

designation of critical habitat because the affected areas have been excluded or reduced.

A more detailed discussion of our economic analysis is contained in the addendum. It is available for inspection at the Pacific Islands Fish and Wildlife Office (*see* **ADDRESSES** section).

No critical habitat units in the proposed rule were excluded or modified due to economic impacts because the expected cost of the designation (*i.e.* direct cost) is not significant. The indirect costs are speculative and represent a worst case scenario.

As described above, section 4(b)(2) of the Act also requires us to consider other relevant impacts, in addition to economic impacts, of designating critical habitat. No critical habitat units were excluded or modified due to non-economic impacts.

### 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 an 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 effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government 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.

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

In today's rule, we are certifying that the designation of critical habitat for the Kauai cave amphipod and the Kauai cave wolf spider will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale.

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 with a population of less than 50,000. By this definition, Federal government agencies are not small business under SBA guidelines and State agencies are not considered small governments under RFA. Kauai County is also not a small governmental jurisdiction because it has a population greater than 50,000. 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.

Based on our final economic analysis, the primary projects and activities that could be affected by the critical habitat designation include Service conservation agreements, NRCS conservation programs, FHWA funding road projects, ACOE section 404 permits, Kauai County Department of Public Works (DPW) road project, and two private entities—Grove Farm partial funding of a survey for a conservation project and KG Kauai Development (KGKD)/Kobayashi Group LLC planned golf courses. For the purposes of the RFA/SBREFA, Federal agencies are not considered small governments. Accordingly, the Service, NRCS, FHWA, and ACOE are not considered small entities. As mentioned above, county agencies such as the DPW are not considered small entities. The primary business activity of Grove Farm is real estate asset management. The SBA defines a business in the real estate asset management industry as small if its annual sales are less than \$1.5 million. According to this definition and 2000 sales information, Grove Farm is not a small business. KGKD is affiliated with Kobayashi Group, LLC (Kobayashi). Kobayashi's primary business activity is real estate asset management. The SBA defines a business in the real estate asset-management industry as small if its annual sales are less than \$1.5 million. Kobayashi is a private business, and its annual sales figures are not listed in the Dun & Bradstreet database. However, the Kobayashi Group owns the following properties: two hotels in Waikiki, the Ocean Resort Hotel Waikiki (450 rooms), and the Queen Kapiolani Hotel (314 rooms); three golf courses; developable land in Koloa; and possibly other property. Rough estimates of the revenues generated from these properties suggest that annual revenues for the Kobayashi Group are at least \$24 million [(764 rooms × 70 percent occupancy × \$100 per room × 365 days) + (3 golf courses × 30,000 rounds of golf per year × \$50 per round) = \$24 million per year]. According to the RFA/SBREFA regulations, the SBA counts