

species known from Lanai and one or more other Hawaiian islands.

For both the seven endemic and the 21 “multi-island” species, it is the Service’s conclusion that the conservation agreement developed by Castle and Cooke Resorts, LLC, and agreed to by the Service will provide more net conservation benefits than would be provided by designating proposed unit D as critical habitat. This agreement, which is described above, will provide tangible proactive conservation benefits that will reduce the likelihood of extinction for all Lanai’s listed plants and increase their likelihood of recovery. We believe that extinction of any these species as a consequence of this exclusion is unlikely because there are no known threats in proposed unit D due to any current or reasonably anticipated Federal actions that might be regulated under section 7 of the Act. Implementation of the conservation agreement between the landowner and the Service, and the exclusion of proposed unit D, has the highest likelihood of preventing extinction of these species, especially the species endemic to the island of Lanai.

In addition, critical habitat is being designated on another area of Lanai for one species (Unit 1—*Tetramolopium remyi*), and critical habitat has been proposed and is likely to be designated on other islands for the remaining 20 multi-island species consistent with the guidance in recovery plans. These other designations identify conservation areas for the maintenance and expansion of the existing populations.

In sum, the above analysis indicates there is a much greater likelihood of the landowner undertaking conservation actions on Lanai to prevent extinction without the proposed unit Lanai D being designated as critical habitat. Therefore, the exclusion of the proposed unit Lanai D will not cause extinction and should in fact improve the chances of recovery for *Abutilon eremitopetalum*, *Adenophorus periens*, *Bonamia menziesii*, *Brighamia rockii*, *Centaureum sebaeoides*, *Cenchrus agrimonoides*, *Clermontia oblongifolia* ssp. *mauiensis*, *Ctenitis squamigera*, *Cyanea grimesiana* ssp. *grimesiana*, *Cyanea lobata*, *Cyanea macrostegia* ssp. *gibsonii*, *Cyrtandra munroi*, *Diellia erecta*, *Diplazium molokaiensis*, *Gahnna lanaiensis*, *Hedyotis mannii*, *Hedyotis schlechtendahlana* var. *remyi*, *Hesperomannia arborescens*, *Hibiscus brackenridgei*, *Isodendron pyrifolium*, *Labordia tinifolia* var. *lanaiensis*, *Melicope munroi*, *Neraudia sericea*, *Solanum incompletum*, *Spermolepis hawaiiense*, *Tetramolopium remyi*,

*Vigna o-wahuensis*, and *Viola lanaiensis*.

### Taxonomic Changes

At the time we listed *Cyanea grimesiana* ssp. *grimesiana* and *Cyanea lobata*, we followed the taxonomic treatments in Wagner *et al.* (1990), the widely used and accepted *Manual of the Flowering Plants of Hawaii*. Subsequent to the final listing, we became aware of new taxonomic treatments of these species. Also, the soon-to-be-published book *Hawaii’s Ferns and Fern Allies* (Palmer, in press) has changed the family name for *Ctenitis squamigera* from Aspleniaceae to Dryopteridaceae. Due to the court-ordered deadlines, we are required to publish this final rule to designate critical habitat on Lanai before we can prepare and publish a notice of taxonomic changes for these three species. We plan to publish a taxonomic change notice for these three species after we have published the final critical habitat designations on Lanai.

### Required Determinations

#### Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this is a significant regulatory action because it may raise novel legal or policy issues. As required by the executive order, we have provided a copy of the rule, which describes the need, for this action and how designation meets that need and the economic analysis, which assesses the costs and benefits of this critical habitat designation, to OMB for review. OMB did not recommend or make any changes in this regulatory action.

#### Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the RFA to require Federal agencies to provide a certification statement with the factual basis for certifying that the rule will not

have a significant economic effect on a substantial number of small entities.

As discussed in our Draft Economic Analysis, we are certifying that the critical habitat designation for the three Lanai species will not have a significant effect on a substantial number of small entities because the lands designated as critical habitat are owned solely by one landowner, Castle and Cooke Resorts, LLC, which is not a small entity as defined by RFA, as amended by the SBREFA. The following discussion explains our rationale.

The regulatory flexibility analysis determines whether this critical habitat designation potentially affects a “substantial number” of small entities in counties supporting critical habitat areas. It also quantifies the probable number of small businesses likely to experience a “significant effect.” While SBREFA does not explicitly define either “substantial number” or “significant effect,” the Environmental Protection Agency and other Federal agencies have interpreted these terms to represent an impact on 20 percent or more of the small entities in any industry and an effect equal or greater than three percent or more of a business’ annual revenues. In both tests, this analysis conservatively examines the total estimated section 7 costs calculated in the Draft Economic Analysis, including those impacts that may be “attributable co-extensively” with the listing of the species.

The RFA/SBREFA defines “small governmental jurisdiction” as the government of a city, county, town, school district, or special district with a population of less than 50,000. By this definition, Maui County is not a small governmental jurisdiction because its population was 128,100 in 2000. Although certain State agencies, such as DLNR, may be affected by the proposed critical habitat designation, State governments are considered independent sovereigns, not small governments, for the purposes of the RFA.

No primary projects or activities that might be affected by the proposed critical habitat are expected to affect small businesses. Castle and Cooke Resorts, LLC, the sole owner of the lands on which critical habitat is designated, may be adversely affected by a decrease in property values. However, this is a company that received over \$13.5 million in net income in 1999 (Lynch, February 7, 2000). It is therefore not considered to be a small business. Thus, the proposed critical habitat designation is not likely to affect small businesses on Lanai.