

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

RIN 1018-AV18

Endangered and Threatened Wildlife and Plants; Clarification of the Economic and Non-Economic Exclusions for the Final Designation of Critical Habitat for Four Vernal Pool Crustaceans and Eleven Vernal Pool Plants in California and Southern Oregon**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Clarification of final critical habitat exclusions.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) provide a clarification of the economic and non-economic exclusions under section 4(b)(2) of the Endangered Species Act of 1973, as amended (Act), in support of the final designation of critical habitat for four vernal pool crustaceans and eleven vernal pool plants in California and Southern Oregon. We are taking this action in response to a court order. This clarification does not change the areas designated as critical habitat for the 15 vernal pool species.

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SUPPLEMENTARY INFORMATION:**Background**

On August 6, 2003, the Service published a final rule designating critical habitat for 4 vernal pool crustaceans and 11 vernal pool plant species in California and southern Oregon (68 FR 46683). In January 2004, Butte Environmental Council and several other organizations filed a complaint alleging that we: (1) Violated both the Act (16 U.S.C. 1531 *et seq.*), and the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) 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. On December 28, 2004, we published in the **Federal Register** a reopening of the comment period to solicit additional comments on the exclusions. On March 8, 2005, the Service published a confirmation of the non-economic exclusions (70 FR 11140) which addressed the first requirement of the October 2004 court-ordered remand. On August 11, 2005, the Service published a final rule (70 FR 46924) addressing the economic exclusions under section 4(b)(2) of the Act which addressed the second requirement of the October 2004 court-ordered remand.

On November 1, 2006, the U.S. District Court for the Eastern District of California issued a Memorandum and Order in *Home Builders Association of Northern California et al. v. U.S. Fish and Wildlife Service et al.* Case No. CIV S-05-0629 WBS-GGH. The court, in its opinion, noted that there were limited deficiencies in the existing rules designating critical habitat for 15 vernal pool plant and invertebrate species, variously listed as threatened or endangered under the Act. Specifically, the court found that the Service had not sufficiently articulated its rationale for excluding two census tracts containing public works projects from critical habitat, and that the Service failed to consider the recovery standard under the Act, pursuant to the Ninth Circuit Court of Appeal's decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) (hereinafter *Gifford Pinchot*). The court remanded the rules to the Service for further action consistent with the court's findings, as well as all applicable laws, and ordered the Service to submit new final critical habitat rules to the **Federal Register** by March 1, 2007. On January 24, 2007, the court clarified its November 2006 Memorandum and Order stating that the Service had adequately considered the recovery standard under the Act, pursuant to *Gifford Pinchot* for the non-economic

exclusions. However, the court confirmed the remand of the economic exclusions for consideration of the recovery benefits of critical habitat pursuant to the *Gifford Pinchot* decision. The court granted an additional 120 days from January 24, 2007 for the Service to address the issues in both orders. This clarification of final critical habitat exclusions complies with the court's November 2006 and January 2007 Memorandum and Orders.

Since the publication of our August 11, 2005 final rule, we have received four petitions to revise critical habitat for the four vernal pool crustaceans and eleven vernal pool plants in California and Southern Oregon. Under the terms of the court ordered remand described above, we have reanalyzed the exclusions from critical habitat and separately evaluated the information contained within the petitions. We have concluded that the petitions do not contain substantial new information that would warrant revision of critical habitat.

Application of Section 4(a)(3) of the Act

There are multiple ways to provide management for species' habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management. Finally, State, local, or private management plans, as well as management under Federal agencies' jurisdictions, can provide needed protections and management making designation of critical habitat unnecessary. When we consider a plan to determine its adequacy in protecting habitat, we consider whether the plan, as a whole, will provide the same level of protection that designation of critical habitat would provide. The plan needs to provide the equivalent protection of critical habitat. In making this determination, we examine whether the plan provides management, protection, or enhancement of the primary constituent elements (PCEs) that is at least equivalent to that provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated

Natural Resource Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management, fish and wildlife habitat enhancement or modification, and wetland protection, enhancement, and restoration where necessary to support fish and wildlife and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not designate 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 integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.”

We consult with the military on the development and implementation of INRMPs for installations with listed species. INRMPs developed by military installations located within the range of the critical habitat designation for the 15 vernal pool species were analyzed for exemption under the authority of section 4(a)(3) of the Act.

Approved INRMPs

Travis Air Force Base

Travis Air Force Base (AFB) has several vernal pool complexes that support the vernal pool fairy shrimp and *Lasthenia conjugens* and that 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 acres (ac) (40 hectares (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 that provides protection of the PCEs for *Neostapfia colusana*, Conservancy fairy shrimp, *Tuctorina mucronata*, and vernal pool tadpole shrimp. The INRMP was approved on April 16, 2003.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMP will provide benefits to the vernal pool fairy shrimp and *Lasthenia conjugens*, *Neostapfia colusana*, Conservancy fairy shrimp, *Tuctorina mucronata*, and vernal pool tadpole shrimp. Therefore, Travis AFB is exempt from inclusion in the designation of critical habitat for the 15 vernal pool species under section 4(a)(3) of the Act. This does not result in a change to the areas currently designated as critical habitat for the 15 vernal pool species.

Beale Air Force Base

Beale Air Force Base (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. A final revised INRMP was approved by the Service on February 26, 2006, and provides a benefit for the vernal pool fairy shrimp and vernal pool tadpole shrimp. The completed INRMP provides for management and conservation of vernal pools within the base and establishes a Vernal Pool Conservation and Management Area to protect vernal pool complexes on the western side of the base. 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 HCMP and base comprehensive plan. The Beale AFB INRMP provides a benefit for the vernal pool fairy shrimp and vernal pool tadpole shrimp.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMP will provide benefits to the vernal pool fairy shrimp and vernal pool tadpole shrimp. Therefore, Beale AFB is exempt from inclusion in the designation of critical habitat for the 15 vernal pool species under section 4(a)(3) of the Act. This does not result in a change to the areas currently designated as critical habitat for the 15 vernal pool species.

Camp Roberts

Camp Roberts has substantial vernal pool complexes that support the vernal pool fairy shrimp. Camp Roberts completed their INRMP in 1999. We will consult with Camp Roberts under section 7 of the Act on the development and implementation of their revised INRMP. The INRMP that is currently in place provides for the vernal pool fairy shrimp and the features essential to its conservation and recovery occurring on Camp Roberts.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMP will provide benefits to the vernal pool fairy shrimp. Therefore, Camp Roberts is exempt from inclusion in the designation of critical habitat for the 15 vernal pool species under section 4(a)(3) of the Act. This does not result in a change to the areas currently designated as critical habitat for the 15 vernal pool species.

Fort Hunter Liggett

Fort Hunter Liggett has several substantial vernal pool complexes that support the vernal pool fairy shrimp. Fort Hunter Liggett completed its INRMP in 2004. The INRMP provides for management and conservation of vernal pool fairy shrimp and vernal pools, and establishes sensitive resource protection areas (SRPA). High quality vernal pools are found in SRPA 3, where current and proposed uses include vehicle travel on existing roads only, foot traffic, maintenance of roads and facilities, landings by helicopters, and habitat improvement projects. Ground disturbing activities are restricted. All other activities require coordination with the Environmental Office to ensure sensitive resources are not adversely affected. Fort Hunter Liggett's INRMP was approved by the Service in a programmatic biological opinion (1–8–02–F–29R) in March 2005.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMP will provide benefits to the vernal pool fairy shrimp on Fort Hunter Liggett. Therefore, Fort Hunter Liggett is exempt from inclusion in the designation of critical habitat for the 15 vernal pool species under section 4(a)(3) of the Act. This does not result in a change to the areas currently designated as critical habitat for the 15 vernal pool species.

Application of Section 4(b)(2) of the Act

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, impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Congressional record is clear that the Secretary is afforded broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered.

Benefits of Designating Critical Habitat

Educational Benefits of Critical Habitat

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the 15 vernal pool species. In general, the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, Habitat Conservation Plans (HCPs) have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second educational benefit: that the designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional educational benefit gained from the designation of critical habitat for the exclusions that we made

in the final rules re-evaluating non-economic and economic exclusions (70 FR 11140, March 8, 2005; 70 FR 46924, August 11, 2005, respectively) because these areas were included in the proposed rule (67 FR 59884, September 24, 2002) as having habitat containing the features essential to the conservation of the species. Consequently, we believe that the educational benefits are already provided, even though these areas are not designated as critical habitat. Additionally, the purpose normally served by the designation, that of informing State agencies and local governments about areas which would benefit from protection and enhancement of habitat for the 15 vernal pool species, is already well established among State and local governments, and Federal agencies in those areas that we excluded from critical habitat in the final rules on the basis of other existing habitat management protections such as those on National Wildlife Refuges, State protected lands, or local government Habitat Conservation Plans.

The information provided in this section applies to all the discussions below concerning the benefits of inclusion and exclusion of critical habitat.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-Federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. This philosophy is evident in Service programs such as Habitat Conservation Plans (HCPs), Safe Harbor Agreements, Candidate Conservation Agreements with Assurances, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to utilize their property, and there is mounting evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

The Department of the Interior's Cooperative Conservation philosophy is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program provide assistance to private landowners in their voluntary efforts to protect threatened, imperiled, and endangered species, including the development and implementation of HCPs.

Conservation agreements with non-Federal landowners (HCPs, contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending protections for species beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can

through coercive methods (61 FR 63854; December 2, 1996).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002). The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation under section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are

likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory measures and terms and conditions to implement such measures are only specified when the proposed action would result in the incidental take of a listed animal or species. Reasonable and prudent alternatives to the proposed Federal action would only be suggested when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Service combined the jeopardy standard with the standard for destruction or adverse modification of critical habitat when evaluating Federal actions that affect currently occupied critical habitat. However, in *Gifford Pinchot* the Court ruled that the two standards are distinct and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we believe the conservation achieved through implementing HCPs or other habitat management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to prevent adverse modification to critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any HCP or management plan that considers enhancement or recovery as the management standard

will often provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans From Critical Habitat

The benefits of excluding lands with HCPs or other approved management plans from critical habitat designation include relieving landowners, communities, counties, and States of any additional regulatory burden that might be imposed by a critical habitat designation. Most HCPs and other conservation plans take many years to develop and, upon completion, are consistent with the recovery objectives for listed species to the extent known that are covered within the plan area. Many conservation plans also provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine conservation efforts and partnerships designed to proactively protect species to ensure that listing under the Act will not be necessary. Designation of critical habitat within the boundaries of management plans that provide conservation measures for a species could be viewed as a disincentive to those entities currently developing these plans or contemplating them in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species are affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning. In fact, designating critical habitat in areas covered by a pending HCP or conservation plan could result in the loss of some species' benefits if participants abandon the planning process, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in plans targeting listed species' conservation.

A related benefit of excluding lands within management plans from critical habitat designation is the unhindered,

continued ability to seek new partnerships with future plan participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. When critical habitat is designated on a managed area, it increases the likelihood that the managers of that area will perceive the designation to be an additional regulatory control over their management plan. If lands within approved management plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop and implement these plans, particularly plans that address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or Natural Community Conservation Plans (NCCP)/HCP application must itself be consulted upon. Such a consultation would review the effects of all activities covered by the HCP which might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3), even without the critical habitat designation. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act and would be reviewed for possibly significant habitat modification in accordance with the definition of harm referenced above.

The information provided in this section applies to the discussion below regarding the benefits of inclusion and exclusion of critical habitat.

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

After consideration under section 4(b)(2) of the Act, the following areas of habitat have been excluded from critical habitat for the 15 vernal pool species: San Joaquin County Multi-Species Habitat Conservation Plan; Western Riverside Multiple Species Habitat Conservation Plan; Santa Rosa Plateau Ecological Reserve; Warm Springs Unit of the Don Edwards National Wildlife Refuge Complex; Kern, San Luis, and Sacramento National Wildlife Refuge Complexes; and the Coleman National Fish Hatchery Complex; Battle Creek, Big Sandy, Grizzly Island, Hill Slough, North Grasslands, and Oroville California Department of Fish and Game Wildlife Areas; 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; Carrizo Plain National Monument; Mechoopda Tribal lands; and other areas where the designation of critical habitat has been determined to show a disproportionately high economic cost (See Economics section below). We believe that: (1) These lands' value for conservation has been addressed by existing protective actions or (2) they are appropriate for exclusion pursuant to the "other relevant factor" provisions of section 4(b)(2) of the Act. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided in the paragraphs that follow.

Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act; (2) there is a reasonable expectation that the conservation management strategies and actions will be implemented based on past practices, written guidance, or regulations; and (3) the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology. We believe that the San Joaquin County Multiple-Species Habitat Conservation Plan and the Western Riverside Multiple Species Habitat Conservation Plan fulfill these criteria, and we excluded non-federal lands covered by these plans that provide for the conservation of the 15 vernal pool species.

San Joaquin County Multiple-Species Habitat Conservation Plan (MSCP)

The San Joaquin County Multiple-Species Habitat Conservation Plan (SJMSCP) encompasses all of San Joaquin County with the exception of Federally-owned lands and the following specific projects: Tracy Hills, the American River Water Resources Investigation Project, Folsom South Canal Connection of the East Bay Municipal Utility District Supplemental Water Supply Program, and the South County Surface Water Supply Project. The SJMSCP identifies the vernal pool fairy shrimp and the vernal pool tadpole shrimp as covered species. The SJMSCP

also identifies and classifies areas where growth and development are expected to occur as 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 limits the amount of vernal pool loss to 15 wetted ac (6 ha) per year up to a maximum cap of 707 wetted ac (286 ha) and 5,894 ac (2,385 ha) of vernal pool grassland over the 50-year life of the plan. Additionally, the SJMSCP requires the preservation of 2 acres and creation of 1 acre of vernal pool habitat for every 1 acre that is impacted; resulting in a total of 3 acres of vernal pool preserves for each impacted acre. Preserves include both wetted surface area and upland grasslands surrounding vernal pools, thereby protecting both the vernal pools and their watersheds. The creation component of this mitigation emphasizes restoration of pre-existing vernal pools, wherever feasible. 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 the SJMSCP, please refer to our August 6, 2003 (68 FR 46684) and March 8, 2005 (70 FR 11140) final designations.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the SJMSCP and have determined that the benefits of excluding the 10 ac (4 ha) of designated critical habitat for vernal pool fairy shrimp protected by the SJMSCP outweigh the benefits of maintaining these lands as critical habitat. As discussed above in detail and outlined below, the SJMSCP will provide for significant preservation and management of habitat for vernal pool fairy shrimp and other listed vernal pool species. Implementation of the SJMSCP will help reach the recovery goals for

each of the species. Additionally, by excluding critical habitat for the listed species, we are enhancing our relationship with these conservation partners and facilitating future conservation partnerships.

Furthermore, implementation of the SJMSCP will contribute to the recovery of vernal pool fairy shrimp and other listed vernal pool species under the Act in part by maintaining and managing the geomorphic and ecological processes of the landscape in large, well-placed blocks of habitat where the vernal pool fairy shrimp are found within the SJMSCP such that vernal pool fairy shrimp are likely to be conserved and therefore persist indefinitely. Since the PCEs required by the listed vernal pool fairy shrimp are similar, the conservation measures outlined in the SJMSCP will benefit both vernal pool fairy shrimp and other listed vernal pool species. These conservation measures include limiting the amount of vernal pool impact to 15 wetted ac (6 ha) per year up to a maximum cap of 707 wetted ac (286 ha) and 5,894 ac (2,385 ha) of vernal pool grassland over the 50-year life of the plan and requiring preservation of 2 acres and creation of 1 acre of vernal pool habitat for every 1 acre that is impacted, resulting in a total of 19,803 acres of vernal pool preserves. Preserves include both wetted surface area and upland grasslands surrounding vernal pools and protecting their watersheds. The creation component of this mitigation emphasizes restoration of pre-existing vernal pools, wherever feasible. The collection of preconstruction survey information is required to ensure that vernal pool compensation habitat reflects vernal pool types that are impacted. Measures to minimize take include conducting preconstruction surveys, excavating, leveling, or filling pools only after they have completely dried, and removing the topmost soil layer from pools prior to impacts for possible use as inoculum of future created vernal pool habitats. Protection and management of the PCEs within the SJMSCP occurs primarily through the formation of vernal pool preserves that protect habitat in perpetuity and maintain the physical and ecological characteristics of occupied habitat within the vernal pool preserves. Designation of critical habitat alone does not achieve recovery or require management of those lands identified in the critical habitat rule; however, management and habitat conservation associated with implementation of the SJMSCP will help provide for recovery of vernal pool

species, even though we are not designating critical habitat in this area. We believe that the recovery benefits of excluding these lands and implementing the SJMSCP outweighs the recovery benefits of including these lands in critical habitat.

We also believe that the benefits of implementation of the SJMSCP outweigh the regulatory benefits of designation of critical habitat under section 7 of the Act. The Service has completed section 7 consultation on the SJMSCP (1–1–00–F–231) and should the lands covered by the SJMSCP be designated as critical habitat, consultations under section 7 would only commit Federal agencies to prevent adverse modification to the critical habitat and not require the conservation, long-term benefits, positive improvements, or enhancement of habitat described in the SJMSCP. Therefore, implementation of the SJMSCP that provides for the conservation of these species provides more benefit than would critical habitat designation of these lands for these species.

We have reviewed and evaluated the proposed exclusion of the portion of Unit 18 within the SJMSCP from the final designation of critical habitat, and have determined that the benefits of excluding the portion of Unit 18 within the SJMSCP outweigh the benefits of including these lands. The SJMSCP contains limits to conversions of vernal pool habitats and requires the collection of preconstruction survey information to ensure that vernal pool compensation reflects pool types that are impacted. Additionally, the SJMSCP contains a variety of measures to avoid, minimize, and mitigate for effects on listed vernal pool species. Mitigation measures to compensate for habitat conversion require 1:1 creation and 2:1 preservation for vernal pool habitats. Measures to minimize take include conducting preconstruction surveys and filling, excavating, or leveling vernal pools only after they have completely dried, and taking the topmost soil layer from pools prior to impacts for possible use in inoculation of future created vernal pool habitats. Of the 42,073 ac (17,026 ha) of suitable habitat for vernal pool crustaceans identified in the SJMSCP, only 707 wetted ac (286 ha) and 5,894 ac (2,385 ha) of vernal pool grassland are proposed for conversion. These specific conservation actions and management for listed vernal pool species and their PCEs as well as the general ecological benefits of large scale HCP planning exceed any conservation value provided as a result of any regulatory protections that may be

afforded through a critical habitat designation.

The exclusion of these lands from critical habitat will also help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the SJMSCP. The benefits of excluding these lands from critical habitat outweigh the minimal benefits of including these lands as critical habitat, including the educational benefits of critical habitat through informing the public of areas important for the long-term conservation of this species, because these educational benefits can still be accomplished from materials provided on our Web site (<http://www.fws.gov/sacramento>). Further, many educational benefits of critical habitat designation have already been achieved through the overall designation and notice and public comment, and will continue to occur whether or not this particular unit were to be designated.

Exclusion Will Not Result in Extinction of the Species

We do not believe that the exclusion of a portion of Unit 18 from the final designation of critical habitat will result in the extinction of the vernal pool fairy shrimp. Overall, this area represents a small portion of the species range and the conservation measures as outlined in the SJMSCP greatly exceed those that may be afforded by the designation of critical habitat.

The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct. The exclusion of these lands from critical habitat leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

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-ac (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 (68 FR 46684) and March 8, 2005 (70 FR 11140) final rules. The strategy implemented by the Western Riverside County MSHCP is to conserve at least 3,123 ac (1,264 ha) of habitat in three core areas representing the three known populations of vernal pool fairy shrimp in Riverside County. Conservation in this area will cover units 34 and 35 and include large blocks of habitat for the vernal pool fairy shrimp. In addition, other areas identified as important to the species will be conserved through the implementation of prescriptions set forth in the plan. The MSHCP requires that prior to construction activities, wetland habitats be identified and surveyed, and if significant impacts are proposed in occupied habitat, that 90 percent of the occupied portions of the site be conserved and therefore continue to provide for the long-term conservation of the vernal pool fairy shrimp.

The Skunk Hollow mitigation bank (the official 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*, which are included as covered species under this regional HCP. The management actions will also 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 associated watershed in western Riverside County. This unit and vernal pool basin are covered by 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 (Western Riverside County MSHCP 2003, pp. C18–26), the Riverside fairy shrimp (Service 2001, p. 29389), *Navarretia fossalis*, and *Orcuttia californica* (Service 1998, p. 9). The vernal pool complex and associated

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 have been 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 all the vernal pool habitat within the area, as well as the PCEs upon which the species relies. 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 vernal pools. In addition, since the entire habitat area is addressed under the HCP, preserve, and mitigation bank areas, and not just habitat with a federal nexus (as is the case with critical habitat), 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 (3,360 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 pool species are known to occur within the complex, including the vernal pool fairy shrimp, Riverside fairy shrimp, Santa Rosa fairy shrimp (*Linderiella santarosae*), *Orcuttia californica*, *Brodiaea filifolia* (Threadleaved brodiaea), and *Eryngium aristulatum* var. *parishii* (San Diego button-celery).

SRPER is owned and managed by CDFG. As a signatory to the Implementing Agreement for the Western Riverside County MSHCP, CDFG oversees the SRPER consistent with the conservation management scheme agreed to by all cooperating agencies and signatories. The CDFG has a broad authority to protect lands and conserve species (Fish and Game Code, sections 2700 et seq.)

Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the Western Riverside County MSHCP and have determined that the benefits of excluding the 10,214 ac (4,134 ha) of

designated critical habitat for the vernal pool and Riverside fairy shrimp protected, directly and indirectly, by the Western Riverside County MSHCP outweigh the benefits of maintaining these lands as critical habitat. Although Riverside fairy shrimp is not addressed by the Western Riverside County MSHCP, it is anticipated that this species will benefit from the Western Riverside County MSHCP because this species occurs in areas also occupied by the listed vernal pool fairy shrimp, which is protected under the Western Riverside County MSHCP. Therefore, we believe that Riverside fairy shrimp will directly receive protection under the Western Riverside County MSHCP. We have determined that the management and protections afforded the vernal pool fairy shrimp in the Western Riverside County MSHCP are adequate for the long-term conservation of these species. 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. As discussed above in detail and outlined below, the Western Riverside County MSHCP will provide for significant preservation and management of habitat for vernal pool fairy shrimp and Riverside fairy shrimp. Implementation of the Western Riverside County MSHCP will help reach the recovery goals for each of the species. Additionally, by excluding critical habitat on these lands for the listed species, we are enhancing our relationship with these conservation partners and facilitating future conservation partnerships by providing an incentive to develop and complete existing and future habitat conservation measures for federally listed species.

Furthermore, implementation of the Western Riverside County MSHCP will contribute to the recovery of vernal pool fairy shrimp and Riverside fairy shrimp under the Act in part by maintaining and managing the geomorphic and ecological processes of the landscape in large, well-placed blocks of habitat where these species are found within the Western Riverside County MSHCP such that the vernal pool fairy shrimp and Riverside fairy shrimp are likely to be conserved and therefore persist indefinitely. Since the PCEs required by the listed vernal pool fairy shrimp and Riverside fairy shrimp are similar, the conservation measures outlined in the Western Riverside County MSHCP will benefit these listed species. The strategy implemented by the Western Riverside

County MSHCP is to conserve at least 3,123 ac (1,264 ha) of habitat in three core areas (representing the three known populations in Riverside County) comprised of large blocks of habitat for the vernal pool fairy shrimp. Designation of critical habitat would not achieve recovery, by itself, or require management of these lands. We believe that the recovery benefits of excluding these lands and implementing the Western Riverside County MSHCP outweighs the recovery benefits of including these lands in critical habitat.

We also believe that the benefits of implementation of the Western Riverside County MSHCP outweigh the regulatory benefits of designation of critical habitat under section 7 of the Act. The Service has completed section 7 consultation on the Western Riverside County MSHCP and should the critical habitat remain in place, consultations under section 7 would only commit Federal agencies to prevent adverse modification to the critical habitat and not require the conservation, long-term benefits, positive improvements, or enhancement of habitat described in the Western Riverside County MSHCP. Therefore, implementation of the Western Riverside County MSHCP that provides for the conservation of these species provides more benefit than would the critical habitat designation of these lands for these species.

Exclusion Will Not Result in Extinction of the Species

We do not believe that the exclusion of Units 34 and 35 from the final designation of critical habitat will result in the extinction of the vernal pool fairy shrimp. The strategy implemented by the Western Riverside County MSHCP is to conserve at least 3,123 ac (1,264 ha) of habitat in three core areas (representing the three known populations in Riverside County) comprised of large blocks of habitat for the vernal pool fairy shrimp. In addition, other areas identified as important to the species will be conserved through the implementation of prescriptions set forth in the plan. Wetland habitats will be identified and surveyed, and, if significant impacts are proposed and survey results are positive, 90 percent of the occupied portions of the property that provide for the long-term conservation value for the vernal pool fairy shrimp will be conserved.

The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct. The exclusion of critical habitat

leaves these protections unchanged from those that would exist if the excluded areas were to be designated as critical habitat.

Relationship of Critical Habitat to National Wildlife Refuge and National Fish Hatchery Lands—Exclusions Under Section 4(b)(2) of the Act

We have determined that proposed critical habitat units on the Don Edwards, Kern, San Luis, and Sacramento 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 National Wildlife Refuges and National Fish Hatchery Lands, please refer to our August 6, 2003 (68 FR 46684) and March 8, 2005 (70 FR 11140) final designations. National Wildlife Refuge and National Fish Hatchery lands are already managed for the conservation of wildlife, and the purpose of these lands is already to preserve natural resource values. Below we will discuss each of the Refuges and Fish Hatcheries separately, but we are providing one balancing discussion for all Service-owned and -managed lands.

Don Edwards National Wildlife Refuge Complex

The Warm Spring Unit of the Don Edwards National Wildlife Refuge Complex has developed a draft Habitat Management Plan (HMP) for vernal pool species and grassland ecosystem conservation. Approximately 275 ac (111 ha) of vernal pool grasslands occur on the Warm Springs Unit. An intra-Service section 7 consultation was conducted on the HMP, and a concurrence memorandum was completed in June 2003 (Service file 1–1–03–I–1852), stating that the management activities would not likely adversely affect the vernal pool tadpole shrimp or *Lasthenia conjugens* (Contra Costa goldfields). The HMP is expected to be finalized in 2008, with the completion of the Comprehensive Conservation Plan (CCP). The HMP establishes various habitat goals and objectives including habitat enhancement, restoration, and monitoring for vernal pool species. The HMP also establishes guidelines for management activities such as grazing, land disturbance activities, pesticide application, exotic plant removal, and water management for the refuge. These and other activities, when carried out as identified in the HMP, will assist in enhancing and conserving the vernal

pool species and the vernal pool grassland ecosystem on the refuge.

Kern National Wildlife Refuge Complex

The Kern National Wildlife Refuge Complex (Kern and Pixley National Wildlife Refuges) has an approved and signed Comprehensive Conservation Plan (CCP) (Service 2004a, pp 109) that provides for the protection and management of all trust resources, including federally listed species and sensitive natural habitats. One goal of the CCP is to protect, preserve, and restore alkali sink, alkali playa, Northern Claypan vernal pool, and grassland habitats within the refuge for the conservation of vernal pool species and grassland ecosystems. To reach this goal, the approved CCP provides for implementing grazing, prescribed burning, monitoring, and status survey programs. The CCP 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, p. 4). In addition, the Kern National Wildlife Refuge Complex will protect vernal pool and other wetland resources through willing seller acquisition, conservation easements, and partnerships to acquire additional natural lands within the approved refuge boundary to provide connectivity between units (Service 2004a, p 14).

San Luis National Wildlife Refuge Complex

Several federally listed species have been documented on the San Luis National Wildlife Refuge Complex (San Luis NWR), including the vernal pool fairy shrimp, vernal pool tadpole shrimp, Conservancy fairy shrimp, *Chamaesyce hooveri* (Hoover's spurge), *Neostapfia colusana* (Colusa grass), and the California tiger salamander (*Ambystoma californiense*). The San Luis NWR has developed and implemented several management activities to provide for the conservation of these species, including: (1) Managing and providing habitat for endangered or sensitive species; (2) maintaining and enhancing the overall biodiversity associated with the existing mix of vegetative communities; and (3) providing an area for compatible, management-oriented research and education/interpretation and recreational programs which may include observation, photography, or hunting. Building upon the concepts originally outlined in the San Joaquin Basin Action Plan, a detailed habitat restoration plan has been developed specifically for the West Bear Creek

Unit. Fish and Wildlife Service staff at San Luis NWR directed all aspects of the project planning, design, and implementation. The habitat restoration plan included construction of wetlands including vernal pools, and planting and restoration of native grassland and woody riparian habitat. In addition, the United States Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the California Department of Fish and Game, under a cooperative agreement called the San Joaquin Basin Action Plan, are in the process of jointly developing a habitat acquisition and wetland enhancement project, including vernal pools, on approximately 23,500 ac (9,510 ha) of lands within the Northern San Joaquin River Basin.

Sacramento National Wildlife Refuge Complex

The Sacramento National Wildlife Refuge Complex (Sacramento NWR) develops an annual Habitat Management Plan for each Refuge within the complex which details actions to be implemented for the year. The plan outlines various resource management and enhancement activities such as noxious weed removal, mowing, and water management for each unit within each refuge and identifies sensitive species concerns if they are present. The refuge also undertakes annual surveying and monitoring of the vernal pool resources on each refuge in the complex. A formal biological opinion was completed for refuge activities in April 1999 (Service file 1-1-98-F-13), stating that the management activities would not jeopardize the Conservancy fairy shrimp, vernal pool fairy shrimp, vernal pool tadpole shrimp, *Orcuttia pilosa* (hairy Orcutt grass), *Tuctoria greenei* (Greene's tuctoria), and *Chamaesyce hooveri*. The Sacramento NWR is also in the process of developing a Comprehensive Conservation Plan (CCP). The CCP is expected to be drafted by August 2007 and finalized by August 2008.

Coleman National Fish Hatchery

The Coleman National Fish Hatchery (Coleman NFH) owns approximately 165 ac (67 ha) of land along Battle Creek in Shasta and Tehama Counties, California. Approximately 13 ac (5 ha) of grassland habitat were proposed as critical habitat for the vernal pool tadpole shrimp and *Orcuttia tenuis* (slender Orcutt grass). No vernal pools or vernal pool species occur on the hatchery lands. However, the grasslands may provide detritus and assist in maintaining the hydrologic functioning of the vernal pools and providing

connectivity for the vernal pool resources in the area. The focus of the Coleman NFH is to provide spawning and rearing facilities for threatened or endangered salmonid species. The Coleman NFH currently does not have any plans to disturb or alter the areas identified as critical habitat in the proposed rule (67 FR 59884, September 24, 2002). Any activities that may impact these areas would be subject to intra-Service section 7 consultation.

Benefits of Exclusion of Refuge and Hatchery Lands Outweigh the Benefits of Inclusion

We have reviewed and evaluated the National Wildlife Refuge and National Fish Hatchery complexes named above and have determined that the benefits of excluding the 42,914 ac (17,367 ha) of proposed critical habitat for the vernal pool species protected, directly and indirectly, within these areas outweigh the benefits of designating these lands as critical habitat. 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 the refuges described above have or are developing comprehensive resource management plans that will provide for protection and management of all public 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. Therefore, any federal activity that is consistent with the terms of the CCP would be very unlikely to have an adverse effect on the primary constituent elements such that the habitat could no longer serve the intended conservation role for the species.

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 would require that funding be diverted from the management of the Refuge and Hatchery resources. The Service believes that the allocation of taxpayer funds to actions that more directly benefit species on the ground provides a more robust conservation benefit to the listed species. Exclusion of these lands will

not increase the likelihood that management activities would be proposed that 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 National Wildlife Refuge and National Fish Hatchery lands from the final critical habitat designation outweigh the benefits of including them.

The lands essential for the conservation of the vernal pool species on refuge and hatchery lands are publicly owned and managed to conserve fish, wildlife, and plants and their habitats, including the 15 species that are the subject of this rule. In addition, environmental education and interpretation are among the priority public uses of the refuge system. As a result, we conclude that the benefits of excluding National Wildlife Refuge and National Hatchery lands from the final critical habitat designation outweigh the benefits of including them. 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 these species. Designation of critical habitat on refuge or hatchery lands would provide redundant, but no additional, conservation value for the vernal pool species in terms of management emphasis, public recognition, or education than currently exists.

Exclusion Will Not Result in Extinction of the Species

We conclude that the benefits of excluding National Wildlife Refuge and National Fish Hatchery lands 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 because these publicly owned lands are managed for the protection of natural resources. The vernal pool and grassland resources on the Don Edwards, Kern, San Luis, and Sacramento National Wildlife Refuge Complexes and Coleman National Fish Hatchery are being managed to protect, conserve, and restore all vernal pool species and their habitat through CCPs, specific management plans, or section 7 terms and conditions. The refuges have developed or are developing long-term ecosystem approaches for managing the vernal pools and vernal pool species occurring on the refuges. By implementing numerous management strategies and monitoring for conserving the vernal pool resources on the refuges and hatchery lands, the long-term

conservation of the vernal pool species is insured.

The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct. The exclusion of these lands from critical habitat leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

In accordance with section 4(b)(2) of the Act, we have excluded lands within the Don Edwards, Kern, San Luis, and Sacramento National Wildlife Refuge Complexes and Coleman National Fish Hatchery Complex from final critical habitat. The exclusion includes portions of Conservancy fairy shrimp Units 2 and 7; longhorn fairy shrimp Unit 2; vernal pool fairy shrimp Units 10, 23, 27a and 27b; vernal pool tadpole shrimp Units 2, 5, 14, and 16; Colusa grass Unit 7b; Contra Costa goldfields Unit 8; Greene's tuctoria Unit 5; hairy Orcutt grass Unit 3; Hoover's spurge Units 3 and 6; and slender Orcutt grass Unit 3.

Relationship of Critical Habitat to State-Managed Ecological Reserves and Wildlife Areas—Exclusions Under Section 4(b)(2) of the Act

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 (68 FR 46684). These areas continue to be managed for the benefit of common and special-status species and their habitats.

We proposed as critical habitat, but excluded 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 (68 FR 46684) and March 8, 2005 (70 FR 11140), final designations.

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, section 1580). They are to be preserved

in a natural condition, or are to be provided some level of protection as determined by the Fish and Game Commission, for the benefit of the general public to observe native flora and fauna and for scientific study or research (Fish and Game Code, section 1584). Wildlife areas are for the purposes of propagating, feeding, and protecting birds, mammals, and fish (Fish and Game Code, section 1525); however, they too provide habitat and are managed for the benefit of listed and sensitive species (CDFG 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, section 1530 and section 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 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 2003)."

Additional Benefits of Exclusion

The consultation requirement associated with critical habitat on the CDFG's ecological reserves and wildlife areas 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 the past, the State of California (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.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the State-managed ecological reserves and wildlife areas named above and have determined that the benefits of excluding the 12,373 ac (5,007 ha) of proposed critical habitat for the vernal pool species protected, directly and indirectly, within these areas outweigh the benefits of designating these lands as critical habitat. 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 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. As discussed above, the State's management activities will provide for significant preservation and management of habitat for the vernal pool species. Implementation of the management activities will help reach the recovery goals for each of the species. Additionally, by excluding these lands from critical habitat for the listed species, we are enhancing our relationship with the State and facilitating future conservation partnerships.

Furthermore, the State's management activities will contribute to the recovery of the vernal pool species under the Act in part by maintaining and managing the geomorphic and ecological processes of the landscape in large, well-placed blocks of habitat where the species are found such that the species are likely to be conserved and therefore persist indefinitely. Designation of critical habitat would not achieve recovery or require management of these lands. We believe that the recovery benefits of excluding these lands and implementing the management actions outlined by the State outweigh the recovery benefits of including these lands in critical habitat.

We also believe that the benefits of State management outweigh the regulatory benefits of designation of critical habitat under section 7 of the Act. Should the critical habitat remain in place, consultations under section 7 would only commit Federal agencies to prevent adverse modification to the critical habitat and not require the conservation, long-term benefits, positive improvements, or enhancement of habitat. 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. For plant species, section 7 consultations are limited to jeopardy and/or adverse modification analysis; biological opinions do not include an incidental take statement, and there are no reasonable and prudent measures issued to minimize the effect of any predicted incidental take. Any measures taken to minimize effects to the plant species or their habitat are completely voluntary. Therefore, the State management actions within the ecological reserves and wildlife areas that provide for the conservation of these species provide more benefit than would a critical habitat designation on these lands for these species.

The benefits of excluding these lands from critical habitat outweigh the benefits of designating these lands as critical habitat, including the educational benefits of critical habitat through informing the public of areas important for the long-term conservation of this species, because these educational benefits can still be accomplished from materials provided on our Web site (<http://www.fws.gov/sacramento>). Many educational benefits of critical habitat designation have been achieved through the designation process, and notice and public comment, and these benefits will continue to occur whether or not these lands are designated as critical habitat.

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 such that the habitat could no longer serve the intended conservation role for the species.

Exclusion Will Not Result in Extinction of the Species

We 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 listed vernal pool species because ecological reserves are set aside to protect threatened or endangered native plants, wildlife, or aquatic organisms or specialized habitat types.

The Reserves are to be preserved in a natural condition, or are to be provided some level of protection as determined by the Fish and Game Commission, for the benefit of the general public to observe native flora and fauna and for scientific study or research (Fish and Game Code, section 1584). 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.

The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct. The exclusion of these lands from critical habitat leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

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. The exclusion includes portions of Conservancy fairy shrimp Units 3 and 7; longhorn fairy shrimp Units 2 and 3; vernal pool fairy shrimp Units 6, 16, 17, 23, 26a, 26c, 27b, 29b, and 30; vernal pool tadpole shrimp Units 11, 16, 18a and 18c; Colusa grass Unit 2; Contra Costa goldfields Unit 4; Hoover's spurge Unit 7a and 7d; Sacramento Orcutt grass Unit 1; San Joaquin Valley Orcutt grass Unit 6a; slender Orcutt grass Units 3 and 5a; Solano grass Unit 2; and fleshy owl's-clover Unit 4.

Relationship of Critical Habitat to Tribal Lands—Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires us to gather information regarding the designation of critical habitat and its effects from all relevant sources, including Indian Pueblos and Tribes. In accordance with the 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" (59 FR 22951); 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.

Mechoopda Trust Lands

The Mechoopda trust lands includes 644 ac (261 ha) of lands in Unit 4. These lands contain suitable habitat for the vernal pool tadpole shrimp. The Mechoopda Environmental Protection Agency is responsible for the management of the Tribe's natural resources, and recognizes the importance of implementing conservation measures that will contribute to the conservation of federally listed species on their lands. The Mechoopda tribe continues to work with the Service on developing and implementing conservation measures to benefit federally listed species on their lands.

Additional Benefits of Exclusion

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" (59 FR 22951); Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments;" and the relevant provision of the Departmental Manual of the Department of the Interior (512 DM 2), we believe that fish, wildlife, and other natural resources on tribal lands are better managed under tribal authorities, policies, and programs than through Federal regulation wherever possible and practicable. Based on this philosophy, we believe that, in many cases, designation of Tribal lands as critical habitat provides very little additional benefit to threatened and endangered species. Conversely, such designation is often viewed by tribes as an unwanted intrusion into tribal self governance, thus compromising the government-to-government relationship essential to achieving our mutual goals of managing for healthy ecosystems upon which the viability of threatened and endangered species populations depend.

In our critical habitat designations, we use the provision outlined in section 4(b)(2) of the Act to evaluate those specific areas that contain the features essential to the conservation of the

species to determine which areas to propose and subsequently finalize (i.e., designate) as critical habitat. On the basis of our evaluation, discussed below, we excluded certain lands from the final designation of critical habitat for the 15 vernal pool species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

The benefits of including Mechoopda trust lands in critical habitat for vernal pool species is low. The total amount of tribal lands is small relative to the remainder of the critical habitat designation and relative to those lands that are currently set aside in conservation banks. Minor educational benefits may arise from the designation of critical habitat on Tribal lands. However, the Mechoopda Environmental Protection Agency, which is responsible for the management of the Tribe's natural resources, recognizes the importance of implementing conservation measures that will contribute to the conservation of federally listed species on their lands and have developed a management plan for sensitive species and habitats (Mechoopda Indian Tribe Environmental Management Plan, March 2003 (EMP)). Any conservation measures implemented by the Mechoopda Environmental Protection Agency will contribute to the recovery of the vernal pool species under the Act. Designation of critical habitat would not achieve recovery or require management of these lands.

The benefits of including the Tribe's land are limited to minor educational benefits. The benefits of excluding these lands from critical habitat outweigh the benefits of designating these lands as critical habitat, including the educational benefits of critical habitat through informing the public of areas important for the long-term conservation of this species, because these educational benefits can still be accomplished from materials provided on our Web site (<http://www.fws.gov/sacramento>). Many educational benefits of critical habitat designation have been achieved through the designation process and notice and public comment, and these benefits will continue to occur whether or not these lands are designated as critical habitat.

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 adverse modification analyses, we expect them to be small. Tribal areas represent a small proportion of vernal pool habitat within

the designation, and the Tribe has demonstrated the willingness and ability to manage these lands in a manner that preserves the lands' conservation benefits as outlined in their EMP. The benefits of excluding these areas from 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. The Mechoopda Environmental Protection Agency recognizes the importance of implementing conservation measures that will contribute to the conservation of federally listed species on their lands. The Mechoopda Tribe has 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.

Exclusion Will Not Result in Extinction of the Species

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 644 ac (261 ha) of 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. Given the importance of our government-to-government relationship with Tribes, the benefit of maintaining our commitment to the Executive Order by excluding these lands outweighs the benefit of including them in critical habitat. For a complete discussion of these Tribal lands, please refer to our August 6, 2003 (68 FR 46684) and March 8, 2005 (70 FR 11140), final designations.

Relationship of Critical Habitat to Conservation Partnerships—Exclusions Under Section 4(b)(2) of the Act

Carrizo Plain National Monument

The Carrizo Plain National Monument (Monument) is cooperatively managed by the Bureau of Land Management (BLM), the Service, and the California Department of Fish and Game and provides habitat for other listed species in addition to the vernal pool fairy shrimp and the longhorn fairy shrimp. In 2005, we reviewed a draft of the Carrizo Plain Resource Management

Plan (CPRMP). At that time, the cooperatively developed CPRMP was based on a conservation standard of long-term conservation and recovery for "listed plants and animals and the natural communities on which they depend." Specific measures and goals outlined in the 2005 draft CPRMP include: (1) Improve and sustain populations of federally and State listed plant and animal species to meet conservation and recovery goals; (2) Implement agency-approved protocols for listed species surveys, take avoidance, and conservation measures; (3) Survey for sensitive resources prior to conducting any activities that have the potential to affect natural communities and species of management concern; (4) Avoid areas supporting the longhorn fairy shrimp and vernal pool fairy shrimp to the greatest extent possible; (5) Require personnel familiar with the sensitive resource to be present during activities which may affect sensitive resources to ensure that activities are conducted in such a way as to avoid and minimize disruption and disturbance of these resources; and (6) Compensate for unavoidable adverse effects (BLM 2005). However, since the publication of our August 2005 final rule (70 FR 46924), the BLM stopped the planning process for the CPRMP to gather additional information and provide for public input for the CPRMP. The BLM expects to restart the CPRMP environmental impact statement planning process in the spring of 2007, and complete all environmental documents within 2 years. We have no reason to believe that the BLM will significantly change the direction of management of listed species, including vernal pool species based on past management of the area and we fully expect the BLM to initiate section 7 consultation on the CPRMP once a draft plan has been developed. In the interim, BLM is actively managing public lands within the Monument in accordance with existing biological opinions and for the recovery of federally listed species (S. Larsen, BLM 2005, p. 1) and is currently managing the area in accordance with the existing Caliente Resource Management Plan (RMP) which includes Carrizo Plain (Saslaw 2007, p. 1). The BLM-managed land overlaps portions of vernal pool fairy shrimp Unit 30 (16,033 ac (6,488 ha)) and longhorn fairy shrimp Unit 3 (16,033 ac (6,488 ha)) in San Luis Obispo County.

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, there would be minimal benefit from designating critical habitat for vernal pool fairy shrimp and longhorn fairy shrimp within the Carrizo Plain National Monument lands because these lands are public trust lands managed for the conservation of natural resources. Critical habitat designation would provide little gain in the way of increased recognition for special habitat values on lands that are expressly managed to protect and enhance those values.

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) for vernal pool fairy shrimp and longhorn fairy shrimp that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of a listed species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed. However, the protection provided is still a limitation on the adverse effects that may occur to designated critical habitat, as opposed to a requirement to affirmatively provide a conservation benefit on those lands.

Another potential benefit of critical habitat would be to signal the importance of these lands to Federal agencies, scientific organizations, State and local governments, and the public to encourage conservation efforts to benefit vernal pool species such as vernal pool fairy shrimp and longhorn fairy shrimp and their habitats. However, the importance of protecting the biological resource values of these lands, including vernal pool fairy shrimp and longhorn fairy shrimp, has already been clearly and effectively communicated to Federal, State, and local agencies and other interested organizations and members of the public through previous and future management planning processes.

Benefits of Exclusion

Excluding lands managed by the BLM within the Carrizo Plain National Monument will preserve the partnerships that we have developed with the BLM and CDFG in the cooperative management of the

Monument. The Service issued a biological opinion in 1996 (Service file 1-1-95-F-149) that covers routine activities on the monument. BLM has demonstrated its proactive commitment to conservation in the development of a previous draft of the CPRMP. Excluding 16,033 ac (6,488 ha) of BLM lands from critical habitat designation recognizes BLM's commitment to conservation and recovery of vernal pool species and other species, and provides additional incentive to BLM to maintain and strengthen the partnerships in the management of the Monument. BLM's commitment to species' conservation in development of a new CPRMP, as outlined in the biological opinion, and subsequent letters and correspondence (Service file 1-1-95-F-149; S. Larsen, BLM 2005, p. 1; Saslaw 2007, p. 1), is in line with the agency's requirement to utilize its programs for the furtherance of the purposes of the Act under section 7(a), and may exceed the conservation value provided by a critical habitat designation alone because BLM is able to focus limited Federal resources toward proactive conservation of sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

The educational benefits of critical habitat, including informing the public of areas that are essential for the long-term survival and conservation of the species, are still accomplished through the BLM's land use planning processes and associated outreach and public participation. Based on our evaluation of previous draft management plans for this area, we expect the new, revised CPRMP to be consistent with previous management strategies and expect that the longhorn fairy shrimp and the vernal pool fairy shrimp will be managed on BLM administered lands under a conservation standard of long-term conservation and recovery for "listed plants and animals and the natural communities on which they depend." We would likely lose the benefits that accrue from the partnerships that have been developed, while realizing no additional conservation benefit, should critical habitat be designated for the two listed crustacean species in the area covered by the CPRMP. For these reasons, we believe that the benefits of exclusion of 16,033 ac (6,488 ha) of land exceed the benefits of designating critical habitat on lands administered by BLM within the Carrizo Plain National Monument within Unit 3 for longhorn fairy shrimp and Unit 30 for vernal pool fairy shrimp.

Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these lands, which are considered to be occupied habitat, will not result in extinction of vernal pool fairy shrimp or longhorn fairy shrimp. Any actions that might adversely affect these two crustaceans would have a Federal nexus and must undergo a consultation with the Service under the requirements of section 7 of the Act. The jeopardy standard of section 7, and routine implementation of habitat conservation through the section 7 process as discussed in the economic analysis, provide assurance that the species will not go extinct. In addition, the two crustacean species are protected from take under section 9 of the Act. The exclusion of these lands from critical habitat leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Additionally, critical habitat is designated for both crustacean species in other areas that are protected from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Vernal pool fairy shrimp are also protected on lands such as conservation banks covered by perpetual conservation easements and managed specifically for listed vernal pool species and their habitat.

The jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct. The exclusion of these lands from critical habitat leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Economics

Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if he determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. Congress has provided this discretionary authority to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required this consideration when designating critical habitat.

In making the following exclusions, we have in general considered that all of the costs and other impacts predicted

in the economic analysis may not be avoided by excluding the areas, because all of the areas in question are currently occupied by the listed species and there will still be requirements for consultation under section 7 of the Act, or for permits under section 10 (henceforth “consultation”), for any take of these species, and other protections for the species exist elsewhere in the Act and under State and local laws and regulations. In conducting economic analyses, we are guided by the Tenth Circuit Court of Appeal’s ruling in the *New Mexico Cattle Growers Association* case (248 F.3d at 1285), which directed us to consider all impacts, “regardless of whether those impacts are attributable co-extensively to other causes.” As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, some elements of the analysis may also overstate some costs.

Conversely, the Ninth Circuit has recently ruled (*Gifford Pinchot*, 378 F.3d at 1071) that the Service’s regulations defining “adverse modification” of critical habitat are invalid because they define adverse modification as affecting both survival and recovery of a species. The Court directed us to consider that determinations of adverse modification should be focused on impacts to recovery. While we have not yet proposed a new definition for public review and comment, compliance with the Court’s direction may result in additional costs associated with the designation of critical habitat (depending upon the outcome of the rulemaking). In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the Act, and should encompass costs that would be considered and evaluated in light of the *Gifford Pinchot* ruling.

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific 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 such exclusions

outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effects of the designation. The draft analysis was made available for public review on June 30, 2005 (70 FR 37739). We accepted comments on the draft analysis until July 20, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the 15 vernal pool species. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The draft economic analysis published on June 30, 2005 (70 FR 37739) reanalyzed the economic effects to the 35 counties in which we had proposed designating critical habitat. The counties most impacted by the critical habitat designation to the new housing industry include Sacramento

(\$374 million), Butte (\$145 million), Placer (\$120 million), Solano (\$87 million), Fresno (\$43 million), Stanislaus (\$33 million), Madera (\$32 million), Monterey (\$29 million), Shasta (\$20 million), Tehama (\$19 million), and Merced (\$16 million). Further, economic impacts are unevenly distributed within these counties. The analysis was conducted at the census tract level, resulting in a high degree of spatial precision compared to our previous economic analysis (March 14, 2003; 68 FR 12336), in which economic effects could not be deconstructed below the county level.

In the base scenario where critical habitat reduces the amount of new housing, designation of vernal pool critical habitat results in nearly \$1.0 billion in losses to consumers and producers between 2005 and 2025. In the event that on-site avoidance can be accomplished through density increases alone, welfare losses from vernal pool critical habitat would be \$820 million over the same time period.

Sacramento County is expected to experience the largest economic impacts from critical habitat—nearly \$375 million in consumer and producer surplus losses. As shown in the map of impacts in Sacramento County, these impacts are concentrated in census tracts close to downtown Sacramento. Economic impacts generally decline in those census tracts that are progressively farther from the city center. This pattern is generally repeated in other counties.

A copy of the final economic analysis with supporting documents may be obtained by contacting U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Application of Section 4(b)(2) of the Act—Economic Exclusion to 23 Census Tracts and Two Public Sector Projects

We have considered designating, but have excluded from critical habitat for 3 of the 4 listed vernal pool crustaceans and 11 listed vernal pool plants, the 23 census tracts and counties listed in Table 1. No critical habitat for longhorn fairy shrimp is contained within any of the 23 census tracts. Therefore, land occupied by 14 of the 15 listed vernal species is affected by exclusion of critical habitat for economic reasons.

TABLE 1.—EXCLUDED CENSUS TRACTS, ASSOCIATED SPECIES, AND COSTS

Census tract	Species	County	Welfare impact in draft EA (\$)	Adjustments after public comment and review	Total adjusted cost
06067008701	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Orcuttia viscida</i> , <i>Orcuttia tenuis</i> .	Sacramento	304,224,384	– 70,565,264	233,659,120
06007000900	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Limnanthus floccosa</i> ssp. <i>californica</i> .	Butte	88,974,848	0	88,974,848
06061021301	Vernal pool fairy shrimp	Placer	74,583,712	0	74,583,712
06061021303	Vernal pool fairy shrimp	Placer	37,184,144	0	37,184,144
06095252309	<i>Lasthenia conjugens</i> , Vernal pool tadpole shrimp, Vernal pool fairy shrimp.	Solano	28,771,992	0	28,771,992
06095253500	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, Conservancy fairy shrimp, <i>Tuctoria mucronata</i> , <i>Lasthenia conjugens</i> , <i>Neostapfia colusana</i> .	Solano	27,448,252	0	27,448,252
06053014103	<i>Lasthenia conjugens</i>	Monterey	26,854,790	0	26,854,790
06067009315	<i>Orcuttia viscida</i> , <i>Orcuttia tenuis</i> , Vernal pool tadpole shrimp, Vernal pool fairy shrimp.	Sacramento	24,236,570	0	24,236,570
06019005515	Vernal pool fairy shrimp, <i>Orcuttia inaequalis</i> , <i>Castilleja campestris</i> ssp. <i>succulenta</i> .	Fresno	22,912,350	0	22,912,350
06067009200	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Orcuttia viscida</i> , <i>Orcuttia tenuis</i> .	Sacramento	21,195,492	0	21,195,492
06099000102	Vernal pool fairy shrimp, <i>Castilleja campestris</i> ssp. <i>succulenta</i> , <i>Chamaesyce hooveri</i> , <i>Tuctoria greenii</i> , <i>Neostapfia colusana</i> .	Stanislaus	16,931,104	0	16,931,104
06007000101	Vernal pool fairy shrimp	Butte	16,364,906	0	16,364,906
06067008600	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Orcuttia tenuis</i> .	Sacramento	16,254,806	0	16,254,806
06019005511	<i>Orcuttia inaequalis</i> , <i>Castilleja campestris</i> ssp. <i>succulenta</i> , Vernal pool fairy shrimp.	Fresno	13,001,144	0	13,001,144
06039000105	Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Tuctoria greenii</i> , <i>Orcuttia pilosa</i> , <i>Castilleja campestris</i> ssp. <i>succulenta</i> , <i>Orcuttia inaequalis</i> .	Madera	12,117,652	0	12,117,652
06007001400	Conservancy fairy shrimp, Vernal pool tadpole shrimp, Vernal pool fairy shrimp, <i>Limnanthus floccosa</i> ssp. <i>californica</i> , <i>Tuctoria greenii</i> , <i>Orcuttia pilosa</i> , <i>Chamaesyce hooveri</i> , <i>Orcuttia tenuis</i> .	Butte	11,405,310	+2,436,015	13,841,325
06089010802	<i>Orcuttia tenuis</i>	Shasta	10,167,456	0	10,167,456
06099000101	Vernal pool fairy shrimp, <i>Neostapfia colusana</i> .	Stanislaus	9,925,463	0	9,925,463
06007002200	Vernal pool tadpole shrimp, <i>Limnanthus floccosa</i> ssp. <i>californica</i> , <i>Tuctoria greenii</i> , <i>Orcuttia pilosa</i> , <i>Chamaesyce hooveri</i> .	Butte	8,825,428	0	8,825,428
06095252502	<i>Lasthenia conjugens</i>	Solano	7,993,725	0	7,993,725
06047001901	Vernal pool fairy shrimp, Conservancy fairy shrimp, Vernal pool tadpole shrimp, <i>Orcuttia inaequalis</i> , <i>Neostapfia colusana</i> , <i>Castilleja campestris</i> ssp. <i>succulenta</i> .	Merced	5,759,870	+10,000,000	15,759,870
06103000900	Vernal pool fairy shrimp, Conservancy fairy shrimp, Vernal pool tadpole shrimp, <i>Tuctoria greenii</i> , <i>Orcuttia pilosa</i> , <i>Orcuttia tenuis</i> , <i>Chamaesyce hooveri</i> .	Tehama	5,359,834	+6,093,965	11,453,799
06061020902	Vernal pool fairy shrimp	Placer	2,462,844	***	74,583,712
Total	779,373,528	740,920,792

***Placer Vineyards straddles two census tracts; impacts for tracts 06061020902 and 06061021301 were aggregated in the final analysis. See the Summary of Comments and Recommendations section in the August 11, 2005 final rule (70 FR 46924).

The notice of availability of the revised draft economic analysis (June 30, 2005, 70 FR 37739) solicited public comment on the potential exclusion of

the 20 highest cost areas. As we finalized the economic analysis, we identified high costs associated with the critical habitat designation to public

projects in Merced and Tehama County. These public projects were the development of the University of California (UC) Merced campus and the

widening of Highway 99 in Tehama County. The final economic analysis indicates additional costs in census tracts in which these projects were located were \$10,000,000 for UC Merced and \$6,093,965 for Highway 99. On the basis of the significance of these costs, we determined these two census tracts should be excluded from critical habitat. In addition, information received during the comment period indicated that the Placer Vineyards Specific Plan was located in two census tracts in Placer County, one of which was identified in the draft economic analysis as being in one of the 20 highest cost areas, and one of which was not. As a result, impacts for the two affected census tracts were aggregated in the final analysis, which significantly increased the costs in the second census tract (See the Summary of Comments and Recommendations section in the August 11, 2005 (70 FR 46924) final rule). For this reason, it too, was excluded from the final critical habitat designation.

Benefits of Inclusion of the 23 Excluded Census Tracts and 2 Public Sector Projects

The areas excluded are currently occupied by one or more of the 3 listed vernal pool crustaceans or the 11 listed vernal pool plants, as shown in Table 1. If these areas were designated as critical habitat, any actions with a Federal nexus which may adversely affect the critical habitat would require a consultation with us. All but three of the census tracts described in Table 1 are currently occupied by one or more of the crustacean species, and, therefore, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act. For the three units occupied only by one or more of the plant species, there is a requirement for a jeopardy analysis to ensure Federal actions are not likely to jeopardize the continued existence of the species. In addition to the consultation requirements outlined above, if these areas were included in the critical habitat designation, the primary constituent elements in these areas would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that

proposed Federal actions avoid likely jeopardy to the species' continued existence. The additional conservation standard would assure that lands designated as critical habitat would provide for species recovery. In other words, there may be discretionary Federal actions that would not trigger the jeopardy standard, but would adversely modify critical habitat. As a result there may be additional avoidance of impacts to areas with critical habitat through the conservation standard of adverse modification, instead of just the jeopardy standard through section 7.

We determined in the economic analysis that designation of critical habitat could result in approximately \$800,000,000 in costs in these 23 census tracts, the majority of which are directly related to residential development impacts. We believe that the potential decrease in residential housing development that could be caused by the designation of critical habitat for the 15 vernal pool species would minimize impacts to and potentially provide some protection to the species, the vernal pool complexes where they reside, and the physical and biological features essential to their conservation (i.e., their primary constituent elements). Thus, this decrease in residential housing development would directly translate into a conservation benefit to the species if these areas were included in the critical habitat designation.

Another possible benefit of a critical habitat designation is education of landowners and the public regarding the potential conservation value of these areas. This may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this education benefit has largely been achieved, or is being achieved in equal measure, by other means. There have been three previous iterations of the critical habitat process for these lands, which has included both public comment periods and litigation, all with accompanying publicity. In addition, we published the *Draft Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon* in October 2004, and the final recovery plan on June 14, 2006. The draft recovery plan identified areas that are important for the conservation of each of the 15 listed vernal pool species. Upon publication of the draft recovery plan, we held numerous workshops throughout the State to educate the public about recovery strategies for the species covered by the plan, including all 15 of the listed vernal pool species that are the subject of this document. In

addition to identifying specific areas that are important for the conservation of the 15 listed vernal pool species, the final recovery plan details the actions necessary to achieve self-sustaining populations of each listed species in the wild so that they will no longer require protection under the Act. The designation of critical habitat and the identification of vernal pool recovery core areas were based on similar methodologies and criteria of using vernal pool regions as classified by Keeler-Wolf *et al.* (1998, pp. 1–159) as a base for determining the extent of the respective recovery or critical habitat areas. The vernal pool regions encompass the range and variation of vernal pool habitats which are the focus of the recovery plan for habitat protection and conservation efforts. As a result of using similar methodologies and criteria the critical habitat boundaries make up a large part of the "Zone 1" core areas identified in the final recovery plan and are an intricate part of recovery for the 15 vernal pool species. The final recovery plan provides information geared to the general public, landowners, and agencies about areas that are important for the conservation of each listed vernal pool species and what actions they can implement to further the conservation of vernal pool species within their own jurisdiction and capabilities. The final recovery plan also contains provisions for ongoing public outreach and education as part of the recovery process.

As implied above, another possible benefit of a critical habitat designation is its contribution to the recovery of threatened and endangered species. Critical habitat is defined in section 3 of the Act 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. In identifying those lands, the Service must consider the recovery needs of the species and its habitat, which, if managed, could provide for the survival and recovery of the species. Furthermore, once critical habitat has been designated, Federal agencies must consult with the Service under section 7 of the Act to ensure that their actions will not either adversely modify

designated critical habitat or jeopardize the continued existence of the species. As noted previously, in the Ninth Circuit's *Gifford Pinchot* decision, the Court ruled that the jeopardy and adverse modification standards are distinct, and that adverse modification evaluations require consideration of impacts to the recovery of species. Thus, through the section 7(a)(2) consultation process, critical habitat designations provide recovery benefits to species by ensuring that Federal actions will not destroy or adversely modify designated critical habitat. Critical habitat also assists in focusing recovery efforts outlined in recovery plans by identifying, developing and potentially protecting core areas which will assist in conserving the species.

In summary, we believe that inclusion of the 23 census tracts and 2 public sector projects as critical habitat would provide some additional Federal regulatory benefits for the species. However, that benefit is limited to some degree by the fact that the habitat is occupied by the species, and therefore Federal agencies must in any case consult with the Service over any action which may affect one or more of the 14 listed vernal pool species within those 23 census tracts. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple opportunities for public notice and comments that accompanied the development of the 15 vernal pool species critical habitat regulations, publicity over the prior litigation, and public outreach associated with the development of the draft recovery plan, and ultimately the implementation of the final recovery plan, for vernal pool species.

Benefits of Exclusion of the 23 Excluded Census Tracts and 2 Public Sector Projects

The economic analysis conducted estimates that the costs associated with designating these 23 census tracts would be approximately \$740,920,792. These costs would be associated with each of the 14 listed vernal pool species in amounts shown in Table 1. By excluding these census tracts, some or all of these costs will be avoided. The exclusion of two important public-sector projects, UC Merced in Merced County and the widening of Highway 99 in Tehama County, will avoid additional costs associated with critical habitat designation.

Benefits of Exclusion Outweigh the Benefits of Inclusion of the 23 Census Tracts and 2 Public Sector Projects

We believe that the benefits of excluding these lands from the designation of critical habitat-avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis-exceed the educational, regulatory, and recovery benefits which could result from including those lands in the designation of critical habitat.

We have evaluated and considered the potential economic costs on the residential development industry and two public sector projects relative to the potential benefit for the 14 vernal pool species and their primary constituent elements that could result from the designation of critical habitat. We believe that the potential economic impact of up to approximately \$800 million on the development industry, \$10 million on the University of California, and over \$6 million on the Federal and State transportation projects in Tehama County significantly outweighs the potential conservation and protective benefits for the species and their primary constituent elements derived from residential development, highways and transportation networks, and higher educational facilities not being constructed as a result of this designation.

We also believe that excluding these lands, and thus helping landowners avoid any additional costs that would result from compliance with the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures, which provide greater conservation benefits than would result from designation of critical habitat—even in the post-*Gifford Pinchot* environment—because designation requires only that there be no adverse modification resulting from actions with a Federal nexus. We therefore find that the benefits of excluding these areas from the designation of critical habitat outweigh the benefits of including them in the designation.

The recently completed (December, 15, 2005) recovery planning process provided equivalent educational value to the public, State and local governments, scientific organizations, and Federal agencies in providing information about habitat that is essential to the conservation of the 3 vernal pool crustacean species and 11 vernal pool plants. The process also facilitated conservation efforts through heightened public awareness of the

plight of the listed species. The final recovery plan contains explicit objectives for ongoing public education, outreach, and collaboration at local, State, and Federal levels, and between the private and public sectors, in recovering the four listed crustaceans. Furthermore, as previously described, we believe the educational benefits of designation were largely achieved through the multiple public notification processes associated with the previous and current iterations of the vernal pool species critical habitat rule.

The identification of those lands that may need management and have features that are essential for the conservation of the species and that can provide for the recovery of a species is expected to contribute to the process of recovering the species. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine lands essential for conservation as well as identify the primary constituent elements or features essential for conservation on those lands. The designation process includes peer review and public comment on the identified features and lands. This process is valuable to landowners and managers in developing conservation management plans for identified lands, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. This process is also valuable to Federal action agencies as they go through processes to fund, authorize, or carry out actions on any lands identified within a critical habitat rule, even if those lands end up being excluded from the final rule, particularly in areas containing occupied habitat where Federal agencies will initiate consultation under section 7 of the Act.

For example, the UC Merced campus is covered by a programmatic biological opinion issued by the Service in 2002 (1-1-02-F-0107). The biological opinion requires the development and implementation of a conservation strategy that incorporates conservation measures for listed species including vernal pool plants and crustaceans. The conservation strategy is still under development and will be included in the Environmental Impact Statement (EIS) currently under preparation by the U.S. Army Corps of Engineers. The conservation strategy includes monitoring and adaptive management measures on some of the preserved lands that is consistent with the implementation of the recently published Recovery Plan for Vernal Pool Ecosystems of California and Southern

Oregon. In addition, approximately 25,964 ac (10,507 ha) of vernal pool habitat has been conserved through conservation easements or fee title that contribute to recovery of the species. Therefore, we believe that the exclusion of the UC Merced campus will facilitate long-term conservation and recovery of listed vernal pool species.

The economic costs associated with the designation of critical habitat for the 15 vernal pool species on a public transportation project in Tehama County totals over \$6 million. The project includes widening approximately 5 mi (8 km) of State Route 99 which is a major transportation corridor for the State. The projected project start date for the project is in 2012, and is currently in the planning and development stage. The surplus cost identified for this census tract totals nearly \$5.4 million. The cost including public projects for Tehama County in census tract 0610300900 totals over \$11.4 million which places this census tract within the top 23 highest cost tracts. Tehama County as a whole has been identified as being in the top ten counties with the highest county-level welfare impacts and has the second highest percentage (1.9 percent) of economic impacts of all counties when looking at the relationship between the amount of surplus lost and the aggregate household income (CRA International 2005, p. 74). When evaluating the costs for Tehama County as a whole (transportation costs (over \$6 million), census tract costs (over \$5.4 million), and surplus loss (\$18.8 million) compared to aggregate income (over \$1 billion)), we have determined that exclusion of critical habitat for the Conservancy fairy shrimp, vernal pool fairy shrimp, vernal pool tadpole shrimp, hairy Orcutt grass, Hoover's spurge, Greene's tuctoria, and slender Orcutt grass based on these factors is appropriate.

We believe that exclusion of these units within the 23 census tracts and 2 public sector projects will not hinder recovery of the 15 vernal pool species. Other vernal pool complexes, including areas identified as critical habitat, in the general area of those excluded are occupied by one or more of the listed vernal pool species, contain functioning PCEs, and would therefore contribute to recovery. Sufficient habitat would be conserved in other areas designated as critical habitat and in other areas, such as perpetual conservation easements, to contribute to the recovery of the 15 listed vernal pool species.

Exclusion Will Not Result in Extinction of the Species

Conservancy Fairy Shrimp, Vernal Pool Fairy Shrimp, Vernal Pool Tadpole Shrimp

We believe that exclusion of these lands, which we consider to be occupied habitat, will not result in the extinction of Conservancy fairy shrimp, vernal pool fairy shrimp, or vernal pool tadpole shrimp. Actions which might adversely affect these three crustaceans are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7 of the Act, and routine implementation of habitat preservation through the section 7 process, as discussed in the economic analysis, provide assurance that the species will not go extinct. In addition, the three crustaceans are protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is designated for all three crustacean species in other areas that are accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, all species occur on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values; this provides protection from extinction and contributes to the recovery of the listed vernal pool crustaceans. For example, Conservancy fairy shrimp is protected on lands, such as conservation banks and other natural areas protected by perpetual conservation easements and managed specifically for the species (e.g., Viera-Sandy Mush, Vina Plains). The species also occurs on lands managed to protect and enhance wetland values under the Wetlands Reserve Program of the Natural Resources Conservation Service of the U.S. Department of Agriculture. Vernal pool fairy shrimp are protected on lands, such as conservation banks, protected by perpetual conservation easements and managed specifically for the species and its habitat (e.g., Arroyo Seco, Bryte Ranch, Clay Station, Laguna Creek, Sunrise Douglas, Aqua Fria, Viera Sandy Mush, Kennedy Table, Dolan Ranch, Dove Ridge, Wildlands—Sheridan, Stillwater Plains, Campbell Ranch, and Fitzgerald Ranch; Sacramento NWR Complex, San Francisco NWR, and San Luis NWR Complex; and Vina Plains Ecological Reserve, Jepson Plains, Grasslands

Ecological Area, Stone Corral Ecological Preserve, and Howard Ranch; and the lands preserved and protected through the UC Merced project). Vernal pool tadpole shrimp occur on lands with perpetual conservation easements managed explicitly for the species on conservation banks (e.g., Stillwater Plains, Campbell Ranch, Arroyo Seco, Bryte Ranch, Clay Station, Laguna Creek, Sunrise Douglas, Viera-Sandy Mush, Kennedy Table, Dolan Ranch, Dove Ridge, Wildlands—Sheridan, and Fitzgerald Ranch; Sacramento NWR Complex, San Francisco NWR, and San Luis NWR Complex; and Nature Conservancy easements, Vina Plains Ecological Reserve, Jepson Plains, Grasslands Ecological Area, Dale's Lake Ecological Reserve, Stone Corral Ecological Preserve, and Big Table Mountain Ecological Preserve). Therefore these lands with perpetual conservation easements will contribute to the conservation and recovery of Conservancy fairy shrimp, vernal pool fairy shrimp, and vernal pool tadpole shrimp.

Eleven Listed Vernal Pool Plant Species

We believe that exclusion of the 23 census tracts and 2 public sector projects, which we consider to be occupied habitat, will not result in extinction of any of the 11 listed vernal pool plants. Federal actions that might adversely affect these 11 listed plants would thus undergo a consultation with the Service under the requirements of section 7 of the Act. The jeopardy standard of section 7 of the Act, and routine implementation of habitat preservation as part of the section 7 process, as discussed in the draft economic analysis, provide insurance that the species will not go extinct. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is designated for all 11 species in other areas that are accorded the protection from adverse modification by federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot*. Additionally, all species occur on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values. This protection and management will contribute to the recovery of the 11 listed vernal pool plant species. These factors acting in concert with the other protections provided under the Act for these lands, absent designation of critical habitat on them, and acting in concert with protections afforded each species by the

designated critical habitat for each species, lead us to find that exclusion of these 23 census tracts and 2 public sector projects will not result in extinction of any of these 11 listed vernal pool plants. *Limnanthes floccosa* ssp. *californica* occurs on land protected by conservation easements on several small reserves in Butte County and at the Dove Ridge Conservation Bank.

Lasthenia conjugens exists on protected lands on San Francisco Bay National Wildlife Refuge, Fort Ord, Travis Air Force Base, and the State Route 4 Preserve. *Chamaesyce hooveri* occurs on the Sacramento NWR Complex, the Vina Plains Ecological Preserve, Stone Corral Ecological Reserve, and the Bert King Ranch. *Castilleja campestris* spp. *succulenta* occurs on protected lands within the Big Table Mountain Ecological Reserve and the Big Table Mountain Preserve, the Kennedy Table Conservation Bank, and the Flying M Ranch (Merced Co.). *Neostapfia colusana* occurs on protected lands within the Jepson Prairie Preserve and the Flying M Ranch. *Tuctoria greenei* occurs on protected lands within the Vina Plains Preserve and on the Sacramento NWR Complex. *Orcuttia pilosa* occurs on protected lands within the Vina Plains Preserve and on the Sacramento NWR Complex. *Orcuttia viscida* occurs on protected lands within the Phoenix Field Ecological Reserve, the Arroyo Seco Conservation Bank, and the Sunrise Douglas preserve. *Orcuttia inaequalis* occurs on protected lands on the Flying M Ranch and on an ecological reserve managed by the California Department of Fish and Game. *Orcuttia tenuis* occurs on protected lands at the Boggs Lake Preserve, the Vina Plains Preserve, the Dale's Lake Ecological Reserve, the Stillwater Plains Conservation Banks, the Arroyo Seco Conservation Bank, and the Sunrise Douglas preserve. *Tuctoria*

mucronata occurs on protected land on the Jepson Prairie Preserve.

References Cited

A complete list of all reference cited herein is available upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 23, 2007.

Todd Willens,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7-10448 Filed 5-30-07; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

RIN 0648-XA57

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

ACTION: Temporary rule; inseason retention limit adjustment.

SUMMARY: NMFS has determined that the Atlantic tunas General and Highly Migratory Species (HMS) Angling categories daily Atlantic bluefin tuna (BFT) retention limits should be adjusted for the 2007 fishing year, which begins on June 1, 2007, and ends December 31, 2007. The adjustment will allow for maximum utilization of the General category June through August

time-period subquota, and will enhance recreational BFT fishing opportunities aboard HMS Angling and Charter/Headboat vessels in the early portion of the season. Therefore, NMFS increases the daily BFT retention limits to provide enhanced commercial and recreational fishing opportunities in all areas without risking overharvest of the General and Angling category quotas.

DATES: The effective dates for the BFT daily retention limits are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Brad McHale, 978-281-9260.

SUPPLEMENTARY INFORMATION:

Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories.

NMFS has proposed 2007 fishing year specifications to set BFT quotas and to set effort controls for the General category and Angling category (72 FR 16318, April 4, 2007). NMFS intends to publish a notice in the **Federal Register** to finalize the specifications and effort controls in June 2007.

Daily Retention Limits

Pursuant to this action, the daily BFT retention limits for the Atlantic tunas General, HMS Angling, and HMS Charter/Headboat categories are as follows:

TABLE 1. EFFECTIVE DATES FOR RETENTION LIMIT ADJUSTMENTS

Permit Category	Effective Dates	Areas	BFT Size Class Limit
Atlantic tunas General and HMS Charter/Headboat (while fishing commercially)	June 1 through July 31, 2007, inclusive, or through the effective date of the final 2007 BFT specifications, whichever occurs first.	All	Three BFT per vessel per trip, measuring 73 inches (185 cm) curved fork length (CFL) or greater.
HMS Angling and HMS Charter/Headboat (while fishing commercially)	June 1 through July 31, 2007, inclusive, or through the effective date of the final 2007 BFT specifications, whichever occurs first.	All	One school BFT measuring 27 inches to less than 47 inches CFL (69 cm to less than 119 cm) and two large school/small medium BFT, measuring 47 inches to less than 73 inches CFL (119 cm to less than 185 cm) per vessel.