

spider, we do not at this time believe the three areas mentioned above adequately provide protection against catastrophic events. Therefore, a designation limited to these three areas would not adequately provide for the conservation of either species.

Issue 2: Legal and Regulatory Issues

(8) *Comment:* The Service has misinterpreted the intent of the Act with exclusion of areas under 3(5)(A)(i) of the Act. If a specific area of cave invertebrate habitat is recognized to be critical to the extent that management is already taking place, the notion that such management renders designation unnecessary does not make sense. In fact, designation of these areas would seem more urgent.

Our Response: While we have not excluded any areas from this rule because they are already sufficiently managed, we still believe this interpretation of the definition is reasonable. Pursuant to the definition of critical habitat in section 3 of the Act, the primary constituent elements as found in any area so designated must also require "special management considerations or protections."

(9) *Comment:* Areas that are merely capable of supporting the species are proposed for designation, as opposed to areas that are essential for the conservation of the species.

Our Response: Based on new information received during the public comment period we have refined the proposed designation. All areas designated as critical habitat are deemed essential to the conservation of the species. Areas designated provide for areas known to be occupied by the animals or provide for protection against catastrophic events by contributing to a wide distribution throughout the Koloa Basin.

(10) *Comment:* The Service failed to consider the cascading impacts resulting from the State-led regulatory activities that must, by law, be implemented as a result of critical habitat designation. These include the broad interpretation of "take" under Hawaii's Endangered Species Act (HRS Ch. 195D); mandatory "downzoning" of private lands under Hawaii's Land Use Law (HRS Ch. 205); unreasonably frequent requirements for full environmental impact statements for minor actions under Hawaii's Environmental Impact Statement Law (HRS Ch. 343); unreasonable permit delays for county-regulated Special Management Area permits under Hawaii's Coastal Zone Management Law (HRS Ch. 205A); uncertainty of interpretation of the reach and extent of State regulatory authority under

Hawaii's State Water Code (HRS Ch. 174C); and implications for water quality standards under Hawaii Administrative Rules Ch. 11-54, Water Quality Standards.

Our Response: Possible costs resulting from interplay of the Federal Endangered Species Act and Hawaii State laws were discussed in sections 3 and 4 of the November 2002 Draft Economic Analysis of Proposed Critical Habitat Designation for the Kauai Cave Wolf Spider and the Kauai Cave Amphipod Island of Kauai, Hawaii (DEA) under direct and indirect costs as modified by the Addendum. They consider the economic impacts of section 7 consultations related to critical habitat even if they are attributable co-extensively to the listing status of the species. In addition, they examine any indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. The addendum to the DEA also fully considered this issue.

(11) *Comment:* The proposal violates the "commerce clause" because the spider and the amphipod are not related to interstate commerce.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect these species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 1185 S. Ct. 2340 (1998). See also *Gibbs v. Babbitt*, No.99-1218 (4th Cir. 2000). The *Home Builders* case involved a challenge to application of ESA prohibitions to protect the listed Delhi Sands flower-loving fly. As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the ESA to this fly was a proper exercise of Commerce Clause power because it prevented loss of biodiversity and destructive interstate competition.

(12) *Comment:* The Service must take into consideration the completed economic analysis prior to designation of critical habitat. Currently, the proposed critical habitat boundaries are proposed prior to the completion of the economic analysis. This runs counter to the requirement for determination of prudence under the ESA.

Our Response: We did not designate critical habitat before conducting an economic analysis. The DEA was published and made available for review on November 15, 2002 (67 FR 69177). The comment period on the proposed rule to designate critical habitat for these two species was

extended until December 16, 2002, to allow interested and affected parties the opportunity to review the DEA in conjunction with the proposed critical habitat rule.

The Service determines whether critical habitat designation is prudent according to regulations found at 50 CFR 424.12(a). In accordance with these regulations, critical habitat designation is not prudent only when one or both of the following two situations exist: (1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or, (2) such designation would not be beneficial to the species. The economic analysis is generally conducted after critical habitat has been proposed in a given area, as set forth in regulations found at 50 CFR 424.19. If we find that economic or other impacts outweigh the benefit of designating critical habitat in a given area, that area will be excluded under section 4(b)(2) of the Act.

(13) *Comment:* Existing protections are adequate to conserve the species. The additional action of designating critical habitat is unnecessary.

Our Response: We are required to designate critical habitat to the maximum extent prudent. Designation is not prudent only when the species is threatened by taking or other human activity and designation would increase that threat or designation would not be beneficial.

(14) *Comment:* Because the DEA indicates that there will be substantial adverse impacts on small landowners, such as KG Kauai Development, LLC, there should be a Regulatory Flexibility Analysis performed on the designation of critical habitat.

Our Response: Small landowners and other entities potentially impacted by the designation of critical habitat for the Kauai cave arthropods were identified and discussed in section 5 of the November 2002 DEA and February 2003 addendum. As summarized in the addendum, there are no small entities, as defined under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act) (RFA/SBREFA) that may be impacted by implementation of the section 7 provisions of the Act for the cave animals. Therefore, we concluded that the designation of critical habitat for the cave species is not likely to significantly impact a substantial number of small entities. The final determination is much smaller than that which was initially proposed, and the addendum discusses impacts to