

generally advocated on-the-ground management in place of critical habitat designation. Suggested alternatives included voluntary outplanting and propagation, Service support for conservation programs, and incentives for landowners to recover species. The commenters recommended that research be conducted to determine if critical habitat areas can be effectively managed in light of the many threats that face them. They concluded that private landowners may welcome the introduction of listed species on their property if the Service could help support such projects and cooperation and, in doing so, showed trust in landowners.

**Our Response:** While we agree that critical habitat will not take the place of on-the-ground management, critical habitat designation is one of a number of conservation tools established in the Act that can play an important role in the recovery of a species. For a Federal action to adversely modify critical habitat, the action would have to adversely affect the critical habitat's constituent elements or their management in a manner likely to appreciably diminish or preclude the conservation of the species. Designation of critical habitat is a way to guide Federal agencies in evaluating their actions, in consultation with the Service, such that their actions do not preclude conservation of listed species. There also are educational or informational benefits to the designation of critical habitat. Educational benefits include notifying landowners, land managers, and the general public about the importance of protecting the habitat of these species and disseminating information about their essential habitat requirements. On-the-ground management for restoration of these species is addressed in the species' recovery plans. The Service routinely coordinates with and assists private landowners and others interested in conservation through a variety of programs.

### Issue 3: Site-Specific Biological Comments

(11) **Comment:** One peer reviewer stated that critical habitat should be designated for TNCH's Pelekunu Preserve unless assurances exist that: (1) Ungulates will be unequivocally controlled if they reach specified damage thresholds; (2) damage thresholds will be reevaluated if experience shows that current thresholds are inadequate to protect listed species; and (3) control of ungulates to threshold levels will occur even if the Molokai Hunters Working

Group objects to the control. Another commenter pointed out that the fact that TNCH recognized the need to manage these fragile areas for conservation should confirm that the habitat not only "may" but actually *does* "require special management considerations or protection," and thus more than satisfies the definition of critical habitat. According to the commenter, failure to designate TNCH lands as critical habitat would be violating the requirement that the Service designate critical habitat "to the maximum extent prudent and determinable" (16 U.S.C. 1533(a)(3)). The commenter also stated that critical habitat designation will protect TNCH's Moomomi, Pelekunu, and Kamakou Preserves from Federal actions occurring outside the preserves that may modify or destroy essential habitat found within preserve boundaries. Another commenter noted that TNCH's land should be designated because it is among the highest quality native habitat areas on Molokai.

**Our Response:** In the revised proposed determinations of prudence and proposed designations of critical habitat for plant species from the island of Molokai, Hawaii (April 5, 2002; 67 FR 16492), we indicated that we believed that lands managed by TNCH provided adequate special management or protection for 19 of the Molokai plant species. This was based the definition of critical habitat (section 3(5)), which specifies critical habitat as areas within the geographical area occupied by the species on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. In order to give meaning to this last clause, we considered that if an area was already adequately managed then there would be no requirement for special management considerations or protection.

However, in a recent opinion (*Center for Biological Diversity v. Norton*, Civ. No. 01-409 TUC DCB D. Ariz. Jan. 13, 2003), a Federal district court determined that our definition of critical habitat, as it applies to special management, is not correct. The court stated that "whether habitat does or does not require special management by defendant or FWS is not determinative on whether or not the habitat is 'critical' to a threatened or endangered species (pages 13-14 of the court's decision)." We continue to believe that our interpretation was reasonable. However, we nevertheless have not declined to include areas from this final designation because they are adequately managed.

As discussed in detail in the "Analysis of Impacts Under Section 4(b)(2)," we have determined that the benefits of excluding TNCH's Molokai preserves as critical habitat outweigh the benefits of including them as critical habitat for *Bidens wiebkei*, *Canavalia molokaiensis*, *Centaurium sebaeoides*, *Clermontia oblongifolia* ssp. *brevipes*, *Cyanea mannii*, *Cyanea procera*, *Hedyotis mannii*, *Labordia triflora*, *Lysimachia maxima*, *Mariscus fauriei*, *Melicope mucronulata*, *Phyllostegia mannii*, *Phyllostegia mollis*, *Platanthera holochila*, *Schiedea sarmentosa*, *Silene alexandrii*, *Stenogyne bifida*, *Tetramolopium rockii*, and *Vigna owahuense*.

(12) **Comment:** One peer reviewer questioned the designation of critical habitat in the western portion of Kalaupapa Peninsula because it is heavily degraded and does not appear to be good habitat for *Centaurium sebaeoides*, *Sesbania tomentosa*, and *Tetramolopium rockii*.

**Our Response:** We agree and have removed this portion of the Kalaupapa Peninsula from critical habitat.

(13) **Comment:** The Service provides no rationale for the decision to eliminate from critical habitat an area that *Marsilea villosa* currently occupies in Kamakaipo Gulch on the west shore of Molokai.

**Our Response:** In the April 5, 2002, revised proposal, we stated there was critical habitat for *Marsilea villosa* within Molokai unit A1. Upon further inspection, we discovered that certain areas contain the suitable habitat for this species were inadvertently left out of the designation. We are unable at this time to publish another revised proposal to include this suitable habitat for *Marsilea villosa*. We have proposed critical habitat for this species on the island of Molokai. We will publish a separate rule incorporating this suitable habitat for the species after completing the final rules for the other Hawaiian islands.

### Issue 4: Legal Issues

(14) **Comment:** A peer reviewer and other commenters noted that critical habitat should be identified for all areas that may need to be managed for the benefit of the listed species. The Act defines critical habitat (Section 3(5)(A)(I)) as "the specific areas \* \* \*(I) essential to the conservation of the species and (II) which may require special management considerations or protection \* \* \*." It does not use the phrase "which may require additional special management considerations or protection." Therefore, all areas that meet the definition of critical habitat