

definition of destruction or adverse modification as currently contained in 50 CFR 402.02 to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

In order to be included in a critical habitat designation, areas within the geographical range of the species at the time of listing must contain physical or biological features essential to the conservation of the species or for an area outside the geographical area occupied by the species at the time of listing, the area itself must be essential to the conservation of the species, 16 U.S.C. 1532(5)(A).

Our regulations state that "The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Section 4 requires that we designate critical habitat for a species, to the extent such habitat is determinable, at the time of listing. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we may not have sufficient information to identify all the areas essential for the conservation of the species, or we may inadvertently include areas that later will be shown to be nonessential. Nevertheless, we are required to complete the designation process, using the best information available to us. If new information becomes available subsequent to the designation, we have authority to revise the critical habitat at that time (16 U.S.C. 1533(a)(3)(B)).

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34270), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be

the listing package for the species. Additional information may be obtained from recovery plans, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials.

It is important to clearly understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the Act's section 7(a)(2) jeopardy standard and section 9 prohibitions, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species.

Prudency

Designation of critical habitat is not prudent when the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species (50 CFR 424.12(a)(1)).

To determine whether critical habitat would be prudent for each species, we analyzed the potential threats and benefits for each species in accordance with the court's order. Two species, *Cyanea copelandii* ssp. *copelandii* and *Ochrosia kilaueaensis*, endemic to the island of Hawaii, are no longer extant in the wild. *Cyanea copelandii* ssp. *copelandii* was last seen in the wild in 1957, in the Glenwood area. *Ochrosia kilaueaensis* was last observed in the wild in 1927, in an area that is now part of Hawaii Volcanoes National Park. Neither of these two species is known to be in storage or under propagation. Under these circumstances, designation of critical habitat for *Cyanea copelandii* ssp. *copelandii* and *Ochrosia*

kilaueaensis is not prudent because such designation would be of no benefit to these species. If these species are rediscovered, we may revise these final prudency determinations to incorporate or address new information as new data become available (See 16 U.S.C. 1532 (5)(B); 50 CFR 424.13(f)).

Due to low numbers of individuals and populations and their inherent immobility, the other 56 plant species may be vulnerable to unrestricted collection, vandalism, or disturbance. However, we examined the evidence currently available for each of these species and found specific evidence of vandalism, disturbance, and the threat of unrestricted collection only for two species of *Pritchardia*, the native palm. At the time of listing, we determined that designation of critical habitat was not prudent for *Pritchardia affinis* and *Pritchardia schattaueri* because it would increase the degree of threat from vandalism or collecting, and would provide no benefit (59 FR 10305, March 4, 1994; 61 FR 53137, October 10, 1996). Since publication of the listing rule, we learned of specific instances of vandalism, collection, and commercial trade involving these two species of *Pritchardia*. In the 1990s, seeds of *Pritchardia schattaueri* were removed from plants in two of the three locations where this species was known at that time (L. Perry and Nick Agorastos, DOFAW pers. comm. 2000). We received information on the commercial trade in palms conducted through the Internet (Grant Canterbury, Service *in litt.* 2000). Several nurseries advertise and sell seedlings and young plants, including 13 species of Hawaiian *Pritchardia*. Seven of these species are federally protected, including *Pritchardia affinis* and *Pritchardia schattaueri*. In light of this information, we believe that designation of critical habitat would likely increase the threat from vandalism to or collection of to these two species of *Pritchardia* on the island of Hawaii. First, these plants are easy to identify, and second, they may be attractive to collectors of rare palms either for their personal use or to trade or sell for personal gain (Johnson 1996). Although the final listing rules for these two species of palm do not list vandalism or overcollection as threats, in light of documented vandalism and overcollection events on these species and on species in the same genus on Kauai, we believe that *Pritchardia affinis* and *P. schattaueri* are vulnerable to these threats (59 FR 10305; 61 FR 53137).

In addition, we believe that designation would not provide significant benefits that would outweigh