

### List of Subjects in 48 CFR Parts 1511 and 1552

Environmental protection,  
Government procurement.

#### The Withdrawal

In consideration of the foregoing, the Notice of Proposed Rulemaking, OARM Docket No. 2002-0001, as published in the **Federal Register** on January 22, 2003 (68 FR 51737), is hereby withdrawn.

Dated: September 30, 2004.

**Judy S. Davis,**

Director, Office of Acquisition Management.  
[FR Doc. 04-22483 Filed 10-5-04; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AJ11

#### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Atriplex coronata* var. *notatior* (San Jacinto Valley crownscale)

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), herein address the proposed designation of critical habitat for *Atriplex coronata* var. *notatior* (San Jacinto Valley crownscale) pursuant to the Endangered Species Act of 1973, as amended (Act). We identified 15,232 (ac) (6,167 hectares (ha)) of habitat essential for the conservation of *A. coronata* var. *notatior*. In developing this proposal, we evaluated those lands determined to be essential to the conservation of *A. coronata* var. *notatior* to ascertain if any specific areas are appropriate for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. All habitat essential for the conservation of *A. coronata* var. *notatior* is either within our estimate of the areas to be conserved and managed by the approved Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) in Riverside County, California, existing public and quasi-public lands plus additional conserved lands, or within areas where the MSHCP will ensure that future projects will not adversely alter essential hydrological processes. On the basis of our evaluation of the conservation measures afforded *A. coronata* var. *notatior* under the

Western Riverside MSHCP, we have concluded that the benefits of excluding the lands covered by this MSHCP outweigh the benefits of including them as critical habitat. Thus, all areas essential for the conservation of *A. coronata* var. *notatior* within the conservation area of the approved Western Riverside MSHCP have been excluded from the designation of critical habitat for this species pursuant to section 4(b)(2) of the Act. Because all essential habitat for this taxon is within the conservation area of the Western Riverside MSHCP, no lands are being proposed as critical habitat for *A. coronata* var. *notatior*. This exclusion will not result in the extinction of *A. coronata* var. *notatior*. We are specifically seeking comment on the determination to exclude all habitat essential for the conservation of this taxon from designation as critical habitat.

**DATES:** We will accept comments from all interested parties until December 6, 2004. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by November 22, 2004.

**ADDRESSES:** Written comments and materials may be submitted to us by one of the following methods:

1. You may submit written comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California, 92009.
2. You may hand-deliver written comments and information to our Carlsbad Fish and Wildlife Office at the above address, or fax your comments to (760) 431-9618.
3. You may send comments by electronic mail (e-mail) to [FW1CFWO\\_SJVC@fws.gov](mailto:FW1CFWO_SJVC@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

Comments and materials received, as well as supporting documentation used in the preparation of this notice, will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92009 (telephone (760) 431-9440).

**FOR FURTHER INFORMATION CONTACT:** Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92009 (telephone (760) 431-9440 or FAX (760) 431-9440).

**SUPPLEMENTARY INFORMATION:**

#### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposal are hereby solicited. We particularly seek public comment on whether we have appropriately identified all areas essential for the conservation of *Atriplex coronata* var. *notatior*, and on the appropriateness of excluding lands within the Western Riverside MSHCP from designation as critical habitat. Because all areas essential for the conservation of the taxon occur within the MSHCP, the result is that no lands will be proposed for designation as critical habitat for *A. coronata* var. *notatior*. If new information indicates that areas excluded from critical habitat should be designated or that there are additional areas essential for the conservation of the taxon, we may designate critical habitat as appropriate (50 CFR 424.12(g)). Comments are also sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species resulting from the designation;

(2) Specific information on the amount and distribution of *Atriplex coronata* var. *notatior* habitat, and what habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in essential habitat areas and their possible impacts on the subject areas;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposal and, in particular, any impacts on small entities; and

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

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to [FW1CFWO\\_SJVC@fws.gov](mailto:FW1CFWO_SJVC@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn:

San Jacinto Valley crownscale" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760/431-9440. Please note that the Internet address *FW1CFWO\_SJVC@fws.gov* will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

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

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

to the species most in need of protection.

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 36 percent (445 species) of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force v. United State Fish and Wildlife Service*, has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

#### **Procedural and Resource Difficulties in Designating Critical Habitat**

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

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent

(NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA), all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

#### **Background**

Herein we discuss only those topics directly relevant to the identification and designation of critical habitat for *Atriplex coronata* var. *notator*. For more information on the taxon, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54975).

#### **Habitat**

*Atriplex coronata* var. *notator* is restricted to highly alkaline, silty-clay soils in association with the Willows soil series and to a lesser extent, the Domino, Traver, Waukena, and Chino soils series (Service 1994, Knecht 1971). *A. coronata* var. *notator* occupies seasonal wetlands, including floodplains and vernal pools that receive seasonal inundation, and within areas dominated by alkali playas, alkali scrub, and alkali grassland (Bramlet 1993, Roberts 1993). Seasonal wetlands that the species occupies are dependent upon adjacent transitional wetlands and

marginal wetlands within the watershed (Service 1994).

*Atriplex coronata* var. *notatior* relies upon a hydrologic regime that includes sporadic flooding in combination with slow drainage in alkaline soils and habitats. The duration and extent of flooding or ponding can be extremely variable from one year to the next. Seasonal flooding is an important process that allows habitat to be maintained in a successional state, restores disturbed alkali habitats, and helps to disperse seed. These processes form a dynamic matrix that allows *A. coronata* var. *notatior* to colonize favorable sites and retreat from less favorable sites in response to disturbance and variations in annual rainfall (Service 1994).

#### Life History

This bushy, erect annual is monoecious (both male and female reproductive organs occur on the same plant), with the staminate and pistillate flowers occurring in mixed clusters (Munz 1974, Taylor and Wilken 1993). *Atriplex coronata* var. *notatior* is a prolific seeder (Ogden Environmental and Energy Services Corporation (OEESC) 1993). Preliminary studies indicate that *A. coronata* var. *notatior* seeds retain a relatively high viability for at least several seasons (OEESC 1993). A viable seed bank may exist in the soil of a known site even if plants are removed or fail to germinate for a season (OEESC 1993). *A. coronata* var. *notatior* produces floating seeds (June 4, 2004, A. Sanders, University of California, Riverside, pers. comm. to S. Brown, U.S. Fish and Wildlife Service). Seasonal flooding is necessary for seed dispersal (Service 1994). The floating seeds are likely dispersed during seasonal flooding by slow-moving flows within the floodplains and vernal pools where *A. coronata* var. *notatior* occurs. *A. coronata* var. *notatior* will generally germinate in the spring as flows recede (Service 1994). The species usually flowers in April and May, and sets fruit by May or June (Bramlet 1992). Other sources indicate that the flowering period may extend to August (California Native Plant Society 2001, Munz 1974). The number of *A. coronata* var. *notatior* plants in a population complex varies in response to rainfall, extent of winter flooding, and temperature (Service 1998).

#### Status and Distribution

*Atriplex coronata* var. *notatior* is endemic to western Riverside County, California. The species has not been studied extensively. Population estimates can vary greatly from year to

year (Amec Earth and Environmental, Inc. 2001). Between 1990 and 1994, approximately 78,000 individuals of this taxon were located (Service 1998). In the 1998 final rule listing the species, we estimated the total occupied habitat consisted of approximately 400 ac (161.9 ha) of alkali habitats within a range of approximately 8,200 ac (3,318 ha) in western Riverside County (Service 1998). At the time of listing, approximately 75 percent of the known plants were associated with three population centers found in the San Jacinto Wildlife Area/Mystic Lake, the San Jacinto River floodplain between Lakeview and Nuevo, and the upper Salt Creek Vernal Pool Complex in the Hemet area. Recent surveys identified approximately 83,741 individual plants occupying an aggregate total of 236.5 ac (95.71 ha) within a 6,000-ac (2,428 ha) survey area within the San Jacinto River between the Ramona Expressway and the mouth of Railroad Canyon (Glen Lukos Associates, Inc. 2000). The estimated range-wide population of approximately 106,000 plants is based on expected populations of 7,470 plants in the San Jacinto Wildlife Area, 15,000 plants in the Upper Salt Creek Vernal Pool Complex, and 84,000 plants along the San Jacinto River between the Ramona Expressway and the mouth of Railroad Canyon (Glenn Lukos Associates, Inc. 2000).

*Atriplex coronata* var. *notatior* is currently known from four general occurrence complexes: (1) The floodplain of the San Jacinto River at the San Jacinto Wildlife Area/Mystic Lake; (2) the floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir; (3) the Upper Salt Creek Vernal Pool Complex in the west Hemet area; and (4) the floodplain of Alberhill Creek north of Lake Elsinore. Most of the known occurrences of *A. coronata* var. *notatior* are on private land, and no occurrences are known from Federal lands. The taxon occurs on State land within the San Jacinto Wildlife Area (California Natural Diversity Data Base (CNDDDB) 2003), on land owned by the Riverside County Habitat Conservation Agency (Roberts and McMillan 1997), and on the Upper Salt Creek Wetland Preserve which is owned and managed by Metropolitan Water District (Amec Earth and Environmental, Inc. 2001).

*San Jacinto Wildlife Area/Mystic Lake:* *Atriplex coronata* var. *notatior* occurs on approximately 4,500 ac (1,800 ha) of alkali sink habitat including both undisturbed alkali grassland and degraded areas with dense stands of non-native weed species (Bramlet 1996, Roberts and McMillan 1997) within the

San Jacinto Wildlife Area/Mystic Lake area. About 700 ac (280 ha) of this habitat has been inundated by Mystic Lake, and another 470 ac (190 ha) is devoted to duck ponds that are flooded through much of the growing season of *A. coronata* var. *notatior* (Roberts and McMillan 1997). Within this area, about 2,865 ac (1,146 ha) of habitat is conserved within the San Jacinto Wildlife Area, however, about 250 ac (100 ha) is devoted to duck ponds with proposed expansions to 550 ac (220 ha) (Roberts and McMillan 1997). At least 36 separate occurrences and as many as 27,000 individual plants, have been reported within the San Jacinto Wildlife Area/Mystic Lake area (Roberts and McMillan 1997). While some of these occurrences (including CNDDDB element occurrence 12, with 20,400 individuals) are outside the San Jacinto Wildlife Area, all of the known occurrences in this area are proposed to be conserved within the Western Riverside MSHCP Additional Reserve Lands (Dudek and Associates 2003).

*Floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir:* In 1996, Bramlet estimated the habitat for *Atriplex coronata* var. *notatior* in this area to be approximately 3,820 ac (1,546 ha). In 2000, Glenn Lukos Associates surveyed 6,000 ac (2,428 ha) of habitat within the 100-year floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir. They observed 83,741 individuals on 237 ac (95.7 ha) of habitat (Glenn Lukos Associates, Inc. 2000). Approximately 90 percent of the individuals observed occurred between the Ramona Expressway and Interstate 215. Alkali playa habitat in this area has been greatly reduced in extent in recent years due to agricultural conversion to irrigated crops and alfalfa farming, as well as discing for weed abatement and sheep grazing (Bramlet 1996, Glenn Lukos Associates, Inc. 2000).

In this area, *Atriplex coronata* var. *notatior* is conserved on a 60-ac (24-ha) parcel owned by the Riverside County Habitat Conservation Agency (Roberts and McMillan 1997). The remainder of the habitat in this area is privately owned. The Western Riverside MSHCP is to include the conservation of habitat for *A. coronata* var. *notatior* within the floodplain of the San Jacinto River, and the maintenance of floodplain processes along the river in order to provide for the distribution of the species to shift over time as hydrologic conditions and seed bank sources change. In addition, the MSHCP identifies specific activities that will be covered under the Plan (i.e., covered activities) that are authorized

under the MSHCP. Pursuant to Section 7.3.7 of the MSHCP, the San Jacinto River Flood Control Project is a Covered Activity that would authorize the Riverside County Flood Control and Water Conservation District to design and implement flood control measures (including channelization or some other form or forms of engineered flood control) on the San Jacinto River between the Ramona Expressway and the mouth of Railroad Canyon ("San Jacinto River Project"). In addition to the flood control project, other covered activities within the vicinity of the San Jacinto River include Ramona Expressway bridge and culvert, Nuevo Road bridge, San Jacinto Avenue crossing, I-215 bridge and levee, Case Road bridge, Burlington Northern Santa Fe Railroad bridge, Goetz Road bridge, Ethanac Road bridge, Perris Valley Storm Drain Channel and Romoland Channel. This coverage is contingent upon complying with the criteria described for the San Jacinto River Project in the MSHCP. Included in the first criterion is the requirement that the future flood control project "[c]onserve lands ('Mitigation Lands') and [provide for] the hydrology" of the 8 Covered Species, which includes *A. coronata* var. *notatior*.

**Upper Salt Creek Vernal Pool Complex:** The Upper Salt Creek Vernal Pool Complex in and west of Hemet contains large areas of alkali grassland with alkali playa and vernal pool communities. This region includes around 1,200 ac (485.6 ha) of alkali habitat (Bramlet 1996). The approximately 40-ac (16.2-ha) Upper Salt Creek Wetland Preserve is located on the western edge of this complex. This preserve was purchased and conserved in perpetuity for native species and habitats to offset the effects of the Eastside Pipeline Project (June 1, 2004, W. Wagner, pers. comm. to S. Brown, U.S. Fish and Wildlife Service). Extensive population studies have been conducted over multiple years with varying environmental conditions within the preserve. In 1996, the *Atriplex coronata* var. *notatior* population was estimated at 16,500 individuals within the preserve. In 1997, the population was estimated at 6,200 individuals. In 1998, the population was estimated at 20,800 individuals, and in 2001, the population was estimated at 136,948 individuals (Amec Earth and Environmental, Inc. 2001). The remainder of the habitat in this area is privately owned, however, the MSHCP proposes the conservation of at least 6,900 acres of suitable habitat for the species within the San Jacinto

River, Mystic Lake and Salt Creek areas. This conservation is to include the floodplain of an unnamed tributary to Salt Creek, and the MSHCP requires that floodplain processes be maintained along the tributary to provide for the distribution of the species to shift over time as hydrologic conditions and seed bank sources change.

**Alberhill Creek:** This location of 185 plants was noted in 1997 and mapped southeast of Nichols Road and west of Alberhill Creek (CNDDDB 2003). More populations may occur in adjacent playa habitat (CNDDDB 2003). Though this population is on private lands, however, the MSHCP proposes to conserve these lands within its Additional Reserve Lands (Dudek and Associates 2003).

#### Threats

*Atriplex coronata* var. *notatior* is declining throughout its range due to habitat destruction and fragmentation resulting from urban and agricultural development, pipeline construction, alteration of hydrology and floodplain dynamics, excessive flooding, channelization, off-road vehicle activity, trampling by cattle and sheep, weed abatement, fire suppression practices (including discing and plowing), and competition from non-native plant species (Bramlet 1993, Roberts and McMillan 1997, Service 1998).

#### Conservation Needs

The conservation needs of *Atriplex coronata* var. *notatior* include conservation and management of occurrences to provide for long-term survival of the species within the larger context of the vernal playa community and its supporting hydrology. The spatial distribution of *A. coronata* var. *notatior* shifts over time as environmental conditions and the seed bank distribution change (Service 1998). *A. coronata* var. *notatior* lives in seasonal wetland habitat that is dependent on adjacent transitional wetlands and marginal wetlands within the watershed (Service 1994).

#### Previous Federal Actions

Please see the final listing rule *Atriplex coronata* var. *notatior* for a description of previous Federal actions through October 13, 1998 (63 FR 54975). At the time of the final rule, the Service determined designation of critical habitat was not prudent because such designation would not benefit the species.

On November 15, 2001, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the Center for Biological Diversity and California Native Plant Society,

challenging our "not prudent" determinations for eight plants including *Atriplex coronata* var. *notatior* (*CBD, et al. v. Norton*, No. 01-CV-2101 (S.D. Cal.)). A second lawsuit asserting the same challenge was filed against DOI and the Service by the Building Industry Legal Defense Foundation (BILD) on November 21, 2001 (*BILD v. Norton*, No. 01-CV-2145 (S.D. Cal.)). The parties in both cases agreed to remand the critical habitat determinations to the Service for additional consideration. In an order dated July 1, 2002, the U.S. District Court for the Southern District of California directed us to reconsider our not prudent finding and publish a proposed critical habitat rule for *A. coronata* var. *notatior*, if prudent, on or before January 30, 2004. In a motion to modify the July 1, 2002 order, the DOI and the Service requested that the due date for the proposed rule for *A. coronata* var. *notatior* be extended until October 1, 2004. This motion was granted on September 9, 2003. This proposal complies with the court's ruling.

In 2004, the Service completed a Biological and Conference Opinion in accordance with section 7 of the Act, regarding the issuance of an incidental take permit in connection with the Western Riverside County MSHCP pursuant to section 10(a)(1)(B) of the Act (Service 2004). The MSHCP establishes a multi-species conservation program to minimize and mitigate the expected loss of habitat values and the incidental take of "covered species." The intent of the MSHCP is to minimize incidental take of covered animals species in the Plan Area and to provide avoidance, minimization, and mitigation measures for the impacts of proposed activities on covered species and their habitats. The MSHCP Plan Area encompasses approximately 1.26 million ac (509,900 ha) in western Riverside County, including the entire known range of *Atriplex coronata* var. *notatior*. *A. coronata* var. *notatior* is a covered species under the MSHCP. In its Biological and Conference Opinion, the Service concluded that the MSHCP would not jeopardize the continued existence of *A. coronata* var. *notatior* (Service 2004). The MSHCP is discussed in greater detail in the section entitled "Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan (MSHCP)."

#### Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic 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 geographic 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. "Conservation" means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2)).

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271) and our U.S. Fish and Wildlife Service Information Quality Guidelines (2002) provide criteria, establish procedures, and provide guidance to ensure that our decisions represent the best scientific

and commercial data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Critical habitat designations do not signal that habitat outside the designation is unimportant to *Atriplex coronata* var. *notatior*. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

#### Methods

As required by section 4(b)(2) of the Act, we used the best scientific and commercial data available in determining the areas that are essential to the conservation of *Atriplex coronata* var. *notatior*. These included data from research and survey observations published in peer-reviewed articles, regional Geographic Information System (GIS) vegetation, soil, and species coverages (including layers for Riverside County), and data compiled in the CNDDDB. We also reviewed available information that pertains to the habitat requirements (i.e., primary constituent elements) of this taxon such as material included in reports submitted during section 7 consultations.

After all the information about the known occurrences of *Atriplex coronata*

var. *notatior* was compiled, we created maps indicating the essential habitat associated with each of the occurrences. We used the information outlined above to aid in this task. The essential habitat was mapped using GIS and refined using topographical and aerial map coverages. These essential habitat areas were further refined by discussing each area with Fish and Wildlife Service biologists familiar with each area. After creating GIS coverage of the essential areas, we created legal descriptions of the essential areas. We used a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the essential areas.

The areas of essential habitat were then analyzed with respect to special management considerations or protection and the provisions of section 4(b)(2) of the Act. Applicable and appropriate exclusions were made based on section 4(b)(2).

#### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific biological and physical features, otherwise referred to as the primary constituent elements, which comprise *Atriplex coronata* var. *notatior* habitat are based on specific components that provide for the essential biological requirements of the species as described below.

#### *Space for Individual and Population Growth, and for Normal Behavior*

*Atriplex coronata* var. *notatior* occupies seasonal wetlands, including vernal pools and floodplains that receive seasonal inundation (Service 1994). The species occurs within alkali playas, alkali scrub, and alkali

grassland, where these habitats occur in association with the Willows soil series, and to a lesser extent, the Domino, Traver, Waukena, and Chino soils series (Service 1994, Knecht 1971). Seasonal wetlands that the species occupies are dependent upon adjacent transitional wetlands and marginal wetlands within the watershed (Service 1994). These areas do not occur in great abundance, and in recent years have been degraded and lost to agriculture, off-road vehicle use, grazing, flood control projects, and development, including pipeline projects, transportation projects, and residential development projects (Service 1994).

The four locations where the taxon is known to occur are no longer pristine and undisturbed. However, these wetlands and associated hydrology continue to provide essential biological and physical features necessary for this species in all four locales. All remaining occurrence complexes have been impacted by agricultural activities (Bramlet 1993, CNDDDB 2003, Roberts and McMillan 1997, Service 1998). The taxon is also affected by non-agricultural related clearing activities (Bramlet 1993, CNDDDB 2003, Roberts and McMillan 1997, Service 1998). Some of the lands that make up the San Jacinto Wildlife Area were agricultural lands, and some farming continues today. The occurrence complex that occupies the floodplain of the San Jacinto River between the Ramona Expressway and the mouth of Railroad Canyon has been severely degraded during recent years by agriculture, including irrigated crops and alfalfa farming. Habitat at the Salt Creek Vernal Pool Complex has been degraded as a result of dry land farming. The occurrence at Alberhill Creek is adjacent to a plowed field.

*Atriplex coronata* var. *notatior* can persist in the seed bank within disturbed lands, including agricultural areas. Restoration of these disturbed areas is essential for the conservation of this taxon. *A. coronata* var. *notatior* is expected to re-establish itself from the seed bank once lands that were previously cleared or are being used for agriculture are restored.

#### Water and Physiological Requirements

*Atriplex coronata* var. *notatior* requires a hydrologic regime that includes sporadic flooding in combination with slow drainage in alkaline soils and habitats. The duration and extent of flooding or ponding can be extremely variable from one year to the next. Seasonal flooding is an important process that allows habitat to be maintained in a successional state,

restores disturbed alkali habitats, and helps to disperse seed. These processes form a dynamic matrix that allows *A. coronata* var. *notatior* to colonize favorable sites and retreat from less favorable sites in response to disturbance and variations in annual rainfall (Service 1994). Irreversible actions that alter the hydrology of the seasonal wetlands or infringe upon the wetlands may threaten the survival of *A. coronata* var. *notatior*.

The San Jacinto Wildlife Area/Mystic Lake occurrence complex and the occurrence complex located between the Ramona Expressway and the mouth of Railroad Canyon depend upon the San Jacinto River for their hydrology and seasonal flooding. The occurrence at Alberhill Creek depends upon the creek for its hydrology and seasonal flooding. The occurrence at the Upper Salt Creek Vernal Pool Complex is located in part within the floodplain of an unnamed tributary to Salt Creek. The natural floodplain processes of these waterways must be maintained as discussed in the Western Riverside MSHCP to allow for the conservation of these occurrence complexes.

The Upper Salt Creek Vernal Pool Complex is in a natural depression and rainfall from the surrounding area flows across the land and pools within the complex. While some of the runoff is from undeveloped hillsides, providing the complex with a needed source of minerals, much of the watershed has been developed, and the flows traveling to the vernal pools include a large amount of urban runoff. The maintenance of clean, seasonal flows from the surrounding watershed is necessary for the conservation of this vernal pool complex.

#### Sites for Reproduction, Germination, and Seed Dispersal

Seasonal flooding, as indicated above, is important for the reproduction, germination, and seed dispersal of *Atriplex coronata* var. *notatior*. The natural process of seasonal flooding allows habitat to be maintained in a successional state, restores disturbed alkali habitats, and helps to disperse seed. This flooding allows *A. coronata* var. *notatior* to colonize favorable sites and retreat from less favorable sites in response to disturbance and variations in annual rainfall (Service 1994). *A. coronata* var. *notatior* produces floating seeds (June 4, 2004, A. Sanders, University of California, Riverside, pers. comm. to S. Brown, U.S. Fish and Wildlife Service). Seasonal flooding is necessary for seed dispersal (Service 1994). The floating seeds are likely dispersed during seasonal flooding by

slow-moving flows within the floodplains and vernal pools where *A. coronata* var. *notatior* occurs. Natural floodplain processes are integral to the biotic processes this species uses to disperse and reproduce.

The San Jacinto Wildlife Area/Mystic Lake occurrence complex and the occurrence complex located between the Ramona Expressway and the mouth of Railroad Canyon depend upon the seasonal flooding from the San Jacinto River for seed dispersal and for the maintenance of sites where seeds can germinate. The occurrence at Alberhill Creek depends upon the seasonal flooding of the creek for seed dispersal and for the maintenance of sites where seeds can germinate. The occurrence complex at the Upper Salt Creek Vernal Pool Complex depends upon the seasonal inundation of the pools from a combination of sheet flow from the surrounding watershed and the seasonal flooding of an unnamed tributary to Salt Creek for seed dispersal and the maintenance of sites where seeds can germinate. These natural hydrological processes must be maintained to allow for the reproduction and dispersal of the species within this occurrence complex.

Pursuant to our regulations (50 CFR 424), we are required to identify the known physical and biological features, *i.e.*, primary constituent elements, essential to the conservation of *Atriplex coronata* var. *notatior*, together with a description of any critical habitat that is proposed. In identifying the primary constituent elements, we used the best available scientific and commercial data available. The primary constituent elements determined to be essential to the conservation of *A. coronata* var. *notatior* are:

- (1) Seasonal wetland habitats, including floodplains and vernal pools, and the natural hydrologic processes upon which these habitats depend;
- (2) Vegetation communities, including alkali playa, alkali scrub, and alkali grassland habitats, within which the taxon is known to occur; and
- (3) Slow-draining alkali soils with a hard pan layer that provides for a perched water table, including the Willows, Domino, Traver, Waukena, and Chino Soils Series (Knecht 1971).

#### Description of Essential Habitat

*Atriplex coronata* var. *notatior* has a narrow geographic distribution. Within its range, the taxon has specialized habitat requirements, including hydrology, vegetation communities, and soils. The areas that provide these specialized habitat requirements do not occur in great abundance and have been degraded and lost in recent years. The known range of the species is limited to

four occurrence complexes within western Riverside County. The four occurrence complexes are: (1) Floodplain of the San Jacinto River at the San Jacinto Wildlife Area/Mystic Lake; (2) Floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir; (3) Upper Salt Creek Vernal Pool Complex; and (4) Alberhill Creek. Each of these four occurrence complexes is essential to the conservation of the species. (Not all known populations of *A. coronata* var. *notatior* are considered essential for the conservation of the species, but all are conserved as part of the Western Riverside MSHCP). The significance of each occurrence complex is described in detail in the Background section. These complexes are mapped as three units in Map 1: Unit 1—San Jacinto River; Unit 2—Salt Creek (Hemet); and Unit 3—Alberhill.

**Unit 1—San Jacinto River** includes the first two occurrence complexes (the floodplain of the San Jacinto River at the San Jacinto Wildlife Area/Mystic Lake and the floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir) and comprises 12,046 acres, 6,535 ac (2,645 ha) of which are privately owned and 5,511 ac (2,230 ha) of which are owned by the California Department of Fish and Game. Between the mouth of the Railroad Canyon to the southwest and the Ramona Expressway, this unit is defined by the written criteria in the MSHCP. From the Ramona Expressway down to Interstate 215, these criteria closely follow the combined boundary of the mapped suitable soils and 100-year floodplain. South of I-215, the unit is constrained at the point where the Perris Valley Storm Drain enters the San Jacinto River from the North. The San Jacinto River is proposed to be channelized here. This will affect approximately 10 percent of the remaining *Atriplex coronata* var. *notatior* (a rough estimate, as the populations fluctuate greatly with rainfall). North of the Ramona Expressway, within the San Jacinto Wildlife Area, the unit follows the 100-year floodplain of the San Jacinto River (excluding a small strip of heavily farmed agricultural land) east to Bridge Street. Along the eastern boundary, the unit follows the edge of the 100-year floodplain (where it meets the hills). A private dairy and a duck club on the eastern side are not included in this unit. The boundary follows the combined edge of the soils and 100-year floodplain around Mystic Lake on the northern end, and then roughly follows the combined edge of the soils and 100-

year floodplain along the west side next to the Bernasconi Hills. Here the line bows out from the floodplain/soils line toward the edge of the hills to include a mapped occurrence of *A. coronata* var. *notatior*.

**Unit 2—Salt Creek (Hemet)** includes the third occurrence complex (Upper Salt Creek Vernal Pool Complex) and comprises 3,154 ac (1,277 ha), all of which are privately owned. To the south, this unit is bound by a tributary to Salt Creek that provides hydrology to part of the complex. To the west, the boundary follows the ridgeline that defines the watershed up to the northern extent of the Heartland Development (the Service has a Memorandum of Understanding that Heartland will ensure clean water flows continue to the south from their detention basin). To the southeast, the boundary includes part of the vernal pool complex, then bows in to avoid the Hemet Auto Mall, and back out to the northeast extent where it picks up the outflow of the Seattle Channel, which provides water to part of the complex by sheet flow across the land. To the northeast, the project is bound by the Tres Cerritos Hills, which also constitute part of the watershed. Unit 2 gets its water from a combination of the tributary to the south and the watershed to the north.

**Unit 3—Alberhill** includes the fourth occurrence complex and comprises 32.3 ac (13.1 ha), all of which are privately owned. The Unit occurs within the floodplain of Alberhill Creek in a small pocket of willows soils. The edges of the unit are defined by the edge of the soil pocket. The north boundary is defined by Nichols Road. The south boundary is defined by a large stand of riparian vegetation.

#### Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protection. Each of the four occurrence complexes of *Atriplex coronata* var. *notatior* faces existing threats that require special management and/or protection (Bramlet 1993, Roberts and McMillan 1997, Service 1998). The occurrence complex that occupies the floodplain of the San Jacinto River between the Ramona Expressway and Railroad Canyon Reservoir is threatened by non-agriculture related clearing, agricultural activity, including irrigated crops and alfalfa farming, and a proposed flood control project (Bramlet 1996, Roberts and McMillan 1997, Dudek and

Associates 2003). The occurrence complex that occupies the San Jacinto Wildlife Area/Mystic Lake is threatened by invasive and weedy plant species introduced as food sources for waterfowl and also remaining from historical agricultural production (Bramlet 1996). Alteration of habitat for duck ponds (Roberts and McMillan 1997) and off-road vehicle activity (CNDDDB 2003) are also management concerns in this area. The occurrence complex located within the Salt Creek Vernal Pool Complex is threatened by agricultural activities, including dry-land farming, weed abatement and fire suppression practices, grazing, invasion of non-native plant species, alteration of hydrology, fragmentation, and a proposed road realignment project (CNDDDB 2003, Bramlet 1996, Roberts and McMillan 1997, Dudek and Associates 2003). The occurrence complex at Alberhill Creek is located in a rapidly urbanizing area and is subject to the threat of increased human-associated disturbance. Actions that alter habitat suitable for the species or affect the natural hydrologic processes upon which the species depends could threaten the species in this area.

Special management and/or protection for these occurrence complexes includes: (1) Protection of habitat by the Western Riverside MSHCP; (2) protection of floodplain processes by species-specific criteria in the MSHCP; (3) reduction of land conversion to agriculture by the MSHCP; and (4) land acquisition that will allow restoration of lands that have already been converted to agriculture.

#### Proposed Critical Habitat Designation

We evaluated all four habitat areas (occurrence complexes) essential for the conservation of *Atriplex coronata* var. *notatior* for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. All four essential habitat areas are within the conservation area of the approved Western Riverside Multiple Species Habitat Conservation Plan (MSHCP) in Riverside County. On the basis of our evaluation of the conservation measures afforded *A. coronata* var. *notatior* under the MSHCP, we have concluded that the benefit of excluding the lands covered by this MSHCP outweighs the benefit of including them as critical habitat (see discussion in section entitled "Exclusions Under Section 4(b)(2) of the Act"). Thus, we are excluding the lands covered by this MSHCP from the designation of critical habitat for this taxon, pursuant to section 4(b)(2) of the Act. Because we have excluded all essential habitat areas from the

proposal, we are not proposing to designate any critical habitat for *A. coronata* var. *notatior*.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

No critical habitat is being designated for *Atriplex coronata* var. *notatior*. The following is a general discussion of the section 7 consultation process for designated critical habitat.

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that the permitted actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. “Reasonable and prudent alternatives” are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency’s legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

Even in the absence of critical habitat designation, activities on Federal lands that may affect *Atriplex coronata* var. *notatior* will require section 7 consultation. Activities lands that may affect *A. coronata* var. *notatior* on private or State lands requiring a permit from a Federal agency, such as a permit from the Army Corps under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), will also

continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. If critical habitat for *Atriplex coronata* var. *notatior* were to be designated, then activities that may destroy or adversely modify critical habitat would include those that appreciably reduce the value of critical habitat to the taxon. We note that such activities may also jeopardize the continued existence of the species.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species’ critical habitat. Actions likely to “jeopardize the continued existence” of a species are those that would appreciably reduce the likelihood of the species’ survival and recovery. Actions likely to “destroy or adversely modify” critical habitat are those that would appreciably reduce the value of critical habitat to the listed species.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These Federal actions include, but are not limited to:

(1) Removing, thinning, or destroying *Atriplex coronata* var. *notatior* habitat, whether by burning, mechanical, chemical, or other means (e.g., plowing, grubbing, grading, grazing, woodcutting, construction, road building, mining, mechanical weed control, herbicide application, etc.);

(2) Activities that appreciably degrade or destroy *Atriplex coronata* var. *notatior* habitat could include, but are not limited to, livestock grazing, clearing, disking, farming, residential or commercial development, introducing or encouraging the spread of nonnative species, off-road vehicle use, and heavy recreational use;



(3) Activities that appreciably diminish habitat value or quality through indirect effects (e.g., edge effects, invasion of exotic plants or animals, or fragmentation); and

(4) Any activity, including the regulation of activities by the Corps of Engineers under section 404 of the Clean Water Act or activities carried out by or authorized by the Environmental Protection Agency (EPA), that could alter watershed or soil characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain *Atriplex coronata* var. *notatior* habitat. These activities could include, but are not limited to, altering the natural fire regime; development, including road building and other direct or indirect activities; agricultural activities, livestock grazing, and vegetation manipulation such as clearing or grubbing in the watershed upslope from *A. coronata* var. *notatior*.

(5) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities, or any activity funded or carried out by the Department of Transportation or Department of Agriculture that results in discharge of dredged or fill material, excavation, or mechanized land clearing of *Atriplex coronata* var. *notatior* habitat;

(6) Sale or exchange of lands by a Federal agency to a non-Federal entity;

(7) Licensing of construction of communication sites by the Federal Communications Commission;

(8) Funding of construction or development activities by the U.S. Department of Housing and Urban Development; and

(9) Funding and implementation of disaster relief projects by the FEMA and the Natural Resource Conservation Service's Emergency Watershed Program, including erosion control, flood control, and stream bank repair to reduce the risk of loss of property.

Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species.

#### *Exclusions Under 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, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical

habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we have used the provisions outlined in section 4(b)(2) of the Act to evaluate lands essential to the conservation of the subject species for possible exclusion from proposed critical habitat. Lands which we have either excluded from or not included in critical habitat based on those provisions include those covered by: (1) Legally operative HCPs that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (2) draft HCPs that cover the species, have undergone public review and comment, and provide assurances that the conservation measures for the species will be implemented and effective (i.e., pending HCPs); (3) Tribal conservation plans that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (4) State conservation plans that provide assurances that the conservation measures for the species will be implemented and effective; and (5) Service National Wildlife Refuge System Comprehensive Conservation Plans that provide assurances that the conservation measures for the species will be implemented and effective.

#### *Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan*

As described above, section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic and national security impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of a Habitat Conservation Plan (HCP) is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

HCPs vary in size and may provide for incidental take coverage and conservation management for one or many federally listed species. Additionally, more than one applicant may participate in the development and

implementation of an HCP. Large regional HCPs expand upon the basic requirements set forth in section 10(a)(1)(B) of the Act because they reflect a voluntary, cooperative approach to large-scale habitat and species conservation planning. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the conservation of numerous federally listed species and unlisted sensitive species and the habitat that provides for their biological needs. These HCPs address impacts in a planning area and create a preserve design within the planning area. Over time, areas in the planning area are developed according to the HCP, and the area within the preserve is acquired, managed, and monitored. These HCPs are designed to implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP, in order to reduce delays in the permitting process.

The Western Riverside MSHCP was in development from 1993 to this year. Participants in this HCP include 14 cities, the County of Riverside (including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department), the California Department of Parks and Recreation, and the California Department of Transportation. The Western Riverside MSHCP is a subregional plan under the State's NCCP and was developed in cooperation with the California Department of Fish and Game. The MSHCP establishes a multi-species conservation program to minimize and mitigate the expected loss of habitat values and the incidental take of "covered species." The intent of the MSHCP is to minimize incidental take of these species in the Plan Area and to provide avoidance, minimization, and mitigation measures for the impacts of proposed activities on covered species and their habitats. Within the 1,260,000 ac (510,000 ha) Plan Area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are to be conserved. The proposed conservation of 153,000 ac (62,000 ha) will complement other existing natural and open space areas (e.g., State Parks, Forest Service, and County Park Lands). The MSHCP Plan Area encompasses the entire known range of *Atriplex coronata* var. *notatior*.

*Atriplex coronata* var. *notatior* is a covered species under the MSHCP. The taxon occurs on State land within the

San Jacinto Wildlife Area, on land owned by the Riverside County Habitat Conservation Agency, and on the Upper Salt Creek Wetland Preserve which is owned and managed by Metropolitan Water District. These conserved lands, which were identified as Public-Quasi Public (PQP) lands in the Western Riverside MSHCP, will be monitored and managed pursuant to the plan. Moreover, the Western Riverside MSHCP proposes the conservation and management of additional habitat for the species within the San Jacinto River, Mystic Lake, and Salt Creek areas. Based on our estimate of the extent of the PQP lands together with the additional lands (i.e., Additional Reserve Lands) of conservation proposed by the MSHCP, only a small portion of essential habitat occurs outside of our estimate of the Conservation Reserve Design for the MSHCP, as summarized in Table 9–2 of the MSHCP. These acres are essential because they provide for the hydrological processes affecting its wetland habitat. However, the MSHCP “will maintain alluvial processes (floodplain hydrology and flooding) upon which this species depends” and commits to not altering adversely existing runoff from adjacent lands (see Section 6.1.4 of the MSHCP). As stated in Table 9–2 of the Western MSHCP: “Conservation for this species will be achieved by inclusion of at least 6,900 acres of suitable Conserved Habitat and the locality at Alberhill Creek near Lake Elsinore and the three core localities (Mystic Lake, the San Jacinto River and the upper Salt Creek drainage) within large blocks of Habitat in the MSHCP Conservation Area. In addition, implementation of Objective 3 for this species will provide new data to guide Reserve Assembly, management and monitoring. Implementation of Objectives 4 and 5 for this species will maintain alluvial processes (floodplain hydrology and flooding) upon which this species depends.” Under the MSHCP, Reserve Managers are also responsible for preventing alteration of hydrology and floodplain dynamics, farming, fire, and fire suppression activities, off-road vehicle use, and competition from non-native plant species (Dudek and Associates 2003).

The remaining occurrences of *Atriplex coronata* var. *notatior* are located on private lands. The MSHCP provides for the conservation of most of the occurrences within all 4 occurrence complexes. Under the MSHCP, the species is anticipated to persist within 80 percent of its modeled habitat (Service 2004).

In 2004, the Service completed a Biological and Conference Opinion, in

accordance with section 7 of the Act, regarding the issuance of an incidental take permit for implementation of the Western Riverside County MSHCP pursuant to section 10(a)(1)(B) of the Act (Service 2004). The Service concluded that the MSHCP would not jeopardize the continued existence of *Atriplex coronata* var. *notatior* (Service 2004). Several covered activities discussed under the MSHCP have the potential to impact populations within these conserved areas, including the San Jacinto River Flood Control Project and the State Route 79 Realignment Project. These projects will require additional consultation with our agency under section 7 of the Act (Dudek and Associates 2003). While the outcome of future section 7 consultations is not known, we anticipate that the application of the jeopardy standard will ensure that actions funded, authorized, or carried out by a Federal agency will not jeopardize the continued existence of *A. coronata* var. *notatior*. Thus, the exclusion of the essential habitats from critical habitat under section 4(b)(2) of the Act will not result in the extinction of the species.

The following discussion presents our rationale for excluding from critical habitat designation the areas of essential habitat for *Atriplex coronata* var. *notatior* within the Western Riverside MSHCP.

#### (1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. Where HCPs are in place, our experience indicates that this benefit is small or nonexistent. Currently approved and permitted HCPs are designed to ensure the long-term survival of covered species within the plan area. In an approved HCP, lands we ordinarily would define as critical habitat for covered species will normally be protected in reserves and other conservation lands by the terms of the HCP and its IA. These HCPs and IAs include management measures and protections for conservation lands designed to protect, restore, and enhance their value as habitat for covered species, and thus provide benefits well in excess of those that would result from a critical habitat designation. In the instance of the Western Riverside MSHCP, *Atriplex coronata* var. *notatior* is a covered species. The MSHCP establishes a

multi-species conservation program to minimize and mitigate the expected loss of habitat values and the incidental take of “covered species.” The intent of the MSHCP is to minimize incidental take of these species in the Plan Area and to provide avoidance, minimization, and mitigation measures for the impacts of proposed activities on covered species and their habitats. We do not believe that designation of MSHCP-covered lands as critical habitat will appreciably benefit *A. coronata* var. *notatior* beyond the protection already afforded the species under the Act. The Service, in its 2004 Biological and Conference Opinion, concluded that the MSHCP would not jeopardize the continued existence of *A. coronata* var. *notatior* (Service 2004).

#### (2) Benefits of Exclusion

The benefits of excluding lands within HCPs from critical habitat designation include carrying out the assurances provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP, including relieving them of the additional regulatory burden that might be imposed by critical habitat. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species’ benefits if participants abandon the voluntary HCP process because it may result in additional regulations requiring more of them than other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP 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. If lands within HCP plan areas are designated as

critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and 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 application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. The jeopardy analysis is similar to the analysis of adverse modification to critical habitat. 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. HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242). Such assurances are typically not provided by section 7 consultations which, in accordance with the Provisions of the Act, are limited to requiring that the specific action being consulted upon not jeopardize the continued existence of the species. Thus, a consultation typically does not accord the lands it covers the extensive benefits an HCP provides. The development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

The Western Riverside MSHCP seeks to accomplish the goals of protecting, restoring, monitoring, managing, and enhancing the habitat to benefit the conservation of *Atriplex coronata* var. *notatior* through the implementation of specific conservation objectives. Excluding non-Federal lands within the MSHCP from the proposed critical habitat will provide benefits, as follows: (1) Exclusion of the lands from the final designation will allow us to continue working with the participants in a spirit of cooperation and partnership; (2) other jurisdictions, private landowners, and

other entities will see the benefit of working cooperatively with us to develop HCPs, which will provide the basis for future opportunities to conserve species and their essential habitat.

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

The Western Riverside MSHCP includes *Atriplex coronata* var. *notatior* as a covered species. 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 is still accomplished from material provided on our Web site and through public notice and comment procedures required to establish the Western Riverside MSHCP. We have also received input from the public through the public participation that occurs in the development of the Western Riverside MSHCP. For these reasons, we believe proposing critical habitat has little additional benefit in areas covered by the Western Riverside MSHCP. Therefore, we are excluding these lands from critical habitat. We do not believe that this exclusion would result in the extinction of the species because the essential habitat will be conserved in accordance with the provisions of the Western Riverside MSHCP.

### Economic Analysis

An analysis of the economic impacts of possible designation of critical habitat for *Atriplex coronata* var. *notatior* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://carlsbad.fws.gov/> or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate independent specialists regarding this determination. The purpose of such review is to ensure that our decision on critical habitat is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposal immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and

conclusions regarding the determination regarding critical habitat.

We will consider all comments and information received during the comment period on this proposal, and the final decision may differ from this proposal.

### Public Hearings

The Act provides for one or more public hearings on this determination, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (see **ADDRESSES** section). We will schedule public hearings on this determination, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the decision? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Required Determinations

#### Regulatory Planning and Review

In accordance with Executive Order 12866, this document is significant in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a

draft economic analysis of this proposed action. We will use this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. We will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this

manner will ensure that we make a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

*Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Atriplex coronata* var. *notatior* is a significant regulatory action under Executive Order 12866 in that it may raise novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and

Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

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

(b) We do not believe that this rule will significantly or uniquely affect small governments because no areas are proposed for critical habitat. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

*Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), this rule is not anticipated to have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Due to current public knowledge of the species' protections we do not anticipate that property values will be affected by the critical habitat designation. However, we have not yet completed the economic analysis for this proposed rule. Once the

economic analysis is available, we will review and revise this preliminary assessment as warranted.

**Federalism**

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI policy, we requested information from, and coordinated development of, this proposal with appropriate State resource agencies in California. The exclusion of critical habitat in areas currently occupied by *Atriplex coronata* var. *notatior* imposes no additional restrictions to those currently in place and, therefore, has no incremental impact on State and local governments and their activities. The exclusion may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

**Civil Justice Reform**

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have excluded critical habitat in accordance with the provisions of the Endangered Species Act. This proposal uses standard property descriptions and

identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Atriplex coronata* var. *notatior*.

**Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)**

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**National Environmental Policy Act**

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

**Government-to-Government Relationship With Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility

to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of *Atriplex coronata* var. *notatior*.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

**Author(s)**

The primary author of this package is the staff of the Carlsbad Fish and Wildlife Office.

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

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

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

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

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

2. In § 17.12(h) revise the entry for "*Atriplex coronata* var. *notatior*" under "FLOWERING PLANTS" to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Atriplex coronata</i> var. <i>notatior</i> .	* San Jacinto Valley crownscale.	* U.S.A. (CA) .....	* <i>Chenopodiaceae</i> — <i>Goosefoot Family</i> .	* E	* 650	* 17.97(b)	* NA
*	*	*	*	*	*	*	*

\* \* \* \* \*  
3. Amend part 17 by adding a new § 17.97 to read as follows:

**§ 17.97 Species for which critical habitat is prudent but not designated.**

This section includes animal and plant species for which we have determined critical habitat to be

prudent, but for which we did not designate critical habitat under the Act for policy and statutory reasons. We identify these species, their primary constituent elements, and the specific habitat areas essential to their conservation to further public awareness and conservation efforts.

(a) [Reserved.]

(b) *Plants*. This paragraph (b) identifies the primary constituent elements and specific habitat areas essential to the conservation of plant species for which we determined critical habitat to be prudent but did not designate for policy and statutory reasons. We will list these species in the same order as they appear in § 17.12(h).

(1) Family Chenopodiaceae: *Atriplex coronata* var. *notatior* (San Jacinto Valley crownscale).

(i) Lands determined to be essential to the conservation of *Atriplex coronata* var. *notatior* are depicted for Riverside County, California, on the map in paragraph (b)(1)(iii)(B) of this section.

(ii) The primary constituent elements of critical habitat for *Atriplex coronata* var. *notatior* are:

(A) Seasonal wetland habitats, including floodplains and vernal pools,

and the natural hydrologic processes upon which these habitats depend.

(B) Vegetation communities, including alkali playa, alkali scrub, and alkali grassland habitats, within which the taxon is known to occur.

(C) Slow-draining alkali soils with a hard pan layer that provides for a perched water table, including the Willows, Domino, Traver, Waukena, and Chino Soils Series.

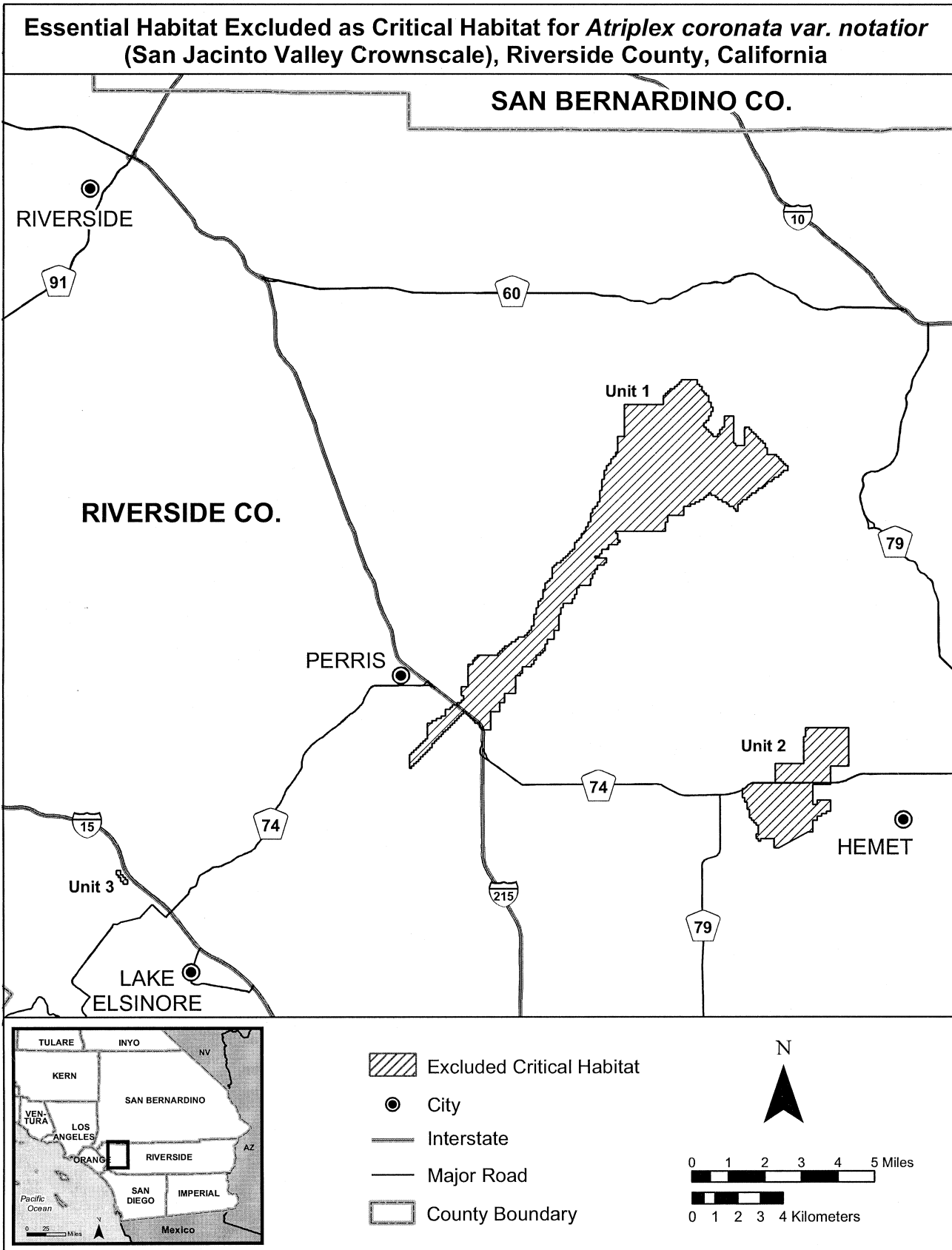
(iii) Lands that have been determined to be essential to the conservation of *Atriplex coronata* var. *notatior* and that

have been excluded from critical habitat designation pursuant to section 4(b)(2) of the Act are described below.

(A) All essential lands within the boundaries of the Western Riverside Multiple Species Habitat Conservation Plan. This plan may be obtained by going to the Riverside County Integrated Project website (<http://www.rcip.org/conservation.htm>).

(B) *Note:* Map of essential habitat for *Atriplex coronata* var. *notatior* follows:

**BILLING CODE 4310-55-U**



(2) [Reserved.]

Dated: September 30, 2004.

**Julie McDonald,**

*Acting Deputy Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 04-22395 Filed 10-5-04; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AT84

#### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Arkansas River Basin Population of the Arkansas River Shiner

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Arkansas River Basin population of the Arkansas River Shiner (*Notropis girardi*) pursuant to the Endangered Species Act of 1973, as amended (Act). Limited new information on the biological needs of the Arkansas River Shiner has become available since critical habitat for the Arkansas River Shiner was published on April 4, 2001 (66 FR 18002). However, this rule is being proposed pursuant to a court order issued in September 2003, vacating critical habitat established for the Arkansas River Basin population of the Arkansas River Shiner and remanding the previous designation of critical habitat for preparation of a new analysis of the economic and other effects of the designation (*New Mexico Cattle Growers Association et al. v. Norton, et al. Civ. No. 02-0461*).

We propose to designate as critical habitat a total of approximately 2,002 kilometers (1,244 miles) of linear distance of rivers, including 91.4 meters (300 feet) of adjacent riparian areas measured laterally from each bank. This distance includes areas that we are proposing to exclude which is described further in the proposed rule below. The areas that we have determined to be essential to the conservation of the Arkansas River Shiner include portions of the Canadian River (often referred to as the South Canadian River) in New Mexico, Texas, and Oklahoma, the Beaver/North Canadian River of Oklahoma, the Cimarron River in Kansas and Oklahoma, and the Arkansas River in Arkansas, Kansas, and Oklahoma.

In developing this proposal, we evaluated those lands determined to be essential to the conservation of the Arkansas River Shiner to ascertain if any specific areas would be appropriate for exclusion from the final critical habitat designation pursuant to section 4(b)(2) of the Act. On the basis of our preliminary evaluation, we believe that the benefits of excluding the Beaver/North Canadian River of Oklahoma (Unit 2) and the Arkansas River in Arkansas, Kansas, and Oklahoma (Unit 4), from the final critical habitat for the Arkansas River Shiner outweigh the benefits of their inclusion. As noted in the "Public Comments Solicited" section below, we are seeking comments on our preliminary 4(b)(2) analysis that is contained within this rule.

If this proposal is made final, section 7 of the Act would prohibit destruction or adverse modification of critical habitat by any activity authorized, funded, or carried out by any Federal agency. As required by section 4 of the Act, we will consider the economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat.

We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the proposed designation. We may revise this proposal prior to final designation to incorporate or address new information received during public comment periods.

**DATES:** We will accept comments until April 30, 2005. The Act provides for a public hearing on this proposal, if requested. Given the high likelihood of such requests, we intend to hold three public hearings, one in central Oklahoma, one in southwest Kansas and one in Texas. The specific times, dates, and locations for those hearings will be announced in the **Federal Register** in the coming months.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, Oklahoma Ecological Services Office, U.S. Fish and Wildlife Service, 222 South Houston, Tulsa, Oklahoma 74127-8909.
2. You may hand-deliver written comments and information to our Oklahoma Office, at the above address, or fax your comments to 918/581-7467.
3. You may send your comments by electronic mail (e-mail) to [r2arshinerch@fws.gov](mailto:r2arshinerch@fws.gov). For directions on how to submit electronic filing of

comments, see the "Public Comments Solicited" section.

All comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jerry Brabander, Field Supervisor, Oklahoma Office (telephone 918/581-7458; facsimile 918/581-7467).

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. On the basis of public comment, during the development of the final rule we may find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2), or not appropriate for exclusion; in all of these cases, this information would be incorporated into the final designation. We particularly seek comments concerning:

- (1) The reasons why any areas included in this proposal should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefit of designation will outweigh any threats to the species due to the designation;
- (2) Specific information on the amount and distribution of Arkansas River Shiner habitat, and which habitat or habitat components are essential to the conservation of this species and why;
- (3) Information on the status, viability, and distribution of the Arkansas River Shiner in the Cimarron River in Kansas and Oklahoma;
- (4) Comments or information related to our determination to include the adjacent riparian area (*i.e.*, 300-feet on either side of the stream bank) as proposed critical habitat;
- (5) Land use designations and current or planned activities in or adjacent to the areas proposed and their possible impacts on proposed critical habitat;
- (6) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation, particularly any impacts on small entities;
- (7) Two areas previously designated as critical habitat (the Beaver/North Canadian River of Oklahoma (Unit 2) and portions of the Arkansas River in Arkansas, Kansas, and Oklahoma (Unit 4), although still considered essential for the conservation of the Arkansas River Shiner, are currently proposed for exclusion from critical habitat because we believe the benefit of excluding these areas outweighs the benefit of including them. We specifically solicit comment on the inclusion