

entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic effect on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. In the final rule, we anticipate being able to certify that the critical habitat designation for the coastal California gnatcatcher will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

Small entities include small organizations, such as independent nonprofit organizations and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result.

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, the 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 *American Trucking Associations, Inc. v. EPA*).

To determine if a 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 determine if certification is appropriate. In some circumstances, especially with proposed critical habitat designations of very limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also consider 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.

In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement. Designation of critical habitat has the potential to affect activities conducted, funded, or permitted by Federal agencies. In areas where the species is present, Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect the coastal California gnatcatcher. Federal agencies must also consult with us if their activities may affect designated critical habitat. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

As required under section 4(b)(2) of the Act, we are preparing a draft analysis of the potential economic impacts of this proposed critical habitat designation. An early version of our draft analysis provides an estimate of the number of small entities potentially affected by the proposed designation of critical habitat for the coastal California gnatcatcher. The analysis conservatively examines total estimated section 7 costs by including both coextensive costs and those solely attributable to critical habitat designation. According to the draft analysis, section 7 implementation for the coastal California gnatcatcher is likely to affect small businesses in the land development and real estate industry and small governments. Approximately 12 small businesses in the land development and real estate industry are affected annually, which represents less than one percent of the total number of small businesses in the industry for the study area. These small businesses are likely to experience

impacts equivalent to about 4 percent of their per-business annual gross revenue. For the small governments in the study area, less than one agency is likely to be affected annually, which represents about two percent of the total number of small governments in the study area. Affected small governments are likely to experience impacts equivalent to less than one percent of the median revenue of small governments in the study area.

In summary, we have concluded that this proposed rule would not result in a significant economic effect on a substantial number of small entities. Therefore, we are certifying that the proposed designation of critical habitat for the coastal California gnatcatcher will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

This discussion is based upon the information regarding potential economic impact that is available to us at this time. This assessment of economic effect may be modified prior to final rulemaking based upon development and review of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and E.O. 12866.

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

A preliminary version of our draft economic analysis indicates that designation of critical habitat will cause an effect on the economy of approximately \$124 million per year. It does not indicate that this designation will cause: (a) Any increases in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions or (b) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.