

likely to occur within 10 years even though critical habitat designation is permanent and not automatically revised if there is new evidence of the benefits of non-designation, or if the species is delisted.

Our Response: As noted above, the illustrative cost of conservation management of the entire critical habitat as modified is \$1.8 million per year. In addition, as discussed in the economic analysis, while there is no existing obligation to proactively manage lands in critical habitat to control threats, there is an undetermined probability that a State or Federal court could mandate conservation management.

A listed species is delisted when it is recovered or has gone extinct. Recovery is defined as no longer needing the protections provided by the Endangered Species Act, including critical habitat. As such, when a species is delisted, its critical habitat would also be "undesigned." Furthermore, as indicated by the DEA, many landowners and managers do not have specific plans for projects beyond 10 years, and forecasts of future economic activity are based on current socio-economic trends and the current level of technology, both of which are likely to change over the long term. However, information available in documents with planning horizons that are longer than 10 years such as the Kauai Planning Department's Kauai General Plan (2002), and the State Department of Transportation Kauai Long Range Land Transportation Plan (1997) are considered in the preparation of the DEA and the Addendum.

(72) *Comment:* One commenter stated the following: The conclusion under E.O. 12866 that the rule will not have an annual economic effect of \$100 million or more, or adversely affect in a material way any sector of the economy or State or local governments or communities, is flawed because it does not consider the major adverse impacts from secondary effects.

Our Response: For the reasons explained in the economic analysis, the rule is not expected to have an annual economic effect of \$100 million or more. As indicated in Table Add-2, the annualized direct costs of the implementation of section 7 for the listed plants ranges from approximately \$17,800 to \$112,500. While the probability that many of the indirect effects will occur is low or unknown, the total worst case scenario for the indirect costs of critical habitat, as modified, includes (1) \$513,000 in direct and indirect annual sales from the loss of economic activity associated with hunting (however, the decrease in

expenditures by the displaced hunters would probably be spent on other recreational activities, goods and services, so this figure is likely to overstate the economic costs); (2) \$149,000 per year in the loss of hunter benefits (however, as above, some of this loss will be offset by benefits derived from alternative recreational activity); (3) \$1.8 million in annual conservation management costs (some of which may be in the form of new Federal funds to Hawaii and thus represent an increase the regional economy instead of a loss); (4) approximately \$178,500 in lost property values; (5) \$3,570 in an annual loss of economic activity associated with ranching; (6) \$500 in increased property taxes; (7) \$25,000 to \$75,000 in the additional cost to prepare an EIS; and (8) \$53,000 to \$169,000 in the costs to investigate the implications of critical habitat. Annualized, these indirect costs amount to \$2.49 million to \$2.51 million per year. The sum of the direct and indirect costs, annually, ranges from \$2.51 million to \$2.62 million, significantly less than the \$100 million level of significance.

(73) *Comment:* Several commenters stated the following: Critical habitat designation could indirectly result in limitations or special management requirements, such as fencing or control of invasive species, being established on private lands. These requirements could result in considerable cost to both the State and private landowners. The DEA estimates that the Palila case may be interpreted to mandate private conservation and could cost Kauai landowners \$3 million or more per year. These costs should be considered. Where such costs are likely to outweigh the benefits, the Service should determine that critical habitat designation is not prudent. At minimum, areas proposed for designation should be significantly reduced so that any special management measures that may eventually be mandated through litigation are of a scale that is reasonable and cost effective to implement.

Our Response: Section 4(a)(3)(A) of the Act directs the Secretary to designate critical habitat to the "maximum extent prudent and determinable." Critical habitat is not prudent when one or both of the following situations exist: (i) A species is threatened by taking or other human activity and identification of critical habitat would increase the degree of threat; or (ii) designation would not be beneficial to the species. 50 CFR 424.12(a)(1). Thus the costs of designation are not considered in

analyzing whether critical habitat is prudent. However, such costs are considered under section 4(b)(2) of the Act, which directs the Secretary to take into consideration the economic and other impacts of designation and authorizes the Secretary to exclude any area if she determines that the benefits of exclusion outweigh the benefits of designating it as critical habitat, unless it will result in extinction of the species.

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, the DEA and the Addendum discuss the potential mandate for conservation management pursuant to litigation and the resulting costs for the proposed designation on Kauai. The cost of conservation management for the critical habitat as modified could be approximately \$1.8 million per year. However, there is an undetermined probability that this impact will occur.

(74) *Comment:* Several commenters stated the following: The cost of potential citizen suits preventing certain activities or requiring some sort of management in critical habitat was not discussed in the DEA. Litigation regarding land management requirements is not only foreseeable, but likely. The proposals will give the government and the environmental groups a legal excuse to attack and severely damage anyone who grows endangered Hawaiian plants, and also anyone whose land is listed as critical habitat. Human freedom and constitutional principles are far more important than biologically incompetent plants. Critical habitat designation will bring unnecessary and costly litigation, thus creating an economic disaster that would severely challenge one private landowner's economic viability. These official listings will also give the government and the environmental groups a legal excuse to meddle destructively in the affairs of Niihau.

Our Response: As discussed in the DEA and in the Addendum, an undetermined probability exists that a Federal or State court could mandate certain indirect impacts as a result of critical habitat. However, it is beyond the scope of the economic analysis to assess the legal merits of the arguments for or against the various indirect impacts, the probability that a lawsuit will be filled, and, if filed, to identify possible outcomes of a court decision and the associated probabilities. However, whenever possible, the DEA and the Addendum present the worst-