when it is necessary to protect a threatened species as if it

⁴⁴ 50 C.F.R. § 424.12(a)(1).

⁴⁵ 89 Fed. Reg. 24300, 24315 (Apr. 5, 2024).

⁴⁶ U.S. Small Bus. Admin., Off. of Advoc., *supra* note 14, at 9.

⁴⁷ 50 C.F.R. §17.31, 17.71.

⁴⁸ 84 Fed. Reg. 44753 (Aug. 27, 2019).

⁴⁹ 89 Fed. Reg. 23919 (Apr. 5, 2024).

⁵⁰ U.S. Small Bus. Admin., Off. of Advoc., *supra* note 14, at 10.

were endangered, the FWS can do so on a case-by-case basis. Simply deferring to an approach where every threatened species is treated as endangered creates unnecessary regulatory burdens for small entities.

The FWS is once again proposing to repeal the “blanket rule,”⁵¹ properly recognizing that it does not adhere to the “single, best meaning” of the ESA as required by *Loper Bright*.⁵² The agency states that the ESA makes clear “that Congress intended for the Service to determine what protections are needed for threatened species on a species-by-species basis.”⁵³

Advocacy supports this approach because it accounts for the individual needs of species and instead of regulating where there may not be a specific need. This fulfills the purpose of the ESA without unnecessarily increasing regulatory burdens on small businesses.

F. The Proposed Revisions to the Interagency Consultation Process Will Reduce Unnecessary Delays and Regulatory Burdens for Small Entities.

Section 7 of the ESA requires federal agencies to consult with the Services on whether proposed agency actions will jeopardize the continued existence of a threatened or endangered species or result in the destruction or adverse modification of designated critical habitat.⁵⁴

The interagency consultation process often results in project delays and increased costs for small entities. The time and expenses associated with these consultations often result in an increase in regulatory burdens and can put potential projects out of reach for small entities. For example, the Section 7 consultation process for port and waterway infrastructure projects currently takes “two to three years, and sometimes longer, to complete.”⁵⁵

In 2024, the Services amended the definition of “effects of the action,” which refers to the impacts of any given action on ESA listed species. The revised definition included “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action.”⁵⁶

Advocacy noted that the phrase “but that are not part of the action” is unclear.⁵⁷ A small entity can reasonably discern the impacts of their actions but requiring that same entity to forecast consequences that are “not part of the action” will cause significant confusion. Small entities

⁵¹ 90 Fed. Reg. 52587 (Nov. 21, 2025).

⁵² 603 U.S. 369, 400 (2024).

⁵³ 90 Fed. Reg. 52587, 52589 (Nov. 21, 2025).

⁵⁴ 16 U.S.C. §§ 1531 *et seq.*

⁵⁵ See Pac. Nw. Waterways Ass’n, Comment Letter on Proposed Rule on Endangered and Threatened Species: Interagency Cooperation (Aug. 1, 2023), <https://www.regulations.gov/comment/FWS-HQ-ES-2021-0104-45203>; Lake Charles Harbor & Terminal Dist., Comment Letter on Proposed Rule on Endangered and Threatened Species: Interagency Cooperation (Aug. 9, 2023), <https://www.regulations.gov/comment/FWS-HQ-ES-2021-0104-70362>.

⁵⁶ 89 Fed. Reg. 24268, 24271 (April 5, 2024) (emphasis added).

⁵⁷ U.S. Small Bus. Admin., Off. of Advoc., *supra* note 14, at 5.

cannot be expected to account for actions they are not directly responsible for. The Services are now proposing to rescind the phrase “but that are not part of the action.”⁵⁸

The Services are also proposing to reinstate language that was removed in 2024⁵⁹ which calls for the use of “clear and substantial information, using the best scientific and commercial data available” to determine whether an activity or consequence is reasonably certain to occur.⁶⁰ Requiring “the best scientific and commercial data available” complies with President Trump’s EO 14303, *Restoring Gold Standard Science*.⁶¹ It will also to ensure that ESA regulations impacting small entities will only be necessary when there is enough support to justify them.

In 2024, the ESA also expanded the scope of “reasonable and prudent” measures that could be required to minimize the impacts of actions on threatened or endangered species by adding regulatory language that could be read to include mitigation measures.⁶² During a roundtable on the Services’ 2024 revisions to the ESA, Advocacy specifically heard concerns from small businesses about the potential cost of these additional requirements.⁶³

In 2023, Advocacy informed the Services that ESA mitigation requirements are already required for a variety of permits, including Clean Water Act permits. Additionally, the Council on Environmental Quality is proposing to add mitigation requirements to various stages of the National Environmental Policy Act review process.⁶⁴ The Services are now proposing to rescind the language.⁶⁵ This will benefit small entities by eliminating duplicative regulatory requirements. Additionally, the change recognizes that the mitigation requirements of various statutes should work in harmony with one another rather than simply adding to each other.

Advocacy supports the Services’ changes to the ESA’s interagency consultation process. The proposed revisions will both reduce regulatory burdens on small entities and reduce delays in the ESA process.

G. Individual Critical Habitat Designations Should Include an Initial Regulatory Flexibility Analysis.

The four proposed rules clarify the ESA’s scope and streamline the process that will later be used to designate critical habitats. Advocacy urges the FWS, when engaged in those future actions, to further protect small entities by providing an initial regulatory flexibility analysis (IRFA) and, when necessary, a final regulatory flexibility analysis (FRFA). In the past, the FWS generally failed to conduct any small-entity analysis of proposed critical habitat determinations.⁶⁶

⁵⁸ 90 Fed. Reg. 52600, 52604 (Nov. 21, 2024).

⁵⁹ 89 Fed. Reg. 24268, 24274 (Apr. 5, 2024).

⁶⁰ 90 Fed. Reg. 52600, 52603 (Nov. 21, 2024).

⁶¹ 90 Fed. Reg. 22601 (May 29, 2025).

⁶² 89 Fed. Reg. 24268, 24283 (Apr. 5, 2024).

⁶³ U.S. Small Bus. Admin., Off. of Advoc., *Small Business Environmental Roundtable* (Aug. 1, 2023), <https://advocacy.sba.gov/2023/07/17/small-business-environmental-roundtable-august-1-2023/>.

⁶⁴ U.S. Small Bus. Admin., Off. of Advoc., *supra* note 14, at 6.

⁶⁵ 90 Fed. Reg. 52600, 52602 (Nov. 21, 2024).

⁶⁶ *See supra* note 21.

The FWS asserted that the RFA does not apply to such rules. This stands in contrast to NMFS, which routinely acknowledges that small entities are impacted by critical habitat decisions by conducting regulatory flexibility analyses when proposing such rules.⁶⁷ The FWS supported their position by stating:

The regulatory mechanism through which critical habitat protections are realized is Section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under Section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, only Federal action agencies would be directly regulated [by a critical habitat designation].⁶⁸

Essentially, this amounts to the FWS asserting that it is not regulating small entities because another federal agency, which is required to consult with FWS and obtain consent to action, stands as an intermediary in the process. If the other agency were making APA rulemaking, then one might debate whether the costs to small entities should be counted by that agency or by FWS. But this is not typically the case. In effect, FWS is telling small entities that the federal government refuses to acknowledge the costs imposed on them. This is unlawful and contrary to sound policy. Advocacy is available, ready, and eager to help FWS prepare an IRFA or a FRFA for any critical habitat rule.

Advocacy supports the FWS's broadening the scope of critical habitat designation analyses to include economic impacts. Doing so is a natural companion to consideration of economic impacts on small entities, as formalized in IRFAs and FRFAs.

As I recently testified before the Senate Committee on Small Business & Entrepreneurship, many small businesses have told me that President Trump's administration "is unlike any before" in terms of listening to how they are affected by regulations.⁶⁹ By ensuring that all critical habitat designations undergo full RFA analyses, the FWS can continue to deliver on the President's deregulatory agenda and encourage competition and innovation that reduce the cost of living.

⁶⁷ See, e.g., 70 Fed. Reg. 52488, 52534 (Sept. 2, 2005).

⁶⁸ 89 Fed. Reg. 94673 (Nov. 29, 2024). This language is taken from the proposed rule "Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Contiguous U.S. Distinct Population Segment of the Canada Lynx," but the FWS has been using similar, if not the exact same, language in critical habitat rules (both proposed and final) for many years.

⁶⁹ *Trump's Regulatory Rollback: Saving Americans \$907 Billion and Counting: Hearing before the S. Comm. on Small Bus. & Entrepreneurship*, 119th Cong. at 4 (Nov. 19, 2025), https://advocacy.sba.gov/wp-content/uploads/2025/11/FINAL-Mulligan-Testimony_11192025.pdf (statement of Dr. Casey B. Mulligan, Chief Counsel, Off. of Advoc., U.S. Small Bus. Admin.).

III. Conclusion

Advocacy supports the Services' proposed changes to the ESA regulatory process. These changes reflect the best possible reading of the statute under *Loper Bright* and will also help restore the clarity small entities need to understand and meet their regulatory responsibilities. Advocacy also urges the FWS to further protect small entities by fully analyzing the regulatory impacts of future critical habitat decisions.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or nick.goldstein@sba.gov.

Sincerely,

/s/

Dr. Casey B. Mulligan
Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Nick Goldstein
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Mr. Jeffrey B. Clark, Sr. Associate Administrator
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