

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: Exsec@ios.doi.gov.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is not a significant rule and, therefore, was not reviewed by the Office of Management and Budget (OMB). We will be preparing a draft economic analysis of this proposed action; we will use this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of the *Astragalus magdalenae* var. *peirsonii*. This draft economic analysis will be made available for public review and comment before we finalize this designation. At that time, copies of the analysis will be available for downloading from the Carlsbad Fish and Wildlife Office's Internet website at <http://carlsbad.fws.gov> or by contacting the Carlsbad Fish and Wildlife Office directly (see ADDRESSES section).

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 the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act 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 also amended the Regulatory Flexibility Act

to require a certification statement. Based on the information that is available to us at this time, we are certifying that this proposed designation of critical habitat will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR 121–201 (also found at <http://www.sba.gov/size/>), which the Regulatory Flexibility Act requires all Federal agencies to follow. 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.

The Regulatory Flexibility Act 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 Regulatory Flexibility Act. (*Mid-Tex Electric Co-Op, Inc. v. F.E.R.C.* and *American Trucking Associations, Inc. v. EPA*).

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 affected 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 if they lack a Federal nexus. In areas where the species is present, Federal agencies funding, permitting, or implementing activities are already required to avoid jeopardizing the continued existence of the *Astragalus magdalenae* var. *peirsonii* through consultation with us under section 7 of the Act. If this critical habitat designation is finalized, Federal agencies must also consult with us to ensure that their activities do not destroy or adversely modify designated critical habitat through consultation with us.

Should a federally funded, permitted, or implemented project be proposed that may affect designated critical habitat, we will work with the Federal action agency and any applicant, through section 7 consultation, to identify ways to implement the proposed project while minimizing or avoiding any adverse effect to the species or critical habitat. In our experience, the vast majority of such projects can be successfully implemented with at most minor changes that avoid significant economic impacts to project proponents.

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 in section 7 consultations—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. The kinds of actions that may be included in future reasonable and prudent alternatives include avoidance, conservation set-asides, management of competing non-native species, restoration of degraded habitat, construction of protective fencing, and regular monitoring. These measures are not likely to result in a significant economic impact to project proponents.

In the case of *Astragalus magdalenae* var. *peirsonii*, our review of the consultation history for this plant suggests that the proposed designation of critical habitat is not likely to have a significant impact on any small entities or classes of small entities. The only class of small entities that could be affected by this designation is the off-