

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

[FWS-R8-ES-2008-0034; 92210-1117-0000-B4]

RIN 1018-AV24

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bay Checkerspot Butterfly (*Euphydryas editha bayensis*)**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed revised designation of critical habitat for the Bay checkerspot butterfly (*Euphydryas editha bayensis*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA) of the proposed revised critical habitat designation and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, and the amended required determinations section. You do not have to resend comments sent earlier. We will incorporate them into the public record as part of this comment period, and we will fully consider them when preparing our final determination.

DATES: We will accept public comments received or postmarked on or before May 15, 2008.**ADDRESSES:** You may submit comments by one of the following methods:

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

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R8-ES-2008-0034; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

FOR FURTHER INFORMATION CONTACT: Susan Moore, Field Supervisor or

Arnold Roessler, Listing Program Coordinator, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825; telephone 916-414-6600; or facsimile 916-414-6712. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:**Public Comments**

We will accept written comments and information during this reopened comment period on our proposed revised critical habitat designation for the Bay checkerspot butterfly published in the **Federal Register** on August 22, 2007 (72 FR 48178), the DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*).

(2) *Specific information on:*

- The amount and distribution of Bay checkerspot butterfly habitat,

- What areas occupied at the time of listing that contain features essential to the conservation of the species we should include in the designation and why, and

- What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land-use designations and current or planned activities in the subject areas and their possible effects on proposed critical habitat.

(4) Information on the extent to which any State and local environmental protection measures we reference in the DEA may have been adopted largely as a result of the listing of the Bay checkerspot butterfly, and which were either already in place at the time of listing or enacted for other reasons.

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

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

(7) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use

controls that may result from the revised critical habitat designation.

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

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

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

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

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

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

(14) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

If you submitted comments or information during the initial comment period from August 22 to October 22, 2007, on the proposed rule (72 FR 48178), please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final designation, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you

may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

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

You may obtain copies of the proposed rule and DEA by mail from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**) or by visiting our Web site at <http://www.fws.gov/sacramento>.

Background

On April 30, 2001, we published in the **Federal Register** the final designation of critical habitat for the Bay checkerspot butterfly (66 FR 21450, April 30, 2001) which encompassed approximately 23,903 acres (ac) (9,673 hectares (ha)). On March 30, 2005, the Home Builders Association of Northern California (Home Builders) filed a complaint contending, among other things, that the Service failed to adequately analyze the economic costs of the designation of critical habitat for this subspecies (*Home Builders of Northern California v. U.S. Fish and Wildlife Service, et al.* Case No. cv-01363-LKK-JFM). On February 24, 2006, the Service entered into a settlement agreement with Home Builders to submit for publication a proposed revised critical habitat designation for this subspecies to the **Federal Register** by August 14, 2007, and to submit a final determination of critical habitat for publication by August 14, 2008. The April 30, 2001, designation remains in place during this revision process. On August 22, 2007, we published a proposed rule to revise critical habitat for the Bay checkerspot butterfly (72 FR 48178), identifying a total of approximately 19,746 ac (7,990 ha) of land in San Mateo and Santa Clara Counties, California.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time

it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

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

If we make final the proposed rule on August 22, 2007, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a DEA of the proposed revised critical habitat designation based on our August 22, 2007, proposed rule to revise the critical habitat designation for the Bay checkerspot butterfly (72 FR 48178).

The intent of the DEA is to quantify the economic impacts of all potential conservation efforts for the Bay checkerspot butterfly; some of these costs will likely be incurred regardless of whether we revise the designated critical habitat. The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed revised critical habitat designation (incremental impacts) and other conservation-related actions (baseline impacts) for this species over the next 22 years. A 22-year period was chosen because information was available to reliably forecast economic activity to 2030. It also considers past

costs associated with conservation of the species from the time it was listed in 1987 (52 FR 35366, September 18, 1987), until the year the proposed revised critical habitat rule was published (72 FR 48178, August 22, 2007). Because the current DEA is analyzing the future costs of the proposed revised designation (72 FR 48178), the costs associated with the current designation of critical habitat (66 FR 21450) have been included only in the past baseline economic impacts.

The economic analysis quantifies impacts associated with the conservation of the Bay checkerspot butterfly including future urban development, management of invasive plants, pesticide use, and over or under grazing. These activities were identified as factors that may require special management (72 FR 48183–48184). Pre-designation (1987 to 2007) impacts associated with species conservation activities in areas proposed for designation are estimated at approximately \$9 million in 2007 dollars. The DEA forecasts baseline economic impacts in the areas proposed for designation to be approximately \$390 million (\$18 million annualized) (2008 dollars) applying a 3 percent discount rate over the next 22 years, \$270 million (\$13 million annualized) (2008 dollars) applying a 7 percent discount rate over the next 22 years, and \$550 million (25 million annualized) (2008 dollars) at an undiscounted rate over the next 22 years. The DEA forecasts incremental economic impacts to be approximately \$0 to \$750,000 (\$0 to \$44,000 annualized) (2008 dollars) applying a 3 percent discount rate over the next 22 years. The cost estimates are based on the proposed revised designation of critical habitat published in the **Federal Register** on August 22, 2007 (72 FR 48178).

The DEA considers the potential economic effects of actions relating to the conservation of the Bay checkerspot butterfly, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of revised critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the Bay checkerspot butterfly in areas containing features essential to the conservation of the species. The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (such as lost

economic opportunities associated with restrictions on land use).

The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector. Finally, the DEA looks retrospectively at costs that have been incurred since the date we listed the Bay checkerspot butterfly as endangered (52 FR 35366, September 18, 1987) and considers those costs that may occur in the 22 years following the designation of critical habitat. Because the DEA considers the potential economic effects of all actions relating to the conservation of the Bay checkerspot butterfly, including costs associated with sections 4, 7, and 10 of the Act and those attributable to a revised designation of critical habitat, the DEA may have overestimated the potential economic impacts of the revised critical habitat designation.

As stated earlier, we are soliciting data and comments from the public on this DEA, as well as on all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or its supporting documents to incorporate or address information we receive during this comment period. In particular, we may exclude an area from the revised critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as revised critical habitat, provided the exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our August 22, 2007, proposed rule (72 FR 48178), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have not made use of the DEA data to make these determinations. In this document we affirm the information contained in our

proposed rule concerning Executive Order (E.O.) 13132; E.O. 12988; the Paperwork Reduction Act; and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments (59 FR 22951). However, based on the DEA data, we revise our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review

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

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

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

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

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

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

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

To determine if the proposed revised designation of critical habitat for the Bay checkerspot butterfly would affect a substantial number of small entities, we considered the number of affected small entities within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed revised critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our DEA of the proposed revised critical habitat designation, we evaluated the potential economic effects on small business entities from conservation actions related to the listing of the Bay checkerspot butterfly

and the proposed revised designation of the species' critical habitat.

The DEA did not identify any small entities according to the Small Business Administration's (SBA) definition of small entities. As a result there are no economic impacts to small businesses with the designation of this critical habitat. We have considered whether this rule would result in a significant economic effect on a substantial number of small entities. We have determined and therefore certify that, for the above reasons and based on currently available information, the proposed designation will not have a significant economic impact on a substantial number of small business entities.

In summary, we have considered whether the proposed rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, this proposed rule would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. The DEA has identified one electric energy firm (Calpine Corporation) which owns land within the proposed revised designation of critical habitat (Unit 5). In 2000, the Calpine Corporation proposed to construct and operate a 600-megawatt, natural gas-fired, combined cycle electric generation facility. The land located within the proposed revised designation of critical habitat was purchased by the Calpine Corporation as compensation to off-set project-related effects to the Bay checkerspot butterfly and its habitat as a result of the U.S. Environmental Protection Agency (EPA) permitting of the Calpine Corporation's Metcalf Energy Center in Santa Clara County, California (Service File 1-1-00-F-235) in 2001. The Calpine Corporation does not plan to expand its facilities or construct new facilities associated with the Metcalf Energy Center on any of its land within or near the area. The biological opinion under section 7 of the

Act for this project identifies the measures already taken by the Calpine Corporation to compensate for effects to the butterfly and its habitat, and the designation of revised critical habitat is not expected to lead to any reduction in electricity production or an increase in cost of energy production or distribution.

Thus, based on information in the DEA, we do not expect Bay checkerspot butterfly conservation activities within proposed revised critical habitat to lead to energy-related impacts. As such, we do not expect the proposed revised designation of critical habitat to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

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

In accordance with the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*), 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, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

Critical habitat designation 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. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action that 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 onto State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. As discussed in the DEA, the majority of lands proposed as revised critical habitat are comprised of privately owned lands, which do not qualify as a small government. Consequently, we do not believe that revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the Bay checkerspot butterfly in a takings implications assessment. Our takings implications assessment concludes that this proposed revised designation of critical habitat for the Bay checkerspot butterfly does not pose significant takings implications.

References Cited

A complete list of all references we cited in the proposed rule is available on <http://www.regulations.gov>.

Author

The primary author of this notice is staff of the Sacramento Fish and Wildlife Office.

Authority

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

Dated: April 2, 2008.

David M. Verhey,

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

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