

Following publication of the revised proposal in January 2002, we met with DOFAW on numerous occasions and conducted several site assessment surveys to evaluate habitat that meets the legal requirements of the Act and takes into account the on-the-ground knowledge of DOFAW's biologists and land managers. As a result of the assessment surveys and information provided to us by Kauai DOFAW staff we excluded non-essential areas that did not contain primary constituent elements. In addition, we received important information from Kauai DOFAW staff that enabled us to refine the final critical habitat designations to meet the conservation needs of the species.

Issue 7: Policy and Regulations

(54) *Comment:* Prudence cannot be determined without an analysis of the economic impacts of critical habitat.

Our Response: The Service makes an initial determination on the prudence of designating critical habitat according to regulations found at 50 CFR 424.12(a). In accordance with these regulations, critical habitat designation is not prudent only when one or both of the following two situations exist: (1) 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; or, (2) such designation would not be beneficial to the species. The economic analysis is conducted after critical habitat has been proposed in a given area, as set forth in regulations found at 50 CFR 424.19. If the Service finds that economic and other impacts outweigh the benefit of designating critical habitat in a given area, that area will be excluded from critical habitat designation unless such exclusion will result in the extinction of the species concerned.

(55) *Comment:* The prudence of critical habitat designation is a final conclusion based on weighing all relevant factors, including economic factors. While the Service promised to complete its economic impact analysis before it promulgates its final determination of critical habitat, it risks putting the decision before the analysis. The prior determination that critical habitat is prudent and therefore required, is treated as a given, even though it ignored economic factors.

Our Response: An economic analysis of the impact of critical habitat cannot be done 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 prudence finding is not a final prudence 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 received 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.

(56) *Comment:* The proposed rule unfairly transfers the Service's obligations to determine "prudent and determinable" areas for designation as critical habitat from itself to the owners of the designated lands. This action could potentially violate Section 3(5)(c) of the ESA, which specifically provides that "except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."

Our Response: All areas designated as critical habitat are determined by the Service, after taking into account the economic analyses and public comments. As established by the Congress of the United States, the Secretary of the Interior or the Secretary of Commerce has the responsibility for designation of critical habitat areas. This responsibility has been delegated to the U.S. Fish and Wildlife Service for listed fish, wildlife and plants and cannot be transferred to any other party. Proposing areas for designation as critical habitat does not transfer any of the designation responsibilities of the Service. As part of the Service's designation process, the entire geographic area that could be occupied by the threatened or endangered species is *never* put forth as proposed or final critical habitat, unless circumstances unique to the species require such a designation and only after approval by the Secretary of the Interior (or the Secretary of Commerce).

Issue 8: Economic Issues

(57) *Comment:* Some reviewers commented that the DEA did not address or did not adequately consider a variety of costs and benefits that they believe could occur due to the implementation of section 7 for the plants.

Our Response: Many of these possible costs were, in fact, considered and some were addressed in the DEA. In many cases, however, potential costs were purposely not addressed in the DEA because they are not expected to occur. In other cases, it is impossible for them to occur. In still other cases, the concerns no longer have substance given the Service's modifications to the proposed critical habitat.

(58) *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 Kauai. If the proposed designation of critical habitat precipitates conversion of agricultural lands to conservation land that has no economically beneficial use, then the Federal and State governments will have taken private property.

Our Response: The possible costs associated with redistricting land proposed for critical habitat designation were discussed in the DEA under indirect costs. The final rule removes most of the land in the Agricultural and Urban Districts from the critical habitat designation. Redistricting the remaining privately owned parcels to the Conservation District could result in a small probability of: (1) Approximately \$178,500 in lost property values; (2) \$3,570 in an annual loss of economic activity associated with ranching; and (3) \$500 in increased property taxes.

(59) *Comment:* One commenter said that estimated management costs needed to recover a species should be part of an economic analysis associated with critical habitat designation. Another commenter said that management costs for the recovery of listed species are not appropriate costs to assign to critical habitat designation.

Our Response: The Act does not obligate landowners to manage their land to protect critical habitat, nor would landowners and managers be obligated under the Act to participate in projects to recover a species for which critical habitat has been established. However, Chapter VI, section 4.d. of the DEA and section 4.c. of the Addendum does discuss landowners' concerns that the interplay between the state's prohibition on take and critical habitat could result in a potential mandate for conservation management pursuant to litigation and the resulting costs for the proposed designation on Kauai. As noted in Section 4.c. of the Addendum, the costs of conservation management for critical habitat as modified could reach \$1.8 million per year. However, the likelihood of this result is estimated to be low and such costs would not