

and comment (67 FR 17122). The proposal provided for a 90-day comment period, which was scheduled to end on July 8, 2002.

EPA received multiple requests from the potentially regulated community to extend the comment period. In most cases, a general extension of 60 days was requested. In one case, a 30-day comment extension was requested for the proposed rule with an additional 30 days required to prepare comments related to the case studies, economic and benefits assessment, and related portions of the proposed rule. These requests argued that an extension of the comment period was necessary because of the large volume of material associated with the proposed rule, including the extensive rulemaking record; the complexity of the proposal and the need for coordination among multidisciplinary areas of expertise (e.g., economic, scientific, engineering, and legal); the inclusion in the proposal of several innovative concepts, such as trading and mitigation through restoration measures, that require time and effort to comprehend and evaluate; difficulty in accessing several electronic documents contained in the rulemaking record; the amount of time needed to copy all written materials in the record for offsite review; difficulty in ascertaining how various aspects of the record support the proposal; and numerous information requests made by EPA within the proposal (i.e., 88 separate requests for comment solicited from the regulated community). Parties requesting an extension argued that the 90-day comment period was insufficient to fully understand the entire content of the proposal, verify data and calculations associated with the proposal (especially impingement and entrainment losses and correlated benefits), and prepare written comments.

In response to these requests, EPA is extending the comment period by 30 days, through August 7, 2002, because of the complexity and the range of issues raised in the proposal. EPA made copies of the proposed rule and preamble available to potentially regulated industries, States, environmental groups, and the public on March 6, 2002, 34 days prior to publication of the proposed rule and preamble in the **Federal Register**. EPA believes that 120 days is a sufficient period of time for comment on the proposed rule, especially in light of the prepublication availability of the proposed rule and preamble.

Dated: June 7, 2002.

**Diane C. Regas,**

*Acting Assistant Administrator for Water.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

**RIN 1018-AG93**

#### **Endangered and Threatened Wildlife and Plants; Critical Habitat Designation for *Sidalcea keckii* (Keck's checkermallow)**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat pursuant to the Endangered Species Act of 1973 as amended (Act), for *Sidalcea keckii* (Keck's checkermallow). Approximately 438 hectares (ha) (1,085 acres (ac)) are proposed in California, consisting of three separate units: one unit in Fresno County, 206 ha (510 ac), and two units in Tulare County, one of 86 ha (213 ac) and one of 146 ha (362 ac).

Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Section 4 of the Act requires us to consider economic and other relevant impacts when specifying any particular area as critical habitat.

We solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation, and our approaches for handling any future habitat conservation plans. We may revise this proposal prior to final designation to incorporate or address new information received during the comment period.

**DATES:** We will accept comments until August 19, 2002. Public hearing requests must be received by August 5, 2002.

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

You may submit written comments and information or hand-deliver comments to the Field Supervisor, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800

Cottage Way, Suite W-2605, Sacramento, CA 95825.

You may also send comments by electronic mail (e-mail) to [fw1kecks\\_checkermallow@fws.gov](mailto:fw1kecks_checkermallow@fws.gov). See the Public Comments Solicited section below for file format and other information about electronic filing.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Glen Tarr or Susan Moore, U.S. Fish and Wildlife Service (telephone 916/414-6600; facsimile 916/414-6710).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

*Sidalcea keckii* (Keck's checkermallow) is an annual herb of the mallow family (Malvaceae). The species grows 15 to 33 centimeters (cm) (6 to 13 inches (in)) tall, with slender, erect stems that are hairy along their entire length. Leaves towards the base of the plant have a roughly circular outline, and seven to nine shallow lobes arranged somewhat like the fingers of a hand (palmate). Leaves farther up the plant have fewer lobes which are more deeply divided. Both types of leaves also have irregular serrations at their margins forming "teeth." The plant flowers in April and early May, producing five petalled flowers that are either solid pink or pink with a maroon center. Petals are 1 to 2 cm (0.4 to 0.8 in) long, and are often shallowly notched at their outermost margins. Below the petals is a smaller calyx (cuplike structure) formed by five narrow green sepals (modified leaves). Each sepal is 8 to 11 millimeters (mm) (0.3 to 0.4 in) long, and has a maroon line running down its center. Below the calyx are bracts (modified leaflike structures), which are much shorter than the sepals and are either undivided or divided into two threadlike lobes. *Sidalcea keckii* is distinguished from other members of its genus by the maroon lines on its sepals, its much shorter bracts, and by stems which are hairy along their entire length (Kirkpatrick 1992; Shevock 1992; Hill 1993).

*Sidalcea keckii* fruit consist of four to five wedge-shaped sections arranged in a disk. The sections measure 3 to 4 mm (0.1 to 0.2 in) across, and each contains a single seed (Abrams 1951; Hill 1993; Cypher 1998). Sections mature and separate in May, but their methods of dispersal, other than gravity, are currently unknown (Cypher 1998). Also unknown are the seeds' requirements for germination (sprouting) in the wild,

their typical germination dates, and how long the seeds remain viable in the soil. Based on other Malvaceae species, and on recent observations of extreme yearly fluctuations in numbers of above-ground plants, it is likely that *S. keckii* seeds remain viable for several years and form a persistent soil seed bank (W. Moise as in Ellen Cypher, Endangered Species Recovery Program, California State University, *in litt.*, 1999; S. Hill, Illinois Natural History Survey, pers. comm., 2002). Persistent seed banks consist of all the viable seeds left ungerminated in the soil longer than a single growing season, and typically extend over a much greater area than the observable above-ground plants (Given 1994). The number and location of standing plants in a population with a persistent seed bank may vary annually due to a number of factors, including the amount and timing of rainfall, temperature, soil conditions, and the extent and nature of the seed bank. As the depository from which each new generation of plants must grow, such seed banks are extremely important for an annual species' long-term survival in an area, and may maintain a population through years in which few or no above-ground plants can grow or survive (Baskin and Baskin 1978).

The primary pollinators of *Sidalcea keckii* are unknown, but two related California species of *Sidalcea* (*S. oregana* ssp. *spicata* and *S. malviflora* ssp. *malviflora*) are pollinated primarily by various species and families of solitary bees, bumble bees, and bee flies (Ashman and Stanton 1991; Graff 1999). Many bees of the solitary bee genus *Diadasia* specialize in collecting pollen solely from members of the Malvaceae family (Service 1998).

*Sidalcea keckii* is endemic to California and grows in relatively open areas on grassy slopes of the Sierra foothills in Fresno and Tulare counties. It is associated with serpentine soils (Kirkpatrick 1992; Cypher 1998), which are unusually low in nutrients and high in heavy metals. These soil properties tend to restrict the growth of many competing plants (Brooks 1987). As with many serpentine species, *S. keckii* appears to compete poorly with densely growing non-native annual grasses (Stebbins 1992; Weiss 1999).

The primary reason so much remains unknown about *Sidalcea keckii* is that after botanists first collected samples from a site near White River, Tulare County in 1935, 1938, and 1939 (Wiggins 1940; California Natural Diversity Database (CNDDB) 2001), it was not collected or observed by botanists again for over 50 years. A possible reason for this includes the

somewhat vague description of the White River site (Wiggins 1940). Searches at the site may also simply have been conducted during poor years when few above-ground plants had germinated from the seed bank (S. Hill, *in litt.*, 1997). Now that botanists have a better understanding of what constitutes appropriate habitat for the species, based on the discovery of additional sites (see below), it is possible that future surveys may relocate *S. keckii* at the White River site. Initial visits to the site have already identified areas of likely habitat (John Stebbins, Herbarium Curator, California State University, pers. comm., 2002).

*Sidalcea keckii* was presumed extinct until it was rediscovered in 1992 at a site near Mine Hill in Tulare County (Stebbins 1992). The Mine Hill population contained about 60 plants growing on private land around a serpentine rock outcrop on 20 to 40 percent slopes at about 229 meters (m) (750 feet (ft)) elevation. Associated plants included *Achyrachaena mollis* (blow-wives), *Bromus madritensis* ssp. *rubens* (red brome), *Lepidium nitidum* (shining peppergrass), *Senecio vulgaris* (common groundsel), *Plantago erecta* (California plantain), and *Silene gallica* (windmill pink) (Kirkpatrick 1992; Cypher 1998). This population has not been resurveyed since 1992 due to the withdrawal of permission by the landowner (E. Cypher, pers. comm., 2001).

Using habitat information from the Mine Hill site, botanists resurveyed a location in the Piedra area of Fresno County where *Sidalcea keckii* had been documented in 1939, and rediscovered the population in 1998 (Service 1997; CNDDB 2001). This population spans a mix of private and Federal land, much of which has since been purchased by Sierra Foothill Conservancy (SFC) to provide a reserve for the plant (SFC 2001). Although initially only 217 plants were found at the site (Service 2000), subsequent surveys have found 500 to 1,000 plants in 8 separate patches ranging in elevation from 183 to 305 m (600 to 1,000 ft) (Cypher 1998; Chuck Peck, SFC, *in litt.*, 2002). Associated plants at this site include *Bromus hordeaceus* (soft chess), *Dichelostemma capitatum* (blue dicks), *Gilia tricolor* (bird's eye gilia), *Trileleia ixioides* (pretty face), *Trileleia laxa* (Ithuriel's spear), *Asclepias* sp. (milkweed), and *Madia* sp. (tarweed) (Cypher 1998).

*Sidalcea keckii* is threatened by urban development, competition from non-native grasses, agricultural land conversion, and random events (S. Hill, pers. comm., 2002; C. Peck, *in litt.*, 2002; Service 2000). Cattle grazing at the

current level does not appear to be detrimental, and may reduce encroachment by non-native grasses (C. Peck, *in litt.*, 2002; Weiss 1999), however, cattle damage *S. keckii* directly by eating and trampling it, and unmanaged increases in grazing during months of flowering or seed maturation could pose a threat (Cypher 1998). The plant's low population numbers, particularly at Mine Hill, leave it vulnerable to random environmental events such as extreme weather, disease, or insect infestations (Shaffer 1981, 1987; Menges 1991). The isolation of *S. keckii* populations exacerbates these vulnerabilities by reducing the likelihood of recolonization of extirpated populations. Inbreeding depression and loss of genetic variability may also be causes for concern in such small isolated populations (Ellstrand and Elam 1993).

#### Previous Federal Action

Federal action on *Sidalcea keckii* began when the Secretary of the Smithsonian Institution, as directed by section 12 of the Act, prepared a report on those native U.S. plants considered to be endangered, threatened, or extinct in the United States. This report (House Doc. No. 94-51) was presented to Congress on January 9, 1975, and included *S. keckii* as a threatened species. On July 1, 1975, we published a notice in the **Federal Register** (40 FR 27823) accepting the report as a petition within the context of section 4(c)(2) (now section 4(b)(3)) of the Act and of our intention to review the status of the plant taxa named in the report. On June 16, 1976, we published a proposed rule in the **Federal Register** (41 FR 24523) determining approximately 1,700 vascular plant species to be endangered pursuant to section 4 of the Act. *Sidalcea keckii* was not included on this initial list.

We addressed the remaining plants from the Smithsonian report in a subsequent Notice of Review (Notice) on December 15, 1980 (45 FR 82479). In that Notice, we determined *Sidalcea keckii* to be a category 1 candidate species, which we defined as a species for which we had enough information on biological vulnerability and threats to support preparation of a listing proposal. We published updates of the plant candidate lists in Notices of Review dated September 27, 1985 (50 FR 39526), February 21, 1990 (55 FR 6184), and September 30, 1993 (58 FR 51144), each time maintaining *S. keckii* as category 1 species. In the Notice of Review published February 28, 1996 (61 FR 7596), we discontinued the use of different categories of candidates, and

defined “candidate species” as those meeting the definition of former category 1. We maintained *S. keckii* as a candidate species in that Notice, as well as in subsequent Notices published September 19, 1997 (62 FR 49398), and October 25, 1999 (64 FR 57533).

On July 28, 1997, we published a proposed rule to list *Sidalcea keckii* as an endangered species under the Act (62 FR 40325). On June 17, 1999, our failure to issue a final rule and to make a critical habitat determination for *S. keckii* was challenged in *Southwest Center for Biological Diversity, et al., v. U.S. Fish and Wildlife Service, et al.* (N.D. Cal) (Case No. C99–2992 CRB). On February 16, 2000, we published a final rule listing *S. keckii* as an endangered species (65 FR 7757). A May 22, 2000, court order, based on a joint stipulation with the plaintiffs, required us to complete the proposed critical habitat designation by September 30, 2001. The court extended the deadline to propose critical habitat for this species, based on a further settlement agreement reached by the parties. In a consent decree issued October 2, 2001, the court required us to publish a proposed critical habitat designation for *S. keckii* and certain other species by June 10, 2002, and to issue a final critical habitat designation for the species by March 10, 2003 (*Center for Biological Diversity, et al., v. Gale Norton, et al.* (D.D.C.) (Case No. Civ. 01–2063)).

### Critical Habitat

Section 3 of the Act defines critical habitat 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 geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. “Conservation” means the use of all methods and procedures that are necessary to bring an endangered 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 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed

critical habitat. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation would not afford any additional regulatory protections under the Act.

Critical habitat also provides non-regulatory benefits to the species by informing the public and private sectors of areas that are important for species recovery and where conservation actions would be most effective. Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features essential for the conservation of that species, and can alert the public as well as land-managing agencies to the importance of those areas. Critical habitat also identifies areas that may require special management considerations or protection, and may help provide protection to areas where significant threats to the species have been identified, by helping people to avoid causing accidental damage to such areas.

In order to be included in a critical habitat designation, the habitat must first be “essential to the conservation of the species.” Critical habitat designations identify, to the extent known and using the best scientific and commercial data available, habitat areas that provide at least one of the physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)). Section 3(5)(C) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, “The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.”

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion

will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires that our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, 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 should be the listing rule for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, and biological assessments or other unpublished materials.

Section 4 of the Act requires that we designate critical habitat based on what we know at the time of designation. 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 newly discovered populations in the future, 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 and the section 9 prohibitions, as determined on the basis of the best available information at the time of the action. Federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

### Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12,

we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of *Sidalcea keckii*. This included information from our own documents on *S. keckii* and related species; the CNDDDB (2001); peer-reviewed journal articles and book excerpts regarding *S. keckii* and related species, or regarding more generalized issues of conservation biology; unpublished biological documents regarding *S. keckii* or related species; site visits, and discussions with botanical experts.

We compared geological and ecological characteristics of the various locations of the plant by using information from the above sources as well as geographic information systems (GIS) coverages of *Sidalcea keckii* population locations (CNDDDB 2001); soil survey maps (U.S. Soil Conservation Service (SCS) 1971, 1982; U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS) 2001); aerial photographs (CNES/SPOT Image Corporation (SPOT) 2001); topological features (United States Geological Survey (USGS) 1990); features of underlying rock (California Department of Conservation (CDC) 2000) and vegetation cover (USGS 1990). We also examined geological maps not available on GIS (California Division of Mines and Geology (CDMG) 1991, 1992).

The Piedra and Mine Hill proposed critical habitat units are occupied by both above-ground plants and seed banks, depending on the time of year (i.e., plants are not observable above-ground all year). Although above-ground plants have not been observed on the White River unit since the 1930s, a complete survey has not been done due to the lack of access to lands in private ownership. "Occupied" is defined here as an any area with above-ground *Sidalcea keckii* plants or a *S. keckii* seed bank of indefinite boundary. Current surveys need not have identified above-ground individuals for the area to be considered occupied because plants may still exist at the site as part of the seed bank (Given 1994). All occupied sites contain some or all of the primary constituent elements and are essential to the conservation of the species, as described below.

Each of the critical habitat units likely includes areas that are unoccupied by *Sidalcea keckii*. "Unoccupied" is defined here as an area that contains no above-ground *S. keckii* plants and that is unlikely to contain a viable seed bank. Determining the specific areas that this taxon occupies is difficult because, depending on the climate and

the natural variations in habitat conditions, the extent of the distributions may either shrink and disappear, or if there is a residual seed bank present, enlarge and cover a more extensive area. Because it is logistically difficult to determine how extensive the seed bank is at any particular site and because above-ground plants may or may not be present in all patches within a site every year, we cannot quantify in any meaningful way what proportion of each critical habitat unit may actually be occupied by *S. keckii*. Therefore, patches of unoccupied habitat are probably interspersed with patches of occupied habitat in each unit. The inclusion of unoccupied habitat in our critical habitat units reflects the dynamic nature of the habitat and the life history characteristics of this taxon. Unoccupied areas provide areas into which populations might expand, provide connectivity or linkage between colonies within a unit, and support populations of pollinators and seed dispersal organisms. Both occupied and unoccupied areas that are proposed as critical habitat are essential to the conservation of the species.

#### Primary Constituent Elements

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

Much of what is known about the specific physical and biological requirements of *Sidalcea keckii* is described in the Background section of this proposed rule. The proposed critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *S. keckii* throughout its range and to provide those habitat components essential for the conservation of the species. These habitat components provide for: (1) Individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; (2) areas that allow gene flow and provide

connectivity or linkage within larger populations; (3) areas that provide basic requirements for growth, such as water, light, and minerals; and (4) areas that support populations of pollinators and seed dispersal organisms.

We believe the long-term conservation of *Sidalcea keckii* is dependent upon the protection of existing population sites and the maintenance of ecological functions within these sites, including connectivity between colonies (i.e., groups of plants within sites) within close geographic proximity to facilitate pollinator activity and seed dispersal. The areas we are designating as critical habitat provide some or all of the habitat components essential for the conservation of *S. keckii*. Based on the best available information at this time, the primary constituent elements of critical habitat for *S. keckii* are:

(1) Minimally shaded annual grasslands in the Sierra foothills containing open patches in which competing vegetation is relatively sparse; and

(2) Serpentine soils, or other soils which tend to restrict competing vegetation.

#### Criteria Used to Identify Critical Habitat

We identified critical habitat areas essential to the conservation of *Sidalcea keckii* in the three primary locations where it currently occurs or has been known to occur: the Piedra area of Fresno County, the Mine Hill area of Tulare County, and near White River in Tulare County. We are proposing to designate sufficient critical habitat at each site to maintain self-sustaining populations of *S. keckii* at each of these locations.

We are including the White River site in our proposal, despite the fact that *Sidalcea keckii* has not been documented there in recent years. The White River population is the type location where the plant was originally discovered and contains the primary constituent elements that would support the species. It is one of the extremely few locations where *S. keckii* has ever been observed and may be occupied by a seed bank. We have evidence from the Piedra site, where *S. keckii* was undocumented from 1939 until its rediscovery in 1998 (Cypher 1998; CNDDDB 2001), that such rediscoveries are possible for *S. keckii*. The Piedra site supports the largest known *S. keckii* population, with 500 to 1,000 plants when last surveyed (Cypher 1998). Even if the species is not rediscovered at the White River site, we still believe the site is essential to the conservation of the species because it is the most

appropriate site for a reintroduction to occur. The combination of limited range, few populations, and restricted habitat makes *S. keckii* susceptible to extinction or extirpation due to random events, such as fire, disease, or other occurrences (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). Such events are a concern when the number of populations or geographic distribution of a species are severely limited, as is the case with *S. keckii*. Establishment of a third location for *S. keckii* is likely to prove important in reducing the risk of extinction due to such catastrophic events.

Despite the association of *Sidalcea keckii* with serpentine soils (Kirkpatrick 1992; Cypher 1998), only a portion of *S. keckii* plants at the Piedra site grow on soil identified by SCS maps as being serpentine derived (the soil: Fancher extremely stony loam) (SCS 1971; NRCS 2001). Other patches at Piedra, as well as the type locality White River population, grow on what SCS maps indicate are Cibo clays, while the Mine Hill population of *S. keckii* grows in an area mapped as Coarsegold rock outcrop complex (NRCS 2001). Neither of these latter two soil types normally derive from serpentine rock (SCS 1971, 1982), although the underlying geology may contain it. Geologic maps, for example, show the Cibo soils of the Piedra population straddling an arm of underlying serpentine rock (CDMG 1991; CDC 2000). The soils may, therefore, in fact be derived from such rock or include pockets of soil derived from such rock, or the amount of serpentine rock may be too small to be mapped (E. Russell, NRCS, pers. comm., 2002). Available geologic maps fail to show any serpentine rock in the vicinity of the type locality White River population (CDMG 1992; Jennings 1977; CDC 2000). However, Cibo soils have an intrinsic tendency to dry out, harden, and form deep cracks during the summer which can discourage the growth of some plants (E. Russell, pers. comm., 2002). Hence, these soils would limit vegetation competition in favor of *S. keckii*.

Based on available soils and geologic maps, the Coarsegold soils of the Mine

Hill population do not overlie serpentine rock, nor are they intrinsically restrictive to plant growth (CDMG 1991; Jennings 1977; SCS 1982; CDC 2000; E. Russell, pers. comm., 2002). The botanists who discovered the population, however, characterized the site as a "serpentine rock outcrop" (Kirkpatrick 1992). Although geologic maps do not list serpentine rock at the site itself, they do show it within a mile to the northeast and southwest (CDMG 1991; Jennings 1977; CDC 2000). The site itself sits over "precenozoic metasedimentary and metavolcanic rocks of great variety" (Jennings 1977). Hence, it appears likely that the site consists of a pocket habitat of serpentine soil which was too small to be mapped (E. Russell, pers. comm., 2002). SCS soil maps tend to list only the dominant soil type in an area. Other such pocket habitats may exist within the same combination of soil and underlying rock.

#### Mapping

We delineated the proposed critical habitat units by creating data layers in a GIS format. First, we identified the locations of the *Sidalcea keckii* populations using information from the CNDDB (2001), and published and unpublished documents from those who located the known populations (Kirkpatrick 1992; Stebbins 1992). In the case of the Piedra population, where *S. keckii* grew in more than one patch, we identified the locations and approximate dimensions of the various patches as well, based on information provided by SFC (C. Peck, *in litt.*, 2002). We mapped populations or patch locations from all sites on USGS 7.5' quadrangle topological maps (USGS 1990) to obtain information on elevation, slope, and recognizable surface features. We then used soil survey maps (NRCS 2001) to restrict potential critical habitat to the boundaries of the basic soil types on which the populations grow. In areas where the presence of *S. keckii* could not be explained by the properties of the mapped soil type alone (such as the Coarsegold soils at the Mine Hill location), we mapped critical habitat

boundaries to the same underlying rock type as at the population site (CDC 2000). We then used recent aerial photos (SPOT 2001), topological maps (USGS 1990), and discussions with experts familiar with the areas (Rosalie Faubion, U.S. Bureau of Reclamation (BOR), pers. comm., 2002; Chuck Peck, Sierra Foothill Conservancy, pers. comm., 2002) to eliminate large contiguous areas which were noticeably more overgrown or which were not grassland and, therefore, not suitable habitat for the species.

In order to provide determinable legal descriptions of the critical habitat boundaries, we then used an overlaid 100 meter grid to establish Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD 83) coordinates which, when connected, provided the critical habitat unit boundaries. We include the legal description for each unit in the Proposed Regulation Promulgation section, below.

In designating critical habitat, we made an effort to avoid developed areas, such as housing developments and agricultural fields, that are unlikely to contribute to the conservation of *Sidalcea keckii*. However, we did not map critical habitat in sufficient detail to exclude all developed areas, or other lands unlikely to contain the primary constituent elements essential for the conservation of *S. keckii*. Areas within the boundaries of the mapped units, such as buildings, roads, parking lots, railroads, airport runways and other paved areas, lawns, and other urban landscaped areas will not contain one or more of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger a section 7 of the Act consultation, unless they affect the species or primary constituent elements in adjacent critical habitat.

#### Proposed Critical Habitat Designation

Lands proposed for critical habitat designation are under private and Federal jurisdiction. The approximate areas of proposed critical habitat by land ownership are shown in Table 1.

TABLE 1.—APPROXIMATE AREAS IN HECTARES (HA) AND ACRES (AC) OF PROPOSED CRITICAL HABITAT FOR *Sidalcea keckii* BY LAND OWNERSHIP.

Unit	Federal	State	Private	Total
1. Piedra .....	3 ha (7ac)	0	203 ha (503 ac)	206 ha (510 ac)
2. Mine Hill .....	0	0	86 ha (213 ac)	86 ha (213 ac)
3. White River .....	0	0	146 ha (362 ac)	146 ha (362 ac)
Totals .....	3 ha (7ac)	0	435 ha (1,078 ac)	438 ha (1,085 ac)

The proposed critical habitat areas constitute our best assessment at this time of the areas that are essential for the conservation of *Sidalcea keckii*. The three critical habitat units include the only two locations where *S. keckii* has been observed since the 1930's and the type locality, which may be occupied by a seed bank, and is the most appropriate location to consider for reintroduction. A brief description of each critical habitat unit is given below:

#### Unit 1: Piedra

Unit 1 is on the western slopes of Tivy Mountain in the Piedra area of southern Fresno County. It contains 206 ha (510 ac), of which 203 ha (503 ac) are privately owned and 3 ha (7 ac) managed by the BOR (R. Faubion, pers. comm., 2002). Of the privately owned land, 77 ha (189 ac) of proposed critical habitat is on the Tivy Mountain Reserve which is owned by SFC and established for the conservation of *Sidalcea keckii* and other rare plants. SFC uses managed grazing as a tool to reduce competing non-native grasses from *S. keckii* sites, and monitors the plant as well (SFC 2001). Another 6.5 ha (16 ac) of this unit occurs on a conservation easement held by SFC on privately owned land adjacent to the reserve.

In 1998, surveys coordinated by the BOR found 500 to 1,000 plants in the area (Cypher 1998). Surveys conducted in 2000 and 2001 by the SFC found eight separate patches of *Sidalcea keckii* growing on both Fancher and Cibo soils (C. Peck, *in litt.*, 2002). Fancher soils are generally serpentine derived, while Cibo soils generally are not (SCS 1971). An arm of ultramafic (serpentine) rock underlies almost the entire area (CDC 2000), although not all of the known *S. keckii* patches are located within the known extent of the serpentine substrate.

This unit is important to the conservation of the species because it is one of the two sites at which the species has been observed since the 1930's. When the number of populations or geographic distribution of a species are severely limited, as is the case when plants have only been observed recently at two locations, possible extinction or extirpation due to random events become a concern. Examples of random events that are a concern include fire and disease (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). This unit is also important because it includes the most northerly location known for *S. keckii* and the only location where above-ground plants with maroon-centered flowers have been documented (Cypher 1998).

#### Unit 2: Mine Hill

Unit 2 is about 3 km (2 mi) south of Success Dam and 5 km (3 mi) east of Porterville in Tulare County and contains 86 ha (213 ac), all of which are on privately owned land. Unit 2 encompasses a single known patch of *Sidalcea keckii*, which contained approximately 60 plants when last surveyed in 1992. At the request of the landowner, it has not been surveyed since that time. Although the Coarsegold rock outcrop soils of the area are best suited to rangeland (SCS 1982), which is the current use of the area, the site is zoned for mobile home development (Roberto Brady, Tulare County Planning Department, pers. comm., 1997).

This unit is important to the conservation of the species because it is one of the two known locations where *Sidalcea keckii* plants have been observed since the 1930's. As is the case with Unit 1, when the number of populations or geographic distribution of a species are severely limited, possible extinction or extirpation due to random events become a concern. Examples of random events that are a concern include fire and disease (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994).

#### Unit 3: White River

Unit 3 is located near the town of White River in southern Tulare County. It contains 146 ha (362 ac), all of which is private land. Unit 3 contains the "type" location, specimens from which were used to first describe the species in 1940 (Wiggins 1940). This site is the only one not closely associated with serpentine rock, but contains the primary constituent elements that would support the species. This may be due to the presence of currently unknown and unmapped serpentine areas, or it may be due to an increased ability to compete on non-serpentine Cibo soils.

As noted above, the White River site is one of the extremely few locations where *Sidalcea keckii* has ever been observed and may be occupied by a seed bank. *Sidalcea keckii* plants may still occur here, but none have been documented recently. Even if the species is not rediscovered at the White River site, we believe the site is essential to the conservation of the species. Because *S. keckii* has been observed at the site, it is the most appropriate site at which a reintroduction might be attempted. The combination of small range, few populations, and restricted habitat makes *S. keckii* susceptible to extinction

or extirpation from a significant portion of its range due to random events, such as fire, disease, or other occurrences (Shaffer 1981, 1987; Primack 1993, Meffe and Carroll 1994). Such events are a concern when the number of populations or geographic distribution of a species are severely limited, as is the case with *S. keckii*. Establishment of a third location for *S. keckii* is likely to be an important component in reducing the risk of extinction due to such catastrophic events. This location also represents the southernmost extent of the known historical range of the species.

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

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

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing, or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the action agency in eliminating conflicts that may be caused by the proposed action. The conservation measures in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal

conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If 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 the likelihood of jeopardizing the continued existence of listed species, or resulting in the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modification to extensive redesign or relocation of the project.

Regulations at 50 CFR 402.16 require Federal agencies to reinstitute consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement, or control has been retained, or is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultations has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Activities that may affect *Sidalcea keckii* or its critical habitat will require section 7 of the Act consultation. Activities on private lands that require a permit from a Federal agency, such as

a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*), a section 10(a)(1)(B) of the Act permit from the Service, or any other activity requiring Federal action (i.e., funding or authorization from the Federal Highways Administration or Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation. Not all of the areas within these units are capable of supporting *S. keckii* or its primary constituent elements, and such areas would not be subject to section 7 consultation.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 ensures that actions funded, authorized, or carried out by Federal agencies are not likely to jeopardize the continued existence of a listed species, or destroy or adversely modify the listed species' critical habitat. Actions likely to jeopardize the continued existence of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat for the recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on the recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned, particularly when the species is present in the area of the proposed action. When the species is present in an area, designation of critical habitat for *Sidalcea keckii* is not likely to result in regulatory requirements above those already in place due to the presence of the listed species. When the species is not present in an area, designation of critical habitat for *S. keckii* may result in an additional regulatory burden when a Federal nexus exists.

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

designation. Activities that may destroy or adversely modify critical habitat would be those that alter the primary constituent elements to the extent that the value of critical habitat for the conservation of *Sidalcea keckii* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency may directly or indirectly destroy or adversely modify critical habitat for *Sidalcea keckii* include, but are not limited to:

(1) Ground disturbances which destroy or degrade primary constituent elements of the plant (e.g., clearing, tilling, grading, construction, road building, mining, etc);

(2) Activities that directly or indirectly affect *Sidalcea keckii* plants (e.g., herbicide application and off-road vehicle use that could degrade the habitat on which the species depends, incompatible introductions of non-native herbivores, incompatible grazing management during times when *S. keckii* is producing flowers or seeds, etc.);

(3) Encouraging the growth of *Sidalcea keckii* competitors (e.g., widespread fertilizer application); and

(4) Activities which significantly degrade or destroy *Sidalcea keckii* pollinator populations (e.g., pesticide applications).

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE. 11th Ave., Portland, OR 97232 (telephone 503/231-2063; facsimile 503/231-6243).

#### **Relationship to Habitat Conservation Plans and Other Planning Efforts**

Currently, no habitat conservation plans (HCPs) exist that include *Sidalcea keckii* as a covered species. In the event that future HCPs covering *S. keckii* are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of this species. This will be accomplished by either directing development and habitat modification to nonessential areas, or appropriately modifying activities within essential



habitat areas so that such activities will not adversely modify the primary constituent elements. The HCP development process would provide an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by *S. keckii*. The process would also enable us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a system of interlinked habitat blocks configured to promote the conservation of the species through application of the principles of conservation biology.

We will provide technical assistance and work closely with applicants throughout the development of any future HCPs to identify lands essential for the long-term conservation of *S. keckii* and appropriate management for those lands. Furthermore, we will complete intra-Service consultation on our issuance of section 10(a)(1)(B) permits for these HCPs to ensure permit issuance will not destroy or adversely modify critical habitat.

#### Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

We will conduct an analysis of the economic impacts of designating these proposed areas as critical habitat prior to a final determination. When completed, we will announce the availability of the draft economic analysis with a notice in the **Federal Register**, and we will open a public comment period on the draft economic analysis and the proposed rule at that time.

#### Public Comments Solicited

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

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

(2) Specific information on the amount and distribution of *Sidalcea keckii* and its habitat, and which habitat is essential to the conservation of this 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) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

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

(6) 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.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods: (1) You may submit written comments and information to the Field Supervisor at the address provided in the **ADDRESSES** section above; (2) You may also comment via the electronic mail (e-mail) to [fw1kecks\\_checkermallow@fws.gov](mailto:fw1kecks_checkermallow@fws.gov). Please submit e-mail comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "Attn: [1018-AG93] and your name and return address in your e-mail message." If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Sacramento Fish and Wildlife Office at phone number 916-414-6600. Please note that the Internet address "[fw1kecks\\_checkermallow@fws.gov](mailto:fw1kecks_checkermallow@fws.gov)" will be closed out at the termination of the public comment period; and (3) You may hand-deliver comments to our Sacramento office (see **ADDRESSES** section above).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours.

Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, 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.

#### Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will solicit the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### Public Hearing

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

#### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations 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 language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make the notice easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW, Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

### Required Determinations

#### Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and was reviewed by the Office of Management and Budget (OMB). The Service is preparing a draft economic analysis of this proposed action. The Service will use this analysis to meet the requirement of section 4(b)(2) of the ESA to determine the economic consequences of designating the specific areas as critical habitat and excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of *Sidalcea keckii*. This analysis will be available for public comment before finalizing this designation. The availability of the draft economic analysis will be announced in the **Federal Register**.

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

This discussion is based upon the information regarding potential economic impact that is available to the Service at this time. This assessment of economic effect may be modified prior to final rulemaking based upon development and review of the economic analysis being prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect the position of the Service 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 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. 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 effect on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this proposed rule will not have a significant effect on a substantial number of small entities. The following discussion explains our rationale for making this assertion.

According to the Small Business Administration (<http://www.sba.gov/size/>), small entities include small organizations, such as independent non-profit 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. 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 consider the types of activities that might trigger regulatory impacts under this rule as well as the 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.

In determining whether this rule could "significantly affect a substantial number of small entities", the economic analysis first determined whether critical habitat could potentially affect a "substantial number" of small entities in counties supporting critical habitat

areas. While SBREFA does not explicitly define "substantial number," the Small Business Administration, as well as other Federal agencies, have interpreted this to represent an impact on 20 percent or greater of the number of small entities in any industry. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies, non-Federal activities are not affected by the designation if they lack a Federal nexus. In areas occupied by *Sidalcea keckii*, Federal agencies funding, permitting, or implementing activities are already required, through consultation with us under section 7 of the Act, to avoid jeopardizing the continued existence of *S. keckii*. If this critical habitat designation is finalized, Federal agencies also must ensure, also through consultation with us, that their activities do not destroy or adversely modify designated critical habitat. However, for the reasons discussed above, we do not believe this will result in any additional regulatory burden on Federal agencies or their applicants.

In unoccupied areas, or areas of uncertain occupancy, designation of critical habitat could trigger additional review of Federal activities under section 7 of the Act, and may result in additional requirements on Federal activities to avoid destroying or adversely modifying critical habitat. However, outside the existing developed areas, land use on the majority of the proposed critical habitat is agricultural, such as livestock grazing and farming. Should a federally funded, permitted, or implemented project be proposed that may affect designated critical habitat, we will work with the Federal action agency and any applicant, through section 7 consultation, to identify ways to implement the proposed project while minimizing or avoiding any adverse effect to the species or critical habitat. In our experience, the vast majority of such projects can be successfully implemented with at most minor

changes that avoid significant economic impacts to project proponents.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for one small business, on average, that may be required to consult with us each year regarding their project's impact on *Sidalcea keckii* and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or resulting in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Secondly, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the

scope of authority of the Federal agency involved in the consultation. As we have a very limited consultation history for *Sidalcea keckii*, we can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary, include conservation set-asides, management of competing non-native species, restoration of degraded habitat, construction of protective fencing, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this proposed critical habitat designation.

It is likely that a developer could modify a project or take measures to protect *Sidalcea keckii*. Based on the types of modifications and measures that have been implemented in the past for plant species, a developer may take such steps as installing fencing or re-aligning the project to avoid sensitive areas. The cost for implementing these measures for one project is expected to be of the same order of magnitude as the total cost of the consultation process, i.e., approximately \$10,000. It should be noted that developers likely would already be required to undertake such measures due to regulations under the California Environmental Quality Act. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this rule would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons, that it will not affect a substantial number of small entities. Furthermore, we believe that the potential compliance costs for the remaining number of small entities that may be affected by this rule will not be significant. Therefore, we are certifying that the proposed designation of critical habitat for *Sidalcea keckii* is not expected to have a significant adverse impact on a substantial number of small entities. Thus, an initial flexibility analysis is not required.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this proposed rule is a significant regulatory action under Executive Order 12866, 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.)*

The Service will use the economic analysis to evaluate consistency with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.).

#### *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 to designate approximately 438 ha (1,085 ac) of lands in Fresno and Tulare counties, California as critical habitat for *Sidalcea keckii* in a takings implication assessment. This preliminary assessment concludes that this proposed rule does not pose significant takings implications. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

#### *Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Sidalcea keckii* 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 of critical habitat in unoccupied areas may require section 7 of the Act consultation on non-Federal lands (where a Federal nexus occurs) that might otherwise not have occurred. However, there will be little additional impact on State and local governments and their activities because all but one of the proposed critical habitat areas are occupied. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are identified. While 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 Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are proposing to designate critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Sidalcea keckii*.

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

This rule does not contain any new collections of information that require OMB approval under the Paperwork Reduction Act. This rule will not impose new record-keeping 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

We have determined we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This proposed determination does not constitute a major Federal action significantly affecting the quality of the human environment.

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

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. The proposed critical habitat for *Sidalcea keckii* does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

#### References Cited

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

#### Author

The primary author of this notice is Glen Tarr, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

#### List of Subjects in 50 CFR Part 17

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

#### Proposed Regulation Promulgation

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 "*Sidalcea keckii*," 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>Sidalcea keckii</i> .....	Keck's checkermallow.	U.S.A. (CA) .....	Malvaceae—Mallow	E	685	17.96(b)	NA
	*	*	*	*	*		

3. In § 17.96, as proposed to be amended at 65 FR 66865, November 7, 2000, amend paragraph (b) by adding an entry for *Sidalcea keckii* in alphabetical order under Family Malvaceae to read as follows:

#### § 17.96 Critical habitat—plants.

\* \* \* \* \*

(b) \* \* \*

Family Malvaceae: *Sidalcea keckii* (Keck's checkermallow)

(1) Critical habitat units are depicted for Fresno and Tulare counties, California, on the maps below.

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

(i) Minimally shaded annual grasslands in the Sierra foothills containing open patches in which competing vegetation is relatively sparse; and

(ii) Serpentine soils, or other soils which tend to restrict competing vegetation.

(iii) Existing man-made features and structures, such as buildings, roads, railroads, airports, other paved areas, lawns, and other urban landscaped areas, do not contain one or more of the primary constituent elements. Federal

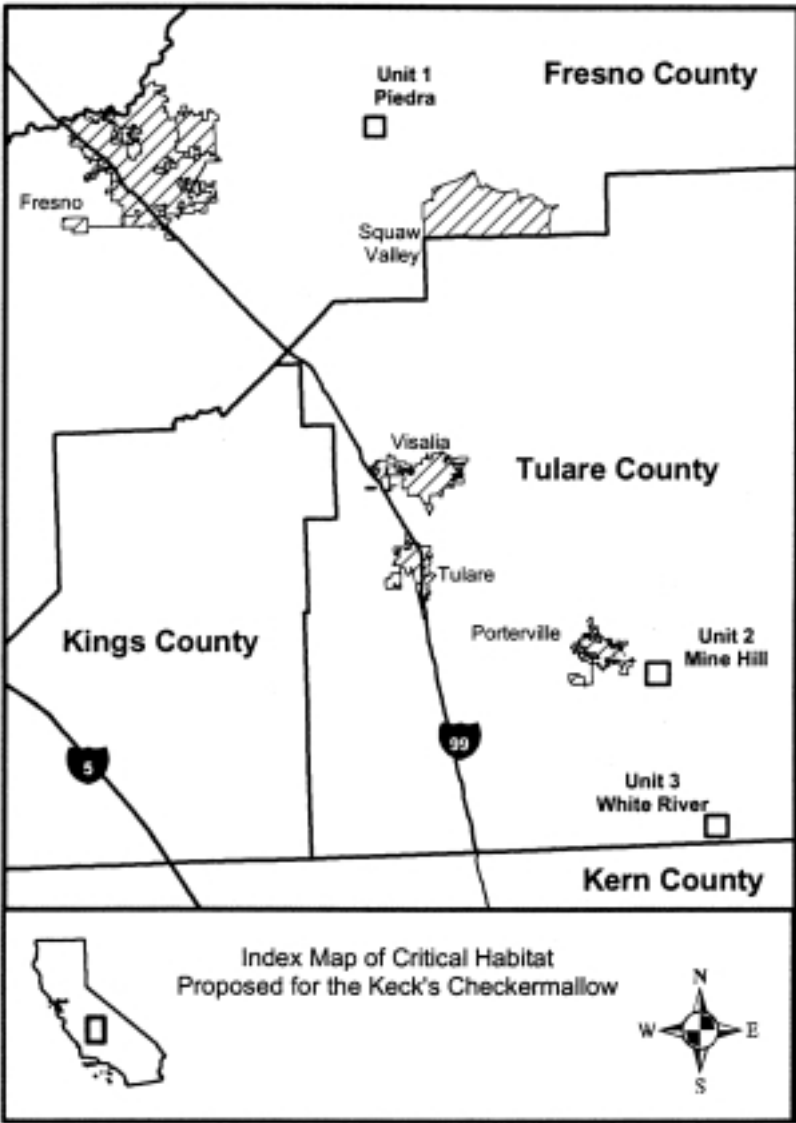
actions limited to those areas, therefore, would not trigger a consultation under section 7 of the Act unless they may affect the species and/or primary constituent elements in adjacent critical habitat.

#### (3) Critical Habitat Map Units.

(i) Data layers defining map units were created on a base of USGS 7.5' quadrangles, and proposed critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(ii) Critical Habitat Map Units—Index Map Follows:

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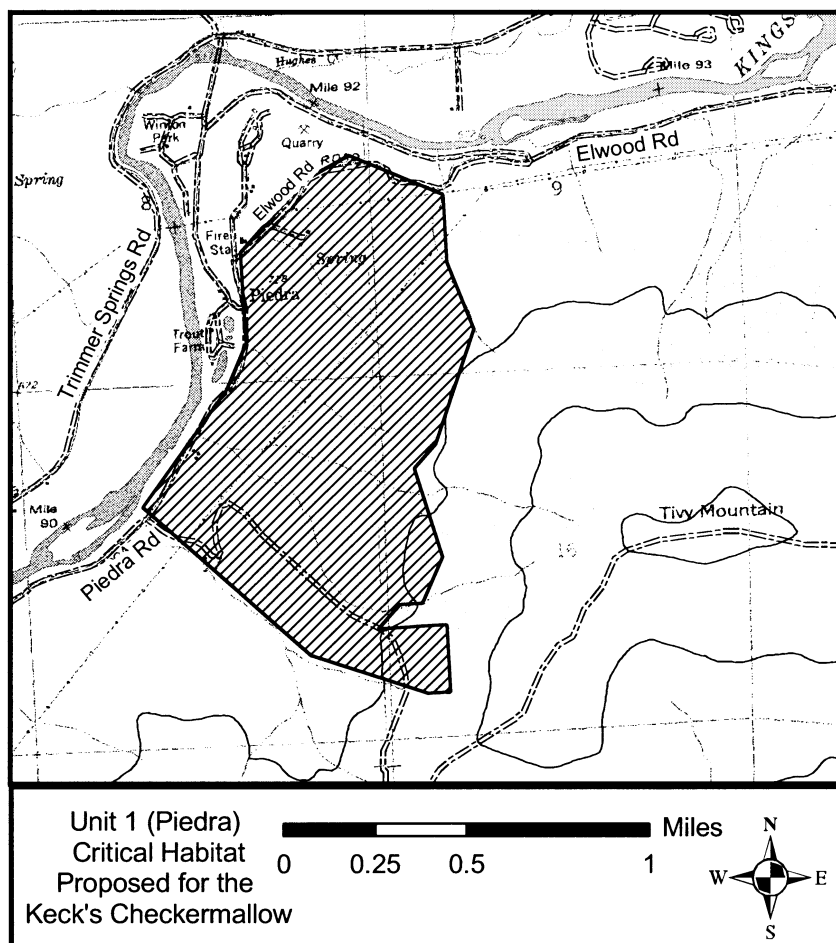
(4) Map Unit 1: Piedra Unit, Fresno County, California

(i) From USGS 1:24,000 quadrangle maps Piedra, and Pine Flat Dam, California; land bounded by the following UTM11 NAD83 coordinates

(E,N): 288300, 4074700; 288200, 4074700; 287700, 4074900; 287000, 4075600; 287400, 4076100; 287500, 4076300; 287500, 4076700; 287800, 4077000; 288000, 4077100; 288400, 4076900; 288400, 4076600; 288500,

4076300; 288300, 4075800; 288200, 4075700; 288300, 4075300; 288200, 4075100; 288100, 4075100; 288000, 4075000; 288300, 4075000; 288300, 4074700.

(ii) Map Unit 1 Map Follows:



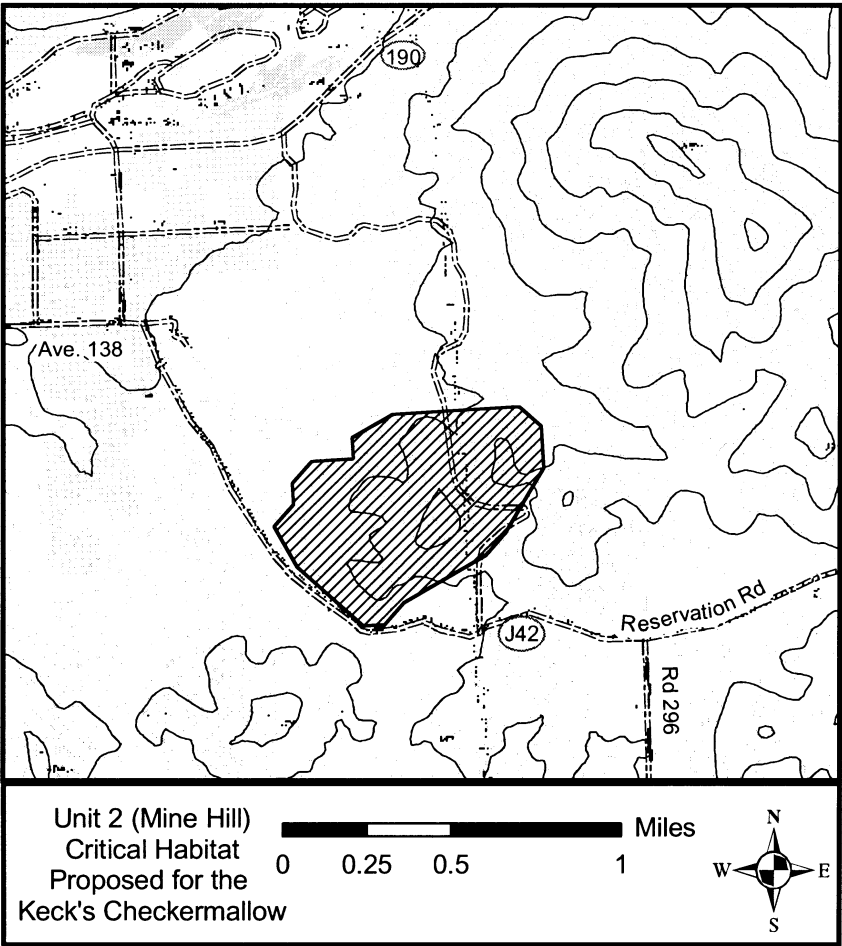
(5) Map Unit 2: Mine Hill Unit, Tulare County, California

(i) From USGS 1:24,000 quadrangle Success Dam, California; land bounded by the following UTM11 NAD83

coordinates (E,N): 326600, 3988600;  
326500, 3988600; 326200, 3988900;  
326100, 3989100; 326200, 3989200;  
326200, 3989300; 326300, 3989400;  
326500, 3989400; 326500, 3989500;

326700, 3989600; 327300, 3989600;  
327400, 3989500; 327400, 3989300;  
327200, 3989000; 327100, 3988900;  
326700, 3988700; 326600, 3988600.

(ii) Map Unit 2 Map Follows:



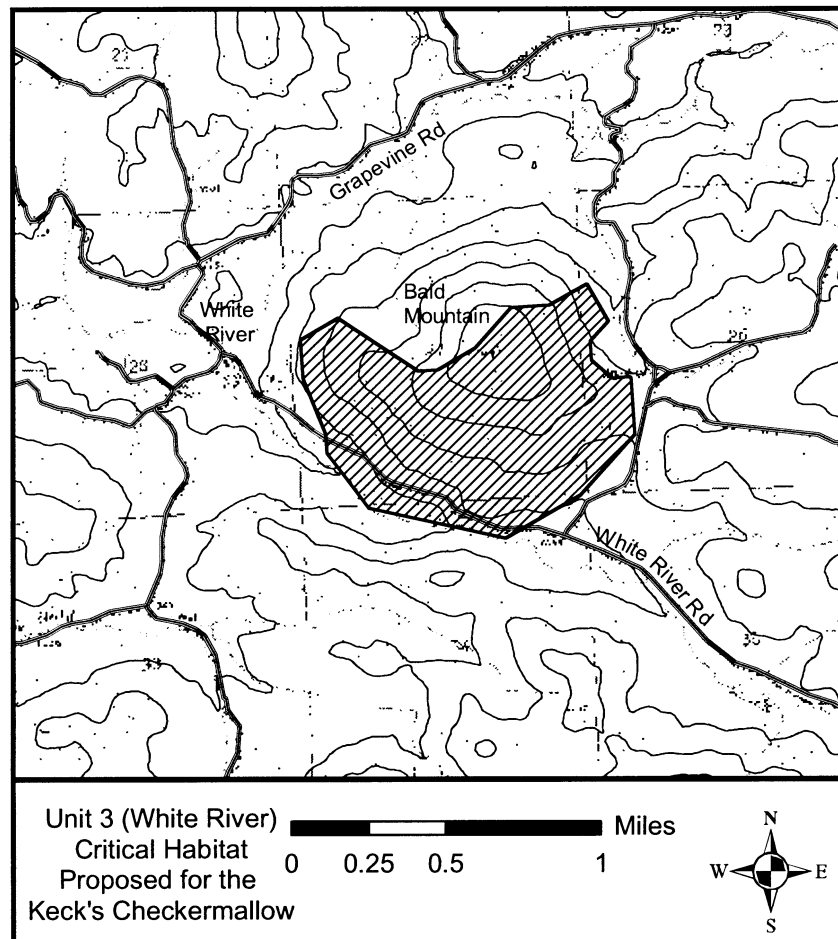
(6) Map Unit 3: White River Unit, Tulare County, California

(i) From USGS 1:24,000 quadrangle maps White River, California; land bounded by the following UTM11 NAD83 coordinates (E,N): 334800,

3963600; 334100, 3963800; 333900, 3964100; 333900, 3964200; 333800, 3964500; 333800, 3964700; 334000, 3964800; 334400, 3964500; 334500, 3964500; 334700, 3964600; 334900, 3964800; 335100, 3964800; 335300,

3964900; 335400, 3964700; 335300, 3964600; 335300, 3964500; 335400, 3964400; 335500, 3964400; 335500, 3964100; 335200, 3963800; 334800, 3963600.

(ii) Map Unit 3 Map Follows:



\* \* \* \* \*

Dated: June 13, 2002.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and  
Parks.*

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**BILLING CODE 4310-55-C**