

will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government.

This designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this proposed critical habitat designation.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness 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 that 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 the rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this proposed rule will not have a significant effect on a substantial number of small entities.

According to the Small Business Administration, 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.

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)).

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). 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 us under section 7 of the Act on activities that they fund, permit, or implement that may affect *Arabis perstellata*.

If this critical habitat designation is finalized, Federal agencies must also consult with us if their activities may affect designated critical habitat. However, we believe this will result in minimal additional regulatory burden on Federal agencies or their applicants because consultation would already be required because of the presence of the listed species, and 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.

Designation of critical habitat could result in an additional economic burden on small entities because of the requirement to reinitiate consultation for ongoing Federal activities. However, since *Arabis perstellata* was listed in 1995, we have conducted only 33 informal and no formal consultations involving this species. Most of these consultations involved Federal projects or permits to businesses that do not meet the definition of a small entity (*e.g.*, federally sponsored projects). Also, a number of USACE permit actions involved other large public entities (*e.g.*, State-sponsored activities) that do not meet the definition of a small entity. No formal consultations involved a non-Federal entity. However, about five informal consultations were on behalf of a private business. Most of these informal consultations were utility-related (*e.g.*, water lines and sewer lines), some being proposed by small entities. We do not believe that the number of utility-related small entities meets the definition of substantial described above.

All of the proposed critical habitat, with the exception of 11 ha (27 ac) of State-owned land, is under private ownership. Small entity economic activities that may require Federal authorization or permits include utility-related activities such as pipelines and powerlines. However, we are not aware of a significant number of future activities that would require Federal permitting or authorization in these areas. Historically, there have been less than two informal consultations per State per year involving both large and small private entities. There are no Federal lands included in these proposed critical habitat designations. Therefore, we conclude that the proposed rule would not affect a substantial number of small entities.

In summary, we have considered whether this proposed rule would result in a significant economic effect on a substantial number of small entities. We have concluded that it would not affect a substantial number of small entities. There would be no additional section 7 consultations resulting from this rule as all proposed critical habitat is currently occupied by *Arabis perstellata*, so the consultation requirement has already been triggered. These consultations are not likely to affect a substantial number of small entities. This rule would result in project modifications only when proposed Federal activities would destroy or adversely modify critical habitat. While this may occur, it is not expected to occur frequently enough to affect a substantial number of small entities. Therefore, we are certifying that