

methods may be cruel and environmentally unsound.

Our Response: The designation of critical habitat does not give the Federal government and its partners the authority to utilize any methodology they wish in dealing with feral animals. Any potential animal control program would be subject to all applicable State, Federal, and local laws.

(32) *Comment:* DATA commented that the Service has provided inadequate support for its decision to reverse its prior determination that designation of critical habitat for the Blackburn's sphinx moth is not "prudent."

Our Response: Our reasoning for determining that the designation of critical habitat for the Blackburn's sphinx moth is prudent is thoroughly discussed in the final rule listing the moth as an endangered species (65 FR 4770), which was published in the **Federal Register** on February 1, 2000, and is consistent with recent case law.

(33) *Comment:* DATA stated that the proposed rule does not contain an analysis of the potential impacts to aviation safety that might result from the designation of certain areas contained within proposed Unit 3. The Service is required by law to analyze any relevant potential impacts when proposing a specific area as critical habitat. The commenter recommended that the proposed rule be withdrawn until an analysis of the potential impacts to aviation safety has been conducted.

Our Response: As discussed in the DEA (Chapter VI, section 3.h. Hawaii Department of Transportation, Airports Division expressed concern about designating critical habitat within the boundaries of Kahului Airport, due to possible conflicts with safety requirements. In this final rule, we have not included Kahului Airport lands from critical habitat designation due to a lack of primary constituent elements or because the areas were not essential to the moth's conservation (see Summary of Changes from the Proposed Rule section). We are unaware of any other areas in which aviation safety may be an issue as a result of the designation of critical habitat for the Blackburn's sphinx moth.

(34) *Comment:* The Service has misinterpreted the intent of the Act with exclusion of areas under 3(5)(A)(I). If a specific area of Blackburn's sphinx moth habitat is recognized to be critical to the extent that management is already taking place, the notion that such management renders designation unnecessary does not make sense. In

fact, designation of these areas would seem more urgent.

Our Response: Although we disagree with the commenter, we have not found any areas that are currently adequately managed for the moth. Therefore, we have not excluded areas on that basis. Please also refer to our response to Comment 26.

(35) *Comment:* The proposal violates the "commerce clause" because the Blackburn's sphinx moth is not related to interstate commerce. Critical habitat designation, and the underlying decision to list the species as endangered, are the subject of the designation and exceed the constitutional limits of the Service's delegated authority. Congress enacted the Act as an exercise of its Commerce Clause power and delegated exercise of that Commerce Clause power to the Service to apply the Act by regulation. The listed species exists only in Hawaii and does not cross State lines. Nor is it in commerce as the subject of any economic endeavor and it lacks any commercial value. Therefore, the Service's regulations listing this species and designating critical habitat for it within Hawaii exceed the Federal power to regulate interstate commerce under the governing precedents interpreting the Commerce Clause.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to apply the protections of the Act to species that occur within a single State. A number of court cases have specifically addressed this issue. *The National Association of Homebuilders v. Babbitt*, 130 F. 3d 1041 (D.C. Cir. 1997), *cert. denied*, 1185 S.Ct. 2340 (1998), involved a challenge to application of Act's prohibitions to protect the listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*). As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one State. The court held that application of the ESA to this fly was a proper exercise of Commerce Clause power because it prevented loss of biodiversity and destructive interstate competition. Similar conclusions have been reached in other cases, *see Gibbs v. Babbitt*, No. 99-1218 (4th Cir. 2000) and *Rancho Viejo v. Norton*, No. 01-5373 (D.C. Cir. 2003).

Issue 6: Economic Issues

(36) *Comment:* HDOA suggested that the Service is required to conduct a cumulative impacts analysis to determine the economic impacts resulting from all critical habitat designations on all the islands.

Our Response: The commenter appears to be using the term "cumulative impacts" in the context of the National Environmental Policy Act (NEPA). We are required to consider only the effect of the designation of critical habitat for Blackburn's sphinx moth. The appropriate baseline for use in this analysis is the regulatory environment without this regulation. Against this baseline, we attempt to identify and measure the incremental costs and benefits associated with this designation of critical habitat. When critical habitat for other species has already been designated, it is properly considered part of the baseline for this analysis. Proposed and future critical habitat designations for other species in the area will be part of separate rulemaking, and consequently, their economic effects will be considered separately.

We have determined that an Environmental Assessment and/or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act, which includes critical habitat designations. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

(37) *Comment:* The DEA lists economic impacts; however, there is no indication that the Service has identified appropriate critical habitat boundaries or modified the critical habitat boundaries in consideration of these economic impacts.

Our Response: We considered the economic impacts that were analyzed and summarized in the DEA, and addendum, and excluded two units (proposed Units 5a and 5b) from critical habitat (*see Exclusions Under Section 4(b)(2)*).

(38) *Comment:* The DEA fails to distinguish potential costs resulting from the designation from those costs resulting from listing the moth as endangered. Nowhere does the draft provide any analysis of what impacts, if any, designating critical habitat for the moth would impose above and beyond those associated with the species' listing. Because the DEA does not distinguish between these costs, it cannot exclude proposed critical habitat from a final critical habitat designation pursuant to section 4(b)(2).

Our Response: Our draft economic analysis evaluated potential future effects associated with the listing of Blackburn's sphinx moth as an endangered species under the Act, as