

Our Response: The DEA did not address the potential indirect impact of the proposed critical habitat designation on subsistence activities for three reasons. First, subsistence activity is less extensive, and less important economically, on Oahu than it is on the other islands. This reflects the fact that Oahu has a comparatively large and diverse economy. Second, much of the subsistence hunting that does take place on Oahu is also recreational hunting, which is addressed in the DEA. Third, the DEA did not expect critical habitat to affect subsistence activities and the subsistence lifestyle.

Nevertheless, in response to the comment, the addendum addresses subsistence activities. The analysis found that it is unlikely that new or additional restrictions on access and prohibitions on subsistence will result from critical habitat designation. This assessment is partly based on the Hawaii State Constitution, which protects traditional subsistence activities. The analysis estimates that it is more likely that restrictions (if any) will occur in small, localized areas that have significant biological importance, *i.e.*, areas containing populations of the plants. However, because of the strong stewardship and conservation values associated with those who practice subsistence activities, combined with the cultural tradition of protecting environmentally sensitive areas, subsistence activities are likely to be consistent with any conservation restrictions in localized areas. Thus, the analysis anticipates no significant impact on subsistence activities as a result of the intended designation.

(54) *Comment:* Several commenters stated the following: The DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically Hawaii's Land Use Law. Critical habitat could result in downzoning under State law. Hawaii Revised Statutes (HRS) § 205–2(e) states that conservation districts shall include areas necessary for conserving endangered species. HRS § 195D–5.1 states that DLNR shall initiate amendments in order to include the habitat of rare species. Even if DLNR does not act, the Land Use Commission (LUC) might initiate such changes, or they might be forced by citizen lawsuits. Areas for endangered species are placed in the protected subzone with the most severe restrictions. While existing uses can be grandfathered in, downzoning will prevent landowners from being able to shift uses in the future, reduce market value, and make the land unmortgageable. Although the Service acknowledges that there could be

substantial indirect costs relating to redistricting of land to the Conservation District, several commentators disagreed with the characterization of these costs as unlikely. The DEA fails to consider additional third-party lawsuits to force redistricting of lands into the conservation district.

Our Response: Chapter VI, Section 4.g. of the DEA and Section 5.e. of the addendum discuss possible costs associated with redistricting land in critical habitat. Most of the land in the urban district and much of the land in the agricultural district initially proposed for designation are removed in the intended designation. As indicated in Section 5.e. of the addendum, the intended designation includes (1) approximately 3,319 acres of agricultural land, of which 2,070 acres are privately owned; and (2) approximately 0.6 acre of urban land, of which about 0.2 acre is privately owned. Under a worst-case scenario, where all land in the agricultural district is redistricted to Conservation, the reduction in land values would be approximately \$18.6 million.

As discussed more fully in Chapter VI, Section 4.g. of the DEA and Section 5.e. of the addendum, agency-initiated and court-ordered redistricting of some of the privately owned land is reasonably foreseeable (moderate to high probability). Further, this analysis judges the probability that all of the parcels will be redistricted to be very low to low. Tables ES–1 and VI–3 in the DEA characterized the risk of redistricting all of the parcels in the proposed designation as “undetermined,” not as “unlikely.” To more accurately reflect the analysis, this analysis changes the probability to “very low to low.” But even if land is not redistricted, the DEA and the addendum noted that the State may seek agreements with landowners to protect the habitats of listed species in order to retain existing district designations.

The DEA recognized that a real or perceived risk of redistricting can cause a loss of land value that continues until the uncertainty is resolved by (1) the passage of time that reveals the extent of redistricting due to critical habitat, or (2) possibly a State court decision on issues raised by critical habitat designation. Over the long-term, a permanent loss of land value (if any) would depend on how the uncertainty is resolved.

(55) *Comment:* The Service has failed to mention the Federal court ruling on the *New Mexico Cattlegrowers Association v. U.S. Fish and Wildlife Service*, which requires consideration of the impact of listing as well as the

impact of designating an area as critical habitat.

Our Response: The DEA and the addendum considered the economic impacts of section 7 consultations related to critical habitat even if they are attributable coextensively to the listed status of the species. In addition, the DEA and the addendum examined the indirect costs of critical habitat designation, *e.g.*, the relationship between critical habitat designation and a State or local statute.

(56) *Comment:* Any activity that could degrade critical habitat, including activities that are not subject to section 7 consultation, could be seen as an “injury” to (and therefore, under State law, a “taking” of) an endangered plant species under the State of Hawaii's endangered species law (Chapter 195D). It is important that this receive due consideration in evaluating the proposed critical habitat designations (for example, in completing the economic analysis) and that the Service explain to what extent it has considered the potential interplay between the Federal Endangered Species Act and Hawaii's endangered species laws.

Our Response: Chapter VI, Sections 4.b. and 4.f. of the DEA and Section 5.d. of the addendum discuss possible indirect costs resulting from the interplay of the Federal Endangered Species Act and Hawaii State law (*e.g.*, court-ordered mandates to manage private lands for conservation of the plants or to reduce game-mammal populations that harm plants or their habitats). Both the DEA and the addendum considered the economic impacts of section 7 consultations related to critical habitat even if they are attributable coextensively to the listed status of the species. In addition, the DEA and the addendum examined any indirect costs of critical habitat designation. However, the impacts are not attributable to critical habitat designation when the listing of a species prompts action at the State or local level. Take prohibitions under Hawaii law are purely attributable to a listing decision and do not occur as a result of critical habitat designations. There are no take prohibitions associated with the plants' critical habitat.

(57) *Comment:* Several commenters stated the following: The Service did not adequately address the takings of private property as a result of designating critical habitat for endangered plants on Oahu. If the proposed designation of critical habitat precipitates conversion of agricultural lands to conservation land that has no economically beneficial use, then the