



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2011–0098]

[4500030113]

RIN 1018–AX14

Endangered and Threatened Wildlife and Plants; Listing 38 Species on Molokai, Lanai, and Maui as Endangered and Designating Critical Habitat on Molokai, Lanai, Maui, and Kahoolawe for 135 Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our June 11, 2012 (77 FR 34464), proposal to list 38 species as

endangered, reaffirm the listing of 2 endemic Hawaiian plants currently listed as endangered, and designate critical habitat for 39 of these 40 plant and animal species on the Hawaiian Islands of Molokai, Lanai, and Maui; designate critical habitat for 11 plant and animal species that are already listed as endangered; and revise critical habitat for 85 plant species that are already listed as endangered or threatened on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe, under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed designation and an amended required determinations section of the proposed designation. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, and the amended required determinations section. Comments previously submitted on this rulemaking do not need to be resubmitted, as they will be fully considered in preparation of the final rule. We also announce a public hearing and public information meeting on our proposed rule and associated documents.

DATES: *Written Comments:* We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Please note comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date. If you are submitting your comments by hard copy, please mail them by [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL

REGISTER PUBLICATION], to ensure that we receive them in time to give them full consideration.

Public Information Meeting: We will hold a public information meeting in Kihei, Maui, on Thursday, February 21, 2013, from 3 p.m. to 5 p.m. (see **ADDRESSES** section, below).

Public Hearing: We will hold a public hearing in Kihei, Maui, on Thursday, February 21, 2013, from 6 p.m. to 8 p.m. (see **ADDRESSES** section, below).

ADDRESSES: Document Availability: You may obtain copies of the June 11, 2012, proposed rule, this document, and the draft economic analysis at <http://www.regulations.gov> at Docket Number FWS–R1–ES–2011–0098, from the Pacific Islands Fish and Wildlife Office’s website (<http://www.fws.gov/pacificislands/>), or by contacting the Pacific Islands Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT**).

Written Comments: You may submit written comments by one of the following methods, or at the public information meeting or public hearing:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Search for Docket No. FWS–R1–ES–2011–0098, which is the docket number for this rulemaking, and follow the directions for submitting a

comment.

(2) *By hard copy*: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R1–ES–2011–0098; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Public Information Meeting and Public Hearing: Both the public information meeting and the public hearing will be held in the multi-purpose room at the Kealia Pond National Wildlife Refuge, Milepost 6, Mokulele Highway (Highway 311), Kihei, Maui; 808–875–1582.

We will post all comments we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Loyal Mehrhoff, Field Supervisor, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Box 50088, Honolulu, HI 96850; by telephone at 808–792–9400; or by facsimile at 808–792–9581. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed rule that was published in the **Federal Register** on June 11, 2012 (77 FR 34464), our draft economic analysis of the proposed critical habitat designation, and the amended required determinations section provided in this document.

On June 11, 2012, we published a proposal (77 FR 34464) to list 38 species as endangered, reaffirm the listing of 2 endemic Hawaiian plants currently listed as endangered, and designate critical habitat for 39 of these 40 plant and animal species on the Hawaiian Islands of Molokai, Lanai, and Maui; designate critical habitat for 11 plant and animal species that are already listed as endangered, and revise critical habitat for 85 plant species that are already listed as endangered or threatened on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe. Later this year, we will publish two separate final rules: one concerning the listing determinations described above, and the other concerning the critical habitat determinations described above. The final listing rule will publish under the existing Docket No. FWS-R1-ES-2011-0098, and the final critical habitat designation will publish under Docket No. FWS-R1-ES-2013-0003.

We request that you provide comments specifically on our listing determination under Docket No. FWS-R1-ES-2011-0098. We will consider information and

recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning threats (or the lack thereof) to the 40 species proposed or reevaluated for listing, and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population sizes of each of the 40 species proposed or reevaluated for listing, including the locations of any additional populations of these species.

(3) Any information on the biological or ecological requirements of the 40 species proposed or reevaluated for listing.

(4) Comments on our proposal to revise taxonomic classification with name changes or family changes for 11 plant species and 2 bird species identified in the proposed rule.

We request that you provide comments specifically on the critical habitat determination and related draft economic analysis under Docket No. FWS-R1-ES-2013-0003. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(5) The reasons why we should or should not designate areas for any of the 135 species as “critical habitat” under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to these species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to these species caused by the designation, such that the designation of critical habitat is prudent.

(6) Whether a revision of critical habitat is warranted for the 85 plant species that are already listed as endangered or threatened under the Act and that currently have designated critical habitat.

(7) Specific information on:

- The amount and distribution of critical habitat for the 135 species;
- Areas in the geographic area occupied at the time of listing and that contain the physical or biological features essential for the conservation of the species;
- Whether special management considerations or protections may be required for the physical or biological features essential to the conservation of the 135 species; and
- What areas not currently occupied are essential to the conservation of the species and why.

(8) Land use designations and current or planned activities in the areas occupied or unoccupied by the species and proposed as critical habitat, and the possible impacts of these activities on these species, or of critical habitat on these designations or activities.

(9) Any foreseeable economic, national security, or other relevant impacts of designating any area as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that may experience these impacts.

(10) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act, after considering the potential impacts and benefits of the proposed critical habitat designation. We are considering the possible exclusion of non-Federal lands, especially areas in private ownership, and whether the benefits of exclusion may outweigh the benefits of inclusion of those areas. We, therefore, request specific information on:

- The benefits of including any specific areas in the final designation and supporting rationale.
- The benefits of excluding any specific areas from the final designation and supporting rationale.

- Whether any specific exclusions may result in the extinction of the species and why.

For private lands in particular, we are interested in information regarding the potential benefits of including private lands in critical habitat versus the benefits of excluding such lands from critical habitat. This information does not need to include a detailed technical analysis of the potential effects of designated critical habitat on private property. In weighing the potential benefits of exclusion versus inclusion of private lands, the Service may consider whether existing partnership agreements provide for the management of the species. We may consider, for example, the status of conservation efforts, the effectiveness of any conservation agreements to conserve the species, and the likelihood of the conservation agreement's future implementation. We request comment on the broad public benefits of encouraging collaborative efforts and encouraging local and private conservation efforts.

(11) Our process used for identifying those areas that meet the definition of critical habitat for the species, as described in the section of the proposed rule titled "Criteria Used to Identify Critical Habitat."

(12) Information on the extent to which the description of potential economic impacts in the draft economic analysis is complete and accurate.

(13) Whether the draft economic analysis makes appropriate assumptions regarding current practices and any regulatory changes that will likely occur as a result of the designation of critical habitat.

(14) Whether the draft economic analysis identifies all Federal, State, and local costs and benefits attributable to the proposed designation of critical habitat, and information on any costs that may have been inadvertently overlooked. For example, are there any costs resulting from critical habitat designation related to the enhancement or maintenance of nonnative ungulates for hunting programs?

(15) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(15) Specific information on ways to improve the clarity of this rule as it pertains to completion of consultations under section 7 of the Act.

Our final determination concerning listing 38 species as endangered and designating critical habitat for 135 species on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe will take into consideration all written comments and information we receive during both comment periods, from peer reviewers, and during the public information meeting, as well as comments and public testimony we receive during the

public hearing. The comments will be included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determinations. On the basis of peer reviewer and public comments, as well as any new information we may receive, we may, during the development of our final determination concerning critical habitat, find that areas within the proposed critical habitat designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

If you submitted comments or information on the proposed rule (June 11, 2012; 77 FR 34464) during the comment period from June 11, 2012, to September 10, 2012 (77 FR 47587), please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations.

You may submit your comments and materials concerning the proposed rule or draft economic analysis by one of the methods listed in the **ADDRESSES** section. Verbal testimony may also be presented during the public hearing (see **DATES** and **ADDRESSES** sections). We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you submit your comment via U.S. mail, you may request at the top of your document that we withhold personal information such as your street address, phone number, or e-mail address from public

review; however, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and draft economic analysis, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R1–ES–2011–0098 or Docket No. FWS–R1–ES–2013–0003, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Information Meeting and Public Hearing

We are holding a public information meeting and a public hearing on the date listed in the **DATES** section at the address listed in the **ADDRESSES** section (above). We are holding the public hearing to provide interested parties an opportunity to present verbal testimony (formal, oral comments) or written comments regarding the proposed listing or re-evaluation of the listing of 40 species as endangered and proposed designation of critical habitat for 135 species on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe, and the associated draft economic analysis. A formal public hearing is not, however, an opportunity for dialogue with the Service; it is only a forum for accepting formal verbal testimony. In contrast to the hearing, the public information meeting will allow the public the opportunity to interact with Service staff who will be available to provide information and address questions on the proposed rule and its

associated draft economic analysis. We cannot accept verbal testimony at the public information meeting; verbal testimony can only be accepted at the public hearing. Anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a written copy of their statement to us at the hearing. At the public hearing, formal verbal testimony will be transcribed by a certified court reporter and will be fully considered in the preparation of our final determination. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up at the hearing if they desire to make an oral statement. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Persons with disabilities needing reasonable accommodations to participate in the public information meeting or public hearing should contact Loyal Mehrhoff, Field Supervisor, Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Reasonable accommodation requests should be received at least 3 business days prior to the public information meeting or public hearing to help ensure availability; at least 2 weeks prior notice is requested for American Sign Language needs.

Background

The topics discussed below are relevant to designation of critical habitat for 135

species on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe in this document. For more information on previous Federal actions concerning these species, refer to the proposed listing and designation of critical habitat published in the **Federal Register** on June 11, 2012 (77 FR 34464), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R1–ES–2011–0098) or from the Pacific Islands Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On June 11, 2012, we published a proposed rule (77 FR 34464) to list 38 species as endangered and designate or revise critical habitat for 135 plant and animal species. We proposed to designate a total of 271,062 acres (ac) (109,695 hectares (ha)) on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe (collectively called Maui Nui) as critical habitat. Within that proposed rule, we announced a 60-day comment period, which we subsequently extended for an additional 30 days (77 FR 47587); in total, the comment period began on June 11, 2012, and ended on September 10, 2012. Approximately 47 percent of the area proposed as critical habitat is already designated as critical habitat for other species, including 85 plant species for which critical habitat was designated in 1984 (49 FR 44753; November 9, 1984) and 2003 (68 FR 1220, January 9, 2003; 68 FR 12982, March 18, 2003; 68 FR 25934, May 14, 2003).

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency unless it is exempted pursuant to the provisions of the Act (16 U.S.C. 1536(e)-(n) and (p)). Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consistent with the best scientific data available, the standards of the Act, and our regulations, we have initially identified, for public comment, a total of 271,062 ac (109,695 ha) in 100 units for the plants, 44 units for each of the 2 forest birds, 5 units for each of the Lanai tree snails, and one unit for the Maui tree snail, located on the Hawaiian Islands of Molokai, Lanai, Maui, and Kahoolawe, that meet the definition of critical habitat for the 135 plant and animal species. In addition, the Act provides the Secretary with the discretion to exclude certain areas from the final designation after taking into consideration economic impacts, impacts on national security, and any other relevant

impacts of specifying any particular area as critical habitat.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat. In the case of the 135 Maui Nui species, the benefits of critical habitat include public awareness of the presence of one or more of these species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the species due to protection from adverse modification or destruction of critical habitat. In

practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. We also consider the potential economic impacts that may result from the designation of critical habitat.

In the proposed rule, we identified several areas to consider excluding from the final rule. We are considering excluding from the final designation approximately 40,973 ac (16,582 ha) of private lands that have a perpetual conservation easement, voluntary conservation agreement, conservation or watershed preserve designation, or similar conservation protection.

These specific exclusions will be considered on an individual basis or in any combination thereof. In addition, the final designation may not be limited to these exclusions, but may also consider other exclusions as a result of continuing analysis of relevant considerations (scientific, economic, and other relevant factors, as required by the Act) and the public comment process. In particular, we solicit comments from the public on whether all of the areas identified meet the definition of critical habitat, whether other areas would meet that definition, whether to make the specific exclusions

we are considering, and whether there are other areas that are appropriate for exclusion.

The final decision on whether to exclude any area will be based on the best scientific data available at the time of the final designation, including information obtained during the comment periods and information about the economic impact of the designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES** section).

Draft Economic Analysis

The purpose of the draft economic analysis (DEA) is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the 135 Maui Nui species.

The DEA describes the economic impacts of potential conservation efforts for the 135 Maui Nui species; some of these costs will likely be incurred regardless of whether we designate critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for these species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore,

represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the 135 species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for these species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act.

The "without critical habitat" scenario represents the baseline for the analysis, and considers the protections already afforded the Maui Nui species regardless of critical habitat designation. The baseline for this analysis is the state of regulation, absent designation of critical habitat that provides protection to the species under the Act, as well as under other Federal, State, and local laws and conservation plans. The baseline includes sections 7, 9, and 10 of the Act to the extent that they are expected to apply absent the designation of critical habitat for the species. The analysis qualitatively describes how baseline conservation for the Maui Nui species is currently implemented across the proposed designation in order to provide context for the incremental analysis (Chapters 3, 4 and 5 of the DEA). The "with critical habitat" scenario describes and monetizes the incremental impacts due specifically to the designation of critical habitat for the species. The incremental Maui Nui conservation efforts and associated impacts

are those not expected to occur absent the designation of critical habitat, and constitute the potential incremental costs attributed to critical habitat over and above those baseline costs attributed to listing. For a further description of the methodology of the analysis, see Chapter 2, “Framework for the Analysis,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the 135 Maui Nui species over the next 10 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 10-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA separately identifies the potential incremental costs of the critical habitat designation on lands being considered for exclusion under section 4(b)(2) of the Act.

In the DEA, we concentrated on the activities of primary concern with respect to potential adverse modification of critical habitat. The key concern is the potential for activities to result in ground disturbance within a critical habitat unit. Such activities include commercial and residential development, and agricultural (grazing and farming) activities. In addition, we also evaluated potential impacts to renewable energy projects, as these projects: (1) Have the potential to generate ground disturbance; and (2)

contribute to the State of Hawaii's ability to meet its established renewable portfolio standards, which are mandated by the State. Our analysis therefore focuses on the following activities:

- Residential and commercial development;
- Grazing and farming activities; and
- Renewable energy developments.

Within these activity categories, we focus our analysis on those projects and activities that are considered reasonably likely to occur within the proposed critical habitat area. This includes projects or activities that are currently planned or proposed, or that permitting agencies or land managers indicate are likely to occur.

When a species is federally listed as an endangered or threatened species, it receives protection under the Act. For example, under section 7 of the Act, Federal agencies must consult with the Service to ensure that actions they fund, authorize, or carry out do not jeopardize the continued existence of the species. Economic impacts of conservation measures undertaken to avoid jeopardy to the species are considered baseline impacts in our analysis as they are not generated by the critical habitat designation. In other words, baseline conservation measures and associated economic impacts are not affected by decisions related to critical habitat designation for these species. Other baseline protections accorded listed species under the Act and other Federal and State regulations and programs are described in Chapters 2 through 5 of the

DEA.

The only Federal regulatory effect of the designation of critical habitat is the prohibition on Federal agencies taking actions that are likely to adversely modify critical habitat. They are not required to avoid or minimize effects unless the effects rise to the level of destruction or adverse modification as those terms are used in section 7 of the Act. Even then, the Service must recommend reasonable and prudent alternatives that can be implemented consistent with the intended purpose of the action, that are within the scope of the Federal agency's legal authority and jurisdiction, and that are economically and technologically feasible. Thus, while the Service may recommend conservation measures, unless the action is likely to destroy or adversely modify critical habitat, implementation of recommended measures is voluntary and Federal agencies and applicants have discretion in how they carry out their section 7 mandates.

Thus, the direct, incremental impacts of critical habitat designation stem from the consideration of the potential for destruction or adverse modification of critical habitat during section 7 consultations. The two categories of direct, incremental impacts of critical habitat designation are: (1) The administrative costs of conducting section 7 consultation; and (2) implementation of any conservation efforts requested by the Service through section 7 consultation, or required by section 7 to prevent the destruction or adverse modification of critical habitat.

The DEA describes the types of project modifications currently recommended by the Service to avoid jeopardy to listed plant, forest bird, and tree snail species (“baseline” project modifications). These baseline project modifications would be recommended in occupied habitat areas regardless of whether critical habitat is designated for these species. Although the standards for jeopardy and adverse modification of critical habitat are not the same, because the degradation or loss of habitat is a key threat to the Maui Nui species, our jeopardy analyses for these species would already consider the potential for project modifications to avoid the destruction of habitat; therefore recommendations to avoid jeopardy would also likely avoid adverse modification or destruction of critical habitat for these species. The Service estimates that the only project modification that may be recommended to avoid adverse modification of critical habitat above and beyond what would be recommended to avoid jeopardy to the species would be in cases where permanent impacts to critical habitat are unavoidable; in such cases, the Service would recommend that habitat loss be offset elsewhere in designated critical habitat, preferably within the critical habitat unit where the loss occurred. In other words, while the Service may recommend that habitat loss be offset even absent critical habitat designation, critical habitat designation may generate the additional specification that the offset occur within the critical habitat unit. In occupied critical habitat, therefore, the incremental impacts are most likely limited to the potential incremental cost of offsetting habitat loss within the critical habitat unit that is affected as opposed to outside of the unit. In

addition, as noted above, any such offsets are not required unless necessary to avoid violating the prohibition of section 7, but to be conservative regarding potential incremental costs of the proposed critical habitat designation, we have assumed that the Federal agency or applicant may choose to implement the recommended offsets.

With regard to occupied habitat, our analysis finds that, in most cases, the recommendation that ground disturbance be offset within the critical habitat unit would not generate additional economic impacts. For all of the ongoing and currently planned projects we have identified, conservation measures have been implemented or are currently being planned to occur within the proposed critical habitat unit even absent critical habitat designation. This means that for all recent and currently proposed projects, the Service does not expect to recommend additional or different conservation measures for the species due to critical habitat designation, although the effects of each project on critical habitat would need to be evaluated as appropriate once a final decision has been made on this designation. In addition, we are aware of one proposed project that has accrued incremental costs associated with additional conservation measures implemented in response to the proposed critical habitat (discussed below).

A number of the proposed critical habitat units are not considered to be occupied by the species. Where the species are not present at a project or activity site, section 7 consultations will not consider jeopardy to the species but will consider the potential for adverse modification of critical habitat. In much of the unoccupied critical habitat area,

the presence of the Blackburn's sphinx moth (*Manduca blackburni*) provides extensive baseline protection that includes offsetting loss of habitat. Blackburn's sphinx moth was listed as an endangered species under the Act on February 1, 2000 (65 FR 4770), and critical habitat was designated for the moth on June 10, 2003 (68 FR 34710).

Approximately 42 percent of the proposed critical habitat designation for the Maui Nui species overlaps with the range of the Blackburn's sphinx moth. Within this overlapping area, projects and activities have been subject to section 7 consultation considering the potential effects on Blackburn's sphinx moth over the last 12 years. The Service has regularly recommended conservation offsets to ensure projects and activities avoid jeopardy to the sphinx moth. A number of the projects identified as occurring within the proposed critical habitat area for the Maui Nui species have already been subject to recommendations to incorporate conservation offsets to avoid adversely affecting the sphinx moth. The native vegetation required by the Blackburn's sphinx moth is often identical to, or coexists with, the physical or biological features that are essential to the conservation of the Maui Nui species. Thus, actions to promote native vegetation supporting the Blackburn's sphinx moth will also be beneficial in establishing and providing ecosystems that support plant species identified as essential elements of the physical or biological features of critical habitat for the Maui Nui species, and thus would be adequate to conserve the proposed critical habitat. Therefore, in these areas of overlap with the range of the Blackburn's sphinx moth, in general we do not anticipate additional conservation recommendations as a consequence of critical habitat designation for the Maui Nui species beyond those already in place for the Blackburn's sphinx moth.

The designation of critical habitat may, under certain circumstances, affect actions that do not have a Federal nexus and thus are not subject to the provisions of section 7 under the Act. Indirect impacts are those unintended changes in economic behavior that may occur outside of the Act, through other Federal, State, or local actions, and that are caused by the designation of critical habitat. Chapter 2 of the DEA discusses the common types of indirect impacts that may be associated with the designation of critical habitat, such as time delays, regulatory uncertainty, and negative perceptions related to critical habitat designation on private property. These types of impacts are not always considered incremental. In the case that these types of conservation efforts and economic effects are expected to occur regardless of critical habitat designation, they are appropriately considered baseline impacts in this analysis.

Critical habitat may generate incremental economic impacts through implementation of additional conservation measures (beyond those recommended in the baseline) and additional administrative effort in section 7 consultation to ensure that projects or activities do not result in adverse modification of critical habitat. However, as described above and in Chapter 2 of the DEA, where critical habitat is considered occupied by the Maui Nui species, critical habitat designation is expected to have a more limited effect on economic activities, since section 7 consultation would already occur due to the presence of the species. Although we recognize that the standards for jeopardy and adverse modification of critical habitat are not the same, with the latter focusing

more closely on effects to conservation of the species, in this case and for the reasons described above, the designation of critical habitat in occupied areas would likely result only in incremental effects over and above the costs associated with consultation due to the presence of the species. Furthermore, where proposed critical habitat overlaps with the probable range of the endangered Blackburn's sphinx moth, economic activities are already subject to conservation measures that benefit the Maui Nui species and their critical habitat. The focus of the DEA is projects that are reasonably likely to occur, including but not limited to activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. All of the projects considered reasonably likely to occur in the DEA are in units that are occupied by the Maui Nui species. Critical habitat designation is therefore expected to have a limited effect on these areas. The majority of the proposed critical habitat area is most likely unsuitable for development, farming, or other economic activities due to the rugged mountain terrain and remote location. As a result, there is likely limited overlap between development, grazing and farming activities, or other economic activities, and proposed critical habitat.

For all ongoing and currently planned projects identified in the DEA, conservation offsets have been implemented or are currently being planned, even absent critical habitat designation, that the Service believes may also avoid adverse modification, although such projects would need to be evaluated on a case-by-case basis if and when critical habitat is designated. Therefore, for most of these projects,

incremental impacts of critical habitat designation are expected to be limited to the costs of additional administrative effort in section 7 consultations to consider adverse modification, as described in Chapters 3 and 4 of the DEA. The proposed Honua'ula development, a master-planned community with residential, commercial, and recreational uses on the island of Maui, is an exception. The developer, Honua'ula Partners, LLC, has been working with the Service to develop a habitat conservation plan (HCP) as part of its application for an incidental take permit. In the course of developing this HCP, Honua'ula Partners has implemented some additional conservation measures that are considered an incremental impact of the proposed critical habitat designation, as they were not planned prior to the proposed designation. As a result, the DEA identifies additional costs above and beyond the additional administrative effort in section 7 consultations to consider adverse modification for the Honua'ula development. For the Honua'ula project, the DEA considers the costs of fencing, outplanting, and additional potentially recommended measures, such as removal of invasive plant species, as incremental costs associated with the proposed critical habitat designation.

The DEA monetizes the incremental impacts of critical habitat designation where sufficient data are readily available. We estimate that the critical habitat designation would result in a total present value impact of approximately \$100,000 (7 percent discount rate) to development activities in two proposed units (a total annualized impact of \$20,000 over 10 years). All impacts would likely occur soon after we adopt a final designation (i.e., in 2013), or are currently occurring. These impacts are associated with

two development projects identified as likely to occur within the proposed critical habitat area: Advanced Technology Solar Telescope Expansion at Haleakala Observatories (Maui–Alpine–Unit 1) and Honua’ula development project in Kihei, Maui (Maui–Lowland Dry–Unit 3). These impacts reflect additional administrative effort as part of future section 7 consultation on both projects, and for the Honua’ula project, additional habitat conservation measures implemented as a result of proposed critical habitat designation.

In addition, we estimate a total present value impact of \$10,000 over the next 10 years across two proposed units (an annualized impact of approximately \$1,000) for consultations regarding energy projects. Impacts on energy projects in areas being considered for exclusion are expected to be \$5,000 across two proposed units (an annualized impact of \$700). These costs reflect additional administrative effort to consider critical habitat designation as part of formal consultation on three proposed energy developments.

The DEA also evaluates potential impacts where data limitations prevent quantification (“unquantified impacts”). The key category of unquantified impacts is the potential for a reduction in land value associated with real or perceived land use restrictions associated with the designation of critical habitat, in particular on grazing or farmland. In the case that critical habitat designation directly or indirectly limits future

land use activities (e.g., subdivision), land values would be reduced by an amount equivalent to the fraction of the total land value associated with foregone potential future uses. Lacking information on whether such restrictions may occur, or whether potential buyers may perceive the potential for such restrictions and be unwilling to pay as much for land, we are unable to monetize these impacts. The analysis does, however, qualitatively discuss the potential for land value impacts and highlights the most vulnerable proposed units. Specifically, we identify the following categories of unquantified impacts:

(1) Future development projects. We identified four proposed critical habitat units that may be subject to future development pressure based on communication with local planners and stakeholders. No specific plans exist, however, for development in these units. To the extent that development is planned, critical habitat designation may result in recommendations for conservation as described in Chapter 3 of the DEA. Lacking data and information about the likelihood and characteristics of development, potential impacts are not quantified.

(2) Grazing and Farming. Twenty-three of the proposed critical habitat units overlap with parcels identified as supporting grazing; 13 of these units include areas being considered for exclusion. Ten of the proposed critical habitat units overlap with parcels identified as supporting farming activities; five of these units include areas being considered for exclusion. While critical habitat is unlikely to directly affect these

activities through section 7 consultation, stakeholders are concerned that: (a) The designation would result in changes in the way that the State or county manage these lands; and (b) critical habitat would generate perceptual effects on land values to the extent that potential buyers expect future economic opportunities on these lands to be restricted in some way. These potential impacts are not quantified due to substantial uncertainty regarding their magnitude; they are, however, provided for consideration regarding potential effects of critical habitat on farming and grazing, as discussed in Chapter 5 of the DEA.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if the Secretary determines that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our June 11, 2012, proposed rule (77 FR 34464), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential

effects on landowners and stakeholders became available in the draft economic analysis. We have now made use of the draft economic analysis data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the draft economic analysis data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 13211 (Energy, Supply, Distribution, and Use).

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an 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 effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will

not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our draft economic analysis of the proposed designation, we are certifying that the critical habitat designation for the 135 Maui Nui species, if adopted as proposed, will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). 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 considered the types of activities that might trigger regulatory impacts under this designation as well as 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 could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as: (1) Agricultural, commercial, and residential development; (2) transportation; and (3) livestock grazing and other human activities. We apply the “substantial number” test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only has regulatory effects on activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and will not be affected by critical habitat designation. In areas where any of the 135 Maui Nui species are present, Federal agencies are already required to consult with us under section 7 of the Act on activities they authorize, fund, or carry

out that may affect the species. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the “Adverse Modification” Standard* section of the proposed rule (June 11, 2012; 77 FR 34464)).

In the draft economic analysis, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the 135 Maui Nui species. Quantified incremental impacts that may be borne by small entities are limited to the administrative costs of section 7 consultation related to residential and commercial development, and renewable energy development (IEc 2012, Appendix A). These impacts are relatively limited because relatively few new projects are anticipated within the proposed critical habitat designation, all areas in which such development is considered reasonably likely to occur are occupied by one or more of the Maui Nui species, and, as described above, the Service does not expect to recommend additional or different conservation for the species due to critical habitat designation (IEc 2012, p. 1-8).

The Service’s current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an

endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In doing so, we focus on the specific areas proposed to be designated as critical habitat and compare the number of small business entities potentially affected in that area with other small business entities in the region, instead of comparing the entities in the proposed area of designation with entities nationally, which is more commonly done.

This analysis results in an estimation of a higher number of small businesses potentially affected. In this proposed rulemaking, we calculate that 0.1 percent of the total small entities engaged in residential and commercial development may be affected if and when a final rule becomes effective (IEc 2012, p. A-5). If we were to calculate that value based on the proportion nationally, then our estimate would be significantly lower. In addition, potential economic impacts to small entities are conservatively estimated as 2 percent of annual revenues for entities in the development industry and less than 0.1 percent of entities in the energy industry (IEc 2012, p. A-8). Therefore, we conclude that the economic impacts are not significant. Following our evaluation of potential effects to small business entities from this proposed rulemaking, we conclude that the number of potentially affected small businesses is not substantial, and that the economic impacts are not significant.

Development. Chapter 3 of the DEA discusses the potential for Maui Nui critical habitat to affect development projects. Our evaluation applied the following method: (1) Identify currently planned development activities across the proposed critical habitat area; (2) identify baseline conservation measures relevant to the identified projects due to the presence of the Maui Nui species or other listed species, such as the Blackburn's sphinx moth; (3) determine whether critical habitat is likely to generate additional conservation recommendations or otherwise change the scope or scale of the proposed projects; and (4) quantify the incremental administrative costs of consultation on the identified projects, and any incremental conservation efforts. In addition, we considered

particular areas in which no specific plans for projects exist but for which future development is reasonably likely to occur.

Two development projects are identified as occurring within Maui Nui proposed critical habitat within the timeframe of the analysis: the Advanced Technology Solar Telescope expansion and the Honua'ula project. The two entities undertaking these projects are the University of Hawaii's Institute for Astronomy and Honua'ula Partners, LLC, respectively. The University of Hawaii, with total revenues of over \$25.5 million, is not considered a small entity. Honua'ula Partners, LLC, is a division of Wailea 670 Associates, Inc. Because revenue information was not readily available for Wailea 670 Associates, Inc., we make the conservative assumption that it is a small entity. This one entity represents 0.1 percent of the total small entities engaged in residential and commercial development in the proposed critical habitat. The estimated third party cost to Wailea 670 Associates, Inc. of participating in the forecast consultation, which is a reinitiation of an informal consultation, is approximately \$125,000 (reflecting both administrative effort and implementation of conservation recommendations, as described above). We estimate that this cost represents approximately 2 percent of the entity's annual revenues, which we do not consider to be a significant economic impact.

The Honua'ula development project is a proposed master-planned community in Kihei, Maui, which includes residential, commercial, and retail mixed uses; on-site recreational amenities; open space; and an 18-hole golf course and related facilities. The

proposed project site consists of 670 acres of land, 170 of which overlap with proposed critical habitat Maui–Lowland Dry–Unit 3. The Honua’ula project planning has been underway for over 10 years and has involved State and Federal agencies and community groups. The developer, Honua’ula Partners, LLC, has been working with the Service to develop an HCP as part of its application for an incidental take permit. The draft HCP considers impacts of the project on Blackburn’s sphinx moth and the nēnē (Hawaiian goose, *Branta sandvicensis*), as well as the Maui Nui species. The draft HCP includes a variety of conservation measures, including a 40-acre, on-site conservation easement (“the Native Plant Preservation Area”) and 354 acres of offsite conservation easements. Following publication of the proposed critical habitat rule for the Maui Nui species, the Service reviewed the draft HCP with respect to potential adverse effects on critical habitat. Specifically, because the project is expected to result in the loss of 119.5 acres of lowland dry critical habitat, the Service recommended that Honua’ula Partners:

(1) Increase habitat offsets by 35 acres within lowland dry proposed critical habitat. Prior to the proposed rule, the Service had recommended offsetting habitat loss at a 2:1 ratio. As a result of proposed critical habitat, the Service recommended that the offsets occur within lowland dry critical habitat (although it did not recommend an increase in the 2:1 ratio). While the 394 acres of conservation easements exceeded the Service’s suggested offset ratio, a portion of the planned offset area falls outside of lowland dry critical habitat, generating a recommendation from the Service to increase the area that is being conserved in lowland dry proposed critical habitat by 35 acres.

(2) Increase outplanting efforts for 10 of the species for which Maui–Lowland Dry–Unit 3 is proposed to conserve.

In response to these recommendations, Honua’ula Partners is undertaking the following additional measures. We consider the costs of these measures as incremental impacts of the critical habitat designation, as they were not planned prior to the proposed designation: (1) Honua’ula Partners will provide an additional \$125,000 to contribute to a fencing project on 35 acres of land within lowland dry critical habitat, and perform fence maintenance through the permit period; and (2) Honua’ula Partners will include in their outplanting efforts nine plant species for which Maui Lowland Dry 03 is proposed to conserve (in addition to the awikiwiki (*Canavalia pubescens*), which was already included in the outplanting effort prior to the proposed critical habitat designation). According to Honua’ula Partners, this measure will not result in any additional cost. In addition, Honua’ula Partners noted that the Service made additional recommendations regarding fire break measures, invasive plant species removal, and the extent of nonnative species cover.

In addition to the \$125,000 cost associated with the implementation of these conservation measures for the Honua’ula project, we expect that there would be a reinitiated informal section 7 consultation in 2013 (following critical habitat designation)

to consider adverse modification of critical habitat. The total incremental administrative costs associated with this section 7 consultation are estimated to be \$5,000.

Renewable Energy Development. Chapter 4 of the DEA discusses the potential for Maui Nui critical habitat designation to affect renewable energy development activities. Our evaluation applied the following method: (1) Identify currently planned energy projects across the proposed critical habitat area; (2) identify baseline regulations of energy developments that provide conservation protection to the Maui Nui species within the proposed critical habitat area; (3) determine whether critical habitat would be likely to generate additional conservation recommendations or otherwise change the scope or scale of the proposed projects; and (4) quantify the incremental administrative costs of consultation on the identified projects, and any incremental conservation efforts.

Overall, three projects are forecast to occur within Maui Nui proposed critical habitat during the timeframe of the analysis. The Service anticipates consultation on all of these projects, but, as detailed below, we do not expect critical habitat designation would generate recommendations for additional conservation measures associated with these projects. The entities undertaking these projects are: (1) Molokai Renewables, LLC, a joint venture between Pattern Energy Group LP and Bio-Logical Capital, LLC; (2) Castle & Cooke Resorts, LLC; and (3) ORMAT Technologies, Inc. With revenues in the hundreds of millions of dollars annually, ORMAT Technologies, Inc., is not

considered to be a small entity. Revenue information was not available for the other two entities undertaking energy projects. We therefore make the conservative assumption that these two entities are small. The per-entity cost to participate in the consultation is approximately \$1,000 on an annualized basis, as described below. We estimate that this cost represents less than 0.1 percent of annual revenues, which we do not consider to be a significant economic impact. Here we detail our analysis of these three anticipated energy projects.

The Molokai Renewables Wind Project (MRWP) is a wind energy project in the early planning stages, located on the island of Molokai. Construction for the project is not expected to begin until 2018. The developer, Pattern Energy, LLC, is proposing to construct wind turbines, access roads, a high voltage DC converter station, and transmission cables on lands owned by Molokai Ranch. While the exact location and extent of ground disturbance related to the project is uncertain at this time, it is expected that turbines, access roads, and the converter station will be located north of proposed Molokai–Lowland Dry–Unit 1 and inland from proposed Molokai–Coastal–Unit 1, but will not occur within the proposed units themselves. Several potential alternative locations are being considered for the transmission cable, which will transmit electricity produced on Molokai to Oahu, including one route near, but not overlapping, proposed Molokai–Coastal–Unit 2. Although current plans for the MRWP do not overlap Maui Nui proposed critical habitat, siting of the MRWP is in the early planning stages and is highly uncertain, and the potential for overlap exists. However, in conversations with

Pattern Energy regarding potential economic impacts to the MRWP, representatives from the company indicated that they expect minimal effects of the proposed critical habitat on the siting of their project, including cabling operations. According to the firm, any potential MRWP facilities located in proposed critical habitat would be relocated to avoid impacts to critical habitat with no increase in the price or production cost of energy (i.e., no quantifiable economic impacts). In addition, as described above, even absent critical habitat designation, the Hawaii Clean Energy Programmatic Environmental Impact Statement provides strong baseline regulatory protections, requiring that energy projects avoid effects on listed species and their habitats. Accordingly, we do not anticipate incremental project modifications related to the MRWP, and the effects of critical habitat would be limited to incremental administrative effort as part of a future formal section 7 consultation on this project.

Castle & Cooke is proposing to install approximately 67 wind turbines on lands owned by Lanai Resorts, LLC, on the northwest portion of Lanai. The Lanai Wind Project (LWP) would generate wind energy to be transmitted to Oahu by undersea cable. The wind turbines would span a total area of approximately 7,000 acres, including five turbines and access roads on a small portion of proposed Lanai–Lowland Mesic–Unit 1. As the LWP is currently in early planning stages, the exact locations of structures and access roads generating ground disturbance remain uncertain. It is unlikely, however, that the project would be subject to additional conservation due to the critical habitat designation because Castle & Cooke have indicated that the project will have a very

limited physical footprint and only affect poor quality habitat. Castle & Cooke suggest the area that they are planning for construction of this project is unlikely to contain the physical and biological features of critical habitat for the Maui Nui species due to the existing level of degradation. In addition, they suggest the level of ground disturbance associated with the project will be limited as all access roads associated with the LWP will be located on existing roadways. In the Service's experience, habitat impacts from the installation of wind turbines are, in general, minor, due to the limited project footprint of a wind turbine tower. However, even in the case that the level of ground disturbance constitutes adverse modification, the project would already be subject to considerable conservation measures as identified by the Hawaii Clean Energy Programmatic Environmental Impact Statement (PEIS). It is therefore likely the project would avoid adverse modification of Maui Nui critical habitat even absent a designation. The DEA therefore expects that the effects of critical habitat would be limited to incremental administrative effort as part of a future formal section 7 consultation on this project.

ORMAT Technologies, Inc., based in Nevada, is a geothermal power plant developer. ORMAT has filed an EIS Preparation Notice (EISPN) related to the Ulupalakua Geothermal Project (UGP) located on Ulupalakua Ranch and State-owned lands adjacent to Ulupalakua Ranch on the southern tip of Maui. The UGP received Department of Energy (DOE) funding for this project. According to the action area described in the EISPN for Ulupalakua Geothermal Mining Lease, it is likely that only portions of the currently operational "Geothermal Resource Subzone" (GRS) overlap

proposed critical habitat. The extent to which the project may affect critical habitat is therefore uncertain. Furthermore, as described in the June 11, 2012, proposed rule (77 FR 34464), Ulupalakua Ranch lands are identified for potential exclusion from critical habitat due to the existing management of the land. For the reasons discussed above for the LWP, it is most likely that the UGP will avoid impacts that would amount to adverse modification of critical habitat for the Maui Nui species, even absent a designation. This is due to the limited overlap of the project with the proposed critical habitat area, and the expected management of these projects as described by the PEIS. According to the PEIS, the DOE intends to avoid impacts of renewable energy projects on listed species and habitats even absent critical habitat designation. The DEA therefore expects that the effects of critical habitat will be limited to incremental administrative effort as part of a future formal section 7 consultation on this project.

To calculate administrative costs, we multiplied the expected number of consultations in each unit by estimated per-consultation administrative costs. As all three energy projects have entered the permitting process, the analysis assumes that each project would be required to consult the Service if and when critical habitat is finalized (in 2013). Overall, the DEA finds that total present value impacts to energy projects in areas proposed for critical habitat designation amount to \$10,000 over the next 10 years (or \$1,000 on an annualized basis). Impacts on energy projects in areas identified for potential exclusion are expected to be \$5,000 (present value). The relatively low level of impact on energy projects reflects two factors: (1) The limited number of future projects

identified within or affecting the proposed critical habitat area; and (2) the likely substantial level of conservation incorporated into future energy projects even absent a Maui Nui critical habitat designation.

As the number of renewable energy development projects is growing in Hawaii, additional businesses may be subject to consultation if and when we finalize Maui Nui critical habitat. As described above, however, we expect the estimated \$1,000 incremental cost to be a small fraction of annual revenues for these businesses. The field of renewable energy development within the areas proposed as critical habitat for the 135 Maui Nui species is evolving, and uncertainty exists concerning the scope of companies that may engage in these activities. Therefore, the relative percentage of the small business entities engaged in these activities is uncertain and speculative. However, the costs that these two identified companies would incur represent less than 0.1 percent of annual revenues, which we do not consider to be a significant economic impact.

In summary, we have considered whether this proposed designation, if finalized as proposed, will result in a significant economic impact on a substantial number of small entities and the energy industry. Information for this analysis was gathered from the SBA, stakeholders, and Service files. We determined that 0.1 percent of the small entities may be affected if and when this final rule becomes effective (IEc 2012, p. A-5), and we do not consider this to be a substantial number of small entities. Furthermore, we determined that the economic impacts to small businesses are estimated at less than 2

percent of annual revenues for development businesses and less than 0.1 percent of annual revenues for energy businesses (IEc 2012, p. A-8), which we do not consider to be significant economic impacts.. Therefore, we are certifying that the designation of critical habitat for the 135 Maui Nui species will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared to not taking the regulatory action under consideration.

In Chapter 4 of the DEA, renewable energy projects, including wind and geothermal developments, that are planned within the timeframe of the analysis are expected to be subject to section 7 consultation considering potential effects on proposed critical habitat for the Maui Nui species. This analysis concludes that impacts of a critical habitat designation on these activities would be most likely limited to additional

administrative costs of section 7 consultation. Consequently, reductions in oil and natural gas production are not anticipated and administrative consultation costs (\$900 per consultation) are not anticipated to reduce energy production or increase the cost of energy production or distribution in the United States in excess of 1 percent. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Authors

The primary authors of this notice are the staff members of the Pacific Islands Fish and Wildlife Office, Pacific Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: January 23, 2013

Michael J. Bean

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55

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