

MARAD will seek to revise and update the sections, keeping the commenters' suggestions in mind, in a future rulemaking.

Turning to question two, nine of the ten respondents strongly opposed changing the current Vessel Priority Rule. One respondent, the USDA, favored changing the rule. MARAD is working with the USDA and other agencies to reach a consensus regarding this and other issues and will revisit this issue in a future rulemaking.

The third question posed in the ANPRM regarding possible changes to the basis for compliance measurement is closely linked to the first question. In turn, the views expressed in the comments submitted in response to question three were essentially identical to those submitted in response to question one. MARAD will address this issue and seek further public comments in a future rulemaking.

In response to question four, in which MARAD asked if we should formally define "liner vessel," "transshipment," or "relay," there was no general consensus from the commenting parties. Thus, MARAD may solicit further comments regarding this issue in a future rulemaking.

In response to question five, the majority of commenters favored the use of standardized commercial terms. Thus, MARAD will revisit this issue in a future rulemaking.

In response to question six, the commenters generally supported the idea that MARAD require the use of commercial practices. Thus, MARAD will also revisit this issue in a future rulemaking.

Finally, in response to question seven, the commenters offered several suggestions to assure compliance by shipper agencies. MARAD will revisit these topics and seek further public input in a future rulemaking.

IV. Reason for Withdrawal

Since cargo preference requirements apply to government shipper agencies as well as to the private shipping industry, issues arise from the differing goals and activities of government agencies versus private industry. Because MARAD and other government agencies have yet to agree on several important issues, we are in the process of discussing and negotiating our differences with other agencies in an effort to accommodate other agencies' needs while still applying cargo preference in the manner intended by Congress. Once discussions and negotiations with other agencies are complete, MARAD will initiate a new rulemaking action.

(Authority: 49 CFR 1.66)

Dated: February 8, 2005.

By Order of the Maritime Administrator

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 05-2753 Filed 2-11-05; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AT42

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Arroyo Toad (*Bufo californicus*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; revisions to proposed critical habitat, reopening of public comment period, and notice of availability of draft economic analysis.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft economic analysis for the proposed designation of critical habitat for the arroyo toad (*Bufo californicus*) under the Endangered Species Act of 1973, as amended (Act). We also announce that we have revised the methods for determining proposed essential and critical habitat areas for the arroyo toad. Additionally, we propose to exclude areas from the proposed designation from Units 1, 6, and 22 in Monterey, Los Angeles, and San Bernardino counties, under authority of section 4(b)(2) of the Act. Comments previously submitted on the proposed rule need not be resubmitted as they have been incorporated into the public record as a part of this reopening of the comment period, and will be fully considered in preparation of the final rule. Copies of the draft economic analysis and the proposed rule for critical habitat designation are available on the Internet at <http://ventura.fws.gov> or from the Ventura Fish and Wildlife Office at the address and contact numbers below.

DATES: We will accept comments and information until 5 p.m. on March 16, 2005. Any comments that we receive after the closing date may not be considered in the final decision on this proposal.

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

(1) You may submit written comments and information to Diane Noda, Field

Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, California 93003.

(2) You may hand-deliver written comments to our office, at the address given above.

(3) You may fax your comments to 805/644-3958.

(4) You may send comments by electronic mail (e-mail) to fw1artoch@r1.fws.gov. Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our internet connection is not functional, please submit your comments by the alternate methods described above.

FOR FURTHER INFORMATION CONTACT:

Creed Clayton or Michael McCrary, Ventura Fish and Wildlife Office, at the address listed above (telephone 805/644-1766; facsimile 805/644-3958).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we solicit comments and information from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the proposed rule (69 FR 23254, April 28, 2004) and amendments, proposed exclusions, or the draft economic analysis for the arroyo toad. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of exclusion outweigh the benefits of specifying such area as part of critical habitat;

(2) Specific information on the amount and distribution of arroyo toad habitat, and what habitat is essential to the conservation of this species and why;

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

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

(5) We request information on how many of the State and local environmental protection measures referenced in the draft economic analysis were adopted largely as a result of the listing of the arroyo toad, and how many were either already in place or enacted for other reasons;

(6) Whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation. If not, what costs are overlooked;

(7) Are the adjustments to local governments' economic data made by the draft economic analysis, as set out in its appendices, reasonable? If not, please provide alternative interpretations and the justification for the alternative and/or the reasons the interpretation in the draft economic analysis is not correct;

(8) Whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(9) Whether the draft economic analysis correctly assesses the effect on regional costs associated with land use controls that derive from the designation;

(10) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation;

(11) Whether the draft economic analysis appropriately identifies all costs that could result from the designation;

(12) Whether the assumptions used in Appendix A of the draft economic analysis are valid; and

(13) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments.

All previous comments and information submitted during the initial comment period on the proposed rule need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning the draft economic analysis and the proposed rule by any one of several methods (see **ADDRESSES** section).

Please submit internet comments to fw1artoch@r1.fws.gov in an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: Arroyo Toad Critical Habitat" 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 Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

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 for 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, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for inspection, by appointment, during normal business hours, in our Ventura Fish and Wildlife Office at the above address.

Copies of the draft economic analysis and the proposed rule for critical habitat designation are available on the internet at <http://ventura.fws.gov> or from the Ventura Fish and Wildlife Office at the address and contact numbers above. In the event that our internet connection is not functional, please obtain copies of documents directly from the Ventura Fish and Wildlife Office.

Background

The arroyo toad is a small (adult length 2–3 inches (55–82 millimeters)), dark-spotted toad, with females larger than males (59 FR 64859). The arroyo toad is found in coastal and desert drainages from Monterey County, California, south into northwestern Baja California, Mexico. These systems are inherently dynamic, with marked seasonal and annual fluctuations in climatic regimes, particularly rainfall. Arroyo toad populations annually fluctuate due to natural climactic variations as well as other random events, such as fires and floods, coupled with the species specialized habitat requirements. Extensive habitat loss as a result of agriculture and urbanization, and the construction, operation, and maintenance of water storage reservoirs, flood control structures, roads, and recreational facilities such as campgrounds and off-highway vehicle parks, have caused many arroyo toad populations to be reduced in size or extirpated (eliminated) (59 FR 64859, December 16, 1994). Threats to the species survival include loss of habitat, habitat modifications due to the

manipulation of water levels in many central and southern California streams and rivers, predation from introduced aquatic species, and habitat degradation from introduced plant species. These threats have caused arroyo toads to be extirpated from about 75 percent of the previously occupied habitat in California.

Pursuant to the Act, the species was federally-listed as endangered on December 16, 1994, due to habitat degradation, small population sizes, and predation (59 FR 64859). We designated a total of approximately 182,360 acres (ac) (73,780 hectares (ha)) of critical habitat for the arroyo toad on February 7, 2001 (66 FR 9414). On November 6, 2001, building industry representatives filed a lawsuit against the Service challenging the designation of arroyo toad critical habitat (*Building Industry Legal Defense Foundation, et al. v. Gale Norton, Secretary of the Interior, et al.* Civ. No. 01–2311 (JDB) (D.D.C.)). On October 30, 2002, the court set aside the designation and ordered us to publish a new critical habitat designation final rule for the arroyo toad by July 30, 2004. The court subsequently extended the deadline to March 31, 2005. On April 28, 2004, we proposed approximately 138,713 acres (ac) (56,133 hectares (ha)) as critical habitat for the arroyo toad (69 FR 23254) in compliance with the court order. Since our April 28, 2004, proposed designation, we have revised our methods as described below to identify 132,282 ac (53,533 ha) of essential habitat areas. Of the essential habitat, we also propose to exclude approximately 36,738 ac (14,867 ha) from the proposed designation. Therefore, after using our new methods, in addition to the proposed exclusions, we propose approximately 95,544 ac (38,668 ha) as critical habitat for the arroyo toad. Proposed critical habitat is located in Santa Barbara, Ventura, Los Angeles, Orange, San Bernardino, Riverside, and San Diego counties, California, as described in the proposed designation.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection; and specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit

destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Summary of Changes to the Proposed Rule

As part of our proposed designation of critical habitat for the arroyo toad, we have made the following changes to our proposed designation:

(1) We mapped critical habitat more precisely by eliminating habitat areas of marginal quality that we do not expect to be used by arroyo toads. In certain upland locations, we determined that busy, paved roads and railroads constituted barriers to toad movement into the uplands. These roads and railroads were found in areas of relatively steep slopes and were supported by steeply-constructed embankments. Where marginal upland habitat was found behind these barriers, it was removed from critical habitat because we do not consider it essential to the arroyo toad population. More precisely mapping critical habitat in this way led to a modest reduction in total acreage from the proposed rule.

(2) Although we attempted to remove as many developed areas as possible before publishing the proposed rule (areas that have no value as arroyo toad habitat such as buildings and roads), we were not able to eliminate all developed areas. Since publication of the proposed rule, we were able to further eliminate a small amount of developed area, which has resulted in a more precise delineation of essential habitat containing one or more of the primary constituent elements. This resulted in a minor reduction in the total acreage published in the proposed rule. However, as it is not possible to remove each and every one of these features even at the refined mapping scale used, therefore the maps of the proposed designation still includes areas that do not contain primary constituent elements. These areas are not being proposed as critical habitat.

(3) In some cases, an upstream or downstream boundary was expanded as a result of the 82-foot (ft) (25-meter (m)) elevational limit in the model we used to determine the extent of the essential upland habitat arroyo toads use for foraging. We changed this upland boundary to our original starting and ending points along a stream, leading to a minor reduction in the total acreage published in the proposed rule.

(4) In subunit 6b, we have determined that San Francisquito Creek above the Newhall Ranch Road bridge does not contain the primary constituent elements to be considered arroyo toad critical habitat. This is because this area is drier than we had originally understood and lacks surface water for a sufficient duration during the spring time during most years to allow for arroyo toad tadpole development. Thus, this portion of San Francisquito Creek, which was included in the proposed rule, does not provide breeding habitat for arroyo toads, and we no longer consider it to be essential for the conservation of the species. Below the Newhall Ranch Road bridge, arroyo toads inhabiting the Santa Clara River may disperse into lower San Francisquito Creek to forage and aestivate; we still consider this reach of San Francisquito Creek to be essential habitat.

(5) We no longer consider the arroyo toad habitat within subunit 22b, a stretch of the Mojave River running through Victorville in San Bernardino County, to be essential to the conservation of the species. Although we do not have new data concerning arroyo toads in this area, we further analyzed and reevaluated the existing data (and lack thereof) to arrive at this decision. This subunit runs through the relatively urbanized area of Victorville and involves numerous private landowners. Much of the upland habitats along the Mojave River in this area have been developed, and even areas within the floodplain have been developed, which are protected by levees. Exotic predators of the arroyo toad have also invaded this portion of the river. Additionally, the occupancy of subunit 22b by arroyo toads is questionable at best. Arroyo toads were rumored to be calling in the Victorville area sometime during the 1990's, probably associated with the last significant El Niño event, but there have been no confirmed reports from this area since 1982. The recovery plan (Service 1999) states that arroyo toads are presumed extinct in this reach.

(6) We revised the criteria we used to identify essential habitat. We truncated the upland habitat delineation at a distance of 1,640 ft (500 m) from streams, instead of 4,921 ft (1,500 m) from streams, if the 82-ft (25-m) elevation limit had not yet been reached at that point. The 82-ft (25-m) elevation limit was reached at distances less than 1,640 ft (500 m) from the mapped stream channel along the majority of the stream reaches, so the distance limit was often not a factor. We based this distance on the results of an arroyo toad

study on Camp Pendleton in San Diego County (Holland and Sisk 2000), which is the most in-depth, complete study of the distribution and use of upland habitat by arroyo toads. Holland and Sisk (2000) used extensive pitfall trap arrays at different distances and locations, and operated the traps at different times of year over several years. Eighty-eight percent of the adult and sub-adult toads were captured in the riparian wash area. Although a few toads were caught at distances of 3,281 ft (1,000 m) or more from the riparian wash area, approximately 68 percent of the arroyo toads captured in upland habitats were within 1,640 ft (500 m). No arroyo toads have been located farther than 1,640 ft (500 m) from a stream in any other study to our knowledge.

(7) For a variety of reasons, we propose to exclude areas of essential habitat from the proposed critical habitat designation in units 1, 6, and 22. In these areas we believe the benefits of exclusion outweigh the benefits of inclusion, as further described below under Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act. In all cases, arroyo toad habitat proposed for exclusion is being protected through other plans, agreements, conservation agreements, or legal instruments. This exclusion would result in the reduction of 9,513 ac (3850 ha) of essential habitat from the designation. We request public comment on whether these areas should be excluded in the final designation, or whether they should be included in the designation.

Draft Economic Analysis

Section 4 of the Act requires that we consider economic impacts, the impact on national security, and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We have prepared a draft economic analysis for the proposal to designate certain areas as critical habitat for the arroyo toad.

Approximately 54 percent of the proposed critical habitat designation is privately owned land, 39 percent is under Federal ownership, six percent is State and locally owned, and two percent is Tribal. The draft economic analysis addresses the impacts of arroyo toad conservation efforts on activities occurring on lands proposed for designation as well as those proposed for exclusion. The analysis measures lost economic efficiency associated with real estate development; changes in water supply; grazing activities; mining activities; road construction projects; utility and other infrastructure projects;

military activities; the California Environmental Quality Act (CEQA); uncertainty; delay; and habitat conservation plan creation. Additionally, impacts to regional economic output and jobs associated with possible increases in water prices borne by water consumers are considered.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of the arroyo toad, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to designating critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the arroyo toad in essential habitat areas. The analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this analysis looks retrospectively at costs that have been incurred since the date the species was listed as an endangered species and considers those costs that may occur in the 20 years following the designation of critical habitat.

Based on our draft economic analysis and comments received on the proposed rule, we are proposing to exclude from designation arroyo toad habitat in Monterey, Los Angeles, and San Bernardino Counties from all or portions of units 1, 6b, and 22a. See Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act.

We solicit data and comments from the public on these draft documents, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as

critical habitat, provided such exclusion will not result in the extinction of the species.

Costs related to conservation activities for the arroyo toad pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately \$1 billion from 2004 to 2025. Overall, the real estate industry is calculated to experience the vast majority of estimated costs (primarily those associated with offsetting compensation or loss in land value), followed by water consumers and road construction projects. Of the 22 proposed critical habitat units (numbers 2 through 23 in the proposed rule (69 FR 23254)), seven are expected to incur economic costs of greater than \$50 million between 2004 and 2025. Annualized impacts of costs attributable to the designation are projected to be approximately \$94 million. Because the majority of the costs are due to real estate development, the draft economic analysis focused on revising real estate costs associated with the current proposed critical habitat designation. We did not revise the non-real estate costs associated with the current proposed designation because of the time allotted to revise the draft economic analysis and the majority of costs are due to real estate development. Therefore, the costs to non-real estate sectors reflect the previous proposed critical habitat designation.

Application of Section 3(5)(A) and 4(a)(3) and 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 geographic 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 and protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that do not require special management 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.

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.

In our critical habitat designations, we use both the provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas that we are proposing as critical habitat as well as for those areas that are formally proposed for designation as critical habitat. Lands we have found do not meet the definition of critical habitat under section 3(5)(A) or have excluded pursuant to section 4(b)(2) include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative habitat conservation plans (HCPs) that cover the species; (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs); (3) Tribal conservation plans that cover the species; (4) State conservation plans that cover the species; (5) National Wildlife Refuge System Comprehensive Conservation Plans; (6) Endangered Species Management Plans prepared by the Army (where a 4(a)(3)(B) exclusion is not possible due to an unsigned Integrated Natural Resource Management Plan (INRMP)); and (7) adequate management plans or agreements that protect the primary constituent elements of the habitat.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and (3) the plan provides assurances

that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

The proposed rule to designate critical habitat for the arroyo toad outlined various exclusions from critical habitat on military lands and lands protected by an HCP. In this notice we further propose to exclude from critical habitat for the arroyo toad the following areas under sections 3(5)(A) and/or 4(b)(2): unit 1 in its entirety encompassing 6,771 ac (2,740 ha) (Fort Hunter-Liggett), subunit 6b in its entirety encompassing 2,363 ac (956 ha) (private lands), and a portion of subunit 22a encompassing 380 ac (154 ha) (private lands).

Fort Hunter-Liggett and Exclusion Under Sections 3(5)(A) and 4(b)(2)

The arroyo toad occupies an approximately 17-mile (mi) (27-kilometer (km)) segment of the San Antonio River at Fort Hunter Liggett. This arroyo toad population is essential to the conservation of the species because it is the northernmost known population located approximately 100 mi (160 km) north of the nearest documented extant population. Arroyo toads in this unit may experience climatic conditions not faced by toads at sites farther south. The protection of this area is essential to maintaining the complete genetic variability of the species and the full range of ecological settings within which it is found. This stretch of the San Antonio River is not dammed, provides excellent habitat for the arroyo toad, and supports one of the largest populations within the species northern region. We expect Fort Hunter Liggett to complete an INRMP, which is in a final draft form, during 2005 as described below. Because the INRMP is not signed and finalized, we are not considering non-inclusion of Arroyo toad habitat areas under 4(a)(3) of the Act.

In the proposed rule, we considered but did not propose to include mission-essential training areas on Fort Hunter Liggett as critical habitat for the arroyo toad under section 4(b)(2) of the Act, because designation of critical habitat could adversely impact national security. The Army conducts training operations using landing fields, tanks, machine guns, grenade launchers, and other weapons at Fort Hunter Liggett. The Army has stated that it considers critical habitat to conflict with mission-essential training tasks, and that critical habitat designation would adversely

affect Fort Hunter Liggett's training mission. The Army submitted a map to us of the mission-essential training areas that are found within lands we determined to be essential to the conservation of the arroyo toad (Army, *in litt.* 2003). During the public comment period for the proposal, the Army stated that we had incorrectly concluded that the only mission-essential areas are the individual training sites. Rather, all Fort Hunter Liggett lands are essential for realistic and effective training. Thus, the designation of the areas we proposed as critical habitat would seriously limit their ability to conduct critical training activities.

The Army recognizes the need for protection and conservation of sensitive species, including the arroyo toad, on military lands and has identified conservation measures to protect and conserve arroyo toads and their habitat. The Army has coordinated with us to finalize the development of their Endangered Species Management Plan (ESMP) for the arroyo toad at Fort Hunter Liggett, which currently guides management of all lands occupied by arroyo toads along the San Antonio River. The ESMP includes measures to minimize harm to the arroyo toad from training activities and outlines actions to ensure the persistence of arroyo toads on the installation. The ESMP is an appendix to, and part of, the INRMP for Fort Hunter Liggett. We expect the INRMP, which is in a final draft form, to be finalized and signed in 2005. We have reviewed Fort Hunter Liggett's ESMP in relation to the three criteria listed above for evaluating management plans, and we find that the ESMP meets the criteria.

(1) Benefits of Inclusion

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. The educational benefits of critical habitat include informing the Army of areas that are important to the conservation of listed species. However, because the Army has worked cooperatively with the Service to develop an ESMP that protects the toad and its essential habitat on Fort Hunter Liggett, and the nearly finalized INRMP is expected to be completed in 2005 (for which we will complete a Section 7 consultation), we do not believe that designation of critical habitat on the fort will significantly benefit the arroyo toad beyond the protection already afforded the species under the Act. In addition,

through the INRMP development process and development of the ESMP for the arroyo toad, the Army is already aware of essential arroyo toad habitat areas on the installation.

(2) Benefits of Exclusion

Substantial benefits are expected to result from the exclusion of Fort Hunter Liggett from critical habitat. The Army has stated that all training and non-training areas together are integral to their mission of ensuring troop readiness. If we designate critical habitat on the base, the Army would be required to engage in consultation with us on activities that may affect designated critical habitat. The requirement to consult on activities occurring on the base could delay and impair the ability of the Army to conduct effective training activities and limit Fort Hunter Liggett's utility as a military training installation, thereby adversely affecting national security.

In addition, exclusion of Fort Hunter Liggett lands from the final designation will allow us to continue working with the Army in a spirit of cooperation and partnership. In the past the Army has generally viewed the designation of critical habitat as having a negative regulatory effect that discourages cooperative and proactive efforts by the Army to conserve listed species and their habitats. The Department of Defense generally views designation of critical habitat on military lands as an indication that their actions to protect the species and its habitat are inadequate. Excluding these areas from the perceived negative consequences of critical habitat will facilitate cooperative efforts between the Service and the Army to formulate the best possible INRMP and ESMP and continue effective management of the arroyo toad at Fort Hunter Liggett.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We met with the Army on December 12, 2003, at Fort Hunter Liggett to discuss essential arroyo toad habitat, and possible impacts to the base. We also received extensive comments from the Army during the public comment period. In light of national security interests and the Army's need to maintain a high level of readiness and fighting capabilities, and in light of the Army's completed ESMP for the arroyo toad, we propose to exclude from proposed critical habitat designation all lands on Fort Hunter Liggett. We find that the benefits of excluding these lands from critical habitat outweigh the benefits of including them. We further find that the exclusion of these areas

will not lead to the extinction of the arroyo toad because Army training activities are conducted primarily outside of the riparian corridor where toads are concentrated and the ESMP is expected to effectively manage for the persistence of the San Antonio River population.

Private Land and Exclusion Under Sections 3(5)(A) and 4(b)(2)

Approximately 80 percent of imperiled species in the United States occur partly or solely on private lands where the Service has little management authority (Wilcove *et al.* 1996). Proactive voluntary conservation efforts are necessary to prevent the extinction and promote the recovery of the arroyo toad on private lands in southern California. We believe that the arroyo toad population within subunit 6b and 22a will benefit from landowner conservation actions due to the protection of arroyo toad breeding and foraging habitat. The conservation benefits of critical habitat are primarily regulatory or prohibitive in nature. Where consistent with the discretion provided by the Act, we believe it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation (Wilcove *et al.* 1998). Thus, we believe it is essential for the recovery of the arroyo toad to build on continued conservation activities with private partners, and to provide positive incentives for other private landowners who might be considering implementing voluntary conservation activities, but have concerns about incurring incidental regulatory or economic impacts.

The recovery of listed species is highly dependent on developing working partnerships with a wide variety of entities, and the voluntary cooperation of non-Federal landowners and others is essential to accomplishing recovery for listed species (Crouse *et al.* 2002). Much of the land within this designation that is suitable for conservation of the arroyo toad is owned by private landowners; therefore, successful recovery of the arroyo toad is especially dependent upon working partnerships and the voluntary cooperation of non-Federal landowners.

Several private landowners provided extensive comments during the public comment period after learning that critical habitat had been proposed over some or all of their land. Some of these landowners have approached us and identified their efforts to protect arroyo toad habitat on their land and in some

cases offered increased protection of arroyo toad habitat. Those cases where we believe adequate protection of arroyo toad habitat on private land warrants an exclusion from critical habitat are discussed below.

Subunit 6b

As discussed above in the Summary of Changes section, we have determined that San Francisquito Creek above the Newhall Ranch Road bridge does not contain the primary constituent elements of arroyo toad critical habitat, and therefore, we no longer consider this portion of San Francisquito Creek to be essential for the conservation of the species. However, we consider the remainder of subunit 6b, including lower San Francisquito Creek below the Newhall Ranch Road bridge, to be essential habitat.

The Natural River Management Plan (NRMP) (Valencia Company 1998) protects most of the river corridor areas considered essential for the arroyo toad along the Santa Clara River and San Francisquito Creek through subunit 6b with conservation easements, which total approximately 1,200 ac (486 ha). The NRMP was developed to allow for the development of upland areas along the Santa Clara River, while protecting the river corridor as wildlife habitat. We included this area in the critical habitat proposal because the NRMP does not require protection of all river corridor habitats in this area. We were also concerned because, as written in the NRMP, protection could be delayed for up to 20 years beyond initiation of the NRMP. Another concern was that upland habitats along the rivers are not protected under the NRMP.

Since the proposal was published, it has also come to our attention that more of the river corridor and upland habitat is protected than we previously believed. Lands owned by the city of Santa Clarita (upstream from the Southern California Gas Company pipeline), which is adjacent to land covered by the NRMP and contains riparian habitat within the river corridors of the Santa Clara River and San Francisquito Creek and upland habitat adjacent to these river corridors, is protected from development as "buffer lots." Additionally, the Newhall Ranch Specific Plan (separate from the NRMP) includes protection via conservation easement for the Santa Clara River corridor from just above the confluence of Castaic Creek down to the Los Angeles County border. The Castaic Creek river corridor below the I-5 bridge would be protected via conservation easement as well.

Thus, most all of the breeding habitat and riparian river corridor within lands considered essential for the conservation of the species in this subunit is protected or designated for protection via conservation easement. Ultimately these easements will extend along every river mile of Castaic Creek, San Francisquito Creek, and the Santa Clara River within subunit 6b.

It has also come to our attention that the conservation easements protecting these reaches of the river corridor are being conveyed much more rapidly than the 20-year deadline established in the NRMP. Two conservation easements totaling 427 ac (173 ha) protecting arroyo toad habitat have already been conveyed to the California Department of Fish and Game, one protecting lower San Francisquito Creek and the other protecting the Santa Clara River below Bouquet Canyon bridge.

Upon closer examination of the upland habitats bordering the river corridors of the Santa Clara River, San Francisquito Creek, and Castaic Creek, we have found that very little of these lands remain as native habitats that would be useable as foraging areas by arroyo toads. The vast majority of these lands are either developed, used for intensive agriculture, or are inaccessible to arroyo toads due to busy roads or very steep slopes. Fortunately, much of the Santa Clara River corridor is rather broad in this area, providing arroyo toad foraging and burrowing habitat outside of the active river channel, yet still within the broader floodplain and riparian habitats that are protected within the river corridor.

Finally, Newhall Land has offered to protect additional acres of prime arroyo toad habitat within the Santa Clara River corridor for the arroyo toad via conservation easement.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that federally funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultations ensure that adequate protection is provided to avoid adverse modification of critical habitat. All critical habitat units within this designation are occupied. In the absence of critical habitat, any section 7 consultation for potential adverse effects to the species would not ensure adverse modification of critical habitat is avoided; however, the consultation would ensure the proposed action would not jeopardize the continued existence of the species in the wild.

Designation of critical habitat also provides important information on

those habitats and their primary constituent elements that are essential to the conservation of the species. This information is particularly important to any Federal agency, State, county, local jurisdiction, conservation organization, or private landowner that may be evaluating adverse actions or implementing conservation measures that involve those habitats.

(2) Benefits of Exclusion

The conservation easements that have been conveyed to the California Department of Fish and Game over the Santa Clara River corridor and San Francisquito Creek, and those that will be put in place over the next several years to extend protection along the Santa Clara River corridor and Castaic Creek, are designed to ensure that the property will forever remain in a natural condition. Use of the property is (or will be) confined to the preservation and enhancement of native species and their habitats, including the arroyo toad and its habitat. These conservation easements provide greater protection of the most crucial arroyo toad breeding and foraging habitat in this area than could be gained through the designation of critical habitat. And, as stated above, very little of the upland habitats remain in a natural condition and useable as foraging areas by arroyo toads. Additionally, we have already completed consultation on the effects of the NRMP on the arroyo toad and found that it would not jeopardize the continued existence of the species.

Newhall Land has also indicated that they are willing to further protect arroyo toad habitat within the Santa Clara River corridor by increasing the size of one of the conservation easements required by the NRMP. They have offered to include in a future conservation easement a combined total of approximately 47 ac (19 ha) of currently unprotected riparian habitats along the Santa Clara River downstream from the Interstate 5 bridge. Newhall Land would likely withdraw their offer to protect these riparian habitats, which are useable by arroyo toads for foraging and burrowing, were we to designate critical habitat in this area. The protection of these riparian habitats, along with the areas protected under the NRMP, also provide conservation benefits to other listed and sensitive species (e.g., least Bell's vireo (*Vireo bellii pusillus*) and unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*)). Imposing an additional regulatory review after working cooperatively with landowners to increase protection in this area solely as a result of the designation of critical

habitat may undermine existing and future conservation efforts and partnerships. Designation of critical habitat within the boundaries of the NRMP, or similar plans that include substantial conservation easements over wildlife habitat, could also be viewed as a disincentive to property owners contemplating future protection of arroyo toad or other wildlife habitat. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We find that the benefits of critical habitat designation on lands within subunit 6b are small while the benefits of excluding such lands from designation of critical habitat are greater. After weighing the small benefits of including these lands against the greater benefits derived from excluding them, including the protection via conservation easement of high-quality riparian habitats, relieving property owners of an additional layer of approvals and regulation, encouraging the pursuit of additional conservation partnerships, and reducing the overall cost of designating critical habitat for the arroyo toad, we have proposed to exclude the land within subunit 6b from proposed critical habitat designation. Because of protection provided for the toad and its habitat via conservation easement along the Santa Clara River, San Francisquito Creek, and Castaic Creek, and due to the various arroyo toad populations found elsewhere, the exclusion of essential arroyo toad habitat within subunit 6b will not result in the extinction of the species. Federal actions in areas occupied by the toad will still require consultation under section 7 of the Act.

Subunit 22a (in part)

During the public comment period, Rancho Las Flores, LLC, submitted comments that included a description of their efforts to protect arroyo toad habitat in Summit Valley, San Bernardino County. The Rancho Las Flores Planned Community (Rancho Las Flores) consists of approximately 9,800 ac (3,966 ha) in Summit Valley surrounding Horsethief Creek and the West Fork of the Mojave River. A portion of Rancho Las Flores falls within subunit 22a. Plans for phases 1, 2, and 3 of Village 1, which is within the larger Rancho Las Flores Planned Community, have been submitted to us, and we completed a section 7 consultation for the project. Included in the project proposal is the stipulation

that a conservation easement will be placed over 290 ac (117 ha) of prime arroyo toad habitat within the river corridors of Horsethief Creek and the West Fork of the Mojave River. Conservation measures incorporated into the project description for Rancho Las Flores, along with the conservation easement that would be designed to maintain and enhance habitat quality for the arroyo toad, include measures to reduce impacts from humans, cattle, and arroyo toad predators, minimize impacts from development, monitor the status of the arroyo toad, and remove exotic species. The plan also contains requirements for the funding of arroyo toad habitat maintenance and improvement measures necessary for the conservation easement. Additionally, Rancho Las Flores has spent roughly \$200,000 conducting a 3-year arroyo toad habitat usage study, which has already contributed significantly to our overall knowledge of arroyo toad ecology and movement patterns (Ramirez 2003). Of the Rancho Las Flores land in subunit 22a that is essential for the conservation of the species, the best breeding and foraging habitats within the river corridor are designated for protection via the conservation easement.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that federally-funded or authorized activities in such habitat that may affect it require consultation under section 7 of the Act. Such consultations ensure that adequate protection is provided to avoid adverse modification of critical habitat. All critical habitat units within this designation are occupied. In the absence of critical habitat, any section 7 consultation for potential adverse effects to the species would not ensure adverse modification of critical habitat is avoided; however, the consultation would ensure the proposed action would not jeopardize the continued existence of the species in the wild.

Designation of critical habitat also provides important information on those habitats and their primary constituent elements that are essential to the conservation of the species. This information is particularly important to any Federal agency, State, county, local jurisdiction, conservation organization, or private landowner that may be evaluating adverse actions or implementing conservation measures that involve those habitats.

(2) Benefits of Exclusion

Rancho Las Flores plans to protect 290 ac (117 ha) of prime arroyo toad

habitat via conservation easement within the river corridors of Horsethief Creek and the West Fork of the Mojave River. This land will forever remain in a natural condition, and its use will be confined to the preservation and enhancement of arroyo toad habitat and that of other native species. The conservation easement will provide greater protection of the most crucial arroyo toad breeding and foraging habitat in this area than could be gained through the designation of critical habitat. We have already completed consultation pursuant to Section 7 of the Act on the effects of Phases 1, 2, and 3 of Village 1 on the arroyo toad and found that this project would not jeopardize the continued existence of the species. The protection of these aquatic and riparian habitats also provides conservation benefits to other listed and sensitive species (e.g., bald eagle (*Haliaeetus leucocephalus*)). Imposing an additional regulatory review after working cooperatively with landowners to increase protection in this area solely as a result of the designation of critical habitat may undermine existing and future conservation efforts and partnerships. Designation of critical habitat within the boundaries of Phases 1, 2, and 3 of Village 1, or similar plans that include substantial conservation easements over wildlife habitat, could also be viewed as a disincentive to property owners contemplating future protection of arroyo toad or other wildlife habitat. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We find that the benefits of critical habitat designation on lands in subunit 22a within Phases 1, 2, and 3 of Village 1 at Rancho Las Flores are small while the benefits of excluding such lands from designation of critical habitat are greater. After weighing the small benefits of including these lands against the greater benefits derived from excluding them, including the protection via conservation easement of high-quality arroyo toad breeding and foraging habitats, relieving property owners of an additional layer of approvals and regulation, encouraging the pursuit of additional conservation partnerships, and reducing the overall cost of designating critical habitat for the arroyo toad, we have proposed to exclude the land within Phases 1, 2, and 3 of Village 1 from the proposed critical habitat designation. Because of protection provided for the toad and its

habitat via conservation easement along Horsethief Creek and the West Fork of the Mojave River, and due to the various arroyo toad populations found elsewhere, the exclusion of essential arroyo toad habitat within Phases 1, 2, and 3 of Village 1 will not result in the extinction of the species. Federal actions in areas occupied by the toad still require consultation under section 7 of the Act.

Required Determinations—Amended

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, 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 timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and

heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if this proposed designation of critical habitat for the arroyo toad would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., land development, fruit and nut farms, cattle ranching, and small governments). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this proposed critical habitat designation is made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. In areas where occupancy by arroyo toad is unknown, the designation of critical habitat could trigger additional review of Federal agencies pursuant to section 7 of the Act and may result in additional requirements on Federal activities to avoid destruction or adverse modification of critical habitat.

In our economic analysis of this proposed designation we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in three categories: land development, fruit and nut farms, and cattle ranching. On the basis of our analysis we determined that this proposed designation of critical habitat for the arroyo toad would result in: (1)

An annual impact to less than one percent (17 projects and therefore businesses—assuming one project per business) of land development small businesses and that those businesses could realize an impact of approximately 20 percent of total annual sales; (2) an annual impact to less than one percent (one farm) of small fruit and nut farms and that that farm would realize an impact of less than three percent of total annual sales; (3) an annual impact to less than one percent of cattle ranches (one ranch) and that the ranch would realize an impact of less than approximately \$100,000 of total annual sales; (4) an annual impact to less than one percent of small viticulture firms (one firm) and that the firm would realize an impact of less than approximately five percent of total annual sales; and (5) an annual impact to less than one percent of small governments as a percent of the county total and small governments would realize an impact of less than one percent of annual government budget. Based on this data we have determined that this proposed designation would not affect a substantial number of small land development companies, fruit and nut farms, or cattle ranches. Further, we have determined that this proposed designation would also not result in a significant effect to the annual sales of those small businesses impacted by this proposed designation. As such, we are certifying that this proposed designation of critical habitat would not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our draft economic analysis of this designation for a more detailed discussion of potential economic impacts to small business entities.

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 is considered a significant regulatory action under E.O. 12866 due to it potentially raising novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant 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, or 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. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, 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) As discussed in the draft economic analysis of the proposed designation of critical habitat for the arroyo toad, only two small local governments are located within the boundaries of the proposed designation that may be affected. Based on the analysis, it appears that these two governments may be required to consult with us on the designation over the next 20 years and that the cost of the consultations may result in an impact of less than one percent of the total annual budget of each of the cities. Consequently, we do not believe that the designation of critical habitat for the arroyo toad will significantly or uniquely affect these two small governmental entities. As such, a Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of proposing critical habitat for arroyo toad. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of HCPs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the designation of critical habitat for the arroyo toad does not pose significant takings implications.

Author

The primary author of this notice is the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

Authority

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

Dated: February 7, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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