

### PART 193—LIQUEFIED NATURAL GAS FACILITIES: FEDERAL SAFETY STANDARDS

- 1. The authority citation for part 193 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60103, 60104, 60108, 60109, 60110, 60113, 60118; and 49 CFR 1.53.

- 2. In 49 CFR part 193, remove the words “Research and Special Programs Administration” and add, in their place, the words “Pipeline and Hazardous Materials Safety Administration” in the following places:

- a. Section 193.2007; and
- b. Section 193.2013.

### PART 194—RESPONSE PLANS FOR ONSHORE OIL PIPELINES

- 1. The authority citation for part 194 continues to read as follows:

**Authority:** 33 U.S.C. 1231, 1321(j)(1)(C), (j)(5) and (j)(6); sec. 2, E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; 49 CFR 1.53.

- 2. In 49 CFR part 194, remove the words “Research and Special Programs Administration” and add, in their place, the words “Pipeline and Hazardous Materials Safety Administration” in § 194.119(a).

- 3. In 49 CFR part 194, remove the abbreviation “RSPA” and add, in its place, the abbreviation “PHMSA” in the following places:

- a. Section 194.101(a) in two places;
- b. Section 194.119(b) in two places, (c) in five places, (d) in two places, (e) in two places, and (f) in four places; and
- c. Section 194.121(b), (c) in two places, and (d) in four places.

### PART 195—TRANSPORTATION OF HAZARDOUS LIQUIDS BY PIPELINE

- 1. The authority citation for part 195 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60118; and 49 CFR 1.53.

- 2. In 49 CFR part 195, remove the words “Research and Special Programs Administration” and add, in their place, the words “Pipeline and Hazardous Materials Safety Administration” in the following places:

- a. Section 195.2;
- b. Section 195.3(b);
- c. Section 195.57(b);
- d. Section 195.58;
- e. Section 195.59(a) and (b); and
- f. Section 195.452(m).

- 3. In 49 CFR part 195, remove the abbreviation “RSPA” and add, in its place, the abbreviation “PHMSA” in the following places:

- a. Section 195.1; and

- b. Section 195.9.

- 4. In § 195.59(a) and (b), remove the e-mail address “roger.little@rspa.dot.gov” and add, in its place, the e-mail address “roger.little@dot.gov”.

### PART 198—REGULATIONS FOR GRANTS TO AID STATE PIPELINE SAFETY PROGRAMS

- 1. The authority citation for part 198 continues to read as follows:

**Authority:** 49 U.S.C. 60105, 60106, 60114; and 49 CFR 1.53.

- 2. In 49 CFR part 198, remove the words “Research and Special Programs Administration” and add, in their place, the words “Pipeline and Hazardous Materials Safety Administration” in § 198.3.

- 3. In 49 CFR part 198, remove the abbreviation “RSPA” and add, in its place, the abbreviation “PHMSA” in § 198.13(e).

### PART 199—DRUG AND ALCOHOL TESTING

- 1. The authority citation for part 199 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

- 2. In 49 CFR part 199, remove the words “Research and Special Programs Administration” and add, in their place, the words “Pipeline and Hazardous Materials Safety Administration” in the following places:

- a. Section 199.3;
- b. Section 199.7;
- c. Section 199.119(b); and
- d. Section 199.229(c).

- 3. In 49 CFR part 199, remove the abbreviation “RSPA” and add, in its place, the abbreviation “PHMSA” in the following places:

- a. Section 199.119(a) in two places;
- b. Section 199.225(b)(4); and
- c. Section 199.229(a) in two places.

Issued in Washington, DC on February 25, 2005.

**Elaine E. Joost,**

*Acting Deputy Administrator.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AI26

### Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon; Re-evaluation of Non-Economic Exclusions From August 2003 Final Designation

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

**ACTION:** Final rule; confirmation.

**SUMMARY:** We, the Fish and Wildlife Service (Service), confirm the non-economic exclusions made to our previous final rule (August 6, 2003, 68 FR 46683, effective September 5, 2003), which designated critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for 4 vernal pool crustaceans and 11 vernal pool plants. A total of approximately 1,184,513 ac (479,356 ha) of land falls within the boundaries of designated critical habitat. This estimate reflects exclusion of: Lands within the boundaries of Habitat Conservation Plans, National Wildlife Refuge lands and National fish hatchery lands (33,097 ac (13,394 ha)), State lands within ecological reserves and wildlife management areas (20,933 ac (8,471 ha)), Department of Defense lands within Beale and Travis Air Force Bases as well as Fort Hunter Liggett and Camp Roberts Army installations (64,259 ac (26,005 ha)), Tribal lands managed by the Mechoopda Tribe (644 ac (261 ha)), and the Santa Rosa Plateau Ecological Reserve (10,200 ac (4,128 ha)) from the final designation. The area estimate does not reflect the exclusion of lands within the California counties of Butte, Madera, Merced, Sacramento, and Solano, which are excluded from the final designation pursuant to section 4(b)(2) of the Act and pending further analysis as directed by the October 29, 2004, order by the court.

This critical habitat designation requires us to consult under section 7 of the Act with regard to actions authorized, funded, or carried out by a Federal agency. Section 4 of the Act requires us to consider economic and other relevant impacts when specifying any particular area as critical habitat. We solicited data and comments from the public on all aspects of the proposed rule, including data on economic and other impacts of the designation.

**DATES:** This document confirms the non-economic exclusions made to our previous final rule (August 6, 2003, 68 FR 46683, effective September 5, 2003), and this document is effective on March 8, 2005.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage, Room W-2605, Sacramento, CA 95825.

**FOR FURTHER INFORMATION CONTACT:** Arnold Roessler, at the Sacramento Fish and Wildlife Office address above (telephone (916) 414-6600; facsimile (916) 414-6710).

**SUPPLEMENTARY INFORMATION:**

**Preamble**

**Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

**Role of Critical Habitat in Actual Practice of Administering and Implementing the Act**

While attention to and protection of habitat are paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 473 species or 37 percent of the 1,264 listed species in the U.S. under

the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,264 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

In crafting the Act, Congress provided guidance for the exercise of discretion by the Secretary in making critical habitat decisions. We have applied the guidance in this rulemaking. Section 3(5)(a) of the Act, defines critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) 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 in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species."

Section 3(5)(C) of the Act further 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." "These provisions of section 3 authorize the exercise of discretion in determining (1) whether special management considerations or protections may be required; (2) whether unoccupied areas are essential for the conservation of the species; and (3) the extent to which the entire area which can be occupied by the species should be included in critical habitat."

Finally, section 4(b)(2) of the Act allows the Secretary to exclude any area from critical habitat, after considering the economic impact and any other relevant impact of a designation, upon

a determination that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species concerned.

The Congressional record is clear that Congress contemplated occasions where the Secretary could exclude the entire designation. In addition, the discretion that Congress anticipated would be exercised in Section 4(b)(2) of the Act is extremely broad. "The consideration and weight given to any particular impact is completely within the Secretary's discretion. \* \* \*"

(Congressional Research Service 1982).

Given that section 4(a)(3)(A) of the Act requires that critical habitat be designated concurrently with making a determination that a species is an endangered species or a threatened species, we are mindful of the Congressional intent with respect to listing as we designate critical habitat. For example, section 4(a)(1) of the Act (16 U.S.C. 1533(a)(1)), states that we must consider in listing determinations, among factors, "the inadequacy of existing regulatory mechanisms" (so-called "Factor D"); and "other natural or manmade factors affecting its continued existence" (referred to as "Factor E").

Section 4(b)(1)(A) requires us also to "tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." Read together, sections 4(a)(1) and 4(b)(1)(A), as reflected in our regulations at 50 CFR 424.11(f), require us to take into account any State or local laws, regulations, ordinances, programs, or other specific conservation measures that either positively or negatively affect a species' status (*i.e.*, measures that create, exacerbate, reduce, or remove threats identified through the section 4(a)(1) analysis). The manner in which the section 4(a)(1) factors are framed supports this conclusion. Factor (D) for example, "the inadequacy of existing regulatory mechanisms" indicates that overall we might find existing regulatory mechanisms adequate to justify a determination not to list a species. Factor (E) in section 4(a)(1) (any "manmade factors affecting [the species'] continued existence") requires us to consider the pertinent laws, regulations, programs, and other specific actions of any entity that either positively or negatively affect the species. Thus, the analysis outlined in

section 4 of the Act requires us to consider the conservation efforts of not only State and foreign governments but also of Federal agencies, Tribal governments, businesses, organizations, or individuals that positively affect the species' status. The section 4 analysis for listing determinations is relevant to our exercise of discretion in critical habitat designations, although it must be stressed that analysis in no way limits the Secretary's discretion.

### Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed. The accelerated schedules of court-ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects, the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy

Act (NEPA); all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

### Background

On September 24, 2002, we published a proposed rule to designate critical habitat, pursuant to the Endangered Species Act of 1973, as amended (Act), for 4 vernal pool crustaceans and 11 vernal pool plants (67 FR 59884). The four vernal pool crustaceans involved in this critical habitat designation are the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), vernal pool fairy shrimp (*Branchinecta lynchi*), and vernal pool tadpole shrimp (*Lepidurus packardii*). The 11 vernal pool plant species are Butte County meadowfoam (*Limnanthes floccosa* ssp. *californica*), Contra Costa goldfields (*Lasthenia conjugens*), Hoover's spurge (*Chamaesyce hooveri*), fleshy (or succulent) owl's-clover (*Castilleja campestris* ssp. *succulenta*), Colusa grass (*Neostapfia colusana*), Greene's tuctoria (*Tuctoria greenei*), hairy Orcutt grass (*Orcuttia pilosa*), Sacramento Orcutt grass (*Orcuttia viscida*), San Joaquin Valley Orcutt grass (*Orcuttia inaequalis*), slender Orcutt grass (*Orcuttia tenuis*), and Solano grass (*Tuctoria mucronata*). We proposed a total of 128 units of critical habitat for these 15 vernal pool species, totaling approximately 672,920 hectares (ha) (1,662,762 acres (ac)) in 36 counties in California and one county in Oregon. In accordance with our regulations at 50 CFR 424.16(c)(2), we opened a 60-day comment period on this proposal which closed on November 25, 2002.

All the species live in vernal pools (shallow depressions that hold water seasonally), swales (shallow drainages that carry water seasonally), and ephemeral freshwater habitats. None are known to occur in riverine waters, marine waters, or other permanent bodies of water. The vernal pool habitats of these species have a discontinuous distribution west of the Sierra Nevada that extends from southern Oregon through California into northern Baja California, Mexico. The species have all adapted to the generally mild climate and seasonal periods of inundation and drying that help make the vernal pool ecosystems of California and southern Oregon unique.

Section 4(b)(2) of the Act requires that the Secretary of the Interior designate or revise critical habitat based upon the

best scientific and commercial data available, after taking into consideration the economic impact, impact to national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if she determines that the benefit of such exclusion outweighs the benefits of specifying such area as part of the critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species concerned. Thus, to fulfill our requirement to consider the potential economic impacts of the proposed designation of critical habitat for the 15 vernal pool species, we conducted an analysis of the potential economic impacts on the proposed designation and published a notice on November 21, 2002 (67 FR 70201), announcing the availability of our draft economic analysis (DEA). The notice opened a 30-day public comment period on the draft economic analysis and extended the comment period on the proposed critical habitat designation.

During the development of the final designation, we reviewed the lands proposed as critical habitat based on public comments and any new information that may have become available and refined the boundaries of the proposal to remove lands determined not to be essential to the conservation of the 15 vernal pool species. We then took into consideration the potential economic impacts of the designation, impacts on national security, and other relevant factors such as partnerships, existing management of the lands being considered, and the effect of designation on the conservation of the species whose critical habitat was covered by the designation. Next, we determined whether the benefits of excluding certain lands from the final designation of critical habitat for the 15 vernal pool species outweighed the benefit of including them in the designation, and whether the specific exclusions would result in the extinction of any of the species involved. The final rule made two types of exclusions, lands excluded from the final designation based on economic effects of the designation and lands excluded due to other considerations. Lands excluded due to other considerations included lands within specific National Wildlife Refuges and Fish Hatcheries; Department of Defense lands; Tribal lands; State Wildlife Areas and Ecological Reserves; and lands covered by habitat conservation plans or other management plans that provide a benefit for the species. Lands proposed

as critical habitat in Butte, Madera, Merced, Sacramento, and Solano Counties were excluded based on potential economic impacts. Thus, on July 15, 2003, we made a final determination of critical habitat for the 15 vernal pool species; the final rule was published in the **Federal Register** on August 6, 2003 (68 FR 46684). A total of approximately 744,067 ac (301,114 ha) of land were identified as within the boundaries of the designated critical habitat for the 15 vernal pool species.

In January 2004, Butte Environmental Council and several other organizations filed a complaint alleging that we: (1) Violated both the Act, and the Administrative Procedure Act (APA) by excluding over 1 million acres from the final designation of critical habitat for the 15 vernal pool species; (2) violated mandatory notice-and-comment requirements under the Act and APA; and (3) engaged in an unlawful pattern, practice, and policy by failing to properly consider the economic impacts of designating critical habitat. On

October 28, 2004, the court signed a Memorandum and Order in that case. The Memorandum and Order remanded the final designation to the Service in part. In particular, the court ordered us to: (1) Reconsider the exclusions from the final designation of critical habitat for the 15 vernal pool species, with the exception of those lands within the 5 California counties that were excluded based on potential economic impacts, and publish a new final determination as to those lands within 120 days; and (2) reconsider the exclusion of the 5 California counties based on potential economic impacts and publish a new final determination no later than July 31, 2005. The court did not alter the August 6, 2003, final designation.

In order to more completely comply with the court order, on December 28, 2004, we reopened the comment period for 30 days (69 FR 77700) on the designation, to solicit any new information concerning the benefits of excluding and including the lands the final rule excluded on the basis of

noneconomic considerations. Comments received during this 30-day comment period are addressed herein.

This notice addresses the first requirement of the remand—the reconsideration of the lands excluded for noneconomic considerations from the final designation of critical habitat for the 15 vernal pool species. Those lands within the 5 California counties that were excluded based on potential economic impacts will be addressed through a future **Federal Register** document, upon completion of the economic analysis currently underway.

Table 1 lists each specific area that was excluded from the proposed designation of critical habitat for the 15 vernal pool species, based on policy by category and size. The total area shown is the cumulative critical habitat area for all 15 species. Many of the critical habitat boundaries for each species overlap and as a result the actual total critical habitat area would be less.

TABLE 1.—APPROXIMATE AREAS OF CRITICAL HABITAT EXCLUSIONS FOR THE VERNAL POOL CRUSTACEANS AND PLANTS IN CALIFORNIA AND OREGON

| Exclusion area  | Acres  | Hectares |
|---|--------|----------|
| <b>National Wildlife Refuges (NWR) and Fish Hatchery Exclusions</b>     |        |          |
| Sacramento NWR Complex .....  | 19,363 | 7,836    |
| San Francisco Bay NWR .....   | 617    | 250      |
| San Luis NWR Complex .....  | 18,014 | 7,290    |
| Kern NWR Complex .....  | 4,894  | 1,980    |
| Coleman Nat. Fish Hatchery .....  | 13     | 5        |
| Total .....   | 42,914 | 17,367   |
| <b>Department of Defense Exclusions</b>                                 |        |          |
| Beale Air Force Base * .....  | 10,033 | 4,060    |
| Travis Air Force Base * .....   | 9,651  | 3,906    |
| Fort Hunter Liggett .....   | 16,583 | 6,711    |
| Camp Roberts .....  | 33,937 | 13,734   |
| Total .....   | 70,204 | 28,410   |
| <b>Tribal Land Exclusions</b>   |        |          |
| Mechoopda Tribe .....   | 644    | 261      |
| Total .....   | 644    | 261      |
| <b>State Wildlife Areas (WA) and Ecological Reserve (ER) Exclusions</b> |        |          |
| Allensworth ER .....  | 1,141  | 462      |
| Battle Creek WA .....   | 637    | 258      |
| Big Sandy WA .....  | 478    | 194      |
| Boggs Lake ER .....   | 50     | 20       |
| Butte Creek Canyon ER .....   | 0.4    | 0.16     |
| Calhoun Cut ER .....  | 3,021  | 1,223    |
| Carrizo Plains ER .....   | 455    | 184      |
| Dales Lake ER .....   | 754    | 305      |
| Fagen Marsh ER .....  | 420    | 170      |
| Grizzly Island WA .....   | 10     | 4        |
| Hill Slough WA .....  | 1,559  | 631      |
| North Grasslands WA .....   | 5      | 2        |
| Oroville WA .....   | 39     | 16       |
| Phoenix Field ER .....  | 7      | 3        |

TABLE 1.—APPROXIMATE AREAS OF CRITICAL HABITAT EXCLUSIONS FOR THE VERNAL POOL CRUSTACEANS AND PLANTS IN CALIFORNIA AND OREGON—Continued

| Exclusion area  | Acres   | Hectares |
|---|---------|----------|
| San Joaquin River ER .....  | 278     | 113      |
| Stone Corral ER .....   | 3,074   | 1,244    |
| Thomes Creek ER .....   | 447     | 181      |
| Total .....   | 12,373  | 5,007    |
| <b>Habitat Conservation Plans (HCP) and Cooperatively Managed Land Exclusions</b> |         |          |
| Skunk Hollow HCP .....  | 239     | 97       |
| Western Riverside Multiple Species HCP .....                                      | 5,730   | 2,319    |
| Santa Rosa Plateau Ecological Reserve .....                                       | 4,246   | 1,718    |
| San Joaquin County Multiple Species HCP .....                                     | 10      | 4        |
| Total .....   | 10,224  | 4,138    |
| Grand Total .....   | 136,358 | 55,182   |

\* Beale and Travis AFB have approved INRMPs and are not designated critical habitat based on 4(a)(3)(B) of the Act.

**Summary of Comments and Recommendations**

In the September 24, 2002, proposed critical habitat designation (67 FR 59884) and subsequent **Federal Register** notices concerning the 15 vernal pool species (67 FR 70201 and 68 FR 12336), we requested all interested parties to submit comments on the specifics of the proposal, including information related to the critical habitat designation, unit boundaries, species occurrence information and distribution, land use designations that may affect critical habitat, potential economic effects of the proposed designation, benefits associated with critical habitat designation, potential exclusions and the associated rationale for the exclusions, and methods used to designate critical habitat.

In the December 28, 2004, reopening of public comment period for noneconomic exclusions related to critical habitat designation (69 FR 77700), we requested all interested parties to submit comments on the specifics of the proposal, including information related to amount and distribution of habitat, essential habitat, rationale for including or excluding habitat, benefits associated with including or excluding critical habitat designation, current or planned activities on proposed critical habitat, and public participation in designating critical habitat.

We contacted all appropriate State and Federal agencies, county governments, elected officials, and other interested parties and invited them to comment. This was accomplished through telephone calls, letters, and news releases faxed and/or mailed to affected elected officials, media outlets, local jurisdictions, interest groups and

other interested individuals. In addition, we invited public comment through the publication of legal notices in numerous newspaper and news media throughout California and Oregon. In 2002, we provided notification of the DEA and proposed rule to all interested parties. At the request of Congressman Cardoza's Office, the Merced County Board of Supervisors, and the Stanislaus County Board of Supervisors, we held two public meetings to explain the December 28, 2004, **Federal Register** notice regarding the noneconomic exclusions to the public and requested that they provide comments. We provided contacts where they could direct questions regarding the proposed designation. We also posted the associated material on our Sacramento Fish and Wildlife Office internet site following the publication on December 28, 2004. Additionally, we made available to the public upon request individual maps of the noneconomic exclusions.

We received a total of 955 comment letters during the first 3 comment periods, and 17 on the most recent comment period, which ended on January 27, 2005. Comments were received from Federal, Tribal, State and local agencies, and private organizations and individuals. We reviewed all comments received, for this and previous rules, for substantive issues and new information on the proposed exclusions and other information regarding the vernal pool plants and vernal pool crustaceans. Similar comments were grouped into several general issue categories relating specifically to the proposed critical habitat determination, the proposed

exclusions, and the Draft Economic Analysis, and are identified below.

**Peer Review**

For a discussion of the peer review of vernal pool critical habitat designation, please refer to our August 6, 2003, final designation (68 FR 46684).

**State Agencies**

For a discussion of the State Agency comments on the vernal pool critical habitat designation, please refer to our August 6, 2003, final designation (68 FR 46684).

**Other Public Comments and Responses**

We address other substantive comments and accompanying information in the following summary. Relatively minor editing changes and reference updates suggested by commenters have been incorporated into this final rule or the final economic analysis, as appropriate.

*Issue 1—Habitat and Species-Specific Information*

*Comment 1:* One commenter suggested that created vernal pool habitat should not be used as a method of mitigation for impacts to existing vernal pool habitat.

*Our Response:* Preservation of naturally occurring vernal pool complexes remains a key component to conservation for vernal pool species. In designating critical habitat areas we evaluated the importance of including created vernal pool habitat within the designated areas. We have determined that created vernal pool areas do provide essential habitat for many of the vernal pool species and are a key component toward their conservation.

*Comment 2:* The military, notably the California Army National Guard,

specifically Camp Roberts and Fort Hunter Liggett, and the U.S. Air Force, specifically Beale Air Force Base and Travis Air Force Base, requested that critical habitat not be designated on the four bases. In addition, the Solano County Board of Supervisors requested that Travis Air Force Base, in particular, not be included in critical habitat designation. Another commenter had concerns that vernal pool habitat for federally listed vernal pool species within Travis Air Force Base was not adequately protected from military activities that occur on the base. This commenter requested that vernal pool habitat within Travis Air Force Base be designated as critical habitat.

*Our Response:* The two Air Force Bases have approved INRMPs and were excluded through section 4(a)(3)(B) of the Act. The two Army National Guard Reserves Bases were excluded through section 4(b)(2) of the Act, since the benefits of excluding outweigh the benefits of including those vernal pool areas within the designation. For a summary of our comments regarding the exclusion of lands occupied by these bases, please refer to our August 6, 2003, final designation (68 FR 46684) and the Exclusions section below. No significant changes to vernal pool habitat and the management of this habitat have occurred since these military bases were evaluated for exclusion from critical habitat designation in the August 6, 2003, final rule. All of these bases have draft or final Integrated Natural Resource Management Plans (INRMPs) and the Service has completed or is currently working on consultations on these through the section 7 consultation process. We recognize that the military is implementing measures to conserve existing locations of federally listed vernal pool species and the habitat they occupy. In addition, section 4(b)(2) of the Act requires that the Secretary of the Interior designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact to national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if she determines that the benefit of such exclusion outweighs the benefits of specifying such area as part of the critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*Comment 3:* Travis Air Force Base stated that in the August 6, 2003, final designation (68 FR 46684) we indicated that the exclusion acreage at Travis AFB

is 9,651 acres. Travis AFB stated that the correct acreage is 5,128 acres of fee owned land and 1,255 acres in lesser interests, such as easements and rights of way.

*Response:* The acreage figures identified in the proposed rule issued on December 27, 2004 (69 FR 77700), reflected the accumulated critical habitat total for each of the species within the Travis Air Force boundary. As a result the total acreage identified was higher.

*Comment 4:* One commenter stated that critical habitat has to be occupied by the species at the time the species is listed, needs to contain the features essential to the conservation of the species, and may require special management considerations or protections. This commenter stated that that the 10 acres under discussion in the San Joaquin County Multiple Species Habitat Conservation Plan should continue to be excluded because this area is already afforded special management considerations or protections.

*Our Response:* We agree that this area is already under special management consideration and afforded protection by virtue of the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan and have excluded the area covered under this HCP from this designation. For further discussion on the legal definition of critical habitat, refer to our August 6, 2003, final rule (68 FR 46684).

*Comment 5:* During the comment period for the proposed rule (67 FR 59884) and the December 28, 2004, proposed rule (69 FR 77700), the Mechoopda Tribe requested the exclusion of their land in Butte County from critical habitat designation. The Mechoopda Tribe's Environmental Department stated that they have implemented measures through a comprehensive management plan to further the protection and conservation of vernal pool ecosystems on their land.

*Our Response:* As a result of meeting with the Tribe and discussing the details of their management plan, we have determined that it is appropriate to exclude the Mechoopda lands from the current designation. We recognize that the Tribe is implementing measures to conserve existing locations of federally listed vernal pool species and the habitat they occupy. In addition, we note that under the tribe's existing management, vernal pool complexes have remained intact and able to support the species that rely on them. For a more detailed discussion summary of our comments regarding the exclusion of lands occupied by the

Tribe and a more detailed description of the Tribe's voluntary measures to benefit the conservation of listed species, please refer to the discussion later in this rule.

*Comment 6:* The Bureau of Land Management (BLM) requested that critical habitat not be designated on the Carrizo Plains National Monument due to current management and protection of vernal pool resources within BLM's jurisdiction.

*Our Response:* The BLM's management plan implements measures to conserve existing locations of federally listed vernal pool species and their habitat. The Service is currently consulting on this plan through the section 7 consultation process. If we determine that the lands of the Carrizo Plains National Monument merits exclusion, we will solicit additional comments on such an exclusion when we reopen the comment period for the draft economic analysis in the spring of 2005. Those comments and any comments already received will be fully considered before sending a final rule to the **Federal Register**.

*Comment 7:* The Placer County Board of Supervisors stated that Critical Habitat Unit 12 for the vernal pool fairy shrimp should be excluded from designation because the Placer Legacy Habitat Conservation Plan, which is currently under development, will provide adequate protection of federally listed vernal pool species in this region. The Board of Supervisors stated that because the Placer Legacy HCP is similar to other HCPs, such as the Western Riverside Multiple Species HCP, and would provide for the conservation of vernal pools and listed vernal pool crustaceans, the Placer Legacy HCP should therefore similarly be excluded from critical habitat designation.

*Our Response:* The scope of this notice was to seek comments on those areas previously excluded for noneconomic reasons. However, we will consider all comments we receive and if additional proposed exclusions result from those comments, we will solicit additional comments on exclusions when we re-open the comment period for the draft economic analysis in the spring of 2005. Those comments and any comments already received will be fully considered before sending a final rule to the **Federal Register**.

*Comment 8:* One commenter stated that the existing designation of critical habitat for vernal pool species should be expanded. Specifically, areas adjacent to the Santa Rosa Plateau Ecological Reserve should be considered for critical habitat designation because

these areas, as well as areas within the ER, are threatened by runoff from development on adjacent unprotected lands.

*Our Response:* The area proposed as critical habitat within the Santa Rosa Plateau Ecological Reserve has been excluded, as part of the Western Riverside MSHCP, under 4(b)(2) of the Act. In our original proposal we proposed to designate only those areas essential to the conservation of the vernal pool fairy shrimp and the vernal pool complexes in which it occurs. In our mapping of the area we believe we captured those areas, which were essential to maintain water quality and hydrology of the vernal pools and vernal pool complexes within the proposed unit. We determined that areas outside the proposed designated areas were not essential for the conservation of the species or its habitat. In addition, the scope of this notice was to seek comments on those areas previously excluded for noneconomic reasons. We will solicit additional comments on exclusions when we reopen the comment period for the draft economic analysis in the spring of 2005. Those comments and any comments already received will be fully considered before sending a final rule to the **Federal Register**.

*Comment 9:* One commenter requested that lands covered in the Skunk Hollow vernal pool basin should continue to be excluded, and if critical habitat designation is necessary, it should only include the 136-acre Barry Jones Wetland Mitigation Bank.

*Our Response:* This area is already under special management considerations and afforded protection as part of the Western Riverside County MSHCP. Therefore, we have determined that it would be appropriate to exclude the area covered under this HCP from this designation. For more detail on our reasons for exclusions please refer to the specific discussion in this rule.

*Comment 10:* Two commenters stated that the Western Riverside Multiple Species HCP is not designed to adequately review environmental effects on unprotected vernal pool habitats in this area.

*Our Response:* Critical habitat is only one of many conservation tools for federally listed species. HCPs are one of the most important tools for conserving habitat and reconciling economic land use with the conservation of listed species on non-Federal lands. Designation of critical habitat does not afford protection to species or habitat unless there is a federal nexus, lands protected under HCPs are protected regardless of the designation of critical

habitat. Section 4(b)(2) allows us to exclude from critical habitat designation areas where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We believe that in most instances, the benefits of excluding HCPs from critical habitat designations will far outweigh the benefits of including them. For this designation, we find that the benefits of exclusion outweigh the benefits of inclusion for the Western Riverside MSHCP issued for the covered federally listed species. In particular, Section 10(a)(1)(B) of the Act states that HCPs must meet issuance criteria, including minimizing and mitigating any take of the listed species covered by the permit to the maximum extent practicable, and that the taking must not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

*Comment 11:* Congressman Dennis Cardoza and one other commenter concurred with our previous noneconomic exclusions of lands from designation of critical habitat. In addition, they further stated that all lands with conservation easements that are managed for the protection of listed vernal pool species should also be excluded from vernal pool critical habitat designation.

*Our Response:* The scope of this notice was to seek comments on those areas previously excluded for noneconomic reasons. We will consider comments requesting additional exclusions and will propose any additional exclusions with opportunity for comments when we reopen the comment period for the draft economic analysis in the spring of 2005. Those comments, and any comments already received, will be fully considered before sending a final rule to the **Federal Register**.

*Comment 12:* Commenters associated with California Native Plant Society (CNPS) and Butte Environmental Council stated that lands excluded for policy and noneconomic reasons are essential to the survival and recovery of endangered vernal pool species, and therefore should be designated as vernal pool critical habitat. CNPS emphasized that vernal pool habitat on Department of Defense lands should be included in the designation of vernal pool critical habitat.

*Our Response:* There is minimal benefit from designating critical habitat for the vernal pool species within areas that are currently excluded because these lands, such as State-owned Wildlife Areas, Ecological Reserves, National Fish and Wildlife Refuges and Hatcheries, are already managed for the

conservation of wildlife. HCPs that have been excluded from the rule for the same reason, they are already managed for conservation under Section 10(a)(1)(B) of the Act, which states that HCPs must meet issuance criteria, including minimizing and mitigating any take of the listed species covered by the permit to the maximum extent practicable, and that the taking must not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Furthermore, an HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated in the proposed plan area, it will determine if the HCP permit would jeopardize the species in the plan area. In addition, protections afforded by HCPs, management plans, and other landscape management programs go beyond any protections provided by a critical habitat designation. A critical habitat designation only protects areas that are subject to a federal action. HCPs and other management plans are not dependent on federal action to provide species protection.

In response to the CNPS concerns regarding exclusions of Department of Defense lands, section 4(b)(2) of the Act requires that the Secretary of the Interior shall designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact to national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if she determines that the benefit of such exclusion outweighs the benefits of specifying such area as part of the critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species concerned. The two AFBs were not eligible for designation through operation of section 4(a)(3)(B) of the Act as they had approved INRMPs, which provided for the conservation of the species. The two ANGR bases were excluded through section 4(b)(2) of the Act, since the benefits of excluding outweigh the benefits of including those vernal pool areas within the designation. For a detailed discussion of our noneconomic exclusion analysis used in our final designation of critical habitat for the 15 vernal pool species, please refer to our August 6, 2003, final designation (68 FR 46684) and in the Exclusions section below.

*Comment 13:* One commenter stated that prior designations and economic analyses do not properly account for the

recovery standard and the mitigation requirements expressed by the court in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004). This commenter stated that certain areas within Critical Habitat Unit 12 in western Placer County should be excluded, specifically the Placer Vineyards site and the Rioso property, because the Primary Constituent Elements (PCEs) are absent. They also stated, along with an additional commenter, that other areas outside this critical habitat unit should actually be included because PCEs are present.

*Our Response:* With regard to including additional areas for critical habitat designation, the scope of this notice was to reexamine our previous noneconomic exclusions and to more fully explain our rationale for any noneconomic exclusions we make subsequent to the re-examination. We will consider all comments received, and if we propose additional exclusions for non-economic reasons or any other reason, we will propose those exclusions and solicit additional comments when we reopen the comment period for the draft economic analysis in the spring of 2005. Those comments and any comments already received will be fully considered before sending a final rule to the **Federal Register**. We will be considering the impact of the recent 9th Circuit decision (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004)) in the economic analysis conducted for this final rule.

*Comment 14:* One commenter requested that the Service incorporate results from Dr. Bob Holland's recent work regarding biogeographic distribution of vernal pool species in relation to their edaphic (soil related) requirements. The commenter also requested that the Service link critical habitat designation to recovery plans as long as critical habitat deadlines are enforced.

*Our Response:* It is the goal of the Service to utilize the most recent scientific information available. In the development of this designation, we contacted numerous species experts and other members of the scientific community, including Dr. Holland. In developing critical habitat designations, we analyze all pertinent scientific and commercial information available to make our final determinations. This information would include any scientific information that was used in the development of recovery plans for the specific species. In the case of the 15 vernal pool species, we used, among other sources of information, scientific

information gathered during the recovery planning process. On November 18, 2004, the draft Vernal Pool Recovery Plan for Vernal Pool Ecosystems in California and Southern Oregon was published in the **Federal Register** (69 FR 67601). We used the scientific information compiled in the draft recovery plan in this final determination; however, we will re-examine the designation in light of any significant information should we become aware of such information and make a final determination by July 31, 2005.

#### *Issue 2—Costs and Regulatory Burden*

*Comment 15:* The military, notably the California Army National Guard, specifically Camp Roberts and Fort Hunter Liggett, and the U.S. Air Force, specifically Beale Air Force Base, requested that critical habitat be excluded on the four bases. Designation of critical habitat would increase the costs and regulatory requirements and hamper the military from carrying out its mission objectives for the bases. Designation of critical habitat would adversely affect national security by diminishing the military's ability to support realistic and effective military operations.

*Our Response:* We have not designated critical habitat on two AFBs based on section 4(a)(3)(B) of the Act and excluded the two Army Bases from final designation of critical habitat pursuant to section 4(b)(2) of the Act. Please refer to the Relationship of Critical Habitat to Military Lands section of this final rule for a detailed discussion of our rationale for not including or excluding these military bases pursuant to section 4(a)(3)(B) or 4(b)(2) of the Act.

*Comment 16:* The Placer County Board of Supervisors and one other commenter stated that critical habitat designation within the County places a disproportionate amount of the regulatory burden on western Placer County. Western Placer County contains the infrastructure to support the majority of the projected growth within the entire County and, therefore, growth in this portion of the County would be hindered by the regulatory burden of the designation of critical habitat.

*Our Response:* The scope of this notice and resulting analysis was to seek comment on the noneconomic exclusions previously excluded in our final determination of critical habitat (68 FR 46684). We will be conducting a new economic analysis and will finalize economic exclusions in the final rule in July 2005. This comment will also be addressed at that time.

*Comment 17:* One commenter suggested that the National Wildlife Refuges, State Wildlife Areas, and Ecological Reserves all provide economic benefits from wildlife viewing, photography, hunting, and fishing. The Commenter requested that the Service quantify these benefits using visitation records as part of the Service's re-evaluation of special lands exclusions.

*Our Response:* We agree that National Wildlife Refuges, State Wildlife Areas and Ecological Reserves provide benefits in the form of recreational opportunities. However, these benefits will remain regardless of whether these areas are designated as critical habitat. These benefits are not due to a critical habitat designation, rather, they result from the legal authorities establishing these areas, such as the National Wildlife Refuge System Administration Act, the Refuge Recreation Act, and other authorities, all of which are independent of critical habitat designations.

#### *Issue 3—Procedural Concerns*

*Comment 18:* One commenter stated that the 30-day comment period for the proposed rule violated 50 CFR 424.16(c)(2) and requested that we extend the comment period on the re-evaluation of noneconomic exclusions for a total of 60 days to allow for additional outreach to interested parties.

*Our Response:* An additional public comment period of at least 30 days will open once the draft economic analysis has been completed prior to the finalization of the rule in July.

*Comment 19:* One commenter stated that the maps of the lands being considered for removal from the exempt status were not readily available and accessible to the public in a timely manner.

*Our Response:* Maps and Geographic Information System (GIS) maps of the final designation published in August of 2003 (68 FR 46684) were available through our Sacramento and Regional Web sites as identified in the proposed rule (69 FR 77700). Specific maps identifying the exclusion areas and any other information requested by the public were made available upon request on an individual basis. Because this rulemaking is subject to a court-imposed deadline, the accelerated schedules of this designation as well as budget and staffing constraints had left us with a limited amount of time and resources to post maps for the December 28, 2004, **Federal Register** document specifically identifying each exclusion area.



*Comment 20:* One commenter stated that the Interior Secretary should not use broad discretion to override critical habitat designation decisions that are made by Service biologists, as exemplified by the proposed special lands exemptions, because it opens the door for political manipulation. The commenter noted that economic factors are important and relevant, but should not be allowed to impede recovery, particularly when interim analysis fails to quantify benefits. In addition, this commenter stated that biology, rather than politics, should be the driving force behind critical habitat designation.

*Our Response:* Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of exclusions outweigh the benefits of specifying such areas as critical habitat. The Congressional record is clear that Congress contemplated occasions where the Secretary could exclude the entire designation. In addition, the discretion that Congress anticipated would be exercised in Section 4(b)(2) of the Act is extremely broad. "The consideration and weight given to any particular impact is completely within the secretary's discretion" (Congressional Research Service 1982). We cannot exclude areas from critical habitat when the exclusion will result in the extinction of the species concerned. We will be analyzing the economic costs associated with the proposed designation and re-evaluate the economic exclusions based on the new analysis when it becomes available. The public will have an opportunity to comment on the analysis at that time.

#### Summary of Changes From the Previous Final Rule

In development of the original final designation of critical habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon, significant revisions to the proposed critical habitat designation were made based on review of public comments received on the proposed designation, the Draft Economic Analysis (DEA), and further evaluation of existing protection on lands proposed as critical habitat. These revisions relied on legal authorities and requirements provided in the Act. This re-evaluation of those exclusions relies on the same legal authorities.

In analyzing the proposed exclusions, we contacted representatives from State

Wildlife Areas and Ecological Reserves, the four military bases, and the Mechoopda Tribe to verify that no significant changes to vernal pool habitat or their management have occurred since the August 6, 2003, final rule. After reviewing the public comments received and the previously proposed and final designations of critical habitat for the 4 vernal pool crustaceans and 11 vernal pool plants in California and southern Oregon, we find that the noneconomic exclusions were based on the best available science and that the benefits of excluding these areas outweighs the benefits of inclusion. As a result we have determined that no significant boundary changes to the noneconomic exclusions should occur to the August 6, 2003, final rule (68 FR 46684). Where we have received new information was included in our reanalysis. In addition, we have expanded our discussion of the analysis conducted on each of the exclusions.

#### Critical Habitat

This rule focuses on the reanalysis and evaluation of the non-economic exclusions from critical habitat. For that reason, much of the August 6, 2003, final rule describing the basis for designation is unchanged. Accordingly, for all discussions other than those related to non-economic exclusions we refer you to the August 6, 2003, final designation (68 FR 46684).

On the basis of the final economic analysis and other relevant impacts, as outlined under section 4(b)(2) of the Act, and the economic effects associated with this rule, certain exclusions were made to our final designation. The Service will be reanalyzing the economic effects of the critical habitat designation over the entire designation. Our original rule excluded five Counties: Butte, Madera, Merced, Sacramento, and Solano Counties. That exclusion was based on a comparison of the economic effects of the designation among the counties, and excluded those with relatively higher effects. At the time, the economic effects were aggregated on a countywide basis, which limited our ability to make exclusions on anything less than a county-level. Pursuant to the October 28, 2004, court order, the Service is reanalyzing the economic effects of the entire designation and will make its final critical habitat designation and any economic exclusions based on this more detailed analysis. A **Federal Register** notice announcing the availability of the draft economic analysis will be published and the public will have the opportunity to comment on the document.

#### Section 4(a)(3)(B) of the Act

Section 318 of fiscal year 2004 the National Defense Authorization Act (Public Law No. 108-136) amended the Endangered Species Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, 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 of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

This provision was added subsequent to our final designation of critical habitat in 2003. However, its provisions apply to this designation. Accordingly the Service does not have the authority to designate Beale Air Force Base or Travis Air Force Base as those facilities have existing INRMPs that provide a benefit to the species.

#### Noneconomic Exclusions Under Section 4(b)(2) of the Act

As noted earlier, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. The following paragraphs will provide detail as to the basis for the non-economic exclusions that we have analyzed and found appropriate.

A total of approximately 1,184,513 ac (479,356 ha) of land falls within the boundaries of designated critical habitat of those lands we propose to exclude:

- Lands within the boundaries of Habitat Conservation Plans,
- National Wildlife Refuge lands and National fish hatchery lands (33,097 ac (13,394 ha)),
- State lands within ecological reserves and wildlife management areas (20,933 ac (8,471 ha)),
- Department of Defense lands within Fort Hunter Liggett Army installation (16,583 ac (6,711 ha)),
- Tribal lands managed by the Mechoopda Tribe (644 ac (261 ha)),

- The Santa Rosa Plateau Ecological Reserve (10,200 ac (4,128 ha)) from the final designation.

#### *Habitat Conservation Plans*

##### (1) Benefits of Inclusion

The benefits of including HCPs or NCCP/HCPs in critical habitat are small to nonexistent. The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. An HCP application must be itself consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. Therefore, any federal activity that is consistent with the terms of the HCP and IA would be very unlikely to have an effect on the primary constituent elements of habitat that would otherwise be designated as critical habitat would not serve the intended conservation role for the species.

HCPs/NCCPs are already designed to ensure the long-term survival of covered species within the entire plan area rather than just those areas with a federal nexus. Where we have approved HCPs or NCCP/HCPs, lands will normally be protected in reserves and other conservation lands by the terms of the HCPs or NCCP/HCPs and their Implementing Agreements (IAs). These HCPs or NCCP/HCPs and IAs include management measures and protections for conservation lands designed to protect, restore, and enhance their value as habitat for covered species and provide the same benefits for any species that relies on the same ecosystems.

Another possible benefit to including these lands is that the designation of critical habitat can serve to educate landowners and the public regarding the potential conservation value of an area. This may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for certain species. However in the case of HCCP/NCCPs the public notice and comment and final publication in the **Federal Register** of the final provisions provide virtually the same notice as a critical habitat designation.

Because of the above, we conclude that any benefits that accrue to habitat

in an HCP from a critical habitat designation are small to non-existent.

##### (2) Benefits of Exclusion

The benefits of excluding HCPs from critical habitat are significant. In an approved HCP, lands that might ordinarily be identified as critical habitat for covered species will normally be protected in reserves and other conservation lands by the terms of the HCP and its associated implementing agreement (IA). Since these large regional HCPs address land use within the plan boundaries, habitat issues within the plan boundaries have been addressed in the HCP and the consultation on its associated permit. In the consultation we are required to if the action jeopardizes the listed species. In the case of critical habitat we analyze whether the function of the habitat for recovery of the species will be reduced or eliminated by the proposed action.

Designating these areas will likely have an adverse impact on the partnerships that we have developed with the local jurisdiction(s) and project proponents in the development of the HCP and NCCP/HCP, and in the management of the other excluded areas to benefit the species. Excluding these areas will promote future partnerships, and avoid duplicative regulatory burden on cooperating parties. We have received substantial comments from various parties in comment periods on this and many other critical habitat rules that those regulatory burdens can be significant to private and public parties. In part, it is to avoid the regulatory costs associated with project-by-project consultations that provides an incentive for private landowners to enter into HCPs. The Service achieves far more conservation when entire regions can be subject to the HCP permit issuance standards instead of just projects with a federal nexus. Failure to exclude HCPs from critical habitat removes any incentive for landowners to voluntarily participate in HCPs and thus removes any protection for lands with no federal nexus.

#### **San Joaquin County Multiple Species Habitat Conservation Plan (MSHCP)**

The San Joaquin County Multi-Species Conservation Plan (SJMSCP) covers the entirety of San Joaquin County and identifies the vernal pool fairy shrimp and the vernal pool tadpole shrimp as covered species. The SJMSCP has identified areas where growth and development are expected to occur (build-out areas). A portion of one of these build-out areas overlaps with the San Joaquin Unit 18 for vernal pool fairy shrimp. The SJMSCP has been finalized

and includes participants from seven cities; the County of San Joaquin, the San Joaquin Council of Governments; various water districts within the County; the California Department of Transportation; East Bay Municipal Utility District; and the San Joaquin Area Flood Control District. The SJMSCP is a subregional plan under the State's Natural Community Conservation Planning (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). Within the county wide planning area of the SJMSCP, approximately 71, 837 ac (29,071 ha) of diverse habitats are proposed for conservation. The proposed conservation of 71, 837 ac (29,071 ha) will compliment other, existing natural and open space areas that are already conserved through other means (e.g., State Parks, USFWS, and County Park lands). For a complete discussion of this HCP, please refer to our August 6, 2003, final designation (68 FR 46684).

#### **Western Riverside Multiple Species Habitat Conservation Plan (MSHCP)**

The Western Riverside MSHCP has been finalized since the issuance of the August 6, 2003, rule. The Western Riverside MSHCP includes participants from 14 cities; the County of Riverside, including the County Flood Control and Water Conservation District; the County Waste Department; the California Department of Transportation; and the California Department of Parks and Recreation. The Western Riverside MSHCP is a subregional plan under the State's Natural Community Conservation Planning (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). Within the 1.26-million-acre (510,000-ha) planning area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are proposed for conservation. The proposed conservation of 153,000 ac (62,000 ha) will compliment other, existing natural and open space areas that are already conserved through other means (e.g., State Parks, USFS, and County Park lands). For a complete discussion of this HCP, please refer to our August 6, 2003, final designation (68 FR 46684).

The Skunk Hollow mitigation bank (the correct title is the Barry Jones Wetland Mitigation Bank) and the Santa Rosa Plateau Preserve are within the planning area of the Western Riverside County MSHCP. Both of these areas are conserved as part of the Western Riverside County MSHCP. The management actions undertaken as part of the Western Riverside County

MSHCP benefit the endangered Riverside fairy shrimp, threatened *Navarretia fossalis*, and the endangered *Orcuttia californica*-vernal pool species, which are included as covered species under this regional HCP, will provide equal conservation benefits for the vernal pool fairy shrimp.

The Skunk Hollow vernal pool basin (Unit 35) consists of a single, large vernal pool and its essential associated watershed in western Riverside County and is part of the Western Riverside County MSHCP. Several federally listed species have been documented as occurring in the Skunk Hollow vernal pool basin. These include the vernal pool fairy shrimp (Simovich, in litt. 2001), the Riverside fairy shrimp (Service 2001), *Navarretia fossalis*, and *Orcuttia californica* (Service 1998). The vernal pool complex and watershed are also currently protected as part of a reserve established within an approved wetland mitigation bank in the Rancho Bella Vista HCP area, and as part of the conservation measures contained in the Assessment District 161 Subregional HCP (AD161 HCP), all of which are now incorporated into the Western Riverside County MSHCP. Although the Skunk Hollow does not identify the vernal pool fairy shrimp as a covered species it does list the endangered Riverside fairy shrimp as a covered species and protects the vernal pool habitat within the area. Since a critical habitat designation is designed to conserve the habitat type or ecosystem (in this case vernal pools) and not the species specifically, the HCP and associated reserve and mitigation bank don't need to name the species specifically in order to provide benefits, as long as the ecosystem upon which the species relies is preserved. In this case, since species which rely on the same ecosystem are the target of the HCP and mitigation bank, we are able to conclude that the plan will provide the necessary management to protect the critical habitat. In addition, since the entire habitat area is addressed under the HCP, preserve, and mitigation bank and not just habitat with a federal nexus, the existing management already provides more protection than can be provided by a critical habitat designation.

The Western Riverside County MSHCP also encompasses lands within the Santa Rosa Plateau Ecological Reserve (SRPER) (Unit 34 for vernal pool fairy shrimp), an area that covers approximately 8,300 ac (3360 ha) near the town of Murrieta, California. The SRPER is situated on a large mesa composed of basaltic and granitic substrates and contains one of the largest vernal pool complexes remaining

in southern Riverside County. Several endemic vernal species are known to occur within the complex, including the vernal pool fairy shrimp, Riverside fairy shrimp, Santa Rosa fairy shrimp (*Lindieriella santarosae*), *Orcuttia californica*, *Brodiaea filifolia* (Thread-leaved brodiaea), and *Eryngium aristulatum* var. *parishii* (San Diego button-celery.) Established in 1984, the SRPER is owned by The Nature Conservancy (TNC), and is cooperatively managed by TNC, the Riverside County Regional Park and Open Space District, CDFG, and the Service.

TNC has transferred ownership of SRPER to CDFG. As a signatory to the agreement, CDFG will oversee the SRPER in a manner consistent with the present conservation management scheme agreed to by the cooperating agencies. The CDFG has a broad authority to protect lands and conserve species (Fish and Game Code §§ 2700 *et seq.*). Designation of critical habitat would not have any beneficial effect of the present management of the vernal pool complex on the SRPER.

#### (1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or nonexistent. The issuance of a permit (under section 10(a) of the Act) in association with an HCP application is subject to consultation under section 7(a)(2) of the Act. During consultation on permit issuance, we must address the issue of destruction or adverse modification of critical habitat for vernal pool species and any other species protected by the plan. In an approved HCP, lands we ordinarily would define as critical habitat for covered species will normally be protected in reserves and other conservation lands by the terms of the HCP and its associated implementing agreement (IA). Since these large regional HCPs address land use within the plan boundaries, habitat issues within the plan boundaries have been addressed in the HCP and the consultation on the permit associated with the HCP. This requires us to make a determination as to the appreciable reduction in the survival and recovery of a listed species, in the case of critical habitat by reducing the function of the habitat so designated. Therefore, any

federal activity that is consistent with the terms of the HCP and IA would be very unlikely to have an effect on the primary constituent elements of habitat that would otherwise be designated as critical habitat would not serve the intended conservation role for the species.

We have determined that the management and protections afforded the vernal pool fairy shrimp in the build-out areas through the SJMSHCP and the Western Riverside County MSHCP are adequate for the long-term conservation of these species. In addition, protections afforded by HCPs, management plans, and other landscape management programs go beyond any protections provided by a critical habitat designation. A critical habitat designation only protects areas that are subject to a federal action. HCPs and other management plans are not dependent on federal action to provide species protection. The Western Riverside County MSHCP provides protection for the affected vernal pool complex and its associated watershed in perpetuity. Therefore it addresses the primary conservation needs of the species by protecting the ecosystem upon which it relies. The management and protections afforded the vernal pool and Riverside fairy shrimp provide for the long-term conservation of this pool and vernal pool fairy shrimp.

The education benefits of critical habitat, including informing the public of areas that are important for long-term survival and conservation of the species, are essentially the same as those that would occur from the public notice and comment procedures required to establish a HCP or NCCP/HCP, as well as the public participation that occurs in the development of many regional HCPs or NCCP/HCPs. Therefore, the benefits of designating these areas as critical habitat are low.

#### (2) Benefits of Exclusion

In contrast, the benefits of excluding these areas from critical habitat, are more significant. Designating these areas will likely have an adverse impact on the partnerships that we have developed with the local jurisdiction and project proponents in the development of the HCP and NCCP/HCP, and in the management of the other excluded areas to benefit the species. Excluding these areas will promote future partnerships, and avoid duplicative regulatory burden on cooperating parties. We have received substantial comments from various parties in comment periods on this and many other critical habitat rules that those regulatory burdens can be significant to private and public

parties. Excluding these areas from critical habitat removes those concerns and provides an incentive to place lands that would not ordinarily be protected under regulatory management to protect the ecosystem.

*(3) Benefits of Exclusion Outweigh the Benefits of Inclusion*

Section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic and national security impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (*i.e.*, take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a conservation plan, and specifies the content of such a plan. The purpose of such an HCP is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species.

Approved and permitted HCPs are designed to ensure the long-term survival of covered species within the plan area. Where we have an approved HCP, the areas we ordinarily would designate as critical habitat for the covered species will be protected through the terms of the HCPs and their IAs. These HCPs and IAs include management measures and protections that are crafted to protect, restore, and enhance their value as habitat for covered species. We have reviewed and evaluated HCPs, NCCP/HCPs, and other cooperatively managed lands at the SRPER currently with approved and implemented management plans within the areas being designated as critical habitat for the vernal pool crustaceans and plants. Based on this evaluation, we find that the benefits of exclusion outweigh the benefits of designating the Western Riverside County MSHCP, and a portion of the San Joaquin County NCCP/MSHCP as critical habitat.

For these reasons, then, we believe that designation of critical habitat has little benefit in areas covered by these HCPs, as the referenced HCP and its associated IA are legally operative and adequately protects the habitat or ecosystem upon which the listed species rely and for which critical

habitat is being designated. We also believe that the measures being taken by the managers of the Santa Rosa Plateau Ecological Reserve will conserve and benefit the vernal pool fairy shrimp. The exclusion of the HCP areas and Ecological Reserve from the designation will not result in the extinction of the vernal pool fairy shrimp.

**Relationship of Critical Habitat to National Wildlife Refuge and National Fish Hatchery Lands**

We have determined that proposed critical habitat units on the Sacramento, San Francisco Bay, San Luis, and Kern National Wildlife Refuge Complexes, and the Coleman National Fish Hatchery Complex, warrant exclusion pursuant to section 4(b)(2) of the Act because the benefits of excluding these lands from final critical habitat outweigh the benefits of their inclusion. For a complete discussion of these NWRs and NFHLs, please refer to our August 6, 2003 final designation (68 FR 46684).

*(1) Benefits of Inclusion*

There is minimal benefit from designating critical habitat for the vernal pool species within National Wildlife Refuge and National Fish Hatchery lands because these lands are already managed for the conservation of wildlife. The benefits of including these lands are low, since their purpose is to preserve natural resource values, a purpose that is not incompatible with critical habitat designation.

Critical habitat designation provides little gain in the way of increased recognition for special habitat values on lands that are expressly managed to protect and enhance those values. All of these refuges are developing comprehensive resource management plans that will provide for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These plans, and many of the management actions undertaken to implement them must also complete consultation under section 7 of the Act. The comprehensive resource management plan for the Kern National Wildlife Refuge Complex has been completed and the associated biological opinion concluded that its implementation would not jeopardize the continued existence of these species (Service 2004). Therefore, any federal activity that is consistent with the terms of the comprehensive resource management plan would be very unlikely to have an effect on the primary constituent elements of habitat that would otherwise be designated as critical habitat would not serve the

intended conservation role for the species.

*(2) Benefits of Exclusion*

The consultation requirement associated with critical habitat on the National Wildlife Refuge and Fish Hatchery lands would require the use of resources to ensure regulatory compliance that could otherwise be used for on-the-ground management of the targeted listed or sensitive species. Therefore, the benefits of exclusion include relieving additional regulatory burden that might be imposed by the critical habitat, which could divert resources from substantive resource protection to procedural regulatory efforts.

*(3) Benefits of Exclusion Outweigh the Benefits of Inclusion*

We believe that the benefit of including these lands in critical habitat is low because they already are publicly owned and managed to protect and enhance unique and important natural resource values. In addition, by designating these lands the Service would be required to conduct internal consultations on activities to determine whether they adversely modify critical habitat. This extra and unnecessary regulatory process will require funding that must be diverted from the management of the resource. The Service would prefer to allocate taxpayer funds to actions that more directly benefit species on the ground. Exclusion of these lands will not increase the likelihood that management activities would be proposed which would appreciably diminish the value of the habitat for conservation of the species. Further, such exclusion will not result in the extinction of the vernal pool species. We, therefore, conclude that the benefits of excluding refuge and Fish Hatchery lands from the final critical habitat designation outweigh the benefits of including them.

In accordance with section 4(b)(2) of the Act, we have excluded lands within the Sacramento, San Francisco Bay, San Luis, and Kern National Wildlife Refuge Complexes, and the Coleman National Fish Hatchery Complex from final critical habitat.

**Relationship of Critical Habitat to State-Managed Ecological Reserves and Wildlife Areas**

We contacted local California Department of Fish and Game (CDFG) resource managers and staff at the various locations to verify that no significant changes to vernal pool habitat and the management of this habitat have occurred since the August

6, 2003, final rule. These areas continue to be managed for the benefit of common and special-status species and their habitats.

We proposed as critical habitat, but have now considered for exclusion from the final designation, the CDFG owned lands within the Battle Creek, Big Sandy, Grizzly Island, Hill Slough, North Grasslands, and Oroville Wildlife Areas and State-owned lands within Allensworth, Boggs Lake, Butte Creek Canyon, Calhoun Cut, Carrizo Plains, Dales Lake, Fagan Marsh, Phoenix Field, San Joaquin River, Stone Corral, and Thomes Creek Ecological Reserves. These State Managed Ecological Reserves and Wildlife Areas were excluded from critical habitat designation in our August 6, 2003, final designation (68 FR 46684).

#### *(1) Benefits of Inclusion*

The designation of critical habitat would require consultation with us for any action undertaken, authorized, or funded by a Federal agency that may affect the species or its designated critical habitat. However, the management objects for State ecological reserves already include specifically managing for targeted listed and sensitive species; therefore, the benefit from additional consultation is likely also to be minimal.

The State of California establishes ecological reserves to protect threatened or endangered native plants, wildlife, or aquatic organisms or specialized habitat types, both terrestrial and nonmarine aquatic, or large heterogeneous natural gene pools (Fish and Game Code § 1580). They are to be preserved in a natural condition, or are to be provided some level of protection as determined by the commission, for the benefit of the general public to observe native flora and fauna and for scientific study or research (Fish and Game Code § 1584). Wildlife areas are for the purposes of propagating, feeding, and protecting birds, mammals, and fish (Fish and Game Code § 1525); however, they too provide habitat and are managed for the benefit of listed and sensitive species (CDFG in litt. 2003).

Take of species except as authorized by State Fish and Game Code is prohibited on both State ecological reserves and wildlife areas (Fish and Game Code § 1530 and § 1583). While public uses are permitted on most wildlife areas and ecological reserves, such uses are only allowed at times and in areas where listed and sensitive species are not adversely affected (CDFG in litt. 2003). The management objectives for these State lands include: "to specifically manage for targeted

listed and sensitive species to provide protection that is equivalent to that provided by designation of critical habitat; to provide a net benefit to the species through protection and management of the land; to ensure adequate information, resources, and funds are available to properly manage the habitat; and to establish conservation objectives, adaptive management, monitoring and reporting processes to assure an effective management program, and monitoring and reporting processes to assure an effective management program (CDFG, in litt. 2003)." In summary, we believe that the benefits of inclusion for these lands are minimal as these lands already are publicly owned and managed to protect and enhance unique and important natural resource values. Therefore, any federal activity that is consistent with the State code for activity on both State ecological reserves and wildlife areas would be very unlikely to have an effect on the primary constituent elements of habitat that would otherwise be designated as critical habitat would not serve the intended conservation role for the species.

#### *(2) Benefits of Exclusion*

While the consultation requirement associated with critical habitat on the CDFG ecological reserves and wildlife areas add little benefit, it would require the use of resources to ensure regulatory compliance that could otherwise be used for on-the-ground management of the targeted listed or sensitive species, in addition, there is no guarantee that any federal action that would require consultation would take place on such as the state preserves. In the past, the State has expressed a concern that the designation of these lands and associated regulatory requirements may cause delays that could be expected to reduce their ability to respond to vernal pool management issues that arise on the ecological reserves and wildlife areas. Therefore, the benefits of exclusion include relieving additional regulatory burden that might be imposed by the designation of critical habitat for vernal pool species, which could divert resources from substantive resource protection to procedural regulatory efforts.

#### *(3) Benefits of Exclusion Outweigh the Benefits of Inclusion*

We believe that the benefits of inclusion for these lands are low as these lands already are publicly-owned and managed by a wildlife agency to protect and enhance unique and important natural resource values.

Therefore, designation of critical habitat would add little value. The benefits of exclusion are higher, as federal actions on these lands may result in the need for consultation, most often on activities that would enhance wildlife conservation. These consultations would result in additional administrative burdens without significant accompanying conservation benefits.

We, therefore, conclude that the benefits of excluding CDFG ecological reserves and wildlife areas from the final critical habitat designation outweigh the benefits of including them. Such exclusion will not result in the extinction of the vernal pool species. Further, we do not believe that such exclusion will increase the likelihood that activities would be proposed that would appreciably diminish the value of the habitat for the conservation of these species.

In accordance with section 4(b)(2) of the Act, we have excluded California Department of Fish and Game-owned lands within the Battle Creek, Big Sandy, Grizzly Island, Hill Slough, North Grasslands, and Oroville Wildlife Areas and State-owned lands within Allensworth, Boggs Lake, Butte Creek Canyon, Calhoun Cut, Carrizo Plains, Dales Lake, Fagan Marsh, Phoenix Field, San Joaquin River, Stone Corral, and Thomes Creek Ecological Reserves.

#### **Relationship of Critical Habitat to Military Lands**

As stated above we are prohibited from designating Military lands with approved INRMPs as critical habitat according to section 4(a)(3)(B) of the Act as long as the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

Section 4(b)(2) of the Act requires us to base critical habitat designations on the best scientific and commercial data available, after taking into consideration the economic and any other relevant impact of specifying any particular area as critical habitat. It also requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including the United States Air Force and the United States Army. The following discussions are provided on Travis AFB, Beale AFB, Camp Roberts, and Fort Hunter Liggett.

#### **Travis Air Force Base**

Travis AFB has several vernal pool complexes that support the vernal pool fairy shrimp and *Lasthenia conjugens* and also contain PCEs for *Neostapfia*

*colusana*, Conservancy fairy shrimp, *Tuctorina mucronata*, and vernal pool tadpole shrimp. As a result of wetland surveys, Travis AFB had identified 235 vernal pools on approximately 100 ac (40 ha) of the 1,100 ac (445 ha) that are not developed on the base. To date, only *Lasthenia conjugens* and the vernal fairy shrimp have been discovered on Travis AFB within these 100 ac (40 ha). Travis AFB has a Service approved INRMP in place that provides a benefit for the vernal pool fairy shrimp and *Lasthenia conjugens* and provides protection of the PCEs for *Neostapfia colusana*, Conservancy fairy shrimp, *Tuctorina mucronata*, and vernal pool tadpole shrimp. As a result we are prohibited from designating critical habitat on Travis AFB in compliance with our section 4(a)(3)(B) responsibilities.

#### **Beale Air Force Base**

Beale AFB has several substantial vernal pool complexes that support the vernal pool fairy shrimp and vernal pool tadpole shrimp, especially on the western side of the base. Beale AFB completed their INRMP in 1999. The completed INRMP provides for management and conservation of vernal pools with the base and establishes a Vernal Pool Conservation and Management Area to protect vernal pool complexes on the western side of the base. Beale AFB has provided an updated INRMP for the Service's review. The Beale AFB is also currently preparing a Habitat Conservation Management Plan (HCMP) for the area. We will consult with Beale AFB under section 7 of the Act on the development and implementation of the revised INRMP, HCMP and base comprehensive plan. A final revised and Service approved INRMP is expected to be completed by March 2005. Beale AFB has a Service approved INRMP in place that provides a benefit for the vernal pool fairy shrimp and vernal pool tadpole shrimp. As a result we are prohibited from designating critical habitat on Beale AFB in compliance with our section 4(a)(3)(B) responsibilities.

#### **Camp Roberts**

Camp Roberts has substantial vernal pool complexes that support the vernal pool fairy shrimp. Camp Roberts completed their INRMP in 1999. The completed INRMP provides for the vernal pool fairy shrimp. We will consult with Camp Roberts under section 7 of the Act on the development and implementation of the INRMP. Camp Roberts has a final INRMP in place that provides a benefit for the vernal pool fairy shrimp. As a result we

are prohibited from designating critical habitat on Camp Roberts (13,247 ha (33,117 ac)) in compliance with our section 4(a)(3)(B) responsibilities.

#### **Fort Hunter Liggett**

Fort Hunter Liggett (6,519 ha (16,298 ac)) and Camp Roberts (13,247 ha (33,117 ac)) occur in San Luis Obispo and Monterey Counties. Fort Hunter Liggett has submitted draft INRMPs for our review. We are currently reviewing the INRMPs and expect completion of the section 7 consultation by April 2005. Fort Hunter Liggett has several substantial vernal pool complexes that support the vernal pool fairy shrimp.

##### *(1) Benefits of Inclusion*

Inclusion of these military lands could provide additional areas of conserved species habitat. However, the principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. The military also has an obligation under the Sykes Act, and Section 7(a)(1) of the Act to conserve threatened and endangered species on lands under its jurisdiction. Therefore, the benefits of inclusion are low.

##### *(2) Benefits of Exclusion*

Military operations in training areas with listed fairy shrimp at Fort Hunter Liggett could be modified, activities affected include the use of field artillery pieces, range training, drop zone use, and use of tank trails or roads. One of these training areas contains a multi-purpose range complex that only occurs at four military bases in the country (FHL 2002b). Consistent access to the facility is critical because comparable facilities at other locations are scheduled for use several months to years in advance. Initiating and completing section 7 consultations that would arise from a critical habitat designation would likely result in alterations to, and delays in, training schedules at the multi-purpose range complex. If critical habitat is designated on these bases, the military would need to consider and possibly implement alternatives that modify the timing, location, and intensity of training activities. Failure to complete the training and activities these bases are intended for would adversely affect national security.

##### *(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion*

Based on the above considerations, and consistent with the direction provided in section 4(b)(2) of the Act, we have determined that the benefits of excluding Fort Hunter Liggett as critical habitat for vernal pool fairy shrimp (Unit 29) outweigh the benefits of including them as critical habitat for vernal pool species. We base this determination on the need for maintaining mission-critical military training activities. Further, we have determined that excluding Fort Hunter Liggett will not result in the extinction of the vernal pool fairy shrimp.

#### **Relationship of Critical Habitat to Tribal Lands**

Section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and the effects thereof from all relevant sources, including Indian Pueblos and Tribes. In accordance with Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments, and Executive Order 13175, we recognize the need to consult with federally recognized Indian Tribes on a Government-to-Government basis. The Secretarial Order 3206 "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (1997)" provides that critical habitat should not be designated in an area that may impact Tribal trust resources unless it is determined to be essential to conserve a listed species.

#### **The Benefits of Exclusion Outweigh the Benefits of Inclusion**

The benefits of including the Tribe's land are limited to minor educational benefits. Because one or more of the species occupies all these areas, consultation on federal actions will occur regardless of whether critical habitat is designated. While some additional benefit might accrue from these adverse modification analyses, we expect them to be small. Tribal areas represent a small proportion of this designation and the tribe has demonstrated the will and ability to manage these lands in a manner that preserves their conservation benefits. The benefits of excluding these areas from being designated as critical habitat are more significant, and include our policy of maintaining a government-to-government relationship with tribes, as

well as encouraging the continued development and implementation of special management measures. For Tribal Lands, the Mechoopda Tribe has their own environmental agency, the Mechoopda Environmental Protection Agency, which is responsible for the management of the Tribe's natural resources, and which recognizes the importance of implementing conservation measures that will contribute to the conservation of federally listed species on their lands. The Mechoopda Tribe have already demonstrated their willingness to work with us to address the habitat needs of listed species that may occur on Mechoopda lands. The exclusion of critical habitat for the Mechoopda trust lands is consistent with our published policies on Native American natural resource management by allowing the Mechoopda Tribe to manage their own natural resources.

Based on the above considerations, and consistent with the direction provided in section 4(b)(2) of the Act, we have determined that the benefits of excluding Mechoopda Tribal land as critical habitat outweigh the benefits of including it as critical habitat for the vernal pool tadpole shrimp (Unit 4) and will not result in the extinction of the vernal pool tadpole shrimp. For a complete discussion of these Tribal lands, please refer to our August 6, 2003, final designation (68 FR 46684).

#### Exclusion Summary

We have reviewed the overall effect of excluding from the designated critical habitat for the vernal pool species lands covered by the following authorities: The above-mentioned approved HCPs, the State, national wildlife refuges, national fish hatcheries, Tribal trusts, and military installations, and we have determined that the benefits of excluding these areas outweigh the benefits of including them in this critical habitat designation. The exclusion of vernal pool critical habitat in Butte, Madera, Merced, Solano, and Sacramento Counties, California, will be evaluated in a future **Federal Register** document. The lands removed from critical habitat as a result of these exclusions will not jeopardize the long-term survival and conservation of the species or lead to their extinction.

#### Economic Analysis

An economic analysis of the effect of critical habitat in the 36 counties in California and 1 county in Oregon was conducted for the final rule. For a complete discussion of the economic analysis, please refer to our August 6, 2003, final rule (68 FR 46684). A re-analysis of the economic impacts of critical habitat designation in the five counties that were excluded in the final rule will be conducted in a future **Federal Register** document.

#### Required Determinations

We have reviewed our analyses of Required Determinations and subsequent conclusions that were made in the August 6, 2003, final rule designating critical habitat for the 15 vernal pool species (68 FR 46684). On the basis that we are affirming our treatment and decisions of noneconomic exclusions from the August 2003 final rule and are making no additional exclusions or changes to the designation, we believe that our previous conclusions stand. Thus, we refer the public to our previous analyses and conclusions of the Required Determinations in the August 6, 2003, final rule.

#### References Cited

A complete list of all references cited herein, as well as others, is available upon request from the Sacramento Fish and Wildlife Office (*see ADDRESSES* section).

#### Authors

The primary authors of this notice are the staff of the Sacramento Fish and Wildlife Office (*see ADDRESSES* section).

Dated: February 28, 2005.

#### Craig Manson,

*Assistant Secretary for Fish and Wildlife and Parks.*

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