

**Pacific Legal Foundation**  
**Supplemental Comments Regarding Fish & Wildlife Service's**  
**Economic Impact Analysis of Proposed Designation of Critical Habitat for**  
**Newcomb's Snail on Kauai**  
**January 28, 2002**  
**67 FR 3849**  
**April 22, 2002**

The Fish and Wildlife Service ("FWS" or "Service") published its notice of its Draft Economic Impact Analysis of Proposed Critical Habitat for the Newcomb's Snail ("Draft Analysis" or "DA") on March 29, 2002. 67 Fed. Reg. 15159. This was the same day that Pacific Legal Foundation ("PLF") filed its comments on the FWS's proposal to designate critical habitat for the Newcomb's Snail. PLF now supplements its comments concerning the critical habitat designation with these comments specifically addressing the Draft Analysis. In its original comments, incorporated here by reference, PLF expressed concern that the economic impact analysis would not adequately consider the impact of the original species listing and would not consider the economic impacts that the listing and critical habitat designation would trigger under Hawai'i state law. As PLF feared, the Draft Analysis suffers these defects.

The Draft Analysis begins by citing *New Mexico Cattle Growers Association v. U.S. FWS*, 248 F.3d 1277 (10<sup>th</sup> Cir. 2001), but evidently this is only boilerplate that "the Service has added . . . to all economic analyses of critical habitat designations." DA at F-1. *N.M. Cattle Growers* holds that Endangered Species Act ("ESA") § 4 requires an economic impact analysis to consider the impact of the original listing of the species as endangered as well as the impact of the designation of an area as critical habitat. The 10<sup>th</sup> Circuit rejected the Service's "baseline" analysis, which almost never found significant impacts because it only looked for marginal impacts of ESA § 7 consultation required by the habitat designation over and above the baseline of species listing.

However, the Draft Analysis fails to take a hard look at the economic impacts of the listing and critical habitat designation that result from the way state law incorporates and reacts to the federal decisions. The analysis is expressly limited to the impact of federal agency consultation with FWS under the jeopardy standard. DA at ES-1 to ES-2. This limitation is confirmed by the discussion of methodology: "Activities on State, county, municipal and private lands that . . . do not involve Federal funding, a Federal permit, or other Federal actions . . . were not addressed." DA at V-2. However, as discussed in PLF's initial comments at 7-13, federal listing and habitat designation may each trigger state law consequences that may have severe economic impacts. State and county laws should not be ignored; they can have effects caused by the federal listing and/or critical habitat provisions. DA at V-3.

For instance, there are water diversion systems in at least four of the critical habitat units, including two irrigation ditches presently in use and another that is

presently unused. DA at I-4, VI-10 to 11. The Service believes that reducing stream flow might harm the species. DA at VI-6. Yet the Draft Analysis does not consider whether designation would trigger state law limits on diversion of water from the streams or the use of streams for hydroelectric power generation. Hawai'i water law might be interpreted to prevent or limit diversion of the water for agricultural use. See PLF's comments at 11-13. This possibility is not excluded merely because the designated habitat will exclude artificial irrigation structures. DA at I-2, V-3. If, as a result of listing and designation, state law requires reducing the amount of water diverted to irrigation, there will be significant economic impacts whether or not the irrigation structures are designated as critical habitat. By restricting consideration to direct federal involvement, the Service fails to properly consider this potential impact.

The Draft Analysis also fails to adequately consider the impact of the proposed critical habitat designation on hydroelectric uses of the streams. A&B has a hydroelectric plant on one of the streams that is not now habitat of the Newcomb's snail. DA at VI-6. Contrary to Draft Analysis, A&B (or perhaps a future owner) may wish to expand hydroelectric power. There are numerous streams in the area that would be suitable for hydroelectric development; the Service apparently intends to spread Newcomb's snails into some of these streams where the snails do not now live. DA at VI-12. The state's energy policy calls for Hawai'i to become energy independent, using renewable resources in Hawai'i such as water and wind power. See HRS § 196-1. Several proposals for hydroelectric development on Kauai have been frustrated by permitting problems. DA at VI-13. Spreading the snails to new streams designated as critical habitat (DA at VI- 12 to 13) could aggravate these problems by triggering additional state law restrictions on use of the streams, as PLF discussed in its comments. FWS's plans could also interfere with existing hydroelectric operations. DA at VI-16. These economic impacts should be analyzed even if they do not involve federal consultations under ESA § 7.

The Draft Analysis mentions state programs that can be triggered by the federal listing and habitat designation but the draft neglects their potential impacts. For instance, at IV-13 to IV-14, the Draft Analysis cites the state statute, HRS Chapter 195D, and regulations protecting endangered species. However there is no mention of the state's more stringent limits on landowners or the way these limits may be triggered by federal listing and designation. PLF discusses these impacts at pp. 7-10 of its comments. Similarly, the Draft Analysis at IV-14 to 15, mentions Hawai'i's Environmental Impact Statement law, HRS Chapter 343, but does not acknowledge that any impact on endangered species habitat will be deemed to be "significant," HAR § 11-200-12(b)(9), thus triggering an expensive and slow process of environmental assessment. See PLF's comments at 10-11. Before finally designating critical habitat, the Service should consider the economic impacts of combining the federal decisions with these state laws.

For the reasons discussed here and in PLF's March 29, 2002 comments, the Draft Analysis fails to satisfy the requirement of ESA § 4 that the FWS take a hard look at the economic impact of both listing and designation and exclude areas from critical habitat that the species does not need where the economic costs of designation exceed the benefits.