

costs range from \$4,900 to \$11,500, all of which are attributable to critical habitat.

(50) *Comment:* Designation will have a huge impact on a new quarry site, the probable source for rock for improvements to the breakwater at Kaumalapau Harbor by the Corps, which will in turn have a material adverse impact on planned development of essential improvements to the harbor. The Service cannot assume that the section 7 costs would be minor because stone could be obtained from another location within the quarry. Private actions in critical habitat within the Conservation District, such as construction of a new quarry in proposed unit F, could require a full EIS at an additional cost.

*Our Response:* Such impacts are not expected since the Service has removed proposed unit F completely from this final rule.

(51) *Comment:* Designation will create uncertainties which will deter investment and potential agricultural and irrigation water resource development.

*Our Response:* As noted above, no agricultural or ranching activities take place within the designated critical habitat. Furthermore, potential agricultural or ranching activities on these agricultural lands in the future are also unlikely due to their remote location (mostly on gulch lands) and rugged terrain. Therefore, such impacts are not expected to occur as a result of the designation.

(52) *Comment:* The DEA must take into account the unique local circumstances of land ownership and limited economic base of Lanai, which are especially susceptible to detrimental impacts of regulations.

*Our Response:* The DEA examined potential impacts on small entities (small businesses, small organizations, and small governmental jurisdictions) under the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996. The DEA concluded that a significant economic impact on a substantial number of small entities would not result from the proposed critical habitat designation. However, the DEA also concluded that small businesses on Lanai that cater to hunters could be indirectly affected by the designation in the unlikely event that DLNR builds enclosure fences around the designated critical habitat. As stated above, this final rule designates fewer areas within State hunting areas than did the proposed rule.

#### *Issue 6: Policy and Regulations*

(53) *Comment:* One commentor stated the proposal fails to properly consider the importance of cooperation and goodwill between the Service and private landowners, and the impact critical habitat designations will have in discouraging voluntary partnerships on private lands.

*Our Response:* The Service recognizes the importance of landowner cooperation for recovery of listed species. This is especially true for the island of Lanai which is under private ownership. We also recognize that critical habitat designations may have a negative impact on voluntary partnerships with private landowners. Conservation of the Lanai plant species requires control of threats from alien species and fire, and translocation of species that have been extirpated from the wild. Castle and Cooke Resorts, LLC, owner of the lands proposed as critical habitat, has cooperated with the Service, the State of Hawaii, and other organizations to implement voluntary conservation activities on their lands that have resulted in tangible conservation benefits to the species. In addition, Castle and Cooke Resorts, LLC has agreed to expand the existing conservation measures to address the threats to all of the species in proposed unit Lanai D. They also indicated that including the area in a critical habitat designation would have a negative impact on their existing and future voluntary conservation efforts on Lanai. After weighing the benefits of including unit Lanai D as critical habitat with the benefits of excluding it, we concluded that the designation of critical habitat would have a net negative conservation effect on the recovery and conservation of the species included in the unit, and thus excluded unit Lanai D from the final designation of critical habitat.

(54) *Comment:* The Service did not adequately address the takings of private property as a result of designating critical habitat for endangered plants on Lanai. If the critical habitat proposal would require reducing water diversions from any stream, the Service should investigate whether that would take anyone's vested water rights. In addition, if the proposed designation of critical habitat precipitates conversion of agricultural lands to conservation land that has no economically beneficial use, then the Federal and State governments will have taken private property.

*Our Response:* We have assessed the takings implications of this rule in accordance with Executive Order 12630 and have concluded that this rule does

not pose significant takings implications. Because no critical habitat unit boundaries are located in existing diversions, no requirements to reduce out-of-stream water use will arise as a result of this rule. Furthermore, none of the plants are stream-dependent for their survival and therefore would not cause a reduction in water diversion. According to the State, land classification would not be changed based on the designation of critical habitat alone, and private lands are rarely changed to conservation. In addition, although the 366 acres within unit Lanai E is zoned for agriculture, the land within this unit is on and/or near mountain flanks lined with gulches, and neither farming nor ranching takes place in the unit.

(55) *Comment:* Prudence cannot be determined without an analysis of the economic impacts of critical habitat. The prudence of critical habitat designation is a final conclusion based on weighing all relevant factors, including economic factors. While the Service promised to complete its economic impact analysis before it promulgates its final determination of critical habitat, it risks putting the decision before the analysis. The prior determination that critical habitat is prudent and is therefore required, is treated as a given, even though it ignored economic factors.

*Our Response:* First, the Service did not make a final conclusion regarding prudence in the proposed rule; in fact, the proposed rule specifically requested public comment on the reasons why habitat is prudent or not prudent. Second, the commenter is conflating the two steps of the process. As defined by regulation, prudence looks at whether critical habitat would harm or benefit the species. See 50 CFR 424.12(a)(1). If critical habitat is prudent, we look at all of the impacts of designating specific areas as critical habitat to see if the benefits of designation outweigh the benefits of excluding an area from critical habitat. Third, this does not mean we ignored the requirement to consider economic and other impacts of critical habitat designation. To the contrary, a draft economic analysis was prepared, comments were solicited, and an addendum was completed. Furthermore, we have excluded a significant portion of the proposed designation based on negative impacts to important private conservation efforts.

(56) *Comment:* While the Service has stated that critical habitat affects only activities that require Federal permits or funding, and does not require landowners to carry out special