

■ 2. In § 310.58, revise paragraph (g) to read as follows:

**§ 310.58 Service obligation for students enrolled after April 1, 1982.**

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(g) *Deferments.* In exceptional cases, the Administration may grant a deferment of all or part of the agreement under paragraph (a)(5) of this section and the service obligation contract, for a period not to exceed 2 years, only for graduates considered to have superior academic and conduct records while at the Academy and only for the purpose of entering a marine or maritime-related graduate course of study approved by the Administrator or for the purpose of pursuing studies as recipients of scholarships or fellowships of national significance; *Provided*, that any deferment of service as a commissioned officer under paragraph (a)(5)(iii) of this section and the service obligation contract shall be subject to the sole approval of the Secretary of the department which has jurisdiction over such service (including the Secretary of the department in which the U.S. Coast Guard is operating and the Secretary of Commerce with respect to NOAA). A graduate shall make application for such deferment through the Superintendent of the Academy, who shall forward each application, together with the Superintendent's recommendation for approval or disapproval and an evaluation of the applicant's academic and conduct records, to the Academies Program Officer, Maritime Administration, Office of Policy and Plans, NASSIF Building, 400 7th St., SW., Washington, DC 20590 for appropriate action.

Dated: May 13, 2004.

By Order of the Maritime Administrator.

**Joel C. Richard,**

*Secretary, Maritime Administration.*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018-A121**

**Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for *Astragalus pycnostachyus* var. *lanosissimus* (Ventura Marsh milk-vetch)**

**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 *Astragalus pycnostachyus* var. *lanosissimus* (Ventura marsh milk-vetch). Approximately 420 acres (170 hectares) of land fall within the boundaries of the critical habitat designation. The designated critical habitat is located in Santa Barbara and Ventura Counties, California.

This critical habitat designation requires the Service to consult 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 designation, including data on economic and other impacts of the designation.

**DATES:** This rule becomes effective June 21, 2004.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for inspection, by appointment, during normal business hours at the Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura CA 93003.

**FOR FURTHER INFORMATION CONTACT:** Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003 (telephone 805/644-1766; facsimile 805/644-3958).

**SUPPLEMENTARY INFORMATION:** Designation of critical habitat provides little additional protection to species. In 30 years of implementing the Endangered Species Act of 1973, as amended (Act), we have found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. We have determined that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit

to the species most in need of protection.

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. [Sidle (1987) stated, "Because the ESA can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 445 species or 36 percent of the 1,244 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat. We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. We conclude that it is these measures that may make the difference between extinction and survival for many species.

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

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

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, our own proposals to list critically imperiled species, and final listing determinations on existing proposals are significantly delayed. Litigation over critical habitat issues for species already listed and receiving the Act's full protection has precluded or

delayed many listing actions nationwide.

The accelerated schedules of court ordered designations have left us with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This, in turn, fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with National Environmental Policy Act, all are part of the cost of critical habitat designation. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

### Background

*Astragalus pycnostachyus* var. *lanosissimus* (Ventura marsh milk-vetch) is an herbaceous perennial in the Pea family (Fabaceae). Little is known of the habitat requirements of this subspecies. The only known population of *Astragalus pycnostachyus* var. *lanosissimus* occurs in a sparsely vegetated low area, at an elevation of about 30 feet (ft) (10 meters (m)), on the North Shore at Mandalay site, which was previously used for disposal of petroleum waste products (Impact Sciences, Inc. 1997). Based on existing information from historical collections, the best description we have of its habitat is from Wilken and Wardlaw (2001), who concluded that the subspecies occurs in low-elevation coastal dune-swale areas, where freshwater levels (in the form of saturated soils or groundwater) are high enough to reach the roots of the plants. Sometimes, high groundwater is shown by the presence of water in sloughs or coastal creeks, but more typically evidence for freshwater availability is seen in the presence of native freshwater-dependent plants such as *Salix* spp. (willows), *Typha* spp. (cattails), *Baccharis salicifolia*, and

others. The soils associated with *Astragalus pycnostachyus* var. *lanosissimus* are well-drained, yet contain a mix of sand and clay. Because of the freshwater influence, the soils do not exhibit a white crust that would indicate saline or alkaline conditions. For additional information on the biology, habitat requirements, and historical collection information of *Astragalus pycnostachyus* var. *lanosissimus*, please refer to the proposed critical habitat rule (October 9, 2002; 67 FR 62926).

Due to the combination of poor seedling and young plant survivorship and low seed production, the single naturally occurring population of *Astragalus pycnostachyus* var. *lanosissimus* has continued to decline since its rediscovery in 1997 and through the 2001 season (Impacts Sciences 1997, 1998; Wilken and Wardlaw 2001; Dieter Wilken, Santa Barbara Botanic Garden, pers. comm. 2002). The population is able to persist due to having established a seedbank (not all seeds produced in one year will germinate the following year). The hard seed coat may require scarification (scraping or small cuts) that cannot happen within one season, so the seed may survive for one year or more in the soil until the coat can break down or is broken by some mechanical means (Michael Wall, Rancho Santa Ana Botanic Garden, pers. comm. 2000). Also, Wilken and Wardlaw (2001) found that the plants may not become reproductive until more than 18 to 30 months following germination. The implication for *Astragalus pycnostachyus* var. *lanosissimus* is that low seed production and, thus, a seedbank deficit, combined with low seedling survival and the mortality of some adult plants, may contribute to the population's decline unless other threats to the plants (e.g., reduced survivorship of seedlings and adult plants due to snail herbivory) can be addressed.

The single natural population of *Astragalus pycnostachyus* var. *lanosissimus* near the city of Oxnard is in a degraded backdune community. From 1955 to 1981, the land on which it occurs (hereafter, North Shore at Mandalay) was used as a disposal site for oilfield wastes (Impact Sciences, Inc. 1998). A development proposal for the site includes remediation of soils contaminated with hydrocarbons, followed by construction of 300 homes and a 6-acre (ac) (2-hectare (ha)) lake on 91 ac (37 ha) of land. The proposed soil remediation would involve excavation and stockpiling of the soils, followed by soil treatment and redistribution of the

soils over the site (Impact Sciences, Inc. 1998). In 1998, the City of Oxnard published a Final Environmental Impact Report (FEIR), pursuant to the California Environmental Quality Act, for development of this site (Impact Sciences, Inc. 1998). In a final step, the project was approved by the California Coastal Commission (2002).

*Astragalus pycnostachyus* var. *lanosissimus* is State-listed as endangered under the California Endangered Species Act (CESA). CESA prohibits the take of any species listed under CESA, including plants. Section 2081 of CESA allows private landowners to obtain a permit for the incidental take of listed species, including plants, which must include mitigation measures commensurate with the level of take proposed, adequate funding for any mitigation, and assurance that the proposed take would not jeopardize the continued existence of the species. The California Department of Fish and Game (CDFG) concluded that the North Shore at Mandalay project would not have direct effects on the subspecies and that therefore a permit was not required; however, the project would have indirect effects on the plant. The landowner entered into a memorandum of understanding with CDFG in order to provide some conservation benefit to the subspecies. The proposed conservation measures for *Astragalus pycnostachyus* var. *lanosissimus* on the site would be to establish a 1.65-ac (0.67-ha) "milk-vetch preservation area" encompassing the entire natural population (California Coastal Commission 2002). The milk-vetch preservation area would be buffered from soil remediation activities by a 100-foot (ft) (30 meters (m)) limit line within which no excavation would occur. The milk-vetch preservation area would ultimately be inside a 23.8-ac (9.6-ha) resource protection area (RPA).

According to a comprehensive review of rare plant preserve design compiled by the Conservation Biology Institute (2000), areas to protect a rare plant species should be at a minimum 300 ft (91 m) wide but a larger area is preferred, because effects (e.g., fuel management, loss of pollinators, introduction of competing exotic plants) are not absorbed by smaller areas, and the effects are likely to extend well into adjacent preserved areas.

The efforts to conserve *Astragalus pycnostachyus* var. *lanosissimus* on the North Shore site are much improved over earlier concepts, and we appreciate the efforts of the landowner. However, the Service believes, based on the published literature, that the

configuration of the preserve is not suitable for buffering the plants from adjacent land uses. Although the RPA is 23.8 acres and one contiguous area, the *Astragalus pycnostachyus* var. *lanosissimus* population is near the edge of the RPA, where it would be adjacent to residential development, and the majority of the natural vegetation in the vicinity to the *Astragalus pycnostachyus* var. *lanosissimus* population would be removed. Although no measurements of buffer size were available, and maps we received were not to scale and not overly clear, it appears that the majority of the RPA is to the south of the *Astragalus pycnostachyus* var. *lanosissimus* preserve and thus does not provide sufficient buffering (i.e., at least 300 feet) from adjacent residential development and roads. Furthermore, at least 50 feet of the RPA, including the buffer area surrounding the milk-vetch preserve, will be landscaped, and not natural vegetation, thus further affecting hydrology, pollinators, and potentially introducing non-native species to the preserve. Also, the RPA was not intended to provide protection solely for the *Astragalus pycnostachyus* var. *lanosissimus* population, and as such, much of the 23.8 acre area (approximately 30 percent by our estimate) encompasses habitat which would not support *Astragalus pycnostachyus* var. *lanosissimus* (e.g., willow riparian habitat along the Edison Canal). Lastly, the soil remediation the developer has agreed to provide, which will take place to within 100 feet of the *Astragalus pycnostachyus* var. *lanosissimus* preserve, will alter the local hydrology upon which the plant relies. We are uncertain if the local hydrology can or will be restored following soil remediation. The RPA is likely to become dominated by non-native plants, and the replacement soil may contain seeds of plant species which will invade the *Astragalus pycnostachyus* var. *lanosissimus* preserve. We have not seen a restoration plan that establishes that the area would be replanted with native plants.

We were not involved in the agreements between the developer and local and State officials because our regulatory authority does not extend to listed plants on private land unless there is a Federal nexus, such as a Federal permit or funding. No nexus was involved at this site, and our role was strictly advisory. However, if a landowner takes a State-listed species in violation of CESA, and the species is also federally listed, the take would also violate section 9 of the Act.

A sooty fungus was found on the leaves of *Astragalus pycnostachyus* var. *lanosissimus* in late summer 1997, as leaves began to wither or senesce (die) and the plants entered a period of dormancy (Impact Sciences, Inc. 1997). The effects of the fungus on the population are not known, but it is possible that the fungus attacks senescing leaves in great number only at the end of the growing season. The plants appeared robust when in flower in June 1997 and matured seed by October 1997, at which point the fungus was noted. The plants were regrowing in March 1998, after a period of dormancy, without obvious signs of the fungus (Diane Steeck, Service, in litt. 1998). Wilken and Wardlaw's 2001 study did not detect any signs of pathogens on mature plants that appeared to be in poor health; however, two mature plants had infestations of aphids (Family: Aphididae) that were being tended by nonnative Argentine ants (*Linepithema humile*). Wilken (2002) reported finding cucumber mosaic virus, which is transmitted by aphids, in the *Astragalus pycnostachyus* var. *lanosissimus* population.

In 1997, the seeds of *Astragalus pycnostachyus* var. *lanosissimus* were heavily infested with seed beetles (Family Bruchidae: Coleoptera). In a seed collection done for conservation purposes in 1997, we found that most fruits partially developed at least four seeds; however, seed predation reduced the average number of undamaged seeds to only 1.8 per fruit (D. Steeck, in litt. 1998). Wilken and Wardlaw (2001) reported similar findings in 2000. Apparently heavy seed predation by seed beetles and weevils has been reported among other members of the genus *Astragalus* (Platt *et al.* 1974; Lesica 1995). Wilken and Wardlaw (2001) estimate that seed predation by these insects may reduce seed viability by 30 percent in a given year.

Because of its small population size, the only known natural population is also threatened by competition with nonnative plant species. *Cortaderia selloana* (pampas grass), *Carpobrotus* sp., and *Bromus madritensis* ssp. *rubens* are invasive nonnative plant species that occur at the site (Impact Sciences, Inc. 1997). *Carpobrotus* sp., in particular, is a competitive, succulent species with the potential to cover vast areas in dense clonal mats and may harbor nonnative snails. *Bromus madritensis* ssp. *rubens* grew in high densities around some mature individuals of *Astragalus pycnostachyus* var. *lanosissimus* in 1998, and seedlings were germinating among patches of *Carpobrotus* sp. and

*Bromus* spp. in 1998 (D. Steeck, in litt. 1998). Seedling survival rates for *Astragalus pycnostachyus* var. *lanosissimus* in these areas have not been determined.

Efforts to conserve *Astragalus pycnostachyus* var. *lanosissimus* have been initiated by the landowner (North Shore at Mandalay LLC), a task force of scientists from the University of California, the Santa Barbara Botanic Garden, California Department of Fish and Game (CDFG), the Service, and the Rancho Santa Ana Botanic Garden (RSABG). Consulting biologists for the landowner and proponents of the development have successfully grown plants in a remote greenhouse facility. Several plants were excavated from the natural population and potted prior to State and Federal listing, and other plants were started from seed gathered from the natural population. In addition, *Astragalus pycnostachyus* var. *lanosissimus* seed from the site was placed in a seed storage collection and a seed bulking project at RSABG. RSABG has been successful in germinating *Astragalus pycnostachyus* var. *lanosissimus* seed and growing the plants in containers (Wilken and Wardlaw 2001).

Research populations have been introduced in two locations within the historical range of *Astragalus pycnostachyus* var. *lanosissimus*: One at Mandalay State Beach, across the street from the extant population, and the other at McGrath State Beach. A further research population is present outside of the known range of the subspecies, at Carpinteria Marsh in Santa Barbara County. In addition, approximately 250 individuals were planted and are being irrigated at the Coal Oil Point Reserve, also in Santa Barbara County. Seed has been introduced at 10 separate dune locations at the Reserve (Cristina Sandoval, Coal Oil Point Reserve Director, pers. comm. 2002). The data gathered from these efforts will be used in establishing self-sustaining populations of *Astragalus pycnostachyus* var. *lanosissimus*. The plants at Coal Oil Point have been established primarily for the purpose of generating seeds ("bulking up seed") to increase the seedbank in storage, and not necessarily for generating data on establishing new populations.

In 1997, the population of *Astragalus pycnostachyus* var. *lanosissimus* at the North Shore at Mandalay consisted of about 374 plants, of which 260 were small plants thought to have germinated in the last year, and 114 were "adult" plants. Fewer than 65 of the adult plants produced fruit in 1997 (Impact Sciences, Inc. 1997). In 1998, 192 plants

were counted during surveys of the population. Service biologists placed cages around a sample of plants in 1999 to protect them from severe herbivory by small mammals, most likely brush rabbits. Despite this protection, only 30 to 40 plants produced flowers in 1999, which was believed to be less than half of those blooming in 1998 (D. Steeck, in litt. 1998). It is not known why flowering was so low in 1999.

The total number of adult plants in the natural population declined between 1997 and 2000 (Wilken and Wardlaw 2001). Although 46 of 80 seedlings that germinated in the 2000 growing season were still present in October 2000, the total number of surviving adult plants in 2000 was estimated at 39. Many are believed to have succumbed to herbivory from snails and brush rabbits (Wilken and Wardlaw 2001). Following efforts to control snails in 2000 (*i.e.*, poisoning, hand removal, clearing of iceplant, fencing), and perhaps more favorable growing conditions in the winter of 2000–01, more than 1,000 seedlings were observed (D. Wilken, pers. comm. 2002). Of these, more than 300 survived until October 2001, when they became dormant, indicating an increase in the number of plants in the natural population.

A census of the natural population on September 15, 2002, revealed that 37 reproductive plants had survived from the seedlings present in 2001, and 38 reproductive plants remained from seedlings established in 2000 or earlier, for a total of 75 reproductive plants in 2002. Approximately 350 plants had germinated in 2002. The total number of surviving plants was not determined. Some mortality is expected among all age classes in the following years depending upon rainfall and other factors.

As of June 2003, the status of the research populations at McGrath State Beach, Carpinteria Marsh Reserve, and Mandalay State Beach (CDFG, in litt. 2003a), was as follows (the Coal Oil Point population is excluded because it is not part of the research, as described earlier):

(1) McGrath State Beach. In April 2002, 167 plants were planted at McGrath State Beach. As of February 2003, 88 percent (147) of the plants had survived, and most were still alive in June 2003. Three sites at McGrath had produced a total of 236 seedlings.

(2) Carpinteria Marsh Reserve. In April 2002, 155 plants were planted. As of February 2003, 44 percent (68) of the plants survived. Only 20 seedlings had been produced by plants at one of the planting sites as of June 2003.

(3) Mandalay State Beach. On February 23, 2003, 57 *Astragalus pycnostachyus* var. *lanosissimus* plants in one-gallon containers were planted. All plants had survived as of June 2003.

The most recent census data we have includes information from the experimental populations at McGrath State Beach and Carpinteria Marsh Reserve gathered over the summer of 2003 (CDFG, in litt. 2003b). Of the five experimental plots at McGrath State Beach, the plants at two plots had died out, and plants at the remaining three plots were vigorous, with a total of 79 plants surviving out of 167 that were alive during the previous census. Of the five plots started at Carpinteria Marsh, only two still supported plants, with a total of 30 plants surviving out of 155 planted (19 percent). At McGrath State Beach, the losses and successes were attributed to moisture availability (*i.e.*, plants died where the roots were not able to reach freshwater, but did well where freshwater was available). At Carpinteria, the losses were attributed to high salinity and gopher foraging (CDFG, in litt. 2003b).

#### Previous Federal Action

On October 9, 2002, we published the proposed critical habitat designation for *Astragalus pycnostachyus* var. *lanosissimus* (67 FR 62926) in compliance with the August 2, 2001, stipulated settlement agreement and order. In that proposed rule, we included a detailed summary of the previous Federal actions completed prior to publication of the proposal. We re-opened the public comment period to seek comments on the draft economic analysis on March 20, 2003 (68 FR 13663). Due to funding shortfalls for critical habitat work in FY 2003, we were unable to complete the final rule by the stipulated date of October 1, 2003. On September 29, 2003, the court granted the Service's motion to modify the August 2, 2001 Stipulated Settlement Agreement and Order and extended the date for publication of the final rule to May 15, 2004 (*Center for Biological Diversity v. United States Fish and Wildlife Service*, C 01–0352 SI (N.D. Cal.)).

#### Summary of Comments and Recommendations

We solicited comments from appropriate Federal, State, and local agencies, the scientific community, and other interested parties. We invited public comment through notification sent to local newspapers in Ventura and Santa Barbara Counties. Additionally, we invited public comment on the proposed critical habitat designation on

October 9, 2002 (67 FR 62926), and again on March 20, 2003, when we published the draft economic analysis and re-opened the comment period on the critical habitat proposal (68 FR 13663).

We received three comment letters on the proposed critical habitat designation. All three were reviewed for substantive issues and new information regarding critical habitat. One of the commentors was against the designation on the single piece of privately-owned land included in the proposal. The other two commentors were neutral but provided some new information and clarification on the subspecies' natural history and status.

#### Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited the expert opinions of six independent specialists regarding this rule. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We sent these peer reviewers copies of the proposed rule immediately following publication in the **Federal Register**. Two of the peer reviewers responded, providing comments that we have incorporated into the final rule.

#### Responses to Comments

(1) *Comment*: One comment stated that a critical habitat designation could add nothing to the multiple protections already in place for *Astragalus pycnostachyus* var. *lanosissimus* at the North Shore site, which supports the only natural population of the subspecies and warrants exclusion under section 4(b)(2) of the Act. The comment further states that similar exemptions have been granted to military installations.

*Our Response*: The comment's rationale for exclusion of the North Shore at Mandalay site from the critical habitat designation, citing that it is similar to exclusions we have granted under section 4(b)(2) for military installations, is not accurate. Where we have excluded a military installation from a critical habitat designation pursuant to section 4(b)(2), we determined that the benefits of excluding lands under the jurisdiction of the U.S. military outweigh the benefits of including them as critical habitat, and would not result in the extinction of the species.

As stated previously, this site supports the only naturally-occurring population. While there are other locations where the subspecies has been planted, these remain under study and

it is not clear at this time how or whether they will contribute to the survival of the species. This site is the only seed source, has provided all of the initial propagules for establishing research populations of the species at other sites, and continues to be the source of genetic variability for future propagation. The research populations at McGrath State Beach, Carpinteria Marsh, and Mandalay State Beach are not intended to become new populations for the recovery of the species, but were established to generate data on the species' needs when such introductions for recovery begin. Their persistence is uncertain, and we have observed some failures (see **Background** section). Consequently, the population of *Astragalus pycnostachyus* var. *lanosissimus* on the North Shore at Mandalay site is currently the only one of which we can be relatively certain that the plants will persist. If this population is extirpated, and the research populations ultimately fail, all of the remaining individuals of *Astragalus pycnostachyus* var. *lanosissimus* will exist as seeds in collections or propagated in greenhouses. The designation of the North Shore at Mandalay site as critical habitat recognizes that this population is essential to the species' conservation. This southernmost unit is geographically separated from other critical habitat within its historical range. This will reduce the likelihood of all populations being destroyed by one naturally occurring catastrophic event.

(2) *Comment*: One comment stated that the proposed rule was based upon the wrong legal standard for determining critical habitat. Critical habitat is to be narrowly drawn.

*Our Response*: The critical habitat units as proposed meet the definition of critical habitat in the Act. The occupied areas designated are essential to the conservation of the species and may require special management. In addition, we have made the finding that the unoccupied areas are essential to the conservation of the species. The North Shore at Mandalay site, for which the comment seeks exclusion, supports the only naturally-occurring population of *Astragalus pycnostachyus* var. *lanosissimus* in existence. The plants on this site are the source of all genetic variation available to the subspecies, and its survival is dependent upon a diverse genetic base that can respond to environmental fluctuations and disease.

The designation includes the site of the one existing population and sufficient area to establish new populations necessary for survival and

recovery of *Astragalus pycnostachyus* var. *lanosissimus*.

(3) *Comment*: One comment stated that the proposed rule was not specific enough to identify properties or whether they contained primary constituent elements, and, therefore, did not allow for comments on specific parcels.

*Our Response*: We disagree that the proposed rule did not adequately identify locations of critical habitat. The proposed rule provided maps and Universal Transverse Mercator (UTM) coordinates of the proposed critical habitat units. The UTM coordinates are typically used in Global Positioning System (GPS) data and are at a scale of 3.3 ft (1 m), which is of sufficient detail for locating the extent and configuration of the units, and should allow most property owners to determine if their property is within the boundaries of critical habitat. Detailed maps of the designation are available on our web site, and property owners may call our office for further assistance if necessary.

(4) *Comment*: One comment asserted that the proposed rule failed to include an economic analysis as required under the Act.

*Our Response*: We conducted an economic analysis as required by the Act. The draft economic analysis was made available for public review on March 20, 2003 (68 FR 13663), and we accepted public comments on it from March 20, 2003, until April 21, 2003. We did not receive any comments on the draft economic analysis. The final economic analysis is part of the administrative record for this rulemaking.

(5) *Comment*: One comment stated that the Service cannot designate critical habitat for the milk-vetch until it first complies with the requirements of the National Environmental Policy Act. The comment cites *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service* (1996) to support its contention.

*Our Response*: As we indicated in our proposed rule, we have determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This position has been upheld by the Ninth Circuit Court of Appeals in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995).

Also, the public involvement and notification requirements under both the Endangered Species Act and the

Administrative Procedure Act provide ample opportunity for public involvement in the process, similar to the opportunities for public involvement and economic analysis of effects that would be provided in the NEPA process.

(6) *Comment*: One comment recommended that we avoid making conclusions about the success of efforts to establish *Astragalus pycnostachyus* var. *lanosissimus* at Carpinteria Marsh until the population proves to be self-sustaining, which could take 3 to 4 years.

*Our Response*: We recognize that the efforts to establish *Astragalus pycnostachyus* var. *lanosissimus* at Carpinteria Marsh were preliminary at the time the proposed rule was published. More recent data has been incorporated into this final rule that shows limited success with the experimental population due to physical (e.g., salinity) and biological factors (e.g., competition from nonnative plants).

(7) *Comment*: Two comments stated that a research population had not been initiated at Mandalay State Beach, despite our contention to that effect in the proposal.

*Our Response*: At the time the critical habitat proposal was published, the comments are correct that the research population had not yet been initiated; however, the CDFG has now implemented an experimental population at Mandalay State Beach in addition to those at McGrath State Beach, Carpinteria Marsh, and Coal Oil Point. The CDFG planted 57 1-gallon specimens of *Astragalus pycnostachyus* var. *lanosissimus* at Mandalay State Beach in February 2003. The status of this outplanting is described in the background section of this final rule.

(8) *Comment*: One comment stated that the plants at Coal Oil Point are an in-ground nursery and not intended to become a self-sustaining population.

*Our Response*: The intent of the Coal Oil Point experiment was not clear to us at the time the critical habitat proposal was published. From discussions with the science task force, we now recognize that the population is meant to provide propagules (cuttings or seed) for other populations.

(9) *Comment*: One comment expressed concern that critical habitat designations on land within the University of California's Natural Reserve System could cause regulatory delays for federally funded research projects on these lands.

*Our Response*: We did not receive any comments from representatives of the University of California's Natural

Reserve System (Reserve) objecting to the proposed designation. We understand that one of the purposes of the Reserve system is conservation of plants and animals, such as *Astragalus pycnostachyus* var. *lanosissimus*, so the critical habitat designation is consistent with that goal. Federal funding of research projects at Carpinteria Marsh could trigger consultation under section 7 of the Act if the research project would adversely affect designated critical habitat for *Astragalus pycnostachyus* var. *lanosissimus*. However, we have concluded that these consultations would not cause undue delays in initiating research projects. Compliance with section 7 could range from simple concurrence, which is usually completed within 30 days, to formal consultation, which could take 135 days or less. Formal consultation on critical habitat would only be necessary if the action would have an adverse effect on the critical habitat. We anticipate that most research within the Reserve would be designed not to adversely affect the primary constituent elements of the critical habitat of *Astragalus pycnostachyus* var. *lanosissimus*.

(10) *Comment*: Two comments noted that the Wilken and Wardlaw (2001) report was not intended to represent a comprehensive analysis of all potential sites for introduction of *Astragalus pycnostachyus* var. *lanosissimus*, and that areas to the south of Ventura County within the historical range of *Astragalus pycnostachyus* var. *lanosissimus* should have been included.

*Our Response*: While Wilken and Wardlaw (2001) was not intended to be an exhaustive analysis of all potential sites for introduction of *Astragalus pycnostachyus* var. *lanosissimus* at the time critical habitat was proposed, it was, and remains, the best scientific information available to support the designations. Our designation is to be based on the best available scientific data. We do not have similar data for all other potential introduction sites, so we did not attempt to include areas for which we did not have data indicating that the location was essential to the conservation of *Astragalus pycnostachyus* var. *lanosissimus*. Based on museum records, we know that *Astragalus pycnostachyus* var. *lanosissimus* was once known from Los Angeles and Orange Counties. In preparation of the proposed rule, we interviewed biologists familiar with the coastal wetlands in Los Angeles and Orange Counties, and specifically, historical locations at the Ballona Wetlands and Bolsa Chica. The

information they provided led us to conclude that opportunities for introductions of *Astragalus pycnostachyus* var. *lanosissimus* were incompatible with current conditions and future restoration efforts. We agree that the areas to the south within the historical range of *Astragalus pycnostachyus* var. *lanosissimus* are worth exploring for recovery efforts; however, the information we had at the time critical habitat units were identified did not support inclusion of sites in Los Angeles and Orange Counties.

(11) *Comment*: One comment asked why land at the Navy Base Ventura County was excluded from the designation when Wilken and Wardlaw (2001) included it, and why the Ormond Beach area was not included.

*Our Response*: Based upon Wilken and Wardlaw's (2001) research, we considered a site at the Navy Base Ventura County, Point Mugu for inclusion as critical habitat. Point Mugu Naval Air Weapons Station, in southern Ventura County, may have suitable habitat (Wilken and Wardlaw 2001). *A. pycnostachyus* var. *lanosissimus* was not found during cursory surveys of the base, nor has this taxon ever been collected there despite habitat evaluations and vegetation sampling by the Navy for the past 15 years (Navy Base Ventura County 2002). Further, our criteria for including sites required more than just suitable habitat. We designated areas with primary constituent elements, where the existing population occurs and those where research populations have been established. Nevertheless, we intend to continue to work with the Navy to develop an introduction and conservation plan for *Astragalus pycnostachyus* var. *lanosissimus* at the Navy Base Ventura.

For the Ormond Beach area, we did not have sufficient information at the time critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* was proposed to warrant its inclusion. As stated above, we did not attempt to include areas for which we did not have data indicating that the location was essential to the conservation of *Astragalus pycnostachyus* var. *lanosissimus*.

(12) *Comment*: One comment stated that gophers (*Thomomys bottae*) are a continuing threat to the plants at some of the sites where *Astragalus pycnostachyus* var. *lanosissimus* has been introduced, but not at the native population site where buried oil sludge may deter gophers. Further, the comment notes that the nonnative *Melilotus indicus* is a competitor for the likely pollinator of *Astragalus*

*pycnostachyus* var. *lanosissimus* where the two plants occur together.

*Our Response*: We recognize that current and new threats to *Astragalus pycnostachyus* var. *lanosissimus* exist; however, this new information does not affect the critical habitat designation at this time. We will consider this information and incorporate this data into the recovery efforts currently under way for *Astragalus pycnostachyus* var. *lanosissimus*.

#### Summary of Changes From Proposed Rule

Based upon our review of the public comments, peer review responses, and the economic analysis, we reevaluated our critical habitat and made changes as necessary. Although some pertinent information on the background of the subspecies was provided by reviewers, we did not receive new information that would warrant changes to the boundaries of critical habitat as proposed. We did incorporate changes to the information on *Astragalus pycnostachyus* var. *lanosissimus* which include the following:

(1) We updated the status of the natural and research populations. These changes are generally the result of more recent counts of the numbers of individual plants. Where available, we included new data on factors affecting the plants' growth and development.

(2) Information on participants in the science task force overseeing current experiments with *Astragalus pycnostachyus* var. *lanosissimus* has been revised.

(3) We updated information on experiments being conducted at Mandalay State Beach, which we erroneously described in the proposed rule.

(4) We updated the description of a proposed development on the North Shore at Mandalay site that supports the only natural population of *Astragalus pycnostachyus* var. *lanosissimus*.

(5) We provided a summary of the Economic Analysis that has been adopted as final for this rule.

#### Critical Habitat

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

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

The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands. Under section 7 of the Act, Federal agencies must consult with us on activities they undertake, fund, or permit that may affect critical habitat and lead to its destruction or adverse modification. However, the Act prohibits unauthorized take of listed species and requires consultation for activities that may affect them, including habitat alterations, regardless of whether critical habitat has been designated.

To be included in a critical habitat designation, habitat must be either a specific area within the geographic area occupied by the species on which are found those physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which may require special management considerations or protections, or be specific areas outside of the geographic area occupied by the species which are determined to be essential to the conservation of the species. Section 3(5)(C) of the Act states that critical habitat shall not include the entire geographical area which can be occupied by a species unless the Secretary determines that circumstances require such designation. Our regulations (50 CFR 424.12(e)) also state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species. Within the geographic area occupied by *Astragalus pycnostachyus* var. *lanosissimus*, 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 *Astragalus pycnostachyus* var. *lanosissimus*. 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. We have also excluded from this proposal, areas of suitable habitat where they might potentially occur, and some localities where they historically occurred.

To be included in a critical habitat designation, the Service must also find that habitat may require special management considerations or protections. As discussed in more detail below, with respect to the individual units, the Service finds that the three units designated as critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* may require special management considerations or protections due to threats to the species and/or its habitat. Such special management considerations or protections may include management of invasive, non-native plants; reducing or eliminating herbivory by snails and rabbits; and reducing or eliminating the indirect effects of development, as well as protecting the composition of native plant and animal communities within critical habitat units.

Section 4(b)(2) of the Act requires that we take into consideration the economics, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards under the Endangered Species Act, published 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 habitats, a primary source of information should 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.

Section 4 of the Act requires that we designate critical habitat based on what we know at the time of designation. Habitat is often dynamic, and species

may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the 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 populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9(a)(2) prohibitions, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

## Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12, we used the best scientific information available to determine areas that contain the physical and biological features that are essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus*. This information included data from the final rule listing the species as endangered (66 FR 27901), the California Natural Diversity Data Base (CNDDDB) (CDFG 2002), recent biological surveys, reports and aerial photos, additional information provided by interested parties, and discussions with botanical experts. We also conducted site visits to locations managed by Federal and State agencies, including NBVC, McGrath State Beach, and Carpinteria Marsh.

Much of our understanding of the habitat requirements of *Astragalus pycnostachyus* var. *lanosissimus* is derived from Wilken and Wardlaw (2001), which represents the most complete information to date regarding the biology and habitat of the species. Of particular relevance to this critical habitat determination, Wilken and Wardlaw (2001) provide descriptions of the habitat of *Astragalus pycnostachyus* var. *lanosissimus*' closest relative, *Astragalus pycnostachyus* var.

*pycnostachyus* (northern marsh milk-vetch). Wilken and Wardlaw (2001) collected data on habitat characteristics at sites occupied by *Astragalus pycnostachyus* var. *pycnostachyus* and compared these with the characteristics at the extant population of *Astragalus pycnostachyus* var. *lanosissimus*. Once common habitat characteristics had been established, Wilken and Wardlaw used these to evaluate areas for their suitability for establishing new populations of *Astragalus pycnostachyus* var. *lanosissimus*. The factors evaluated included: degree of disturbance; vegetative cover (percent and type); associated species; proximity to subterranean water table; and potential threats. Wilken and Wardlaw (2001) also analyzed soil from the site where *Astragalus pycnostachyus* var. *lanosissimus* currently exists for physical and chemical properties important for general plant growth, such as texture, pH, salinity, nutrients, and micronutrients.

Determining what constitutes habitat for *Astragalus pycnostachyus* var. *lanosissimus* is difficult because there is only one extant population, and the site has been altered by soil dumping and oil waste disposal. Also, the historical collections did not fully document the habitat where the plants were found. Therefore, both Wilken and Wardlaw (2001) and the Service's data (D. Steeck, in litt. 1998) were used to characterize the habitat of *Astragalus pycnostachyus* var. *lanosissimus* and to determine the primary constituent elements. Some differences between the two subspecies of *Astragalus pycnostachyus* are apparent, especially in regard to associated plant species and general habitat type. For example, some individuals of *Astragalus pycnostachyus* var. *pycnostachyus* are found in habitats similar to *Astragalus pycnostachyus* var. *lanosissimus*, but individuals are also found some distance from wet habitats in relatively dry or gravelly soils. Such differences may be a function of a small data set for *Astragalus pycnostachyus* var. *lanosissimus* due to its single population, uncertainty surrounding its presence on the extant site (*i.e.*, whether it is a natural occurrence or was introduced through soil dumping), and differences in habitat needs of the two subspecies. We have paid particular attention to information from Wilken and Wardlaw (2001) because they analyzed conditions at the only known site where *Astragalus pycnostachyus* var. *lanosissimus* currently occurs.

### Primary Constituent Elements

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

Much of what is known about the specific physical and biological requirements of *Astragalus pycnostachyus* var. *lanosissimus* 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 *Astragalus pycnostachyus* var. *lanosissimus* throughout its range, and to provide those components essential for the conservation of the subspecies. These habitat components provide for: (1) Individual and population growth, including sites for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; and (2) areas that provide basic requirements for growth, such as water, light, and minerals.

We have concluded that the long-term success of the conservation of *Astragalus pycnostachyus* var. *lanosissimus* is dependent upon the protection of the existing population site and sites where introductions can be conducted, as well as the maintenance of ecological functions within these sites, including connectivity between colonies (*i.e.*, groups of plants within sites) within close geographic proximity to facilitate pollinator activity and seed dispersal. The areas we are designating as critical habitat provide some or all of the habitat components essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus*. Based on the best available information from the only extant site of the species, the primary constituent elements of critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* consist of, but are not limited to:

(1) Vegetation cover of at least 50 percent but not exceeding 75 percent, consisting primarily of known associated native species, including but not limited to, *Baccharis salicifolia*, *Baccharis pilularis*, *Salix lasiolepis*, *Lotus scoparius* (deerweed), and *Ericameria ericoides* (coast goldenbush);

(2) Low densities of nonnative annual plants and shrubs;

(3) The presence of a high water table, either fresh or brackish, as evidenced by the presence of channels, sloughs, or depressions that may support stands of *Salix lasiolepis*, *Typha* spp., and *Scirpus* spp. (cattail);

(4) Soils that are fine-grained, composed primarily of sand with some clay and silt, yet are well-drained; and

(5) Soils that do not exhibit a white crystalline crust that would indicate saline or alkaline conditions.

### Criteria Used To Identify Critical Habitat

Critical habitat designated for *Astragalus pycnostachyus* var. *lanosissimus* includes the only known location where the subspecies currently occurs and two other sites with high potential to support the subspecies based upon habitat and/or historical occurrences. We have concluded that establishment of new, self-sustaining populations of *Astragalus pycnostachyus* var. *lanosissimus* at other sites is essential for the subspecies' survival because it is currently known from a single location where its future is uncertain due to its small population size, and the high degree of threat from chance catastrophic events. Catastrophic events are a concern when the number of populations or geographic distribution of a species is severely limited (Shaffer 1981, 1987; Meffe and Carroll 1997; Primack 1998), as is the case with *Astragalus pycnostachyus* var. *lanosissimus*. Because a critical habitat designation limited to this subspecies' present range, which is one known location, would be inadequate to ensure its conservation, the establishment of additional locations for *Astragalus pycnostachyus* var. *lanosissimus* is critical to reducing the risk of extinction.

For sites not currently occupied by *Astragalus pycnostachyus* var. *lanosissimus*, we first considered the historical range of the subspecies based upon collection data and records from the CNDDB (CDFG 2001). From this potential distribution, we located areas where the plants were observed or collected in the past.

By examining aerial photographs and reviewing pertinent literature, and

through discussions with botanical experts, we identified areas where the primary constituent elements exist. These broader areas were refined with information on the extant population and the other locations as derived from Wilken and Wardlaw (2001). We also engaged in discussions, by phone and electronic mail, with the Carlsbad Fish and Wildlife Office, which has responsibility for and experience with, the historical locations in southern Los Angeles and Orange Counties (K. Clark, Service, pers. comm. 2002; J. Fancher, Service, pers. comm. 2002).

We identified the boundaries of the units on aerial photographs and U.S. Geological Survey topographical maps and refined them based upon adjacent land uses. For example, one unit is bordered on three sides by urban areas and on the other side by the Pacific Ocean. The critical habitat units were designed to encompass a large enough area to support existing ecological processes that may be essential to the conservation of *Astragalus pycnostachyus* var. *lanosissimus* (i.e., that provide areas for population expansion, provide connectivity or linkage between colonies within a unit, and support populations of pollinators and seed dispersal organisms).

Within the historical range of *Astragalus pycnostachyus* var. *lanosissimus*, we considered two of the collection localities: Bolsa Chica, Orange County, and the Ballona Wetlands, Los Angeles County. During discussions with biologists most familiar with these areas (K. Clark, pers. comm. 2002; J. Fancher, pers. comm. 2002), we concluded that, although the areas remain undeveloped for the most part, conditions have changed dramatically since the plants were collected. For example, the Bolsa Chica area has been altered by oil development, which created raised pads and lower excavated areas, and channelized the natural freshwater inflow that once existed. The influence of tidal flow is now more pronounced, to the point that the soils have become saline. The area, also, does not contain plant species that indicate freshwater influence. Plant species indicating freshwater influence are found at the currently occupied site and at locations where the close relative, *Astragalus pycnostachyus* var. *pycnostachyus*, occurs. Also, long-range plans for Bolsa Chica would increase the tidal influence by establishing a direct connection to the ocean across Bolsa Chica State Beach. The Ballona Wetlands are similarly isolated from a freshwater source and are subject to considerable disturbance from human activities.

Consequently, we rejected both Bolsa Chica and the Ballona Wetlands as potential reintroduction sites for *Astragalus pycnostachyus* var. *lanosissimus* and as critical habitat units.

For critical habitat outside of the historical range, we considered areas from Gaviota State Beach, Santa Barbara County, south to San Diego County. We have included only one critical habitat unit (Carpinteria Marsh) that could be considered outside of the known range of the subspecies in this critical habitat designation. That location is included because of its proximity to the historical distribution and the presence of primary constituent elements. Data to support designation of critical habitat elsewhere outside the historic range of *Astragalus pycnostachyus* var. *lanosissimus* are limited. In addition, introducing *Astragalus pycnostachyus* var. *lanosissimus* in the vicinity of *Astragalus pycnostachyus* var. *pycnostachyus* is not prudent because of the potential for hybridization and dilution of genetic identity between the two varieties. Therefore, we did not consider other locations outside the historical range of *Astragalus pycnostachyus* var. *lanosissimus*.

In designating critical habitat, we made an effort to avoid developed areas, such as housing developments, that are unlikely to contain the primary constituent elements for *Astragalus pycnostachyus* var. *lanosissimus*. However, we did not map critical habitat at a small enough scale to all for the exclusion of all lands unlikely to contain the primary constituent elements essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus*. Areas within the boundaries of the mapped units such as buildings, roads, parking lots, railroads, airport runways and other paved areas, lawns, and other urban landscaped areas will not contain any of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger a section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

In summary, we selected critical habitat areas that provide for the conservation of *Astragalus pycnostachyus* var. *lanosissimus* where it is known to occur, as well as areas essential for establishment of new populations in order for the species to be conserved. As noted above, establishment of new populations is important to reduce the risk of extirpation from chance catastrophic events.

### Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be essential for the conservation of the species may require special management or protections. The Mandalay Unit may require special management considerations or protections due to the threats to the species and its habitat posed by development (e.g., loss of native vegetation, disruption of pollinator community, herbivory by snails, increase in non-native plants, soil remediation), herbivory by rabbits, and trampling as a result of human activity. Currently, competition by non-native plants, herbivory by snails and rabbits, and human activity are ongoing in the Mandalay Unit. The McGrath Unit may require special management considerations or protections due to the threats to the species and its habitat posed by invasive, non-native plants and trampling as a result of human activity. Currently, competition from non-native plants and human activity are ongoing in the McGrath Unit. The Carpinteria Salt Marsh Unit may require special management considerations or protections due to the threats to the species and its habitat posed by non-native plants and high salinity. Currently, competition from non-native plants and fluctuations in salinity levels are ongoing in the Carpinteria Salt Marsh Unit.

### Critical Habitat Designation

The critical habitat areas described below constitute our best assessment at this time of the areas essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus*. The areas designated as critical habitat are: (1) Mandalay, including the site of the extant population at Fifth Street and Harbor Boulevard in the city of Oxnard, Ventura County; (2) McGrath Lake area, McGrath State Beach, California Department of Parks and Recreation (CDPR), Ventura County, and (3) Carpinteria Salt Marsh Reserve run by the University of California, Santa Barbara, (UC Santa Barbara) Santa Barbara County.

The only site occupied by a natural population of *Astragalus pycnostachyus* var. *lanosissimus* is in the Mandalay Unit in the city of Oxnard. A research population has been initiated at the Mandalay State Beach portion of the unit. Research introductions have also occurred at the Carpinteria Salt Marsh Reserve and McGrath State Beach units. Research populations may be present in some of the units; however, these are

not considered self-sustaining populations as they require continued monitoring and control. Therefore, we consider all of the units unoccupied except for the Mandalay Unit where the natural population occurs. We find that unoccupied areas are essential to the conservation of the species because the single extant natural population is likely to be affected by direct and indirect impacts of the approved development of the North Shore at Mandalay project (*i.e.*, due to inadequate preserve design). Furthermore, a catastrophic event could eliminate the population regardless of the development. In the absence of suitable off-site locations where the subspecies could be established, it is possible that it could go extinct. The two unoccupied sites we have included have been identified through research as the most likely candidates for new

populations because the primary constituent elements are present and they can be adequately protected from the threats identified earlier. One site is within the historical range of the subspecies and one is not.

Our evaluation of *Astragalus pycnostachyus* var. *lanosissimus* has shown that suitable habitat areas are scarce within the historical range of the subspecies. The combination of associated plant species, high groundwater, low salinity, and other primary constituent elements has either been removed or disrupted by urbanization, agriculture, oilfield development, or flood control projects. Other areas within the historical range were considered and rejected, and areas outside of the historical range were limited in scope and only one was included. The scarcity of suitable

habitat has also contributed to the need to designate areas currently unoccupied by *Astragalus pycnostachyus* var. *lanosissimus* as critical habitat. We have therefore concluded that the designation of currently unoccupied locations as critical habitat is essential to the conservation of *Astragalus pycnostachyus* var. *lanosissimus*.

In summary, we have designated approximately 420 ac (170 ha) of land in three units as critical habitat for *Astragalus pycnostachyus* var. *lanosissimus*. The approximate areas of designated critical habitat by land ownership are shown in Table 1. Private lands comprise approximately 33 percent of the designated critical habitat; and State lands comprise 67 percent. No Federal lands are included in the designation.

TABLE 1.—APPROXIMATE AREAS IN ACRES (AC) AND HECTARES (HA) OF DESIGNATED CRITICAL HABITAT FOR ASTRAGALUS PYCNOSTACHYUS VAR. LANOISSISSIMUS BY LAND OWNERSHIP<sup>1</sup>

Unit name	Private	State	Federal	Total
Mandalay Unit .....	104 ac (42 ha) .....	49 ac (20 ha) .....	0 ac (0 ha) .....	153 ac (62 ha).
McGrath Unit .....	35 ac (14 ha) .....	27 ac (11 ha) .....	0 ac (0 ha) .....	62 ac (25 ha).
Carpinteria Salt Marsh Unit .....	0 ac (0 ha) .....	205 ac (83 ha) .....	0 ac (0 ha) .....	205 ac (83 ha).
Total .....	139 ac (56 ha) .....	281 ac (114 ha) .....	0 ac (0 ha) .....	420 ac (170 ha).

<sup>1</sup> Approximate acres have been converted to hectares (1 ha = 2.47 ac).

The three critical habitat units include the only known location where the subspecies currently occurs and two unoccupied sites that contain the primary constituent elements. A brief description of each critical habitat unit is given below.

**Mandalay Unit**

The Mandalay Unit is approximately 153 ac (62 ha) in size and is essential to the conservation of *Astragalus pycnostachyus* var. *lanosissimus* because it contains the only known location where *Astragalus pycnostachyus* var. *lanosissimus* naturally exists and the remainder of the unit also supports the primary constituent elements. The State-owned Mandalay State Beach is managed by the Ventura County Parks and Recreation Department and comprises about 49 ac (20 ha) of this unit. The remaining area of the unit is privately owned and is currently undeveloped, but has been chosen as the site for a 300-housing-unit subdivision (Economic and Planning Systems, Inc. 2003).

The pending development is called North Shore at Mandalay and would occur in the eastern portion of this critical habitat unit. The project

includes a 1.65-ac (0.67-ha) “milk-vetch preservation area” encompassing the entire natural population (California Coastal Commission 2002), which in turn, would be inside a 23.8-ac (9.6-ha) resource protection area (RPA). The RPA would be buffered from adjacent residential development by a 50-ft (15 m) wide landscaped area. The population will be mostly isolated from surrounding vegetation, and the ecological processes sustaining the population may be interrupted. Also, the project may allow increased human intrusion, provide habitat for nonnative plants and snails, alter the hydrologic regime, and introduce pesticides and fertilizers that adversely affect the plants. Therefore, the risk of extinction of the subspecies is high without the development of additional populations.

The portion of this unit on Mandalay State Beach is identified by Wilken and Wardlaw (2001) as a possible site for establishing a new population of *Astragalus pycnostachyus* var. *lanosissimus*. In 2003, the first efforts at researching how new populations could be established in this unit were begun. The proximity of Mandalay State Beach to the extant population indicates that some natural exchange of seeds or pollen could take place if a second

population were established at Mandalay State Beach. The site contains one or more of the primary constituent elements defined for *Astragalus pycnostachyus* var. *lanosissimus* critical habitat, although Wilken and Wardlaw (2001) note some dense cover of nonnative annuals. Also, using their five parameters, Wilken and Wardlaw (2001) ranked the Mandalay State Beach portion of this unit as one of the most similar to the natural occurrences of *Astragalus pycnostachyus* var. *lanosissimus* and the closely related *Astragalus pycnostachyus* var. *pycnostachyus*, and hence one of the top candidates for establishing a new population.

California Department of Parks and Recreation (CDPR) has approved experimental introductions of *Astragalus pycnostachyus* var. *lanosissimus* conducted by the CDFG. Because the area is public land owned by the CDPR and the species is State-listed, we will work with the State to develop conservation strategies to reintroduce the subspecies and develop and manage reserves.

As discussed above, this unit is essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus* because it contains the

primary constituent elements for *Astragalus pycnostachyus* var. *lanosissimus*. The population of *Astragalus pycnostachyus* var. *lanosissimus* at the North Shore at Mandalay site is the only naturally-occurring, self-perpetuating population of the species in existence. It has provided all of the initial propagules for establishing research populations of the species at other sites, and continues to be the source of genetic variability for future propagation. The research populations at McGrath State Beach and Carpinteria Marsh are not intended to become new populations for the recovery of the species, but were established to generate data on the species' needs when such introductions for recovery begin. Their persistence is uncertain, and we have observed some failures (see Background section). Consequently, the population of *Astragalus pycnostachyus* var. *lanosissimus* on the North Shore at Mandalay site is currently the only one of which we can be relatively certain that the plants will persist. If this population is extirpated, and the research populations ultimately fail, all of the remaining individuals of *Astragalus pycnostachyus* var. *lanosissimus* will exist as seeds in collections or propagated in greenhouses. The designation of the North Shore at Mandalay site as critical habitat recognizes that this population is essential to the species' conservation. This southernmost unit is geographically separated from other critical habitat within its historical range. This will reduce the likelihood of all populations being destroyed by one naturally occurring catastrophic event.

#### McGrath Unit

The site within McGrath Beach State Park is adjacent to McGrath Lake on the leeward side of the southern end of the lake, between the lake and Harbor Boulevard. The unit covers 62 ac (25 ha). It includes 35 ac (14 ha) of private land and 27 ac (11 ha) of State-owned land managed by CDPR.

Of the sites they examined, Wilken and Wardlaw (2001) identify the McGrath Lake area as having the best combination of habitat characteristics similar to that of the extant population of *Astragalus pycnostachyus* var. *lanosissimus* and its closest relative, *Astragalus pycnostachyus* var. *pycnostachyus* based upon five parameters (*i.e.*, dominant vegetation composed of a shrub canopy less than 75 percent; absence of competitive annual or perennial exotic plants; water table in close proximity; soil types consistent with that at the site of the

extant population; and native habitat supporting pollinators).

CDPR agreed to allow CDFG and RSABG establish a research population on this site. This effort is still in its early stages, and no conclusive data have yet been retrieved. Because the area is currently operated by CDPR and is public land, there is opportunity to work with the State to develop reintroduction strategies for *Astragalus pycnostachyus* var. *lanosissimus* and to form manageable reserves. This unit is also one of the last known places where the subspecies was observed growing naturally, and it is close to the extant population and shares many of the broader climatic and habitat features of that site.

As discussed above, this unit is essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus* because it once supported a population *Astragalus pycnostachyus* var. *lanosissimus* until it was extirpated in 1967. It contains the primary constituent elements for *Astragalus pycnostachyus* var. *lanosissimus*. It includes habitat that is necessary for the expansion of the only known population, which may become nonviable in the future. It contains habitat features that are essential for this species including, but not limited to, high diversity of native plants, open canopy, sandy dune hollows, seep margin areas, subterranean water table. This central unit is geographically separated from other critical habitat within *Astragalus pycnostachyus* var. *lanosissimus* historical range. This will reduce the likelihood of all populations being destroyed by one naturally occurring catastrophic event.

#### Carpinteria Salt Marsh Unit

The Carpinteria Salt Marsh Unit extends from the Southern Pacific Railroad tracks south and west to Sand Point Drive and Santa Monica Creek and is approximately 205 ac (83 ha) in size. The entire unit is managed by the UC, Santa Barbara.

This unit includes saltmarsh habitat, which is essential to support the pollinators and other ecological processes that *Astragalus pycnostachyus* var. *lanosissimus* requires for its survival. The research population of *Astragalus pycnostachyus* var. *lanosissimus* was introduced in April 2002 into a portion of the unit. As of February 2003, 44 percent (68) of the 155 original plants survived. By June 2003, only 20 seedlings had been produced by plants at one of the planting sites. We have determined that this area contains the primary constituent elements necessary for the

introduction of *Astragalus pycnostachyus* var. *lanosissimus* based on Wilken and Wardlaw's (2001) description of five parameters of habitat suitability. These parameters closely parallel the primary constituent elements, so one or more of the elements are represented at this site. The diverse native vegetation provides for a robust pollinator community. The unit is bordered by a residential community where nonnative snails were observed; protection is required for herbivory by snails on *Astragalus pycnostachyus* var. *lanosissimus* plants.

This site in Santa Barbara County is near the range of the subspecies as predicted by the historical collections and described by Skinner and Pavlik (1994), who list the known counties as Ventura, Los Angeles, and Orange. We have included this unit because, although it is outside the historical range for *Astragalus pycnostachyus* var. *lanosissimus*: (1) Insufficient suitable habitat for the subspecies remains within its historical range; and (2) the area has habitat features essential to the conservation of the subspecies, which suggests a high potential for successful establishment of a new population (Wilken and Wardlaw 2001). This unit is essential for the conservation of *Astragalus pycnostachyus* var. *lanosissimus* because it supports the pollinators and other ecological processes for *Astragalus pycnostachyus* var. *lanosissimus*. It contains habitat features that are essential for this species including, but not limited to, dominant vegetation composed of a shrub canopy less than 75 percent; absence of competitive annual or perennial exotic plants; water table in close proximity; soil type; and native habitat supporting pollinators. Seedling recruitment has been observed at this site in the research population. This northernmost unit is geographically separated from other critical habitat. This will reduce the likelihood of all populations being destroyed by one naturally occurring catastrophic event.

#### Effects of Critical Habitat Designation

##### Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, permit, or carry out do not destroy or adversely modify critical habitat. 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.

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

We may issue a formal conference report if requested by a Federal agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (50 CFR 402.10(d)).

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

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also

provide "reasonable and prudent alternatives" to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project.

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 designated critical habitat, or adversely modify or destroy proposed critical habitat.

Activities on Federal lands that may affect *Astragalus pycnostachyus* var. *lanosissimus* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Corps) under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration, Environmental Protection Agency (EPA), or Federal Emergency Management Authority funding), would also 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.

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

constituent elements to the extent that the value of critical habitat for the conservation of the subspecies is appreciably reduced. We note that such activities may also jeopardize the continued existence of the subspecies.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and require that a section 7 consultation be conducted include, but are not limited to, the following:

(1) Alteration of existing hydrology by lowering the groundwater table through surface changes or pumping of groundwater, or redirection of freshwater sources through diverting surface waters (e.g., channelization);

(2) Compaction of soil through the establishment of trails or roads;

(3) Placement of structures or hardscape (e.g., pavement, concrete, nonnative rock or gravel);

(4) Removal of native vegetation that reduces native plant cover to below 50 percent;

(5) Introduction of nonnative vegetation or creation of conditions that encourage the growth of nonnatives, such as irrigation, landscaping, soil disturbance, addition of nutrients, etc.;

(6) Use of pesticides or other chemicals that can directly affect *Astragalus pycnostachyus* var. *lanosissimus*, its associated native vegetation, or pollinators;

(7) Introduction of nonnative snails or Argentine ants or creation of conditions favorable to these species. Such conditions arise as a result of landscaping with nonnative groundcover plants, irrigation, or other activities that increase moisture and food availability for these nonnative species that have been detrimental to the existing population;

(8) Activities that isolate the plants or their populations from neighboring vegetation or reduce the size of natural open spaces, and thus interfere with ecological processes that rely upon connectivity with adjacent habitat, such as maintaining pollinator populations and seed dispersal; and

(9) Soil disturbance that damages or interferes with the seedbank of the subspecies, such as discing, tilling, grading, removal, or stockpiling.

We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. Critical habitat designations do not signal that habitat outside the designation is unimportant or not required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be

implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the applicable prohibitions of section 9 of the Act, as determined on the basis of the best available information at the time of the action.

Several other species that are listed under the Act have been documented to occur in the same general areas as the current distribution of *Astragalus pycnostachyus* var. *lanosissimus*. These include: brown pelican (*Pelecanus occidentalis*); western snowy plover (*Charadrius alexandrinus nivosus*); California least tern (*Sterna antillarum browni*); light-footed clapper rail (*Rallus longirostris levipes*); and salt marsh bird's beak (*Cordylanthus maritimus* ssp. *maritimus*).

If you have questions regarding whether specific activities will likely constitute adverse modification of critical habitat, contact the Field Supervisor, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section). Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Portland Regional Office, 911 NE 11th Avenue, Portland, OR 97232-4181 (503/231-6131; facsimile 503/231-6243).

#### Relationship to Habitat Conservation Plans

Currently, no HCPs exist that include *Astragalus pycnostachyus* var. *lanosissimus* as a covered species.

#### Economic Analysis

Following the publication of the proposed critical habitat designation on October 9, 2002, a draft economic analysis was prepared to estimate the potential direct and indirect economic impacts associated with the designation, in accordance with the recent decision in *N.M. Cattlegrowers Ass'n v. U.S. Fish and Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) (Economic and Planning Systems 2003). The draft analysis was made available for public review and comment on March 20, 2003 (68 FR 13663), and we accepted comments on the draft analysis until April 21, 2003.

Our draft economic analysis evaluated the potential direct and indirect economic impacts associated with the proposed critical habitat designation for *Astragalus pycnostachyus* var. *lanosissimus* over the next 10 years. Direct impacts are those related to consultations under section 7 of the Act. They include the cost of completing the section 7 consultation process and potential project modifications resulting

from the consultation. Indirect impacts are secondary costs and benefits not directly related to operation of the Act. Examples of indirect impacts include potential effects to property values, redistricting of land from agricultural or urban to conservation, and social welfare benefits of ecological improvements.

The categories of potential direct and indirect costs and benefits considered in the analysis included the costs associated with: (1) Conducting section 7 consultations, including incremental consultations and technical assistance; (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 including potential effects on property values and the interaction of State and local laws; and (4) potential offsetting beneficial costs associated with critical habitat, including educational benefits. The most likely economic effects of critical habitat designation are on activities funded, authorized, or carried out by a Federal agency (*i.e.*, direct costs).

Following the close of the comment period on the draft economic analysis, an addendum was completed. We received no comments on the draft economic analysis. The draft economic analysis and addendum addressed the impact of the proposed critical habitat designation that may be attributable coextensively to the listing of the subspecies. Because of the uncertainty about the benefits and economic costs resulting solely from critical habitat designations, we believe that it is reasonable to estimate the economic impacts of a designation utilizing this single baseline. It is important to note that the inclusion of impacts attributable coextensively to the listing does not convert the economic analysis into a tool to be used in deciding whether or not a species should be added to the Federal list of threatened and endangered species.

The critical habitat designations for *Astragalus pycnostachyus* var. *lanosissimus* include State and private lands only. No Federal lands are involved. The estimates for section 7 consultation in the economic analysis were based upon activities that are "reasonably foreseeable," which is defined as the time period from the present and for the next 10 years. Beyond 10 years, the numbers of projects and the potential for section 7 consultations become increasingly speculative.

Together, the draft economic analysis and the addendum constitute our final economic analysis. The final economic

analysis estimates that over the next 10 years, the designation (co-extensive with the listing) will likely not result in section 7 consultations in any of the designated three units. Therefore, costs associated with section 7 implementation are anticipated to be \$0. Similarly, the benefits of designation, which may include educational benefits that are difficult to quantify, are also limited. The cleanup of the Mandalay unit will be conducted by the developer and overseen by the Los Angeles Water Quality Control Board. There might have been a Federal nexus had the EPA overseen or funded the cleanup. However, the EPA has determined that the State's provision over the site cleanup was sufficient, and therefore, there will not be a Federal nexus (Economic and Planning Systems, Inc. 2003).

A copy of the final economic analysis and supporting documents are included in our administrative record and may be obtained by contacting our Ventura Fish and Wildlife Office (see **ADDRESSES** section).

#### 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 formally reviewed this final critical habitat designation.

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

Under the Regulatory Flexibility Act (RFA) (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 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.

According to the Small Business Administration, small entities include small organizations, such as independent non-profit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121 and <http://www.sba.gov/size>). 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, this 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 Electric Co-Op, Inc. v. F.E.R.C.* and *American Trucking Associations, Inc. v. EPA*).

To determine if the rule would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (e.g., housing

development, grazing, oil and gas production, timber harvesting). We applied the "substantial number" test individually to each industry to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. The final economic analysis found that the designation of critical habitat will not affect a single entity, and therefore, the designation will not result in a significant economic impact on a substantial number of small entities.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies; non-Federal activities are not affected by the designation if they lack a Federal nexus. In areas where the subspecies is present, Federal agencies funding, permitting, or implementing activities are already required to avoid jeopardizing the continued existence of *Astragalus pycnostachyus* var. *lanosissimus* through consultation with us under section 7 of the Act. Following finalization of this critical habitat designation, Federal agencies must also ensure that their activities do not destroy or adversely modify designated critical habitat through consultation with us. However, this will not result in any additional regulatory burden on Federal agencies or their applicants where the subspecies is present because conservation already would be required due to the presence of a listed species.

In unoccupied areas, or areas of uncertain occupancy, designation of critical habitat could trigger additional review of Federal activities under section 7 of the Act, and may result in additional requirements on Federal activities to avoid destroying or adversely modifying critical habitat. *Astragalus pycnostachyus* var. *lanosissimus* has only been listed since June 2001, and no formal consultations involving the subspecies have taken place. Therefore, for the purposes of this review and certification under the RFA, we are assuming that any future consultations in the areas proposed for critical habitat that are considered unoccupied will be due to the critical habitat designation. Should a federally funded, permitted, or implemented project be proposed that may affect designated critical habitat, we will work with the Federal action agency and any applicant, through section 7 consultation, to identify ways to implement the proposed project while minimizing or avoiding any adverse

effect to the subspecies or critical habitat. In our experience, the vast majority of such projects can be successfully implemented with at most minor changes that avoid significant economic impacts to project proponents.

Based on our experience with section 7 consultations for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. As we have no consultation history for *Astragalus pycnostachyus* var. *lanosissimus*, we can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the subspecies and the threats it faces, especially as described in the final listing rule and in this final critical habitat designation, as well as our experience with similar listed plants in California. In addition, the State of California listed *Astragalus pycnostachyus* var. *lanosissimus* as an endangered species under the California Endangered Species Act of 1978, and we have also considered the kinds of actions required through State regulations for this subspecies. The kinds of actions that may be included in future reasonable and prudent alternatives include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, construction of protective fencing, and regular monitoring. These measures are not likely to result in a significant economic impact to project proponents.

As required under section 4(b)(2) of the Act, we have conducted an analysis of the potential economic impacts and benefits of this critical habitat designation, and made that analysis available for public review and comment before finalizing this designation. Based upon the economic analysis, we conclude that the economic effects of the final rule for *Astragalus pycnostachyus* var. *lanosissimus* will be less than those identified for other California plant critical habitat designations because the amount of private land involved is limited, and the plant occurs naturally in only one of the units. Further, no Federal nexus exists for a proposed development on the private land within the designated

critical habitat. The designation of critical habitat in areas not occupied by *A. pycnostachyus* var. *lanosissimus* could result in extra costs involved with consultations that may not have occurred were it not for the designations. However, one unit is entirely State-owned and the burden of consultation should not cause economic hardship on private entities.

Efforts to establish *Astragalus pycnostachyus* var. *lanosissimus* on unoccupied sites would be mostly funded by Federal, State, and non-governmental organizations, and would likely not require private funding. Consequently, we conclude that the economic effects of the designation of critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* are likely to be minimal.

In summary, we have concluded that this final rule would not result in a significant economic effect on a substantial number of small entities. The designation includes only one privately-owned parcel for which a project has been proposed and for which there is no Federal involvement or section 7 consultation required. This rule would result in project modifications only when proposed Federal activities would destroy or adversely modify critical habitat. While this may occur, it is not expected to affect any small entities. Even if a small entity is affected, we do not expect it to result in a significant economic impact, as the measures included in reasonable and prudent alternatives must be economically feasible and consistent with the proposed action. The kinds of measures we anticipate we would recommend can usually be implemented at low cost. Therefore, we are certifying that the designation of critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* will not have a significant economic impact on a substantial number of small entities, and a final regulatory flexibility analysis is not required.

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

Under SBREFA, this rule is not a major rule (see Regulatory Flexibility Act section). Our assessment of the economic effects of this designation is described in the economic analysis. Based upon the effects identified in the economic analysis, this rule will not have an effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based

enterprises to compete with foreign-based enterprises. Please refer to the final economic analysis for a discussion of the effects of this determination.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under E.O. 13211, and it is not expected to significantly affect energy supplies, distribution, or use because none of those activities currently occur within the critical habitat units or would be affected by the designation. 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 they must ensure that any programs involving Federal funds, permits, or other authorized activities, will not adversely modify the critical habitat.

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

#### *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 420 ac (170 ha) of lands in Santa Barbara and Ventura Counties, California, as critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* in a takings implications assessment. The takings assessment concludes that this final rule does not pose significant takings implications.

#### *Federalism*

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the

Interior policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State Resource Agencies in California. The designation of critical habitat in areas currently occupied by *Astragalus pycnostachyus* var. *lanosissimus* imposes no additional restrictions beyond 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 California Department of Parks and Recreation in that the areas essential to the conservation of this subspecies are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of this subspecies are specifically identified. While this definition and identification do not alter where and what federally sponsored activities may occur, they may assist 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 does meet the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Endangered Species Act. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Astragalus pycnostachyus* var. *lanosissimus*.

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

This rule does not contain any new or revised information collections for which OMB approval is required under the Paperwork Reduction Act. 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 that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental

Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reason for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This final determination does not constitute a major Federal action significantly affecting the quality of the human environment.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a

Government-to-Government basis. The designation of critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

**References Cited**

A complete list of all references cited herein, as well as others, is available upon request from the Ventura Fish and Wildlife Office (see **ADDRESSES** section).

**Author**

The primary author of this final rule is Rick Farris, Ventura 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. 4201–4205; Pub. L. 99–625, 100 Stat. 3500, unless otherwise noted.

■ 2. In § 17.12(h), in the table, revise the entry for *Astragalus pycnostachyus* var. *lanosissimus* under "FLOWERING PLANTS" to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
* <i>Astragalus pycnostachyus</i> var. <i>lanosissimus</i> .	* Ventura Marsh milk-vetch.	* U.S.A. (CA) .....	* Fabaceae—Pea Family.	* E	* 708	* 17.96(a)	* NA
*	*	*	*	*	*	*	*

■ 3. In § 17.96, amend paragraph (a) by adding critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* in alphabetical order under Family Fabaceae to read as follows:

**§ 17.96 Critical habitat—plants.**

- (a) \* \* \*  
Family Fabaceae: *Astragalus pycnostachyus* var. *lanosissimus* (Ventura Marsh milk-vetch)
  - (1) Critical habitat units are depicted for Santa Barbara and Ventura Counties, California, on the maps below.
  - (2) The primary constituent elements of critical habitat for *Astragalus pycnostachyus* var. *lanosissimus* are as follows:
    - (i) Vegetation cover of at least 50 percent but not exceeding 75 percent, consisting primarily of known associated native species, including but not limited to, *Baccharis salicifolia*, *Baccharis pilularis*, *Salix lasiolepis*, *Lotus scoparius*, and *Ericameria ericoides*;
    - (ii) Low densities of nonnative annual plants and shrubs;
    - (iii) The presence of a high water table, either fresh or brackish, as evidenced by the presence of channels,

- sloughs, or depressions that may support stands of *Salix lasiolepis*, *Typha* spp., and *Scirpus* spp.;
- (iv) Soils that are fine-grained, composed primarily of sand with some clay and silt, yet are well-drained; and
- (v) Soils that do not exhibit a white crystalline crust that would indicate saline or alkaline conditions.
- (3) Critical habitat does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airport runways and buildings, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.
- (4) Critical Habitat Map Units. Data layers defining map units were created on a base of USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.
- (5) McGrath and Mandalay Units. Ventura County, California.
  - (i) Mandalay Unit A. From USGS 1:24,000 quadrangle map Oxnard, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 293381, 3786370; 293036, 3787170; 292994, 3787290; 292974, 3787330; 292995,

- 3787330; 293017, 3787330; 293122, 3787270; 293269, 3787190; 293331, 3787150; 293362, 3787140; 293399, 3787130; 293570, 3787080; 293640, 3787050; 293665, 3787040; 293686, 3787020; 293699, 3786990; 293707, 3786960; 293701, 3786620; 293713, 3786580; 293732, 3786540; 293760, 3786520; 293851, 3786460; 293903, 3786420; 293928, 3786380; 293936, 3786360; 293381, 3786370.
- (ii) Mandalay Unit B. From USGS 1:24,000 quadrangle map Oxnard, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 293352, 3786380; 293044, 3786380; 292798, 3786960; 292761, 3787040; 293070, 3787030; 293352, 3786380.
- (iii) McGrath Unit. From USGS 1:24,000 quadrangle map Oxnard, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 292406, 3788600; 292474, 3788440; 292752, 3787790; 292716, 3787780; 292704, 3787770; 292702, 3787770; 292717, 3787730; 292718, 3787720; 292715, 3787710; 292692, 3787680; 292725, 3787600; 292530, 3787600; 292415, 3787630; 292394, 3787670; 292400, 3787690; 292403, 3787710; 292407, 3787720; 292412, 3787770; 292412,

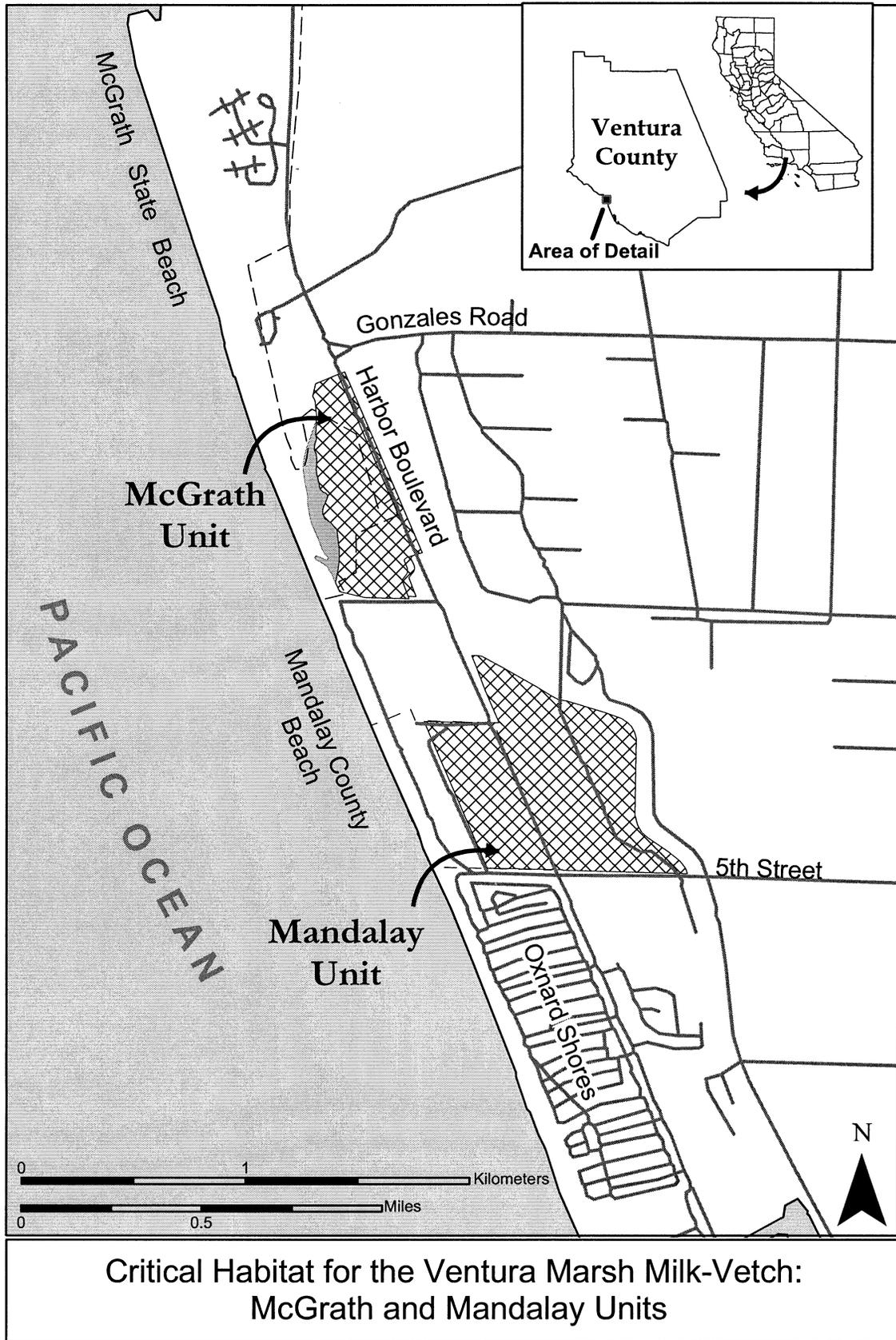
3787800; 292412, 3787820; 292409,  
3787840; 292401, 3787900; 292375,  
3787940; 292348, 3787960; 292338,  
3787980; 292338, 3788000; 292343,  
3788010; 292353, 3788030; 292358,  
3788040; 292360, 3788050; 292360,  
3788060; 292354, 3788070; 292338,  
3788070; 292326, 3788090; 292322,

3788120; 292313, 3788150; 292310,  
3788170; 292312, 3788230; 292309,  
3788250; 292301, 3788260; 292302,  
3788280; 292304, 3788290; 292308,  
3788300; 292311, 3788320; 292307,  
3788330; 292308, 3788350; 292310,  
3788380; 292310, 3788390; 292310,  
3788400; 292311, 3788420; 292306,

3788450; 292305, 3788480; 292301,  
3788490; 292295, 3788500; 292297,  
3788520; 292304, 3788550; 292306,  
3788560; 292406, 3788600.

(iv) Map 1—McGrath and Mandalay  
Units—follows:

**BILLING CODE 4310-55-P**



Critical Habitat for the Ventura Marsh Milk-Vetch:  
McGrath and Mandalay Units

(6) Carpinteria Salt Marsh. Santa Barbara and Ventura Counties, California.

(i) Carpinteria Salt Marsh Unit A. Santa Barbara County, California. From USGS 1:24,000 quadrangle map Carpinteria, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 266039, 3810060; 266166, 3810060; 266335, 3810050; 266449, 3810040; 266521, 3810040; 266572, 3810030; 266621, 3810010; 266711, 3809980; 266784, 3809950; 266912, 3809880; 267485, 3809530; 267463, 3809500; 267453, 3809470; 267428, 3809440; 267403, 3809390; 267381, 3809360; 267343, 3809300; 267290, 3809250; 267255, 3809190; 267243, 3809170; 267214, 3809160; 267185, 3809170; 267148, 3809200; 267094, 3809240; 267058, 3809260; 267023, 3809260; 266973, 3809260; 266932, 3809250; 266889, 3809250; 266813, 3809250; 266793, 3809260; 266772, 3809270; 266720, 3809290; 266690, 3809300; 266655, 3809310; 266644, 3809330; 266645, 3809350; 266602, 3809360; 266580, 3809380; 266544, 3809420; 266498, 3809480; 266456, 3809530; 266408, 3809590; 266356, 3809650; 266320, 3809690; 266264, 3809750; 266206, 3809810; 266162, 3809860; 266122, 3809900; 266081, 3809940; 266053, 3809960; 266042, 3809980; 266033, 3809990; 266032, 3810010; 266037, 3810060; 266039, 3810060.

(ii) Carpinteria Salt Marsh Unit B. Santa Barbara County, California. From USGS 1:24,000 quadrangle map Carpinteria, lands bounded by the following UTM zone 11 NAD83

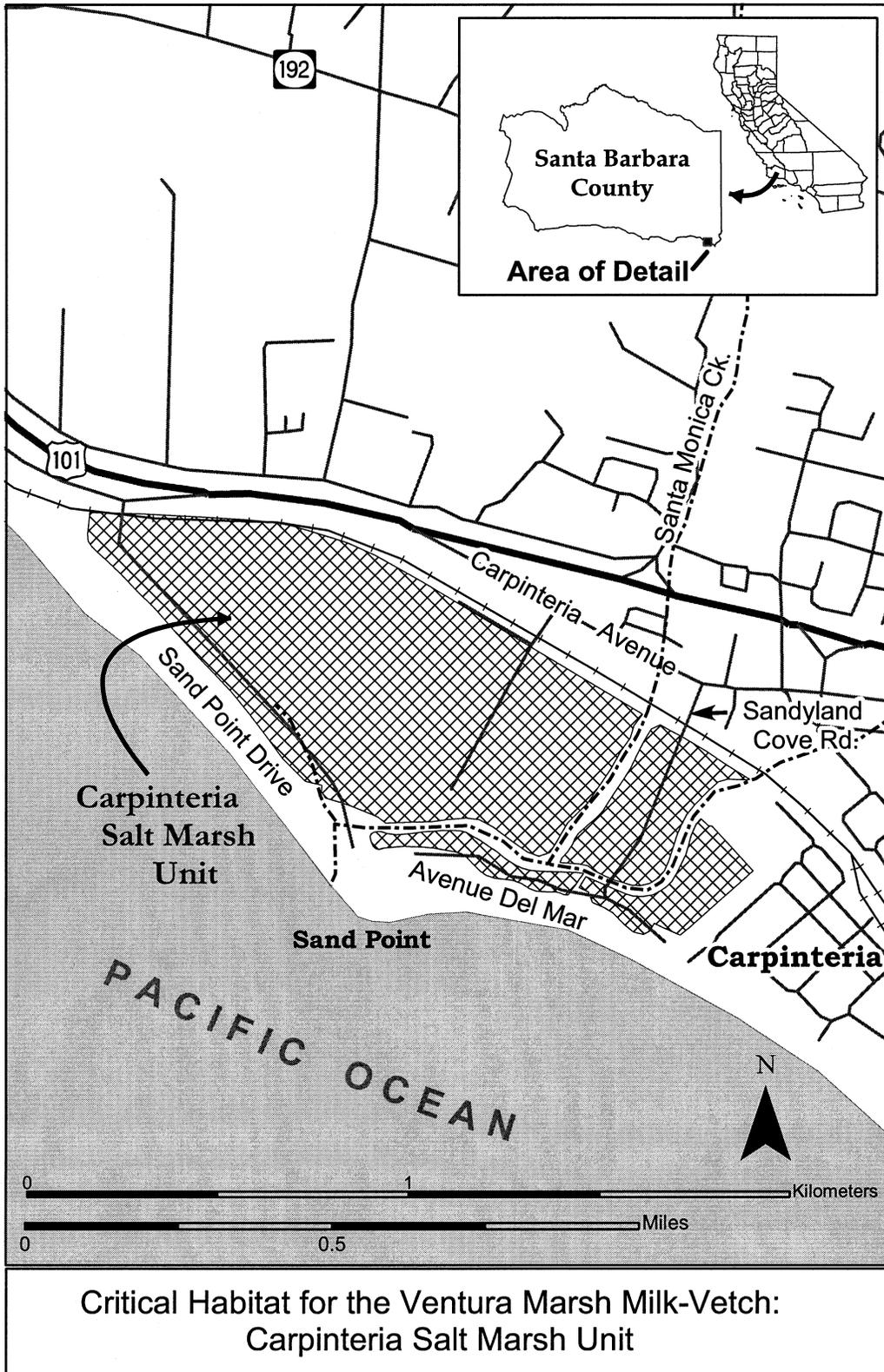
coordinates (E,N): 267531, 3809510; 267588, 3809470; 267654, 3809440; 267708, 3809400; 267767, 3809360; 267755, 3809360; 267733, 3809360; 267710, 3809360; 267684, 3809360; 267662, 3809340; 267638, 3809310; 267621, 3809290; 267602, 3809270; 267587, 3809240; 267577, 3809220; 267563, 3809180; 267555, 3809150; 267544, 3809120; 267526, 3809100; 267504, 3809090; 267480, 3809080; 267458, 3809080; 267434, 3809090; 267413, 3809100; 267387, 3809110; 267357, 3809120; 267342, 3809130; 267318, 3809140; 267270, 3809140; 267275, 3809160; 267291, 3809170; 267303, 3809190; 267309, 3809210; 267319, 3809220; 267342, 3809240; 267365, 3809260; 267384, 3809280; 267411, 3809330; 267435, 3809360; 267454, 3809390; 267469, 3809420; 267490, 3809470; 267508, 3809490; 267531, 3809510.

(iii) Carpinteria Salt Marsh Unit C. Santa Barbara County, California. From USGS 1:24,000 quadrangle map Carpinteria, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 267638, 3809260; 267658, 3809240; 267668, 3809240; 267775, 3809120; 267611, 3808980; 267584, 3808950; 267538, 3808970; 267516, 3808980; 267504, 3808960; 267488, 3808950; 267462, 3808960; 267437, 3808980; 267408, 3809010; 267386, 3809020; 267354, 3809040; 267344, 3809070; 267320, 3809080; 267337, 3809110; 267410, 3809070; 267443, 3809060; 267461, 3809050; 267487, 3809050; 267513, 3809060; 267532, 3809070; 267548, 3809080; 267564, 3809100; 267576, 3809120;

267600, 3809170; 267613, 3809210; 267627, 3809250; 267638, 3809260.

(iv) Carpinteria Salt Marsh Unit D. Ventura County, California. From USGS 1:24,000 quadrangle map Carpinteria, lands bounded by the following UTM zone 11 NAD83 coordinates (E,N): 266801, 3809220; 266818, 3809220; 266839, 3809220; 266859, 3809220; 266883, 3809220; 266912, 3809220; 266939, 3809230; 266960, 3809230; 266988, 3809230; 267008, 3809230; 267025, 3809220; 267044, 3809210; 267062, 3809200; 267085, 3809180; 267105, 3809170; 267127, 3809150; 267149, 3809140; 267171, 3809130; 267190, 3809120; 267211, 3809120; 267239, 3809120; 267262, 3809120; 267290, 3809120; 267312, 3809120; 267331, 3809110; 267323, 3809100; 267314, 3809090; 267305, 3809080; 267294, 3809060; 267290, 3809060; 267279, 3809060; 267271, 3809060; 267258, 3809070; 267240, 3809070; 267223, 3809070; 267208, 3809070; 267190, 3809080; 267169, 3809090; 267147, 3809100; 267125, 3809100; 267099, 3809100; 267079, 3809110; 267061, 3809120; 267047, 3809140; 267029, 3809150; 267022, 3809160; 267012, 3809170; 266993, 3809170; 266970, 3809180; 266940, 3809180; 266912, 3809180; 266883, 3809190; 266862, 3809190; 266843, 3809180; 266823, 3809180; 266810, 3809180; 266795, 3809180; 266787, 3809180; 266781, 3809190; 266775, 3809200; 266773, 3809210; 266776, 3809220; 266783, 3809220; 266791, 3809230; 266801, 3809220.

(v) Map 2—Carpinteria Salt Marsh Unit—follows:



Critical Habitat for the Ventura Marsh Milk-Vetch:  
Carpinteria Salt Marsh Unit

\* \* \* \* \*

Dated: May 14, 2004.  
**Paul Hoffman,**  
*Acting Assistant Secretary for Fish and  
Wildlife and Parks.*  
[FR Doc. 04-11382 Filed 5-19-04; 8:45 am]  
BILLING CODE 4310-55-C