

landowners but also concludes that no small entities will be impacted.

(15) *Comment:* In the context of Hawaii law, the designation constitutes taking as it results in the loss of value to the property.

*Our Response:* To a property owner, the designation of critical habitat becomes important when viewed in the context of section 7 of the Act, which requires all Federal agencies to ensure, in consultation with the Service, that any action that these agencies authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. If, after consultation, our biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of the critical habitat. If we cannot suggest acceptable reasonable and prudent alternatives, the agency (or the applicant) may apply for an exemption, in accordance with section 7(e) through (p) of the Act.

The mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use of their land (*Agins v. City of Tiburon*, 447 U.S. 255, 260–263 (1980); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 195 (1981); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)). The designation of critical habitat alone does not deny anyone economically viable use of their property. The Act does not automatically restrict all uses of critical habitat; it only imposes restrictions under section 7(a)(2) of the Act on Federal agency actions that may result in destruction or adverse modification of designated critical habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in destruction or modification of critical habitat, we are required to suggest reasonable and prudent alternatives.

(16) *Comment:* Several commenters requested an extension of the public comment period to enable more time for preparing and submitting comments to the Service. This request was made in part to enable the completion of scientific surveys of certain lands within proposed critical habitat and to allow more time to develop voluntary conservation agreements on some of these lands that might obviate the need for critical habitat.

*Our Response:* The Service provided a total of 90 days of public comment following publication of the proposed critical habitat rule and draft economic analysis. The Service was unable to accommodate further requests for an extension of the public comment period due to the court-ordered deadline mandating completion of this final critical habitat rule. However, the Service would be happy to receive and review any new information, and if warranted will consider this information in possible future revisions of this rule (*see* 16 U.S.C. 1533(a)(3)(B)). In addition, interested parties may petition to revise a critical habitat designation based on new information (16 U.S.C. 1533(b)(3)(D)).

(17) *Comment:* The DEA lists economic impacts; however, there is no indication that the Service has identified appropriate critical habitat boundaries or modified the critical habitat boundaries in consideration of these economic impacts.

*Our Response:* We considered the economic impacts that were analyzed and summarized in the DEA and final addendum, and no critical habitat units in the proposed rule were excluded or modified due to economic impacts (*see* section “Analysis of Impacts Under Section 4(b)(2)”). However, several areas were excluded or modified because they lacked primary constituent elements, or were more degraded than other essential habitat areas, and therefore were not considered essential to the conservation of the species (*see* “Summary of Changes from the Proposed Rule” section).

(18) *Comment:* The incremental impact of designating critical habitat, over and above the original listing, is that it creates a presumption that modification of the land will “take” members of the species. The Service is obliged to calculate the impact of deterring landowners’ use of their lands. If any economic use of the land is prevented, the Service is liable to compensate the private landowner for losses.

*Our Response:* Under federal law, while critical habitat may provide information to help a landowner identify where take through habitat modification may occur, the take prohibition applies whether or not critical habitat has actually been designated. The Act defines “take” to include “harm.” 16 U.S.C. 1532 (19). “Harm is defined by regulation to include significant habitat modification or degradation where it actually kills or injures wildlife. 50 CFR 17.3. However, just because an action occurs in critical habitat would not demonstrate a take

violation; the action must actually kill or injure the species. Take of a listed wildlife species may occur inside or outside of critical habitat if it causes death or injury to the species.

(19) *Comment:* A cost benefit and economic analysis pursuant to Executive Order 12866 is required because the DEA indicates that there may be an annual effect on the economy of over \$100 million per year.

*Our Response:* While the DEA estimated potential costs greater than \$100 million, this was based on the proposed critical habitat acreage of approximately 1,697 ha (4,193 ac). The final economic analysis evaluated the revised acreage of 110 ha (272 ac) and concluded that costs did not exceed \$100 million.

(20) *Comment:* Portions of Unit 2 and the eastern portion of Unit 1 are planned but not permitted for major resort development; the southern portion of Unit 1 is planned but not permitted for subdivision into over 50 “upscale” houseslots; a portion of Unit 3 is planned and permitted for a future limestone and basalt quarry; the area surrounding the old Koloa sugar mill will be expanded into an industrial area; several water wells are located in Unit 1 and additional water wells are expected. This development will create residential and employment opportunities for over a thousand island residents. In view of their economic importance, these areas should be excluded from consideration.

*Our Response:* As indicated in the “Summary of Changes from the Proposed Rule” section, large portions of the proposed critical habitat Units 1 and 2 have been excluded in the final designation of critical habitat due to biological, rather than economic, considerations. Unit 3 has been completely removed from critical habitat designation for biological reasons, as well.

(21) *Comment:* The Eric A. Knudsen Trust is seeking to subdivide or otherwise participate in the development of at least 741 lots/resorts units on 202 acres of trust-controlled lands [Tax Map Keys (TMKs): (4) 2–8–015:082; (4) 2–8–013:01; (4) 2–8–014:01, 02, 03, 04, 19, 30 {in part}; (4) 2–8–09:09; (4) 2–8–011:01, 18, 20, 35]. Because critical habitat designation may impact these plans, the trust asks that the lands be excluded from designation. Certain Eric A. Knudsen Trust lands may not be suitable as critical habitat because of prior urban and resort development [TMKs: (4) 2–8–01421, 26], and the trust asks that these lands be excluded from designation.