

July 14, 2008

BY ELECTRONIC MAIL

Charles L. Myers
Associate Deputy Chief
National Forest System

Mr. Tony L. Ferguson
Director
Minerals and Geology Management Staff

Forest Service, USDA
36cfr228a@fs.fed.us

**Re: Locatable Minerals Operations; Regulatory Flexibility Act Assessment
(73 Fed. Reg. 34239)**

Dear Chief Myers and Director Ferguson,

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) submits these comments on the U.S. Forest Service (Forest Service) Regulatory Flexibility Act Assessment (RFA Assessment) for its *Locatable Minerals Operations* proposed rule.¹ When the Forest Service first published the proposed rule, the Forest Service certified that the proposed rule would not have a significant economic impact on a substantial number of small entities²; however, the Forest Service did not provide a factual basis for that certification, as required by the Regulatory Flexibility Act (RFA).³ Advocacy commends the Forest Service for seeking to remedy that mistake by publishing this RFA Assessment and providing another opportunity for small business to comment. While appreciative of the Forest Service's efforts to comply with the RFA, Advocacy remains concerned that the Forest Service has not accurately calculated the cost of the proposed rule on small business. These comments provide additional information that should assist the Forest Service in determining whether it can ultimately certify that the proposed rule does not have a significant economic impact on a substantial number of small entities.

The Office of Advocacy

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 SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA

¹ 73 Fed. Reg. 34239 (June 18, 2008).

² 73 Fed. Reg. 15694 (March 25, 2008).

³ The RFA requires that in any notice and comment rulemaking, an agency must publish either an Initial Regulatory Flexibility Analysis (IRFA) or a certification that the proposed rule will not have a significant economic impact on a substantial number of small entities. See, 5 U.S.C § 603(a), 605 (b). If an agency provides a certification in lieu of an IRFA, it must provide a factual basis for that certification. *Id.*

or the Administration. The Regulatory Flexibility Act (RFA)⁴, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA)⁵, 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 assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

On August 13, 2002, President Bush signed Executive Order 13272,⁶ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the Federal Register of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule

Background

On March 25, 2008, the Forest Service published a Notice of Proposed Rulemaking (NPRM) revising its regulations for locatable minerals operations conducted on National Forest System lands.⁷ The proposed revisions would apply to prospecting, exploration, development, mining and processing operations, and reclamation. Pursuant to the RFA, the Forest Service certified that the proposed revisions would not have a significant economic impact on a substantial number of small entities; however, the Forest Service did not include the required statement of the factual basis for its certification.⁸

On June 18, 2008, the Forest Service published a notice in the *Federal Register* seeking comment on a supplemental RFA Assessment which provides a factual basis for its previous RFA certification.⁹ The RFA Assessment concludes that, while the proposed rule will have an impact on a substantial number of small entities, the impact will not be economically significant.¹⁰

Advocacy Recommendations and Comments on the RFA Assessment

I. Advocacy Encourages the Forest Service to Consider Small Business Comments

Following the publication of the proposed rule, Advocacy spoke with representatives of the small mining operations affected by the March 2008 proposed rule. Several of the representatives Advocacy spoke with expressed strong concerns that the Forest Service certification was incorrect and unsupported. Advocacy appreciates the effort the Forest

⁴ 5 U.S.C. § 601 et seq.

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

⁶ *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (Aug. 16, 2002).

⁷ *Supra* note 2.

⁸ Under 5 U.S.C. § 605(b), an agency must provide a factual basis for any certification that a proposed rule will not have a significant economic impact on substantial number of small entities, and that factual basis is subject to judicial review. See *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

⁹ *Supra* note 1.

¹⁰ *Id.* at 34240.

Service has made to ensure that small businesses affected by the proposed rule have an opportunity to provide comments on the Forest Service's assessment of the economic impacts of the rule on small entities. Advocacy encourages the Forest Service to carefully consider the comments submitted regarding its RFA certification and address them if a Final Rule follows from this NPRM.

If, after reviewing the comments received regarding its RFA certification, the Forest Service has reason to believe that it can no longer certify that the proposed rule will not have a significant economic impact on a substantial number of small entities, then the Forest Service should examine feasible alternatives that would lessen the burden on small entities. In that event, the Forest Service should also publish an Initial Regulatory Flexibility Analysis (IRFA) detailing those alternatives and describing the scope and impacts of the proposed rule on small entities, and provide another opportunity for small businesses to comment.

Additionally, Advocacy reminds the Forest Service that the Administrative Procedure Act provides that the public comments an agency receives are part of the administrative record and must therefore be made available to the public for copying and inspection.¹¹ Upon request, the Forest Service provided Advocacy with a document which contained only portions of the hundreds of comments that the Forest Service received on the proposed rule. At this time, Advocacy has not been able to view the public comments on the proposed rule in their entirety. Advocacy has also spoken with members of the small mining communities affected by this rule who have expressed their frustration at their inability to view the public comments and what they view as a lack of transparency the Forest Service has provided with respect to this rulemaking. The Forest Service can easily remedy this problem by making the public comments it receives regarding proposed rules available online at www.regulations.gov. By making public comments easily reviewable, the Forest Service may receive comments that are less duplicative and more focused because individuals writing comments can respond to and build on the comments of others.

II. The Forest Service Should Recalculate the Costs of the Information Collections

The RFA Assessment estimates that the total annual cost of the information collections required under the proposed rule would be \$102.21 per small entity. The \$102.21 figure is the result of totaling the historical annual costs of the past information collections, and adding it to the total projected annual costs for the new information collection, and then allocating it across the 1,260 small mining operations that the Forest Service asserts will be affected by the rule. That calculation does not yield the estimated cost per respondent of completing the information collection, but rather the average cost of compliance across all firms. That average is actually lower than the average historical costs of the information collection.

Advocacy believes the Forest Service can provide calculations that offer more accurate estimates of the potential costs of the information collection per respondent. The RFA Assessment provides estimates of the cost per respondent for each of the four information collections:

¹¹ 5 U.S.C. § 552

Type of Information Collection	Estimated Cost per Respondent
Plan of Operations	\$293.76
Notice of Intent	\$14.55
Cessation of Operations	\$24.33
Bonded Notice	\$146.88
Total	\$479.52

Using this data, the Forest Service should be able to demonstrate two things to form a stronger factual basis for certification. First, the Forest Service should try to calculate the probability that a small operator would face each of the four information collections and then multiply the probability by the per-respondent cost for each of the four. This is the cost a typical small firm would face for each individual information collection (which may be similar to the average cost calculated by the agency in the certification statement, depending upon the probabilities). Second, the Forest Service can calculate the absolute maximum cost that a small firm might face under the information collections of this rule by summing the costs for each of the four information collections.

This second piece of information could be sufficient to demonstrate no significant economic impact if it is a small enough number. For instance, in the unlikely event that a small mining operation would have to complete each of the four information collections in a given year, the maximum cost imposed by the proposed regulations would be \$ 479.52 per small entity. Assuming the accuracy of the underlying data regarding the cost per hour to complete the information collection, this “worst case scenario” figure would not necessarily preclude the Forest Service from certifying under the RFA if it does not represent a significant cost to a substantial number of small entities.

The Forest Service notes that total production from mining operations on Forest Service Lands ranges from zero to a few thousand dollars per year for very small mining operators, to several million dollars per year for larger mining operations.¹² Thus, the \$479.52 figure above could very well represent significant costs to some very small mining operations. Before it can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities, the Forest Service should determine whether or not a substantial number of small mining operations are likely to face such significant costs.

III. The Forest Service Should Establish a Proper Baseline for its Assessment

In its RFA assessment, the Forest Service states that it expects increased operating costs from the proposed rule to be insignificant because small entities are already working under the proposed rule through current policies outlined in the Forest Service manual and handbooks.¹³ Because of this, the Forest Service has concluded that the incremental costs associated with the proposed rule will only be attributable to the new information collections required by the rule. Advocacy is concerned that this part of the analysis may inaccurately describe the baseline costs for small entities that will have to comply with the proposed regulations if they become final.

¹² *Supra* note 1 at 34240.

¹³ *Id.* at 34239.

OMB Circular A-4 directs agencies assessing economic impacts to use current statutory or regulatory requirements as a baseline for calculating incremental costs.¹⁴ Advocacy has been contacted by small business representatives who assert that some of the policies the Forest Service is seeking to codify in this proposed rule are not currently enforceable against mining operators on Forest Service lands. The Forest Service should use current regulatory or statutory requirements as the baseline for its RFA Assessment. If the proposed regulations do impose new legal requirements on small mining operations, the Forest Service will have to determine the costs of complying with those new requirements before it can certify no significant impact.

For example, if the proposed regulations will require small miners to post bond before they can operate within Forest Service lands, and such bonds are not currently required, the Forest Service will have to consider the cost of obtaining those bonds in its economic impact assessment. The Forest Service must then reexamine whether it can still certify that the proposed rule does not create a significant economic impact on a substantial number of small entities by comparing the costs imposed by the new legal requirements to current compliance costs. If the incremental cost of complying with the proposed rule is significant for a substantial number of small operators, the Forest Service must publish an IRFA that examines feasible alternatives to reduce the burden on small entities.

Conclusion

Advocacy thanks the Forest Service for providing small business with an opportunity to comment on its RFA Assessment for the proposed rule. Advocacy recommends that the Forest Service consider these comments and those of small business while considering whether to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

Advocacy is pleased to forward the comments and concerns of small businesses. Please feel free to contact me or Jamie Belcore at (202) 619-0312 (Jamie.Belcore@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//

Thomas M. Sullivan
Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs

¹⁴ OMB Circular A-4 at 15 (September 17, 2003).