

designation of critical habitat could adversely affect plans for remediation.

Our Response: The burning landfill is not within the final critical habitat designation. Operation and maintenance of existing manmade features and structures adjacent to critical habitat are not subject to section 7 consultation. Unless a Federal action related to landfill remediation activities directly or indirectly affects nearby habitat containing the primary constituent elements, these activities would not be affected by the designation of critical habitat.

Issue 6: Legal Issues

(55) *Comment:* One commenter stated that the Service cannot lawfully exclude areas from critical habitat based on a finding that they currently are adequately managed or protected. To do so would violate the mandatory duty to designate critical habitat to the maximum extent prudent and determinable. The commenter urges the Service not to exclude any areas from designation on this basis (*i.e.*, lands already managed or protected), since doing so would violate the mandatory duty to designate critical habitat “to the maximum extent prudent and determinable.”

Our Response: In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. If an area is covered by a plan that meets our management criteria, we believe it does not constitute critical habitat as defined by the Act because the primary constituent elements found there are not considered to be in need of special management or protection. For a detailed explanation of this evaluation see the “*Analysis of Managed Lands Under Section 3(5)(A)*” section below. However, to the extent that special management considerations and protection may be required for any of these areas and they, therefore, would meet the definition of critical habitat according to section 3(5)(A)(i), they are also properly excluded from designation under section 4(b)(2) of the Act (*see* “*Analysis of Impacts under Section 4(b)(2)*” section below).

(56) *Comment:* Several commenters, including the Department of Land and Natural Resources, Land Division, a

State agency, stated that the proposal appeared to not recognize the interplay in Hawaii between Federal and State laws, particularly environmental laws. They stated that harming endangered and threatened plants, even on private property, is already prohibited under State law and that designation of critical habitat duplicates existing regulations, zoning laws, and land use laws, creating an additional unnecessary regulatory burden and decrease in land values, thus resulting in “taking.”

Our Response: The designation of critical habitat requires all Federal agencies to ensure, in consultation with the Service, that any action authorized, funded, or carried out by the agency is not likely to result in the destruction or adverse modification of designated critical habitat. If, after consultation, our biological opinion concludes that a proposed action is likely to result in the destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives to the action that would avoid the destruction or adverse modification of the critical habitat (16 U.S.C. 1536(b)(3)(A)). If we cannot suggest acceptable reasonable and prudent alternatives, the agency (or the applicant) may apply for an exemption from the Endangered Species Committee under section 7(e) through (p) of the Act. Possible effects resulting from interplay of the Federal Endangered Species Act and Hawaii State law are also discussed in the DEA and Addendum under indirect costs.

However, the mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use of their land (*Agins v. City of Tiburon*, 447 U.S. 255, 260–263 (1980); *Hodel v. Virginia Surface Mining and Reclamation Ass’n*, 452 U.S. 264, 195 (1981); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)). The Act does not automatically restrict all uses of critical habitat, but only imposes restrictions under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of designated critical habitat. Furthermore, as discussed above, if a biological opinion concludes that a proposed action is likely to result in destruction or modification of critical habitat, we are required to suggest reasonable and prudent alternatives. Finally, habitat value is only one factor among many that State and local governments consider in making decisions on allowable property uses, (*See, e.g.* HRS

205–17) and would not necessarily be solely attributable to critical habitat.

(57) *Comment:* Several commenters, including the Department of Land and Natural Resources, Land Division, a State agency, raised concerns over the temporal relationship of the economic analysis relative to designation of critical habitat. One commenter stated that economic impacts should be considered concurrent with all other information and objected to the disjointed process. Another commenter wanted to ensure that the economic analysis be completed prior to the designation of critical habitat to ensure the Service meets the “prudent and determinable” standard for such designation.

Our Response: An economic analysis of the impact of critical habitat cannot be performed without knowing the location of the critical habitat. This fact is easily realized by considering the difference of proposed critical habitat on land zoned for protective conservation versus land zoned for urban development. These types of zoning issues, as well as other issues, will greatly affect any economic analysis of critical habitat and cannot be taken into consideration until a proposal of critical habitat is put forth. The proposed prudency finding is not a final prudency finding since it has not considered the economic issues. The fact that the proposed critical habitat is published in a proposed rule emphasizes that no final decision has been made on location or extent of critical habitat. The final designation of critical habitat occurs after public comments have been taken into consideration and the economic analysis on the proposed critical habitat has been completed. The effects of the public comments and the economic analysis are then reflected in the final rulemaking.

(58) *Comment:* Several commenters stated that designation of critical habitat could have an adverse affect on the voluntary cooperation for species conservation between the private sector and the Federal government and may actually result in less species recovery. Several commenters suggested the use of alternatives to critical habitat designation that would result in greater net benefits to the species and recommended that the Service and landowners focus their resources towards proactive cooperation between the Federal and State agencies and private landowners, including the development of monetary and other incentives to engage in species protection and recovery.