

remaining parcel—i.e., TMK (2) 1–8–001:003—is approximately 710 acres (4 ha) in the Agricultural District, and this would remain within the designation. Chapter VI, Section 3.g. of the DEA and Section 4.e. of the Addendum discuss activities on Agricultural land and specifically recognizes that some of the State managed Agricultural land is leased out to private entities as pasturage. However, no direct section 7 costs involving these leases are anticipated because there is no known Federal involvement.

While section 4(b)(1)(A) of the Act stipulates that listing determinations must be made solely on the basis of biological evidence, section 4(b)(2) of the Act, which calls for the establishment of critical habitat for all listed species if it is prudent and determinable, adds that the Secretary should take into consideration the economic impact of the designation and any other relevant impacts before specifying any particular area as critical habitat. Hence, an economic analysis is part of the process of designating critical habitat. Section 4(b)(2) of the Act provides the Secretary with broad discretion to take into consideration the economic impacts of any proposed critical habitat designation and exclude areas where she finds that the benefits of exclusion outweigh the benefits of designation.

The Secretary may exclude any area from critical habitat if she determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned (16 U.S.C. 1533(b)(2)).

Thus, the Secretary is not required to find that the benefits of inclusion outweigh the costs of inclusion before designating an area, nor is the Secretary required to exclude an area from critical habitat if she determines that the benefits of exclusion outweigh the benefits of inclusion. Rather, the Act provides the Secretary with the discretion to take economic consideration into account when designating critical habitat.

As such, the DEA and the Addendum serve to illustrate possible impacts that can result from the designation, whether in form of costs or benefit. They provide information for the Secretary to exercise her discretion, but do not provide definitive conclusions or recommendations as to what areas, if any, should be excluded from the final designation.

(56) *Comment*: While the Service has stated that critical habitat affects only activities that require Federal permits or funding, and does not require landowners to carry out special management or restrict use of their land, they fail to address the breadth of Federal activities that affect private property in Hawaii and the extent to which private landowners are required to obtain Federal approval before they can use their property. These requirements extend to all State agencies using Federal funds in connection with a proposed action and community actions for which Federal approval or review is necessary. For example, if the Federal government approves eligibility for flood insurance, flood plain development programs shall become subject to consultations under the Act. Federal agencies such as the U.S. Department of Agriculture and the Federal Farm Services Agency (FFSA) have numerous programs that provide funds or other assistance to farmers and ranchers in the form of loans, grants, loan deficiency, and subsidy payments for certain commodities, marketing assistance, disaster assistance, and other financial, technical, and educational assistance. Participation in any such programs would be subject to section 7 consultation, thus making Federal assistance unavailable to the types of operations that these programs are designed to assist.

*Our Response*: The analysis in the DEA, as revised by the Addendum, is based on a review of all “reasonably foreseeable” projects, land uses, and activities that may be directly affected by the implementation of section 7 for the plants. “Reasonably foreseeable” projects, land uses, and activities are defined in the DEA as those which are: (1) Currently authorized, permitted, or funded; (2) proposed in plans currently available to the public; or (3) projected or likely to occur within next 10 years based on (a) recent economic or land-use trends, development patterns, evolving technologies, competitive advantages, etc., and (b) limits imposed by land-use controls, access, terrain, infrastructure and other restrictions on development. After determining the “reasonably foreseeable” projects, land uses, and activities that could affect the physical and biological features of the proposed critical habitat units, the next step in the analysis was to determine Federal involvement. Thus, the DEA does not evaluate all potential activities with Federal nexus; instead, the DEA is limited to those activities that were “reasonably foreseeable.” The results of this analysis are presented in Table VI–

3 in the DEA and Table Add-2 in the Addendum.

(57) *Comment*: Two commenters wrote that lands in Urban, Agricultural, and Rural Districts are designated, used, and intended for a wide variety of land use activities. These commenters stated that there is a much greater likelihood, therefore, that critical habitat designation will have an adverse economic impact on these landowners.

*Our Response*: None of the critical habitat units are in the Urban or Rural District. In fact, 86 percent of the critical habitat designation is in Conservation District and 14 percent in Agricultural District. As discussed above, designation of the Agricultural lands may result in direct section 7 costs through 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, the 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.

(58) *Comment*: Several commenters stated that although the Service has expressed that designation of critical habitat does not create a reserve, refuge, or wilderness area; require fencing for any reason; close off areas to hunters, hikers, or other land users; or create a land management plan, many are concerned that critical habitat designation could result in limitations or special management requirements (such as fencing, removal of grazing animals, or control of invasive species) being established on private lands at great expense to the private and public. The Service’s own recovery plans for many of the species in the proposed rule specifically identify cattle grazing as a potential threat to the species or their habitats. Many feel that it is likely that private party litigation will force the implementation of “special management considerations or protection.” An example of this is the worrisome precedent of *Palila v. Hawaii Department of Land and Natural Resources* in which the Sierra Club Legal Defense Fund sued the State of Hawaii under the Endangered Species Act and resulted in a Federal court order specifying that sheep and goats should be permanently removed from critical habitat designated for palila on the Big Island. The argument against this case being relevant for the plants critical habitat is not persuasive when it argues that palila cases are irrelevant to