

that agencies use the Small Business Administration's definition of "small business" that has been codified at 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. The RFA/SBREFEA defines "small governmental jurisdiction" as the government of a city, county, town, school district, or special district with a population of less than 50,000. By this definition, neither Maui nor Hawaii County is a small governmental jurisdiction because both counties had populations exceeding 50,000 in 2000. Although certain State agencies, such as the DLNR, may be affected by this critical habitat designation, State governments are not considered small governments, for the purposes of the RFA. SBREFEA further defines "small organization" as any not for profit enterprise that is independently owned and operated and is not dominant in its field.

The RFA/SBREFEA 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 an area. In addition, Federal courts and Congress have indicated that an RFA/SBREFEA is properly limited to impacts to entities directly subject to the requirements of the regulation (Service 2002). Therefore, entities not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis.

The primary projects and activities that might be affected by the designation that could affect small entities include ranching operations and conservation projects. Our DEA found that the only small or potentially small entities that could be impacted by the listing of Blackburn's sphinx moth and critical habitat designation were: (1) Ka Ohana O Kahikinui on Maui (participation in residential loan program; conservation activities; development of water collection system); (2) one to two lending institutions on Maui (loans for Department of Hawaiian Home Lands residential development); and (3) one farmer or rancher on Maui, Molokai, or the island of Hawaii (participation in

farm loan programs). The DEA concluded that these entities did not represent a substantial number of small entities in their respective fields or industries. Because estimated section 7 costs associated with possible lessee participation in the Housing and Urban Development loan insurance and guarantee program are no longer expected, the Addendum estimates that the one to two lending institutions on Maui would no longer be impacted by critical habitat designation, and no new small entities were identified as being potentially impacted. Thus, the Addendum concluded that the critical habitat designation would not have a significant economic impact on a substantial number of small entities in Hawaii.

These conclusions are supported by the history of consultations on the Blackburn's sphinx moth. Since the species was listed in February 2000, there have been no formal section 7 consultations and only five informal section 7 consultations concerning the species, specifically on the island of Kahoolawe and entirely involved the Department of the Navy. The Navy is not a small entity.

Even where the requirements of section 7 might apply due to critical habitat, based on our experience with section 7 consultations for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations under section 7—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.

For these reasons, we are certifying that the designation of critical habitat for the Blackburn's sphinx moth 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 detailed assessment of the economic effects of this designation are described in the DEA and final addendum to the economic analysis. Based on the effects identified in these documents, 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 final addendum 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. Although this rule is a significant regulatory action under Executive Order 12866, it is not expected 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 Blackburn's sphinx moth on the islands of Hawaii, Kahoolawe, Maui, and Molokai 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) For reasons described in the economic analysis, 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 "significantly regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no direct obligations on State or local governments.

(b) This rule will not "significantly or uniquely" affect small governments so a Small Government Agency Plan is not required. Small governments will not be affected unless they propose an action 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.

#### *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 designating critical habitat for Blackburn's sphinx moth on