

substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule addresses internal DoD responsibilities for performance of contract administration functions. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003–D051.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

#### List of Subjects in 48 CFR Part 242

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR part 242 as follows:

1. The authority citation for 48 CFR part 242 continues to read as follows:

**Authority:** 41 U.S.C. 421 and 48 CFR Chapter 1.

### PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

2. Section 242.302 is revised to read as follows:

#### 242.302 Contract administration functions.

(a)(4) Also, review and evaluate—

(A) Contractor estimating systems (see FAR 15.407–5); and

(B) Contractor material management and accounting systems under Subpart 242.72.

(7) See 242.7503 for ACO responsibilities with regard to receipt of an audit report identifying significant accounting system or related internal control deficiencies.

(9) For additional contract administration functions related to IR&D/B&P projects performed by major contractors, see 242.771–3(a).

(12) Also perform all payment administration in accordance with any applicable payment clauses.

(13)(A) Do not delegate the responsibility to make payments to the Defense Contract Management Agency (DCMA).

(B) Follow the procedures at PGI 242.302(a)(13)(B) for designation of payment offices.

(39) See 223.370 for contract administration responsibilities on contracts for ammunition and explosives.

(67) Also support program offices and buying activities in precontractual efforts leading to a solicitation or award.

(S–70) Serve as the single point of contact for all Single Process Initiative (SPI) Management Council activities. The ACO shall negotiate and execute facilitywide class modifications and agreements for SPI processes, when authorized by the affected components.

(S–71) DCMA has responsibility for reviewing earned value management system (EVMS) plans and verifying initial and continuing contractor compliance with DoD EVMS criteria. The contracting officer shall not retain this function.

(b)(S–70) Issue, negotiate, and execute orders under basic ordering agreements for overhaul, maintenance, and repair.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018–AT92

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Endangered *Monardella linoides* ssp. *viminea* (Willow Monardella)

**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 the endangered *Monardella linoides* ssp. *viminea* (willow monardella) under the Endangered Species Act of 1973, as amended (Act). We have determined that approximately 2,539 acres (ac) (1,028 hectares (ha)) of land within San Diego County, California, contain the physical and biological features essential to the conservation of *M. l. ssp. viminea*. Of that, we are proposing to designate as critical habitat approximately 115 acres (47 ha) of private lands and the Padre Dam Municipal Water District lands within the City of Santee. We do not include Tribal lands in this proposed designation. We are exempting or

considering whether to exclude from critical habitat designation the other lands that contain the features essential to the conservation of *M. l. ssp. viminea*. We fully discuss the exemption and exclusions under consideration in the preamble of this proposed rule. We are soliciting data and comments from the public on all aspects of this proposal, including the exemption and exclusions under consideration.

**DATES:** We will accept comments from all interested parties until January 9, 2006. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by December 27, 2005.

**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 Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (CFWO), 6010 Hidden Valley Road, Carlsbad, CA 92011.

2. You may hand-deliver written comments to the CFWO, at the address given above.

3. You may send comments by electronic mail (e-mail) to [fw8cfwomolivi@fws.gov](mailto:fw8cfwomolivi@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

4. You may fax your comments to 760/431–9624.

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 CFWO at the above address. Maps showing areas proposed as critical habitat, areas under consideration for exclusion from critical habitat, and areas exempted from critical habitat are available for public review and comment at the CFWO or on the Internet at <http://carlsbad.fws.gov>.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, CFWO at the above address (telephone 760/431–9440; facsimile 760/431–9624).

#### 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 are particularly 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 *Monardella linoides* ssp. *viminea* habitat, and what areas should be included in the designations that were occupied at the time of listing that contain the features that are essential to 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 and why;

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

(4) The exclusion from critical habitat that we are considering for lands within the San Diego MSCP and the BLM Otay Mountain Wilderness and the multiple agency 1994 MOU under section 4(b)(2) of the Act (see *Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* for details, including maps, of the San Diego MSCP and Otay Mountain Wilderness and MOU). Please provide information on the benefits of including or excluding these lands from the critical habitat designation;

(5) The exemption from critical habitat at MCAS Miramar pursuant to section 4(a)(3) of the Act because their Integrated Natural Resources Management Plan (INRMP) provides a benefit to *M. l. ssp. viminea*. We specifically solicit comment concerning the exemption of MCAS Miramar under section 4(a)(3) of the Act and whether their INRMP provides a benefit to the species (see *Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act* section for a detailed discussion and figure of the area).

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

(7) 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 section). Please submit Internet comments to [fw8cfwomolivi@fws.gov](mailto:fw8cfwomolivi@fws.gov) in ASCII file format and avoid the use of

special characters or any form of encryption. Please also include "Attn: Willowy Monardella" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our CFWO at phone number 760/431-9440. Please note that this Internet address will be closed at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which 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. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

#### **Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. 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.

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 470 species, or 37.5 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat.

We address the habitat needs of all 1,253 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions against take of animal species and other unauthorized actions regarding plants, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference for the conservation of many species.

We note, however, that the August 6, 2004 Ninth Circuit judicial opinion, (*Gifford Pinchot Task Force v. United States Fish and Wildlife Service*) found our definition of adverse modification was invalid. In response to the decision, the Director has provided guidance to the Service based on the statutory language. In this rule, our analysis of the consequences and relative costs and benefits of the critical habitat designation is based on application of the statute consistent with the 9th Circuit's ruling and the Director's guidance.

#### **Procedural and Resource Difficulties in Designating Critical Habitat**

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

with the most biologically urgent species conservation needs.

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

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate 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, is very expensive, and in the final analysis provides relatively little additional protection to listed 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). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

### Background

In this proposed rule, we discuss only those topics directly relevant to the designation of critical habitat. For more information on *Monardella linoidea* ssp. *viminea*, refer to the final rule listing the species as endangered published in the **Federal Register** on October 13, 1998 (63 FR 54938).

### Life History

*Monardella linoidea* ssp. *viminea* is a small perennial, herbaceous subshrub with aromatic foliage and several erect stems extending from a woody base (Munz 1968; 63 FR 54937). It is a member of the Lamiaceae (mint family) and flowers from June to August (Munz 1968). Because *M. l. ssp. viminea* branches arise from trailing stems, plants tend to grow in groupings or

"clumps," rather than as discrete plants (Epling 1925). Seeds are small with a hard seed coat and may fall directly below existing plants after setting (Mike Kelly, pers. comm. to Carolyn Lieberman, U.S. Fish and Wildlife Service, 2003). Little is known about how the species disperses, however, seeds and vegetative shoots are believed to be transported by flowing water (Mark Elvin, botanist, Dudek and Associates, pers. comm. to C. Lieberman, U.S. Fish and Wildlife Service, 2003).

*M. l. ssp. viminea* primarily inhabits coarse, rocky, sandy alluvium on terraces, benches, and stabilized sandbars along and within ephemeral drainages (Scheid 1985) in coastal sage scrub or riparian scrub habitat that is frequently associated with *Eriogonum fasciculatum* (California buckwheat), *Platanus racemosa* (sycamore), *Artemisia californica* (California sagebrush), and *Baccharis sarothroides* (coyotebush), and *Quercus agrifolia* (coast live oak) (Scheid 1985). These semi-open washes and drainage areas typically contain little to no canopy cover (Reiser 1994; 63 FR 54937) and are maintained by large intermittent water flows that erode and deposit alluvial material, developing benches and sandbars.

### Distribution and Status

The distribution of *M. l. ssp. viminea* is extremely restricted within San Diego County, California, and extends south to Baja California, Mexico (Scheid 1985). This narrow endemic plant persists in small isolated occurrences within a 72 square-mile (186 square-kilometer) area between Los Peñasquitos Canyon and Mission Gorge in San Diego County and in Otay Mesa and northern Baja California. The morphology of *M. l. ssp. viminea* differs between the populations bounded by the Los Peñasquitos Canyon and Mission Gorge region to the north and Otay Mesa and northern Baja California region to the south. These differences led Elvin and Sanders (2003) to propose the Otay Mesa and northern Baja California occurrences as a different taxon. The Service evaluated this information and concluded that the authors did not provide adequate evidence to elevate the Otay Mesa and northern Baja California occurrences to the species rank (Bartel and Wallace, *in litt.* 2004).

As stated in the 1998 listing rule, approximately 6,000 individuals of *M. l. ssp. viminea* from 20 occurrences were known to exist in the United States within the following canyons or geographic areas at the time the species was listed as endangered: MCAS

Miramar, Sycamore Canyon (partially on private land, partially on Federal land managed by the U.S. Navy, and partially on Sycamore Canyon City Park), Lopez Canyon (Los Peñasquitos City Regional Park), San Clemente Canyon (San Clemente Park), Cedar Canyon, and Marron Valley. Since *M. l. ssp. viminea* was listed, a population was found on BLM land on Otay Mountain.

We are currently aware of only 15 occurrences in the United States within the following canyons or geographic areas: MCAS Miramar (Rose Canyon, part of Sycamore Canyon, West Sycamore Canyon, part of Spring Canyon, San Clemente Canyon, Elanus Canyon (MCAS Miramar 2002)), part of Sycamore Canyon on private property and Sycamore Canyon City Park, Cedar Canyon (now referred to as Otay Lakes), Lopez Canyon (Los Peñasquitos City Regional Park), Marron Valley, and Otay Mountain.

The remaining six occurrences are believed to have been extirpated after the species was listed in 1998:

The Carroll Canyon occurrence (California Natural Diversity Data Base (CNDDDB) occurrence number 25): this occurrence is comprised of 122 clumps, was collected as mitigation for the Carroll Canyon Business Park project in 2003 to prevent their destruction during the project's construction. Of these 122 clumps, 30 are being held at the Rancho Santa Ana Botanic Garden as live material. Others will be reintroduced back into suitable sites in Carroll Canyon, at a robust historical population site at San Clemente Canyon, and/or in Lopez Canyon next to existing populations. The exact location where *M. l. ssp. viminea* will be reintroduced will depend on the results of genetic testing to determine the genetic similarity of the donor population with any population in which it may interact.

The three San Clemente Canyon occurrences on City of San Diego Park land (CNDDDB occurrence numbers 11, 16, and 17): These three occurrences of *M. l. ssp. viminea* historically occurred in the upper portion of the canyon at MCAS Miramar, and in the lower portion of the canyon west of Interstate 805 in the City of San Diego's Marian Bear Natural Park. These occurrences within this park are believed to have been extirpated due to construction of Highway 52, development within its watershed resulting in conversion of the occupied stream from ephemeral to perennial (Sherman 2003), and an increase in nonnative invasive species.

The two occurrences within Murphy Canyon (CNDDDB occurrence numbers

15, and 30) (CNDDDB 1997; CNDDDB 2001; 63 FR 54937): These occurrences have not had any live standing plants since 2002, and we do not know if suitable habitat remains here but they are believed to be extirpated (JoEllan Kassebaum, Botanist, MCAS Miramar, pers. com. to Bridgette Tuerler, Service 2005).

*Monardella linoides* ssp. *viminea* was also known from Cemetery Canyon, Beeler Canyon (near Poway), and Switzer Canyons but is believed to have been extirpated from these areas prior to listing (CNDDDB 2001; Elvin and Sanders 2003).

Methods to survey *Monardella linoides* ssp. *viminea* vary because it

tends to grow in groupings (referred to as clumps) rather than as discrete plants, making it difficult to compare the numbers of individuals counted between different surveys. Surveys have counted individual plants, clumps of individual plants, and/or colonies (see Table 1 for details).

TABLE 1.—SURVEY DATA FOR EXTANT OCCURRENCES OF MONARDELLA LINOIDES SSP. VIMINEA AT VARIOUS LOCATIONS OVER TIME, FROM PRE-2000 TO 2004

[Years for which we have no data are represented as “ND” and years for which we have no specific abundance data, only positive survey data, are represented as “occupied”]

Geographic area	Ownership	Date					
		Pre-2000	2000	2001	2002	2003	2004
(1) Sycamore Canyon .....	MCAS Miramar .....	383 plants <sup>13</sup> ..	ND* .....	ND .....	446 clumps <sup>8</sup> ..	ND .....	ND.
	Private .....	Occupied** <sup>7</sup> ..	262 clumps <sup>2</sup> ..	170 clumps <sup>3</sup> ..	128 plants <sup>4</sup> ....	85 clumps (390 plants) <sup>5</sup> .	93 clumps (354 plants). <sup>6</sup>
(2) West Sycamore Canyon ..	MCAS Miramar .....	1376 plants <sup>13</sup> ; 650 colonies in 1987 <sup>10</sup> .	907 clumps <sup>9</sup> ..	ND .....	1,737 plants (132 clumps) <sup>8</sup> .	ND .....	ND.
	City of San Diego .....	Occupied <sup>7</sup> .....	12 clumps. <sup>12</sup> ..	ND .....	ND .....	ND .....	ND.
	Private .....	ND .....	ND .....	ND .....	ND .....	0 clumps, previously 23 clumps. <sup>11</sup> .	ND.
(3) Spring Canyon .....	MCAS Miramar .....	185 clumps in 1994 <sup>10</sup> .	ND .....	ND .....	549 plants (80 clumps) <sup>8</sup> .	ND .....	ND.
(4) San Clemente Canyon .....	Private (East Elliot) .....	ND .....	133 clumps <sup>2</sup> ..	ND .....	ND .....	ND .....	ND.
	MCAS Miramar .....	Occupied <sup>7</sup> .....	343 clumps <sup>9</sup> ..	ND .....	503 plants (83 clumps) <sup>8</sup> .	ND .....	ND.
(5) Elanus Canyon .....	MCAS Miramar .....	10 clumps or individuals <sup>10</sup> .	9 clumps <sup>9</sup> .....	ND .....	13 plants (2 clumps) <sup>8</sup> .	ND .....	ND.
(6) Lopez Canyon .....	City of San Diego (Los Peñiquitos City Regional Park).	60 plants in 1980 <sup>1</sup> , 12 clumps in 1994, 8 clumps in 1997 <sup>1</sup> , 35 plants in 1987 <sup>1</sup> .	8 clumps <sup>2</sup> .....	8 clumps <sup>3</sup> .....	44 plants <sup>4</sup> ....	8 clumps (82 plants) <sup>5</sup> .	8 clumps (82 plants). <sup>6</sup>
(7) Marron Valley .....	City of San Diego & State (CDF).	60 plants in 1992 <sup>14</sup> .	42 clumps <sup>2</sup> ....	66 clumps <sup>3</sup> ....	98 plants <sup>4</sup> ....	83 clumps (192 plants) <sup>5</sup> .	70 clumps (113 plants). <sup>6</sup>
(8) Otay Lakes (also referred to as Cedar Canyon).	State (CDFG) .....	200 plants in 1989 <sup>10</sup> .	Occupied <sup>7</sup> .....	ND .....	4 clumps <sup>12</sup> ....	ND .....	ND.
	City of San Diego .....	ND .....	2 clumps <sup>2</sup> .....	2 clumps <sup>3</sup> .....	2 plants <sup>4</sup> .....	ND .....	2 plants <sup>6</sup> .
(9) Rose Canyon .....	Private .....	ND .....	ND .....	25 plants <sup>12</sup> .....	ND .....	ND .....	ND.
	MCAS Miramar .....	Occupied <sup>7</sup> .....	ND .....	ND .....	4 plants (2 clumps) <sup>8</sup> .	ND .....	ND.
(10) Otay Mountain .....	Federal (BLM) .....	ND .....	202 clumps <sup>2</sup> ..	ND .....	ND .....	ND .....	ND.

(Marine Corps Air Station (MCAS); California Department of Fish and Game (CDFG); Bureau of Land Management (BLM); California Department of Forestry (CDF)).

\*ND = Years for which we have no data.

\*\*Occupied = Years for which we have no specific abundance data, only positive survey data.

<sup>1</sup> Kelly and Burrascano 2001.

<sup>2</sup> City 2000.

<sup>3</sup> City 2001.

<sup>4</sup> City 2002.

<sup>5</sup> City 2003.

<sup>6</sup> City 2004.

<sup>7</sup> GIS data layer from MCAS (No Date).

<sup>8</sup> MCAS Miramar 2002.

<sup>9</sup> Service 2000.

<sup>10</sup> CNDDDB 2001.

<sup>11</sup> Helix Environmental Planning, Inc. 2004.

<sup>12</sup> Sherman 2003.

<sup>13</sup> GIS data layer from MCAS (unknown, but before 1998).

<sup>14</sup> MSCP GIS layer from San Diego Association of Governments.

As stated in the final listing rule, threats to *Monardella linoides* ssp. *viminea* include habitat alteration resulting from urban development, sand and gravel mining, off-road vehicle (ORV) activities, trampling, trash dumping, erosion, and invasion of

nonnative species (October 13, 1998; 63 FR 54938).

Due to its small population sizes and numbers, *M. l.* ssp. *viminea* is potentially threatened with stochastic (random) extinction (Service 1995). Chance events (e.g., floods, fires, or

drought) can substantially reduce or eliminate local populations and increase the likelihood of the plant's extinction. Major flood events can physically wash away individual plants and existing habitat (Kelly and Burrascano 2001). *M. l.* ssp. *viminea* had likely adapted to a

natural fire regime since fires maintain open and available habitat necessary for *M. l. ssp. viminea*. Alternatively, disruptions to natural fire cycles may be detrimental to *M. l. ssp. viminea* because excessive fuel build up may cause hotter fires than those to which *M. l. ssp. viminea* has become adapted. Fire has resulted in loss of *M. l. ssp. viminea* individuals on Otay Lakes lands, although it was recently verified that surviving individuals still occur in this area (Sherman 2003) and on MCAS Miramar. Drought has reduced population size within Sycamore Canyon (City 2002). Herbivory by unchecked populations of native rabbits and deer also has been identified as a threat to populations of *M. l. ssp. viminea* (Kelly and Burrascano 2001).

### Previous Federal Actions

Please see the final rule listing *Monardella linoides* ssp. *viminea* as endangered for a description of previous Federal actions up to the time of listing on October 13, 1998 (63 FR 54938). In the final listing rule, the Service determined designation of critical habitat was not prudent because such designation would not benefit the species and could increase the threat of illegal collection.

On September 26, 2001, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the California Native Plant Society (CNPS) alleging, in part, that the Service improperly determined that designation of critical habitat for *Monardella linoides* ssp. *viminea* was not prudent (CNPS v. Norton, No. 01-CV-1742IEG (JAH)). The Service entered into a settlement agreement with the plaintiffs, under which we agreed to reconsider our "not prudent" finding, publish a proposed critical habitat rule for *M. l. ssp. viminea* in the **Federal Register**, if prudent, on or before October 30, 2005, and publish a final critical habitat rule, if prudent, on or before October 30, 2006. This proposed rule complies with the June 2, 2003 settlement agreement.

Section 4(a)(3) of the Act and its implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is listed as endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial

to the species. In our October 13, 1998, final rule (63 FR 54938), we determined that designation of critical habitat would provide little conservation benefit over that provided by listing. We determined that designation of critical habitat was not prudent based on the increased threat of collection and vandalism and stated that designation of critical habitat could lead to increased publicity, illegal collection, and trampling of plants by individuals interested in seeing rare plants.

However, in the past few years, several of our determinations that the designation of critical habitat would not be prudent have been overturned by court decisions. For example, in *Conservation Council for Hawaii v. Babbitt*, the United States District Court for the District of Hawaii ruled that the Service could not rely on the "increased threat" rationale for a "not prudent" determination without specific evidence of the threat to the species at issue (2 F. Supp. 2d 1280 [D. Hawaii 1998]). Additionally, in *Natural Resources Defense Council v. U.S. Department of the Interior*, the United States Court of Appeals for the Ninth Circuit ruled that the Service must balance, in order to invoke the "increased threat rationale," the threat against the benefit to the species of designating critical habitat (113 F. 3d 1121, 1125 [9th Cir. 1997]).

At this time, we do not have specific evidence for overcollection or vandalism specific to this plant and its habitat. The courts also have ruled that, in the absence of a finding that the designation of critical habitat would increase threats to a species, the existence of another type of protection, even if it offers potentially greater protection to the species, does not justify a "not prudent" finding (*Conservation Council for Hawaii v. Babbitt* 2 F. Supp. 2d 1280). We are already working with Federal, State of California, County of San Diego, and City of San Diego agencies and organizations in carrying out conservation activities for this plant and conducting surveys for additional occurrences of the species and to assess habitat conditions. These entities are fully aware of the distribution, status, and habitat requirements for this plant. We have reconsidered our evaluation of the threats posed by collection and vandalism in the prudency determination. We have determined that the threats to *Monardella linoides* ssp. *viminea* from specific instances of collection vandalism are speculative. Accordingly, we withdraw our previous determination that the designation of critical habitat is not prudent for *M. l. ssp. viminea*. Therefore, we determine

that the designation of critical habitat is prudent for *M. l. ssp. viminea*. At this time, we have sufficient information necessary to identify specific features as essential to the conservation of *M. l. ssp. viminea* and are therefore, proposing critical habitat (see "Methods" section below for a discussion of information used in our reevaluation). In total, we have determined that approximately 2,539 acres (ac) (1,028 hectares (ha)) of land within San Diego County, California, contain the primary constituent elements essential to the conservation of *M. l. ssp. viminea*.

### 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" means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

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

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing 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 (PCEs), as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may

require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2)). With regard to areas not known to be occupied by the species at the time of listing, we will designate such areas when the best available scientific data indicates that the conservation needs of the species so require.

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 (P.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 (P.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)(1)(A) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of *Monardella linoides* ssp. *viminea*. Information sources included data from research and survey observations published in peer-reviewed articles; survey reports submitted as requirement of obtaining a section 10(a)(1)(A) permit; regional Geographic Information System (GIS) data from the San Diego Multiple Species Conservation Program (MSCP), soil, and species coverages (including layers for the City of San Diego and MCAS Miramar); and data compiled in the California Natural Diversity Data Base (CNDDB). We have also reviewed available information that pertains to the habitat requirements of this species. The material included data in reports submitted during section 7 consultations; research published in peer-reviewed articles and agency reports; and, regional GIS coverages. We are not proposing critical habitat in areas outside the geographical area occupied at the time of listing. The Otay Mountain population, discovered after the publication of the final listing rule, is approximately 4.75 miles (7.6 kilometers) west of the known population at Marron Valley. We consider the Otay Mountain occurrence to be a confirmation of the distribution of *M. l.* ssp. *viminea* within southern San Diego County. We are considering whether to exclude the Otay Mountain population from critical habitat in the final rule, as discussed below in the Exclusions section of this proposed rule.

We have reviewed and used the best available information about known occurrences and habitat requirements of *Monardella linoides* ssp. *viminea*. We

delineated the boundaries of habitat containing features essential to the conservation of species by outlining the local drainage area from the upper-to the lower-most occurrence point within each occupied drainage area following topographic lines on USGS topographical maps. The majority of the occurrence points are based on data collected in 1998 and 2002 and were used to delineate the up- and down-stream boundaries of habitat containing features essential to the conservation of species within each drainage.

These areas were further refined by gathering information about these areas with Service biologists and other knowledgeable individuals familiar with *Monardella linoides* ssp. *viminea* and their habitat. After creating GIS coverage of the areas containing features essential to the conservation of species, we created legal descriptions using a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the area proposed as critical habitat.

#### 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 data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. The specific PCEs required for *Monardella linoides* ssp. *viminea* are derived from the biological needs of the species as described below and in the final listing rule for *M. l.* ssp. *viminea* (October 13, 1998; 63 FR 54937).

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

Open or semi-open rocky, sandy alluvium on terraced floodplains, benches, stabilized sandbars, channel banks, and sandy washes along ephemeral streams, washes, and

floodplains are needed for individual and population growth of *Monardella linoidea* ssp. *viminea* (October 13, 1998; 63 FR 54938) (PCE 1). *M. l.* ssp. *viminea* in the Otay Lakes/Marron Valley area also occur in cracks of bedrock of ephemeral drainages. While little is known about the space needed for reproduction, flowing water appears to be important for transporting seeds and vegetative shoots (Mark Elvin, botanist, Dudek and Associates, pers. comm. to C. Lieberman, U.S. Fish and Wildlife Service, 2003). Animals may also be important for seed dispersal. We are unaware of any studies documenting specific pollinators of *M. l.* ssp. *viminea*; however, the floral structure suggests insect pollination. Intermittently flooded areas are dynamic such that the stream path and the location of benches and sandbars along the shoreline may change depending on seasonal water flows. Therefore, the riparian corridor where *M. l.* ssp. *viminea* is found is an integral part of and important for providing space for growth and reproduction within this dynamic ecosystem.

#### Water and Physiological Requirements

A natural hydrologic regime that includes intermittent flooding during the rainy season is needed to maintain washes and sandbars where *Monardella linoidea* ssp. *viminea* grows (PCE 2) (October 13, 1998; 63 FR 54938). Large intermittent water flows resulting from seasonal rains and major flooding events erode and deposit alluvial material, developing benches and sandbars used by *M. l.* ssp. *viminea*. These seasonal rains and intermittent flooding events may also be important for transporting seeds and vegetative shoots as stated above and are needed to maintain the open or semi-open riparian areas with little or no canopy cover needed to ensure that the species receives adequate sunlight for nutrient uptake (photosynthesis) (PCE 3).

#### Primary Constituent Elements for *Monardella linoidea* ssp. *viminea*

Based on our current knowledge of the life history, biology, and ecology of the species and the habitat requirements to sustain the essential life history functions of the species, we have determined that the PCEs essential for the conservation of *Monardella linoidea* ssp. *viminea* are:

(1) Coarse, rocky, sandy alluvium on terraced floodplains, benches, stabilized sandbars, channel banks, and sandy washes along and within the ephemeral drainages that provide space for growth, reproduction, and dispersal;

(2) Ephemeral drainages where water flows only after peak seasonal rains and major flooding events and periodically scours riparian vegetation and redistributes alluvial material by eroding and developing stream channels, benches, and sandbar and thus maintains necessary dynamic habitat processes for the species; and

(3) Coastal sage and riparian scrub with an open and semi-open canopy and little or no herbaceous understory situated along ephemeral drainages and adjacent floodplains to ensure that the subspecies receives adequate sunlight for nutrient uptake for photosynthesis.

#### Criteria Used to Identify Critical Habitat

We are proposing to designate critical habitat on lands that were known to be occupied at the time of listing and contain the PCEs for *Monardella linoidea* ssp. *viminea*. We used the following criteria to identify these areas: (1) Areas known to be occupied at the time of listing and/or known to be currently occupied; and (2) ephemeral washes and drainage areas associated with documented occurrences.

These areas were then analyzed with respect to special management considerations or protections. Subsequently, we identified areas we are exempting from critical habitat designation based on provisions of section 4(a)(3) of the Act and other areas we are considering excluding from critical habitat based on the provisions of section 4(b)(2) of the Act.

Using the above criteria, we identified 10 areas that contain features essential to the conservation of *M. l.* ssp. *viminea*, one in each of the following canyons/geographic areas: (1) Sycamore Canyon, (2) West Sycamore Canyon, (3) Spring Canyon, (4) San Clemente Canyon, (5) Elanus Canyon, (6) Lopez Canyon, (7) Marron Valley, (8) Otay Lakes (also known as Cedar Canyon), (9) Otay Mountain, and (10) Rose Canyon (MCAS Miramar). All 10 areas, except Otay Mountain, were known to be occupied at the time of listing, and all 10 areas, including Otay Mountain, are currently known to be occupied.

When mapping proposed critical habitat boundaries, we made every effort to remove all lands containing developed areas such as buildings, paved areas, boat ramps and other structures that lack PCEs for *Monardella linoidea* ssp. *viminea*. Any lands containing such structures that could not be removed from the maps, due to the mapping scale used, are excluded by this text from critical habitat. Therefore, Federal actions limited to these lands would not trigger section 7

consultations, unless they affect the species and/or PCEs in adjacent critical habitat.

#### Special Management Considerations or Protections

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

As stated in the final listing rule, threats to *Monardella linoidea* ssp. *viminea* include habitat alteration resulting from urban development, sand and gravel mining, off-road vehicle (ORV) activities, trampling, trash dumping, erosion, and invasion of nonnative species (October 13, 1998; 63 FR 54938). These activities could impact the PCEs determined to be essential for conservation of *M. l.* ssp. *viminea*.

Urban development and sand and gravel mining upstream of *Monardella linoidea* ssp. *viminea* occurrences may alter the hydrologic regime needed to maintain the habitat characteristics required by *M. l.* ssp. *viminea*. Conversion of intermittent water flows to persistent water flows may increase scour and erode terraces and benches, washing away rooted plants and reducing available habitat (PCEs 1 and 2). Kelly and Burrascano (2001) attribute disappearance of terraces in Lopez Canyon to increased erosion associated with urban runoff from upstream development. Water diversion, such as water removal from the drainage system occupied by the subspecies could reduce the amount of water flowing downstream following seasonal flooding events resulting in decreased deposition of alluvial material and a subsequent reduction in the amount of available habitat (PCEs 1 and 2). Disruption of the hydrologic cycle could also result in a decrease in the number of seeds that could have been transported downstream during seasonal flooding events, thereby, fragmenting populations (PCE 2). The use of pesticides or herbicides in residential and commercially landscaped areas within the watershed may impact water quality if used upslope or above a stream (PCE 2). Special management such as bank replacement or stabilization to maintain the substrate, restoration of intermittent water flows, erosion and runoff control measures, and prohibitions against grading during the rainy season may be required to reduce impacts to *M. l.* ssp. *viminea* habitat resulting from alteration of the hydrologic regime due to development within the local watershed.



Alteration of the hydrologic regime also can result in an increase in native and nonnative plant species invading the riparian areas where *M. l. ssp. viminea* occurs. Increased water flow associated with urban runoff has led to dense stands of riparian vegetation in the upper reaches of Lopez Canyon where *M. l. ssp. viminea* once occurred (Kelly and Burrascano 2001). Increases in riparian vegetation within ephemeral drainages may also be responsible for losses of *M. l. ssp. viminea* in lower San Clemente Canyon. Conversely, decreased water availability may result in conversion of habitat from mesic to xeric, adversely impacting *M. l. ssp. viminea*. More drought tolerant plants could expand into *M. l. ssp. viminea* habitat and create unnaturally high canopy cover or dense riparian vegetation that could crowd *M. l. ssp. viminea* out or render the habitat unsuitable by creating excessive shading (PCE 3). Special management may be required to remove invasive species to maintain an open or semi-open canopy of coastal sage and riparian scrub with minimal herbaceous understory

required by *M. l. ssp. viminea* for persistence (PCE 3). Human use (e.g., ORV activities and trampling) along streams can change the character of the riparian area and associated vegetation in ways that make portions of the riparian corridor less suitable as habitat for *M. l. ssp. viminea*. For example, heavy trampling may erode or denude stream banks and washes, thereby, reducing or eliminating available habitat (PCE 1). Special management such as bank replacement or stabilization to maintain the substrate and prohibitions against ORV use during the rainy season may be required to reduce impacts to *M. l. ssp. viminea* habitat resulting from human use within the local watershed.

**Proposed Critical Habitat Designation**

As stated above, we identified 10 canyons/geographic areas containing habitat with features essential to the conservation of this species. We are proposing critical habitat within a portion of Sycamore Canyon (Unit 1) within the City of Santee. We are exempting under section 4(a)(3) of the Act, all lands within MCAS Miramar

(Rose Canyon and portions of San Clemente Canyon, Elanus Canyon, Spring Canyon, West Sycamore Canyon, and Sycamore Canyon) from this critical habitat designation. We are also considering excluding from this critical habitat designation a portion of Sycamore Canyon and all of West Sycamore Canyon, Spring Canyon, San Clemente Canyon, Elanus Canyon, Lopez Canyon, Marron Valley, Otay Lakes, and Otay Mountain under section 4(b)(2) of the Act. Table 2 below provides approximate area (ac/ha) of lands being proposed as critical habitat for *M. l. ssp. viminea* and information about landownership within this unit.

The proposed critical habitat unit described below constitutes our best assessment at this time of those areas determined to be occupied at the time of listing that contain one or more PCEs essential to the conservation of the *Monardella linoidea* ssp. *viminea* that may require special management. A brief description of the proposed critical habitat unit and reasons why this unit is essential for the conservation of *M. l. ssp. viminea* is presented below.

TABLE 2.—OWNERSHIP AND APPROXIMATE AREAS (AC/HA) PROPOSED AS CRITICAL HABITAT FOR MONARDELLA LINOIDES SSP. VIMINEA

Unit	Ownership	Proposed critical habitat acres (ac) (hectares (ha))
Unit 1: Sycamore Canyon .....	Private .....	114 ac (46 ha).
	Water District .....	1 ac (1 ha).
	Total .....	115 ac (47 ha)

**Unit Description**

*Unit 1: Sycamore Canyon: (115 ac (47 ha))*

Sycamore Canyon area supports one of the largest occurrences of *Monardella linoidea* ssp. *viminea* (CNDDDB 2001) and was known to be occupied at the time of listing and is currently known to be occupied (Table 1). Lands in Unit 1 contain one or more of the PCEs identified for *M. l. ssp. viminea*. This unit is important for the conservation of *M. l. ssp. viminea* because it represents one of the ten canyons/geographic areas in San Diego County that support this species and one of only 14 occurrences of this *M. l. ssp. viminea*. Given the restricted range and low numbers of occurrences, this unit is essential to minimize the risk of extinction from random events and urban development.

Approximately 114 ac (46 ha) in Unit 1 are private lands and located within the City of Santee on lands being proposed for the Fanita Ranch

development project. Fanita Ranch is currently developing a habitat conservation plan that will serve as the foundation for the City of Santee’s subarea plan under the MSCP. In the future, we may consider excluding Fanita Ranch from critical habitat designation based on a pending or approved HCP that provide benefits for *M. l. ssp. viminea* or an approved conservation agreement between the Service and Fanita Ranch that provides assurances of the conservation measures that Fanita Ranch will undertake to protect and manage for *M. l. ssp. viminea* on their lands. Fanita Ranch has provided the Service with a letter that expressed their interest in working together to prepare a conservation agreement for *M. l. ssp. viminea* that would provide the basis for excluding their lands from designation under section 4(b)(2) of the Act.

Likewise, approximately 1 ac (1 ha) in Unit 1 is on lands owned by the Padre Dam Municipal Water District. This

water district, along with Helix Water District, Santa Fe Irrigation District, and Sweetwater Authority, is developing a multiple species habitat conservation plan under section 10(a)(1)(B) of the Act. We published a notice of intent to prepare an environmental impact statement/environmental impact report for a Natural Communities Conservation Plan and HCP on February 4, 2005 (February 4, 2005; 70 FR 6033). In the future, we may consider excluding Padre Dam Municipal Water District from critical habitat designation based on a pending or approved HCP that provide benefits for *M. l. ssp. viminea* or an approved conservation agreement between the Service and Padre Dam Municipal Water District that provides assurances of the conservation measures that Padre Dam Municipal Water District will undertake to protect and manage for *M. l. ssp. viminea* on their lands.

Habitat with features essential to the conservation of *M. l. ssp. viminea* on



private and Padre Dam Municipal Water District lands in Unit 1 may require special management to minimize impacts by nonnative invasive weeds, fire, indirect and direct effects of development, including altered hydrology, and recreational activities.

### 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. 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." We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

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

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an 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 substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). Until such a time as a proposed designation is finalized, any reasonable and prudent alternatives or reasonable and prudent measures included in a conference report are advisory.

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 (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or 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 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 conference 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.

Federal activities that may affect the *Monardella linoides* ssp. *viminea* 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 under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), 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 and private lands that are not federally funded,

authorized, or permitted do not require section 7 consultation.

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

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 *M. l. ssp. viminea*. Federal activities that, when carried out, may adversely affect critical habitat for the *M. l. ssp. viminea* include, but are not limited to:

(1) Actions that would significantly alter the natural hydrologic pattern of intermittent flows and peak seasonal flooding necessary to support *Monardella linoides* ssp. *viminea*. These activities could include Federal authorization for urban and agricultural development in the watershed that changes the amount, timing, frequency, and magnitude of stream flows. Increased and/or more frequent water flows associated with urban runoff could lead to dense stands of riparian vegetation that may out-compete *M. l. ssp. viminea*. Changes in the magnitude of seasonal flooding may increase scouring and erosion of terraces, banks, and benches and thereby reduce the quality and availability of suitable soils and habitat. Conversely, reduced water flow could result in more xeric conditions that would limit plant growth and reproduction and thereby allowing more drought tolerant plants to compete with *M. l. ssp. viminea*.

(2) Actions that would remove alluvium from stream channels or change the physical structure of the stream channel by altering floodplains, benches, sand bars, and stream channels from sand and gravel mining, stream channelization, flood channel management, highway construction, and dredging. Federal authorization for projects that physically alter the stream channel may remove suitable alluvium from stream channels and result in the loss and degradation of habitat for *M. l. ssp. viminea*.

*Application of Section 4(a)(3) and Possible Exclusions Under Section 4(b)(2) of the Act*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographical area occupied by the species at the time of listing on which are found those physical and biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Therefore, areas within the geographical area occupied by the species at the time of listing that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographical area occupied by the species at the time of listing that do not require special management or protection also are not, by definition, critical habitat. To determine whether an area requires special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other

reason, then the area does not require special management.

We consider a current plan to provide adequate management or protection if it meets two criteria: (1) The plan provides management, protection or enhancement to the PCEs at least equivalent to that provided by a critical habitat designation; and (2) the Service has reasonable expectation the management, protection or enhancement actions will continue for the foreseeable future.

Section 318 of fiscal year 2004 the National Defense Authorization Act (Pub. L. 108-136) amended the Endangered Species Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

Further, section 4(b)(2) of the Act states that critical habitat shall be

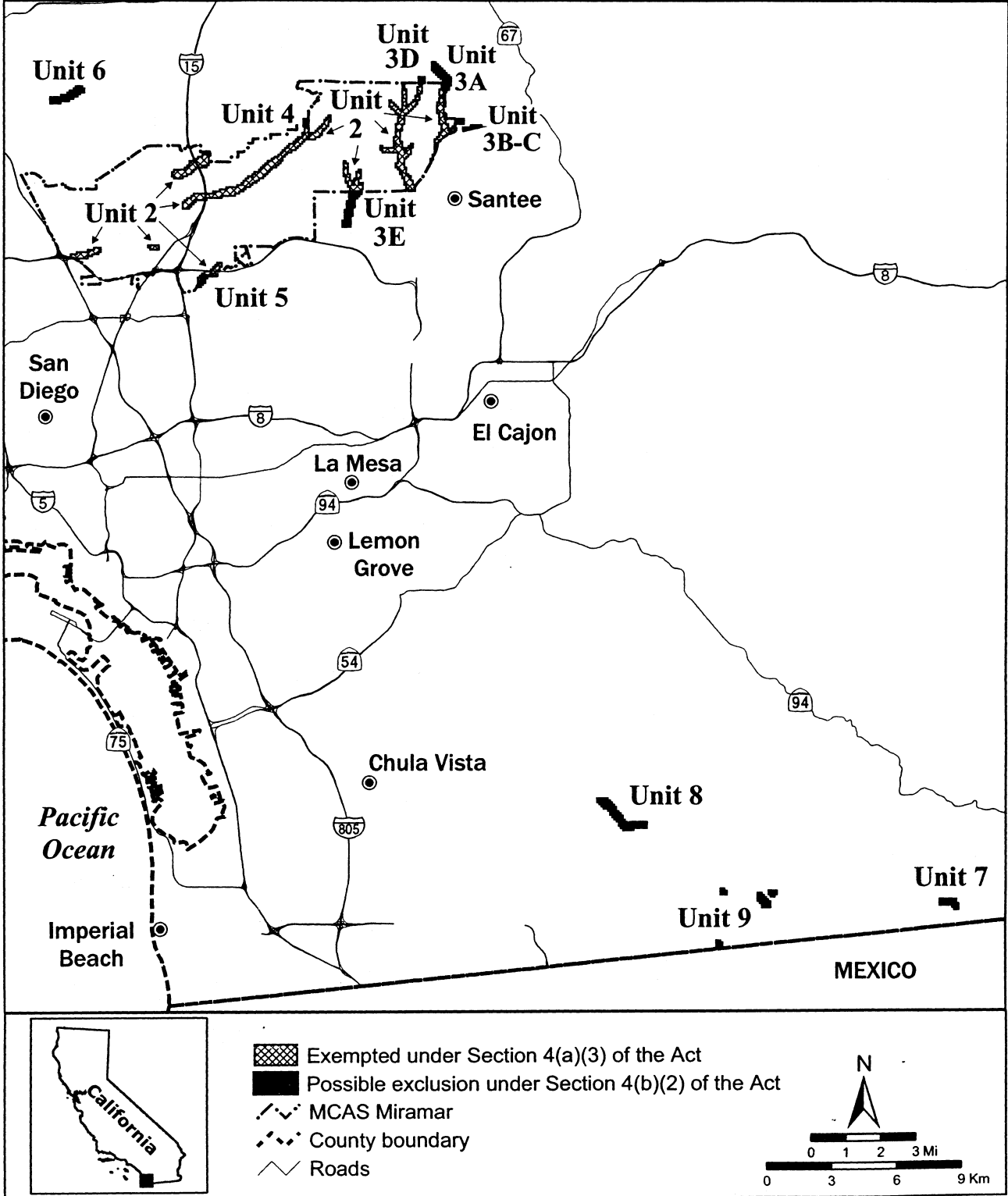
designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

For our critical habitat designations, we use the provisions outlined in sections 3(5)(A), 4(a)(3) and 4(b)(2) of the Act to evaluate those specific areas that we consider proposing as critical habitat. Lands we have found that do not meet the definition of critical habitat under section 3(5)(A) or that we are considering excluding pursuant to section 4(b)(2) include those covered by legally operative HCPs that cover the species.

The following index figure provides an overview of the areas we are exempting under section 4(a)(3) of the Act and considering excluding under section 4(b)(2) of the Act from critical habitat.

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Figure 1  
 Index of Areas Exempted Under Section 4(a)(3) of the Act and Possible Exclusions Under Section 4(b)(2) of the Act for *Monardella linoides* ssp. *viminea* (willow monardella), San Diego County, California



*Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3)*

As discussed above, under section 4(a)(3) of the Act, the Secretary is prohibited from designating as critical habitat any Department of Defense lands or other geographical areas that are subject to an INRMP if the Secretary has determined in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. In order to qualify for this exemption, an INRMP must be found to provide a benefit to the species in question. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the military installation, including conservation provisions for listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species. Habitat on military installations with completed and approved INRMPs that provide a benefit to the species are exempt from designation as critical habitat pursuant to section 4(a)(3)(B).

We believe that the INRMP for MCAS Miramar provides a benefit for *Monardella linoides* ssp. *viminea*. Therefore, we are exempting MCAS Miramar from critical habitat designation under section 4(a)(3) of the

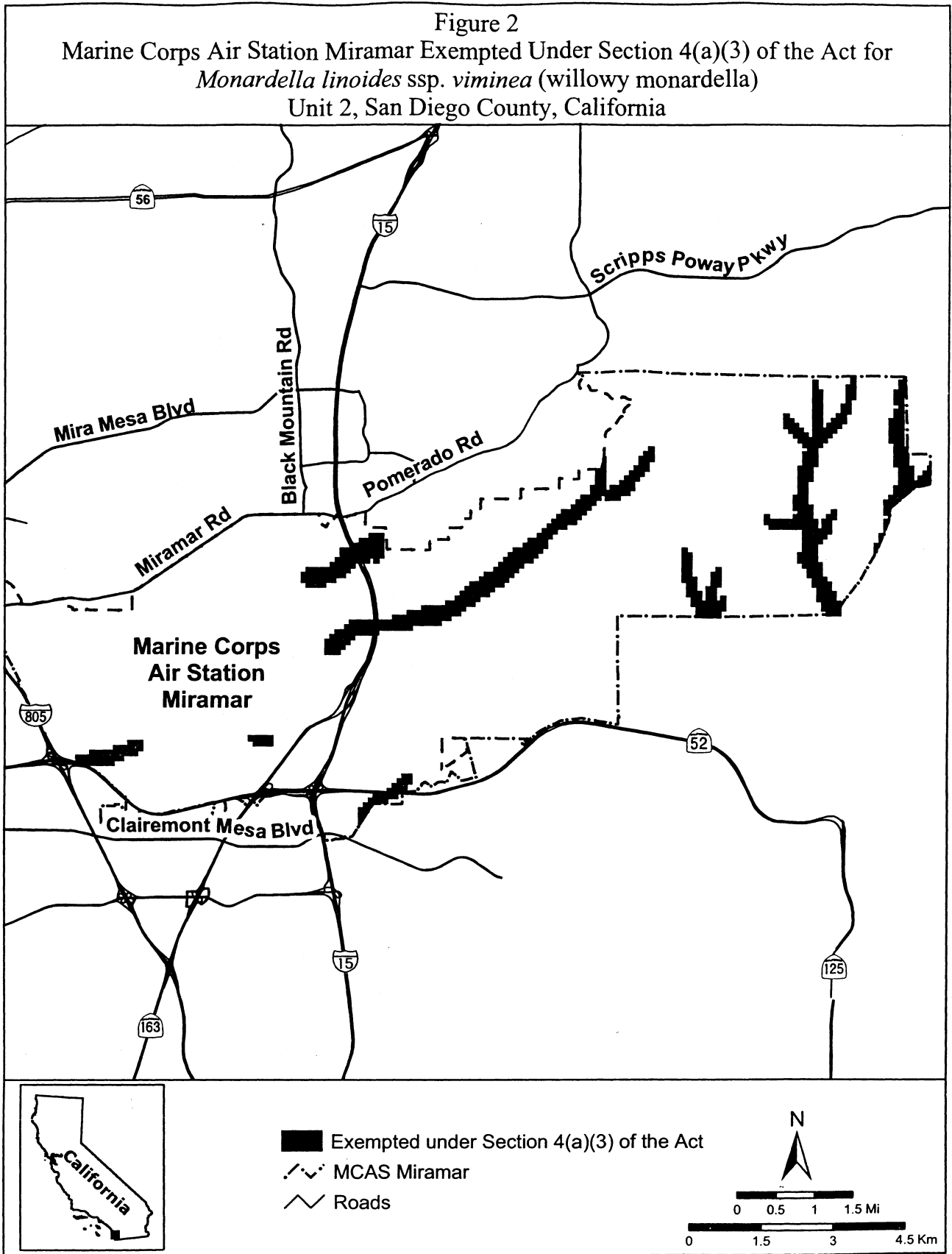
Act based on the legally operative INRMP for this station (Unit 2). Through our process of identifying areas that contain features essential to the conservation of *M. l. ssp. viminea*, we found that 1,863 ac (754 ha) on MCAS Miramar contain the features that are essential to the conservation of *M. l. ssp. viminea*. MCAS Miramar, which contains a large majority of the mapped *M. l. ssp. viminea* occurrences in the United States, has developed and is currently implementing their INRMP for the Station. The INRMP identifies management areas for specific endangered species, including *M. l. ssp. viminea*. The INRMP integrates current and future land use activities at MCAS Miramar with natural resources management and conservation. Chapter 7 of the INRMP outlines objectives and planned activities for the Station. High priority planned activities include management of wetlands and their associated watersheds to maintain no-net-loss of wetland values as well as management of special status species, including *M. l. ssp. viminea*. Over 99 percent of *M. l. ssp. viminea* populations within MCAS Miramar are protected within specific management areas (Dames and Moore 2000). Specific measures, such as management and monitoring of sensitive biological resources, apply to these management areas. Future development projects within MCAS Miramar should avoid these management areas. The U.S. Marines have initiated long-term monitoring and management of *M. l. ssp. viminea* on MCAS Miramar (San Diego Natural History Museum 2002). The U.S. Marines conducted baseline

surveys for *M. l. ssp. viminea* during the spring of 2002. Any future projects on the station that may affect *M. l. ssp. viminea* will be subject to consultation between MCAS Miramar and the Service under section 7 of the Act. We therefore believe that the ongoing protection, management and monitoring of *M. l. ssp. viminea* provided under the MCAS Miramar INRMP provides a benefit to the species. Therefore, we are exempting MCAS Miramar lands from critical habitat designation under Section 4(a)(3) of the Act.

The U.S. Marine Corps is currently working on a draft version of their update of this INRMP which further addresses management and conservation of *Monardella linoides* ssp. *viminea*. This updated plan includes detailed mapping of *M. l. ssp. viminea*, places 99 percent of the point occurrences in areas that focus on natural resource management referred specifically to as “Level Two Management Areas,” and outlines specific projects that will be funded to aid in the conservation of *M. l. ssp. viminea* (pers. comm. David Boyer, Director, Natural Resources Division, Environmental Management Department, MCAS Miramar to Jonathan Snapp-Cook, Fish and Wildlife Biologist, Service, October 4, 2005). The updated INRMP will provide additional benefits to *M. l. ssp. viminea*.

The following figure shows the areas of MCAS Miramar that we are exempting from critical habitat designation under section 4(a)(3) of the Act:

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### Relationship of Critical Habitat to Habitat Conservation Plans—Possible Exclusions Under Section 4(b)(2) of the Act

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

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 available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat, unless the failure to designate such area will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

Below, we first provide some general background information on the San Diego MSCP, followed by an analysis pursuant to section 4(b)(2) of the Act of the benefits of including San Diego MSCP lands within the critical habitat designation, an analysis of the benefits of excluding these lands, and an analysis of why we believe the benefits of exclusion are greater than those of inclusion. Finally, we provide a determination that exclusion of these lands would not result in extinction of *Monardella linoides* ssp. *viminea*.

We are considering excluding from critical habitat designation approximately 494 ac (200 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. *Monardella linoides* ssp. *viminea* is a covered species under these two approved and legally operative subarea plans. We completed our section 7 consultations on the issuance of the section 10(a)(1)(B) permit for the City of San Diego subarea plan on June 6, 1997, and on the permit for the County of San Diego subarea plan on March 12, 1988. These HCPs provide special management and protection for the physical and biological features essential for the conservation of *M. l.* ssp. *viminea* 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 essential 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 *M. l.* ssp. *viminea*.

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. Three of the 12 jurisdictions cover lands that support *Monardella linoides* ssp. *viminea*. Two of the jurisdictions, County of San Diego and the City of San Diego, have completed subarea plans. The third jurisdiction, the City of Santee, is currently preparing its subarea plan. 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. As noted above, we completed each of these analyses prior to approving the City and County of San Diego subarea plans and incidental take permits.

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 *Monardella linoides* ssp. *viminea*, 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 *M. l.* ssp. *viminea* 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 will prepare a framework management plan as a condition of its implementing agreement. The framework management plan will provide general direction for all preserve management issues within the subarea plan's boundaries. Area-specific management directives will be 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 *Monardella linoides* ssp. *viminea* and reduce the threats to this species. The MSCP also provides for a biological monitoring program, and *M. l.* ssp. *viminea* is identified as a first priority plant species for field monitoring (Ogden Environmental and Energy Services 1996). Species prioritized for field monitoring (like *M. l.* ssp. *viminea*) face the greatest threats to their viability, and detailed field monitoring would assess both immediate threats and long-term population trends. The City of San Diego monitors *M. l.* ssp. *viminea* on an annual basis (City of San Diego 2000, 2001, 2002, 2003, and 2004). Moreover, the rare plant monitoring plan is being 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 MHPA and PAMA, the MSCP incorporates processes to protect sensitive species of limited distribution, including *Monardella linoides* ssp. *viminea*, 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) transplantation to areas identified for preservation. Under the County of San Diego's subarea plan, narrow endemic plants, including *M. l. ssp. viminea*, 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 *M. l. ssp. viminea*, 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 *M. l. ssp. viminea* 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 are therefore considering excluding from critical habitat a portion of Sycamore Canyon and all of West Sycamore Canyon, Spring Canyon, San Clemente Canyon, Elanus Canyon, Lopez Canyon, Marron Valley, and Otay Lakes under section 4(b)(2) of the Act because they are covered by the City and the County subarea plans. All of the populations of *Monardella linoides* ssp. *viminea* anticipated to be conserved by the MSCP under the City of San Diego and County of San Diego subarea plans occur in these geographical areas. These populations will be conserved and will be managed and monitored pursuant to or consistent with the MSCP. The framework and area-specific management plans (described above) provide management and monitoring of *M. l. ssp. viminea*.

The portions of Sycamore Canyon (Units 3A, 3B, and 3C) that we are

considering excluding from critical habitat are under City and County ownership and are within the reserve design of the MHPA and PAMA under the City's and County's subarea plans. The majority of the County-owned PAMA lands in Sycamore Canyon has already been conserved and is being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, consistent with the framework and area-specific management plans described above. The remaining County-owned lands and City-owned lands in Sycamore Canyon have not yet been formally committed to the preserve but will continue to be protected through the City's and County's subarea plans processes to protect narrow endemic species (described above) until these lands become part of the preserve.

Lands in West Sycamore Canyon (Unit 3D) that we are considering excluding from critical habitat are under City ownership and are within the reserve design of the MHPA. These lands have been already conserved and are being managed for the conservation of covered species consistent with the framework and area-specific management plans described above, including *Monardella linoides* ssp. *viminea* under the City's subarea plan.

Lands in Spring Canyon (Unit 3E) that we are considering excluding from critical habitat are under private ownership but are within the reserve design of the MHPA and are targeted for preservation under the City's subarea plan. The private lands in Spring Canyon have not yet been formally committed to the preserve, but are within an area that calls for 100 percent conservation of *Monardella linoides* ssp. *viminea*. The City of San Diego has recently acquired private lands in Spring Canyon through the MSCP that will benefit *M. l. ssp. viminea*. Populations of *M. l. ssp. viminea* on the remaining private lands will continue to be protected through the City's subarea plan process described above to protect narrow endemic species until these private lands become part of the preserve.

Lands in San Clemente Canyon (Unit 4) that we are considering excluding from critical habitat are under City ownership. The majority of these lands is within the reserve design of the MHPA, has been committed to the preserve, and is being managed for the conservation of covered species consistent with the framework and area-specific management plans described above, including *Monardella linoides* ssp. *viminea*, under the City's MSCP subarea plan. A small portion of these

lands is on City-owned lands that are not within the MHPA. Populations of *M. l. ssp. viminea* on the remaining City-owned lands will continue to be protected through the City's subarea plan process described above to protect narrow endemic species.

Lands in Elanus Canyon (Unit 5) that we are considering excluding from critical habitat are under City ownership and are within the reserve design of the MHPA. They are committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the City's subarea plan.

Lands in Lopez Canyon (Unit 6) that we are considering excluding from critical habitat are under City ownership and are within the reserve design of the MHPA. The lands are committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the City's subarea plan.

Lands in Marron Valley (Unit 7) that we are considering excluding from critical habitat are under City and State ownership and are within the reserve design of the MHPA. The City-owned lands have been committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the City's subarea plan.

Lands in Otay Lakes (Unit 8) that we are considering excluding from critical habitat are under City of San Diego, City of Chula Vista, State of California, and private ownership; are within the MHPA and PAMA; and are either already committed to the preserve or are targeted for 100 percent preservation under the City's and County's subarea plans. The lands owned by the City of Chula Vista were formerly owned by Otay Ranch and were conveyed to the City as mitigation of the Otay Ranch development. These lands are conserved within the County of San Diego's subarea plan. The preserve lands are being managed for the conservation of the covered species, including *Monardella linoides* ssp. *viminea*, under the City's and County's subarea plans and pursuant to commitments made by the State of California to implement the MSCP on state owned lands. Those lands not yet formally committed to the preserve will continue to be protected through the County's subarea plan process described above to protect narrow endemic species until these lands become part of the preserve.

The following figures show the San Diego MSCP lands that we are considering excluding from critical



habitat designation under section 4(b)(2)  
of the Act:  
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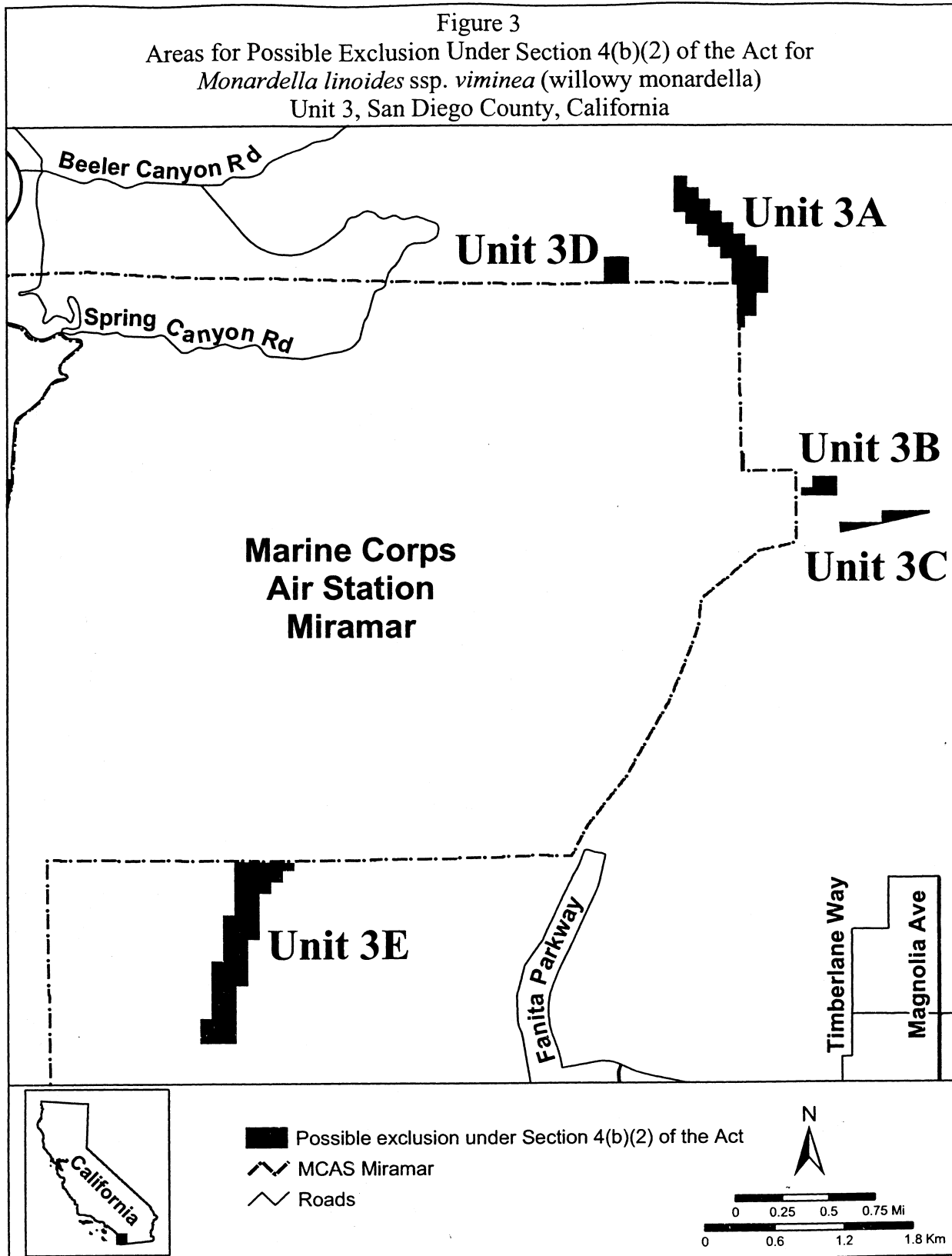


Figure 4  
Areas for Possible Exclusion Under Section 4(b)(2) of the Act for  
*Monardella linoides* ssp. *viminea* (willowy monardella)  
Units 4, 5, and 6, San Diego County, California

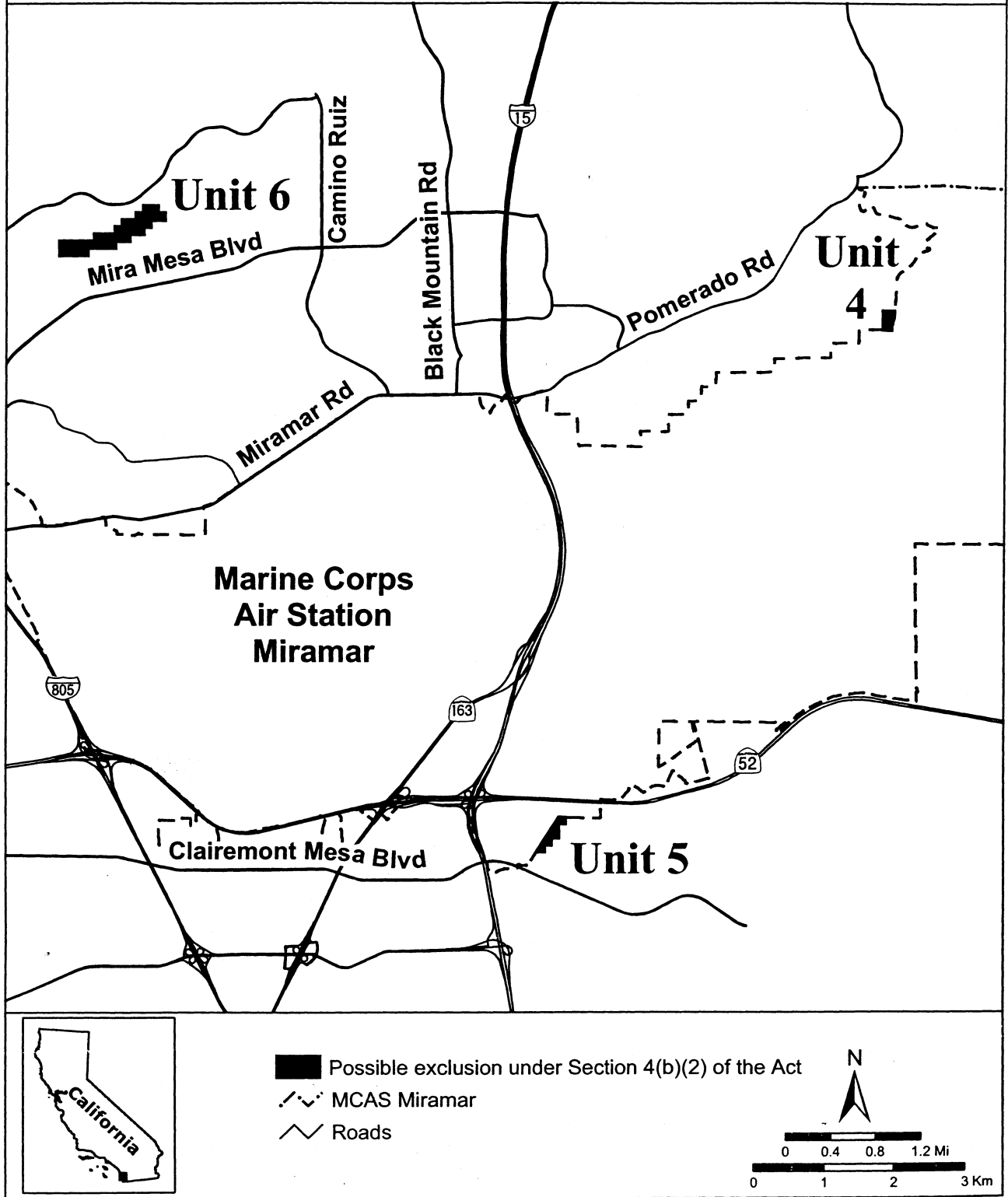
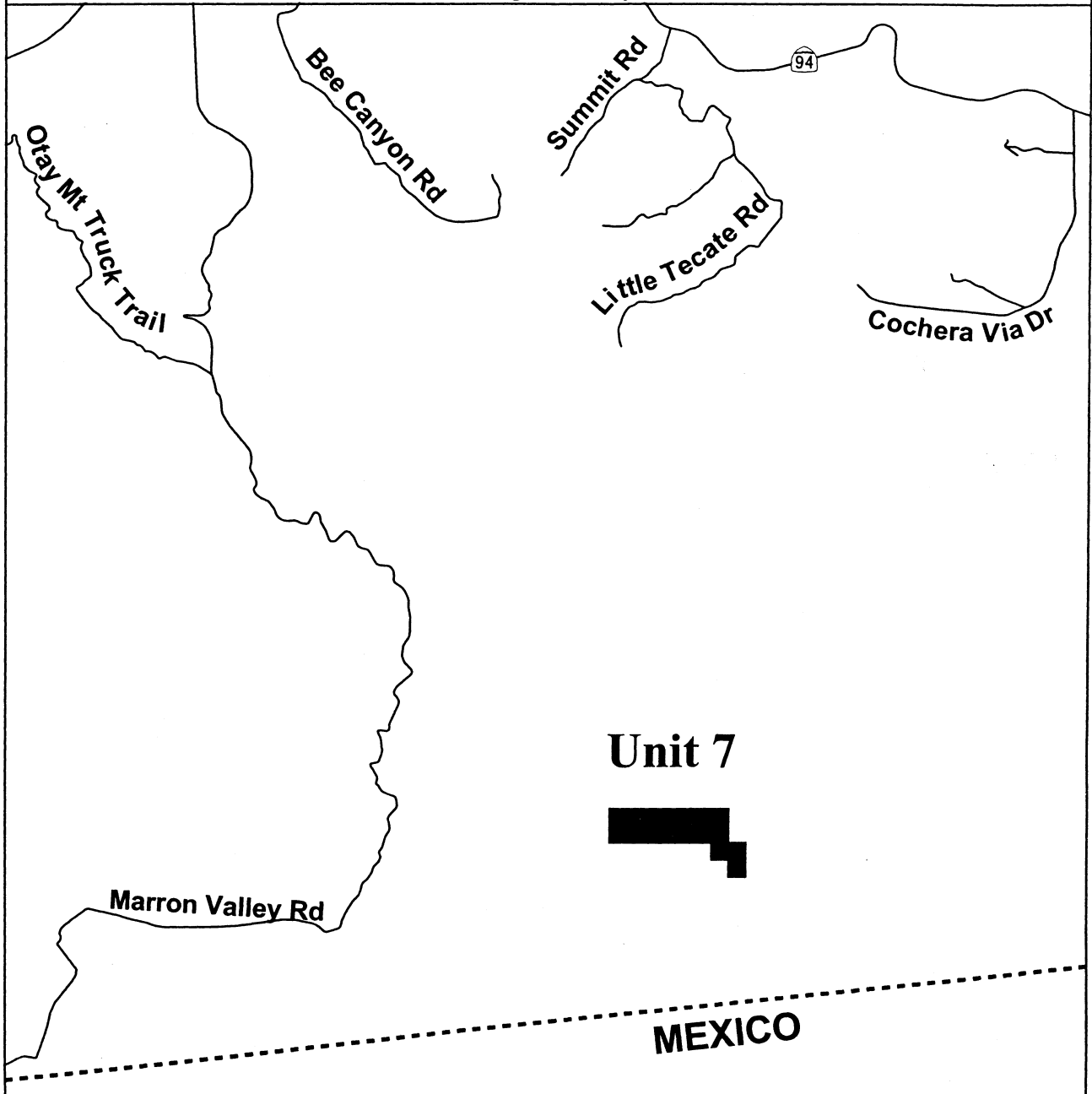
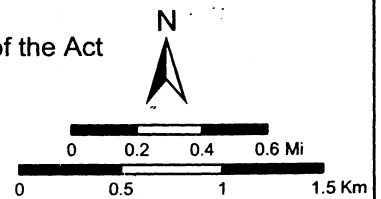
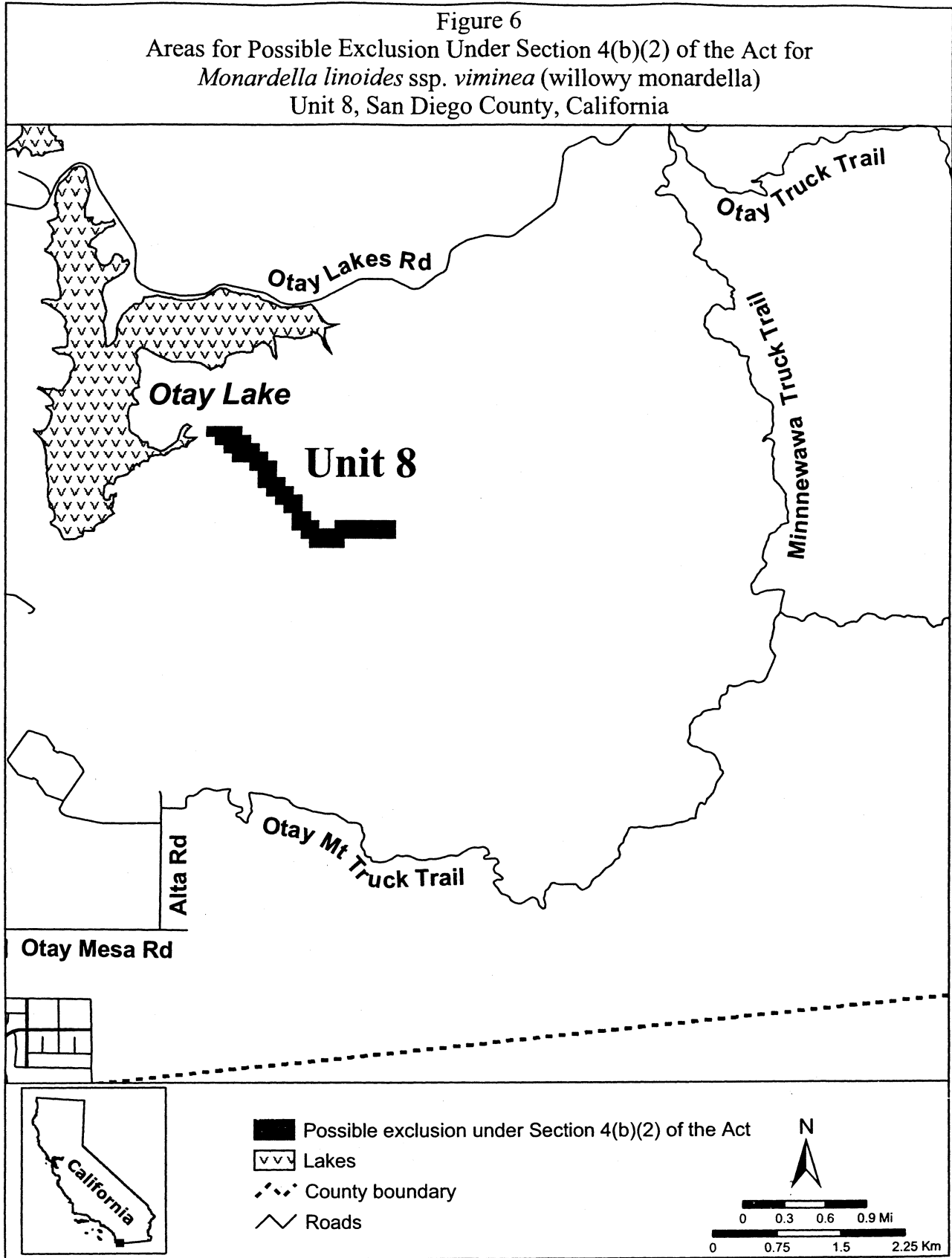


Figure 5  
Areas for Possible Exclusion Under Section 4(b)(2) of the Act for  
*Monardella linoides* ssp. *viminea* (willow monardella)  
Unit 7, San Diego County, California



- Possible exclusion under Section 4(b)(2) of the Act
- - - County boundary
- Roads





## (1) Benefits of Inclusion

Overall, we believe that there is minimal benefit from designating critical habitat for *Monardella linoides* ssp. *viminea* within approved subarea plans under the San Diego MSCP. As explained above, the majority of these lands are either already permanently protected and managed for the conservation of covered species, including *M. l. ssp. viminea* or are subject to restrictions on development and City's and County's subarea plans' processes described above to protect narrow endemic species. These processes will protect narrow endemic species, including *M. l. ssp. viminea*, until these lands become part of the preserve. Below, we discuss benefits of inclusion of these HCP lands.

A benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a level of protection under section 7(a)(2) of the Act for *Monardella linoides* ssp. *viminea* that is distinct from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. *Gifford Pinchot* arguably makes it easier to reach an 'adverse modification' finding by reducing the harm or affecting recovery, rather than the survival of the species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, there is also an important limitation inherent in section 7(a)(2). This provision limits adverse effects to the species and its designated critical habitat either through jeopardy or destruction or adverse modification analyses. It does not require positive improvements to or enhancement of the species' status. Thus, any management plan will almost always provide more benefit than the critical habitat designation, particularly where, as is the case for *M. l. ssp. viminea*, the species may require active management to recover.

The areas being considered for exclusion from critical habitat are currently occupied by the species. Therefore, for Federal actions that may affect lands occupied by *Monardella linoides* ssp. *viminea* and may adversely affect the species, consultation would be required, even without the critical

habitat designation under section 7 of the Act. If these areas were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained previously in Effects of Critical Habitat Designation section, and their PCEs would be protected from destruction or adverse modification using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. Thus, a potential benefit of critical habitat would be the requirement of Federal agencies to ensure their actions do not result in the destruction or adverse modification of critical habitat pursuant to section 7(a)(2) of the Act. We believe that the affirmative management and protection afforded essential habitat of *M. l. ssp. viminea* under the approved MSCP subarea plans provides permanent conservation benefits to the species in excess of those likely to result through the regulatory requirement to avoid adverse modification of critical habitat under Section 7. Therefore the additional conservation benefit, if any, of designating critical habitat on lands covered by approved MSCP subarea plans, would be minimal.

Another potential benefit of designation would be to signal the importance of these lands to the conservation of *Monardella linoides* ssp. *viminea* to Federal agencies and to the public. In *Sierra Club v. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat containing the features essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The inclusion of an area as critical habitat may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this educational benefit has largely been achieved for *M. l. ssp. viminea*. The public outreach and environmental impact reviews required under the National Environmental Policy Act for the MSCP, City of San Diego Subarea Plan, and County of San Diego Subarea Plan provided significant opportunities for public education regarding the

conservation of the areas occupied by *M. l. ssp. viminea*. Under the MSCP, annual public meetings are held to assess progress being made to implement the approved subarea plans and protect covered species and their habitats. These ongoing public outreach efforts ensure that members of the public will continue to be made aware of the importance of protecting the covered species and their habitats and will be provided with a continuing opportunity to comment on and contribute to the MSCP's conservation goals. There would be little additional informational benefit gained from including these lands as critical habitat because of the level of information that has been, and continues to be, made available to the public as part of the regional planning effort.

In summary, we believe that designating any non-Federal lands within the City's and County's subarea plan as critical habitat would provide little additional regulatory or educational benefits for the species. These essential lands are already protected under the MSCP and are required to be conserved and managed for the benefit *Monardella linoides* ssp. *viminea* through implementation of the subarea plans. The additional educational benefits that might arise from critical habitat designation have been and continue to be accomplished through the public review and comment of the environmental impact documents which accompanied the development of the San Diego MSCP, periodic public meetings to assess the plans, and the recognition by the City of San Diego, County of San Diego, State of California, and Federal agencies of the presence of *Monardella linoides* ssp. *viminea* and the value of their lands for the conservation and recovery of the species that has already been provided through development and implementation of the MSCP.

## (2) Benefits of Exclusion

As mentioned above, the San Diego MSCP requires avoidance of impacts to *Monardella linoides* ssp. *viminea* both within and outside of existing and targeted reserve areas and provides for permanent conservation and active management of this species consistent with the framework and area-specific management plans (described above) and its habitat within the MHPA. Because the MSCP requires protection of the physical and biological features essential to the conservation of *M. l. ssp. viminea* and addresses the species' special management needs, we believe that designation of critical habitat would not provide an appreciable

benefit to the species beyond those achieved through the positive conservation measures in the plan.

The benefits of excluding from critical habitat designation lands covered by approved MSCP subarea plans include relieving landowners, communities, the City and the County of any additional regulatory burden that might be imposed by a critical habitat designation consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Many HCPs, particularly large regional HCPs such as the MSCP, take many years to develop and, upon completion, become regional conservation plans that essentially implement recovery objectives for listed covered species within the plan area. Additionally, many of these HCPs, including the MSCP, provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and result in a loss of species' benefits if participants abandon the HCP process. This is particularly true with regard to plant species such as *Monardella linoidea* ssp. *viminea*, and unlisted species, the coverage of which is completely voluntary under an HCP, because critical habitat designation may result in more regulatory requirements than those faced by other parties who have not participated in voluntary conservation efforts for these species.

Another benefit of excluding these lands is to maintain the partnerships developed among the City of San Diego, County of San Diego, State of California, and the Service to implement the City of San Diego Subarea Plan and County of San Diego Subarea Plan. Instead of using limited funds to comply with administrative consultation and designation requirements which are unlikely to provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP 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. A primary objective of applicants developing multiple species regional HCPs is to streamline future regulatory requirements. If lands within HCP plan areas are designated as critical habitat

and required to undergo subsequent Section 7 consultation based solely on critical habitat designation, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we would preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the regulatory prohibition against adverse modification of critical habitat unless critical habitat has already been designated within the proposed plan area, the consultation will determine if the HCP is likely to jeopardize the species in the plan area. Since the objective of virtually all habitat conservation plans is to protect the covered species by conserving their essential habitat within the plan area, an important component of the Section 7 jeopardy review is an analysis of the effects of the covered activities on this essential habitat. In the biological opinions completed for the San Diego MSCP, the Service concluded that implementation of the plan is not likely to result in jeopardy to the species directly or through habitat loss. HCPs and NCCP/HCPs, including the MSCP, typically provide for greater conservation benefits to covered species than section 7 consultations because they include proactive long-term protection and management of covered species and their habitats, along with assured funding for such management through the standards found in the 5 Point Policy for HCPs (June 1, 2000; 64 FR 35242) and the HCP "No Surprises" regulation (February 23, 1998; 63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development. In summary, the benefits of excluding lands covered by approved HCP and HCP/NCCPs generally, and the City and

County approved MSCP subarea plans in particular, include the preservation of existing partnerships and conservation efforts and the cultivation of new partnerships in the future by eliminating largely duplicative regulatory requirements that can serve as a disincentive to development and implementation of these conservation plans. This benefit is particularly important with regard to *Monardella linoidea* ssp. *viminea*, which as a listed plant species is not subject to the Act's section 9 prohibition against take. The affirmative conservation measures provided for this species under the MSCP are entirely voluntary.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We have reviewed the proposed exclusion from critical habitat of approximately 494 ac (200 ha) of non-Federal lands covered by approved subarea MSCP subarea plans and based on this review, we believe that the benefits of excluding (avoidance of increased regulatory costs which could result from including those lands in this designation of critical habitat, maintaining existing conservation partnerships, encouraging new conservation partnerships, and directing limited funding to proactive conservation actions with partners) those lands containing features essential to the conservation of *M. l. ssp. viminea* outweigh the benefits of including (limited educational and regulatory benefits, which are largely duplicative of those provided for under the MSCP) the lands in our critical habitat designation. The benefits of inclusion of these 494 ac (200 ha) of non-Federal lands as critical habitat are small because of the significant level of conservation already provided to the *M. l. ssp. viminea* and its habitat under the San Diego MSCP (conservation of occupied and potential habitat). These minimal benefits are outweighed by the significant benefits of preserving our long term partnership with the City of San Diego, County of San Diego, and State of California and encouraging similar future conservation partnerships with others through the exclusion of these 494 ac (200 ha) of non-Federal lands.

### (4) Exclusion Will Not Result in Extinction of the Species

Exclusion of these 494 ac (200 ha) of non-Federal lands would not result in extinction of *Monardella linoidea* ssp. *viminea* because these lands 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 conservation through the section 7 process also provide assurances that the species will not go extinct. The exclusion leaves these protections unchanged from those that would exist if these areas were designated as critical habitat.

**Possible Exclusion of Critical Habitat Within the Bureau of Land Management Otay Mountain Wilderness Under Section 4(b)(2) of the Act**

Federal lands managed by the Bureau of Land Management (BLM) are an integral part of the conservation strategy of San Diego MSCP. However, BLM, like any other Federal agency, is not a permittee under the section 10(a)(1)(B) permit for the San Diego MSCP. The BLM, Service, CDFG, City of San Diego, and County of San Diego, in cooperation with the San Diego Association of Governments (SANDAG) signed a MOU in June 1994 committing to cooperate in habitat conservation planning and management related to the San Diego MSCP. Under the MOU, BLM agreed to take the following actions to assist in implementing the MSCP's conservation goals and objectives: (1) To make maintenance and management of the area's unique biological diversity a principal goal in the design and implementation of its conservation programs; (2) to coordinate with the other signatory parties regarding

assessment of the wildlife values of those lands managed by BLM within San Diego County; (3) to coordinate with signatory parties to resolve any BLM, State, regional and/or local land management prescriptions that are inconsistent with existing or proposed conservation objectives; (4) to work with the County, the City, SANDAG, CDFG, and Service in identifying the lands it manages for inclusion within the region's habitat conservation systems; and (5) to work with signatory parties to acquire key habitat areas using a variety of techniques. Thus, while not a permittee to the section 10(a)(1)(B) permit for the San Diego MSCP, BLM lands, in particular those on Otay Mountain that support a variety of listed and sensitive covered MSCP species, are a key component of the overall reserve design for the MSCP.

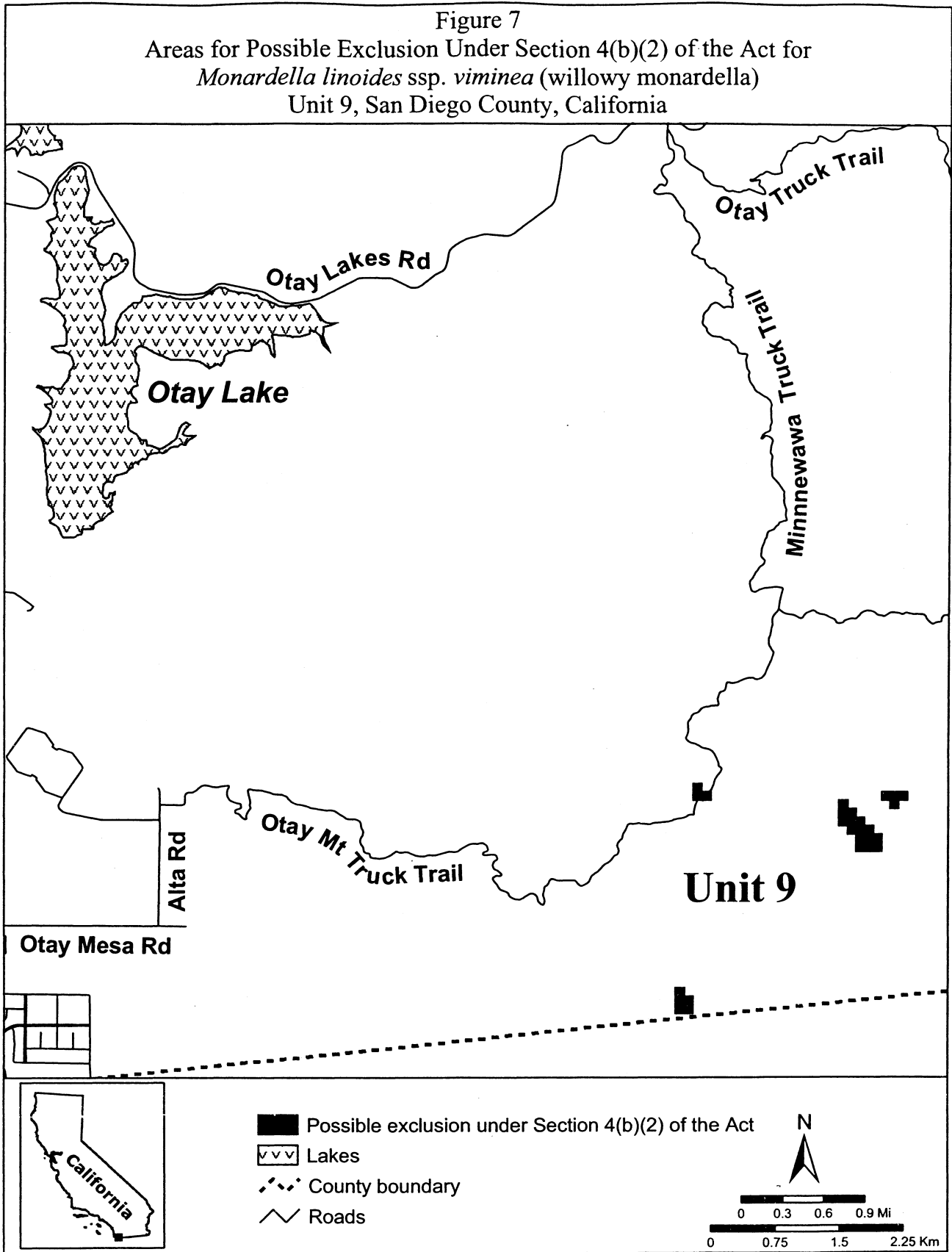
At the time of the MOU, *Monardella linoides* ssp. *viminea* was not known to occur on BLM lands at Otay Mountain. Since the development and approval of the San Diego MSCP, new information has identified a previously unknown population of *M. l. ssp. viminea* on BLM lands at West Otay Mountain. Surveys in 2000 counted 202 clumps of *M. l. ssp. viminea*, making this occurrence the fourth largest population at that time. The populations of *M. l. ssp. viminea* on BLM lands at Otay Mountain are within the area covered by the MOU. Congress formally designated BLM lands on Otay Mountain as the Otay Mountain

Wilderness in 1999 (Otay Mountain Wilderness Act, Pub. L. 106-145, December 9, 1999). The occurrences of *M. l. ssp. viminea* on Otay Mountain are within the designated boundaries of the Otay Mountain Wilderness. The inclusion of these occupied habitats within a designated Wilderness provide additional significant protection for this area and complement BLM's objective to manage these public lands to provide protection and enhancement for biological values. The Wilderness Act of 1964 (16 U.S.C. 1131 et seq.) restricts vehicles, new developments, chainsaws, mountain bikes, leasing, and mining from the wilderness area. Grazing is permitted within the wilderness area; however, no grazing allotments currently exist. Thus, the population of *M. l. ssp. viminea* on BLM land receives conservation protection consistent with the Otay Mountain Wilderness, MOU, and San Diego MSCP. We are therefore considering excluding from critical habitat Unit 9 for approximately 67 ac (27 ha) of Federal lands managed by the BLM within the designated Otay Mountain Wilderness and targeted for conservation under the MOU for the San Diego MSCP under section 4(b)(2) of the Act.

The following figure shows the areas of BLM lands that we are considering excluding from critical habitat designation under section 4(b)(2) of the Act:

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## (1) Benefits of Inclusion

Overall, we believe that there is minimal benefit from designating critical habitat for *Monardella linoides* ssp. *viminea* on BLM lands because the habitat essential for this species on Otay Mountain is already conserved within the Otay Mountain Wilderness and is targeted for conservation under the MOU for the San Diego MSCP as explained above.

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for *M. l. ssp. viminea* that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the adverse effects that occur as opposed to a requirement to provide a conservation benefit.

The inclusion of these 67 ac (27 ha) of Federal land in critical habitat designation is unlikely to provide any additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Inclusion of this area in critical habitat would require Federal agencies to ensure that their actions on these Federal lands are not likely to result in the destruction or adverse modification of critical habitat. The potential benefits resulting from this additional analysis to determine destruction or adverse modification of critical habitat are likely to be minimal to nonexistent because the extensive restrictions on permitted uses and the prohibition on development of designated wilderness lands virtually eliminates the possibility of future Federal actions likely to negatively impact essential habitat for *Monardella linoides* ssp. *viminea* within this area. Further, in contrast to section 7(a)(2) of the Act, the wilderness designation and MOU go well beyond a simple requirement to avoid adverse modification of critical habitat. BLM has demonstrated its proactive commitment to the conservation goals and objectives of the MSCP by entering into the 1994

MOU and committing to manage its public lands for the benefit of *M. l. ssp. viminea* and other covered species.

Another potential benefit of critical habitat would be to signal the importance of these lands to Federal agencies, scientific organizations, State and local governments, and the public to encourage conservation efforts to benefit *M. l. ssp. viminea* and its habitat. However, as discussed above, the importance of protecting the biological resource values of these lands, including *M. l. ssp. viminea*, has already been clearly and effectively communicated to Federal, State, and local agencies and other interested organizations and members of the public through designation of the lands as wilderness as well as through the 1994 MOU.

## (2) Benefits of Exclusion

As mentioned above, the Otay Mountain Wilderness designation provides significant levels of protection, and the MOU provides for the management and protection of *Monardella linoides* ssp. *viminea* on lands managed by the BLM consistent with the San Diego MSCP. Through these mechanisms, the physical and biological features essential for the conservation of *M. l. ssp. viminea* will be protected and managed. We believe that designation of critical habitat would not provide any meaningful additional benefit to the species and its habitat beyond those provided through Otay Mountain Wilderness designation and the 1994 MSCP MOU.

A benefit of excluding Federal lands within the Otay Mountain Wilderness and the MOU from critical habitat designation includes relieving Federal agencies of any unnecessary additional regulatory burden that might be imposed by a critical habitat designation. As noted above, this benefit is likely to be minimal since the wilderness designation prohibits virtually all development and use of these lands that might adversely modify designated critical habitat. The exclusion of these Federal lands as critical habitat does not remove the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of *M. l. ssp. viminea* or to comply with the Otay Mountain Wilderness Act.

Another benefit from excluding these lands is to maintain the partnerships developed among BLM, Service, State of California, City of San Diego, and the County of San Diego to manage the Otay Mountain Wilderness and implement the San Diego MSCP. Instead of using limited funds to comply with

administrative consultation and designation requirements that cannot provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species. By excluding these lands, we would preserve our current partnerships.

## (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits of exclusion (avoiding the costs in money and time of duplicative and unnecessary Section 7 consultations) of the lands containing features essential to the conservation of *Monardella linoides* ssp. *viminea* within the designated Otay Mountain Wilderness, although minimal, outweigh the even more minimal benefits of inclusion (potential educational and regulatory benefits that are already provided and exceeded under the Otay Mountain Wilderness Act and MOU) of these lands as critical habitat.

Critical habitat designation is anticipated to provide little or no additional benefit to *Monardella linoides* ssp. *viminea* on BLM lands. The primary benefit of any critical habitat is that activities that require Federal funding, permitting, or authorization, and which may affect critical habitat, require consultation pursuant to section 7 of the Act to ensure the activity will not destroy or adversely modify designated critical habitat. This benefit is already present by virtue of the inclusion of the occupied habitat within the Otay Mountain Wilderness. The educational benefits of critical habitat, including informing the public of areas that are important to the conservation of listed species, are already in place as a result of the enactment of the Otay Mountain Wilderness legislation and the approval and ongoing implementation of the MSCP. For these reasons, we believe that the inclusion of critical habitat on BLM lands would provide virtually no benefit.

After weighing the minimal benefits of including these lands as critical habitat against the slightly greater benefits derived from excluding these lands as critical habitat, we are considering excluding from critical habitat BLM lands within the Otay Mountain Wilderness pursuant to section 4(b)(2) of the Act.

## (4) Exclusion Will Not Result in Extinction of the Species

The proposed exclusion of these 67 ac (27 ha) of Federal lands would not result in extinction of *Monardella linoides* ssp. *viminea* because these lands will be permanently protected for

the benefit of this species and its essential habitat pursuant to the Otay Mountain Wilderness Act and will be actively managed pursuant to the 1994 MOU. The protection of the Otay Mountain population of *Monardella linoidea* ssp. *viminea* and its habitat, along with the conservation of the remaining populations and essential habitat of this species under the San Diego MSCP and MCAS Miramar INRMP, will ensure the species' continued existence.

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

We have not included legal descriptions or maps of the areas we are exempting (under section 4(a)(3) of the Act) or excluding (under section 4(b)(2) of the Act) in the rule portion of this document. As mentioned above, however, we are soliciting public comment on whether the exemption or possible exclusions are appropriate for the subject lands.

#### Economic Analysis

An analysis of the economic impacts of the proposed critical habitat designation for *Monardella linoidea* ssp. *viminea* will be prepared soon. 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://carlsbad.fws.gov>, or by contacting the Carlsbad Fish and Wildlife Office directly (see **ADDRESSES** section).

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), 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 (E.O.) 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 E.O. 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and E.O. 12630.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis will be available from the Internet Web site at <http://carlsbad.fws.gov> or by contacting the CFWO directly (see **ADDRESSES** section). *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Our assessment of economic effect will be completed prior to final rulemaking based upon review of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

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 is prepared pursuant to section 4(b)(2) of the Act and E.O. 12866. This

draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. 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 Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E. O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Monardella linoides* ssp. *viminea* is not a significant regulatory action under E. O. 12866, and 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 the proposed critical habitat is on private lands and Padre Dam Municipal Water District lands. As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

#### *Federalism*

In accordance with E.O. 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI policy, we requested information from, and coordinated development of, this proposed critical habitat designation with the State of California Resources Agency. The designation of critical habitat in areas currently occupied by *Monardella linoides* ssp. *viminea* 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 PCEs 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 Endangered Species Act. This proposed rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of *Monardella linoides* ssp. *viminea*.

#### *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 Tenth Circuit, 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 occupied at the time of listing containing the features essential for the conservation, and no Tribal lands that are unoccupied areas that are essential for the conservation of *Monardella linoides* ssp. *viminea*. Therefore, we are proposing no critical habitat for *M. l.* ssp. *viminea* is not being 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 "*Monardella linoides* ssp. *viminea*" 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>Monardella linoides</i> ssp. <i>viminea</i> .	* willowy monardella	* U.S.A. (CA), Mexico	* Lamiaceae (Mint family).	* E	* 629	* 17.96(a)	* NA
*	*	*	*	*	*	*	*

3. In § 17.96(a), add critical habitat for *Monardella linoides* ssp. *viminea* in alphabetical order under Family Lamiaceae to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) *Flowering plants.*

\* \* \* \* \*

Family Lamiaceae: *Monardella linoides* ssp. *viminea* (willowy monardella)

(1) Critical habitat unit is depicted for San Diego County, California, on the map below.

(2) The primary constituent elements for *Monardella linoides* ssp. *viminea* are the habitat components that provide:

(i) Coarse, rocky, sandy alluvium on terraced floodplains, benches, stabilized sandbars, channel banks, and sandy washes along and within the ephemeral drainages that provide space for growth, reproduction, and dispersal;

(ii) Ephemeral drainages where water flows only after peak seasonal rains and major flooding events, periodically scours riparian vegetation, and redistributes alluvial material by eroding and developing stream channels, benches, and sandbars, thus maintaining necessary dynamic habitat processes for the species; and

(iii) Coastal sage and riparian scrub with an open and semi-open canopy and little or no herbaceous understory situated along ephemeral drainages and adjacent floodplains to ensure that the subspecies receives adequate sunlight for nutrient uptake for photosynthesis.

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

(4) Data layers defining the map unit were created on a base of USGS 7.5' quadrangles, and the critical habitat unit was then mapped using a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the area defined by features essential to the conservation of *Monardella linoides* ssp. *viminea*.

(5) Unit 1 for *Monardella linoides* ssp. *viminea*: Sycamore Canyon Unit, San Diego County, California. From USGS 1:24,000 quadrangle San Vicente Reservoir. Lands bounded by the following UTM NAD27 coordinates

(E,N): 501900, 3640200; 501700, 3640200; 501700, 3640100; 501600, 3640100; 501600, 3640000; 501800, 3640000; 501800, 3640100; thence east to the City of Santee boundary at y-coordinate 3640100; thence south and east following the City of Santee boundary to x-coordinate 502700; thence south following 502700, 3640000; 502400, 3640000; 502400, 3639900; thence west to the City of Santee boundary at y-coordinate 3639900; thence north along the City of Santee boundary to y-coordinate 3640300; thence east to 501600, 3640300; thence north to the City of Santee boundary at x-coordinate 501600; thence west along the City of Santee boundary to x-coordinate 501900; returning to 501900, 3640200; and lands bounded by 501400, 3639800; 501200, 3639800; 501200, 3639700; thence west to the City of Santee boundary at y-coordinate 3639700; thence north along the City of Santee boundary to x-coordinate 501400; returning to 501400, 3639800; and beginning at 501000, 3639600; thence west to the City of Santee boundary at y-coordinate 3639600; thence northeast along the City of Santee boundary to x-

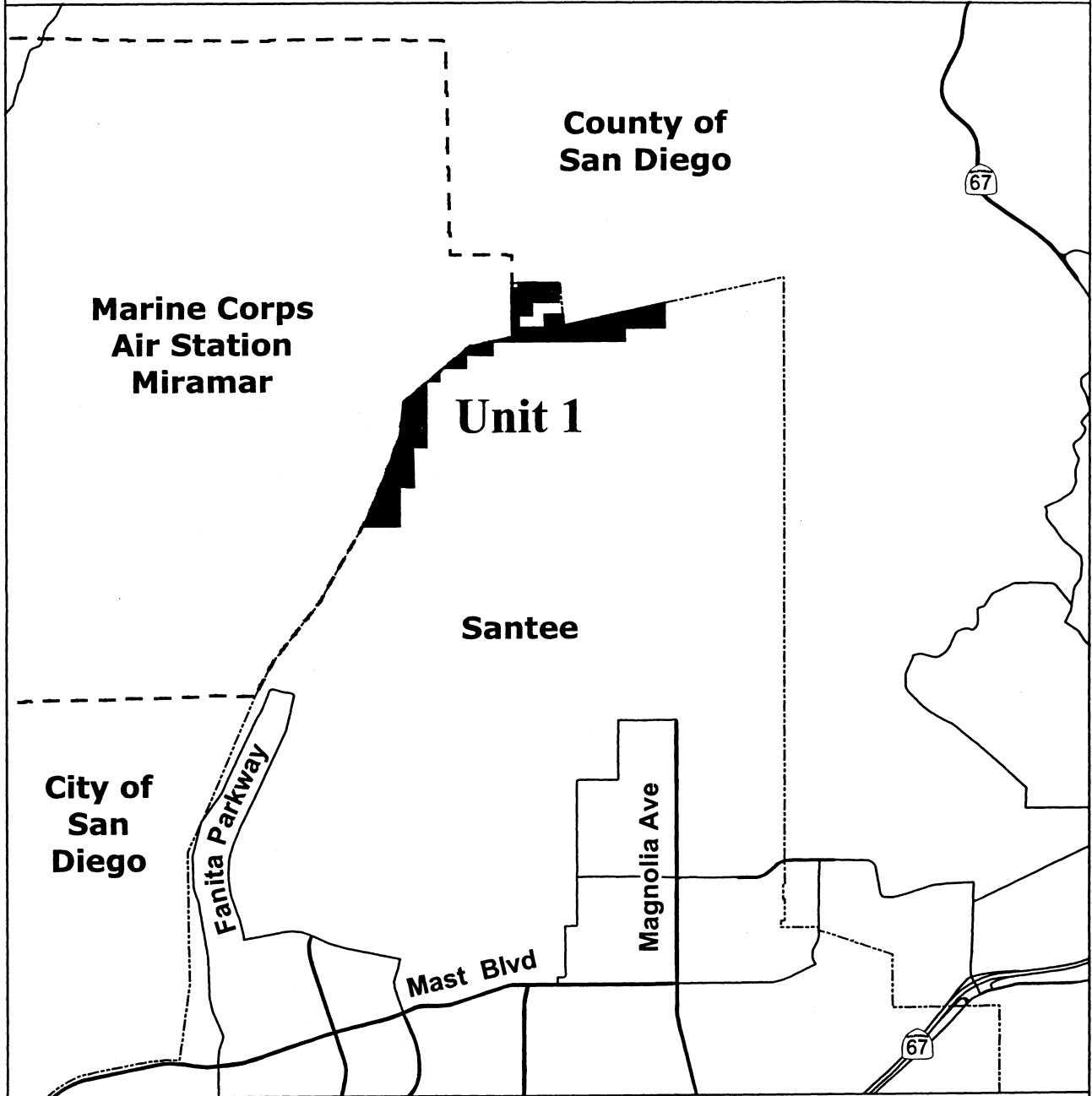
coordinate 501000; returning to 501000,  
3639600; and lands bounded by 500900,  
3639100; 500800, 3639100; 500800,  
3638800; 500700, 3638800; 500700,





3638500; thence west to the City of  
Santee boundary at y-coordinate  
3638500; thence northeast along the  
City of Santee boundary to x-coordinate

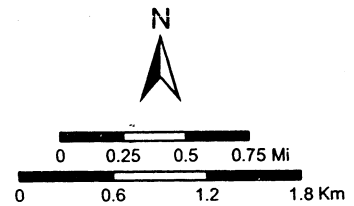
500900; thence returning to 500900,  
3639100.

**BILLING CODE 4310-55-P**

Map of  
Proposed Critical Habitat for *Monardella linoides* ssp. *viminea* (willow monardella)  
Unit 1, Sycamore Canyon, San Diego County, California



-  Proposed critical habitat
-  MCAS Miramar
-  City boundaries
-  Roads





\* \* \* \* \*

Dated: November 1, 2005.

**Craig Manson,***Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05-22190 Filed 11-8-05; 8:45 am]

BILLING CODE 4310-55-C

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 622**

[Docket No. 051031284-5284-01; I.D. 102605B]

RIN 0648-AT64

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Atlantic; Commercial Spanish Mackerel Fishery of the Atlantic; Control Date****AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.**ACTION:** Advance notice of proposed rulemaking; consideration of a control date.

**SUMMARY:** This notice announces the South Atlantic Fishery Management Council (SAFMC) is considering additional management measures to limit entry into the commercial fishery for Spanish mackerel in the exclusive economic zone of the Atlantic (South Atlantic EEZ). Possible measures include the establishment of a limited entry program to control participation or effort in the commercial Spanish mackerel fishery in the Atlantic. If a limited entry program is established, the SAMFC is considering June 15, 2004, as a possible control date.

**DATES:** Comments must be submitted by December 9, 2005.**ADDRESSES:** You may submit comments by any of the following methods:

- E-mail: 0648-

AT64.ANPR@noaa.gov. Include in the subject line of the e-mail comment the following document identifier: 0648-AT64.

- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

- Fax: 727-824-5308.

**FOR FURTHER INFORMATION CONTACT:** Steve Branstetter, 727-824-5305.

**SUPPLEMENTARY INFORMATION:** The commercial fishery for Spanish mackerel in the Atlantic EEZ is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Atlantic and Gulf of Mexico (FMP). The FMP was prepared jointly by the SAFMC and the Gulf of Mexico Fishery Management Council (GMFMC) and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act.

The SAFMC anticipates that future action may be necessary to control effort in the Atlantic Spanish mackerel fishery by restricting the number of participants. The SAFMC has concerns about increasing fishing effort in the Atlantic EEZ and wants to prevent the possibility of the development of excess harvesting capacity for the Spanish mackerel fishery of the region. Should the SAFMC and GMFMC take future action to restrict participation in the fishery, they may use June 15, 2004, as a possible control date. This control date would replace an existing control date of July 2, 1993 (58 FR 35914, July 2, 1993). Implementation of any program to restrict access in the Atlantic

Spanish mackerel fishery would require preparation of an amendment to the FMP and publication of a notice of availability of the amendment with a comment period, publication of a proposed rule with a public comment period, approval of the amendment, and issuance of a final implementing rule.

Consideration of a control date does not commit the SAFMC, GMFMC, or NMFS to any particular management regime or criteria for entry into the commercial Spanish mackerel fishery. Fishermen are not guaranteed future participation in a fishery regardless of their entry date or intensity of participation in the fishery before or after the control date under consideration. Use of the control date in future management actions would mean that anyone entering the fishery after the control date would not be assured of future access. Nevertheless, even fishermen who are permitted prior to the control date also are not guaranteed future participation in a fishery. The SAFMC may choose to give variably weighted consideration to fishermen active in the fishery before and after the control date. Other qualifying criteria, such as documentation of landings and sales, may be applied for entry into the fishery. The SAFMC subsequently may choose a different control date, or they may choose a management regime without using a control date. The SAFMC also may choose to take no further action to control entry or access to the fishery, in which case the control date may be rescinded.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: November 4, 2005.

**James W. Balsiger,***Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 05-22364 Filed 11-8-05; 8:45 am]

BILLING CODE 3510-22-S