

that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

#### *Unfunded Mandates*

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

#### **List of Subjects in 30 CFR Part 917**

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 9, 2002.

**Allen D. Klein,**

*Regional Director, Appalachian Regional Coordinating Center.*

[FR Doc. 02-1944 Filed 1-25-02; 8:45 am]

**BILLING CODE 4310-05-P**

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

[CA 254-0318b; FRL-7132-2]

#### **Revisions to the California State Implementation Plan, Yolo-Solano Air Quality Management District**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the Yolo-Solano Air Quality Management District (YSAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (Nox) emissions from stationary internal combustion engines. We are proposing to approve the local rule to regulate these emission sources under the Clean Air Act as amended in 1990.

**DATES:** Any comments on this proposal must arrive by February 27, 2002.

**ADDRESSES:** Mail comments to Andy Steckel, Rulemaking Office Chief (AIR-4), U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

You can inspect copies of the submitted SIP revisions and EPA's technical support document (TSD) at

our Region IX office during normal business hours. You may also see copies of the submitted SIP revisions at the following locations:

California Air Resources Board,  
Stationary Source Division, Rule  
Evaluation Section, 1001 "I" Street,  
Sacramento, CA 95812  
Yolo-Solano Air Quality Management  
District, 1947 Galileo Court, Suite  
103, Davis, CA 95616.

**FOR FURTHER INFORMATION CONTACT:** Charnjit Bhullar, Rulemaking Office (AIR-4), U.S. Environmental Protection Agency, Region IX, (415) 972-3960.

**SUPPLEMENTARY INFORMATION:** This proposal addresses the local rule: YSAQMD Rule 2.32. In the Rules and Regulations section of this **Federal Register**, we are approving this local rule in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rules and address the comments in subsequent action based on these proposed rules. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: December 28, 2001.

**Jack Broadbent,**

*Acting Regional Administrator, Region IX.*

[FR Doc. 02-2008 Filed 1-25-02; 8:45 am]

**BILLING CODE 6560-50-P**

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

RIN 1018-AH95

#### **Endangered and Threatened Wildlife and Plants; Proposed Determination of Critical Habitat for the Newcomb's Snail**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose designation of critical habitat for the Newcomb's snail (*Erinna newcombi*) pursuant to the Endangered Species Act of 1973, as amended (Act). The proposed critical habitat consists of nine stream segments and associated tributaries, springs and seeps on the

island of Kauai, Hawaii, totaling approximately 26.29 kilometers (16.35 miles).

If this proposal is made final, section 7 of the Act requires Federal agencies to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat for the survival and recovery of the species.

Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation. We may revise or further refine critical habitat boundaries described in this proposal after taking into consideration the comments or any new information received during the comment period, and such information may lead to a final regulation that differs from this proposal.

**DATES:** We will consider comments from all interested parties received by March 29, 2002. Requests for public hearing must be received by March 14, 2002.

**ADDRESSES:** Submit comments and requests for public hearing to Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3-122, Box 50088, Honolulu, Hawaii 96850.

**FOR FURTHER INFORMATION CONTACT:** Paul Henson, Field Supervisor, Pacific Islands Fish and Wildlife Office, at the above address (telephone: 808/541-3441; facsimile: 808/541-3470).

**SUPPLEMENTARY INFORMATION:**

#### **Background**

The Hawaiian archipelago consists of eight main islands and the numerous shoals and atolls of the northwestern Hawaiian Islands. The islands were formed sequentially by basaltic lava that emerged from the earth's crust located near the current southeastern coast of the island of Hawaii (Stearns 1985). Ongoing erosion has formed steep-walled valleys with well-developed soils and stream systems throughout the chain. Kauai, geologically the oldest and most northwesterly of the eight main islands, is characterized by deep valleys, high rainfall, abundant vegetation, and numerous streams and springs.

The island of Kauai is 1,430 square kilometers (km<sup>2</sup>) (552 square miles (mi<sup>2</sup>)) in size, the fourth largest of the main Hawaiian islands. Most of the land mass of Kauai was formed between 5.6 and 3.6 million years ago from one or more large shield volcanoes. More recent, secondary eruptions occurred over the eastern portion of the island as

recently as the Pleistocene epoch, approximately 0.6 million years ago. Due to the age and climate of the island, Kauai is heavily eroded, with numerous steep, water-carved valleys and gulches.

The prevailing northeasterly trade winds are typically laden with moisture in the central Pacific latitudes where Kauai is located. Substantial precipitation is brought to the windward and interior portions of the island as a result of uplift and cooling of the warm, moist surface airmass as it flows over the steep topography of the island. The high elevation areas in the vicinity of the Alakai Plateau such as Mt. Waialeale (1,600 meters (m), 5,248 feet (ft)), are among the rainiest places on earth, receiving an average of 11.3 m (444 inches (in)) of precipitation annually (Juvik and Juvik 1998). This large volume of rainwater flows to perennial and intermittent streams and wetlands, and infiltrates into the island's aquifers. The west and southwest coastal areas of the island lie in the rain shadow of the Alakai Plateau and interior uplands, and these areas receive considerably less rain.

Kauai has at least 61 streams that are considered perennial, and a similarly large number of intermittent streams (Hawaii Stream Assessment (HSA) 1990). The Hanalei River, for example, is 27 km (17 mi) in length and is the largest stream system in the State by volume, with a long-term mean discharge of 216 cubic feet per second (34-year average calculated from 1964 to 1997). The headwaters of the Hanalei River are near the summit of Mt. Waialeale and the river flows towards Hanalei Bay on the island's north shore. The basalts that form the bulk of the main Hawaiian islands are porous and permeable, which facilitates infiltration and storage of groundwater. A lens-shaped body of groundwater (the basal lens) exists within these porous basalts at lower elevations. In some areas, the basal lens is partially confined by lower-permeability coastal alluvial and calcareous deposits ("caprock"). Recent groundwater investigations in the southern Lihue basin indicate that permeabilities of both the basalt and the younger rock from secondary eruptions are low, which allows the basal groundwater lens to thicken and thereby reach greater elevations than on the other Hawaiian islands (Izuka and Gingerich 1998). This causes basal groundwater to enter and support stream and spring flow up to relatively high elevations. Because the basal lens groundwater reserve is very large in size, streams, springs, and rock seeps (rheocrenes) fed by basal groundwater exhibit highly permanent, stable flows.

In addition to the basal lens, smaller, perched groundwater systems form at higher-elevations above dense geologic features of low permeability such as those formed by layers of ash. Groundwater bodies may also form within higher elevation geologic formations as a result of confinement by dikes, which are vertical sheets of low-permeability rock that cut through more permeable basalt in some places. Groundwater bodies that form behind these perched and dike-confined aquifers contribute water to streams and springs at higher elevations, although these aquifers are smaller in volume than basal systems and their contribution to surface water would be expected to be reduced during prolonged drought (MacDonald *et al.* 1960).

Human-caused modifications to surface and ground water systems on Kauai and throughout Hawaii have profoundly altered natural hydrologic regimes. Plantation irrigation systems, built to support the cultivation of sugar cane over a century ago, transfer large volumes of water out of natural watercourses and into extensive systems of ditches, tunnels, flumes, reservoirs, and ultimately to fields. Historically, stream water diversion structures were typically built to be highly efficient in their ability to entrain water. These dams usually divert all flowing stream water at moderate to low flows, leaving the stream channel below the dam dry. At least one third of all Kauai's streams are significantly dewatered for agricultural and industrial water supplies (HSA 1990); in 1994, a total of 224.17 million gallons per day (mgd) was used island-wide for irrigation, and 93.72 mgd was used for generation of hydroelectric power (Wilcox 1996).

Four species of Lymnaeidae snails are native to Hawaii (Morrison 1968, Hubendick 1952). Three of these species are found on two or more of the eight main islands. The fourth species, Newcomb's snail, is restricted to the island of Kauai. Newcomb's snail is unique among the Hawaiian lymnaeids in that the shell spire typically associated with lymnaeids has been substantially reduced. The result is a smooth, black shell formed by a single, oval whorl, 6 millimeters (mm) (0.25 in.) long and 3 mm (0.12 in.) wide. A similar shell shape is found in a Japanese lymnaeid (Burch 1968), but Burch's study of chromosome number shows that Newcomb's snail has evolutionary ties to the rest of the Hawaiian lymnaeids, all of which are derived from North American ancestors (Patterson and Burch 1978). This parallel evolution of similar shell

morphology in Japan and Hawaii from two distinct lineages of lymnaeid snails is of particular scientific interest.

At the present time, there is no generally accepted nomenclature for the genera of Hawaiian lymnaeids, although each of these snail species, including Newcomb's snail, is recognized as a well-defined species. Newcomb's snail was originally described as *Erinna newcombi* in 1855 by H. & A. Adams (see Hubendick 1952). Hubendick (1952) did not feel that the distinctive shell form (described above) and reduced structures of the nervous system of Newcomb's snail warranted a monotypic genus. In fact, Hubendick included all Hawaiian lymnaeids in the genus *Lymnaea*. Morrison (1968) contradicted Hubendick, and argued that the distinctive shell characters of Newcomb's snail supported the generic name *Erinna*. Burch (1968), Patterson and Burch (1978), Taylor (1988), and Cowie *et al.* (1995) all followed Morrison and referred to Newcomb's snail as *Erinna newcombi*. This is the currently accepted scientific name for Newcomb's snail.

The Newcomb's snail is restricted to freshwater. While the details of its ecology are not well known, Newcomb's snail probably has a life history similar to other members of the family. These snails generally feed on algae and vegetation growing on submerged rocks. Eggs are attached to submerged rocks or vegetation and there are no widely dispersing larval stages; the entire life cycle is tied to the stream system in which the adults live (Baker 1911). Very little is known about the biological or environmental factors that affect population size in Newcomb's snails. Important factors may include annual, multi-year or decadal changes in streams flows, severe-weather high-flow channel-scouring events, or periods of severe or prolonged drought. Dispersal of the snails in both upstream and downstream directions within a stream system probably plays an important function in gene flow and in colonizing or recolonizing suitable habitat, especially microhabitat that is protected from channel scour. Dispersal of Newcomb's snail between stream systems is likely very infrequent due to their freshwater habitat requirements, and historic dispersal probably relied on long-term erosional events that captured adjacent stream systems. It should be noted that this life history differs greatly from the freshwater Hawaiian neritid snails (*Neritina* spp.), which have marine larvae that colonize streams following a period of oceanic dispersal (Kinzie 1990). It is likely that larvae of these neritid snails can disperse across

the oceanic expanses that separate the Hawaiian Islands and colonize streams on any or all of these islands. This dispersal capacity is not available to the Newcomb's snail.

Based on past and recent field observations, the specific habitat requirements of the Newcomb's snail include fast-flowing perennial streams and associated springs, seeps, and vertical-to-overhanging waterfalls (Stephen Miller, U.S. Fish and Wildlife Service *in litt.* 1994a, 1994b; Polhemus *et al.* 1992; Burch 1968; and Hubendick 1952). Surveys of main stream channels of many of the perennial streams of Kauai indicate that the Newcomb's snail is found only in protected areas within main stream channels (Michael Kido, University of Hawaii, *in litt.* 1994). The limited occurrence of this snail in main stream channels is likely due to periodic channel scouring by sediment, rocks, and boulders that are moved downstream during runoff events due to the frequent heavy rains. Consequently, suitable habitat is generally associated with overhanging waterfalls located in the main channel of perennial streams supported by stable groundwater input, or with small, spring-fed tributaries. Another common element among the sites harboring snail populations is that the water source appears to be consistent and permanent, even during severe drought.

Five populations of Newcomb's snail were identified prior to 1925. These include populations from sites located in Waipahee Stream (a tributary to Kealia Stream), Wainiha River, Hanakapiai Stream, Hanakoa Stream, and Kalalau Stream. Three of these populations (Wainiha River, Hanakapiai Stream, and Hanakoa Stream) are now thought to be extirpated. Of the two remaining pre-1925 populations, one (Waipahee Stream) is small and the other (Kalalau Stream) is relatively large (see below). Since about 1993, surveys of approximately 50 sites located along numerous streams and their associated tributaries and springs on Kauai have located four previously unknown populations of Newcomb's snail (M. Kido, *in litt.* 1994). The current known range of Newcomb's snail is limited to very small sites located within six stream systems in north- and east-facing drainages on Kauai. They are: Kalalau Stream; Lumahai River; Hanalei River (four subpopulations); Waipahee Stream (a tributary to Kealia Stream); two subpopulations in Makaleha Stream (a tributary to Kapaa Stream); and the North Fork Wailua River.

No historic information is available on the population size of Newcomb's snail. However, recent reports indicate

that two of the six known populations of Newcomb's snail are relatively large: the Kalalau Stream and Lumahai River populations. The Kalalau Stream population is found in the northeastern fork of Kalalau Stream on two permanent waterfalls and in the stream reach between the waterfalls. The high density of individuals in this population may be indicative of an undisturbed natural condition. The estimated maximum density at the base of the upper waterfall, including the area behind the falling water, is approximately 800 snails/square meter ( $m^2$ ) (75 snails/square foot ( $ft^2$ )) (S. Miller, *in litt.* 1994b). The total area occupied by these snails could not be accurately evaluated due to the extreme vertical orientation of the waterfall. Habitat used by these snails may be limited to the lower section of the waterfall that receives a high amount of spray from the falling water. Little information on specific size or area is currently available for the population of Newcomb's snail from the Lumahai River, although this population has been reported to be large (M. Kido, *in litt.* 1995a).

The population in Makaleha Stream is divided into two subpopulations. The subpopulation at the waterfall that forms the head of the main channel of Makaleha Stream is estimated at 30 snails/ $m^2$  (2 to 3 snails/ $ft^2$ ) distributed over 2 to 3  $m^2$  (21 to 32  $ft^2$ ) (M. Kido, *in litt.* 1994; M. Kido, pers. comm. 1995b). This is considerably smaller than the population in Kalalau Stream described above. The reasons for differences in these two populations are not known with certainty, but may be due to the presence or absence of non-native predators and biocontrol agents that feed on lymnaeid snails. The subpopulation that occupies Makaleha Springs (which forms a series of very small tributaries to Makaleha Stream) covers approximately 20 to 30  $m^2$  (212 to 318  $ft^2$ ) (S. Miller, *in litt.* 1994a). Snail densities at this site are difficult to estimate but may be as high as 20 to 30 snails/ $m^2$  (1 to 3 snails/ $ft^2$ ) (S. Miller, *in litt.* 1994a).

The sizes of three other populations of Newcomb's snail have been characterized as small. The population in the Waipahee tributary of Kealia Stream is estimated to cover 5 to 10  $m^2$  (53 to 106  $ft^2$ ) with a density of approximately 50 to 80 snails/ $m^2$  (4 to 8 snails/ $ft^2$ ) (Adam Asquith, U.S. Fish and Wildlife Service, *in litt.* 1994). The population of Newcomb's snail in the Hanalei River is divided into four subpopulations in the upper reach of this river (M. Kido, *in litt.* 1994, 1995a). One subpopulation has approximately

10 to 20 snails/ $m^2$  (1 to 2 snails/ $ft^2$ ) and occupies 2 to 3  $m^2$  (21 to 32  $ft^2$ ) (M. Kido, *in litt.* 1994). A second subpopulation supports approximately 25 snails. The two remaining subpopulations in the Hanalei River are reported to be small with very few snails (M. Kido, *in litt.* 1995a). The population found in the upper reaches of the North Fork of the Wailua River just upstream of a concrete agricultural water diversion intake, appears to vary over time but was made up of just a few scattered individuals during surveys in 1996 and 1997 (M. Kido, pers. comm. 1995b; M. Kido, pers. comm. 2000).

Based on these data, we estimate that the six known populations of Newcomb's snail have a total of approximately 6,000 to 7,000 individuals. The great majority of these snails, perhaps over 90 percent, are located in the populations found in Kalalau Stream and the Lumahai River.

#### Previous Federal Action

The February 28, 1996, **Federal Register** Notice of Review of Plant and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species (61 FR 7596) included Newcomb's snail as a candidate species. Candidates are those species for which we have on file sufficient information on biological vulnerability and threats to support issuance of a proposed rule to list, but issuance of the proposed rule is precluded by other higher priority listing actions. We published a proposed rule on July 21, 1997 (62 FR 38953), to list this species as threatened. On January 26, 2000 (65 FR 4162), we published a final rule determining Newcomb's snail to be a threatened species.

In the final listing rule we determined that designation of critical habitat for the Newcomb's snail would be prudent because such a designation could benefit the species beyond listing as threatened by extending protection under section 7 of the Act to currently unoccupied habitat and by providing informational and educational benefits. Despite the prudency determination, we also indicated that we were not able to develop a proposed critical habitat designation for the Newcomb's snail at that time due to budgetary and workload constraints. However, on June 2, 2000, the U.S. Fish and Wildlife Service was ordered by U.S. District Court (*Conservation Council for Hawaii vs. Bruce Babbitt and Jamie Rappaport Clark*, Civil No. 99-00603 SCM/BMK) to publish the critical habitat designation for Newcomb's snail by February 1, 2002. The plaintiffs and the Service have entered into a consent decree

stating that we will jointly seek an extension of this deadline to August 10, 2002 (*Center for Biological Diversity, et al. vs. Norton*, Civil No. 01-2063 (JR) (D.D.C.); October 2, 2001). This proposed rule responds to the court's order.

On March 5, 2001, we mailed letters to 104 potentially interested parties informing them that the Service was in the process of designating critical habitat for the Newcomb's snail and requesting from them information concerning the range of the Newcomb's snail, observational life history accounts, current threats, and management activities on lands where Newcomb's snail currently occurs or occurred in the past. The letters contained a fact sheet describing the Newcomb's snail and included a map depicting the current range of the Newcomb's snail. Recipients of these letters included land owners and managers that own and manage land at the two sites where Newcomb's snails are found on private lands, and the various State agencies responsible for managing State of Hawaii lands and water resources at the other locations where the Newcomb's snail are known to occur. We received seven responses to our written request for information: four from various State agencies within the Hawaii Department of Land and Natural Resources (State Historic Preservation Office, Commission on Water Resource Management, Land Division, and the Office of the Chairperson of the Board of Land and Natural Resources), one from the Office of Hawaiian Affairs, one from the Office of the Mayor of Kauai County, and one from a Museum-affiliated researcher. The information provided in the responses was considered and incorporated into this proposed rule. In addition, on March 15, 2001, a public informational meeting was held on Kauai to provide an opportunity for the general public, non-governmental organizations, and representatives from government agencies to meet with Service personnel and discuss the critical habitat designation process.

### Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as—(i) the specific areas within the geographic 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 (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic 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.

In order for occupied habitat to be included in a critical habitat designation, the habitat features must be "essential to the conservation of the species." Such critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Regulations under 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species. Special management and protection are not required if adequate management and protection are already in place. Adequate special management or protection may be provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. If any areas containing the primary constituent elements are currently being managed to address the conservation needs of the Newcomb's snail and do not require special management or protection, they would not meet the definition of critical habitat in section 3(5)(A)(i) of the Act and would not be included in this proposal.

In order for unoccupied habitat to be included in a critical habitat designation, it must be "essential to the conservation of the species." Conservation is defined in section 3(3) of the Act as the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. Destruction or adverse modification is defined as the direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or

biological features that were the basis for determining the habitat to be critical. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of regulatory protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation does not afford any additional regulatory protection under the Act.

Critical habitat also provides non-regulatory benefits to the species by informing the public of areas that are important for species recovery and where conservation actions would be most effective. Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features that are essential for conservation of that species, and can alert the public as well as land-managing agencies to the importance of those areas. Critical habitat also identifies areas that may require special management considerations or protection, and may help provide protection to areas where significant threats to the species have been identified or help to avoid accidental damage to such areas.

When we designate critical habitat at the time of listing, as required under Section 4 of the Act, or under short court-ordered deadlines, we may not have the information necessary to identify all areas which are essential for the conservation of the species. Nevertheless, we are required to designate those areas we know to be critical habitat, using the best information available to us.

Within the geographic area of the species, we will designate only currently known essential areas. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area will not be included in the critical habitat designation. Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs

of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published on July 1, 1994 (59 FR 34271), provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires that our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by states and counties, scientific status surveys and studies, and biological assessments, unpublished materials, and expert opinion or personal knowledge.

Habitat is often dynamic, however, and populations may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. It is possible that federally funded or assisted projects affecting listed species outside their designated critical habitat areas could jeopardize those species. Similarly, critical habitat designations made on the basis of the best available information at the time of

designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning and recovery efforts if new information available to these planning efforts calls for a different outcome.

#### Methods and Criteria Used To Identify Critical Habitat

As required by the Act and regulations (section 4(b)(2) and 50 CFR 424.12), we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the survival and recovery of the Newcomb's snail. This information included: Peer-reviewed scientific publications (Hubendick 1952, Morrison 1968, Patterson and Burch 1978, and Cowie *et al.* 1995); unpublished reports, field notes and correspondence by Service personnel, State agency biologists, and university researchers (M. Kido, *in litt.* 1994, 1995a, 1995b; S. Miller, *in litt.* 1994a, 1994b; A. Asquith, *in litt.* 1994; Donald Heacock, Hawaii Department of Land and Natural Resources Division of Aquatic Resources, pers. comm. 1994, D. Heacock pers. comm. 2001); and responses to the Newcomb's snail critical habitat outreach material mailed to Federal, State, and private land managers and land owners.

Most of the currently occupied Newcomb's snail sites are located in close proximity to one another. For example, the Hanalei river population is located just 3.2 km (1.9 mi) from the North Fork Wailua River population, and the Makaleha Springs population is just 2.5 km (1.6 mi) from the Waipahee Stream population. The exception is the population found in Kalalau Stream, which is located 11 km (6.3 mi) from the Lumahai River population, its nearest neighbor. Despite the relatively short distances between snail populations, the steep, rugged terrain and circular shape of the island creates conditions that allow the sites to be exposed to severe weather and other natural phenomena from markedly different directions. For example, the Hanalei River valley is aligned in a south-to-north direction, while the North Fork Wailua River valley extends from north-to-south. The two Newcomb's snail populations in these drainages are separated by a distance of a few km, but the ridge between them is over 900 m (2953 ft) in elevation. Because the terrain where Newcomb's snail is found is remote and extremely rugged, three of the six known populations (located in Kalalau Stream, Lumahai River and Waipahee Stream) have not been resurveyed since their initial discovery or rediscovery.

Growth rates, life span, reproductive potential, age at first reproduction, dietary needs, and microhabitat preferences are not known. As noted above, accurate population estimates and the natural variability of populations over time are also not available. We are in the process of developing a draft recovery plan for this species. We anticipate the draft being available for public review and comment by the spring of 2002.

Because of the topography of the island and the prevalent weather patterns, torrential rains that may cause flooding, channel scour, and landslides are usually restricted to one or two quadrants of the island during any single storm event. Recent examples of such recurring natural phenomena include Hurricane Iniki (a category 4 hurricane which devastated Kauai on September 11, 1992), Hurricane Iwa (November 23, 1982), and the huge upper Olokele Valley landslide of October 31, 1981 (Fitzsimons *et al.* 1993, Jones *et al.* 1984). Each of these events markedly degraded or entirely eliminated large areas of potential Newcomb's snail habitat which had never been surveyed to locate snail populations. These physical conditions indicate that recovery through protection of the existing populations, plus reestablishment of populations in suitable areas of historical range that provide a wide geographical separation, is necessary for the ensured survival of the species. We therefore find that inclusion of three currently unoccupied areas identified as containing the primary constituent elements is essential to the conservation of the Newcomb's snail. These three sites are located in the northwest quadrant of the island, in drainages between the Lumahai River and Kalalau Stream populations. These three locations are identified as priority recovery units for translocation efforts in the draft Newcomb's snail Recovery Plan currently under preparation by the Service.

Complete recovery will require restoration of Newcomb's snails to areas of historically occupied habitat either through natural dispersal or translocation. Mere stabilization of Newcomb's snail populations within its currently occupied habitat will not achieve recovery of the species. The locations currently occupied by known Newcomb's snail populations are not sufficiently dispersed to consider the species safe from extinction. Existing known populations are found in remarkably small areas of only a few square meters of aquatic habitat, each of which is at risk from even a small,

localized landslide or high flow event. Recovery actions are likely to include: Maintaining existing populations through regulatory mechanisms that protect water resources, watershed protection and stabilization efforts; control of non-native predators; and translocation of snails for the purpose of reestablishing additional self-sustaining populations in the wild. Recovery criteria will require persistence of populations of snails that are geographically separated in natural habitats to reduce the threat of total elimination of entire populations through catastrophic events such as hurricanes, landslides, fire, drought, and predator invasions.

We used several criteria to identify and select locations proposed for designation as critical habitat: (1) We began with all locations that are currently occupied by Newcomb's snail; (2) we then added three locations where Newcomb's snail was found historically but is now thought to be extirpated in the northwest extent of its range. In

deciding which unoccupied areas to propose for designation as critical habitat, we gave preference to sites that (a) were most recently known to be occupied, or (b) provided the greatest geographic diversity to the array of locations under consideration for critical habitat. Two of these sites are on lands that are publicly owned (Na Pali Coast State Park and Hono O Na Pali Natural Area Reserve) and one site is on private land. These areas are in the northwest quadrant of the island and would presumably be most exposed to severe weather events such as hurricanes from the north and northwest. With the exception of the Kalalau Stream population, all other populations of Newcomb's snails are located in the northeast or southeast quadrants of the island, and these sites would be exposed to severe weather events such as hurricanes primarily from the east and northeast.

Nine critical habitat units are proposed, and these units are located within three stream complexes that

share similar characteristics (Table 1). The stream complexes share common topography, watershed characteristics, population characteristics, and exposure to natural disasters. Each stream complex and the proposed critical habitat units within them are discussed below.

Within the proposed critical habitat unit boundaries, only waterbodies containing one or more of the primary constituent elements are proposed as critical habitat. Existing features and structures within the boundaries of the mapped units, such as dams, ditches, tunnels, flumes, and other human-made water features that do not contain the primary constituent elements, are not proposed as critical habitat. Federal actions limited to those areas, therefore, would not trigger a section 7 consultation unless they affect the species and/or primary constituent elements in adjacent critical habitat.

TABLE 1.—PROPOSED CRITICAL HABITAT UNITS FOR THE NEWCOMB'S SNAIL BY LOWER AND UPPER BOUNDARY ELEVATIONS IN METERS (M) (FEET (FT)) AND THE LENGTH OF THE STREAM SEGMENTS IN KILOMETERS (KM) (MILES (MI))

Stream complex	Critical habitat units	Ownership	Lower boundary elevation	Upper boundary elevation	Stream segment length*	
I. Na Pali Coast Streams.	(a) Kalalau Stream .....	State—Na Pali Coast State Park.	183 m (600 Ft) .....	488 m (1,600 ft) ....	1.38 km (0.86 mi)	
	(b) Hanakoa Stream .....	State—Na Pali Coast State Park.	122 m (400 ft) .....	457 m (1,500 ft) ....		
	(c) hanakapiai Stream	State—Na Pali Coast State Park.	183 m (600 ft) .....	457 m (1,500 ft) ....		0.56 km (0.35 mi).
II. Central Rivers ..	(a) Wainiha River .....	Private—Alexander and Baldwin, Inc..	244 m (800 ft) .....	457 m (1,500 ft) ....	5.26 km (3.27 mi)	
	(b) Lumahai River	Private—Kamehameha Schools.	183 m (600 ft) .....	457 m (1,500 ft) ....		5.0 km (3.11 mi).
	(c) Hanalei River	State—Halela Forest Reserve.	122 m (400 ft) .....	457 m (1,500 ft) ....		7.58 km (4.71 mi).
III. Eastside Mountain Streams.	(a) Waipahee Stream .....	Private—Cornerstone Hawaii Holdings, LCC.	244 m (800 ft) .....	366 m (1,200 ft) ....	2.41 km (1.50 mi)	
	(b) Makaleha Stream .....	State—Kealia Forest Reserve.	183 m (600 ft) .....	457 m (1,500 ft) ....	1.59 km (0.99 mi)	
	(c) North Fork Wailua River	State—Lihue-Koloa Forest Reserve.	305 m (1000 ft) ....	427 m (1,400 ft) ....	1.71 km (1.06 mi)	
TOTAL .....	.....	.....	.....	.....	26.29 km (16.35 mi)	

\* Length of main stream channel, does not include tributaries or springs.

**Primary Constituent Elements**

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12 in determining which areas to propose as critical habitat, we are required to consider those physical and biological features that are essential to the conservation of the species and that may require special management considerations and protection. Such features are termed Primary Constituent Elements, and include but are not limited to: space for individual and

population growth and for normal behavior; food, water, air, light, minerals and other nutritional or physiological requirements; cover or shelter; space for breeding and reproduction; and habitats that are protected from disturbance and are representative of the historic geographical and ecological distributions of the species.

The primary constituent elements for the Newcomb's snail are those habitat components that are essential for the primary biological needs of foraging,

sheltering, reproduction, and dispersal. These primary constituent elements are found in locations that, as a result of their geologic and hydrologic setting in the landscape, support permanently flowing streams, springs and seeps in mid-elevation locations in valleys on the island of Kauai. The primary constituent elements are: cool, clean, moderate-to fast-flowing water in streams, springs and seeps; the associated watersheds and hydrogeologic features that capture and

direct water flow to these spring and stream systems; a hydrologic regime that supports perennial flow throughout even the most severe drought conditions; and stream channel morphology that provides protection from channel scour by having overhanging waterfalls, protected tributaries, or similar areas. All proposed critical habitat areas contain one or more of the primary constituent elements for the Newcomb's snail.

#### Proposed Critical Habitat Designation

Locations proposed as critical habitat provide the full range of primary constituent elements needed by the Newcomb's snail, including foraging, sheltering, reproduction, and dispersal. Proposed critical habitat is limited to segments of perennial streams, their tributaries, and associated springs. Critical habitat boundaries were derived using topographical characteristics of the valley and nearby drainages immediately adjacent to locations where Newcomb's snails occur or occurred historically. The upper and lower elevations of critical habitat boundaries were chosen based upon the elevational distribution from each recorded population, or nearby watersheds where Newcomb's snails are found or were found historically. An area of upland riparian habitat adjacent to the actual aquatic sites is included in the designation of critical habitat. The size of the riparian area was determined based on the steepness of the adjacent valley walls, the number and size of adjacent small drainages, and the distance and elevation gain to adjacent ridge lines. The riparian areas are included in this critical habitat designation because the stream and spring systems that contain or may contain Newcomb's snails are dependent upon riparian areas for shade, moderating water flow, sediment retention, and nutrient inputs.

Areas proposed as critical habitat for the Newcomb's snail occur in nine separate watersheds and may include the main channel of a named stream, contiguous named and unnamed tributaries, and springs and seeps. Proposed critical habitat includes locations under State and private ownership and includes six sites currently known to be occupied and, in addition, includes three locations where the species was known to occur in the early 1900s, but where it is now thought to be extirpated.

Stream reaches are identified using elevations of the stream or tributary channels as upstream and downstream boundaries; these elevations were derived separately for each of the nine

reaches and were delineated by recognizing unique physiographic features within each watershed such as waterfalls, small tributaries, and springs. A brief description of each stream reach and reasons for proposing it as critical habitat are presented below.

#### Unit I: Na Pali Coast Streams

Streams of the Na Pali Coast are small, short, and flow over steep terrain. These streams are located in the northwest quadrant of the island, and, because they are located in smaller watersheds, they are directly exposed to coastal weather conditions. Rainfall in this area is lower than in the other watersheds proposed for critical habitat. The vegetation of the Na Pali Coast Stream Complex consists primarily of mixed-species mesic forest composed of native and introduced plant species. The higher elevations are primarily native forest, but the lower elevations are more disturbed and are dominated by introduced plant species. One of the three locations currently has snails present. The other two locations were known to harbor Newcomb's snail populations relatively recently but the species is now thought to be extirpated at those sites.

#### Unit I(a): Kalalau Stream

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with the east fork of Kalalau Stream and its tributaries, including springs and seeps, from an elevation of 183 to 488 m (600 to 1,600 ft). This reach contains one of the two largest known populations of Newcomb's snails, and it contains the largest population of snails documented on public lands. At least two large, vertical or overhanging waterfalls in this reach appear to provide important refuge from high, channel-scouring flows (S. Miller, in litt. 1994b). This population is currently the most isolated of the Newcomb's snail populations, and it is separated from the nearest neighboring population, located in Lumahai River, by 11.8 km (7.3 mi). It is the only remaining population in the northwest quadrant of the island.

This unit is essential to the conservation of Newcomb's snail because it has the most robust population of snails ever recorded, as documented in Service surveys conducted in 1994. This unit is required to maintain one of the six known populations of snails. This stream segment is located within the Na Pali Coast State Park. Kalalau Stream has no water diversions.

#### Unit I(b): Hanakoa Stream

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with Hanakoa Stream and its tributaries, including springs and seeps, from an elevation of 122 to 457 m (400 to 1,500 ft). Historical records from the early 1900s indicate that Newcomb's snails were found in this stream; however, a recent survey failed to locate any snails (S. Miller in litt. 1994b). This reach is located on the northwest side of the island and is exposed to severe weather approaching from the northwest. Hanakoa Stream was heavily impacted by Hurricane Iniki in 1992 (Fitzsimons *et al.* 1993), prior to surveys intended to locate populations of Newcomb's snail.

This unit is essential to the conservation of Newcomb's snail because it was occupied until recently and is therefore one of only nine locations known with certainty to contain suitable habitat conditions for Newcomb's snails. For the reasons discussed above, it is essential to the conservation of the species to have stream sites in the northwest part of its range available for repopulation by Newcomb's snails either by natural dispersal or through experimental translocation. This stream segment is located within the Na Pali Coast State Park and is adjacent to the Honu O Na Pali Natural Area Reserve. Hanakoa Stream has no water diversions.

#### Unit I(c): Hanakapiai Stream

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with Hanakapiai Stream and its tributaries, including springs and seeps, from an elevation of 183 to 457 m (600 to 1,500 ft). Historical records indicate that Newcomb's snail occurred in this reach; however, no recent surveys have located snails (M. Kido, in litt. 1994, A. Asquith pers. comm. 2001). This reach, like those in Kalalau and Hanakoa streams, is located in the northwest portion of the island and is exposed to severe weather from the north and northwest (Fitzsimons *et al.* 1993).

This unit is essential to the conservation of Newcomb's snail because it was occupied until recently and is therefore one of only nine locations known with suitable habitat conditions for Newcomb's snails. Because it is located in the northwest part of its range and has exhibited habitat conditions known to support Newcomb's snail in the recent past it should continue to be available for repopulation by Newcomb's snails either by natural dispersal or through

experimental translocation. This stream segment is located within the Na Pali Coast State Park and is adjacent to the Honu O Na Pali Natural Area Reserve. Hanakapiai Stream has no water diversions.

#### Unit II: Central Rivers

The central rivers of Kauai are large relative to other streams in the State, and flow through relatively low-gradient watersheds. These rivers are located in the northern half of the island and, because their headwaters are located well inland and in large valleys, are exposed to weather conditions that are greatly influenced by the surrounding landmass. Rainfall in this area is higher than in the other watersheds proposed for critical habitat. The vegetation of the Central Rivers Complex watersheds consists primarily of mixed-species wet and mesic forest composed of native and introduced plant species. The higher elevations are primarily native forest, but the lower elevations are more disturbed and are dominated by introduced plant species. Two of the three locations currently have Newcomb's snail populations present, and the remaining location was known to harbor Newcomb's snail populations historically, but the species is now thought to be extirpated there.

#### Unit II(a): Wainiha River

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with the Wainiha River and its tributaries, including springs and seeps, from an elevation of 244 to 457 m (800 to 1,500 ft). Historical records indicate that Newcomb's snail occurred in this stream, which is one of the largest stream systems in the State. Surveys have failed to locate snails (M. Kido, *in litt.* 1994). This site is located well inland in a steep-walled valley that is in the northwest portion of the island. The potential exposure to severe weather at this site is primarily from the north, but this exposure is greatly influenced by the precipitous valley walls, which rise some 975 m (3,200 ft) above the stream channel.

This stream segment is located on private land. A major water diversion structure is located at the 213 m (700 ft) elevation of Wainiha River below which the river channel is frequently dry. The dam is located approximately one kilometer downstream of the lower boundary of the area proposed for designation as critical habitat. This diversion removes an average of 50 million gallons per day (2.19 cubic meters per second) of water from the river at the 213 m (700 ft) elevation; this water is transported in ditches, tunnels,

and flumes approximately 5.3 km (3.3 m) downstream to a powerhouse. This facility is the largest hydroelectric power producer in the State.

This unit is essential to the conservation of Newcomb's snail because it was historically occupied and is therefore one of only nine locations known with certainty to contain suitable habitat conditions for Newcomb's snails. This location should be considered for experimental repopulation by Newcomb's snails through translocation efforts.

#### Unit II(b): Lumahai River

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with Lumahai River and its tributaries, including springs and seeps, from an elevation of 183 to 457 m (600 to 1,500 ft). One of the largest populations of Newcomb's snails ever documented occurs in this reach of Lumahai River and its tributaries. This stream segment is located on private land. Lumahai River has no water diversions.

This unit is essential to the conservation of Newcomb's snail because it has one of the most robust population of snails ever discovered, as recorded at the time of the discovery of the population by Hawaii Department of Land and Natural Resources division of Aquatic Resources personnel in 1994. This unit is required as critical habitat to maintain and recover one of the six known populations of Newcomb's snails.

#### Unit II(c): Hanalei River

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with the Hanalei River and its tributaries, including springs and seeps, from an elevation of 122 to 457 m (400 to 1,500 ft), excluding ditches and flumes. The four sub-populations found within this stream system represent the largest number of Newcomb's snail sub-populations occurring within a single watershed. Segments of several named tributaries to the Hanalei River are included in this designation, and these include Kaapoko, Kaiwa, and Waipunaea Streams. This stream segment is located within the Halela Forest Reserve on State lands. The proposed critical habitat that contains the Hanalei River subpopulations of Newcomb's snail is essential to the conservation of the species because this area is needed to maintain one of the six existing known populations of snails.

A complex of stream diversion works that includes dams, ditches and tunnels, is found at the 378 m (1,240 ft) elevation

of the Hanalei River, in the vicinity of the upper two main-channel Hanalei River sub-populations and upstream of the Kaapoko tributary sub-population at an elevation of 396 m (1,300 ft). These dams and associated ditches and tunnels historically diverted large volumes of water out of Kaapoko tributary and the Hanalei River to watersheds in the southeast portion of the island for irrigation use. Typical diversion structures in Hawaiian streams completely divert all of a streams flowing water during moderate-to low-flow periods, leaving the stream channel below the dam completely dry. The water diversion structures and associated ditches and tunnels in the upper Hanalei River and its tributaries are currently in disrepair and, although they locally alter flow characteristics, no water is diverted out of the Hanalei watershed at this time.

#### Unit III: Eastside Mountain Streams

The streams proposed for critical habitat designation that flow towards the east and southeast portions of the island are intermediate in size. Rainfall is moderate in comparison to the other locations proposed as critical habitat. All three of the locations included in this stream complex are known to be occupied by extant populations of snails. The vegetation of the Eastside Mountain Stream watersheds consists primarily of mixed-species wet forest composed of native and introduced plant species. The higher elevations are primarily native forest, but the lower elevations are more disturbed and are dominated by introduced plant species.

#### Unit III(a): Waipahee Stream (tributary to Kealia Stream)

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with Waipahee Stream and its tributaries, including springs and seeps, from an elevation of 244 to 366 m (800 to 1,200 ft). Newcomb's snail was historically known to occur in Waipahee Stream, and a recent survey has confirmed the presence of Newcomb's snails within this reach. The proposed critical habitat that contains the Waipahee Stream population of Newcomb's snail is essential to the conservation of the species because this area is needed to maintain one of the six existing populations of snails.

Waipahee Stream is located on private land that, in the lower elevation areas, is undergoing a transition in use from commercial plantation-style sugarcane agriculture to pasture, forestry, diversified crops, and "ecotourism" use. Higher elevation areas of these private



lands, such as where Newcomb's snails are found, are not used for agriculture and are relatively undisturbed. Water is diverted from Kealia Stream at several locations at lower elevations.

Unit III(b): Makaleha Stream (tributary to Kapaa Stream)

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with Makaleha Stream and its tributaries, including Makaleha Springs, other springs, and seeps, from an elevation of 183 to 457 m (600 to 1,500 ft). The Makaleha Stream and Makaleha Springs Newcomb's snail populations have been surveyed several times in recent years. Two subpopulations are known to occur within this reach: Newcomb's snails are found within the complex of small tributary streams originating from Makaleha Springs, and a small number of snails are found upstream of the springs at a waterfall located in the Makaleha Stream main channel. This stream segment is located within the Kealia Forest Reserve on State lands. Water is diverted from Makaleha Stream and Kapaa Stream at several locations at lower elevations. The proposed critical habitat that contains the Makaleha Stream population of Newcomb's snail are essential to the conservation of the species because this area is needed to maintain one of the six existing populations of snails.

Unit III(c): North Fork Wailua River

Critical habitat for Newcomb's snail is proposed for all flowing surface waters associated with the North Fork of the Wailua River and its tributaries, including springs and seeps, from an elevation of 305 to 427 m (1,000 to 1,400 ft), excluding ditches and flumes. This population was the most recent to be discovered and is apparently small. This is the only population located in the southwest quadrant of the island and is found in a watershed that flows to the west. This stream segment is located within the Lihue-Koloa Forest Reserve on State lands. Water is diverted from the North Fork Wailua River at an elevation of 326 m (1,070 ft), within the area proposed as critical habitat. This diversion removes approximately 13 mgd from the stream. The proposed critical habitat that contains the North Fork Wailua River population of Newcomb's snail is essential to the conservation of the species because this area is needed to maintain one of the six existing populations of snails.

## Effects of Critical Habitat Designation

### Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species nor to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation we would ensure that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat.

Activities on Federal lands that may affect the Newcomb's snail or its critical habitat would require section 7 consultation; however, no populations of Newcomb's snail are known to exist on Federal land. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U. S. Army Corps of Engineers (ACOE) under section 404 of the Clean Water Act, or some other Federal action, including funding (e.g., from the Federal Highway Administration, Federal Aviation Administration, Federal Emergency Management Agency, or Natural Resources Conservation Service) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be

affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of the Newcomb's snail is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that may directly or indirectly adversely affect critical habitat include, but are not limited to:

(1) Destroying or degrading Newcomb's snail habitat (as defined in the primary constituent elements discussion) through activities adjacent to or upstream of Newcomb's snail habitat. Such activities may include reduction or redirection of stream or spring water flow, dam construction, channel alteration or realignment, substrate alteration, or other direct means (e.g., pesticide or herbicide application, waste discharge, groundwater withdrawal, groundwater contamination, reduction of groundwater recharge, etc.).

(2) Appreciably decreasing habitat value or quality through indirect effects (e.g., introduction or promotion of potential predators, diseases or disease vectors, vertebrate or invertebrate food competitors, invasive plant species, watershed degradation through overgrazing, augmentation of feral ungulate populations, an altered fire regime, or other activities that degrade water quality or quantity to an extent that it detrimentally affects stream structure and function).

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the conservation of a listed species. Actions likely to result in the destruction or adverse modification of critical habitat are those that would appreciably reduce the value of critical habitat for both the survival and recovery of the listed species.

Actions likely to result in the destruction or adverse modification of critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is occupied by the

species concerned. In those cases, critical habitat provides little additional protection to a species, and the ramifications of its designation are few or none. However, there is a potential benefit from critical habitat designation in unoccupied areas, and consultation under section 7 of the Act would be triggered in these areas if they were designated as critical habitat.

Federal agencies already must consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Regulation of activities affecting waters of the United States by the ACOE under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Development on private or State lands requiring permits from other Federal agencies, such as Department of Housing and Urban Development;

(4) Military training or similar activities of the U.S. Department of Defense on their lands or lands under their jurisdiction;

(5) Construction of communication sites licensed by the Federal Communications Commission;

(6) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities by Federal agencies;

(7) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency; and

(8) Other activities such as those funded or authorized by the U.S. Department of Agriculture (Forest Service, Natural Resources Conservation Service), Department of Transportation, Department of Energy, Department of the Interior (U.S. Geological Survey, National Park Service, Bureau of Reclamation), Department of Commerce (National Oceanic and Atmospheric Administration), Environmental Protection Agency, or any other Federal agency.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Pacific Islands Ecological Services Field Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits should be directed to the U.S. Fish and Wildlife Service, Endangered Species Act Section 10 Program at the same address.

Application of the Section 3(5)(A) Criteria Regarding Special Management Considerations or Protection

Special management and protection are not required if adequate management and protection are already in place. Adequate special management or protection is provided by a legally operative plan/agreement that addresses the maintenance and improvement of the primary constituent elements important to the species and manages for the long-term conservation of the species. If any areas containing the primary constituent elements are currently being managed to address the conservation needs of the Newcomb's snail and do not require special management or protection, they would not meet the definition of critical habitat in section 3(5)(A)(i) of the Act and so would not be included in this proposed rule.

To determine if a plan provides adequate management or protection we consider: (1) Whether a current plan specifies the management actions and whether such actions provide sufficient conservation benefit to the species; (2) whether the plan provides assurances that the conservation management strategies will be implemented; and (3) whether the plan provides assurances that the conservation management strategies will be effective. In determining if management strategies are likely to be implemented, we consider whether: (a) A management plan or agreement exists that specifies the management actions being implemented or to be implemented; (b) the plan includes a timely schedule for implementation; (c) there is a high probability that the funding source(s) or other resources necessary to implement the actions will be available; and (d) the party(ies) have the authority and long-term commitment to the agreement or plan to implement the management actions, as demonstrated, for example, by a legal instrument providing enduring protection and management of the lands. In determining whether an action is likely to be effective, we consider whether: (a) The plan specifically addresses the management needs, including reduction of threats to the species; (b) such actions have been successful in the past; (c) the plan includes provisions for monitoring and assessment of the effectiveness of the management actions; and (d) adaptive management principles have been incorporated into the plan.

Based on information provided to us by land owners and managers to date, we will need to work with the land owners and managers to adequately

manage to address the threats to the Newcomb's snail. Several areas are covered under current management plans and are being managed in a manner that meets some of the conservation needs of the Newcomb's snail, but we find that the management does not adequately reduce the primary threats to this species.

#### *Exclusions Under Section 4(b)(2)*

Section 4(b)(2) of the Act requires that we designate critical habitat on the basis of the best scientific and commercial information available, and that we consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat designation if the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We will conduct an analysis of the economic impacts of designating these areas as critical habitat prior to a final determination. When completed, we will announce the availability of the draft economic analysis with a notice in the **Federal Register**.

Currently, no habitat conservation plans (HCPs) include the Newcomb's snail as a covered species. However, we believe that in most instances the benefits of excluding HCPs from critical habitat designations will outweigh the benefits of including them. In the event that future HCPs are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of this species. This will be accomplished by either directing development and habitat modification to nonessential areas, or appropriately modifying activities within essential habitat areas so that such activities will not adversely modify the critical habitat.

We will also provide technical assistance and work closely with applicants throughout the development of any future HCPs to identify lands essential for the long-term conservation of the Newcomb's snail and appropriate management for those areas. The take minimization and mitigation measures provided under such HCPs would be expected to protect the essential habitat lands proposed as critical habitat in this rule. Furthermore, we will complete intra-Service consultation on our issuance of section 10(a)(1)(B) permits for these HCPs to ensure permit issuance will not destroy or adversely modify critical habitat.

#### *Public Comments Solicited*

We intend that any final action resulting from this proposal be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We are particularly interested in comments concerning:

(1) The reasons why any area should or should not be determined to be critical habitat as provided by section 4 of the Act and 50 CFR 424.12(a)(1), including whether the benefits of designation will outweigh any threats to the species due to designation;

(2) Specific information on the number and distribution of Newcomb's snail and what habitat is essential to the conservation of this species and why;

(3) Whether lands within proposed critical habitat are currently being managed to address conservation needs of the Newcomb's snail;

(4) Land use practices and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(5) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

(6) Whether future development and approval of conservation measures (e.g., Conservation Agreements, Safe Harbor Agreements, etc.) should be excluded from critical habitat and, if so, by what mechanism; and

(7) Economic and other values associated with designating critical habitat for the Newcomb's snail, such as those derived from non-consumptive uses (e.g., hiking, camping, wildlife-watching, enhanced watershed protection, improved air quality, increased soil retention, "existence values," and reductions in administrative costs).

If we receive information that any of the areas proposed as critical habitat are currently being managed to address the conservation needs of the Newcomb's snail and provide adequate management and protection, we may exclude such areas from the final rule because they would not meet the definition of critical habitat in section 3(5)(A)(i) of the Act. We may also exclude areas pursuant to section 4(b)(2) of the Act if information on impacts received during the public comment period or developed as part of the economic analysis indicates that the benefits of exclusion outweighs the benefits of inclusion, provided it will not result in extinction of the species. If

you wish to comment on this proposed rule, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**):

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold their home address, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Pacific Islands Fish and Wildlife Office in Honolulu.

#### *Peer Review*

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure listing and critical habitat decisions are based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite the peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designations of critical habitat.

We will consider all comments and data received during the 60-day public comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### *Public Hearings*

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of

those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

#### *Clarity of the Rule*

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the document? (5) Is the background information useful and is the amount appropriate? (6) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240.

#### **Required Determinations**

##### *Regulatory Planning and Review*

In accordance with Executive Order (E.O.) 12866, this document is a significant rule and has been reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below. We are preparing a draft analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific areas as critical habitat. The availability of the draft economic analysis will be announced in the **Federal Register** so that it is available for public review and comments.

(a) While we will prepare an economic analysis to assist us in considering whether areas would be excluded from critical habitat designation pursuant to section 4 of the Act, we do not believe this rule will have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local or tribal communities. Therefore, we do not believe a cost benefit and economic analysis pursuant to E.O. 12866 is required.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; critical habitat does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency. Section 7 of the Act requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based on our experience with the species and its needs, we believe that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered as jeopardy to the species under the Act in areas occupied by the species.

Accordingly, we do not expect the designation of areas as critical habitat within the geographical range of the species to have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. The designation of areas as critical habitat where section 7 consultations would not have occurred but for the critical habitat designation may have impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons who receive Federal authorization or funding that are not attributable to the species listing. We will evaluate any impact through our economic analysis (under section 4 of the Act: see the "Exclusions Under Section 4(b)(2)" section of this rule). Non-Federal persons who do not have a Federal sponsorship of their actions are not restricted by the designation of critical habitat.

(b) This rule is not expected to create inconsistencies with other agencies' actions. Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Newcomb's snail since its listing in January of 2000. The prohibition against adverse modification of critical habitat is expected to impose few, if any, additional restrictions to those that currently exist in the proposed critical habitat on currently occupied lands. We will evaluate any impact of designating areas where section 7 consultations would not have occurred but for the critical habitat designation through our economic analysis. Because of the potential for impacts on other Federal agency activities, we will continue to review this proposed action for any inconsistencies with other Federal agency actions.

(c) This proposed rule, if made final, will not significantly impact entitlements, grants, user fees, loan

programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and, as discussed above, we do not anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have any incremental effects in areas of occupied habitat on any Federal entitlement, grant, or loan programs. We will evaluate any impact of designating areas where section 7 consultations would not have occurred but for the critical habitat designation through our economic analysis.

(d) OMB has determined that this rule will raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Act (SBREFA) of 1996), 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. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that rule will not have a significant economic effect on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. In today's rule, we are certifying that the rule will not have a significant effect on a small number of small entities. However, should the economic analysis prepared pursuant to section 4(b)(2) of the ESA indicate otherwise, we will revisit this determination at that time. 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 some circumstances, especially with proposed critical habitat designations of very limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. 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 is 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 Newcomb's snail. If this critical habitat designation is finalized, Federal agencies must also consult with us if their activities may affect designated critical habitat. However, we do not believe 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 would not trigger additional regulatory impacts beyond the duty to avoid jeopardizing the species. An action that appreciably diminishes habitat for the conservation of the species may also jeopardize the continued existence of the species by

reducing population numbers, decreasing reproductive success, or altering species distribution because of negative impacts to such habitats.

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 reinitiate consultation for ongoing Federal activities. However, since Newcomb's snail has only been listed since January 2000, and there are no consultations involving the species, the requirement to reinitiate consultations for ongoing projects will not affect a substantial number of small entities.

When the species is clearly not present, designation of critical habitat could trigger additional review of Federal activities under section 7 of the Act. Because Newcomb's snail has been listed only a relatively short time and there have been no activities with Federal involvement in these areas during this time, there is no history of consultations based on the listing of this species. Therefore, for the purposes of this review and certification under the Regulatory Flexibility Act, we are assuming that any future consultations in the area proposed as critical habitat will be due to the critical habitat designation.

None of the proposed designation is on Federal lands. Six of the nine sites are on lands owned and managed by the State of Hawaii, which is not a small entity for purposes of this analysis. This includes units within the Na Pali Coast State Park, Hono O Na Pali Natural Area Reserve, the Halela Forest Reserve and the Lihue-Koloa Forest Reserve. All of these land areas are primarily managed for conservation of natural resources, including threatened and endangered species. In state lands, activities with no Federal involvement would not be affected by the critical habitat designation.

Three of the nine units of the proposed designation are on private land. On private lands, activities that lack Federal involvement would not be affected by the critical habitat designation. No activities of an economic nature currently occur on the private lands in the area encompassed by this proposed designation. These areas are in the State Conservation District and have a very limited range of allowable activities that could occur there under the State Conservation District Use permitting program. Because of the Conservation District zoning, and because the sites are so remote and inaccessible that helicopter

transport is normally required for access, even small-scale commercial or agricultural development is unlikely. Therefore, Federal agencies such as the Economic Development Administration, which is occasionally involved in funding municipal projects, is unlikely to be involved in projects in these areas. On the Island of Kauai, previous consultations under section 7 of the Act between us and other Federal agencies most frequently involved the Department of the Navy, and the U.S. Army Corps of Engineers (ACOE). In the case of ACOE consultations, the applicant is often the County of Kauai which is not considered a small entity as defined here. ACOE consultations involve permits for discharge of fill material in wetlands or waterways and occur due to the presence of threatened or endangered species (primarily the five endangered Hawaiian waterbirds) that spend at least part of their life in aquatic habitats. Because the stream channels proposed for Newcomb's snail critical habitat are so remote, no consultations due to ACOE permits are anticipated for activities such as road construction. Construction of new diversion structures in the stream segments proposed for critical habitat, or rehabilitation of the abandoned water diversion structures in the proposed Hanalei critical habitat unit, is unlikely because agriculture practices have changed and irrigation demands have greatly diminished, but if such activities do occur and involve discharge of fill, ACOE permitting and section 7 consultation would be required.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or resulting in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing

the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives. Secondly, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with section 7 consultations for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. As we have no consultation history for Newcomb's snail, we can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, especially as described in the final listing rule and in this proposed critical habitat designation, as well as our experience with the listed terrestrial snails in Hawaii. The kinds of actions that may be included in future reasonable and prudent alternatives include conservation set-asides, management of competing non-native species and predators, restoration of degraded habitat, construction of protective fencing, and regular monitoring. As required under section 4(b)(2) of the Act, we will conduct an analysis of the potential economic impacts of this proposed critical habitat designation, and will make that analysis available for public review and comment before finalizing this designation.

In summary, we have considered whether this proposed rule would result in a significant economic effect on a substantial number of small entities. It would not affect a substantial number of

small entities. The entire designation involves six sites on state lands and three sites on privately owned land; all of which are located in areas where likely future land uses are not expected to result in Federal involvement or section 7 consultations. As discussed earlier, the private lands are within the state Conservation District and no commercial activities are undertaken at those locations and, therefore, are not likely to require any Federal authorization. In these areas, Federal involvement—and thus section 7 consultations, the only trigger for economic impact under this rule—would be limited to a subset of the area proposed. The most likely Federal involvement would be through some unforeseen activity within a stream channel that would call for a permit or authorization from the ACOE. Because of the rugged terrain and extreme remoteness of the island interior, we anticipate that projects involving the ACOE and other Federal agencies will be infrequent within the proposed designation. This rule would result in project modifications only when proposed Federal activities would destroy or adversely modify critical habitat. While this may occur, it is not expected frequently enough to affect a substantial number of small entities. Therefore, we are certifying that the proposed designation of critical habitat for Newcomb's snail will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required. However, should the economic analysis of this proposed rule indicate that there may be significant economic impacts on a substantial number of small entities, we will revisit this determination.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order 13211, which applies to regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Though this proposed rule is a significant regulatory action under Executive Order 12866, it 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.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 August 25, 2000 *et seq.*):

(a) This rule, as proposed, will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed above, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated to result from critical habitat designation of occupied areas. In our economic analysis, we will evaluate any impact of designating areas where section 7 consultations would not have occurred but for the critical habitat designation.

(b) This rule, as proposed, will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

#### *Takings*

In accordance with Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of designating critical habitat for the Newcomb's snail in a preliminary takings implication assessment. The takings implications assessment concludes that this proposed rule does not pose significant takings implications. Once the revised economic analysis is completed for this proposed rule, we will review and revise this preliminary assessment as warranted.

#### *Federalism*

In accordance with Executive Order 13132, this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior and Department of Commerce policy, we requested information from appropriate State resource agencies in Hawaii. The designation of critical habitat for Newcomb's snail would have little incremental impact on State and local governments and their activities. The designations may have some benefit to these governments in that the areas essential to the conservation of this species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While this

definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long range planning rather than waiting for case-by-case section 7 consultation to occur.

*Civil Justice Reform*

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Act. The proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Newcomb's snail.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have determined that we do not have to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. The proposed designation of critical habitat for the Newcomb's snail does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

*References Cited*

A complete list of all references cited in this proposed rule is available upon

request from the Pacific Islands Fish and Wildlife Office (see **ADDRESSES** section).

*Author*

The primary author of this document is Gordon Smith, Pacific Islands Fish and Wildlife Office (see **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

*Proposed Regulation Promulgation*

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for "Snail, Newcomb's" under "SNAILS" to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* * * * *		*	*	*	*	*	*
SNAILS							
* * * * *		*	*	*	*	*	*
Snail, Newcomb's	<i>Erinna newcombi</i>	U.S.A. (HI),	N/A	T	680	17.95(f)	
* * * * *		*	*	*	*	*	*

3. Amend § 17.95 (f) by adding critical habitat for the Newcomb's snail (*Erinna newcombi*) in the same alphabetical order as this species occurs in § 17.11(h), to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*  
(f) Clams and snails.  
\* \* \* \* \*

**Newcomb's snail (*Erinna newcombi*)**

(1) Critical Habitat Units are depicted for the County of Kauai, Hawaii, on the maps below.

(2) Within these areas, the primary constituent elements required by the Newcomb's snail are those habitat components that are essential for the biological needs of foraging, sheltering, reproduction, and dispersal. These primary constituent elements are found in locations that support permanently flowing streams, springs, and seeps in mid-elevation locations in valleys on the island of Kauai. The primary constituent elements are: cool, clean,

moderate- to fast-flowing water in streams, springs, and seeps; the associated watersheds and hydrogeologic features that capture and direct water flow to these spring and stream systems; a hydrologic regime that supports perennial flow throughout even the most severe drought conditions; and stream channel morphology that provides protection from channel scour by having overhanging waterfalls, protected tributaries, or similar refugia.

(3) Existing features and structures, such as dams, ditches, tunnels, flumes, and other human-made aquatic habitat features that do not contain one or more of the primary

constituent elements, are not proposed as critical habitat.

(4) Critical Habitat Unit I—Na Pali Coast Streams.

(i) Unit I(a): Kalalau Stream (149 ha; 368 ac)

The Kalalau Stream Newcomb's snail critical habitat location consists of all flowing surface waters within 63 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 435010, 2450871; 434991, 2450828; 435008, 2450782; 435112, 2450715; 435107, 2450681; 435044, 2450591; 435058, 2450537; 435120, 2450441; 435078, 2450308; 435048, 2450279; 435017, 2450341; 434968, 2450375; 434678, 2450406; 434682, 2450441; 434678, 2450551; 434618, 2450603; 434578, 2450602; 434518, 2450564; 434418, 2450540; 434444, 2450711; 434428, 2450733; 434388, 2450657; 434338, 2450612; 434278, 2450596; 434228, 2450621; 434188, 2450596; 434166, 2450621; 434159, 2450691; 434148, 2450691; 434058, 2450599; 433995, 2450571; 433968, 2450540; 433878, 2450559;

433825, 2450544; 433767, 2450451; 433738, 2450478; 433700, 2450581; 433670, 2450611; 433670, 2450671; 433633, 2450738; 433715, 2450996; 433732, 2451168; 433740, 2451380; 433642, 2451551; 433633, 2451598; 433688, 2451664; 433842, 2451694; 434206, 2451592; 434680, 2451547; 435053, 2451609; 435129, 2451611; 435147, 2451590; 435114, 2451460; 435048, 2451400; 434973, 2451360; 435041, 2451320; 435043, 2451250; 435134, 2451170; 435126, 2451120; 435089, 2451069; 435075, 2451013; 435018, 2450933; 435010, 2450871;

(ii) Unit I(b): Hanakoa Stream (63 ha; 156 ac)

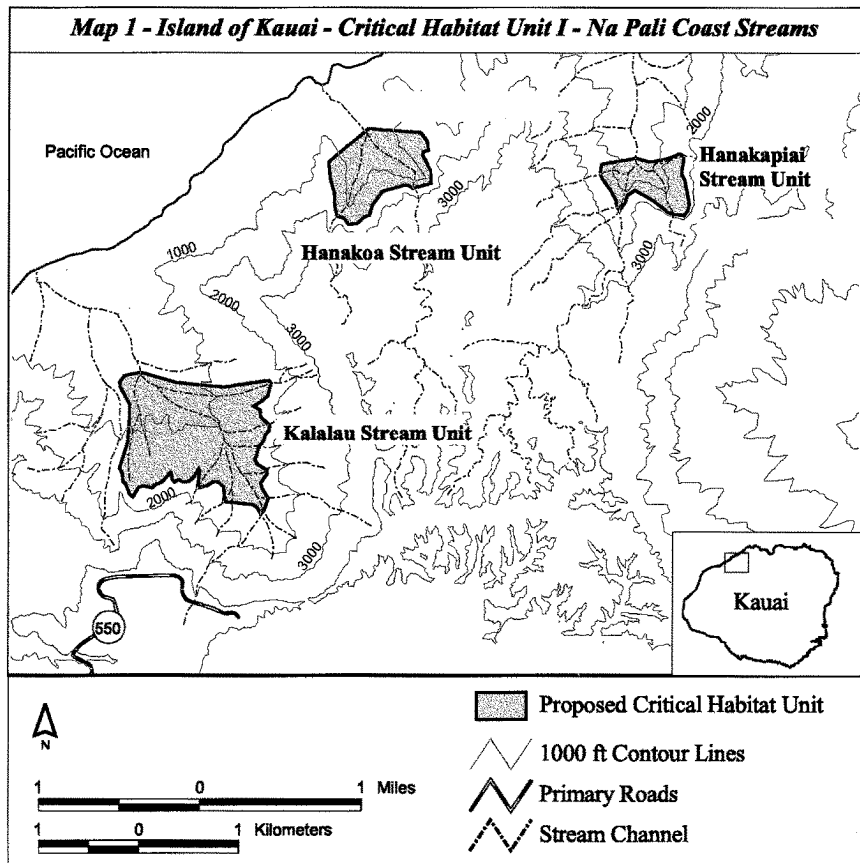
The Hanakoa Stream Newcomb's snail critical habitat location consists of all flowing surface waters within 24 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 435729, 2453628; 435717, 2453789; 436111, 2454127; 436637, 2454087; 436700, 2454008; 436719, 2453907; 436658, 2453889; 436654, 2453857; 436735, 2453697; 436744, 2453577; 436558, 2453527; 436518, 2453555; 436478, 2453559;

436250, 2453496; 436152, 2453358; 436123, 2453263; 436068, 2453238; 435998, 2453171; 435918, 2453168; 435869, 2453229; 435799, 2453248; 435780, 2453320; 435770, 2453490; 435729, 2453628.

(iii) Unit I(c): Hanakapiai Stream (35 ha; 86 ac)

The Hanakapiai Stream Newcomb's snail critical habitat location consists of all flowing surface waters within 25 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 438438, 2453772; 438785, 2453827; 438899, 2453794; 438961, 2453796; 439113, 2453829; 439216, 2453871; 439257, 2453846; 439234, 2453666; 439263, 2453606; 439310, 2453377; 439299, 2453306; 439258, 2453253; 439158, 2453265; 439098, 2453290; 438949, 2453407; 438769, 2453508; 438692, 2453457; 438674, 2453387; 438618, 2453307; 438591, 2453347; 438578, 2453417; 438525, 2453507; 438443, 2453622; 438429, 2453677; 438438, 2453772.

(iv) Map 1—Unit I—Na Pali Coast Streams—follows:



(5) Critical Habitat Unit II—Central Rivers  
(i) Unit II(a): Wainiha River (229 ha; 566 ac)

The Wainiha River Newcomb's snail critical habitat location consists of all flowing surface waters within 97 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 442795, 2446794; 442920, 2446901; 442806, 2446971;

442788, 2447024; 442714, 2447047; 442714, 2447111; 442595, 2447098; 442621, 2447201; 442708, 2447313; 442348, 2447194; 442331, 2447221; 442451, 2447358; 442418, 2447470; 442243, 2447470; 442368, 2447704; 442088, 2447660; 442149, 2447860; 442108, 2447916; 441936, 2447898; 441979, 2448161; 441686, 2448150; 441684, 2448250; 441799, 2448430; 441655, 2448417; 441686, 2448587; 441884, 2448882; 442498, 2449142; 442608, 2449108;

442607, 2448878; 442728, 2448926; 442797, 2448769; 442572, 2448540; 442605, 2448467; 442519, 2448310; 442521, 2448210; 442618, 2448118; 442768, 2448120; 442780, 2447942; 442967, 2447939; 442876, 2447700; 443058, 2447588; 443075, 2447517; 443239, 2447510; 443207, 2447420; 443222, 2447360; 443111, 2447280; 443229, 2447111; 443274, 2446940; 443358, 2446898; 443560, 2446922; 443608, 2446854; 443678, 2446875; 443708, 2446811;



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(ii) Unit II(b): Lumahai River (492 ha; 1216 ac)

The Lumahai River Newcomb's snail critical habitat location consists of all flowing surface waters within 89 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 447598, 2445954; 447344, 2446136; 447298, 2446352; 447248, 2446290; 447178, 2446384; 447088, 2446327; 446972, 2446364; 446950, 2446572; 446787, 2446678; 446648, 2446627; 446648, 2446739; 446445, 2446836; 446409, 2447000; 446278, 2447034; 446208, 2447169; 446097, 2447178; 446141, 2447349; 446024, 2447449; 446014, 2447649; 445808, 2447618; 445809, 2447680; 445839, 2447840; 445616, 2447859; 445773, 2448009; 445589, 2448069; 445728, 2448189; 445531, 2448299; 445685, 2448359;

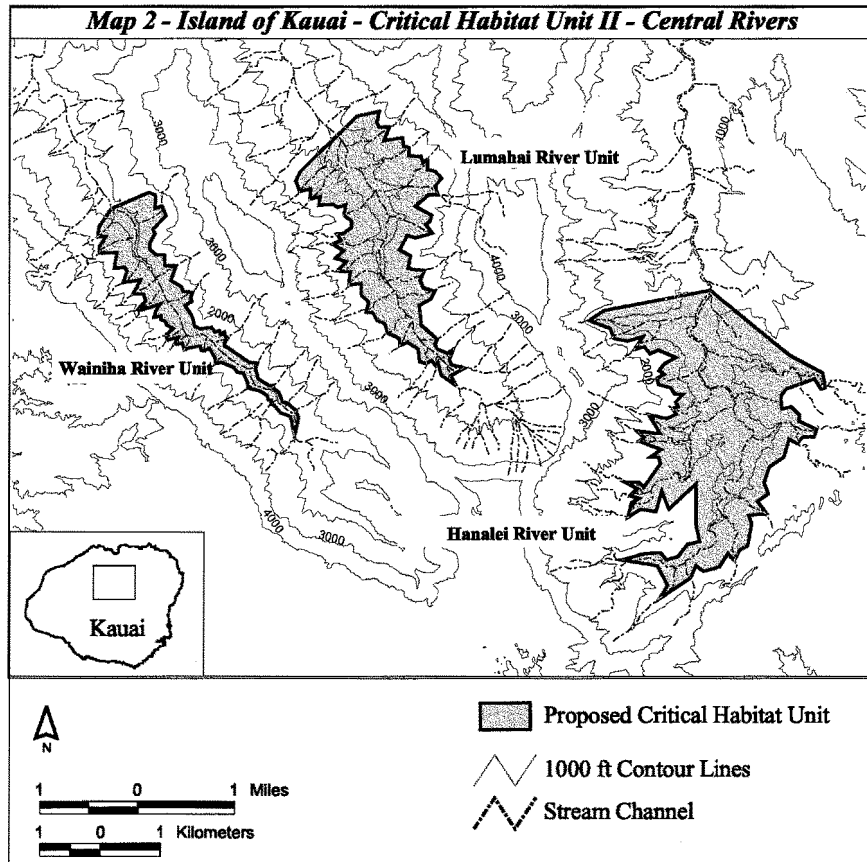
445605, 2448469; 445728, 2448478; 445854, 2448578; 445858, 2448680; 445728, 2448778; 445759, 2448939; 445618, 2448896; 445548, 2448954; 445318, 2448932; 445338, 2449080; 445164, 2449034; 445171, 2449211; 444998, 2449168; 444932, 2449348; 445008, 2449493; 445936, 2450417; 446309, 2450498; 446262, 2450317; 446309, 2450238; 446476, 2450245; 446385, 2450007; 446688, 2450060; 446714, 2449913; 446811, 2449890; 446799, 2449758; 446998, 2449747; 447028, 2449643; 447101, 2449690; 447098, 2449525; 447228, 2449509; 447343, 2449387; 447229, 2449247; 447298, 2449117; 447128, 2449116; 446901, 2448918; 447174, 2448778; 447144, 2448668; 447066, 2448628; 447190, 2448478; 446898, 2448400; 446778, 2448451; 446649, 2448198; 446831, 2448108; 446782, 2447899; 447064, 2447862; 446986, 2447707; 447038, 2447583; 447225, 2447529; 447162, 2447395; 446973, 2447289; 447008, 2446969; 447288, 2446719; 447234, 2446659; 447268, 2446571; 447448, 2446499; 447548, 2446559; 447484, 2446393; 447518, 2446304; 447739, 2446259; 447507, 2446131; 447598, 2445954;

(iii) Unit II(c): Hanalei River (876 ha; 2165 ac)

The Hanalei River Newcomb's snail critical habitat location consists of all flowing surface waters within 91 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 450038, 2447210; 451786, 2447529; 453099, 2446469; 453648, 2446167; 453691, 2445925; 453614, 2445904; 453508, 2446074; 453044, 2445908; 452961, 2445785; 452974, 2445578; 453125,

2445605; 453267, 2445468; 453258, 2445377; 453550, 2445238; 453508, 2445111; 453318, 2445096; 453238, 2444991; 453098, 2445064; 453010, 2444769; 452768, 2444606; 452680, 2444349; 452760, 2444169; 452581, 2444039; 452723, 2443844; 452429, 2443810; 452486, 2443680; 452419, 2443309; 452280, 2443240; 452198, 2443073; 452088, 2443185; 451948, 2442960; 451678, 2442885; 451549, 2442979; 451471, 2442787; 450955, 2442448; 451082, 2442651; 450916, 2442988; 450337, 2443081; 450718, 2443188; 450968, 2443197; 451068, 2443077; 451255, 2443133; 451414, 2443330; 451612, 2443370; 451552, 2443666; 451549, 2444330; 451107, 2443911; 450988, 2444210; 450894, 2443874; 450638, 2443920; 450431, 2443773; 450492, 2444026; 450614, 2444100; 450468, 2444134; 450592, 2444250; 450389, 2444360; 450621, 2444363; 450698, 2444275; 450967, 2444669; 450939, 2444770; 450803, 2444769; 450978, 2444899; 450611, 2445032; 450698, 2445101; 450573, 2445219; 450969, 2445168; 450768, 2445479; 451068, 2445422; 451226, 2445489; 451158, 2445584; 451251, 2445606; 451216, 2445692; 451335, 2445819; 451188, 2445824; 451124, 2445925; 450928, 2445983; 450904, 2446088; 451017, 2446148; 450940, 2446208; 451031, 2446325; 451208, 2446428; 450928, 2446552; 450788, 2446490; 450688, 2446603; 450538, 2446560; 450668, 2446774; 450418, 2446700; 450199, 2446739; 450133, 2446913; 449784, 2447034; 450038, 2447210.

(iv) Map 2—Unit II—Central Rivers— follows:



(6) Critical Habitat Unit III—Eastside Mountain Streams

(i) Unit III(a): Waipahee Stream (106 ha; 262 ac)

The Waipahee Stream Newcomb's snail critical habitat location consists of all flowing surface waters within 89 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 458928, 2447407; 458921, 2447414; 458943, 2447424; 458998, 2447420; 459102, 2447444; 459044, 2447534; 459104, 2447563; 459108, 2447613; 459085, 2447643; 459100, 2447671; 459118, 2447693; 459108, 2447714; 459078, 2447703; 459048, 2447661; 459028, 2447663; 459017, 2447694; 459045, 2447696; 459054, 2447727; 459118, 2447770; 459164, 2447749; 459191, 2447646; 459231, 2447596; 459309, 2447603; 459321, 2447623; 459306, 2447685; 459351, 2447663; 459398, 2447531; 459478, 2447584; 459518, 2447553; 459568, 2447656; 459586, 2447613; 459648, 2447556; 459738, 2447649; 459918, 2447569; 459998, 2447569; 460018, 2447584; 460048, 2447572; 460092, 2447599; 460188, 2447591; 460225, 2447606; 460592, 2447476; 460703, 2447365; 460814, 2447311; 460738, 2447092; 460451, 2446778; 460396, 2446632; 460318, 2446566; 460314, 2446634; 460270, 2446746; 460127, 2446673; 460168, 2446764; 460178, 2446877; 460058, 2446836; 459978, 2446834; 459906, 2446782; 459887, 2446803; 459902, 2446878; 459848, 2446946; 459818, 2446933; 459778, 2446940; 459694,

2446904; 459702, 2447004; 459648, 2447020; 459638, 2447098; 459608, 2447104; 459508, 2447031; 459502, 2447068; 459448, 2447061; 459500, 2447134; 459467, 2447203; 459445, 2447214; 459408, 2447183; 459388, 2447194; 459318, 2447163; 459268, 2447169; 459248, 2447139; 459218, 2447136; 459182, 2447074; 459148, 2447057; 459078, 2447076; 459083, 2447094; 459148, 2447124; 459185, 2447224; 459166, 2447274; 459178, 2447334; 459118, 2447345; 458948, 2447313; 459001, 2447384; 458928, 2447407.

(ii) Unit III(b): Makaleha Stream (95 ha; 235 ac)

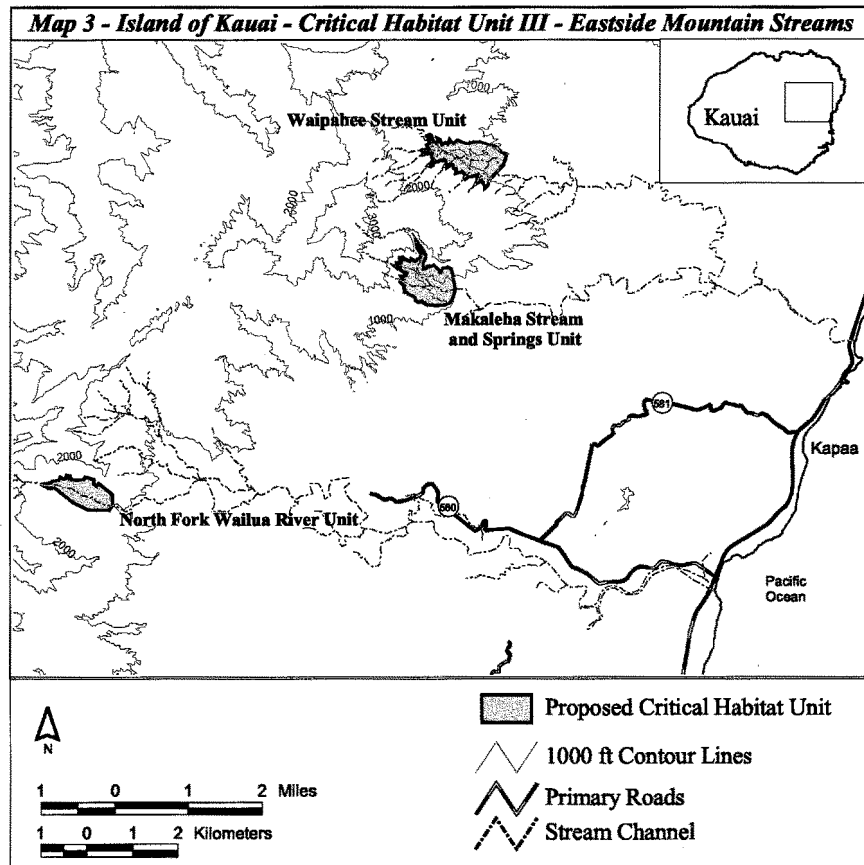
The Makaleha Stream Newcomb's snail critical habitat location consists of all flowing surface waters within 68 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 459368, 2444730; 459372, 2444732; 459414, 2444830; 459438, 2444851; 459498, 2444854; 459528, 2444873; 459588, 2444828; 459601, 2444832; 459689, 2444388; 459662, 2444260; 459604, 2444112; 459455, 2444044; 459279, 2444030; 459064, 2444037; 459008, 2444069; 459002, 2444101; 458968, 2444099; 458944, 2444123; 458878, 2444096; 458808, 2444142; 458803, 2444197; 458748, 2444245; 458658, 2444279; 458633, 2444322; 458576, 2444325; 458582, 2444377; 458552, 2444407; 458568, 2444467; 458478, 2444527; 458474, 2444587; 458537, 2444607; 458492, 2444667; 458608, 2444684; 458633, 2444746; 458545, 2444763; 458495,

2444803; 458485, 2444833; 458418, 2444844; 458347, 2444897; 458418, 2444925; 458411, 2444963; 458504, 2444960; 458503, 2444991; 458458, 2445046; 458458, 2445076; 458528, 2445084; 458582, 2445036; 458678, 2444990; 458718, 2445049; 458798, 2444992; 458818, 2444992; 458868, 2445050; 458908, 2445056; 458933, 2445106; 458927, 2445176; 458854, 2445276; 458808, 2445463; 458960, 2445258; 459033, 2445116; 459033, 2445066; 458978, 2444969; 458983, 2444831; 459038, 2444842; 459088, 2444900; 459158, 2444877; 459218, 2444913; 459331, 2444816; 459368, 2444730.

(iii) Unit III(c): North Fork Wailua River (64 ha; 158 ac)

The North Fork Wailua River Newcomb's snail critical habitat location consists of all flowing surface waters within 97 boundary points with the following coordinates in UTM Zone 4 with the units in meters using North American Datum of 1983 (NAD83): 450656, 2440137; 450861, 2440154; 450920, 2440206; 450968, 2440196; 451045, 2440217; 451079, 2440286; 451145, 2440241; 451197, 2440262; 451211, 2440324; 451291, 2440314; 451291, 2440244; 451426, 2440217; 451589, 2440237; 451616, 2440286; 451811, 2440230; 451800, 2440137; 451873, 2440095; 451918, 2440151; 452209, 2439915; 452223, 2439665; 452140, 2439565; 451672, 2439575; 451343, 2439745; 450968, 2440043; 450840, 2440040; 450656, 2440137.

(iv) Map 3—Unit III—Eastside Mountain Streams—follows:



Dated: January 15, 2002.

**Joseph E. Doddridge,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 02-1770 Filed 1-25-02; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 300

[Docket No. 011206293-1293-01; I.D. 101501A]

RIN 0648-AK17

#### Pacific Halibut Fisheries; Guideline Harvest Levels for the Guided Recreational Halibut Fishery

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement a guideline harvest level (GHL) and a system of harvest reduction measures for managing the harvest of Pacific halibut in the guided recreational fishery in International Pacific Halibut Commission (Commission) areas 2C and 3A off Alaska. The GHL would establish an estimated amount of halibut harvests that may be taken annually in the guided recreational fishery. The system of harvest reduction measures would provide for a number of management measures to take effect incrementally in the event that harvests exceed the GHL. This action is necessary to allow NMFS to manage more comprehensively the Pacific halibut stocks in waters off Alaska. It is intended to further the management and conservation goals of the Northern Pacific Halibut Act of 1982 (Halibut Act).

**DATES:** Comments on the proposed rule must be received by February 27, 2002.

**ADDRESSES:** Comments must be sent to Sue Salvesson, Assistant Regional Administrator for Sustainable Fisheries, Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Gravel, or delivered to the Federal Building, 709 West 9th Street, Juneau, AK. Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) prepared for this action are available from the North Pacific Fishery Management Council at 605 West 4th

Avenue, Suite 306, Anchorage, AK 99501-2252.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Commission promulgates regulations governing the Pacific halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979). The Commission's regulations are subject to approval by the Secretary of State with concurrence of the Secretary of Commerce (Secretary) (16 U.S.C. 773b). Additional management measures may be developed by the North Pacific Fishery Management Council (Council) to allocate harvesting privileges among U.S. fishermen. The Halibut Act provides NMFS with authority to implement such allocation measures through regulatory amendments approved by the Secretary in consultation with the Council. In addition to the IPhC regulations, the commercial halibut fishery off Alaska is managed under the halibut Individual Fishing Quota (IFQ) Program implemented in 1995.

Each year the Commission staff assesses the abundance and potential yield of Pacific halibut using all available data from the commercial fishery and scientific surveys. Harvest limits for 10 regulatory areas are determined by fitting a detailed population model to the data from each area. A biological target level for total removals in a given area is then calculated by multiplying a fixed harvest rate, presently 20 percent, to the estimate of exploitable biomass. This target level is called the "constant exploitation yield" (CEY) for that area in the coming year. Each CEY represents the total allowable harvest (in net pounds) for that area, which cannot be exceeded. The Commission then estimates the sport and personal use, subsistence harvests, wastage, and bycatch mortalities for each area. These are subtracted from the CEY and the remainder may be set as the catch quota for each area's directed commercial fixed gear fishery. Allocations to the guided recreational fishery are thus unrestricted within the CEY and represent an open-ended allocation to the guided recreational fishery from quota available to the commercial halibut fishery. Hence, as the guided recreational fishery expands, its harvests reduce the pounds available to

be fished in the commercial halibut fishery and, subsequently, the value of quota shares (QS) in the IFQ Program.

The Council has discussed the expansion of the halibut guided recreational fleet since 1993, when the rapid increase in guided recreational vessel effort in some small Alaskan communities, such as Sitka, gave rise to concerns about localized depletion of the halibut resource and the potential reallocation of greater percentages of the CEY from the IFQ fishery to the guided recreational vessel fishery. In 1995, the Council developed the following six-point problem statement to direct its analysis of issues attending the guided recreational halibut fishery:

The recent expansion of the halibut charter industry may make achievement of Magnuson-Stevens Act National Standards more difficult. Of concern is the Council's ability to maintain the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource. Specifically, the Council notes the following areas of concern with respect to the recent growth of halibut charter operations:

1. Pressure by charter operations may be contributing to localized depletion in several areas.
2. The recent growth of charter operations may be contributing to overcrowding of productive grounds and declining harvests for historic sport and subsistence fishermen in some areas.
3. As there is currently no limit on the annual harvest of halibut by charter operations, an open-ended reallocation from the commercial fishery to the charter industry is occurring. This reallocation may increase if the projected growth of the charter industry occurs. The economic and social impact on the commercial fleet of this open-ended reallocation may be substantial and could be magnified by the IFQ program.
4. In some areas, community stability may be affected as traditional sport, subsistence, and commercial fishermen are displaced by charter operators. The uncertainty associated with the present situation and the conflicts that are occurring between the various user groups may also be impacting community stability.
5. Information is lacking on the socioeconomic composition of the current charter industry. Information is needed that tracks: (1) the effort and harvest of individual charter operations; and (2) changes in business patterns.
6. The need for reliable harvest data will increase as the magnitude of harvest expands in the charter sector.

In September 1997, the Council took final action on two management actions affecting the halibut guided recreational fishery, culminating more than 4 years of discussion, debate, public testimony, and analysis. First, the Council