

negative impacts. Therefore the exclusion of these lands will not cause extinction and should in fact improve the chance of recovery for *Alectryon macrococcus*, *Argyroxiphium sandwicense* ssp. *macrocephalum*, *Asplenium fragile* var. *insulare*, *Bonamia menziesii*, *Cenchrus agrimonoides*, *Clermontia lindseyana*, *Clermontia oblongifolia* ssp. *mauiensis*, *Clermontia samuelii*, *Colubrina oppositifolia*, *Ctenitis squamigera*, *Cyanea glabra*, *Cyanea lobata*, *Cyanea mceldowneyi*, *Cyrtandra munroi*, *Diellia erecta*, *Diplazium molokaiense*, *Flueggea neowawraea*, *Geranium arboreum*, *Geranium multiflorum*, *Hesperomannia arborescens*, *Lipochaeta kamolensis*, *Melicope adscendens*, *Melicope balloui*, *Melicope knudsenii*, *Melicope mucronulata*, *Neraudia sericea*, *Phlegmariurus mannii*, *Phyllostegia mollis*, *Plantago princeps*, *Platanthera holochila*, *Remya mauiensis*, and *Sanicula purpurea*.

Taxonomic Changes

At the time we listed *Clermontia peleana*, *Cyanea grimesiana* ssp. *grimesiana*, *Cyanea lobata*, *Delissea undulata*, *Mariscus pennatifolius*, *Phyllostegia parviflora*, and *Phyllostegia mollis*, we followed the taxonomic treatments in Wagner *et al.* (1990), the widely used and accepted *Manual of the Flowering Plants of Hawaii*. For *Phlegmariurus mannii*, we used the "Revised Checklist of Hawaiian Pteridophytes" (Wagner and Wagner 1994). Subsequent to the final listing, we became aware of new taxonomic treatments of these species. Also, in the recently published *Hawaii's Ferns and Fern Allies* (Plamer 2003), the family name for *Ctenitis squamigera* has changed (from Aspleniaceae to Dryopteridaceae). Due to the court-ordered deadlines, we are required to publish this final rule to designate critical habitat on Maui and Kahoolawe before we can prepare and publish a notice of taxonomic changes for these nine species. We plan to publish a taxonomic change notice for these nine species after we have published the final critical habitat designations on Maui and Kahoolawe.

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 formally reviewed this final critical habitat designation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal 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 effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental 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.

Based on the information in our economic analysis (draft economic analysis, supplement, and addendum), we are certifying that the critical habitat designation for 60 Maui and Kahoolawe plant species will not have a significant effect on a substantial number of small entities because a substantial number of small entities are not affected by the designation.

SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, this analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a "significant economic impact." 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 (*See Mid-Tex Electric Co-Op, Inc. v. F.E.R.C.* and *America Trucking Associations, Inc. v. EPA.*). As such, entities indirectly impacted by the plant listings and critical habitat and, therefore, not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis.

Small entities include small organizations, such as independent non-profit organizations, and small governmental jurisdictions, such as school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. Refer to the draft economic analysis for a further discussion of the definition of small entities.

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 the RFA. The County of Maui is also not a small governmental jurisdiction because its population was approximately 128,240 in 2000.

SBREFA further defines "small organization" as any not-for-profit enterprise that is independently owned and operated and is not dominant in its field. The East Maui Watershed Partnership and the West Maui Watershed Partnership are not independently owned but are public-private partnerships between Federal agencies, State agencies, private landowners, and community organizations that are dominant in setting policy for watershed protection. While the definition of "small organization" leaves some room for interpretation, based on the above factors, the economic analysis does not consider either partnership to be a "small organization." Our draft economic analysis further identified one other organization that may be affected by the critical habitat designation on Maui, although, to this point, we have never consulted with them directly or indirectly, as Hawaii Television Broadcasters Association (HTBA). The HTBA is a Hawaii nonprofit corporation that represents the common interests of Hawaii's television broadcasters, each of which has annual revenues in excess of \$750,000. As the entity representing all the local broadcast stations, HTBA appears to be dominant in its field and therefore does not appear to meet SBREFA's definition of a "small organization."