representatives of the United States Government.

(End of clause)

[FR Doc. 06–8413 Filed 10–2–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU77

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Ceanothus ophiochilus* (Vail Lake ceanothus) and *Fremontodendron mexicanum* (Mexican flannelbush)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for *Ceanothus ophiochilus* (Vail Lake ceanothus) and *Fremontodendron mexicanum* (Mexican flannelbush) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 644 acres (ac) (262 hectares (ha)) are proposed for the designation of critical habitat for these two species. Approximately 283 ac (115 ha) of land in Riverside County, California, are being proposed as critical habitat for C. ophiochilus, and approximately 361 ac (147 ha) of land in San Diego County, California, are being proposed as critical habitat for *F. mexicanum.*

DATES: We will accept comments from all interested parties until December 4, 2006. We must receive requests for public hearings, in writing, at one of the addresses shown in the **ADDRESSES** section by November 17, 2006.

ADDRESSES: If you wish to comment on the proposed rule, you may submit your written comments and information by any of the following methods:

(1) *E-mail: fw8cfwocomments@fws.gov.* Include ''RIN 1018–AU77'' in the subject line. Please see the Public Comments Solicited section under **SUPPLEMENTARY INFORMATION.**

(2) *Fax:* 760/431–9624.

(3) *U.S. mail or hand-delivery:* Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

(4) *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

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

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, telephone, 760/431–9440.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether it is prudent to designate critical habitat;

(2) Specific information on the amount and distribution of *Ceanothus ophiochilus* or *Fremontodendron mexicanum* habitat, what areas should be included in the designations that were occupied at the time of listing that contain the features that are essential for the conservation of the species, and what areas that were not occupied at the listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the mapped critical habitat subunits and their possible effects on proposed critical habitat;

(4) We are proposing to exclude non-Federal lands targeted for conservation within the Western Riverside County MSHCP from the final designation of critical habitat for *Ceanothus ophiochilus* under section 4(b)(2) of the Act (see *Exclusions Under Section 4(b)(2) of the Act* for details on the Western Riverside MSHCP). Please provide information concerning whether the benefits of exclusion of any of these specific areas outweigh the benefits of their inclusion under section 4(b)(2) of the Act. If the Secretary determines the benefits of including these lands outweigh the benefits of excluding them, they will not be excluded from critical habitat;

(5) The appropriateness of excluding lands that contain *Fremontodendron mexicanum* occurrences within areas of the San Diego MSCP and areas of the BLM Otay Mountain Wilderness covered by the 1994 multiple agency MOU (MOU 1994) from the final designation of critical habitat. *Fremontodendron mexicanum* is not covered by the MSCP; however, other species that co-occur with *F. mexicanum* are covered by the MSCP. Please provide comments whether the protection and management of the habitat for these co-occurring species is adequate to justify the exclusion of these lands under section 4(b)(2) of the Act. Also, we are seeking any information on the benefits of including or excluding these lands from the critical habitat designation;

(6) The appropriateness of including lands in the Agua Tibia Mountains owned by the U.S. Forest Service and managed under its Land Management Plans for the Four Southern California National Forests from the final designation of critical habitat for *Ceanothus ophiochilus.* Please provide comments on how implementation of the management plan(s) in the Agua Tibia Mountains will or will not provide for conservation for *C. ophiochilus.* Also provide information on any minimization measures or monitoring plans for *C. ophiochilus* that will help insure that the occurrences of *C. ophiochilus* remain healthy and viable in the Cleveland National Forest. Finally, provide comments on the benefits of including or excluding these lands from the critical habitat designation;

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

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

(9) Information concerning pollinator species for *Ceanothus ophiochilus* or *Fremontodendron mexicanum* and whether sufficient information exists to determine if such a biological feature should be considered a primary constituent element for either of these species (please see ''Primary Constituent Elements'' section of this proposed rule for a detailed discussion);

(10) Whether any areas not currently known to be occupied by either species, but essential to the conservation of either species, should be included in the proposed designation; and

(11) Whether the benefit of exclusion of any particular area outweighs the

benefits of inclusion under section 4(b)(2) of the Act.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *fw8cfwocomments@fws.gov.* Please also include ''Attn: RIN 1918–AU77'' in your e-mail subject line and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number (760) 431–9440. Please note that the e-mail address *fw8cfwocomments@fws.gov* will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their names and/or home addresses, etc. but if you wish us to consider withholding this information you must state this prominently at the beginning of your comments. In addition, you must present rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, this information will be released. We will always make submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

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

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under section 4(b)(2) of the Act, there are significant limitations on the regulatory effect of designation under section 7(a)(2) of the Act. In brief, (1) Designation provides additional protection to habitat only where there is a federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, 475 species, or 36 percent of the 1,310 listed species in the United States under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,310 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, the Section 10 incidental take permit process, and cooperative, nonregulatory efforts with private landowners. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

In considering exclusions of areas proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) (hereinafter Gifford Pinchot). In that case, the Ninth Circuit invalidated the Service's regulation defining ''destruction or adverse modification of critical habitat.'' In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This proposed critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas in this final designation. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designation of critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Procedural and Resource Difficulties in Designating Critical Habitat

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

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

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on *Ceanothus ophiochilus* and *Fremontodendron mexicanum,* refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956).

Species Descriptions and Life History

As discussed in the listing rule, *Ceanothus ophiochilus* is a 4–5 feet (ft) (1.2–1.5 meters (m)) tall shrub in the buckthorn family (Rhamnaceae) described by Steve Boyd, Timothy Ross, and Laurel Arnseth based on a collection made by the authors in March 1989 west of Vail Lake in Riverside County, California (Boyd *et al.* 1991). *Fremontodendron mexicanum* is a small tree or shrub 5–19 ft (1.5–6 m) tall in the cacao family (Sterculiaceae) first described by Anstruther Davidson (1917) based on a collection sent to him by Kate Sessions.

Ecology and Habitat

Ceanothus ophiochilus occurs in restricted, localized occurrences in the interior foothills of Riverside County, California, and *Fremontodendron mexicanum* occurs in restricted and localized occurrences from the foothills of San Diego County and northwestern Baja California, Mexico. *Ceanothus ophiochilus* is found in chamise-chaparral, often in association with specific soil types (Fross and Wilken 2006, p. 216). *Fremontodendron mexicanum* is known from ephemeral drainages and associated slopes with closed-cone coniferous forest dominated by Tecate cypress and chaparral. *Fremontodendron mexicanum* is found on the San Miguel Exchequer soil series; however, the distribution of this soil series covers a much larger geographic area than the known distribution of this species in the United States.

Chaparral, like other Mediterranean shrubland communities, is adapted to intervals between wildfires of approximately 20 to 50 years (Keeley 1986). However, chaparral species have differing life history modes and characteristics (Keeley 1986, p. 95). *Ceanothus ophiochilus* does not resprout after fire but instead recovers by post-fire seed germination from seeds stored in the soil. This ''obligate seeder,'' like other species of *Arctostaphylos* (manzanita) and *Ceanothus,* require[s] 5–25 years for seed crops sufficient to replenish the seed pool in the soil (Keeley 1986, p. 99). Citing Arnold *et al.* 1951 and Zedler *et al.* 1983, Keeley (1986, p. 99) stated that if frequent fires occur, obligate seeders may not produce enough seed, then these obligate seeders may be eliminated from chaparral. Moreover, sustained fire prevention can result in senescent stands of *C. ophiochilus* that may not survive the eventual and unpredictable fires to reproduce vegetatively (Boyd *et. al.* 1991, pp. 30–39).

On the other hand, *Fremontodendron mexicanum* is a ''facultative resprouter'' because it recovers after fire by seed germination and by resprouting from its roots. According to Keeley (1986, pp. 104–105), facultative resprouters are ''clearly more resilient to frequent fire [than obligate seeders] and they are potentially more resilient to long fire-free periods [like ''obligate resprouters''] because of their ability to replace their canopy with new basal sprouts in the absence of fire.''

Distribution

Both *Ceanothus ophiochilus* and *Fremontodendron mexicanum* have extremely limited distributions. The listing rule (63 FR 54956) describes only three known occurrences of *C. ophiochilus*. These occurrences are known from two distinct places; one is west of Vail Lake and the other two are south of Vail Lake in the Agua Tibia Wilderness of the Cleveland National Forest in southwestern Riverside County. No new occurrences of this species have been found since the time it was listed. *Fremontodendron mexicanum* is only found growing naturally in southern San Diego County on Otay Mountain and in northwestern Baja California, Mexico. As stated in the listing rule, *F. mexicanum* is used in landscaping as a drought-tolerant plant, and this has led to a number of collection records that are far outside this species' natural range. At the time of listing, fewer than 10 historical locations had been reported for *F. mexicanum* in the United States. After researching the historical locations for the publication of the listing rule, it was determined that only one population of *F. mexicanum* was both extant and of native origin.

In early 2006, a previously undiscovered occurrence of *Fremontodendron mexicanum* was found in Little Cedar Canyon on Otay Mountain by Service biologists on land managed by the Bureau of Land Management. Little Cedar Canyon is located just to the west of Cedar Canyon, where the only other natural U.S. occurrence of *F. mexicanum* is found. This new occurrence in Little Cedar Canyon is spread out over a 1-mile (1.6 kilometers) stretch of the canyon bottom. Twenty-six plants were documented in this canyon; however, the entire canyon was not surveyed and additional plants may occur further up the canyon or up one of the side canyons. With regards to occurrences in Baja California, Mexico, we have no current information on the population in Arroyo Seco; however, the occurrence in Arroyo Hediondo was visited in early 2006 (Snapp-Cook 2006). During that survey effort, four plants were found and a dam had been built upstream about 1 mile (1.6 kilometers) from the location where the plants were found that may affect the hydrology of the stream (Snapp-Cook 2006).

Previous Federal Actions

Ceanothus ophiochilus and *Fremontodendron mexicanum* were federally listed as endangered and threatened, respectively, on October 13, 1998 (63 FR 54956). *Ceanothus ophiochilus* and *F. mexicanum* are listed as endangered and rare, respectively, by the State of California (Fross and Wilken 2006, p. 85). At the time these plants were federally listed, the Service evaluated the benefits of designating critical habitat to the detrimental effects (threats) of increased collection and vandalism and the potential for private landowner misunderstandings about the effects of critical habitat designation on private lands. The Service found, based on these factors, that designation of critical habitat for each species, *C. ophiochilus* and *F. mexicanum,* was not prudent. On August 10, 2004, the Center for Biological Diversity and California Native Plant Society challenged our failure to designate critical habitat for these two species as well as three other plant species (*Center for Biological Diversity, et al.* v. *Gale Norton, Secretary of the Department of the Interior, et al.*, C–04–3240 JL, N. D. Cal.). The Service agreed to withdraw our previous not prudent finding and publish a proposed determination of critical habitat on or before September

20, 2006. If prudent and a proposed designation is promulgated, then a final designation is due by September 20, 2007. Neither of these species currently has a completed recovery plan. We are hereby withdrawing our previous not prudent determination of critical habitat for *C. ophiochilus* and *F. mexicanum*. We have further re-evaluated prudency of designating critical habitat for these two species and reconsidered our evaluation of the threats posed by vandalism and overcollection in our previous prudency determination. We currently have no credible information indicating that the designation of critical habitat would be expected to increase the human threat from vandalism or overcollection. Therefore, we have now determined critical habitat to be prudent. As a result, we are now proposing to designate critical habitat for *C. ophiochilus* and *F. mexicanum*.

Critical Habitat

Critical habitat is defined in section 3 of the Act as (i) 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 (I) Essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) 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. Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

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

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management considerations or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) In addition, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), along with Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

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

Areas that support occurrences, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(2) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of *Ceanothus ophiochilus* and *Fremontodendron mexicanum.* This includes information from the proposed listing rule (October 2, 1995, 60 FR 51433) and final listing rule (63 FR 54956), data from research and survey observations published in peer-reviewed articles, site visits and unpublished survey data, regional Geographic Information System (GIS)

layers including soil, vegetation and species coverages from both San Diego and Riverside Counties, and data compiled in the California Natural Diversity Database (CNDDB). We have also reviewed available information that pertains to the habitat requirements of these species. We are not proposing any areas outside the geographical area occupied by the species at the time of listing except for Little Cedar Canyon, which contains *F. mexicanum.*

For *Ceanothus ophiochilus,* the primary informational sources used for this proposal are (1) CNDDB (2005 and 2006); (2) Boyd *et. al.* (1991); (3) Boyd and Banks (1995); (4) herbarium records from San Diego Natural History Museum, University of California at Berkeley, University of California at Riverside, and Rancho Santa Ana Botanical Garden; and (5) site visits by Service biologists to the known occurrences of *Ceanothus ophiochilus* in the Agua Tibia Wilderness of the Cleveland National Forest in early 2006. Additional information was provided by the Cleveland National Forest of the U.S. Forest Service (USFS), which was reviewed for development of this proposed rule.

For *Fremontodendron mexicanum,* the primary informational sources used for mapping the *Fremontodendron mexicanum* proposed critical habitat are the following: (1) CNDDB (2005 and 2006); (2) Kelman (1983, 1991); (3) herbarium records from San Diego Natural History Museum, University of California at Berkeley, University of California at Riverside, and Rancho Santa Ana Botanical Garden; and (4) site visits conducted by Service biologists in late 2005 and early 2006. The following informational sources were also used in the preparation of this rule: (1) The San Diego Project Office/Palm Springs—South Coast Field Office of the U.S. Bureau of Land Management (BLM); (2) the County of San Diego, MSCP Division; (3) the Botany Department of San Diego Natural History Museum; and (4) site visits by Service biologists. Service biologists conducted site visits to Cedar Canyon (CNDDB element occurrence #1, #13, #16), Little Cedar Canyon, and one unnamed canyon on the west side of Otay Mountain (CNDDB element occurrence #7) in late 2005 and early 2006 with the goal of relocating presumed extirpated historical occurrences of *F. mexicanum.* Service biologists also surveyed Horsethief Canyon north of Barret Lake in early 2006 to investigate a collection of *F. mexicanum* made in 1999 (CNDDB element occurrence #17). Service biologists were unable to relocate any of the historical sites outside of the known occurrence in Cedar Canyon; however, Service biologists did locate a previously undiscovered occurrence of *F. mexicanum* in Little Cedar Canyon during these site visits. In the site visit to the occurrences in Cedar Canyon and Little Cedar Canyon, the species was found growing on the terraces adjacent to Cedar Creek and on the slopes associated with the stream and terraces.

Primary Constituent Elements

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

Ceanothus ophiochilus

The specific primary constituent elements required for *Ceanothus ophiochilus* are derived from the biological and physical needs of the species as described in the final listing rule (63 FR 54956), as well as information contained in this proposed rule.

Space for Growth and Reproduction

Ceanothus ophiochilus is restricted to ridgetops and north- to northeast-facing slopes in chamise chaparral (PCE #1). It occurs on soils formed from metavolcanic and ultra-basic parent materials or deeply weathered gabbro, all of which are phosphorus deficient and thus considered to be nutrient-poor (PCE #2) (Boyd *et al.* 1991). These soils are similar to serpentine soils, which are well known for the high number of associated rare and endemic plants (Kruckeburg 1984). The high number of rare and endemic plants that grow on nutrient-poor soils, sometimes termed as harsh soils, is due to the difficulty that common plants have with growing in these conditions. In turn, when plants become established on such soils, they remain genetically isolated from close relatives that are not able to thrive on the specialized soils. In this way, these nutrient-poor soils may help the species maintain reproductive isolation (Boyd *et al.* 1991). This is important because *C. ophiochilus* appears to hybridize with the locally common *C. crassifolius* in places where the two species come in close proximity (Boyd *et al.* 1991). Hybrids are generally found on the margins of *C. ophiochilus* occurrences, where the soil changes from the harsh metavolcanic soil that *C. ophiochilus* is typically found on to the milder surrounding soil that supports species such as *C. crassifolius* (Boyd *et al.* 1991). Because hybridization is a common natural phenomenon among the species of *Ceanothus* (Schmidt 1993; Fross and Wilken 2006, pp. 131–149), these metavolcanic soils are not only important for growth and reproduction of *C. ophiochilus,* but also for space and separation from other *Ceanothus* species.

Soils where the plant is found in the Agua Tibia Wilderness are mapped as Ramona, Cienaba, and Vista series (USDA 1973, pp 38–40, 70–71, 82–83), but appear to be Las Posas series based on field review and soil samples (USFS 1998a). Soils where the plant is found at Vail Lake are mapped as Cajalco series (USDA 1971, p. 21).

Ceanothus ophiochilus is found in chamise chaparral or mixed chamise-ceanothus-manzanita chaparral at elevations of 2,000–3,000 ft (666 to 1,000 m) (California Department of Fish and Game 2000, CNF occurrence record forms) with the following associated species: *Adenostoma fasciculatum, A. sparsifolium, Quercus berberidifolia, C. crassifolius, Arctostaphylos* spp., *Salvia clevelandii,* and *Eriodictyon crassifolium* (PCE #3) (Boyd *et. al.* 1991). These species are much more common than *C. ophiochilus* in chaparral ecosystems. Even though they grow in close proximity to *C. ophiochilus,* some of these species are unable to grow on the specific type of soil where *C. ophiochilus* is found, and hybrids were found on the edges of the occurrence in a different type of soil (Boyd *et. al.* 1991, p. 38).

We have little information about the pollinators or reproductive biology of this species. This species does not have a burl (an underground mass from which the species can resprout following fire) as some species of *Ceanothus* do; instead, the seeds need fire to germinate and sprout. Little information exists regarding the dispersal of this species.

Primary Constituent Elements for *Ceanothus ophiochilus*

Pursuant to our regulations, we are required to identify the known physical and biological features (PCEs) essential

to the conservation of *Ceanothus ophiochilus.* All areas proposed as critical habitat for *C. ophiochilus* are currently occupied, within the species' historical geographic range, identified within the listing rule, and contain sufficient PCEs to support at least one life history function. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that *C. ophiochilus'* PCEs are:

(1) Flat to gently sloping north to northeast facing ridge tops with slopes in the range of 0 to 40 percent slope that provide the appropriate solar exposure for seedling establishment and growth;

(2) Soils formed from metavolcanic and ultra-basic parent materials and deeply weathered gabbro or pyroxenite-rich outcrops that provide nutrients and space for growth and reproduction. Specifically in the areas that *Ceanothus ophiochilus* is found, the soils are:

(a) Ramona, Cienaba, Las Posas, and Vista series in the Agua Tibia Wilderness; and

(b) Cajalco series in the vicinity of Vail Lake; and

(3) Chamise chaparral or mixed chamise-ceanothus-arctostaphylos chaparral at elevations of 2,000 ft to 3,000 ft (610 m to 914 m) that provide the appropriate canopy cover and elevation requirements for growth and reproduction.

This proposed designation is designed for the conservation of PCEs necessary to support the life history functions which were the basis for the proposal. Because not all life history functions require all the PCEs, not all proposed critical habitat will contain all the PCEs.

Each of the areas proposed in this rule have been determined to contain sufficient PCEs to provide for one or more of the life history functions of *Ceanothus ophiochilus.* In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation conducted subsequent to this designation.

Fremontodendron mexicanum

The specific primary constituent elements required for *Fremontodendron mexicanum* are derived from the biological and physical needs of the species as described in the final listing rule (63 FR 54956), as well as the information below.

Space for Growth and Reproduction

For its individual and population growth, *Fremontodendron mexicanum* needs alluvial terraces and benches adjacent to moderately sloped streams, creeks, and ephemeral drainages; stabilized north-to east-facing slopes associated with steep slopes (San Miguel—Exchequer soil complex has slopes in a range of 9 to 70 percent (USDA 1973, p. 76)); and canyons (PCE #1 and #2). *Fremontodendron mexicanum* occurs at elevations of 900 ft (274 m) to 3,000 ft (914 m) in the United States (63 FR 54956); however, in Mexico, *F. mexicanum* occurs at an elevation of approximately 30 ft (9 m). Erosion from the steep slopes on Otay Mountain provides soils that form benches along the streambeds in Cedar Canyon and Little Cedar Canyon where *F. mexicanum* grows. *Fremontodendron mexicanum* also occupies some areas on slopes adjacent to the streambeds (Snapp-Cook 2006). Approximately 1,000 plants were observed on the slopes associated with the alluvial terraces in three specific locations (Snapp-Cook 2006). In each of these locations, plants occurring on the slopes were between 10 and 500 ft (3 and 152 m) from the stream bed. Although the role that the plants on sloped areas play in the dynamics of growth and reproduction of this species is unknown at this time, the high density of these plants suggests that they may play a significant role.

Fremontodendron mexicanum is found growing within open stands of Tecate cypress, which often form a closed-cone coniferous forest, or is interspersed with mixed chaparral and *Platanus racemosa* (sycamore) (PCE #3) (63 FR 54956). In addition to cypress and sycamore, *F. mexicanum* is frequently associated with *Dendromecon rigida* ssp. *rigida* (tree poppy) and *Malosma laurina* (laurel sumac) (Snapp-Cook 2006). The canyon slopes around *F. mexicanum* are generally vegetated with chaparral and coastal sage scrub species (63 FR 54956). This mix of chaparral and riparian species may provide adequate shade and ground cover to exclude nonnative species, preventing such species from competing with *F. mexicanum* (Snapp-Cook 2006). *Fremontodendron mexicanum* is a facultative resprouter, meaning it is able to sprout from underground roots after a fire, flood, or other disturbance destroys the above ground plant (Snapp-Cook 2006). This makes *F. mexicanum* more resilient to frequent fire than obligate seeders (plants that need fire to activate the germination of their seeds) because obligate seeders like Tecate cypress need 6 to 30 years to produce sufficient numbers of seeds to reproduce following a fire, whereas, *F. mexicanum* has the ability to begin replacing its canopy with new basal sprouts relatively quickly following a fire (Keeley 1986). More research is needed into *F. mexicanum's* reproduction and the role that pollination and seed production play in its survival.

Hydrology and Soil Moisture Requirements for the Species

Fremontodendron mexicanum has been cultivated since its discovery in the early 1900s, and the data available from the cultivation reports suggest that this species does not need much water and does not do well in soils that do not drain well (Bornstein *et al.* 2005). *Fremontodendron mexicanum* grows on terraces and alluvial benches that are maintained by a natural hydrological cycle, which erodes the surrounding metavolcanic soils on the slopes and deposits those soils in the stream beds (Snapp-Cook 2006). The natural hydrological cycle also maintains open and semi-open spaces where *F. mexicanum* can establish itself. The natural flows may also provide transportation of seeds down stream to establish and augment downstream occurrences.

Primary Constituent Elements for *Fremontodendron mexicanum*

Pursuant to our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of *Fremontodendron mexicanum.* The areas proposed as critical habitat for *F. mexicanum* are currently occupied, within the species' historical geographic range, and contain sufficient PCEs to support the species. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the PCEs for *F. mexicanum* are:

(1) Alluvial terraces, benches, and associated slopes within 500 feet (152 meters) of streams, creeks, and ephemeral drainages where water flows primarily after peak seasonal rains with a gradient ranging from 3 to 7 percent; and stabilized north-to east-facing slopes associated with steep (9 to 70 percent) slopes and canyons that provide space for growth and reproduction.

(2) Silty loam soils derived from metavolcanic and metabasic bedrock, mapped as San Miguel-Exchequer Association soil series that provide

nutrients and substrate with adequate drainage to support seedling establishment and growth.

(3) Open *Cupressus forbesii* and *Platanus racemosa* stands at elevations of 900 ft (274 m) to 3,000 ft (914 m) within a matrix of chaparral (such as *Dendromecon rigida ssp. rigida* and *Malosma laurina*) and riparian vegetation that provide adequate space for growth and reproduction.

This proposed designation is designed for the conservation of PCEs necessary to support the life history functions which were the basis for the proposal. Because not all life history functions require all the PCEs, not all proposed critical habitat will contain all the PCEs.

Each of the areas proposed in this rule have been determined to contain sufficient PCEs to provide for one or more of the life history functions of *Fremontodendron mexicanum.* In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation conducted subsequent to this designation.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of *Ceanothus ophiochilus* and *Fremontodendron mexicanum.* Both of these species have small ranges and relatively few occurrences; therefore, all known occurrences of each species are essential for their conservation.

To delineate the proposed critical habitat for *Ceanothus ophiochilus*, we used the following criteria: (1) We identified all areas known to be occupied by *C. ophiochilus* at the time of listing and/or currently known to be occupied using the location data from Boyd and Banks (1995); (2) we created GIS polygons, using these areas as guides, that included the occurrences and the ridge tops and north- and northeast-facing slopes immediately adjacent (within 500 ft (152 m)) to the occurrences of *C. ophiochilus*; and (3) we connected the polygons that were closer than 0.6 mi (1 km) to reduce fragmentation and ensure that the subunits captured populations and not individual occurrences.

To delineate the proposed critical habitat for *Fremontodendron mexicanum*, we used the following criteria: (1) We identified all areas known to be occupied by native occurrences (we did not include occurrences known to be of cultivated origin) of *F. mexicanum* at the time of listing and/or currently known to be occupied using current data in the CNDDB (2005) and data obtained from field surveys (Snapp-Cook 2006); (2) we created GIS polygons, using these areas as guides, that included the alluvial terraces and benches occupied by *F. mexicanum*, and the associated slopes within 500 ft (152 m) of the areas occupied by *F. mexicanum* to insure that adequate space was delineated to encompass all existing *F. mexicanum* and the area needed to maintain the PCEs; and (3) we connected the polygons that were closer than 0.5 mi (0.8 km) from one another with a 660 ft. (201 m) wide corridor to allow for connectivity between known occurrences for the transfer of pollen and seeds and natural riparian process to occur.

We then analyzed areas meeting these criteria to determine if any existing conservation or management plans exist that benefit the species and their PCEs. *Ceanothus ophiochilus* is included as a covered species in the Western Riverside County MSHCP. As a result, some occupied areas are being proposed for exclusion under section 4(b)(2) of the Act from the final designation of critical habitat for this species (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion). *Fremontodendron mexicanum* was initially considered for coverage under the San Diego MSCP; however, it was not covered because there was not enough information to determine how the MSCP would affect this plant. Other species covered by the San Diego MSCP, such as Tecate cypress and the Thorne's hairstreak butterfly (*Mitoura thornei*) co-occur with *F. mexicanum* in Cedar Canyon and/or Little Cedar Canyon, and the management for these other species may benefit *F. mexicanum.* At this time we are not proposing these areas for exclusion; however, we are soliciting public comment on any benefits to *F. mexicanum* from management of co-occurring species and the appropriateness of exclusion in the final rule (see Public Comments Solicited section).

The MSHCP and MSCP documents were used as aids in determining areas that contain the features that are essential to the conservation of these two species. No areas outside the geographical area occupied at the time of listing by *C. ophiochilus* have been proposed for designation. Areas known to be occupied by *F. mexicanum* at the time of listing plus one newly discovered occupied area are proposed for designation. On the basis of an analysis of the newly discovered population we have determined that the population is essential for the recovery of the species. As such, the specific area containing this population has been determined to be essential to the conservation of *F. mexicanum.* The importance of the identification of any additional populations was identified in the 1997 biological opinion on the San Diego MSCP, which states, ''due to the rarity of the species, any new population found within the planning area will be significant to the survival and recovery of this species' (Service 1997, p. 112).

When determining proposed critical habitat boundaries, we made every effort to avoid including areas such as buildings, paved areas, and other structures that lack PCEs for *Fremontodendron mexicanum* and/or *Ceanothus ophiochilus.* The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures, and the land under them inadvertently left inside critical habitat boundaries shown on the maps for this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they may affect the species and/or primary constituent elements in adjacent critical habitat.

We are proposing to designate critical habitat on lands that we have determined are occupied and contain sufficient primary constituent elements to support life history functions essential for the conservation of each species.

Units are proposed for designation based on sufficient PCEs being present to support one or more of the species life history functions. Some units contain all PCEs and support multiple life processes. Some segments contain only a portion of the PCEs necessary to support the two species' particular use of that habitat. Where a subset of the PCEs are present (such as water temperature during migration flows) at the time of designation, this rule protects those PCEs and thus the conservation function of the habitat.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the

requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. While take of listed plant species is not authorized under section 10(a)(1)(B) of the Act, HCPs can include conservation measures that benefit listed plant species. We are proposing to exclude the private lands at Vail Lake under the Western Riverside County MSHCP from the final designation of critical habitat for *Ceanothus ophiochilus* because the benefits of exclusion outweigh the benefits of inclusion (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain one or more PCEs that may require special management considerations or protection.

As stated in the final listing rule, threats to *Ceanothus ophiochilus* include habitat destruction, alteration, fragmentation, and degradation from urban development, as well as fire at too frequent intervals to allow for sufficient seed bank replenishment in the soil (63 FR 54956). Threats to *Fremontodendron mexicanum* as cited in the final listing rule include altered fire regimes, indirect impacts from nearby urbanization, and increased competition from nonnative species (63 FR 54965). These threats could impact the PCEs determined to be essential for conservation of *C. ophiochilus* and *F. mexicanum.*

Urban development near *Ceanothus ophiochilus* proposed units may alter the habitat characteristics required by the species. Land grading in and around occurrences of *C. ophiochilus* may affect the topography of the site and change the soil composition (PCEs #1 and #2) rendering it unsuitable for species growth and reproduction. Urban development in these areas may also encourage invasion by nonnative plant species that would change the vegetation community and/or directly impact the vegetation community (PCE #3). In addition, urban development near this species may increase the frequency of fire. No urban development is expected to impact the occurrences of *C. ophiochilus* on land owned by the U.S. Forest Service, and all of the private land included in this proposed critical habitat designation is covered by the Western Riverside County MSHCP (MSHCP). The single occurrence of *C. ophiochilus* on private land in the MSHCP is targeted for development avoidance, and this occurrence and associated habitat will be managed as part of the MSHCP. We do not believe that special management or protections will be required in addition to what is provided for by the MSHCP for the occurrence on private land within the MSHCP. Therefore, we are proposing to exclude private lands covered under the MSHCP from the final designation of critical habitat for *C. ophiochilus* (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion).

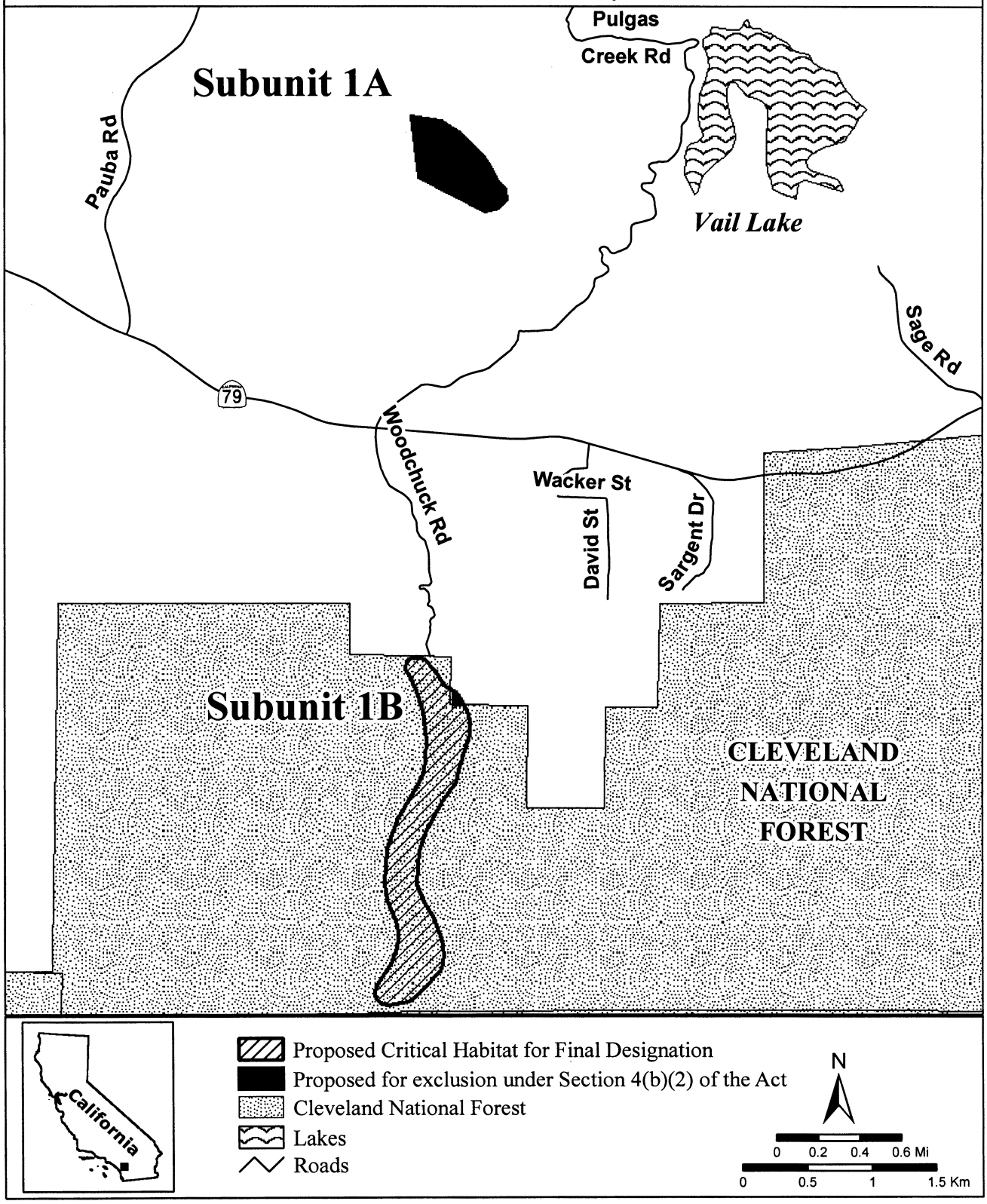
Nonnative plant species such as *Tamarix* spp. (salt cedar) and *Cortaderia selloana* (Pampas grass) could reduce the amount of space available to *F. mexicanum* (PCE #1 and #2) and alter the vegetation community (PCE #3) if they become well established in either Cedar Canyon or Little Cedar Canyon. In our unit descriptions below for this proposed designation, we further describe the threats requiring special management or protections for each proposed unit.

Proposed Critical Habitat Designation for *Ceanothus ophiochilus*

In total, approximately 644 acres (ac) (262 hectares (ha)) are proposed for the designation of critical habitat for these two species. We are proposing as critical habitat 283 ac (115 ha) of land for *Ceanothus ophiochilus* within one unit. This unit is further divided into two subunits: subunits 1A (Vail Lake) and 1B (Agua Tibia Mountains). Of this 283 ac (115 ha) of land, we are proposing to exclude 80 ac (33 ha) under section 4(b)(2) of the Act from the final designation of critical habitat for *C. ophiochilus* (*See Figure 1*)

BILLING CODE 4310–55–P

Figure 1
Proposed Critical Habitat for *Ceanothus ophiochilus* (Vail Lake ceanothus)
Subunits 1A and 1B, Riverside County, California



BILLING CODE 4310–55–C

Unit 1 is located near Vail Lake in southern Riverside County, California. The areas being proposed as critical habitat constitute our best assessment at this time of areas determined to be occupied at the time of listing, containing the primary constituent elements essential to the conservation of the species that may require special management considerations or protection for *Ceanothus ophiochilus.* Below, we present brief descriptions of the proposed subunits, reasons why they meet the definition of critical habitat for *C. ophiochilus,* and our rationale for their inclusion in this proposal.

Unit 1: Western Riverside County

Subunit 1A, Vail Lake, Riverside County, California

Subunit 1A (Vail Lake) consists of 76 ac (31 ha) of privately-owned land proposed for exclusion from the final critical habitat designation. Subunit 1A contains CNDDB element occurrence #1, and it is one of only three occurrences of *Ceanothus ophiochilus* known of at the time of listing. Land in this subunit is entirely within an area targeted for conservation under the Western Riverside County MSHCP. Threats to the PCEs that require special management or protections include impacts to ridge tops (PCE #1) from grading activities resulting from urban development impacts to the associated vegetation community (PCE #3), and special planning efforts to maintain a natural fire regime. However, the Western Riverside County MSHCP outlines conservation measures for this species and its habitat, and therefore, the 76 ac (31 ha) of privately owned land is being proposed for exclusion from the final designation (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion).

Subunit 1B, Agua Tibia Mountains, Riverside County, California

Subunit 1B (Agua Tibia Mountains) consists of 207 ac (84 ha) of land, of which 203 ac (82 ha) is federally owned. The remaining 4 ac (2 ha) of privately-owned land are within an area targeted for conservation under the Western Riverside County MSHCP. Therefore, these lands are being proposed for exclusion from the final critical habitat designation (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion). Subunit 1B contains two of the three CNDDB element occurrences (#2 and #3) of *Ceanothus ophiochilus* known at the time of listing. Threats to features within this subunit that may require special management include impacts to ridge tops (PCE #1) from grading associated with the creation of fuel breaks and impacts to the associated vegetation community (PCE #3) resulting from unnatural fire regimes. Subunit 1B is mostly within the Agua Tibia Wilderness of the Cleveland National Forest, which is managed by the USFS.

Recently the USFS completed the revised Land Management Plans for the Four Southern California National Forests (Forest Plans). Implementation of these Forest Plans was analyzed by the Service to address potential impacts to *C. ophiochilus.* This analysis found that impacts to *C. ophiochilus* would be minor or negligible upon implementation of appropriate minimization measures due to the low impact nature of activities planned (*e.g.*, dispersed recreation, non-motorized trails) (Service 2005 p. 129–132). However, the plan did not set up specific management and monitoring for *C. ophiochilus,* which may be necessary to insure that the occurrences of *C. ophiochilus* remain healthy and viable. As a result, we believe that the features essential to the conservation of *C. ophiochilus* within this area require special management to address altered fire regime and nonnative species. Therefore, we are proposing to include these lands containing features essential to the conservation of the species in this critical habitat proposal. In this proposed rule, we ask for public comment on the appropriateness of including portions of the Agua Tibia Wilderness in the final designation.

Proposed Critical Habitat Designation for *Fremontodendron mexicanum*

We are proposing as critical habitat 361 ac (147 ha) of land for Fremontodendron mexicanum within one unit. This unit is further divided into two subunits: subunits 1A (Cedar Canyon) and 1B (Little Cedar Canyon). The one unit of critical habitat is located on Otay Mountain in southern San Diego County, California. This unit contains privately owned land and federally owned land in the Otay Mountain Wilderness Area managed by the Bureau of Land Management (BLM) (Otay Mountain Wilderness Act of 1999, Pub. L. 106–145, H.R. 15). The critical habitat described below constitutes our best assessment of specific areas determined to be occupied at the time of listing, containing the primary constituent elements essential to the conservation of the species that may require special management considerations or protection for *Fremontodendron mexicanum.* Critical habitat also includes those additional areas that were not known to be occupied at the time of listing, but are currently occupied and contain the primary constituent elements essential to the conservation of the species. These latter lands (Subunit 1B: Little Cedar Canyon) have been determined to be essential to the conservation of *F. mexicanum.*

Below, we present brief descriptions of the proposed subunits, reasons why they meet the definition of critical habitat for *Fremontodendron mexicanum*, and our rationale for their inclusion in this proposal.

Unit 1: Otay Mountain

Unit 1 consists of 361 ac (147 ha) on Otay Mountain in San Diego County and contains Federal land managed by the BLM and private land. Subunit 1A (Cedar Canyon) and subunit 1B (Little Cedar Canyon) are each separate canyons on the northwest portion of Otay Mountain; subunit 1A encompasses proposed critical habitat within Cedar Canyon and subunit 1B encompasses proposed critical habitat within Little Cedar Canyon. This unit contains all of the PCEs required by *Fremontodendron mexicanum* and is essential to the conservation of the species because it supports the only natural occurrences of this species in the United States.

Otay Mountain is located in southern San Diego County and is part of the San Ysidro Mountains. The Otay Mountain Wilderness Act of 1999 states, ''this rugged mountain adjacent to the United States-Mexico border is internationally known for its diversity of unique and sensitive plants.'' The base of Otay Mountain is at 500 ft (152 m) elevation and the peak is at 3,566 ft (1,087 m) elevation. The distance from the north base of the mountain to the peak is 4 mi (6.4 km) and from the western flank the distance is 4.5 mi (7.2 km).

The majority of lands proposed for designation in this unit are federally owned and under the management of the BLM. This area is also within the Multiple Habitat Preserve Area (MHPA)/ Pre-approved Mitigation Area (PAMA) of the MSCP for the City and County of San Diego (MSCP). At the time the plan was written, *Fremontodendron mexicanum* was not included for coverage under the MSCP because there was not enough information on this species. In our analysis of the MSCP, we concluded that the implementation of the plan would not jeopardize the species (Service 1997, p. 112). Using GIS analysis, we determined that the proposed critical habitat for this species overlaps with the distribution of other

species that are covered species under the MSCP. These species include: Tecate cypress; *Muilla clevelandii* (San Diego goldenstar); *Tetracoccus dioicus* (Parry's tetracoccus); coastal California gnatcatcher (*Polioptila californica californica*); and the Thorne's hairstreak butterfly (*Mitoura thornei*). The BLM currently has a MOU with several parties stating that the management of the Otay Mountain will follow the MSCP. We are requesting public comment to determine if the protection and management provided for the species covered by the MSCP benefits *F. mexicanum* and its PCEs. However, at this time we are not proposing these areas for exclusion based on the MSCP.

Subunit 1A, Cedar Canyon, Otay Mountain, San Diego County, California

Subunit 1A, Cedar Canyon, consists of 259 ac (105 ha) of land proposed for designation as critical habitat. Subunit 1A contains CNDDB element occurrences #1, #13, and #16. Land in this subunit is entirely within the Cedar Canyon Area of Critical Environmental Concern (ACEC) and a Research Natural Area (RNA) (BLM 1994, pp. 1, 19, 22). The BLM has not yet developed a specific management plan that outlines how the species would be managed for in the Cedar Canyon ACEC and RNA. The majority of this subunit (145 ac (59 ha)) is managed by BLM as part of the Otay Mountain Wilderness Area. An additional 114 ac (46 ha) are on private land. This subunit was known to be occupied at the time of listing and contains all of the PCEs. This population requires special management considerations or protection to adequately protect it from negative impacts related to fire fighting activities and possible negative impacts from the growth of nonnative species that may affect the space available for this species.

In 1998, when *Fremontodendron mexicanum* was federally listed, less than 100 individual plants were documented from Cedar Canyon. This occurrence was thought to be the only location where *F. mexicanum* occurred naturally in the United States. Prior to the 2003 fire, the canyon was dominated by Tecate cypress and riparian vegetation. In late 2005 and early 2006 when this canyon was surveyed for *F. mexicanum* by Service biologists, over 1,000 plants were found. Because this species is a facultative resprouter (*i.e.*, resprouts and produces seedlings after fire), this increase in numbers may be a result of the 2003 Otay fire that burned Cedar Canyon. This phenomenon of healthy *F. mexicanum* plants growing following fire was also recorded following a 1979 fire in Cedar Canyon (CNDDB 2005 p. 1). Future monitoring of this occurrence of *F. mexicanum* will help determine if the number of plants recorded in 2005 and 2006 decline as other vegetation further recovers following the 2003 fire.

Subunit 1B, Little Cedar Canyon, Otay Mountain, San Diego County, California

Subunit 1B, Little Cedar Canyon, consists of 102 ac (42 ha) of land proposed for designation as critical habitat. This occurrence has not yet been assigned a number by the CNDDB. Little Cedar Canyon is located approximately 1.9 miles (3 km) to the west of Cedar Canyon. Within this subunit, 83 ac (34 ha) of land are federally owned and managed by the BLM as part of the Otay Mountain Wilderness Area and 19 ac (8 ha) are on privately owned land. However, this area is not within the Cedar Canyon ACEC and RNA because the presence of the species in Little Cedar Canyon was not known at the time the ACEC and RNA were created. Though only 26 plants were documented in Little Cedar Canyon in early 2006, these plants were healthy, and evidence of mature seed from 2005 was detected. Although this occurrence is a relatively small one when compared to the more than 1,000 plants in Cedar Canyon estimated in early 2006, the Little Cedar Canyon occurrence likely will help to stabilize the existence of *F. mexicanum* in the United States. Despite relatively few plants found in this canyon, the discovery of *F. mexicanum* in Little Cedar Canyon almost doubles the amount of known occupied habitat for this species in the United States. Prior to the 2003 fire, Little Cedar Canyon likely would have been difficult to survey due to thick riparian vegetation and chaparral. This subunit was not known to be occupied at the time of listing; however, it is considered to be essential to the conservation of this species. This subunit contains all of the PCEs. This population and the essential features within the unit require special management or protection to adequately protect it from negative impacts related to fire fighting activities and possible negative impacts from the growth of nonnative species that may affect the space available for this species.

Table 1 provides the approximate area (ac/ha) determined to meet the definition of critical habitat for *C. ophiochilus* and *F. mexicanum* and indicates the areas proposed for final designation and the areas proposed for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (please see ''Exclusions under Section 4(b)(2) of the Act'' for a detailed discussion).

TABLE 1.—AREAS PROPOSED FOR FINAL CRITICAL HABITAT DESIGNATION FOR CEANOTHUS OPHIOCHILUS AND FREMONTODENDRON MEXICANUM, AND THE AREA PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT

Critical habitat unit	Land ownership	Area that meets the definition of critial habitat	Area proposed as final critital habitat	Area proposed for exclusion from final critical habitat
Ceanothus ophiochilus				
1. Western Riverside County				
1A. Vail Lake	Private	76 ac (31 ha)	0 ac (0 ha)	76 ac (31 ha)*.
1B. Agua Tibia Mountains	U.S. Forest Service	203 ac (82 ha)	203 ac (82 ha)	0 ac (0 ha).
	Private	4 ac (2 ha)	0 ac (0 ha)	4 ac (2 ha)*.
Subtotal		283 ac (115 ha)	203 ac (82 ha)	80 ac (33 ha).
Fremontodendron mexicanum				
1. Otay Mountain				
1A. Cedar Canyon	BLM	145 ac (59 ha)	145 ac (59 ha)	0 ac (0 ha).
	Private	114 ac (46 ha)	114 ac (46 ha)	0 ac (0 ha).
1B. Little Cedar Canyon	BLM	83 ac (34 ha)	83 ac (34 ha)	0 ac (0 ha).

TABLE 1.—AREAS PROPOSED FOR FINAL CRITICAL HABITAT DESIGNATION FOR CEANOTHUS OPHIOCHILUS AND FREMONTODENDRON MEXICANUM, AND THE AREA PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT—Continued

Critical habitat unit	Land ownership	Area that meets the definition of critial habitat	Area proposed as final critital habitat	Area proposed for exclusion from final critical habitat
	Private	19 ac (8 ha)	19 ac (8 ha)	0 ac (0 ha).
Subtotal		361 ac (147 ha)	361 ac (147 ha)	0 ac (0 ha).
Total		644 ac (262 ha)	564 ac (229 ha)	80 ac (33 ha).

* Lands proposed for exclusion under section 4(b)(2) of the Act due to inclusion in the Western Riverside County MSHCP.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report; while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

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

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where a new

species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect *Ceanothus ophiochilus* and *Fremontodendron mexicanum* or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to Fremontodendron Mexicanum and Ceanothus Ophiochilus and Its Critical Habitat

Jeopardy Standard

Prior to and following designation of critical habitat, the Service has applied and will apply an analytical framework for *Ceanothus ophiochilus* and *Fremontodendron mexicanum* jeopardy analyses that rely heavily on the importance of core area occurrences to the survival and recovery of *C. ophiochilus* and *F. mexicanum*. The section 7(a)(2) analysis is focused not only on these occurrences but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Ceanothus ophiochilus* and *Fremontodendron mexicanum* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area occurrence to the survival and recovery of the species as a whole.

Adverse Modification Standard

The analytical framework described in the Director's December 9, 2004, memorandum may be used to complete section 7(a)(2) analyses for Federal actions affecting *Ceanothus ophiochilus* and *Fremontodendron mexicanum* critical habitat. The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. Generally, the conservation role of *C. ophiochilus* and *F. mexicanum* critical habitat units is to support viable core area occurrences.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species.

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for *Ceanothus ophiochilus* and *Fremontodendron mexicanum* is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for *C. ophiochilus* and *F. mexicanum*, include, but are not limited to:

(1) Actions that would directly impact *C. ophiochilus* and *F. mexicanum* habitat. Such activities could include, but are not limited to, road grading, streambed clearing, the creation of firebreaks, and grading near these occurrences. These activities could change the physical and biological features of the habitat by affecting the topography of the site; removing soil and associated species; burying the appropriate soil for these species, making it unavailable for species growth and/or reproduction; or encouraging invasion by nonnative plant species;

(2) Actions that would alter fire frequency in the areas occupied by *C. ophiochilus*. Such activities could include, but are not limited to, prescribed burns. These activities could alter the soil composition by increasing the nutrients in the soil; and

(3) Actions that would increase the presence of nonnative species. Such activities could include, but are not limited to, seeding areas with nonnative species following a fire and inadvertently introducing nonnative seed via machinery, vehicles, and field gear. These activities could reduce the ability of these two species to grow and produce seed because the nonnative species may crowd out or otherwise compete with *Ceanothus ophiochilus* and *Fremontodendron mexicanum*. An increase presence of nonnative species could also change the fire regime as mentioned above or could alter the soil composition.

All lands proposed as critical habitat, including those that have been proposed for exclusion from the final designations, contain features essential to the conservation of *Ceanothus ophiochilus* and *Fremontodendron mexicanum*. Except for the Little Cedar Canyon population of *F. mexicanum*, all subunits are within the geographic range of either species, and were known to be occupied at the time of listing. All of the subunits proposed for designation are currently occupied. Federal agencies already consult with us on activities in areas occupied by these species, or if either species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of *C. ophiochilus* and *F. mexicanum*.

Exclusions Under Section 4(b)(2) of the Act

There are multiple ways to provide management for species' habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management, as can lack of pressure for change, such as areas too remote for anthropogenic disturbance. Finally, State, local, or private management plans, as well as management under Federal agencies' jurisdictions, can provide protection and management to avoid the need for designation of critical habitat. When we consider a plan to determine its adequacy in protecting habitat, we consider whether the plan as a whole will provide the same level of protection that designation of critical habitat would provide. The plan need not lead to exactly the same result as a designation in every individual application, as long as the protection it provides is equivalent overall. In making this determination, we examine whether the plan provides management, protection, or enhancement of the PCEs that is at least equivalent to that

provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Secretary is afforded broad discretion and the Congressional record is clear that in making a determination under the section, the Secretary has discretion as to which factors and how much weight will be given to any factor.

Under section 4(b)(2), in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered. In addition, the Service is conducting an economic analysis of the impacts of the proposed critical habitat designation and related factors, which will be available for public review and comment. Based on public comment on that document, the proposed designation itself, and the information in the final economic analysis, additional areas beyond those identified in this assessment may be excluded from critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act, and in our implementing regulations at 50 CFR 242.19.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995) and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (*i.e.*, 90–100 percent of their known occurrences were restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-Federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through the Four Cs philosophy—conservation through communication, consultation, and cooperation. This philosophy is evident in Service programs such as HCPs, Safe Harbors, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (*e.g.*, reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002).

The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a level of conservation superior to that of critical habitat alone. For example, less than 17 percent of Hawaii is federally owned, but the State is home to more than 24 percent of all federally listed species, most of which will not recover without State and private landowner cooperation. Castle and Cooke Resorts, LLC, which owns 99 percent of the Island of Lanai, entered into a conservation agreement with the Service. The conservation agreement provides conservation benefits to target species through management actions that remove threats to these target species. These actions will significantly improve the habitat for all currently occurring species. Because of the low likelihood of a Federal nexus on the island, we believe this agreement provides a superior level of protection to the affected species than would be provided through the designation of critical habitat.

The Department's Four Cs philosophy—conservation through communication, consultation, and cooperation—is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program provide assistance to private land owners in their voluntary efforts to protect

threatened, imperiled, and endangered species, including the development and implementation of HCPs.

Conservation agreements with non-Federal landowners (*e.g.*, Habitat Conservation Plans (HCPs), contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854; December 2, 1996).

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that those areas that contain the physical and biological features essential to the conservation of the species, or unoccupied areas that are essential to the conservation of the species, are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) (hereinafter *Gifford Pinchot*), the Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. The Court ruled that the Service could no longer equate the two standards and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the Gifford Pinchot decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we believe the conservation achieved through implementing habitat conservation plans (HCPs) or other habitat management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to prevent adverse modification to critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed project. Thus, any HCP or management plan that considers enhancement or recovery as the management standard will always provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

Educational Benefits of Critical Habitat

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for *Ceanothus ophiochilus* and *Fremontodendron mexicanum.* In general, the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit: that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional educational benefit gained from the designation of critical habitat in areas we are proposing to exclude in this rule. The educational benefit normally served by the designation of critical habitat has already been satisfied by other existing habitat management protections. These protections have provided State agencies and local governments, as well as Federal agencies with information on the areas that would benefit from the protection and enhancement of *Ceanothus ophiochilus* and *Fremontodendron mexicanum* habitat. Thus, in areas proposed to be excluded from critical habitat, we believe that the educational benefits have already been provided for.

The Service is conducting an economic analysis of the potential impacts of the proposed critical habitat designation and related factors, which will be available for public review and comment. Based on public comment on that document, the proposed designation itself, and the information in the final economic analysis, additional areas beyond those identified in this assessment may be excluded from critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act, and in our implementing regulations at 50 CFR 242.19.

The information provided in this section applies to all the discussions below on the benefits of inclusion and exclusion of critical habitat.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans From Critical Habitat

The benefits of excluding lands with HCPs or other approved management plans from critical habitat designation

include relieving landowners, communities, counties, and States of any additional regulatory burden that may occur as a result of a critical habitat designation. Most HCPs and other conservation plans take many years to develop and, upon completion, are consistent with the recovery objectives for listed species that are covered within the plan area. In addition, many conservation plans provide conservation benefits to unlisted sensitive species; measures designed to proactively protect species to ensure that listing under the Act will not be necessary. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine these important conservation efforts and partnerships.

Designation of critical habitat within the boundaries of management plans that provide conservation measures for a species could be viewed as a disincentive to those entities currently developing these plans or contemplating them in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species are affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning. In fact, designating critical habitat in areas covered by a pending HCP or conservation plan could result in the loss of some species' benefits if participants abandon the planning process, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified in order for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in plans targeting listed species' conservation.

A related benefit of excluding lands within an HCP or management plan from critical habitat designation is the unhindered, continued ability to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Designation of lands within approved HCP or management plan areas as critical habitat would likely have a negative effect on our ability to establish new partnerships to develop these plans, particular plans that address landscape-level conservation of species and their habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon pursuant to section 7 of the Act. Such a consultation would review the effects of all activities covered by the HCP that might adversely impact the species under a jeopardy standard, including possible habitat modification even without the critical habitat designation. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act; (2) there is a reasonable expectation that the conservation management strategies and actions will be implemented based on past practices, written guidance, or regulations; and (3) the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology. We believe that the Western Riverside County MSHCP fulfils these criteria, and we are considering the exclusion of non-Federal lands covered by this plan that provide for the conservation of *Ceanothus ophiochilus* from the final designation of critical habitat pursuant to section 4(b)(2) of the Act. We are requesting comments on the benefit to *Fremontodendron mexicanum* from the San Diego MSCP and the 1994 MOU with BLM; however, at this time we are not proposing the exclusion of any areas in the proposed critical habitat for *F. mexicanum.*

Western Riverside County Multiple Species Habitat Conservation Plan

The Western Riverside County MSHCP is a large-scale, multi-jurisdictional habitat conservation plan (HCP) that addresses 146 listed and unlisted ''Covered Species,'' including *Ceanothus ophiochilus*, within the 1,260,000 ac (510,000 ha) Plan Area in western Riverside County. Participants in the MSHCP include 14 cities in western Riverside County; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department; California Department of Parks and Recreation; and the California Department of Transportation (Caltrans). The MSHCP was designed to establish a multi-species conservation program that minimizes and mitigates the expected loss of habitat and the incidental take of Covered Species. On June 22, 2004, the Service issued a single incidental take permit pursuant to section 10(a)(1)(B) of the Act to 22 Permittees under the MSHCP for a period of 75 years. The Service granted the participating jurisdictions ''take authorization'' of listed species in exchange for their contribution to the assembly and management of the MSHCP Conservation Area. Collectively, the MSHCP Conservation Area includes MSHCP lands and additional Federal partner lands, and totals approximately 500,000 ac (202,343 ha).

The MSHCP will establish approximately 153,000 ac (61,916 ha) of new conservation lands (Additional Reserve Lands) to complement the approximate 347,000 ac (140,426 ha) of existing natural and open space areas (*e.g.*, State Parks, USFS, and County Park lands known as Public/Quasi-Public (PQP) Lands) in forming the MSHCP Conservation Area. The precise configuration of the 153,000 ac (61,916 ha) of Additional Reserve Lands is not mapped or precisely identified in the MSHCP, but rather is based on textual descriptions within the bounds of a 310,000-ac (125,453-ha) Criteria Area that is interpreted as implementation of the MSHCP proceeds. For *Ceanothus ophiochilus,* critical habitat subunits 1A (Vail Lake) and 1B (Agua Tibia Wilderness) are located entirely within the MSHCP Plan Area and are comprised of USFS and private lands.

The private lands within these subunits are within the Criteria Area and are targeted for inclusion within the MSHCP Conservation Area as potential Additional Reserve Lands. Specific conservation objectives in the MSHCP for *Ceanothus ophiochilus* provide for conservation and management of at least 13,290 ac (5,378 ha) of suitable chaparral habitat and at least three core locations of this species in the vicinity of Vail Lake and the Agua Tibia Wilderness. Additionally, the plan requires surveys for *C. ophiochilus* as part of the project review process for public and private projects where

suitable habitat is present within a defined boundary of the Criteria Area (see Criteria Area Species Survey Area Map, Figure 6–2 of the MSHCP, Volume I). For locations with positive survey results, 90 percent of those portions of the property that provide long-term conservation value for the species will be avoided until it is demonstrated that the conservation objectives for the species are met. We are currently only aware of three populations of *C. ophiochilus* in the MSHCP Conservation Area. The MSHCP recognizes these same three populations. The goal of the MSHCP is to conserve a minimum of three populations of *C. ophiochilus.* Although the specific location of individual target areas for this species has yet to be identified, we recognize that no other populations of the plant have been identified and agree that conservation of three populations of this plant through the survey requirements, avoidance and minimization measures, and management for *C. ophiochilus* (and its PCEs) exceed any conservation value provided as a result of any regulatory protections that may be afforded through a critical habitat designation over the three known populations.

We propose to exclude approximately 80 ac (33 ha) of non-Federal lands from the *Ceanothus ophiochilus* final critical habitat designation in subunits 1A and 1B within the MSHCP Plan Area under section 4(b)(2) of the Act. These non-Federal lands are comprised of private lands to the west of Vail Lake (approximately 76 ac (31 ha)) (subunit 1A) and private lands adjacent to the northern boundary of the Cleveland National Forest east of Woodchuck Road (approximately 4 ac (2 ha)) (subunit 1B).

The USFS lands within these subunits are considered PQP lands under the MSHCP and as such are included within the overall 500,000 ac (202,343 ha) MSHCP Conservation Area. While these Federal lands are managed by the USFS and are an integral part of the overall conservation strategy of the MSHCP, the USFS is not a permittee under the section 10(a)(1)(B) permit. Therefore, we are not excluding USFS lands within subunit 1B based on the MSHCP.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed and evaluated the proposed exclusion from the final designation of approximately 80 ac (33 ha) of critical habitat on non-Federal lands within the MSHCP Plan Area, and have determined that the benefits of proposing to exclude these non-Federal lands in subunits 1A and 1B outweigh the benefits of including these lands. The PCEs required by *Ceanothus ophiochilus* will benefit by the conservation measures outlined in the MSHCP. In summary, these conservation measures include protecting and managing PCEs within the MSHCP Conservation Area, primarily through the protection of habitat from surface-disturbing activities; implementing specific management and monitoring practices to help ensure the conservation of *C. ophiochilus* and its PCEs in the Plan Area; maintaining the physical and ecological characteristics of occupied habitat; and conducting surveys and implementing other required procedures to ensure avoidance of impacts to at least 90 percent of suitable habitat areas determined important to the long-term conservation of *C. ophiochilus* within the Criteria Area. The specific area identified as Subunit 1A will be addressed under the MSHCP. These specific conservation actions, survey requirements, avoidance and minimization measures, and management for *C. ophiochilus* and its PCEs exceed any conservation value provided as a result of any regulatory protections that may be afforded through a critical habitat designation.

The exclusion of these lands from critical habitat will also help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the MSHCP. The benefits of excluding these lands from critical habitat outweigh the minimal benefits of including these lands as critical habitat, including the educational benefits of critical habitat through informing the public of areas important for the long-term conservation of this species, because these educational benefits can still be accomplished from materials provided on our Web site. Further, many educational benefits of critical habitat designation will be achieved through the overall designation process and notice and public comment, and will occur whether or not these particular subunits are designated.

Exclusion Will Not Result in Extinction of the Species

We do not believe that the exclusion of 80 ac (33 ha) from the final designation of critical habitat for *Ceanothus ophiochilus* will result in the extinction of the taxon because the Western Riverside County MSHCP provides for the conservation of this species and its PCEs on all known occupied areas within the county, including areas that may be newly discovered occupied areas in the future. Importantly, as we stated in our biological opinion, while some loss of modeled habitat for *C. ophiochilus* is anticipated due to implementation of the MSHCP, we concluded that implementation of the plan will not jeopardize the continued existence of this species.

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

Economic Analysis

An analysis of the potential economic impacts of proposing critical habitat for *Ceanothus ophiochilus* and *Fremontodendron mexicanum* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.fws.gov/carlsbad/SpeciesInfo.htm* or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), and based on our implementation of the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek the expert opinions of at least five appropriate and independent peer reviewers regarding the science in this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on the specific assumptions and conclusions regarding the proposed revised designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings

must be made in writing at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

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

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

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement under the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** so that it is available for public review and comments. The draft economic analysis can be obtained from the internet Web site at *http://www.fws.gov/carlsbad/SpeciesInfo.htm* or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

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

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

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

Executive Order 13211

On May 18, 2001, the President issued an Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Ceanothus ophiochilus* and *Fremontodendron mexicanum* is considered to be a significant regulatory action under Executive Order 12866 in that it may raise novel legal and policy issues. However, based on the extent of specific areas being proposed for designation, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, we do not believe that this action is not a significant energy action and no Statement of Energy Effects is required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

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

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

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

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

(b) We do not anticipate that this rule will significantly or uniquely affect small governments due to current public knowledge of the species' protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions. As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

Federalism

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

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Endangered Species Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Ceanothus ophiochilus* and *Fremontodendron mexicanum.*

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

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

National Environmental Policy Act (NEPA)

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

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that no essential habitat for either *Ceanothus ophiochilus* or *Fremontodendron mexicanum* exists on tribal lands. Therefore, critical habitat for *C. ophiochilus* and *F. mexicanum* has not been proposed on Tribal lands.

References Cited

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

Author(s)

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

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. In § 17.12(h), revise the entry for ''*Ceanothus ophiochilus*'' and the entry for ''*Fremontodendron mexicanum*'' under ''FLOWERING PLANTS'' to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Ceanothus ophiochilus.	Vail Lake ceanothus	U.S.A. (CA)	Rhamnaceae	T	648	17.96(a)	NA
*	*	*	*	*	*		*
Fremontodendron mexicanum.	Mexican flannelbush	U.S.A. (CA), Mexico	Sterculiaceae	E	648	17.96(a)	NA
*	*	*	*	*	*		*

3. Amend § 17.96(a), by adding an entry for *Ceanothus ophiochilus* (Vail Lake ceanothus) in alphabetical order under family Rhamnaceae and an entry for *Fremontodendron mexicanum* (Mexican flannelbush) in alphabetical order under family Sterculiaceae, to read as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering Plants.

* * * * *

Family Rhamnaceae: *Ceanothus ophiochilus (Vail Lake ceanothus)*

(1) Critical habitat units are depicted for Riverside County, California on the maps below.

(2) The primary constituent elements (PCEs) of critical habitat for *Ceanothus ophiochilus* are the habitat components that provide:

(i) Flat to gently sloping north to northeast facing ridge tops with slopes in the range of 0 to 40 percent slope that provide the appropriate solar exposure for seedling establishment and growth.

(ii) Soils formed from metavolcanic and ultra-basic parent materials and deeply weathered gabbro or pyroxenite-rich outcrops that provide nutrients and space for growth and reproduction. Specifically in the areas that *Ceanothus ophiochilus* is found, the soils are:

(A) Ramona, Cienaba, Las Posas, and Vista series in the Agua Tibia Wilderness; and

(B) Cajalco series in the vicinity of Vail Lake;

(iii) Chamise chaparral or mixed chamise-ceanothus-arctostaphylos chaparral at elevations of 2,000 ft to 3,000 ft (610 m to 914 m) that provide the appropriate canopy cover and elevation requirements for growth and reproduction.

(3) Critical habitat does not include man-made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) Data layers defining map units were created on a base of USGS 1:24,0000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Unit 1.

(i) Subunit 1A for *Ceanothus ophiochilus,* Vail Lake Subunit, Riverside County, California. From USGS 1:24,000 quadrangles Pechanga and Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 499944, 3705490; 500174, 3705450; 500339, 3705344; 500489, 3705188; 500546, 3705102; 500615, 3704967; 500677, 3704920; 500682, 3704828; 500626, 3704765; 500519, 3704736; 500004, 3705012; thence returning to 499944, 3705490.

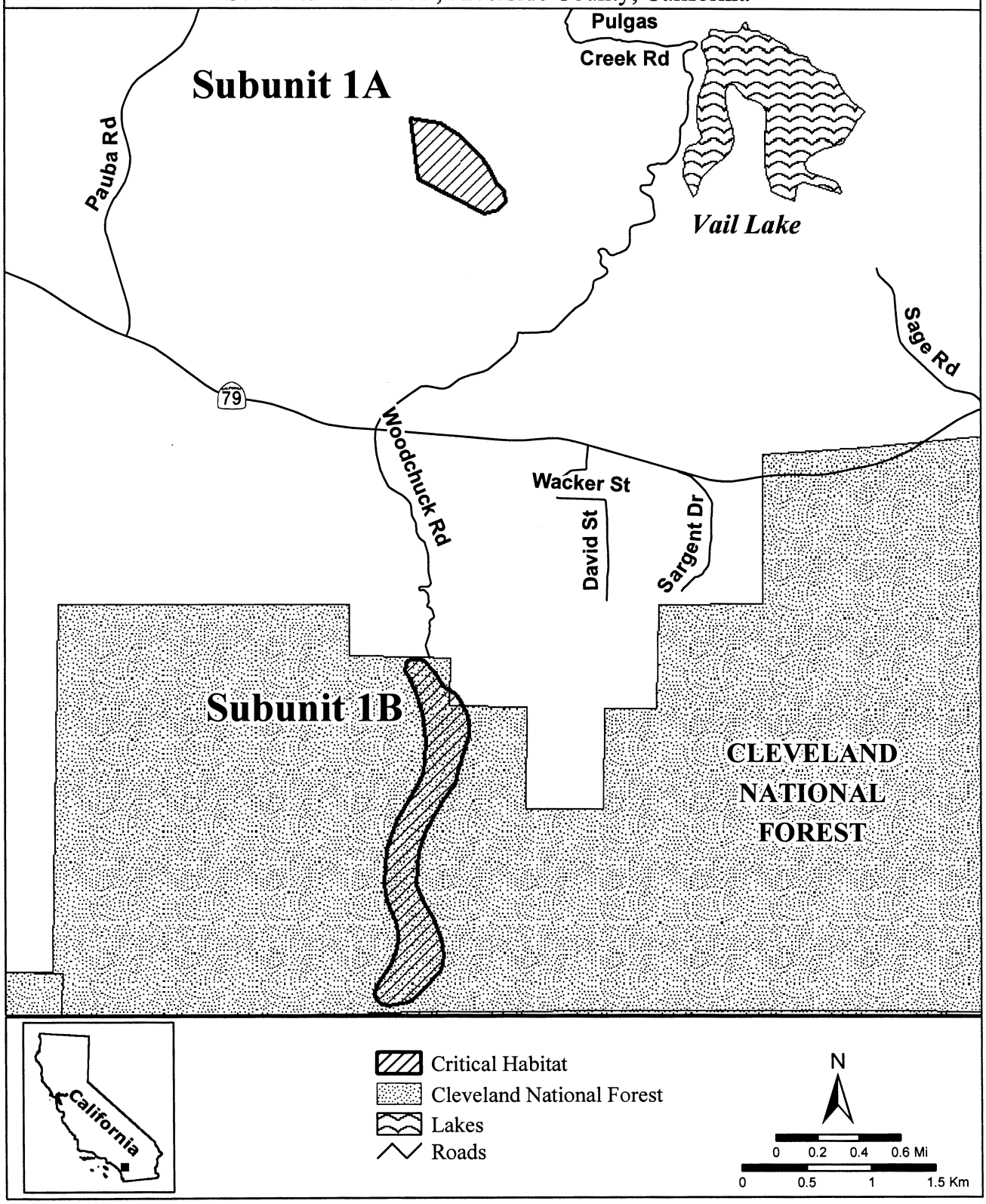
(ii) Map depicting Subunit 1A is located at paragraph (5)(iv) of this entry.

(iii) Subunit 1B for *Ceanothus ophiochilus,* Agua Tibia Subunit, Riverside County, California. From USGS 1:24,000 quadrangles Pechanga and Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 499902, 3701154; 499909, 3701222; 499950, 3701238; 500022, 3701235; 500060, 3701218; 500091, 3701184; 500127, 3701138; 500158, 3701092; 500191, 3701048; 500226, 3701010; 500247, 3700998; 500262, 3700990; 500273, 3700981; 500294, 3700965; 500326, 3700909; 500351, 3700872; 500353, 3700869; 500362, 3700855; 500375, 3700824; 500398, 3700735; 500400, 3700646; 500370, 3700546; 500308, 3700359; 500293, 3700272; 500173, 3700102; 500057, 3699889; 500008, 3699730; 499990, 3699595; 499988, 3699460; 500022, 3699376; 500045, 3699326; 500113, 3699213; 500179, 3699040; 500199, 3698902; 500173, 3698801; 500010, 3698618; 499966, 3698566; 499920, 3698544; 499823, 3698518; 499757, 3698516; 499704, 3698537; 499671, 3698570; 499655, 3698612; 499671, 3698670; 499783, 3698843; 499834, 3698968; 499840, 3699020; 499840, 3699090; 499819, 3699185; 499755, 3699338; 499731, 3699474; 499757, 3699750; 499838, 3699993; 499974, 3700214; 500037, 3700349; 500055, 3700453; 500063, 3700594; 500033, 3700813; 499984, 3700976; 499924, 3701105; thence returning to 499902, 3701154.

(iv) Map of Subunits 1A and 1B (Map 1) follows.

BILLING CODE 4310–55–P

Map of
Critical Habitat for *Ceanothus ophiochilus* (Vail Lake ceanothus)
Subunits 1A and 1B, Riverside County, California



Family Sterculiaceae: *Fremontodendron mexicanum* (Mexican flannelbush)

(1) Critical habitat units are depicted for San Diego County, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Fremontodendron mexicanum* are the habitat components that provide:

(i) Alluvial terraces, benches, and associated slopes within 500 feet (152 meters) of streams, creeks, and ephemeral drainages where water flows primarily after peak seasonal rains with a gradient ranging from 3 to 7 percent; and stabilized north- to east-facing slopes associated with steep (9 to 70 percent) slopes and canyons that provide space for growth and reproduction.

(ii) Silty loam soils derived from metavolcanic and metabasic bedrock, mapped as San Miguel—Exchequer Association soil series that provides the nutrients and substrate with adequate drainage to support seedling establishment and growth.

(iii) Open *Cupressus forbesii* and *Platanus racemosa* stands at elevations of 900 ft (274 m) to 3,000 ft (914 m) within a matrix of chaparral (such as *Dendromecon rigida* ssp. *rigida* and *Malosma laurina*) and riparian vegetation that provides adequate space for growth and reproduction.

(3) Critical habitat does not include man made structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) Data layers defining map units were created on a base of USGS 1:24,0000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

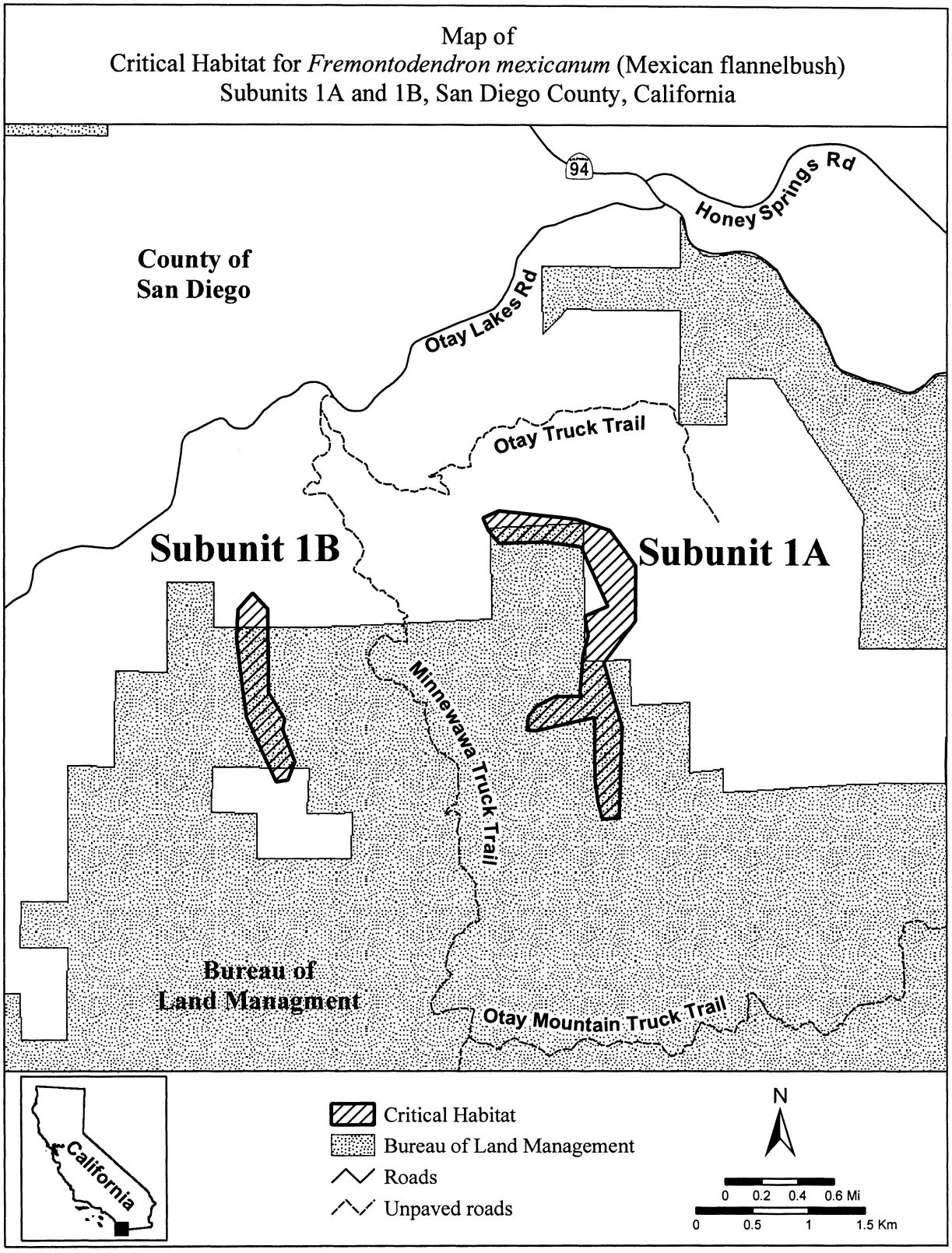
(5) Unit 1.

(i) Subunit 1A for *Fremontodendron mexicanum,* Cedar Canyon Subunit, San Diego County, California. From USGS 1:24,000 quadrangles Dulzura and Otay Mountain, lands bounded by the following UTM NAD27 coordinates (E, N): 515014, 3611487; 515155, 3611552; 515695, 3611495; 515848, 3611474; 516142, 3611376; 516372, 3611063; 516368, 3610565; 516091, 3610192; 516251, 3609616; 516229, 3608802; 516080, 3608793; 516038, 3608958; 516013, 3609134; 516008, 3609701; 515493, 3609581; 515407, 3609585; 515418, 3609710; 515497, 3609804; 515663, 3609889; 515878, 3609887; 515904, 3610258; 515952, 3610432; 515921, 3610608; 516125, 3610698; 515989, 3611007; 515889, 3611230; 515567, 3611277; 515159, 3611261; 515064, 3611374; thence returning to 515014, 3611487.

(ii) Map depicting Subunit 1A is located at paragraph (5)(iv) of this entry.

(iii) Subunit 1B for *Fremontodendron mexicanum,* Little Cedar Canyon Subunit, San Diego County, California. From USGS 1:24,000 quadrangles Dulzura and Otay Mountain, lands bounded by the following UTM NAD27 coordinates (E, N): 512964, 3610810; 513099, 3610671; 513104, 3609924; 513252, 3609684; 513232, 3609584; 513344, 3609302; 513278, 3609139; 513174, 3609122; 512911, 3609699; 512854, 3610125; 512821, 3610402; 512834, 3610662; thence returning to 512964, 3610810.

(iv) Map of Subunits 1A and 1B (Map 2) follows.


Map of
Critical Habitat for *Fremontodendron mexicanum* (Mexican flannelbush)
Subunits 1A and 1B, San Diego County, California
94
Honey Springs Rd
County of
San Diego
Otay Lakes Rd
Otay Truck Trail
Subunit 1B
Subunit 1A
Minnewawa Truck Trail
Bureau of
Land Managment
Otay Mountain Truck Trail
California
Critical Habitat
Bureau of Land Management
Roads
Unpaved roads
N
0 0.2 0.4 0.6 Mi
0 0.5 1 1.5 Km

* * * * *

Dated: September 18, 2006.

David M. Verhey,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 06–8189 Filed 10–2–06; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Delist the Plymouth Redbelly Turtle (*Pseudemys rubriventris bangsi*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the Plymouth redbelly turtle (*Pseudemys rubriventris bangsi*), now referred to as the Plymouth (or northern) red-bellied cooter (*P. rubriventris*), from the Federal List of Threatened and Endangered Wildlife under the Endangered Species Act of 1973, as amended (Act). We find that the petition and additional information in our files presents substantial information indicating that delisting the Plymouth red-bellied cooter may be warranted, and we are therefore initiating a status review. To assist us in ensuring that the review is comprehensive, we are soliciting information and data regarding this species.

DATES: The administrative finding announced in this document was made on October 3, 2006. To be considered in the 12-month finding for this petition, comments and information should be submitted to us by December 4, 2006.

ADDRESSES: Data, information, comments, or questions concerning this petition and our finding should be submitted to the Field Supervisor (*Attention:* Endangered Species), New England Field Office, 70 Commercial Street, Suite 300, Concord, New Hampshire 03301. The petition, administrative record, supporting data, and comments will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Michael J. Amaral, Sr. Endangered Species Specialist, at the New England Field Office (see **ADDRESSES** above), or at 603–223–2541.

SUPPLEMENTARY INFORMATION:

Public Information Solicited

When we make a finding that substantial information exists to indicate that listing or delisting a species may be warranted, we are required to promptly commence a review of the status of the species. We intend that any final action resulting from this status review will be as accurate and effective as possible. Therefore, we request comments or suggestions from the public, other concerned governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties. We would be particularly interested in any data indicating that the Plymouth red-bellied cooter may qualify for protection under the Act as a distinct population segment per standards as described in the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (February 7, 1996; 61 FR pages 4722) or as part of some larger taxonomic entity that is threatened or endangered. We are opening a 60-day public comment period (see **DATES**) to allow all interested parties an opportunity to provide information on the status of the Plymouth red-bellied cooter throughout its range, including information on the species' biology and ecology; its genetics and taxonomic classification; the historic and current abundance and distribution of the Plymouth, Massachusetts population; ongoing conservation measures for the species and its habitat; and the threats facing the Plymouth red-bellied cooter in relation to the five listing factors (as defined in section 4(a)(1) of the Act).

We will base our 12-month finding on a review of the best scientific and commercial information available, including all information received during the public comment period. If you wish to provide comments you may submit your comments and materials concerning this finding to the Field Supervisor, New England Field Office (see **ADDRESSES** section). Please note that comments merely stating support or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species shall be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will issue the 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

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

All comments and materials received will be available for public inspection, by appointment, during normal business hours at our New England Field Office (see **ADDRESSES**).

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, we are to make this finding within 90 days of the receipt of the petition and publish a notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the involved species. After completing the status review, we will issue a 12-month finding determining whether delisting or an alternative action is warranted.

The factors for listing, delisting, or reclassifying species are described at 50 CFR 424.11. We may delist a species