

Continued operation of the systems require registration permits from the State and, depending on the nature of the maintenance, may require Army Corps of Engineers (COE) permits. These uses should not be burdened with the threat of potential Federal or civil action prohibiting or delaying their continued or expanded use. Furthermore, any additional requirement brought about by a critical habitat designation would be borne by the system's end users. Similarly, restoration of the taro fields in Haena State Park would require a COE permit. The designation of this area as critical habitat would make it unlikely that this permit would be approved, thus frustrating the efforts and development of the park. Additional analysis of costs associated with hydropower development is warranted. Such analysis would indicate that agricultural lands and hydropower development should be excluded from designation of critical habitat because benefits of exclusion would far outweigh the benefits of designation and the exclusion would not result in the extinction of the species.

*Our Response:* The irrigation system stemming from the North Fork diversion of the Wailua River, the diversion and hydropower plant located in Wainiha Valley, the taro fields in Haena State Park, and all areas downstream from these water systems/improvements have been removed from the critical habitat as modified in this final rule. In addition, as noted in responses to other comments, none of the listed plants are aquatic and therefore would not cause a reduction in water diversion. Thus, no costs are expected from continued operation of these water systems.

Chapter VI, section 3.i. of the DEA discusses the potential for additional hydropower development in the areas proposed as critical habitat. Since the publication of the DEA, information regarding a hydropower diversion and powerhouse in the upper Wainiha Valley was made available. This hydropower plant was proposed in the 1980's, but due to the landowner's capital limitations at the time, it was not constructed. There are no current plans to continue to investigate the feasibility of the project, but the potential for future development adds to the land value of the Upper Wainiha Valley. However, the area planned for the diversion, powerhouse, and other project elements are no longer included in critical habitat as modified. As such, no costs associated with future hydropower development potential are anticipated.

(69) *Comment:* One commenter stated the following: In discussing possible future hydropower facilities, the DEA appears to contradict itself by saying that in May 2001 a company filed an application with the Federal Energy Regulation Commission for a preliminary permit and then saying it is "highly unlikely" that any additional hydro plants will be built. If critical habitat designations make it all but impossible to build a new hydropower facility, which seems to be the implication of the DEA, then the designations contradict the State and national policies of promoting energy independence.

*Our Response:* Chapter VI, Section 3.i. of the DEA does mention that in May 2001, a company filed an application with the Federal Energy Regulatory Commission (FERC) to build a dam on the lower Wailua River and that the area affected by this project is outside of critical habitat. The DEA also states that "it is highly unlikely that additional plants will be built in the next 10 years in areas that could impact the proposed critical habitat." This statement is supported by studies performed by the State Department of Business, Economic Development, and Tourism (DBEDT) of the areas in critical habitat, and current plans of those who own land in critical habitat. In addition, the planned generating capacity on Kauai is sufficient to supply projected demand over the 10-year period of the analysis. Since the proposed critical habitat does not cover the entire island of Kauai, these two statements are not contradictory.

Furthermore, development of a new hydropower plant would still be possible even if the hydropower plant was located upstream or within critical habitat. If the project had Federal involvement, and the Federal action agency determined the project may affect critical habitat or listed species, the Federal action agency would enter into section 7 consultation with the Service. The section 7 consultation process is described in detail in Chapter III of the DEA.

(70) *Comment:* One commenter stated the following: On Maui, there is an administrative contested case proceeding pending before the Board of Land and Natural Resources that involves the diversion of millions of gallons of water. Any diversion in or upstream of critical habitat will be challenged by people who oppose all diversions on principle. They will contend that diverting water from endangered plants risk driving them to extinction. Opponents of diversions could use the critical habitat

designations to invent a colorable argument sufficient to delay and confuse water use decisions.

*Our Response:* Chapter VI, section 3.j.(2). of the DEA states that it is highly unlikely that a new ditch system or major expansion to an existing one (including new diversions) would be proposed or approved in the proposed critical habitat. This assessment is made due to the existing protections provided by the baseline environmental regulations (described in Chapter IV of the DEA), the projected demand for additional diversions for irrigation above and beyond the existing supply, and current environmental concerns, as well as likely public opposition to stream diversions.

None of the plants for which critical habitat is designated on Kauai or Niihau in this final rule are aquatic. These plants rely on rainwater that percolates down through the substratum and is absorbed by the plant's roots. Thus, local rainfall and localized surface runoff are the critical factors that affect the habitat of the listed plants. In addition, water infrastructure, including irrigation systems, are considered manmade features and therefore would not be included in critical habitat pursuant to the rule, because these features and structures normally do not contain, and are not likely to develop, any primary constituent elements. Thus, unless its operation and maintenance would indirectly affect critical habitat, which is not anticipated, it should not be affected by section 7 of the Act. (See comment 7.m. of the Economic Analysis for a discussion of the impacts of the proposed designation on potential new water diversions.)

We are unable to find documentation of extinction of Hawaiian plants due to water diversions and are unable to comment on the speculation that people who oppose all water diversions on principle will challenge any future or current diversions by contending that diverting water from endangered plants risks driving them to extinction.

(71) *Comment:* Two commenters stated the following: The estimated total costs of designating critical habitat are deceptively low because they exclude costs that "are difficult to estimate." However, the costs of conservation management are quantifiable and examples of cost per acre are available from watershed management projects around the State. There is no reason why these costs should be ignored in the DEA. If included, these costs will certainly outweigh the benefits of designation. The DEA also underestimates the economic costs because they are limited to what is