

elements or were more degraded than other available proposed or designated habitat for the species.) Thus this final rule represents no increase in impacts beyond the revised proposed rule.

### Taxonomic Changes

At the time we listed *Cyrtandra limahuliensis*, *Delissea undulata*, *Hibiscus brackenridgei*, *Lipochaeta fauriei*, *Lipochaeta micrantha*, *Lipochaeta waimeaensis*, and *Mariscus pennatifolius*, we followed the taxonomic treatments in Wagner *et al.* (1990), the widely used and accepted *Manual of the Flowering Plants of Hawaii*. Subsequent to the final listing, we became aware of new taxonomic treatments of these species. Also, the soon-to-be-published book *Hawaii's Ferns and Fern Allies* (Palmer, in press) has changed the family name for *Ctenitis squamigera* (from Aspleniaceae to Dryopteridaceae). Due to the court-ordered deadlines, we are required to publish this final rule to designate critical habitat on Kauai and Niihau before we can prepare and publish a notice of taxonomic changes for these eight species. We plan to publish a taxonomic change notice for these eight species after we have published the final critical habitat designations on Kauai and Niihau.

### Required Determinations

#### Regulatory Planning and Review

In accordance with Executive Order 12866, the Office of Management and Budget (OMB) has determined that this is a significant regulatory action because it may raise novel legal or policy issues. As required by the executive order, we have provided a copy of the rule, which describes the need for this action and how designation meets that need and the economic analysis, which assesses the costs and benefits of this critical habitat designation, to OMB for review. OMB did not recommend or make any changes in this regulatory action.

#### Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility

analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Federal courts and Congress have indicated that an RFA/SBREFA analysis may be limited to all impacts to entities directly subject to the requirements of the regulation (Service 2002). As such, entities indirectly impacted by the plant listings and critical habitat and, therefore, not directly regulated by the listing or critical habitat designation are not considered in this section of the analysis.

In today's rule, we are certifying that the designation of critical habitat for the 83 Kauai and Niihau species will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale.

Small entities include small organizations, such as independent non-profit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

To determine if the rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting, etc.). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also

consider whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation. In areas where the species are present, Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect any one of the 83 species. Federal agencies must also consult with us if their activities may affect critical habitat. However, in areas where the species are present, we do not believe that this will result in any additional regulatory burden on Federal agencies or their applicants because consultation would already be required due to the presence of the listed species, and the duty to avoid adverse modification of critical habitat likely would not trigger additional regulatory impacts beyond the duty to avoid jeopardizing the species.

Even if the duty to avoid adverse modification does not trigger additional regulatory impacts in areas where the species is present, designation of critical habitat could result in an additional economic burden on small entities due to the requirement to reinstitute consultation for ongoing Federal activities. However, since these 83 plant species were listed (between 1991 and 1996), there have been no formal consultations, and we have conducted only six informal consultations, in addition to consultations on Federal grants to State wildlife programs, which would not affect small entities. On the island of Kauai the six informal consultations have concerned nine of the 83 species (*Alsinidendron lychnoides*, *Cyanea recta*, *Cyrtandra limahuliensis*, *Diellia erecta*, *Dubautia latifolia*, *Exocarpos luteolus*, *Panicum niihauense*, *Sesbania tomentosa*, and *Wilkesia hobbeyi*) and were conducted with the Corps, Navy, and the U.S. Department of Agriculture. One informal consultation was conducted on behalf of the Corps for the Defense Environmental Restoration Program, who requested a list of endangered species on a site formerly used by the Department of Defense at the Wailua Impact Area. Three of the 83 species, *Cyanea recta*, *Cyrtandra limahuliensis*, and *Exocarpos luteolus*, were reported from the project area. Four informal consultations were conducted with the Navy: one for the construction of a missile support facility at the PMRF at Barking Sands regarding several listed