

and solicited additional information from them regarding biological, cultural, social, or economic data pertinent to the proposed rule, economic analysis, or EIS. We will continue to provide assistance to and cooperate with Indian Pueblos and Tribes that potentially could be affected by this critical habitat designation at their request.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule as the Office of Management and Budget (OMB) determined that this rule may raise novel legal or policy issues, but was not reviewed by OMB due to the court ordered deadline. We prepared an 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 agency 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, but this rule was not reviewed by OMB due to the court ordered deadline. 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 (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 804(2)), 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 an agency certifies that 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. We are certifying that the rule will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale.

The economic analysis determined whether this critical habitat designation potentially affects a "substantial number" of small entities in counties supporting critical habitat areas. It also quantifies the probable number of small businesses that experience a "significant effect." While SBREFA does not explicitly define either "substantial number" or "significant effect," the Small Business Administration (SBA) and other Federal agencies have interpreted these terms to represent an impact on 20 percent or more of the small entities in any industry and an effect equal to 3 percent or more of a business' annual sales.

Based on the past consultation history for the silvery minnow, wastewater discharges from municipal treatment plants are the primary small business activities anticipated to be affected by the designation of critical habitat. To be conservative, (i.e., more likely to overstate impacts than understate them), the economic analysis assumes that a unique company 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).

The first step was to estimate the number of small businesses affected. As shown in Exhibit 1 below, the following calculations yield this estimate:

- Estimate the number of businesses within the study area affected by section 7 implementation annually (assumed to be equal to the number of annual consultations);
- Calculate the percent of businesses in the affected industry that are likely to be small;
- Calculate the number of affected small businesses in the affected industry;
- Calculate the percent of small businesses likely to be affected by critical habitat.

EXHIBIT 1.—ESTIMATED ANNUAL NUMBER OF SMALL BUSINESSES AFFECTED BY CRITICAL HABITAT DESIGNATION: THE "SUBSTANTIAL" TEST

Industry name	Sanitary services ISC 14959
Annual number of affected businesses in industry:	
By formal consultation	0.13
(Equal to number of annual consultations): ²	
By informal consultation	0.75
Total number of all businesses in industry within study area	6
Number of small businesses in industry within study area	6
Percent of businesses that are small (Number of small businesses)/(Total Number of businesses)	100%
Annual number of small businesses affected (Number of affected businesses)*(Percent of small businesses)	0.88
Annual percentage of small businesses affected (Number of small businesses affected)/(Total number of small businesses); >20 percent is substantial	15%

¹ISC = Interstate Stream Commission.