DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 224 and 226

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RIN 0648–BC45

Endangered and Threatened Wildlife and Plants: Final Rulemaking To Designate Critical Habitat for the Main Hawaiian Islands Insular False Killer Whale Distinct Population Segment

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

ACTION: Final rule.

SUMMARY: We, NMFS, issue a final rule to designate critical habitat for the Main Hawaiian Islands (MHI) insular false killer whale (IFKW) (*Pseudorca crassidens*) distinct population segment (DPS) by designating waters from the 45-meter (m) depth contour to the 3,200-m depth contour around the main Hawaiian Islands from Niihau east to Hawaii, pursuant to section 4 of the Endangered Species Act (ESA). We have excluded 14 areas (one area, with two sites, for the Bureau of Ocean Energy Management (BOEM) and 13 areas requested by the Navy) from the critical habitat designation because we have determined that the benefits of exclusion outweigh the benefits of inclusion, and exclusion will not result in extinction of the species. Additionally, the Ewa Training Minefield and the Naval Defensive Sea Area are precluded from designation under section 4(a)(3) ofthe ESA because they are managed under the Joint Base Pearl Harbor-Hickam Integrated Natural Resource Management Plan that we find provides a benefit to the MHI IFKW.

DATES: This rule becomes effective August 23, 2018.

ADDRESSES: The final rule, maps, and other supporting documents (Economic Report, ESA Section 4(b)(2) Report, and Biological Report) can be found on the NMFS Pacific Island Region's website at *http://www.fpir.noaa.gov/PRD/prd_mhi_false_killer_whale.html#critical_habitat.*

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SUPPLEMENTARY INFORMATION:

Background

On December 28, 2012, the listing of the MHI IFKW (*Pseudorca crassidens*) DPS as endangered throughout its range under the ESA became effective. The listing cited the population's high extinction risk and insufficient conservation efforts in place to reduce that risk (77 FR 70915; November 28, 2012). With approximately 150 individuals, small population size and incidental take (hooking or entanglements) in commercial and recreational fisheries are the highest threats to this DPS. However, other medium-level threats such as environmental contaminants, competition with fisheries for food, effects from climate change, and acoustic disturbance may also play a role in impeding recovery (NMFS 2016). Under section 4 of the ESA, critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is listed as threatened or endangered (16 U.S.C. 1533(b)(6)(C)). In the final listing rule, we stated that critical habitat was not determinable at the time of the listing, because sufficient information was not currently available on the geographical area occupied by the species, the physical and biological features essential to conservation, and the impacts of the designation (77 FR 70915; November 28, 2012). Under section 4 of the ESA, if critical habitat is not determinable at the time of listing, a final critical habitat designation must be published 1 year after listing (16 U.S.C. 1533(b)(6)(C)(ii)). The Natural Resources Defense Council filed a complaint in July 2016 with the U.S. District Court for the District of Columbia seeking an order to compel NMFS to designate critical habitat for the MHI IFKW DPS, and a court-approved settlement agreement was filed on January 24, 2017 (*Natural Resources Defense Council, Inc.* v. *Penny Pritzker, National Marine Fisheries Services,* 1:16–cv–1442 (D.D.C.)). The settlement agreement stipulated that NMFS will submit the final rule to the Office of the Federal Register by July 1, 2018.

Based on the recommendations provided in the Draft Biological Report, the initial Regulatory Flexibility Analysis (RFA) and ESA section 4(b)(2) analysis (which considers exclusions to critical habitat based on economic, national security and other relevant impacts), we published a proposed rule on November 3, 2017 (82 FR 51186) to designate waters from the 45-m depth contour to the 3,200-m depth contour around the main Hawaiian Islands from Niihau east to Hawaii, with some exceptions, as MHI IFKW critical habitat. In accordance with the definition of critical habitat under the ESA, this area contained physical or biological features essential to conservation of the species and which may require special management considerations or protections. The proposed rule included background information on MHI IFKW biology and habitat use, which is not included here but the reader may access by referring to the proposed rule (82 FR 51186; November 3, 2017).

In the proposed rule, we described the physical or biological features essential to the conservation of MHI IFKWs as (1) island-associated marine habitat for MHI IFKWs; (2) prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth; (3) waters free of pollutants of a type and amount harmful to MHI IFKWs, and (4) habitat free of anthropogenic noise that would significantly impair the value of the habitat for false killer whale use or occupancy. We requested public comments through January 2, 2018. For a complete description of our proposed action, including the natural history of the MHI IKFW, we refer the reader to the proposed rule (82 FR 51186; November 3, 2017).

Statutory and Regulatory Background for Critical Habitat

The ESA defines critical habitat under section 3(5)(A) as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. (16 U.S.C. 1532(5)(A)). Conservation is defined in section 3(3) of the ESA as: To use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary (16 U.S.C. 1532(3)). Section 3(5)(C) of the ESA provides that except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Section 4(a)(3)(B) prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD) or designated for its use, that are subject to an Integrated Natural Resources Management Plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species, and its habitat, for which critical habitat is proposed for designation.

Section 4(b)(2) of the ESA requires us to designate critical habitat for threatened and endangered species on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. This section also grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat upon determining that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. However, the Secretary may not exclude areas if this will result in the extinction of the species. Our regulations provide that critical habitat shall not be designated within foreign countries or in other areas outside U.S. jurisdiction (50 CFR 424.12(g)). Once critical habitat is designated, section 7(a)(2) of the ESA requires Federal agencies to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify that habitat (16 U.S.C. 1536(a)(2)). This requirement is in addition to the section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to jeopardize the continued existence of ESA-listed species. Specifying the geographic location of critical habitat also facilitates implementation of section 7(a)(1) of the ESA by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the ESA. Critical habitat requirements do not apply to citizens engaged in actions on private land that do not involve a Federal agency. However, designating critical habitat can help focus the efforts of other conservation partners (*e.g.,* State and local governments, individuals, and nongovernmental organizations).

Summary of Changes From the Proposed Rule

After considering public comments received and the best scientific information available, we have made the following changes: (1) We have combined the four proposed features into a single essential feature with four characteristics that describe how island-associated marine habitat is essential to MHI IFKWs; and (2) we have excluded under section 4(b)(2) the Kaulakahi Channel portion of Warning area 186, the area north of Molokai, the reduced Alenuihaha Channel, the Hawaii Area Tracking System, and the Kahoolawe Training Minefield due to national security impacts.

Single Essential Feature

In the proposed rule we identified four features that are essential to MHI IFKWs: Island-associated habitat, prey, water quality, and sound. We received public comments that questioned the clarity of some of these features, and whether certain features were sufficiently described to meet the definition of critical habitat. For example, one comment criticized the feature, island-associated marine habitat for MHI IFKWs, because it lacks objective parameters that warrant special management considerations or protections. The commenter requested more clarity on or removal of this feature.

After review of this comment and other comments, we recognize the interdependence of movement and space, prey, sound, and water quality characteristics in identifying island-associated habitat that is essential to the conservation of the species because these habitat characteristics collectively support important life history functions, such as foraging and reproduction, which are essential for this population's conservation. Indeed, MHI IFKWs are an island-associated population of false killer whales with their range restricted to the shelf and slope habitat around the MHI, unlike pelagic false killer whales found more in open oceans. Because these habitat characteristics are important components to the ecology of these whales, we have reorganized the essential features in the proposed rule into a single feature, island-associated marine habitat for MHI IFKWs, with four characteristics that support this feature. The four characteristics include (1) adequate space for movement and use within shelf and slope habitat; (2) prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth; (3) waters free of pollutants of a type and amount harmful to MHI IFKWs; and (4) sound levels that will not significantly impair false killer whales' use or occupancy (see the *Physical and Biological Features* section below for full descriptions).

The first characteristic, adequate space for movement and use within shelf and slope habitat, is used to describe, in part, the ''island-associated marine habitat'' feature in the proposed rule. We have highlighted this as a characteristic of the island-associated habitat for this final rule in response to comments that requested clarity on the special management considerations for this feature. Under the description of this feature, we note the importance of supporting these whales' ability to move to, from, and around areas of concentrated (high) use and provide details about how activities, such as large-scale construction or noise, may act as barriers to movement for these whales within their restricted range.

Characteristics 2 and 3, prey and water quality, have not materially changed from the proposed rule; however, we do provide more information in our description in the *Physical and Biological Features Essential for Conservation* section of this final rule and in the Biological Report about factors that influence these characteristics. For example, we have used information provided in the Biological Report under diet to provide additional detail about the specific types of prey species that these whales are known to eat (NMFS 2017b). Additionally, we have provided more information about factors that threaten prey and water quality in these descriptions.

In the proposed rule we solicited comments on the feature ''habitat free of anthropogenic noise that would significantly impair the value of the habitat for MHI IFKW use or occupancy.'' We received multiple comments that suggested removing this feature for the following reasons: The effects of noise on IFKWs are already considered under the jeopardy standard analysis; the absence of noise is not a feature of the habitat, there is not sufficient scientific justification for the feature, and the management of this feature is not clearly described.

As odontocetes, these whales rely on their ability to receive and interpret sound within their environment in order to forage, travel, and communicate with one another. Accordingly, island-associated habitat must be capable of supporting MHI IFKWs' ability to do so. While noise has the potential to affect individual whales in a manner that may have biological significance (*i.e.,* to result in a ''take'' by harassment, injury, or otherwise), scientific information also indicates that the introduction of a permanent or chronic noise source can degrade the value of habitat by interfering with the sound-reliant

animal's ability to gain benefits from that habitat, impeding reproduction, foraging, or communication (*i.e.,* altering the conservation value of the habitat). This reliance on sound, combined with the whales' adaptation to a restricted range, make sound an important characteristic of island-associated habitat. Thus, it is appropriate to consider how chronic and persistent noise sources may alter the value of that habitat and manage for it.

To clarify how sound as a characteristic of habitat supports these whales and should be managed for this designation, we have revised the language of this characteristic to ''sound levels that would not significantly impair MHI IFKW's use or occupancy.'' For this characteristic we describe the importance of sound in this populations' ecology and describe how noise sources may alter the value of their habitat. After considering public comments, we recognize that the mere presence of noise in the environment—even noise that might result in harassment—does not necessarily result in adverse modification of critical habitat. Rather, chronic exposure to noise as well as persistent noise may impede the population's ability to use the habitat for foraging, navigating, and communicating, and may deter MHI IFKWs from using the habitat entirely (see also our response to Comment 6 and the *Physical and Biological Features Essential for Conservation* section of this rule).

Additional National Security Exclusions

In the proposed rule we noted that we would be considering six additional requests submitted by the Navy, which were subsets of a larger area that the Navy initially requested for exclusion, but which NMFS determined should not be excluded under 4(b)(2). We reviewed these six areas along with four additional areas requested by the Navy consistent with the criteria reviewed for all other areas considered for national security exclusion for this rule.

For the Kaulakahi Channel Portion of W–186, the area north of Molokai, a reduced portion of the Alenuihaha Channel, the Hawaii Area Tracking System, and the Kahoolawe Training Minefield (NMFS 2018b), we find that the benefits of exclusion for national security outweigh the benefit of designating MHI IFKW critical habitat. On June 22, 2017, the Navy requested exclusion of each of these areas as a subset of a larger ''Entire Area.'' The Navy also identified the area north of Molokai for exclusion as a subset of the ''four islands region,'' and the Alenuihaha Channel as a portion of the ''waters surrounding the Island of Hawaii'' exclusion request. NMFS initially proposed not to exclude these areas as included in the larger units (DON 2017a, as referenced in NMFS 2017b). We have now reevaluated these geographically limited portions of the initial request in response to information submitted by the Navy on October 10, 2017, along with the Navy's supplemental information limiting the geographic scope of their request to exclude Alenuihaha Channel. Although the June 22, 2017 request provided a full description of the defense activities in all of these areas, the Navy's supplemental submissions helped improve our understanding of the geographic scope of the particular impacts to national security. For example, the Navy clarified that the Channel Portion of the W–186 area is used to support military activities occurring on the Pacific Missile Range Facility (PMRF) Offshore Areas and that the area north of Molokai provides unique bathymetry that supports the Submarine Command Course (DON 2017b, DON 2018). Supplemental information also identified the unique training capabilities provided by the bathymetry of the Hawaii Area Tracking System and the instrumentation found within the Kahoolawe Training Minefield, which support military readiness. Additionally, with respect to the Alenuihaha Channel, our exclusion decision is limited to the deeper areas of the Channel that support Undersea Warfare training exercises; these waters include approximately 2,609 square kilometers (km^2) (1,007 square miles (mi^2)) of the 4,381 km^2 (1691 mi^2) area identified in the proposed rule. In light of our improved understanding of the defense activities conducted and the reduced size of the requested exclusions, we now conclude that the benefits of exclusion outweigh the benefits of designating critical habitat, and that granting these exclusions will not result in extinction of the species. The Kaulakahi Channel Portion of W–186 area overlapped with approximately 1,631 km^2 (630 mi^2) or approximately 3 percent of the area that was proposed for designation, the area north of Molokai overlapped with approximately 596 km^2 (230 mi^2) or approximately one percent of the area that was proposed for designation, and the Alenuihaha Channel overlapped with approximately 2,609 km^2 (866 mi^2) or approximately 5 percent of the area that was proposed for designation. The Hawaii Area Tracking System overlaps with about 96 km^2 (37mi^2) or about 0.2 percent of the area that was proposed for designation, and the Kahoolawe Training Minefield overlaps with about 12 km^2 (5 mi^2) or about 0.02 percent of the area that was proposed for designation. These overlap a small area of low-use and lower traveled MHI IFKW habitat.

For the other three areas identified in the Navy's October 10, 2017 request, as well as two additional areas identified by the Navy on February 8, 2018, we find that the benefits of designating critical habitat for MHI IFKWs outweigh the benefits of excluding these areas. The *National Security Impacts* section of this rule provides a detailed summary of our weighing process for all areas, and the full analysis can be found in the ESA Section 4(b)(2) Report (NMFS 2018b).

Thus, given these changes, in total we have excluded 14 areas (one area, with two sites, for BOEM and 13 areas requested by the Navy from the critical habitat designation because we have determined that the benefits of exclusion outweigh the benefits of inclusion, and exclusion will not result in extinction of the species. The excluded areas are: (1) The BOEM Call Area offshore of the Island of Oahu (which includes two sites, one off Kaena point and one off the south shore); (2) the Navy Pacific Missile Range Facility's Offshore ranges (including the Shallow Water Training Range (SWTR), the Barking Sands Tactical Underwater Range (BARSTUR), and the Barking Sands Underwater Range Extension (BSURE; west of Kauai)); (3) the Navy Kingfisher Range (northeast of Niihau); (4) Warning Area 188 (west of Kauai); (5) Kaula Island and Warning Area 187 (surrounding Kaula Island); (6) the Navy Fleet Operational Readiness Accuracy Check Site (FORACS) (west of Oahu); (7) the Navy Shipboard Electronic Systems Evaluation Facility (SESEF) (west of Oahu); (8) Warning Areas 196 and 191 (south of Oahu); (9) Warning Areas 193 and 194 (south of Oahu); (10) the Kaulakahi Channel portion of Warning area 186 (the channel between Niihau and Kauai and extending east); (11) the area north of Molokai; (12) the Alenuihaha Channel, (13) the Hawaii Area Tracking System, and (14) the Kahoolawe Training Minefield. In addition, the Ewa Training Minefield and the Naval Defensive Sea Area are precluded from designation under section 4(a)(3) of the ESA because they are managed under the Joint Base Pearl Harbor-Hickam Integrated Natural Resource Management Plan that we find provides a benefit to the MHI IFKW.

Summary of Comments and Response

We requested comments on the proposed rule to designate critical habitat for the MHI IFKW and associated supporting reports as described above. We received 26 individual submissions in response to that request. We have considered all public comments, and provide responses to all significant issues raised by commenters that are relevant to the proposed designation of MHI IFKW critical habitat. We have not responded to comments or concerns outside the scope of this rulemaking, including comments disagreeing with the listing of this DPS as endangered, or recommendations regarding broad ESA policy issues.

Special Management Considerations or Protections

Comment 1: We received comments suggesting that major threats to this DPS were not adequately addressed in the proposed designation including threats associated with longline factory fishing boats, water pollution, and noise pollution. Some commenters noted that the proposal did not mention the threat posed by biannual Rim of the Pacific (RIMPAC) exercises conducted by the Department of Defense. One commenter suggested that RIMPAC exercises should not be allowed to occur in the proposed critical habitat.

Response: The Special Management Considerations or Protection section of the Draft and Final Biological Reports (NMFS 2017a, 2018a) provides information about the types of activities that raise significant habitat-based threats, and the special management considerations or protections that may be necessary to manage or protect the feature and its characteristics, essential to the conservation of MHI IFKWs. Water pollution, noise pollution, and reductions in prey or habitat were among the threats discussed. This section of the reports also identifies seven categories of activities with a Federal nexus (*i.e.,* a project that is authorized, funded, or carried out by a Federal agency) that may have the potential to contribute to these habitat threats and that are subject to the ESA section 7 consultation process. Specifically, we discussed fisheries, activities that contribute to water pollution, and military activities, and how these activities may impact available prey resources, water quality, or sound levels in the marine environment.

We note that federally managed longline fisheries (including the deep-set and shallow-set fisheries) are currently not considered a ''major'' threat to this DPS or their habitat. As noted in the MHI IFKW Recovery Outline (NMFS 2016a), which categorizes the significance of threats to this DPS from low to high, the threat of incidental take (*e.g.,* entanglements or hookings) in federally-managed longline fisheries is considered low because about 95 percent of the DPS' range is within the Main Hawaiian Islands Longline Fishing Prohibited Area that surrounds the MHI (NMFS 2016a; *See* 50 CFR 229.37(d)). Further, we note that fishery interactions, such as entanglements and hooking, are considered a threat to the individual animals themselves and not the habitat. Such threats are properly analyzed under the jeopardy analysis conducted during the section 7 consultation process.

We note that reductions in prey are described as a medium threat, with several fisheries potentially contributing to this risk. In the Draft Biological Report we reviewed the sustainability of stocks that are targeted by the federally managed longline fisheries and that are known IFKW prey species. Current information, although incomplete, suggests that these stocks are sustainably managed and that additional management is not necessary to conserve prey species (NMFS 2018). However, we also note in the Draft and Final Biological Report that, as new information becomes available regarding MHI IFKW dietary needs or the sustainability of overlapping fish stocks, additional management measures may be taken in the future to ensure that MHI IFKW critical habitat is not adversely modified.

With regard to water pollution, we have included water quality as a characteristic of MHI IFKW critical habitat because pollutants in marine waters of the island-associated habitat affect the quality of prey for this DPS and can create environments in which these whales are at higher risk of disease. The Draft and Final Biological Reports discuss water quality threats to MHI IFKW habitat under the Activities that Contribute to Water Pollution section, and discuss activities that may reduce water or prey quality by increasing persistent organic pollutants (POP) or other chemicals of emerging concern, heavy metals, pathogens, or naturally occurring toxins in Hawaii's surrounding waters (NMFS 2017a, 2018a). Although we have not identified additional management measures beyond the existing protections already granted from other regulations (*e.g.,* the Clean Water Act), we note that special management considerations may be necessary in the future, and that a project's specific details, such as discharge location, chemical or biological composition, frequency, duration, and concentration, will help determine necessary conservation measures.

With regard to military activities, the Draft Biological Report indicated that a wide variety of activities were covered by this category including training, construction, and research activities undertaken by the Department of Defense. We have revised the Final Biological Report to clarify that RIMPAC exercises are included among the military training exercises considered under this category. The report notes that many of the military exercises in the Hawaii Range Complex are subject to a five-year MMPA authorization for the incidental take of marine mammals, which is subject to the consultation requirements of the ESA. These five-year reviews include the consideration of exercises that are undertaken during biannual RIMPAC events.

With regard to the comment that we should not allow RIMPAC to occur in critical habitat, we note that a critical habitat designation does not restrict activities from occurring in critical habitat; it is only during the section 7 consultation process that effects on critical habitat are determined and additional conservation and management measures are considered, as appropriate.

Comment 2: BOEM commented that the characterization of offshore energy projects as a threat to the physical and biological features of critical habitat is not supported by information in the rule or supporting documents, and that NMFS was inconsistent in describing the relative risk of activities that are identified as possibly threatening habitat features compared with other activities. BOEM's comment noted that, despite threats from specific energy-related development being described as either uncertain or already managed under existing regulatory protections, the Biological Report suggests that special management considerations would include changes in siting of energy projects based on the boundaries of proposed critical habitat. BOEM noted that this contrasts with NMFS' discussion of and recommendations for the management of fisheries, in which additional management considerations are not suggested for federally managed commercial fisheries, despite the threat of reduced prey availability being described as a moderate risk for the listing of this DPS. BOEM recommended that we ''remove energy activities from [our] list of activities that may threaten

the physical and biological features of critical habitat based on [low risk and uncertain] conclusions made in [our] Draft Biological Report and focus instead on management considerations for other activities that are consistent with habitat requirements for IFKWs.''

Response: We conclude that that offshore energy projects should remain on the list of activities that may affect the physical and biological feature of MHI IFKW critical habitat because there is sufficient information available to suggest that these projects have the potential to affect MHI IFKW critical habitat. Offshore energy includes a broad suite of different projects (*e.g.,* wind, wave, and ocean thermal) that may involve constructing or placing structures in the marine environment, as well as operating and maintaining these structures. As cited in the Draft and Final Biological Reports, the Department of Energy acknowledges that there are common elements among these projects that pose a risk of adverse environmental effects including, but not limited to, noise during construction and operation; alteration of substrates; sediment transportation and deposition; generation of electromagnetic fields (EMF); toxicity of paints, lubricants, and antifouling coatings; and interference with animal movements (Cada 2009). This list of environmental effects indicates that these projects present risk to MHI IFKW prey, water quality, sound levels, and adequate space for movement and use.

As acknowledged in the Draft Biological Report (NMFS 2017a), current information suggests that risks associated with certain threats may be minimal (*e.g.,* EMF) or sufficiently managed under existing regulatory regimes (*e.g.,* water quality). However, the fact that habitat characteristics may directly or indirectly benefit from existing regulatory regimes is not determinative of whether energy development activities have the potential to adversely affect the feature and characteristics essential to MHI IFKWs, such that the feature may require special management or protection. Further, other risks related to noise and adequate space for movement and use remain relatively unclear because noise sources vary (in levels and frequency) among device types, and effects to habitat use as a result of structures in the water may vary locally (Bergstrom *et al.* 2014, Teilmann and Carstensen 2012, Scheidat *et al.* 2011). For example, Teilmann and Carstensen (2012) report a decline in harbor porpoise habitat use followed by evidence of slow recovery since a large scale offshore wind farm was installed in the Baltic, while Scheidat *et al.* (2011) report increased habitat use by harbor porpoises in a wind farm in the Dutch North Sea. Accordingly, project-specific details would be required to analyze the relative risk that any particular type of energy development project may have on MHI IFKW critical habitat. Due to the uncertainties associated with the size and scope of these projects and their impact on MHI IFKWs and their habitat, we expect that monitoring will be recommended for many first generation projects in Hawaiian waters.

As noted by the Department of Energy, project location can play a large role in minimizing the environmental impacts of any particular project (DOE 2009). While we do find that impacts to critical habitat from offshore energy activities may occur, we do not expect that these project siting considerations will be raised as late as the formal section 7 consultation process. Based on BOEM's objective to work with regulatory agencies early in the planning process and to choose locations that will minimize environmental impacts (Gilman *et al.* 2016), we expect that site locations that minimize potential effects to MHI IFKWs and their habitat will be made early in the planning process. We have made revisions to the Final Biological Report and Economic Report to help clarify that change in location of projects is not an expected modification to be made during section 7 consultation; rather, regulatory agencies are likely to consider the sensitivity of the habitat early in the planning process and to select sites that will minimize any potential environmental effects, which is likely to minimize impacts to both MHI IFKWs and their critical habitat.

With regard to the perceived inconsistency between modifications for fishery and energy development activities, we note that our anticipated modifications to minimize effects to MHI IFKW critical habitat vary among activities based on the available information. We recognize that fisheries have the potential to adversely affect MHI IFKW prey stocks and have included this activity in the list of activities that may affect MHI IFKW critical habitat. However, as noted in the Draft and Final Biological Reports, commercial fisheries are already regulated under catch limits and area restrictions that help ensure sustainability of fish stocks, and there is no current information suggesting that fishery catch rates are adversely affecting the availability of prey for IFKWs (NMFS 2017a and 2018a). Nevertheless, we anticipate that through the consultation process, NMFS will recommend project-specific modifications that will help reduce impacts to critical habitat, whether that activity involves commercial fisheries, energy development, or some other Federal action.

Essential Features

Comment 3: The Hawaii Longline Association (HLA) provided comments noting several reasons why the ''prey'' feature may not be appropriately identified as a biological feature essential to the conservation of the MHI IFKW and why the proposed feature should not be used to determine future fisheries management. These comments stated that prey is not a limiting factor for this DPS, and noted that the Biological Report's conclusion, which anticipated no additional management for the longline fisheries, suggests that there are no special management measures required for this feature. HLA noted that without the need for special management measures, this feature does not meet the definition of features that can be used to delineate critical habitat under the ESA. HLA also noted that there is insufficient detail describing the prey feature (*e.g.,* standards identifying the quantity, quality, or availability of prey that is necessary to support MHI IFKW conservation) for NMFS to regulate the fisheries in the future, and noted that any revised management measures premised upon impacts to the prey feature would require a revision to the designation and an updated economic analysis to consider the impacts to and any potential exclusions for commercial fisheries.

Response: As noted in the *Summary of Changes from the Proposed Rule* section, we have restructured the feature essential to the conservation of MHI IFKWs to clarify that prey is one of four characteristics that support the feature, island-associated marine habitat for MHI IFKWs. These characteristics, in combination, support the unique ecology of MHI IFKWs, and each characteristic may require special management considerations or protection to support the overall health and recovery of this population.

The ESA defines critical habitat, in relevant part, as the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection, 16 U.S.C. 1532(5)(A)(i).

Merriam-Webster defines a limiting factor as the environmental factor that is of predominant importance in restricting the size of a population. The ESA does not require that a feature be limiting, but only that it be essential to conservation and that it may require special management. It is rare that a single factor limits a species' conservation; instead, most listed species face multiple threats of varying magnitudes, and the combination of these threats can hinder recovery. As noted in the species' status review and recovery outline (Oleson *et al.* 2010 and NMFS 2016a), reductions in prey size and biomass as well as environmental contaminants (received through prey) are medium threats for this DPS (Oleson *et al.* 2010, and NMFS 2016a), indicating that prey is an element in supporting recovery of MHI IFKWs. Accordingly, the availability of prey is an important characteristic that supports the successful growth and health of individuals throughout all life-stages. Further, the successful management of this characteristic, which does have competition from fisheries that catch MHI IFKW prey within island-associated marine habitat for MHI IFKWs, will ultimately support recovery of the population.

The phrase ''may require'' indicates that critical habitat includes features that may now, or at some point in the future, be in need of special management or protection. Similar to our analyses in the proposed rule, we determined that this characteristic of the essential feature may require special management considerations or protections due to competition from fisheries that catch MHI IFKW prey. Certain laws and regulatory regimes already directly or indirectly protect, to differing degrees and for various purposes, the prey characteristic of the essential feature. However, in determining whether essential features may require special management considerations or protection, we do not base our decision on whether management is currently in place, or whether that management is adequate, but simply that it may require management. That is, we cannot read the statute to require that additional special management be required before we designate critical habitat (See *Center for Biological Diversity* v. *Norton*, 240 F.Supp.2d 1090 (D. Ariz. 2003)). That a feature essential to conservation may be under an existing management program is not determinative of whether it meets the definition of critical habitat.

We recognize that there is uncertainty associated with the relative importance of particular prey items in the diet; however, the diet of these whales and their energetic requirements are sufficiently described in the Draft and Final Biological Reports (NMFS 2017a and 2018a). Specifically, MHI IFKWs are known to primarily forage on large pelagic fish, including yellowfin tuna, albacore tuna, skipjack tuna, broadbill swordfish, mahi-mahi, wahoo, and lustrous pomfret (for the full list of dietary items see Table 2 of the Final Biological Report; NMFS 2018a), and the energetic requirements for the population is estimated to be approximately 2.6 to 3.5 million pounds of fish annually (see the Diet section of the Final Biological Report, NMFS 2017a). As noted in the Fisheries section of the Final Biological Report several fisheries target or catch MHI IFKW prey species. At least nine MHI IFKW prey species (from Table 2) are taken by the Federally managed longline fisheries (see Table 3 of the Final Biological Report) and several other species are incidentally caught by the state and Federal bottomfish fisheries. This overlap in targeted species of fish indicates there may be competition between fisheries and MHI IFKWs. Our designation and associated economic analysis are based upon the best available scientific information available at the time of designation. At this time, the prey characteristic of the essential feature meets the definition of critical habitat, in that it is essential to the conservation of the species and may require special management considerations or protection.

Comment 4: The Western Pacific Regional Fishery Management Council (the Council) submitted comments noting that they agree with our assessment of prey competition between MHI IFKWs and federally managed fisheries and our conclusion that additional management is not necessary for these activities. However, the Council disagreed with statements that future revised management measures could be necessary for Federal fisheries, noting that this was unlikely in the foreseeable future given the diverse prey base of MHI IFKWs and given existing protections already in place to manage healthy levels of pelagic fish stocks.

Response: As noted in our response to comment 3, we recognize that current information indicates that MHI IFKWs prey on a number of species (see Table 2 of the Final Biological Report; NMFS 2018a) and that their diet is diversified; however, as noted in the Biological Report, there is little known about specific diet composition, prey preferences, or potential differences among the diets of MHI IFKWs of different age, size, sex, or even social cluster. However, we do have information that false killer whales prefer pelagic prey species (*e.g.,* broadbill swordfish, skipjack tuna, albacore tuna, yellowfin tuna, blue marlin, and bigeye tuna) targeted by commercial fisheries. While we do not expect modifications to fishery management at present, we cannot assume that Federal regulations that are designed to maintain sustainable fisheries will be adequate by themselves to address the prey needs of a recovering IFKW DPS. Accordingly, we refrain from speculating as to the need for additional management of this characteristic as more information becomes available in the future.

Comment 5: BOEM commented that there are no special management considerations or protective measures that can reasonably be attributed to the ''Island-associated marine habitat for MHI IKFWs'' feature, without which the feature has little or no utility within the context of ESA consultations. BOEM recommended removing the feature to minimize confusion and avoid unnecessary analyses.

Response: As noted in the *Summary of Changes from the Proposed Rule* section, we have restructured the feature essential to the conservation of MHI IFKWs. The feature, island-associated marine habitat for MHI IFKWs, now consists of four component characteristics that, in combination, help describe the feature of habitat that is essential to MHI IFKWs. As noted above, we previously attempted to describe the significance of allowing for movement to, from, and within this habitat as part of the description of the proposed ''island-associated marine habitat'' feature. In the restructured version of the essential feature for this critical habitat designation, we have specifically described ''adequate space for movement and use within shelf and slope habitat'' as a characteristic of this feature. To clarify the special management considerations or protections, each characteristic includes a discussion of factors that may threaten or pose a risk to that characteristic. With regard to adequate space for movement and use within shelf and slope habitat, we specify that human activities that interfere with whale movement through the habitat by acting as a barrier may adversely affect this characteristic. We also provide examples of activities that may act as barriers to movement, such as large marine structures or sustained acoustic disturbance, and describe factors that may intensify these habitat effects, many of which can be minimized or mitigated.

Comment 6: We received several comments (from HLA, State of Hawaii's Division of Aquatic Resources (DAR), BOEM and the Navy) recommending that NMFS remove the ''habitat free of anthropogenic noise'' feature. The DAR noted that noise is related to an activity and is not a feature of the habitat, and that anthropogenic noise should be considered for its potential negative impacts to IFKWs, but it should not be an essential feature of the habitat. BOEM recommended removing the feature from the designation because (1) the proposed feature is not an existing physical or biological habitat feature, (2) effects of anthropogenic sound are evaluated through the ESA section 7 analysis as a direct effect to the DPS, and (3) there is insufficient information available to predict with confidence if, how, and where noise-related activities may require additional management as an element of habitat for the DPS. HLA noted that it is not appropriate or lawful for NMFS to include the absence of an element (sound) as an essential feature. HLA noted that the absence of certain levels of sound is not a tangible physical or biological feature that can be found in a specific area, and that the presence of sound should be evaluated under the ''jeopardy'' prong of a section 7 consultation because any determination by NMFS that sound may adversely affect the IFKW would be predicated on the finding that the sound affects the animals, not the animal's habitat. Further, HLA noted that many of NMFS' past critical habitat designations for other species that are susceptible to adverse effects associated with in-water sound do not include sound as a feature, and that we should not change our existing policy by identifying it as a feature for this species. The Navy submitted comments expressing concerns that the proposed rule did not include examples of what activities or impacts might adversely affect or adversely modify the proposed sound feature and requested that NMFS remove the feature until such time that the science becomes more mature.

Response: As noted in our response above and the *Summary of Changes from the Proposed Rule* section, based on this and other comments, we have restructured the feature essential to the conservation of MHI IFKWs. In the final rule, the several features described as independent features in the proposed rule now appear as characteristics that exist in combination under a single essential feature, island-associated marine habitat for MHI IFKWs. We agree with the commenters that the description ''free of anthropogenic noise'' does not provide a clear standard for determining how this habitat characteristic supports MHI IFKW conservation within island-associated habitat. However, we still find that sound levels are an important attribute of the island-associated habitat that is essential to MHI IFKWs' conservation.

As odontocetes, these whales rely on their ability to receive and interpret sound within their environment in order to forage, travel, and communicate with one another. Accordingly, island-associated habitat must be capable of supporting MHI IFKWs' ability to do so. While it is clear that noise introduced into the environment has the potential to affect individual whales in a manner that may have biological significance (*i.e.,* to result in a take by harassment or injury), scientific information also indicates that the introduction of a permanent, chronic, or persistent noise source can degrade the habitat of such sound-reliant species by adversely altering the animal's ability to use the habitat for foraging, navigating, or reproduction (*i.e.,* altering the conservation value of the habitat). This reliance on sound, combined with the fact that these whales are adapted to a restricted range, make sound levels an important characteristic of island-associated habitat. Thus, it is appropriate to consider how permanent, chronic, or persistent noise sources may alter the value of that habitat and manage for it.

With regard to the comment that this characteristic has not been expressed as a feature of the habitat, we considered rephrasing this characteristic to describe how ambient sound levels support MHI IFKW's capacity to forage, navigate, and communicate. However, we find that this articulation would not provide sufficient guidance to the regulated community about human activities that may degrade listening conditions for MHI IFKWs within island-associated marine habitat. To clarify how sound as a characteristic of habitat supports these whales and how human activities may adversely affect this characteristic we have revised the language describing this characteristic from ''Habitat free of anthropogenic noise that would significantly impair the value of the habitat for false killer whales' use or occupancy'' to ''sound levels that would not significantly impair MHI IFKW's use or occupancy.'' We believe that this formulation appropriately identifies that these whales rely on sound levels within their environment, and that noise that alters sound levels such that it interferes with these whales' use or occupancy may result in adverse effects to MHI IFKW critical habitat.

In this rule (see the *Physical and Biological Features Essential for Conservation* section) and the Final Biological Report (NMFS 2018a) we describe the importance of sound in this populations' ecology and how chronic noise sources may alter the value of their habitat. We recognize that the mere presence of noise, or even noise which might cause harassment of the species, does not necessarily result in adverse modification. Rather, we emphasize that chronic, or persistent noise sources are of concern and should be evaluated to consider the degree to which the noise may impede the population's ability to use the habitat for foraging, navigating, and communicating, or whether the noise source may deter MHI IFKWs from using the habitat entirely.

Our designation must be based on the best available scientific information at the time of designation and this includes considerable information on the species' reliance on sound in the environment and the effects of sound on their ability to communicate, forage and travel. Although we may not be able to predict exactly what noise-related activities may result in adverse modification of critical habitat or the management measures that will be taken in the future, we conclude that sound is an important characteristic of this species' habitat that may need special management considerations.

While previous critical habitat designations may not always have directly identified sound levels as a characteristic of critical habitat, we have considered how anthropogenic noise affects habitat use for species that are susceptible to the adverse effects associated with in-water sound for example, by creating barriers to passage or movement of Southern Resident killer whales (71 FR 69054; November 29, 2006) and Atlantic sturgeon (82 FR 39160, August 17, 2017). Although we ultimately did not include sound as an essential feature for the Southern Resident killer whale, our designation of critical habitat for Cook Inlet beluga whales does include the essential feature of the absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet whales'' (76 FR 20180; April 11, 2011).

As discussed in the Final Biological Report, how human activities that introduce noise in the environment might change the animals' use of habitat and determining the biological significance of that change can be complex and involve consideration of site specific variables, including: The characteristics of the introduced sound (frequency content, duration, and intensity); the physical characteristics of

the habitat; the baseline soundscape; and the animal's use of that habitat. For the MHI IFKW designation, we include ''sound levels'' as a characteristic of the essential feature, because it notifies Federal agencies of the significance of sound levels in supporting MHI IFKWs' habitat use. Additionally, it allows these agencies to use the best available information to consider whether their activities may result in adverse effects to MHI IFKW habitat.

Areas Included in the Designation

Comment 7: We received several comments in support of the size and protections associated with the proposed designation. These comments generally acknowledged the importance of protecting habitat for this DPS. A number of these comments noted that the designation may provide ancillary habitat protections, thereby benefiting other species, biological resources, or cultural resources in Hawaiian waters.

Response: We agree that critical habitat designations are important in supporting thoughtful planning for the conservation of a species and, as noted in the Draft and Final Economic Reports, these designations can provide ancillary habitat protections to other species and resources that overlap with those areas (Cardno 2017 and 2018).

Comment 8: We received several additional comments about the overall size of this designation and the area included. Comments from BOEM and DAR suggested that the size of the designation was too large and both agencies recommended that NMFS focus the designation on high-use areas for IFKWs. Specifically, BOEM noted that the proposed designation includes the entire area used by this DPS, yet the proposed rule suggests that ''high-use'' and ''low-use'' areas within the designation may be used to identify special management considerations for siting offshore energy facilities. BOEM noted that the proposed rule considers access to high-use areas to be important, but does not describe how access may be affected by human activities in an open ocean environment. BOEM recommended focusing on ''high-use areas to provide better definition for special management considerations and/or protections of habitat.''

DAR referred to the large area of the proposed designation at 19,184 mi^2 and noted that the proposal seemed overly large for 151 animals, providing an average of 127 mi^2 per animal. DAR indicated that the non-uniform habitat use patterns of this DPS suggests that all waters within the 45–3,200 m depth range are not equally important and that designating all of these waters is not logical. DAR recommended that NMFS focus on the areas that seem to be important (*i.e.,* high-use areas) as the basis for critical habitat designation.

Comments received from the Marine Mammal Commission (MMC) also noted the large size of this designation and the potential difficulty in managing acute threats to IFKWs over a broad designation. However, the MMC also noted that, for the time being, the size of this designation was appropriate because information necessary to refine this designation is not yet available for this DPS. The MMC noted that the proposal meets the statutory requirements and went on to recommend that NMFS continue to undertake and support research needed to refine the designation in the future to further support recovery needs for this DPS.

Response: We find that the area designated as critical habitat is appropriate and representative of the ecological needs of this large marine predator. Moreover, it is based on the best available information, and does not include the entire range of the DPS. The area that is being designated includes approximately 26.5 percent of this DPS's range. The boundaries take into consideration the population's preference for deeper waters just offshore (45 m) and align with habitat use on the leeward and windward sides of the islands, while also allowing for travel around and among the islands through the selection of the offshore depth boundary at 3,200 m. While much information has been gained about habitat use for this DPS, there is still more to be learned about how habitat use differs among social clusters and over time as seasonal or long-term oceanographic changes influence prey. As noted in this comment, the proposed rule and the Biological Report (Baird *et al.* 2012) applied a density analysis to MHI IFKW satellite tracking information to identify high-density areas (also referred to as high-use areas) of the DPS's range; these portions of the range likely represent particularly important feeding areas for the animals represented in the data (Baird *et al.* 2012). We note however, that the known high-use areas are not necessarily representative of all clusters, as very few animals from some clusters have been tagged to date. Based on the incomplete information available, we cannot conclude that the documented high-use areas represent all feeding areas or sources of prey essential for the conservation of this DPS.

Rather, current information suggests that these whales travel great distances throughout the MHI (Baird *et al.* 2012), and their prey species are also known to be broadly ranging, widely migratory species that are patchily distributed throughout the whales' range (Oleson *et al.* 2010). Additionally, these whales are observed feeding throughout the low-density areas of their range (Baird *et al.* 2012). Although the data indicates that the whales concentrate efforts in certain areas where foraging success is high, additional information indicates MHI IFKWs continue to forage for prey located throughout their range; therefore, other areas of the waters surrounding the MHI meet the definition of critical habitat.

We have not identified the high-use areas of the range as an independent feature of MHI IFKW critical habitat, but rather as a strong indicator of the presence of characteristics of the essential feature. We also use the information about known concentrated habitat use to evaluate the conservation value of areas, as noted in the ESA Section 4(b)(2) Report (NMFS 2018b). Because of the concentrated use of this habitat, we infer the conservation value for high-use areas to be higher than low-use areas of the range. In other words, we considered that these high-use areas of the designation may offer more benefits to IFKWs and that the loss or degradation of these areas may result in a greater impact to the DPS as a whole. In our response to Comment 5, we note that we revised our Biological Report to clarify that we expect siting decisions for renewable energy projects to occur early in the planning stage rather than at the consultation stage. Nonetheless, we do expect planners to take into consideration IFKW use of a particular area and to minimize any potential impacts to these whales and their habitat. Thus, while the effects of certain technologies are largely uncertain, planning groups may choose to avoid placing projects in high conservation value areas if alternative locations exist in low-use areas.

Comment 9: We received comments specific to the boundaries that were selected for the proposed designation. Two comments suggested that NMFS reconsider the inner boundary of the designation. In particular, the National Park Service recommended that the inner boundary of the designation be moved to 30 m in depth to incorporate additional areas where this DPS has been documented (in accordance with Baird *et al.* 2010) and to include a buffer zone. Alternatively, DAR suggested that NMFS use IFKW satellite tagging data to select a boundary for the designation. DAR noted that this data seems to support a critical habitat designation

that is in closer proximity to the islands, especially near Molokai and Hawaii.

The Council requested that NMFS provide further clarification on the basis for selecting the outer boundary of 3,200 m in depth. The Council noted that the depth appears to have been selected to allow the designation to be drawn in a continuous range around the MHI and that the designation may include areas that may not be essential to the conservation of the MHI IFKWs. The Council recommended that an alternative delineation be made based on different depth ranges around each island and the channels to account separately for habitat characteristics around each island and areas used among islands for movement.

Response: In response to these comments we re-analyzed the data used to select the boundaries for this designation as well as new satellite information received from Cascadia Research Collective to determine if different boundaries may be appropriate. We also reviewed the data by island to consider whether alternative patterns exist at different depths or distances from shore.

Review of this information revealed that 2.5–3.8 percent of satellite-tag locations were shallower than 45 m across the islands (the higher percent includes points located on land, which likely fall into shallow locations due to the associated error with these satellite-tag locations). When we mapped shallow satellite-tag locations across the islands, we did not observe clear spatial patterns around each island, but saw that shallower use varied somewhat between islands. Similar to the proposed rule, we then reviewed depth frequency histograms of satellite-tag locations, but considered these locations specific to each island as requested by the above comments. These histograms varied slightly from island to island, but we noted that when high-use areas are located near islands, the depth frequency histogram for that island is skewed toward deeper depths, indicating these data may be limited in describing meaningful patterns around the entire island. In addition to considering depth around each island, we reviewed distance from shore and found similarly disparate patterns ranging from 500 m offshore to over 1,200 m. Looking across the islands as a whole, less than four percent of the satellite-tag locations are found at depths shallower than 45 m, and this remains a depth at which the frequency of satellite-tag locations increases and remains more consistent.

Throughout this review we considered whether prescribing a different depth or distance from shore for each island would provide more clarity about MHI IFKW habitat use or management of their habitat around each island; however, prescribing island-specific boundaries would not better match how these animals use Hawaiian waters. Given the DPS's non-uniform treatment of habitat around each island, splitting these data by island may not partition the habitat in manner that is ecologically meaningful.

With regard to the outer boundary, we selected the outer depth boundary to incorporate those areas of island-associated habitat where MHI false killer whales are known to spend a larger proportion of their time (see high-use discussion in Movement and Habitat Use in the Biological Report), and to include island-associated habitat that allows for movement between islands and around each island. As noted above, these whales move great distances throughout the MHI, moving back and forth between areas off multiple islands. The 3,200 m depth boundary best aligns with the span of habitat used on the leeward and windward sides of the islands, allowing for ample space for these whales to move among areas of concentrated or high-use, including habitat across the core portions of the range.

We have not revised the boundaries at this time because the commenters requested revisions are not supported by the data, although some aspects of our analysis indicate that further consideration may be warranted as additional information becomes available. The current delineation of 45–3,200 m is appropriate because it includes a depth just offshore where MHI IFKWs are more likely to be found and an outer boundary that aligns with habitat use on the leeward and windward sides of the islands, while allowing for travel around and between the islands.

Comment 10: DAR provided comments on the vertical extent of this designation, noting that NMFS should limit the designation to those depths that are utilized by the DPS and their prey. DAR noted that 1,272 m is the maximum dive depth recorded for this DPS, and recommended that, similar to the monk seal critical habitat designation which focuses on the habitat 10-m from the bottom where monk seals forage, the IFKW designation focus on the upper 1,500 m of the water column which is the portion of the habitat being used by the IFKWs.

Response: We considered the recommendation to limit this designation to the depth of 1,500 m; however, given the limited data available and other management considerations associated with water quality and sound, we have not limited the designation to a specific depth. For the Hawaiian monk seal we limited the critical habitat designation to 10 m from the bottom to help clarify where Hawaiian monk seal foraging areas, an essential feature of the designation, exist and to help clarify where protections should apply (80 FR 50926; August 21, 2015). While we recognize that MHI IFKWs and their prey may limit their habitat use to specific depths, information about these patterns is still relatively limited. Further, sound levels and water quality, which also support the feature essential to the conservation of MHI IFKWs, may be at risk at a wider range of depths.

Comment 11: One commenter noted that a study by Baird *et al.* (2011) found an island-associated population of false killer whales in the Papahanaumokuakea Marine National Monument and suggested that this area be added to the critical habitat of the MHI IFKW DPS, because the area is free of anthropogenic noises, and the listed species has been found in this region. The commenter went on to note that an expansion of critical habitat into this region may also shield the DPS from climate change impacts and prepare for range shifts in the DPS or in their prey as a result of climate change.

Response: We have not included areas of the Papahanaumokuakea Marine National Monument in this designation of critical habitat because we find that this area is unoccupied habitat outside the range of the DPS and is not essential to its conservation. To be clear, the MHI IFKW is one of three false killer whale populations found in Hawaiian waters: The MHI IFKW, Northwestern Hawaiian Islands FKW, and pelagic FKW. Only the MHI IFKW is listed under the ESA. Although the range of the MHI IFKW overlaps with that of the Northwestern Hawaiian Islands and pelagic populations, the MHI IFKW range does not extend into the Papahanaumokuakea Marine National Monument. While we can consider designation of critical habitat outside the geographic range of a listed species, given the unique ecology of the MHI IFKW, their reliance on the shelf and slope habitat of the MHI, and the fact that another population of false killer whales occupies the waters of the NWHI, we find no information to suggest that waters in the NWHI are essential to conservation. Further, climate change predictions do not provide information that would allow us to conclude that the NWHI will

provide habitat that is essential to conserving MHI IFKWs.

Areas Ineligible for Designation

Comment 12: We received several comments that disagreed with or questioned our determination that the Joint Base Pearl Harbor Hickam (JBPHH) INRMP provides a benefit to MHI IFKWs. Comments received from the MMC, Natural Resources Defense Council (NRDC), the Center for Biological Diversity (CBD), and a researcher with the Cascadia Research Collective noted that MHI IFKW habitat-use information suggests that the overlapping areas (the Ewa Training Minefield and National Defensive Sea Area) provide important corridors for MHI IFKWs and that NMFS should consider this information in meeting its ESA section 4(a)(3) requirements. These comments also noted that the INRMP was approved prior to the listing of the MHI IFKW, and therefore does not take into account the unique conservation needs of this DPS. Comments from the MMC noted that JBPHH conservation measures mentioned in the proposed rule do not provide a direct, quantifiable, or obviously substantial benefit to MHI IFKWs. The MMC recommended that NMFS withdraw its proposed determination and subsequent preclusion of areas managed under the JBPHH, but if retained, that the INRMP be updated to include activities that benefit IFKWs more directly. In a joint comment, NRDC and CBD also noted that there is not a direct link between the JBPHH conservation measures and direct benefits to the MHI IFKW or their prey. NRDC and CBD noted that many of these measures are merely proposed and not yet officially included in the JBPHH INRMP, which is due to be drafted in 2018. NRDC and CBD similarly recommended that NMFS re-evaluate its consideration of whether the INRMP provides a benefit to MHI IFKWs and that NMFS not preclude these areas from the critical habitat designation due to the high conservation value of these areas for MHI IFKWs.

Response: In response to these comments we reviewed our determination regarding the JBPHH INRMP; we also contacted the Navy for additional information about the on-going implementation and the plans for revision of this INRMP. As noted in the ESA Section 4(b)(2) Report (NMFS 2018b), regulations at 50 CFR 424.12(h) provide that the Secretary will not designate as critical habitat DOD lands that are subject to an INRMP if the Secretary determines in writing that such plan provides a conservation benefit to the species for which critical habitat is being designated. In determining whether such a benefit is provided, NMFS considers (1) the extent of the area and features present; (2) the type and frequency of use of the area by the species; (3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and (4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis. Importantly, NMFS can find that an INRMP provides a benefit to a species where, as here, the species is not directly addressed in the INRMP. In these cases, we consider adaptive conservation management for the feature essential to the conservation of the species (*i.e.,* its habitat features) or the species itself either directly or indirectly. We also consider whether adaptive conservation management measures are effective and reasonably certain to be implemented.

The JBPHH INRMP overlaps with the areas under consideration for critical habitat in two areas, the Naval Defensive Sea Area and the Ewa Training Minefield, which include approximately 27 km² (~10 mi²) of area or approximately 0.5 percent of the areas under consideration for critical habitat. Based on our review of relevant data, including supplemental satellite-tracking information from Cascadia Research Collective (3 new animals), we consider these areas to be low-use (low-density) areas for MHI IFKWs, and note that they travel through these areas at moderate levels (see Figure 4 of the ESA Section 4(b)(2) Report). We therefore consider these areas to be of low to moderate conservation value to MHI IFKWs in comparison to other areas of the designation.

During development of the proposed rule the Navy highlighted a number of JBPHH management efforts that benefit MHI IFKW habitat. After reevaluation, we still find that the JBPHH INRMP provides a number of conservation measures that benefit MHI IFKWs and their habitat, including those that address water quality and fishery prey base (see the *Application of ESA Section 4(a)(3)(B)(i)(Military Lands*) section of this rule). Specifically, measures taken to improve water quality, including restoration projects and pollution prevention plans, directly improve or maintain the water quality characteristic of MHI IFKW critical habitat. Actions taken to remove feral animals, as well as restrictions on free roaming cats in residential areas, also help to maintain water quality and lower the risk of infectious agents being introduced into MHI IFKW habitat. The Navy's participation as an active member of the Toxoplasmosis and At-Large Cat Technical Working Group helps address issues that JBPHH faces on base and encourages a broader response to a conservation issue that threatens much of Hawaii's wildlife, including MHI IFKWs. Finally, the Navy has issued fishing restrictions adjacent to and within areas that overlap the potential designation, and conducts creel surveys that provide information about fisheries in unrestricted areas of Pearl Harbor. These measures provide protections for and information about the marine ecosystem and food web that supports MHI IFKW prey species.

We find that some of these protections (*e.g.,* stormwater and pollution measures or watershed enhancement activities) address effects that would otherwise be addressed through an adverse modification analysis (provided they are not already addressed through baseline protections). Other conservation measures (*e.g.,* controlling cats to prevent the spread of toxoplasmosis and fishery restrictions) address effects to MHI IFKW habitat that otherwise may not be subject to a section 7 consultation. In these instances, the Navy's INRMP provides protections aligned with 7(a)(1) of the ESA, which instructs Federal agencies to aid in the conservation of listed species.

As part of an adaptive management approach for this INRMP, NMFS staff participates in JBPHH INRMP annual reviews to provide recommendations about plan implementation and effectiveness and to receive information about upcoming plan amendments. These reviews help ensure that the plan provides an effective mechanism for addressing MHI IFKW conservation within areas managed under the JBPHH INRMP. Specifically, the reviews provide a reliable method for feedback, regular assurances that the above-described conservation measures are being implemented, and a procedure for assessing and modifying measures to ensure conservation effectiveness.

Although not essential to our determination that the JBPHH INRMP provides a benefit to the MHI IFKW, we also take into consideration additional future measures that the Navy plans to include in updates to the INRMP by December 2018. These expected additional measures include (1) specific information about MHI IFKWs, (2) where MHI IFKWs may be found in areas managed by the installation, (3)

new projects associated with watershed enhancement, and (4) mandatory mitigation measures already used by the Pacific Fleet to minimize impacts to MHI IFKWs as they use these areas. Procedural mitigation measures are mandatory activity-specific measures taken to avoid or reduce the potential impacts on biological resources from stressors, including those that may cause acoustic or physical disturbance to marine mammals during Navy training and testing. These procedural measures are required in the Navy's Protective Measures Assessment Protocol consistent with letters of authorization for training activities issued under the MMPA and supporting ESA analyses. Procedural mitigation measures are adaptively managed as new information becomes available about effective mitigation techniques and are identified in the current Hawaii-Southern California Training and Testing Final Environmental Impact Statement. Examples of measures include training personnel to spot and identify marine mammals (lookouts), reporting requirements for trained lookouts, and halt or maneuvering requirements when marine mammals are spotted within identified mitigation zones of Navy activities (DON 2013 and 2017c). Although not restricted to the JBPHH areas, these mandatory mitigation measures help ensure that the Navy will avoid or reduce the impacts from acoustic stressors on MHI IKFWs as the INRMP is updated by December 2018.

After careful review, we are satisfied that the Navy's 2011 JBPHH INRMP provides a benefit to the MHI IFKW in this relatively small (0.5 percent of habitat that overlaps with areas that meet the definition of MHI IFKW critical habitat) area having low-moderate conservation value to MHI IFKWs. We are satisfied that the Navy's documented history of consistent plan implementation and their commitment to adaptive management through the implementation of mandatory mitigation measures will ensure that MHI IFKWs receive benefits under the JBPHH INRMP, particularly with respect to improving watershed health in the Pearl Harbor area, which will benefit prey and water quality characteristics. Further, we expect that the Navy will continue to strengthen its INRMP through scheduled updates to be completed by December 2018.

Comments on the Economic Impacts

Comment 13: We received comments from BOEM indicating that the proposed rule did not describe the full range of the economic effects because the analysis was limited to a discussion of incremental administrative costs and did not describe, quantitatively or qualitatively, the cost factors associated with changes in site selection should the proposed critical habitat be interpreted to require such changes. BOEM noted that even small changes to siting decisions can equate to large costs, and that during initial planning these decisions can impact the viability of developing reliable and cost-effective renewable energy resources. Additionally, BOEM noted that ''the economic report does not appear to reconcile the estimated increases in administrative costs between sectors [comparing energy and fisheries] when compared with its conclusions for the management needs that are used to justify incremental increases in administrative costs.''

Response: As noted in our response to Comment 2, we expect that BOEM will make site location decisions that minimize potential effects to MHI IFKWs and their habitat early in the planning process (Gilman *et al.* 2016). We also note that current potential site locations are predominantly found in low-use habitat areas. Accordingly, we have revised the Biological Report to clarify that site relocation is not an anticipated modification identified during section 7 consultation for this designation. With regard to the comment about estimated increases in administrative costs between sectors, Chapter 4 of the Economic Report (Cardno 2018) points out that the administrative costs for each activity are estimated using the number of consultations for that activity over the last 10 years (from NMFS section 7 database) as well as any information gathered about likely future projects that may require consultation. These administrative costs take into consideration whether technical assistance, informal, formal, or programmatic consultation is expected and do not include incremental costs associated with any recommended project modifications to minimize the impacts to critical habitat (see Table 4–1; Cardno 2018). The administrative cost differences between fishery activities and energy activities are therefore based on the number and type of consultations expected over the next ten years and do not include any incremental modification costs associated with consultation. Fishery activities regularly undergo consultation around Hawaii, and the consultation history indicated that this category of activity underwent 7 formal, 17 informal and 2 technical assistances over the 10-year period. Thus, the administrative costs for fishery activities were estimated assuming a similar pattern of consultation. Renewable energy development activities do not have the robust history of consultation in Hawaii that fishery activities have. As such, we estimated the administrative costs for these activities based on information provided about three anticipated projects within the next 10 years (the time frame of the analysis), which are assumed to require formal consultation. BOEM and Hawaii State Energy staff indicated that there was uncertainty regarding whether the projects would be implemented in the next ten years. As such, the administrative cost estimates for energy activities were estimated in a range from a low of 0 to a high of 16,000 dollars, to reflect alternatives in which none of the projects occur (0 dollar estimate) and all three projects occur and require consultation in the next 10 years (16,000 dollar estimate).

Comment 14: DAR provided comments suggesting that Federal agencies may not be the only ones impacted by a broad designation and noted that an overly broad critical habitat designation wouldn't necessarily identify important habitats that are essential for the conservation of the species and could unintentionally and unnecessarily, increase management costs. This comment referred to costs and delays to projects associated with the management of Essential Fish Habitat (EFH) and suggested that a broad critical habitat designation could result in similar costs and delays.

Response: As noted in our response to Comment 8, we conclude that this designation is representative of the ecological needs of this endangered population and is based on the best available information. We do not agree that designation is overly broad, as it is based on habitat characteristics that support important biological needs, and includes less than thirty percent of the IFKW's occupied range. Moreover, as noted in the Economic Report (Cardno 2018), the economic impacts of this designation are low because the designation does not include many nearshore areas, including developed shoreline, harbors and inlets, where a majority of Hawaii's marine section 7 consultations occur, and because existing regulatory measures provide some baseline protections for habitat characteristics, such as water quality and prey. As such, we anticipate that the costs of this designation will be largely attributed to federally-managed fisheries, Department of Defense activities, and marine-related construction and energy development,

and we do not anticipate that the additional consultation on effects to critical habitat will result in significant, additional project delays or costs.

We note that the consultation process for critical habitat under the ESA and EFH under the Magnuson-Stevens Act have different requirements and work under different timeframes. We have no basis to conclude that the costs associated with conserving existing EFH are related to costs associated with this critical habitat designation.

Comments on 4(b)(2) Exclusions

Comment 15: The MMC provided comments on the 4(b)(2) weighing process for national security exclusions, expressing concerns that, without a quantitative analysis of benefits to security or conservation, decisions to designate or exclude an area from the designation based on qualitatively balancing IFKW use with potential regulatory compliance burden appear to be somewhat arbitrary. The MMC, provided examples: ''Waters Enroute to PMRF,'' Kingfisher Range, and Kaula and Warning Area 187, in which NMFS chose not to exclude the first area and to exclude the second and third areas, using essentially the same reasoning of having low MHI IFKW use and a minor impact to the Navy's consultation. The MMC recommended that NMFS reconsider its benefit analysis, and investigate methods to draw equivalence, ideally quantitative, between conservation benefits inferred from IFKW usage and benefits of relief from potential regulatory compliance impacts.

Response: We have not identified a quantitative method to compare the benefits of excluding particular areas for national security to the benefits of designation of critical habitat for MHI IFKWs. A qualitative approach allows us to better evaluate the different factors that weigh in the balancing test. We note that even where we have quantitative information, that information is incomplete and may require qualitative assessment. For example, in our comparison of benefits of exclusion versus benefits of designation, we consider MHI IFKW habitat use in areas where satellite tracking information may be underrepresented (*e.g.,* areas known to be used by cluster 2 and 4 animals).

With regard to the ''Waters Enroute to PMRF,'' Kingfisher Range, and Kaula and Warning Area 187 examples, we disagree that our weighing process was inconsistent in the proposed rule, and we note that key differences in our analyses outlined in the ESA Section 4(b)(2) Report turned on differences associated with the size of the requests, the control that DOD has over each area, and the likelihood that other Federal activities may require consultation and may occur in each area. For example, both the Kingfisher and Kaula areas are relatively small in size, and DOD control and use of these areas are likely to preclude other Federal activities that would otherwise undergo consultation, thus presenting a lower benefit of designating critical habitat in these areas. In contrast, ''Waters Enroute to PMRF'' includes a larger area in which the Air Force's activities and use are not likely to preclude other Federal activities that would otherwise undergo consultation. However, based on this comment, and the question raised about inconsistencies in our decision making process, we have revised tables in our ESA Section 4(b)(2) Report to articulate more clearly the differences in our determinations for this weighing process.

As noted above, we have reassessed our evaluation of the waters south and east of PMRF (the Kaulakahi Channel portion of Warning area 186) after considering supplemental information furnished by the Navy in October of 2017, and for the reasons discussed above, we concluded that the benefits of excluding this area outweigh the benefits of designation. While the Kaulakahi Channel portion of Warning area 186 overlaps in part with the ''Waters Enroute to PMRF,'' these two areas were assessed independently based on differences in the geographic scopes of the requests made by the Air Force and Navy, as well as differences in the activities occurring in these areas (DOAF 2017, DON 2017b, DON 2018). Although our independent weighing of the Air Force's request for the ''Waters Enroute to PMRF'' area did not change, we note that a portion of this area is now excluded from critical habitat because it overlaps with the Kaulakahi Channel portion of Warning area 186, where the benefits of exclusion (for Navy activities) were found to outweigh the benefits of designation.

Comment 16: Cascadia Research Collective's Researcher Robin Baird, Ph.D., provided additional information about MHI IFKW habitat use for 13 of the areas analyzed in our 4(b)(2) national security exclusion process as well as the six additional areas we identified in the proposed rule but for which we did not include a proposed exclusion determination. This information included analyses of a larger sample size of satellite tag data from that reported in the Draft Biological Report (*i.e.,* 3 additional individuals' data was included with the 27 already considered in the Draft Biological Report). Using this satellite-tag information and the boundaries of the areas under consideration for exclusion, Baird calculated the total area requested for exclusion (in km^2), percent of the total range, percent of total time spent in an area, days spent in area (per 100 km^2), and the number of visits (per 100 km^2). Baird noted that these analyses show that a number of areas that are proposed for exclusion are relatively high-use areas or appear to be important as transit areas. Baird noted that NMFS should reconsider the exclusion of areas such as FORACS and SESEF based on these calculations. Baird also noted that the NDSA and Ewa Training Minefield, which were determined ineligible under 4(a)(3), also lie within the same important transit corridor off Oahu, and that NMFS should reconsider this decision in terms of the costs of not including these two areas in critical habitat. Comments received from NRDC also requested that we reconsider the exclusion of FORACS, SESEF, and Kingfisher in light of these areas being high transit areas.

With regard to the six additional areas under consideration for exclusion, Baird noted that only one area, the Kaulakahi Channel Portion of W–186, represents an area that is likely not particularly important to the population. The other five areas, however, represent areas where MHI IFKWs spend a disproportionate amount of time. NRDC and the CBD also commented that the NMFS should not exclude the area south of Oahu, the Kaiwi Channel, or the Alenuihaha Channel due to the importance of areas to MHI IFKWs.

Response: We have reanalyzed the areas under consideration for exclusion using the Navy's initial June 2017 request, as supplemented by its October 2017 input and Baird's updated satellite tracking information. As noted in the Draft ESA Section 4(b)(2) Report (NMFS 2017b), for the proposed rule we relied on density analysis of satellite-tracking data to provide information about MHI IFKW habitat use, and the conservation value for high-use areas was inferred to be higher than low-use areas of the range. For particular areas of the range, we also used additional information (*e.g.,* observational data of MHI IFKWs from boat surveys in portions of the MHI) that may supplement our current understanding of MHI IFKW habitat use patterns, because current information provides a limited representation for social clusters 2 and 4.

To consider the conservation value of a particular area relative to other areas of the potential designation, we overlaid tracking information from Cascadia

Research Collective across the whole area under consideration for designation using the grid squares from the high-density areas analysis (from Baird *et al.* 2012). We calculated the number of times tagged animals passed through each grid square and used the standard deviation from these calculations to display travel areas from high to low across the range, similar to the high-density areas. We incorporated information relevant to travel within these areas into our considerations with regard to the benefits of designation, along with information that may supplement our knowledge of particular areas with regard to MHI IFKWs (see ESA Section 4(b)(2) Report for additional detail; NMFS 2018b).

Looking at the maps of MHI IFKW high-density and travel information, FORACS includes areas that fall within low-use areas and moderate to low transit areas, and SESEF and Kingfisher generally fall within low-use areas and low transit areas. After taking into consideration DOD's use of the area (including the types of activities that occur here and the uniqueness of that activity), the likelihood of changes to the consultation, the level of protection already provided by management and the likelihood of non-DOD actions occurring in these areas, we confirm our initial finding that the benefits of excluding these areas for national security still outweigh the benefits of designation. While we recognize that travel to, from, and around habitat areas is important for these whales, we find that existing management protections provide adequate levels of protections for these sites and that Navy control and use of these areas is likely to deter other non-DOD actions that may otherwise require consultation in these particular areas. As such we have excluded these areas from the final designation.

With regard to the six additional areas under consideration for exclusion, we reviewed each area consistent with the review of all other areas considered for national security exclusions for this rule. We agree with commenters that three of these areas (the area north and east of Oahu, the Kaiwi Channel, and the area south of Oahu) represent high-use or high to moderate travel areas for MHI IFKWs. However, the Kaulakahi Channel Portion of W–186, and the area north of Molokai fall within mostly low-use and low travel areas of the designation. Additionally, as noted in the *Summary of Changes from the Proposed Rule* section above, the Alenuihaha Channel request was reduced in geographic scope to only include those deeper areas of the Channel that support Undersea Warfare training, which only overlaps with low-use and low-travel areas.

For the Kaulakahi Channel Portion of W–186, the area north of Molokai, and the reduced Alenuihaha Channel area (NMFS 2018b), we found that the benefits of exclusion for national security outweigh the benefits of designating MHI IFKW critical habitat. We note that on June 22, 2017, the Navy requested exclusion of these areas as a subset of the larger ''Entire Area'' and, in the case of the area north of Molokai, as a subset of the ''four islands region.'' NMFS initially proposed not to exclude these two larger units. Although the June 22, 2017, request provided a full description of the defense activities in these areas (DON 2017a as referenced in NMFS 2017b), the Navy's supplemental submission in October 2017 helped improve our understanding of the geographic scope of the particular impacts to national security in the Kaulakahi Channel Portion of W–186 and the area north of Molokai (see Figure 2 of the proposed rule (82 FR 51186; November 03, 2017) and NMFS 2018b). Additionally, the Navy provided supplemental information regarding training activities in the Alenuihaha Channel, and clarified that its request for exclusion included only the deeper areas of the Channel that support Undersea Warfare training exercises. We also note that all three of these areas represent largely low-use and low-transit habitat and were identified as significant for Navy use and activities. Given our improved understanding of the defense activities conducted and the reduced size of the exclusions, we conclude that the benefits of exclusion outweigh the benefits of designating critical habitat, and that exclusions will not result in extinction of the species.

With respect to the remaining three sites (the area north and east of Oahu, the Kaiwi Channel, and the area south of Oahu), we found that the benefits of designation outweighed the benefits of exclusion, largely because these areas represent high-use or high to moderate transit areas for MHI IFKWs and other non-DOD activities that may require consultation may occur in these areas.

With regard to the comment on the Naval Defensive Sea Area and the Ewa Training Minefield, we refer to our response to Comment 12 regarding our decision to find that the JBPHH INRMP provides a benefit to MHI IFKWs.

Comment 17: We received comments from the MMC requesting that NMFS provide an opportunity for the public to comment on the inclusion or exclusion of any of the six areas that were still under consideration for national security exclusion for the Navy. Similarly, NRDC and CBD noted that the public should have the opportunity to comment on the exclusion of any of these areas, given the large size and overlap with significant proportion of the proposed critical habitat designation.

Response: As explained above, we have exercised our discretion to exclude three of the six sites requested, the Kaulakahi Channel Portion of W–186, the area north of Molokai, and the reduced Alenuihaha Channel area (NMFS 2018b), because we find that the benefits of exclusion for national security outweigh the benefit of designating MHI IFKW critical habitat. As indicated above, on June 22, 2017, the Navy requested exclusion of these areas as a subset of a larger ''Entire Area''. The Navy also requested exclusion of the area north of Molokai as a subset of the larger ''four islands region''. In the proposed rule, we determined that these areas did not warrant exclusion as part of the larger units. While the Navy's June 22, 2017, request provided a full description of the defense activities conducted in these areas, the Navy's supplemental submission in October 2017 helped us reassess our initial decision in the context of a more spatially limited area. Additionally, the Navy clarified that it was only seeking exclusion of the deeper areas of the Alenuihaha Channel that support Undersea Warfare training exercises. Because in the proposed rule we identified both the national security importance of the areas as well as the Navy's supplemental request limiting the geographic scope of the requested exclusions, we are satisfied that the public was afforded a sufficient opportunity to comment on the proposed exclusions.

Comment 18: We received several comments on the proposed exclusion related to the BOEM Call Area, found northwest and south of Oahu.

The Navy submitted comments noting that, while the Navy supports the exclusion of areas suitable for renewable energy development, portions of the currently identified areas (BOEM Call Areas) are not suitable for renewable energy development, due to national security concerns. The Navy asserted that it is committed to bringing renewable energy to Oahu and has identified alternative locations which the Navy deems suitable. In support of identifying areas for renewable energy development, the Navy completed an assessment of areas (see *http://greenfleet.dodlive.mil/rsc/department-of-the-navy-hawaii-offshore-wind-compatibility/*) around Oahu, noting where commercial wind energy projects

are not compatible with military activities and identifying only small sections of the two sites (*i.e.,* two sections of the Call Area) that are compatible (DON 2016).

Response: We understand that the Navy and BOEM continue to discuss areas that are suitable for military activities as well as offshore energy production and that, through these consultations, the most suitable sites will be selected for wind-energy development. However, in determining the economic costs of this designation, we rely on the best available information to identify where economic costs are likely to occur. The two sites noticed as the BOEM Call Area (81 FR 41335; June 24, 2016) remain significant in meeting Hawaii's renewable energy goals as these sites have been identified as areas where wind resources, water depth, and proximity to shore are favorable for wind-energy development. Given that the boundaries of these two sites have not been revised and that the sites are noted as significant for energy development, we have weighed the benefit of excluding the BOEM Call Area based on the economic impacts that may result from this designation. After determining that economic benefits of exclusion outweigh the benefits of designation, we have excluded the BOEM Call Area from this critical habitat designation (see the *Economic Impacts of Designation* section).

Comment 19: Several other comments (received from the MMC; NRDC and CBD (in a joint letter); and the Humane Society of the United States, the Humane Society Legislative Fund, and Whale and Dolphin Conservation (in a joint letter)) expressed disagreement with NMFS' weighing of the benefits of exclusion versus the benefits of designation for the BOEM Call Area and recommended that NMFS not exclude the sites from critical habitat. Among these, several comments noted that the benefits of exclusion do not appear to outweigh the benefits of designation, particularly because these areas represent rather large sections of habitat, which additional satellite tracking information suggests is important to MHI IFKWs for travel. Comments noted the scientific uncertainty about the effects of renewable energy and large-scale in-water projects on MHI IFKWs and their habitat and noted that these factors should favor providing additional protections for the habitat of an endangered DPS with a restricted range.

In recommending that NMFS not exclude this area, the MMC noted that NMFS should only consider exclusion in instances in which the exclusion would not result in the extinction of the DPS and noted that, due to the precarious status of IFKWs, the apparent importance of its entire range to its continued existence, and NMFS' inability to identify which factor or factors caused the population to decline in the past and may continue to threaten its persistence, the exclusion of any of the areas proposed as critical habitat from the final designation could contribute to the population's eventual extirpation.

Response: As noted in our response above, we have excluded the BOEM Call Area (both of the sites northwest and south of Oahu) from this designation (see the *Economic Impacts of Designation* section) Generally, these areas include low-use and lower transit areas for MHI IFKWs, although small areas of overlap occur with moderate transit areas along the northeast tip and eastern edge of the south Oahu area. As noted in the ESA Section 4(b)(2) Report, NMFS is satisfied that there are sufficient pathways within critical habitat to allow for unimpeded transit for MHI IFKWs and that the small overlap in this area will not significantly impede MHI IFKW movement to other areas of critical habitat, due to the relatively small size of this overall exclusion (NMFS 2018b). Although large in-water construction projects are an activity of concern for this DPS, consultations required to ensure that activities are not likely to jeopardize the MHI IFKWs are expected to achieve substantially the same conservation benefits of designating this area as critical habitat for this DPS. Moreover, Federal activities in this area for wind energy development are not expected to result in destruction or adverse modification of MHI IFKW critical habitat.

Given the significance of this offshore area in supporting renewable energy goals for the State of Hawaii and the goals of Executive Order 13795, the low administrative costs of this designation, the existing baseline protections, and the low-use by MHI IKFWs, we find that the benefits of exclusion of this area outweigh the benefits of designation. Based on our best scientific judgment and acknowledging the relatively small size of the area (approximately 0.2 percent of the overall designation), and other safeguards that are in place (*e.g.,* protections already afforded MHI IFKWs under its ESA listing, or regulatory efforts that provide ancillary protections to water quality and prey characteristics, such as the Clean Water Act as amended by the Oil Pollution Act, or the Magnuson-Stevens Fishery Conservation and Management Act), we find that exclusion of this area will not result in the extinction of the species.

Furthermore, we conclude that none of the exclusions will result in extirpation of the species. As previously noted, this population and its habitat benefit throughout its range from other protections under the ESA as well as other statutes and their regulations. In addition, the exclusions outlined in this rule are limited in scope and include habitat that is of lower conservation value for this population. Thus, this designation provides protections throughout the core portions of the MHI IFKWs' range and in areas of high conservation value.

Comment 20: One comment expressed concerns that the BOEM Call Area identified for exclusion could be subject to changes after the public's ability to comment and noted that it was not clear if the public will have an opportunity to see and comment on any changes that could adversely affect protection of the area critical to the survival of this DPS.

Response: As noted in our responses above, we are excluding the BOEM Call Area that was noticed in our proposed rule and, as a result, revisions have not been made to the boundaries. While we recognize that ongoing negotiations between the Navy and BOEM and additional public participation may result in future Call Area boundary changes, we base our decision on the best information currently available and do not speculate on revisions that may occur in the future. The basis for our excluding this area for economic impacts has not changed from the proposed rule (see the *Economic Impacts of Designation* section).

Comment 21: One comment noted that designation of critical habitat in these areas will benefit BOEM, the State of Hawaii, and prospective offshore wind developers by raising awareness that the endangered MHI IFKW may be regularly transiting through the site and allowing these groups to appropriately evaluate the risks of any prospective development.

Response: We agree with the commenter's assertion that the designation of critical habitat will raise awareness and provide public education benefits regarding habitat use of MHI IFKWs (Cardno 2018), and will allow prospective developers to evaluate the risks of developing in particular areas of this designation. However, as more fully described above, we also found that for the BOEM Call Area, the benefits of exclusion outweigh the benefits of designation and that exclusion of this mostly low-use area of habitat will not result in extinction of this DPS.

Comment 22: We received comments that expressed concern as well as confusion about the areas being proposed for exclusion and the protections associated with critical habitat. One commenter expressed concern that a fractured critical habitat designation, due to exclusions, would not provide benefits to MHI IFKWs. Another commenter disagreed with the exemption of military agencies from this rule and noted that the military should be required to obtain permission to conduct projects within critical habitat. A third commenter noted that loud anthropogenic noise created from military activities are in violation of the Marine Mammal Protection Act because it can cause damage to the whales' echolocation system. This commenter suggested that NMFS take into consideration a study by Nachtigall and Supin (2013) on the effects of the louder sounds on false killer whale echolocation systems.

Response: The 4(b)(2) exclusion process allows us to consider the benefits of designating critical habitat compared with the benefit of excluding particular areas due to economics, national security, or other relevant impacts, as long as the exclusion of that area will not result in extinction of the species. Although we have excluded certain areas from designation, ESA protections still apply to MHI IFKWs wherever the species is found (including the excluded areas) due to their listing, and all Federal agencies (including military agencies) that authorize, fund, or carry out activities in these areas will still be subject to section 7 consultation to ensure that their activities are not likely to jeopardize the continued existence of the species. It is through this consultation process that the effects of sound, as well as other effects of the action on individuals and the population are considered. Further, there are often other regulatory protections for marine habitat that will support to some degree the characteristics and feature of MHI IFKWs critical habitat (*e.g.,* the Clean Water Act and the Magnuson-Stevens Fishery Conservation and Management Act). Based on these underlying protections and the designation of critical habitat, which still includes large contiguous portions of high and low-use habitat, we conclude that MHI IFKWs will benefit from this designation. See the Benefits of the Designation section and the Economic Report (Cardno 2018) for further detail regarding direct and ancillary benefits of designation.

With regard to the comments about requiring permission and minimizing the impacts of sound, we also refer back to our response to Comment 1, which explains that military activities already undergo consultation to minimize the impacts of their activities and ensure they are not likely to jeopardize the species. Specifically, military readiness activities in the Hawaii Range Complex are subject to a 5-year MMPA incidental take authorization for marine mammals, which is subject to ESA consultation. These review and consultation efforts under the ESA and MMPA help to identify management or mitigation that may be necessary to minimize adverse impacts to MHI IFKWs, and such analyses include reviews of the best scientific information available, including works such as Nachtigall and Supin (2013), to help identify mitigation measures. MHI IFKW critical habitat will establish an additional consideration to the existing ESA section 7 consultation process in designated areas.

Comments on the Biological Report

Comment 23: We received comments referring to figures used in the Biological Report. One comment noted that the report illustrates the boundaries of the critical habitat but fails to indicate that areas would be excluded. This comment recommended that NMFS avoid public confusion about the actual designation by including maps that depicted the full designation, including all exclusions, in this report. A comment also requested that we re-examine more recent data when reviewing habitat use by this DPS. This comment noted that a figure from Baird *et al.* (2015) shows areas of higher habitat use that are not reflected in Figure 4 of the Biological Report.

Response: The Biological Report is completed prior to analyses pursuant to 4(b)(2) and 4(a)(3) of the ESA, and provides information from the critical habitat review team about features and areas that meet the ESA definition of critical habitat as a first step in the determination process. Only after these areas are identified can we determine which areas warrant consideration under 4(a)(3) or 4(b)(2) of the ESA. That said, we understand the commenter's concerns regarding how maps in this report may mistakenly be taken for the final designation. To clarify this point, we have revised the captions to these maps (in the Biological Report) indicating that this is not the final designation and point the reader to the final rule. With regard to the request to use the most recent information, we note that our information has been updated to include satellite tracking information as of the beginning of January 2018, and we used this updated information to supplement other data upon which we based our exclusions under 4(b)(2) (NMFS 2018b). However, we also wish to clarify that the information used in Baird *et al.* (2015) relies on one standard deviation from the mean to identify biologically import areas, whereas we have relied on the methods used in Baird *et al.* (2012) using two standard deviations from the mean to indicate areas of high use.

Other Comments

Comment 24: We received recommendations from DAR that NMFS hold public hearings on the Kauai, Maui, and Hawaii Islands, in addition to the one hearing that was held on Oahu. With IFKW high-use areas off Hawaii, Northern Molokai, and around the Maui-Nui complex, DAR noted that potential impacts of the proposed designation could be greater for those islands, and that these people should have the opportunity to be heard in the process.

Response: The public comment period was open for 60 days and, and consistent with 50 CFR 424.16(c), NMFS gave notice of and held one public hearing on the proposed action on the island of Oahu. The 60-day comment period provided ample time and opportunity for the public to provide comments electronically or by mail. It should be noted that comments submitted electronically or by mail have the same weight as comments made in public hearings. We held the public hearing in Honolulu, not only because this location is centralized for a majority of the state's population, but also because our Economic Report indicated that a majority of the Federal action agencies, regulated entities, and individual applicants affected by this designation are located on Oahu. In contrast to DAR's statement of concern, we did not find that impacts were likely to be greatest along MHI IFKWs' high-use areas, because these areas do not coincide with areas of high-use for Federal activities, such as offshore development. Aside from this comment, we received no requests for public hearings in other areas of the State and found no additional information to suggest that impacts would be higher near MHI IFKWs' high-use areas.

Comment 25: Comments from the Council stated that critical habitat designations for marine species provide little conservation benefit for the species unless habitat-related factors are known to be inhibiting recovery, and that NMFS did not identify anthropogenic

activities that are likely to negatively affect the habitat's essential features. Accordingly, the Council suggested that, similar to NMFS' finding for the exclusion of renewable energy areas, section 7 analysis associated with the listing of the MHI IFKW DPS should provide substantially the same conservation benefits for most Federal activities, including fisheries.

Response: As noted in the *Special Management Considerations or Protections* section of this rule and the Biological Report, MHI IFKWs do face habitat-related threats (NMFS 2018a). As such, we identified anthropogenic activities that are likely to negatively affect the habitat's essential features. Further, as noted in our response to Comment 3 above, multiple threats often act as obstacles to recovery, requiring that a suite of measures be taken to ensure that imperiled species are able to increase in number and eventually thrive. Critical habitat designations provide important details about habitat characteristics and the conservation value of habitat, which, in turn, serve as valuable planning tools for ensuring that Federal planning and development do not limit recovery for the species. While we found that the section 7 analysis associated with listing would provide substantially the same conservation benefits within the BOEM Call Area, we caution that this finding was site-specific and activity-specific and may not be true across all areas of the designation or from activity to activity.

Critical Habitat Identification

In the following sections, we describe the relevant definitions and requirements in the ESA and our implementing regulations, and the key information and criteria used to prepare this critical habitat designation. In accordance with section 4(b)(2) of the ESA and our implementing regulations at 50 CFR part 424, this final rule is based on the best scientific data available.

To assist with identifying potential MHI IFKW critical habitat areas, we convened a critical habitat review team (CHRT) consisting of five agency staff with experience working on issues related to MHI IFKWs and Hawaii's pelagic ecosystem. The CHRT used the best available scientific data and its best professional judgment to (1) determine the geographical area occupied by the DPS at the time of listing, (2) identify the physical and biological features essential to the conservation of the species, and (3) identify specific areas within the occupied area containing those essential physical and biological features. The CHRT's evaluation and recommendations are described in detail in the Biological Report (NMFS 2018a). Beyond the description of the areas, the critical habitat designation process includes two additional steps (although these are not conducted by the CHRT): (1) Identify whether any area may be precluded from designation because the area is subject to an INRMP that we have determined provides a benefit to the DPS, and (2) consider the economic, national security, or any other impacts of designating critical habitat and determine whether to exercise our discretion to exclude any particular areas. These considerations are described further in the Final ESA Section 4(b)(2) Report (NMFS 2018b), and economic impacts of this designation are described in detail in the Final Economic Report (Cardno 2018).

Physical and Biological Features Essential for Conservation

The ESA does not specifically define physical or biological features; however, court decisions and joint NMFS–USFWS regulations at 50 CFR 424.02 (81 FR 7413; February 11, 2016) provide guidance on how physical or biological features are expressed.

Physical and biological features support the life-history needs of the species including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. Features may constitute combinations of habitat characteristics, and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species.

Based on the best available scientific information and in response to public comments, the CHRT identified the specific biological and physical feature essential for the conservation of the Hawaiian IFKW DPS, as the following: Island-associated marine habitat for MHI insular false killer whales.

MHI IFKWs are island-associated whales that rely entirely on the productive submerged habitat of the main Hawaiian Islands to support all of their life-history stages. The following characteristics of this habitat support insular false killer whales' ability to travel, forage, communicate, and move freely around and among between the main Hawaiian Islands:

(1) *Adequate space for movement and use within shelf and slope habitat*—As large marine predators, MHI IFKWs are highly mobile, employing a foraging strategy that includes circumnavigating the islands and moving throughout their range. Generally found in deeper waters just offshore of the MHI, these whales move primarily throughout and among the shelf and slope habitat on both the windward and leeward sides of all the islands. This generally includes depths ranging from 45 m to 3,200 m. Available data indicates that habitat use is not uniform in waters that surround the islands, and may be concentrated in certain areas (often described as high-use or high-density areas) that are likely to provide greater foraging success than other areas, and that high-use areas may be specific to certain social clusters.

Human activities can interfere with movement of the whales and adversely affect their ability to travel to and move throughout areas of high-use. In particular, large marine structures or long-term acoustic disturbance may present obstacles to whale movement. These obstacles could cause the whales to swim further to reach high-use areas, expending additional energy and displacing these whales into waters farther from shore. In severe cases, such obstacles may cause the whales to abandon areas of concentrated use.

(2) *Prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth.*

MHI IFKWs are top predators that feed on a variety of large pelagic fish and squid. Prey preference and relative importance is still difficult to determine for this population; however, commonly described prey species from observations include large game fish such as mahi mahi, wahoo, yellowfin tuna, albacore tuna, skipjack tuna, broadbill swordfish and threadfin jack. In addition, analyses from recent strandings of insular false killer whales suggest that some species of squid may play a role in the IFKW diet.

Sustained decreases in prey quantity and availability in island-associated waters can decrease foraging success of these whales and eventually lead to reduced individual growth, reproduction, and development. Additionally, factors that reduce prey size and introduce or increase contaminant or toxin levels reduce the quality of prey for these whales. Decreased prey size reduces the energetic value gained, while

contaminants and toxins introduced through prey consumption may put these whales' individual health or reproduction at risk.

(3) *Waters free of pollutants of a type and amount harmful to MHI insular false killer whales.*

Pollutants that reach Hawaii's marine waters through point source and nonpoint source pollution have the potential to degrade the water quality or prey quality and increase the health risks to MHI IFKWs. As a long-lived, top marine predator, water quality plays an important role in supporting the MHI IFKWs' ability to forage and reproduce free from disease and impairment. Environmental contaminants, such as organochlorines, heavy metals, and other chemicals that persist and accrue in waters surrounding the MHI, accumulate in prey species and subsequently in MHI IFKWs. Biomagnification of some pollutants can adversely affect health in these top marine predators, causing immune suppression, decreased reproduction, or other impairments. Water pollution and changes in water temperatures may also increase pathogens, naturally occurring toxins, or parasites in surrounding waters. MHI insular false killer whales' may be exposed to these infectious or harmful agents (such as bacteria, viruses, toxins, or parasites) either through their prey or directly through ingestion of contaminated waters. Exposure to water pollutants are known to adversely affect the health and reproduction of cetaceans, including false killer whales.

(4) *Sound levels that would not significantly impair false killer whales' use or occupancy.*

For the purposes of this final rule, noises that would significantly impair use or occupancy are those that inhibit MHI IFKW's ability to receive and interpret sound for the purposes of navigation, communication, and detection of predators and prey. Such noises are likely to be long-lasting, continuous, and/or persistent in the marine environment and, either alone or added to other ambient noises, significantly raise local sound levels over a significant portion of an area.

False killer whales rely on their ability to produce and receive sound within their environment to navigate, communicate, and detect predators and prey. With a foraging strategy that is adapted to the shelf and slope habitat of the MHI, these large marine predators travel in subgroups that are dispersed from each other but converge when prey resources are found. Accordingly, these animals rely on their ability to receive and interpret acoustic cues to find prey at a distance and convey information about available prey resources to other dispersed subgroups of IFKWs. Habitats that contribute to the conservation of MHI IFKWs allow these whales to employ underwater sound in ways that support important life history functions, such as foraging and communicating.

A large body of scientific information on the effects of anthropogenic noise on the behavior and distribution of toothed whales, including false killer whales, demonstrates that the presence of anthropogenic noise can adversely affect the value of marine habitat to MHI IFKWs (Shannon *et al.* 2015, Erbe *et al.* 2016, Gedamke *et al.* 2016, Hatch *et al.* 2016). Of particular concern are those noises that are chronic or persistent and cause cumulative interference such that the animals' ability to receive benefits (*e.g.,* opportunities to forage or reproduce) from these habitats is sufficiently inhibited.

How human activities that introduce noise in the environment might change the animals' use of habitat and the determination of the biological significance of that change can be complex and involve consideration of site specific variables, including: The characteristics of the introduced sound (frequency content, duration, and intensity); the physical characteristics of the habitat; the baseline soundscape; and the animal's use of that habitat. NMFS will continue to use the best scientific information available to analyze chronic or persistent noise sources and determine whether they degrade listening conditions within habitat for the IFKW, including but not limited to, the Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, (81 FR 51693; August 04, 2016; NMFS 2016b, or replacement publications).

Geographical Area Occupied by the Species

The first steps in the critical habitat revision process is to define the geographical area occupied by the species at the time of listing, and to identify specific areas within this geographical area that contain at least one of the essential features that may require special management considerations or protection. As noted earlier, the best available information indicates that the range of this DPS is smaller than the range identified at the time of listing (77 FR 70915, November 28, 2012; Bradford *et al.,* 2015). After reviewing available information, the CHRT noted, and we agree, that the range proposed by Bradford *et al.* (2015) and recognized in the 2015 NMFS Stock Assessment Report provides the best available information to describe the areas occupied by this DPS. This is because this range includes all locations that tagged animals have visited in Hawaii's surrounding waters and accommodates for uncertainty in the data. Therefore, the area occupied by the DPS is the current range as identified in the 2015 SAR, which includes 188,262 km^2 (72,688 mi^2) of marine habitat surrounding the MHI (Carretta *et al.,* 2016).

Areas Under Consideration for Critical Habitat

To be eligible for designation as critical habitat under the ESA's definition of occupied areas, each specific area must contain at least one essential feature that may require special management considerations or protection. To meet this standard, the CHRT concluded that false killer whale tracking data would provide the best available information to identify habitat use patterns by these whales and to recognize where the physical and biological features essential to their conservation exist. Cascadia Research Collective provided access to MHI IFKW tracking data for the purposes of identifying critical habitat for this DPS. Due to the unique ecology of this island-associated population, habitat use is largely driven by depth. Thus, the features essential to the species' conservation are found in those depths that allow the whales to travel throughout a majority of their range seeking food and opportunities to socialize and reproduce.

One area has been identified as including the essential feature for the MHI IFKW DPS. This area ranges from the 45-m depth contour to the 3,200-m depth contour in waters that surround the MHIs from Niihau east to the Island of Hawaii (see the Biological Report for additional detail; NMFS 2018a). MHI IFKWs are generally found in deeper areas just offshore (Baird *et al.,* 2010). For the proposed rule, MHI IFKW tracking locations were used to identify a nearshore depth at which habitat use by MHI IFKWs is fairly consistent. Specifically, MHI IFKW locations were found to be infrequent at depths less than 45 m (less than 2 percent of locations are captured at these depths), and a spatial pattern was not evident in shallower depth locations (*i.e.,* locations were not clumped in specific areas around the MHI). Because the frequency of MHI IFKW locations increased at depths greater than 45 m and appeared to demonstrate more consistent use of marine habitat beyond this depth, the 45-m depth contour was selected to delineate the inshore extent of areas that

would include the proposed essential features for MHI IFKWs. An outer boundary of the 3,200-m depth contour was selected to incorporate those areas of island-associated habitat where MHI IFKWs are known to spend a larger proportion of their time, and to include island-associated habitat that allows for movement between and around each island.

In response to some public comments that suggested we choose different boundaries for this designation (see Comment 9 and response), we re-analyzed the data used to select the boundaries for this designation, and also analyzed new satellite information received from Cascadia Research Collective.

Review of this information revealed that 2.5–3.8 percent of satellite-tag location data were shallower than 45 m across the islands (the higher percentage includes points located on land, which likely fall into shallow locations due to the error associated with these points). When shallow points were mapped across the islands (using GIS), clear spatial patterns were not evident across all islands; for some islands shallower use was seen around a good portion of the island (*e.g.,* Oahu), while for other islands use seemed to vary along different portions of the coastline. In addition to considering depth around each island, we reviewed distance from shore and found disparate patterns ranging from 500 m offshore to over 1,200 m offshore. Looking across the islands as a whole, 45 m remained a depth at which frequency of satellite-tag location data increased and remained more consistent.

Throughout this review we considered whether prescribing a different depth or distance from shore for each island would provide more clarity about MHI IFKW habitat use or for management of their habitat around each island; however, it was not clear that prescribing island-specific boundaries would better match how these animals use Hawaiian waters. Given the population's non-uniform treatment of habitat around each island, splitting these points by island may not partition the habitat in manner that is ecologically meaningful.

As noted above, these whales move great distances throughout the MHI, moving back and forth between areas off multiple islands. NMFS found that the 3,200 m depth boundary best aligns with the span of habitat used on the leeward and windward sides of the islands, allowed for ample space for these whales to move among areas of concentrated or high-use, and included habitat across the core portions of the range.

At this time we find that the current delineation of 45–3,200 m allows for travel around and among the islands and incorporates our objectives of selecting an inner boundary and outer boundary where MHI IFKWs are most likely to be found. The full range of depths—from the 45-m to the 3,200-m depth contours—incorporates approximately 90 percent of the tracking locations of MHI IFKW and includes the feature and characteristics essential to the conservation of the MHI IFKWS DPS. The area that was under consideration for critical habitat included 56,821 km^2 (21,933 mi^2) or 30 percent of the MHI IFKW DPS' range.

Need for Special Management Considerations or Protection

Joint NMFS and USFWS regulations at 50 CFR 424.02 define special management considerations or protection to mean methods or procedures useful in protecting physical and biological features essential to the conservation of listed species.

Several activities were identified that may threaten the physical and biological feature essential to conservation such that special management considerations or protection may be required. This is based on information from the MHI IFKW Recovery Outline, Status Review for this DPS, and discussions from the Main Hawaiian Islands Insular False Killer Whale Recovery Planning Workshop (NMFS 2016a, Oleson *et al.,* 2010, NMFS 2016c). Major categories of activities include (1) in-water construction (including dredging); (2) energy development (including renewable energy projects); (3) activities that affect water quality; (4) aquaculture/mariculture; (5) fisheries; (6) environmental restoration and response activities (including responses to oil spills and vessel groundings, and marine debris clean-up activities); and (7) some military readiness activities. All of these activities may have an effect on one or more characteristics of the essential feature by altering the quantity, quality or availability of the features that support MHI IFKW critical habitat. This is not an exhaustive or complete list of potential effects; rather it is a description of the primary concerns and potential effects that we are aware of at this time and that should be considered in accordance with section 7 of the ESA when Federal agencies authorize, fund, or carry out these activities. The Biological Report (NMFS 2018a) and Economic Analysis Report (Cardno 2018) provide a more detailed description of the potential effects of each category of activities and threats on the essential features. For example, activities such as in-water construction, energy projects, aquaculture projects, and some military readiness activities may have impacts on one or more characteristics of the essential feature.

Unoccupied Critical Habitat Areas

Section 3(5)(A)(ii) of the ESA authorizes the designation of specific areas outside the geographical area occupied at the time the species is listed, if the Secretary determines ''that such areas are essential for the conservation of the species.'' There is insufficient evidence at this time to indicate that areas outside the present range are essential for the conservation of this DPS; therefore, no unoccupied areas were identified for designation.

Application of ESA Section 4(a)(3)(B)(i) (Military Lands)

Section 4(a)(3)(B) of the ESA prohibits designating as critical habitat any lands or other geographical areas owned or controlled by DOD, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such a plan provides a benefit to the species for which critical habitat is proposed for designation.

Regulations at 50 CFR 424.12(h) provide that in determining whether an applicable benefit is provided by a ''compliant or operational'' plan, we will consider the following:

(1) The extent of the area and features present;

(2) the type and frequency of use of the area by the species;

(3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and

(4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

NMFS can find that an INRMP provides a benefit to a species where, as here, the species is not directly addressed in the INRMP. In these cases, we consider adaptive conservation management for the features essential to the conservation of the species (*i.e.,* its habitat features) or the species itself either directly or indirectly. We also consider whether adaptive conservation management measures are effective and reasonably certain to be implemented.

The JBPHH INRMP overlaps with the areas under consideration for critical habitat in two areas, the Naval Defensive Sea Area and the Ewa Training Minefield, which include approximately 27 km^2 (~10 mi^2) of area or approximately 0.5 percent of the areas under consideration for critical habitat. Based on our review of relevant data, including supplemental satellite-tracking information from Cascadia Research Collective (3 new animals), we consider these areas to be low-use (low-density) areas for MHI IFKWs, and note that they travel through these areas at moderate levels (see Figure 4 of the ESA Section 4(b)(2) Report). We therefore consider these areas to be of low to moderate conservation value to MHI IFKWs in comparison to other areas meeting the definition of MHI IFKW critical habitat.

In May 2017, we requested information from the DOD to assist in our analysis. Specifically, we asked for a list of facilities that occur within potential critical habitat areas and available INRMPs for those facilities. The U.S. Navy stated that areas subject to the JBPHH INRMP overlap with the areas under consideration for MHI IFKW critical habitat; no other INRMPs were identified as overlapping with the potential designation. This INRMP was drafted prior to the ESA listing of the MHI IFKW and did not incorporate conservation measures that are specific to MHI IFKWs. The plan was compliant through the end of 2017; and although its five-year review as to operation and effect is late, the INRMP remains funded and effective. The Navy continues to implement and report on conservation measures outlined in the JBPHH INRMP and is currently reviewing and updating the INRMP with a goal of finishing in December 2018.

In the response to NMFS' request for information about this INRMP, the Navy outlined several elements of the 2011 INRMP's implemented and ongoing conservation measures that may benefit the MHI IFKW and their habitat (with the characteristic of the essential element that is addressed): Fishing restrictions adjacent to and within areas that overlap the potential designation (prey), creel surveys that provide information about fisheries in unrestricted areas of Pearl Harbor (prey), restrictions on free roaming cats and dogs in residential areas (water free of pollutants), feral animal removal (water free of pollutants), participation in the Toxoplasmosis and At-large Cat Technical Working Group (which focuses on providing technical information to support policy decisions to address the effects of toxoplasmosis on protected wildlife and provides education and outreach materials on the impacts that free-roaming cats have on Hawaii's environment; waters free of pollutants), efforts taken to prevent and reduce the spread of biotoxins and contaminants from Navy lands (including best management practices, monitoring for contamination, restoration of sediments, and spill prevention; waters free of pollutants), a Stormwater Management Plan and a Stormwater Pollution Control Plan associated with their National Pollutant Discharge Elimination System (waters free of pollutants), and coastal wetland habitat restoration projects (waters free of pollutants) (DON 2017a). Although the 2011 JBPHH INRMP does not specifically address the MHI IFKW, several of the above measures support the protection of the IFKW and the physical and biological feature identified for this designation. Specifically, the Navy's efforts that focused on preventing the spread of toxoplasmosis, biotoxins, and other contaminants to the marine environment provide protections for MHI IFKW water quality and address threats to this feature characteristic; these threats are identified in our Draft Biological Report (NMFS 2017a). Further, efforts to support coastal wetland habitat restoration provide protections for MHI IFKW water quality and provide ancillary benefits to MHI IFKW prey, which also rely on these marine ecosystems. Additionally, fishery restrictions in the NDSA and Ewa Training Minefield provide protections to MHI IFKW prey within the limited overlap areas. Some of the protections associated with the management of stormwater and pollution address effects that would otherwise be addressed through an adverse modification analysis. Other protections associated with the spread of toxoplasmosis to the marine environment or that enhance prey, address effects to MHI IFKW habitat that otherwise may not be subject to a section 7 consultation. In these instances, the Navy's INRMP provides protections aligned with 7(a)(1) of the ESA, which instructs Federal agencies to aid in the conservation of listed species.

As part of an adaptive management approach for this INRMP, NMFS staff participates in JBPHH INRMP annual reviews to provide recommendations about plan implementation and effectiveness and to receive information about upcoming plan amendments. These reviews help ensure that the plan provides an effective mechanism for addressing MHI IFKW conservation within areas managed under the JBPHH INRMP. Specifically, the reviews provide a reliable method for feedback, regular assurances that the above-described conservation measures are being implemented, and a procedure for assessing and modifying measures to ensure conservation effectiveness.

Although not essential to our determination that the JBPHH INRMP provides a benefit to the MHI IFKW, we also take into consideration additional future measures that the Navy plans to include in updates to the INRMP by December 2018. These expected additional measures include (1) specific information about MHI IFKWs, (2) where MHI IFKWs may be found in areas managed by the installation, (3) new projects associated with watershed enhancement, and (4) mandatory mitigation measures already used by the Pacific Fleet to minimize impacts to MHI IFKWs as they use these areas. Procedural mitigation measures are mandatory activity-specific measures taken to avoid or reduce the potential impacts on biological resources from stressors, including those that may cause acoustic or physical disturbance to marine mammals during Navy training and testing. These procedural measures are required in the Navy's Protective Measures Assessment Protocol consistent with letters of authorization for training activities issued under the MMPA and supporting ESA analyses. Procedural mitigation measures are adaptively managed as new information becomes available about effective mitigation techniques, and are identified in the current Hawaii-Southern California Training and Testing Final Environmental Impact Statement. Examples of measures include training personnel to spot and identify marine mammals (lookouts), reporting requirements for trained lookouts, and halt or maneuvering requirements when marine mammals are spotted within identified mitigation zones of Navy activities (DON 2017c). Although not restricted to the JBPHH areas, these mandatory mitigation measures help ensure that the Navy will avoid or reduce the impacts from acoustic stressors on MHI IKFWs. These measures will be reflected in the INRMP by December 2018. Additionally, the Navy's continued efforts towards understanding the baseline conditions of Pearl Harbor (and associated watersheds) and improving water quality in this area will also support the prey and water free of pollutants characteristics of MHI IFKW habitat.

After consideration of the above factors, we determined that the Navy's

JBPHH INRMP provides a benefit to the MHI IFKW and its habitat. In accordance with 4(a)(3)(B)(i) of the ESA, areas managed under this INRMP are not eligible for the designation of MHI IFKW critical habitat. Therefore, the Ewa Training Minefield and the Naval Defense Sea Area, both found south of Oahu, are not eligible for designation.

Application of ESA Section 4(b)(2)

Section 4(b)(2) of the ESA requires the Secretary to consider the economic, national security, and any other relevant impacts of designating any particular area as critical habitat. Any particular area may be excluded from critical habitat if the Secretary determines that the benefits of excluding the area outweigh the benefits of designating the area. The Secretary may not exclude a particular area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any areas. In this designation, the Secretary has applied statutory discretion to exclude 14 (1 area, with two sites, for economic exclusion and 13 areas for national security exclusion) occupied areas from critical habitat where the benefits of exclusion outweigh the benefits of designation for the reasons set forth below.

In preparation for the ESA section 4(b)(2) analysis, we identified the ''particular areas'' to be analyzed. The ''particular areas'' considered for exclusion are defined based on the impacts that were identified. We considered economic impacts and weighed the economic benefits of exclusion against the conservation benefits of designation for two particular areas where economic impacts were identified as being potentially higher than the costs of administrative efforts and where impacts were geographically concentrated. We also considered exclusions based on impacts on national security. Delineating particular areas with respect to consideration of national security impacts was based on land ownership or control (*e.g.,* land controlled by the DOD within which national security impacts may exist) or on areas identified by DOD as supporting particular military activities. For each particular area we identified the impacts of designation (*i.e.,* the economic costs of designation or impacts to national security). These impacts of designation are equivalent to the benefits of exclusion. We also consider the benefits achieved from designation or the conservation benefits that may result from a critical habitat designation in that area. We then weigh the benefits of designation against the benefits of exclusion. Where the benefits of exclusion outweigh the benefits of designation, the area is excluded from critical habitat as long as we determine that such exclusion would not result in extinction of the DPS. These steps and the resulting list of areas excluded from designation are described in detail in the sections below.

Impacts of Designation

The primary impact of a critical habitat designation stems from the requirement under section 7(a)(2) of the ESA that Federal agencies ensure that their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining this impact is complicated by the fact that section 7(a)(2) contains the overlapping requirement that Federal agencies must also ensure their actions are not likely to jeopardize the species' continued existence. One incremental impact of the designation is the extent to which Federal agencies modify their actions to ensure their actions are not likely to destroy or adversely modify the critical habitat of the species, beyond any modifications they would make because of the listing and the subsequent requirement to avoid jeopardy. When the same modification would be required due to impacts to both the species and critical habitat, the impact of the designation is considered co-extensive with the ESA listing of the species (*i.e.,* attributable to both the listing of the species and the designation of critical habitat). Additional impacts of designation include state and local protections that may be triggered as a result of the designation, and the benefits from educating the public about the importance of each area for species conservation. Thus, the impacts of the designation include conservation impacts for MHI IFKW and its habitat, economic impacts, impacts on national security and other relevant impacts that may result from the designation and the application of ESA section 7(a)(2).

In determining the impacts of designation, we focused on the incremental change in Federal agency actions as a result of critical habitat designation and the adverse modification provision, beyond the changes predicted to occur as a result of listing and the jeopardy provision. Following a line of recent court decisions (including *Arizona Cattle Growers Association* v. *Salazar,* 606 F. 3d 1160 (9th Cir. 2010), *cert. denied,* 562 U.S. 1216 (2011) (*Arizona Cattle Growers*); and *Home Builders Association of Northern California et al.,* v. *U.S. Fish and Wildlife Service,* 616 F.3d 983 (9th Cir. 2010), *cert. denied,* 562 U.S. 1217 (2011) (*Home Builders*)), economic impacts that occur regardless of the critical habitat designation are treated as part of the regulatory baseline and are not factored into the analysis of the effects of the critical habitat designation. In other words, we focus on the potential incremental impacts beyond the impacts that would result from the listing of the species and consultation under the jeopardy clause. In some instances, potential impacts from the critical habitat designation could not be distinguished from protections that may already occur under the baseline (*i.e.,* protections already afforded MHI IFKWs under its listing or under other federal, state, and local regulations). For example, the project modifications needed to prevent destruction or adverse modification of critical habitat may be similar to the project modifications necessary to prevent jeopardy to the species in an area. The extent to which these modifications differ may be project specific, and the incremental changes or impacts to the project may be difficult to tease apart without further project specificity.

Once we determined the impacts of the designation, we then determined the benefits of designation. The benefits of designation include the conservation impacts for MHI IFKWs and their habitat that result from the critical habitat designation and the application of ESA section 7(a)(2). The benefits of exclusion include avoidance of the economic, national security, and other relevant impacts (*e.g.,* impacts on conservation plans) of the designation if a particular area were to be excluded from the critical habitat designation. The following sections describe how we determined the benefits of designation, and how the impacts of designation were considered, as required under section 4(b)(2) of the ESA, to identify particular areas that may be eligible for exclusion from the designation. We also summarize the results of our weighing process and determinations of the areas that may be eligible for exclusion (for additional information see the ESA Section 4(b)(2) Report (NMFS 2018b)).

Benefits of Designation

The primary benefit of designation is the protection afforded under section 7(a)(2) of the ESA, requiring all Federal agencies to ensure their actions are not likely to destroy or adversely modify designated critical habitat. This is in addition to the requirement that all Federal agencies ensure their actions are

not likely to jeopardize the continued existence of the species. Another benefit of critical habitat designation is that it provides specific notice of the feature essential to the conservation of the MHI IFKW DPS and where that feature occurs. This information will focus future consultations and other conservation efforts on the key habitat attributes that support conservation of this DPS. There may also be enhanced awareness by Federal agencies and the general public of activities that might affect that essential feature. Accordingly, identification of that feature may improve discussions with action agencies regarding relevant habitat considerations of proposed projects.

In addition to the protections described above, Chapter 12 of the Final Economic Report (Cardno 2018) discusses other forms of indirect benefits that may be attributed to the designation including, but not limited to, use benefits and non-use or passive use benefits (Cardno 2018). Use benefits include positive changes that protections associated with the designation may provide for resource users, such as increased fishery resources, sustained or enhanced aesthetic appeal in ocean areas, or sustained wildlife-viewing opportunities. Non-use or passive benefits include those independent of resource use, where conservation of MHI IFKW habitat aligns with beliefs or values held by particular entities (*e.g.,* existence, bequest, and cultural values) (Cardno 2018). More information about these types of values may be found in Chapter 12 of the Final Economic Report (Cardno 2018).

Most of these benefits are not directly comparable to the costs of designation for purposes of conducting the section 4(b)(2) analysis described below. Ideally, benefits and costs should be compared on equal terms; however, there is insufficient information regarding the extent of the benefits and the associated values to monetize all of these benefits. We have not identified any available data to monetize the benefits of designation (*e.g.,* estimates of the monetary value of the essential feature within areas designated as critical habitat, or of the monetary value of education and outreach benefits). Further, section 4(b)(2) also requires that we consider and weigh impacts other than economic impacts that may be intangible and do not lend themselves to quantification in monetary terms, such as the benefits to national security of excluding areas from critical habitat. Given the lack of information that would allow us either to quantify or monetize the benefits of the designation for MHI IFKWs discussed above, we determined that conservation benefits should be considered from a qualitative standpoint. In determining the benefits of designation, we considered a number of factors. We took into account MHI IFKW use of the habitat, the existing baseline protections that may protect that habitat regardless of designation, and how the essential feature may be affected by activities that occur in these areas if critical habitat were not designated. These factors combined provided an understanding of the importance of protecting the habitat for the overall conservation of the DPS.

Generally, we relied on density analysis of satellite-tracking data as well as an analysis of travel throughout the areas to provide information about MHI IFKW habitat use (Figure 4 of the Final ESA Section 4(b)(2) Report; NMFS 2018b). The descriptions of MHI IFKW habitat use provided in the sections below describe habitat in terms of high and low-use areas using the density analysis described in Baird *et al.* (2012) and describe how these areas may be used for travel or transit. Cascadia Research Collective supplied satellite-tracking information to support NMFS' determination of this critical habitat designation for the proposed and final rule. For the proposed rule, density analysis of data received included information from 27 tagged individuals (18 from Cluster 1, 1 from Cluster 2, 7 from Cluster 3, and 1 from Cluster 4) (R. Baird, Cascadia Research Collective, pers. comm., June 2017). For the final rule, data from a total of 30 tagged individuals (2 additional animals from cluster 1 and 1 additional animal from cluster 4) was used to inform the analyses (R. Baird, Cascadia Research Collective, pers. Comm, January 2018).

High-use areas denote areas where satellite-tracking information indicates more frequent use by MHI IFKWs. High to moderate travel areas provide further understanding about how these whales travel through specific areas. The conservation value for high-use and high-traveled areas is inferred to be higher than low-use and low-traveled areas of the range; however, all areas contain the essential feature and meet the definition of critical habitat for this DPS. As noted in the Biological Report (NMFS 2018a), there is limited representation among social clusters in the tracking data and information. Accordingly, the available satellite-tracking information may not be fully representative of MHI IFKW habitat use. While describing MHI IFKW use for the exclusion of some particular areas, we provide additional information (*e.g.,* observation data from boat surveys) that supplemented our understanding of MHI IFKW habitat use patterns. In these instances, we describe how this information may enhance our understanding of the conservation value of the area.

Generally, we describe high-use areas as indicating areas of higher conservation value where greater foraging and/or reproductive opportunities are believed to exist. Additionally, high to moderate travel areas indicate areas of concentrated travel. However, particularly within a restricted range, low-use and low-traveled areas continue to offer the essential feature and may provide unique opportunities for foraging as oceanic conditions vary seasonally or temporally.

Economic Impacts of Designation

Economic costs of the designation accrue primarily through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not likely to destroy or adversely modify critical habitat. The Economic Report (Cardno 2018) considered the Federal activities that may be subject to a section 7 consultation and the range of potential changes that may be required for each of these activities under the adverse modification provision. To the extent possible, the analysis focused on changes beyond those impacts that may result from the listing of the species or that are established within the environmental baseline. However, the report acknowledges that some existing protections to prevent jeopardy to MHI IFKWs are likely to overlap with those protections that may be put in place to prevent adverse modification (Cardno 2018). The project modification impacts represent the benefits of excluding each particular area (that is, the impacts that would be avoided if an area were excluded from the designation).

The Final Economic Report (Cardno 2018) estimates the impacts based on activities that are considered reasonably foreseeable, which include activities that are currently authorized, permitted, or funded by a Federal agency, or for which proposed plans are currently available to the public. These activities align with those identified under the *Special Management Considerations or Protections* section (above). Projections were calculated for the next 10-year period. The analysis relied largely upon NMFS' records of section 7 consultations to estimate the average number of projects that are likely to occur within the particular areas (*i.e.,*

projections were based on past numbers of consultations) and determine the level of consultation (formal, informal) that would be necessary based on the described activity. Where appropriate, the analysis also included projections for actions that are likely to occur within the particular areas that were identified by action agencies (Cardno 2018).

The Final Economic Report (Cardno 2018) identifies the total estimated present value of the quantified incremental impacts of this designation to be between approximately 196,000 to 213,000 dollars over the next 10 years; on an annualized undiscounted basis, the impacts are equivalent to 19,600 to 21,300 dollars per year. Applying discounted rates recommended in the Office of Management and Budget Circular A–4, the Final Economic Report estimates these incremental impacts of designation to be between 170,000 to 185,000 using a 3 percent discount rate and 143,000 to 156,000 using a 7 percent discount rate (Cardno 2018). These impacts include only incremental administrative efforts to consider critical habitat in section 7 consultations for the section 7 activities identified under the *Need for Special Management Considerations or Protections* section of this rule. However, private energy developers may also bear some of the administrative costs of consultation for large energy projects; the Final Economic Report estimates these costs are between 0 and 300 dollars annually undiscounted and are expected to involve three consultation projects over the next 10 years (Cardno 2018). Across the MHI, economic impacts are expected to be small and largely associated with the administrative costs borne by Federal agencies, but may include low administrative costs to non-Federal entities as well.

Both the Final Biological Report and the Final Economic Report recognize that some of the future impacts of the designation are difficult to predict (NMFS 2018a, Cardno 2018). Although considered unlikely, NMFS cannot rule out future modifications for federally managed fisheries and activities that contribute to water quality (NMFS 2018a). For federally managed fisheries, modifications were not predicted as a result of the critical habitat designation based on current management of the fisheries. However, we noted that future revised management measures could result as more information is gained about MHI IFKW foraging ecology, or as we gain a better understanding of the relative importance of certain prey species to the health and recovery of a larger MHI IFKW population. Similarly, modifications to water quality standards were not predicted as a result of this designation; however, future modifications were not ruled out because future management measures may be necessary as more information is gained about how pollutants affect MHI IFKW critical habitat. The Final Economic Report discusses this qualitatively, but does not provide quantified costs associated with any uncertain future modifications (Cardno 2018).

Economic impacts from the designation are largely attributed to the administrative costs of consultations. Generally, the quantified economic impacts for this designation are relatively low because in Hawaii most projects that would require section 7 consultation occur onshore or nearshore and would not overlap with the designation. Projects with a Federal nexus (*i.e.,* authorized, funded, or carried out by a Federal agency) that occur in deeper waters are already subject to consultation under section 7 to ensure that activities are not likely to jeopardize the continued existence of MHI IFKWs, and throughout the specific area, activities of concern are already subject to multiple environmental laws, regulations, and permits that afford the essential features a high level of baseline protection. Despite these protections, significant uncertainty remains regarding the true extent of the impacts that some activities like fishing and activities affecting water quality may have on the essential features, and economic impacts of the designation may not be fully realized. Because the economic impacts of these activities are largely speculative, we lack sufficient information with which to balance them against the benefits of designation.

BOEM provided comments on our proposed rule indicating their appreciation for the BOEM Call Area exclusion. In addition, the Navy submitted comments on the proposed rule noting that, while they support the exclusion of areas suitable for renewable energy development, portions of the currently identified BOEM Call Areas are not suitable for renewable energy development due to national security concerns. In support of identifying areas for renewable energy development, the Navy completed an assessment of areas (see *http://greenfleet.dodlive.mil/rsc/department-of-the-navy-hawaii-offshore-wind-compatibility/*) around Oahu, noting wind farm areas that are not compatible with military activities and identifying only small sections of the two sites that are compatible (DON 2016). However, the Call Area boundaries have not been revised as a result of the Navy's assessment.

In determining the economic costs of this designation, we rely on the best available information to identify where economic costs are likely to occur. The two sites noticed as the BOEM Call Area remain significant in meeting Hawaii's renewable energy goals as these sites have been identified as areas where wind resources, water depth, and proximity to shore are favorable for wind-energy development (81 FR 41335; June 24, 2016). Given that the boundaries of these two sites have not been revised and that the sites are noted as significant for energy development, our exclusion analysis is based on the areas of the current BOEM Call Area (as published in 81 FR 41335; June 24, 2016).

The estimated economic impacts in the BOEM Call Area are expected to occur as a result of three potential commercial wind-energy projects offshore of the island of Oahu (to be located off Kaena point and off the south shore) (81 FR 41335; June 24, 2016).

The BOEM Call Area sites identified for exclusion overlapped with approximately 1,961 km^2 (757 mi^2), or approximately 3.5 percent of the areas that were under consideration for designation. Density analysis of satellite-tracking information indicates that these sites are not high-use areas for MHI IFKWs; rather they include low-use and mostly lower traveled area for MHI IFKWs, with some small overlap into a moderately traveled area. As noted above, the baseline protections are strong, and energy projects are likely to undergo formal section 7 consultation to ensure that the activities are not likely to jeopardize MHI IFKWs or other protected species (Cardno 2018).

Although economic costs of this designation in the BOEM Call Area are considered low, NMFS also considers the potential intangible costs of designation in light of Executive Order 13795, *Implementing an America-First Offshore Energy Strategy,* which sets forth the nation's policy for encouraging environmentally responsible energy exploration and production, including on the Outer Continental Shelf, to maintain the Nation's position as a global energy leader and to foster energy security. In particular, both Hawaii's State Energy Office and BOEM expressed concerns that the designation may discourage companies from investing in offshore energy projects in areas that are identified as critical habitat and noted that the costs of lost opportunities to meet Hawaii's renewable energy goals could be

significant (Cardno 2018). Because Oahu has the greatest energy needs among the MHI and has limited areas available for this type of development, and receiving energy via interconnection among islands is technologically difficult, these wind projects off Oahu are considered necessary to meet the State of Hawaii's renewable energy goals of 100 percent renewable energy by 2045 (Cardno 2018).

Given the significance of this offshore area in supporting renewable energy goals for the State of Hawaii and the goals of Executive Order 13795, the low administrative costs of this designation, the small size of these areas, and the low-use of this area by MHI IKFWs, we find that the benefits of exclusion of this identified area outweigh the benefits of designation. Although large in-water construction projects are an activity of concern for this DPS, we anticipate that consultations required to ensure that activities are not likely to jeopardize the MHI IFKWs will achieve substantially similar conservation benefits for this DPS. Specifically, we anticipate that conservation measures implemented as a result of consultation to address impacts to the species will also provide incidental protections to the habitat feature. Additionally, wind energy projects in these areas are not expected to result in destruction or adverse modification of critical habitat. Based on our best scientific judgment, and acknowledging the small size of this area (approximately 0.2 percent of the overall designation) and that other safeguards that are in place (*e.g.,* protections already afforded MHI IFKWs under its listing and other regulatory mechanisms), we conclude that exclusion of this area will not result in the extinction of the species.

National Security Impacts

The national security benefits of exclusion are the national security impacts that would be avoided by excluding particular areas from the designation. In preparation for the proposed rule, we contacted representatives of DOD and the Department of Homeland Security to request information on potential national security impacts that may result from the designation of particular areas as critical habitat for the MHI IFKW DPS. In response to the request, the Navy and U.S. Coast Guard each submitted a request that all areas be excluded from critical habitat out of concerns associated with activities that introduce noise to the marine environment (NMFS 2017b). Although we considered the request for exclusion of all areas proposed for critical habitat, we also separately considered particular areas identified by the Navy because these areas support specific military activities. The Coast Guard did not provide specific explanations with regard to particular areas. The Air Force provided a request for exclusion that included the waters leading to and the offshore ranges of the PMRF (NMFS 2017b). As the PMRF offshore ranges were also highlighted as important to Navy activities, we included the information provided by the Air Force regarding their request for exclusion for the PMRF ranges with the Navy's information, due to the similarities between the activities and impacts identified for these areas (*e.g.,* both requests in this area were associated with training and testing activities).

We considered a total of 13 sites for exclusion, and we proposed 8 of those sites for exclusion in the proposed rule. Additionally, we notified the public in the proposed rule that we would be considering six additional requests submitted by the Navy (82 FR 51186; November 03, 2017), which were subsets of a larger area that the Navy initially requested for exclusion, but which NMFS determined should not be excluded under 4(b)(2). In addition to these six areas, the Navy requested the exclusion of two additional areas—north and south of Maui as well as the Hawaii Area Tracking System and the Kahoolawe Training Minefield (see the ESA Section 4(b)(2) Report, NMFS 2018b); these four areas were also subsets of the Four Island Region request for exclusion that was not proposed for exclusion at the proposed rule stage.

For the final designation, we reanalyzed the 13 areas already considered for exclusion using the updated satellite tracking information from the Cascadia Research Collective. Additionally, we separately reviewed each of the 10 areas requested by the Navy that were subsets of the larger areas requested for exclusion, consistent with the review criteria for the 13 previous areas considered for national security exclusion.

Our determinations for these 23 requests are summarized in Table 1 below.

As in the analysis of economic impacts, we weighed the benefits of exclusion (*i.e.,* the impacts to national security that would be avoided) against the benefits of designation. The Navy and Air Force provided information regarding the activities that take place in each area, and they assessed the potential for a critical habitat designation to adversely affect their ability to conduct operations, testing, training, and other essential military readiness activities. The possible impacts to national security summarized by both groups included potential restrictions or constraints on military operations, training, research and development, and preparedness vital for combat operations for around the world.

The primary benefit of exclusion is that the DOD's activities would continue under current regulatory regimes and the DOD would not be required to consult with NMFS under section 7 of the ESA regarding its actions that may affect critical habitat, and thus potential delays or costs associated with conservation measures for critical habitat would be avoided. For each particular area, national security impacts were weighed considering the intensity of use of the area by DOD and how activities in that area may affect the features essential to the conservation of MHI IFKWs. Where additional consultation requirements are likely due to critical habitat at a site, we considered how the consultation may change the DOD activities, and how unique the DOD activities are at the site.

Benefits to the conservation of MHI IFKWs depend on whether designation of critical habitat at a site leads to additional conservation of the DPS above what is already provided by being listed as endangered under the ESA in the first place. We weighed the potential for additional conservation by considering several factors that provide an understanding of the importance of protecting the habitat for the overall conservation of the DPS: MHI IFKW use of the habitat (high vs. low use or travel by MHI IFKWs and/or observational data), the existing baseline protections that may protect that habitat regardless of designation, and the likelihood of other Federal (non-DOD) actions being proposed within the site that would be subject to section 7 consultation associated with critical habitat. Throughout the weighing process the overall size of the area considered for exclusion was considered, along with our overall understanding of importance of protecting that area for conservation purposes.

As discussed in the *Benefits of Designation* section (above), the benefits of designation are not directly comparable to the benefits of exclusion for purposes of conducting the section 4(b)(2) analysis because neither have been fully quantified. The ESA Section 4(b)(2) Report (NMFS 2018b) provides our qualitative comparison of the national security impacts to the conservation benefits in order to determine which is greater. If we found

that national security impacts outweigh conservation benefits, we excluded the site from the critical habitat designation. If conservation benefits outweigh national security impacts, we did not exclude the site from the critical habitat designation. The decision to exclude any sites from a designation of critical habitat is always at the discretion of NMFS. Table 1 outlines the determinations made for each particular area identified and the factors that weighed significantly in that process.

TABLE 1—SUMMARY OF THE ASSESSMENT OF PARTICULAR AREAS FOR EXCLUSION FOR THE DOD AND U.S. COAST GUARD BASED ON IMPACTS ON NATIONAL SECURITY

DOD site, agency	Size of particular area, approximate percent of the total area under consideration	Exclusion warranted	Significant weighing factors
(1) Entire Area Under Consideration for Designation, Navy and Coast Guard.	56,821 km^2 (21,933 mi^2), 100 ..	No	This area includes the entire designation and all benefits from MHI IFKW critical habitat would be lost. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting the habitat.
(2) PMRF Offshore Areas, Navy and Air Force.	843 km^2 (~325 mi^2), 1.5	Yes	This area overlaps a relatively small area of low-use and lower traveled areas of MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD training and testing. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(3) Waters Enroute to PMRF from the Port Allen Harbor, Air Force.	1,077 km^2 (~416 mi^2), 2	No	This area overlaps a relatively small area of low-use and lower traveled MHI IFKW habitat that is not owned or controlled by DOD and where non-DOD activities may occur. Impacts from section 7 consultations are expected to be minor. Thus, short delays for minor modifications to consultation are outweighed by benefits of protecting this habitat from future DOD and non-DOD Federal actions. Note: a portion of this area is now excluded from critical habitat because it overlaps with the Kaulakahi Channel portion of Warning area 186.
(4) Kingfisher Range, Navy	14 km^2 (~6 mi^2), .02	Yes	This area overlaps a small area of low-use and lower traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD training. Impacts from short delays from minor modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(5) Warning Area 188, Navy	2,674 km^2 (~1,032 mi^2), 5	Yes	This area overlaps a medium area of low-use and lower traveled MHI IFKW habitat. DOD maintains control over a portion of the habitat, but does not control deeper waters. Impacts from delays and possible major modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are less likely.
(6) Kaula and Warning Area W–187, Navy.	266 km^2 (~103 mi^2), 0.5	Yes	This area overlaps a small area of low-use and very low traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD training. Impacts from short delays by informal consultation outweigh benefits of protecting low-use and very low traveled habitat where future non-DOD Federal actions are unlikely.
(7) W–189, HELO Quickdraw Box and Oahu Danger Zone, Navy.	2,886 km^2 (~1,114 mi^2), 5	No	This area overlaps a medium area of low-use and moderate to low traveled MHI IFKW habitat and a small high-use area for MHI IFKWs. The DOD does not maintain control over these waters and non-DOD activities are expected in portions of this area. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting both high and low-use and moderate to low traveled MHI IFKW habitat from future DOD and non-DOD Federal actions.
(8) Fleet Operational Readiness Accuracy Check Site Range (FORACS), Navy.	74 km^2 (~29 mi^2), 0.1	Yes	This area overlaps a small area of low-use and moderate to low traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD testing to maintain equipment accuracy. Impacts from delays and possible modifications to consultation outweigh benefits of protecting low-use and moderate to low traveled habitat where future non-DOD Federal actions are unlikely.

TABLE 1—SUMMARY OF THE ASSESSMENT OF PARTICULAR AREAS FOR EXCLUSION FOR THE DOD AND U.S. COAST GUARD BASED ON IMPACTS ON NATIONAL SECURITY—Continued

DOD site, agency	Size of particular area, approximate percent of the total area under consideration	Exclusion warranted	Significant weighing factors
(9) Shipboard Electronic Systems Evaluation Facility Range (SESEF), Navy.	74 km² (~29 mi²), 0.1	Yes	This area overlaps a small area of low-use and lower traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD testing to maintain equipment accuracy. Impacts from delays and possible modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(10) W–196 and 191, Navy	728 km² (~281 mi²), 1	Yes	This area overlaps a relatively small area of low-use and lower traveled MHI IFKW habitat that is not controlled by DOD but where non-DOD Federal actions are unlikely. Impacts from short delays and possible modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(11) W 193 and 194, Navy	458 km² (~177 mi²), 1	Yes	This area overlaps a relatively small area of low-use and lower traveled MHI IFKW habitat that is not controlled by DOD but where non-DOD Federal actions are unlikely. Impacts from short delays and possible modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(12) Four Islands Region (Maui, Lanai, Molokai Kahoolawe), Navy.	15,389 km² (~5,940 mi²), 27	No	This area includes a relatively large area of both high and low-use and high and lower traveled MHI IKFW habitat that is not controlled by DOD. Impacts from delays and possible major modifications to consultation are outweighed by benefits of protecting the entire area, which includes both high and low-use and high and lower traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.
(13) Hawaii Island, Navy	16,931 km² (~6,535 mi²); 30	No	This area includes a relatively large area of both high and low-use and high and lower traveled MHI IKFW habitat that is not controlled by DOD. Impacts from delays and possible major modifications to consultation are outweighed by benefits of protecting the entire area, which includes both high and low-use and high and lower traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.
(14) Kaulakahi Channel Portion of W–186, Navy.	1,631 km² (~630 mi²), 3	Yes	This area overlaps a small to medium area of low-use and lower traveled MHI IFKW habitat that is not controlled by DOD. This area is unique for DOD and provides specific opportunities for DOD training and testing. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting low-use and lower traveled habitat where future non-DOD Federal actions are unlikely.
(15) Area North and East of Oahu, Navy.	2,472 km² (~954 mi²), 4	No	This area overlaps a medium area of both high-use and low-use and high to low traveled MHI IFKW habitat. The DOD does not maintain control over these waters and non-DOD activities are expected in portions of this area. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting both high and low-use and high and low traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.
(16) Area to the South of Oahu, Navy.	1,803 km² (~696 mi²), 3	No	This area overlaps a medium area of low-use and moderate to low traveled MHI IFKW habitat. The DOD does not maintain control over these waters and non-DOD activities are expected in portions of this area. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting both low-use and moderate to low traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.
(17) Kaiwi Channel, Navy	2,355 km² (~909 mi²), 4	No	This area includes a medium area with mostly high-use and high to low traveled MHI IKFW habitat that is not controlled by DOD. Impacts from delays and possible major modifications to consultation are outweighed by benefits of protecting the entire area, which includes both high and low-use and high to low traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.

TABLE 1—SUMMARY OF THE ASSESSMENT OF PARTICULAR AREAS FOR EXCLUSION FOR THE DOD AND U.S. COAST GUARD BASED ON IMPACTS ON NATIONAL SECURITY—Continued

DOD site, agency	Size of particular area, approximate percent of the total area under consideration	Exclusion warranted	Significant weighing factors
(18) Area North and Offshore of Molokai; Navy.	596 km² (~230 mi²), 1	Yes	This area overlaps a relatively small area of potential critical habitat and includes mostly low-use and low-travel area for MHI IKFWs. This area also includes very small portions of high-use and moderate to low travelled MHI IFKW habitat on the southern boundary of the area. The DOD does not maintain control over these waters and non-DOD activities may occur in these areas. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting mostly low-use and lower traveled habitat at the edge of the designation.
(19) Alenuihaha Channel, Navy	2,609 km² (~1,007 mi²), 5	Yes	This area overlaps a small to medium sized area of potential critical habitat and includes mostly low-use and low-travel area for MHI IKFWs. The DOD does not maintain control over these waters and non-DOD activities may occur in these areas. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting mostly low-use and lower traveled habitat.
(20) Area north of Maui, Navy	2,590 km² (~1,000 mi²), 5	No	This area overlaps a medium area with high-use and high to low traveled MHI IFKW habitats. The DOD does not maintain control over these waters and non-DOD activities may occur in these areas. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting portions of high-use and high to low traveled MHI IFKW habitat, from future DOD and non-DOD Federal actions.
(21) Area south of Maui, Navy	1,899 km² (~733 mi²), 3	No	This area overlaps a small to medium area of low-use and lower traveled MHI IFKW habitat and is located between three high-use areas of the designation allowing for contiguous travel between those areas. The area is not controlled by DOD. This area is unique for DOD and provides specific opportunities for DOD training and testing. Impacts from delays and possible modifications to consultation are outweighed by benefits of protecting contiguous habitat between MHI IFKW high-use areas, from future DOD and non-DOD Federal actions.
(22) Hawaii Area Tracking System.	96 km² (~37 mi²), 0.2	Yes	This area overlaps a small area of low-use and lower traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD training. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting mostly low-use and lower traveled habitat.
(23) Kahoolawe Training Minefield.	12 km² (~5 mi²) 0.02	Yes	This area overlaps a small area of low-use and lower traveled MHI IFKW habitat where DOD maintains control of the area. This area is unique for DOD and provides specific opportunities for DOD training. The impacts from delays and possible major modifications to consultation outweigh benefits of protecting mostly low-use and lower traveled habitat.

Other Relevant Impacts of the Designation

Finally, under ESA section 4(b)(2) we consider any other relevant impacts of critical habitat designation to inform our decision as to whether to exclude any areas. For example, we may consider potential adverse effects on existing management plans or conservation plans that benefit listed species, and we may consider potential adverse effects on tribal lands or trust resources. In preparing this designation, we have not identified any such management or conservation plans, tribal lands or resources, or anything else that would be adversely affected by the critical habitat designation. Accordingly, we do not exercise our discretionary authority to exclude any areas based on other relevant impacts.

Critical Habitat Designation

This rule designates approximately 45,504 km² (17,564 mi²) of marine habitat surrounding the main Hawaiian Islands within the geographical area presently occupied by the MHI IFKW. This critical habitat area contains physical or biological features essential to the conservation of the DPS that may require special management considerations or protection. We have not identified any unoccupied areas that are essential to conservation of the MHI IFKW DPS and are not proposing any such areas for designation as critical habitat. This rule proposes to exclude from the designation the following areas (one area, two sites, for the Bureau of Ocean Energy Management (BOEM) and 13 exclusions requested by the Navy): (1) The BOEM Call Area offshore of the Island of Oahu (which includes two sites, one off Kaena point and one off the south shore), (2) the Navy Pacific Missile Range Facility's Offshore ranges (including the Shallow Water Training Range (SWTR), the Barking Sands Tactical Underwater Range (BARSTUR), and the Barking Sands Underwater

Range Extension (BSURE; west of Kauai), (3) the Navy Kingfisher Range (northeast of Niihau), (4) Warning Area 188 (west of Kauai), (5) Kaula Island and Warning Area 187 (surrounding Kaula Island), (6) the Navy Fleet Operational Readiness Accuracy Check Site (FORACS) (west of Oahu), (7) the Navy Shipboard Electronic Systems Evaluation Facility (SESEF) (west of Oahu), (8) Warning Areas 196 and 191 (south of Oahu), (9) Warning Areas 193 and 194 (south of Oahu), (10) the Kaulakahi Channel portion of Warning area 186 (the channel between Niihau and Kauai and extending east), (11) the area north of Molokai, (12) the Alenuihaha Channel, (13) Hawaii Area Tracking System, and (14) the Kahoolawe Training Minefield. Based on our best scientific knowledge and expertise, we conclude that the exclusion of these areas will not result in the extinction of the DPS, and will not impede the conservation of the DPS. In addition, the Ewa Training Minefield and the Naval Defensive Sea Area are precluded from designation under section 4(a)(3) of the ESA because they are managed under the JBPHH INRMP that we find provides a benefit to the Main Hawaiian Islands insular false killer whale.

Effects of Critical Habitat Designations

Section 7(a)(2) of the ESA requires Federal agencies, including NMFS, to ensure that any action authorized, funded, or carried out by the agency (agency action) is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. When a species is listed or critical habitat is designated, Federal agencies must consult with NMFS on any agency action to be conducted in an area where the species is present and that may affect the species or its critical habitat. During the consultation, NMFS evaluates the agency action to determine whether the action may adversely affect listed species or critical habitat and issues its finding in a biological opinion. If NMFS concludes in the biological opinion that the agency action would likely result in the destruction or adverse modification of critical habitat, NMFS would also recommend any reasonable and prudent alternatives to the action. Reasonable and prudent alternatives are defined in 50 CFR 402.02 as alternative actions identified during formal 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 would avoid the destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances in which (1) critical habitat is subsequently designated; or (2) new information or changes to the action may result in effects to critical habitat not previously considered in the biological opinion. Consequently, some Federal agencies may request re-initiation of consultation or conference with NMFS on actions for which formal consultation has been completed, if those actions may affect designated critical habitat. Activities subject to the ESA section 7 consultation process include activities on Federal lands, as well as activities requiring a permit or other authorization from a Federal agency (*e.g.,* a section 10(a)(1)(B) permit from NMFS), or some other Federal action, including funding (*e.g.,* Federal Highway Administration or Federal Emergency Management Agency funding). ESA section 7 consultation would not be required for Federal actions that do not affect listed species or critical habitat, and would not be required for actions on non-Federal and private lands that are not carried out, funded, or authorized by a Federal agency.

Activities That May Be Affected

ESA section 4(b)(8) requires, to the maximum extent practicable, in any regulation to designate critical habitat, an evaluation and brief description of those activities (whether public or private) that may adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect MHI IFKW critical habitat and may be subject to the ESA section 7 consultation processes when carried out, funded, or authorized by a Federal agency. The activities most likely to be affected by this critical habitat designation once finalized are the following: (1) In-water construction (including dredging); (2) energy development (including renewable energy projects); (3) activities that affect water quality; (4) aquaculture/mariculture; (5) fisheries; (6) environmental restoration and response activities (including responses to oil spills and vessel groundings, and marine debris clean-up activities); and (7) some military readiness activities. Private entities may also be affected by this critical habitat designation if a Federal permit is required, Federal funding is received, or the entity is indirectly affected by delays or changes in a Federal project. These activities would need to be evaluated with respect to their potential to destroy or adversely modify critical habitat. Changes to the actions to minimize or avoid destruction or adverse modification of designated critical habitat may result in changes to some activities. Please see the Economic Analysis Report (Cardno 2018) for more details and examples of changes that may need to occur in order for activities to minimize or avoid destruction or adverse modification of designated critical habitat. Questions regarding whether specific activities would constitute destruction or adverse modification of critical habitat should be directed to NMFS (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

References Cited

A complete list of all references cited in this rule can be found on our website at: *http://www.fpir.noaa.gov/PRD/prd_mhi_false_killer_whale.html#fwk_esa_listing* or at *www.regulations.gov,* and is available upon request from the NMFS office in Honolulu, Hawaii (see **ADDRESSES**).

Classification

Takings

Under E.O. 12630, Federal agencies must consider the effects of their actions on constitutionally protected private property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property that substantially affect its value or use. In accordance with E.O. 12630, this rule does not have significant takings implications. The designation of critical habitat for the MHI IFKW DPS is fully described within the offshore marine environment and is not expected to affect the use or value of private property interests. Therefore, a takings implication assessment is not required.

Executive Orders 12866 and 13771

OMB has determined that this rule is significant for purposes of Executive Order 12866 review. Economic and Regulatory Impact Review Analyses and 4(b)(2) analyses as set forth and referenced herein have been prepared to support the exclusion process under section 4(b)(2) of the ESA. To review these documents see **ADDRESSES** section above.

We have estimated the costs for this rule. Economic impacts associated with

this rule stem from the ESA's requirement that Federal agencies ensure any action authorized, funded, or carried out will not likely jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. In practice, this requires Federal agencies to consult with NMFS whenever they propose an action that may affect a listed species or its designated critical habitat, and then to modify any action that could jeopardize the species or adversely affect critical habitat. Thus, there are two main categories of costs: Administrative costs associated with completing consultations, and project modification costs. Costs associated with the ESA's requirement to avoid jeopardizing the continued existence of a listed species are not attributable to this rule, as that requirement exists in the absence of the critical habitat designation.

The Economic Report (Cardno 2018) identifies the total estimated present value of the quantified impacts above current consultation effort to be between approximately 192,000 to 208,000 dollars over the next 10 years; on an annualized undiscounted basis, the impacts are equivalent to 19,200 to 20,800 dollars per year. Applying discounted rates recommended in the Office of Management and Budget Circular A–4, the Final Economic Report estimates these incremental impacts of designation to be between 170,000 to 185,000 using a 3 percent discount rate and 143,000 to 156,000 using a 7 percent discount rate (Cardno 2018). These total impacts include the additional administrative efforts necessary to consider critical habitat in section 7 consultations. Across the MHI, economic impacts are expected to be small and largely associated with the administrative costs borne by Federal agencies. However, private energy developers may also bear the administrative costs of consultation for large energy projects. The Final Economic Report estimates these costs to be between 0 and 3,000 dollars over the next 10 years. While there are expected beneficial economic impacts of designating critical habitat, there are insufficient data available to monetize those impacts (see *Benefits of Designation* section).

This rule is not expected to be subject to the requirements of E.O. 13771 because this rule is expected to result in no more than *de minimis* costs.

Executive Order 13132, Federalism

The Executive Order on Federalism, Executive Order 13132, requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations in which a regulation may preempt state law or impose substantial direct compliance costs on state and local governments (unless required by statute). Pursuant to E.O. 13132, we determined that this rule does not have significant federalism effects and that a federalism assessment is not required. We requested information from and coordinated development of this final critical habitat designation with appropriate Hawaii State resources agencies. The designation may have some benefit to state and local resource agencies in that the rule more clearly defines the physical and biological features essential to the conservation of the species and the areas on which those features are found. While this designation would not alter where and what non-Federally sponsored activities may occur, it may assist local governments in long-range planning.

Where state and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests only on the Federal agency.

Energy Supply, Distribution, and Use (Executive Order 13211)

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects when undertaking a ''significant energy action.'' According to Executive Order 13211, ''significant energy action'' means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under Executive Order 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this action on the supply, distribution, or use of energy (see section 13.2 of the Economic Report; Cardno 2018). It is unlikely for the oil and gas industry to experience a ''significant adverse effect'' due to this designation, as Hawaii does not produce petroleum or natural gas, and refineries are not expected to be affected by this designation. Offshore energy projects may affect the essential features of critical habitat for the MHI IFKW DPS. However, foreseeable impacts are limited to two areas off Oahu where prospective wind energy projects are under consideration (see *Economic Impacts of Designation* section). Impacts to the electricity industry would likely be limited to potential delays in project development, costs to monitor noise, and possibly additional administrative costs of consultation. The potential critical habitat area is not expected to affect the current electricity production levels in Hawaii. Further, it appears that the designation will have little or no effect on electrical energy production decisions (other than the location of the future project), subsequent electricity supply, or the cost of future energy production. The designation is unlikely to impact the industry by greater than the 1 billion kWh per year or 500 MW of capacity provided as guidance in the executive order. It is therefore unlikely for the electricity production industry to experience a significant adverse effect due to the MHI IFKW critical habitat designation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a RFA describing the effects of the rule on small entities, *i.e.,* small businesses, small organizations, and small government jurisdictions. A final regulatory flexibility analysis (FRFA) has been prepared, which is included as Chapter 13 to the Economic Report (Cardno 2018). This document is available upon request (see **ADDRESSES**), via our website at *http://www.fpir.noaa.gov/PRD/prd_mhi_false_killer_whale.html#fwk_esa_listing* or via the Federal eRulemaking website at *www.regulations.gov.*

A statement of need for and objectives of this rule is provided earlier in the preamble and is not repeated here. This rule will not impose any recordkeeping or reporting requirements. NMFS received comments on the proposed rule and supplementary reports during the 60-day comment period; no comments were received on the initial regulatory flexibility analysis for this action.

We identified the impacts to small businesses by considering the seven activities most likely impacted by the designation: (1) In-water construction (including dredging); (2) energy development (including renewable energy projects); (3) activities that affect

water quality; (4) aquaculture/mariculture; (5) fisheries; (6) environmental restoration and response activities (including responses to oil spills and vessel groundings, and marine debris clean-up activities); and (7) some military activities. As discussed in the *Economic Impacts of Designation* section of this proposed rule and the Economic Report, the only entities identified as bearing economic impacts (above administrative costs) by the potential critical habitat designation are two developers of offshore wind energy projects; however, these entities exceed the criterion established by SBA for small businesses (Cardno 2018). Although considered unlikely (NMFS 2018a), there remains a small, unquantifiable possibility that federally-managed longline boats (*i.e.,* deep-set or shallow-set fisheries) could be subject to additional conservation and management measures. At this time, however, NMFS has no information to suggest that additional measures are reasonably necessary to protect prey species. Chapter 13 of the Economic Report provides a description and estimate of the number of these entities that fit the criterion that could be impacted by the designation if future management measures were identified (Cardno 2018). Due to the inherent uncertainty involved in predicting possible economic impacts that could result from future consultations, we acknowledge that other unidentified impacts may occur.

In accordance with the requirements of the RFA, this analysis considered alternatives to the critical habitat designation for the MHI IFKW that would achieve the goals of designating critical habitat without unduly burdening small entities. The alternative of not designating critical habitat for the MHI IFKW was considered and rejected because such an approach does not meet our statutory requirements under the ESA. We also considered and rejected the alternative of designating as critical habitat all areas that contain at least one identified essential feature (*i.e.,* no areas excluded), because the alternative does not allow the agency to take into account circumstances in which the benefits of exclusion for economic, national security, and other relevant impacts outweigh the benefits of critical habitat designation. Finally, through the ESA 4(b)(2) consideration process, we identified and selected an alternative that may lessen the impacts of the overall designation for certain entities, including small entities. Under this alternative, we considered excluding particular areas within the designated specific area based on economic and national security impacts. This selected alternative may help to reduce the indirect impact to small businesses that are economically involved with military activities or other activities that undergo section 7 consultation in these areas. However, as the costs resulting from critical habitat designation are primarily administrative and are borne mostly by the Federal agencies involved in consultation, there is insufficient information to monetize the costs and benefits of these exclusions at this time. We did not consider other economic or relevant exclusions from critical habitat designation because our analyses identified only low-cost administrative impacts to Federal entities in other areas not proposed for exclusion.

In summary, the primary benefit of this designation is to ensure that Federal agencies consult with NMFS whenever they carry out, fund, or authorize any action that may adversely affect MHI IFKW critical habitat. Costs associated with critical habitat are primarily administrative costs borne by the Federal agency taking the action. Our analysis did not identify any economic impacts to small businesses based on this designation and current information does not suggest that small businesses will be disproportionately affected by this designation (Cardno 2018). Although the analysis shows that we could have certified that there would not be significant economic impact on a substantial number of small entities, we are instead presenting this FRFA.

During a formal section 7 consultation under the ESA, NMFS, the action agency, and the third party applying for Federal funding or permitting (if applicable) communicate in an effort to minimize potential adverse effects to the species and to the proposed critical habitat. Communication among these parties may occur via written letters, phone calls, in-person meetings, or any combination of these. The duration and complexity of these communications depend on a number of variables, including the type of consultation, the species, the activity of concern, and the potential effects to the species and designated critical habitat associated with the activity that has been proposed. The third-party costs associated with these consultations include the administrative costs, such as the costs of time spent in meetings, preparing letters, and the development of research, including biological studies and engineering reports. There are no small businesses directly regulated by this action and there are no additional costs to small businesses as a result of section 7 consultations to consider.

Coastal Zone Management Act

Under section 307(c)(1)(A) of the Coastal Zone Management Act (CZMA) (16 U.S.C. 1456(c)(1)(A)) and its implementing regulations, each Federal activity within or outside the coastal zone that has reasonably foreseeable effects on any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved state coastal management programs. We have determined that the designation of critical habitat for the MHI IFKW DPS is consistent to the maximum extent practicable with the enforceable policies of the approved Coastal Zone Management (CZM) Program of Hawaii. This determination was submitted to the Hawaii CZM Program for review. While the Hawaii CZM Program noted comments from Hawaii's Department of Land and Natural Resources DAR expressing concerns about the expansiveness of the proposed designation, the Hawaii CZM Program concurred with our consistency determination in a letter they issued to NMFS on December 15, 2017. These concerns about the expansiveness of the designation were submitted by DAR and are addressed under our responses to Comments 8 and 10 above.

Paperwork Reduction Act

The purpose of the Paperwork Reduction Act is to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, and other persons resulting from the collection of information by or for the Federal government. This final rule does not contain any new or revised collection of information. This rule, does not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations.

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

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(A) This proposed rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon state, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' The designation of critical habitat does not impose an enforceable duty on non-Federal government entities or private parties. The only regulatory effect of a

critical habitat designation is that Federal agencies must ensure that actions that they fund, authorize, or undertake are not likely to destroy or adversely modify critical habitat under ESA section 7. Non-Federal entities that receive funding, assistance, or permits from Federal agencies, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly affected because they receive Federal assistance or participate in a voluntary Federal aid program; however, the Federal action agency has the obligation to avoid destruction or adverse modification of critical habitat.

(B) This rule will not significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Consultation and Coordination With Indian Tribal Governments

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States towards Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments,'' outlines the responsibilities of the Federal government in matters affecting tribal interests. ''Federally recognized tribe'' means an Indian or Alaska Native tribe or community that is acknowledged as an Indian tribe under the federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

In the list published annually by the Secretary, there are no federally recognized tribes in the State of Hawaii (74 FR 40218; August 11, 2009). Although Native Hawaiian lands are not tribal lands for purposes of the requirements of the President's Memorandum or the Department Manual, recent Department of Interior regulations (43 CFR 50) set forth a process for establishing formal government-to-government relationship with the Native Hawaiian Community. Moreover, we recognize that Native Hawaiian organizations have the potential to be affected by Federal regulations and as such, consideration of these impacts may be evaluated as other relevant impacts from the designation.

We solicited comments regarding areas of overlap with the designation that may warrant exclusion from critical habitat for the MHI IFKW due to such impacts mentioned above, and/or information from affected Native Hawaiian organizations concerning other Native Hawaiian activities that may be affected in areas other than those specifically owned by the organization. We received no additional information regarding any potential impacts.

In conclusion we find that this critical habitat designation does not have tribal implications, because the final critical habitat designation does not include any tribal lands and does not affect tribal trust resources or the exercise of tribal rights.

Information Quality Act (IQA)

Pursuant to the Information Quality Act (section 515 of Pub. L. 106–554), this information product has undergone a pre-dissemination review by NMFS. The signed Pre-dissemination Review and Documentation Form is on file with the NMFS Pacific Islands Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects

50 CFR Part 224

Endangered and threatened species, Exports, Imports, Transportation.

50 CFR Part 226

Endangered and threatened species.

Dated: July 16, 2018.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 224 and 226 are amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, amend the table in paragraph (h) by revising the entry for ''Whale, false killer (Main Hawaiian Islands Insular DPS) under the ''Marine Mammals'' subheading to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(h) * * *

Species [1]			Citation(s) for listing determination(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
Marine Mammals					
*	*	*	*	*	*
Whale, false killer (Main Hawaiian Islands Insular DPS).	*Pseudorca crassidens*	False killer whales found from nearshore of the main Hawaiian Islands out to 140 km (approximately 75 nautical miles) and that permanently reside within this geographic range.	77 FR 70915, Nov. 28, 2012.	§ 226.226	NA.
*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

PART 226—DESIGNATED CRITICAL HABITAT

■ 3. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 4. Add § 226.226, to read as follows:

§ 226.226 Critical habitat for the main Hawaiian Islands insular false killer whale (*Pseudorca crassidens*) Distinct Population Segment.

Critical habitat is designated for main Hawaiian Islands insular false killer whale as described in this section. The maps, clarified by the textual descriptions in this section, are the definitive source for determining the critical habitat boundaries.

(a) *Critical habitat boundaries.* Critical habitat is designated in the waters surrounding the main Hawaiian Islands from the 45-meter (m) depth contour out to the 3,200-m depth contour as depicted in the maps below.

(b) *Essential features.* The essential feature for the conservation of the main Hawaiian Islands insular false killer whale is the following: *Island-associated marine habitat for main Hawaiian Islands insular false killer whales.* Main Hawaiian Islands insular false killer whales are island-associated whales that rely entirely on the productive submerged habitat of the main Hawaiian Islands to support all of their life-history stages. The following characteristics of this habitat support insular false killer whales' ability to travel, forage, communicate, and move freely around and among the waters surrounding the main Hawaiian Islands:

(1) Adequate space for movement and use within shelf and slope habitat;

(2) Prey species of sufficient quantity, quality, and availability to support individual growth, reproduction, and development, as well as overall population growth;

(3) Waters free of pollutants of a type and amount harmful to main Hawaiian Islands insular false killer whales; and

(4) Sound levels that would not significantly impair false killer whales' use or occupancy.

(c) *Areas not included in critical habitat.* Critical habitat does not include the following particular areas where they overlap with the areas described in paragraph (a) of this section:

(1) Pursuant to Endangered Species Act (ESA) section 4(b)(2), the following areas have been excluded from the designation: The Bureau of Ocean Energy Management Call Area offshore of the Island of Oahu (which includes two sites, one off Kaena point and one off the south shore), the Navy Pacific Missile Range Facility's Offshore ranges (including the Shallow Water Training Range (SWTR), the Barking Sands Tactical Underwater Range (BARSTUR), and the Barking Sands Underwater Range Extension (BSURE; west of Kauai), the Navy Kingfisher Range (northeast of Niihau), Warning Area 188 (west of Kauai), Kaula Island and Warning Area 187 (surrounding Kaula Island), the Navy Fleet Operational Readiness Accuracy Check Site (FORACS) (west of Oahu), the Navy Shipboard Electronic Systems Evaluation Facility (SESEF) (west of Oahu), Warning Areas 196 and 191 (south of Oahu), Warning Areas 193 and 194 (south of Oahu), the Kaulakahi Channel portion of Warning area 186 (the channel between Niihau and Kauai and extending east), the area north of Molokai (found offshore at the outer edge of the designation), the Alenuihaha Channel, the Hawaii Area Tracking System, and the Kahoolawe Training Minefield.

(2) Pursuant to ESA section 4(a)(3)(B), all areas subject to the Joint Base Pearl Harbor-Hickam Integrated Natural Resource Management Pl69.

(d) *Maps of main Hawaiian Islands insular false killer whale critical habitat.*

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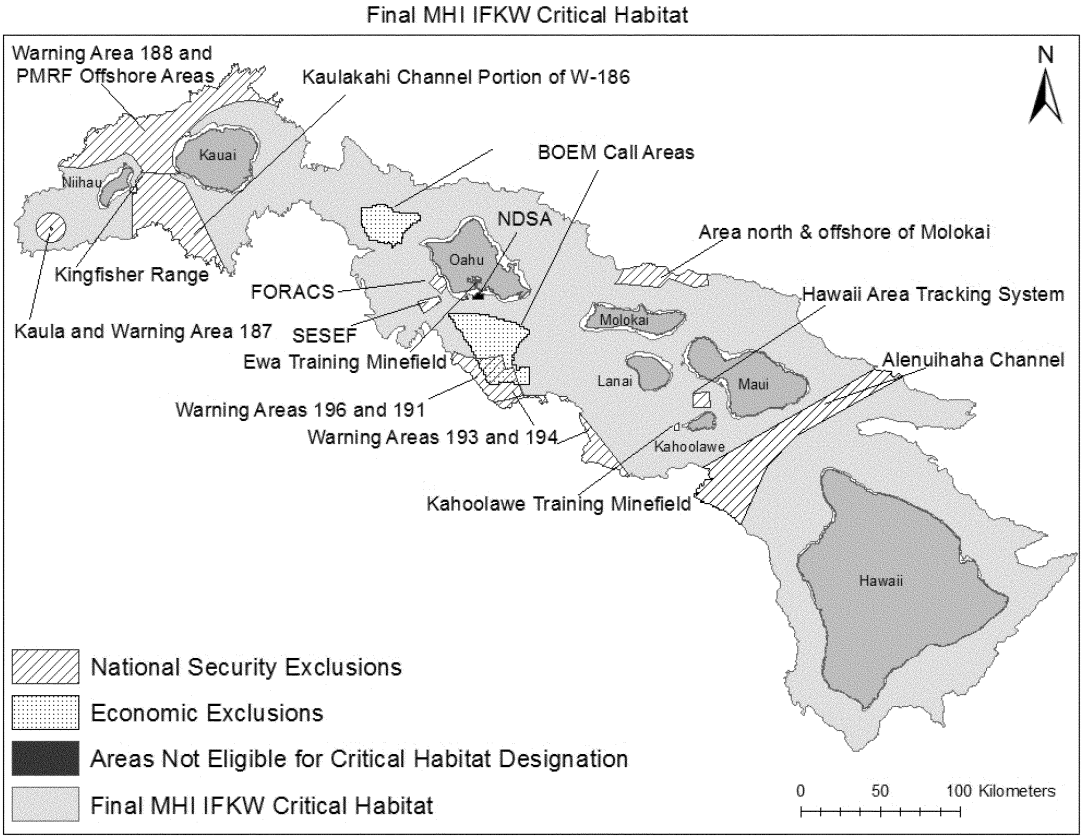
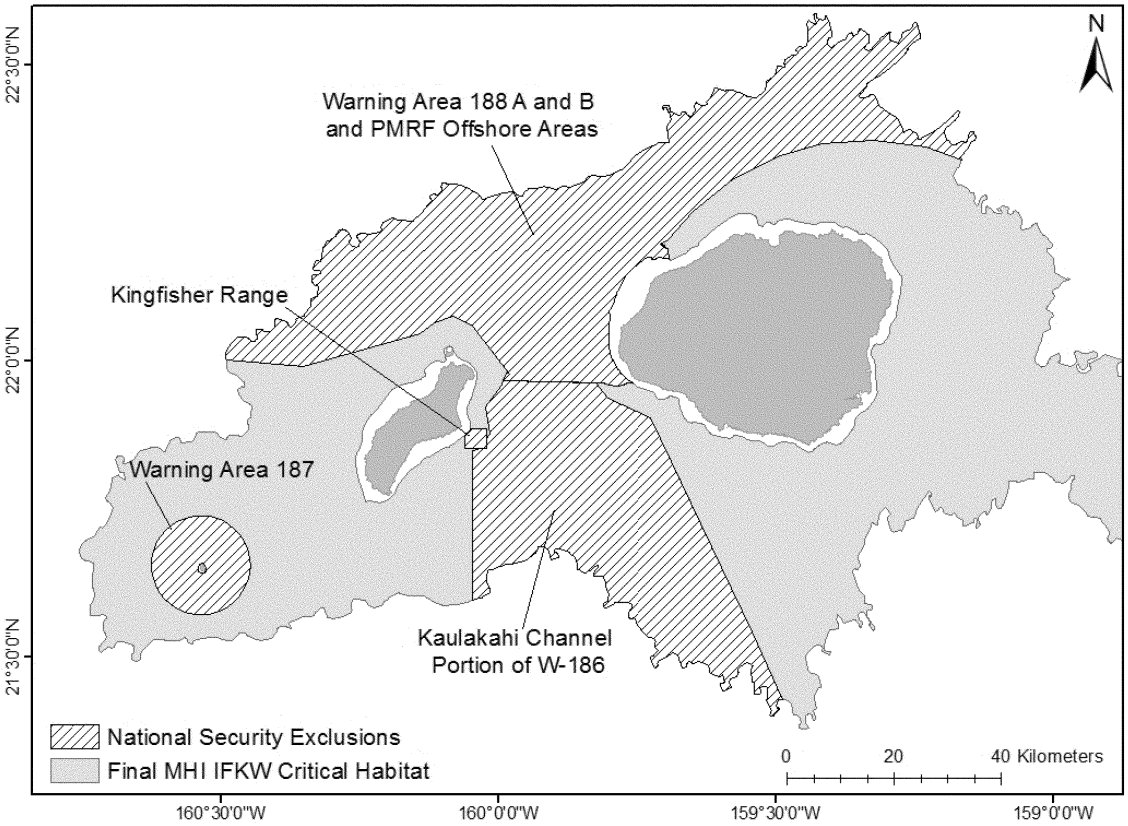
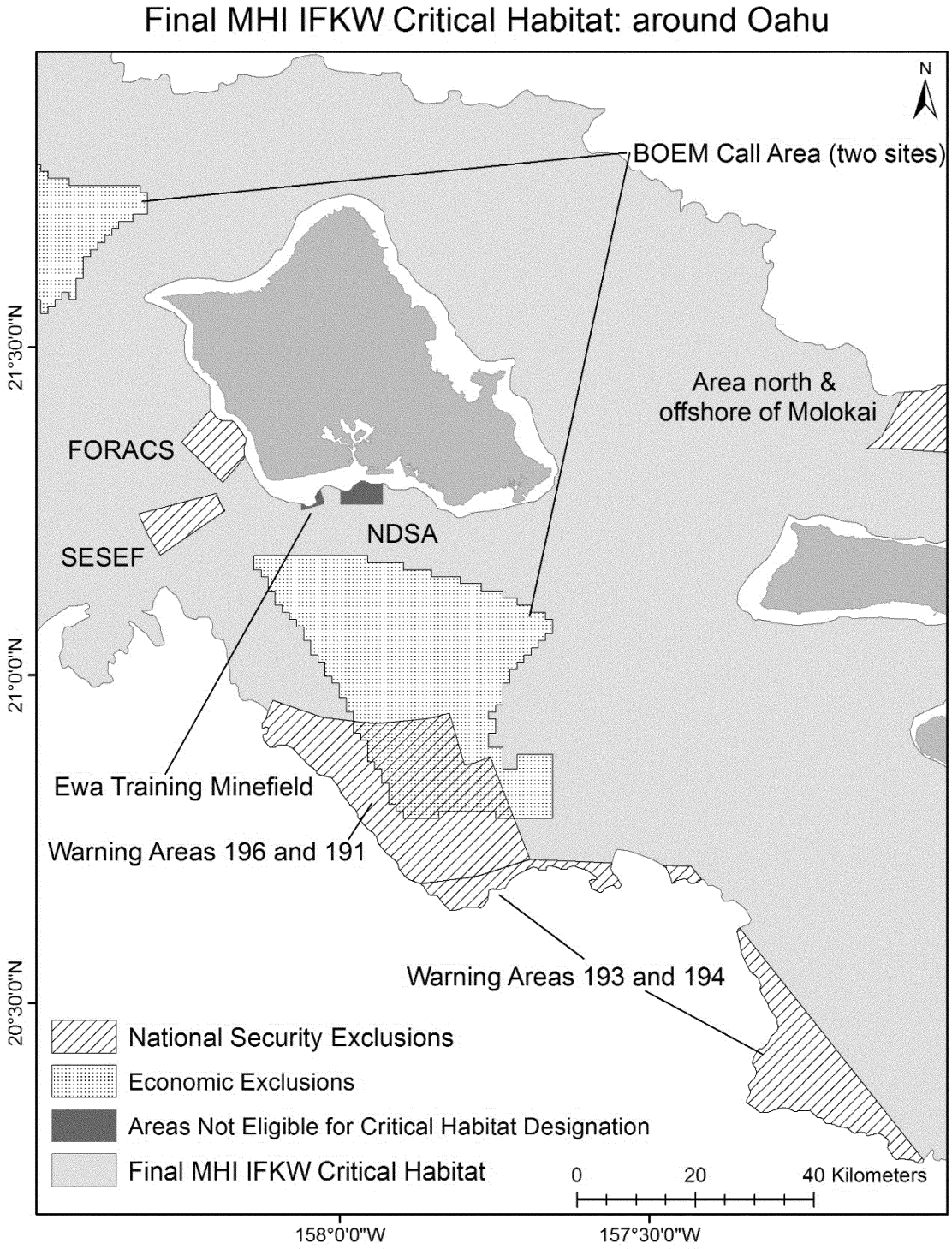
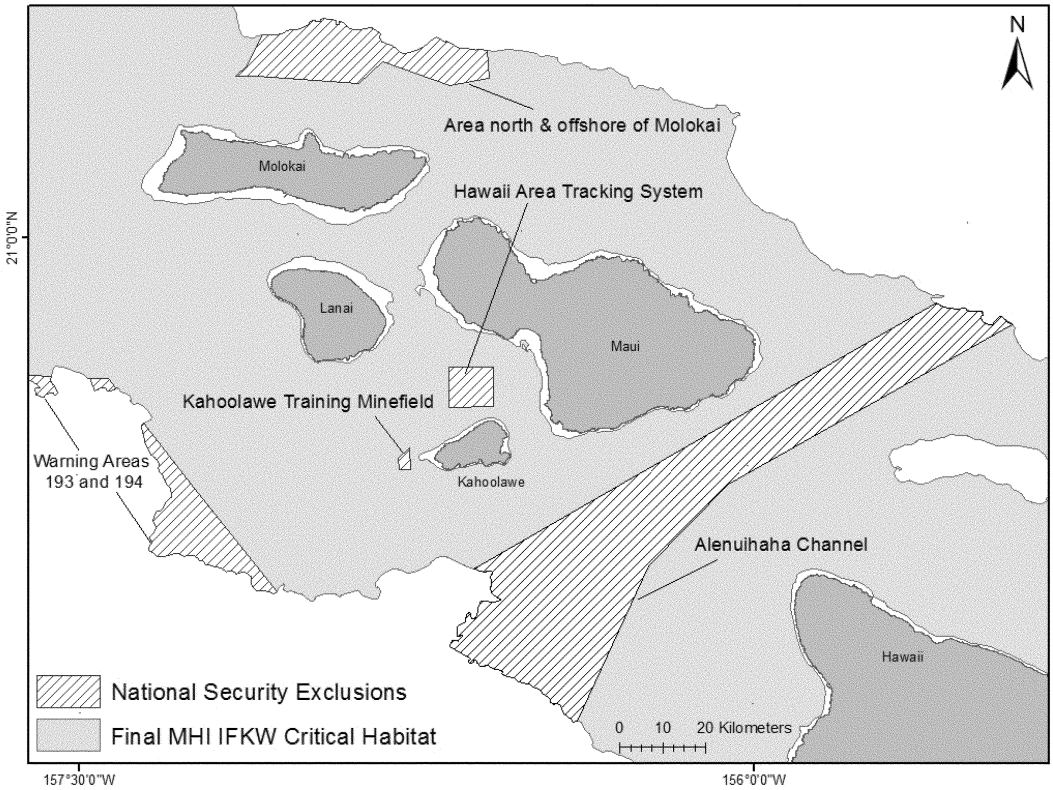


Final MHI IFKW Critical Habitat: around Niihau and Kauai

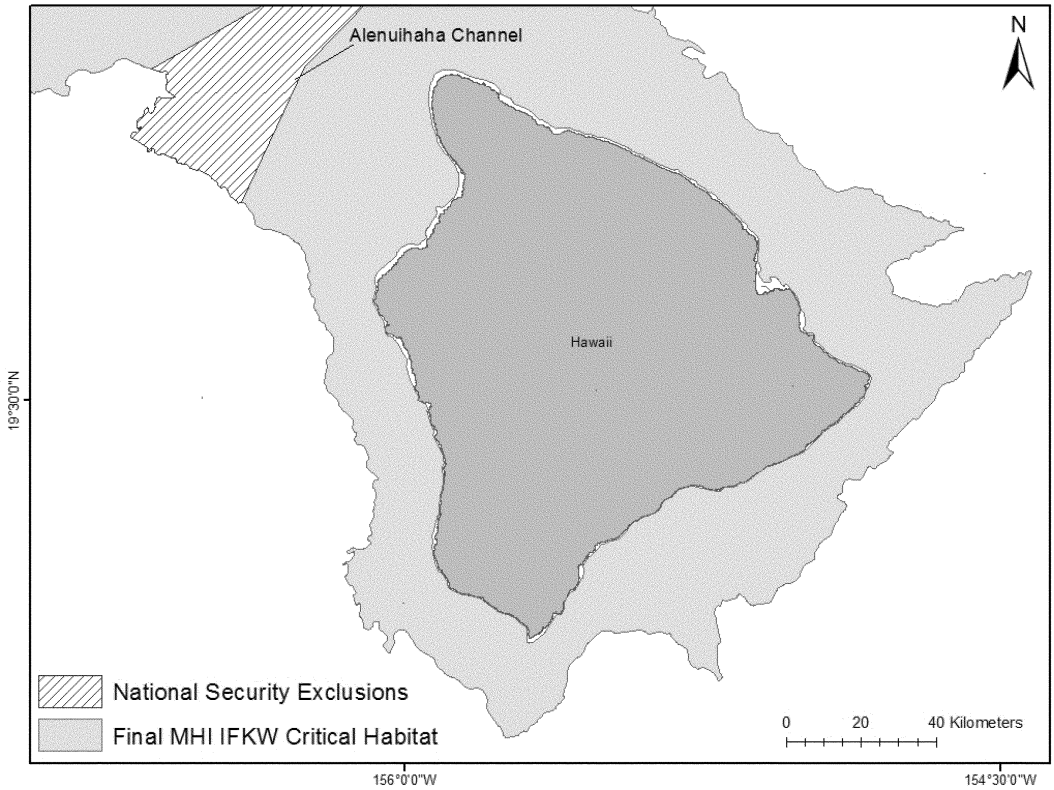



Final MHI IFKW Critical Habitat: around Oahu
N
BOEM Call Area (two sites)
Area north &
offshore of Molokai
FORACS
SESEF
NDSA
Ewa Training Minefield
Warning Areas 196 and 191
Warning Areas 193 and 194
21°30'0"N
21°0'0"N
20°30'0"N
158°0'0"W
157°30'0"W
National Security Exclusions
Economic Exclusions
Areas Not Eligible for Critical Habitat Designation
Final MHI IFKW Critical Habitat
0
20
40 Kilometers

Final MHI IFKW Critical Habitat: around Maui, Lanai, Molokai, and Kahoolawe



Final MHI IFKW Critical Habitat: around Hawaii



[FR Doc. 2018–15500 Filed 7–23–18; 8:45 am]
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