



January 24, 2022

VIA ELECTRONIC SUBMISSION

The Honorable Tom Vilsack  
Secretary  
U.S. Department of Agriculture  
Forest Service  
1400 Independence Ave SW  
Washington, D.C. 20250

**Re: Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska (86 Fed. Reg. 66498; November 23, 2021).**

Dear Secretary Vilsack:

On November 23, 2021, the U.S. Department of Agriculture published a notice of proposed rulemaking to repeal the 2020 final Alaska Roadless Rule. The 2020 final rule exempted the Tongass National Forest from the requirements of the 2001 Roadless Rule, which prohibited timber harvest and road construction within designated areas within Alaska. The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments on Forest Service's proposal. Forest Service should select a regulatory alternative that balances the competing interests of small businesses and that minimizes the overall burdens to impacted entities.

---

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to

---

<sup>1</sup> 5 U.S.C. § 601 et seq.

<sup>2</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>3</sup> The agency must include a response to Advocacy's comments on the proposed rule in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.<sup>3</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>5</sup>

### **Background**

The Tongass National Forest (subsequently "Tongass") is approximately 16.7 million acres and includes approximately 80 percent of the land area in southeast Alaska.<sup>4</sup> The Multiuse Sustained Yield Act delegates statutory authority to the Secretary of Agriculture to manage forest resources so that they best meet the needs of the American people.<sup>5</sup> The statute does not require the Secretary to designate any specific amount of land to a particular activity. Instead, it specifies that there should be "harmonious and coordinated management of the various resources".<sup>6</sup>

On January 12, 2001, the Forest Service issued a final rule entitled "Roadless Area Conservation Rule" (subsequently "2001 rule").<sup>7</sup> This rule prohibited timber harvest and road construction and reconstruction within the Tongass, except for on a very limited basis and only after obtaining special permits.<sup>8</sup> While the Forest Service considered exempting the Tongass from the rulemaking, ultimately the agency did not finalize the exemption. Advocacy filed comments on the 2001 roadless rule, stating that the Forest Service had improperly certified the rule and failed to consider the direct economic impacts of the rule on small entities.<sup>9</sup>

In 2003, the Forest Service reversed its decision and exempted the Tongass from the rulemaking.<sup>10</sup> Following the rule's enactment several legal challenges ensued ultimately resulting in the 2003 rule being overturned.<sup>11</sup> In 2018, the State of Alaska filed a petition for rulemaking requesting that the Forest Service promulgate a state-specific rule exempting the

---

<sup>3</sup> *Id.*

<sup>4</sup> Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 86 Fed. Reg. 66498 (November 23, 2021).

<sup>5</sup> 16 U.S.C. § 528 et seq.

<sup>6</sup> 16 U.S.C. § 531 (a).

<sup>7</sup> Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3243 (January 12, 2001).

<sup>8</sup> *Id.*

<sup>9</sup> *See attached*, Letter from Office of Advocacy Chief Counsel Gere Glover to U.S. Forest Service Associate Chief, Hilda Diaz-Soltero, (July 17, 2000).

<sup>10</sup> Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75136 (December 30, 2003).

<sup>11</sup> *Organized Village of Kake v. USDA*, 776 F. Supp. 2d 960 (D. Alaska 2011).

Tongass from the roadless rule.<sup>12</sup> The petition was accepted, and the Forest Service finalized a rule to exempt the Tongass from roadless prohibitions in 2020.<sup>13</sup>

On November 23, 2021, the Forest Service published a proposed rule repealing the 2020 final rule and restoring the 2001 Roadless Rule that would not exempt the Tongass from roadless prohibitions. Forest Service stated that the 2020 rule conflicted with protecting the environment.<sup>14</sup>

### **Small Business Outreach**

Advocacy conducted individual outreach and held a small business roundtable on January 18, 2022, to hear directly from small entities impacted by this rulemaking. Among the many industries represented, Advocacy heard from mining and prospecting businesses, fisheries, logging and forestry businesses, and tourism businesses.

Small businesses in the mining and prospecting industries stated that Forest Service should exempt these industries from the roadless rule. They described the grave safety challenges in using helicopters to conduct mining operations and noted that ingress and egress roads are a must for these operations but are not a permanent disruption to the forest. They described how once an area has been fully mined, and the mine is shut down, it is not long before the roads are once again overgrown with native vegetation.

Small fisheries spoke about the need to protect forest resources, because a disruption to estuaries and culverts can affect fish populations that spawn in these areas. One small business representative described how road construction damages culverts and that many were not repaired, causing salmon to be unable to migrate and spawn and ultimately perish.

One small tour operator spoke about the demand for “untouched” natural areas by tourists. She described a network of small businesses that are supported by these visitors, including small lodging facilities, restaurants, grocery stores, and various gear and guide shops.

Small businesses also spoke about issues related to energy and delivering electricity to small remote communities within southeast Alaska. They observed that diesel and gas are simply too costly, and that hydropower is a much cheaper option for these communities. They noted that having some roads within the Tongass ensures that power can be adequately delivered to customers, and that infrastructure can be adequately maintained year-round.

Logging and forestry representatives indicated that removing roadless prohibitions would not automatically open the Tongass to new activities as logging activities are already outlined in the 2016 Forest Plan. Rather, they noted that roadless prohibitions are about access, and adequate infrastructure to transport and deliver their products.

---

<sup>12</sup> Roadless Area Conservation; National Forest System Lands in Alaska, 83 Fed. Reg. 44252 (August 30, 2018).

<sup>13</sup> Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 85 Fed. Reg. 68688 (October 29, 2020).

<sup>14</sup> *Supra* note 7.

### Comments from Advocacy

#### **I. Forest Service should consider the comments of small businesses as they make up the predominate number of firms in the affected Alaskan industries.**

The table below shows the number and percentage of firms with fewer than 500 employees in Alaska in multiple industries that small business stakeholders identified as impacted by the rule. Although economic data are not available to determine the number of small businesses at the state level under the SBA size standard for some industries or the number of small businesses that are located only in the southeastern region of Alaska, the table demonstrates that the industries most likely impacted by the rule are predominantly small across Alaska. This is likely true in much of the Tongass region, where most areas have small populations.

Given that the majority of firms are small, Forest Service should give full consideration to the comments and information provided by small entities and their representatives with respect to the impacts of the rule, and potential alternatives.

Percentage of Firms in Alaska with Fewer than 500 Employees in Various Impacted Industries

NAICS Code	Industry Name	Firms		
		Total	<500 Employees	Pct <500 Employees
1141	Fishing	421	420	99.8%
212	Mining (except Oil and Gas)	56	48	85.7%
211	Oil and Gas Extraction	14	10	71.4%
3117	Seafood Product Preparation and Packaging	65	58	89.2%
42446	Fish and Seafood Merchant Wholesalers	38	38	100.0%
44-45	Retail Trade	1,824	1,712	93.9%
44522	Fish and Seafood Markets	14	14	100.0%
487	Scenic and Sightseeing Transportation	182	180	98.9%
56152	Tour Operators	63	63	100.0%
71219	Nature Parks and Other Similar Institutions	9	8	88.9%
7211	Traveler Accommodation	366	348	95.1%
7212	RV Parks and Recreational Camps	160	159	99.4%
722	Food Services and Drinking Places	1,364	1,344	98.5%

Source: Census Bureau's 2018 Statistics of US Businesses.

#### **II. Forest Service should weigh the impacts of all affected small entities and decide on an approach that minimizes overall small entity impacts while still meeting its stated conservation goals.**

In its proposed rulemaking, Forest Service presents several regulatory alternatives to the 2001 Roadless Rule. These alternatives outline options ranging from a full exemption, to a "roaded

roadless” alternative.<sup>15</sup> Forest Service also describes the relative impacts of each of these alternatives both to the overall protection of the Tongass and the potential impacts by resource area. Despite indications that there are other alternatives that would not only allow for small businesses to better carryout activities within the Tongass, but that also meet the stated conservation objectives, Forest Service chose to retain the 2001 rule.<sup>16</sup>

Forest Service should review the comments from small businesses, and work to balance these competing interests to allow all industries a fair and equal opportunity for success while still meeting the conservation goals of the agency. Forest Service asserts that restoring the 2001 rule will not have adverse impacts on timber and mining industries which is contrary to the comments received on the 2001 rule, and the comments received by Advocacy in conducting its outreach.

The statute states that multiple uses should make, “...the most judicious use of the land for some or all of these resources or related services...”<sup>17</sup> Given that Forest Service has demonstrated that there are other alternatives to the 2001 roadless rule that would allow for the same benefits in protecting natural resources while still exempting certain activities or areas from roadless characteristics, it would be prudent for the agency to consider one of these alternatives instead of simply returning to the 2001 rule without proper justification for doing so.

**III. Forest Service should make the language within the regulatory text consistent with the findings presented in its initial Regulatory Flexibility Act analysis and seek comment on regulatory approaches that will minimize the impact on small businesses while still accomplishing the statutory objective.**

In its proposed regulatory text, Forest Service asserts that the rule “does not directly subject small entities to regulatory requirements,” and thus certifies that the rule will not have a significant economic impact on a substantial number of small entities.<sup>18</sup> However, in its initial regulatory flexibility act analysis (IRFA), Forest Service includes a discussion of potential impacts to small entities including a breakdown of impacts by industry type.<sup>19</sup> These two documents appear to be inconsistent with one another in the information that they are presenting to the public and in the conclusions they draw with respect to the impact of the rule on small entities.

Section 603 of the RFA requires that agencies conduct an initial regulatory flexibility analysis that considers alternative regulatory approaches that would minimize the impact on small entities while still accomplishing the agencies’ statutory objectives. Section 603 does not apply to a proposed regulation if under Section 605 of the RFA the head of an agency certifies that the rule will not have such an impact, and publishes the certification in the Federal Register at the same

---

<sup>15</sup> *Supra* note 7 at 66500.

<sup>16</sup> *Id.* at 66502.

<sup>17</sup> 16 U.S.C. § 1531 (a).

<sup>18</sup> *Id.* at 66504.

<sup>19</sup> See U.S. FOREST SERVICE, *Regulatory Flexibility Analysis Opportunities for Small Entities for Repeal of the 2020 Alaska Roadless Rule* (November 23, 2021), <https://www.regulations.gov/document/FS-2021-0007-0004>.

time as publishing the proposed rule.<sup>20</sup> Certification must include a factual basis.<sup>21</sup> Certifications are subject to judicial review, and courts evaluate them by determining whether the statement of basis and purpose accompanying the rule identifies a “factual basis” to support the certification.<sup>22</sup>

As Advocacy stated in its 2001 comment letter, certification was improper for the 2001 roadless rule<sup>23</sup> and remains improper for this proposed rule. Small businesses that already operate within the Tongass may see new restrictions and prohibitions on their ability to build or maintain roads. Furthermore, early-stage road development projects that relied on the 2020 final rule may now be prohibited by this rulemaking. Finally, restoring the 2001 roadless prohibitions inhibits the ability of small businesses to explore many new business opportunities within the Tongass. Forest Service should remove the certification language from its regulatory text, and instead summarize the contents of its IRFA within the rulemaking itself.

The IRFA includes regulatory alternatives that would minimize the impact of the rule as proposed. Forest Service should ask for comments on these approaches, as well as other approaches raised by small entities in response to the 2001 and 2020 final rules and this proposed rule.

### **Conclusions and Recommendations**

Forest Service should reevaluate regulatory alternatives that better balance the competing interests of all small businesses in both being able to perform certain activities within the Tongass and preserving its “untouched” natural status. Forest Service should also ensure that its regulatory text is consistent with the language and conclusions drawn in its IRFA and present this information in a clear and concise manner to the public.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or [prianka.sharma@sba.gov](mailto:prianka.sharma@sba.gov).

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

---

<sup>20</sup> 5 U.S.C. § 605 (b).

<sup>21</sup> *Id.*

<sup>22</sup> 5 U.S.C. § 611. *See also Id.*

<sup>23</sup> *Supra* note 9.

/s/

Prianka P. Sharma  
Assistant Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: Sharon Block, Acting Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

July 17, 2000

VIA ELECTRONIC &  
REGULAR MAIL

Hilda Diaz-Soltero  
Associate Chief  
United States Department of Agriculture  
Forest Service  
Washington, DC  
Email: roadlessdeis@fs.fed.us

Dear Ms. Diaz-Soltero:

As stated in previous correspondence on this issue, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by §612(a) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) to monitor agency compliance with the RFA. In that Advocacy is an independent office within SBA, the comments provided are solely those of the Office of Advocacy and do not necessarily reflect the views of SBA.

### **A Brief Review of RFA Compliance Requirements**

#### *Initial Regulatory Flexibility Analysis*

The RFA requires agencies to consider the impact that a proposed rulemaking will have on small entities. If the proposal is expected to have a significant impact on a substantial number of small entities, the agency is required to prepare an initial regulatory flexibility analysis (IRFA) describing the reasons the action is being considered; a succinct statement of the objectives of, and legal basis for the proposal; the estimated number and types of small entities to which the proposed rule will apply; the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and the significant alternatives that accomplish the stated objectives of the of the statutes and that minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C § 603. The analysis or a summary of the analysis must be published with the proposal for public comment.

#### *Final Regulatory Flexibility Analysis*

When an agency issues any final rule, it must prepare a final regulatory flexibility analysis (FRFA) when a rule will have a significant economic impact on a substantial



number of small entities. The FRFA must discuss the comments received, the alternatives considered and the rationale for the final rule. Specifically, each FRFA must contain a succinct statement of the need for and objectives of the rule; a summary of the significant issues raised by public comments in response to the IRFA; a summary of the agency's assessment of such issues and a statement of any changes made in the proposed rule as a result of such comments; a description and an estimate of the number of small businesses to which the rule will apply or an explanation of why no such estimate is available; a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record; and a description of the steps the agency has taken to minimize the significant economic impacts on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule, and the reasons for rejecting each of the other significant alternatives. In complying with the provisions of section 603 and 604 of the RFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable. 5 U.S.C. § 607.

#### *Certification in Lieu of a Regulatory Flexibility Analysis*

If the proposed or final rulemaking is not expected to have a significant economic impact on a substantial number of small entities, 5 USC §605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA or FRFA. If the head of the agency makes such a certification, the agency shall publish such a certification in the Federal Register at the time of the publication of the general notice of proposed or final rulemaking for the rule along with a statement providing the factual basis for the certification. See 5 U.S.C. §605(b).

#### **The Proposed Rulemaking**

Because of the nature of this rule, the Office of Advocacy consistently maintained in its pre-proposal comments to the Forest Service (FS) that certification was inappropriate from a public policy standpoint. On May 10, 2000, FS published a proposed rule in the *Federal Register*, Vol. 65, No. 91, p.30276 on *Special Areas; Roadless Area Conservation*. The purpose of the proposal is to protect the environmental resources in national forests by prohibiting road construction and reconstruction in most inventoried roadless areas of the National Forest System and require the evaluation of roadless area characteristics in the context of overall multiple-use objectives during land and resource management plan revisions. The intent of the rulemaking is to provide lasting protection in the context of multiple use management for inventoried roadless areas and other unroaded areas within the National Forest System. Id.

Prior to the proposal, the Office of Advocacy worked with FS in an effort to assist FS with RFA compliance. Throughout the process, FS has maintained that it believed that the proposed rulemaking would not have a significant economic impact on a substantial number of small businesses. FS has also contended that the proposed rule does not

directly regulate small entities and, therefore, an IRFA was not necessary. Nevertheless, FS prepared an Initial Regulatory Flexibility Analysis (IRFA) at Advocacy's request. Because FS did not have sufficient economic information to prepare a complete IRFA, Advocacy advised FS to include a list of questions in the IRFA to solicit from the public information on the economic impacts of the proposal. FS complied with this request also.<sup>1</sup> See, Fed. Reg. at 30285-30286.

### **FS Should Abandon Its Assertion that the Rule Does Have a Direct Impact on Small Entities**

As stated above, FS has consistently asserted that a regulatory flexibility analysis is not required since the proposal does not have a direct impact on small entities. It is Advocacy's understanding that the basis of the assertion is that the proposal establishes procedures, and nothing more, to be followed in local forest planning processes. Local FS offices will maintain the authority to determine the actual forest plan; hence national FS is not directly regulating small entities. Consequently, a regulatory flexibility analysis is not required.

Advocacy acknowledges that there is case law that states that the RFA only requires an agency to perform a regulatory flexibility analysis of small entity impacts when a rule directly regulates them. However, Advocacy asserts that the cases are inapplicable to FS' proposal. If anything, the case law and the facts support a finding that the impact of the proposal is indeed direct, not indirect.

The primary case on the consideration of direct versus indirect impacts for RFA purposes in promulgating regulations is Mid-Tex Electric Co-op Inc. v. F.E.R.C., 249 U.S. App. D.C. 64, 773 F.2d 327 (1985). In Mid-Tex Electric Co-op Inc. v. F.E.R.C., FERC ruled that electric utility companies could include in their rate bases amounts equal to 50% of their investments in construction work in progress (CWIP). In promulgating the rule, FERC certified that the rule would not have a significant economic impact on a substantial number of small entities. The basis of the certification was that virtually all of the utilities did not fall within the meaning of the term small entities as defined by the RFA. Plaintiffs argued that FERC's certification was insufficient because it should have considered the impact on wholesale customers of the utilities as well as the regulated utilities. The court dismissed the plaintiffs' argument and concluded that an agency may certify that no RFA analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are not subject to the requirements of the rule. Id. at 64.

The US Court of Appeals for the District of Columbia applied the holding of the Mid-Tex case in American Trucking Associations, Inc. v. U.S. E.P.A., 175 F.3d 1027, 336 U.S.App.D.C. 16 (D.C.Cir., May 14, 1999) (hereinafter ATA). In the ATA case, EPA

---

<sup>1</sup> Usually, the Office of Advocacy does not publicize its interaction with an agency during the prior to the proposal of a rule. However, since Forest Service has agreed to release communications that it had with the Office of Advocacy to House Committee on Small Business, Subcommittee on Rural Enterprises, Business Opportunities, and Special Programs, the communications are now part of the public record.

established a primary national ambient air quality standards (NAAQS) for ozone and particulate matter. At the time of the rulemaking, EPA certified the rule pursuant to 5 USC § 605(b). The basis of the certification was that EPA had concluded that small entities were not subject to the rule because the NAAQS regulated small entities indirectly through the state implementation plans (SIPs). Id. Although the Court remanded the rule to the agency, the Court found that EPA had complied with the requirements of the RFA. Specifically, the Court found that since the States, not EPA, had the direct authority to impose the burden on small entities, EPA's regulation did not directly impact small entities. The Court also found that since the states would have broad discretion in obtaining compliance with the NAAQS, small entities were only indirectly affected by the standards. Id.

In Mid-Tex, compliance with FERC's regulation by the utilities would have a ripple effect on customers of the small utilities. There were several unknown factors in the decisionmaking process that were beyond FERC's control like whether utility companies had investments, the number of investments, costs of the investments, the decision of what would be recouped, who would the utilities pass the investment costs onto, etc. In this instance, FS is the ultimate decision-maker and its decisions will have a direct effect on known small entities that have profited from multiple use of FS' lands in the past or which planned to profit from the resources in the future.

Likewise, this matter is distinguishable from the ATA case. Unlike the ATA case, where EPA was setting standards for the States to implement under state regulatory authority, FS is developing a framework for the local/regional FS offices to use in adopting multiple use plans for national forests. The fact that it is a local office of FS versus the national office of FS is inconsequential. In either event, FS will implement the rule, not a third party entity. Regardless of where the office is located, FS is making the ultimate decision of whether a road will or will not be constructed. The proposed rule clearly states that roads may not be constructed or reconstructed in the unroaded portions of inventoried areas of the National Forest System unless the road is needed for public safety, for environmental response or restoration, for outstanding rights or interests protected by statute or treaty, or to prevent irreparable resource damage. See, Section 294.12 , Fed. Reg., p. 30288.

#### *Direct Impacts on Small Entities*

Moreover, small entities will be directly affected as a result of FS' decisions. The word "direct" is defined as "to regulate the activities or course of action thereof; stemming immediately from a source, cause, or reason; operating without agency or step..."<sup>2</sup> Small entities that already operate in national forests will have their operations seriously curtailed. (FS recognizes that the majority of these entities are small.) These and others, like the construction companies that build the roads, may have developed their business plans based on expectations of continued access and as a result of previously published FS plans. These impacts need to be evaluated. FS has some data already that would allow it to do so. For example, according to Tables 4 and 6 of the IRFA, the proposal

---

<sup>2</sup> The Merriam Webster Dictionary.

estimates that there will be a 45% reduction in forest harvest in the Manti-Lasal National Forest alone in Utah. Other forests, such as Dixie (Utah) and Shoshone (Wyoming) will experience reductions in harvest that exceed 20%. In Montana, the Helena Forest will experience a reduction in total harvest volume of 12%. In those same areas of the country, FS controls more than 50% of the forested land base.<sup>3</sup> For example, FS controls 52.3% of forested land in Montana; 66.6% of the land in Wyoming; and 68.5% of the forested land in Utah.<sup>4</sup> Considering the vast amount of area owned by the FS, moving to or procuring from another location to harvest or process natural resources may be unrealistic or a short term solution. The end result of this proposal may be the ultimate demise of small businesses and small governmental jurisdictions that rely on the resources.

Advocacy recognizes that there is a substantial public policy interest in maintaining the natural beauty of the national forests and protecting the environmental resources found in the national forests. However, just these few examples indicate that the overall impact of this initiative could be economically devastating to many small businesses. The high percentage of reduction, combined with the fact that FS owns such a high percentage of the land in some areas, indicates that this rule may have a direct economic effect that cannot be recouped at other locations by the small entities that rely on them. Since the FS has some data, and will receive additional data from the comment period, it is not plausible for FS to continue to maintain that the proposal will not have a direct effect on small entities.<sup>5</sup>

---

<sup>3</sup> Testimony of Mr. Frank Glatics, President of Independent Forest Product Association, before The House of Representatives Subcommittee on Rural Enterprises, Business Opportunities, and Special Business Programs, Tuesday, July 11, 2000, pp. 9-10.

<sup>4</sup> *Id.*

<sup>5</sup> Advocacy notes that FS may be arguing that the RFA does not apply because the use of FS property for harvesting natural resources is a future activity that may or may not occur, depending on the decision of the forest planners. While this argument may have some validity, it is not necessarily convincing. Some of the land that is being placed off limits by the initiative was originally targeted for resource harvesting. As a result of this rule, forest planners will not be able to allow the original tentative multiple use plans to be implemented. Small entities may have relied on the original plans in making business decisions. This issue should be addressed.

*Information Provided By the Public Must Be Addressed in the FRFA*

At the time of the proposal, FS asserted that they could not perform a complete IRFA because it lacked sufficient economic information about the economic impacts on the industry. Because its information was insufficient, FS provided a list of questions in an attempt to obtain the necessary information from the public. In reviewing the comments from the public, Advocacy hopes that FS will give full consideration to the information provided by the industry in response to FS' solicitation for additional information and perform an analysis that reflects 1) the impact on small entities that had access to resources that will have limited or no access after the rulemaking; 2) the impact of the regulation on small entities that were relying on future activities that will not occur as a result of the regulation; and 3) the impact of the regulation on activities outside of the FS lands (i.e. small communities).

Since our comments are being submitted prior to the close of the comment period, we cannot comment on the full scope of the information that FS may receive from the public regarding the economic impacts of this rule. However, we have received some information from the industry about potential impacts. The early information received indicates that the impact may in fact be significant. For example, representatives of the timber industry, which FS acknowledges is primarily dominated by small businesses, assert that FS controls 73.3% of the saw timber in Montana; 80.8% of the saw timber in Wyoming; and 85.4% of the timber volume in Utah.<sup>6</sup> In the IRFA, FS asserts that the reduction in harvest as a result of this rule could range from 1 to 8% depending on the location<sup>7</sup>. Fed. Reg. at 30286. Considering the high dependence on FS timber in certain areas, a 1 to 8% reduction could be economically significant. If not, FS needs to provide data showing why it is not economically significant to support its conclusion in the FRFA.

Moreover, the mining industry has indicated that the proposal disallows mining on 43 million acres of federal land. It asserts that more than \$7 trillion dollars of coal and metal resources will be placed off limits by the proposed rule.<sup>8</sup> If this is not correct, then FS must explain why these resources will still be available and the approximate costs of obtaining access to the resources in areas where road construction and reconstruction is prohibited.

Economic effects such as these cannot be ignored. These early numbers indicate that the impact may indeed be significant. FS needs to explain why they are not significant and provide this information to the public. On the other hand, if the analysis indicates that the impact is indeed significant, Advocacy asserts that FS must fully address this in the FRFA and possibly repropose the rule.

---

<sup>6</sup> Id.

<sup>7</sup> On the surface, the percentages in the IRFA summary appear to be inconsistent with the tables found in the IRFA. FS needs to explain the inconsistencies found in the documents.

<sup>8</sup> Testimony of Laura Skauer, Northwest mining Association

## **Alternatives Provided By Public Must be Given Full Consideration**

The RFA requires an agency to consider alternatives to the proposal and provide a statement of the factual, policy and legal reasons for selecting the alternative adopted. 5 USC §605. If a reasonable alternative is provided from a member of the public, the agency must give it its full consideration. In its testimony before the House Subcommittee on Rural Enterprises, Business Opportunities, and Special Small Business Problems, the Northwest Mining Association suggested the alternative of allowing temporary roads, on an as needed basis, with either natural or affirmative reclamation. While Advocacy acknowledges that it is not an expert in forest planning, this seems like an alternative in allows harvesting of natural resources while assuring that the forests are not permanently damaged or irreparably harmed. At least the mitigating impacts of this alternative should be carefully analyzed.

Northwest Mining's suggestion is only one of what may be several strong alternatives offered by the public as a less burdensome solution to the problem. Failure to fully address alternatives that may provide a workable solution to the problem may violate the RFA and raise questions as to whether the agency actions were arbitrary and capricious. If challenged, a court may find that FS' treatment of alternatives was insufficient.

In addition, Advocacy believes that FS should require local FS planners to require local FS planners to perform an RFA analysis in drafting future forest plans that implement this rulemaking to assure that the implementation minimizes the economic impact while achieving the goal of preserving the environment. RFA compliance will provide the public with information necessary to participate fully in the rulemaking process and possibly provide suggestions as to ways that may make implementation less costly.

## **Conclusion**

The Office of Advocacy recognizes the importance of protecting the environment, conserving our national forests, and preserving the natural beauty of the area. However, there is also a significant public interest in allowing access to natural resources in order to preserve our economic base. The potential economic impact of this proposal on small businesses and small communities could be devastating. Prior to implementing such a rule, FS should make every attempt to understand fully the economic impact of its actions and to find less burdensome or mitigating alternatives. In the alternative, it should explain fully why these alternatives will not help FS achieve its environmental objectives. As Advocacy has stated on several occasions, the requirements of the RFA are not intended to prevent an agency from fulfilling its statutory mandate. Rather, it is intended to assure that the economic impacts are fairly weighed and considered in the regulatory decision making process.

The public has an interest in knowing the potential economic impact of a particular proposed regulation. As the court stated when remanding a rule to the agency in Northwest Mining v. Babbitt, "While recognizing the public interest in preserving the environment, the Court also recognizes the public interest in preserving the rights of parties which are

affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress.”*Supra.* at 13. Providing the public with a complete economic analysis that fully discloses the potential impact of the action and considers less burdensome alternatives not only complies with the requirements of the RFA, it also complies with the basic tenets of sound public policy that balance conflicting interests.

Thank you for the opportunity to comment on this proposal. If you have any questions, please feel free to contact us. Please place a copy of these comments in the record.

Sincerely,

Sincerely,

Sincerely,

Jere W. Glover  
Chief Counsel  
Office of Advocacy

Jennifer A. Smith  
Assistant Chief Counsel  
for Economic Regulation &  
International Trade

Brian Headd  
Economist

cc: Charles Rawls