

requirements that would be imposed by the final rule issued on December 19, 2008. The 60-day comment period on the information collection requirements of the December 19, 2008 final rule expired on February 27, 2009, and OMB approval for the information collection requirements has not yet been sought.

List of Subjects in 45 CFR Part 88

Abortion, Civil rights, Colleges and universities, Employment, Government contracts, Government employees, Grant programs, Grants administration, Health care, Health insurance, Health professions, Hospitals, Insurance companies, Laboratories, Medicaid, Medical and dental schools, Medical research, Medicare, Mental health programs, Nursing homes, Public health, Religious discrimination, Religious liberties, Reporting and recordkeeping requirements, Rights of conscience, Scientists, State and local governments, Sterilization, Students.

Dated: March 5, 2009.

Charles E. Johnson,
Acting Secretary.

PART 88—[REMOVED AND RESERVED]

Therefore, under 5 U.S.C. 301, the Department of Health and Human Services proposes to remove and reserve 45 CFR part 88.

[FR Doc. E9-5067 Filed 3-6-09; 11:15 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R8-ES-2008-0078; 92210-1117-0000-B4]

RIN 1018-AV03

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Cirsium loncholepis* (La Graciosa thistle)

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 *Cirsium loncholepis* (common name La Graciosa thistle) under the Endangered Species Act of

1973, as amended (Act). We also announce the availability of the January 16, 2009, draft economic analysis (DEA) of the proposed revised designation of critical habitat for *C. loncholepis* and announce 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 revised designation of critical habitat for *C. loncholepis*, the associated DEA, and the amended required determinations section. Comments previously submitted on this rulemaking do not need to be resubmitted. These comments have already been incorporated into the public record and will be fully considered in preparation of the final rule.

DATES: We will accept public comments received or postmarked on or before April 9, 2009.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV03; 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:

Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003, (telephone 805-644-1766; facsimile 805-644-3958). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on the proposed revised designation of critical habitat for *Cirsium loncholepis* published in the **Federal Register** on August 6, 2008 (73 FR 45805), the DEA of the proposed revised designation of critical habitat for *Cirsium loncholepis*, 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. 1533), including whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

2. Specific information on:

- The amount and distribution of *Cirsium loncholepis* habitat,
 - The importance of including habitat that provides connectivity between extant populations of *Cirsium loncholepis* to the species' conservation and recovery, and the amount and distribution of such habitat,
 - What areas occupied at the time of listing and that contain features essential for the conservation of the species should be included in the designation and why, and
 - What areas not occupied at the time of listing are essential to the conservation of the species and why.
3. Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised designation of critical habitat for *Cirsium loncholepis*.

4. Probable economic, national security, or other impacts from designating particular areas as critical habitat. We are particularly interested in any impacts on small entities and specific impacts on national security, and the benefits of including or excluding areas that exhibit these impacts.

5. Any proposed critical habitat areas covered by existing or proposed conservation or management plans that we should consider for exclusion from the designation under section 4(b)(2) of the Act. We specifically request information on any final or draft habitat conservation plans that include *Cirsium loncholepis* as a covered species that have been prepared under section 10(a)(1)(B) of the Act, or any other management plan, conservation plan, or agreement that benefits this plant or its primary constituent elements.

6. Land use designations and current or planned activities in the subject areas and their possible impacts on the proposed revised designation of critical habitat for *Cirsium loncholepis*.

7. Additional scientific information that will help us to better delineate areas that contain the primary constituent elements.

8. Any foreseeable environmental impacts directly or indirectly resulting from the proposed revised designation of critical habitat for *Cirsium loncholepis*.

9. Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate proposed revised critical habitat for *Cirsium loncholepis*.

10. Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the proposed revised designation of critical habitat for *Cirsium loncholepis*.

11. Information on whether the proposed revised designation of critical habitat will result in disproportionate economic impacts to specific areas or small businesses that should be evaluated under 4(b)(2) of the Act for possible exclusion from the proposed revised designation of critical habitat for *Cirsium loncholepis* and whether the failure to designate such areas as critical habitat will result in the extinction of *C. loncholepis*.

12. Information on the accuracy of our methodology in the DEA for distinguishing baseline and incremental costs, and the assumptions underlying the methodology.

13. Information on whether the DEA identifies all costs that could result from the proposed revised designation of critical habitat for *Cirsium loncholepis*.

14. Information on any quantifiable economic benefits of the proposed revised designation of critical habitat for *Cirsium loncholepis*.

15. Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular lands in Units 4, 5, and 6 covered by a draft endangered species conservation agreement for *Cirsium loncholepis* that was submitted to the Service by Vandenberg Air Force Base (VAFB) for further evaluation and consideration during the public comment period.

16. Information on any economic impacts associated with implementing the draft conservation agreement covering specified lands in Units 4, 5, and 6 submitted to the Service for further evaluation and consideration.

17. Economic data on the incremental costs of designating a particular area as revised critical habitat.

18. Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed revised designation of critical habitat for *Cirsium loncholepis* and, in particular, any impacts on electricity production, and the benefits of including or excluding areas that exhibit these impacts.

19. Whether we could improve or modify our approach to designating critical habitat to provide for greater public participation and understanding,

or to assist us in accommodating public concerns and comments.

20. Information on potential critical habitat exclusions from the proposed revised designation of critical habitat for *Cirsium loncholepis*.

If you submitted comments or information on the proposed revised rule (73 FR 45805) during the initial comment period from August 6, 2008, to October 6, 2008, 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 the 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 determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning our proposed rule, the associated DEA, and our amended required determinations 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 hard copy 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 hard copy comments on <http://www.regulations.gov>.

Comments and materials we receive (and have received), as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov> [Docket Number FWS-R8-ES-2008-0078], or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule and DEA by mail from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, or on our Web site at <http://www.fws.gov/ventura>.

Background

It is our intent to discuss only those topics directly relevant to the proposed revised designation of critical habitat for *Cirsium loncholepis* in this notice. For more information on previous Federal actions concerning *C. loncholepis*, refer to the proposed revised designation of critical habitat published in the **Federal Register** on August 6, 2008 (73 FR 45805). For more information on the endangered *C. loncholepis* or its habitat, refer to the proposed and final listing rules published in the **Federal Register** on March 30, 1998 (63 FR 15164), and on March 20, 2000 (65 FR 14888), the proposed rule to designate critical habitat (66 FR 57559; November 15, 2001), and the final designation of critical habitat for *C. loncholepis* (69 FR 12553; March 17, 2004), or from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

In March 2005, the Homebuilders Association of Northern California, *et al.*, filed suit against the Service challenging the merits of the final critical habitat designations for several species, including *C. loncholepis*. In March 2006, a settlement was reached that required us to re-evaluate five final critical habitat designations, including critical habitat designated for *C. loncholepis*. The settlement (as modified by a court-approved amendment) stipulated that any proposed revisions to *C. loncholepis* critical habitat designation would be submitted for publication to the **Federal Register** on or before July 27, 2008, and final revisions would be submitted on or before July 27, 2009.

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, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical

habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact, including but not limited to the value and contribution of continued, expanded, or newly forged conservation partnerships.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide. In the case of *Cirsium loncholepis*, the benefits of critical habitat include public awareness of *C. loncholepis* presence and the importance of habitat protection, and where a Federal nexus exists, increased habitat protection for *C. loncholepis* due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies. Since *C. loncholepis* was listed in 2000, we have had few projects on privately owned lands that had a Federal nexus to trigger consultation under section 7 of the Act, and have consulted only once with a Federal agency regarding its effects to *C. loncholepis* on Federal lands.

When we evaluate the benefits of excluding an area being managed under an existing conservation plan, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring

program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

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 draft economic analysis of our August 6, 2008 (73 FR 45805), proposed revised designation of critical habitat for *Cirsium loncholepis*.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised designation of critical habitat for *Cirsium loncholepis*. Additionally, the economic analysis looks retrospectively at costs incurred since the March 20, 2000 (65 FR 14888), listing of *C. loncholepis* as endangered. The DEA quantifies the economic impacts of all potential conservation efforts for *C. loncholepis*; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised designation of critical habitat for *C. loncholepis* is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated and may include costs incurred in the future. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and

beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised designation of critical habitat for *C. loncholepis*. For a further description of the methodology of the analysis, see Chapter 2, “Framework for the Analysis”, of the DEA.

The current DEA estimates the foreseeable economic impacts of the proposed revised designation of critical habitat for *Cirsium loncholepis* by identifying the potential resulting incremental costs. The DEA describes economic impacts of *C. loncholepis* conservation efforts associated with the following categories of activity: (1) Military activities on Vandenberg Air Force Base; (2) recreation (primarily off-highway vehicle use); (3) residential and commercial development; (4) agriculture and ranching; (5) oil and gas operations; and (6) other public lands management.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for *Cirsium loncholepis* not attributable to designation of critical habitat and thus are expected to occur regardless of whether we designate critical habitat. Total future baseline impacts are estimated to be \$11.0 million (\$720,000 annualized) to \$320 million (approximately \$20.9 million annualized) in present value terms using a 3 percent discount rate, and \$10.4 million (\$915,000 annualized) to \$230 million (approximately \$20.3 million annualized) in present value terms, using a 7 percent discount rate, over the next 20 years (2009 to 2028) in areas proposed as revised critical habitat. Impacts to recreation in Unit 1 (Callender-Guadalupe Dunes) represent the majority of the total post-designation baseline impacts (between 96 and 97 percent), depending on the discount rate.

Future baseline impacts for areas currently considered for exclusion were calculated separately from other areas proposed as revised critical habitat. The baseline impacts for VAFB were estimated to be between \$0.21 million using a 3 percent discount rate, and \$0.15 million using a 7 percent discount rate over the next 20 years (2009 to 2028).

The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 20 years (2009 to 2028) to range from \$405,000 (\$26,500 annualized) to

\$55.6 million (\$3.6 million annualized) in present value terms using a 3 percent discount rate, and from \$355,000 (\$31,300 annualized) to \$39.6 million (\$3.5 million annualized) in present value terms using a 7 percent discount rate. Almost all incremental impacts attributed to the proposed revised designation of critical habitat are expected to be related to recreation (approximately 99.89 percent); the remaining incremental impacts are related to development and public lands management (approximately 0.11 percent).

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 (e.g., 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, ranching and agriculture, and off-highway vehicle recreation, and its effects on 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.

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

Areas Considered for Exclusion

Department of Defense Lands

Based on comments submitted during the initial public comment period from August 6, 2008, to October 6, 2008, we are considering exclusion of lands on VAFB (13,832 ac (5,598 ha) total) in Units 4, 5, and 6 from critical habitat. In their comment letter, dated

September 29, 2008, VAFB requested to be excluded from the revised designation of critical habitat based on: (1) Their draft Integrated Natural Resources Management Plan (INRMP), (2) a draft conservation agreement for *Cirsium loncholepis* (included as an appendix), and (3) reasons of national security.

Under section 4(a)(3)(B)(i) of the Act, the Secretary of the Interior (Secretary) is prohibited from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. An INRMP is currently being prepared in coordination with the Service that will ensure conservation of the species. However, because the INRMP is not yet final and approved by the Secretary, the statutory prohibition on designation of these lands as critical habitat is inapplicable.

We are also considering excluding these areas under section 4(b)(2) of the Act based on a draft endangered species conservation agreement for *Cirsium loncholepis* that proposes a *C. loncholepis* conservation partnership and agreement between VAFB and the Service. This draft conservation agreement focuses on the continuation of compliance with Federal and State laws, conducting surveys for federally listed species, and protecting and enhancing existing populations and habitats of threatened and endangered species. We are currently working with VAFB to complete this draft conservation agreement. We will assess the benefits of excluding VAFB lands included in this conservation agreement and consider these lands for exclusion from the revised critical habitat final rule under section 4(b)(2) of the Act. If this conservation agreement is finalized before the designation and our analysis results in a determination that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical habitat, then we will exclude the lands from the revised final designation, provided the exclusion will not result in the extinction of the species.

You may obtain a copy of the draft conservation agreement for lands on VAFB by visiting the Federal eRulemaking Portal at <http://www.regulations.gov>, at <http://www.fws.gov/ventura>, or by requesting copies of these documents by mail from

the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

We are also considering excluding these areas under section 4(b)(2) of the Act for reasons of national security. Lands may be excluded from designation as critical habitat if the Secretary determines that the benefits of exclusion, including the benefits with respect to national security, outweigh the benefits of inclusion, unless failure to designate that specific area as critical habitat will result in the extinction of the species, as explained below.

Vandenberg Air Force Base is a U.S. Air Force installation. It operates as a missile test and aerospace center, supporting west coast launch activities for the U.S. Air Force, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. Vandenberg Air Force Base is headquarters for the 30th Space Wing, the Air Force's Space Command unit that operates VAFB and the western test range. Activities on the grounds of VAFB consist of the following:

- Mission operations such as:
 - Space and missile launch programs,
 - Security and antiterrorism operations,
 - Explosive ordnance management,
 - Air operations, and
 - Miscellaneous mission operations;
 - Infrastructure support such as:
 - Paved and unpaved road maintenance,
 - Utility installation, maintenance and removal,
 - Landscaping, and
 - Fencing installation, maintenance, and replacement;
 - Infrastructure development;
 - Environmental management programs such as:
 - Installation restoration,
 - Military munitions response,
 - Environmental compliance,
 - Archeological support,
 - Invasive and pest species removal,
 - Cropland management,
 - Grazing and livestock, and
 - Sensitive species management;
- and
- Fire management.

Vandenberg Air Force Base stated in their comment letter submitted September 29, 2008, regarding the proposed revised designation of critical habitat that the need for additional consultations and possible conservation restrictions would limit the amount of natural infrastructure available for ongoing and future mission execution and training needed for national security; not designating these areas on

VAFB as critical habitat for *Cirsium loncholepis* would not result in the extinction of the species; and operations at VAFB do not constitute either a long-term threat or adverse modification of suitable *C. loncholepis* habitat. Short-notice, mission-critical activities not previously analyzed may be delayed in order to conduct section 7 consultations under the Act.

Aside from these areas now being considered for exclusion from the final revised designation of critical habitat, no other areas are being considered for exclusion and the proposed revised designation of critical habitat remains unchanged as presented.

Required Determinations—Amended

In our proposed rule dated August 6, 2008 (73 FR 45805), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), the President's memorandum of April 29, 1994, and "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning E.O. 12866 (Regulatory Planning and Review) and the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, and Use), E.O. 12630 (Takings), and the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed rule under E.O. 12866. The 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, as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. 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 a final rulemaking.

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

To determine if the proposed revised designation of critical habitat for *Cirsium loncholepis* would affect a

substantial number of small entities, we considered the number of small entities affected 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 only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect *Cirsium loncholepis*. Federal agencies also must consult with us if their activities may affect critical habitat.

In the DEA of the proposed revised designation of critical habitat, we evaluated the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revised designation of critical habitat. The DEA identified the estimated incremental impacts associated with the proposed revised designation of critical habitat as described in sections 2 through 9, and evaluated the potential for economic impacts related to activity categories including military-related activities on VAFB, residential and commercial development, agriculture and ranching, recreation, oil and gas operations, and public lands management. The DEA concluded that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated with agriculture and ranching, and recreation. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the potential impacts of the proposed revised designation of critical habitat on agriculture and ranching over the next 20 years would result from unquantified delay costs associated with future construction of up to four cooling facilities or processing plants in Unit 2; and future vineyard conversion projects in Unit 3. The delay costs associated

with future construction of cooling facilities or processing plants will potentially affect fewer than one small agricultural entity per year. The delay costs associated with future vineyard conversion projects will affect one small entity (one landowner).

As discussed in Appendix A of the DEA, impacts on small businesses associated with recreation are provided through two scenarios; the lower bound assumes that no restrictions are placed on off-highway vehicle (OHV) recreation at Oceano Dunes State Vehicle Recreation Area (ODSVRA), and the upper bound assumes that five percent of critical habitat within ODSVRA is closed to OHV recreation, and that some people who would have made a trip to ODSVRA for OHV recreation will forego future trips due to the closure of five percent of the riding area. Since there are no impacts to small businesses with the lower bound scenario, only costs for the upper bound scenario are given. In this case, the DEA identifies estimated lost opportunity costs associated with OHV recreation at ODSVRA over the next 20 years (2009 to 2028) at \$55.2 million in present value terms using a 3 percent discount rate, and \$39.3 million in present value terms using a 7 percent discount rate. The costs would be borne by businesses in the region surrounding the ODSVRA that provide lodging, food and beverage, retail shopping, and vehicle-related services to OHV users, and is based on the assumption in the DEA that OHV use would decline if portions of the ODSVRA are closed to OHV use due to critical habitat. The DEA assumes that an average of 85 percent of the businesses that supply goods and services to OHV users are small businesses.

In summary, we have considered whether the proposed revised designation of critical habitat would result in a significant economic impact on a substantial number of small entities. We have identified small businesses that may be affected within the ranching and agriculture and recreation sectors. However, for the construction of cooling facilities/processing plants, less than one small entity per year may be affected; and for vineyard conversion, only one small entity may be affected by the proposed revised designation of critical habitat. Within the recreation sector, the DEA identifies a large percentage of small businesses that may be impacted by the proposed revised designation of critical habitat. Although this action has a potential to impact small businesses that provide goods and services to OHV users, we believe that the ODSVRA can

incorporate measures to ensure the long-term conservation of *Cirsium loncholepis* in proposed critical habitat Unit 1 without closing large areas that are currently open to OHV users.

Therefore, it is likely that these small businesses will not bear the majority of the estimated impacts, which are associated with lost opportunity costs stemming from reduced OHV use of ODSVRA. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised designation of critical habitat for *C. loncholepis* would not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A, the DEA finds that none of these criteria are relevant to this analysis. The DEA identifies that the most likely energy-related activity to occur is the re-activation of an existing well, which generally will not result in incremental impacts; therefore, designation of critical habitat is not expected to lead to any adverse outcomes (such as a reduction in electricity production or an increase in the cost of energy production or distribution), 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, 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 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. As discussed in the DEA of the proposed designation of critical habitat for *Cirsium loncholepis*, we do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA concludes incremental impacts may occur due to project modifications that may need to be made for agriculture and development activities; however, these are not expected to affect small governments. Consequently, we do not believe that the 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 *Cirsium loncholepis* in a takings implications assessment. 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. In conclusion, the proposed revision to critical habitat for *C. loncholepis* does not pose significant takings implications.

References Cited

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

Authors

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

Authority

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

Dated: February 20, 2009.

Jane Lyder,

Assistant Deputy Secretary, Department of the Interior.

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