

agricultural businesses with annual sales less than \$750,000.

SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, this analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a "significant economic impact." Only small entities that are expected to be directly affected by the designation are considered in this portion of the analysis. This approach is consistent with several judicial opinions related to the scope of the RFA (*Mid-Tex Electric Co-Op, Inc. v. F.E.R.C.* and *America Trucking Associations, Inc. v. EPA*).

To determine if the rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting, etc.). We applied the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation. Federal agencies are already required to consult with the Services under section 7 of the Act on activities that they fund, permit, or implement that may affect the federally listed mussels discussed herein.

If this critical habitat designation is finalized, Federal agencies must also consult with us if their activities may affect designated critical habitat. However, in areas where the mussel species are present, we believe this will result in only minimal additional regulatory burden on Federal agencies or their applicants because consultation would already be required due to the presence of the listed mussel species. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process and trigger only minimal additional regulatory impacts beyond the duty to avoid jeopardizing the species. In the area

below Jordan Dam (lower Coosa River, Unit 26) where the mussel species are not present, we also believe designation of critical habitat will result in only minimal additional regulatory burden on Federal agencies or their applicants because consultations have been required, since 1991, due to the presence of the listed Tulotoma snail (56 FR 797, January 9, 1991).

Since the 11 mussels were listed (March 17, 1993, 58 FR 14330), we have conducted 7 formal consultations involving 1 or more of these 11 species. Four of the formal consultations involved Federal projects, including a flood control project by the COE, a horse trail system on the Talladega National Forest, programmatic activities by the Forest Service, and administration of the Clean Water Act in Alabama by the Environmental Protection Agency (EPA). Another formal consultation involved a COE permit to construct water withdrawal and discharge facilities for a gas powered electrical generating facility. These 5 consultations resulted in non-jeopardy opinions, and had no economic effects on small entities. The other 2 consultations involved COE permits to small entities to construct dams; one on a stream that was occupied habitat of the fine-lined pocketbook, and the other on a river that was occupied by the orange-nacre mucket and dark pigtoe. Biological Opinions prepared by us for these consultations concluded the actions were "not likely to jeopardize" the species, and identified reasonable and prudent measures to reduce take of the species affected by the projects. In reviewing these 2 consultations in light of proposed critical habitat, we recognize that with critical habitat present, our analysis would also include a determination of whether the action would destroy or adversely modify the critical habitat. One of these dams has not been constructed, and reinitiation of consultation may be necessary if construction plans proceed, after this designation is finalized (see "Previous Section 7 Consultations" above).

We also reviewed approximately 300 informal consultations that have been conducted since these 11 species were listed involving private businesses and industries, counties, cities, towns, or municipalities. At least 200 of these were with entities that likely met the definition of small entities. These informal consultations concerned activities such as excavation or fill, docking facilities, bridges, transmission lines, pipe lines, quarries, mines, housing developments, road and utility development, etc., authorized by COE, FERC, or EPA, or review of National

Pollution Discharge Elimination System permit applications to State water quality agencies by developers, municipalities, mines, businesses, and others. Informal consultations on Federal activities also included campground improvements, burning programs, and southern pine beetle control by the Forest Service. Informal consultations regarding the mussels usually resulted in recommendations to employ Best Management Practices for sediment control, relied on current State water quality standards for protection of water quality, and resulted in little to no modification of the proposed activities. In reviewing these past informal consultations and the activities involved in light of proposed critical habitat, we do not believe the outcomes would have been different in areas designated as critical habitat.

In summary, we have considered whether this proposed designation would result in a significant economic impact on a substantial number of small entities and find that it would not. Informal consultations on approximately 300 activities in the Basin by businesses and governmental jurisdictions that might affect these species and their habitats resulted in little to no economic effect on small entities. In the decade since the 11 mussels were listed, there have been only 2 formal consultations regarding actions by small entities, both of which culminated in findings which allowed the projects to go forward. Our review indicates that even if the outcomes of these 2 formal consultations had been quite different, in light of critical habitat designation, less than 1 percent of small entities affected by a designation would have experienced a significant economic impact. This does not meet the definition of "substantial." In addition, there is no indication that the types of activities we review under section 7 of the Act will change significantly in the future. There would be no additional section 7 consultations resulting from this rule as 25 of the proposed critical habitat units are currently occupied by 1 or more listed mussels, and the lower Coosa River (Unit 26) is currently occupied by the endangered tulotoma snail (*Tulotoma magnifica*), so the consultation requirement has already been triggered. Future consultations are not likely to affect a substantial number of small entities. This rule would result in major project modifications only when proposed activities with a Federal nexus would destroy or adversely modify critical habitat. While this may occur, it is not expected to occur frequently enough to affect a substantial