

rules. When the Commission requests additional information, parties to whom such requests are addressed must provide the requested information within the time period the Commission specifies.

(5) To demonstrate closed captioning compliance, video programming distributors or providers may rely on certifications from video programming owners, as provided for in § 79.4(c)(1)(i) and (ii), unless, at any time, the video programming distributor or provider seeking to rely upon the certification knew or should have known that the certification was false or erroneous. The Commission may take enforcement action against video programming distributors, providers, or owners with respect to false or erroneous certifications.

(6) If the Commission finds that a video programming distributor, provider, or owner has violated the closed captioning requirements of this section, it may employ the full range of sanctions and remedies available under the Act against any or all of the violators.

(g) *Private rights of action prohibited.* Nothing in this section shall be construed to authorize any private right of action to enforce any requirement of this section. The Commission shall have exclusive jurisdiction with respect to any complaint under this section.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0076; MO 92210-0-0009]

RIN 1018-AX18

#### Endangered and Threatened Wildlife and Plants; Revised Endangered Status, Revised Critical Habitat Designation, and Taxonomic Revision for *Monardella linoides* ssp. *viminea*

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

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the June 9, 2011, proposed rule to revise the listing and critical habitat designation for *Monardella viminea* (willow monardella) under the Endangered Species Act of 1973, as amended (Act)

(76 FR 33880). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for *Monardella viminea* and an amended required determinations section of the proposal. In the proposed rule that published June 9, 2011 (76 FR 33880), we recognized the taxonomic split of the listed entity, *Monardella linoides* ssp. *viminea*, into two distinct full species: *Monardella viminea* (willow monardella) and *Monardella stoneana* (Jennifer's monardella). We proposed to retain the listing status of *Monardella viminea* as endangered; we proposed to remove protections afforded by the Act from those individuals now recognized as a separate species, *Monardella stoneana*, because the new species does not meet the definition of endangered or threatened under the Act; and we proposed revised critical habitat for *Monardella viminea*. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed listing determinations and critical habitat designation, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

**DATES:** We will consider comments received on or before October 28, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Search for Docket No. FWS-R8-ES-2010-0076, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R8-ES-2010-0076; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

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:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011;

telephone 760-431-9440; facsimile 760-431-5901. 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 designation of critical habitat for *Monardella viminea* published in the **Federal Register** on June 9, 2011 (76 FR 33880), our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider comments and information from all interested parties. We are particularly interested in comments and information concerning:

(1) Specific information regarding our recognition of *Monardella viminea* and *M. stoneana* at the species rank, on the segregation of ranges of *M. stoneana* and *M. viminea*, and on our proposals that *M. viminea* should remain listed as endangered and that *M. stoneana* does not warrant listing under the Act (16 U.S.C. 1531 *et seq.*).

(2) Any available information on known or suspected threats and proposed or ongoing development projects with the potential to threaten either *Monardella viminea* or *M. stoneana*.

(3) The effects of potential threat factors to both *Monardella viminea* and *M. stoneana* that are the basis for a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(4) Specific information regarding impacts of fire on *Monardella viminea* or *M. stoneana* individuals or their habitat.

(5) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act for *Monardella viminea* including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threats outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(6) Specific information on:

(a) The amount and distribution of *Monardella viminea* or *M. stoneana* habitat.

(b) What areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of these species, should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change, and

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

(7) Information that may assist us in identifying or clarifying the physical and biological features essential to the conservation of *Monardella viminea*.

(8) How the proposed critical habitat boundaries could be refined to more closely or accurately circumscribe the areas identified as containing the physical and biological features essential to the conservation of *Monardella viminea*.

(9) How we could improve or modify our design of critical habitat units, particularly our criteria for width of essential habitat for *Monardella viminea*. We especially request information on West Sycamore Canyon and Unit 2 (where two groups of *M. viminea* were not included under the criteria used to draw proposed critical habitat boundaries) and areas such as Elanus, Lopez, and Rose Canyons that we have identified as not meeting the definition of critical habitat.

(10) Information on pollinators of *Monardella viminea* or *M. stoneana* that may be essential for the conservation of these species, including information on areas that provide habitat for these pollinators.

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

(12) Information on the projected and reasonably likely impacts of climate change on the two species and the proposed critical habitat.

(13) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(14) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(15) Whether any specific areas we are proposing for critical habitat designation for *Monardella viminea*

should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those lands covered by the County of San Diego Subarea Plan or the City of San Diego Subarea Plan under the Multiple Species Conservation Program (MSCP). Information on obtaining copies of these plans will be provided by the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

(16) 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.

(17) Information on the extent to which the description of potential economic impacts in the DEA is complete and accurate.

(18) Whether the DEA appropriately identifies all costs and benefits that could result from the designation.

If you submitted comments or information on the proposed rule (76 FR 33880) during the initial comment period from June 9, 2011, to August 8, 2011, 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 listing *Monardella viminea* as an endangered species, delisting the portion of the previously listed entity (*Monardella linoides* ssp. *viminea*) now considered to be *M. stoneana*, and designating critical habitat for *M. viminea* will take into consideration all written comments and any additional information we receive during the comment period. 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 this proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We request that you submit information **ONLY** by one of the methods 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. We will post all hardcopy comments on <http://www.regulations.gov> as well. 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.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS-R8-ES-2010-0076, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed listing and proposed critical habitat (76 FR 33880) and the DEA on the Internet at <http://www.regulations.gov> at Docket No. FWS-R8-ES-2010-0076, or by mail from the Carlsbad Fish and Wildlife Office (see the **FOR FURTHER INFORMATION CONTACT**).

### Background

In the proposed rule (76 FR 33880; June 9, 2011), we recognized the taxonomic split of *Monardella linoides* ssp. *viminea* into two distinct taxa: *Monardella viminea* (willow monardella) and *Monardella stoneana* (Jennifer's monardella); we proposed the retention of *M. viminea* as endangered; proposed critical habitat for *M. viminea*; and concluded that *M. stoneana* does not meet the definition of endangered or threatened. We did not include an analysis of whether *M. stoneana* warrants listing based on it being threatened or endangered in a significant portion of its range (SPR) in the June 9, 2011 **Federal Register** notice. We have included that analysis here. Apart from the SPR analysis, we discuss only those topics directly relevant to the designation of critical habitat for *M. viminea* in this document. For more information on the taxonomy, nomenclature, biology, and ecology of *M. viminea*, please refer to the listing rule for *M. linoides* ssp. *viminea* published in the **Federal Register** on October 13, 1998 (63 FR 54938), our critical habitat designation published in the **Federal Register** on November 8, 2006 (71 FR 65662), or our proposed critical habitat designation published in the **Federal Register** on June 9, 2011 (76 FR 33880), or contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

### *Analysis of Significant Portion of the Range of Monardella stoneana*

The Act defines “endangered species” as any species which is “in danger of

extinction throughout all or a significant portion of its range,” and “threatened species” as any species which is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The definition of “species” is also relevant to this discussion. The Act defines the term “species” as follows: “The term ‘species’ includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.” The phrase “significant portion of its range” (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as “significant.” In our proposed rule (76 FR 33880; June 9, 2011), we proposed to list *Monardella viminea* throughout its entire range; therefore, a discussion of significant portion of its range was unnecessary.

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined “species”: *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service’s delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and *WildEarth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service’s 2008 finding on a petition to list the Gunnison’s prairie dog (73 FR 6660, Feb. 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a “species,” as defined by the Act (*i.e.*, species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species’ range is inconsistent with the Act’s definition of “species.” The courts concluded that once a determination is made that a species (*i.e.*, species, subspecies, or DPS) meets the definition of “endangered species” or “threatened species,” it must be placed on the list in its entirety and the Act’s protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this proposed rule, we interpret the phrase “significant portion of its range” in the Act’s definitions of “endangered species” and “threatened species” to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an “endangered species.” The same analysis applies to “threatened species.” Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act’s protections shall be applied across the species’ entire range.

We conclude, for the purposes of this proposed rule, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (*i.e.*, prior to the 2007 Solicitor’s Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase “significant portion of its range” provides an independent basis for listing and protecting the entire species, we next turn to the meaning of “significant” to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species’ range is “significant,” we conclude, for the purposes of this proposed rule, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for “significant” in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of “significant” best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species’ conservation. Thus, for the purposes of this proposed rule, a portion of the range of a species is “significant” if its contribution to the viability of the species is so important

that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species’ adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species’ range may be determined to be “significant” due to its contributions under any one of these concepts.

For the purposes of this proposed rule, we determine if a portion’s biological contribution is so important that the portion qualifies as “significant” by asking whether, *without that portion*, the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (*i.e.*, would be “endangered”). Conversely, we would not consider the portion of the range at issue to be “significant” if there is sufficient resiliency, redundancy, and representation elsewhere in the species’ range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of “significant” establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for “significant” that is robust. It would not be meaningful or appropriate to

establish a very low threshold whereby a portion of the range can be considered “significant” even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species’ range can be said to contribute some increment to a species’ viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for “significant” that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered “significant” only if threats in that portion result in the entire species’ being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

The definition of “significant” used in this proposed rule carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase “in a significant portion of its range” loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of “significant” used in this proposed rule, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.*, if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the species in the

remainder of the range to be endangered; rather, the *complete* extirpation (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be “significant,” and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not “significant,” we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is “significant.” In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species’ range that clearly would not meet the biologically based definition of “significant”, such portions will not warrant further consideration.

As described in the proposed rule (76 FR 88330), we found the stressors affecting *Monardella stoneana* not of sufficient imminence, intensity, magnitude, or geographic concentration such that it warrants listing under the Act. The stressors affecting *M. stoneana*, including megafire, occur across the species’ entire range. Additionally, factors that might be limited to individual drainages, such as altered hydrology or urban development, do not threaten *M. stoneana*. Therefore, because *Monardella stoneana* has no geographical concentration of threats, it does not qualify for listing based on threats to the species in a significant portion of its range.

Decisions by Ninth Circuit Court of Appeals in *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (2001) and *Tucson Herpetological Society v.*

*Salazar*, 566 F.3d 870 (2009) found that the Act requires the Service, in determining whether a species is endangered or threatened throughout a significant portion of its range, to consider whether lost historical range of a species (as opposed to its current range) constitutes a significant portion of the range of that species. While this is not our interpretation of the statute, we will consider whether the lost historical range might qualify as an SPR for *Monardella stoneana*.

We evaluated whether the best available information indicates that the range of *Monardella stoneana* has contracted over time. We have little information on the historical range of *M. stoneana*. However, unlike *M. viminea*, *M. stoneana* has not undergone a dramatic decline in population size. *Monardella stoneana* appears to have persisted for over two decades in the two occurrences known in the United States since the 1970s and 1980s, respectively (see proposed rule at 76 FR 33880; June 9, 2011). The other seven occurrences of *M. stoneana* in the United States were discovered in 2003 or later, so long-term data are not available; only one of those seven occurrences has since been extirpated. We have almost no information about the range of *M. stoneana* in Mexico other than observations of plants directly across the Mexican border from occurrences in the United States. Because the best available information indicates that *M. stoneana* has not experienced a significant population decline, nor have multiple occurrences been extirpated within its known range, we are unable to find that a significant amount of historical range has been lost. In sum, we conclude that there has not been a loss of historical habitat that represents a significant portion of the range of *M. stoneana*.

#### Critical Habitat

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 the 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 critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

All critical habitat units for *Monardella viminea* were occupied at the time of listing. Occupancy was determined at the unit level, and unit lines were drawn to capture essential habitat supporting the documented occurrences within each unit. For more information on how critical habitat units were outlined, see the Methods section of the proposed critical habitat rule published on June 9, 2011 (76 FR 88330).

#### Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific 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. If we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, we may then exercise our discretion to exclude an area from critical habitat, provided such exclusion will not result in the extinction of the species.

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 (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the 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. In the case of *Monardella viminea*, the benefits of critical habitat include public awareness of the presence of *M. viminea* and the importance of habitat protection, and, where a Federal nexus exists, potentially increased habitat protection for *M. viminea* due to protection from adverse modification or destruction of critical habitat. A Federal nexus exists where a proposed action will occur on Federal lands or where a proposed action will be conducted,

funded, permitted, or authorized by a Federal agency.

The final decision about whether to exercise our discretion to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES** section).

#### Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate 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.

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for *Monardella viminea*. We prepared a DEA that identifies and analyzes the potential impacts associated with the proposed designation of critical habitat for *M. viminea* that we published in the **Federal Register** on June 9, 2011 (76 FR 33880). The DEA describes the economic impacts of all known potential conservation efforts for *M. viminea*; some of these costs will likely be incurred regardless of whether we designate critical habitat.

The economic impact of the proposed critical habitat designation 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 otherwise afforded to the species (*e.g.*, 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. The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the critical habitat designation for *M. viminea*. 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 when evaluating the benefits of excluding particular areas under section 4(b)(2) of

the Act. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (*i.e.*, incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, “Framework for the Analysis” of the DEA.

The DEA also discusses the potential benefits associated with the designation of critical habitat, but does not monetize these benefits. The incremental impacts are the impacts we may consider in the final designation of critical habitat relative to areas that may be excluded under section 4(b)(2) of the Act.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for *Monardella viminea* over the next 19 years, which was determined to be the appropriate period for analysis because limited planning information is available to forecast activity levels for projects beyond a 19-year timeframe. Additionally, the timeframe evaluates the impacts of the critical habitat rule from its finalization in 2012 to 2030, which is the length of transportation planning efforts by the California Department of Transportation (CalTrans). The DEA identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of *M. viminea* conservation efforts associated with the following categories of activity: (1) Residential development and (2) transportation projects.

The DEA concludes that critical habitat designation is not likely to affect levels of economic activity or conservation measures being implemented within the proposed critical habitat area. Unless changes occur to existing conservation measures or the management of land use activities, the incremental impacts of critical habitat designation would be limited to additional administrative costs of section 7 consultations for Federal agencies associated with considering the potential for adverse modification of critical habitat. The DEA estimates that 50 percent of incremental impacts will be related to urban development, and 50 percent will be related to transportation projects.

The DEA estimates total potential incremental economic impacts in areas

proposed as critical habitat over the next 19 years (2012 to 2030) to be \$9,700 (\$700 annualized) in present value terms using a 3-percent discount rate, and \$9,300 (\$800 annualized) in present value terms applying a 7-percent discount rate.

The proposed critical habitat area is unlikely to generate economic impacts beyond administrative costs of section 7 consultation for several reasons. Sixty percent of the proposed designation already receives protection through the MSCP subarea plans, and all units are occupied by the plant and thus will require consultation regardless of the designation. Additionally, project modifications necessary to avoid adverse modification of critical habitat are indistinguishable from those necessary to avoid jeopardizing the species.

In conclusion, the Service does not foresee a circumstance in which critical habitat designation will change the outcome of future section 7 consultations. Any conservation measures implemented to minimize impacts to the species would coincidentally be sufficient to minimize impacts to critical habitat. Therefore, we do not believe any additional conservation measures would be needed solely to minimize impacts to critical habitat. Based on this reasoning, we also do not anticipate critical habitat designation to result in any appreciable incremental economic impacts. Any economic impacts related to conservation activities would result from the listing of the species, rather than the designation of critical habitat, and would fall within the economic baseline.

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

#### Required Determinations—Amended

In our proposed rule that published in the **Federal Register** on June 9, 2011 (76 FR 33880), 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.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), 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.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). Based on the DEA data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### Regulatory Flexibility Act

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 critical habitat designation, we provide our analysis for determining whether the proposed designation 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 designation of critical habitat for *Monardella viminea* 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 proposed 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. In areas where *M. viminea* 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 the species. If we finalize this proposed listing and proposed critical habitat designation, reasonable and prudent measures to avoid adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed critical habitat for *Monardella viminea*. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in Appendix A of the DEA, and evaluates the potential for economic impacts associated with activity categories including residential development and road construction. The DEA concludes that none of the entities with which the Service might consult on *M. viminea* meet the definition of a small business.

In summary, we have considered whether the proposed designation

would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have identified no small entities that may be impacted by the proposed critical habitat designation. For the above reason and based on currently available information, we certify that, if promulgated, the

proposed critical habitat would not have a significant economic impact on small entities. Therefore, an initial regulatory flexibility analysis is not required.

#### **Authors**

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office, Pacific Southwest Region, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

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

Dated: September 15, 2011.

#### **Rachel Jacobson,**

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

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