

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “\* \* \* the direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” The relationship between a species survival and its recovery has been a source of confusion to some in the past. We believe that a species’ ability to recover depends on its ability to survive into the future when its recovery can be achieved; thus, the concepts of long-term survival and recovery are intricately linked. However, in the March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434) regarding a not prudent finding, the Court found our definition of destruction or adverse modification as currently contained in 50 CFR 402.02 to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

In order to be included in a critical habitat designation, the habitat must first be “essential to the conservation of the species.” Critical habitat designations identify, to the extent known, using the best scientific and commercial data available, habitat areas that provide essential life-cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat for a species, to the extent such habitat is determinable, at the time of listing. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we may not have sufficient information to identify all the areas essential for the conservation of the species or alternatively, we may inadvertently include areas that later will be shown to be nonessential. Nevertheless, we are required to designate those areas we know to be critical habitat, using the best information available to us.

Within the geographic areas occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have some of the features and habitat characteristics that are necessary to sustain the species. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation.

Our regulations state that “The Secretary shall designate critical habitat outside the geographic areas presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species” (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from recovery plans, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials.

It is important to clearly understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the Act’s 7(a)(2) jeopardy standard and section 9

prohibitions, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species.

#### A. Prudency

We originally proposed that designation of critical habitat was prudent for six plants (*Abutilon eremitopetalum*, *Cyanea macrostegia* ssp. *gibsonii*, *Gahnia lanaiensis*, *Portulaca sclerocarpa*, *Tetramolopium remyi*, and *Viola lanaiensis*) from the island of Lanai on December 27, 2000 (65 FR 82086). In that same proposal, we incorporated by reference the proposed prudency analysis for 13 other plants (*Bonamia menziesii*, *Centaurium sebaeoides*, *Clermontia oblongifolia* ssp. *mauiensis*, *Ctenitis squamigera*, *Cyanea grimesiana* ssp. *grimesiana*, *Cyrtandra munroi*, *Hedyotis mannii*, *Hedyotis schlechtendahlana* var. *remyi*, *Hibiscus brackenridgei*, *Labordia tinifolia* var. *lanaiensis*, *Melicope munroi*, *Spermolepis hawaiiensis*, and *Vigna o-wahuensis*) that are reported from Lanai as well as from Kauai, Niihau, Maui, or Kahoolawe (64 FR 48307, 65 FR 66808, 65 FR 79192, and 65 FR 82086). No change was made to the proposed prudency findings for the 19 plants in the revised proposal published on March 4, 2002, and they were incorporated by reference (67 FR 9806). In addition, in the December 27, 2000, proposal, we proposed that designation of critical habitat was not prudent for *Phyllostegia glabra* var. *lanaiensis*, and no change was made to this proposed prudency finding in the March 4, 2002, revised proposal (65 FR 82086 and 67 FR 9806). In the March 4, 2002, revised proposal no change was made to the proposed prudency analysis published in other proposed rules for 16 plants (*Adenophorus periens*, *Bidens micrantha* ssp. *kalealaha*, *Brighamia rockii*, *Cenchrus agrimonioides*, *Cyanea lobata*, *Cyperus trachysanthos*, *Diellia erecta*, *Diplazium molokaiense*,