

(38) *Comment*: The large scale maps of the designated critical habitat make it impossible to determine the exact boundaries of the critical habitat. This, in turn, makes it impossible to be precise in commenting on economic impacts.

Our Response: The maps in the **Federal Register** provide the general location and shape of critical habitat and are provided for reference purposes to guide Federal agencies and other interested parties in locating the general boundaries of the critical habitat; the maps do not constitute the definition of the boundaries of a critical habitat (50 CFR 17.94). The legal descriptions are the definition of the boundaries of critical habitat, are readily plotted, are transferable to a variety of mapping formats, and were made available electronically upon request for use with GIS programs. Unit boundaries were defined by giving the coordinates in UTM Zone 5 with units in meters using North American Datum of 1983 (NAD83). These coordinates can be used to determine boundaries with some accuracy. At the public hearing, the maps were expanded to wall-size to assist the public in better understanding the proposed critical habitat. These larger scale maps were also provided to individuals upon request. Furthermore, we provided direct assistance in response to written or telephone questions with regard to mapping and landownership within the proposed critical habitat.

Issue 6: Policy and Regulations

(39) *Comment*: Two commenters stated that the Service's suggestion that current management efforts can render otherwise "critical" habitat no longer "critical" illegally reads into section 3(5) of the Act an additional, unstated requirement that habitat cannot be "critical" unless the Service finds it needs more management or protection than it currently receives.

Our Response: Please refer to the response to comment 8.

(40) *Comment*: The proposal violated the commerce clause and exceeds the constitutional limits of the Service's delegated authority. The listed species are not interstate; they exist only in Hawaii and do not cross State lines.

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).

(41) *Comment*: One commenter disagreed with the Service's approach of proposing critical habitat designations in advance of any economic analysis. Another commenter stated that economic analysis must be completed before critical habitat can be prudently designated.

Our Response: We agree that the economic analysis must be completed before critical habitat can be designated, and we do so in all cases, including this regulation. The Service must first decide upon a specific area, or set of areas, to propose as critical habitat before the economic analysis of the proposal can begin. In cases such as this rulemaking, where we are under a court-ordered deadline to make a decision by a fixed date, we frequently issue the critical habitat proposal for public comment while the economic analysis is still being prepared, so as to maximize the time available for the public to review and comment on the proposal. When the economic analysis is prepared, it is also issued for public comment. The critical habitat proposal and the economic analysis are then revised as appropriate based on information received during the public comment period, and the economic and other relevant impacts of the proposal are evaluated, along with the available biological information, in making the final critical habitat determination.

(42) *Comment*: One commenter stated that the Service must exclude an area from critical habitat if that area is not "essential" to conservation of the species and if the cost-benefit analysis indicates that it is better to exclude the area. Absent proper completion of the procedure for designation of critical habitat outside the geographic area currently occupied by the species, when such areas are essential for the conservation of the species, "there is no evidence that Congress intended to allow the USFWS to regulate any parcel of land that is merely capable of supporting a protected species"

(*Arizona Cattle Growers Association v. USFWS*, 273 F. 3d 1229 (9th Cir. 2001)).

Our Response: As explained in the Methods section of the proposed rule (67 FR 37108) and this final rule, and in accordance with the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific information available to determine areas that are essential for the conservation of these 99 Oahu plant species, not simply those areas that are capable of supporting the species. This information included the known locations; site-specific species information from the HINHP database and our own rare plant database; species information from the Center for Plant Conservation's (CPC) rare plant monitoring database housed at the University of Hawaii's Lyon Arboretum; island-wide Geographic Information System (GIS) coverages (e.g., vegetation, soils, annual rainfall, elevation contours, land ownership); the final listing rules for these 99 species; discussions with botanical experts; recommendations from the HPPRCC; and public comments (Service 1994, 1995a, 1995b, 1996a, 1996b, 1996c, 1996d, 1997, 1998a, 1998b, 1999; HPPRCC 1998; HINHP Database 2000, CPC *in litt.* 1999; J. Lau *et al.*, pers. comm., 2001). The cost of designating these areas as critical habitat was determined in the draft economic analysis and the addendum to the draft economic analysis. Neither the draft economic analysis nor the addendum found that the financial benefit of excluding these areas was so great that it outweighs the non-financial benefit of including these areas in a final critical habitat designation.

(43) *Comment*: The draft economic analysis concedes that State law protects "habitats" of endangered species and therefore protects federally designated critical habitat, including unoccupied habitat. Thus, designation is not necessary because State law already protects the habitat. In addition, Federal environmental impact analyses provide additional protection for federally listed species.

Our Response: As discussed above in "Previous Federal Action," we were ordered by U.S. District Court (Haw.) to publish proposed and final critical habitat designations or nondesignations for 255 Hawaiian plant species (*Conservation Council for Hawaii v. Babbitt*, 1998, 1999, 2000). In addition, under section 4(a)(3) of the Act, we are required to designate critical habitat for a species at the time it is federally listed as an endangered or threatened species, and on the basis of the best scientific data available and after taking into consideration the economic impact, and