

critical habitat will result in more expensive environmental studies. The DEA noted that subject to certain exemptions, a State Environmental Assessment (EA) or Environmental Impact Statement (EIS) is required for projects that: (1) Use State or county lands or funds; (2) are in the Conservation District; (3) are in the Shoreline Setback Area (usually 12 m (40 ft) inland from the certified shoreline); (4) require an amendment to a county plan that would designate land to some category other than Agriculture, Conservation or preservation; or (5) involve reclassification of State Conservation District lands. If a project "substantially affects a rare, threatened, or endangered species, or its habitat," then a State EIS might be required instead of the simpler and less expensive EA.

Based on a review of projects planned within the critical habitat designation, the DEA concluded that five projects could be affected: Makena State Park; Kanaha Beach Park improvements; Kahoolawe Island Reserve Commission projects; and water tank installation and fire control at Puu Waawaa. The DEA reported that if all these projects subsequently require EISs, the additional cost to prepare them could be between \$125,000 and \$375,000. However, the DEA also recognized that this estimate may overstate costs, because other aspects of these projects may compel the preparation of an EIS rather than an EA. Because the areas surrounding these five projects remain within the intended designation, the Addendum made no changes to the conclusions reported in the DEA.

(62) *Comment:* Multiple commenters stated that the DEA fails to evaluate the practical effect critical habitat designation will have on development. One commenter speculated that Special Management Area permits administered by Maui County as required by Hawaii's Coastal Zone Management Act will be harder to get, will result in delays, will cause a decline in property values, and may make it impossible to develop. This economic impact disappears because the DEA's bottom line erroneously counts only so-called "direct" costs of consultation.

Another commenter expressed concern that the Service may get involved in county permitting processes, stating: "[r]egardless of whether there is a Federal nexus for a proposed action, State and local agencies can and will require consultations with the Service (whether formal or informal) on actions that they approve in areas within or near critical habitat, and are likely to place

restrictions on those actions as a result of such consultations. For example, a recent informal consultation between the County of Maui and the Service, pursuant to issuance of a County Special Management Area Permit for a proposed A & B project near BSM habitat in Kahului, resulted in the incorporation of permit conditions requiring the planting of three native *Nothocestrum latifolium* trees for every tree tobacco plant removed from the project area. The proposed project would not have impacted any BSM critical habitat, nor would it have resulted in the take of any BSM. Mandatory compensatory measures therefore do not appear to have been warranted for this project under any provisions of the Endangered Species Act."

Finally, another commenter stated the following: The Service has taken the position in other states that it has a right to intervene in local land use proceedings if they affect endangered species on private property. For example, the Service petitioned the local zoning board in Arizona to postpone approval of a rezoning petition pending a survey to determine the extent to which an endangered plant was present on the property even though no Federal approval was being sought. The failure of the Service to address this type of activity in the DEA is a fundamental error of the analysis.

Our Response: The DEA acknowledged that if a proposed project requires major State or county approvals and is within critical habitat, developers are likely to be required by State and county agencies to request comments from us on the project. If we indicate that the project would have a negative impact on the habitat of listed species, then State and county agencies may require project mitigation to address our concerns. This would be expected even with no Federal involvement. The DEA concluded that the cost of the potential mitigation would depend upon the circumstances. Because there were no anticipated projects within the proposed critical habitat for the moth that would require major discretionary approvals by the State or county, there was no specific discussion in the DEA of what mitigation measures might be required by the State or county as a condition of receiving the discretionary approvals for projects within the critical habitat designation.

During public comment, a landowner in proposed Unit 5a (island of Hawaii) indicated that the Kaloko Properties development in critical habitat will require major discretionary approvals from the State and county, including

Land Use District Boundary Amendment and a county zone change. (Note: this area was not included in this designation.) Section 4.c. of the Addendum addresses the costs of potential State and county mitigation measures that could be associated with approvals for this project. For example, as a mitigation measure for this project, the State or county may require the landowner to use native vegetation that is beneficial to the moth in the residential and golf course construction. The cost of this mitigation measure is estimated at \$720,000 to \$750,000. In a most extreme scenario, if the State or county did not grant the discretionary approvals as a result of the moth critical habitat designation, the landowner may not be able to continue with the current plans for residential and golf course development. In this case, the total cost for the Kaloko Properties development would be \$4.2 million in previous expenditures and \$13 million to \$25 million in the potential loss of future profits. The specific likelihood of either occurrence is unknown, as it depends upon the actions of the State or county agency with permit approval under circumstances for which there is no prior history. In addition, the State or county may develop their own mitigation measures based on the particular circumstances before them when reviewing the permit. Based on the professional judgment of the team of economists preparing the economic analysis, it is not deemed likely that discretionary approval for the Kaloko Properties project would be denied solely on the basis of moth critical habitat designation. However, for illustrative purposes, costs associated with this most extreme scenario are reported.

(63) *Comment:* Multiple commenters stated that the DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically the State Water Code. HRS 174C-2 states "adequate provision shall be made for protection of fish and wildlife." HRS 174C-71 instructs the Commission of Water Resource Management to establish an instream use protection program to protect fish and wildlife. Multiple commenters were concerned that water resource development would be greatly restricted leading to many indirect costs. The proposed rule states that activities such as watershed alteration or water diversion may trigger section 7 consultations if there is Federal involvement. If the ability to divert or take water from these sources or systems is restricted or limited, the impact