

**Catalog of Federal Domestic Assistance Numbers**

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits; and 64.012, Veterans Prescription Service.

**List of Subjects in 38 CFR Part 17**

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: December 26, 2007.

**James B. Peake,**

*Secretary of Veterans Affairs.*

**Editorial Note:** This document was received at the Office of the Federal Register on April 11, 2008.

For the reasons set out in the preamble, VA proposes to amend 38 CFR part 17 as follows:

**PART 17—MEDICAL**

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

**Authority:** 38 U.S.C. 501, 1721, unless otherwise noted.

2. Amend § 17.108 by redesignating paragraphs (e)(12) and (e)(13) as paragraphs (e)(13) and (e)(14), respectively; and by adding a new paragraph (e)(12) to read as follows:

**§ 17.108 Co-payments for inpatient hospital care and outpatient medical care.**

\* \* \* \* \*

(e) \* \* \*

(12) Weight management counseling (individual and group);

\* \* \* \* \*

**§ 17.47 [Amended]**

3. In § 17.47(e)(2), remove “under 38 U.S.C. 1710(a)(1) rather than § 1710(a)(2)” and add, in its place, “under 38 U.S.C. 1710(a)(1) or (a)(2) rather than 38 U.S.C. 1710(a)(3)”.

[FR Doc. E8–8098 Filed 4–15–08; 8:45 am]

**BILLING CODE 8320–01–P**

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[FWS–R8–ES–2007–0008]; [92210–1117–0000 B4]

RIN 1018–AV07

**Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*)**

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

**ACTION:** Proposed rule; reopening of comment period, changes to the proposed critical habitat revision, notice of availability of draft economic analysis, and amended required determinations.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our June 19, 2007, proposed revision to critical habitat for the San Bernardino kangaroo rat (*Dipodomys merriami parvus*) under the Endangered Species Act of 1973, as amended (Act). In this document, we also propose to: Increase the size of proposed critical habitat Unit 1 (Santa Ana River Wash), and add two new proposed units: Unit 4 (Cable Creek Wash) and Unit 5 (Bautista Creek). In total, we are adding approximately 1,579 acres (ac) (638 hectares (ha)), which are currently designated as critical habitat for this subspecies, to our proposed revision to critical habitat. We also announce the availability of the draft economic analysis (DEA) of the proposed revision of critical habitat and an amended required determinations section of the proposal. The DEA estimates potential costs attributed to the revised critical habitat designation (incremental costs) to be approximately \$71.2 million in present value terms using a 3 percent discount rate over a 23-year period in areas proposed as critical habitat. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the original proposed revision of critical habitat, the additions to revised critical habitat proposed in this document, the associated DEA, and the amended required determinations section. Comments previously submitted on this rulemaking do not need to be resubmitted, as they will be incorporated into the public record and fully considered when preparing our final determination.

**DATES:** We will accept comments received or postmarked on or before May 16, 2008.

**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018–AV07; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760/431–9440; facsimile 760/431–5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:****Public Comments**

We will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the San Bernardino kangaroo rat published in the **Federal Register** on June 19, 2007 (72 FR 33808), the additions to revised critical habitat proposed in this document, the DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why habitat should or should not be designated as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), specifically the benefits of excluding or the benefits of including any particular area as critical habitat.

(2) *Specific information on:*

- The amount and distribution of San Bernardino kangaroo rat habitat,
- Areas occupied by the subspecies at the time of listing that contain features essential for the conservation of the subspecies we should include in the designation and why, and

- Areas not occupied by the subspecies at the time of listing are essential to the conservation of the subspecies and why.

(3) Specific information on dispersal areas important for habitat connectivity, their role in the conservation of the subspecies, and why such areas should or should not be included in the critical habitat designation.

(4) Our revision of criteria used to identify critical habitat, our proposed addition of areas to critical habitat Unit 1, and the proposed addition of Units 4 and 5 as described in this notice (see Changes to Proposed Critical Habitat section below).

(5) Our proposed exclusions totaling 2,544 ac (1,029 ha) of San Bernardino kangaroo rat habitat and whether the benefits of excluding these areas would outweigh the benefits of including these areas under section 4(b)(2) of the Act (see the Exclusions Under Section 4(b)(2) of the Act section of the June 19, 2007, proposed rule (72 FR 33808) for a detailed discussion).

(6) Any areas included in the proposed revision of critical habitat that are covered by existing or proposed conservation or management plans that we should consider for exclusion from the final designation under section 4(b)(2) of the Act. We specifically request information on any operative or draft Habitat Conservation Plans for the San Bernardino kangaroo rat that have been prepared under section 10(a)(1)(B) of the Act, as well as any other management or conservation plan or agreement that benefits the kangaroo rat or its essential physical and biological features.

(7) Specific information regarding the current status of plan implementation for the following management plans: the Woolly-Star Preserve Area Management Plans; the Former Norton Air Force Base Conservation Management Plan; the Cajon Creek Habitat Conservation Management Area Habitat Enhancement and Management Plan; and Western Riverside Multiple Species Habitat Conservation Plan.

(8) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(9) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the DEA may have been adopted largely as a result of the subspecies' listing.

(10) Information on whether the DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we have overlooked.

(11) Information on the economic costs and benefits associated with the

proposed additions to revised critical habitat announced in this document.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes likely if we designate revised critical habitat.

(13) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Any foreseeable economic, national security, or other impacts resulting from the proposed revised designation and, in particular, any impacts on small entities, and information on the benefits of including or excluding areas that exhibit these impacts.

(16) Information on whether the DEA appropriately identifies all costs that could result from the proposed revised designation.

(17) Information on any quantifiable economic benefits of the revised designation of critical habitat.

(18) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(19) Economic data on the incremental costs of designating any particular area as revised critical habitat.

(20) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (72 FR 33808) during the initial comment period from June 19 to August 20, 2007, or the second comment period from December 11, 2007 to January 25, 2008 (opened to announce the public hearing held on January 10, 2008, in San Bernardino, California (72 FR 70284)), please do not resubmit them. These comments have been incorporated into the public record and will be fully considered in the preparation of our final determination.

You may submit your comments and materials concerning this proposed rule and draft economic analysis by one of the methods listed in the **ADDRESSES** section. We will not accept anonymous comments; your comment must include your first and last name, city, State, country, and postal (zip) code. Finally, we will not consider hand-delivered

comments or mailed comments that are not received or postmarked, respectively, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in addition to the required items specified in the previous paragraph, such as your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Our final determination concerning revised critical habitat for the San Bernardino kangaroo rat will take into consideration all written comments we receive, oral or written comments we received at the public hearing on January 10, 2008, and any additional information we receive during all comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed revision of critical habitat and the DEA on the Internet at <http://www.regulations.gov>, or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

### Background

On March 30, 2005, the Pacific Legal Foundation filed suit against the Service challenging our failure to provide adequate delineation, justification, or sufficient analysis of economic and other impacts in the designation of critical habitat for the San Bernardino kangaroo rat and 26 other species. On March 23, 2006, a settlement agreement was reached requiring the Service to propose to revise critical habitat for the San Bernardino kangaroo rat as appropriate. The settlement stipulated that on or before June 1, 2007, the Service was required to submit for publication to the **Federal Register** a proposed rule regarding any revisions to the designation of critical habitat, and that we must submit a final rule for

publication to the **Federal Register** on or before June 1, 2008. On June 19, 2007, we published a proposed rule to revise critical habitat for the San Bernardino kangaroo rat (72 FR 33808), identifying approximately 9,079 ac (3,674 ha) in Riverside and San Bernardino Counties, California, that meet the definition of critical habitat for this subspecies. Of this, we proposed to exclude approximately 2,544 ac (1,029 ha) of non-Federal land covered by the Woolly-Star Preserve Area Management Plans, the Former Norton Air Force Base Conservation Management Plan, the Cajon Creek Habitat Conservation Management Area Habitat Enhancement and Management Plan, and the Western Riverside County Multiple Species Habitat Conservation Plan from the final designation under section 4(b)(2) of the Act (see 72 FR 33808, "Exclusions Under Section 4(b)(2) of the Act" section of the June 19, 2007, proposed revision to critical habitat for details).

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

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

#### **Draft Economic Analysis**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact,

impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a DEA of the June 19, 2007, proposed revision of critical habitat for the San Bernardino kangaroo rat (72 FR 33808). The DEA does not analyze potential economic impacts associated with the proposed additions to revised critical habitat announced in this document; however, an addendum to the DEA will be prepared for those areas. A final economic analysis will address all areas designated as revised critical habitat.

The intent of the DEA is to quantify the baseline and incremental economic impacts of all potential conservation efforts for the San Bernardino kangaroo rat. Baseline impacts include the potential economic impacts of all actions relating to the conservation of the San Bernardino kangaroo rat, including costs associated with sections 4, 7, and 10 of the Act, as well as those attributable to past efforts to conserve currently designated critical habitat. Baseline impacts also include the economic impacts of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation in the study area. Incremental impacts are those potential future economic impacts of conservation actions relating to the revised designation of critical habitat; these would not be expected to occur but for the designation of critical habitat.

For the purposes of the economic analysis and assessing effects on development, the proposed revised critical habitat was divided into upland and lowland areas. Lowland areas are occupied by the San Bernardino kangaroo rat year-round, at high densities of individuals. Because this is such a narrow endemic subspecies found in very few locations, any adverse modification decision would likely be coincident to a jeopardy determination for the same action. Thus, potential economic impacts from conservation efforts that may be necessary to avoid adverse modification of critical habitat within lowland areas are considered co-extensive with the impacts of the listing of the San Bernardino kangaroo rat and, for the purposes of the economic analysis, are considered to be baseline impacts of the revised designation.

The general conservation role of critical habitat designated within the upland habitat areas is to act as refuge for the San Bernardino kangaroo rat during flooding events that inundate the low-lying alluvial fans (i.e., the lowlands), which this subspecies usually occupies. Conservation efforts

not otherwise necessary to avoid jeopardy to the San Bernardino kangaroo rat may be required in upland areas designated as critical habitat to ensure that the conservation role and functional ability of the areas are conserved. Therefore, incremental costs may be incurred in upland areas designated as critical habitat, as it is reasonable to expect that the Service may recommend avoidance and minimization efforts in such upland areas (up to and including complete avoidance) specifically to avoid the destruction or adverse modification of the critical habitat. Thus, for purposes of the economic analysis, potential economic impacts of conservation efforts that may result in reduced or no development in the upland areas designated as critical habitat are considered incremental impacts of the revised designation.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for the San Bernardino kangaroo rat, including past costs incurred due to the existing designation of critical habitat. Baseline economic impacts consist of impacts to water conservation efforts and impacts due to potential constraints on development. Past baseline impacts total \$14.5 million in present value terms using a 3 percent discount rate. Future baseline impacts are estimated to be \$243.9 million in present value terms using a 3 percent discount rate over a 23-year period from 2008 to 2030, or \$15.2 million annualized. Stated in other terms, these future baseline impacts are estimated to be approximately \$342 million (\$14.9 million annualized) in undiscounted dollars or approximately \$145.8 million (\$79.6 million annualized) in present value terms using a 7 percent discount rate.

The vast majority of incremental impacts attributed to the proposed revised critical habitat designation are due to potential constraints on development within upland areas. The projected number of housing units in upland areas of proposed revised critical habitat is 847. Assuming the potential constraints on development in the upland areas result in complete avoidance of these areas, the DEA estimates potential incremental economic impacts in areas proposed as revised critical habitat over a 23-year period from 2008 to 2030 to be \$71.2 million in present value terms (\$4.3 million annualized), using a 3 percent discount rate. These impacts are estimated to be approximately \$99.6 million (\$4.3 million annualized) in undiscounted dollars or approximately

\$48.8 million (\$26.3 million annualized) in present value terms using a 7 percent discount rate. A very small portion of incremental effects are attributed to water conservation activities in upland areas, approximately \$90 annualized at a 3 percent discount rate. No incremental economic impacts are expected in areas proposed for exclusion from the revised critical habitat. The potential economic impacts in these areas are all considered to be baseline impacts (refer to Appendix A in DEA).

The economic analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The economic analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by the decision-makers to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

Finally, the economic analysis looks retrospectively at costs that have been incurred since the date we listed the San Bernardino kangaroo rat as endangered (September 24, 1998; 63 FR 51005), and considers those costs that may occur in the years following the revised designation of critical habitat, with the timeframes for this analysis varying by activity. The baseline and incremental economic impacts of potential conservation efforts for the San Bernardino kangaroo rat are associated with the following activities: (1) Water conservation, (2) flood control, (3) urban development, (4) sand and gravel mining, (5) agricultural activities, and (6) off-road vehicle activities.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed rule, the additions to revised critical habitat proposed in this document, and our amended required determinations. The final designation

may differ from the proposed rule based on new information we receive during the public comment periods. Our supporting record will reflect any new information used in making the final designation. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as revised critical habitat, provided such exclusion will not result in the extinction of the subspecies.

#### **Changes to Proposed Revised Critical Habitat**

##### *Criteria Used To Identify Critical Habitat*

In this document, we are advising the public of revisions we made to the criteria we used to identify critical habitat (as described in the June 19, 2007, proposed rule (72 FR 33808)). During the first and second comment periods for the proposed rule, we received significant comments from the public, including biologists familiar with the San Bernardino kangaroo rat, which lead us to reevaluate and revise the criteria used to identify critical habitat. Below, we present our revised "Criteria Used To Identify Critical Habitat" section, which replaces the "Criteria Used To Identify Critical Habitat" section provided in the June 19, 2007, proposed rule.

We are proposing to designate critical habitat for the San Bernardino kangaroo rat in areas we have determined to be occupied by the subspecies at the time of listing, and that contain the physical and biological features essential to the conservation of the subspecies. The physical and biological features are those primary constituent elements (PCEs) laid out in a specific spatial arrangement and quantity to support the life history functions essential for the conservation of this subspecies. Some designated lands contain all PCEs and support multiple life processes. Some lands contain only a portion of the PCEs necessary to support the particular biological value of that habitat to this subspecies.

We define occupied habitat as: (a) Those areas containing occurrence data prior to listing (1980 to 1998); (b) those areas containing occurrence data since the time of listing (1998 to present); and (c) areas adjacent to and between occurrence points that maintain habitat connectivity in one continuous patch of suitable habitat. As discussed in the Background section of the June 19, 2007, proposed rule (72 FR 33808), occurrences discovered since the listing of the subspecies in 1998 are within

areas considered to be occupied by the subspecies at the time of listing (Santa Ana River, Lytle/Cajon Creek, and San Jacinto River washes).

In this proposed designation, we have focused primarily on core populations (i.e., areas where the subspecies has been repeatedly detected through live trapping) in undisturbed habitat in the Santa Ana River, Lytle/Cajon Creeks, and the San Jacinto River washes. We believe that protecting these three largest core populations is necessary for the conservation of the species. Protecting small, isolated, peripheral populations in areas of degraded habitat and those areas devoid of fluvial processes where detection of San Bernardino kangaroo rat has been sporadic is not essential for recovery as these populations are likely unsustainable. In defining core population boundaries, we included areas demographically disconnected from the three largest populations, but which may provide the subspecies with protection against demographically stochastic events (e.g., flooding in excess of a 100-year storm event that removes flood-plain terrace habitat, earthquakes, fires followed by erosion of adjacent slopes that bury occupied habitat) which could cause local extinctions in the larger units. These areas are occupied by the subspecies and likely contain self-sustaining populations, relatively undisturbed alluvial scrub habitat with largely unimpeded fluvial dynamics, the PCEs identified for the subspecies, and are important for the long-term conservation of the subspecies.

Utilizing 2005 aerial imagery and occurrence data to determine areas of occupancy, we delineated critical habitat on maps to include occupied, non-degraded alluvial fans, washes, floodplains, and adjacent upland areas containing the PCEs required by the San Bernardino kangaroo rat. We then made site visits with biologists considered to be experts on this subspecies and its habitat to confirm the presence of PCEs in the areas delineated on the maps. Areas determined not to contain any of the PCEs are not proposed as critical habitat. Because of the importance of upland habitat as a source of animals to repopulate wash areas following flood events, we include upland habitat containing one or more PCEs, and adjacent to occupied wash habitat in this proposed designation.

When determining the critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the San Bernardino kangaroo rat. Areas

currently being used for sand/gravel mining operations (e.g., pits, staging areas) do not contain the physical and biological features essential to the conservation of the San Bernardino kangaroo rat. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any developed structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this proposed critical habitat have been excluded by text in this rule and would not be designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they may affect the subspecies or physical and biological features in adjacent critical habitat.

#### *Areas Proposed as Critical Habitat*

In this document, we are proposing additional revisions to the area of critical habitat described in the June 19, 2007, proposed rule (72 FR 33808). During the first and second comment periods for the proposed rule, we received significant comments from the public, including biologists familiar with the San Bernardino kangaroo rat, on areas that are essential to the subspecies and should be included in the designation. As a result of these comments, new information received, and revision of the criteria used to identify critical habitat, we reevaluated the following areas: Mill Creek, Plunge Creek (including areas providing habitat connectivity of the Plunge Creek wash with the Santa Ana River wash), Cable Creek wash, and Bautista Creek. All of these areas are currently designated as critical habitat for the San Bernardino kangaroo rat (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002); however, we did not propose these areas as critical habitat in the June 19, 2007, proposed revision to critical habitat (73 FR 33808). Below we describe each area we reevaluated, explain why we did not include the area in the 2007 proposed rule, and explain why we are now proposing the area for inclusion in the revised designation of critical habitat.

#### *Mill Creek*

Mill Creek flows into and joins the Santa Ana River wash (Unit 1) in the eastern side of the unit. We did not include the Mill Creek area in the 2007 proposed rule (72 FR 33808), although we indicated that it was considered important to the subspecies by contributing fluvial dynamics to the Santa Ana River wash. At the time of the proposed revised rule, we had

limited survey data indicating Mill Creek was sparsely occupied by the San Bernardino kangaroo rat. Furthermore, we determined this area contained large expanses of unsuitable habitat. As such, we did not include the majority of lower Mill Creek in the June 19, 2007 proposed revision to critical habitat.

During the public comment period, we received a number of comments highlighting the importance of Mill Creek as an area not only occupied by the San Bernardino kangaroo rat connected to and contiguous with the core population in the Santa Ana wash, but also containing the physical and biological features necessary for the long-term conservation of this subspecies. Upon receiving comments from the public about Mill Creek, we reevaluated our data in this area. Evidence of extensive burrowing activity observed by Service biologists indicates this area is occupied by kangaroo rats, and live-trapping confirms that Mill Creek is occupied by the San Bernardino kangaroo rat subspecies. We agree that the reach of Mill Creek occupied by the San Bernardino kangaroo rat to its confluence with the Santa Ana River is important to the recovery of the subspecies as it is the only large stretch of contiguous, occupied habitat for the San Bernardino kangaroo rat within Unit 1 that is not fragmented by development (e.g., roads, aggregate mining pits). Further, we agree that the habitat at Mill Creek is connected to and contiguous with habitat supporting the core population in Unit 1, and therefore, San Bernardino kangaroo rats inhabiting Mill Creek are part of the Santa Ana River wash core population.

We also received comments about the importance of Mill Creek as a source of sediment through natural fluvial dynamics to the majority of the Santa Ana River wash (Unit 1). Existing infrastructure (e.g., levees, culverts, concrete-lined channels, bridge abutments and other fill) affects the function of the Santa Ana River and its tributaries within the historic and current range of this subspecies. As a result, the historic flood plain dynamics within the upper Santa Ana River watershed have been permanently altered (MEC 2000, pp. 175–176). Periodic flooding provides natural scour and sediment deposition, decreases vegetation density and cover, and naturally maintains the alluvial sage scrub that supports this subspecies. Mill Creek is the only remaining source of alluvial sediments remaining within Unit 1 that has not been significantly altered by flood control structures, water diversions, or other activities.

Although the Santa Ana River is incised just downstream from its confluence with Mill Creek, the flood plain elevations downstream (e.g., downstream of Opal Street in Mentone) allow overbank scour and sediment deposition during even small-to moderate-intensity storms. The periodic deposition of sediments from Mill Creek helps to naturally maintain the soil and alluvial fan sage scrub (i.e., the PCEs upon which the survival and recovery of the San Bernardino kangaroo rat in Unit 1 depend) within critical habitat along the Santa Ana River as suitable habitat to support the core population of San Bernardino kangaroo rats within this unit. Because of the importance of Mill Creek, we are proposing to include 388 ac (157 ha) of Mill Creek in the revision to critical habitat for proposed Unit 1. This area is currently designated as critical habitat as part of Unit 1 (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002).

#### *Plunge Creek*

Plunge Creek is located north of the main stem of the Santa Ana River in Unit 1 and is largely isolated from the core population of San Bernardino kangaroo rats in the wash by sand and gravel mining operations. A portion of Plunge Creek was included in the June 19, 2007, proposed revision to critical habitat, but no critical habitat connection between this area of Plunge Creek and other portions of proposed Unit 1 was included in the proposal. We did not propose revised critical habitat connecting Plunge Creek to other critical habitat areas in proposed Unit 1 because, although lands in this area are managed by the Bureau of Land Management (BLM), the BLM is considering the revision of their South Coast Resource Management Plan and an exchange of land within their existing Area of Critical Environmental Concern (ACEC) for lands that are privately owned within the Santa Ana River wash. Should this exchange occur, we anticipate that the Upper Santa Ana River Habitat Conservation Plan (USAR HCP, also known as “Plan B”) would put forward. The land exchange would be done to facilitate aggregate mining, water conservation, roadway improvements, and other activities in areas that are now within the ACEC, while other, less-disturbed habitat areas for the San Bernardino kangaroo rat would be conserved through the implementation of the USAR HCP. Although we have been working with the BLM and associated stakeholders on the land exchange for many years, we have not yet been asked by the BLM to formally consult with them on this

action. However, during collaboration with the BLM and stakeholders in the USAR HCP, we had considered areas where future mining may be proposed, and determined in our June 19, 2007, proposed revision to critical habitat that these areas should not be included in the proposed revision at that time.

We received significant comment from the public highlighting the importance of Plunge Creek to the conservation of the San Bernardino kangaroo rat. Commenters were concerned that proposed revision to critical habitat around Plunge Creek (which is north of existing and proposed mining pits) did not connect to critical habitat in the Santa Ana River mainstem south of these pits. Plunge Creek is extensively modified upstream of Greenspot Road by levees and the bridge crossing the creek on Greenspot Road, and the creek at Orange Street is completely channelized and diverted from its historic connection with the Santa Ana River. However, significant sediment deposition occurs immediately downstream of the Greenspot Road bridge and provides for habitat renewal in portions of the adjacent Woolly-Star Preserve Area and the reach of Plunge Creek from Greenspot Road to its diversion at Orange Street. This area of relatively undisturbed alluvial scrub is known to be occupied by the San Bernardino kangaroo rat. Commenters, including biologists familiar with the San Bernardino kangaroo rat, stated that it is important for the persistence of the subspecies in Unit 1 that the demographic and genetic connectivity of populations in Plunge Creek and the Santa Ana wash be conserved. We agree that without a habitat connection in Unit 1 to provide for demographic and genetic exchange between San Bernardino kangaroo rats in Plunge Creek and the main stem area, the population of San Bernardino kangaroo rat in Plunge Creek is at risk of local extirpation. Due to the importance of Plunge Creek and connectivity to the remainder of the unit, we are now proposing to include approximately 265 ac (107 ha) of habitat that was occupied at the time of listing and currently occupied in proposed Unit 1. This additional area, which contains the physical and biological features essential to the conservation of the subspecies, would allow for connectivity of Plunge Creek and the core population in the Santa Ana River wash. This area is currently designated as critical habitat as part of Unit 1 (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002).

#### *Cable Creek Wash*

The Cable Creek wash is located northeast of the Lytle/Cajon Creek wash (within current Unit 2) on the opposite side of Interstate 215 (I-215). This wash, although occupied, is isolated from proposed Unit 2 by I-215, flood control structures, and other development. Cable Creek is channelized where it approaches the freeway. The concrete channel eventually crosses underneath the I-215 to flow into the Lytle/Cajon wash, but the channel precludes the movement of individual San Bernardino kangaroo rats between these areas. Hence, any genetic or demographic connection between San Bernardino kangaroo rats in Cable Creek wash and the Lytle/Cajon wash is likely minimal to non-existent. We did not propose the Cable Creek wash in the June 19, 2007, proposed revision to critical habitat because of the disconnect between this population at Cable Creek and the larger population of San Bernardino kangaroo rats at Lytle/Cajon Creek.

During the comment periods for the San Bernardino kangaroo rat proposed critical habitat revision, we received significant comment from the public about Cable Creek wash. Commenters stated that this wash contains the essential physical and biological features, and retains fluvial dynamics, and is one of the few areas of occupied San Bernardino kangaroo rat habitat within the remaining range of the subspecies. Further, this area appears to be large enough to support a population of San Bernardino kangaroo rats indefinitely, despite its disconnection from the core population in the Lytle/Cajon Creek wash. We agree that Cable Creek contains quality San Bernardino kangaroo rat habitat and the repeated positive survey results suggest this area supports a population of this subspecies. We also received comments suggesting that this area could be important for the long-term conservation of this subspecies in the future if population levels in the core area of the Lytle/Cajon wash were to decrease due to catastrophic events. The demographic isolation of Cable Creek from Lytle/Cajon Creek occurred relatively recently on an evolutionary time scale, and therefore, we agree that the Cable Creek wash population could be utilized to augment recovery of the Lytle/Cajon wash population. Based on these comments, we revised our criteria identifying critical habitat to include areas disconnected from core population areas that we determine may be important for the long-term conservation of the subspecies, and we are proposing to include approximately

483 ac (195 ha) of land in the Cable Creek wash in a new critical habitat Unit 4. This area is currently designated as critical habitat as part of Unit 2 (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002).

#### *Bautista Creek*

Bautista Creek drains into the San Jacinto River wash from the south, flowing into the area supporting the core population of San Bernardino kangaroo rats within the San Jacinto River (proposed Unit 3). Bautista Creek has been channelized approximately 2 miles (3.2 kilometers) downstream of the San Bernardino National Forest boundary and now flows for several miles through a 4-sided concrete box channel to its confluence with San Jacinto Creek. This steep-sided channel effectively isolates San Bernardino kangaroo rats in Bautista Creek from those in San Jacinto Creek. Minimal genetic connectivity may exist between the Bautista Creek and San Jacinto River populations by way of highly disturbed, upland agricultural fields along the length of the concrete channel (if those agricultural areas are occupied at some low level by the subspecies). Demographic connectivity of the two populations through these highly disturbed agricultural areas is unlikely. Although unlikely, an occasional individual may survive being washed downstream through the channel during a high flow event, but such an event is likely so rare as to be relatively meaningless to the population in terms of demographic or genetic exchange between individual animals in Bautista and San Jacinto creeks. It is also unlikely that San Bernardino kangaroo rats could successfully migrate from the San Jacinto upstream through the concrete channel to the Bautista Creek area. Because of this, we did not include Bautista Creek in the June 19, 2007, proposed revision to critical habitat.

We received significant comment during the public comment periods about the unchannelized reaches of Bautista Creek that were designated in the April 23, 2002, final rule as critical habitat (67 FR 19812). These comments focused on the unimpeded fluvial dynamics that maintain existing physical and biological features and occupancy by the San Bernardino kangaroo rat in this area. It was noted that given the extent and quality of habitat in this area of Bautista Creek, the population of San Bernardino kangaroo rats in Bautista Creek is likely self-sustaining in the long-term despite the lack of habitat connectivity with the San Jacinto River wash. We agree that the unchannelized portion of Bautista Creek

is occupied as documented through live-trapping results, and that this area retains fluvial dynamics maintaining the physical and biological features required by the San Bernardino kangaroo rat. We also received comments suggesting the Bautista Creek population is important for the long-term conservation of the San Bernardino kangaroo rat, as it provides a safeguard against population declines and local extinction in the San Jacinto unit (proposed Unit 3). The demographic isolation of Bautista Creek from the San Jacinto River occurred relatively recently on an evolutionary time scale,

and therefore, we agree that the Bautista Creek population could be utilized to augment recovery of the San Jacinto River wash population. The comments we received also highlighted the importance of conserving the Bautista Creek area as it represents the southernmost extent of the range for San Bernardino kangaroo rat. Based in part on these comments, we revised our criteria identifying critical habitat to include disconnected areas that we determine are important for the long-term conservation of the subspecies, and we are proposing to include approximately 443 ac (180 ha) of land

in Bautista Creek in a new proposed Unit 5. This area is currently designated as critical habitat as part of Unit 3 (see 50 CFR 17.95(a); 67 FR 19812, April 23, 2002).

In total, we are adding approximately 1,579 ac (638 ha) of Federal and private land to the June 19, 2007, proposed revision to critical habitat for the San Bernardino kangaroo rat (Table 1). These proposed areas are not analyzed in the DEA that is now out for public review, but will be analyzed in an addendum and, if designated, will be addressed in the final economic analysis.

**TABLE 1.—LAND OWNERSHIP, AREAS PROPOSED AS REVISED CRITICAL HABITAT IN THE JUNE 19, 2007 PROPOSED RULE (72 FR 33808), ADDITIONAL AREAS PROPOSED IN THIS DOCUMENT, AREAS PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT**

[Area estimates reflect all land within revised proposed critical habitat unit boundaries]

Critical habitat unit	Land ownership	Proposed critical habitat (72 FR 33808)	Additions to proposed critical habitat	Areas proposed for exclusion under section 4(b)(2) of the act
1. Santa Ana River Wash, San Bernardino County .....	BLM <sup>1</sup> .....	559 (226)	184 (74)	00 (00)
	Local <sup>2</sup> .....	268 (109)	00 (00)	268 (109)
	Private .....	2,797 (1,132)	469 (190)	742 (300)
Subtotal .....		3,624 (1,467)	653 (264)	1,010 (409)
2. Lytle/Cajon Creek Wash, San Bernardino County .....	USFS <sup>3</sup> .....	89 (36)	00 (00)	00 (00)
	Private .....	4,597 (1,860)	00 (00)	1,271 (514)
	Subtotal .....	4,686 (1,896)	00 (00)	1,271 (514)
3. San Jacinto River Wash, Riverside County .....	Water District <sup>4</sup> ..	506 (205)	00 (00)	00 (00)
	Local Flood <sup>5</sup> .....	94 (38)	00 (00)	94 (38)
	Private .....	169 (68)	00 (00)	169 (68)
Subtotal .....		769 (311)	00 (00)	263 (106)
4. Cable Creek Wash, San Bernardino County .....	Private .....	00 (00)	483 (195)	00 (00)
	Subtotal .....	00 (00)	483 (195)	00 (00)
5. Bautista Creek, Riverside County .....	USFS <sup>3</sup> .....	00 (00)	73 (30)	00 (00)
	USFS Inholding .....	00 (00)	38 (15)	00 (00)
	Local Flood <sup>5</sup> .....	00 (00)	4 (2)	00 (00)
	Private .....	00 (00)	328 (133)	00 (00)
Subtotal .....		00 (00)	443 (180)	00 (00)
Total .....		9,079 (3,674)	1,579 (638)	2,544 (1,029)

<sup>1</sup> BLM = Bureau of Land Management.

<sup>2</sup> Local = Local Reuse Authority.

<sup>3</sup> USFS = U.S. Forest Service.

<sup>4</sup> Water District = Eastern Municipal Water District and Lake Hemet Municipal Water District.

<sup>5</sup> Local Flood = Riverside County Flood Control.

**Revised Unit Descriptions**

Below, we present a revised unit description for San Bernardino kangaroo rat proposed critical habitat Unit 1, which replaces the unit description presented in the June 19, 2007, proposed rule (72 FR 33808). We also present unit descriptions for newly proposed Units 4 and 5. The unit

descriptions for proposed Units 2 and 3 presented in the June 19, 2007, proposed rule remain unchanged.

*Unit 1: Santa Ana River Wash*

Unit 1 consists of approximately 4,277 ac (1,731 ha) and is located in San Bernardino County. This unit includes the Santa Ana River and portions of City, Plunge, and Mill Creeks. The area

includes lands within the cities of San Bernardino, Redlands, and Highland. Although Seven Oaks Dam (northeast of Unit 1) impedes sediment transport and reduces the magnitude, frequency, and extent of flood events from the Santa Ana River, the system still retains partial fluvial dynamics because Mill Creek is not impeded by a dam or debris



basin. This proposed critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the PCEs (PCEs 1, 2, and 3) in the appropriate quantity and spatial arrangement essential for the conservation of the subspecies. Additionally, this unit contains the highest densities of San Bernardino kangaroo rat in the Santa Ana wash. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development.

Approximately 742 ac (300 ha) of Unit 1 occurs within the Woolly-Star Preserve Area (WSPA), a section of the flood plain downstream of Seven Oaks Dam that was preserved by the flood control districts of Orange, Riverside, and San Bernardino Counties. The WSPA was established in 1988 by the U.S. Army Corps of Engineers (ACOE) to minimize the effects of Seven Oaks Dam on the federally endangered plant, *Eriastrum densifolium* ssp. *sanctorum* (Santa Ana River woolly-star). This area of alluvial fan scrub in the wash near the low-flow channel of the river was designated for preservation because these sections of the wash were thought to have the highest potential to maintain the hydrology necessary for the periodic regeneration of early phases of alluvial fan sage scrub. A 1993 Management Plan for the Santa Ana River WSPA has been completed, and a draft multi-species habitat management plan (MSHMP) for WSPA lands, which includes protection for the San Bernardino kangaroo rat, is to be completed as an additional conservation measure pursuant to our December 19, 2002, biological opinion on operations for Seven Oaks Dam (Service 2002b, p. 8). As a result, we are proposing to exclude approximately 742 ac (300 ha) of WSPA lands that fall within the proposed revision to critical habitat from the final revised critical habitat designation based on the benefits to the subspecies provided by these plans (see the Exclusions Under section 4(b)(2) of the Act section of the June 19, 2007, proposed rule (72 FR 33808) for a detailed discussion).

In 1994, the BLM designated three parcels in the Santa Ana River, a total of approximately 760 ac (305 ha), as an Area of Critical Environmental Concern (ACEC). One parcel is located south of the Seven Oaks barrow pit, another is farther west and south of Plunge Creek, and the third is located farther west between two large mining pits. The

primary goal of this ACEC designation is to protect and enhance the habitat of federally listed plant species occurring in the area while providing for the administration of valid existing water conservation rights. Although the establishment of this ACEC is important in regard to conservation of sensitive species and communities in this area, the administration of existing water-conservation rights conflicts with the BLM's ability to manage their lands for the San Bernardino kangaroo rat. Existing rights include a withdrawal of Federal lands for water conservation through an act of Congress on February 20, 1909 (Pub. L. 248, 60th Cong., 2nd sess.). The entire ACEC is included in this withdrawn land and may be used for water conservation measures such as the construction of percolation basins. Although the BLM is coordinating with the Service to conserve San Bernardino kangaroo rat habitat, at this time we do not consider these lands to be managed for the benefit of the San Bernardino kangaroo rat or the physical and biological features essential to the conservation of the species. We are not proposing to exclude these lands from the final revised critical habitat designation.

We are currently coordinating with the BLM, ACOE, San Bernardino Valley Conservation District, Cemex Construction Materials, Robertson's Ready Mix, and other local interests on a proposed exchange of Federal and private lands and the development of the USAR HCP. The goal of the USAR HCP is to consolidate a large block of alluvial fan scrub occupied by three federally endangered species (the San Bernardino kangaroo rat, *Eriastrum densifolium* ssp. *sanctorum*, and *Dodecahema leptoceras* (slender-horned spineflower)) and one federally threatened species (the coastal California gnatcatcher (*Polioptila californica californica*)). The area under consideration includes the majority of the Santa Ana wash from just downstream of the confluence of Mill Creek with the Santa Ana River to Alabama Street. While the goal of this effort is to benefit the San Bernardino kangaroo rat through the establishment of preserve lands that will be managed for this subspecies and other listed species, we are still in the development phase of this HCP. We are not proposing to exclude any lands within the proposed Santa Ana River Wash Conservation Area from the final revised critical habitat designation.

Approximately 268 ac (109 ha) of occupied habitat in the Santa Ana River wash has been set aside for conservation in perpetuity by the U.S. Air Force as

part of on-base site remediation efforts at the former Norton Air Force Base (AFB) in San Bernardino, California. These areas are managed specifically for the San Bernardino kangaroo rat and *Eriastrum densifolium* ssp. *sanctorum* pursuant to the Former Norton Air Force Base Conservation Management Plan (CMP) completed in March 2002. We are proposing to exclude these 268 ac (109 ha) from the final revised critical habitat designation based on benefits provided to San Bernardino kangaroo rat habitat under the CMP (see Proposed Rule (72 FR 33808), Exclusions Under section 4(b)(2) of the Act section for a detailed discussion).

#### Unit 4: Cable Creek Wash

Unit 4 consists of approximately 483 ac (195 ha) and is located in San Bernardino County. This unit encompasses the Cable Creek alluvial flood plain from the mouth of Cable Canyon to Interstate 215 (I-215) where the creek becomes channelized. Because Cable Creek is not impeded by a dam or debris basin, the fluvial dynamics necessary to maintain the PCEs of San Bernardino kangaroo rat critical habitat remain in this unchannelized portion of Cable Creek. This proposed critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the PCEs (PCEs 1, 2, and 3) in the appropriate quantity and spatial arrangement essential for the conservation of the subspecies. Additionally, this unit contains a likely self-sustaining population of San Bernardino kangaroo rats that may be important for the long-term conservation of the subspecies. This unit is demographically isolated from the core population of the subspecies in the Lytle/Cajon wash (proposed Unit 2). A stochastic event causing dramatic population decline or local extinction in proposed Unit 2 may have little effect on proposed Unit 4. In such a case, the population in proposed Unit 4 could serve as a source of individuals for repopulating proposed Unit 2. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with flood control operations, water conservation projects, sand and gravel mining, and urban development.

#### Unit 5: Bautista Creek

Unit 5 consists of approximately 443 ac (180 ha) and is located in Riverside County. This unit includes known occupied habitat from the unchannelized reach of Bautista Creek (i.e., from the existing instream mining



operation to upstream areas where the grade of the creek precludes the formation of alluvial terraces or braids). This unit represents the southernmost extent of the San Bernardino kangaroo rat's current range. The wash system in upper Bautista Creek still retains fluvial dynamics because it is not impeded by a dam, debris basin, or concrete channelization. This proposed critical habitat unit was occupied at the time of listing, is currently occupied, and contains all of the PCEs (PCEs 1, 2, and 3) in the appropriate quantity and spatial arrangement essential for the conservation of the species. This unit contains agricultural areas that could be occupied at low densities by this subspecies (PCE 3). Additionally, this unit contains a likely self-sustaining population of San Bernardino kangaroo rats that may be important for the long-term conservation of the subspecies. This unit is demographically isolated from the core population of the subspecies in the San Jacinto Wash (proposed Unit 3). Given the current status of the San Bernardino kangaroo rat and degradation in areas currently designated as critical habitat that we are not proposing as revised critical habitat, it is important for the conservation of the San Bernardino kangaroo rat that natural fluvial processes in occupied habitat are maintained. A stochastic event could cause a dramatic population decline or local extinction in either proposed Unit 3 or Unit 5. In such a case, through relocation for the purposes of recovery, the population in proposed Unit 5 could serve as a source of individuals for repopulating proposed Unit 3, and vice versa. The physical and biological features contained within this unit may require special management considerations or protection to minimize impacts associated with agricultural activities, sand and gravel mining, and urban development.

#### Required Determinations—Amended

In our June 19, 2007, proposed rule (72 FR 33808), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations

with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

#### Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our DEA of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration, small entities include

small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revision of critical habitat for the San Bernardino kangaroo rat would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. We apply the "substantial number" test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the San

Bernardino kangaroo rat. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

In the DEA of the proposed revision to critical habitat, we evaluated the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the San Bernardino kangaroo rat. The DEA is based on the estimated incremental impacts associated with the proposed rulemaking as described in section 3 of the DEA. The DEA evaluates the potential for economic impacts related to activity categories including water conservation, flood control, and development. Impacts of conservation activities are not anticipated to affect small entities in the following categories: fire management on Federal lands; invasive, nonnative plant species management on Federal lands; recreation management on Federal lands; and surveying, monitoring, and other activities on Federal lands. Land managers that may be impacted by the proposed rule include the BLM, the San Bernardino County Flood Control District (SBCFCD), and private landowners. Of the entities that are likely to bear incremental impacts, there are no entities identified as small businesses, small organizations, or small government jurisdictions. The Federal agency, BLM, and the special district, SBCFCD, do not meet the criteria for a small business. Individual private landowners in the areas proposed as revised San Bernardino kangaroo rat critical habitat are not considered small businesses. Please refer to the DEA (Appendix C) of the proposed revision to critical habitat for a more detailed discussion of potential economic impacts.

In summary, we have considered whether this proposed rule to revise critical habitat would result in a significant economic effect on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the revised designation of critical habitat for the San Bernardino kangaroo rat will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required.

*Executive Order 13211—Energy Supply, Distribution, and Use*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed revision to critical habitat for the San Bernardino kangaroo rat is not considered a significant regulatory action under E.O. 12866. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared without the regulatory action under consideration. The DEA finds that none of these criteria are relevant to this analysis. Thus, based on information in the DEA (Appendix C), energy-related impacts associated with San Bernardino kangaroo rat conservation activities within the areas included in the proposed revision to critical habitat are not expected. As such, the proposed revision to critical habitat is not expected to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments,” with two exceptions. It excludes “a condition of federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding” and the State, local, or tribal governments “lack authority” to adjust

accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under section 7 of the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. As discussed in the DEA, anticipated future impacts in areas proposed for final designation as critical habitat will be borne by the Federal Government and SBCFCD; in areas proposed for exclusion from the final designation, the total anticipated future impacts are not attributable to the designation of critical habitat. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. The SBCFCD is also not considered to a small entity because it services a population exceeding the criteria for a “small entity.” As such, a Small Government Agency Plan is not required.

*Executive Order 12630—Takings*

In accordance with E.O. 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of proposing revised critical habitat for the San Bernardino kangaroo rat in a takings implications assessment. The takings implications assessment concludes that this proposed revision to critical habitat for the San Bernardino kangaroo rat does not pose significant takings implications.

**References Cited**

A complete list of all references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> or by contacting the Field Supervisor, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

**Authors**

The primary authors of this rulemaking are the staff of the Carlsbad Fish and Wildlife Office.

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

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

**Proposed Regulation Promulgation**

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 72 FR 33808, June 19, 2007, as follows:

**PART 17—[AMENDED]**

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

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

2. Critical habitat for the San Bernardino kangaroo rat (*Dipodomys*

*merriami parvus*) in § 17.95(a), which was proposed to be revised on June 19, 2007, at 72 FR 33808, is proposed to be amended by:

- a. Revising the introductory text of paragraph (5) and Map 1;
- b. Retaining the proposed introductory text of paragraph (6);
- c. Revising paragraph (6)(i), the introductory text of paragraph (6)(ii), and Map 2;
- d. Adding paragraphs (9), (9)(i), (9)(ii), and Map 5; and
- e. Adding paragraphs (10), (10)(i), (10)(ii), and Map 6, to read as follows:

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

(a) *Mammals.*

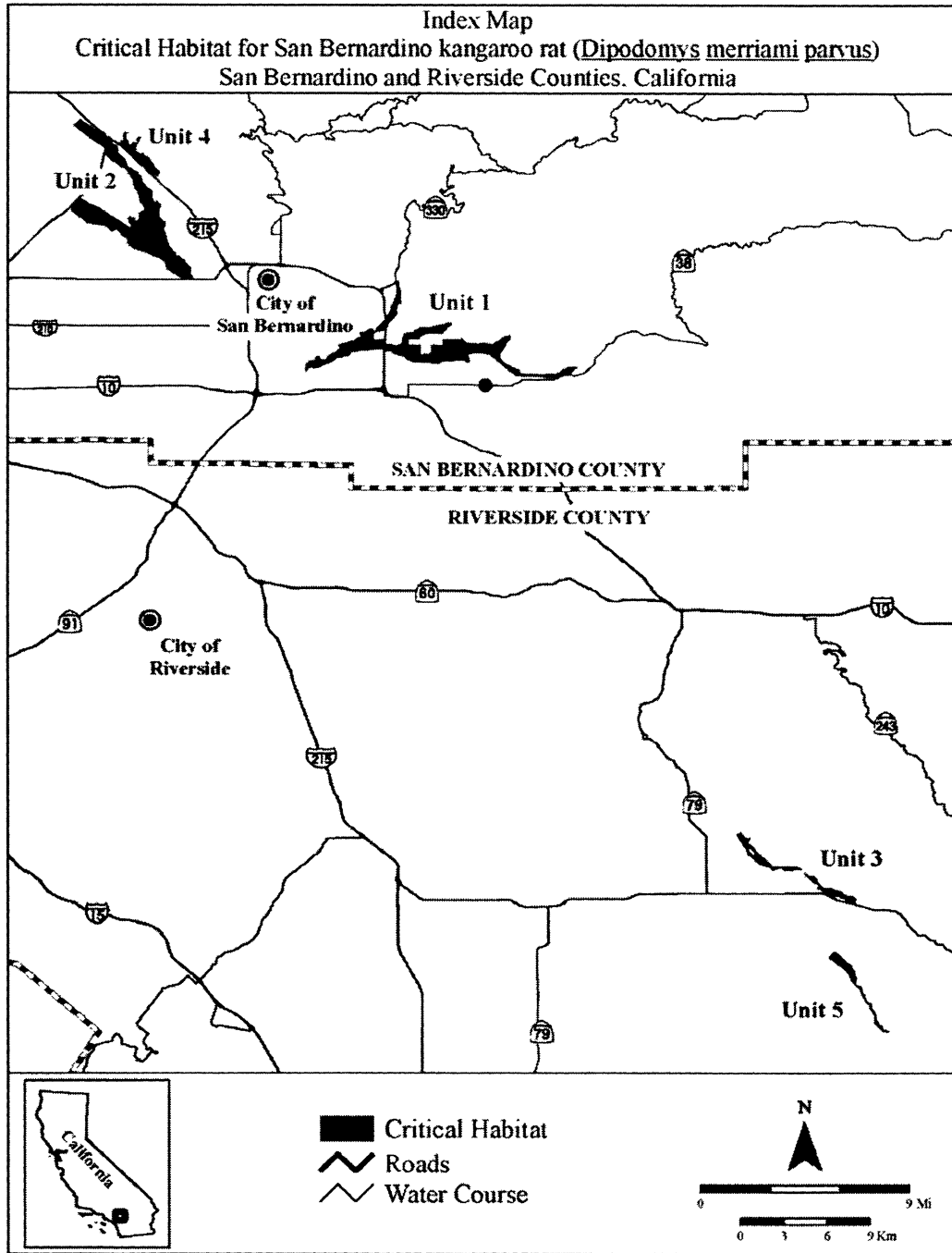
\* \* \* \* \*

San Bernardino Kangaroo Rat  
(*Dipodomys merriami parvus*)

\* \* \* \* \*

(5) Note: Index map of critical habitat units for the San Bernardino kangaroo rat follows:

**BILLING CODE 4310–55–P**



**BILLING CODE 4310-55-C**

(6) Unit 1: Santa Ana River Wash, San Bernardino County, California. From USGS 1:24,000 quadrangles San Bernardino North and Devore.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1927

(NAD27) coordinates (E, N): 482590, 3777012; 482552, 3776943; 482558, 3776715; 482692, 3776286; 482707, 3776201; 482717, 3775426; 482568, 3775426; 482435, 3775170; 482428, 3774953; 482444, 3774750; 482466, 3774716; 482231, 3774477; 482161, 3774375; 481828, 3773959; 481701,

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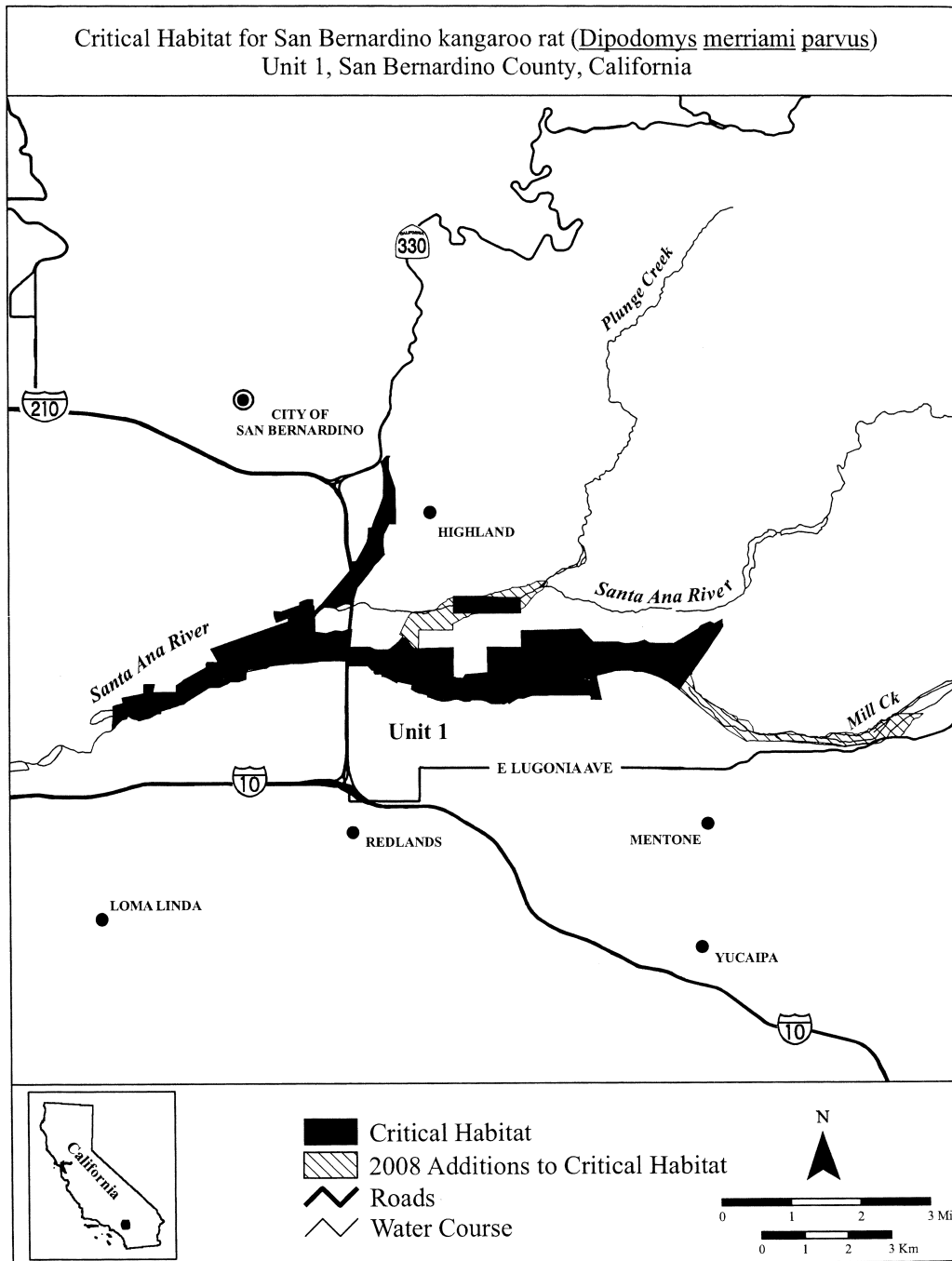
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(ii) Note: Map of Unit 1—Santa Ana River Wash follows:

BILLING CODE 4310-55-P



**BILLING CODE 4310-55-C**

(9) Unit 4: Cable Creek Wash, San Bernardino County, California. From USGS 1:24,000 quadrangles San Bernardino North and Devore.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1927 (NAD27) coordinates (E, N): 463568, 3787386; 463824, 3787384; 463795, 3787337; 463726, 3787340; 463697, 3787333; 463683, 3787308; 463680, 3787241; 463699, 3787117; 463708, 3787053; 463689, 3787019; 463683, 3786998; 463684, 3786958; 463694,

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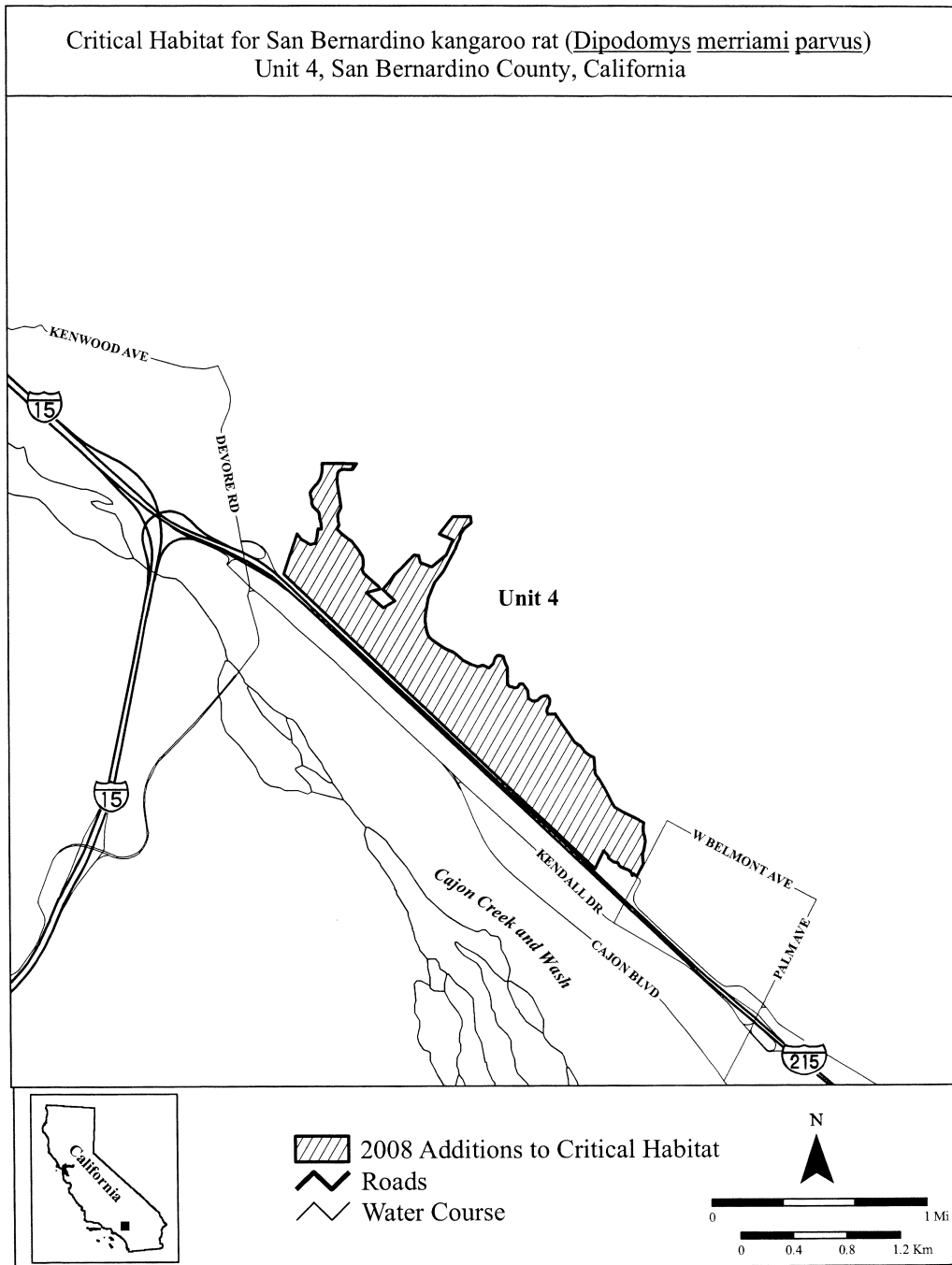


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Note: Map of Unit 4—Cable Creek  
Wash follows:



**BILLING CODE 4310-55-C**

(10) Unit 5: Bautista Creek, Riverside County, California. From USGS 1:24,000 quadrangles San Jacinto, Lake Fulmor, and Blackburn Canyon.

(i) Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1927 (NAD27) coordinates (E, N): 512399, 3729457; 512445, 3729531; 512490, 3729591; 512548, 3729672; 512629, 3729768; 512689, 3729841; 512729, 3729881; 512768, 3729895; 512788, 3729884; 512978, 3729767; 513280, 3729497; 513714, 3729078; 513781,

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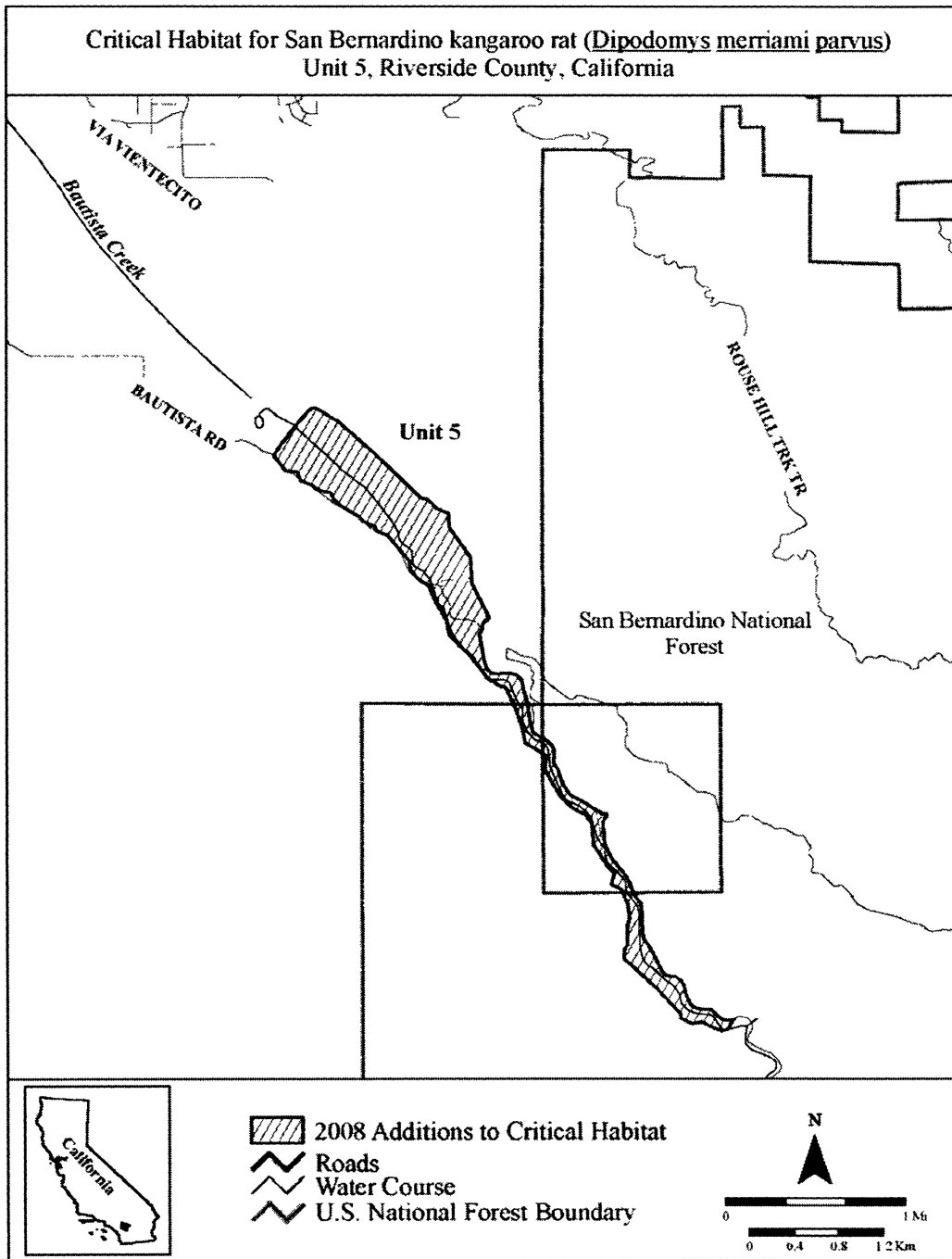
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3724979; 515566, 3725014; 515563,  
3725176; 515585, 3725258; 515569,  
3725376; 515512, 3725522; 515423,  
3725563; 515445, 3725658; 515359,  
3725770; 515318, 3725843; 515255,  
3725935; 515251, 3726068; 515242,  
3726128; 515191, 3726198; 515102,  
3726243; 515020, 3726303; 514956,  
3726382; 514880, 3726509; 514832,  
3726606; 514835, 3726738; 514651,  
3726852; 514616, 3727011; 514559,

3727173; 514486, 3727338; 514484,  
3727338; 514474, 3727357; 514419,  
3727369; 514310, 3727440; 514239,  
3727537; 514197, 3727591; 514140,  
3727666; 514062, 3727731; 513975,  
3727818; 513957, 3727874; 513947,  
3727967; 513917, 3728004; 513915,  
3728014; 513848, 3728129; 513785,  
3728278; 513686, 3728341; 513626,  
3728421; 513610, 3728506; 513416,  
3728735; 513321, 3728770; 513302,  
3728814; 513213, 3728856; 513156,  
3728907; 513016, 3728992; 512940,  
3729056; 512908, 3729119; 512793,  
3729145; 512749, 3729186; 512638,  
3729234; 512603, 3729313; 512502,  
3729322; thence returning to 512399,  
3729457.

Note: Map of Unit 5—Bautista Creek follows:

BILLING CODE 4310-55-P



\* \* \* \* \*

Dated: March 21, 2008.  
**Lyle Lavery,**  
*Assistant Secretary for Fish and Wildlife and  
Parks.*  
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