



# Federal Register

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**Wednesday,  
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## **Part II**

# **Department of the Interior**

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**Fish and Wildlife Service**

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**50 CFR Part 17**

**Endangered and Threatened Wildlife and  
Plants; Designation of Critical Habitat for  
*Acanthomintha ilicifolia* (San Diego  
thornmint); Proposed Rule**

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

RIN 1018-AU86

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Acanthomintha ilicifolia* (San Diego thornmint)****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 *Acanthomintha ilicifolia* (San Diego thornmint) under the Endangered Species Act of 1973, as amended (Act). We have determined that a total of approximately 1,936 acres (ac) (783 hectares (ha)) in San Diego County, California, meets the definition of critical habitat. We are proposing to exclude 1,302 ac (527 ha) from the critical habitat designation. If these proposed exclusions are adopted, this would result in a designation of critical habitat of approximately 634 ac (257 ha) of land under Federal (553 ac (224 ha)), and State and local (81 ac (33 ha)), ownership in San Diego County, California.

**DATES:** We will accept comments from all interested parties until May 14, 2007. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by April 30, 2007.

**ADDRESSES:** If you wish to comment on the proposed rule, you may submit your comments and materials identified by RIN 1018-AU86, by any of the following methods:

(1) You may send comments by electronic mail (e-mail) to

[fw8cfwocomments@fws.gov](mailto:fw8cfwocomments@fws.gov). Include "RIN 1018-AU86" in the subject line.

(2) You may fax your comments to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office at 760-431-5901.

(3) You may mail or hand-deliver your written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

(4) You may submit your comments at the 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 (telephone 760-431-9440).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office at the address or telephone number listed under

**ADDRESSES.** Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Public Comments 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, including whether the benefit of designation will outweigh any threats to the species due to designation;

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

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

(4) Our proposed exclusion of 1,302 acres (ac) (527 hectares (ha)) of non-Federal lands already conserved or targeted for conservation within subarea plans under the San Diego Multiple Species Conservation Program (MSCP) and the San Diego Multiple Habitat Conservation Program (MHCP) from the final designation of critical habitat for *Acanthomintha ilicifolia* under section 4(b)(2) of the Act. We are specifically seeking public comment on our proposed exclusion of lands covered under the City of Encinitas subarea plan of the MHCP (see Exclusions Under Section 4(b)(2) of the Act for details of these HCPs). It is our understanding that little progress has been made by the City of Encinitas to finalize their subarea plan since the 2001 release of the draft plan. Based on information received during the public comment period, the

Secretary may determine that sufficient progress has not been made and that lands within the City of Encinitas' subarea plan should not be excluded from the final designation. Specifically, useful information would include: Whether essential lands within Encinitas are being managed, or are proposed to be managed, to conserve *A. ilicifolia*, and; the outlook for completion of the draft subarea plan. Please provide information concerning whether the benefits of exclusion of any of these specific areas outweigh the benefits of their inclusion in designated critical habitat. If the Secretary determines the benefits of including these lands outweigh the benefits of excluding them, they will not be excluded from final critical habitat;

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

(6) 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.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). Please submit e-mail comments to [fw8cfwocomments@fws.gov](mailto:fw8cfwocomments@fws.gov). Please also include "Attn: RIN 1018-AU86" 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 message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760-431-9440. Please note that comments must be received by the date specified in **DATES** in order to be considered.

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 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.

### **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, only 483 species, or 37 percent of the 1,311 listed species in the United States under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of 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 evaluate 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 the proposed 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 timeframe 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 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) (42 U.S.C. 4321 *et seq.*). 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 the biology and ecology of *Acanthomintha ilicifolia*, please refer to the final rule listing the species as threatened published in the **Federal Register** on October 13, 1998 (63 FR 54938). This species has been listed by the State of California as endangered since 1982.

### **Species Description and Life History**

*Acanthomintha ilicifolia* (San Diego thornmint) is an annual member of the mint family in the genus *Acanthomintha*. This plant ranges in height from 2 to 6 inches (in) (5 to 15 centimeters (cm)) and has white, two-lipped, tubular flowers with rose-colored markings on the lower lip (Jokerst 1993, p. 713). Members of this genus have paired leaves and several sharp spiny bracts (modified leaves) below whorled flowers. *Acanthomintha ilicifolia* can be distinguished from other members of the genus by its flower, which has hairless anthers and style.

### Distribution, Ecology, and Habitat

*Acanthomintha ilicifolia* usually occurs on heavy clay soils in open areas surrounded by shrubby vegetation. These openings are generally found within coastal sage scrub, chaparral and native grassland of coastal San Diego County and south to San Telmo in northern Baja California, Mexico (Beauchamp 1986, p. 175; Reiser 2001, pp. 3–5). *Acanthomintha ilicifolia* is frequently associated with gabbro soils, which are derived from igneous rock, and gray calcareous clays derived from soft calcareous sandstone (Oberbauer and Vanderwier 1991, pp. 208–209). This species is endemic to San Diego County, California, and northwestern Baja California, Mexico, and grows on open clay lenses described as friable, meaning that these soils have a loose, crumbly texture.

In the final listing rule for *Acanthomintha ilicifolia* (63 FR 54938, October 13, 1998), 32 of 52 historic populations were presumed to be extant (still in existence). In the listing rule we estimated that the total number of individual plants in all remaining populations was approximately 150,000 to 170,000 (63 FR 54938). Throughout this proposed rule, occurrences of *A. ilicifolia* are referred to by their element occurrence (EO) number. This is a code that is assigned to each specific location of rare species that is cataloged in the California Natural Diversity Database (CNDDDB). Element occurrences do not necessarily represent populations, but are used to represent areas where a species is found. Element occurrences that are close together may be part of the same population. Therefore, the number of element occurrences does not represent the number of populations that exist for this species. For the purpose of this proposed critical habitat designation, we are assuming that element occurrences within one mile (1.6 kilometers (km)) of each other and on habitat that is not fragmented by roads or structures are part of the same population.

Through surveys associated with the development of Habitat Conservation Plans (HCPs) and additional surveys on public and private lands since the time of listing, additional populations of *A. ilicifolia* have been discovered. We currently have data for a total of 88 element occurrences (or 64 populations) of which 54 element occurrences (or 34 populations) are extant or presumed extant and 34 element occurrences (or 30 populations) are considered to be extirpated (no longer in existence) or possibly extirpated. Specifically, we consider 68 element occurrences to have

been known at the time of listing in 1998 (52 historic populations) and an additional 20 element occurrences to have been discovered since the time of listing (12 new populations). Detailed information about the new element occurrences is available upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

### Previous Federal Actions

*Acanthomintha ilicifolia* was federally listed as threatened on October 13, 1998 (63 FR 54938), and has been listed as endangered by the State of California since 1982 (CDFG 2006, p.1). This species currently does not have a recovery plan.

At the time this plant was federally listed, the Service compared 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 (63 FR 54938, pp. 54951–54953). Additionally, we conflated the jeopardy standard with the standard for destruction or adverse modification of critical habitat, stating that a jeopardy finding would be equivalent to a finding of adverse modification of critical habitat thereby resulting in identical section 7 findings. Based on these factors, the Service found that designation of critical habitat for *A. ilicifolia* 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 this species as well as four other plant species (*Center for Biological Diversity v. Norton*, C–04–3240 JL (N. D. Cal.)). In settlement of the lawsuit, the Service agreed to withdraw our previous not prudent finding and deliver a proposed determination of critical habitat, if prudent, to the **Federal Register** on or before February 28, 2007 and a final designation by February 28, 2008.

We have re-evaluated the prudence of designating critical habitat for this species. Despite the potential threats to this species from collection and vandalism and the continuing potential for private landowner misunderstandings about the effects of critical habitat designation on private land, we believe that designation of critical habitat will benefit *A. ilicifolia*. As a result of the *Gifford Pinchot* court ruling in 2004, we now recognize the jeopardy standard and the standard for destruction or adverse modification of critical habitat are separate and distinct. Additionally, we recognize critical habitat designations may provide

benefits to the recovery of a species. Therefore, we now find designation of critical habitat for *A. ilicifolia* to be prudent because designation of critical habitat has the potential to provide greater protections to the species and its habitat than the jeopardy standard under section 7(a)(2) of the Act.

### 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 pursuant to 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 of the Act 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 of the Act 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 within the geographic area occupied by the species at the time of listing may be included in critical habitat only if the essential features thereon may require special management considerations or protection. Areas outside of the geographic area occupied by the species at the time of listing may only be included in critical habitat if they are essential for the conservation of the species. Accordingly, 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), and 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 populations but are outside the critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

#### Methods

As required by section 4(b)(2) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of *Acanthomintha ilicifolia*. This includes information from the proposed listing rule (60 FR 40549, August 9, 1995); final listing rule (63 FR 54938, October 13, 1998); 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 San Diego County and data compiled in the California Natural Diversity Database (CNDDDB). More specifically, the information sources used for this proposal include: (1) CNDDDB element occurrence data (2005 and 2006); (2) Bauder and McMillan (1994, pp. 1-87); (3) McMillan (2001, pp. 1-91); (4) herbarium records from San Diego Natural History Museum, University of California at Berkeley and Rancho Santa Ana Botanical Garden; (5) personal

communications with *A. ilicifolia* experts (Bauder 2006; Hanson 2006; Kelly 2005; McMillan 2006; Sproul 2006; and Vinje 2006); (6) site visits by Service biologists to several known element occurrences of *A. ilicifolia* in 2005 and 2006; and (7) information provided by the Cleveland National Forest of the U.S. Forest Service (Winter and Young 2005).

#### 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 areas occupied by the species at the time of listing that contain physical or biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and 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 of offspring, germination, and seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific primary constituent element required for *Acanthomintha ilicifolia* is derived from the biological needs of *A. ilicifolia* as described in the proposed and final listing rules (60 FR 40549; 63 FR 54938).

#### *Space for Individual and Population Growth and Normal Behavior*

*Acanthomintha ilicifolia* occurs on isolated patches of clay soils derived from gabbro and soft calcareous sandstone substrates (Oberbauer and Vanderwier 1991, pp. 208-209) (PCE). The soils derived from gabbro substrates are red to dark brown clay soils, and those derived from soft calcareous sandstone are gray, sometimes loamy, clay soils. These patches of clay soils are called "clay lenses," and in San Diego County and northern Baja California, Mexico, clay lenses are known to support a variety of narrow endemic (restricted to a specific geographic area) plants. Clay lenses tend to have an open or unpopulated look because many common species cannot tolerate living on these clay soils. Clay lenses are typically devoid of woody, perennial shrubs (PCE). It is believed shrubs have difficulty surviving on these soils because in the rainy winter months these soils become saturated

with water and the large root systems of shrubs are not able to get oxygen (Oberbauer and Vanderwier 1991, pp. 208–209). Also, as the soils become saturated they expand and move, and when the soils dry they contract and crack, making it difficult for shrubs to become established. Likewise, relatively few common annual plant species inhabit clay lenses due to the harsh conditions, and those plants that are adapted to these conditions, in some cases, have become differentiated from their common relatives. Due to the absence of most common native vegetation from these clay lenses, the areas where *A. ilicifolia* occurs appear as open areas in a matrix of coastal sage scrub or chaparral (PCE).

Clay lenses are generally inhabited by a specific flora that consist of forbs, native grasses, and geophytes (perennial plants propagated by buds on underground bulbs, tubers, or corms such as lilies, iris, and onions). Native plant species that characterize the vegetation found with *Acanthomintha ilicifolia* on clay lenses include *Hesperervax sparsiflora* var. *sparsiflora* (erect evax), *Harpagonella palmeri* (Palmer's grappling-hook), *Convolvulus simulans* (bindweed), *Apiastrum angustifolium* (mock parsley), and *Microseris douglasii* ssp. *platycarpa* (small flowered microseris) (Bauder et al. 1994, pp. 9–10; McMillan 2006, p. 1; Vinje 2006b, pp. 1–2).

In addition to the characteristics discussed above, the texture and structure of the clay lenses are essential for supporting the seedling establishment and growth of *Acanthomintha ilicifolia*. This soil provides many small pockets where seeds from *A. ilicifolia* become lodged as they fall from decomposing plants (Bauder and Sakrison 1999, p. 28). The seeds then stay in the soils until the temperatures become cooler in the winter months and the soil becomes saturated with the winter rains (Bauder and Sakrison 1997, p. 28). The seedlings then germinate and grow to mature plants. These plants do best when they are not crowded or shaded by other plants (Bauder and Sakrison 1999, p. 12). The loose, crumbly texture of the soil provides the proper substrate to hold the seed bank and allow for root growth (PCE).

Clay lenses generally form on gentle slopes. An analysis of 20 sites where *Acanthomintha ilicifolia* was observed found that the slopes range from 0 to 25 degrees, with the majority of the sites having slopes below 20 degrees (Bauder et al. 1994, pp. 10–11) (PCE). This study also found that many thriving, natural populations were on slopes that faced

southeast, south, southwest, and west, although not all sites fit this pattern (Bauder et al. 1994, pp. 10–11). Using GIS, we found that the known populations of *Acanthomintha ilicifolia* range in elevation from sea level to 3,000 ft (914 m). *Acanthomintha ilicifolia* occurs on several soil types. These soils are mapped as Las Posas, Olivenhain, Redding, Huerhuero, Altamont, Cieneba, and Linne (Bowman 1973, pp. 22–24, 38–40, 54–55, 61–64, 67–68, and 71–72) and are derived from gabbro and soft calcareous sandstone substrates with a loose, crumbly structure and deep fissures that provide space for population and individual growth and substrate for seedling establishment.

#### *Water and Hydrology*

The loose, crumbly clay soils that support *Acanthomintha ilicifolia* act like a sponge and are saturated by winter rains. The saturation of these soils allows for seeds of *A. ilicifolia* to imbibe with water and germinate in the cool winter months (Bauder and Sakrison 1997, p. 32). As such, the species requires a natural hydrological regime to reproduce. Since we do not have specific information on the hydrological regime that this species requires, we did not include hydrological regime as a primary constituent element.

#### *Reproduction and Pollination*

The breeding system of *Acanthomintha ilicifolia* has not been studied, but it has been determined that other members of the genus *Acanthomintha* are self-compatible (Steeck 1995, pp. 27–33). A 1996 study (Bauder and Sakrison 1997, p. 38) found that several insect species visited the flowers and moved from plant to plant. These insects represented possible pollinators of *A. ilicifolia*; however, none were thought to represent species-specific pollinators (Bauder and Sakrison 1997, p. 39). Since we do not have information on any species-specific pollinators that visit *A. ilicifolia*, we did not include pollinators as a primary constituent element.

#### *Primary Constituent Elements for Acanthomintha ilicifolia*

Pursuant to our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of *Acanthomintha ilicifolia*.

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 PCE for *Acanthomintha ilicifolia* is:

Clay lenses that provide substrate for seedling establishment and space for growth and development of *Acanthomintha ilicifolia*, that are:

(a) Within chaparral and coastal sage scrub;

(b) On gentle slopes ranging from 0 to 25 degrees;

(c) Derived from gabbro and soft calcareous sandstone substrates with a loose, crumbly structure and deep (approximately 2 feet (60 cm)) fissures; and

(d) Characterized by a low density of forbs and geophytes, and a low density or absence of shrubs.

This proposed designation is designed for the conservation of those areas containing the PCE necessary to support one or more of the species' life history functions. All units and subunits in this proposed designation contain the PCE and support multiple life processes. This proposed rule would protect the PCE and thus the conservation function of the habitat.

#### **Criteria Used To Identify Critical Habitat**

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that contain the features that are essential to the conservation of *Acanthomintha ilicifolia*. All of the areas proposed for designation are currently occupied by the species. Occupied areas were determined from survey data and element occurrence data in the CNDDDB (CNDDDB 2006). For the purpose of this proposal, we assumed that each element occurrence represents a population of *A. ilicifolia*, except in cases where there are several element occurrences located within 1 mile (1.6 km) of each other and the habitat is not fragmented by manmade features. In these cases, we considered the group of element occurrences as a single population. Examples of this include the Manchester Preserve in Encinitas (element occurrence (EO) 28, EO 42, and EO 54), McGinty Mountain near Jamul (EO 21, EO 22, and EO 30), and Viejas and Poser Mountains near Alpine (EO 12, EO 50, EO 51, EO 62, EO 73, EO 74, and EO 75).

We then identified the areas that contain the features that are essential to the conservation of *A. ilicifolia* by identifying areas that: (1) Support populations that occur on rare or unique habitat within the species' range; (2) support the largest known populations of *A. ilicifolia*; or (3) support stable populations of *A. ilicifolia*. These

criteria are explained in greater detail below. Areas containing the primary constituent elements and that meet at least one of the above criteria were considered for critical habitat designation. To evaluate locations occupied by this species we used: the California Natural Diversity Database (CNDDDB 2006); a study by Bauder et al. (1994); biological surveys (City of San Diego 2000; City of San Diego 2001; City of San Diego 2003; City of San Diego 2004; City of San Diego 2005; Conservation Biology Institute 2002, p. A3–1; County of San Diego 2002, p. 17; Dudek and Associates, Inc. 2006, Appendix A pp. 3–4; Helix Environmental Planning, Inc. 2002, p. 6; and REC Consultants, Inc. 2004, p. figure 5); and interviews with botanists working on this species (Kelley 2005; McMillan 2006).

The first criterion we used to identify proposed critical habitat was areas that support populations that occur on rare or unique habitat within the species' range. The majority of areas that currently support *Acanthomintha ilicifolia* are on dark brown to reddish brown clay soils that are derived from gabbro substrates. Historically, *A. ilicifolia* also occurred on gray clay soils that are derived from soft calcareous sandstone substrates. The only remaining population on this soil type is northeast of the intersection of Palomar Airport Road and El Camino Real, in the City of Carlsbad. Conserving unique soil types that this species occurs on will help to reduce the risk of extinction for this species because it may allow for the preservation of a greater amount of genetic diversity within the species' gene pool. Therefore, this area containing population (EO 70) is proposed for critical habitat designation under criterion one.

The second criterion we used to identify proposed critical habitat was areas that support the largest known populations of *Acanthomintha ilicifolia*. The CNDDDB includes data for this species that date back to 1978. Populations of this species range from just a few individual plants to several thousand. The majority of the known populations range from 50 to 2,000 plants. Yet, there are four populations that stand out as the largest, each having greater than 25,000 plants. The four largest populations and the estimated population at each location are: Sycamore Canyon (EO 32), 31,000 plants; Slaughterhouse Canyon (EO 64), 60,000 plants; Viejas and Poser Mountains (EO 12, EO 50, EO 51, EO 62, EO 73, and EO 74), 29,650 plants; and Hollenbeck Canyon (EO L), 100,000 plants. These large populations are vital

for the conservation of this species because they occur within large blocks of open space and are less likely to be impacted by edge effects associated with smaller populations in highly urbanized areas. Additionally, the conservation of these large populations will increase the persistence of the species across its range. Therefore, the area containing these populations is proposed for critical habitat designation under criterion two. These four populations represent approximately 75 percent of the total known plants of this species.

The third criterion we used to identify proposed critical habitat was areas that support stable populations of *Acanthomintha ilicifolia*. For the purpose of this proposed critical habitat designation, we defined stable populations as those that contained more than 1,000 plants at least once during the period for which we have survey data. We evaluated the population data from the CNDDDB and determined that populations with more than 1,000 plants at one time had the ability to rebound following years with low population numbers. Therefore, we considered populations with more than 1,000 plants to have a high probability of persisting into the future and thus contribute to the conservation of the species. The locations of these populations are generally characterized by a series of clay lenses where the plants are found in a matrix of intact coastal sage scrub and chaparral. Although these areas are not free from exotic plant competitors, these populations have persisted over time without being out-competed by the exotic plant species present. This may be due in part to the low density of exotic plant species at these locations. In addition to all of the areas that meet criterion two, five other areas meet criterion three: the southeast portion of the City of Carlsbad (EO 47); the Manchester Preserve in Encinitas (EO 28, EO 42, and EO 54); Los Peñasquitos Canyon (EO 19); Sabre Springs (EO 36); and McGinty Mountain in the southern part of San Diego County (EO 21, EO 22, and EO 30). Each of these areas provides habitat that consistently supports large populations of *A. ilicifolia*. Therefore, the area containing these populations is proposed for critical habitat designation under criterion three.

The 10 areas that we identified as meeting the criteria for critical habitat contain the features that are essential for the conservation of this species. These areas support the only population of *Acanthomintha ilicifolia* on calcareous clay soil and the largest and most stable populations. These areas were mapped using data from field surveys and

element occurrences in the CNDDDB (CNDDDB 2006), and unit boundaries were created using GIS.

Annual plants experience annual fluctuation in population density and spatial distribution. Through the review of existing survey data and as a result of field work conducted by Service biologists, it appears that this holds true for *Acanthomintha ilicifolia*, as additional individuals are frequently located outside initially mapped occurrence areas (Bauder et al. 2004, pp. 14–15; CNDDDB 2006, pp. 11, 28–29, and 70; Service unpublished data 2006). Because soil data are not available on a fine enough scale to ensure that proposed critical habitat included all occupied habitat, each area mapped for *A. ilicifolia* in the CNDDDB was enlarged to include habitat within 500 ft (152 m) around the edge of mapped occurrences. Using aerial photography, we confirmed that no identifiable portion of an occupied clay lens appeared to have been inadvertently omitted and removed manmade features such as roads, buildings, parking lots and agricultural fields. This boundary was then used as our proposed critical habitat boundary.

When determining proposed critical habitat boundaries within this proposed rule, we made every effort to avoid including developed areas such as lands covered by buildings, paved areas, and other structures that lack the PCE for *Acanthomintha ilicifolia*. 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 of 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 or primary constituent elements in adjacent critical habitat.

We are proposing to designate critical habitat on lands that we have determined were occupied at the time of listing that contain the PCE that supports life history functions essential for the conservation of the species and lands that were not known to be occupied at the time of listing, but that we have determined are essential to the conservation of the species. The lands that were not known to be occupied at the time of listing are all currently occupied and contain the PCE essential for the conservation of the species. The 10 areas defined above, each representing one population, have been



categorized into four units. Due to large amounts of area that did not contain the PCE in each of the four units, the units were further broken down into 17 subunits so that the essential habitat could be accurately mapped and not include areas that do not have the PCE. These units/subunits are described in the Unit Descriptions section.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal 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 section 10(a)(1)(B) of the Act does not cover take of listed plant species, HCPs often cover both listed animal and plant species. *Acanthomintha ilicifolia* is a covered species in approved subarea plans under two major HCPs, the San Diego Multiple Species Conservation Program (MSCP) and the San Diego Habitat Conservation Program (MHCP). We are proposing to exclude areas from the final designation of critical habitat where this species is covered by one of these HCPs. See the Exclusions under Section 4(b)(2) of the Act for a detailed discussion of these exclusions. We identify the areas proposed for exclusion in the discussion of individual critical habitat units below.

#### Special Management Considerations or Protection

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

As stated in the final listing rule, threats to *Acanthomintha ilicifolia* include trampling and grazing, the presence of exotic plant species, off-road vehicles (ORVs), mining, and urbanization (63 FR 54938). Through

our review of the existing data on *A. ilicifolia*, the threats listed in the final listing rule continue to impact this species and could impact the PCE as well. Building on the information contained in the final listing rule, data on the effects of competition from exotic plant species have been studied in greater detail (Bauder and Sakrison 1999, pp. 6–19, 28–44) and attempts have been made to manage this threat (Kelly 2002, pp. 1–3).

Urban development near *Acanthomintha ilicifolia* populations may alter the habitat characteristics required by the species. The destruction of habitat can change the slope and aspect of the site, making it uninhabitable for *A. ilicifolia* (PCE). The close proximity of development to populations of *A. ilicifolia* may affect other aspects of the site. For example, increased water runoff from developments may erode the clay lens and change the topography of the site (Bauder et al. 1994, p. 23) (PCE).

The introduction of exotic plant species such as *Centaurea melitensis* can drastically change the species present in, and eliminate the open character of, the clay lens habitat (PCE). *Centaurea melitensis* has been shown, in field and greenhouse experiments, to negatively effect the biomass (growth) and seed production (reproduction) of *Acanthomintha ilicifolia* (Bauder and Sakrison 1999, p. 16). Populations of *A. ilicifolia* that are close to urbanized areas or in areas that have been heavily grazed generally have a high density of exotic plant species. In disturbed soils, *C. melitensis* is a common weed. When this and other exotic plant species become established they can out-compete *A. ilicifolia* for light, water, nutrients, and space. *A. ilicifolia* often grows larger and at a higher density when competition with exotic weeds is reduced (Bauder and Sakrison 1999, pp. 12–16; Vinje 2007, p. 10).

The final listing rule (63 FR 54938) discusses the impacts of ORV activity and trampling. In recent years the impacts associated with the use of mountain bikes has been observed to cause similar impacts (Vinje 2006a, p. 1). Trampling, ORV activity, and mountain bike use outside of designated, maintained trails can compact the loose, crumbly soils (PCE). The repeated travel over a trail or track degrades the habitat of *Acanthomintha*

*ilicifolia* in two ways: (1) by displacing soil; and (2) by compacting soil and reducing the amount of water that can percolate, thus reducing the plant's ability to establish roots.

Mining has been documented as a threat at two sites known to support *Acanthomintha ilicifolia* (63 FR 54938; Bauder et al. 1994, p. 17). Mining can alter many aspects of *A. ilicifolia* habitat. Heavy machinery can compact or remove clay lenses (PCE) or alter the slope of an area (PCE). The grading of large areas adjacent to *A. ilicifolia* habitat can make those areas vulnerable to invasion by exotic plant species and lead to the subsequent crowding and shading of *A. ilicifolia* habitat (PCE). All of these impacts may in turn lead to the disruption of the growth and reproduction of *A. ilicifolia*.

#### Proposed Critical Habitat Designation

We are proposing a total of 1,936 ac (783 ha) in four units as critical habitat for *Acanthomintha ilicifolia*. These four units are further subdivided into 17 subunits. The critical habitat areas described below constitute our best assessment at this time of areas known to be occupied at the time of listing that contain the primary constituent elements that may require special management considerations or protection, and those additional areas that were not known to be occupied at the time of listing (subunits 3E and 4D), but are essential to the conservation of *Acanthomintha ilicifolia*. The four units proposed for designation as critical habitat are: (1) Unit 1: Northern San Diego County; (2) Unit 2: Central San Diego County; (3) Unit 3: Viejas Mountain and Poser Mountain, San Diego County; and (4) Unit 4: Southern San Diego County. We are proposing to exclude 1,302 ac (527 ha) under section 4(b)(2) of the Act from the final designation of critical habitat. Table 1 identifies the occupancy status for each subunit. Table 2 identifies the acreage and ownership of the areas being proposed as critical habitat and the areas proposed for exclusion from the final designation under section 4(b)(2) of the Act (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for a detailed discussion).



TABLE 1.—OCCUPANCY OF PROPOSED CRITICAL HABITAT UNITS FOR ACANTHOMINTHA ILICIFOLIA

Critical habitat unit	Known to be occupied to the time of listing?	Occupied currently?	Acres (hectares)
Unit 1: Northern San Diego County			
1A. Palomar Airport (EO 70) .....	Yes .....	Yes .....	88 ac (36 ha)
1B. Southeast Carlsbad (EO 47) .....	Yes .....	Yes .....	73 ac (29 ha)
1C. Manchester (EO 28, EO 42 and EO 54) .....	Yes .....	Yes .....	92 ac (37 ha)
Unit 2: Central San Diego County			
2A. Los Peñasquitos Canyon (EO 19) .....	Yes .....	Yes .....	63 ac (25 ha)
2B. Sabre Springs (EO 36) .....	Yes .....	Yes .....	52 ac (22 ha)
2C. Sycamore Canyon (EO 32) .....	Yes .....	Yes .....	306 ac (124 ha)
2D. Slaughterhouse Canyon (EO 64) .....	Yes .....	Yes .....	77 ac (31 ha)
Unit 3: Viejas Mountain and Poser Mountain			
3A. Viejas Mountain (EO 73) .....	Yes .....	Yes .....	33 ac (13 ha)
3B. Viejas Mountain (EO 50) .....	Yes .....	Yes .....	208 ac (84 ha)
3C. Viejas Mountain (EO 51) .....	Yes .....	Yes .....	318 ac (128 ha)
3D. Viejas Mountain (EO 62) .....	Yes .....	Yes .....	82 ac (33 ha)
3E. Poser Mountain (EO 74) .....	No .....	Yes .....	34 ac (14 ha)
3F. Poser Mountain (EO 12) .....	Yes .....	Yes .....	163 ac (66 ha)
Unit 4: Southern San Diego County			
4A. McGinty Mountain (EO 21) .....	Yes .....	Yes .....	18 ac (7 ha)
4B. McGinty Mountain (EO 22) .....	Yes .....	Yes .....	220 ac (89 ha)
4C. McGinty Mountain (EO 30) .....	Yes .....	Yes .....	27 ac (11 ha)
4D. Hollenbeck Canyon (EO L) .....	No .....	Yes .....	84 ac (34 ha)
Total* .....	.....	.....	1,936 ac (783 ha)

\* Some columns may not sum exactly due to rounding of values.

TABLE 2.—PROPOSED CRITICAL HABITAT FOR ACANTHOMINTHA ILICIFOLIA AND THE AREAS BEING PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT (ACRES (AC), HECTARES (HA), CNDDDB ELEMENT OCCURRENCES (EO))

Critical habitat unit	Land ownership	Area that meets the definition of critical habitat	Area proposed as critical habitat	Area being considered for exclusion from final critical habitat*
Unit 1: Northern San Diego County				
1A. Palomar Airport (EO 70) .....	Private .....	7 ac (3 ha) .....	7 ac (3 ha) .....	7 ac (3 ha)
	State/Local .....	81 ac (33 ha) .....	81 ac (33 ha) .....	0 ac (0 ha)
1B. Southeast Carlsbad (EO 47) .....	Private .....	73 ac (29 ha) .....	73 ac (29 ha) .....	73 ac (29 ha)
1C. Manchester (EO 28, EO 42 and EO 54) .....	Private .....	92 ac (37 ha) .....	92 ac (37 ha) .....	92 ac (37 ha)
Unit 2: Central San Diego County				
2A. Los Peñasquitos Canyon (EO 19) .....	State/Local .....	63 ac (25 ha) .....	63 ac (25 ha) .....	63 ac (25 ha)
	Private .....	1 ac (1 ha) .....	1 ac (1 ha) .....	1 ac (1 ha)
2B. Sabre Springs (EO 36) .....	State/Local .....	51 ac (21 ha) .....	51 ac (21 ha) .....	51 ac (21 ha)
	Private .....	30 ac (12 ha) .....	30 ac (12 ha) .....	30 ac (12 ha)
2C. Sycamore Canyon (EO 32) .....	State/Local .....	276 ac (112 ha) .....	276 ac (112 ha) .....	276 ac (112 ha)
	Private .....	77 ac (31 ha) .....	77 ac (31 ha) .....	77 ac (31 ha)
2D. Slaughterhouse Canyon (EO 64) ...	State/Local .....	276 ac (112 ha) .....	276 ac (112 ha) .....	276 ac (112 ha)
	Private .....	77 ac (31 ha) .....	77 ac (31 ha) .....	77 ac (31 ha)
Unit 3: Viejas Mountain and Poser Mountain				
3A. Viejas Mountain (EO 73) .....	Private .....	33 ac (13 ha) .....	33 ac (13 ha) .....	33 ac (13 ha)
	Private .....	156 ac (63 ha) .....	156 ac (63 ha) .....	156 ac (63 ha)
3B. Viejas Mountain (EO 50) .....	Federal .....	52 ac (21 ha) .....	52 ac (21 ha) .....	0 ac (0 ha)
	Private .....	38 ac (15 ha) .....	38 ac (15 ha) .....	38 ac (15 ha)
3C. Viejas Mountain (EO 51) .....	Federal .....	280 ac (113 ha) .....	280 ac (113 ha) .....	0 ac (0 ha)
	Private .....	50 ac (20 ha) .....	50 ac (20 ha) .....	50 ac (20 ha)
3D. Viejas Mountain (EO 62) .....	Federal .....	32 ac (13 ha) .....	32 ac (13 ha) .....	0 ac (0 ha)
	Private .....	50 ac (20 ha) .....	50 ac (20 ha) .....	50 ac (20 ha)
3E. Poser Mountain (EO 74) .....	Federal .....	34 ac (14 ha) .....	34 ac (14 ha) .....	0 ac (0 ha)
3F. Poser Mountain (EO 12) .....	Private .....	7 ac (3 ha) .....	7 ac (3 ha) .....	7 ac (3 ha)
	Federal .....	156 ac (63 ha) .....	156 ac (63 ha) .....	0 ac (0 ha)
Unit 4: Southern San Diego County				
4A. McGinty Mountain (EO 21) .....	Private .....	18 ac (7 ha) .....	18 ac (7 ha) .....	18 ac (7 ha)
4B. McGinty Mountain (EO 22) .....	Private .....	210 ac (85 ha) .....	210 ac (85 ha) .....	210 ac (85 ha)
	State/Local .....	10 ac (4 ha) .....	10 ac (4 ha) .....	10 ac (4 ha)
4C. McGinty Mountain (EO 30) .....	Private .....	27 ac (11 ha) .....	27 ac (11 ha) .....	27 ac (11 ha)
4D. Hollenbeck Canyon (EO L) .....	Private .....	23 ac (9 ha) .....	23 ac (9 ha) .....	23 ac (9 ha)
	State/Local .....	61 ac (25 ha) .....	61 ac (25 ha) .....	61 ac (25 ha)

TABLE 2.—PROPOSED CRITICAL HABITAT FOR ACANTHOMINTHA ILICIFOLIA AND THE AREAS BEING PROPOSED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT (ACRES (AC), HECTARES (HA), CNDDDB ELEMENT OCCURRENCES (EO))—Continued

Critical habitat unit	Land ownership	Area that meets the definition of critical habitat	Area proposed as critical habitat	Area being considered for exclusion from final critical habitat*
Total **		1,936 ac (783 ha)	1,936 ac (783 ha)	1,302 ac (527 ha)

\* Lands proposed for exclusion from final critical habitat under section 4(b)(2) of the Act due to the conservation provided for *Acanthomintha ilicifolia* from the City of Carlsbad and City of Encinitas subarea plans of the San Diego MHCP and the City of San Diego and County of San Diego subarea plans of the San Diego MSCP.

\*\* Some columns may not sum exactly due to rounding of values.

Below, we present brief descriptions of all units and subunits, and reasons why they meet the definition of critical habitat for *Acanthomintha ilicifolia*. The PCE in each subunit of critical habitat is threatened by the presence of exotic plants and recreational activities (e.g., trampling, erosion and soil compaction caused by hiking, off-road vehicle activity, and mountain biking); therefore, special management considerations or protections of the PCE is required to address these threats.

**Unit Descriptions**

*Unit 1: Northern San Diego County*

Unit 1 consists of 253 ac (102 ha) in northern San Diego County divided into three subunits. This critical habitat unit includes habitat for *Acanthomintha ilicifolia* in the cities of Carlsbad and Encinitas under private, State, and local ownership (Table 1). The majority of habitat for *A. ilicifolia* in northern San Diego County is located in proximity to residential and commercial development; however, the habitat being proposed as critical habitat is mostly on land that has been set aside for the conservation of this and other species. This unit contains five element occurrences, all of which were known at the time of listing. The majority of the element occurrences in this unit are covered by the San Diego Multiple Habitat Conservation Program (MHCP). As part of the MHCP, each city will complete a subarea plan. At this time, the City of Carlsbad has completed its subarea plan under the San Diego MHCP and the City of Encinitas is nearing the completion of its subarea plan. We are proposing to exclude 172 ac (70 ha) in the City of Carlsbad (portions of Subunit 1A and all of Subunit 1B) and the City of Encinitas (Subunit 1C) from the final designation of critical habitat based on protections afforded to *A. ilicifolia* under the Carlsbad and Encinitas subarea plans of the MHCP (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section

4(b)(2) of the Act below for more information). The remaining 81 ac (33 ha) in Subunit 1A is owned by the County of San Diego and is not part the San Diego MHCP.

Subunit 1A, Palomar Airport (EO 70)

Subunit 1A consists of 88 ac (36 ha) and was known to be occupied at the time of listing. This subunit contains several habitat patches known to support *Acanthomintha ilicifolia* and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports a population on a unique soil type (criterion 1). This is the only area where *A. ilicifolia* is still known to occupy calcareous clay soils. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. This subunit is within the designated preserve area for the Carlsbad subarea plan (referred to as the Carlsbad Habitat Management Plan (HMP)) of the San Diego MHCP; however, most of this subunit is owned by the County of San Diego and not a part of the Carlsbad HMP. The portion covered by the Carlsbad HMP will be managed for the conservation of this species. Therefore, we are proposing to exclude the 7 ac (3 ha) of this subunit that are covered by the Carlsbad HMP from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). The remaining 81 ac (33 ha) of land owned by the County of San Diego is proposed for inclusion in the designation of critical habitat.

Subunit 1B, Southeast Carlsbad (EO 47)

Subunit 1B consists of 73 ac (29 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports a stable population (criterion

3). This population was estimated to have 400 plants in 1989, 2,000 plants in 1994, and 500 plants in 2006. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. The majority of the lands within this subunit are within an area designated as a hardline conservation area (an area that has already been or is slated to be preserved) and the entire subunit is covered by the Carlsbad HMP of the San Diego MHCP which will provide substantial protection and management of the PCE essential to the conservation of *Acanthomintha ilicifolia*. Therefore, we are proposing to exclude this subunit from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

Subunit 1C, Manchester (EO 42, EO 28, and EO 54)

Subunit 1C consists of 92 ac (37 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports a stable population (criterion 3). This population was estimated to have 5,000 plants in 1984, 300 plants in 1985, 100 plants in 1986, 571 plants in 1989, 2,000 plants in 1990, 4,000 plants in 1999, 5,000 plants in 1994, 3,000 plants in 2005, and 500 plants in 2006. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities.

Lands within this subunit are within a Focused Planning Area (core areas and linkages important for conservation of sensitive species) as designated under the City of Encinitas subarea plan of the San Diego MHCP. This plan indicates that the City of Encinitas will complete the HCP process under the San Diego

MHCP and implement the conservation measures outlined for *Acanthomintha ilicifolia*. We are proposing to exclude all non-Federal lands in Subunit 1C covered by the City of Encinitas subarea plan of the San Diego MHCP from the final designation of critical habitat pursuant to section 4(b)(2) of the Act (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). However, since it is our understanding that little progress has been made by the City of Encinitas to finalize their subarea plan since the 2001 release of the draft plan, we are seeking public comment on our proposed exclusion (see Public Comments Solicited section above). Based on information received during the public comment period, the Secretary may determine that sufficient progress has not been made and that lands within the City of Encinitas' subarea plan should not be excluded from the final designation of critical habitat.

#### Unit 2: Central San Diego County

Unit 2 consists of 497 ac (201 ha) divided into four subunits. This unit is located in central San Diego County. This critical habitat unit includes habitat for *Acanthomintha ilicifolia* in the City of San Diego and in portions of unincorporated County of San Diego under private, State, and local ownership (Table 1). The majority of habitat for *A. ilicifolia* in Unit 2 is located within preserves and open space; however, the PCE in this unit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. All of the element occurrences included in Unit 2 are protected under the approved City of San Diego and County of San Diego subarea plans under the San Diego Multiple Species Conservation Program (MSCP); therefore, we are proposing to exclude all four subunits from the final designation of critical habitat (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 2A, Peñasquitos Canyon (EO 19)

Subunit 2A consists of 63 ac (25 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports a stable population (criterion

3). This population was estimated to have 1,000 plants in 1986, 740 plants in 1990, 14 plants in 1991, 36 plants in 1992, 1,800 plants in 1994, 1,053 plants in 2000, 601 plants in 2001, 0 plants in 2002, 726 plants in 2003, 501 plants in 2004, and 2,091 plants in 2005. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. This area is covered under the City of San Diego subarea plan of the San Diego MSCP and is within an area designated as a hardline conservation area. Therefore, we are proposing to exclude this area from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 2B, Sabre Springs (EO 36)

Subunit 2B consists of 52 ac (22 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports a stable population (criterion 3). This population was estimated to have 5,970 plants in 1989, 2,900 plants in 1990, 7,000 plants in 1992, 16,400 plants in 1994, 3,858 plants in 2000, 2,832 plants in 2001, 250 plants in 2002, 19,721 plants in 2003, 17,085 plants in 2004, 13 plants in 2005, and 150 plants in 2006. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. This area is covered under the City of San Diego subarea plan of the San Diego MSCP and is within an area designated as a hardline conservation area. Therefore, we are proposing to exclude this area from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 2C, Sycamore Canyon (EO 32)

Subunit 2C consists of 306 ac (144 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it is one of the largest recorded populations of *Acanthomintha ilicifolia* and it supports a stable population (criteria 2 and 3). This population was estimated to have 3,000 plants in 1986, 200 plants in 1989, 8,800 plants in 1992, and

31,000 plants in 1994. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. In the San Diego MSCP analysis, this area was recognized as one of eight "major populations." This area is covered under the County of San Diego subarea plan of the San Diego MSCP and is within an area designated as a hardline conservation area; therefore, we are proposing to exclude this area from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 2D, Slaughterhouse Canyon (EO 64)

Subunit 2D consists of 77 ac (31 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. The subunit meets our selection criteria because it supports one of the largest recorded populations of *Acanthomintha ilicifolia* (criterion 2). This population was estimated to have 60,000 plants in 1993. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. In the San Diego MSCP analysis, this area was recognized as one of eight major populations. The element occurrence of *A. ilicifolia* at this site is on open space adjacent to a sand and gravel mining operation. This element occurrence is covered under the County of San Diego subarea plan of the San Diego MSCP. Therefore, we are proposing to exclude this area from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Unit 3: Viejas Mountain and Poser Mountain

Unit 3 consists of 837 ac (339 ha) divided into six subunits in interior San Diego County. This critical habitat unit includes habitat for *Acanthomintha ilicifolia* in the City of Alpine and in the Cleveland National Forest on Viejas and Poser Mountains. The majority of habitat for *A. ilicifolia* in this unit is located on land managed by the U.S. Forest Service (USFS) (Table 1). The element occurrences that are on Viejas and Poser Mountains are interspersed in clay patches in a mosaic of relatively

undisturbed habitat. Due to the proximity of these element occurrences and the fact that the habitat is not fragmented by any manmade barriers, these element occurrences are considered to be a single population of *A. ilicifolia*. This unit is proposed for critical habitat designation because it supports one of the largest recorded populations of the species (criterion 2). This population is estimated to have greater than 30,000 plants based on the maximum number of plants observed at the different element occurrences (EO 12, 6,650 plants in 1991; EO 50, 5,600 plants in 1994; EO 51, 8,300 plants in 2003; EO 62, 1,115 plants in 2000; EO 73, 8,750 plants in 1997; and EO 74, 2,000 plants in 2000). The PCE in this unit may require special management to control exotic plant species. This unit has some areas that are protected as part of the San Diego MSCP. We are proposing to exclude non-Federal lands covered by the County of San Diego subarea plan of the San Diego MSCP in this unit (284 ac (115 ha)) from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 3A, Viejas Mountain (EO 73)

Subunit 3A consists of 33 ac (13 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. Subunit 3A is privately owned and covered by the County of San Diego subarea plan of the San Diego MSCP (33 ac (13 ha)). The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. Because the County of San Diego subarea plan provides for the conservation of *Acanthomintha ilicifolia* and this subunit is within a hardline conservation area, we are proposing to exclude all of this subunit from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### Subunit 3B, Viejas Mountain (EO 50)

Subunit 3B consists of 208 ac (84 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. Subunit 3B includes land managed by the USFS and land under private ownership. The privately owned land is covered by the County of San Diego subarea plan of the

San Diego MSCP (156 ac (63 ha)). The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. Because the County of San Diego subarea plan provides for the conservation of *Acanthomintha ilicifolia*, we are proposing to exclude the portion of this subunit on private land from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). The remaining 52 ac (21 ha) of federally owned land is proposed for inclusion in the designation of critical habitat.

#### Subunit 3C, Viejas Mountain (EO 51)

Subunit 3C consists of 318 ac (129 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. Subunit 3C includes land managed by the USFS and land under private ownership. The privately owned land is covered by the County of San Diego subarea plan of the San Diego MSCP (38 ac (15 ha)), some of which falls within a hardline conservation area. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. Because the County of San Diego subarea plan provides for the conservation of *Acanthomintha ilicifolia*, we are proposing to exclude the portion of this subunit on private land from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). The remaining 280 ac (113 ha) of federally owned land is proposed for inclusion in the designation of critical habitat.

#### Subunit 3D, Viejas Mountain (EO 62)

Subunit 3D consists of 82 ac (33 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. Subunit 3D includes land managed by the USFS and land under private ownership. The privately owned land is covered by the County of San Diego subarea plan of the San Diego MSCP (50 ac (20 ha)), some of which falls within a hardline conservation area. The PCE in this subunit may require special management considerations or protection to control exotic plant species and reduce impacts associated

with recreational activities. Because the County of San Diego subarea plan provides for the conservation of *Acanthomintha ilicifolia*, we are proposing to exclude the portion of this subunit on private land from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). The remaining 32 ac (13 ha) of federally owned land is proposed for inclusion in the designation of critical habitat.

#### Subunit 3E, Poser Mountain (EO 74)

Subunit 3E consists of 34 ac (14 ha) and was not known to be occupied at the time of listing; however, this area is currently occupied and contains the PCE. This area containing population (EO 74) is essential to the conservation of *Acanthomintha ilicifolia* because it meets criterion 2 for designation of critical habitat in that it is a portion of the four largest known populations of *A. ilicifolia*. Based on our analysis of reported density estimates, this subunit contains approximately 6 percent of individuals in the greater Poser and Viejas Mountain population. In 2000, when this population was discovered, it totaled 2,000 plants. This subunit is on land managed by the USFS. No exclusions are proposed for this subunit. Therefore, 34 ac (14 ha) of federally owned land is proposed for inclusion in the final designation of critical habitat.

#### Subunit 3F, Poser Mountain (EO 12)

Subunit 3F consists of 163 ac (66 ha), was known to be occupied at the time of listing, and contains the feature (PCE) considered to be essential to the conservation of the species. Subunit 3F includes land managed by the USFS and land under private ownership. The privately owned land is covered by the County of San Diego subarea plan of the San Diego MSCP (7 ac (3 ha)), some of which falls within a hardline conservation area. The PCE in this unit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. Because the County of San Diego subarea plan provides for the conservation of *Acanthomintha ilicifolia*, we are proposing to exclude the portion of this subunit on private land from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information). The remaining 156 ac (63 ha) of federally

owned land is proposed for inclusion in the designation of critical habitat.

#### Unit 4: Southern San Diego County

Unit 4 consists of 351 ac (142 ha) divided into four subunits in southern San Diego County. This critical habitat unit includes habitat for *Acanthomintha ilicifolia* near the City of Jamul in the southern portion of the unincorporated County of San Diego that is under private, State, and local ownership (Table 1). The habitat for *A. ilicifolia* in southern San Diego County is located in proximity to rural residential development and in relatively undeveloped areas. This unit has many element occurrences that are protected as part of the San Diego MSCP and included in the subarea plan for the County of San Diego. All of the land proposed for critical habitat in this unit is covered by this subarea plan. Therefore, we propose to exclude all four subunits covered by the San Diego MSCP from the final designation of critical habitat (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

Subunits 4A, 4B, and 4C, McGinty Mountain (EO 21, EO 22, and EO 30)

Subunits 4A, 4B, and 4C consist of 265 ac (107 ha), were known to be occupied at the time of listing, and contain the feature (PCE) considered to be essential to the conservation of the species. These sites include three element occurrences occupied by *Acanthomintha ilicifolia* on McGinty Mountain, and due to the proximity of these element occurrences, they are considered to be a single population. This population was estimated to have 1,200 plants in 1986, and 2,625 plants in 1994. The PCE in this unit may require special management considerations or protection to control exotic plant species and reduce impacts associated with recreational activities. In the San Diego MSCP analysis, this area was considered one of eight major populations discussed in the plan. This population is included in the County of San Diego subarea plan of the San Diego MSCP and is within an area designated as a hardline conservation area. Therefore, we are proposing to exclude the entirety of these subunits from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

Subunit 4D, Hollenbeck Canyon (EO L)

Subunit 4D consists of 84 ac (34 ha) and was not known to be occupied at the time of listing; however it is currently occupied and contains the PCE. This site is on the Hollenbeck Canyon Wildlife Area, a preserve owned and managed by the California Department of Fish and Game. This area is essential to the conservation of the species because it meets criterion 2 for designation of critical habitat in that it contains approximately 100,000 plants, the largest known population of *Acanthomintha ilicifolia*; almost twice as large as the next largest population at Slaughterhouse Canyon (EO 64), that has 60,000 plants. The population in this subunit was estimated to contain 30,000 plants in 2002 which suggests active recruitment at this location. This population is included in the County of San Diego subarea plan of the San Diego MSCP and the majority of the subunit is within an area designated as a hardline conservation area. Therefore, we are proposing to exclude all of this subunit from the final designation of critical habitat (Table 1) (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act below for more information).

#### 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*, 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 species proposed for listing 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) of the Act 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) of the Act 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 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 reinstate consultation on previously reviewed actions in certain instances, including where a new species is listed or critical habitat is subsequently designated that may be affected by the Federal action, where 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 reinstatement 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 *Acanthomintha ilicifolia* 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 Army Corps of Engineers 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 Highway Administration, Federal Aviation Administration, or 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 Acanthomintha ilicifolia and Its Critical Habitat*

**Jeopardy Standard**

The Service applies an analytical framework for *Acanthomintha ilicifolia* jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of *A. ilicifolia*. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Acanthomintha ilicifolia* 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 population to the survival and recovery of the species as a whole.

**Adverse Modification Standard**

If this proposal is adopted, the analytical framework described in the Director's December 9, 2004, memorandum will be used to complete section 7(a)(2) analyses for Federal actions affecting *Acanthomintha ilicifolia* 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 *A. ilicifolia* critical habitat units is to support viable core area populations.

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 PCE to an extent that the conservation value of critical habitat for *Acanthomintha ilicifolia* 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 *A. ilicifolia* include, but are not limited to:

(1) Actions that would disturb or remove the clay soils within a subunit of critical habitat. Such activities could include, but are not limited to, clearing areas for development and roads, creation of trails, and installation of pipelines or other underground infrastructure. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of *Acanthomintha ilicifolia*.

(2) Actions that would introduce exotic plant species or alter the natural habitat in a way that increases the likelihood for the invasion of exotic plant species. Such activities could include, but are not limited to, the introduction of fill dirt to development sites adjacent to *Acanthomintha ilicifolia* critical habitat, grading areas for agriculture, clearing native vegetation, and the use of mountain bikes and off-highway vehicles. These activities could create space for populations of exotic plants to grow and then invade *A. ilicifolia* habitat or bring the seeds of exotic plants into *A. ilicifolia* habitat, thus filling the open space needed for the growth and reproduction of this species with exotic plant competitors.

(3) Actions that would alter the hydrology of critical habitat subunits. Such activities could include, but are not limited to, runoff from developed streets, runoff from irrigated landscapes, and increased flow or erosion from

storm drains. These activities could alter the timing and amount of water that *Acanthomintha ilicifolia* plants receive, altering their phenology and fecundity. These activities could also cause the erosion of the clay soils that are necessary for the growth of *A. ilicifolia*.

We consider all of the units proposed as critical habitat, as well as those that have been proposed for exclusion from the final designation, to contain features essential to the conservation of *Acanthomintha ilicifolia*. All units are within the geographic range of the species, all units except 3E and 4D were occupied by the species at the time of listing, and all units are currently occupied (based on observations made within the last 15 years). Federal agencies already consult with us on activities in areas currently occupied by *A. ilicifolia*, or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of *A. ilicifolia*.

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

There are multiple ways to provide management or protection for species' habitat. Statutory and regulatory frameworks that exist at a local level can provide protection or 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 or management that may lessen or even eliminate any appreciable benefit to a 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 to use and how much weight will be given to any factor.

Under section 4(b)(2) of the Act, 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, areas in addition to those proposed for exclusion here 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 424.19.

#### **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 (90–100 percent of their known

occurrences 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 Harbor Agreements, 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 exclusion of specific areas of non-federally owned lands from critical habitat designation can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The Department of Interior's Cooperative Conservation philosophy 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 landowners 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., HCPs, contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending protections for species 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 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. Mandatory measures and terms and conditions to implement such measures are only specified when the proposed action would result in the incidental take of a listed animal or species. Reasonable and prudent alternatives to the proposed Federal action would only be suggested 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 conflated the jeopardy standard with the standard for destruction or adverse modification of critical habitat when evaluating Federal actions that affect currently occupied critical habitat. The Court ruled that the two standards are distinct 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 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 which considers enhancement or recovery as the management standard will often 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 *Acanthomintha ilicifolia*. 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 informational benefit gained from the designation of critical habitat for the exclusions we are proposing in this rule because these areas are identified as having habitat containing the features essential to the conservation of the species. Consequently, we believe that the informational benefits are already

provided even though these areas are not designated as critical habitat. Additionally, the purpose normally served by the designation, that of informing State agencies and local governments about areas that would benefit from protection and enhancement of habitat for *Acanthomintha ilicifolia* is already well established among State and local governments, and Federal agencies, in those areas that we are proposing to exclude from critical habitat in this rule on the basis of other existing habitat management protections.

The information provided in this section applies to all the discussions below that discuss 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 through 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. Many conservation plans not only provide conservation benefits to federally listed species, but also to unlisted sensitive species. Imposing an additional layer of regulatory review as a result of the designation of critical habitat may undermine these conservation efforts and partnerships in many areas where HCPs or management plans exist or are being developed. 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. The 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 conservation benefits to the species 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 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 other 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. If lands within approved HCP or other management plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly 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 Natural Communities Conservation Plan (NCCP)/HCP application must itself be consulted upon, even without the critical habitat designation. 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 possibly significant habitat modification (see definition of "harm" at 50 CFR 17.3). 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 and would be reviewed for possibly significant habitat modification in accordance with the definition of harm referenced above.

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

#### *Exclusions Under Section 4(b)(2) of the Act for Acanthomintha ilicifolia*

After consideration under section 4(b)(2) of the Act, we are proposing to exclude the following areas from critical habitat for *Acanthomintha ilicifolia*: private lands covered by the San Diego Multiple Habitat Conservation Program in subunits 1A, 1B, and 1C and private lands covered by the San Diego Multiple Species Conservation Program in subunits 2A, 2B, 2C, 2D, 3A, 3B, 3C, 3D, 3F, 4A, 4B, 4C, and 4D. We believe that: (1) The value of these lands for conservation has been addressed by

existing protective actions, or (2) it is appropriate to exclude these lands pursuant to the "other relevant factor" provisions of section 4(b)(2) of the Act. We specifically solicit comment, however, on the inclusion or exclusion of such areas. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided in the paragraphs that follow.

#### *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 following HCPs fulfill these criteria for *Acanthomintha ilicifolia*: the City of San Diego subarea plan, the County of San Diego subarea plan, the City of Poway subarea plan, the City of Chula Vista subarea plan under the San Diego MSCP, and the City of Carlsbad subarea plan under the San Diego MHCP. We are considering the exclusion of non-Federal lands covered by these plans that provide for the conservation of *A. ilicifolia* from the final designation of critical habitat pursuant to section 4(b)(2) of the Act.

We also consider HCP covered lands for exclusion under 4(b)(2) of the Act if the plans are approaching completion and, when completed, will meet the above criteria. We have proposed critical habitat in one subarea plan that has not yet been completed. The City of Encinitas completed a final draft subarea plan that was released for public review in 2001. This plan indicates that the City of Encinitas will complete the HCP process under the San Diego MHCP and implement the conservation measures outlined for *Acanthomintha ilicifolia*. However, it is our understanding that little progress has been made by the City of Encinitas to finalize their subarea plan since the 2001 release of the draft plan. Therefore, we are seeking public comment on our proposal to exclude 92 ac (37 ha) of non-Federal lands in Subunit 1C covered by the City of Encinitas subarea plan of the San Diego MHCP pursuant

to section 4(b)(2) of the Act (see Public Comments Solicited section above). Based on information received during the public comment period, the Secretary may determine that sufficient progress has not been made and that lands within the City of Encinitas' subarea plan should not be excluded from the final designation of critical habitat.

To aid in the public review of this proposed critical habitat, we are providing maps of the areas that we are proposing to exclude. Maps and GIS layers for areas proposed for exclusion are available from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) and on our website at <http://carlsbad.fws.gov/sdtm.htm>.

### San Diego Multiple Habitat Conservation Program (MHCP)

We are proposing to exclude from the final critical habitat designation approximately 172 ac (70 ha) of non-Federal lands within the City of Carlsbad subarea plan and the City of Encinitas subarea plans of the San Diego MHCP under section 4(b)(2) of the Act. The San Diego MHCP includes the following subareas: City of Carlsbad, City of Encinitas, City of Escondido, City of Oceanside, City of San Marcos, and City of Vista. We are proposing to exclude 7 ac (3 ha) in Subunit 1A and 73 ac (29 ha) in Subunit 1B covered under the City of Carlsbad subarea plan, and 92 ac (37 ha) in Subunit 1C which will be covered under the City of Encinitas subarea plan. This exclusion pertains to all but 7 ac (3 ha) of land proposed as critical habitat in Unit 1. Only the City of Carlsbad subarea plan is completed and legally operative; however the City of Encinitas completed a final draft subarea plan that was released for public review in 2001. Once in place, the City of San Marcos, City of Oceanside, City of Escondido, and City of Vista subarea plans will also provide for the conservation of *A. ilicifolia*; however, no critical habitat has been proposed within these cities. The City of Carlsbad and City of Encinitas subarea plans provide for special management and protection for the physical and biological features essential for the conservation of *A. ilicifolia* that exceed the level of regulatory control that would be afforded this species by the designation of critical habitat. We believe that the benefits of excluding proposed critical habitat covered by these HCPs from the critical habitat designation would outweigh the benefits of including them as critical habitat and that the exclusion under consideration would not result in the extinction of *A. ilicifolia*.

The San Diego MHCP is a comprehensive, multi-jurisdictional, planning program designed to create, manage, and monitor an ecosystem preserve in northwestern San Diego County. The San Diego MHCP is also a regional subarea plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). The MHCP preserve system is intended to protect viable populations of native plant and animal species and their habitats in perpetuity, while accommodating continued economic development and quality of life for residents of northern San Diego County. The MHCP includes an approximately 112,000-ac (45,324-ha) study area within the cities of Carlsbad, Encinitas, Escondido, San Marcos, Oceanside, Vista and Solana Beach.

The 10(a)(1)(B) permit for the City of Carlsbad HMP was issued on November 9, 2004. *Acanthomintha ilicifolia* is a conditionally covered species under the HMP. "Conditional" coverage means that the City of Carlsbad receives take authorization under the Act for this species as long as they comply with the conservation measures outlined in the HMP. Under the MHCP, the majority of the known populations fall within Focused Planning Areas (FPA) (core areas and linkages important for conservation of sensitive species) and will be conserved at levels of 95 to 100 percent. Populations that fall outside of FPAs will be conserved at a minimum 80 percent level based on the Narrow Endemic Plant policy. The Narrow Endemic Policy requires the conservation of new populations of narrow endemic species (80 percent outside of FPAs) and mitigation for unavoidable impacts as well as management practices designed to achieve no net loss of narrow endemic populations. In addition, cities cannot permit more than 5 percent gross cumulative loss of narrow endemic populations or occupied acreage within the Focused Planning Areas and no more than 20 percent cumulative loss of narrow endemic locations, population numbers, or occupied acreage outside of Focused Planning Areas (AMEC Earth and Environmental, Inc. 2003). According to the MHCP, 91 percent of the major populations and critical locations of this species (as identified in the MHCP) in the study area will be conserved under the FPA design. In addition to conserved point localities, an estimated 3,403 acres of potentially suitable habitat will be conserved as a

result of the existing preserve design and preserve policies.

The subarea plan for the City of Encinitas follows the same framework under the MHCP, allowing for similar conservation and management of known *A. ilicifolia* populations. Areas that contain features essential to the conservation of the species that fall within the boundaries of both the City of Carlsbad and the City of Encinitas subarea plans under the MHCP will be incorporated into the preserve areas, and provisions to manage the populations within the preserve areas will provide for the long-term conservation of the species.

### Benefits of Exclusion Outweigh the Benefits of Inclusion

We expect the approved City of Carlsbad subarea plan and the City of Encinitas subarea plan, once approved, to provide substantial protection and management of the PCE essential to the conservation of *Acanthomintha ilicifolia* on lands in Subunit 1A (7 ac (3 ha)), Subunit 1B (73 ac (29 ha)), and Subunit 1C (92 ac (37 ha)). We expect the subarea plans to provide active management for *A. ilicifolia* on non-Federal lands in contrast to designation of critical habitat, which would only preclude their destruction or adverse modification. Moreover, the educational benefits that would result from critical habitat designation, including informing the public of areas that are necessary for the long-term conservation of the species, are already in place both as a result of material provided on our website and through public notice-and-comment procedures required to establish the MHCP and associated subarea plans.

In contrast to the lack of an appreciable benefit of including these lands as critical habitat, the exclusion of these lands from critical habitat will help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the MHCP and associated subarea plans. As discussed above, many landowners perceive critical habitat as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing complex regional HCPs, such as the MHCP. For these reasons, we believe that designating critical habitat has little benefit in areas covered by subarea plans of the MHCP, and such minor benefit is outweighed by the benefits of maintaining partnerships with local jurisdictions and private landowners with lands covered by the MHCP.

We have reviewed and evaluated the benefits of inclusion and the benefits of exclusion of lands as critical habitat for *Acanthomintha ilicifolia*. Based on this evaluation, we find that the benefits of excluding lands in areas covered by the City of Carlsbad and City of Encinitas subarea plans of the MHCP outweigh the benefits of including those lands as critical habitat for *A. ilicifolia*.

#### *Exclusion Will Not Result in Extinction of the Species*

Exclusion of these 172 ac (70 ha) of non-Federal lands from the final designation of critical habitat would not result in the extinction of *Acanthomintha ilicifolia* because these lands will be permanently conserved and managed for the benefit of this species pursuant to the MHCP subarea plans. The jeopardy standard of section 7 and routine implementation of habitat protection through the section 7 process also provide assurances that the species will not go extinct. The protections afforded to *A. ilicifolia* under the jeopardy standard will remain in place for the areas proposed for exclusion from critical habitat.

#### **San Diego Multiple Species Conservation Program (MSCP)**

We are proposing to exclude from the final critical habitat designation approximately 1,130 ac (457 ha) of non-Federal lands within the City of San Diego subarea plan and the County of San Diego subarea plan of the San Diego MSCP under section 4(b)(2) of the Act. We propose to exclude 63 ac (25 ha) in Subunit 2A and 52 ac (22 ha) in Subunit 2B covered by the City of San Diego subarea plan, and 306 ac (124 ha) in Subunit 2C, 77 ac (31 ha) in Subunit 2D, 33 ac (13 ha) in Subunit 3A, 156 ac (63 ha) in Subunit 3B, 38 ac (15 ha) in Subunit 3C, 50 ac (20 ha) in Subunit 3D, 7 ac (3 ha) in Subunit 3F, 18 ac (7 ac) in Subunit 4A, 220 ac (89 ha) in Subunit 4B, 27 ac (11 ha) in Subunit 4C, and 84 ac (34 ha) in Subunit 4D covered by the County of San Diego subarea plan of the San Diego MSCP. *Acanthomintha ilicifolia* is a covered species under these two approved and legally operative subarea plans. The City of Poway and the City of Chula Vista have subarea plans that also provide for the conservation of *A. ilicifolia*; however, no critical habitat has been proposed within the City of Poway or the City of Chula Vista. These HCPs provide special management and protection for the physical and biological features essential for the conservation of *A. ilicifolia* that exceed the level of regulatory control that would be afforded this species by the designation

of critical habitat. We believe that the benefits of excluding proposed critical habitat covered by these HCPs from the critical habitat designation would outweigh the benefits of including them as critical habitat and that the exclusion under consideration would not result in the extinction of *A. ilicifolia*.

In southwestern San Diego County, the MSCP effort encompasses more than 582,000 ac (236,000 ha) and anticipates the participation of 12 jurisdictions. Under the broad umbrella of the MSCP, each of the 12 participating jurisdictions prepares a subarea plan that implements the goals of the MSCP within that particular jurisdiction. Four of the 12 jurisdictions cover lands that support *Acanthomintha ilicifolia*. All four of these jurisdictions, the City of San Diego, the City of Chula Vista, the County of San Diego, and the City of Poway, have approved subarea plans. We conduct a consultation on each subarea plan and associated permit under section 7 of the Act to ensure they are not likely to result in jeopardy or adversely modify or destroy the designated critical habitat of any covered species. We also review the plans under Section 10 of the Act to ensure they meet the criteria for issuance of an incidental take permit and are consistent with the terms and goals of the MSCP. We completed these analyses for the City of San Diego, the City of Chula Vista, the County of San Diego, and the City of Poway subarea plans prior to issuing incidental take permits to the jurisdictions.

The regional MSCP is also a regional subarea plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). Over the 50-year term of the City and County permits, the MSCP provides for the establishment of approximately 171,000 ac (69,573 ha) of preserve lands within the Multi-Habitat Planning Area (MHPA) (City of San Diego) and Pre-Approved Mitigation Areas (PAMA) (County of San Diego) to benefit the 85 federally listed and sensitive species, including *Acanthomintha ilicifolia*, covered under the plan. Private lands within the MHPA and PAMA lands are subject to special restrictions on development and, as they are committed to the preserve, must be legally protected and permanently managed to conserve the covered species. Public lands owned by the City and County and by the State of California and Federal government that are identified for conservation under the MSCP must also be protected and permanently managed to protect the

covered species. The MSCP requires the City and County to develop broad framework and site-specific management plans, subject to the review and approval of the Service and CDFG, to guide the management of all preserve lands under City and County control. The plans incorporate requirements to monitor and adaptively manage *A. ilicifolia* habitats over time. Under the MSCP, the State and Federal governments have also committed to provide similar management for their preserve lands.

As discussed above, each take authorization holder must prepare a framework management plan. The framework management plan provides general direction for all preserve management issues within the subarea plan's boundaries. Area-specific management directives are developed for managing lands that are conserved as part of the reserves. The framework and area-specific management plans are comprehensive and address a broad range of management needs at the preserve and species levels. These plans include the following: (1) Fire management; (2) public access control; (3) fencing and gates; (4) ranger patrol; (5) trail maintenance; (6) visitor/interpretive and volunteer services; (7) hydrological management; (8) signage and lighting; (9) trash and litter removal; (10) access road maintenance; (11) enforcement of property and/or homeowner requirements; (12) removal of invasive species; (13) nonnative predator control; (14) species monitoring; (15) habitat restoration; (16) management for diverse age classes; (17) use of herbicides and rodenticides; (18) biological surveys; (19) research; and (20) species management conditions (Final MSCP Plan 1998). These management measures benefit *Acanthomintha ilicifolia* and reduce the threats to this species. The MSCP also provides for a biological monitoring program for *A. ilicifolia* (Final MSCP Plan 1998). The City of San Diego monitors *A. ilicifolia* on an annual basis (City of San Diego 2000; 2001; 2003; 2004; and 2005). Moreover, the rare plant monitoring under the MSCP is being evaluated and updated with the assistance of the U.S. Geological Survey Biological Research Division and a three-member, independent, scientific advisory group.

In addition to the restrictions on development and conservation obligations that apply within the Multiple Habitat Planning Area (MHPA) and Pre-Approved Mitigation Area (PAMA), the MSCP incorporates processes to protect sensitive species of limited distribution, including

*Acanthomintha ilicifolia*, within the plan area. Under the City of San Diego's subarea plan, impacts to narrow endemic species inside the MHPA will be avoided and outside the MHPA will be protected as appropriate by (1) avoidance, (2) management, (3) enhancement, and/or (4) translocation to areas identified for preservation. Under the County of San Diego's subarea plan, narrow endemic plants, including *A. ilicifolia*, would be conserved under their Biological Mitigation Ordinance using a process that (1) requires avoidance to the maximum extent feasible, (2) allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible, and (3) requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property. Thus, these processes to protect narrow endemic plants, including *A. ilicifolia*, whether located on lands targeted for preserve status within the MHPA and PAMA or located outside of those areas, ensure these limited distribution species are protected wherever they occur. Considered as a whole, the protection and management of *A. ilicifolia* provided under the City and County subarea plans will ensure the permanent conservation of this species and its habitat within the areas covered by the plans.

We therefore propose to exclude from the final critical habitat designation all of Unit 2 and Unit 4 and the non-Federal portion of Unit 3 under section 4(b)(2) of the Act because these lands are covered by the City of San Diego and the County of San Diego subarea plans. Populations of *Acanthomintha ilicifolia* that occur within these subarea plan areas will be conserved and will be managed and monitored pursuant to the MSCP. The framework and area-specific management plans will provide management and monitoring of *A. ilicifolia*.

#### *Benefits of Exclusion Outweigh the Benefits of Inclusion*

We expect the City of San Diego and the County of San Diego subarea plans to provide substantial protection and management of habitat that contains features essential to the conservation of *Acanthomintha ilicifolia* in areas covered by these plans. We expect these subarea plans to provide active management for *A. ilicifolia* on non-Federal lands in contrast to designation of critical habitat, which would only preclude their destruction or adverse modification. Moreover, the educational benefits that would result from critical

habitat designation, including informing the public of areas that are necessary for the long-term conservation of the subspecies, are already in place both as a result of material provided on our Web site and through public notice-and-comment procedures required to establish the MSCP and specific subarea plans.

In contrast to the lack of an appreciable benefit of including these lands as critical habitat, the exclusion of these lands from critical habitat will help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the MSCP. As discussed above, many landowners perceive critical habitat as an unfair and unnecessary regulatory burden given the expense and time involved in developing and implementing complex regional HCPs, such as the MSCP. For these reasons, we believe that designating critical habitat has little benefit in areas covered by the MSCP subarea plans, and such minor benefit is outweighed by the benefits of maintaining partnerships with local jurisdictions and private landowners with lands covered by the MSCP.

We have reviewed and evaluated the benefits of inclusion and the benefits of exclusion of lands as critical habitat for *Acanthomintha ilicifolia*. Based on this evaluation, we find that the benefits of excluding lands in the planning area for the City of San Diego and the County of San Diego subarea plans outweigh the benefits of including those lands as critical habitat for *A. ilicifolia*.

#### *Exclusion Will Not Result in Extinction of the Species*

Exclusion of these 1,130 ac (457 ha) of non-Federal lands from the final designation of critical habitat will not result in the extinction of *Acanthomintha ilicifolia* because these lands, determined to contain features essential to the conservation of the species, will be permanently conserved and managed for the benefit of this species pursuant to the approved MSCP subarea plans. The jeopardy standard of section 7 and routine implementation of habitat protection through the section 7 process also provide assurances that the species will not go extinct. The protections afforded to *A. ilicifolia* under the jeopardy standard will remain in place for the areas proposed for exclusion from critical habitat.

#### **Economic Analysis**

An analysis of the economic impacts of proposing critical habitat for *Acanthomintha ilicifolia* 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/> or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section). Based on public comments, the proposed designation itself, and the information in the full economic analysis, areas in addition to those proposed for exclusion in this proposed rule may be excluded from final 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 424.19.

#### **Peer Review**

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding 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 these peer reviewers copies of this proposed rule 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 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 (see **DATES** section). 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](mailto: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, then the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), 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 pursuant to 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 subspecies. 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.

The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers 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/> 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 under section 4(b)(2) of the Act and Executive Order 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 (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) 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. While this proposed rule to designate critical habitat for *Acanthomintha ilicifolia* is a significant regulatory action under Executive Order 12866, in that it may raise novel legal and policy issues, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

#### *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 believe that this rule will significantly or uniquely affect small governments because 91 percent of the lands being proposed for final designation are managed by Federal agencies and do not fit the definition of "small governmental jurisdiction." 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.

#### Takings

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally

Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for *Acanthomintha ilicifolia* in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the *A. ilicifolia* does not pose significant takings implications.

#### Federalism

In accordance with Executive Order 13132 (Federalism), the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Acanthomintha ilicifolia* 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 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 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 *Acanthomintha ilicifolia*.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local

governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### National Environmental Policy Act

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

#### Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands that were occupied at the time of listing that contain features essential for the conservation of *Acanthomintha ilicifolia* and no Tribal lands essential for the conservation of *A. ilicifolia*. Therefore, critical habitat for *A. ilicifolia* 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 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 “*Acanthomintha ilicifolia*” 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							
* <i>Acanthomintha ilicifolia</i>	* San Diego thornmint	* U.S.A. (CA), Mexico	* Lamiaceae .....	* T	* 649	* 17.96(a)	* NA
*	*	*	*	*	*	*	*

3. Amend § 17.96(a) by adding an entry for “*Acanthomintha ilicifolia* (San Diego thornmint)” in alphabetical order under family Lamiaceae, to read as follows:

**§ 17.96 Critical habitat—plants..**

(a) *Flowering plants.*  
\* \* \* \* \*

**Family Lamiaceae: *Acanthomintha ilicifolia* (San Diego thornmint)**

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

(2) The primary constituent element of critical habitat for *Acanthomintha*

*ilicifolia* is clay lenses that provide substrate for seedling establishment and space for growth and development of *Acanthomintha ilicifolia*, that are:

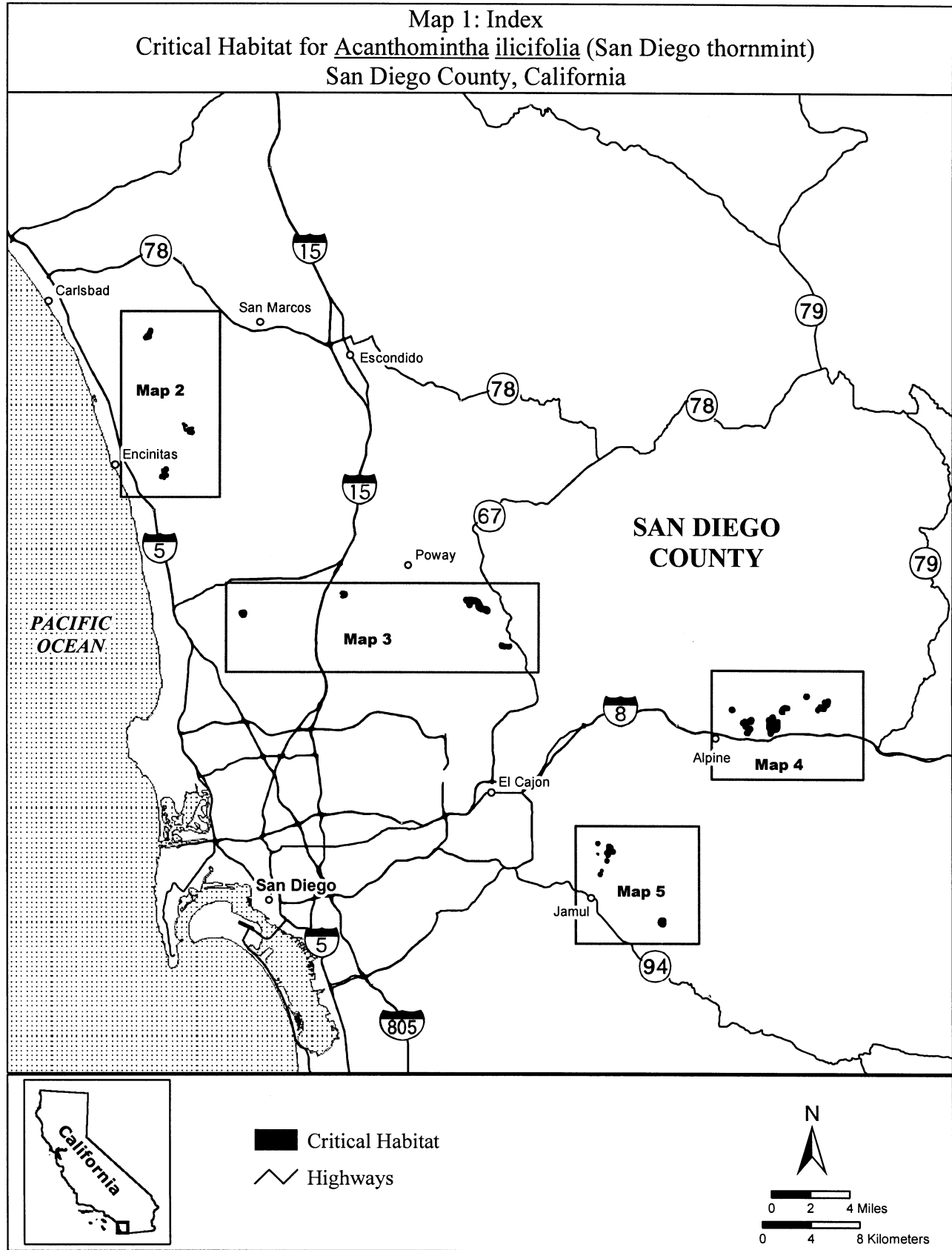
- (i) Within chaparral and coastal sage scrub;
- (ii) On gentle slopes ranging from 0 to 25 degrees;
- (iii) Derived from gabbro and soft calcareous sandstone substrates with a loose, crumbly structure and deep (approximately 2 feet (60 cm)) fissures; and
- (iv) Characterized by a low density of forbs and geophytes, and a low density or absence of shrubs.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which such structures are located existing on the effective date of this rule.

(4) Data layers defining map units were created on a base of USGS 1:24,000 maps, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(5) Note: Index map for *Acanthomintha ilicifolia* (Map 1) follows:

**BILLING CODE 4310–55–P**



(6) Unit 1: San Diego County, California. From USGS 1:24,000 quadrangle maps Encinitas, Rancho Santa Fe, and San Luis Rey.

(i) Subunit 1A. Land bounded by the following UTM NAD27 coordinates

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(ii) Subunit 1B. Land bounded by the following UTM NAD27 coordinates (E,N): 478577, 3658061; 478502,

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(iii) Subunit 1C. Land bounded by the following UTM NAD27 coordinates (E,N): 476907, 3654254; 476907,

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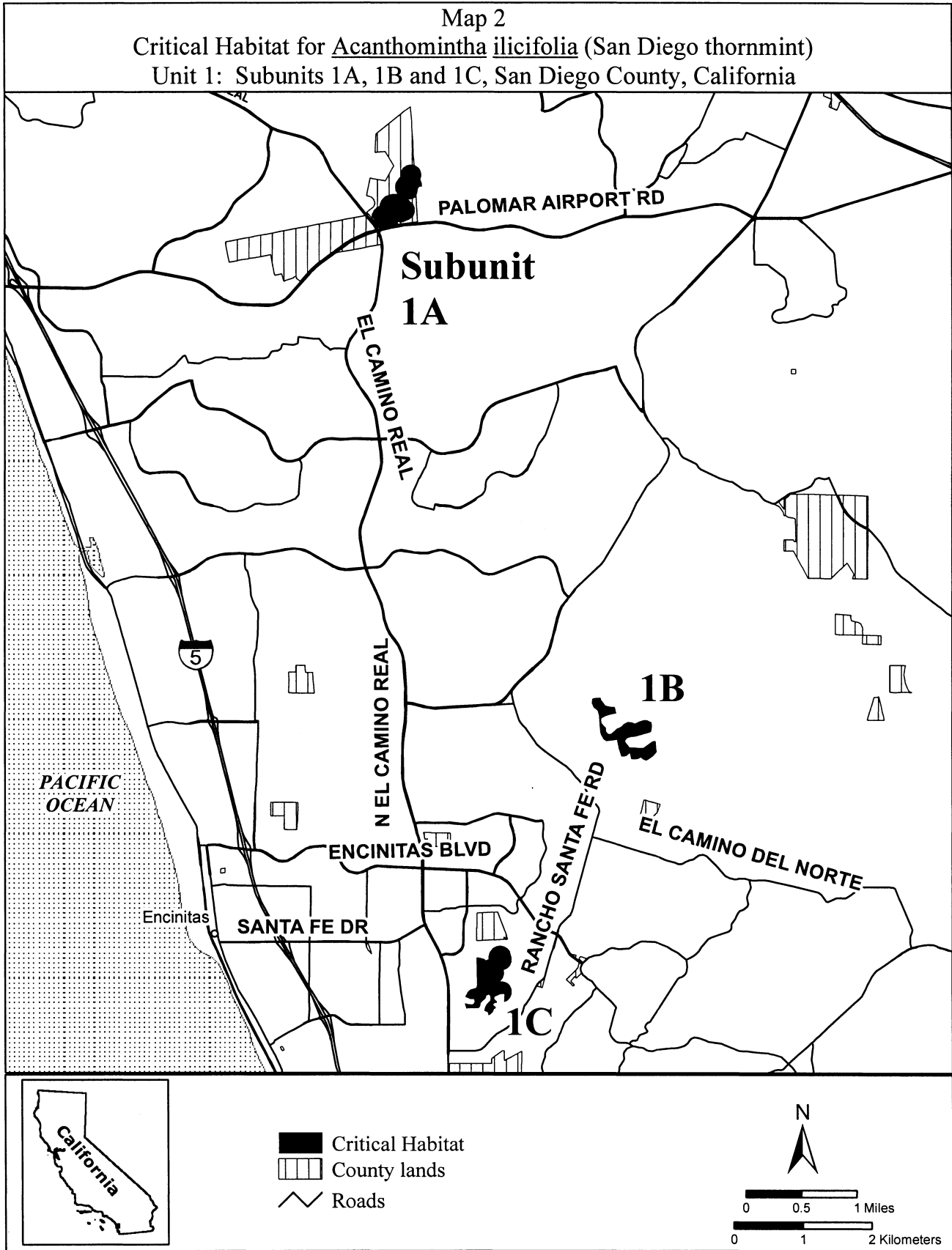
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(iv) Note: Map of Unit 1, subunits 1A, 1B, and 1C (Map 2), follows:

BILLING CODE 4310-55-P



(7) Unit 2: San Diego County, California. From USGS 1:24,000 quadrangle maps Del Mar, Poway, and San Vicente Reservoir.

(i) Subunit 2A. Land bounded by the following UTM NAD27 coordinates

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(ii) Subunit 2B. Land bounded by the

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(iii) Subunit 2C. Land bounded by the following UTM NAD27 coordinates

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(iv) Subunit 2D. Land bounded by the following UTM NAD27 coordinates (E,N): 504291, 3640664; 504292, 3640667; 504360, 3640637; 504432, 3640633; 504488, 3640633; 504526, 3640599; 504586, 3640595; 504647, 3640580; 504711, 3640535; 504745, 3640542; 504821, 3640565; 504866, 3640542; 504987, 3640546; 505135, 3640580; 505138, 3640574; 505142, 3640566; 505148, 3640550; 505149, 3640550; 505152, 3640540; 505155, 3640531; 505157, 3640521; 505157, 3640521; 505161, 3640516; 505166, 3640508; 505170, 3640499; 505176, 3640487; 505177, 3640487; 505181, 3640478; 505184, 3640468; 505187, 3640459; 505189, 3640449; 505191, 3640439; 505192, 3640429; 505192, 3640419; 505192, 3640419; 505192, 3640406; 505192, 3640396; 505191, 3640386; 505189, 3640376; 505187, 3640366; 505185, 3640357; 505181, 3640346; 505181, 3640346; 505177, 3640336; 505173, 3640327; 505168, 3640319; 505163, 3640310; 505157, 3640302; 505151, 3640294; 505144, 3640287; 505137, 3640280; 505129, 3640274; 505121, 3640268; 505112, 3640263; 505104, 3640258; 505090, 3640251; 505089, 3640251; 505080, 3640247; 505071, 3640243; 505061, 3640240; 505051, 3640238; 505042, 3640236; 505032, 3640235; 505031, 3640235; 505012, 3640234; 505003, 3640234; 504993, 3640234; 504983, 3640235; 504973, 3640237; 504967, 3640238; 504962, 3640237; 504958, 3640236; 504948, 3640235; 504938, 3640234; 504928, 3640233; 504918, 3640234; 504908, 3640235; 504898, 3640236; 504898, 3640236; 504886, 3640239; 504876, 3640241; 504867, 3640244; 504857, 3640247; 504848, 3640251; 504839, 3640256; 504831, 3640261; 504823, 3640267; 504815, 3640274; 504808, 3640280; 504801, 3640288; 504795, 3640295; 504789, 3640303; 504786, 3640309; 504782, 3640304; 504778, 3640301; 504771, 3640294; 504763, 3640288; 504755, 3640282; 504752, 3640279; 504724, 3640262; 504719, 3640259; 504710, 3640254; 504701, 3640250; 504691, 3640246; 504689, 3640246; 504670, 3640240; 504663, 3640237; 504653, 3640235; 504643, 3640234; 504633, 3640233; 504623, 3640232; 504614, 3640233; 504594, 3640234; 504593, 3640234; 504583, 3640235; 504573, 3640236; 504563, 3640239; 504556, 3640241; 504554, 3640242; 504535, 3640243; 504527, 3640244; 504518, 3640246; 504508, 3640248; 504498, 3640251; 504489, 3640254; 504480, 3640258; 504471, 3640263; 504463, 3640268; 504454, 3640274; 504454, 3640274; 504454, 3640274; 504432, 3640268; 504430, 3640268; 504421, 3640265; 504411, 3640264; 504401, 3640263; 504391, 3640262; 504381, 3640263; 504371, 3640264; 504361, 3640265; 504351, 3640268; 504342, 3640270; 504333, 3640274; 504332,

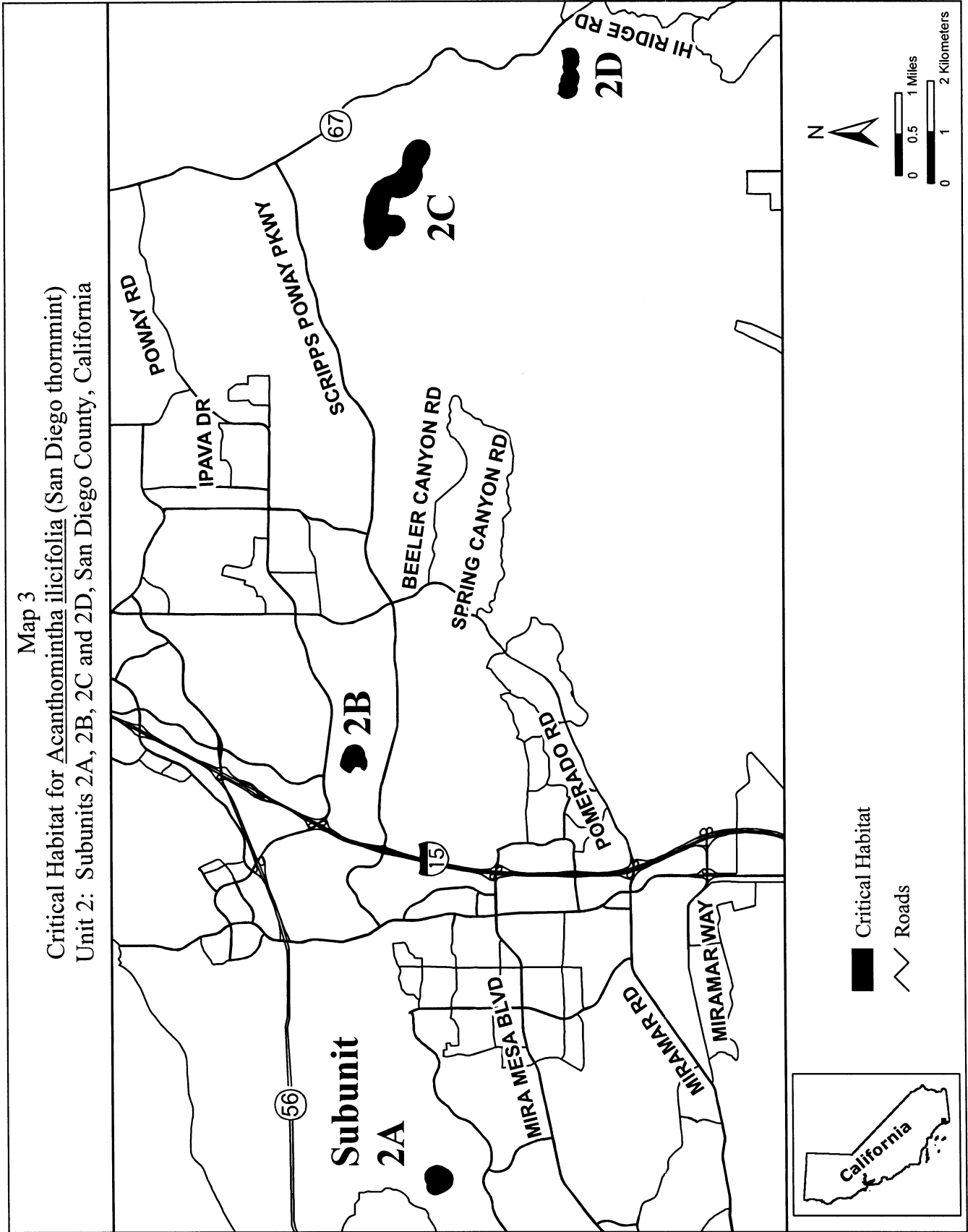
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(v) Note: Map of Unit 2, subunits 2A,  
2B, 2C, and 2D (Map 3), follows:

**BILLING CODE 4310-55-P**



(8) Unit 3: San Diego County, California. From USGS 1:24,000 quadrangle maps Alpine and Viejas Mountain.

(i) Subunit 3A. Land bounded by the following UTM NAD27 coordinates (E,N): 523323, 3635057; 523320,

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(ii) Subunit 3B. Land bounded by the following UTM NAD27 coordinates (E,N): 524731, 3634052; 524721,

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3634111; 524880, 3634104; 524872, 3633846; 524818, 3633840; 524826, 3634098; 524864, 3634092; 524856, 3633834; 524833, 3633827; 524840, 3633820; 524846, 3633812; 524852, 3633804; 524857, 3633796; 524862, 3633787; 524866, 3633778; 524869, 3633768; 524871, 3633763; 524896, 3633679; 524897, 3633675; 524900, 3633665; 524901, 3633655; 524902, 3633645; 524902, 3633635; 524902, 3633625; 524901, 3633615; 524900, 3633606; 524897, 3633596; 524894, 3633586; 524891, 3633577; 524887, 3633568; 524882, 3633559; 524877, 3633551; 524871, 3633542; 524865, 3633535; 524858, 3633527; 524851, 3633521; 524844, 3633515; 524805, 3633485; 524768, 3633441; 524700, 3633357; 524665, 3633291; 524604, 3633162; 524603, 3633158; 524598, 3633150; 524593, 3633141; 524590, 3633137; 524449, 3633137; 524449, 3633180; 524437, 3633224; 524431, 3633250; 524419, 3633283; 524395, 3633287; 524381, 3633260; 524371, 3633220; 524366, 3633180; 524356, 3633155; 524345, 3633133; 524345, 3633133; 524339, 3633141; 524338, 3633144; 524280, 3633234; 524276, 3633240; 524271, 3633249; 524267, 3633258; 524264, 3633267; 524261, 3633277; 524259, 3633287; 524257, 3633297; 524256, 3633306; 524256, 3633316; 524256, 3633326; 524257, 3633336; 524259, 3633346; 524261, 3633356; 524264, 3633365; 524267, 3633375; 524271, 3633384; 524276, 3633393; 524281, 3633401; 524287, 3633409; 524291, 3633414; 524317, 3633446; 524318, 3633447; 524322, 3633483; 524322, 3633484; 524324, 3633494; 524326, 3633503; 524329, 3633513; 524333, 3633522; 524337, 3633531; 524342, 3633540; 524347, 3633549; 524353, 3633557; 524353, 3633557; 524462, 3633699; 524456, 3633695; 524448, 3633691; 524438, 3633686; 524429, 3633683; 524420, 3633680; 524410, 3633678; 524400, 3633676; 524390, 3633675; 524383, 3633675; 524328, 3633674; 524325, 3633674; 524315, 3633674; 524305, 3633675; 524295, 3633677; 524285, 3633679; 524276, 3633683; 524266, 3633685; 524265, 3633686; 524230, 3633701; 524222, 3633705; 524213, 3633709; 524205, 3633714; 524197, 3633720; 524189, 3633727; 524182, 3633733; 524175, 3633741; 524168, 3633748; 524163, 3633757; 524157, 3633765; 524153, 3633774; 524148, 3633783; 524145, 3633792; 524142, 3633802; 524140, 3633812; 524139, 3633815; 524127, 3633882; 524126, 3633888; 524125, 3633898; 524125, 3633908; 524125, 3633918; 524126, 3633928; 524127, 3633933; 524123, 3633932; 524113, 3633933; 524103, 3633934; 524093, 3633935; 524083, 3633938; 524074, 3633941; 524065, 3633944; 524043, 3633953; 524043, 3633953; 524034, 3633957; 524025, 3633962; 524016, 3633967; 524008, 3633973; 524001, 3633979; 523993, 3633986; 523986, 3633993; 523980, 3634001; 523974, 3634009; 523969, 3634018; 523964, 3634027; 523960, 3634036; 523957, 3634045; 523954, 3634054; 523954, 3634055; 523946, 3634083; 523944, 3634092; 523943, 3634102; 523942, 3634112; 523941, 3634122; 523942, 3634132; 523943, 3634142; 523944, 3634148; 523954, 3634206; 523954, 3634210; 523957, 3634219; 523959, 3634229; 523963, 3634238; 523967, 3634247; 523972, 3634256; 523976, 3634262; 524028, 3634344; 524029, 3634346; 524035, 3634354.

(iii) Subunit 3C. Land bounded by the following UTM NAD27 coordinates (E,N): 527113, 3634393; 527120, 3634389; 527111, 3634389; 527111, 3634111; 527113, 3633915; 527118, 3633794; 527114, 3633788; 527113, 3633774; 527112, 3633774; 527093, 3633707; 527076, 3633649; 527039, 3633580; 527011, 3633527; 526971, 3633497; 526913, 3633452; 526859, 3633439; 526776, 3633426; 526708, 3633424; 526665, 3633413; 526631, 3633392; 526626, 3633391; 526620, 3633369; 526618, 3633363; 526614, 3633353; 526610, 3633344; 526606, 3633335; 526601, 3633328; 526570, 3633281; 526556, 3633238; 526555, 3633238; 526552, 3633229; 526548, 3633220; 526543, 3633211; 526541, 3633208; 526515, 3633165; 526512, 3633159; 526506, 3633151; 526499, 3633143; 526493, 3633136; 526485, 3633129; 526478, 3633123; 526470, 3633117; 526461, 3633112; 526452, 3633107; 526443, 3633103; 526434, 3633099; 526424, 3633096; 526415, 3633094; 526405, 3633093; 526402, 3633092; 526376, 3633089; 526369, 3633089; 526359, 3633088; 526349, 3633089; 526339, 3633090; 526329, 3633091; 526319, 3633093; 526310, 3633096; 526300, 3633100; 526291, 3633104; 526282, 3633109; 526274, 3633114; 526266, 3633120; 526258, 3633126; 526251, 3633133; 526244, 3633140; 526238, 3633148; 526221, 3633170; 526221, 3633170; 526215, 3633178; 526209, 3633187; 526205, 3633195; 526201, 3633205; 526197, 3633214; 526194, 3633223; 526194, 3633225; 526175, 3633297; 526173, 3633306; 526171, 3633315; 526171, 3633325; 526170, 3633335; 526170, 3633340; 526173, 3633452; 526174, 3633458; 526175, 3633468; 526176, 3633478; 526179, 3633487; 526181, 3633497; 526185, 3633506; 526189, 3633515; 526194, 3633524; 526199,

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 3634393.

(iv) Subunit 3D. Land bounded by the following UTM NAD27 coordinates (E,N): 527888, 3635506; 527895,

3635500; 527901, 3635233; 527900,  
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(v) Subunit 3E. Land bounded by the following UTM NAD27 coordinates (E,N): 529317, 3636146; 529307,

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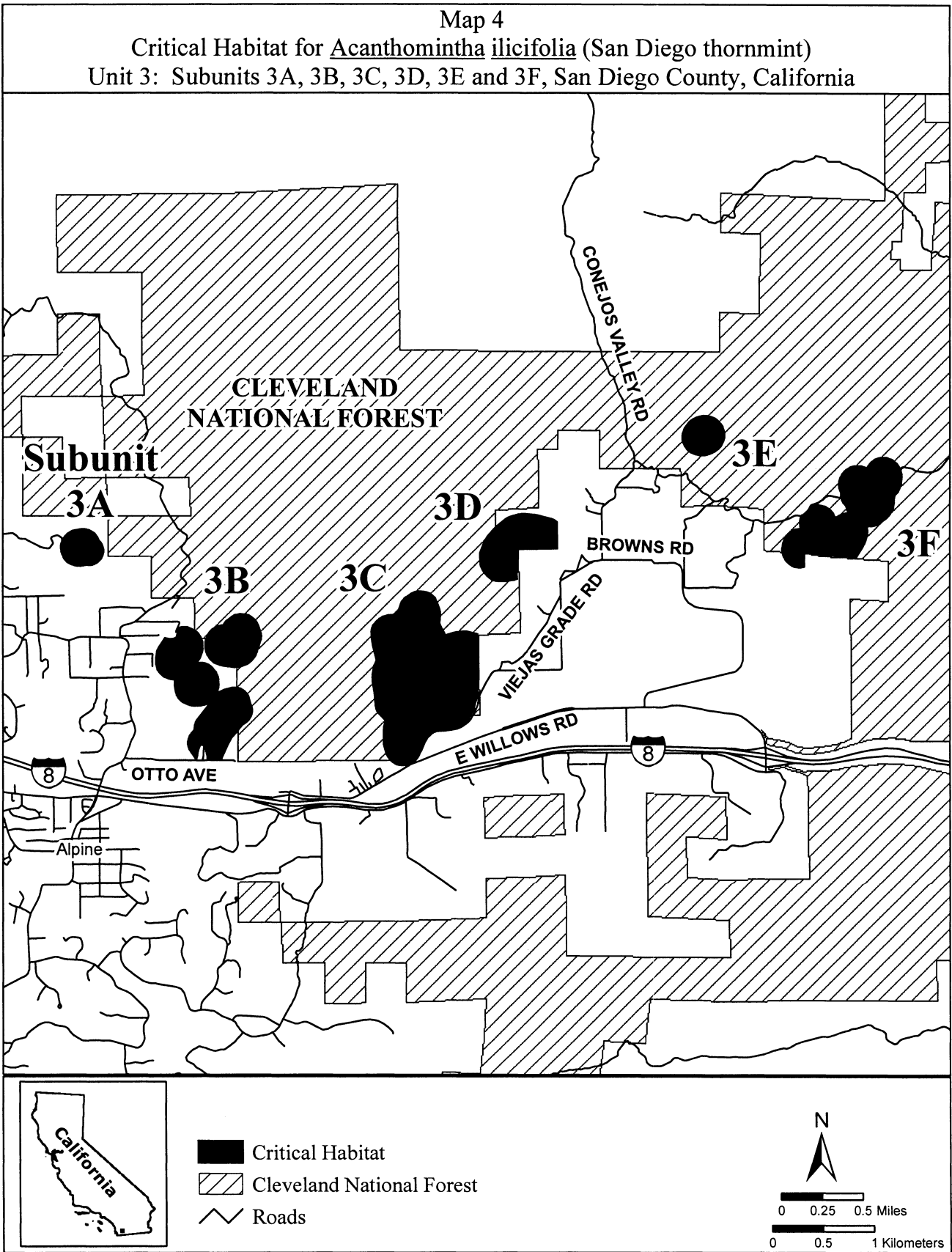
(vi) Subunit 3F. Land bounded by the following UTM NAD27 coordinates (E,N): 530313, 3635051; 530303,  
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(vii) Note: Map of Unit 3, subunits 3A, 3B, 3C, 3D, 3E, and 3F (Map 4), follows:

**BILLING CODE 4310-55-P**



(9) Unit 4: San Diego County, California. From USGS 1:24,000 quadrangle maps Alpine and Dulzura.

(i) Subunit 4A. Land bounded by the following UTM NAD27 coordinates (E,N): 512236, 3624084; 512233, 3624084; 512230, 3624084; 512227, 3624084; 512224, 3624084; 512221, 3624085; 512218, 3624085; 512216, 3624085; 512213, 3624085; 512210, 3624086; 512207, 3624086; 512204, 3624087; 512201, 3624087; 512198, 3624088; 512196, 3624089; 512193, 3624089; 512190, 3624090; 512187, 3624091; 512184, 3624092; 512182, 3624093; 512179, 3624094; 512176, 3624095; 512174, 3624096; 512171, 3624097; 512168, 3624098; 512166, 3624100; 512163, 3624101; 512161, 3624102; 512158, 3624104; 512155, 3624105; 512153, 3624107; 512151, 3624108; 512148, 3624110; 512146, 3624112; 512143, 3624113; 512141, 3624115; 512139, 3624117; 512136, 3624119; 512134, 3624120; 512132, 3624122; 512130, 3624124; 512128, 3624126; 512126, 3624128; 512124, 3624130; 512122, 3624132; 512120, 3624135; 512118, 3624137; 512116, 3624139; 512114, 3624141; 512112, 3624143; 512110, 3624146; 512109, 3624148; 512107, 3624151; 512105, 3624153; 512104, 3624155; 512102, 3624158; 512101, 3624160; 512099, 3624163; 512098, 3624165; 512097, 3624168; 512095, 3624171; 512094, 3624173; 512093, 3624176; 512092, 3624179; 512091, 3624181; 512090, 3624184; 512089, 3624187; 512088, 3624189; 512087, 3624192; 512086, 3624195; 512085, 3624198; 512085, 3624201; 512084, 3624203; 512083, 3624206; 512083, 3624209; 512082, 3624212; 512082, 3624215; 512082, 3624218; 512081, 3624221; 512081, 3624224; 512081, 3624226; 512081, 3624229; 512081, 3624232; 512080, 3624235; 512080, 3624238; 512081, 3624241; 512081, 3624244; 512081, 3624247; 512081, 3624250; 512081, 3624253; 512082, 3624255; 512082, 3624258; 512082, 3624261; 512083, 3624264; 512083, 3624267; 512084, 3624270; 512085, 3624273; 512085, 3624275; 512086, 3624278; 512087, 3624281; 512088, 3624284; 512089, 3624286; 512090, 3624289; 512091, 3624292; 512092, 3624295; 512093, 3624297; 512094, 3624300; 512095, 3624303; 512097, 3624305; 512098, 3624308; 512099, 3624310; 512101, 3624313; 512102, 3624315; 512104, 3624318; 512105, 3624320; 512107, 3624323; 512109, 3624325; 512110, 3624327; 512112, 3624330; 512114, 3624332; 512116, 3624334; 512118, 3624336; 512120, 3624339; 512122, 3624341; 512124, 3624343; 512126,

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(ii) Subunit 4B. Land bounded by the following UTM NAD27 coordinates (E,N): 513127, 3624170; 513130, 3624169; 513133, 3624169; 513139, 3624168; 513142, 3624168; 513144, 3624168; 513147, 3624167; 513150, 3624166; 513153, 3624166; 513156, 3624165; 513159, 3624164; 513161, 3624164; 513164, 3624163; 513167, 3624162; 513170, 3624161; 513172, 3624160; 513175, 3624159; 513178, 3624158; 513179, 3624157; 513186, 3624157; 513196, 3624156; 513205, 3624154; 513205, 3624154; 513211, 3624153; 513224, 3624150; 513228, 3624149; 513237, 3624146; 513246, 3624143; 513255, 3624139; 513264, 3624134; 513273, 3624129; 513281, 3624123; 513289, 3624116; 513296, 3624110; 513303, 3624102; 513303, 3624102; 513306, 3624098; 513309, 3624096; 513317, 3624089; 513323, 3624081; 513330, 3624074; 513332, 3624071; 513337, 3624069; 513341, 3624067; 513350, 3624063; 513359, 3624058; 513367,

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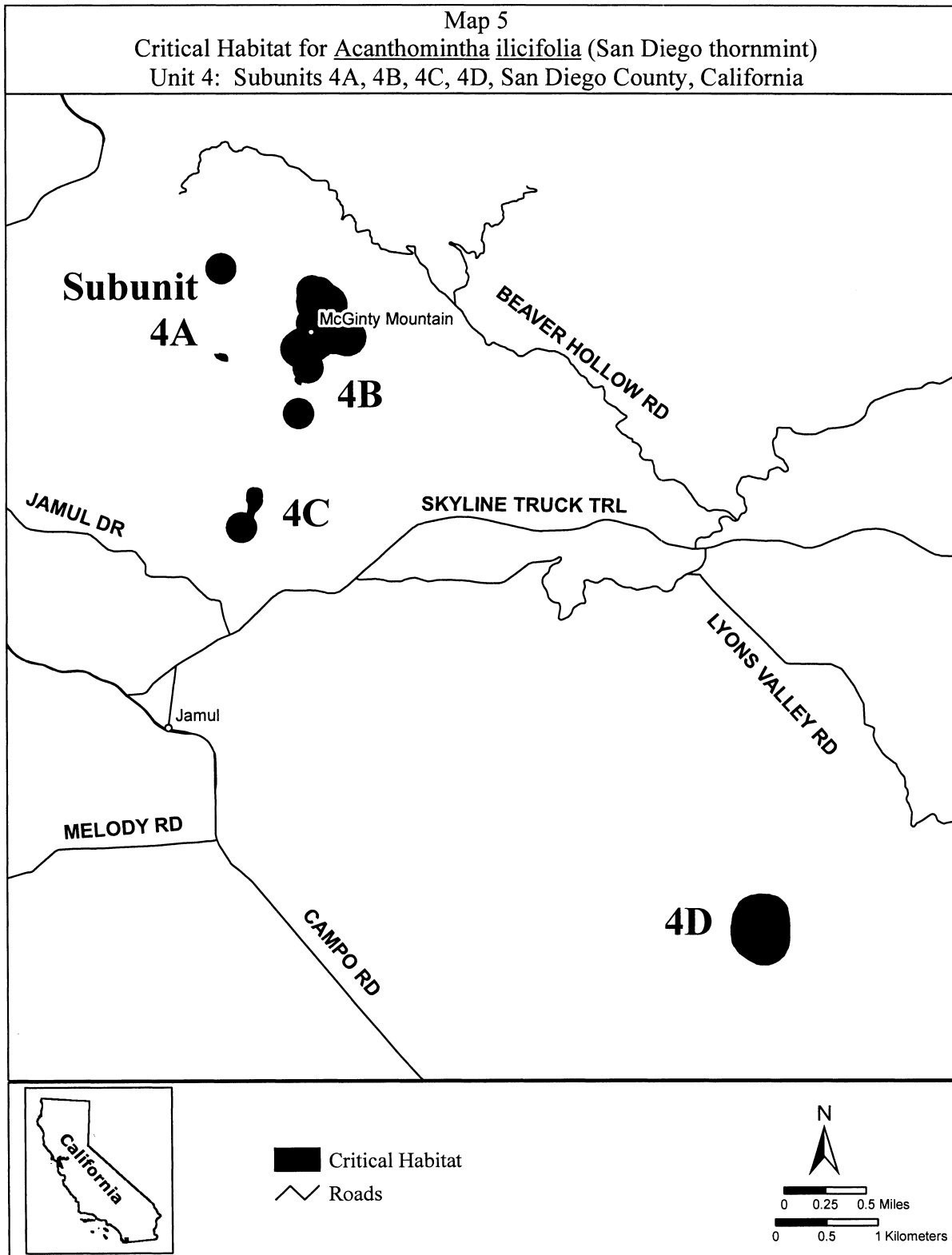
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(iv) Subunit 4D. Land bounded by the  
following UTM NAD27 coordinates  
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(v) Note: Map of Unit 4, subunits 4A,  
4B, 4C, and 4D (Map 5), follows:

BILLING CODE 4310-55-P



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Dated: February 28, 2007.  
**David M. Verhey,**  
*Acting Assistant Secretary for Fish and  
Wildlife and Parks.*  
[FR Doc. 07-1100 Filed 3-13-07; 8:45 am]  
BILLING CODE 4310-55-C