

permits needed by researchers involved in endangered mussel propagation. These nine consultations resulted in non-jeopardy biological opinions.

We also reviewed approximately 100 informal consultations that have been conducted since these 5 species were listed involving private businesses and industries, counties, cities, towns, or municipalities. At least 15 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, transmission lines, pipelines, mines, and road and utility development authorized by various Federal agencies, or review of National Pollution Discharge Elimination System permit applications to State water quality agencies by developers, municipalities, mines, businesses, and others. 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 100 activities in the Tennessee and Cumberland River Basins, 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 6 years since the five mussels were listed, there have been no formal consultations regarding actions by small entities. This does not meet the definition of "substantial." In addition, we see 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 all 13 of the proposed critical habitat units are currently occupied by one or more listed mussels, 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 number of small entities. Therefore, we are certifying that the proposed designation of critical habitat for these 5 mussels will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required. This determination will be revisited after the close of the comment period and revised, if necessary, in the final rule.

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 review of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and Executive Order 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

#### **Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))**

In the draft economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of \$100 million or more; (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) 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 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. This rule is not a significant regulatory action under Executive Order 12866, and 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.

#### **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.), the Service will use the economic analysis to further evaluate this rule's effect on nonfederal governments.

#### **Takings**

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing to designate approximately 544 rmi in 13 river and stream reaches in Alabama, Mississippi, Tennessee, Kentucky, and Virginia. This preliminary assessment concludes that this proposed rule does not pose significant takings implications. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

#### **Federalism**

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policies, the Service requested information from, and coordinated development of this critical habitat proposal with, appropriate State resource agencies in Mississippi, Alabama, Tennessee, Kentucky, and Virginia. The designation of critical habitat for these five species imposes no additional restrictions to those currently in place, and, therefore, has little additional impact on State and local governments and their activities. The designation may provide some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While this definition and this identification do not alter where and what federally sponsored activities may occur, they may assist these local governments in long-range planning, rather than leaving them to wait for case-by-case section 7 consultations to occur.

#### **Civil Justice Reform**

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system, and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the five mussel species.