

Our Draft Economic Analysis does mention that some small businesses may be adversely affected if, in the unlikely event that the Department of Land and Natural Resources builds fences around the critical habitat, some businesses that cater to the hunting community may be adversely affected. However, courts have indicated that an RFA/SBREFA analysis is properly limited to the impacts on entities directly regulated by the regulation. *American Trucking Ass'n v. U.S. Envtl. Protection Agency*, 178 F.3d 1027, 1045 (D.C. Cir. 1999); *Mid-Tex Elec. Corp. v. Federal Energy Regulatory Comm'n*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). In this instance, that would mean that the RFA/SBREFA analysis should consider impacts on entities subject to section 7 consultation requirements, not entities regulated indirectly because of affiliation or relationship to a directly regulated entity. Thus entities that are not directly regulated by the critical habitat designation, such as businesses that supply hunters on Lanai, are not considered in this analysis.

Since these three plant species were listed (between 1991 and 1994), there have been no formal section 7 consultations and only seven informal section 7 consultations on Lanai, in addition to consultations on Federal grants to State wildlife programs. None of these consultations affected small entities. Two informal consultations were conducted on behalf of a private consulting firm, representing Maui Electric Company, who requested species lists for a proposed generating station at Miki Basin. None of the three species were reported from this area. Two informal consultations were conducted on behalf of the FAA for airport navigational or improvement projects. None of the three species were reported from the project areas. One informal consultation was conducted on behalf of the U.S. Department of the Navy regarding nighttime, low-altitude terrain flights and confined area landings over and on limited areas of northwestern Lanai by the Marine Corps. None of the three species were reported from the project area. One informal consultation was conducted on behalf of the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS) for the construction of a wildlife exclusion fence and removal of nonnative ungulates from the enclosure, control of invasive nonnative plants within the enclosure, and outplanting of native plants in the Lanaihale watershed area. Two species, *Bidens micrantha* ssp. *kalealaha* and *Tetramolopium remyi*,

were reported from the project area. Funding for the project will be provided by NRCS, through their Wildlife Habitat Incentive Program, to Castle and Cooke Resorts, LLC. One informal consultation was conducted on behalf of the Service, for the effects of fencing and replanting of listed and endangered species within Awehi Gulch. None of the three species were reported from the Awehi Gulch project area. In addition, we are in the process of determining a project area in the Lanaihale watershed for fencing and restoration of native vegetation. Funding for the project will be provided by the Service to Castle and Cooke Resorts, LLC, in partnership with the State DLNR. Only one of the three species (*Tetramolopium remyi*) is reported from the project area.

We have determined that Maui Electric Company is not a small entity because it is not an independent non-profit organization, small governmental jurisdiction, or a small business. The FAA, U.S. Department of the Navy, and NRCS are not small entities. The informal consultations on the Lanaihale watershed area project and the Awehi Gulch project indirectly affected or concerned the major landowner on Lanai, Castle and Cooke Resorts, LLC. As stated above, we have determined that Castle and Cooke Resorts, LLC, is not a small entity because it is not a small retail and service business with less than \$5 million in annual sales nor is it a small agricultural business with annual sales less than \$750,000. We concurred with the NRCS's determination that the Lanaihale watershed area project, as proposed, was not likely to adversely affect listed species. At this time, the Lanaihale watershed area projects are ongoing. Therefore, the requirement to reinstate consultation for ongoing projects will not affect a substantial number of small entities on Lanai.

In areas where the species is clearly not present, designation of critical habitat could trigger additional review of Federal activities under section 7, that would otherwise not be required. However, there will be little additional impact on State and local governments and their activities because two of the proposed critical habitat areas are occupied by at least one species. Other than the federally funded habitat restoration projects in the Lanaihale watershed area, we are aware of relatively few activities in the designated critical habitat areas for these three plants that have Federal involvement and thus would require consultation for ongoing projects. As mentioned above, we have conducted only seven informal consultations under

section 7 on Lanai to date, and only one consultation involved any of the three species. As a result, we cannot easily identify future consultations that may be due to the listing of the species or the increment of additional consultations that may be required by this critical habitat designation. Therefore, for the purposes of this review and certification under the Regulatory Flexibility Act, we are assuming that any future consultations in the area proposed as critical habitat will be due to the critical habitat designations.

On Lanai, all of the designations are on private land under one landowner. Nearly all of the land within the critical habitat units is unsuitable for development, land uses, and activities. This is due to the units remote locations, lack of access, and rugged terrain. The majority of this land is within the State Conservation District, where State land-use controls severely limit development and most activities. Approximately 46 percent of this land is within the State Agricultural District, and less than one percent is within the State Rural District. On non-Federal lands, activities that lack Federal involvement would not be affected by the critical habitat designations. However, activities of an economic nature that are likely to occur on non-Federal lands in the area encompassed by these designations consist of improvements in communications and tracking facilities; ranching; road improvements; recreational use, such as hiking, camping, picnicking, game hunting, and fishing; botanical gardens; and crop farming. With the exception of communications and tracking facilities improvements by the FAA or the Federal Communications Commission, these activities are unlikely to have Federal involvement. On lands that are in agricultural production, the types of activities that might trigger a consultation include irrigation ditch system projects that may require section 404 authorizations from the Corps and watershed management and restoration projects sponsored by NRCS. However the NRCS restoration projects typically are voluntary, and the irrigation ditch system projects within lands that are in agricultural production are rare, and would likely affect only the major landowner on the island (who is not a small entity), within these critical habitat designations.

Lands that are within the State Rural District are primarily located within undeveloped coastal areas. The types of activities that might trigger a consultation include shoreline restoration or modification projects that may require section 404 authorizations