

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small 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 RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

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.*)

In today's rule, we are certifying that the designation of critical habitat for the five plant species on the NWHI will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale.

Federal courts and Congress have indicated that an RFA/SBREFA analysis is appropriately limited to impacts to entities directly regulated by the requirements of the regulation (Service 2002). As such, entities not directly regulated by the critical habitat designation are not considered in this section of the analysis.

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. 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. The RFA/SBREFA defines "small organization" as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field (5 U.S.C. 601).

For the purposes of the RFA/SBREFA, Federal agencies (*e.g.*, the Service, U.S. Geological Survey, National Park Service, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, and Western Pacific Regional Fisheries Council) are not considered small governments and thus are not small entities. State governments are not considered small governmental entities and thus DLNR is not considered a small entity. The University of Hawaii is a large State university system, so it is also not a small entity. The Bishop Museum, which may sponsor research, is not likely to be considered a small organization because it is the largest museum in the State and thus is dominant in its field.

Thus, none of the entities potentially impacted by the designation of critical habitat are likely to be considered a small entity under the RFA/SBREFA. For these reasons, we are certifying that the designation of critical habitat for *Amaranthus brownii*, *Mariscus pennatifolius*, *Pritchardia remota*, *Schiedea verticillata*, and *Sesbania tomentosa* will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

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

Under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 *et seq.*), this rule is not a major rule. Our assessment of the economic effects of this designation are described in the economic analysis. Based on the effects identified in this analysis, we believe that this rule will not have an effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment,

productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 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. According to OMB, this rule is not a significant regulatory action under Executive Order 12866, and we do not expect it to significantly affect energy production supply and distribution facilities because no energy production, supply, and distribution facilities are included within designated critical habitat. Further, for the reasons described in the economic analysis, we do not believe the designation of critical habitat for the five NWHI plants will affect future energy production. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. All of the land being designated as critical habitat in this rule is owned by the Federal government and is managed as a National Wildlife Refuge by the Service. Small governments will not be affected unless they propose an action affecting the refuge and requiring Federal funds, permits, or other authorizations. Any such activities will require that the Federal agency ensure that the action will not adversely modify or destroy designated critical habitat.

(b) This rule will not produce a Federal mandate on State or local governments or the private sector of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. For the reasons described above, the designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings