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Critical Habitat Information Report: Appendix D Initial Regulatory Flexibility Act Analysis



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INFORMATION REPORT: APPENDIX D
INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS
MARCH 2022

This Initial Regulatory Flexibility Act analysis (IRFA) considers the extent to which the potential economic impacts associated with the proposed designation of critical habitat for Indo-Pacific coral species listed as threatened under the Endangered Species Act (ESA) could be borne by small entities in the Pacific Islands Region (PIR). The IRFA presented is conducted pursuant to the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. Information for this IRFA was gathered from the U.S. Small Business Administration (SBA) and the Dun and Bradstreet Hoovers Database.

Summary of Findings

Estimated impacts on small entities are summarized in Table 1 and Table 2. As described in Sections 5 and 6 of the economic impact analysis report, the quantified costs associated with critical habitat for the Indo-Pacific corals reflect administrative effort to consider potential for adverse modification as part of future section 7 consultations, as well as potential project modification costs. Primarily, consultations are between NMFS and Federal action agencies to evaluate the potential for projects and activities to result in adverse modification of critical habitat. Therefore, most incremental impacts are borne by NMFS and other Federal agencies and not by private entities or small governmental jurisdictions.

However, some consultations may include third parties that may be small entities. These third parties may bear some portion of the administrative consultation and project modification costs. This analysis finds that consultations on in-water and coastal construction and dredging activities may generate costs borne by small entities. All other activities are either not expected to involve small entities or are associated with no more than one consultation per year spread across the entire critical habitat. Assuming small entities bear all third-party consultation and project modification costs, this analysis estimates maximum combined annual impacts across American Samoa, Guam, and CNMI ranging from \$4,675 to \$872,331. Maximum estimated impacts per entity, expressed as a percentage of revenue, range from 0.2% to 36.9%. The assumptions, methodology, and uncertainties underlying these estimates are discussed below.

As noted above, consultations on in-water and coastal construction and dredging and disposal (as determined by the 4(b)(2) economic impact analysis report, which is Appendix C of the Information Report), all have the potential to involve third parties, such as recipients of Clean Water Act Section 404 permits. These activities were combined into one broad industry category that may experience impacts to small entities: In-Water and Coastal Construction and Dredging¹. Information presented in Section 4.0 of the economic impact analysis report demonstrates the lack of third party involvement in consultations on the effects of federal fishery management, protected area management, shipwreck removal, scientific research and monitoring, and military activities on ESA-listed marine species within the island units considered for proposed coral critical habitat in the five jurisdictions. Unlike consultations on in-water and coastal construction and dredging projects, these consultations are conducted directly between NMFS and the federal action agency with no third party involvement. Each of these five types of consultations is represented in the consultations completed in 2005-2020 that were reviewed for the economic impact analysis, and third parties were not involved in any of them. As a result, no incremental costs are assigned to small entities for these activities.

This IRFA relies on the estimated incremental impacts resulting from the proposed critical habitat designation, as described in Section 6 of the economic impact analysis report. To be consistent with this analysis, the IRFA provides low-end and high-end estimates of the impacts to small entities.

The low-end estimate assumes no incremental project modifications occur because baseline permit conditions/regulations would provide sufficient protection to avoid adverse modification of critical habitat. Impacts to small entities would be due solely to the additional administrative costs of considering the potential for adverse effects to critical habitat during section 7 consultations. In addition, the low-end estimate assumes that trends in the frequency of informal consultations over the next 10 years will resemble those of the past 10 years (Section 6 of the economic impact analysis report).

¹ Does not include beach nourishment/shoreline protection because future economic impacts from coral critical habitat cannot be estimated due to lack of consultation history. However, if beach nourishment/shoreline protection are proposed in the future, they could be affected by coral critical habitat.

The high-end estimate of the impacts to small entities assumes that all future projects related to in-water and coastal construction and dredging will require formal consultations and that there will be incremental project modification costs for all these future projects (Section 6 of the economic impact analysis report). In order to present a conservative estimate of the impacts to small entities (i.e., an estimate more likely to overstate impacts than understate them), this IRFA assumes that all project modification costs are borne by third parties for the high-end estimate.

Table 1 and Table 2 present a summary of the low-end and high-end estimated impacts to small entities, respectively². These impacts are anticipated to be borne by the small entities engaged in in-water and coastal construction and dredging that consult with NMFS regarding the listed Indo-Pacific coral species critical habitat in the next 10 years. Impacts are presented for each of the three U.S. Pacific jurisdictional areas where one or more of the listed coral species occur and where small businesses engaged in the relevant activities have been identified – American Samoa, Guam, and CNMI. According to Section 5.2 of the economic impact analysis report, two or fewer consultations on in-water and coastal construction projects are forecasted to occur in both the NWHI and the PRIA. However, because no businesses are located in either the NWHI or the PRIA, it is not possible to determine what small entities, if any, would be affected (i.e., any such small entities involved in these consultations would be located elsewhere). In any case, given that few consultations are expected occur and that these consultations are likely be informal, the potential costs to small entities associated with in-water and coastal construction projects in the NWHI and the PRIA are anticipated to be negligible.

Due to the uncertainty regarding the number of small entities that may be affected by critical habitat designation, this IRFA estimates impacts to small entities under two different scenarios. Scenario 1 assumes that all small entities bear an equal share of costs, while Scenario 2 assumes that one small entity bears all costs. To assess the relative impact of regulatory costs on business and industry viability, costs per entity were expressed as a percentage of the average annual revenues of a business engaged in in-water and coastal construction or dredging.

² See Table 4 at the end of this IRFA for additional detail regarding the development of low-end and high-end estimated impacts.

Table 1. Summary of Low-End Quantified Impacts to Small Entities by Area

Metric	In-Water and Coastal Construction and Dredging			
	Am Samoa	Guam	CNMI	PIR
Estimated total annualized impacts of critical habitat designation to small entities ^a	\$1,244	\$2,700	\$731	\$4,675
Estimated average annual revenues for small entities ^b	\$1,500,000	\$2,372,967	\$2,466,667	\$2,364,568 ^e
Estimated number of small entities conducting activities in critical habitat areas being considered ^b	1	30	6	37
Scenario 1: Assumes that all small entities bear an equal share of costs				
Estimated number of small entities subject to section 7 consultation per year ^c	1.0	9.6	3.1	13.8
Estimated annual consultations per small entity ^d	3.1	0.3	0.5	0.4 ^e
Estimated impact per small entity per year	\$1,244	\$281	\$235	\$341 ^e
Estimated impact per small entity as a percentage of revenues	0.08%	0.01%	0.01%	0.01% ^e
Scenario 2: Assumes that one small entity bears all costs				
Estimated impact per small entity per year	\$1,244	\$2,700	\$731	\$4,674
Estimated impact per small entity as a percentage of revenues	0.08%	0.11%	0.03%	0.20%
<p>Notes:</p> <p>^a This value is the low-end estimate of annualized total incremental costs expected to be borne by small entities engaged in in-water and coastal construction or dredging (Section 6 of the economic impact analysis report).</p> <p>^b The number of small entities and their average revenues were estimated through queries of the Dun and Bradstreet Hoovers Database. Small entities were identified based on the industry-specific criteria outlined in Table 3.</p> <p>^c The estimated maximum number of small entities subject to consultation annually reflects the total number of consultations projected to occur annually for in-water and coastal construction and dredging activities (Section 5 of the economic impact analysis report). This figure is 1 for American Samoa because the query of the Dun and Bradstreet Hoovers Database revealed only one small business conducting in-water and coastal construction or dredging activities in American Samoa.</p> <p>^d These are annual averages for a 10-year period.</p> <p>^e These values represent weighted averages of estimates across the three jurisdictional areas.</p>				

Table 2. Summary of High-End Quantified Impacts to Small Entities by Area

Metric	In-Water and Coastal Construction and Dredging			
	Am Samoa	Guam	CNMI	PIR
Estimated total annualized impacts of critical habitat designation to small entities ^a	\$254,356	\$469,947	\$148,028	\$872,331
Estimated average annual revenues for small entities ^b	\$1,500,000	\$2,372,967	\$2,466,667	\$2,364,568 ^d
Estimated number of small entities conducting activities in critical habitat areas being considered ^b	1	30	6	37
Scenario 1: Assumes that all small entities bear an equal share of costs				
Estimated number of small entities subject to section 7 consultation per year ^c	1.0	9.6	3.1	13.8
Estimated annual consultations per small entity	3.1	0.3	0.5	0.4 ^d
Estimated impact per small entity per year	\$254,356	\$48,953	\$47,751	\$63,443 ^d
Estimated impact per small entity as a percentage of revenues	17.0%	2.1%	1.9%	2.7% ^d
Scenario 2: Assumes that one small entity bears all costs				
Estimated impact per small entity per year	\$254,356	\$469,947	\$148,028	\$872,331
Estimated impact per small entity as a percentage of revenues	17.0%	19.8%	6.0%	36.9%
<p>Notes: ^a This value is the high-end estimate of annualized total incremental costs expected to be borne by small entities engaged in in-water and coastal construction or dredging (Section 6 of the economic impact analysis report). This IRFA conservatively assumes that all project modification costs are borne by third parties rather than federal agencies.</p> <p>^b The number of small entities and their average revenues were estimated through queries of the Dun and Bradstreet Hoovers Database. Small entities were identified based on the industry-specific criteria outlined in Table 3.</p> <p>^c The estimated maximum number of small entities subject to consultation annually reflects the total number of consultations projected to occur annually for in-water and coastal construction and dredging activities (Section 5 of the economic impact analysis report). This figure is 1 for American Samoa because the query of the Dun and Bradstreet Hoovers Database revealed only one small business conducting in-water and coastal construction or dredging activities in American Samoa.</p> <p>^d These values represent weighted averages of estimates across the three jurisdictional areas.</p>				

The low-end estimate of the total annualized incremental impacts of critical habitat designation to small entities within the in-water and coastal construction and dredging category across the three areas is approximately \$4,700. Under Scenario 1, these costs are distributed evenly among the approximately 14 entities expected to be subject to section 7 consultations each year. As indicated in footnote c in the tables above, the estimated maximum number of small entities subject to consultation annually reflects the total number of consultations projected to occur annually for in-water and coastal construction and dredging activities. Per entity annualized impacts of critical habitat designation across the three areas are estimated to make up only 0.01 percent of the average annual revenues for a business engaged in in-water and coastal construction or dredging. Under Scenario 2, the \$4,700 in annualized impacts would be borne by a single small entity. Even under this conservative assumption, the impact is expected to result in impacts that are just 0.2 percent of average annual revenues. This percentage would be higher for a small entity with annual revenues lower than the average of annual revenues of all potentially impacted small entities, and lower for a small entity with annual revenues higher than the average of annual revenues of all potentially impacted small entities.

The high-end estimate of the annualized impacts to small entities within the in-water and coastal construction and dredging category across the three areas is approximately \$872,000. Under Scenario 1, per entity annualized impacts of critical habitat designation across the three areas are estimated to make up 2.7 percent of annual revenues for each affected small entity. Under Scenario 2, in which the more than \$872,000 in annualized impacts are borne by a single small entity, the impact represents approximately 37 percent of the average annual revenues. As with Scenario 1, this percentage would be higher for a small entity with annual revenues lower than the average of annual revenues of all potentially impacted small entities, and lower for a small entity with annual revenues higher than the average of annual revenues of all potentially impacted small entities.

The high-end estimate is almost certainly an overstatement of the costs borne by small entities, especially under Scenario 2. It is not likely that all projected future actions will require formal consultations, nor is it likely that one small entity would bear all the consultation costs. Moreover, Scenario 2 conservatively assumes that all project modification costs are borne by third parties rather than federal agencies.

Nor does this scenario explicitly consider pass-through costs, i.e. the portion of incremental administrative and project modification costs borne directly by small entities engaged in in-water and coastal construction or dredging activities that are then passed along to the project proponents contracted with the small entities to perform the construction or dredging work. Consequently, it is probable that Scenario 2 of the high-end estimate understates the number of affected small entities and overstates the costs borne by these entities. On the other hand, Scenario 1 of the low-end estimate likely overstates the number of small entities affected and possibly understates the costs borne directly by these entities. In other words, the scenarios in Table 1 and Table 2 present broad ranges of the number of potentially affected entities and associated revenue effects. The actual number of small entities affected and revenue effects are not expected to fall at either extreme end of the continuum.

IRFA Requirements

The RFA, passed in 1980, requires federal agencies to consider the impacts of proposed regulations on small entities. When a final regulation is published for public comment in the Federal Register, it must be accompanied by an IRFA, or certify that the action will not have a significant economic impact on a substantial number of small entities. As described in 5 U.S. Code § 603, each IRFA is required to contain several elements: (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of and an estimate of the number of small entities to which the rule will apply; (4) a description of the projected reporting, record keeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule. Additionally, each IRFA is required to contain “a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.” (5 USC § 603).

Why Action by the Agency Is Being Considered

In 2014, 15 Indo-Pacific coral species were listed as threatened under the ESA (79 FR 53851; September 10, 2014). Section 4(a)(3)(A) of the ESA requires that, to the extent

prudent and determinable, critical habitat be designated concurrently with the listing of a species as endangered or threatened (50 CFR 424.12). Designation of critical habitat in marine waters off the coasts of American Samoa, Guam, CNMI, the NWHI, and the PRIA is being proposed in order to fulfill this legal requirement of the ESA.

Objectives of and Legal Basis for the Proposed Rule

The objective of this rule is to use the best scientific data available to designate critical habitat for the Indo-Pacific coral species listed as threatened under the ESA. The designation is designed to meet the conservation needs of the listed coral species and ultimately aid in species recovery. The ESA defines critical habitat as:

1. The specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection, and;
2. Specific areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (50 CFR 424.02).

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

Definition of a Small Entity

The RFA defines three types of small entities:

1. **Small Business.** Section 601(3) of the RFA defines a small business according to the definition of a small business concern provided in section 3 of the Small Business Act. The Act broadly defines a small business concern as a business which is “independently owned and operated and which is not dominant in its field of operation” (15 U.S.C § 632). The SBA provides industry specific criteria based on either revenues or number of employees that delineate which businesses meet this definition (U.S. Small Business Administration 2019).

2. **Small Organization.** Section 601(4) of the RFA defines a small organization as a non-profit enterprise that is independently owned and operated and not dominant in its field.
3. **Small Governmental Jurisdiction.** Section 601(5) of the RFA defines a small governmental jurisdiction as a government of a county, city, town, township, village, school district, or special district, with a population less than 50,000.

The RFA requires consideration of direct impacts to small entities that may result from a proposed rule. For critical habitat designation, all potential direct impacts are incurred through the section 7 consultation process. Though section 7 of the ESA only applies to activities with a federal nexus, small entities may be directly impacted if they are involved in actions that are funded or permitted through federal agencies.

Indirect impacts of critical habitat are unintended changes in economic behavior that may occur outside of the ESA, through other federal or non-federal actions, and that are caused by the designation of critical habitat. Economic effects expected to occur regardless of critical habitat designation are considered baseline impacts. While it is possible that indirect impacts to small entities may occur as a result of critical habitat designation, these impacts are not quantified in this IRFA.

The courts have held that the RFA/SBREFA requires federal agencies to perform an analysis of impacts to small entities that are directly regulated by the proposed rule. In the case of *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission (FERC)* (773 F.2d 327 (D.C. Cir. 1985)), FERC proposed regulations affecting the manner in which generating utilities incorporated construction work in progress in their rates. The generating utilities that expected to be regulated were large businesses; however, their customers – transmitting utilities such as electric cooperatives – included numerous small entities. In this case, the court agreed that FERC simply authorized large electric generators to pass these costs through to their transmitting and retail utility customers, and FERC could therefore certify that small entities were not directly impacted within the definition of the RFA.

Similarly, *American Trucking Associations, Inc. v. Environmental Protection Agency (EPA)* (175 F.3d 1027 (D.C. Cir. 1999)) addressed a rulemaking in which EPA established a primary national ambient air quality standard for ozone and

particulate matter. The basis of EPA's RFA/SBREFA certification was that this standard did not directly regulate small entities; instead, small entities were indirectly regulated through the implementation of state plans that incorporated the standards. The court found that, while EPA imposed regulation on states, it did not have authority under this rule to impose regulations directly on small entities, and, therefore, small entities were not directly impacted within the definition of the RFA.

In its guidance on how to comply with the RFA, the SBA recognizes that consideration of indirectly affected small entities is not required by the RFA, but encourages agencies to perform an analysis of impacts on small entities even when the impacts of its regulation are indirect: "If an agency can accomplish its statutory mission in a more cost-effective manner, the Office of Advocacy [of the SBA] believes that it is good public policy to do so. The only way an agency can determine this is if it does not certify regulations that it knows will have a significant impact on small entities even if the small entities are regulated by a delegation of authority from the federal agency to some other governing body" (U.S. Small Business Administration 2017).

The regulatory mechanism through which critical habitat protections are enforced is section 7 of the ESA, which directly regulates only those activities carried out, funded, or permitted by a federal agency. By definition, federal agencies are not considered small entities, although the activities they may fund or permit may be proposed or carried out by small entities. Given the SBA guidance described above, this analysis considers the extent to which this designation could potentially affect small entities, regardless of whether these entities would be directly regulated by the NMFS through the critical habitat designation or by a delegation of impact from the directly regulated entity.

Description of Economic Activities for Which Impacts Are Most Likely

This IRFA focuses on identifying small entities that may bear the incremental impacts of this rulemaking. Section 4 of the economic impact analysis report (Appendix C of the Information Report) identifies the following economic activities as potentially requiring modification to avoid destruction or adverse modification of the essential features of the listed Indo-Pacific coral species:

- In-water and Coastal Construction
- Dredging and Disposal
- Water Quality and Discharges
- Fishery Management
- Military Activities
- Shipwreck Removal
- Scientific Research and Monitoring
- Aquaculture
- Protected Area Management
- Beach Nourishment and Shoreline Protection

Though there is significant uncertainty regarding which future section 7 consultations will involve third parties, information presented in Section 4 of the economic impact analysis report provides some indication of the probability of third party involvement for each activity category. This information is summarized in the paragraphs below.

Consultations on water quality management include both project-specific consultations regarding point source water pollution, such as National Pollutant Discharge Elimination System (NPDES) permits issued to third parties, and inter-agency consultations on regional water quality standards. The third parties issued NPDES permits in American Samoa, Guam, and CNMI are either businesses with average annual receipts that exceed the SBA thresholds for determining whether a firm is small or are governments of a territory or commonwealth that have populations greater than 50,000. Consultations on water quality standards take the form of inter-agency consultations that do not involve third parties.

Consultations on aquaculture have the potential to involve third parties, such as recipients of Rivers and Harbors Act of 1899 (RHA) Section 10 permits, Clean Water Act (CWA) Section 404 permits and NPDES permits. While approximately seven

consultations on aquaculture projects are projected to occur from 2022-2031, the potential economic impacts to third parties are considered *de minimis*³ and, therefore, not detailed in this IRFA. Moreover, all eight of the historical aquaculture projects (six in Guam and two in CNMI) that resulted in consultation were sponsored by public entities, none of which qualify as small entities, and NMFS was the federal action agency for the lone formal consultation. In addition, because no section 7 consultations occurred for beach nourishment and shoreline protection projects within the historical time frame selected for the economic impacts analysis (2005-2020), the number of section 7 consultations that may result from such projects over the next ten years was not estimated (Section 5 of the economic impact analysis report).

Consultations on fishery management, protected area management, shipwreck removal, scientific research and monitoring, and military activities typically take the form of inter-agency consultations that do not involve third parties. As a result, no incremental costs are assigned to small entities for these activities.

Consultations on in-water construction and dredging and disposal all have the potential to involve third parties, such as recipients of RHA Section 10 and CWA Section 404 permits. These activities were combined into one broad industry category that may experience impacts to small entities: In-Water and Coastal Construction and Dredging. Table 3 lists potentially affected industries within this category by North American Industry Classification System (NAICS) code and SBA size standard. Given the uncertainty regarding the proportion of consultations on activities in this category that will involve third parties, this IRFA conservatively assumes that all future consultations on these activities will involve third parties.

This IRFA only considers industries that would be directly affected through consultation with NMFS. The two categories of direct incremental impacts of critical habitat designation are:

³ A query of the Dun and Bradstreet Hoovers database identified three small businesses in Guam whose industry codes indicate that they may be involved in aquaculture activities. This analysis estimates high-end impacts of approximately 0.5 percent of average annual revenues for a single small business assumed to bear the full costs of consultation on projected aquaculture projects.

- The additional administrative costs of considering the potential for adverse effects to critical habitat during section 7 consultations; and
- Implementation of any project modifications recommended by NMFS through section 7 consultation to avoid potential destruction or adverse modification of critical habitat.

Ideally, this IRFA would identify the number of small entities that may engage in consultation with NMFS regarding potential effects of projects and activities on coral species critical habitat. However, significant uncertainty exists regarding what future projects may involve which small entities. Absent specific knowledge regarding which small entities may engage in consultation with NMFS over the next 10 years, this analysis relies on industry and location-specific information on small businesses available in American Samoa, Guam, and CNMI, through the Dun and Bradstreet Hoovers Database. Table 3 summarizes the NAICS codes that were identified as relevant to in-water and construction and dredging and disposal.

Table 3. Major Relevant Activities and a Description of the Industry Sectors Engaged in Those Activities

Activity	NAICS Code	Description of Included Industry Sectors	SBA Size Standard (Average Annual Receipts) ^a
In-Water and Coastal Construction and Dredging	237	<p>Heavy and Civil Engineering Construction -- This subsector comprises establishments whose primary activity is the construction of entire engineering projects, and specialty trade contractors, whose primary activity is the production of a specific component for such projects.</p> <p>The heavy and civil engineering construction subsector consists of these industry groups: Water and Sewer Line and Related Structures Construction: NAICS 237110 Highway, Street, and Bridge Construction: NAICS 237310 Other Heavy and Civil Engineering Construction: NAICS 237990 Dredging and Surface Cleanup Activities: NAICS 237990</p>	\$39.5 million ^b
<p>Notes:</p> <p>^a This IRFA used size standards from the SBA Table of Size Standards Effective August 19, 2019.</p> <p>^b The size standard for NAICS 237110, NAICS 237310, and NAICS 237990 (Other Heavy and Civil Engineering Construction) is \$39.5 million. The size standard for NAICS 237990 (Dredging and Surface Cleanup Activities) is \$30.0 million.</p>			

Description of the Projected Reporting, Record Keeping and Other Compliance Requirements of the Rule

Critical habitat would not require “reporting” or “recordkeeping” efforts as defined by the Paperwork Reduction Act. However, designation of critical habitat will require third parties to consult with NMFS and other federal action agencies regarding any potential impacts to critical habitat from projects. This process is likely to involve communication with NMFS and federal action agencies through letters, phone calls, or in-person meetings.

Identification of Relevant Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

The proposed rule will not duplicate or conflict with any other laws or regulations. However, the protection of listed species and habitat under critical habitat may overlap other sections of the ESA. For instance, listing of the threatened Indo-Pacific corals under the ESA already requires federal agencies to consult with NMFS to avoid jeopardy to the species. However, this analysis only examines the incremental impacts to small entities from the proposed critical habitat rule.

Description of the Steps Taken to Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes

The RFA requires consideration of alternative rules that would minimize impacts to small entities. We considered the following alternatives when developing the proposed critical habitat rule.

Alternative 1: No Action Alternative

Under the no action alternative, we would not designate critical habitat for the listed corals. The alternative of not designating critical habitat was considered in this IRFA but rejected because, in this case, it would violate the legal requirements of the ESA. Moreover, we have determined that the physical feature forming the basis for critical habitat designation is essential to the corals’ conservation, and conservation for these species will not succeed without this feature being available. Thus, the lack of protection of the critical habitat feature from adverse modification could result in continued declines in abundance of the listed corals, and loss of associated economic and other values these corals provide to society, such as recreational and commercial fishing and diving services, and shoreline protection services. Small

entities engaged in some coral reef-dependent industries would be adversely affected by the continued declines in the listed corals. Thus, the no action alternative is not necessarily a “no cost” alternative for small entities.

Alternative 2: Preferred Alternative

Under this alternative, the areas designated are waters ranging from 0 to 10 m deep to 0 to 50 m deep in the 15 units located in American Samoa, Guam, CNMI, the NWHI, and the PRIA. As noted in the Critical Habitat Information Report, the following areas are ineligible for proposed critical habitat: parts of Guam, parts of Tinian, all of Farallon de Medinilla, and all of Wake Atoll. An analysis of the costs and benefits of the preferred alternative designation is presented in Appendix C of the Information Report. Relative to the no action alternative, this alternative will likely involve an increase in administrative and project modification costs for those section 7 consultations required to avoid adverse impacts to critical habitat, above and beyond those required due to the corals’ listing alone. We have determined that no categories of activities would require consultation, and no categories of project modifications would be required, in the future solely due to this rule and the need to prevent adverse modification of critical habitat. Similarly, all categories of activities have similar potential to adversely impact corals and critical habitat, and the same project modifications would remedy both sets of adverse effects. However, in some areas of proposed coral critical habitat, there may be locations with no colonies of listed corals, especially after a natural disturbance event (e.g., coral bleaching or crown-of-thorns starfish outbreak). For future federal actions that have small action areas within such locations, costs to small entities could occur, and would represent an incremental impact of this rule. On the other hand, because projects with larger or more diffuse action areas are more likely to impact both the listed corals and their critical habitat, consultation and project modification costs associated with those projects would more likely be coextensive with the coral listings or another regulatory requirement. The preferred alternative was selected because it best implements the critical habitat provisions of the ESA by including the well-defined environmental features essential to the species’ conservation, and due to the important conservation benefits that will result from this alternative relative to the no action alternative.

Alternative 3: Designating a Subset of Areas

A third alternative was considered that would have excluded from designation those areas in which, on economic or national security bases, the benefits of exclusion outweigh the benefits of inclusion. No areas, other than those excluded in the Preferred Alternative on the basis of national security impacts, were identified where it was determined that the benefits of exclusion outweigh the conservation value of designation to the species. In addition, the public did not submit comments on the benefits of exclusion and inclusion in general, nor were comments submitted on those benefits as they relate to specific areas. Thus, we rejected this alternative because it would lessen the conservation value to the species.

Section 603(b)(5) requires an IRFA to include information about all Federal rules which may duplicate, overlap, or conflict with the proposed rule. Please include that information in the IRFA.

REFERENCES

- U.S. Small Business Administration. 2019. Table of Small Business Size Standards Matched to North American Classification System Codes. Washington, D.C.
- U.S. Small Business Administration, Office of Advocacy. 2017. A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act. Washington, D.C.

SUPPLEMENTARY DATA

Table 4. Development of Low-End and High-End Estimated Impacts

Metric		Am Samoa	Guam	CNMI	PIR
Low-end Impacts: Administrative Costs, No Project Modifications					
Estimated Number of Annual Consultations on In-Water & Coastal Construction	Formal	0.2	0.3	0.0	0.5
	Informal	1.6	3.0	1.0	5.6
	Tech. Asst.	0.5	2.4	0.4	3.4
Estimated Number of Annual Consultations on Dredging	Formal	0.1	0.0	0.0	0.1
	Informal	>0.1	0.3	0.1	0.5
	Tech. Asst.	0.0	0.4	0.1	0.5
Estimated Total Number of Annual Consultations ^a	Formal	0.3	0.3	0.0	0.6
	Informal	1.6	3.3	1.1	6.1
	Tech. Asst.	0.5	2.8	0.6	3.9
Estimated Administrative Cost per Consultation to Third Parties ^a	Formal	\$875			
	Informal	\$513			
	Tech. Asst.	\$263			
Estimated Total Low-end Administrative Costs of Consultation	Formal	\$273	\$273	\$0	\$547
	Informal	\$839	\$1,688	\$583	\$3,110
	Tech. Asst.	\$131	\$738	\$148	\$1,017
Estimated Total Low-end Impacts		\$1,244	\$2,700	\$731	\$4,674
High-end Impacts: Administrative and Project Modification Costs					
Estimated Number of Annual Consultations on In-Water & Coastal Construction	Formal	1.9	3.3	1.0	6.1
	Tech. Asst.	0.5	2.4	0.4	3.4
Estimated Number of Annual Consultations on Dredging	Formal	0.1	0.4	0.1	0.6
	Tech. Asst.	0.0	0.4	0.1	0.5
	Formal	2.0	3.6	1.1	6.7

Metric		Am Samoa	Guam	CNMI	PIR
Estimated Total Annual Consultations	Tech. Asst.	0.5	2.8	0.6	3.9
Estimated Total High-end Administrative Costs of Consultation	Formal	\$1,706	\$3,155	\$995	\$5,857
	Tech. Asst.	\$131	\$738	\$148	\$1,017
Estimated Total High-end Administrative Costs of Consultation		\$1,838	\$3,894	\$1,143	\$6,874
Estimated Cost per Project Modification: In-Water & Coastal Construction Projects ^b	Conditions monitoring ^c	\$120,000			
	Anchoring/mooring installation ^d	\$4,290			
	Submarine cable anchoring ^e	\$5,500			
Estimated Cost per Project Modification: Dredging Projects ^b	Conditions monitoring ^c	\$120,000			
	Anchoring/mooring installation ^d	\$4,070			
	Submarine cable anchoring ^e	\$0			
Estimated Annual Project Modification Costs	Conditions monitoring ^c	\$234,000	\$432,750	\$136,500	\$803,250
	Anchoring/mooring installation ^d	\$8,344	\$15,394	\$4,851	\$28,588
	Submarine cable anchoring ^e	\$10,175	\$17,909	\$5,534	\$33,619
Estimated Total Project Modification Costs		\$252,519	\$466,053	\$146,885	\$865,457
Estimated Total High-End Impacts		\$254,356	\$48,953	\$47,751	\$63,443
<p>Notes: Columns and rows may not sum to totals due to rounding.</p> <p>^a Section 6.1 of the economic impact analysis report discusses the development of estimates of the incremental administrative costs of section 7 consultations to federal agencies and third parties.</p> <p>^b Section 6.2 of the economic impact analysis report discusses the development of estimates of incremental project modification costs.</p> <p>^c Biological and physico-chemical conditions monitoring.</p> <p>^d Restricted or assisted anchoring/mooring installation.</p> <p>^e Submarine cable anchoring.</p>					