

not be considered "significant" under Executive Order 12866, there will be some economic impact within Wyoming and Colorado. Additionally, the Addendum to the Economic Analysis recognizes the benefits associated with conservation of an endangered species. The Addendum to the Economic Analysis provides information on benefits associated with habitat protection for the Preble's (e.g., recreation, benefits to other species, ecosystem services, and value of open space). These benefits are described in detail in the Addendum to the Economic Analysis.

In accordance with Executive Order 12866, this document is a significant rule since the Office of Management and Budget (OMB) determined that this rule may raise novel legal or policy issues and it was reviewed by OMB. We prepared a Draft Economic Analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Endangered Species Act to determine the economic consequences of designating the specific areas as critical habitat. The Draft Economic Analysis was made available for public comment, and we considered those comments during the preparation of this rule. The draft analysis indicates that this rule will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. Under the Act, critical habitat may not be destroyed or adversely modified by a Federal agency action; the Act does not impose any restrictions related to critical habitat on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Because of the potential for impacts on other Federal agencies' activities, we reviewed this action for any inconsistencies with other Federal agencies' actions. We believe that this rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients, except those involving Federal agencies which would be required to ensure that their activities do not destroy or adversely modify designated critical habitat. As discussed above, we do not anticipate that the adverse modification prohibition (from critical habitat designation) will have any significant economic effects such that it will have an annual economic effect of \$100 million or more. OMB has determined that the critical habitat portion of this rule will raise novel legal or policy issues, and this rule was

reviewed by OMB. The final rule follows the requirements for designating critical habitat contained in the Act.

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

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever a Federal 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 effect 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 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. We are certifying that the designation of critical habitat for the Preble's will not have a significant effect 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. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the 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 each industry to determine if certification is appropriate. 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 be conservative, (*i.e.*, more likely to overstate impacts than understate them), the Preble's economic analysis assumes that a unique entity will undertake each of the projected consultations in a given year, and so the number of businesses affected is equal to the total annual number of consultations (both formal and informal).

Small businesses in the construction and related development industry could potentially be affected by section 7 protection for the Preble's if critical habitat designation leads to significant project modifications or delays. Our economic analysis assumes that 173 unique companies will consult with the Service on development projects during the next 10 years, or 17.3 businesses per year. There are approximately 335 small residential and related development companies in Boulder, El Paso, Douglas, and Larimer counties in which critical habitat units are located. Thus, according to our economic analysis, approximately 5 percent of small residential and related development companies may be affected by section 7 implementation in critical habitat annually.

Small businesses in the construction and development industries could potentially bear a per-business cost of \$25,000 to \$2.6 million. The annual sales that a company would require for this per-business cost to constitute a "significant effect" would be less than \$86.7 million. Based on national