

discussion under the *Exclusions Under Section 4(b)(2) section*.

(27) *Comment:* Multiple commenters, including DLNR, a State agency, noted that the Service has stated 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. However, the commenters stated that this fails 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 develop their property. Such 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. The requirements also extend to loan and grant programs such as Natural Resources Conservation Service (NRCS) loans and grants.

*Our Response:* Under section 7 of the Act, all Federal agencies must consult with the Service to insure that any action that they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. We have provided our best assessment of what may be the effects of this consultation requirement on private landowners as well as for State agencies. However, not every project, land use, and activity that has a Federal involvement has historically been subject to a formal or informal section 7 consultation with the Service. The draft economic analysis and Addendum were confined to those projects, land uses, and activities that are, in practice, likely to be subject to consultation and are based on review of past consultations, current practices, and the professional judgments of Service staff and other Federal agency staff.

If the Service finds that the proposed actions are likely to jeopardize the continued existence of an endangered or threatened species or result in destruction or adverse modification of critical habitat, we suggest reasonable and prudent alternatives that would allow the Federal agency to implement their proposed action without such adverse consequences. Again, we have provided our best assessment for what this may mean in terms of management actions or land uses and any associated costs in the draft economic analysis and Addendum.

(28) *Comment:* Two commenters, including the Hawaii Department of Transportation, Airports Division

(DATA), stated that prudence cannot be determined without an analysis of the economic impacts of critical habitat. The prudence of critical habitat designation is a final conclusion based on weighing all relevant factors, including economic factors. While the Service promised to complete its economic impact analysis before it promulgates its final determination of critical habitat, it risks putting the decision before the analysis. The prior determination that critical habitat is prudent and is therefore required, is treated as a given, even though it ignored economic factors. The Service should revisit (*Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 440–443 (5th Cir. 2001)).

*Our Response:* We determine whether critical habitat designation is prudent according to regulations found at 50 CFR 424.12(a)(1). In accordance with these regulations and recent case law, critical habitat designation is not prudent only when the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species. To determine whether critical habitat would be prudent for the species, we analyzed the potential threats and benefits to the species. The economic analysis is conducted after critical habitat has been proposed in a given area, as set forth in regulations found at 50 CFR 424.19. If designation of critical habitat is prudent, we look at all of the impacts of designating specific areas as critical habitat to see if the benefits of designation outweigh the benefits of excluding it from critical habitat. If we find that economic or other impacts outweigh the benefit of designating critical habitat in a given area, that area will be excluded. We concluded in the final rule listing the Blackburn's sphinx moth as endangered that there may be benefits of critical habitat designation that may outweigh the risks. Therefore, critical habitat is prudent for the species.

(29a) *Comment:* Multiple commenters stated that 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.

*Our Response:* Chapter VI, section 4.e. of the DEA and section 4.b. of the Addendum address costs involved in redistricting lands from the Urban, Rural and Agricultural Districts to the Conservation District. About 50,772 acres of Agricultural land, one acre of Rural land, and 430 acres of Urban land are included in the intended

designation. Of this, approximately 12,352 acres of Agricultural land is owned by private landowners; one acre of Rural land is owned by private landowners; and 32 acres of Urban land is owned by private landowners. In the event that all of these private lands were redistricted to the Conservation District, the total economic cost could range from \$80 million to \$249 million. However, as discussed in the economic analysis, the redistricting of all lands to Conservation 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