

not adequate to find that the designated areas in PMRF are no longer in need of special management considerations or protection and thus do not meet the definition of critical habitat because it does not include enough specific information on the conservation of *Panicum niihauese*. As far as the Service is aware, this INRMP has not yet been updated to address management needs of this species.

(40) *Comment*: Additional dry and mesic areas should be considered for critical habitat designations, including Olokeke Canyon.

Our Response: Olokeke Canyon was not included in any critical habitat designations because no data was available on the historic or current primary constituent elements or current species locations within those lands.

(41) *Comment*: One commenter would like to see Haena State Park removed from the critical habitat designation, because it is a high use visitor area, wall to wall historic and cultural landscape, and very degraded habitat with very few native plants. The cultural sites are currently being restored by the Hawaiian community.

Our Response: Information received during the public comment period informed us of the lack of primary constituent elements for the species in this area. Therefore, we revised the lines for the final designation to start around the 200-foot elevation line where a higher density of primary constituent elements exist for the species at issue.

Issue 3: Legal Issues

(42) *Comment*: Critical habitat designation and the underlying decision to list as endangered the species that are the subject of the designation, exceed the constitutional limits of the Service's delegated authority. Congress enacted the ESA as an exercise of its Commerce Clause power and delegated exercise of that Commerce Clause power to the Service to apply the ESA by regulation. The listed species are not interstate. They exist only in Hawaii and do not cross State lines. Nor are they in commerce as the subject of any economic endeavor. They lack any commercial value. Therefore, the Service's regulations listing these species and designating critical habitat for them within Hawaii exceed the federal power to regulate interstate commerce under the governing precedents interpreting the Commerce Clause.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect this species, for the reasons given in Judge Wald's

opinion and Judge Henderson's concurring opinion in *National Association of Homebuilders v. Babbitt*, 130 F. 3d 1041 (D.C. Cir. 1997), *cert. denied*, 1185 S.Ct. 2340 (1998). See also *Gibbs v. Babbitt*, No. 99-1218 (4th Cir. 2000). The *Home Builders* case involved a challenge to application of ESA prohibitions to protect the listed Delhi Sands flower-loving fly. As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one state. Judge Wald 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.

(43) *Comment*: Since concerns were raised from the hunting community and local government officials, a fair approach to resolving this issue may be through mediation, using the State's Judiciary Center for Alternative Dispute Resolution. To date, this will be the second recommendation made on this issue that still has not been taken under advisement.

Our Response: We have held several meetings with the hunting community and local government officials to promote information exchange and open dialogue. These meetings have served to alleviate some of the controversy and contention that have surrounded the issue of critical habitat designation on Kauai and other Hawaiian Islands. However, this is a rulemaking process governed by the ESA and the Administrative Procedures Act and not easily resolved thru mediation. We have tried our best to have an open process with an opportunity for all interested parties to participate, while complying with our statutory responsibilities and court-ordered deadlines.

(44) *Comment*: Any activity that may 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 (Hawaii Revised Statutes (HRS) 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 endangered species laws.

Our Response: Possible costs resulting from interplay of the Federal Endangered Species Act and Hawaii State law were discussed in the economic analysis under indirect costs (e.g., possible conservation management

mandate for the private landowner and reduction in game mammal populations). The economic analysis considers the economic impacts of section 7 consultations related to critical habitat even if they are attributable co-extensively to the listed status of the species. In addition, the economic analysis examines any indirect costs of critical habitat designation, such as where critical habitat triggers the applicability of a State or local statute. However, where it is the listing of a species that prompts action at the State or local level, the impacts are not attributable to critical habitat designation. Take prohibitions under Hawaii law are purely attributable to a listing decision and do not co-extensively occur because of critical habitat designations. There are no take prohibitions associated with critical habitat.

(45) *Comment*: One commenter stated that the Service should do a better job of communicating what critical habitat does and does not do, including a review of recent "Federal monies and Federal approvals," and which of those programs might even remotely be affected by designations of critical habitat.

Our Response: We have made a concerted effort to provide the public with information on what critical habitat does and does not do, through a series of public workshops and meetings, correspondence, news releases, and publications. A detailed review of Federal activities that may be affected by the critical habitat designations on Kauai and Niihau may be found in the economic analysis section of this rule. The public could also refer to the Service's National website <http://www.fws.gov>.

Issue 4: Section 7 Consultation

(46) *Comment*: The draft economic analysis states that if a landowner needs a Federal permit or receives Federal funding for a specific activity, the Federal agency issuing the permit or dispersing the funds would consult with the Service to determine how the action may affect the designated critical habitat. The commenter questioned what is meant by the term "consult." The nature of the consultation could result in control of whether the Federal government conducts its proposed action on those lands or not, thereby controlling the land to the extent that the private landowner could or could not do business with the Federal government. What would consultation result in when a proposed Federal action is being compared to the activities not affected by critical habitat