

publish this final rule to designate critical habitat on Molokai before we can prepare and publish a notice of taxonomic changes for these five species. We plan to publish a notice of taxonomic change for these five species after we have published the final critical habitat designations on Molokai.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this critical habitat designation is not a significant regulatory action. This rule will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government. This designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this final critical habitat designation.

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

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal 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 effect 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 statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Based on the information in our economic analysis (draft economic analysis and addendum), we are certifying that the critical habitat designation for 41 Molokai plant species will not have a significant effect on a substantial number of small entities because a substantial number of small

entities are not affected by the designation. In addition, the economic analysis concludes that the economic impacts from the designation of critical habitat would not be significant, based on the estimated cost of the designation which may result in potential direct economic costs of between \$5,447 and \$27,000 per year over the next 10 years.

Federal courts and Congress have indicated that an RFA/SBREFA analysis may be limited to all impacts to entities directly subject to the requirements of the regulation (Service 2002). As such, entities indirectly impacted by the plant listings and critical habitat and, therefore, not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis.

Small entities include small organizations, such as independent non-profit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. 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, Department of Agriculture (DOA), and Department of Transportation (DOT) may be affected by the critical habitat designation, State governments are considered independent sovereigns, not small governments, for the purposes of the RFA. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types

of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting, etc.). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

The primary projects and activities that might be affected by the designation that could affect small entities include ranching operations and conservation projects. Based on our draft economic analysis and addendum, there were 170 cattle livestock operations in Maui County in 2000. The combined cattle sales of all of these operations in 2000 was about \$3.2 million (Statistics of Hawaii Agriculture, 2000). Since this implies average annual cattle sales per business of \$19,000, it is likely that all or almost all of the Maui County cattle operations, including those on Molokai, meet the definition of a small business (annual sales less than \$750,000). Thus, our draft economic analysis concluded that the proposed critical habitat designation might affect two to three businesses out of 170 (one to two percent) of the small businesses in the cattle industry in Maui County. It also found that one community organization was likely to enter into section 7 consultation for coastal strand restoration due to the receipt of funding from the Service. Because the Service is also the funding entity and will likely provide technical assistance to the organization, the impact on this organization was found to be minimal. In addition, the consultation would have occurred regardless of designation of critical habitat. For these reasons, the draft economic analysis critical habitat designation would not be likely to affect small community organizations.

However, even though the proposed designation would not affect a "substantial" number of small businesses in each industry, an estimate of the impact was provided in the draft economic analysis. The cost of consultations with Pu'u o Hoku Ranch was estimated to be \$15,300 to \$25,800. The cost of the consultations with one to two unknown ranching operations was estimated to be \$9,700 to \$41,200. These costs reflect costs to the Service and NRCS to participate in the consultations; in general, none of the consultation costs are absorbed by the rancher. The estimated cost of consultations with Hui Malama o Mo'omomi was \$5,200 to \$10,400.