

To determine if the rule would affect a substantial number of small entities, we consider 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 apply the "substantial number" test individually to each industry to determine if certification is appropriate. 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.*, 773 F.2d 327 (D.C. Cir. 1985) and *American Trucking Associations, Inc. v. U.S. E.P.A.*, 175 F.3d 1027, (D.C. Cir. 1999))

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. Residential development on private land constitutes the primary activity expected to be impacted by the designation of critical habitat for *Polygonum hickmanii*.

To be conservative (i.e., more likely overstate impacts than understate them), the economic analysis assumed that the two potentially affected parties (American Dream/Glenwood and Lennar/Graystone Homes) that may be engaged in development activities within critical habitat are small entities. There are approximately 35 small residential development and construction companies in Santa Cruz County. At most two formal consultations could arise involving private entities. Therefore, the economic analysis assumes that at most two separate residential/small business entities may be affected by the designation of critical habitat for *Polygonum hickmanii* over 10 years.

Under the reasonable assumption that the two consultations would be spread out over the 10-year period, less than 1 percent of residential development and construction companies may be affected

annually, on average, by the designation of critical habitat for the *Polygonum hickmanii*. Consequently, the economic analysis concludes that this designation will not affect a substantial number of small entities as a result of the designation of critical habitat for *P. hickmanii*.

In general, two different mechanisms in consultations under section 7 of the Act could lead to additional regulatory requirements for the one small business, on average, that may be required to consult with us each year regarding their project's impact on *Polygonum hickmanii* and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or destroy or adversely modify its critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or resulting in destruction or adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or destruction or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives. Secondly, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through nondiscretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually

all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. As we have no consultation history for *Polygonum hickmanii*, we can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in this final listing rule and critical habitat designation.

It is likely that a developer could modify a project to avoid removing standing plants. Based on the types of modifications that have been implemented in the past for plant species, a developer may take such steps as installing fencing to protect existing colonies of plants, re-aligning the project to avoid sensitive areas, continuation of current grazing practices or establishment of new management provisions to ensure containment of nonnative exotic species that threaten *Polygonum hickmanii*, and or restrictions of certain recreation uses to avoid disruption of normal propagation of the species. As determined in our economic analysis, the cost for implementing these modifications for one project may range from \$11,000 to \$55,000. It should be noted that developers likely would already be required to undertake such modifications due to regulations in CEQA. These modifications are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this rule would result in a significant economic effect on a substantial number of small entities and have determined, for the above reasons, that it will not affect a substantial number of small entities. Furthermore, we believe that the potential compliance costs for the number of small entities that may be affected by this rule will not be significant. Therefore, we are certifying that the designation of critical habitat for *Polygonum hickmanii* will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

OMB's Office of Information and Regulatory Affairs has determined that