

solely to the designation of critical habitat are a result of expected project modifications and a reduction in the net number of new housing associated with real estate development. Several counties have been excluded from this rule because of the high economic impacts found by our economic analysis.

The following counties are excluded from this rule under Section 4(b)(2): Butte, Madera, Merced, Solano, and Sacramento. The exclusion of these counties substantially reduces the economic effect of this rule.

A copy of the final economic analysis and supporting documents are included in our supporting record for this rulemaking and may be obtained by contacting the Sacramento Fish and Wildlife Office (*see ADDRESSES* section). Copies of the final economic analysis also are available on the Internet at <http://pacific.fws.gov/news/>.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and was reviewed by the Office of Management and Budget (OMB). Our detailed assessment of the economic effects of the proposed designation are described in the Final Economic Analysis of Critical Habitat Designation for Vernal Pool Species. This analysis indicates that the total costs that may be attributable to future section 7 consultations resulting from the listing of the 15 vernal pool species and the critical habitat designation could be about \$1.3 billion over the next 20 years, or about \$115 million annually. It is important to note the estimated economic includes impacts to areas ultimately excluded from the final designation and therefore likely over estimates the potential economic impact of the final designation. Several counties have been excluded from this rule because of the high economic impacts found by our economic analysis. The following counties are excluded from this rule under section 4(b)(2): Butte, Madera, Merced, Solano, and Sacramento. The exclusion of these counties substantially reduces the economic effect of this rule.

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 governmental 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.

Based on the information in our economic analysis (DEA and Addendum), we are certifying that the critical habitat designation for the 15 vernal pools species will not have a significant effect on a substantial number of small entities because a substantial number of small entities are not affected by the designation. Several counties have been excluded from this rule because of the high economic impacts found by our economic analysis. The following counties are excluded from this rule under Section 4(b)(2): Butte, Madera, Merced, Solano, and Sacramento. The exclusion of these counties substantially reduces the economic effect of this rule.

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. The RFA/SBREFA requires 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/SBREFA 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. Our analysis showed that only two percent of the small land developers affected by section 7 are expected to experience effects that on average would constitute three percent of its gross annual revenue. The effects

to small businesses associated solely with the designation, which would occur only in the San Francisco Bay Area, would be less given the findings in the analysis that showed these effects constituted about one-half of the estimated coextensive costs. Although certain State agencies may be affected by this critical habitat designation, State governments are not considered small governments, for the purposes of the RFA. SBREFA 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/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 an area. In addition, Federal courts and Congress have indicated that an RFA/SBREFA 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.

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 15 vernal pool species 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. 801 et seq.)

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 economic analysis.

Several counties have been excluded from this rule because of the high economic impacts among small entities estimated from our economic analysis. Based on the economic analysis, the