

necessarily be assigned to critical habitat.

(60) *Comment:* Several commenters stated the following: The Service fails to adequately analyze the economic impact to small entities under the Regulatory Flexibility Act, and the Small Business Regulatory Enforcement Fairness Act. Given Kaua'i's small population, a large proportion of firms in the agricultural sector may well be affected and could suffer severe impact. In addition, the prospect of indirect costs mounting into the tens of millions of dollars on a small island requires the Service to reconsider its blithe assumption that there will be no significant impact on small businesses. Having mentioned huge potential losses to landowners and the county economy, the DEA fails to carefully consider the sum of the many "indirect" effects of critical habitat designation, ignoring all but direct costs of consultation.

Our Response: Section 5 of the addendum presents a regulatory flexibility analysis that is consistent with the RFA/SBREFA. Federal courts and Congress have indicated that an RFA/SBREFA analysis should be limited to the impacts to entities subject to the requirements of the regulation (Service, 2002). As such, entities not directly regulated by the listing or critical habitat designation are not considered in the RFA/SBREFA analysis. Based on the analysis, there are no small entities that may be impacted by the implementation of the Act's section 7 provisions for the plants on Kauai. Therefore, the plants' critical habitat designation, as modified, will not have a significant economic impact on a substantial number of small entities.

(61) *Comment:* Several commenters stated the following: While the Service has stated that critical habitat affects only activities that require Federal permits or funding, and does not require landowners to carry out special management or restrict use of their land, this fails to address the breadth of Federal activities that affect private property in Hawaii and the extent to which private landowners are required to obtain Federal approval before they can use their property. These requirements also extend to State agencies requiring Federal funds or approvals.

Our Response: The analysis in the DEA, as revised by the Addendum, is based on a review of all projects, activities, and land uses that may be directly affected by the implementation of section 7 for the listed plants. The DEA and the Addendum present any reasonably foreseeable Federal

involvement (Federal permit, license, or other authorization, or Federal funding) for these projects, activities, and land uses. These results of this analysis are presented in Table ES-1 in the DEA and Table Add-2 in the Addendum.

(62) *Comment:* Several commenters stated the following: The impact of the proposed designations under State law is potentially more extensive than under Federal law since the Act contains at least general criteria for determining when alteration of critical habitat constitutes "destruction or adverse modification." The lack of analogous provisions under State law lends itself to a much broader interpretation of what activities might be considered injurious to the species (and therefore prohibited). One commenter asked if, to the extent that the Service has considered the potential interplay between the Act and State statutes, whether the Service is aware of any circumstances where similar issues have been raised under other State conservation statutes when critical habitat was designated. Another commenter noted, however, that because Hawaii's land use laws are uniquely onerous, precedent from other states is of little value. The current wave of proposals to designate critical habitat are the first time that the Act has been applied to significant areas of private land in Hawaii. Consequently, even prior experience in Hawaii is of little relevance.

Our Response: Possible costs resulting from interplay of Federal Endangered Species Act and Hawaii State law are already discussed in the DEA and Addendum under indirect costs (e.g., possible conservation management mandate for the private landowner and reduction in game mammals population). The lack of experience with critical habitat on private land in Hawaii is reflected in the uncertainty regarding the probabilities that certain indirect costs will occur.

(63) *Comment:* Several commenters stated the following: The DEA fails to consider economic impacts of listing and critical habitat that result through interaction with State law, specifically Hawaii's Endangered Species Act. *New Mexico Cattlegrowers Association v. U.S. Fish and Wildlife Service* requires consideration of the impact of listing as well as the impact of designating an area as critical habitat. Instead, the analysis is expressly limited to the impact of Federal agency consultation under the jeopardy standard. However, since listing triggers listing under State law, the Service must consider the impact of take prohibitions under State law (and consequently Federal law which

prohibits destruction of plants in knowing violation of State law).

Our Response: The DEA and Addendum consider 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, they examine 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.

(64) *Comment:* Several commenters stated the following: The DEA fails to consider economic impacts of critical habitat that result through interaction with State law, specifically Hawaii's Land Use Law. Critical habitat could result in downzoning under State law. HRS § 205-2(e) states that conservation districts shall include areas necessary for conserving endangered species. HRS 195D-5.1 states that DLNR shall initiate amendments in order to include the habitat of rare species. Even if DLNR does not act, the Land Use Commission may initiate such changes, or they may be forced by citizen suits. Areas for endangered species are placed in the protected subzone with the most severe restrictions. While existing uses can be grandfathered in, downzoning will prevent landowners from being able to shift uses in the future, reduce market value, and make the land unmortgageable. Although the Service acknowledges that there could be substantial indirect costs relating to redistricting of land to the Conservation District, several commentators disagreed with the characterization of these costs as "minor" and with the statement that the probabilities of redistricting as "slight to small."

Our Response: About 370 acres of privately owned agricultural lands and 12 acres of privately owned urban lands are included in the final designation. Most of the agricultural land is on Niihau and all of the urban land is on steep ocean cliffs. The potential economic costs discussed in the DEA of over \$10 million associated with urban Land in Unit D1 are no longer anticipated because Unit D1 has been removed from the final critical habitat designation for biological reasons. Reduction in land values due to redistricting land from Agricultural or