

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

The VOLA project has already been troubled by litigation and defaulting developers; additional regulatory or legal uncertainties arising from this designation could well cause further delays or kill the project altogether. If this were to occur, the Housing and Community Development Corporation would lose the \$30 million in sunk costs, and the affordable housing units that would have been constructed. Although the final addendum to the economic analysis assigns a cost to the loss of the affordable units of \$4.8 million, there could well be considerable non-monetary social costs as well, particularly inasmuch as the available information indicates that there are no other affordable housing projects planned within the next 10 years.

We do not find that the benefits from the designation of critical habitat for lands within the VOLA project, as discussed above, exceed the benefits of avoiding the possible economic and social costs which could well arise from this designation.

For the Kaloko Properties/Kaloko Town Center, there is also the real possibility that the designation of critical habitat could lead to loss of necessary regulatory approvals. This in turn could lead to loss of the \$5.8 million in sunk costs for the portion of the property within the proposed critical habitat, or of the entire \$20 million investment. In addition, there would be an estimated loss of future profits from the land proposed for inclusion within the critical habitat of between \$39 to \$78 million. Using a present value discount, this loss would range between \$17 and \$34 million. (There could also be the loss of all project revenues in the event the inability to utilize the lands within the critical habitat designation caused the failure of the entire project.)

Alternatively, in an effort to avoid those situations, the developer might offer additional restrictions on the development. The final addendum estimates, with admitted imprecision, that these costs might range from \$1.1 to \$2 million for the portion of the project within the proposed designation.

We do not find that the benefits from the designation of critical habitat for lands within the VOLA project, as discussed above, exceed the benefits of avoiding the possible economic costs which could well arise from this designation.

We note that the developers of this project contacted us after the close of

the comment period offering to undertake a number of actions designed to provide conservation benefits to the species. Specifically, the offer included: (1) To set aside 100 to 130 acres within the proposed unit Y2; (2) enter into good faith negotiations with the Federal, State or county entities for acquisition of the area; (3) agree to enter into a Safe Harbor agreement with us; and (4) to enter into a memorandum of understanding or cooperative agreement to address habitat protection, monitoring and management actions for the remainder of their property relating to these species (and Blackburn's sphinx moth).

Due to the court-ordered date by which this designation must be completed, we were unable to conclude such an agreement prior to issuing this notice and regulation. If we had been able to do so, this is the type of agreement for which we have found in other cases that the conservation benefits of the agreement exceed the benefits of designation and thus warrant exclusion (*See* discussions below). We have generally not made exclusions under section 4(b)(2) based on offers of conservation agreements, and we are not doing so here. However, we do believe the ability to pursue this proposal, and a Safe Harbor agreement with the State, are secondary benefits of the exclusions, in that neither would likely remain a possibility without the exclusions. A decision by the State and the developers to follow through on this offer might well be in both their and the species best interest.

We also note that while preparing an original critical habitat proposal and designation is extremely costly and time-consuming, a revision to a designation, where all of the appropriate biological and economic information is already available, could be relatively easy. We will closely monitor the status of the listed plants within this exclusion and will be prepared to take necessary actions in the event their situation warrants it.

For the non-profit K2020 organization, the designation of critical habitat could add an additional \$5.1 million in direct costs to their effort to remediate a burning old landfill, as discussed above. Requiring this non-profit group to raise and expend \$5.1 million for use of unoccupied critical habitat to remediate an environmental problem, when the remediation will ultimately benefit the species, does not provide an overall conservation benefit to the species. This funding could well come from funds otherwise intended for conservation purposes in Hawaii, or the cost could cause the group to abandon the project. We accordingly believe the

benefit of excluding the lands needed for the remediation effort, thus saving the group the \$5.1 million cost and making it more likely that the landfill will be remediated, exceed the benefit of designating these lands as critical habitat.

(4) Exclusion of These Units Will Not Cause Extinction of the Species

Proposed units Y1 and Y2 on State and private lands provide occupied and unoccupied habitat for two species: *Isodendron pyrifolium* and *Neraudia ovata*. According to our published recovery plans, recovery of these two species will require reproducing, self-sustaining populations located in a geographic array across the landscape, with population numbers and population locations of sufficient robustness to withstand periodic threats caused by natural disaster or biological threats (Service 1996, 1998). The highest priority recovery tasks include active management, such as plant propagation and reintroduction, fire control, nonnative species removal, and ungulate fencing. Failure to implement these active management measures on this and other units, all of which require voluntary landowner support and participation, virtually assures the extinction of these species in the wild. Many of these types of conservation actions in this area of the island of Hawaii will be carried out as part of a partnership with the Service and by actions taken on the landowner's initiative. These activities, which are described in more detail below, require substantial voluntary cooperation.

For both species, we conclude, based on all of the information available to us, that the projects proposed for the areas to be excluded will not adversely impact existing populations of either listed species. In addition, the Hawaii Housing and Community Development Corporation has proposed the creation of preserves for the plant with the VOLA development, which would be actively managed for the benefit of the plants. As noted below in detail, active management is an essential need of these species, one which cannot be accomplished through a critical habitat designation alone. Finally, we note that in Hawaii State law protected Federally listed plants against direct take, a protection not found in the ESA.

If a critical habitat designation reduces the likelihood that voluntary conservation activities will be carried out on the island of Hawaii, and at the same time fails to confer a counterbalancing positive regulatory or educational benefit to the species, then the benefits of excluding such areas