

to the costs of each project. Assuming that participation over the past three years is indicative of the average level of participation, over a period of ten years, the value of the conservation projects would exceed \$1.7 million. Thus, a reduction in cooperation in conservation projects by these two landowners could be expected to result in a corresponding environmental loss to society of more than \$1.7 million. In addition, these landowners have indicated that they will not allow outside individuals, agencies or organizations to monitor, investigate, or collect data about native plants on their lands. In qualitative terms, the total loss to society as a result of reduced cooperation in conservation projects could be considered significant.

(43) *Comment:* The DEA fails to consider economic impacts of critical habitat that result through interaction with Hawaii Land Use Law. Critical habitat could result in changes to zoning under State law. There is an overriding directive under State law that endangered plant species are to be protected in the State's planning and zoning process. HRS § 205–2(e) states that Conservation Districts shall include areas necessary for conserving endangered species. HRS 195D–5.1 states that DLNR shall initiate amendments in order to include the habitat of rare species. Even if DLNR does not act, the Land Use Commission may initiate such changes, or they may be forced by citizen lawsuits. Areas for endangered species are placed in the protected subzone with the most severe restrictions. While existing uses can be grandfathered, downzoning will prevent landowners from being able to shift uses in the future, will reduce market value, increase property tax, and make the land unmortgageable. Although the Service acknowledges that there could be substantial indirect costs relating to redistricting of land to the Conservation District, several commentators disagreed with the characterization of these costs as “minor” and with the statement that the probabilities of redistricting is “slight to small.”

Our Response: In our economic analysis we indicated that about 8,770 ha (21,670 ac) of Agricultural lands would be included in the designation, of which 4,443 ha (10,980 ac) is privately owned. However, in this final rule, we have designated critical habitat on only 5,170 ha (12,744 ac) of Agricultural lands on Maui and Kahoolawe; the remaining Agricultural lands were excluded from the final designation pursuant to section 4(b)(2). Of this, approximately 15 percent, or 794 ha (1,960 ac), is owned by private

landowners. The primary activity that takes place on privately-owned agriculturally-zoned land is ranching. The economic analysis found that reduction in land values that would be caused by redistricting privately owned land from Agricultural to Conservation District ranges from \$1,000 to \$10,000 per acre. Since 1,960 acres of Agricultural land are privately owned, if all such lands were redistricted, the total loss would range from \$1,960,000 to \$19,600,000. Even if a landowner has no plans to sell the land, the loss in land value due to redistricting could reduce potential mortgage financing. However, as discussed in the economic analysis, the redistricting of all Agricultural land to Conservation is a worst-case scenario, and one which is not envisioned for several reasons.

HRS section 195D–5.1 states that the Department of Land and Natural Resources (DLNR) “shall initiate amendments to the conservation district boundaries consistent with section 205–4 in order to include high quality native forests and the habitat of rare native species of flora and fauna within the conservation district.” HRS section 205–2(e) specifies that “conservation districts shall include areas necessary for * * * conserving indigenous or endemic plants, fish and wildlife, including those which are threatened or endangered * * *.” Unlike the automatic conferral of State law protection for all federally listed species (see HRS 195D–4(a)), these provisions do not explicitly reference federally designated critical habitat and, to our knowledge, DLNR has not proposed amendments in the past to include all designated critical habitat in the Conservation District. Nevertheless, according to the Land Division of DLNR, DLNR is required by HRS 195D–5.1 to initiate amendments to reclassify critical habitat lands to the Conservation District (Deirdre Mamiya, Administrator, Land Division, in litt. 2002).

State law only permits other State departments or agencies, the county in which the land is situated, and any person with a property interest in the land to petition the State Land Use Commission (LUC) for a change in the boundary of a district. HRS section 205–4. The Hawaii Department of Business, Economic Development & Tourism's (DBEDT) Office of Planning also conducts a periodic review of district boundaries taking into account current land uses, environmental concerns and other factors and may propose changes to the LUC.

The State Land Use Commission determines whether changes proposed

by DLNR, DBEDT, other state agencies, counties or landowners should be enacted. In doing so, State law requires LUC to take into account specific criteria, set forth at HRS 205–17. While the LUC is specifically directed to consider the impact of the proposed reclassification on “the preservation or maintenance of important natural systems or habitats,” it is also specifically directed to consider five other impacts in its decision: (1) “maintenance of valued cultural, historical, or natural resources;” (2) “maintenance of other natural resources relevant to Hawaii's economy, including, but not limited to, agricultural resources;” (3) “commitment of state funds and resources;” (4) “provision for employment opportunities and economic development;” and (5) “provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups.” HRS 205.17. Approval of redistricting requires six affirmative votes from the nine commissioners, with the decision based on a “clear preponderance of the evidence that the proposed boundary is reasonable.” HRS 205–4.

Thus, even if all federally designated critical habitat is petitioned for redistricting, the likelihood of redistricting will vary parcel by parcel. While the LUC may redistrict some parcels, it is unlikely that lands with a high economic value to the community, such as lands with significant State investments, prime agricultural land, land planned for the economic and community development, and land planned for the provision of housing, would be redistricted. By way of illustration, in the last State district boundary review only five privately owned parcels were redistricted to Conservation even though several hundred parcels were proposed for redistricting (Addendum). While concern has been expressed that a third party would challenge a decision by the LUC not to redistrict a critical habitat parcel in State court, State courts have been deferential to the LUC decisions if they are supported by the record, consistent with statutory provisions, and not affected by errors. See, e.g., *Kilauea Neighborhood Ass'n. v. Land Use Comm'n.* 751 P.2d 1031, 1035 (Haw. Ct. App. 1988) (finding that, although LUC's findings were poorly drawn, the record provided sufficient support for the decision); *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 675 P.2d 784, 793 (Haw. Ct. App. 1983) (upholding LUC's decision as consistent