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50 CFR Part 17

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

DEPARTMENT OF THE INTERIOR

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RIN 1018–AJ11

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), herein address the 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 are designating zero acres of critical habitat for *A. coronata* var. *notatior*. We identified 15,232 acres (ac) (6,167 hectares (ha)) of habitat with features essential to the conservation of this taxon. However, all habitat with essential features for this taxon is located either within our estimate of the areas to be conserved and managed by the approved Western Riverside MSHCP on existing Public/Quasi-Public Lands (PQP) lands, or within areas where the MSHCP will ensure that future projects will not adversely alter essential hydrological processes, and therefore is excluded from critical habitat under section 4(b)(2) of the Act.

DATES: This rule becomes effective on November 14, 2005.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours, at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011 (telephone 760/431–9440). The final rule, economic analysis, and maps will also be available via the Internet at *http://carlsbad.fws.gov/SJVCDocs.htm.*

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Carlsbad Fish and Wildlife Office, at the above address, (telephone 760/431–9440; facsimile 760/431–9624).

SUPPLEMENTARY INFORMATION:

Designation of Critical Habitat Provides Little Additional Protection to Species

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

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

While attention to and protection of habitat 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 473 species, or 38 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat.

We address the habitat needs of all 1,253 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434, and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*). On December 9, 2004, the Director issued guidance to be used in making section 7 adverse modification determinations.

Procedural and Resource Difficulties in Designating Critical Habitat

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

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

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

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects 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). 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

It is our intent to discuss only those topics directly relevant to the subject of this final rule. For more information on

the biology, ecology, and distribution of this taxon, refer to the proposed listing rule published in the **Federal Register** on December 15, 1994 (59 FR 64812), the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54975), and the proposed critical habitat rule published in the **Federal Register** on October 6, 2004 (69 FR 59844).

Previous Federal Actions

Please see the final rule listing *Atriplex coronata* var. *notatior* as endangered for a description of previous Federal actions through October 13, 1998 (63 FR 54975). At the time of the final listing 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 and final rules for *A. coronata* var. *notatior* be extended until October 1, 2004 and October 1, 2005, respectively. This motion was granted on September 9, 2003. The proposed rule was signed September 30, 2004 and published in the **Federal Register** October 6, 2004 (69 FR 59844). This final rule complies with the court's ruling.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Atriplex coronata* var. *notatior* and on the draft economic analysis of the proposed designation during two comment periods. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and the draft economic analysis.

During the comment period that opened on October 6, 2004, and closed December 6, 2004, we received 5 comment letters directly addressing the proposed critical habitat designation: 3 from peer reviewers, and 2 from organizations or individuals. During the comment period that opened on August 31, 2005, and closed on September 15, 2005, we received 6 comment letters directly addressing the proposed critical habitat designation and the draft economic analysis: 3 were from a peer reviewer, and 3 were from organizations. One commenter supported our decision not to designate critical habitat for *Atriplex coronata* var. *notatior* and five opposed our decision. Comments received were grouped into 18 general issues specifically relating to the proposed critical habitat designation for *A. coronata* var. *notatior*, and are addressed in the following summary and incorporated into the final rule as appropriate. We did not receive any requests for a public hearing. We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for *A. coronata* var. *notatior*. All comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from all three peer reviewers. The peer reviewers were generally supportive of the designation of critical habitat. However, they did not support the exclusion of critical habitat for *Atriplex coronata* var. *notatior* based on the presence of an existing habitat conservation plan (HCP).

Peer Reviewer Comments on the Proposed Rule

1. *Comment:* The three peer reviewers submitted 26 comments on how to: reduce the redundancy and length of the rule; edit punctuation, wording, and terminology: and incorporate citations to help the rule be more clear and succinct.

Our Response: We have incorporated these comments into the final rule as appropriate.

2. *Comment:* The three peer reviewers submitted 38 comments on *Atriplex coronata* var. *notatior* and the Western Riverside MSHCP. These comments emphasized the importance of including in the final rule a clear, detailed explanation of the Western Riverside MSHCP, its associated Implementing Agreement (IA), the Service's formal section 7 consultation for the MSHCP, and the Service's responsibilities and authority under the MSHCP as they relate to *A. coronata* var. *notatior.*

Our Response: We appreciate the peer reviewers' concerns regarding the MSHCP and its associated documents, and we have incorporated detailed information on these as they relate to *Atriplex coronata* var. *notatior* under the section titled ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan.'' The MSHCP and its associated IA are available via the Internet at *http://rcip.org/conservation.htm,* and the Service's formal section 7 consultation and Conceptual Reserve Design map are available via the Internet at *http://www.fws.gov/pacific/carlsbad/WRV_MSHCP_BO.htm.*

3. *Comment:* The three peer reviewers submitted 12 comments that disagreed with our decision to exclude critical habitat based on the presence of an existing habitat conservation plan. Specific comments included: (1) The statement that the Service had failed to provide an adequate basis for the exclusion of lands from critical habitat; (2) that our decision to exclude lands from critical habitat based on the MSHCP's ability to protect the taxon's habitat was not adequately supported; and (3) that not all agencies are signatory to the MSHCP and therefore critical habitat should be identified for those projects and agencies operating outside the MSHCP.

Our Response: Section 4(b)(2) of the Act allows us to consider 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 an area as critical habitat will result in the extinction of the species. We have determined that benefits of exclusion of areas covered by the Western Riverside MSHCP outweigh the benefits of inclusion, and have included a more detailed analysis of the benefits of the MSHCP in this final rule

under the section titled ''Exclusions Under Section 4(b)(2) of the Act''.

4. *Comment:* The three peer reviewers submitted four comments that disagreed with the Service's statement in the rule that designation of critical habitat provides little additional protection to species (see **SUPPLEMENTARY INFORMATION** section above). Concern was expressed that a critical habitat proposal was not the appropriate venue for a discussion of the resource and procedural difficulties in designating critical habitat. It was suggested that critical habitat could be used as a tool to manage or end threats to the species, such as manure dumping. Additionally, it was suggested that the designation of critical habitat would give more recognition and attention to the habitat of *Atriplex coronata* var. *notatior.*

Our Response: As discussed in the **SUPPLEMENTARY INFORMATION** section and other sections of this and other critical habitat designations, we believe that (in most cases) various conservation mechanisms provide greater incentives and conservation benefits than designation of critical habitat. These include section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations.

While we concur that critical habitat designation can provide some level of species protection, this can only be provided if there is a Federal nexus for those agencies planning actions that may impact the designated habitat. We are unaware of any Federal nexus that would generally apply to application of soil amendments, such as the dumping of manure.

5. *Comment:* Two peer reviewers submitted two comments that disagreed with the Service's statement that the exclusion of critical habitat based on existing HCPs offers ''unhindered, continued ability to seek new partnerships with future HCP participants.'' They commented that the Service should be able to continue working cooperatively with partners on HCPs and other conservation efforts once critical habitat has been designated, and asked that we provide further explanation of how the designation of critical habitat may impede cooperative conservation efforts, such as the MSHCP.

Our Response: Both HCPs and critical habitat designations are designed to provide conservation measures to protect species and their habitats. The advantage of seeking new conservation partnerships (through HCPs or other means) is that they can offer active management and other conservation measures for the habitat on a full-time and predictable basis. Critical habitat designation only prevents adverse modification of the habitat where there is a Federal nexus to the modifying activity. The designation of critical habitat may remove incentives to participate in the HCP processes, in part because of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, delayed approval and development of the plan, and greater vulnerability to legal challenge. We have in the past received direct statements of intent to withdraw from other forms of cooperative efforts beneficial to the conservation of listed species if those landowners' property was included in pending critical habitat designations. We work with HCP applicants to ensure that their plans meet the issuance criteria and that the designation of critical habitat on lands where an HCP is in development does not delay the approval and implementation of their HCP. Additionally, HCPs offer conservation of covered species whether or not the area is designated as critical habitat.

6. *Comment:* The three peer reviewers submitted five comments that recommended that the reader be referred, under the ''Previous Federal Actions'' section, to both the proposed listing rule published on December 15, 1994 (59 FR 64812), which included proposed critical habitat, and the final listing rule published on October 13, 1998 (63 FR 54975), which withdrew the 1994 critical habitat proposal due to the severe decline of the species.

Our Response: This reference has been incorporated into the Previous Federal Actions section above.

7. *Comment:* The three peer reviewers submitted four comments that recommended that the discussion on Special Management Considerations be expanded. Recommendations include citing specific language from the Act to support our statement that occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection, and clarifying the extent and limitations of management measures proposed under the MSHCP. The reviewers were concerned that the MSHCP had not yet resulted in the implementation of management actions that would address threats to the species, such as soil chemistry alteration resulting from manure dumping.

Our Response: In the ''Critical Habitat'' section of the proposed rule we provided a definition of critical habitat pursuant to section 3(5)(A) of the Act. Within the ''Special Management Considerations'' section below, we have expanded our discussion to address this comment. We have also provided a more detailed discussion of the management measures proposed under the MSHCP (see ''Exclusions Under Section 4(b)(2) of the Act'' section).

8. *Comment:* Two peer reviewers submitted seven comments that recommended that we incorporate changes into the final rule to better address the unique status of plants under the Act, including the limited protection plants are provided under section 9 of the Act, and the assistance critical habitat could provide to the protection and recovery of Atriplex coronata var. notatior.

Our Response: As stated in the ''Effects of Critical Habitat Designation'' section of the proposed rule, 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. 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. The designation of critical habitat would not change this. *Atriplex coronata* var. *notatior* is currently known to occur exclusively on private lands. If occupied private lands were designated as critical habitat, any actions with a Federal nexus that might adversely affect the critical habitat would require a consultation with us. However, consultation for activities (e.g., habitat modification) with a Federal nexus which might adversely impact the species in occupied habitat would be required even without the critical habitat designation. Since there is no prohibition against take of listed plants on private lands, activities without a Federal nexus which might adversely impact the species or its habitat would not require consultation with us even with a critical habitat designation.

9. *Comment:* The three peer reviewers submitted nine comments that stated that threats to the species were not adequately addressed in the proposed rule. Additional threats to discuss included the following: (1) Manure spreading which buries the seed bank, introduces vast quantities of organic material and nutrients, and alters soil composition and chemistry allowing for the invasion of alkali intolerant weeds; (2) activities posed by MSHCP covered

projects such as the State Route 79 Realignment Project, the Ramona Expressway, and the San Jacinto River Flood Control Project; and, (3) non-seasonal flows which may result from future development.

Our Response: We address the threats of manure spreading, MSHCP covered projects, and non-seasonal flows in the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' and ''Special Management Considerations or Protections'' sections of this final rule.

10. *Comment:* One peer reviewer suggested expanding the discussion of the species conservation needs to include *Atriplex coronata* var. *notatior's* requirement for a functioning hydrologic system, both in terms of local and riverine flooding.

Our Response: We have expanded our discussion of the reliance of *Atriplex coronata* var. notatior on functioning hydrologic systems under the ''Water and Physiological Requirements'' section of this final rule.

11. *Comment:* One peer reviewer stated that restoration of plant communities is essential to the recovery of *Atriplex coronata* var. *notatior,* noting the Service's role in evaluating proposed efforts to restore disturbed alkali habitats within the species range. The reviewer suggested addressing whether critical habitat would allow additional review of the success of restoration efforts.

Our Response: There are two ways in which restoration actions will be accomplished for the species under the MSHCP, and the Service is included in the review process for both. First, reserve managers are responsible for the maintenance and enhancement of floodplain processes of the San Jacinto River, Mystic Lake, and upper Salt Creek under the MSHCP. We anticipate that these actions will be addressed in Reserve Management Plans (RMPs) which are controlled and implemented through the Reserve Management Oversight Committee (RMOC) and coordinated with Reserve Managers. The Service is a member of the RMOC. Within 5 years of significant acquisition of new reserve lands in a management unit, RMPs must be submitted to the RMOC.

Second, several MSHCP policies require that if avoidance of certain sensitive habitats and species is not feasible, to ensure adequate replacement of lost functions and values, the MSHCP Permittee must make a Determination of Biologically Equivalent or Superior Preservation (DBESP) that demonstrates that a proposed action, including design features to minimize impacts and compensation measures, will provide equal or better conservation than avoidance of the sensitive habitats and species. The Service has a 60-day review and comment period for any DBESP prepared under the MSHCP. To date, two DBESPs have been submitted that will result in restoration activities that may benefit *Atriplex coronata* var. *notatior* (Lockhart 2004; LSA Associates Inc. 2005). Project proponents have elected to introduce the species into restored and created vernal pool habitat north of the upper Salt Creek populations once initial success criteria have been met, even though the proposed actions that resulted in impacts to vernal pool habitat did not directly affect *A. coronata* var. *notatior.*

Finally, and more directly, the designation of critical habitat provides only restrictions on adverse modification to that habitat where there is a Federal nexus for the modification. It provides no mechanism for positive conservation actions that might be beneficial to the species, such as additional review of or increased efforts toward restoration and recovery.

12. *Comment:* The three peer reviewers submitted six comments that pointed out inherent problems with censusing an annual plant such as *Atriplex coronata* var. *notatior,* which is only visible seasonally and is subject to changing rainfall conditions. The reviewers believe that population estimates provided in the proposed rule are confusing and should be presented in context.

Our Response: Because information on this narrow endemic species is very limited, we presented all census information we were aware of in the 2004 proposed critical habitat rule. However, it is important to recognize that numbers for this annual plant vary greatly in response to changing rainfall conditions. Additionally, the seasonally-flooded alkali vernal plain habitat which the species occupies is a very dynamic system. Areas that are suitable for the species within this dynamic habitat matrix change from year to year resulting in more variation in census numbers. We have expanded our description of the species habitat under the ''Water and Physiological Requirements'' and ''Sites for Reproduction, Germination, and Seed Dispersal'' sections of this final rule.

13. *Comment:* Two peer reviewers submitted four comments that stated that population estimates presented in the proposed rule are out of date and conflicting information is presented on the amount of alkali habitat available for the species. One peer reviewer has observed large fluctuations in significant populations of the species, and attributes impacts to heavy discing and manure dumping. This reviewer recommended that we use current GIS capabilities to produce a single habitat model for the species and monitor populations more frequently. Another peer reviewer recommended that the final rule incorporate the most recent estimates for the species which were submitted to our office by two of the peer reviewers on January 14, 2004 (Table 2, Bramlet and White 2004).

Our Response: In our 2004 proposed critical habitat rule, we included population and habitat estimates for the species from many sources, including our 1998 final rule, Bramlet's 1996 estimates, and Glenn Lukos Associates estimates from 2000. There is variation between these estimates, which has led to confusion regarding how much suitable habitat currently exists for the species. In addition, as discussed in our response to comment 12 above, populations of this annual plant fluctuate greatly from year to year. When conducting our analysis of the MSHCP, we used current GIS capabilities to model suitable habitat for the species. This is discussed in the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section of this final rule. We address impacts to the species from manure dumping in the ''Special Management Considerations or Protections'' section of this final rule.

Population estimates submitted by Bramlet and White (2004) are summarized as follows: (1) San Jacinto River populations (Habitat with Essential Features—Unit 1), 115,544 individuals, 9,141 ac (3699 ha) of suitable habitat; (2) Upper Salt Creek populations (Habitat with Essential Features—Unit 2), 51,996 individuals, 1,200 ac (486 ha) of suitable habitat; and, (3) Alberhill populations (Habitat with Essential Features—Unit 3), 185 individuals, 160 ac (65 ha) of suitable habitat. The total population and habitat estimates are 167,725 individuals and 10,501 ac (4250 ha) of suitable habitat, respectively. We are unable to compare these estimates with our habitat model or with the Units of habitat with essential features because Bramlet and White (2004) did not include a map of suitable habitat.

14. *Comment:* One peer reviewer commented on the differences in alkali soil types at different population centers. For example, the San Jacinto Wildlife Area (SJWA) has Willows, Traver, Chino, Waukena and Domino soils, the upper Salt Creek area has Willows, Traver, and Domino soils, and the Alberhill population is located on

Willows soils. The reviewer stated that approximately 80 percent of the individuals in the SJWA were on Willows soils, and approximately 99 percent of Glenn Lukos Associates records were on Willows soil. However, there is a more even distribution of the species across soil types at upper Salt Creek.

Our Response: We appreciate the peer reviewer's comments regarding alkali soils types at the different population centers and will take the information into account when working with the species and during our MSHCP implementation processes. See also our discussion of ''Primary Constituent Elements.''

15. *Comment:* Two peer reviewers submitted two comments that stated that *Atriplex coronata* var. *notatior* occurs in soils that are naturally nutrient poor. The reviewers believe that if natural runoff has been documented to provide essential minerals not otherwise available in the soil, the source should be cited.

Our Response: We appreciate the peer reviewers' comments on this matter. We have removed from the final rule our undocumented statement that natural runoff provides essential minerals to *Atriplex coronata* var. *notatior.*

16. *Comment:* The three peer reviewers submitted seven comments that recommended including in the final rule a better explanation of the importance of hydrological processes to *Atriplex coronata* var. *notatior.* The reviewers stated that stands of plants vary in size and location with rainfall and inundation of alkali habitat. Additionally, the species is not usually found in inundated areas but on small mounds within the floodplain and along the upper margins of normalized local flooding. The reviewers stated that both seasonal localized flooding and occasional large-scale flooding are important to the species. Seasonal localized flooding would distribute seeds locally, while large-scale flooding (which occurs every 20 to 50 years) would distribute seeds throughout the habitat, resetting the system by killing alkali scrub and erasing the impact of discing and other activities.

Our Response: We have expanded our discussion on the importance of hydrological processes to *Atriplex coronata* var. *notatior* under the ''Water and Physiological Requirements'' and ''Sites for Reproduction, Germination, and Seed Dispersal'' sections of this final rule.

17. *Comment:* Two peer reviewers submitted two comments that stated that removal of habitat and plants may be mandated in some portions of the species' range by local fire control ordinances, and that discing in crownscale habitat, if it is related to fire at all, is for fire prevention rather than fire suppression.

Our Response: Discing for fire prevention may currently occur within the species' range. However, as discussed under the Fuels Management section of the MSHCP (section 6.4), the impacts of fuels management on the MSHCP Conservation Area will be minimized as new reserve lands and new developments are proposed within the MSHCP plan area. The MSHCP requires that Conservation Area boundaries be established to avoid encroachment by the brush management zone in areas where Reserves are created adjacent to existing developed areas. Additionally, brush management zones must be incorporated into the development boundaries when new development is planned adjacent to the MSHCP Conservation Area or other undeveloped areas.

18. *Comment:* One peer reviewer stated that, based on general observations, seeds of the species are viable for greater than 5 years.

Our Response: In our 2004 proposed rule, we stated that ''Preliminary studies indicate that *Atriplex coronata* var. *notatior* seeds retain a relatively high viability for at least several seasons (Ogden Environmental and Energy Services Corporation 1993).'' We appreciate the peer reviewer's comment on this matter and will take the information into account when working with the species.

19. *Comment:* One peer reviewer recommended that we review the most current California Natural Diversity Database (CNDDB) records and herbarium specimens from the Rancho Santa Ana Botanic Garden and the University of California, Riverside, before finalizing boundaries of habitat with essential features.

Our Response: We have reviewed the most current CNDDB records and herbarium specimens from these two organizations. No new records have been submitted to these agencies since the publication of our proposed rule.

20. *Comment:* Two peer reviewers submitted seven comments that suggested alterations to Unit 1 of Habitat with Essential Features. The reviewers recommended defining the Unit to exclude upland and watershed areas that are not suitable for the species, as well as some heavily disced, irrigated agricultural fields that no longer support the species. One peer reviewer provided a detailed map showing upland and agricultural areas that are not suitable habitat for the species and thus should not be considered habitat with essential features. Two peer reviewers recommended making it clear in the text of the final rule that habitat for *Atriplex coronata* var. *notatior* does not extend into Railroad Canyon. The peer reviewers expressed concern that the Service may have excluded occupied habitat southwest of Interstate 215 based on future projects rather than known biological or soils data. Additionally, they recommended that Unit 1 be expanded to incorporate occupied habitat southwest of Interstate 215.

Our Response: We appreciate the peer reviewers' area-specific expertise and their recommendation not to include as habitat with essential features specific upland areas and heavily disced, irrigated agricultural fields. We concur with their recommendation that these areas should not be considered essential for the species and we will make use of their comments and map when working with the species and during our MSHCP implementation processes. Additionally, we concur with the peer reviewers that habitat for the species does not extend into Railroad Canyon. As explained in greater detail in the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section of this final rule, the occupied habitat areas southwest of Interstate 215 that are outside of our Units of habitat with essential features do not fall within our interpretation of the MSHCP Conservation Area. However, in accordance with the Additional Survey Needs and Procedures section of the MSHCP (section 6.3.2), property owners within the MSHCP Criteria Area must avoid 90 percent of those portions of the property that provide long-term conservation value for the species until the permitees have demonstrated that conservation goals for the species have been met. Additionally, the requirements of the Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools section of the MSHCP (section 6.1.2) may result in additional conservation for this species.

21. *Comment:* One peer reviewer advised the Service to check the ownership of the San Jacinto Wildlife Area (SJWA) and stated that the SJWA is likely owned by the State of California or the Wildlife Conservation Board (WCB) rather than the California Department of Fish and Game (CDFG).

Our Response: We have been informed by the CDFG that legal title to all state lands is taken in the name of the State of California. The CDFG is the State Trustee Agency for the management of the fish and wildlife

resources of the State of California. As such, the CDFG is the State agency responsible for the management of the State lands comprising the SJWA. The WCB is the State agency responsible for the acquisition of lands in the name of the State of California for purposes of wildlife conservation and public access. Over the years the WCB has acquired virtually all the formerly private lands now comprising the state public lands of the SJWA (Paulek 2005 *in litt.*).

22. *Comment:* Two peer reviewers submitted two comments asking that the final rule explain that the SJWA was purchased and is managed by the CDFG primarily for waterfowl conservation. The reviewers stated that most of the conservation management implemented on the SJWA, such as flooding ponds in March when *Atriplex coronata* var. *notatior* blooms, is beneficial to waterfowl but not to *A. coronata* var. *notatior.* The reviewers further recommended describing any management obligations the CDFG may have for rare plants, including *A. coronata* var. *notatior,* citing the Wildlife Area's management plan where appropriate.

Our Response: We have been informed by the CDFG that the SJWA was established in the early 1980's as a mitigation site for the direct impacts of the State Water Project (SWP) which was completed in the mid-1970's. Management objectives for the original 4,800 ac (1,942 ha) of land acquired for SWP mitigation were directed towards habitat conservation and the restoration of historic habitat values associated with the San Jacinto Valley of Western Riverside County. To that end, initial habitat restoration efforts included the development of freshwater wetlands and extensive restoration of willow-cottonwood riparian habitat. Wildlife habitats conserved in public ownership include Riversidian Sage Scrub, annual grasslands, Alkali Sink Scrub, and virtually the entirety of the historic Mystic Lake floodplain. The placement of the Mystic Lake floodplain in public ownership represents the most important *A. coronata* var. *notatior* conservation action realized to date.

In 1995, the SJWA was included in the reserve lands for the Stephens' Kangaroo Rat (SKR) pursuant to the SKR Habitat Conservation Plan. More recently the SJWA has been designated a principal reserve for the MSHCP adopted in June 2004. Over the years and with the recent acquisition of the Potrero Unit, the SJWA has grown to nearly 20,000 ac (8,094 ha). Pursuant to the conservation mandates above, the management objectives for the SJWA continue to seek the conservation of multiple species of plants and animals by maintaining and restoring a diversity of habitat types.

As to the conservation of *A. coronata* var. *notatior,* the draft management plan for the SJWA designates the habitat of *A. coronata* (Alkali Sink Scrub) a Special Ecological Community. The plan recognizes the need for additional survey of the distribution of the species on the SJWA, and provides for the incorporation of appropriate impact analysis for this sensitive plant in future project environmental review procedures. The plan also recognizes the need to initiate additional species-specific research efforts with the goal of formulating a management prescription for this endangered plant (Paulek 2005 *in litt.*).

23. *Comment:* One peer reviewer stated that there appears to have been an overestimate in the proposed rule of the total acreage of *Atriplex coronata* var. *notatior* habitat that is located within waterfowl ponds. The reviewer requested that we review this information and correct the text in the final rule.

Our Response: In our 2004 proposed critical habitat rule, we wrote that within the SJWA/Mystic Lake area, approximately 470 ac (190 ha) of habitat consist of duck ponds, 250 ac (100 ha) of which fall within the SJWA (Roberts and McMillan 1997). We have been informed by the CDFG that wetland habitat (freshwater marsh) on the 10,000-ac (4,047-ha) Davis Road Unit of the SJWA includes approximately 470 ac (190 ha) of marsh habitat managed under a moist soil management regimen. Typically these wetlands are flooded in the fall and the water is drawn off in the spring. In addition, up to 500 ac (202 ha) of semi-permanent wetland at other locations on the Wildlife Area can be flooded in the early spring and maintained into the summer months. The moist soil management regimen (fall flooding) at several locations on the SJWA has been found to promote the germination of *Atriplex coronata* var. *notatior* after the spring drawdown (Paulek 2005 *in litt.*).

24. *Comment:* Two peer reviewers submitted two comments that noted that the proposed rule states that CNDDB Element Occurrence 12 is outside of the SJWA, but that was incorrect and that the occurrence was added to the SJWA in 1996.

Our Response: We appreciate the peer reviewer's comment on this matter and will take the information into account when working with the species in this area.

25. *Comment:* One peer reviewer stated that the survey conducted by Glenn Lukos Associates in 2000 was conducted under special circumstances. The reviewer stated that landowners suspended discing and manure dumping for a spring census at the request of their biological consultants. Additionally, discing and manure dumping resumed following the census, with significant impact to the populations. This further illustrated both the impact of these activities on the species and the species resilience to temporary disturbance.

Our Response: We appreciate the peer reviewers' comments with regard to the Glenn Lukos Associates 2000 survey, and we will take this information into account when working with the species and during our MSHCP implementation processes. We address impacts to the species from manure dumping, and how the MSHCP can address this threat, in the ''Special Management Considerations or Protections'' section of this final rule.

26. *Comment:* Two peer reviewers submitted three comments that suggested some alterations to Unit 2 of Habitat with Essential Features. They recommended that the Unit be better defined to exclude upland and watershed areas that are not suitable for the species, including habitat north of Florida Avenue and upland slopes west of the San Diego Canal. One peer reviewer provided a detailed map to show which upland and agricultural areas are not suitable habitat for the species and should be excluded from Unit 2. Additionally, the peer reviewers expressed that occupied habitat known to occur south of the railroad tracks at the southern end of the Unit, and south of the intersection of Warren Road and Esplanade Avenue north of the Unit, should be included in Unit 2. Additionally, one peer reviewer expressed that occupied habitat known to occur south of the railroad tracks at the southern end of the Unit, and between Devonshire Road and Tres Cerritos Road within the Metropolitan Water District right-of-way for the San Diego Canal, should be included in Unit 2.

Our Response: We appreciate the peer reviewers' comments with regard to excluding upland and watershed areas from habitat with essential features. We will take this information into account when working with the species and during our MSHCP implementation processes. As is explained in greater detail in the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section of this final rule, the occupied habitat area south of the railroad tracks at the southern end of the

unit that is outside of our Unit does not fall within our interpretation of the MSHCP Conservation Area. However, in accordance with the Additional Survey Needs and Procedures section of the MSHCP (section 6.3.2), property owners must avoid 90 percent of those portions of the property within the MSHCP Criteria area that provide long-term conservation value for the species until the permitees have demonstrated that conservation goals for the species have been met. Additionally, the Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools section of the MSHCP (*i.e.*, section 6.1.2) may result in additional conservation for this species.

Because we have no source on file for the population reported by one peer reviewer between Devonshire Road and Tres Cerritos Road within the Metropolitan Water District right-of-way for the San Diego Canal, we requested that the peer reviewer provide a source. The peer reviewer said that the surveys that detected these individuals were conducted this year and collections are forthcoming (David Bramlet 2005 pers. comm. with USFWS). This area also does not fall within our interpretation of the MSHCP Conservation Area.

27. *Comment:* One peer reviewer recommended that the Service review the study of the Unit 2 area conducted by Recon in 1995, and incorporate information into the final rule to provide a more complete overview of the Unit.

Our Response: The 1995 study by Recon is a fairly comprehensive survey of the Unit 2 area, excluding watershed areas to the north and west. *Atriplex coronata* var. *notatior* was found to be locally common within the study area. Survey results indicate a total of 33 data points for the species, with numbers of individuals at each point ranging from 2 to 10,000 plants.

28. *Comment:* One peer reviewer recommended the Service closely examine the survey methodology of the 2001 Amec Earth and Environmental, Inc. census. The reviewer believes the estimate of 136,000 plants on 40 ac (16 ha) in the Upper Salt Creek Wetland Preserve is extremely high.

Our Response: According to the Amec Earth and Environmental, Inc. (2001) study, ''methodologies were consistent from year to year * * * population estimates based on average plant densities were calculated for [*Atriplex coronata* var. *notatior*]. Ten-meter-square quadrats were randomly placed within a stand of [*A. coronata* var. *notatior*] and average plant density was then multiplied by the population area to arrive at the estimated number of plants per population.'' Please also see our response to comment 12 above.

29. *Comment:* One peer reviewer stated that habitat restoration is needed in the Upper Salt Creek Area due to significant hydrological impacts from ground surface alterations. For example, the reviewer explained that a drainage ditch was constructed in 1989 that drains water off of the surrounding flats, and has led to a reduction of *Juncus* sp. and *Eleocharis* sp. which were once abundant in the area.

Our Response: We appreciate the peer reviewer's comment and we will take this information into account when working with the species in this area and during our MSHCP implementation processes.

30. *Comment:* One peer reviewer recommended documenting in the final rule instances where storm flows are allowed to reach *Atriplex coronata* var. *notatior* habitat rather than being collected in storm drains and directed into stormwater channels. The reviewer further explained that land conversion to large developed areas with storm drain systems fundamentally changes the natural hydrology within watersheds supporting *A. coronata* var. *notatior*.

Our Response: We have participated in three informal consultations in the watershed area of Unit 2 of Habitat with Essential Features which have resulted in the maintenance of clean water flows to the seasonally flooded alkali vernal plain habitat at upper Salt Creek. Clean water flows from Reinhardt Canyon and hillside areas west of the Heartland Project are collected in a detention basin located northwest of the California Avenue and Florida Avenue intersection. These flows are then pumped out of the detention basin and travel by sheet flow to the seasonally flooded alkali vernal plain habitat (Heartland Project Description 2000; Heartland Memorandum of Understanding 2000). Once construction is completed for these projects, clean water flows from the Tres Cerritos hills north of the JP Ranch and Tres Cerritos West Projects will be collected in a system of pipes which will direct the clean water flows under the project sites to a spreader located south of Devonshire Avenue between Warren Road and Old Warren Road (Lockhart and Associates 2004; LSA Associates, Inc. 2004). Through informal consultation, the City of Hemet has agreed to maintain these clean water delivery systems.

31. *Comment:* One peer reviewer stated that dryland farming has not been conducted in Hemet on any scale for over a decade. Additionally, the reviewer believed that discing conducted in Hemet is for fire prevention rather than dryland farming.

Our Response: We have been informed by the City of Hemet that weed abatement notifications for fire prevention are not sent to properties within the MSHCP Criteria Area (Masyczek 2005 *in litt.*).

32. *Comment:* Two peer reviewers submitted four comments that suggested alterations to Unit 3 of Habitat with Essential Features. They recommended that the unit be better defined to exclude the area north of Nichols Road and include the field west and southwest of the unit due to the presence of Willows soils. One peer reviewer provided a detailed map to show these recommended changes.

Our Response: First, we appreciate the peer reviewers' comments with regard to excluding the area north of Nichols Road from habitat with essential features. The text in our proposed rule stated that ''the northern boundary [of Unit 3] is defined by Nichols Road.'' The inclusion of the area north of Nichols Road in the critical habitat unit was a mapping error resulting from the presence of mapped Willows soils in that area. Due to the presence of dense riparian habitat, we concur with the peer reviewers that habitat for the species does not extend north of Nichols Road. Second, we have reviewed the map provided by peer reviewers of the field in question located west and southwest of the Unit of habitat with essential features. According to official soil survey data (United States Department of Agriculture Soil Conservation Service 1971), the soil types in this area are Garretson very fine sandy loam and Arbuckle loam. However, this area is included in our interpretation of the MSHCP Conservation Area (as described in greater detail in the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section of this final rule) and should be conserved under the MSHCP.

33. *Comment:* Two peer reviewers submitted two comments that recommended adding to the final rule that it is likely the Alberhill Creek population is larger than currently known. Additionally, the reviewer stated that information for this occurrence is limited to a few collections and no surveys of potential habitat have been conducted.

Our Response: We appreciate the peer reviewer's comment and we will take this information into account when working with the species in this area and during our MSHCP implementation processes.

Public Comments

34. *Comment:* One commenter submitted four comments that supported our decision to exclude critical habitat based on the presence of an existing HCP. The commenter stated that the MSHCP provides protection for covered species and sensitive habitats, including *Atriplex coronata* var. *notatior* and its habitat. The commenter expressed concern that the designation of critical habitat within HCP boundaries would undermine partnerships with landowners that were developed during the planning process. The commenter further stated that landowners participated in the regional MSHCP planning effort in part to prevent the inefficient and ineffective project-by-project regulation that is associated with designated critical habitat, and that designating critical habitat in this area would subject landowners to two different regulatory processes that would be a financial burden.

Our Response: As stated in the ''Exclusions Under Section 4(b)(2) of the Act'' section of the proposed rule, we agree that the MSHCP benefits the conservation of *Atriplex coronata* var. *notatior* and that the benefits of excluding lands covered under the MSHCP outweigh the benefits of including such lands. We also recognize that the designation of critical habitat may remove incentives to participate in the HCP processes, in part because of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, delayed approval and development of the plan, and greater vulnerability to legal challenge. We believe HCPs are one of the most important tools for reconciling land use with the conservation of listed species on non-Federal lands. We look forward to working with HCP applicants to ensure that their plans meet the issuance criteria and that the designation of critical habitat on lands where an HCP is in development does not delay the approval and implementation of their HCP.

35. *Comment:* One commenter submitted two comments that disagreed with our decision to exclude critical habitat based on the presence of an existing HCP. The commenter stated that all agencies are not signatories to the MSHCP, and therefore critical habitat should be identified for those projects and agencies operating outside the MSHCP. The commenter was concerned that the reason for habitat exclusions did not have a scientific basis.

Our Response: See the response to Peer Reviewer Comment 3 above.

36. *Comment:* One commenter submitted two comments stating that threats to the species were not adequately addressed in the proposed rule and the MSHCP. The commenter recommended additional discussion on the threats of manure spreading and non-seasonal flows which may result from future development.

Our Response: See the response to Peer Reviewer Comment 9 above.

37. *Comment:* One commenter stated that failure to designate critical habitat within HCP boundaries would be a disincentive to the participation of their organizations in the development of future HCPs.

Our Response: It has been our experience that many different stakeholders participate in the creation of an HCP. We appreciate the commenter's participation in HCP planning efforts and urge them to continue to participate in future HCP efforts. However, it has been our experience that the designation of critical habitat in HCP areas removes incentives for most stakeholders to participate in the HCP process due to added regulatory uncertainty, increased costs to plan development and implementation, delayed approval and development of the plan, and greater vulnerability to legal challenge.

38. *Comment:* One commenter stated that it is incumbent upon the Service to designate areas as critical habitat if they are identified as ''essential habitat,'' based on the definition of critical habitat.

Our Response: Section 4(b)(2) of the Act allows us to consider the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. Areas identified as having features essential for the conservation of the taxon 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 an area as critical habitat will result in the extinction of the species. We have determined that the benefits of exclusion of habitat with essential features covered by the MSHCP outweigh the benefits of inclusion. See ''Exclusions Under Section 4(b)(2) of the Act'' section for a detailed discussion.

In addition, the Service in this and other notices has been using the term ''essential habitat'' as shorthand for ''areas eligible for designation as critical habitat''. We recognize that this might cause confusion with the provisions of the Act that areas unoccupied at the time of listing may be designated by the Secretary as ''essential to the conservation of the species'' and so included in a critical habitat designation. The use of the term ''essential habitat'' in this and past notices is not a determination by the Service or the Secretary that this habitat is, within the terms of the Act, essential to the conservation of the species, unless the use of the term is accompanied by an express statement that the Secretary has made such a determination. In either event, however, we have authority under section 4(b)(2) of the Act to exclude any such area.

39. *Comment:* One commenter stated that the reserves proposed under the MSHCP are fragmented and the connectivity between units of habitat with essential features is lacking.

Our Response: The three Units of Habitat with Essential Features for *Atriplex coronata* var. *notatior* include areas of seasonally-flooded alkali vernal plain habitat that are currently naturally isolated from each other. The MSHCP provides for a connection through different habitat types between Units 1 and 3. Unit 2 falls within proposed MSHCP noncontiguous habitat block 7 which is not connected to the larger MSHCP Conservation Area. However, this habitat block is currently isolated from other natural areas by existing development and agricultural lands. Efforts are being made on a local level in order to prevent fragmentation of habitat within MSHCP noncontiguous habitat block 7. For example, the City of Hemet has adopted an Interim Urgency Ordinance to ensure that development efforts within the MSHCP Criteria Area are coordinated such that habitat conserved within the criteria area does not become fragmented, thereby allowing the City to meet their obligations under the MSHCP (Ordinance No. 1742).

40. *Comment:* One commenter stated that the Service should consider multiple variables (*e.g.*, life strategy, disturbance probability, potential habitat, population size, recovery from disturbance, habitat suitability, predation, and competition) when determining the size of plant conservation areas and critical habitat units. Additionally, this commenter stated that the purpose of critical habitat designation is not only to prevent extinction but to facilitate recovery, as supported by case law. The commenter stated that the critical habitat proposal failed to include areas of unoccupied suitable habitat that would provide for recovery opportunities, including

genetic exchange and migration in response to climate change.

Our Response: As described in the ''Critical Habitat'' portion of this final rule, a number of policy and regulatory guidelines and standards provide the Service with criteria, procedures, and guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists, to the extent consistent with the Act and with the use of the best scientific 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 is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials, expert opinions, or personal knowledge.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Moreover, we believe this HCP, and HCPs generally, offer greater benefits to all aspects of the conservation of listed species, including to recovery, than a critical habitat designation. We also believe that this action complies with all applicable laws.

Public Comments on the Draft Economic Analysis

41. *Comment:* Three commenters state that the Draft Economic Analysis (DEA) quantifies costs for projects that do not contain occupied habitat for *Atriplex coronata* var. *notatior*. Two of the commenters also question why costs not related to protection of *A. coronata* var. *notatior* or its habitat are presented in Table 6 in Section 5.1.

Our Response: As described in Section 5.1, Table 6 of the DEA, past development projects outside of the footprint of the proposed critical habitat designation have impacted the species habitat within the lands proposed for designation. In this scenario, the DEA appropriately quantifies the costs of the project modifications implemented at the offsite development projects to protect the species and habitat within the proposed designation. This is consistent with the scope of analysis as described in Section 1.2: the analysis considers the cost of species and habitat conservation, not just impacts to projects located within occupied habitat.

The information on the costs of vernal pool conservation not related to protecting *Atriplex coronata* var. *notatior* or habitat are provided in Section 5.1, Table 6 as these activities provide insight into the types and costs of project modifications implemented to protect vernal pool species and habitat in general. The conservation activities and associated dollar amounts described in the table, however, are provided only for context and are not captured in the quantitative results of the DEA.

42. *Comment:* Two commenters question the framework for development effects, as discussed in Section 2.2.2.1 of the DEA. These commenters state that the DEA is an analysis of the impacts of the California Environmental Quality Act (CEQA) and the Western Riverside County MSHCP, not solely of designating critical habitat.

Our Response: Coextensive effects, as defined in Section 1.2 of the DEA, may include impacts associated with overlapping protective measures of other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation. Because habitat conservation efforts affording protection to a listed species likely contribute to the efficacy of the critical habitat efforts, the impacts of these actions are considered relevant for understanding the full effect of the proposed critical habitat designation.

43. *Comment:* One commenter suggests that information on specific, planned development projects should be reviewed.

Our Response: Throughout the development of the DEA, past and current development projects within the potential critical habitat area were researched. As described in Table 6 of Section 5.1, two development projects are currently in progress and the development companies were contacted to determine the details and status of the projects. The DEA captures the impacts of mitigating these projects based on information obtained. Data are not available on all potential development projects that may occur during the 20-year forecast period; thus, the analysis estimates and applies average costs of impacts to development on a per-acre rather than per-project basis where specific information is unavailable.

44. *Comment:* Multiple comments state that the DEA fails to evaluate the cost of property for conservation acquisition or the costs of implementing and maintaining of conservation easements. Specifically, one comment asserts that the methodology used to quantify development impacts is questionable as it does not quantify the cost of purchasing reserves for the MSHCP. The comment further states that while the MSHCP reserve boundaries are not yet proposed, land will have to be purchased or obtained through mitigation dedication and projects may have to be modified to avoid impacts to vernal pools and vernal pool watersheds. The comment also states the DEA fails to analyze the potential loss of developable private lands or the potential cost of transfer of ownership of lands for mitigation.

Our Response: As acknowledged by the commenter, the MSHCP does not describe the exact location or timing of each acre of private land to be acquired for the MSHCP reserve. However, as described in Section 5.2.4.1 of the DEA, current land use and population growth rates were available from the Riverside County to spatially forecast future development within the proposed critical habitat units. Section 2.2.2.1 of the DEA describes the model applied to estimate impacts to development using these data. The DEA assumes that development is permitted in potential critical habitat areas if appropriate project modifications and/or mitigation activities are undertaken, and/or mitigation fees paid. That is, the analysis does not assume that land is lost to development, but instead that development occurs with mitigation.

Quantified mitigation efforts include the collection of a mitigation fee from future development within the boundaries of the MSHCP. These funds will be used by the County to finance the future acquisition of lands for the MSHCP reserve. The impact of these fees is captured in the DEA (Section 5.2.5). Further, as outlined in Section 5.2.2, other conservation efforts associated with development projects have been quantified in the DEA, including purchase of on-site or off-site mitigation lands through restoration and enhancement; habitat creation; purchasing preservation credits from a conservation bank; or purchasing vernal pool habitat from a private land owner and preserving wetted acreage. To account for a variety of potential mitigation ratios and mitigation measures, the DEA presents impacts of *Atriplex coronata* var. *notatior*

conservation efforts on development projects as a range. That is, the DEA reports the full range of costs associated with a combination of mitigation ratios and conservation efforts that may be recommended to offset impacts of development to the species and habitat.

45. *Comment:* One commenter states the DEA should justify why it assumes that habitat protection under the MSHCP will not affect existing development patterns. The comment also questions how the habitat with essential features will be conserved if all of the potential developments are approved.

Our Response: It is uncertain which specific areas of the habitat with essential features may be developed during the forecast period, when those areas may be developed, what mitigation would be recommended, and if the County would be interested in acquiring a portion of that area for the MSHCP reserve. By assuming that all future development is allowed in habitat areas with appropriate project modifications and/or mitigation activities, the DEA captures the cost of modifying development projects to protect the plant and its habitat.

46. *Comment:* According to one comment, the DEA fails to include impacts to the proposed expansion of the Ramona Expressway and the construction of a dam across the San Jacinto River.

Our Response: The DEA quantifies economic impacts to specific road projects where information is available (Section 6.1.1.1) and applies a generic impact estimate future road projects for periods where project-specific information is not known. California Department of Transportation (Cal Trans) was contacted during the development of the DEA to identify future transportation projects planned in and around the essential habitat areas. While the proposed expansion of the Ramona Expressway was not explicitly identified by Cal Trans as a project during its 2006–2009 planning period, the DEA captures the economic impacts associated with future project in its generic forecast of impacts to road projects generally if the Ramona Expressway expansion occurs during the 2010–2025 period.

47. *Comment:* One commenter states that the DEA fails to consider that the main purpose of the SJWA is waterfowl management. The comment further suggests that the Reserve Manager should have been contacted to determine the budget for *Atriplex coronata* var. *notatior* conservation efforts and opines that these costs should be offset by the benefits of maintaining these sites. In addition, the California Native Plant Society (CNPS) and Center for Biological Diversity (CBD) state *A. coronata* var. *notatior* conservation is not explicitly considered in the operating budget of the Wildlife Area and therefore, costs of Wildlife Area management should not be included in the DEA. The commenters further state that, while the operation of the Wildlife Area benefits some *A. coronata* var. *notatior* populations, management has also damaged the species in the past, for example, inundating habitat, which reduces the potential for recovery. The DEA fails to evaluate these damages.

Our Response: As described in Section 6.6, the DEA acknowledges that the SJWA was established as mitigation for the State Water Project, and that the primary purpose of the Wildlife Area was to conserve the floodplain ecosystem and species' habitat. In addition, the manager of the Wildlife Area was contacted regarding costs of conservation activities specifically benefiting *A. coronata* var. *notatior.* As quantified in the DEA, the SJWA spends approximately $5,000 every other year to protect vernal playa habitat. Information was also provided on the annual number of recreational user days, which were valued and used to quantify the net economic impacts of Wildlife Area management in the DEA. No information was identified regarding the impact of past damages to *A. coronata* var. *notatior* habitat resulting from Wildlife Area management. The DEA does, however, capture the costs of monitoring and maintaining the habitat, which is assumed to include avoiding such damages in the future.

48. *Comment:* Two commenters state the cost model used in the DEA to estimate the administrative cost of section 7 consultation is highly inflated.

Our Response: As described in Section 2.2 of the DEA, the cost model is based on a survey of Federal agencies and Service Field Offices across the country and the costs are believed to be representative of the typical range of costs of the section 7 consultation process. Throughout the development of the DEA, stakeholders were asked whether the range of estimated consultation costs was reasonable. In the case that stakeholders anticipated higher or lower costs, this improved information would be applied in the DEA. No stakeholders indicated, however, that the range of costs applied in the DEA was inappropriate.

49. *Comment:* A comment provided by the CNPS and CBD states that the cost estimates of species conservation as provided in the DEA conflict with the cost estimated in the Western Riverside MSHCP for this species alone, which is much less. Therefore, either the DEA or the MSHCP contain errors in its impact estimates.

Our Response: Section 8.2.1 of the MSHCP describes the costs of implementing the plan, including costs to acquire reserve lands, manage and monitor the reserve area, and general administration of the MSHCP. The County estimates these costs will total almost $1 billion during the first 25 years of the MSHCP. This impact estimate, however, is not directly comparable to that in the DEA as the policy actions being analyzed are different. The MSHCP estimates the cost of acquiring and managing its reserve area and conservation actions for the multiple species covered under the plan. Further, the geographic scope of the MSHCP and the potential critical habitat for *A. coronata* var. *notatior* are different.

50. *Comment:* Two commenters question the use of ''low income farmers'' as an example of a group that may be adversely affected by species conservation in Section 1.1. Another comment states that the report appears biased because it implies that low income farmers are the principal landowners within the habitat with essential features being reviewed, and that the report does not provide a review of the economic status of the private landowners in the affected areas.

Our Response: The DEA considers the status of public and private land ownership; however, the identity of every private landowner within the 15,232 acres of essential habitat is unknown. As described in Section 6.8, approximately one-half of all habitat with essential features is classified as agriculture land, and this agriculture land represents 60 percent of the developable acres. Considering farmers comprise a large percentage of landowners within the habitat with essential features and developable land, the use of farmers as an example of a group of individuals that could be impacted in Section 1.1 is considered appropriate.

51. *Comment:* One commenter requests that more detail be provided on local regulations that protect *A. coronata* var. *notatior* within the County.

Our Response: Section 4 of the DEA includes discussion of the relevant Federal, State, and local regulations that provide protection to the species and its habitat.

52. *Comment:* One commenter states that the description of the Clean Water Act in Section 4.2.1 does not include

the proposed Special Area Management Plan (SAMP) for the San Jacinto River watershed.

Our Response: Section 4.0 provides a summary of important regulations that provide protection for the plant and its habitat but does not provide an exhaustive list of all regulatory protection. The proposed SAMP may streamline the Section 404 permitting process in the future, but it is not expected to influence the types of project modifications and mitigation implemented to protect *A. coronata* var. *notatior* and its habitat as quantified in the DEA.

53. *Comment:* Four commenters stated that the DEA should include an analysis of benefits, such as flood protection, watershed management, and open space. The commenters further stated that there is a benefit of having critical habitat in place should the Western Riverside MSHCP falter in its conservation mandate. Two of the commenters also stated the DEA fails to consider non-market values. One comment noted that large portions of the existing occupied habitat outside of the San Jacinto Valley Wildlife Area are being disked and that this will result in considerable costs to restore the habitat for this species. Thus, the beneficial costs of extant habitat that will not require restoration should be carefully evaluated.

Our Response: In the context of a critical habitat designation, the primary purpose of the rulemaking is to designate areas in need of special management that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from ''just knowing'' that a particular listed species' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions. In addition, there is no general agreement on how to value ''just knowing'' benefits.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition, are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, the DEA quantified the net economic impact of the proposed designation taking into account additional recreation activities. This is described in Section 6.6 (CDFG, San Jacinto Wildlife Area) of the DEA.

While the Act requires us to specifically consider the economic impact of a designation, it does not require us to explicitly consider in economic terms, or in an economic analysis, any broader social benefits (or costs) that may be associated with the designation where these are not readily monetized.

54. *Comment:* Four commenters stated that costs should be allocated among all the threatened and endangered species that benefit from the efforts.

Our Response: Coextensive effects as quantified in the DEA may also include impacts associated with overlapping protective measures of other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation. We note that in past instances, some of these measures have been precipitated by the listing of the species and impending designation of critical habitat. Because habitat conservation efforts affording protection to a listed species likely contribute to the efficacy of the critical habitat designation efforts, the impacts of these actions are considered relevant for understanding the full effect of the proposed critical habitat designation. Enforcement actions taken in response to violations of the Act, however, are not included.

55. *Comment:* Two commenters stated that the DEA does not make a distinction between the cost of listing the species under the ESA versus the cost of designating critical habitat.

Our Response: This analysis identifies those economic activities believed to be most likely to threaten *Atriplex coronata* var. *notatior* and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the essential habitat area. In instances where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be coextensive with the designation.

56. *Comment:* Four commenters suggested that the economic analysis should be limited to the proposed critical habitat designation, zero acres, rather than the 15,232 acres of essential habitat, which comprise lands excluded from designation.

Our Response: In the proposed critical habitat rule we considered 15,232 acres of habitat essential for *Atriplex coronata* var. *notatior*, but we excluded that habitat from designation due to the presence of an existing habitat conservation plan under section 4(b)(2) of the Act. However, we recognized that we might receive comments on the proposed rule that would cause us to reassess our exclusions, and for this reason we conducted an economic analysis on the essential habitat. In addition, the Act requires us to consider economic impacts. The fact that we have proposed in advance to exclude areas for other reasons does not exempt us from this requirement.

57. *Comment:* Three commenters submitted requests that the 14 day comment period on the Draft Economic Analysis be extended to 30 or 60 days and four commenters stated that the Service did not offer a reasonable time period for review of the Draft Economic Analysis.

Our Response: We were unable to extend the comment period on the Draft Economic Analysis due to the lawsuit settlement deadline for the publication of the final critical habitat rule.

58. *Comment:* Two commenters stated that the essential habitat areas are not protected by the MSHCP but are within the MSHCP Criteria Area which directs potential conservation. They further stated that a full year after the issuance of the section 10(a)(1)(B) permit for the MSHCP, manure dumping and habitat conversion such as sod farming, continues to directly impact the species.

Our Response: The MSHCP is a large and complex habitat conservation plan, and its implementation is expected to take time. In its first year of

implementation, the MSHCP has already resulted in conservation and management actions that address threats to *Atriplex coronata* var. *notatior* on private lands. We address this issue further under the ''Special Management Considerations or Protections'' section of this final rule.

59. *Comment:* One commenter stated that although the Service mapped 15,232 acres of essential habitat for the species, the MSHCP proposes the conservation of only 6,900 acres of suitable habitat for the species. Moreover, our essential habitat coincided with the lands already conserved (Public/Quasi-Public Lands (PQP) and lands to be conserved (conceptual reserve design) under the MSHCP. The watershed lands in Salt Creek identified as essential habitat are expected to be developed and the MSHCP provides guidelines to maintain water quality and quantity to occupied seasonal wetlands. Thus, there is not a conflict between the proposed conservation of *Atriplex coronata* var. *notatior* under the MSHCP and the essential habitat identified in the proposed rule for the following reasons: (1) Although we did not use the habitat model used in the MSHCP, all essential habitat is protected by the MSHCP; (2) the 6,900 acres of suitable habitat for *Atriplex coronata* var. *notatior* is embedded within the much larger MSHCP Conservation Area; (3) approximately 77 percent of the essential habitat for *Atriplex coronata* var. *notatior* (11,760 acres of the 15,232 acres of essential habitat) would be protected on existing PQP lands and conceptual reserve design lands within the Western Riverside County MSCHP at San Jacinto River, Mystic Lake, Salt Creek, and Alberhill Creek, and (4) approximately 23 percent of the essential habitat (3,473 ac, 1405 ha) provides the watershed for the MSHCP Conservation Area at Unit 2. These watershed lands are not part of the MSHCP Conservation Area and are not known to be occupied by *A. coronata* var. *notatior*. The MSHCP species-specific Objectives for *A. coronata* var. *notatior* and the Guidelines Pertaining to the Urban/Wildlands Interface will ensure that floodplain processes will be maintained and the quantity and quality of runoff discharged to the MSHCP Conservation Area will not be altered in an adverse way when compared with existing conditions such that the essential functions and values that these watershed areas provide for the species will be maintained.

Our Response: When we mapped essential habitat for *Atriplex coronata* var. *notatior*, we did not use the habitat model used in the MSHCP for the species. The MSHCP defines suitable habitat for the species as consisting of grasslands on alkali soils, playas, and vernal pools within the Mystic Lake, San Jacinto River, and Salt Creek areas. When we mapped essential habitat for the species, we looked at habitat as described in the primary constituent elements of this rule, and our essential habitat includes watershed areas that were not captured in the MSHCP's definition of suitable habitat for *Atriplex coronata* var. *notatior*.

60. *Comment:* One commenter stated that in the MSHCP's proposal to conserve 6,900 acres of suitable habitat for the species, there is no consideration of conserving occupied versus potential habitat and asked for an explanation of how the MSHCP will conserve essential habitat for the species.

Our Response: MSHCP species-specific objective 2 for *Atriplex coronata* var. *notatior* requires that the locality at Alberhill creek and the three Core Areas for the species located along the San Jacinto River from the vicinity of Mystic Lake southwest to the vicinity of Perris and in the upper Salt Creek drainage west of Hemet, be included within the MSHCP Conservation Area. For further explanation of how the MSHCP will conserve essential habitat for the species, see the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section below.

61. *Comment:* One commenter expressed concern that the Conservation Areas are the only areas that will be conserved through the MSHCP and that all habitat enhancement, revegetation, and restoration will occur only within these areas.

Our Response: The ''Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools'' and ''Additional Survey Needs and Procedures'' sections of the MSHCP may result in additional conservation and habitat enhancement, revegetation, and restoration for *Atriplex coronata* var. *notatior*. To date, these policies have resulted in the submittal of two DBESPs that will result in conservation and restoration activities that may benefit *A. coronata* var. *notatior* (Lockhart 2004; LSA Associates Inc. 2005). For these two projects, the DBESPs propose to introduce the species into restored and created vernal pool habitat north of the upper Salt Creek populations once initial success criteria have been met, even though the proposed actions that resulted in impacts to vernal pool habitat did not directly affect *A. coronata* var. *notatior*.

Summary of Changes From Proposed Rule

We have reviewed public comments received on the proposed designation of critical habitat for *Atriplex coronata* var. *notatior* and the related draft economic analysis. While we have made no major changes to the rule, we have made a minor administrative change: Instead of adding text pertaining to *A. coronata* var. *notatior* to 50 CFR 17.97 as proposed, we are adding text to 50 CFR 17.96 instead. Since publication of the proposed rule, we have used § 17.97 for a different purpose. Consistent with the proposed rule, no lands are being designated as critical habitat for *A. coronata* var. *notatior* because all habitat with features essential to the conservation of this taxon are within the conservation area of the approved Western Riverside MSHCP, and are excluded pursuant to section 4(b)(2) of the Act. However, we have incorporated detailed information on the MSHCP and its associated documents as they relate to *A. coronata* var. *notatior* into this rule under the section titled ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan.''

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. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such

designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific 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)).

Habitat occupied at the time of listing 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).) Accordingly, when the best available scientific 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 at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely be considered essential to the conservation of the species and, therefore, included in the critical habitat designation.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific 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 is generally the listing package for the species. Additional information sources include the recovery plan for the species, 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. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted 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)(1)(A) of the Act, we used the best scientific data available in determining those areas that contain the features essential to the conservation of *Atriplex coronata* var. *notatior*. We utilized data and information contained in, but not limited to, the proposed critical habitat rule (69 FR 59844), the proposed listing rule (59 FR 64812), the final listing rule (63 FR 54975), CNDDB, reports submitted by biologists holding section 10(a)(1)(A) recovery permits, reports and documents on file in the Service's field offices, and communications with experts outside the Service who have extensive knowledge of the species and its habitat. Additionally, we used information contained in comments received by December 6, 2004, which were submitted on the proposed critical habitat designation (69 FR 59844), and comments received by September, 14, 2005, submitted on the draft economic analysis (70 FR 51739).

After all the information about the known occurrences of *Atriplex coronata* var. *notatior* was compiled, we created maps indicating the habitat areas with essential features associated with each of the occurrences. We used the information outlined above to aid in this task. Theses areas were mapped using GIS and refined using topographical and aerial map coverages. These areas were further refined by discussing each area with Service biologists familiar with each area, and by site visits to all three areas. After creating GIS coverage of the areas, we created legal descriptions of those 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 areas.

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 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 biological and physical features which are essential to the conservation of *Atriplex coronata* var. *notatior, i.e.,* the PCEs, 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 seasonally-flooded alkali vernal plain habitat, which includes alkali playa, alkali scrub, alkali vernal pool, and alkali annual grassland components (Interface Between Ecology and Land Development in California 1993, Service 1994, Madrono 1996). The species occurs in areas where this habitat is associated 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, soil chemistry alteration resulting from the dumping of manure, discing for fire prevention, 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, the wetlands and associated hydrology continue to provide essential biological and physical features necessary for this taxon at all four locales. All remaining occurrence complexes have been impacted by agricultural activities (Bramlet 1993, CNDDB 2003, Roberts and McMillan 1997, Service 1998). The taxon is also affected by nonagricultural related clearing activities (Bramlet 1993, CNDDB 2003, Roberts and McMillan 1997, Service 1998). Farming continues today on a portion of the lands that make up the SJWA. 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 soil chemistry alteration resulting from the dumping of manure (Roberts 2003 and 2004). Habitat at the Salt Creek Vernal Pool Complex has been degraded as a result of dry land farming. Finally, the occurrence within the Alberhill Creek floodplain is adjacent to a plowed field. This population may have previously extended into the adjacent agricultural area. Additionally, the population may be affected by agricultural runoff and sediment.

Atriplex coronata var. *notatior* can persist in the seed bank within disturbed lands, including agricultural areas. Therefore, the species is expected to re-establish itself from the seed bank once lands are restored. Restoration of these disturbed areas is necessary for the conservation of this taxon.

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. Both localized and large-scale flooding are important to the survival of *A. coronata* var. *notatior.*

Local flooding occurs on a seasonal basis and large-scale flooding occurs less frequently, approximately every 20 to 50 years (Roberts 2004). *Atriplex coronata* var. *notatior* occupies the margins of flooded areas on dry mounds and banks within seasonally-flooded alkali vernal plain habitat. This annual species may be abundant during average and dry years due to the increased presence of floodplain margins. However, alkali scrub habitat expands and crowds out habitat for annuals such as *A. coronata* var. *notatior* under normal circumstances (Roberts 2004, Bramlet 2004).

When large-scale flooding occurs, standing and slow moving water is present for weeks or months and results in the death of submerged alkali scrub. Large-scale flooding will also naturally restore areas that have been degraded by discing or other activities. Because *Atriplex coronata* var. *notatior* occupies the margins of flooded areas, populations may be reduced during very wet years when most of the species habitat is underwater (Bramlet 2004). However, large-scale flooding is essential to the continued survival of the species due to its ability to restore and maintain this habitat in a successional state. Irreversible actions that alter the hydrology of the seasonal wetlands or infringe upon the wetlands may threaten the survival of *A. coronata* var. *notatior.*

All four occurrence complexes rely on seasonal localized flooding and ponding from surrounding watershed areas (Roberts 2004, Bramlet 2004). Less frequent large-scale flooding is provided by the San Jacinto River at the SJWA/Mystic Lake occurrence complex and the occurrence complex located between the Ramona Expressway and the mouth of Railroad Canyon. Alberhill Creek would provide large-scale flooding for the occurrence complex at that location. Finally, the Upper Salt Creek Vernal Pool Complex is in a natural depression where rainfall from the surrounding area flows across the land and pools within the complex, in addition to flooding received from an unnamed tributary to Salt Creek. While some of the localized flooding for the Upper Salt Creek Vernal Pool Complex comes from undeveloped hillsides, 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, as well as natural floodplain processes, is necessary for the conservation of all four occurrence complexes.

Sites for Reproduction, Germination, and Seed Dispersal

Both localized and large-scale flooding are important to the reproduction, germination, and seed dispersal of *Atriplex coronata* var. *notatior* (Roberts 2004, Bramlet 2004). *A. coronata* var. *notatior* produces floating seeds (A. Sanders, June 4, 2004, University of California, Riverside, pers. comm. to S. Brown, USFWS) that are likely dispersed during local and large scale flooding by slow-moving flows within the floodplains and vernal pools where the species occurs. Natural floodplain processes are integral to the biotic processes this species uses to disperse and reproduce.

Local flooding allows for the distribution and germination of seeds within a localized area. Large scale flooding widely distributes seed of *Atriplex coronata* var. *notatior,* allowing the taxon to colonize favorable sites and retreat from less favorable sites in response to disturbance and variations in annual rainfall (Service 1994, Roberts 2004, Bramlet 2004). Natural hydrological processes must be maintained in these areas to allow for the reproduction and dispersal of the species.

Primary Constituent Elements for Atriplex coronata var. notatior

Based on our current knowledge of the life history, biology, and ecology of the taxon and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that *Atriplex coronata* var. *notatior's* primary constituent elements are:

(1) Seasonal wetlands, including floodplains and vernal pools, and the natural hydrologic processes upon which these areas depend;

(2) Natural communities, including seasonally-flooded alkali vernal plain, alkali playa, alkali scrub, and alkali grassland, 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.

Criteria Used To Identify Habitat Areas With Essential Features

In our proposed critical habitat designation (69 FR 59844), we delineated three Units of habitat with features essential to the conservation of *Atriplex coronata* var. *notatior* encompassing the four occurrence

complexes where the taxon is known to occur. These Units encompass a total of approximately 15,232 ac (6,167 ha) of habitat.

All four of the occurrence complexes are within the geographic area occupied by the species, are known to have been occupied at the time of listing, and contain one or more PCEs (*e.g.*, soil type, habitat type). The four occurrence complexes are: (1) Floodplain of the San Jacinto River at the SJWA/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, although not all known populations within these complexes are considered essential to the conservation of the species. We included those populations which are considered essential to the conservation of the species within the essential habitat units delineated in the proposed critical habitat designation (69 FR 59844). The significance of each occurrence complex is described in detail in the proposed rule (69 FR 59844).

These complexes are mapped as three Units in Map 1 in the proposed rule (69 FR 59844): 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. *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. *Unit 3—Alberhill* includes the fourth occurrence complex and comprises 32.3 ac (13.1 ha), all of which are privately owned.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the primary constituent elements may require special management considerations or protections. Within the areas of habitat with essential features occupied by *Atriplex coronata* var. *notatior,* we believe special management considerations or protections may be needed to maintain the physical and biological features that the species requires. Threats to the species habitat include habitat destruction and fragmentation resulting from urban and agricultural development, manure dumping, 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). Each of these threats render the habitat less suitable for *A. coronata* var. *notatior,* and special management may be needed to address them.

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 (CNDDB 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 (CNDDB 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.

In our proposed critical habitat designation (69 FR 59844), we delineated essential habitat units to provide for the conservation of *Atriplex coronata* var. *notatior* at the four occurrence complexes where it is known to occur. These essential areas total approximately 15,232 ac (6,167 ha) of habitat. Although all four complexes are considered essential to the conservation of *A. coronata* var. *notatior,* not all known populations within these complexes are considered essential to the conservation of the species. We included those populations which are considered essential to the conservation of the species within the essential habitat units delineated in the proposed critical habitat designation (69 FR 59844).

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. 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 requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed IA under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act.

The Western Riverside MSHCP species specific conservation objectives and written criteria provide for the conservation of the species within all four delineated essential habitat units. Therefore, no lands are being designated as critical habitat for this species. Please refer to the proposed rule (69 FR 59844) for details on how we determined the boundaries of the essential habitat units. Peer Reviewers provided comments regarding their recommendations for revisions to the essential habitat unit boundaries during the public comment period for this final rule. We have addressed their recommendations in the ''Peer Reviewer Comments'' section of this final rule and incorporated their recommendations throughout the rule as appropriate.

Permittees under the Western Riverside MSHCP are obligated to adopt and maintain ordinances or resolutions as necessary, and amend their general plans as appropriate, to implement the requirements and to fulfill the purposes of the MSHCP and its associated IA and Permit (see IA for the MSHCP, page 41). In its first year of implementation, the MSHCP has already resulted in conservation and management actions that address threats to *Atriplex coronata* var. *notatior* on private lands. For example, the City of Hemet has adopted two ordinances that have halted manure dumping within the City, and allowed the conditioning and coordination of development efforts such that habitat necessary for the conservation of

MSHCP Covered Species within the Criteria Area is protected and will not become fragmented (Ordinance No. 1666 and Ordinance No. 1742). For further information on management actions proposed for *A. coronata* var. *notatior* under the MSHCP see the ''Relationship of Critical Habitat to the Western Riverside Multiple Species Habitat Conservation Plan'' section below.

Critical Habitat Designation

We evaluated all 3 Units (four occurrence complexes) with features essential for the conservation of *Atriplex coronata* var. *notatior* for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. All three Units are within the conservation area of the approved Western Riverside 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 areas of habitat with essential features from the proposal, we are designating zero acres (0 ac) (0 ha) of critical habitat in this final rule for *A. coronata* var. *notatior.*

Effects of Critical Habitat Designation

Section 7 Consultation

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.'' The Service uses the guidance issued in the Director's December 9, 2004, memorandum when making adverse modification determinations under section 7 of the Act.

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. 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)). 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 their actions do not 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.

Federal activities that may affect *Atriplex coronata* var. *notatior* will continue to require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers 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. However, no lands are being designated as critical habitat for *Atriplex coronata* var. *notatior* because all habitat areas with essential features are within the conservation area of the approved Western Riverside MSHCP.

If you have questions regarding whether specific activities would require consultation under section 7 of the Act, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Portland Regional Office, 911 NE. 11th Avenue, Portland, OR 97232 (telephone 503/231–6131; facsimile 503/231–6243).

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 available after taking into consideration the economic impact, impact on national security, 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 such 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. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

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

We are excluding critical habitat from approximately 15,232 ac (6,167 ha) of non-Federal lands within the Western Riverside County MSHCP under section 4(b)(2) of the Act. *Atriplex coronata* var. *notatior* is a covered species under the Western Riverside County MSHCP. We completed our section 7 consultations on the issuance of the section 10(a)(1)(B) permit for the Western Riverside County MSHCP on June 22, 2004. This approved and legally operative HCP provides special management and protection for the physical and biological features essential for the conservation of *A. coronata* var. *notatior* that exceed the level of regulatory control that would be afforded this species by the designation of critical habitat. We have determined that the benefits of excluding critical habitat within this HCP from the critical habitat designation will outweigh the benefits of including them as critical habitat and this exclusion will not result in the extinction of *A. coronata* var. *notatior*.

Below we first provide general background information on the Western Riverside County MSHCP, followed by an analysis pursuant to section 4(b)(2) of the Act of the benefits of including HCP lands within the critical habitat designation, an analysis of the benefits of excluding HCP lands, and an analysis of why we believe the benefits of exclusion are greater than the benefits of inclusion. Finally, we provide a determination that exclusion of the HCP lands will not result in extinction of *Atriplex coronata* var. *notatior*.

The Western Riverside County MSHCP establishes a multiple species conservation program to minimize and mitigate the expected loss of habitat values and, with regard to ''covered'' animal species, the incidental take of such species. The MSHCP Plan Area encompasses approximately 1.26 million ac (509,900 ha) in western Riverside County, including the entire range of *Atriplex coronata* var. *notatior*, which is a covered species under this plan. The Western Riverside County MSHCP is a subregional plan under the State's Natural Communities Conservation Plan (NCCP) and was developed in cooperation with the California Department of Fish and Game. The Service concluded that the MSHCP would not jeopardize the continued existence of *Atriplex coronata* var. *notatior* in its Biological and Conference Opinion (Service 2004).

The MSHCP has five species-specific conservation objectives to conserve and monitor *Atriplex coronata* var. *notatior* populations: (1) Include within the MSHCP Conservation Area at least 6,900 acres of suitable habitat (grassland and playas and vernal pools within the San Jacinto River, Mystic Lake and Salt Creek portions of the MSHCP Conservation Area); (2) include within the MSHCP Conservation Area the Alberhill Creek locality as well as the three Core Areas, located along the San Jacinto River from the vicinity of Mystic Lake southwest to the vicinity of Perris and in the upper Salt Creek drainage west of Hemet; (3) conduct surveys for *Atriplex coronata* var. *notatior* as part of the project review process for public and private projects within the Criteria Area where suitable habitat is present. *Atriplex coronata* var. *notatior* located as a result of survey efforts shall be conserved in accordance with procedures described within the MSHCP; (4) include within the MSHCP Conservation Area the floodplain along the San Jacinto River consistent with Objective 1. Floodplain processes will be maintained 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; and (5) include within the MSHCP Conservation Area the floodplain along Salt Creek generally in its existing condition from Warren Road to Newport Road and the vernal pools in Upper Salt Creek west of Hemet. Floodplain processes will be maintained in order to provide for the distribution of the species to shift over time as hydrologic conditions and seed bank sources change.

Approximately 77 percent of the essential habitat for *Atriplex coronata* var. *notatior* (11,760 acres of the 15,232 acres of essential habitat) would be protected on existing Public/Quasi-Public Lands (PQP) lands and conceptual reserve design lands within the Western Riverside County MSCHP (MSHCP Conservation Area) (see objectives 1 and 2). This essential habitat is located at Alber Hill Creek, San Jacinto Wildlife Area, along the floodplain of the San Jacinto River, and upper Salt Creek west of Hemet and includes many occurrences of *A. coronata* var. *notatior* (see objectives 1, 2 and 4). The assembly of the MSHCP Conservation Area is anticipated to occur over the life of the permit. The MSHCP also includes monitoring and management requirements for *A. coronata* var. *notatior*. Known localities within the MSHCP Conservation Area will be monitored every eight years. Under the MSHCP, reserve managers are responsible for the maintenance and enhancement of floodplain processes on the San Jacinto River and Upper Salt Creek. Particular management emphasis will be given to preventing alteration of hydrology and floodplain dynamics, farming, fire and fire suppression activities, off-road vehicle use, and competition from non-native plant species. Thus, a significant amount of essential habitat and occurrences of *Atriplex coronata* var. *notatior* are expected to be conserved and managed in the MSHCP Conservation Area.

Approximately 14 percent of the essential habitat (2,202 acres of the 15,232 acres of essential habitat) provides the watershed for the MSHCP Conservation Area at upper Salt Creek west of Hemet. These watershed lands are not part of the MSHCP Conservation Area and are not known to be occupied by *Atriplex coronata* var. *notatior*. The Guidelines Pertaining to the Urban/Wildlands Interface is to ensure that the quantity and quality of runoff discharged to the MSHCP Conservation Area is not altered in an adverse way when compared with existing conditions. The function of these lands would be to maintain the quantity and quality of runoff discharged to the MSHCP Conservation Area. While these lands are expected to be developed, this guideline would ensure that future urbanization would maintain the existing water quality and quantity needed to sustain the seasonal wetlands occupied by *Atriplex coronata* var. *notatior*.

Numerous processes are incorporated into the MSHCP that allow for Service oversight of MSHCP implementation. These processes include (1) annual reporting requirements; joint review of projects proposed within the Criteria Area; participation on the Reserve Management Oversight Committee; and a Reserve Assembly Accounting Process which will be implemented to ensure that conservation of lands occurs in rough proportionality to development, are assembled in the configuration as generally described in the MSHCP, and that conservation goals and objectives are being achieved. The Service is also responsible for reviewing Determinations of Biologically Equivalent or Superior Preservation that are proposed under the Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools policy and for reviewing minor amendment projects, such as the State Route 79 Realignment project and the San Jacinto River Flood Control project, for consistency with the requirements of the MSHCP.

Thus, the Western Riverside County MSHCP provides significant conservation benefits to *Atriplex coronata* var. *notatior.* These benefits include a MSHCP Conservation Area that protects a significant percentage of the essential habitat and occurrences for *Atriplex coronata* var. *notatior* and long-term management of the preserve areas. The MSHCP also provides avoidance and minimization measures, under the Guidelines Pertaining to the Urban/Wildlands Interface that provide benefits to the species and watershed for *Atriplex coronata* var. *notatior.* Finally, the MSHCP provides oversight to ensure effective implementation.

(1) Benefits of Inclusion

Overall, we believe that there is minimal benefit from designating critical habitat for *Atriplex coronata* var. *notatior* within the Western Riverside County MSHCP because, as explained above, these lands are already managed or will be managed for the conservation of *Atriplex coronata* var. *notatior.* Below we discuss benefits of inclusion of these HCP lands.

A benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat and the analysis to determine if the proposed Federal action may result in the destruction or adverse modification of critical habitat for *Atriplex coronata* var. *notatior* may provide a different level of protection under section 7(a)(2) of the Act that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of *Atriplex coronata* var. *notatior.* Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided under section 7(a)(2) of the Act is still a limitation on the harm that occurs to the species or critical habitat as opposed to a requirement to provide a conservation benefit.

The inclusion of these 15,232 ac (6,167 ha) of non-Federal land as critical habitat may provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these 15,232 ac (6,167 ha) of non-Federal lands would likely consider the conservation value of these lands as identified in the Western Riverside County MSHCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat. In any event, they will still need to consult with us to avoid jeopardy to the species, and we generally consider habitat impacts in such jeopardy consultations.

The areas excluded as critical habitat include the seasonal wetlands that are occupied by *Atriplex coronata* var. *notatior* and the surrounding watershed (the watershed is not occupied by *A. coronata* var. *notatior*). If these areas were designated as critical habitat, any actions with a Federal nexus, such as the issuance of a permit under section 404 of the Clean Water Act, which might adversely affect critical habitat would require a consultation with us, as explained previously, in Effects of Critical Habitat Designation. However, inasmuch as portions of these areas are currently occupied by the species, consultation for Federal activities which might adversely impact the species would be required even without the critical habitat designation. For the surrounding watershed not occupied by *A. coronata* var. *notatior,* the Federal action agency would need to determine if the proposed action would affect the species rather than making a determination if the proposed action would cause destruction or adverse modification of critical habitat. A potential benefit of critical habitat would be to signal the importance of the surrounding watershed not occupied by *A. coronata* var. *notatior* to Federal agencies and to ensure their actions do not result in the destruction or adverse modification of critical habitat pursuant to section 7(a)(2) of the Act.

This potential benefit of critical habitat is reduced by the measures contained in the HCP to maintain watersheds for endangered species and seasonal wetlands. The Western Riverside County MSHCP provides Guidelines Pertaining to the Urban/Wildlands Interface. Under this guideline, proposed developments in proximity to MSHCP Conservation Areas shall incorporate measures, including measures required through the National Pollutant Discharge Elimination System requirements, to ensure that the quantity and quality of runoff discharged to the MSHCP Conservation Area is not altered in an adverse way when compared with existing conditions. In particular, measures shall be put in place to avoid discharge of untreated surface runoff from developed and paved areas into the MSHCP Conservation Area. Stormwater systems shall be designed to prevent the release of toxins, chemicals, petroleum products, exotic plant materials or other elements that might degrade or harm biological resources or ecosystem processes within the MSHCP Conservation Area. Thus, this HCP provide a greater level of protection and management for the watersheds of seasonal wetlands occupied by *Atriplex coronata* var. *notatior* than the simple avoidance of adverse effects to critical habitat.

If these areas were included as critical habitat, primary constituent elements would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, for those seasonal wetland areas occupied by *Atriplex coronata* var. *notatior* and the surrounding watershed, consultation for activities which may adversely affect the species, would be required even without the critical habitat designation.

In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat areas essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The inclusion of an area as critical habitat may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this educational benefit has largely been achieved for *Atriplex coronata* var. *notatior.* The public outreach and environmental impact reviews required under the National Environmental Policy Act for the Western Riverside County MSHCP provided significant opportunities for public education regarding the conservation of the areas occupied by *Atriplex coronata* var. *notatior* and the surrounding watershed. In addition, there has been public notice and opportunity for comment on this proposal, which identified lands eligible for designation as critical habitat, and on the economic analysis for the proposal, which also identified those lands. There would be little additional informational benefit gained from including these lands as critical habitat because of the level of information that has been made available to the public as part of these regional planning efforts. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the Western Riverside County MSHCP to provide protection and enhancement of habitat for *Atriplex coronata* var. *notatior* is already well established among State and local governments, and Federal agencies.

As discussed below, however, we believe that designating any non-Federal lands within the Western Riverside County MSHCP as critical habitat would provide little additional educational and Federal regulatory benefits for the species. Because portions of the excluded seasonal wetlands are occupied by the species, there must be consultation with the Service over any action which may affect these populations. For the surrounding watershed not occupied by *Atriplex coronata* var. *notatior,* the Western Riverside County MSHCP provide management measures to protect the watershed for these seasonal wetlands. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the Western Riverside County MSHCP, the public notice and comment period on this proposal, which identified lands eligible for designation as critical habitat, and on the economic analysis for the proposal, which also identified those lands, and the recognition by the County of Riverside of the presence of *Atriplex coronata* var. *notatior* and the value of their lands for the conservation and recovery of the species. The areas identified for conservation in the Western Riverside County MSHCP under the species-specific conservation objectives (San Jacinto River, Mystic Lake, Salt Creek, and Alberhill Creek portions of the MSHCP Conservation Area) are the same lands we have identified as providing the physical and biological features essential to the conservation of this species.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot,* the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an ''adverse modification'' finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: section 7(a)(2) limits harm to the species either through jeopardy or destruction or adverse modification of its habitat where there is a Federal nexus to the potential harm. It does not affect purely State or private actions on State or private land, nor does it require positive habitat improvements or enhancement of the species status. Thus, any management plan which has enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation.

(2) Benefits of Exclusion

As mentioned above, the Western Riverside County MSHCP provide for the conservation of *Atriplex coronata* var. *notatior* through avoidance, minimization, and/or mitigation of impacts, management of habitat, and maintenance of watershed. The Western Riverside County MSHCP provides for protection of the PCEs, and addresses special management needs such as edge effects and maintenance of hydrology. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures provided in this HCP.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* 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 the critical habitat designation may result in additional regulatory requirements than faced by 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.

Another benefit from excluding these lands is to maintain the partnerships developed among the County of Riverside, State of California, and the Service to implement the Western Riverside County MSHCP. Instead of using limited funds to comply with administrative consultation and designation requirements which cannot provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species.

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 excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/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. 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. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs 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) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/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. In the biological opinions for the Western Riverside County MSHCP, the Service concluded that issuance of section 10(a)(1)(B) permit for this plan is not likely to result in jeopardy to the species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the exclusion of critical habitat for *Atriplex coronata* var. *notatior* from approximately 15,232 ac (6,164 ha) of non-Federal lands within the Western Riverside County MSHCP and based on this evaluation, we find that the benefits of exclusion (avoid increased regulatory costs which could result from including those lands in this designation of critical habitat, ensure the willingness of existing partners to continue active conservation measures, maintain the ability to attract new partners, and direct limited funding to conservation actions with partners) of the lands containing features essential to the conservation of *Atriplex coronata* var. *notatior* within the Western Riverside County MSHCP outweigh the benefits of inclusion (limited educational and regulatory benefits, which are largely otherwise provided for under the HCP) of these lands as critical habitat. The benefits of inclusion of these 15,232 ac (6,164 ha) of non-Federal lands as critical habitat are lessened because of the significant level of conservation provided *Atriplex coronata* var. *notatior* under the Western Riverside County MSHCP (conservation of occupied and potential habitat, monitoring, and providing hydrology). In contrast, the benefits of exclusion of these 15,232 ac (6,164 ha) of non-Federal lands as critical habitat are increased because of the high level of cooperation by the County of Riverside, State of California, and the Service to conserve this species and these partnerships exceed any conservation value provided by a critical habitat designation.

(4) Exclusion Will Not Result in Extinction of the Species

We believe that exclusion of these 15,232 ac (6,164 ha) of non-Federal lands will not result in extinction of *Atriplex coronata* var. *notatior* since these lands are conserved or will be conserved and managed for the benefit of this species pursuant to the Western Riverside County MSHCP. This HCP includes specific conservation objectives, avoidance and minimization measures, and management that exceed any conservation value provided as a result of a critical habitat designation. The Service concluded that the Western Riverside County MSHCP would not jeopardize the continued existence of *N. fossalis Atriplex coronata* var. *notatior* in our Biological and Conference Opinion because of the management measures and level of conservation.

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

Additionally, the species within the Western Riverside County MSHCP occurs on lands protected and managed either explicitly for the species or indirectly through more general objectives to protect natural values. These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion of these 15,232 ac (6,164 ha) within the Western Riverside County MSHCP will not result in extinction of *Atriplex coronata* var. *notatior.*

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific data information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on August 31, 2005, (70 FR 51739). We accepted comments on the draft analysis until September 14, 2005.

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

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and

enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

There is no economic impact within the final designation because the Service has not designated any lands as critical habitat for *Atriplex coronata* var. *notatior.*

A copy of the final economic analysis and supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section) or by download from the Internet at *http://carlsbad.fws.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues. However, because we are designating zero acres of critical habitat, this rule would not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the time line for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review this rule. As explained above, we prepared an economic analysis of this action. We used 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. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

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. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

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

To determine if this rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, residential and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation. Typically, when proposed critical habitat designations are made final, Federal agencies must consult with us if their activities may affect that designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. However, since no critical habitat is being designated, no consultations would be necessary.

In our economic analysis of this proposed designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. Because zero acres of critical habitat are being designated, there would be no additional costs to small businesses, and, thus, this rule would not result in a ''significant effect'' for the small business entities in Riverside County. As such, we are certifying that this rule will not result in a significant economic impact on a substantial number of small entities.

Executive Order 13211

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is considered a significant regulatory action under E.O. 12866 because it raises 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 action under E.O. 13211, and no Statement of Energy Effects is required. Please refer to Appendix A of our draft economic analysis of this proposed designation for a more detailed discussion of potential effects on energy supply.

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.''

The designation of critical habitat 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. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments, because we are designating zero acres of critical habitat. Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of desinating critical habitat for *Atriplex coronata* var. *notatior*. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. Because we are designating zero acres of critical habitat for *Atriplex coronata* var. *notatior*, this rule does not pose significant takings implications.

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 and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in California. The designation of zero acres of critical habitat in areas currently occupied by *Atriplex coronata* var. *notatior* would have no impact on State and local governments and their activities. The process of identifying habitat with essential features may have some benefit to State and local governments in that the areas essential to the conservation of these species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While 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 making them wait for case-by-case section 7 consultation 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 are designating zero acres of critical habitat in accordance with the provisions of the Endangered Species Act. This final rule 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 assertion 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 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 with features essential for the conservation of *Atriplex coronata* var. *notatior*. Critical habitat for *A. coronata* var. *notatior* has not been designated on Tribal lands.

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 Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

■ Accordingly, we 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), in the List of Endangered and Threatened Plants, 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							
*	*	*	*	*		*	*
Atriplex coronata var. *notatior*.	San Jacinto Valley crownscale.	U.S.A. (CA)	*Chenopodiaceae—Goosefoot Family*.	E	650	17.96 (a) (No areas designated)	NA
*	*	*	*	*		*	*

■ 3. In § 17.96, amend paragraph (a) by adding an entry for *Atriplex coronata* var. *notatior* in alphabetical order under Family Chenopodiaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) *Flowering plants.*

* * * * *

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

Pursuant to section 4(b)(2) of the Act, we have excluded all areas determined to meet the definition of critical habitat under section 3(5)(A) of the Act for *Atriplex coronata* var. *notatior.* Therefore, no specific areas are designated as critical habitat for this species.

* * * * *

Dated: September 30, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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