

S^{1/2} sec. 11, S^{1/2} sec. 12, secs. 13–14, E^{1/2} sec. 15, NE^{1/4} sec. 23, NW^{1/4} sec. 24; T.4 S., R.1 E., S^{1/2} sec. 7, S^{1/2} sec. 8, sec. 9, secs. 16–18, NE^{1/4} sec. 19, NE^{1/4} sec. 20, sec. 21, W^{1/2} sec. 27, N^{1/2} sec. 28.

Dated: February 29, 2000.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF97

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the San Diego Fairy Shrimp

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose designation of critical habitat for the San Diego fairy shrimp (*Branchinecta sandiegonensis*), pursuant to the Endangered Species Act of 1973, as amended (Act). We propose designation of critical habitat within an approximately 14,771-hectare (36,501-acre) area for the San Diego fairy shrimp in San Diego and Orange Counties.

Critical habitat identifies specific areas that are essential to the conservation of a listed species, and may require special management considerations or protection. The primary elements for the San Diego fairy shrimp are those habitat components that are essential for the primary biological needs of foraging, sheltering, reproduction, and dispersal.

If this proposed rule is made final, section 7 of the Act would prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicit data and comments from the public on all aspects of this proposal, including data on the economic and other impacts of the designation. We may revise this proposal to incorporate or address new information received during the comment period.

DATES: We will accept comments from all interested parties until May 8, 2000.

Public hearing requests must be received by April 24, 2000.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods.

1. You may submit written comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California 92008.

2. You may hand-deliver written comments to our Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2730 Loker Avenue West, Carlsbad, California.

3. You may send comments by electronic mail (e-mail) to fw1sdfs@fws.gov. Please submit comments in ASCII file format and avoid the use of special characters and encryption. Please include “Attn: [RIN number]” and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number 760/431–9440.

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.

FOR FURTHER INFORMATION CONTACT: Field Supervisor, Carlsbad Fish and Wildlife Office at the above address; (telephone 760/431–9440; facsimile 760/431–5902).

SUPPLEMENTARY INFORMATION:

Background

The San Diego fairy shrimp (*Branchinecta sandiegonensis*) is a small aquatic crustacean (Order: Anostraca), restricted to vernal pools (pools that have water in them for only a portion of any given year) in coastal southern California and south to northwestern Baja California, Mexico. It is a habitat specialist found in small, shallow vernal pools and ephemeral (lasting a short time) basins that range in depth from approximately 5 to 30 centimeters (2 to 12) inches (Simovich and Fugate 1992; Hathaway and Simovich 1996). Water chemistry is also an important factor in determining fairy shrimp distribution (Belk 1977; Branchiopod Research Group 1996; Gonzales *et al.* 1996), hence, no individuals have been found in riverine or marine waters. All known localities are below 701 meters (2,300 feet) and

are within 64 kilometers (km) (40 miles (mi)) of the Pacific Ocean.

San Diego fairy shrimp is one of the six groups of fairy shrimp known as branchinectids that occur in southern California (Simovich and Fugate 1992). The only other species of *Branchinecta* in southern California are the non-listed Lindahl’s fairy shrimp (*B. lindahli*) and the federally threatened vernal pool fairy shrimp (*B. lynchi*). Male San Diego fairy shrimp are distinguished from males of other species of *Branchinecta* by differences found at the distal (located far from the point of attachment) tip of the second antennae. Females are distinguishable from females of other species of *Branchinecta* by the shape and length of the brood sac, and by the presence of paired dorsolateral (located on the sides, toward the back) spines on five of the abdominal segments (Fugate 1993).

Mature individuals lack a carapace (hard outer covering of the head and thorax) and have a delicate elongate body, large stalked compound eyes, and 11 pairs of swimming legs. They swim or glide gracefully upside down by means of complex wave-like beating movements of the legs that pass from front to back. Adult male San Diego fairy shrimp range in size from 9 to 16 millimeters (mm) (0.35 to 0.63 inches (in.)); adult females are 8 to 14 mm (0.31 to 0.55 in.) long. The second pair of antennae in males are greatly enlarged and specialized for clasping the females during copulation, while the second pair of antennae in the females are cylindrical and elongate. The females carry their eggs in an oval or elongate ventral brood sac (Eriksen and Belk 1999). Nearly all species of fairy shrimp feed on algae, bacteria, protozoa, rotifers, and bits of organic matter (Pennak 1989; Eng *et al.* 1990).

Adult San Diego fairy shrimp are usually observed from January to March; however, in years with early or late rainfall, the hatching period may be extended. The species hatches and matures within 7 days to 2 weeks depending on water temperature (Hathaway and Simovich 1996; Simovich and Hathaway 1997). The San Diego fairy shrimp disappear after about a month, but animals will continue to hatch if subsequent rains result in additional water or refilling of the vernal pools (Branchiopod Research Group 1996). The eggs are either dropped to the pool bottom or remain in the brood sac until the female dies and sinks. The “resting” or “summer” eggs are capable of withstanding temperature extremes and prolonged drying. When the pools refill in the same or subsequent rainy seasons, some but not

all of the eggs may hatch. Fairy shrimp egg banks in the soil may be composed of the eggs from several years of breeding (Donald 1983; Simovich and Hathaway 1997). Simovich and Hathaway (1997) found that vernal pools and ephemeral wetlands that support anostracans (*i.e.*, San Diego fairy shrimp), and occur in areas with variable weather conditions or filling periods (such as southern California), may hatch only a fraction of the total cyst (organisms in a resting stage) bank in any given year. Thus, reproductive success is spread over several seasons.

Vernal pools have a discontinuous occurrence in several regions of California (Keeler-Wolf *et al.* 1995), from as far north as the Modoc Plateau in Modoc County, south to the international border in San Diego County. Vernal pools form in regions with Mediterranean climates, where shallow depressions fill with water during fall and winter rains and then evaporate in the spring (Collie and Lathrop 1976; Holland 1976, 1988; Holland and Jain 1977, 1988; Thorne 1984; Zedler 1987; Simovich and Hathaway 1997). In years of high precipitation, overbank flooding from intermittent streams may augment the amount of water in some vernal pools (Hanes *et al.* 1990). Vernal pool studies conducted in the Sacramento Valley indicate that the contribution of subsurface or overland flows is significant only in years of high precipitation when pools are already saturated (Hanes and Stromberg 1996). Downward percolation of water in vernal pool basins is prevented by the presence of an impervious subsurface layer, such as a claypan, hardpan, or volcanic stratum (Holland 1976, 1988).

Researchers have found that vernal pools located in San Diego County are associated with five soil series types, Huerhehuero, Olivenhain, Placentia, Redding, and Stockpen (Bauder and McMillan 1998). These soil types have a nearly impermeable surface or subsurface soil layer with a flat or gently sloping topography (Service 1998). Due to local topography and geology, the pools are usually clustered into pool complexes (Bauder 1986; Holland and Jain 1988). Pools within a complex are typically separated by distances on the order of meters, and may form dense, interconnected mosaics of small pools or a more sparse scattering of larger pools.

Vernal pool systems are often characterized by different landscape features including mima mound (miniature mounds) micro-topography, varied pool basin size and depth, and vernal swales (low tract of marshy land).

Vernal pool complexes that support one too many distinct vernal pools are often interconnected by a shared watershed. This habitat heterogeneity (consisting of dissimilar elements or parts) generally ensures that some between-pool water flow continues.

San Diego County supports the largest number of remaining vernal pools occupied by the San Diego fairy shrimp. Scientists estimated that, historically, vernal pool soils covered approximately 208 hectares (ha) (520 acres (ac)) of San Diego County (Bauder and McMillan 1998). Based on available information at the time of listing, we estimate that fewer than 82 ha (202 ac) of occupied vernal pool habitat remain in the county, of which an estimated 70 percent occurs on military lands (Weir and Bauder 1991). Keeler-Wolf *et al.* (1995) concluded that the greatest recent losses of vernal pool habitat in San Diego County have occurred in Mira Mesa, Rancho Penasquitos, and Kearny Mesa, which accounted for 73 percent of all the pools destroyed in the region during the 7-year period between 1979 and 1986. Other substantial losses have occurred in the Otay Mesa area, where over 40 percent of the vernal pools were destroyed between 1979 to 1990. Similar to San Diego County, vernal pool habitat was once extensive on the coastal plain of Los Angeles and Orange Counties (R. Mattoni and T. Longcore, 1998). Unfortunately, there has been a near-total loss of vernal pool habitat in these areas (Ferren and Pritchett 1988; Keeler-Wolf *et al.* 1995).

Urban and water development, flood control, highway and utility projects, as well as conversion of wildlands to agricultural use, have eliminated vernal pools and/or their watersheds in southern California (Jones and Stokes Associates 1987). Changes in hydrologic pattern, overgrazing, and off-road vehicle use also imperil this aquatic habitat and the San Diego fairy shrimp. The flora and fauna in vernal pools or swales can change if the hydrologic regime is altered (Bauder 1986, 1987). Anthropogenic (of human origin) activities that reduce the extent of the watershed or that alter runoff patterns (*i.e.*, amounts and seasonal distribution of water) may eliminate the San Diego fairy shrimp, reduce their population sizes or reproductive success, or shift the location of sites inhabited by this species. The California Department of Fish and Game's Natural Diversity Data Base ranks the vernal pool habitat type in priority class G1-S1, which denotes communities in the State of California that occur over fewer than 809 ha (2,000 ac) globally.

Previous Federal Action

David Hogan, formerly of the San Diego Biodiversity Project in Julian, California; Dr. Denton Belk of Our Lady of the Lake University in San Antonio, Texas; and the Biodiversity Legal Foundation petitioned us to list the San Diego fairy shrimp as an endangered species, in a letter dated March 16, 1992. We received the petition on March 24, 1992. On August 4, 1994, we published a proposed rule in the **Federal Register** (59 FR 39874) to list the San Diego fairy shrimp as an endangered species. The proposed rule was the first Federal action on the San Diego fairy shrimp, and also constituted the 12-month petition finding, as required by section 4(b)(3)(B) of the Act. On February 3, 1997, we published a final rule determining the San Diego fairy shrimp to be an endangered species (62 FR 4925).

At the time of listing, we concluded that designation of critical habitat for the San Diego fairy shrimp was not prudent because such designation would not benefit the species. We were also concerned that critical habitat designation would likely increase the degree of threat from vandalism or other human-induced impacts. We were aware of several instances of apparently intentional habitat destruction that had occurred during the listing process. However, we have determined that the threats to this species, and its habitat, from specific instances of habitat destruction do not outweigh the broader educational and any potential regulatory and other possible benefits that designation of critical habitat would provide for this species. A designation of critical habitat will provide educational benefits by formally identifying those areas essential to the conservation of the species, and the areas likely to be the focus of our recovery efforts for the San Diego fairy shrimp. Therefore, we conclude that the benefits of designating critical habitat on lands essential for the conservation of the San Diego fairy shrimp will not increase incidences of vandalism above current levels for this species.

On October 14, 1998, the Southwest Center for Biological Diversity filed a lawsuit in Federal District Court for the Southern District of California for our failure to designate critical habitat for the San Diego fairy shrimp. On September 16, 1999, the Court ordered that "On or before February 29, 2000, the Service shall submit for publication in the **Federal Register**, a proposal to withdraw the existing not prudent critical habitat determination together with a new proposed critical habitat

determination for the San Diego fairy shrimp" (*Southwest Center for Biodiversity v. United States Department of the Interior et al.*, CV 98-1866) (S.D. Cal.).

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographic 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 geographic 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" means the use of all methods and procedures that are necessary to bring an endangered species or a threatened species to the point at which listing under the Act is no longer necessary. Proposed critical habitat for the San Diego fairy shrimp includes areas that currently support the species, and areas that contain recovery habitat essential for the conservation of the species.

We reconsidered our evaluation in the prudence determination of the threats posed by vandalism and determined that instances of vandalism have not increased since the listing of the San Diego fairy shrimp. Therefore, we find that designating critical habitat for the San Diego fairy shrimp is prudent.

Critical habitat receives protection under the Act through the prohibition against destruction or adverse modification of critical habitat as set forth under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the adverse modification or destruction of proposed critical habitat. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal action, critical habitat designation would not afford any protection under the Act against such activities.

Designating critical habitat does not, in itself, lead to recovery of a listed species. Designation does not create a management plan, establish numerical population goals, prescribe specific management actions (inside or outside of critical habitat), or directly affect

areas not designated as critical habitat. Specific management recommendations for areas designated as critical habitat are most appropriately addressed in recovery and management plans, and through section 7 consultation and section 10 permits.

Critical habitat identifies specific units that are essential to the conservation of a listed species and that may require special management considerations or protection. All of the proposed critical habitat areas are considered essential to the conservation of the San Diego fairy shrimp as described in the Recovery Plan for Vernal Pools of Southern California (Recovery Plan) (Service 1998). The proposed critical habitat units include a mosaic of vernal pools currently supporting San Diego fairy shrimp, as well as areas that historically supported vernal pools and are still capable of supporting this species. All of these areas may not currently contain all of the primary constituent elements, but could develop them in the future.

Methods

In determining areas that are essential to conserve the San Diego fairy shrimp, we used the best scientific and commercial data available. This included data from research and survey observations published in peer-reviewed articles, recovery criteria outlined in the Recovery Plan, regional Geographic Information System (GIS) vegetation and species coverages (including vegetation layers for Orange and San Diego Counties), data collected on the U.S. Marine Corps Air Station Miramar (Miramar) and U.S. Marine Corps Station Camp Pendleton (Camp Pendleton), and data collected from reports submitted by biologists holding section 10(a)(1)(A) recovery permits.

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 are required to base critical habitat determinations on the best scientific and commercial data available. We consider those physical and biological features (primary constituent elements) 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, or other nutritional or physiological requirements; cover or shelter; sites for breeding and reproduction; and habitats that are protected from disturbance or

are representative of the historic and ecological distributions of a species.

The primary constituent elements for the San Diego fairy shrimp are those habitat components that are essential for the primary biological needs of foraging, sheltering, reproduction, and dispersal; or the capacity to develop those habitat components. The primary constituent elements are found in those areas that support or have the potential to support vernal pools or other ephemeral depressional wetlands. Primary constituent elements include the vernal pool basins and associated watersheds, and include, but are not limited to: Small to large vernal pools with shallow to moderate depths that hold water for at least 5 days but not necessarily every year; entire watershed(s) and hydrology for vernal pool basins and their related vernal pool complexes; ephemeral depressional wetlands, flat or gently sloping topography, and any soil type with a clay component and/or an impermeable surface or subsurface layer known to support vernal pool habitat. Primary constituent elements or components thereof are found in all the areas proposed for critical habitat.

Criteria Used To Identify Critical Habitat

In an effort to map areas essential to the conservation of the species, we used data on known San Diego fairy shrimp locations, and those vernal pools and vernal pool complexes that were identified in the Recovery Plan as essential for the stabilization and reclassification of the species. We then evaluated those areas based on the hydrology, watershed and topographic features. Based on this evaluation, a 1-km (.62 mi) Universal Transverse Mercator (UTM) grid was overlaid on top of those vernal pool complexes and their associated watersheds. This 1-km (.62 mi) UTM grid provides a buffer area around either individual vernal pool basins or vernal pool complexes, and provides additional assurances that watersheds and hydrology are captured and maintained for this species. In those cases where occupied vernal pools were not identified in the Recovery Plan, we relied on recent scientific data to update the map coverage.

We did not map critical habitat in sufficient detail to exclude all developed areas such as towns, housing developments, and other lands unlikely to contain primary constituent elements essential for San Diego fairy shrimp conservation. Within the delineated critical habitat unit boundaries, only lands containing or that could develop the primary constituent elements described above are proposed for critical

habitat. Within this area proposed as critical habitat, only an estimated 18 ha (45 ac) is of unknown occupancy. The remaining areas of vernal pools within the total designated critical habitat area are occupied by San Diego fairy shrimp.

We also considered the existing status of lands in designating areas as critical habitat. Section 10(a) of the Act authorizes us to issue permits for the taking of listed species incidental to otherwise lawful activities. Incidental take permit applications 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. Non-Federal lands that are covered by an existing operative HCP and executed implementation agreement for San Diego fairy shrimp under Section 10(a)(1)(B) of the Act receive special

management and protection under the terms of the HCP/IA and are therefore not being proposed for inclusion in critical habitat.

We expect that critical habitat may be used as a tool to help identify areas within the range of the San Diego fairy shrimp that are most critical for the conservation of the species. We encourage the development of HCPs for such areas on non-Federal lands. We consider HCPs to be one of the most important methods through which non-Federal landowners can resolve endangered species conflicts. We provide technical assistance and work closely with applicants throughout development of HCPs to help identify special management considerations for listed species. We intend that HCPs provide a package of protection and management measures sufficient to address the conservation needs of the species.

Proposed Critical Habitat Designation

The approximate area encompassing proposed critical habitat by county and land ownership is shown in Table 1. Proposed critical habitat includes San Diego fairy shrimp habitat throughout the species' range in the United States (*i.e.*, Orange and San Diego Counties, California). Lands proposed are under private, State, and Federal ownership, with Federal lands including lands managed by the U.S. Department of Defense (DOD) and the Service. Lands proposed as critical habitat have been divided into six Critical Habitat Units. A brief description of each unit, and reasons for proposing it as critical habitat, are presented below. The units are generally based on geographical location of the vernal pools, soil types, and local variation of topographic position (*i.e.*, coastal mesas, inland valley).

TABLE 1.—APPROXIMATE AREA ENCOMPASSING PROPOSED CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)) BY COUNTY AND LAND OWNERSHIP.

[Area estimates reflect critical habitat unit boundaries, not the primary constituent elements within]

County	Federal land *	Local/State land	Private land	Total **
Orange	N/A	100 ha (247 ac)	N/A	100 ha (247 ac)
San Diego	9,234 ha (22,817 ac)	267 ha (660 ac)	5,171 ha (12,778 ac)	14,671 ha (36,254 ac)
Total	9,234 ha (22,817 ac)	367 ha (907 ac)	5,171 ha (12,778 ac)	14,771 ha (36,501 ac)

* Includes Department of Defense and Fish and Wildlife Service lands.

** Includes an estimated 18 ha (45 ac) of unknown occupancy. The remaining areas of vernal pools within the total designated critical habitat area are known to be occupied by San Diego fairy shrimp.

Unit 1: Orange County (Fairview Regional Park) Critical Habitat Unit

Unit 1 encompasses approximately 100 ha (247 ac) within the Los Angeles Basin-Orange Management Area as outlined in the Recovery Plan. The Fairview Regional Park vernal pool complex is proposed as critical habitat. This unit provides the northern extent of this species' distribution and represents the historic distribution of coastal terrace vernal pools in this area. Proposed critical habitat units are based on UTM coordinates.

Unit 2: San Diego: North Coastal Mesa Critical Habitat Unit

Unit 2 encompasses approximately 5,572 ha (13,768 ac) within the San Diego: North Coastal Mesa Management Area as outlined in the Recovery Plan on Camp Pendleton and within the City of Carlsbad. Areas proposed on Camp Pendleton include (1) five training areas, (2) habitat found elsewhere on the base, and (3) lands leased by the

California State Department of Parks and Recreation and private interests from Camp Pendleton. Camp Pendleton has several substantial vernal pool complexes that support the San Diego fairy shrimp. Within the jurisdiction of the City of Carlsbad, one vernal pool complex located in the vicinity of Palomar Airport and one complex at Poinsettia Lane train station are being proposed as critical habitat.

These vernal pool complexes represent vernal pool habitat associated with coastal terraces found north of the San Dieguito River. Proposed critical habitat units are based on UTM coordinates.

Unit 3: San Diego: Inland Valley Critical Habitat Unit

Unit 3 encompasses 2,600 ha (6,425 ac) within the San Diego: Inland Valley Management Area as outlined in the Recovery Plan. Lands proposed contain vernal pool complexes within the jurisdiction of the City of San Marcos

and the community of Ramona. In the community of Ramona, one of the complexes is within the County's Ramona Airport boundaries. These vernal pool complexes are generally isolated to a degree from maritime influence (greater than 10 km (6 mi) from the coast) and are representative of vernal pools associated with alluvial or volcanic type soils. Proposed critical habitat units are based on UTM coordinates.

Unit 4: San Diego: Central Coastal Mesa Critical Habitat Unit

Unit 4 encompasses 7,500 ha (18,531 ac) within the San Diego: Central Coastal Mesa Management Area as outlined in the Recovery Plan. Lands proposed contain vernal pool complexes within the jurisdiction of the City of San Diego, Miramar, U.S. Department of Defense, State of California, Service, and private interests. These vernal pool complexes are associated with coastal terraces and mesas found south of the

San Dieguito River to the San Diego Bay. Proposed critical habitat units are based on UTM coordinates.

Unit 5: San Diego: Southern Coastal Mesa Critical Habitat Unit

Unit 5 encompasses 2,967 ha (7,332 ac) within the San Diego: Southern Coastal Mesa Management Area as outlined in the Recovery Plan. Lands proposed include vernal pool complexes within the jurisdiction of the Service, City of San Diego, City of Chula Vista, County of San Diego, U.S. Immigration and Naturalization Service (INS), and private interests. These vernal pool complexes are associated with coastal mesas from the Sweetwater River south to the International Border. Proposed critical habitat units are based on UTM coordinates.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

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 designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed or critical habitat is designated, section 7(a)(2) 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 must enter into consultation with us. Through this consultation, we

would ensure that the permitted actions do not adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in 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 resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated, and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conferencing with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain a biological opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no significant new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

Activities on Federal lands that may affect the San Diego fairy shrimp or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from

the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, or some other Federal action, including funding (*e.g.*, Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

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 adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the San Diego fairy shrimp is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency, may destroy or adversely modify critical habitat include, but are not limited to:

(1) Any activity that results in discharge of dredged or fill material, excavation, or mechanized land clearing of ephemeral and/or vernal pool basins;

(2) Any activity that alters the watershed, water quality or quantity to an extent that water quality becomes unsuitable to support San Diego fairy shrimp, or any activity that significantly affects the natural hydrologic function of the vernal pool system; and

(3) Activities that could lead to the introduction of exotic species into occupied or potentially occupied San Diego fairy shrimp habitat.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the

value of critical habitat for the survival and recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is occupied by the species concerned. In those cases, critical habitat provides little additional protection to a species, and the ramifications of its designation are few or none. Designation of critical habitat in areas occupied by the San Diego fairy shrimp is not likely to result in a regulatory burden above that already in place due to the presence of the listed species. Designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not. If occupied habitat becomes unoccupied in the future, there is a potential benefit to critical habitat in such cases.

Designation of critical habitat could affect Federal agency activities. Federal agencies already consult with the Service on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

- (1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;
- (2) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;
- (3) Regulation of airport improvement activities by the Federal Aviation Administration;
- (4) Military training and maneuvers on Camp Pendleton and Miramar, and other applicable DOD lands;
- (5) Construction of roads and fences along the international border with Mexico, and associated immigration enforcement activities by the INS;
- (6) Licensing of construction of communication sites by the Federal Communications Commission, and;
- (7) Funding of activities by the U.S. Environmental Protection Agency, Department of Energy, or any other Federal agency.

Relationship To Habitat Conservation Plans

A number of habitat planning efforts have been completed within the range

of the San Diego fairy shrimp. Principal among these is the NCCP effort in San Diego County. The MSCP, and its subarea plans, provide conservation measures for the San Diego fairy shrimp even though take authorization, should any be needed, is designed to come from a subsequent permitting process (typically through a Section 7 consultation with the Corps of Engineers). The MSCP will result in the total avoidance the great majority of all fairy shrimp habitat within the MHPA planning area. The MSCP provides that the remaining fairy shrimp habitat should be completely avoided to the maximum extent practicable. Unavoidable impacts to this remaining area of habitat is to be minimized and mitigated to achieve no net loss of wetland function and value and to provide additional protective measures, including adaptive management, contained in the MSCP. Because the fairy shrimp habitat preserved in the MHPA planning area is managed for the benefit of the fairy shrimp under the terms of the MSCP, there are no "additional management considerations or protections" required for those lands. Therefore, we have determined that non-Federal lands within approved HCP planning areas for the San Diego fairy shrimp do not meet the definition of critical habitat in the Act, and we are not proposing designation of such lands as critical habitat.

The NCCP/HCP effort in Orange County Central/Coastal is designed to provide the same level of protection for San Diego fairy shrimp as the San Diego MSCP. However, unlike the San Diego MSCP, the vernal pool complex within Orange County occurs within a city which is not a participating jurisdiction under the plan. We have therefore determined that this vernal pool complex (Fairview Regional Park complex) is not receiving special management consideration or protection and that it meets the definition of critical habitat and should be designated as such.

Habitat conservation plans currently under development are intended to provide for protection and management of habitat areas essential for the conservation of the San Diego fairy shrimp, while directing development and habitat modification to nonessential areas of lower habitat value. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the fairy shrimp. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the

context of constructing a biologically configured system of interlinked habitat blocks. We fully expect that HCPs undertaken by local jurisdictions (*e.g.*, counties, cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of the species. We believe and fully expect that our analyses of these proposed HCPs and proposed permits under section 7 will show that covered activities carried out in accordance with the provisions of the HCPs and permits will not result in destruction or adverse modification of critical habitat.

We provide technical assistance and work closely with applicants throughout the development of HCPs to identify appropriate conservation management and lands essential for the long-term conservation of the San Diego fairy shrimp. Several HCP efforts are now under way for listed and non-listed species in areas within the range of the San Diego fairy shrimp in areas we propose as critical habitat. These HCPs, coupled with appropriate adaptive management, should provide for the conservation of the species. We are soliciting comments on whether future approval of HCPs and issuance of section 10(a)(1)(B) permits for the San Diego fairy shrimp should trigger revision of designated critical habitat to exclude lands within the HCP area and, if so, by what mechanism (see Public Comments Solicited section).

Relationship to Mexico

We are not aware of any existing regulatory mechanism in Mexico that would protect the San Diego fairy shrimp or its habitat. Although Mexico has laws that could provide protection for rare species, they are not easily enforced. At this time, Mexico enforces no specific protections for this species, or the vernal pools on which it depends. If specific protections were available and enforceable in Mexico, the portion of the range in Mexico alone, in isolation, would not be adequate to ensure the long-term conservation of this species.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Ave., Portland, OR 97232

(telephone 503/231-2063; facsimile 503/231-6243).

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species. We will conduct an analysis of the economic impacts of designating these areas as critical habitat prior to a final determination. When completed, we will announce the availability of the draft economic analysis with a notice in the **Federal Register**, and we will open a 30-day comment period at that time.

Public Comments Solicited

We intend for any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of San Diego fairy shrimp habitat, and what habitat is essential to the conservation of the species and why;

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

(4) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families; and,

(5) Economic and other values associated with designating critical habitat for the San Diego fairy shrimp, such as those derived from non-consumptive uses (e.g., hiking, camping, bird-watching, enhanced watershed protection, improved air quality, increased soil retention, "existence values," and reductions in administrative costs).

In this proposed rule, we do not propose to designate critical habitat on non-Federal lands within the boundaries of an existing approved HCP and subarea plan with an executed IA for San Diego fairy shrimp approved under section 10(a)(1)(B) of the Act because the existing HCP provides for long-term commitments to conserve the species and areas essential to the conservation of the gnatcatcher. Therefore, we believe that such areas do not meet the definition of critical habitat because they do not need special management considerations or protection. However, we are specifically soliciting comments on the appropriateness of this approach and on the following or other alternative approaches for critical habitat designation in areas covered by existing approved HCPs:

(1) Designate critical habitat without regard to existing HCP boundaries and allow the section 7 consultation process on the issuance of the incidental take permit to ensure that any take we authorized will not destroy or adversely modify critical habitat;

(2) Designate reserves, preserves, and other conservation lands identified by approved HCPs, on the premise that they encompass areas that are essential to conservation of the species within the HCP area and that will continue to require special management protection in the future. Under this approach, all other lands covered by existing approved HCPs where incidental take for the San Diego fairy shrimp is authorized under a legally operative permit pursuant to section 10(a)(1)(B) of the Act would be excluded from critical habitat.

The amount of critical habitat we designate for the San Diego fairy shrimp in a final rule may either increase or decrease, depending upon which approach we adopt for dealing with designation in areas of existing approved HCPs.

Additionally, we are also seeking comments on critical habitat designation relative to future HCPs. Several conservation planning efforts are now under way within the range of the San Diego fairy shrimp, and other listed and nonlisted species, in areas we are proposing as critical habitat. For areas where HCPs are currently under development, we are proposing to designate critical habitat for areas that we believe are essential to the conservation of the species and need special management or protection. We invite comments on the appropriateness of this approach.

In addition, we invite comments on the following or other approaches for addressing critical habitat within the

boundaries of future approved HCPs upon issuance of section 10(a)(1)(B) permits for the San Diego fairy shrimp:

(1) Retain critical habitat designation within the HCP boundaries and use the section 7 consultation process on the issuance of the incidental take permit to ensure that any take we authorize will not destroy or adversely modify critical habitat;

(2) Revise the critical habitat designation upon approval of the HCP and issuance of the section 10(a)(1)(B) permit to retain only preserve areas, on the premise that they encompass areas essential for the conservation of the species within the HCP area and require special management and protection in the future. Assuming that we conclude, at the time an HCP is approved and the associated incidental take permit is issued, that the plan protects those areas essential to the conservation of the San Diego fairy shrimp, we would revise the critical habitat designation to exclude areas outside the reserves, preserves, or other conservation lands established under the plan. Consistent with our listing program priorities, we would publish a proposed rule in the **Federal Register** to revise the critical habitat boundaries;

(3) As in (2) above, retain only preserve lands within the critical habitat designation, on the premise that they encompass areas essential for conservation of the species within the HCP area and require special management and protection in the future. However, under this approach, the exclusion of areas outside the preserve lands from critical habitat would occur automatically upon issuance of the incidental take permit. The public would be notified and have the opportunity to comment on the boundaries of the preserve lands and the revision of designated critical habitat during the public review and comment process for HCP approval and permitting;

(4) Remove designated critical habitat entirely from within the boundaries of an HCP when the plan is approved (including preserve lands), on the premise that the HCP establishes long-term commitments to conserve the species, and no further special management or protection is required. Consistent with our listing program priorities, we would publish a proposed rule in the **Federal Register** to revise the critical habitat boundaries; or

(5) Remove designated critical habitat entirely from within the boundaries of an HCP when the plan is approved (including preserve lands), on the premise that the HCP establishes long-term commitments to conserve the

species, and no additional special management or protection is required. This exclusion from critical habitat would occur automatically upon issuance of the incidental take permit. The public would be notified and have the opportunity to comment on the revision of designated critical habitat during the public notification process for HCP approval and permitting.

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

Peer Review

In accordance with our 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 listing decisions are 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 60-day 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 at least 15 days prior to the close of the public comment period. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register**

and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

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

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and has been reviewed by the Office of Management and Budget (OMB), under Executive Order 12866.

(a) This rule will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The San Diego fairy shrimp was listed as an endangered species in 1997. In fiscal years 1997 through 1999, we conducted 27 formal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the fairy shrimp.

Approximately 18 ha (45 ac) of the areas encompassing proposed critical habitat for the San Diego fairy shrimp are currently of unknown occupancy. The remaining areas of vernal pools within the total designated critical habitat area are occupied by San Diego fairy shrimp. Under the Act, critical habitat may not be adversely modified by a Federal agency action; critical habitat does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below). Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered

as "jeopardy" under the Act. Accordingly, the designation of currently occupied areas as critical habitat does not have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal "sponsorship" of their actions are not restricted by the designation of critical habitat (however, they continue to be bound by the provisions of the Act concerning "take" of the species). Designation of unoccupied areas as critical habitat may have impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding, but since the potentially unoccupied area (area of unknown occupancy) is only 18 ha (45 ac), we expect little, if any, additional impact from designating this area as critical habitat. Additionally, designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not. We will evaluate this impact through our economic analysis (under section 4 of the Act; see Economic Analysis section of this rule).

(b) This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the San Diego fairy shrimp since the listing in 1997. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist in occupied areas of proposed critical habitat. Additional restrictions may be imposed in the area of unknown occupancy proposed as critical habitat; we will evaluate this possibility through our economic analysis under section 4 of the Act. Because of the potential for impacts on other Federal agency activities, we will continue to review this proposed action for any inconsistencies with other Federal agency actions.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and, as discussed above, we do not anticipate that the adverse modification

prohibition (resulting from critical habitat designation) will have any incremental effects in areas of occupied habitat. We expect little additional effect for the potentially unoccupied area of proposed critical habitat, since this area (area of unknown occupancy) is only 18 ha (45 ac). Additionally, designation of critical habitat in areas

that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not. We will review the effects of this proposed action on Federal agencies or non-

Federal persons that receive Federal authorization or funding in the area of unknown occupancy critical habitat.

(d) This rule will not raise novel legal or policy issues. The proposed rule follows the requirements for determining critical habitat contained in the Endangered Species Act.

TABLE 2.—IMPACTS OF SAN DIEGO FAIRY SHRIMP LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities potentially affected by species listing only ¹	Additional activities potentially affected by critical habitat designation ²
Federal Activities Potentially Affected ³ .	Activities such as those affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act; road construction and maintenance, right-of-way designation, and regulation of agricultural activities; regulation of airport improvement activities under Federal Aviation Administration jurisdiction; military training and maneuvers on Marine Corps Base Camp Pendleton and Marine Corps Air Station, Miramar and other applicable DOD lands; construction of roads and fences along the international border with Mexico and associated immigration enforcement activities by the Immigration and Naturalization Service; construction of communication sites licensed by the Federal Communications Commission, and; activities funded by any Federal agency.	None.
Private or other non-Federal Activities Potentially Affected ⁴ .	Activities such as removing or destroying San Diego fairy shrimp habitat (as defined in the primary constituent elements discussion), whether by mechanical, chemical, or other means (e.g., grading, overgrazing, construction, road building, herbicide application, etc.) and appreciably decreasing habitat value or quality through indirect effects (e.g., edge effects, invasion of exotic plants or animals, or fragmentation that require a Federal action (permit, authorization, or funding)).	None.

¹ This column represents the activities potentially affected by listing the San Diego fairy shrimp as an endangered species (February 3, 1997; 62 FR 4925) under the Endangered Species Act.

² This column represents activities potentially affected by the critical habitat designation in addition to those activities potentially affected by listing the species.

³ Activities initiated by a Federal agency.

⁴ Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

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

In the economic analysis (under section 4 of the Act), we will determine whether designation of critical habitat will have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, this rule is not expected to result in any restrictions in addition to those currently in existence for areas of occupied critical habitat. As indicated on Table 1 (see Proposed Critical Habitat Designation section), we designated property owned by Federal, State, and local governments, and private property.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of grazing, mining, and recreation by the Bureau of Land Management or U.S. Forest Service;

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;

(5) Regulation of airport improvement activities by the Federal Aviation Administration;

(6) Military training and maneuvers on Camp Pendleton, Miramar, and other applicable DOD lands;

(7) Construction of roads and fences along the international border with Mexico, and associated immigration enforcement activities by the INS;

(8) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;

(9) Construction of communication sites licensed by the Federal Communications Commission; and

(10) Activities funded by the U.S. Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

Many of these activities sponsored by Federal agencies within the proposed critical habitat areas are carried out by small entities (as defined by the

Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed above, these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities in areas of critical habitat occupied by the species. We expect little additional effect for the potentially unoccupied area of proposed critical habitat, since this area (area of unknown occupancy) is only 18 ha (45 ac). Additionally, designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not. We will evaluate whether designation of critical habitat in the unknown occupancy area will have an effect on activities carried out by small entities.

For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of

the species remain in effect, and this rule will have no additional restrictions.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

In the economic analysis, we will determine whether designation of critical habitat will cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions in the economic analysis, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. As discussed above, we anticipate that the designation of critical habitat will not have any additional effects on these activities in areas of critical habitat occupied by the species. We expect little additional effect for the potentially unoccupied area of proposed critical habitat, since this area (area of unknown occupancy) is only 18 ha (45 ac). Additionally, designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any programs having Federal funds, permits or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed above, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated in areas of occupied proposed critical habitat. We expect little additional effect for the potentially unoccupied area of proposed critical habitat, since this area (area of unknown occupancy) is only 18 ha (45 ac). Additionally, designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools,

whether it is known that San Diego fairy shrimp are present or not.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of the San Diego fairy shrimp. Due to current public knowledge of the species protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions in areas of occupied critical habitat, we do not anticipate that property values will be affected by the critical habitat designation. We expect little additional effect for the potentially unoccupied area of proposed critical habitat, since this area (area of unknown occupancy) is only 18 ha (45 ac). Additionally, designation of critical habitat in areas that are not known to be occupied by this species will also not likely result in an increased regulatory burden since the Corps requires review of projects requiring permits in all vernal pools, whether it is known that San Diego fairy shrimp are present or not. Additionally, critical habitat designation does not preclude development of habitat conservation plans and issuance of incidental take permits. Landowners in areas that are included in the designated critical habitat will continue to have opportunity to utilize their property in ways consistent with the survival of the San Diego fairy shrimp.

Federalism

In accordance with Executive Order 13132, 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, the Service requested information from and coordinated development of this critical habitat proposal with appropriate State resource agencies in California, as well as during the listing process. We will continue to coordinate any future designation of critical habitat for the

San Diego fairy shrimp with the appropriate State agencies. The designation of critical habitat in areas currently occupied by the San Diego fairy shrimp 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 essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival 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 designate critical habitat in accordance with the provisions of the Act, and plan public hearings on the proposed designation during the comment period. The 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 the San Diego fairy shrimp.

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

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

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) and 512 DM 2, we understand that Federally recognized Tribes must be related to on a Government-to-Government basis. The 1997 Secretarial Order on Native Americans and the Act clearly states that Tribal lands should not be designated unless absolutely necessary for the conservation of the species. According to the Secretarial Order, “Critical habitat shall not be designated in an area that may impact Tribal trust resources unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of a listed species can be achieved by limiting the designation to other lands.”

We determined that there are no Tribal lands essential for the conservation of the San Diego fairy

shrimp because they do not support populations or suitable habitat. Therefore, we are not proposing to designate critical habitat for the San Diego fairy shrimp on Tribal lands.

References Cited

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

Author

The primary authors of this notice are the Carlsbad Fish and Wildlife Office staff (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

For the reasons given in the preamble, we propose to amend 50 CFR part 17 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 § 17.11(h) revise the entry for “Fairy shrimp, San Diego” under “CRUSTACEANS” to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
CRUSTACEANS							
Fairy shrimp, San Diego.	<i>Branchinecta sandiegonensis</i> .	U.S.A. (CA)	NA	E	608	17.95(h)	NA
*	*	*	*	*	*	*	*

3. In § 17.95 add critical habitat for the San Diego fairy shrimp (*Branchinecta sandiegonensis*) under paragraph (h) in the same alphabetical order as this species occurs in § 17.11(h), to read as follows:

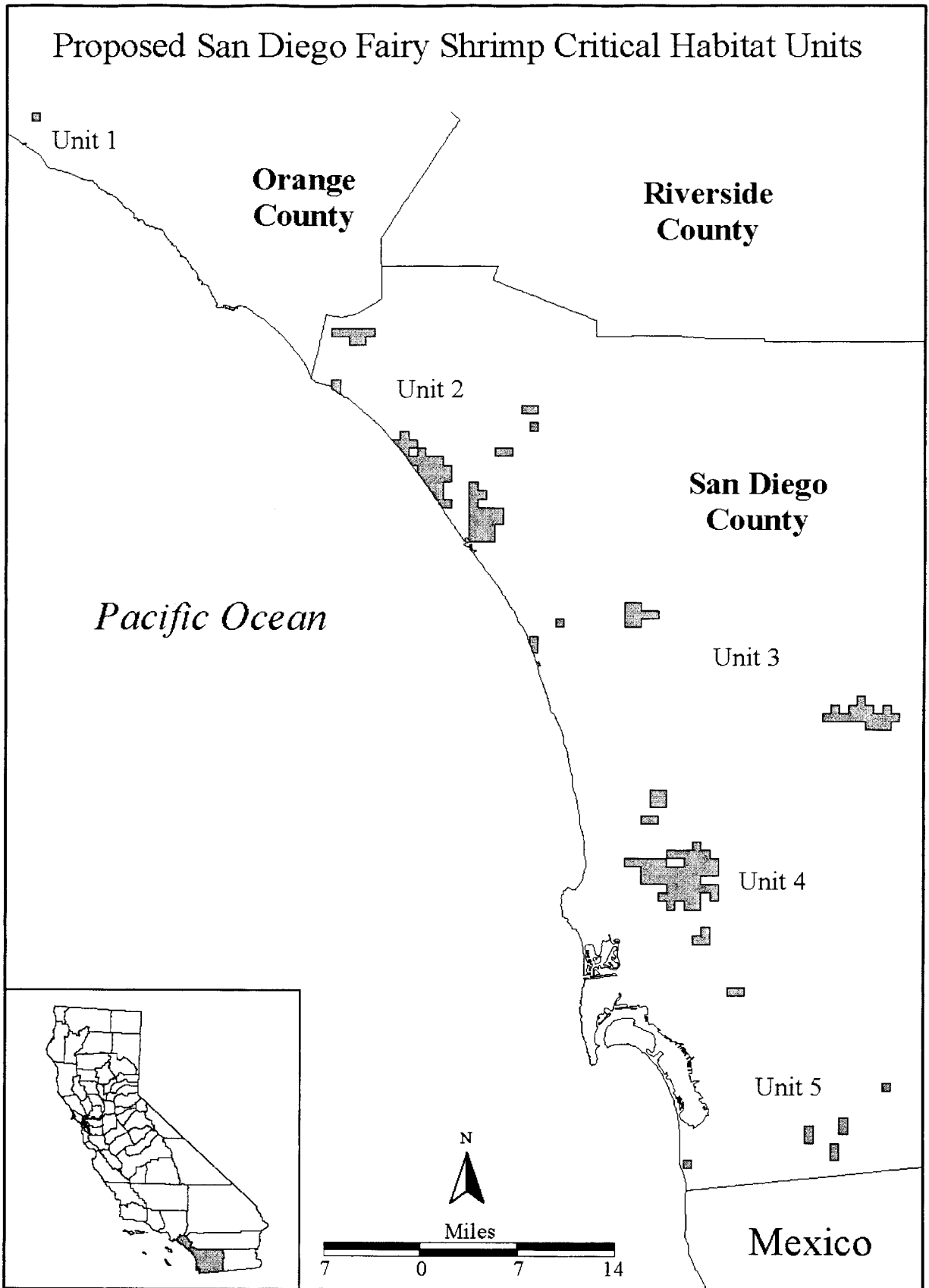
Sec. 17.95 Critical habitat—fish and wildlife.

* * * * *
(h) Crustaceans
* * * * *

San Diego fairy shrimp (*Branchinecta sandiegonensis*)

1. Critical habitat units are depicted for Orange and San Diego Counties, California, on the maps below.

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2. Critical habitat includes vernal pool basins and vernal pool complexes indicated on the maps below and their associated watersheds and hydrologic regime.

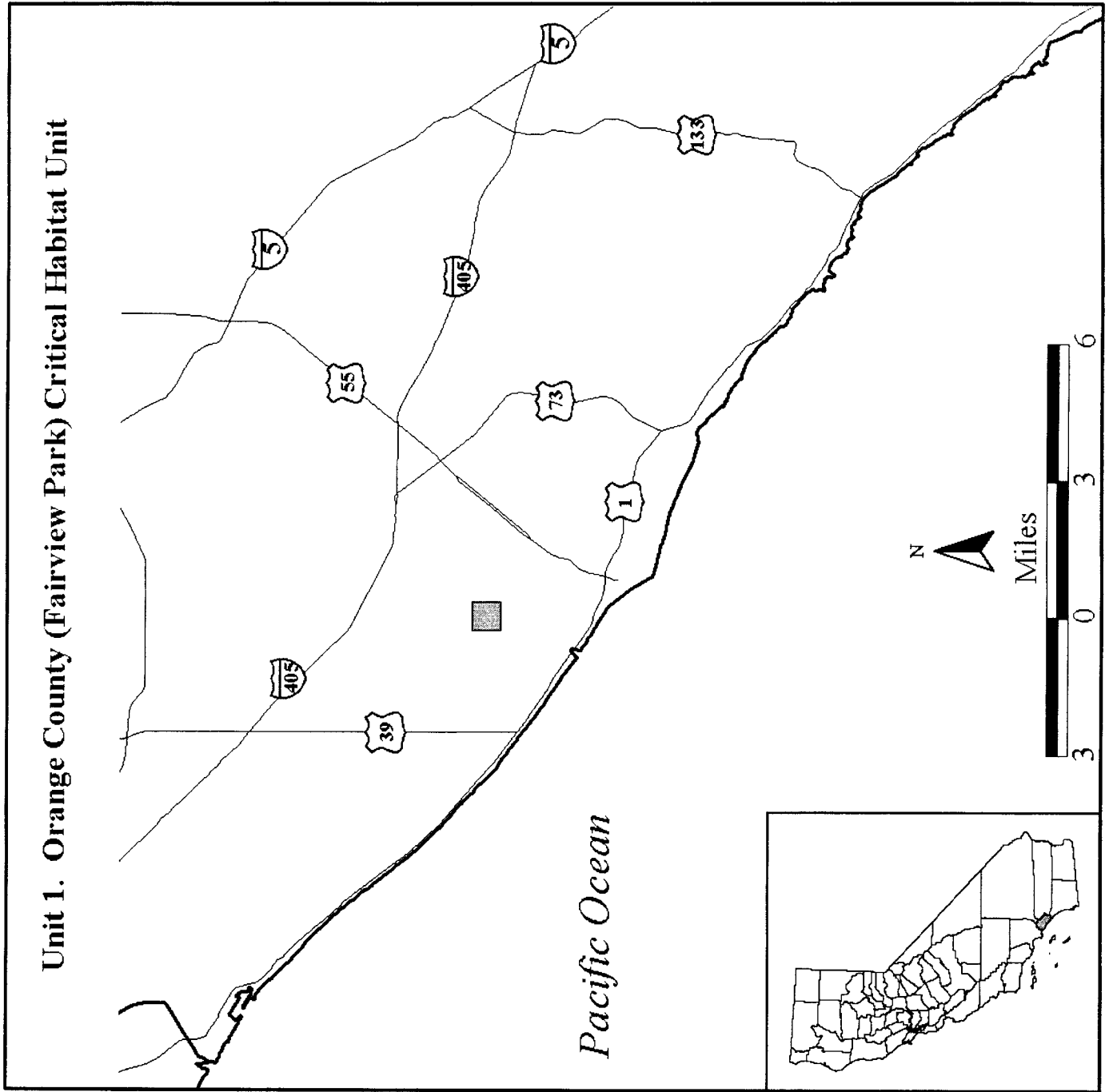
3. Within these areas, the primary constituent elements include, but are not limited to, those habitat components that are essential for the primary biological needs of foraging, sheltering, reproduction, and dispersal. The primary constituent elements are found in those areas that support or have the

potential to support vernal pools or other ephemeral depressional wetlands. Within these seasonal wetlands, specific associations that are essential to the primary biological needs of the San Diego fairy shrimp include, but are not limited to, the following: small to large vernal pools with shallow to moderate depths that hold water for at least 5 days but not necessarily every year; entire watershed(s) and hydrology for vernal pool basins and their associated vernal pool complexes, ephemeral

depressional wetlands, flat or gently sloping topography, and any soil type with a clay component and/or an impermeable surface or subsurface layer known to support vernal pool habitat.

4. Critical habitat does not include nonFederal lands covered by a Habitat Conservation Plan or Subarea Plan, with an executed implementation agreement, approved for the San Diego fairy shrimp under section 10(a)(1)(B) of the Act on or before March 8, 2000.

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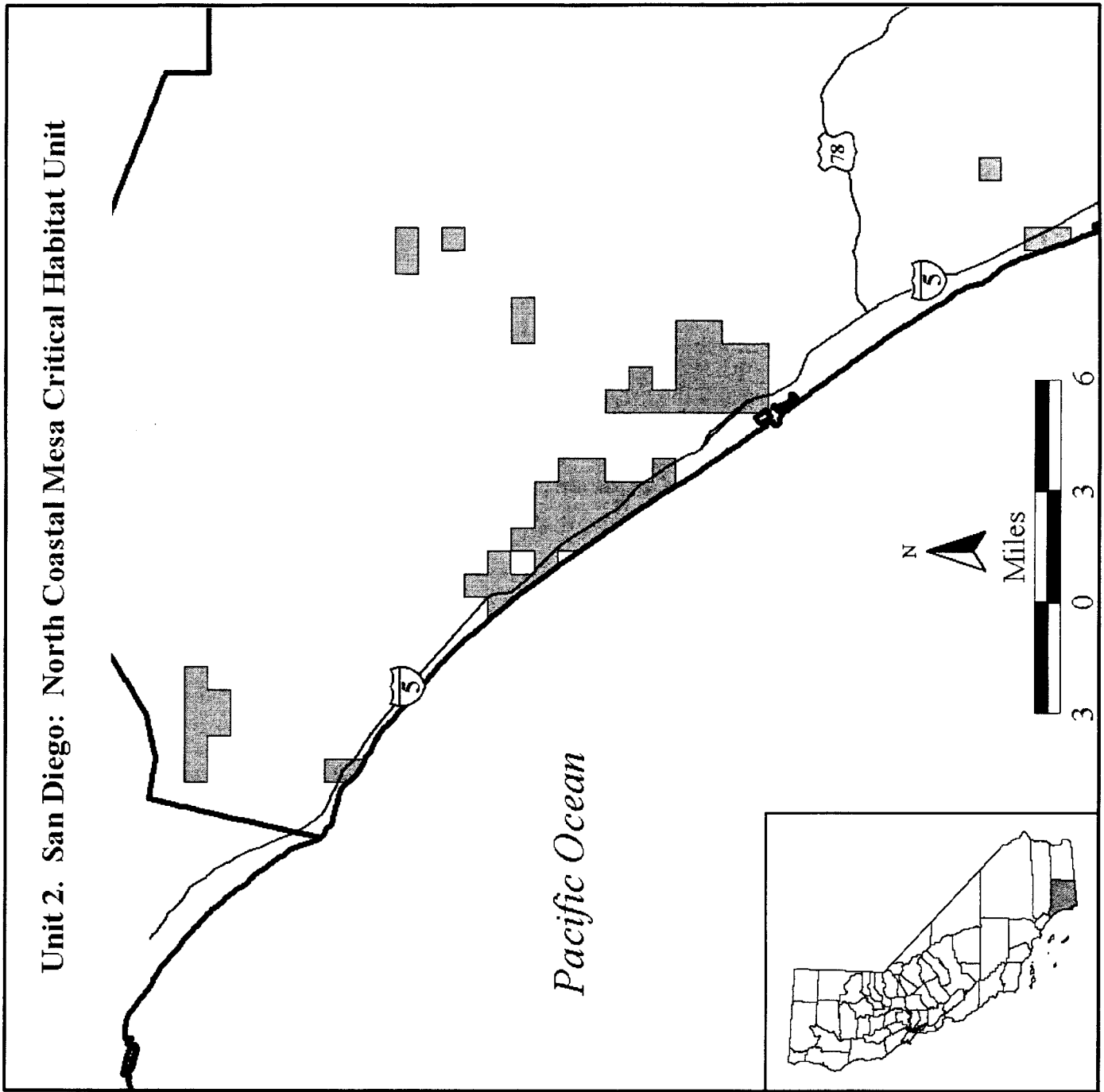


Map Unit 1; Orange County, California. From USGS 1:24,000 quadrangle map Newport Beach, California (1981). The following lands located in Fairview Regional Park within the

City of Costa Mesa are being proposed for critical habitat; starting from UTM coordinate 413000 E, 3725000 N to 413000 E, 3724000

N to 412000 E, 3724000 N to 412000 E, 3725000 N to 413000 E, 3725000 N.

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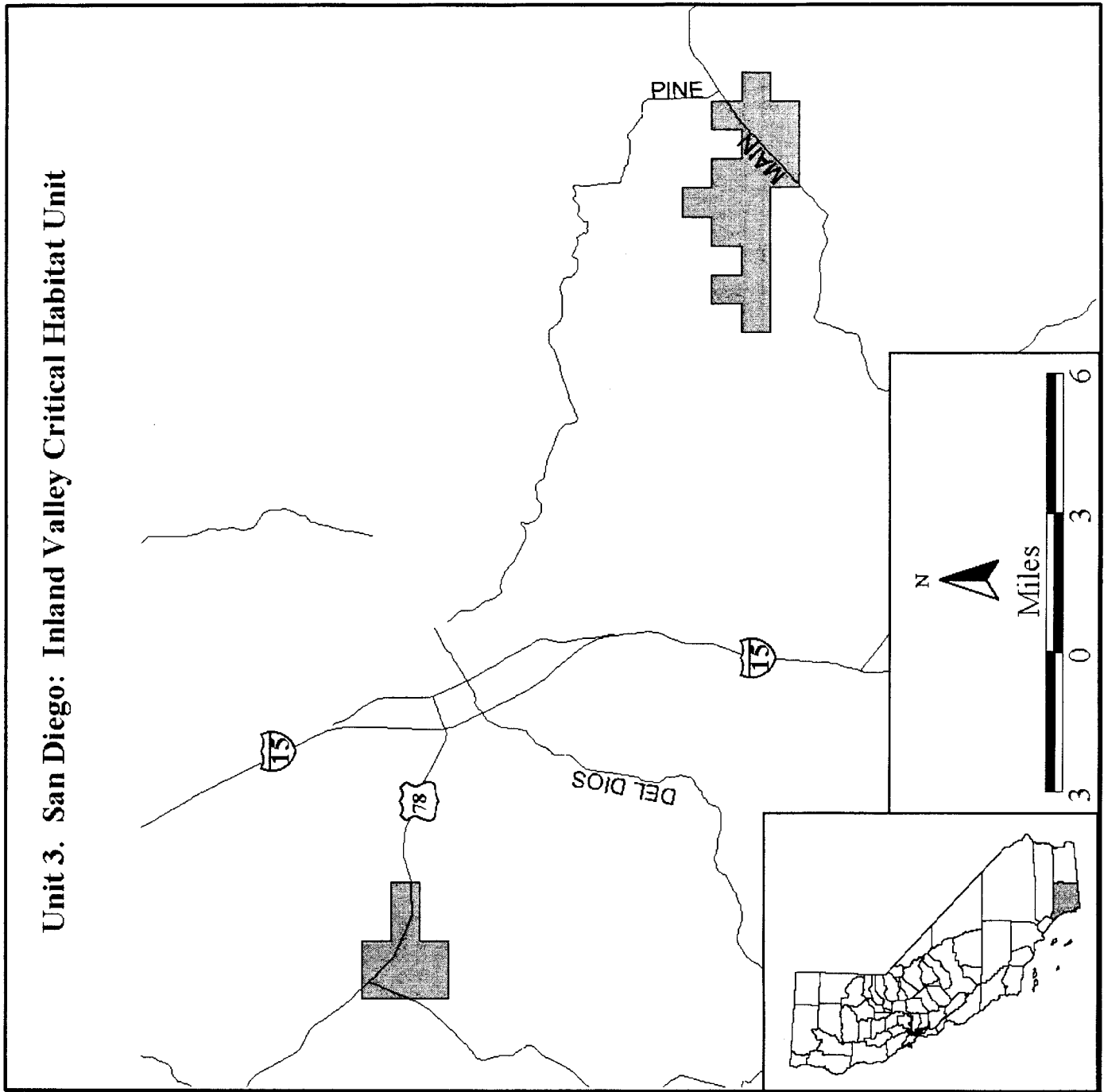


Map Unit 2; San Diego County, California. From USGS 1:24,000 quadrangle maps Oceanside, California (1975), San Onofre Bluffs, California (1975), Las Pulgas Canyon, California (1968), Morro Hills, California (1968), San Luis Rey, California (1975), Encinitas, California (1975): The following lands within San Clemente, California (1975) quadrangle map starting at UTM coordinate 452000 E, 3700000 N to 452000 E, 3699000 N to 452000 E, 3700000 N to 451000 E, 3698000 N to 449000 E, 3698000 N to 449000 E, 3699000 N to 447000 E, 3699000 N to 447000 E, 3700000 N to 452000 E, 3700000 N. The following lands within San Clemente, California (1975) quadrangle map starting at UTM coordinate 447000 E, 3694000 N to 448000 E, 3694000 N to 448000 E, 3692000 N to 447000 E, 3692000 N to 448000 E, 3694000 N to 447000 E, 3694000 N within San Clemente, California (1975) quadrangle map to the Pacific Ocean but not including the Pacific Ocean. The following lands within Morro Hills, California (1968) quadrangle map starting at UTM coordinate 468000 E, 3686000 N to 468000 E, 3685000 N to 466000 E, 3685000 N to 466000 E, 3686000 N to 468000 E, 3686000 N. The following lands within Morro Hills, California (1968) quadrangle map starting at UTM coordinate

471000 E, 3691000 N, to 471000 E, 3690000 N, to 469000 E, 3690000 N, to 469000 E, 3691000 N, to 471000 E, 3691000. The following lands within Morro Hills, California (1968) quadrangle map starting at UTM coordinate 471000 E, 3689000 N, to 471000 E, 3688000 N, to 470000 E, 3688000 N, to 470000 E, 3689000 N, to 471000 E, 3689000. The following lands within Las Pulgas Canyon, California (1968) quadrangle map starting at UTM coordinate 456000 E, 3688000 N, to 456000 E, 3687000 N, to 457000 E, 3687000 N, to 457000 E, 3686000 N, to 458000 E, 3686000 N, to 458000 E, 3685000 N, to 460000 E, 3685000 N, to 460000 E, 3684000 N, to 461000 E, 3684000 N, to 461000 E, 3682000 N, to 460000 E, 3682000 N, to 460000 E, 3680000 N, to 461000 E, 3680000 N, to 459000 E, 3679000 N, to 459000 E, 3680000 N, to 458000 E, 3680000 N, to 458000 E, 3681000 N, to 457000 E, 3681000 N, to 457000 E, 3684000 N, to 455000 E, 3684000 N, to 455000 E, 3686000 N, to 454000 E, 3686000 N, to 454000 E, 3687000 N, to 455000 E, 3687000 N, to 455000 E, 3688000 N, to 456000 E, 3688000. Excluding the following: the Las Pulgas Canyon, California (1968) quadrangle map starting at UTM coordinate 456000 E, 3686000 N, to 457000 E, 3686000 N, to 457000 E, 3685000

N, to 456000 E, to 3685000 N, to 456000 E, 3686000 N. The following lands within Las Pulgas Canyon, California (1968) quadrangle map starting at UTM coordinate 464000 E, 3682000 N, to 464000 E, 3681000 N, to 465000 E, 3681000 N, to 465000 E, 3680000 N, to 464000 E, 3680000 N, to 464000 E, 3679000 N, to 467000 E, 3679000 N within the Morro Hills, California (1968) quadrangle map to 467000 E, 3677000 N within the San Luis Rey, California (1975) quadrangle map to 466000 E, 3677000 N, to 466000 E, 3675000 N, to 463000 E, 3675000 N within the Oceanside, California (1975) quadrangle map, to 463000 E, 3682000 N within the Las Pulgas Canyon, California (1968) quadrangle map to 464000 E, 3682000 N. The following lands within San Luis Rey, California (1975) quadrangle map starting at UTM coordinate 473000 E, 3666000 N to 474000 E, 3666000 N to 474000 E, 3665000 N to 473000 E, 3665000 N to 473000 E, 3666000 N. The following lands within Encinitas, California (1975) quadrangle map starting at UTM coordinate 471000 E, 3664000 N to 471000 E, 3662000 N to 470000 E, 3662000 N to 470000 E, 3664000 N to 471000 E, 3664000 N.

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Unit 3. San Diego: Inland Valley Critical Habitat Unit

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Map Unit 3; San Diego County, California. From USGS 1:24,000 quadrangle map San Marcos, California (1968), Ramona, California (1975), San Pasqual, California (1971): The following lands within San Marcos, California (1968) quadrangle map starting at UTM coordinate 483000 E, 3668000 N to 483000 E, 3667000 N to 485000 E, 3667000 N to 485000 E, 3666000 N to 483000 E, 3666000 N to 483000 E, 3665000 N to 481000

E, 3665000 N to 481000 E, 3668000 N to 483000 E, 3668000 N. The following lands within San Pasqual, California (1971) quadrangle map starting at UTM coordinate 509000 E, 3657000 N to 509000 E, 3656000 N to 510000 E, 3656000 N to 510000 E, 3655000 N to 511000 E, 3655000 N to 511000 E, 3656000 N to 512000 E, 3656000 N within Ramona, California (1975) quadrangle map to 512000 E, 3655000 N to 513000 E, 3655000 N to 513000 E, 3654000 N to 512000 E,

3654000 N to 512000 E, 3653000 N to 509000 E, 3653000 N within San Pasqual, California (1971) quadrangle map to 509000 E, 3654000 N to 504000 E, 3654000 N to 504000 E, 3655000 N to 505000 E, 3655000 N to 505000 E, 3656000 N to 506000 E, 3656000 N to 506000 E, 3655000 N to 507000 E, 3655000 N to 507000 E, 3656000 N to 508000 E, 3656000 N to 508000 E, 3657000 N to 509000 E, 3657000 N.

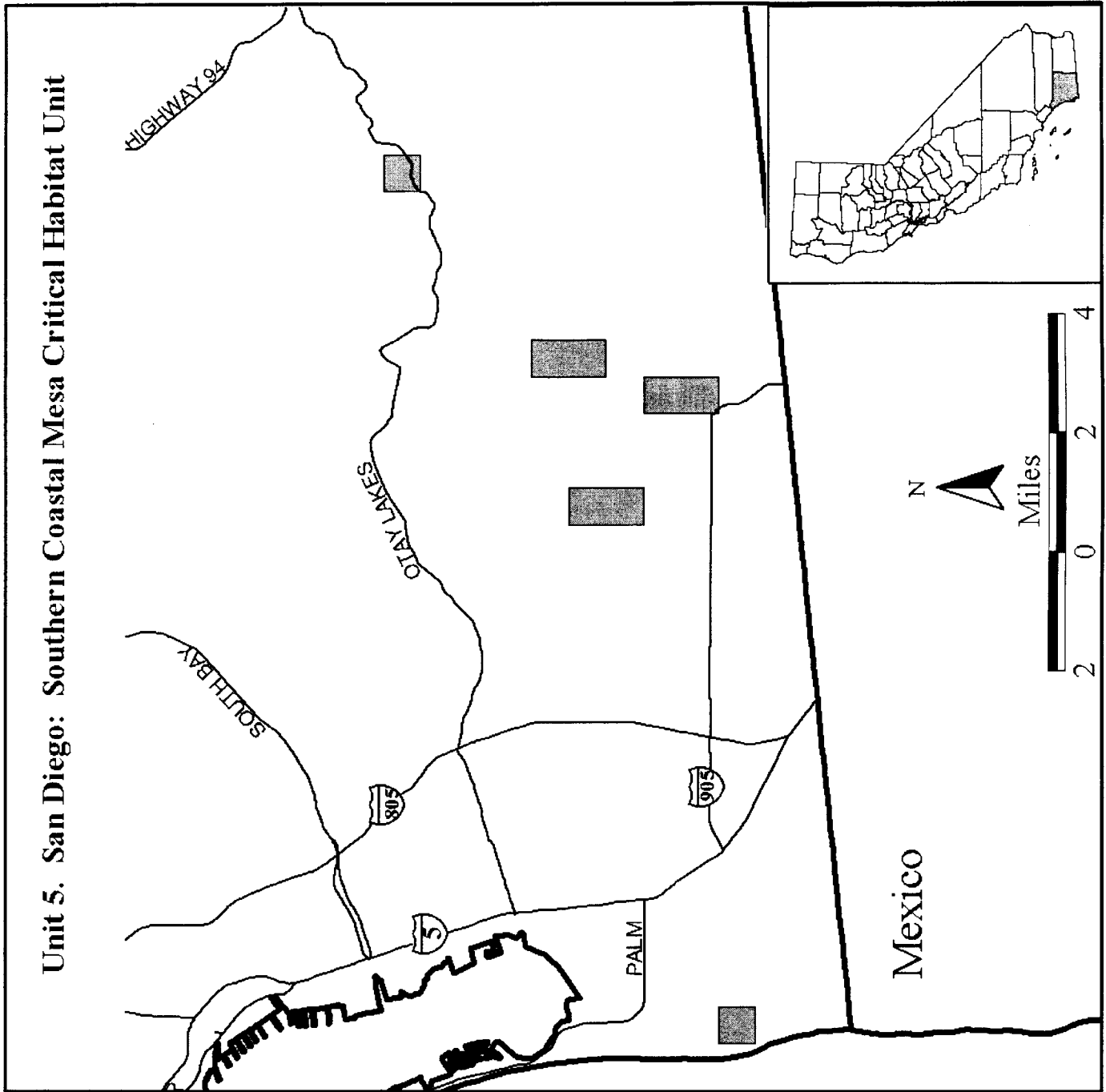
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E, 3638000 N to 486000 E, 3639000 N to 486000 E, 3637000 N to 488000 E, 3637000 N to 488000 E, 3638000 N to 486000 E, 3638000 N. Excluding the following: the Del Mar, California (1975) quadrangle map starting at 486000 E, 3638000 N to 488000 E, 3638000 N to 488000 E, 3637000 N within the La Jolla, California (1975) quadrangle map to 486000 E, 3637000 N to 486000 E,

3638000 N Del Mar, California (1975) quadrangle map and excluding all lands within the jurisdiction of the City of San Diego and the County of San Diego MSCP. The following federal and state lands within La Mesa, California (1975) quadrangle map starting at UTM coordinate 491000 E, 3630000 N to 491000 E, 3628000 N to 489000 E, 3628000 N to 489000 E, 3629000 N to

490000 E, 3629000 N to 490000 E, 3630000 N to 491000 E, 3630000 N. The following federal and state lands within National City, California (1975) quadrangle map starting at UTM coordinate 495000 E, 3623000 N to 495000 E, 3622000 N to 493000 E, 3622000 N to 493000 E, 3623000 N to 495000 E, 3623000 N.

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Map Unit 5; San Diego County, California. From USGS 1:24,000 quadrangle map National City, California (1975), Jamul

Mountains, California (1971), Dulzura, California (1988), Otay Mesa, California (1975), Imperial Beach, California (1975): The following federal and state lands within Jamul Mountains, California (1971)

quadrangle map starting at UTM coordinate 511000 E, 3612000 N, to 512000 E, 3612000 N within the Dulzura, California (1988) quadrangle map to 512000 E, 3611000 N to 511000 E, 3611000 N within the Jamul

Mountains, California (1971) quadrangle map to 511000 E, 3612000 N. The following federal and state lands within Otay Mesa, California (1975) quadrangle map starting at UTM coordinate 506000 E, 3608000 N to 507000 E, 3608000 N to 507000 E, 3606000 N to 506000 E, 3606000 N to 506000 E, 3608000 N. The following federal and state lands within Otay Mesa, California (1975) quadrangle map starting at UTM coordinate 505000 E, 3605000 N to 506000 E, 3605000

N to 506000 E, 3603000 N to 505000 E, 3603000 N to 505000 E, 3605000 N. The following federal and state lands within Otay Mesa, California (1975) quadrangle map starting at UTM coordinate 502000 E, 3607000 N to 503000 E, 3607000 N to 503000 E, 3605000 N to 502000 E, 3605000 N to 502000 E, 3607000 N. The following federal and state lands within Imperial Beach, California (1975) quadrangle map starting at UTM coordinate 489000 E, 3603000 N to

489000 E, 3602000 N to 488000 E, 3602000 N to 488000 E, 3603000 N to 489000 E, 3603000 N.

Dated: February 29, 2000.

Donald J. Barry,

Assistant Secretary for Fish and Wildlife and Parks.

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