

U.S. Department of Transportation, room PL-401, 400 Seventh Street, SW., Washington, DC, 20590-0001.

**FOR FURTHER INFORMATION CONTACT:**

Linda C. Lasley, Attorney-Advisor, Office of the Assistant General Counsel for Regulation and Enforcement, (202) 366-4723.

**SUPPLEMENTARY INFORMATION:**

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, 104 Stat. 890), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134, 110 Stat. 1321) (the Act), requires Federal agencies to review each civil penalty provision within their respective jurisdictions at least once every four years and determine whether adjustments to any penalty provisions are required due to inflation. If an adjustment is required, the agency must issue a rulemaking adjusting its civil penalties provision accordingly. The Department of Transportation (Department), in meeting this statutory requirement in the past, has allowed each of its Operating Administration to review and adjust its own civil penalty provisions. This final rule delegates the responsibility of reviewing annually each civil penalty provision throughout the Department to the Assistant Secretary for Budget and Programs (Assistant Secretary). The Assistant Secretary will be responsible for determining which civil penalty provisions are required to be adjusted and for calculating the necessary adjustment. Further, the Assistant Secretary will coordinate with each Operating Administration to ensure that any necessary and appropriate rulemaking is published in the **Federal Register**.

This delegation is designed to centralize the Department's efforts at complying with the statutory mandates of the Act to ensure a timelier, efficient, and consistent review of the Department's various civil penalty provisions.

Because this final rule is ministerial in nature and relates only to Departmental management, organization, procedure, and practice, the Office of the Secretary of Transportation (OST) has determined that notice and comment are unnecessary and that the rule is exempt from prior notice and comment requirements under 5 U.S.C. 553(b)(3)(A). These changes will not have substantive impact, and OST does not expect to receive substantive comment on the rule. Therefore, OST finds that there is good cause under 5 U.S.C. 553(d)(3) to make this rule

effective less than 30 days after publication in the **Federal Register**.

**Regulatory Evaluation**

*Regulatory Assessment*

This rulemaking is a non-significant regulatory action under section 3(f) of Executive Order 12866 and has not been reviewed by the Office of Management and Budget under that Order. This rule is also not significant under the regulatory policies and procedures of the Department of Transportation, 44 FR 11034.

This rule does not impose unfunded mandates or requirements that will have any impact on the quality of the human environment.

*Collection of Information*

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

*Federalism Assessment*

This proposed rule has been reviewed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and it is determined that this action does not have a substantial direct effect on the States, or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule will not limit the policymaking discretion of the States nor preempt any State law or regulation.

**List of Subjects in 49 CFR Part 1**

Authority delegations (government agencies), Organization and functions (government agencies).

In consideration of the foregoing, part 1 of title 49, Code of Federal Regulations, is amended to read as follows:

**PART 1—[AMENDED]**

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

**Authority:** 49 U.S.C. 322; 46 U.S.C. 2104(a); 28 U.S.C. 2672; 31 U.S.C. 3711(a)(2); Pub. L. 101-552, 104 Stat. 2736; Pub. L. 106-159, 113 Stat. 1748; Pub. L. 107-71, 115 Stat. 597.

2. In § 1.58, add a new paragraph (i) to read as follows:

**§ 1.58 Delegations to Assistant Secretary for Budget and Programs.**

\* \* \* \* \*

(i) In accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410, 104 Stat. 890), as amended by the Debt Collection

Improvement Act of 1996 (Pub. L. 104-134, 110 Stat. 1321), review, on an annual basis, each of the Department's civil penalty provisions, determine whether adjustment is required, calculate the necessary adjustment, and coordinate with the relevant Operating Administration to ensure that the requisite regulation making the adjustment is issued.

\* \* \* \* \*

Issued on February 20, 2003.

**Norman Y. Mineta,**

*Secretary of Transportation.*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018-AG96**

**Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Two Larkspurs From Coastal Northern California**

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat pursuant to the Endangered Species Act of 1973, as amended (Act), for *Delphinium bakeri* (Baker's larkspur) and *Delphinium luteum* (yellow larkspur). We are designating 2 units totaling approximately 740 hectares (ha) (1,828 acres (ac)) for *D. bakeri*, and 4 units totaling approximately 1,022 ha (2,525 ac) for *D. luteum*, in Marin and Sonoma counties, California. The total critical habitat for both plants is approximately 1,762 ha (4,353 ac) in 6 units. This critical habitat designation provides additional protection 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 solicited data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation.

**DATES:** This rule becomes effective on April 17, 2003.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for

public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W-2605, Sacramento, CA 95825.

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

**SUPPLEMENTARY INFORMATION:**

**Background**

*Delphinium bakeri* is a perennial herb in the buttercup family (Ranunculaceae). Ewan (1942) described *Delphinium bakeri* based on type material collected by Milo Baker in 1939 from "Coleman Valley, Sonoma Co., California." In the most recent treatment, Warnock (1997) retained the taxon as a full species. It grows from a thickened, tuber-like, fleshy cluster of roots. The stems are hollow, erect, and grow to 65 centimeters (cm) (26 inches (in)) tall. Shallowly five-parted leaves occur primarily along the upper third of the stem and are green (as opposed to withering) at the time the plant flowers. The flowers are irregularly shaped. The five sepals (members of the outermost set of flower parts) are conspicuous, bright dark blue or purplish, with the rear sepal elongated into a spur (hollow, often cone-shaped, projection). The inconspicuous petals occur in two pairs. The lower pair is oblong and blue-purple; the upper pair is oblique (having unequal sides or an asymmetric base) and white. Seeds are produced in several dry, many-seeded fruits, which split open at maturity on only one side (*i.e.*, follicles). *D. bakeri* flowers from April through May (Warnock 1993). *D. bakeri* can be differentiated from other members of the genus by its crenate leaf margins (margins notched or scalloped so as to form rounded teeth), leaves that are not withering at time of flowering, and flowers that are loosely arranged (California Native Plant Society (CNPS) 1977).

*Delphinium bakeri* has only been known from three locations: Coleman Valley in southern Sonoma County, near the town of Tomales in northern Marin County, and approximately 10 km (6 mi) east of Tomales Bay in northern Marin County (California Natural Diversity Database (CNDDDB) 2001). *D. bakeri* is thought to have been extirpated from Coleman Valley sometime prior to 1986, and from the site near Tomales, where the species has not been relocated since 1925 (CNDDDB 2001). At the only known extant (currently existing, not extirpated

or destroyed) population, approximately 10 km (6 mi) east of Tomales Bay, the number of individuals has varied from 0 to 67 individuals over the last 20 years (CNDDDB 2001).

*Delphinium bakeri* occurs on decomposed shale. The sites where it is found range from 90 to 205 meters (m) (295 to 672 feet (ft)) in elevation (CNDDDB 2001). The collection from the type locality (the location where the species was first described) in Coleman Valley was described by Joseph Ewan as growing "along fence rows and in heavy low brush" (Ewan 1942). Two species listed as growing with *D. bakeri* at the type locality were *Potentilla elata* (now known as *Horkelia californica* ssp. *dissita* (California honeydew)) and *Ranunculus orthorynchus* (straightbeak buttercup) (Ewan 1942). No information is reported for the associated species or habitat for the other occurrence near Tomales that is thought to be extirpated (CNDDDB 2001).

The single extant occurrence of *Delphinium bakeri* grows in mesic (moderate moisture) conditions along an extensive north-facing slope under an overstory that includes *Umbellularia californica* (California bay), *Aesculus californica* (California buckeye), and *Quercus agrifolia* (coastal live oak). Other native plants associated with *D. bakeri* at this site include: *Baccharis pilularis* ssp. *consanguinea* (coyotebrush), *Symphoricarpos* cf. *rivularis* (snowberry), *Rubus ursinus* (California blackberry), *Pteridium aquilinum* (braken fern), *Polystichum munitum* (sword fern), *Pityrogramma triangularis* (goldback fern), *Dryopteris arguta* (coastal woodfern), *Adiantum jordani* (maidenhair fern), *Polypodium glycyrrhiza* (licorice fern), *Toxicodendron diversilobum* (poison oak), *Ceanothus thyrsiflorus* (blueblossom ceanothus), *Lithophragma affine* (woodland star), and *Holodiscus discolor* (oceanspray) (J. Koontz, Center for Biodiversity, *in litt.*, 2002; CNDDDB 2001). These plants are important indicators of remaining areas of natural habitat that support *D. bakeri*, and are likely to support ecological processes such as water retention, shading, nitrogen processing, and other factors that create suitable habitat conditions for *D. bakeri*. The property is privately owned, but Sonoma County has a right-of-way along the road. Pollinators have not specifically been identified for *D. bakeri*, but pollinators for species in the genus *Delphinium* typically are large hymenoptera, especially *Bombus* ssp. (bumblebees) (Guerrant 1978).

In 1942, Ewan noted that the habitat of *Delphinium bakeri* was formerly more abundant, but had been reduced

by cultivation (Ewan 1942). Habitat conversion, grazing, and roadside maintenance activities are cited as the reasons for the decline of the species, and two of the three known occurrences of *D. bakeri* in Marin and Sonoma counties, including the occurrence at the type locality in Coleman Valley, have been extirpated (California Department of Fish and Game (CDFG) 1994). The single location where *D. bakeri* is known to remain extant is threatened by road work, such as right-of-way maintenance (including use of herbicides), overcollection, and sheep grazing (CNDDDB 2001). For example, many plants were accidentally mowed by a county road maintenance crew in May 2002 (J. Koontz, *in litt.*, 2002). Because of the restriction in its range to a single population and the small population size of the one remaining occurrence, *D. bakeri* is extremely vulnerable to extinction from random natural events, such as unseasonal fire or insect outbreaks (Shaffer 1981; Primack 1993).

*Delphinium luteum* is a perennial herb in the buttercup family (Ranunculaceae). Heller (1903) described *D. luteum* based on type material collected from "grassy slopes about rocks, near Bodega Bay, along the road leading to the village of Bodega" in Sonoma County. Although Jepson (1975) reduced *D. luteum* to a variety of *D. nudicaule* (red larkspur), it is currently recognized as a full species (Warnock 1993). *D. luteum* grows from thin tuberous roots up to 30 cm (12 in) long to a height of 55 cm (22 in) tall. The leaves are mostly basal, fleshy, and green at the time of flowering. The flowers are cornucopia-shaped. The five conspicuous sepals are bright yellow, with the posterior sepal elongated into a spur. The inconspicuous petals occur in two pairs. The upper petals are narrow and unlobed; the lower petals are oblong to ovate (egg-shaped). The fruit is a follicle. *D. luteum* flowers from March to May. The species is distinguished from other *Delphinium* by its yellow flowers and its erect seed follicles (CNPS 1977). In contrast to typical pollinators for the genus *Delphinium*, potential pollinators for *D. luteum* are Allen's hummingbirds (*Selasphorus sasin*), which have been observed visiting *D. luteum* flowers. In addition, the flower shape and sucrose-dominated nectar are consistent with characteristics of species that are typically pollinated by hummingbirds (Guerrant 1978).

*Delphinium luteum* inhabits coastal prairie and coastal scrub areas, which typically have no overstory vegetation, at elevations ranging from sea level to

about 100 m (300 ft) within northwestern Marin and southwestern Sonoma counties, California (CNDDDB 2001). The species occurs on moderate to steep slopes, generally near areas showing evidence of some level of ground disturbance in the past, including landslides (Guerrant 1978, CNDDDB 2001). Roots of *D. luteum* are tuberous, long, and thin, an unusual combination in this genus, which may provide an advantage in thin, unstable soils (Weaver 1919 as cited in Guerrant 1978). Typical soil types supporting *D. luteum* include the Kneeland series in Sonoma County and the Yorkville series in Marin County. These soils derive from sandstone or shale, and share qualities of rapid runoff and high erosion potential (U.S. Department of Agriculture 1972; Soil Conservation Service (SCS) 1985). The most recently documented populations of *D. luteum* (those seen in the 1980s or later) tend to grow on north-facing slopes in canyon complexes with steep sides (LSA Associates (LSA) 1997; CNDDDB 2001). Presumably the more shaded north-facing slopes provide a more moist microclimate than slopes facing other directions, while the steep-sloped canyon walls increase the likelihood of erosion and landslides in the vicinity. Two potential exceptions to this trend are evident (CNDDDB 2001): one population near Tomales, California, is mapped on a south-facing slope, and a relatively nearby population does not appear to grow near any steep-sloped canyon walls. Both of these populations are in critical habitat Unit L4, described below. The first population has not been documented since 1983, and its mapped location is precise to a 0.32 km (0.20 mi) radius. This could put its actual location across the canyon on a north-facing slope. The other population is growing in a road cut, which might provide erosional and soil disturbance characteristics similar to those near canyon walls (CNDDDB 2001).

Temperatures in the region inhabited by *Delphinium luteum* are moderated by fog. As a result, the summers are relatively cool and winters are relatively warm compared to inland habitats.

Much of the coastal prairie in this species' range has been grazed by livestock for over a century, and is now characterized by a mixture of nonnative annuals and forbs and native prairie plants. Native plants typically occurring with *D. luteum* include *Arabis blepharophylla* (rose rockcress), *Calochortus tolmei* (Tolmei startulip), *Mimulus aurantiacus* (orange bush monkeyflower), *Dudleya caespitosa* (sea lettuce), *Polypodium californicum* (California polyploidy), *Eriogonum*

*parviflorum* (sea cliff buckwheat), *Toxicodendron diversilobum* (poison oak), *Romanzoffia californica* (California mistmaiden), *Hesperevax sparsiflora* (evax), *Pentagramma triangularis* (goldenback fern), and *Sedum spathulifolium* (broadleaf stonecrop) (CNDDDB 2001; J. Koontz, *in litt.*, 2002;). These plants are important indicators of remaining areas of natural habitat that support *D. luteum*, and are likely to support ecological processes such as water retention, shading, nitrogen processing, and other factors that create suitable habitat conditions for *D. luteum*.

We know of 12 occurrences of *Delphinium luteum*, 11 of which are documented in the CNDDDB (CNDDDB 2001). (The CNDDDB defines an "occurrence" of a plant species as a location where the species is present and which is separated from other such locations by at least 0.40 kilometer (km) (1/4 mile (mi)). All occurrences of *D. bakeri* and *D. luteum* mapped by the CNDDDB GIS data layers indicate single populations.) Since the early 1980s, however, only 6 of these 11 occurrences have been documented (reported in the CNDDDB or other reputable source). Of the other five occurrences in the CNDDDB, three have not been documented since 1935 or earlier (two of which were revisited in the 1980s with negative results), another is based entirely on unsupported and undated information found on a 1979 map, and the fifth is a questionable identification never confirmed by a second sighting (CNDDDB 2001). The six occurrences documented more recently in the CNDDDB grow in three separate drainages, one in Sonoma County and two in Marin County. These groupings form the basis of three of the four critical habitat units we are proposing (see Units L1, L2 and L4, below). The twelfth occurrence, not yet recorded in the CNDDDB, occurs in a third Marin County drainage (Amme 1993; D. Amme, California Department of Transportation (CalTrans), *in litt.* 2002; D. Amme, pers. comm. 2002), and forms the basis of critical habitat Unit L3, as described below.

Recent surveys have not found many plants in any of these populations. The largest number recorded by CNDDDB is 134 plants for one of the Marin County populations in 1993. The total number of remaining individuals of *Delphinium luteum* currently is estimated at 100 to 175 plants (J. Koontz, *in litt.*, 2002). Each recently documented population faces one or more potential threats to its existence, including overcollection, road widening, inadequately managed sheep grazing, fire suppression, and

hybridization with another *Delphinium* species (B. Guggolz, CNPS, pers. comm., 1995; CNDDDB 2001). Additionally, the combination of few populations, small numbers of individuals within each population, narrow range, and restricted habitat makes *D. luteum* susceptible to extirpation in significant portions of its range from random natural events such as unseasonal fire, drought, disease, or other natural occurrences (Shaffer 1981; Primack 1993).

#### Previous Federal Action

Federal actions on the two plant species began when the Secretary of the Smithsonian Institution, as directed by section 12 of the Act (16 U.S.C. 1531 *et seq.*), prepared a report on those native U.S. plants considered to be endangered, threatened, or extinct in the United States. This report, known as House Document No. 94-51, was presented to Congress on January 9, 1975, and included *Delphinium bakeri* and *D. luteum* as species the Smithsonian considered to be endangered. 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, including *D. bakeri* and *D. luteum*, to be endangered species pursuant to section 4 of the Act. We assembled the list of 1,700 plant taxa on the basis of House Document No 94-51, our July 1, 1975, **Federal Register** publication (40 FR 27823), and comments and data received in response to both documents. General comments received in response to the 1976 proposal were summarized in an April 26, 1978, **Federal Register** publication (43 FR 17909).

In 1978, Congress passed amendments to the Act requiring us to withdraw all listing proposals more than 2 years old. The amendments included a 1-year grace period for proposed rules which already were more than 2 years old. On December 10, 1979, we published a notice in the **Federal Register** (44 FR 70796) withdrawing the portion of the June 16, 1976, proposed rule that had not been made final, along with four other proposals that had expired. We published an updated Notice of Review (NOR) for plants on December 15, 1980 (45 FR 82480). This NOR included *Delphinium bakeri* and *D. luteum* as "category 1 candidates" (defined at that time as species for which data in our

possession was sufficient to support proposals for listing).

On February 15, 1983, we published a notice in the **Federal Register** (48 FR 6752) of our prior finding that the listing of *Delphinium bakeri* and *D. luteum* was warranted but precluded in accordance with section 4(b)(3)(B)(iii) of the Act. Pursuant to section 4(b)(3)(C)(i) of the Act, such findings must be recycled annually, until the species is either proposed for listing or the petitioned action is found to be not warranted. Each October from 1983 through 1994, further findings were made that the listing of *D. bakeri* and *D. luteum* were warranted, but that the listing of these species was precluded by other pending proposals of higher priority.

On November 28, 1983, we published a supplement to the plant NOR (48 FR 53640). This supplement changed *Delphinium bakeri* and *D. luteum* from "category 1" to "category 2 candidates" (defined at the time as species for which data in our possession indicated listing was possibly appropriate, but for which substantial data on biological vulnerability and threats were not currently known or on file to support proposed rules).

The plant NOR was revised again on September 27, 1985 (50 FR 39526). *Delphinium bakeri* and *D. luteum* were included as category 2 candidates. Another revision of the plant NOR was published on February 21, 1990 (55 FR 6184). In this revision *D. bakeri* and *D. luteum* were included as category 1 candidates, and remained as category 1 candidates in the plant NOR published on September 30, 1993 (58 FR 51144). Upon publication of the February 28, 1996, NOR (61 FR 7596), we ceased using category designations and included *D. bakeri* and *D. luteum* as candidate species. We define candidate species as those for which we have on file sufficient information on the biological vulnerability and threats to support proposals to list them as threatened or endangered. On June 19, 1997, we published a proposed rule in the **Federal Register** (62 FR 33383) to list *D. bakeri* and *D. luteum* as endangered.

On June 17, 1999, our failure to issue final rules for listing *Delphinium bakeri* and *D. luteum* and seven other plant species as endangered or threatened, and our failure to make a final critical habitat determination for the nine species, was challenged in *Southwest Center for Biological Diversity and California Native Plant Society v. U.S. Fish and Wildlife Service and Bruce Babbitt* (Case No. C99-2992 (N.D.Cal.)). We subsequently published a final rule listing *D. bakeri* and *D. luteum* as

endangered species on January 26, 2000 (65 FR 4156). On May 22, 2000, the judge signed an order requiring us to propose critical habitat for the two species by September 30, 2001. The court subsequently extended this deadline to June 10, 2002, based on a settlement agreement reached on October 1, 2001 (*Center for Biological Diversity, et al., v. Gale Norton, et al.* (D.D.C.) (Case No. Civ. 01-2063)). The agreement also established March 10, 2003, as the date by which we would reach a final critical habitat determination for the species.

We published a proposed critical habitat designation for *Delphinium bakeri* and *D. luteum* in the **Federal Register** on June 18, 2002 (67 FR 41367). Publication of the proposed rule opened a 60-day public comment period, which closed on August 19, 2002. On November 1, 2002, we published a notice announcing the availability of our draft economic analysis of the proposed critical habitat designation (67 FR 66599). The notice opened a public comment period on the draft economic analysis, and reopened the comment period on the proposed critical habitat designation. This second public comment period lasted approximately 30 days, closing on December 2, 2002.

#### Summary of Comments and Recommendations

In our June 18, 2002, proposed critical habitat designation (67 FR 41367) we solicited comments from all interested parties on all aspects of the proposed rule, including information related to biological justification, economic impacts, proposed critical habitat boundaries, and proposed projects. In our November 1, 2002, notice of availability for the draft economic analysis (67 FR 66599), we invited comments on the draft analysis and on the proposed critical habitat designation. In addition to these **Federal Register** publications, we also sent notification letters to appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment. We solicited independent peer review of the proposed designation from three botanists with applicable areas of expertise (see Peer Review section below). We also invited public comment through the publication of notices in three local newspapers: the Marin Independent Journal (June 26, 2002), the Santa Rosa Press Democrat (June 27, 2002), and the Point Reyes Light (July 3, 2002).

Seven individuals, including one peer reviewer, responded with comments. One of those individuals initially

requested a public hearing, but subsequently decided to meet instead with Sacramento Fish and Wildlife Office's Listing Branch personnel to submit his comments verbally. Four of the seven commenters indicated their overall support of the proposed designation, two were neutral, and one was opposed. We have reviewed all the comments we received for substantive issues and new information regarding *Delphinium bakeri* and *D. luteum*, and for potential impacts of the proposed critical habitat designation. The comments are addressed in the following summary.

#### Issue 1: Comments on the Biology of the Species

(1) *Comment*: One commenter questioned whether *Delphinium luteum* qualifies as a valid species.

*Our Response*: Although Jepson (1975) reduced *Delphinium luteum* to a variety of *D. nudicaule*, it currently is recognized as a full species (Warnock 1993). Guerrant (1978) proposed, based on morphological, ecological, and chemical characteristics, that *D. luteum* might have originated as a species from the hybridization of *D. nudicaule* (red larkspur) and *D. decorum* (yellowtinge larkspur). However, genetic testing by Koontz *et al.* (2001) has shown that if this did in fact occur, it was many generations ago, and that naturally occurring *D. luteum* cannot now be "recreated" simply by hybridizing *D. nudicaule* and *D. decorum*. Thus, the best available scientific information supports the recognition of *D. luteum* as a valid species.

(2) *Comment*: One commenter argued that we lack evidence to conclude, with regard to *Delphinium luteum*, that "sheep grazing, fire, water run, rock quarry activities, etc. are a threat, and that there is a need to restrict them \* \* \* The commenter also mentioned a study by Richard Knight of Colorado State University which found grazing land to be an important resource for many native wildlife species.

*Our Response*: The proposed critical habitat designation included "unmanaged sheep grazing" and "unseasonal fire" among potential threats faced by *Delphinium luteum* (67 FR 41367, at 41369), not just "sheep grazing" or "fire." We did not list "water run" as a threat, and we are not aware of any populations currently being threatened by rock quarrying, although this has threatened populations in the past (Service 2000). The CNDDDB (2001) lists sheep grazing as a threat for two of the three largest remaining occurrences of *D. luteum*, and specifically notes that flowers were

found to have been chewed off some of the plants. We recognize that properly controlled grazing can often benefit some native species by cropping back competing plants and by providing an incentive to avoid urban or agricultural development, but we also believe that overgrazing remains a threat for this species. The establishment of critical habitat is unlikely to restrict or affect grazing levels unless the activity has the involvement of a Federal agency, such as a permit or funding.

(3) *Comment:* Another commenter referred to unmanaged sheep grazing as one of the main threats to *Delphinium luteum*. The commenter argued that the remaining population locations may be limited to the steeper and brushier north-facing slopes specifically because those are the places which sheep find most difficult to reach. This commenter recommended that critical habitat for *D. luteum* include “the larger coastal prairie community with all the traversing canyons and watersheds,” possibly the entire Marin Gap between Bodega Bay and the Bolinas Ridge, to encourage the future establishment of conservation easements that could eventually ease grazing pressures and allow *D. luteum* populations to expand back outward.

*Our Response:* We agree that sheep grazing may be a key factor in restricting the species to north-facing slopes in some areas. We want to ensure it is understood, however, that although all but one recently documented population of *D. luteum* occurs on basically north-facing slopes, the species is not restricted to north-facing slopes. Slopes with other aspects can support the species, they support continuity within the units, and provide a range of microhabitat sites for potential expansion that is necessary for the conservation of the species. Therefore, we have redefined the primary constituent elements of the species to more clearly indicate that slope and aspect are separate requirements. Because areas within the defined units are considered critical habitat if they possess at least one of the primary constituent elements of the species, the treatment of slope and aspect as separate constituent elements will more clearly indicate our intent that critical habitat should include areas within each unit that are either steeply sloping or north aspect. However, we believe the possible historical impacts of sheep grazing on the range of *Delphinium luteum* are too speculative to support the expansion of the units beyond their current boundaries in the manner suggested by the commenter.

(4) *Comment:* One commenter thought the *Delphinium luteum* units followed specific soil types too closely and should include more steeply sloped (30 percent or greater) areas with other sandstone or shale-based soil types. He specifically recommended the Tocaloma-Saurin hillsides within Unit L4 and within the Walker Creek watershed east of Unit L4. He also recommended including sloped areas of Tomales series soils between Units L2 and L3.

*Our Response:* The reference to Kneeland and Yorkville series soils in the list of primary constituent elements for the species was meant as an example and not a limitation, so the areas in Unit L4 with Tocaloma-Saurin soils and slopes of 30 percent or greater do contain the primary constituent element regarding soils, and we consider such areas to be included in our designation of critical habitat in Unit L4.

In response to the recommendation regarding the areas between two of the proposed units, we considered expanding the critical habitat boundaries to include the Tocaloma-Saurin hillsides along Walker Creek and the Tomales series soils between units L2 and L3. Given our limited current knowledge of the species and its conservation requirements, however, and because we have no records of *D. luteum* growing in the suggested locations, we have little certainty that these areas would meet the definition of critical habitat (as defined in section 3(5)(A) of the Act) as areas on which are found physical and biological features that are essential to the conservation of the species. Within the geographical area occupied by the species, we designate only areas currently known to be essential, and consequently we do not believe it is appropriate to include the suggested areas in our designation of critical habitat for *D. luteum*.

As further described in the section of this preamble entitled “Critical Habitat” (below), we recognize that our designation of critical habitat may not include all of the habitat areas that might eventually be determined to be necessary for the conservation 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. 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. Also, as provided for by section 4(a)(3) of the Act, we can revise our designation of critical habitat in the future if it is appropriate to do so.

#### *Issue 2: Site Specific Comments*

(5) *Comment:* Two commenters questioned the validity of the *Delphinium luteum* occurrence in Unit L3.

*Our Response:* This occurrence was documented in Amme (1993), and reconfirmed by both discoverers (D. Amme, *in litt.* 2002; D. Amme, pers comm. 2002; C. Patterson, pers comm. 2003). It was also cited in a plant survey conducted in 1997 (LSA 1997), although that survey did not attempt to directly reconfirm the occurrence’s existence. Mr. Amme is a biologist for CalTrans, while Mr. Patterson is a consulting botanist with over 20 years’ experience. Although Mr. Amme has indicated some concern that the occurrence may have hybridized to some extent with another species, a small amount of genetic introgression would be unlikely to invalidate the protections of the Act (Service 1996 (61 FR 4710)). Mr. Amme has mentioned to us the possibility that the occurrence could be a yellow-flowered hybrid of two other larkspur species: *Delphinium nudicaule* (red larkspur) and *D. decorum* (coast larkspur) (D. Amme, *in litt.*, 2003). While this possibility cannot be conclusively ruled out, we believe that given the extremely few *D. luteum* occurrences remaining, in the absence of evidence to indicate the occurrence is not *D. luteum*, we must proceed on the assumption that it is. If future evidence demonstrates conclusively that this occurrence is not *D. luteum*, the critical habitat designation can be revised at that time.

(6) *Comment:* Two commenters provided information regarding separate areas in Unit L3 that indicates the areas do not contain *Delphinium luteum* plants or appropriate habitat.

*Our Response:* Although developed areas such as buildings, roads, or lawns may inadvertently be included within critical habitat boundaries, such areas generally do not have any of the primary constituent elements of the species, and so do not qualify as critical habitat. Where possible we prefer to exclude such areas directly, so we have redrawn Unit L3 to avoid the areas in question. See the “Summary of Changes from Proposed Rule” section below.

(7) *Comment:* A commenter argued that Units L2 and L3 have been actively grazed or farmed for over 100 years and either they do not contain *Delphinium*

*luteum* or else *D. luteum* can coexist with current land uses, and therefore critical habitat designation in those areas is unnecessary.

*Our Response:* Maps of grazing impact, habitat quality, and habitat type prepared as part of an "Overview Summary" for a planned golf ranch in the area in 1992 show extensive grazing impacts (Marin Coast Associates 1992). However, the maps also show areas with relatively high quality habitat, and the L2 and L3 *Delphinium luteum* occurrences fall within these areas. Hence, *D. luteum* apparently can coexist with sheep grazing in areas which are not heavily grazed.

The Act defines critical habitat as areas on which are found physical and biological features essential to the conservation of the species and which may require special management considerations or protection. We believe that the occurrences in Units L2 and L3 are areas with features essential to the conservation of the species, and we also believe they may need special management considerations to survive despite having persisted to this point, because they remain subject to the various threats as described above. While critical habitat designation imposes no special management requirements on private landowners, it does require Federal agencies to take the species' habitat needs into account whenever their actions might adversely modify the habitat. It also alerts the public to the importance of the area for the species, thereby making it easier for landowners to obtain support or compensation from public or private sources for special management actions they are willing to take.

(8) *Comment:* A commenter stated that Units L2 and L3 need ground truthing to see if *Delphinium luteum* plants are still there.

*Our Response:* Based on consideration of the best available information, we have determined that Units L2 and L3 meet the definition of critical habitat. In general, more ground truthing would be helpful, but we are limited by our inability to enter private property without permission. In the case of Units L2 and L3, we have requested permission from one owner but have not received an answer. Ground truthing would be useful to ascertain further the value of the habitat for *Delphinium luteum*. Plants may be missed if they are not mature and flowering, and a seed bank may be present even when mature plants are not.

#### Issue 3: Legal and Procedural Comments

(9) *Comment:* A commenter recommended that we provide more

accurate maps of unit boundaries and more background information on field reconnaissance work.

*Our Response:* The maps we publish are limited by the printing capabilities of the **Federal Register** and the Code of Federal Regulations. We can provide more accurate maps on request, however, as well as answer questions regarding field reconnaissance of particular areas. We also commonly publish maps and information on our Web page, <http://sacramento.fws.gov>. Because of private property considerations, our field reconnaissance was limited to habitat inspections made from public roads for Units B1, B2, L1, and L4, and at some other historically documented sites for *Delphinium luteum* which had not been confirmed since the early 1980s.

(10) *Comment:* A commenter found the comment period too short and asked us to extend it.

*Our Response:* As detailed above in the Previous Federal Action section, the initial comment period for the proposed rule lasted 60 days, and was followed by a second 30-day comment period to allow comment on both the proposed rule and the draft economic analysis. These time periods are within the requirements of our regulations, and we believe they allow a reasonable time for comment. We were unable to reopen the comment period a third time because we are under a court imposed deadline to reach a final critical habitat determination by March 10, 2003.

(11) *Comment:* One commenter argued that the Act requires us to make a draft economic analysis available prior to proposing critical habitat.

*Our Response:* Section 4(b)(2) of the Act requires us to "designate critical habitat \* \* \* after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." We interpret this to mean the economic analysis must precede the final critical habitat designation, not the proposed designation. It would not be possible for us to weigh the economic impacts of a designation which we had not yet proposed, since the projected costs of critical habitat depend on the location and size of the areas which may be designated. We made the draft economic analysis available for review, and accepted comments on it, from November 1 to December 2, 2002.

(12) *Comment:* A commenter pointed out that we had not provided a map showing the locations of *Delphinium bakeri* and *D. luteum* occurrences, or the number of plants and date observed for each occurrence.

*Our Response:* We have access to much of this information through a use agreement with the CNDDDB database, compiled and maintained by the CDFG. We do not believe it would be prudent for us to publish the exact locations of these plants because we might thereby facilitate collection or vandalism of them. We can provide more accurate maps on request, however, as well as answer questions regarding field reconnaissance of particular areas.

(13) *Comment:* A commenter argued that the California Environmental Quality Act (CEQA) requires us to complete an Environmental Impact Report for this critical habitat designation because it could result in a change in agricultural use.

*Our Response:* CEQA only applies to discretionary projects of State or local public agencies (Cal. Pub. Res. Code §§ 21063, 21080(a)).

(14) *Comment:* A commenter who had difficulty accessing the economic analysis on our website claimed this constituted a failure to make the information readily accessible, in violation of the Federal Data Quality Act. The commenter clarified in a separate e-mail that he was referring to the Service Information Quality Guidelines.

*Our Response:* The Information Quality Guidelines (Guidelines) (67 FR 64407) concern the accuracy of information disseminated by our agency. They are not violated by a failure of our ability to disseminate the information over the Internet on a particular day. Additionally, the Guidelines are intended to improve the internal management of information quality and do not create an enforceable legal right or benefit (67 FR 64407). The notice of availability of the draft economic analysis which we published in the **Federal Register** (67 FR 22404) provided contact information for personnel from our office who could have provided assistance.

#### Issue 4: Comments on the Economic Analysis

(15) *Comment:* A commenter stated that critical habitat designation causes a loss in property values which the economic analysis fails to take into account. The commenter suggested that the analysis might have quantified some of the lost land value by totaling the number of acres of grazing land affected, since such lands have a specific grazing value per acre. The commenter also stated that the economic analysis did not attempt to quantify "the most basic economic effects a critical habitat designation will cause."

*Our Response:* The commenter suggested that critical habitat designation and Federal listing restricts grazing activities which, in turn, reduces property values. In this situation, grazing activities are not expected to be changed by critical habitat designation or Federal listing because there are no section 7 requirements triggered specifically by private landowner grazing activities in the areas being designated as critical habitat. Although the implementation of section 7 regulations is not likely to reduce the value of land designated as critical habitat, uncertainty about the scope and impact of the designation may cause the areas to be temporarily stigmatized. Because public uncertainty about the section 7 process is often heightened immediately after critical habitat designation, stigma associated with the proposed designation may cause a reduction in a willingness-to-pay for the land. This, in turn, can result in a reduced land value. By definition, stigma effects are associated with perceived regulatory or land-value effects as opposed to actual regulatory or land-value effects. As explained in the final economic analysis, once the public understands the actual effect of critical habitat, any stigma associated with the area may be greatly reduced or even disappear. While stigma effects are solely attributable to critical habitat designation, the impacts are generally difficult to quantify. Therefore, a count of grazing acres within critical habitat would not have helped to quantify property values lost due to stigma effects.

Critical habitat designation and Federal listing of species do not impose on a private landowner any additional costs if future land uses are not changed by the designation and listing. The economic analysis concluded that because of county land use restrictions, no future development would occur in the areas we are designating as critical habitat. The county land use restrictions are independent of our designation of critical habitat. No section 7 consultation requirements are expected to be triggered within Marin County habitat units due to development.

The commenter also stated that the economic analysis did not attempt to quantify "the most basic economic effects a critical habitat designation will cause." The intent of this statement is not entirely clear to us, and it may have been meant to reiterate the point discussed above, namely that the concern the economic analysis did not quantify possible losses in property value. Alternatively, the comment may be interpreted as being intended to

point out that the economic benefits of critical habitat designation remained unquantified in the analysis, so we also are responding to that possible concern. We typically report all quantified benefits of critical habitat designation if there are peer reviewed and published studies estimating benefits, and if these studies use a relatively sound methodology. Because no such studies exist for *Delphinium bakeri* and *D. luteum*, the draft economic analysis discusses these benefits in qualitative terms, but does not provide a numerical estimate of their value. The section of this preamble entitled "Critical Habitat" (below) also addresses the benefits of designating critical habitat.

(16) *Comment:* A commenter stated that the draft economic analysis did not consider additional development plans in the designated critical habitat units located in Marin County.

*Our Response:* We consulted with officials of the Marin County Community Development Department (CDD) in an effort to obtain the most current and comprehensive information about the likelihood of future planned and proposed development within areas that were proposed for critical habitat. CDD officials confirmed that no development applications had been submitted for the critical habitat units in Marin County, and that future development is unlikely due to lack of utility infrastructure, distance to jobs and basic supplies, and agricultural zoning restrictions established by the Marin County General Plan.

(17) *Comment:* Two commenters mentioned that the economic analysis failed to account for costs associated with the treatment of critical habitat by State and local requirements such as the California Environmental Quality Act (CEQA) and the general plan for Marin County.

*Our Response:* The comments could be interpreted as expressing concern over the potential costs to landowners, or the concern may have been the potential costs to State and local governments of revising documents such as the county general plan to reflect critical habitat designation. We are responding to both of these potential interpretations. Critical habitat designation is not likely to affect the content or implementation of Marin County's General Plan, nor will it result in additional review under CEQA. Zoning and land use designations were determined prior to the proposed designation of critical habitat, and our rulemaking is unlikely to trigger any revisions of the General Plan. According to section 15065 (California Code of Regulations Title 14, Chapter 3) of

CEQA guidelines, an environmental impact report (EIR) is required by local lead agencies, when, among other things, a project has the potential to "reduce the number or restrict the range of an endangered, rare or threatened species." Although federally listed species are presumed to meet the CEQA definition of "endangered, rare or threatened species" under section 15380 (California Code of Regulations Title 14, Chapter 3), few additional constraints should result from the designation of critical habitat beyond those now in place as a result of the earlier listing of *Delphinium bakeri* and *D. luteum* as endangered species. Only if loss or degradation of the proposed project site's habitat resources (viewed comprehensively) are determined to be significant will significant impacts to habitat be analyzed and mitigation, where feasible, be planned as part of a project. Because officials from the CDD confirmed that no new development applications are anticipated for the proposed Marin County habitat units, no EIRs are likely to be prepared. Therefore, neither landowners nor State or local governments are likely to experience additional costs anticipated by the commenters.

(18) *Comment:* A commenter questioned why the draft economic analysis does not account for impacts of critical habitat designation on existing land uses such as stock pond maintenance and quarry operations.

*Our Response:* Federal assistance for stock pond maintenance is sponsored by the Natural Resource Conservation Service (NRCS), an agency in the U.S. Department of Agriculture (USDA). However, no consultations have occurred with the Service in the past for NRCS programs that provide assistance for stock pond maintenance. Therefore, based on the consultation history, this analysis assumes that the NRCS will continue its current operating procedures and is unlikely to consult with us on these types of activities in the future. As stated in the draft economic analysis, other programs sponsored by NRCS, namely technical and financial assistance to landowners for erosion and flood control projects, have a consultation history, and economic impacts of section 7 regulations for those activities have been estimated.

The U.S. Environmental Protection Agency requires under the Clean Water Act (33 U.S.C. 1251 *et seq.*), that a private landowner obtain a National Pollutant Discharge Elimination Program permit for any quarry operation that may result in a point source discharge of a pollutant into waters of

the United States. The commenter gave no specific mention of actual quarries, and, after consulting with an official at Region 2 of the California Water Quality Control Board, we are not aware of any quarries on or near the habitat units proposed for Marin County. Hence, no consultations or project modifications are likely to occur as no plans exist for additional quarries.

(19) *Comment:* A commenter thought the economic analysis should include the cost of suing us for improperly designating critical habitat.

*Our Response:* We have followed all of the legal requirements pertaining to the designation of critical habitat and believe we have made the designation properly, and consequently do not believe it is necessary or appropriate to engage in speculation regarding the potential for litigation and costs that might be associated with it. It is possible that litigation may be initiated in response to the rulemaking and if that happens, the court will determine whether the plaintiff(s) should be reimbursed for any of the costs of litigation, and if so, what the level of reimbursement should be.

(20) *Comment:* A commenter thought we should try to balance the economic impacts of the designation against the benefit to the species.

*Our Response:* In designating critical habitat, section 4(b)(2) of the Act requires us to take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat, and allows us to exclude any area if the benefits of exclusion outweigh the benefits of designation, unless we determine that the failure to designate such an area will result in the extinction of the species. We have estimated the costs associated with the critical habitat designation in our economic analysis, and do not find that the benefits of exclusion, as indicated by the avoided costs, would outweigh the benefits to the species of designating the six units of critical habitat.

#### Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from three knowledgeable individuals with expertise in one or several fields, including familiarity with the species, familiarity with the geographic region in which the species occurs, and familiarity with the principles of conservation biology. One of the three reviewers responded, providing us with comments that are summarized here.

Overall the peer reviewer supported the designation, finding that the proposed rule “is well written and appears justified” (J. Koontz, *in litt.*, 2002). He provided us with information regarding further habitat southeast of Unit L1 which appears to contain the primary constituent elements for *Delphinium luteum*. Although we do not believe that, in the absence of any new occurrences of the plant, the extension of the unit to include this area is essential to the conservation of the species at this time, we will keep the area in mind while developing a recovery plan. We will evaluate the value of this area for species recovery during the development of the recovery plan for these species.

The peer reviewer also suggested certain changes and additions which we have incorporated into the Background, Primary Constituent Elements, and Critical Habitat Designation sections of the rule, as appropriate. These changes include an updated estimate of the number of plants remaining, a more inclusive list of community associates for *Delphinium bakeri* and *D. luteum*, information regarding the mowing of the *D. bakeri* population in May 2002, and information regarding the possible hybrid origin of *D. luteum*. He also included updated or corrected citations for some of the points made in the proposed rule, and provided useful background information and opinion, such as contact information for other species experts and an overview of the costs and benefits to the species of designating critical habitat in the amounts proposed. Finally, he emphasized the importance of field reconnaissance and questioned the extent to which we were able to do this for the proposed units. We addressed this comment in our responses to comments 8 and 9.

#### Summary of Changes From the Proposed Rule

In response to comment 3 (above) we redefined the primary constituent elements of the species to more clearly indicate that slope and aspect are separate requirements. Based on comment 6 (above), we refined our mapping with the result of eliminating approximately 24 ha (60 ac) of land proposed to be designated for Unit L3. The eliminated areas include the northernmost peninsular area of the unit, which contains several buildings and is heavily silted, and another peninsular area at the southwestern end of the unit, which contains a wastewater treatment and disposal system. These areas do not contain *Delphinium bakeri* and *D. luteum* plants, nor do they

contain the primary constituent elements for these species. We have also incorporated changes suggested by our peer reviewer (*see* Peer Review section above).

#### Critical Habitat

Section 3 of the Act defines critical habitat as—(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with section 4 of this Act, upon a determination that such areas are essential for the conservation of the species. “Conservation,” as defined by the Act, 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.

Section 7(a)(2) of the Act requires that Federal agencies shall, in consultation with us, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Section 7 also requires conferences on Federal actions that are likely to jeopardize the continued existence of any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. 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. 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, and consequently critical habitat designation does not afford any additional regulatory protection under the Act under those circumstances.

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 using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). 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 geographical 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 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. We recognize that our designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the conservation 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 by Federal agencies 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.

Within the geographical area occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation. Within the geographical area occupied by the species, we will attempt to avoid designating areas that do not now have the primary constituent elements, as defined at 50 CFR 424.12(b), which provide essential life cycle needs of the species. However, we may be restricted by our minimum mapping unit or mapping scale.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** 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 our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should, at a minimum, be the listing package 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, biological assessments or other unpublished materials, and discussions with experts.

#### 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 *Delphinium bakeri* and *D. luteum*. We reviewed available information that pertains to the habitat requirements of these species, including data from research and survey observations; regional Geographic Information System (GIS) coverages (*e.g.*, soils, known

locations, vegetation, land ownership); information from herbarium collections such as CalFlora (<http://www.calflora.org>); data from CNDDDB (2001); and data collected from project-specific and other miscellaneous reports submitted to us. This included information from our final rule listing *D. bakeri* and *D. luteum* as endangered (65 FR 4156), the CNDDDB (2001), soil survey maps (SCS 1972, 1985), certified soil GIS layers for Marin County, geologic formation maps, 1993 digital orthophotoquarterquads, and discussions with botanical experts who have worked closely with these plant species. We also conducted site visits at one historical occurrence of *D. bakeri* and five historical occurrences of *D. luteum* as well as one extant occurrence of *D. bakeri* and three extant occurrences of *D. luteum* (to the extent we could visit the habitat without going onto private land).

#### Mapping

We delineated the critical habitat units by using data layers in a GIS format with all the known *Delphinium bakeri* and *D. luteum* occurrences from the CNDDDB (2001) and other sources (D. Amme, *in litt.*, 2002, pers. comm., 2002). We created additional data layers to reflect vegetation types using aerial photographs, GIS data for Marin soils (Natural Resource Conservation Service 2001), and recent development using satellite imagery (CNES/SPOT Image Corporation 2001). We created an additional data layer by digitizing Kneeland soils data for Sonoma County from a U.S. Geological Survey (USGS) soil survey (1972). These data layers were laid over a base of USGS 3.75' digital orthophotographic quarter quadrangle images.

In designating critical habitat, we made an effort to avoid developed areas such as houses, intensive agricultural areas (such as row crops, vineyards, and orchards), and lands unlikely to contain the primary constituent elements for *Delphinium bakeri* or *D. luteum*. However, we did not map critical habitat in sufficient detail to exclude all developed areas. Developed areas within the boundaries of the mapped units, such as buildings, lawns, roads, parking lots, and other paved areas will not contain one or more of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger consultation relative to critical habitat under section 7 of the Act unless they affect the species, or affect primary constituent elements in adjacent critical habitat.

### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas to propose as critical habitat, we consider those physical and biological features 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, the following:

- (1) Space for individual and population growth, and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;
- (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Our regulations at 50 CFR 424.12(b) further direct that when considering the designation of critical habitat, we are to focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species, and we are to list known primary constituent elements with the critical habitat description. Our regulations describe known primary constituent elements in terms that are more specific than the description of physical and biological features. Specifically, primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species of plant pollinator, geological formation, vegetation type, tide, and specific soil types.

All areas identified as critical habitat for *Delphinium bakeri* and *D. luteum* are within the historical range and contain one or more of the primary constituent elements that we have identified, based on the best available scientific information, as essential for the conservation of the species.

Much of what is known about the specific physical and biological requirements of *Delphinium bakeri* and *D. luteum* is described in the Background section of this final rule. The designated critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *D. bakeri* and *D. luteum* throughout their ranges, and to provide those habitat components essential for the conservation of these species. These habitat components provide for: (1)

Space for individual and population growth, including areas that allow gene flow and provide connectivity or linkage between populations including open spaces and disturbed areas that in some instances may also contain nonnative plant species; (2) areas that provide basic requirements for growth such as water, light, minerals; (3) sites for germination, pollination, reproduction, and seed dispersal; (4) areas that support populations of pollinators and seed dispersal organisms; and (5) habitats that are representative of the historic geographical and ecological distributions of each species.

We believe the conservation of *Delphinium bakeri* and *D. luteum* is dependent upon a number of factors, including the conservation and management of sites where existing populations grow, the establishment of *D. bakeri* at a new location to provide insurance against stochastic (randomly occurring) events, the maintenance of normal ecological functions within these sites, and the preservation of the connectivity between sites to maintain recent levels of gene flow between sites through pollinator activity and seed dispersal agents. The areas we are designating as critical habitat provide some or all of the habitat components essential for the conservation of these two species.

Based on our knowledge to date, the primary constituent elements of critical habitat for *Delphinium bakeri* consist of:

- (1) Soils that are derived from decomposed shale;
- (2) Plant communities that support associated species, including, but not limited to: *Umbellularia californica* (California bay), *Aesculus californica* (California buckeye), and *Quercus agrifolia* (coastal live oak), *Baccharis pulularis* ssp. *consanguinea* (coyotebrush), *Symphoricarpos* cf. *rivularis* (snowberry), *Rubus ursinus* (California blackberry), *Pteridium aquilinum* (braken fern), *Polystichum munitum* (sword fern), *Pityrogramma triangularis* (goldback fern), *Dryopteris arguta* (coastal woodfern), *Adiantum jordanii* (maidenhair fern), *Polypodium glycyrrhiza* (licorice fern), *Toxicodendron diversilobum* (poison oak), *Ceanothus thyrsiflorus* (blueblossom ceanothus), *Lithophragma affine* (woodland star), and *Holodiscus discolor* (oceanspray); and
- (3) Mesic (moderate moisture) conditions on extensive north-facing slopes.

Based on our knowledge to date, the primary constituent elements of critical habitat for *Delphinium luteum* consist of:

- (1) Plant communities, including north coastal scrub or coastal prairie communities, including, but not limited to, species such as: *Arabis blepharophylla* (rose rockcress), *Calochortus tolmei* (Tolmei startulip), *Mimulus aurantiacus* (orange bush monkeyflower), *Dudleya caespitosa* (sea lettuce), *Polypodium californicum* (California polyploidy), *Eriogonum parviflorum* (sea cliff buckwheat), *Toxicodendron diversilobum* (poison oak), *Romanzoffia californica* (California mistmaiden), *Hesperrevax sparsiflora* (evax), *Pentagramma triangularis* (goldenback fern), and *Sedum spathulifolium* (broadleaf stonecrop).

- (2) Relatively steep sloped soils (30 percent or greater) derived from sandstone or shale, with rapid runoff and high erosion potential, such as Kneeland or Yorkville series soils;

- (3) Generally north aspected areas; and

- (4) Habitat upslope and downslope from known populations to maintain disturbance such as occasional rock slides or soil slumping that the species appears to require.

### Criteria Used to Identify Critical Habitat

We identified areas on which are found physical and biological features essential for the conservation of *Delphinium bakeri*, based on consideration of the known primary constituent elements, in Marin County at the only location where the species currently is known to occur (Unit B2), as well as in the Coleman Valley area in Sonoma County (Unit B1), where the species was historically found. We are including the Coleman Valley site in our designation despite the apparent extirpation of *D. bakeri* from this location, because we believe the area is essential to the conservation of the species and still contains primary constituent elements for the species. The Coleman Valley unit encompasses the location where the species was first described, and it is one of very few locations where *D. bakeri* has ever been observed. We believe that reintroduction of *D. bakeri* at the Coleman Valley site is essential for the species' survival due to the extremely limited range of *D. bakeri*, its small population size (0 to 67 individuals over the last 20 years), and the high degree of threat from chance catastrophic events (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 is severely limited, as is the case with *D. bakeri*.

Establishment of a second location for *D. bakeri* is important in reducing the risk of extinction of the species due to such catastrophic events. Further, when considering establishment of new locations as part of meeting the conservation needs of a species, we believe it is appropriate to look first to reestablishing populations within the historic range of a species, especially specific areas where the species was once known to occur, rather than going to completely new areas. Our designation of critical habitat does not include the location near Tomales, California, however, because our information is too vague to accurately identify the site.

We identified critical habitat for *Delphinium bakeri* by mapping the distribution of the known occurrences of the species with respect to distance from the coast, location within watersheds, soil series associations, aspect of the slopes and watersheds, position on slopes, our field observations of the soil conditions at each location, and our field observations of the plant associations found in the area of each location. We then drew an initial critical habitat demarcation that included the appropriate soils, vegetation, and watershed, consistent with our understanding of the physical and biological features and primary constituent elements that are essential for the conservation of this species. We mapped the critical habitat units to include the upslope and downslope areas that would be important to the maintenance of these features and related primary constituent elements essential for the conservation of the species.

We identified areas with features essential to the conservation of *Delphinium luteum* in the locations where it is known to occur in Marin and Sonoma counties. Due to the limited number of populations of *D. luteum* and the high degree of threat from catastrophic events, we have determined that all areas with recently documented occurrences contain physical and biological features that are essential for the conservation of this species and are necessary and appropriate to designate as critical habitat. All four *D. luteum* units (L1, L2, L3, and L4) are within the geographical area currently occupied by the species, and *D. luteum* occurs in all four of the units. In addition, the Center for Plant Conservation (2002) recommends that additional populations be established and managed for this species. Some locations within these critical habitat units may be suitable sites for such

introductions or for natural expansion of the existing populations.

As a rule, we drew boundary lines for *Delphinium luteum* critical habitat units to include all areas of the same soil type and in the same canyon system as the enclosed population(s). Although all but one recently documented population of *D. luteum* occurs on basically north-facing slopes, we consistently included as critical habitat both sides of the canyons which contain *D. luteum*. We did this because the folds and side canyons common to these sites can produce localized north aspect areas even on generally south aspect canyon walls, the species is not restricted to north-facing slopes, and south aspect slopes may support any of the other three primary constituent elements for this species. We did not extend critical habitat boundaries to deliberately include south aspect slopes unless they supported at least one of the other three primary constituent elements, although mapping limitations may have resulted in including a few such areas inadvertently. Including both sides of the canyons where the plant occurs also encompasses a wider range of microhabitats to support population growth. This approach also may have the benefit of making management of the units easier.

Units L1, L2, and L4 contain features which caused us to modify somewhat our general rule of drawing boundaries based on the same soil type and canyon system as the known population. In Unit L3, the soil boundaries conformed well to the canyon boundaries, and also included areas of steep-sloped canyon walls, so no modification of what was drawn (based on application of the general rule described above) was appropriate or necessary. Unit L1 soil boundaries included several branching canyons with numerous coastal drainage outlets, so we included those canyons which drained roughly to the same location and did not include the others. In Unit L2, the soil boundaries conformed well to the drainage, but because the area enclosed was very small and unbranched, and because the same soil type also occurred with suitable habitat in a separate drainage less than half a mile away, we extended the boundaries of the unit to include the north-facing slopes of the second drainage as bounded by the suitable soil type. The resulting unit is still the smallest of the four designated for *Delphinium luteum*, and by including this small area of nearby habitat, we can provide the resident *D. luteum* population an opportunity to colonize a new area. Given the susceptibility of *D.*

*luteum* populations to extirpation by random, uncontrollable events, the establishment of new populations is essential to the continuing survival of the species.

Unit L4 contains the population growing in a road-cut away from steep-sloped canyon walls, as well as the population mapped on a south-facing slope. It also includes a third population which is located in typical habitat, but which the CNDDDB lists as "possibly extirpated" due to the inability of several surveys to relocate it since 1982. All three populations are mapped as growing on different soil types (CNDDDB 2001). However, with two exceptions, all soil types in the area share the rapid run-off and high erosion potential with which *Delphinium luteum* is associated. The two exceptions are the canyon floor and a small area at the head of the canyon where the walls are not steeply sloped. We are including these for contiguity of the unit and because both of them abut the location of the population located in the road cut. Taken together, the various soil types conform well to the main canyon boundaries (SCS 1985) and include all the habitat requirements of the species. Therefore, we have drawn Unit L4 largely according to the soil boundaries as they extend down the main canyon. We did not extend the unit up either of two large side canyons because those areas neither contain *D. luteum* populations nor a soil type common to all the populations in the unit.

#### Special Management Considerations

Special management considerations or protections may be needed to maintain the physical and biological features and primary constituent elements that are essential for the conservation of *Delphinium bakeri* and *D. luteum* within the units being designated as critical habitat. In some cases, protection of existing habitat and current ecological processes may be sufficient to ensure that populations of the plants are maintained at those sites and have the ability to reproduce and disperse in surrounding habitat. In other cases, however, active management may be needed to maintain the primary constituent elements for the two species.

As noted in the Critical Habitat section, "special management considerations or protection" is a term that originates in the definition of critical habitat. We believe the designated critical habitat units may require special management considerations or protection because remaining populations of *Delphinium bakeri* and *D. luteum* are extremely rare,

contain few individuals, and are subject to threats which could extirpate them. In addition to the risk due to random natural events that can result in the extinction of species with very few, small, and highly isolated populations, potential threats to the habitat of *D. bakeri* include overcollection, application of herbicides, and sheep grazing, and potential threats to the habitat of *D. luteum* include overcollection, road widening, sheep grazing, fire suppression, and hybridization. Currently, no legally operative plans or agreements have been developed that address the maintenance and improvement of the primary constituent elements important to the species, or that provide management for the long-term conservation of *D. bakeri* or *D. luteum*.

We have outlined below the most likely kinds of special management and protection that the habitat features and primary constituent elements essential to the conservation of *Delphinium bakeri* and *D. luteum* may require. The following actions apply to both species, unless otherwise noted:

- (1) In all plant communities where these taxa occur, invasive, nonnative species need to be actively controlled;
- (2) The quality of water must be maintained to keep it free from levels of herbicides or other chemical or organic contaminants that would be deleterious to the species;
- (3) Certain areas where these species occur may need to be fenced to protect them from accidental or intentional trampling by humans and livestock;
- (4) Aerial application of herbicides and insecticides that are likely to be deleterious to the species needs to be curtailed in the critical habitat. Exposure to deleterious herbicides and insecticides from drift needs to be avoided;
- (5) The appropriate level of soil disturbance needs to be maintained (this applies only to *Delphinium luteum*); and
- (6) Existing hydrologic conditions may need to be protected by avoiding activities that cause a change in surface or subsurface water flows.

#### Critical Habitat Designation

Lands designated as critical habitat areas described below contain physical or biological features essential to the conservation of *Delphinium bakeri* and *D. luteum*, including one or more of the primary constituent elements described above, and constitute our best assessment at this time of the areas which meet the Act's definition of critical habitat. The approximate areas

of critical habitat by land ownership are shown in Table 1.

TABLE 1.—APPROXIMATE AREAS OF *Delphinium bakeri* AND *D. luteum* CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)). ALL CRITICAL HABITAT FOR BOTH SPECIES IS ON PRIVATE LANDS

Species (unit)	Private land
<i>D. bakeri</i> (B1) .....	322 ha (796 ac)
<i>D. bakeri</i> (B2) .....	418 ha (1,032 ac)
Subtotal <i>D. bakeri</i> .	740 ha (1,828 ac)
<i>D. luteum</i> (L1) .....	554 ha (1,369 ac)
<i>D. luteum</i> (L2) .....	133 ha (329 ac)
<i>D. luteum</i> (L3) .....	142 ha (351 ac)
<i>D. luteum</i> (L4) .....	193 ha (476 ac)
Subtotal <i>D. luteum</i> .	1,022 ha (2,525 ac)
Total (both species).	1,762 ha (4,353 ac)

Critical habitat for *Delphinium bakeri* includes one unit in Marin County which contains the only currently known location of *D. bakeri*, and a second unit in Sonoma County we believe includes the type locality for the species. The second unit is essential because establishment of a second location for *D. bakeri* is important in reducing the risk of extinction of the species due to catastrophic events. Critical habitat for *D. bakeri* totals 740 ha (1,828 ac), with 418 ha (1,032 ac) in Marin County and 322 ha (796 ac) in Sonoma County. Critical habitat for *D. luteum* includes four units. These units together contain all the *D. luteum* populations documented since the 1980s. Critical habitat for *D. luteum* includes 1,022 ha (2,525 ac), with 554 ha (1,369 ac) in Sonoma County and 468 ha (1,156 ac) in Marin County.

A brief description of each unit, along with our reasons for designating it as critical habitat, is presented below.

#### Unit B1: Coleman Valley, Sonoma County, California

This unit is located near Coleman Valley Road west of the town of Occidental, approximately 8 km (5 mi) from the coast. The 322 ha (796 ac) unit is bounded on the north side by Coleman Valley Road and represents an area either near or at the original type locality for *Delphinium bakeri*. The exact location of the type locality for *D. bakeri* is somewhat vague, with the location described only as "Hedrin Ranch in Coleman Valley, West of Occidental." The location is mapped to

within a 1.6 km (1 mi) radius in the CNDDDB (CNDDDB 2001).

This unit contains an extensive north-facing slope with mesic vegetation similar to the extant location of *Delphinium bakeri*, with the addition of coastal redwood. The Coleman Valley location of *D. bakeri* represents the northernmost extent of the known range of this species. This unit is essential for the survival as well as the conservation of *D. bakeri* because it provides a second area separate from the existing population for *D. bakeri*, into which the species can be reintroduced. We believe it is particularly important to have a second unit to reduce the likelihood that the species may become extinct as the result of a catastrophic event in the single location where the species is now known to occur. A second, geographically separate unit can provide greater protection to the species from chance events, such as disease, that can destroy the only remaining population.

#### Unit B2: Salmon Creek, Marin County, California

This unit is near the Marshall-Petaluma Road in Marin County approximately 10 km (6 mi) from the coast. This 418 ha (1,032 ac) unit is bounded on the north side by Salmon Creek and contains an extensive north-facing slope that is essential to maintaining the mesic conditions needed for the conservation of *Delphinium bakeri*. Land in this unit is privately owned with a county right-of-way along the road. This unit is of great importance to the survival of *D. bakeri* because it contains the only known extant occurrence of *D. bakeri*, and represents the southernmost extent of the range of this species.

#### Unit L1: Bodega Bay, Sonoma County, California

Unit L1 consists of 554 ha (1,369 ac) south of Bay Hill Road, near the town of Bodega in Sonoma County, California. This unit is comprised of Kneeland series soils, coastal prairie and scrub habitat, and is within the fog belt that moderates the climate. This unit contains features that are essential to the conservation of *Delphinium luteum*. It also is important for the conservation of the species because it supports about 30 percent of the roughly 220 total known remaining individual plants (based on the most recent population totals (CNDDDB 2001; D. Amme, pers. comm. 2002)). Because so few *D. luteum* plants remain, habitat supporting all of them is essential to the continued survival and conservation of the species. In addition, this unit is important to the conservation of the

species because it contains two of the very few remaining sites at which the species has been recently observed. Due to the limited number of populations of *D. luteum*, and the high degree of threat of extinction from catastrophic events, we believe that habitat supporting all recently documented occurrences is essential for the conservation of this species.

*Unit L2: Estero Americano, Marin County, California.*

Unit L2 is located just south of Estero Americano on the Marin County coast. This 133 ha (328 ac) unit contains one occurrence of *Delphinium luteum*, with about 134 individual plants at last count (CNDDDB 2001). It is located on Yorkville series soils that support coastal prairie and coastal scrub habitat and is within the fog belt that moderates the climate. This unit contains features that are essential for the survival of *D. luteum*. The unit also is important because it contains the single largest population of the plant, with more than half of all the individuals in the entire species. Because so few *D. luteum* plants remain, we believe that providing habitat to support all of them is essential to the continued survival and conservation of the species. In addition, this unit is essential to the conservation of the species because it contains one of very few remaining sites at which the species has been recently observed. Due to the limited number of populations of *D. luteum*, and the high degree of threat of extinction from catastrophic events, we believe that habitat supporting all recently documented occurrences is essential for the conservation of this species.

*Unit L3: Estero de San Antonio, Marin County, California.*

Unit L3 is located near the mouth of the Estero de San Antonio in Marin County and includes steep sloped canyon walls composed of Yorkville series soils on both sides of the water channel, with coastal prairie and coastal scrub habitat and temperatures moderated by fog. This 142 ha (351 ac) unit contains one population of *Delphinium luteum* discovered in 1993 that is not yet recorded in the CNDDDB. This unit is important because it is positioned roughly halfway between Unit L4 to the south, and Units L1 and L2 to the north, and may help to prevent the genetic isolation of Unit L4. It also contains the largest continuous area of Yorkville soils of all the units. Yorkville soils are important because, in Units L2 and L3, these soils support roughly two thirds of all individual *D. luteum* plants. Because a large proportion of the

remaining *D. luteum* individuals occur on Yorkville soils, we believe these soils are an indicator of situations in which the plants are likely to survive and reproduce. Therefore, we believe areas which contain these soils are essential to the conservation of the species.

*Unit L4: Tomales, Marin County, California.*

Unit L4 is located approximately 1.6 km (1 mi) south of the town of Tomales in Marin County. This 193 ha (476 ac) unit consists of coastal prairie and coastal scrub within the fog belt. It is known to have contained three populations of *Delphinium luteum*, although two of the populations have not been documented since the early 1980s, and one of these has been listed by the CNDDDB as "possibly extirpated" (CNDDDB 2001). The "possibly extirpated" population may have consisted of hybrids of *D. luteum* and *D. nudicaule* (red larkspur). The third population occurs on a road embankment rather than in the vicinity of canyon walls. This population was documented as recently as 2000, and was genetically tested and confirmed to be a non-hybrid, but only one plant was seen at that time (J. Koontz, in *litt.*, 2002). This unit contains primary constituent elements that are essential to the conservation of the species. The unit also is important to the conservation of the species because it contains one of very few remaining sites at which the species has been recently observed. Due to the limited number of populations of *D. luteum*, and the high degree of threat of extinction from catastrophic events, we believe that habitat supporting all recently documented occurrences is essential for the conservation of this species. In addition, this unit is important because it represents the southernmost extent of the range of *D. luteum*. The population growing in the road embankment may also provide important information on the characteristics of managed soil disturbances which can support *D. luteum*. Such information would be of great help in conserving the species.

*Effects of Critical Habitat Designation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, permit, or carry out are not likely to result in the destruction or adverse modification of critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.

Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." However, in a March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434), the Court found our definition of destruction or adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to 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 proposed species, or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed action. The conservation recommendations 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 (see 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 actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or result in the destruction or adverse modification of 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 formal 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 we believe would avoid resulting in the destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate 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 over the action, or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinstatement of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect subsequently designated critical habitat, or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect *Delphinium bakeri* or *D. luteum* or their critical habitat will require consultation under section 7 of the Act. Activities on private, State, county, or lands under local jurisdictions that involve a Federal action such as funding (e.g., Federal Highway or Federal Emergency Management Act funding), or a permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act), will continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal and private lands that are not federally funded, authorized, or permitted, do not require section 7 consultation. Not all of the area within the boundaries of the mapped units provide primary constituent elements capable of supporting *Delphinium bakeri* or *D. luteum*. For instance, buildings, lawns, roads, parking lots, and other paved areas will not contain one or more of the

primary constituent elements. Federal actions limited to these areas, therefore, would not be subject to section 7 consultation unless the action would affect the species or primary constituent elements in adjacent designated critical habitat.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 of the Act ensures that actions funded, authorized, or carried out by Federal agencies are not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of 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.

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 destroy or 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 *Delphinium bakeri* or *D. luteum* would be appreciably reduced. Within the units designated as critical habitat, this pertains only to those areas containing the primary constituent elements. 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 *Delphinium luteum* or *D. bakeri* 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, and mining);

(2) Activities which directly or indirectly affect *Delphinium bakeri* or *D. luteum* plants or underlying seed bank (e.g., herbicide application and heavy off-road vehicle use that could degrade the habitat on which the species depends, incompatible introductions of nonnative herbivores, and incompatible grazing during times

when *D. bakeri* or *D. luteum* is producing flowers or seeds);

(3) Activities which significantly degrade or destroy likely pollinator populations for *Delphinium bakeri* (e.g., pesticide applications that degrade or destroy large hymenoptera, especially *Bombus* spp. (bumblebees)) in proximity to the designated critical habitat for *D. bakeri*; and

(4) Activities that would appreciably change the rate of erosion of soils for *Delphinium luteum* such as slope stabilization; residential and commercial development, including road building and golf course installation; and vegetation manipulation, such as clearing and grubbing upslope from *D. luteum*.

If you have questions regarding whether specific activities will constitute 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, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Portland Regional Office, 911 NE 11th Avenue, Portland, OR 97232-4181 (telephone 503/231-6131; facsimile 503/231-6243).

#### **Exclusions Under Section 4(b)(2)**

Subsection 4(b)(2) of the Act allows us to exclude areas from the critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in extinction of the species. Following a review of available information from our files, public comments on the proposal, and the economic analysis of the proposed designation, we have determined that none of the lands proposed as critical habitat warranted exclusion from the final designation based on economic impacts or other relevant impacts pursuant to section 4(b)(2).

#### **Relationship to Habitat Conservation Plans (HCPs) and Other Planning Efforts**

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. An incidental take permit application must be supported by an HCP that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the permitted incidental take. Although take of listed plants is not generally prohibited by the Act, listed plant species may also be covered in an HCP for wildlife species. Currently, no

HCPs exist that include *Delphinium bakeri* or *D. luteum* as covered species.

In the event that future HCPs covering *Delphinium bakeri* or *D. luteum* are developed within the boundaries of the 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 these 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 *D. bakeri* or *D. luteum*. The process would also enable us to conduct detailed evaluations of the importance of such lands to the long-term survival and conservation of the species in the context of constructing a biologically configured 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 *Delphinium bakeri* or *D. luteum*, 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 concerned. Following the publication of the proposed critical habitat designation, we conducted a draft economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for review on November 1, 2002 (67 FR 66599). We accepted

public comment on the draft analysis until December 2, 2002.

Our economic analysis evaluated the potential future effects associated with the section 7 consultation requirements of *Delphinium bakeri* and *D. luteum* as endangered species under the Act, as well as any potential effect of the critical habitat designation above and beyond those regulatory and economic impacts associated with listing. To quantify the proportion of total potential economic impacts attributable to the critical habitat designation, the analysis evaluated a "without section 7" scenario and compared it to a "with section 7" scenario. The "without section 7" baseline represented the level of protection currently afforded to the species under the Act if section 7 protective measures were absent, and includes protections afforded by other Federal, State, and local laws such as the California Environmental Quality Act. The "with section 7" scenario identifies land-use activities likely to involve a Federal nexus that may affect the species or its designated critical habitat, and that therefore have the potential to be subject to future consultations under section 7 of the Act.

Upon identifying section 7 impacts, the analysis proceeds to consider the subset of impacts that can be attributed exclusively to the critical habitat designation. The upper-bound estimate includes both jeopardy and critical habitat impacts. The subset of section 7 impacts likely to be affected solely by the designation of critical habitat represents the lower-bound estimate of the analysis. The categories of potential costs and benefits considered in the analysis included: (1) Conducting section 7 consultations associated with the listing or with the critical habitat; (2) modifications to projects, activities, or land uses resulting from the section 7 consultations; (3) uncertainty and public perceptions resulting from the designation of critical habitat; and (4) potential offsetting benefits associated with critical habitat including educational benefits. Our economic analysis recognizes that there may be costs from delays associated with reinitiating completed consultations after the critical habitat designation is made final.

The analysis estimated that this critical habitat designation will result in the need for one formal and two informal section 7 consultations. The formal consultation will be required for a State highway culvert repair project, while the informal consultations will result from an estimated two flood and erosion control projects on private land that will involve a Federal nexus. The

total administrative cost of these consultations is estimated at \$18,000, of which \$7,000 is attributable to this critical habitat designation as opposed to other section 7 requirements pertaining to the listing of the species. No project modifications are expected to occur as a result of these consultations.

Total costs resulting from technical assistance, formal and informal consultations, development of biological assessments, and project modifications due to listing and critical habitat designation are presented in the economic analysis, according to land use activities and individual critical habitat units. Costs to third parties result from technical assistance, consultations, and development of a biological assessment. Costs to Federal action agencies include those incurred from consultations. Costs to the Service result from technical assistance and consultations.

We received a few comments on the draft economic analysis of the proposed determination. We considered these comments, and our response to them is included as part of the preamble of this rule (see Summary of Comments and Recommendations), as well as in the final Addendum to the Economic Analysis. As a result of the comments received, a correction was made in relation to a statement in the draft economic analysis that private landowners should incur no additional costs as a result of section 7 requirements. In fact, certain private landowners participating in flood control and revegetation projects that have a Federal nexus are expected to pay for costs associated with an informal consultation with the Service. The final Addendum to the Economic Analysis discusses the resulting correction, and the effects were included in the description (above) of costs associated with expected informal consultations. The final Addendum to the Economic Analysis also provides explanations to more clearly explain and justify the methodology used, based on comments received concerning the methodology. There were no other revisions or additions to the draft economic analysis.

A copy of the final economic analysis and supporting documents are included in our administrative record and may be obtained by contacting the Sacramento Fish and Wildlife Office (see ADDRESSES section). Copies of the final economic analysis also are available on the Internet at <http://pacific.fws.gov/news/>.

#### 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 final rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the final rule clearly stated? (2) Does the final rule contain technical language or jargon that interferes with the clarity? (3) Does the format of the final 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 final 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, the Office of Management and Budget (OMB) has determined that this critical habitat designation is not a significant regulatory action. This rule will not have an annual economic effect of \$100 million or more or adversely affect any economic sector, productivity, competition, jobs, the environment, or other units of government.

This designation will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. It will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Finally, this designation will not raise novel legal or policy issues. Accordingly, OMB has not reviewed this final critical habitat designation.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the

head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a 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. In this final rule, we are certifying that the critical habitat designation for *Delphinium bakeri* and *D. luteum* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

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 consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result.

SBREFA does not explicitly define either "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in the area. Similarly, the analysis considers the relative cost of compliance on the revenues/profit margins of small entities in determining whether or not entities incur a "significant economic impact." Only small entities that are expected to be directly affected by the designation are considered in this portion of the analysis. This approach is consistent with several judicial opinions related to the scope of the RFA. (*Mid-Tex Elec. Coop., Inc. v. FERC* 773 F.2d 327 (D.C. Cir. 1985) and *American Trucking Associations, Inc. v. USEPA*, 175 F.3d 1027 (D.C. Cir. 1999)).

To determine if a rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting, etc.). We apply the "substantial number" test individually to determine if certification is appropriate. In some circumstances, especially with proposed critical habitat designations of very 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 consider 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 critical habitat designation.

In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement. Designation of critical habitat only has the potential to affect activities conducted, funded, or permitted by Federal agencies. In areas where the species is present, Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect *Delphinium bakeri* or *D. luteum*. Federal agencies must also consult with us if their activities may affect designated critical habitat. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

As required under section 4(b)(2) of the Act, we conducted an analysis of the potential economic impacts of this critical habitat designation. In the analysis, we found that the future section 7 consultations resulting from the listing of *Delphinium bakeri* and *D. luteum* and the proposed designation of critical habitat could potentially impose total economic costs for consultation and modifications to projects up to \$18,000 with approximately \$7,000 of this attributable to critical habitat designation over the next 10-year period. The small business activities taking place within the critical habitat units which might be affected by section 7 consultation requirements are forestry, agriculture, and livestock production (Economic and Planning Systems 2002, 2003).

In summary, we have considered whether this rule could result in significant economic effects on a substantial number of small entities. Our analysis concluded that there are 653 smaller producers in forestry, agriculture, and livestock production for



Sonoma and Marin counties, of which only 0.3 percent are likely to be affected by this rule. Therefore, we are certifying that the designation of critical habitat for *Delphinium bakeri* and *D. luteum* will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

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

OMB's Office of Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. In the economic analysis, we determined whether designation of critical habitat would cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination. We anticipate that this final rule will not place significant additional burdens on any entity.

*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. The primary land uses within this designated critical habitat are agricultural. This rule is not expected to significantly affect energy supplies, distribution, or use. In our economic analysis, we did not identify energy production or distribution as being significantly affected by this designation, and we received no comments indicating that the proposed designation could significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

(a) This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will be

affected only to the extent that Federal agencies must ensure that any small government action they (the Federal agencies) authorize (permit) or fund is not likely to result in the adverse modification or destruction of designated critical habitat.

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

*Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally protected Private Property Rights"), we have analyzed the potential takings implications of designating approximately 1,762 ha (4,353 ac) of lands as critical habitat for the two *Delphinium* species in Marin and Sonoma counties, California in a takings implication assessment. This assessment concludes that this final rule does not pose significant takings implications.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior policy, we requested information from, and coordinated development of this critical habitat designation with, the appropriate State resource agencies in California. We will continue to coordinate any future changes in the designation of critical habitat for *Delphinium bakeri* and *D. luteum* with the appropriate State agencies. Where these species are present, the designation of critical habitat 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 consultation under section 7 of the Act on non-Federal lands (where a Federal nexus occurs) that might otherwise not have occurred. The designation may have some benefit to these governments in that the areas essential to the conservation of these 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 designating critical habitat in accordance with the provisions of the Endangered Species Act, as amended. The rule uses standard property descriptions and identifies the principal constituent elements within the designated areas to assist the public in understanding the habitat needs of *Delphinium bakeri* and *D. luteum*.

*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 (44 U.S.C. 3501 et seq.). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

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, with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This rule 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 Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. The designated critical habitat for *Delphinium bakeri* and *D. luteum* does not contain any lands that we have

identified as impacting Tribal trust resources. *D. bakeri* and *D. luteum* are known only to occur on private lands. We are not aware of any Tribal lands in or near our critical habitat units for *D. bakeri* and *D. luteum*. Therefore, we have determined that there are currently no Tribal lands essential for the conservation of *D. bakeri* or *D. luteum* because they do not support populations or provide essential habitat for either plant species. If we learn of any Tribal lands in the vicinity of the critical habitat designation subsequent to this proposal, we will coordinate with the Tribes before making a final determination as to whether any Tribal lands should be included as critical habitat for *D. bakeri* or *D. luteum*.

**References Cited**

A complete list of all references cited herein is available upon request from the Sacramento Fish and Wildlife Office (see ADDRESSES section)

**Author**

The primary authors of this final rule are Kirsten Tarp and 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.

**Regulation Promulgation**

Accordingly, we 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 entries for “*Delphinium bakeri*” and “*Delphinium luteum*,” under “FLOWERING PLANTS,” to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*

(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rule
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
<i>Delphinium bakeri</i> ....	Baker’s larkspur .....	U.S.A. (CA) .....	Ranunculaceae .....	E	681	17.96(a)	NA
<i>Delphinium luteum</i> ...	Yellow larkspur .....	U.S.A. (CA) .....	Ranunculaceae .....	E	681	17.96(a)	NA
*	*	*	*	*	*		*

3. In § 17.96, amend paragraph (a) by adding critical habitat entries for “Family Ranunculaceae *Delphinium bakeri*” and “Family Ranunculaceae *Delphinium luteum*” in alphabetical order to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) \* \* \*

**Family Ranunculaceae: *Delphinium bakeri* (Baker’s larkspur)**

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

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

(i) Soils that are derived from decomposed shale;

(ii) Plant communities that support associated species, including, but not limited to: *Umbellularia californica* (California bay), *Aesculus californica* (California buckeye), *Quercus agrifolia* (coastal live oak), *Baccharis pulularis* ssp. *consanguinea* (coyotebrush), *Symphoricarpos* cf. *rivularis* (snowberry), *Rubus ursinus* (California blackberry), *Pteridium aquilinum* (braken fern), *Polystichum munitum* (Sword fern), *Pityrogramma triangularis* (goldback fern), *Dryopteris arguta* (coastal woodfern), *Adiantum jordanii* (maidenhair fern), *Polypodium glycyrrhiza* (licorice fern), *Toxicodendron diversilobum* (poison oak), *Ceanothus thyrsiflorus* (blueblossom ceanothus), *Lithophragma affine* (woodland star), and *Holodiscus discolor* (oceanspray); and

(iii) Mesic conditions on extensive north-facing slopes.

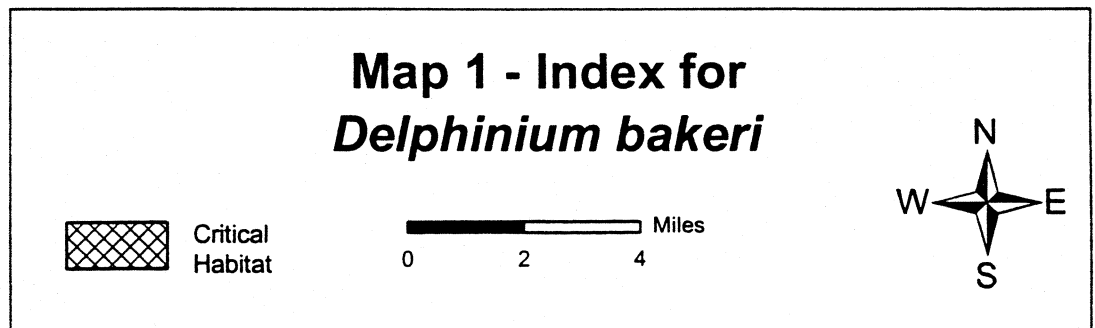
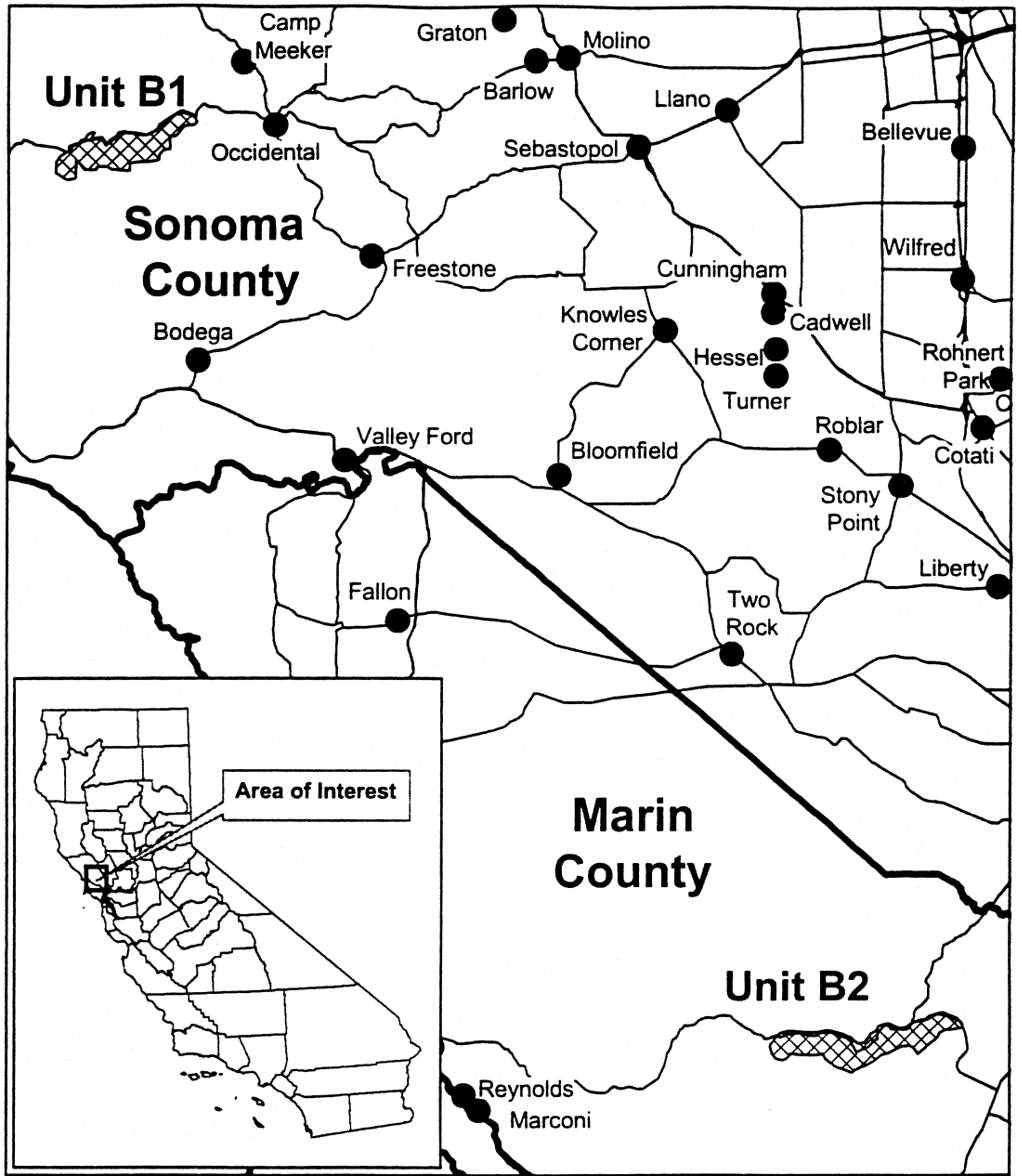
(3) Critical habitat does not include existing features and structures made by people, such as buildings, roads and other paved areas, lawns, and developed areas not containing one or more of the primary constituent elements.

(4) Critical Habitat Map Units.

(i) Data layers defining map units were created on a base of USGS 7.5’ quadrangles obtained from the State of California’s Stephen P. Teale Data Center. Proposed critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(ii) Map 1—Index map for *Delphinium bakeri* follows:

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(5) Unit B1: Sonoma County, California.

(i) From USGS 1:24,000 quadrangle maps Camp Meeker and Duncan Hills, California, land bounded by the

following UTM10 NAD83 coordinates (E,N): 498360, 4249440; 498030, 4249650; 498040, 4249990; 498160,

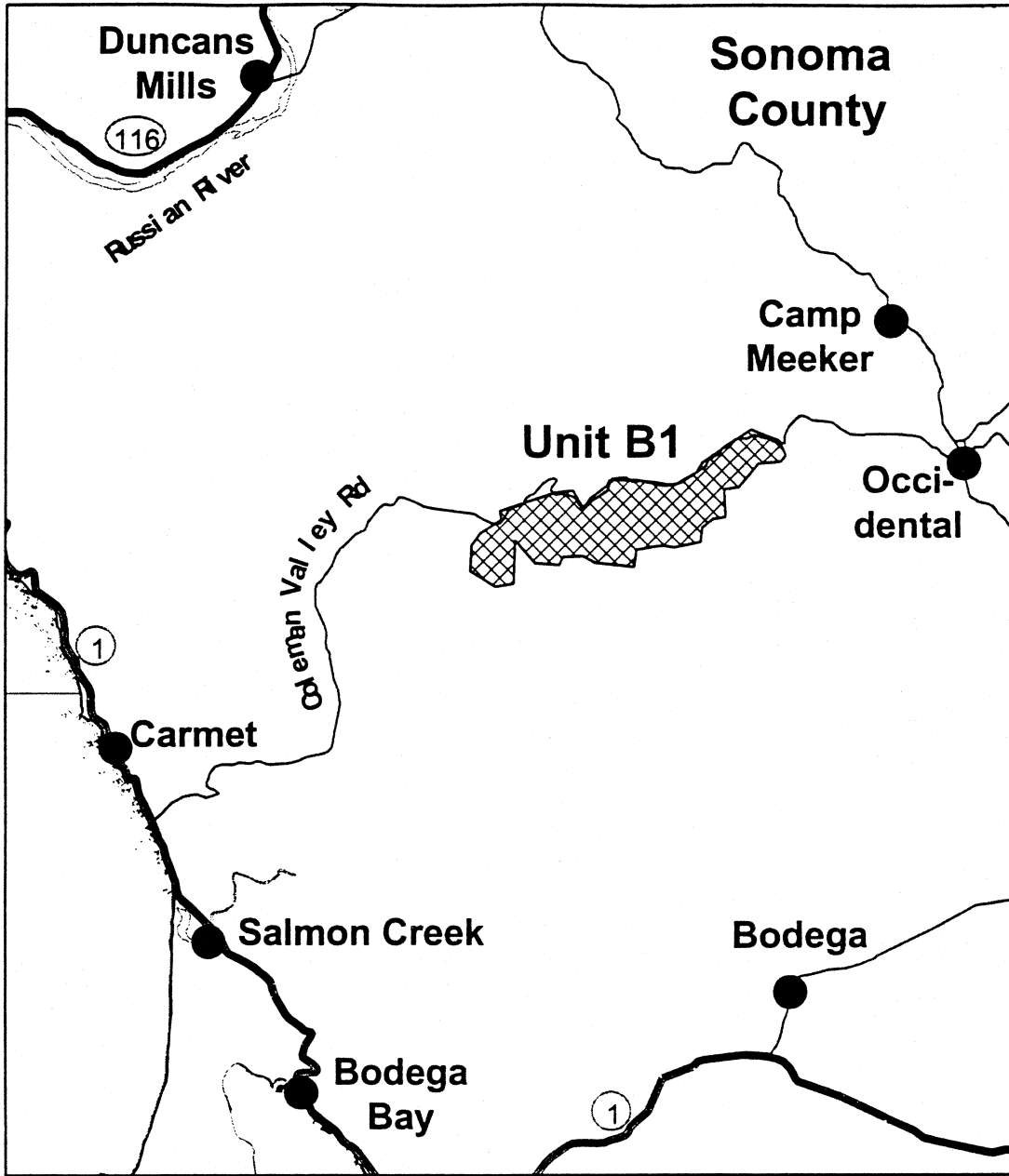
4250150; 498430, 4250320; 498420,  
4250440; 499140, 4250680; 499380,  
4250710; 499510, 4250490; 499840,  
4250710; 499880, 4250840; 500250,  
4250840; 500580, 4250770; 500730,  
4250780; 501020, 4250950; 501080,  
4251070; 501360, 4251270; 501520,  
4251370; 501730, 4251520; 502100,

4251370; 502190, 4251180; 502120,  
4251090; 501830, 4251060; 501570,  
4250750; 501380, 4250720; 501400,  
4250360; 501230, 4250330; 501090,  
4250220; 501070, 4250030; 500720,  
4249960; 500550, 4249990; 500220,  
4249930; 500190, 4249700; 499680,  
4249760; 499520, 4249850; 499250,

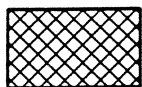
4249830; 499210, 4249730; 498880,  
4249750; 498620, 4250050; 498600,  
4249490; 498360, 4249440.

(ii) Map 2—Unit B1 for *Delphinium bakeri* follows:

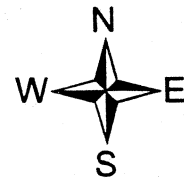
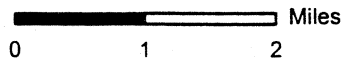
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**Map 2: Critical Habitat Unit B1**  
*Delphinium bakeri*



Critical Habitat



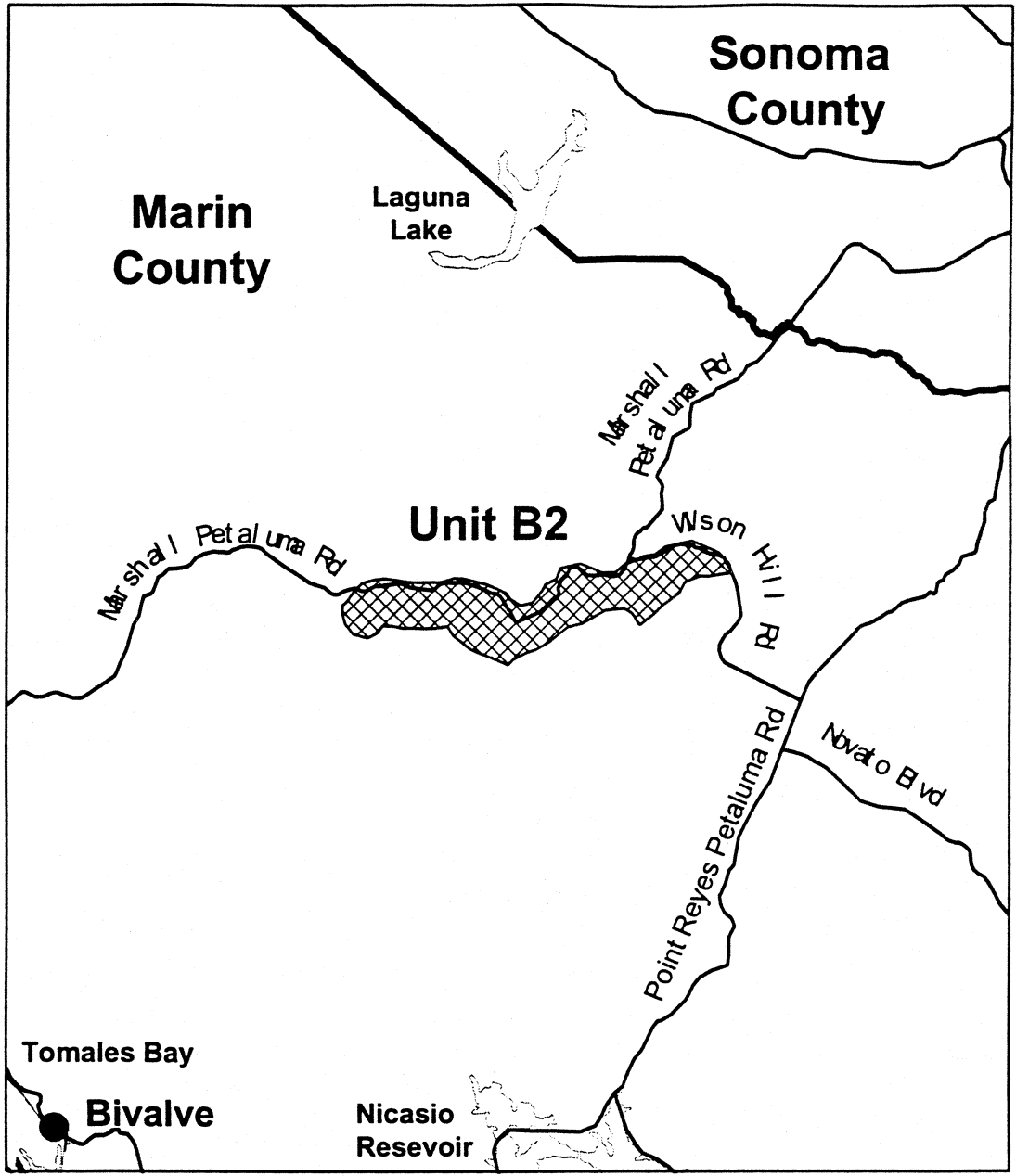
(6) Unit B2: Marin County, California.  
(i) From USGS 1:24,000 quadrangle maps Petaluma and Point Reyes NE, California, land bounded by the following UTM10 NAD83 coordinates (E,N): 521780, 4222900; 521560, 4223000; 521350, 4223070; 521230, 4223130; 520980, 4223320; 520890, 4223460; 520680, 4223430; 520220, 4223440; 520100, 4223460; 519940, 4223460; 519870, 4223360; 519720, 4223280; 519510, 4223340; 519400, 4223480; 519350, 4223630; 519360, 4223760; 519410, 4223800; 519530,

4223970; 519640, 4224090; 519830, 4224140; 519980, 4224160; 520440, 4224100; 520760, 4224100; 520990, 4224170; 521130, 4224160; 521460, 4224080; 521740, 4223960; 521820, 4223870; 521960, 4223770; 522130, 4223810; 522290, 4224000; 522320, 4224070; 522480, 4224160; 522550, 4224310; 522830, 4224380; 523160, 4224240; 523340, 4224250; 523470, 4224360; 523660, 4224430; 523750, 4224480; 523920, 4224510; 524070, 4224620; 524460, 4224710; 524860, 4224530; 525010, 4224370; 525030,

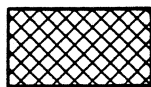
4224250; 524690, 4224190; 524590, 4224200; 524360, 4224100; 524280, 4223950; 524050, 4223780; 523920, 4223650; 523700, 4223480; 523600, 4223640; 523480, 4223720; 523210, 4223700; 522880, 4223510; 522650, 4223450; 522370, 4223230; 522170, 4223120; 522050, 4223080; 521860, 4222980; 521780, 4222900.

(ii) Map 3—Unit B2 for *Delphinium bakeri* follows:

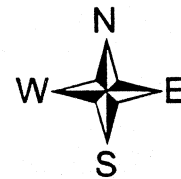
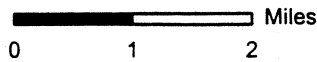
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**Map 3: Critical Habitat Unit B2**  
*Delphinium bakeri*



Critical Habitat



**Family Ranunculaceae: *Delphinium luteum* (Yellow larkspur)**

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

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

(i) Plant communities, including north coastal scrub or coastal prairie communities, including but not limited to: *Arabis blepharophylla* (rose rockcress), *Calochortus tolmei* (Tolmei startulip), *Mimulus aurantiacus* (orange bush monkeyflower), *Dudleya caespitosa* (sea lettuce), *Polypodium californicum* (California polyploidy), *Eriogonum parviflorum* (sea cliff

buckwheat), *Toxicodendron diversilobum* (poison oak), *Romanzoffia californica* (California mistmaiden), *Hesperis matronalis* (evax), *Pentagramma triangularis* (goldenback fern), and *Sedum spathulifolium* (broadleaf stonecrop);

(ii) Relatively steep sloped soils (30 percent or greater) derived from sandstone or shale, with rapid runoff and high erosion potential, such as Kneeland or Yorkville series soils;

(iii) Generally north aspected areas; and

(iv) Habitat upslope and downslope from known populations to maintain disturbance such as occasional rock slides or soil slumping that the species appears to require.

(3) Critical habitat does not include existing features and structures made by people, such as buildings, roads and other paved areas, lawns, and other developed areas not containing one or more of the primary constituent elements.

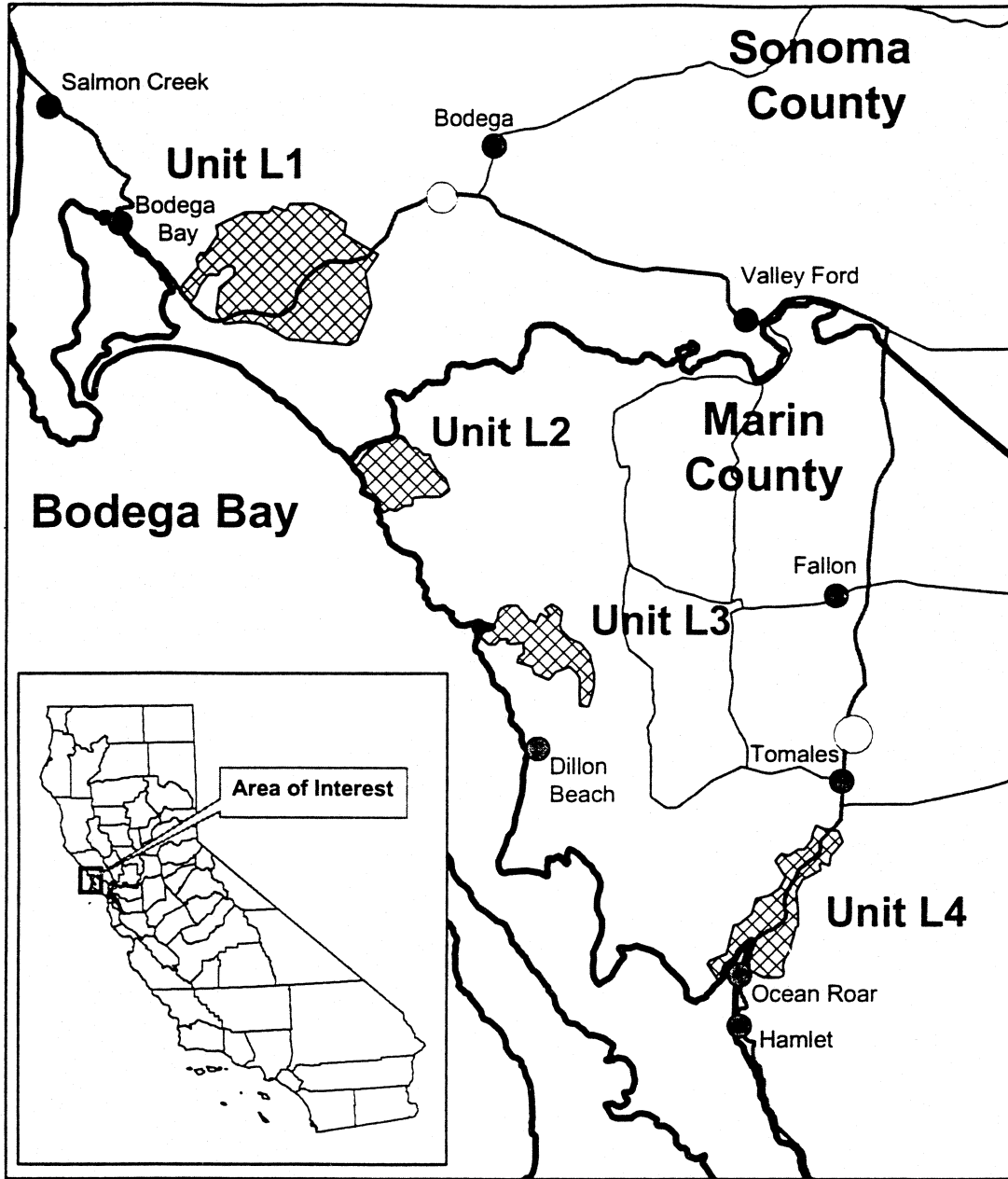
(4) Critical Habitat Map Units.

(i) Data layers defining map units were created on a base of USGS 7.5' quadrangles obtained from the State of California's Stephen P. Teale Data Center. Proposed critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(i) Map 4—Index map for *Delphinium luteum* follows:

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**Map 4 - Index for  
*Delphinium luteum***

**Critical  
Habitat**

Miles  
0 1 2

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(5) Unit L1: Bodega Bay, Sonoma County, California.

(i) From USGS 1:24,000 quadrangle map Bodega Head. Lands bounded by the following UTM10 NAD83

coordinates (E,N): 496820, 4241560; 496870, 4241690; 497130, 4241990; 497110, 4242130; 497170, 4242240;

497250, 4242220; 497470, 4242550;  
497440, 4242700; 497930, 4242940;  
498340, 4242940; 498430, 4243040;  
498640, 4242960; 498720, 4243080;  
499110, 4243090; 499410, 4242960;  
499690, 4242760; 499650, 4242560;  
500250, 4242210; 500030, 4241880;  
500140, 4241320; 499900, 4240730;  
499750, 4240650; 498690, 4240750;  
498220, 4241010; 497940, 4241050;  
497590, 4241010; 497450, 4241220;  
497500, 4241630; 497750, 4241830;  
497760, 4241970; 497720, 4242010;  
497630, 4242010; 497520, 4241940;  
497480, 4241850; 497320, 4241860;  
497170, 4241680; 497100, 4241500;

497030, 4241410; 496910, 4241440;  
496820, 4241560.

(ii) Map for Unit L1 is set forth below.

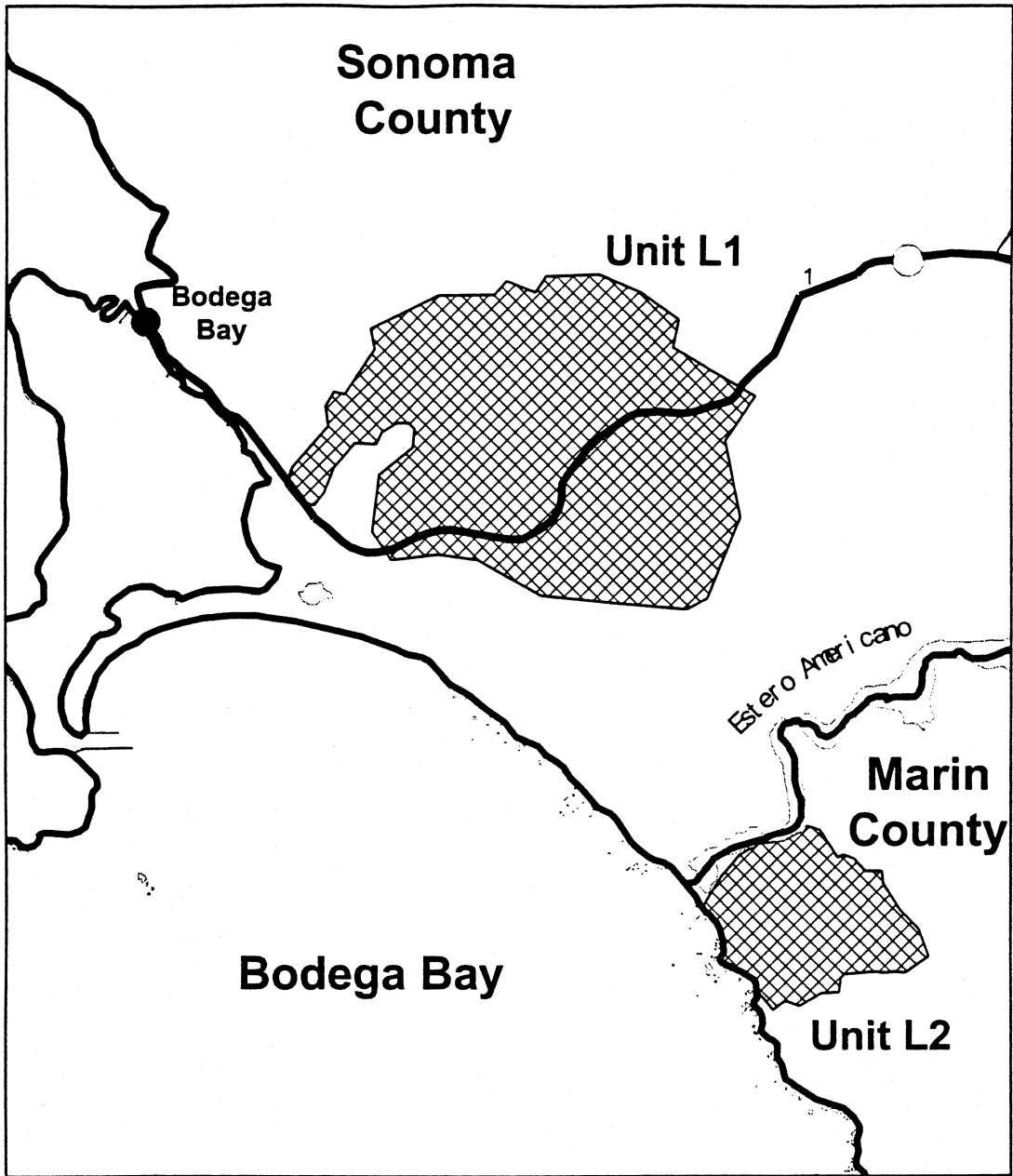
(6) Unit L2: Estero Americano, Marin County, California.

(i) From USGS 1:24,000 quadrangle map Valley Ford. Lands bounded by the following UTM10 NAD83 coordinates (E,N): 499970, 4238100; 500010, 4238150; 500010, 4238240; 499870, 4238480; 500010, 4238710; 500140, 4238860; 500280, 4238940; 500470, 4238970; 500580, 4239030; 500630, 4239070; 500720, 4239040; 500850, 4238840; 500890, 4238860; 500970, 4238830; 501050, 4238740; 501170,

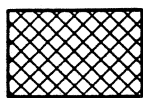
4238740; 501180, 4238650; 501300, 4238460; 501440, 4238320; 501510, 4238120; 501340, 4238000; 501270, 4238010; 501190, 4238000; 501120, 4238010; 500900, 4237990; 500870, 4237960; 500860, 4237860; 500730, 4237850; 500570, 4237760; 500470, 4237800; 500380, 4237730; 500250, 4237890; 500240, 4237940; 500180, 4237980; 499990, 4238060; 499970, 4238100.

(ii) Map 5—Units L1 and L2 for *Delphinium luteum* follows:

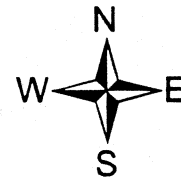
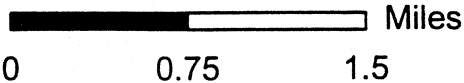
**BILLING CODE 4310-55-P**



**Map 5: Critical Habitat Units L1 and L2**  
*Delphinium luteum*



Critical Habitat



BILLING CODE 4310-55-C

(7) Unit L3: Estero de San Antonio, Marin County, California.

(i) From USGS 1:24,000 quadrangle map Valley Ford. Lands bounded by the following UTM10 NAD83 coordinates

(E,N): 502060, 4235600; 502110, 4235750; 502230, 4235770; 502300, 4235840; 502350, 4235930; 502370,

4236030; 502410, 4236100; 502510, 4236150; 502700, 4236150; 502900, 4235910; 503010, 4235860; 502900, 4236160; 502870, 4236120; 502700, 4236260; 502880, 4236400; 503060, 4236370; 503130, 4236240; 503070, 4236180; 503090, 4236010; 503200, 4235950; 503260, 4235990; 503170, 4236090; 503280, 4236180; 503410, 4236100; 503470, 4236040; 503430, 4235810; 503460, 4235720; 503600, 4235580; 503800, 4235490; 503950, 4235300; 504020, 4235010; 504030, 4234810; 504000, 4234630; 503920, 4234390; 503780, 4234410; 503780, 4234890; 503710, 4234990; 503610, 4234970; 503520, 4234840; 503560, 4234620; 503580, 4234470; 503520, 4234440; 503350, 4234580; 503360, 4234710; 503250, 4234860; 502990, 4234970; 502950, 4235100; 502700,

4235170; 502710, 4235260; 502810, 4235330; 502800, 4235510; 502580, 4235480; 502510, 4235510; 502530, 4235580; 502390, 4235560; 502310, 4235470; 502200, 4235470; 502060, 4235600.

(ii) Map for Unit L3 is set forth below.

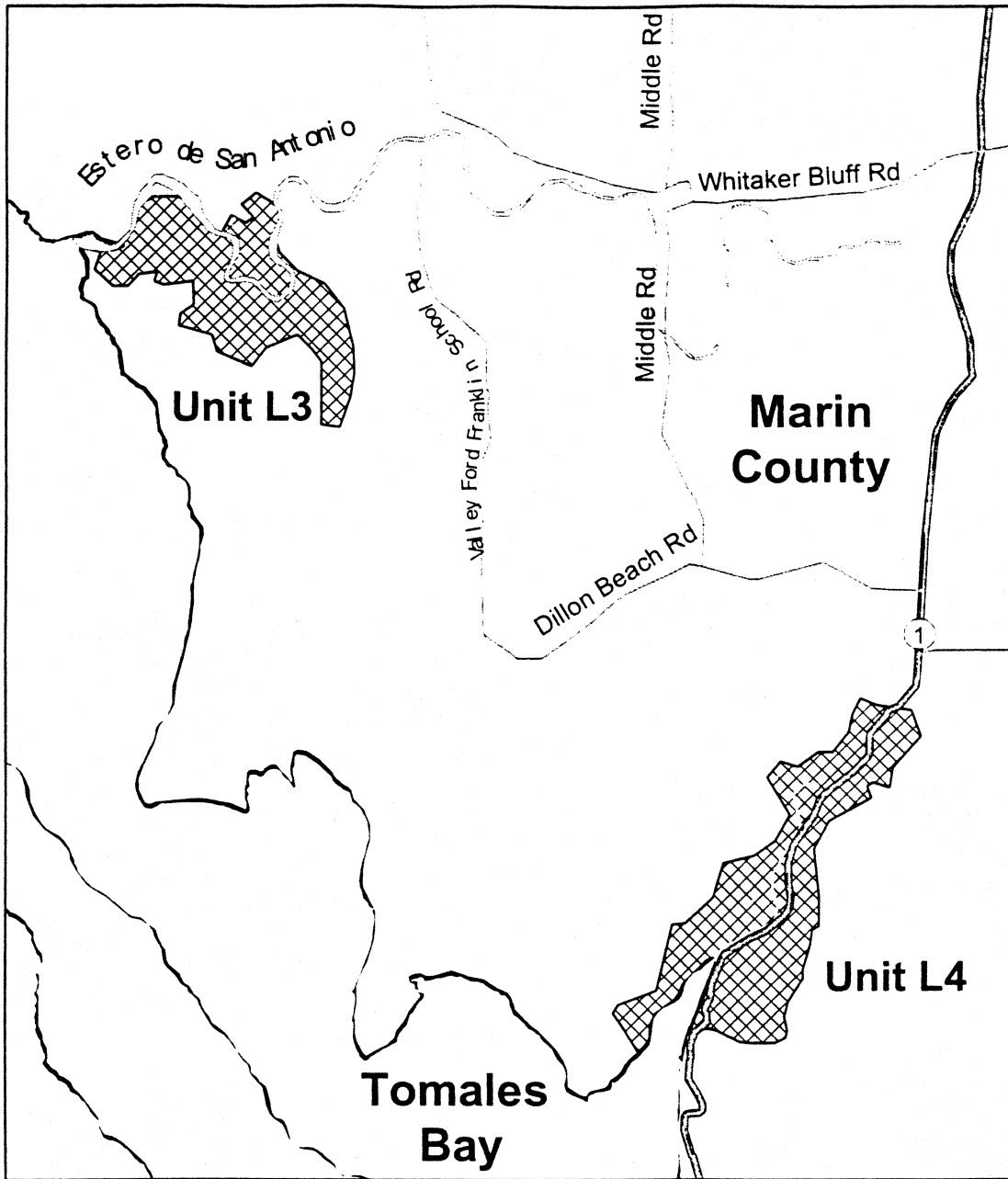
(8) Unit L4: Tomales, Marin County, California.

(i) From USGS 1:24,000 quadrangle map Tomales. Lands bounded by the following UTM10 NAD83 coordinates (E,N): 506200, 4229650; 506000, 4229960; 506040, 4230020; 506330, 4230130; 506450, 4230630; 506550, 4230640; 506760, 4230830; 506840, 4231090; 507070, 4231150; 507230, 4231260; 507340, 4231460; 507170, 4231740; 507270, 4231860; 507400, 4231820; 507550, 4231930; 507660, 4231930; 507780, 4232080; 507810,

4232220; 507870, 4232340; 507990, 4232290; 508250, 4232250; 508320, 4232050; 508110, 4231810; 508090, 4231660; 507960, 4231700; 507920, 4231670; 507950, 4231580; 507630, 4231410; 507520, 4231200; 507560, 4230830; 507560, 4230620; 507510, 4230590; 507490, 4230470; 507440, 4230300; 507440, 4230220; 507330, 4230050; 507300, 4229930; 507320, 4229820; 507310, 4229770; 507230, 4229730; 507060, 4229730; 506960, 4229740; 506780, 4229830; 506710, 4229840; 506580, 4229790; 506600, 4229860; 506720, 4230150; 506770, 4230340; 506640, 4230230; 506460, 4230020; 506200, 4229650.

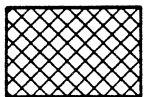
(ii) Map 6—Units L3 and L4 for *Delphinium luteum* follows:

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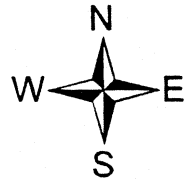
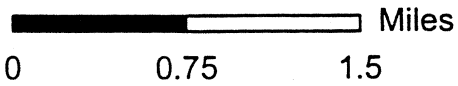


**Map 6: Critical Habitat Units L3 and L4**

*Delphinium luteum*



Critical Habitat



\* \* \* \* \*

Dated: March 7, 2003.

**Craig Manson,**

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03-6133 Filed 3-17-03; 8:45 am]

BILLING CODE 4310-55-C

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****RIN 1018-AG93****Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for *Sidalcea keckii* (Keck's checkermallow)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), 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 designated 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). This critical habitat designation provides additional protection 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 solicited data and comments from the public on all aspects of our proposal, including data on economic and other impacts of the designation.

**DATES:** This rule becomes effective on April 17, 2003.**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during the normal business hours at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Suite W-2605, Sacramento, CA 95825.**FOR FURTHER INFORMATION CONTACT:** Kirsten Tarp or Susan Moore, Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service (telephone 916/414-6600; facsimile 916/414-6710; [kirstent\\_tarp@fws.gov](mailto:kirstent_tarp@fws.gov) or [susan\\_moore@fws.gov](mailto:susan_moore@fws.gov)).**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 may have 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 E. 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 (J. Stebbins, Herbarium Curator, California State University, pers. comm., 2002).