

to utilize any methodology they wish in dealing with feral animals, even though such methods may be cruel and environmentally unsound.

Our Response: The designation of critical habitat does not give the Federal government and its partners the authority to utilize any methodology they wish in dealing with feral animals. Any potential animal control program would be subject to all applicable State, Federal, and local laws.

(26) *Comment:* Critical habitat designation, and the underlying decision to list as endangered the species that are the subject of the designation, exceed the constitutional limits of the Service's delegated authority. Congress enacted the ESA as an exercise of its Commerce Clause power and delegated exercise of that Commerce Clause power to the Service to apply the ESA by regulation. The listed species are not interstate. They exist only in Hawaii and do not cross state lines. Nor are they in commerce as the subject of any economic endeavor. They lack any commercial value. Therefore, the Service's regulations listing these species and designating critical habitat for them within Hawaii exceed the Federal power to regulate interstate commerce under the governing precedents interpreting the Commerce Clause.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect species, for the reasons given in Judge Wald's opinion and Judge Henderson's concurring opinion in *National Association of Homebuilders 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 (*Rhaphiomidas terminatus abdominalis*). 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.

(27) *Comment:* Many commenters questioned the utility of critical habitat designation because it will not result in on-the-ground improvement of habitat or endangered species. Most commenters felt that voluntary partnerships to effect actual land management would be more beneficial to the species. Conversely, some commenters pointed out that critical habitat will prevent the Federal

government from carrying out activities that destroy habitat or species in need of recovery and that it will benefit the people of Maui by preserving native forests, thus preventing erosion that pollutes water and smothers reefs.

Our Response: 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 role of that habitat in 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 hamper conservation of listed species. There also are educational or informational benefits to the designation of critical habitat. Education benefits include the notification of land owners, land managers, and the general public of the importance of protecting the habitat of these species and dissemination of information regarding their essential habitat requirements.

(28) *Comment:* One commenter stated that the designation of critical habitat may result in delays and confusion in water use decisions in the State and that permits for non-point source discharges into protected areas may be denied, which would have a devastating effect on agricultural activities.

Our Response: As noted in the October 2002 Draft Economic Analysis (DEA), the likelihood of changes to the existing water diversions based on critical habitat is very low for the following two reasons: (1) None of the plants are stream-dependent for their survival and therefore would not cause a reduction in water diversion, and (2) water infrastructure is considered a manmade feature and therefore would not be included in critical habitat pursuant to the rule, because these features and structures normally do not contain, and are not likely to develop, any primary constituent elements. Thus, unless its operation and maintenance would indirectly affect critical habitat, which is not anticipated, it should not be affected by section 7 of the Act.

The potential impacts on State water uses were analyzed in the October 2002 DEA and December 2002 Addendum to the DEA. As noted in the DEA and Addendum, Maui County and Department of Water Supply (DWS) submitted specific information regarding planned projects in the

proposed critical habitat during the public comment period. Possible and planned projects by the DWS include water source development in Unit B2; construction of a water reservoir adjacent to Unit L; access and intake improvements in Unit L; and repair and maintenance of existing flumes in Unit L. As noted in this final rule, we have removed Unit B2 from the final designation. Most of the identified DWS projects in Unit L involve repair and maintenance of existing manmade features and structures, and as such, would not be subject to section 7 consultation. However, to the extent that the planned improvements go beyond repair and maintenance and would be subject to section 7 consultation caused by Federal funding or permitting, the DEA's estimate of zero to two consultations reasonably reflects the potential number of section 7 consultations over the next 10 years (see Chapter VI, Section 3.k. of the DEA). As a worst case scenario, the DEA estimates that the consultations could cost up to \$68,000 with project modifications that could range up to \$200,000.

The State Department of Health Polluted Runoff Control Program and the State Office of Planning, Coastal Zone Management Program work together to address nonpoint source pollution through outreach and education and programs that utilize incentives. Under the Coastal Zone Act Reauthorization Amendments, Section 6217, the State is required to meet various conditions for approval of the State's Coastal Nonpoint Pollution Control Program by the U.S. Environmental Protection Agency. To meet these conditions, the State Department of Health is developing administrative rules to create Statewide enforceable policies and mechanisms to address nonpoint source pollution. These draft rules are currently the subject of public informational meetings. Public comments and suggestions received during these meetings will be considered before final rules are drafted and proposed to the Governor.

At the present time, there is no permit requirement for nonpoint source pollution. Moreover, the proposed rules regarding nonpoint source pollution make no reference to either water quality standards or to critical habitat. Until the State administrative rules are finalized, the impact caused by the interplay of nonpoint source pollution requirements and the designation of critical habitat is entirely speculative.