

nondesignation, or if the species is delisted.

Our Response: A listed species is delisted when it is recovered or has become extinct. Recovery is defined as no longer needing the protections provided by the Act, which includes critical habitat. As such, when a species is delisted, its critical habitat would be simultaneously “undesignated.”

Furthermore, a 10-year time horizon is used because many landowners and managers do not have specific plans for projects beyond 10 years. In addition, the forecasts in the analysis of future economic activity are based on current socioeconomic trends and the current level of technology, both of which are likely to change over the long term.

(50) *Comment:* The DEA dismisses concerns about impacts on the use of structures and features already in place in areas to be designated as critical habitat. The draft concedes that the lack of clarity can force landowners to incur costs to investigate the implications of the regulations. The estimate that this will only take 15–40 hours is too low given the size of the designated areas, the vagueness of the regulatory exclusion, and the real costs of obtaining development approvals.

In addition, the DEA’s analysis of potential costs expected to be incurred by private landowners to investigate the implications of critical habitat on their lands is flawed, because the analysis fails to recognize that the cost to investigate the implications of CH are sunk costs associated with the designation process, not additional costs that the final designation would impose.

Our Response: The DEA recognized that some landowners might spend a great deal of time investigating the implications of critical habitat, while others might not spend any time. The costs reported in the DEA reflect a reasonable estimate of total costs for all landowners, based on an estimate of the number of landowners who are likely to investigate the implications of critical habitat. The Addendum revised this number upwards in response to public comment. However, on further reflection, the estimate contained in the DEA better reflects an average estimate for all affected landowners for the following reasons. The estimate takes into account whether their land is in areas that are unsuitable for development due to mountainous terrain and/or being in the Conservation District. The analysis also assumes an average cost per landowner to investigate the implications of critical habitat. Public comment did not offer an alternative estimate of time or costs that would support changing the estimate in

the DEA. Thus the estimates of hours spent and costs incurred remain the same as they appear in the DEA.

(51) *Comment:* One commenter stated the following: The DEA fails to consider the economic impacts of listing and critical habitat that result through interaction with State law, specifically Hawaii’s Endangered Species Act. The commenter suggested that *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service* requires consideration of the impact of listing as well as the impact of designating an area as critical habitat. Instead, the analysis is expressly limited to the impact of Federal agency consultation under the jeopardy standard. Since Federal listing triggers listing under State law, the Service must consider the impact of take prohibitions under State law (and consequently Federal law, which prohibits destruction of plants in knowing violation of State law). Violations of these laws can trigger lawsuits.

Our Response: The DEA and the Addendum consider the economic impacts of section 7 consultations related to critical habitat even if they are attributable co-extensively to the listed status of the species. In addition, the DEA and the Addendum examine any indirect costs of critical habitat designation; however, where it is the listing of a species that prompts action at the State or local level, the impacts are not attributable to critical habitat designation. Take prohibitions under Hawaii law are purely attributable to a listing decision and do not occur because of critical habitat designations. There are not take prohibitions associated with the plants critical habitat.

(52) *Comment:* Multiple commenters opposed the designation of agricultural lands needed to support agriculture and ranching. They stated that critical habitat designation would reduce property values and the ability to develop lands that were previously planned for development. Approximately 77 percent of the proposed designated land is within the State Conservation District, which includes irrigation water essential to agriculture. The rest of the lands proposed for designation are in the State Agricultural District. Designation of agricultural lands could prevent a farmer or rancher from using those lands since the very nature of those uses would in all likelihood entail cutting, uprooting, or injuring plants to a certain extent. The DEA fails to examine the economic impact of a landowner not being able to use his own land for fear of injuring a species he doesn’t even

recognize. No protection is afforded to farmers who unwittingly “harm” the designated critical habitat. A careful cost-benefit analysis should conclude that agricultural lands should be excluded.

Our Response: There are no take provisions associated with critical habitat. The Act requires only that Federal agencies consult with the Service to ensure that activities they fund, authorize, or carry out do not result in destruction or adverse modification of critical habitat. Because consultation under section 7 only applies to activities that have Federal involvement, the designation of critical habitat does not afford any additional protections for listed species with respect to strictly private activities. As such, designation of critical habitat on agricultural lands would not prevent a private farmer or rancher from farming or ranching on their land, unless the activity had Federal involvement, such as through participation in federally sponsored agricultural or ranching programs.

Chapter VI, Section 3.g. of the DEA presents estimates of section 7 costs associated with participation in federally sponsored agricultural or ranching related programs, such as Farm Bill programs administered by NRCS. The DEA bases its estimate of two to eight consultations over the next 10 years on the amount of Agricultural land contained within the proposed designation; number of past projects located within the area proposed for designation; and the possibility that some landowners could decide not to participate in future programs to avoid Federal involvement in their activities.

The Service reduced the amount of Agricultural land designated from 29,175 ac (11,806 ha) to 21,670 ac (8,770 ha), a reduction of 25 percent. The designation contains approximately 10,980 ac (4,443 ha) of Agricultural land owned by those most likely to participate in NRCS programs. However, the majority of this land, approximately 9,028 acres, is owned by two landowners who indicated during public comment that they will not participate in future NRCS programs if their land was designated as critical habitat. Moreover, as noted in the DEA, not all of the Agricultural land designated is in active agricultural use. Finally, competition for NRCS funding is strong. Based upon the final critical habitat designation and the new information, the Addendum adjusts the direct section 7 costs accordingly. The Addendum estimates that the consultation cost can range from \$0 to