

would be far reaching and affect all lands served by such water sources or systems. The Service has an obligation to thoroughly investigate this issue, and refrain from designating critical habitat until it has determined whether its actions will affect water use and balance this against any benefit to the species. One commenter stated that opponents of water diversions may use critical habitat as a tool to delay, and effectively stop, many worthwhile water diversion projects.

Our Response: Future (*i.e.*, currently unplanned) water diversion projects are most likely to be planned in mountainous areas with significant rainfall or existing water resources. In other words, they are most likely to occur in areas already in the Conservation District and thus, would be subject to discretionary approval by the BLNR. While development is already limited within the Conservation District, the designation of critical habitat would be relevant to BLNR's determination of whether to grant a permit. More specifically, the designation of critical habitat could make it more likely that BLNR would find that a proposed land use would cause substantial adverse impact to existing natural resources within the surrounding area (Hawaii Administrative Rules 13–5–30). Therefore, it is possible that critical habitat designation could result in additional environmental studies, project delays, project modifications, and potential project denials (as discussed generally in chapter VI, section 4.f. of the DEA). However, without more specific information on the scope and location of a future (and currently unplanned) water diversion project, it is not possible to meaningfully estimate the potential indirect costs associated with these events.

Moreover, no costs would be expected to occur from such impacts to water systems, because neither the Blackburn's sphinx moth nor the host plants on which it relies are stream-dependent for their survival and, therefore, would not cause a reduction in existing water diversions.

(64) *Comment:* A commenter stated the following: The DEA failed to consider the more restrictive Habitat Conservation Plan (HCP) guidelines under the Hawaii Endangered Species Law (HRS 195D–4, HRS 195D–21) that required the State HCP permittee show a net benefit to the species. The DEA

failed to analyze impacts due to the circumstance in which a landowner qualifies for a Federal HCP but is unable to obtain a State HCP.

Our Response: As discussed in chapter III of the DEA, the Act allows us to permit take by private applicants that would otherwise be prohibited, provided such taking is “incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity.” Section 10(a)(1)(B) of the Act allows non-Federal parties planning activities that have no Federal involvement, but which could result in the incidental taking of listed animals, to apply for an incidental take permit. The application must include an HCP laying out the proposed actions, determining the effects of those actions on affected fish and wildlife species and their habitats (often including proposed or candidate species), and defining measures to minimize and mitigate adverse effects. We must issue an incidental take permit if the incidental take is to be minimized by reasonable and prudent measures and implementing terms and conditions that are stipulated in the permit. The HESA has a comparable incidental take provision that also requires the permittee to show a net benefit to the species to receive the permit.

The economic analysis considers the economic impacts of section 7 consultations related to critical habitat, even if they are attributable co-extensively to the listed status of the species. In addition, the economic analysis examines any indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. However, where it is the listing of a species that prompts action at the State or local level (*e.g.*, further regulating the take of federally listed species), the impacts are not attributable to critical habitat designation and are not appropriately considered in the economic analysis of critical habitat designation. Take prohibitions under Hawaii law are tied to the Federal listing of the species and do not co-extensively occur because of critical habitat designation. Thus, the circumstance in which a landowner qualifies for a Federal HCP but is unable to obtain a State HCP is outside the scope of the economic analysis and was not addressed by it.

Summary of Changes From the Proposed Rule

Based on a review of public comments received on the proposed

critical habitat determination, we have reevaluated our proposed designations and included several changes to the final designation of critical habitat. These changes include the following:

(1) We revised the list of manmade features that are excluded from the designation in order to exclude additional features based on information received during the public comment periods. The revised list is described in the Criteria Used to Identify Critical Habitat section, and in regulatory language for section 17.95, “Critical habitat— fish and wildlife,” described at the end of this document.

(2) We made revisions to the unit boundaries based on information supplied by commenters, as well as information gained from field visits to some of the sites, which indicated: (1) The primary constituent elements were not present in certain portions of the proposed units; (2) certain changes in land use had occurred on lands within the proposed critical habitat that would preclude those areas from supporting the primary constituent elements; or (3) the areas were not essential to the conservation of the species. Specifically, private landowners on the islands of Molokai, Maui, and Hawaii provided us with new information regarding current land uses or prior land changes to some of the proposed areas that allowed us to identify certain lands as not essential or unsuitable for the long-term conservation of the Blackburn's sphinx moth. Likewise, the State provided us with new information regarding current land uses or prior land changes to some proposed areas on islands of Maui, Kahoolawe, and Hawaii that allowed us to identify portions of some proposed units as not essential or unsuitable for the long-term conservation of the moth. In addition, information obtained during the process of finalizing critical habitat designations for plants on the islands of Maui, Molokai, and Hawaii helped us to identify some proposed areas on those islands that are lacking the primary constituent elements, or are unsuitable for the long-term conservation of the moth. Lastly, some areas were excluded based on weighing the benefits of inclusion versus exclusion pursuant to section 4(b)(2) of the Act (*see* Economic Analysis section). A brief summary of the modifications made to each unit is given below (*see* also Figures 1–4).

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