III. Transcripts

A transcript of the proceedings from these public meetings, as well as all information and data submitted voluntarily to FDA during the public meetings, will become part of the administrative record and will be available to the public under 21 CFR 20.111 from FDA's Division of Dockets Management (HFA–305), 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 at a cost of 10 cents per page. Summaries of the public meetings will also be available for public examination at FDA's Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: September 29, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–22476 Filed 10–4–04; 2:49 pm]

BILLING CODE 4160–01–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7825–6]

Delaware: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Delaware has applied to EPA for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA proposes to grant final authorization to Delaware. In the ''Rules and Regulations'' section of this **Federal Register**, EPA is authorizing the revisions by an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we receive written comments that oppose this authorization during the comment period, the immediate final rule will become effective on the date it establishes, and we will not take further action on this proposal. However, if we receive comments that oppose this action, or portions thereof, we will withdraw the relevant portions of the immediate final rule, and they will not take effect. We will then respond to public comments in a later final rule based on this proposal. You may not have another opportunity for comment. If you want to comment on this action, you must do so at this time.

DATES: Send your written comments by November 8, 2004.

ADDRESSES: Submit your comments, identified by FRL–7825–5 by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. E-mail: *ellerbe.lillie@epamail.epa.gov.*
3. Mail: Lillie Ellerbe, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.
4. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

You may inspect and copy Delaware's application from 8 a.m. to 4:30 p.m., Monday through Friday at the following addresses: Delaware Department of Natural Resources & Environmental Control, Division of Air & Waste Management, Solid and Hazardous Waste Management Branch, 89 Kings Highway, Dover, DE 19901, Phone number (302) 739–3689, attn: Karen J'Anthony, and EPA Region III, Library, 2nd Floor, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone number: (215) 814–5254.

Instructions: Direct your comments to FRL–7825–5. EPA's policy is that all comments received will be included in the public file without change, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The federal *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public file and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Lillie Ellerbe, Mailcode 3WC21, RCRA State Programs Branch, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029, Phone Number: (215) 814–5454.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules and Regulations'' section of this **Federal Register**.

Dated: September 17, 2004.

Thomas Voltaggio,

Acting Regional Administrator, EPA Region III.

[FR Doc. 04–22593 Filed 10–6–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018—AT86

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Navarretia fossalis* (spreading navarretia)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for *Navarretia fossalis* (spreading navarretia) pursuant to the Endangered Species Act of 1973, as amended (Act). We have identified 31,086 acres (ac) (12,580 hectares (ha)) of habitat essential to the conservation of *Navarretia fossalis,* and propose to designate 4,301 ac (1,741 ha) of this essential habitat as critical habitat in San Diego and Los Angeles Counties, California. We have excluded 26,785 ac (10,839 ha) of essential habitat in Riverside and San Diego Counties from this proposed critical habitat designation. The excluded lands are located within approved and pending habitat conservation plans (HCPs), ''mission-critical'' training areas on Department of Defense lands, and areas covered by Integrated Natural Resource Management Plans (INRMPs) on Department of Defense lands. In developing this proposal, we evaluated those lands determined to be essential

to the conservation of *Navarretia fossalis* to ascertain if any specific areas warrant non-inclusion or exclusion from critical habitat pursuant to sections 4(a)(3) and 4(b)(2) of the Act. On the basis of our evaluation, we have determined that the benefits of excluding approved and pending HCPs and ''mission-critical'' training lands owned and managed by the Department of Defense from critical habitat for *Navarretia fossalis* outweighs the benefits of their inclusion, and have subsequently excluded those lands from this proposed designation of critical habitat for this species pursuant to section 4(b)(2) of the Act. We have also evaluated Integrated Natural Resource Management Plans (INRMP) on Department of Defense lands and have not proposed critical habitat where the INRMP provides a benefit to the species pursuant to section 4(a)(3) of the Act. We hereby solicit data and comments from the public on all aspects of this proposal, including data on economic and other impacts of the designation. We may revise this proposal prior to final designation to incorporate or address new information received during public comment periods.

DATES: We will accept comments until December 6, 2004. Public hearing requests must be received by November 22, 2004.

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

1. You may submit written comments and information to the Field Supervisor, Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92009.

2. You may hand-deliver written comments and information to our Carlsbad Fish and Wildlife Office, at the above address, or fax your comments to (760) 731–9618.

3. You may send your comments by electronic mail (e-mail) to *fw1cfwo_nafo@fws.gov.* For directions on how to submit electronic filing of comments, see the ''Public Comments Solicited'' section. In the event that our internet connection is not functional, please submit your comments by the alternate methods mentioned above.

All comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address. Maps of essential habitat not included in the proposed critical habitat are available for viewing by appointment during regular business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section) or on the Internet at *http://carlsbad.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (telephone (760) 431–9440; facsimile (760) 431–9618).

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

It is our intent that any final action resulting from this proposal will be as accurate as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. In the development of our final designation, we will incorporate or address any new information received during the public comment periods, or from our evaluation of the potential economic impacts of this proposal. As such, we may revise this proposal to address new information and/or to either exclude additional areas that may warrant exclusion pursuant to section 4(b)(2) or we designate additional areas determined to be essential to the species but excluded from this proposal. We particularly seek comments concerning:

(1) The reasons why any areas should or should not be determined to be critical habitat as provided by section 4 of the Act.

(2) Specific information on the amount and distribution of *Navarretia fossalis* and its habitat, and which habitat or habitat components are essential to the conservation of this species and why;

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

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

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

Some of the lands we have identified as essential for the conservation of the *Navarretia fossalis* are not being proposed as critical habitat. The following areas essential to the conservation of *N. fossalis* are not being proposed as critical habitat or have been excluded from this proposal: lands on Marine Corps Air Station Miramar (MCAS, Miramar); ''mission-critical'' training areas on Marine Corps Base, Camp Pendleton (Camp Pendleton); areas within the San Diego Multiple Species Conservation Program (MSCP), and areas within the Western Riverside Multiple Species Habitat Conservation Plan (MSHCP). These areas have been excluded because they meet the standard for exclusion under section 4(a)(3) of the Act, or because we believe the benefit of excluding these areas from critical habitat outweighs the benefit of including them pursuant to section 4(b)(2). We specifically solicit comment on: (a) Whether these areas are essential; (b) whether these areas warrant exclusion; and (c) the basis for not designating as or excluding these areas from critical habitat pursuant to section 4(a)(3) or section 4(b)(2) of the Act (*see Exclusions Under Section 4(b)(2) of the Act* and *Relationship to Department of Defense Lands* sections for a detailed discussion).

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit Internet comments to *fw1cfwo_nafo@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: RIN 1018–AT86'' in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Carlsbad Fish and Wildlife Office at phone number (760) 431–9440. Please note that the e-mail address *fw1cfwo_nafo@fws.gov* will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

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

Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. Additionally, we have also found that comparable conservation can be achieved by implementation of laws and regulations obviating the need for critical habitat. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 36 percent (445 species) 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, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, and the section 10 incidental take permit process. The Service believes it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United State Fish and Wildlife Service,* has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

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

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

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

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA), 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

It is our intent to discuss only those topics directly relevant to the identification and proposed designation of critical habitat for *Navarretia fossalis* in this rule. For more information on this species, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54975) and the Recovery Plan for the Vernal Pools of Southern California (Recovery Plan) finalized on September 3, 1998 (Service 1998).

Life History

Navarretia fossalis, a member of *Polemoniaceae* (phlox family), is a low, mostly spreading or ascending, annual herb, 10 to 15 centimeters (cm) (4 to 6 inches (in)) tall. This species grows in vernal pools, clay flats, irrigation ditches, alkali grasslands, alkali playas, and alkali sinks (Dudek and Associates, Inc. 2003; Spencer 1997). The lower portions of the stems are mostly glabrous (bare). The leaves are soft and finely divided, 1 to 5 cm (0.4 to 2 in) long, and spine-tipped when dry. The flowers are white to lavender white with linear petals and are arranged in flat-topped, compact, leafy heads. The fruit is an ovoid, 2-chambered capsule (Day 1993; Moran 1977).

There are approximately 30 species in the genus *Navarretia,* several of which occur within the range of *Navarretia fossalis. N. fossalis* can be confused with, and has been misidentified as, *N. prostrata* (Moran 1977). *N. fossalis* is distinguished by its linear or narrowly ovate corolla lobes, erect habit, cymose inflorescences, the size and shape of the calyx, and the position of the corolla relative to the calyx (Day 1993; Service 1998). Two other *Navarretia* taxa are also federally listed as endangered: *N. leucocephala* ssp. *plieantha* (many-flowered navarretia) and *N. leucocephala* ssp. *pauciflora* (few-flowered navarretia) (62 FR 33029). However, these two species are found in vernal pools in northern California.

Distribution and Status

Navarretia fossalis is distributed from northwestern Los Angeles County and western Riverside County, south through coastal San Diego County, California to northwestern Baja California, Mexico (Moran 1977; Oberbauer 1992). It is found at elevations between sea level and 4,250

feet (ft) (1,300 meters (m)) in vernal pools, alkali grassland, alkali playa, and alkali sink habitats (Day 1993; Munz 1974; California Native Plant Society (CNPS) 2001; Reiser 2001; California Natural Diversity Data Base (CNDDB) 2004).

One population has been reported from San Luis Obispo County, however, the identification of this population is thought to be in error (pers. comm. with Spencer 2004). Fewer than 45 populations exist in the United States (CNDDB 2004). Nearly 60 percent of the known populations are concentrated in three locations: Otay Mesa in southern San Diego County, along the San Jacinto River in western Riverside County, and near Hemet in Riverside County (Service 1998). The two largest populations occur in Riverside County and have been estimated to support 375,000 and 100,000 individuals respectively within 8 ac (3 ha) of habitat. Most other populations contain fewer than 1,000 individuals and occupy less than 1 ac (0.5 ha) of habitat. We estimate that less than 300 ac (120 ha) of habitat in the United States is occupied by this species (63 FR 54975). This estimate only quantifies the areas where the *Navarretia fossalis* is physically found and does not include the areas adjacent to the populations that are necessary to provide the hydrology that this species requires. In Mexico, *N. fossalis* is known from fewer than 10 populations clustered in three areas: along the international border, on the plateaus south of the Rio Guadalupe, and on the San Quintin coastal plain (Moran 1977).

Threats

It is estimated that greater than 90 percent of the vernal pool habitat in Southern California has been converted as a result of past human activities (Bauder and McMillan 1998; Keeler-Wolf *et al.* 1998). *Navarretia fossalis* is threatened by habitat destruction and fragmentation from urban and agricultural development, pipeline construction, alteration of hydrology and floodplain dynamics, excessive flooding, channelization, off-road vehicle activity, trampling by cattle and sheep, weed abatement, fire suppression practices (including discing and plowing to remove weeds and create fire breaks), and competition from alien plant species (63 FR 54975).

Previous Federal Action

The final listing rule for *Navarretia fossalis* provides a description of previous Federal actions through October 13, 1998 (63 FR 54975). Efforts necessary for the survival and recovery of *N. fossalis* are presented in the Recovery Plan (Service 1998).

At the time of listing, we concluded that designation of critical habitat for *Navarretia fossalis* was not prudent because such designation would not benefit the species. On November 15, 2001, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the Center for Biological Diversity and California Native Plant Society, challenging our ''not prudent'' determinations for eight plants including *Navarretia fossalis (CBD, et al.* v. *Norton,* No. 01–CV–2101 (S.D. Cal.)). A second lawsuit asserting the same claim was filed against the DOI and us by the Building Industry Legal Defense Foundation (BILD) on November 21, 2001 (*BILD* v. *Norton,* No. 01–CV–2145 (S.D. Cal.)). The parties in both cases agreed to a remand of the critical habitat determinations to us for additional consideration. In an order dated July 1, 2002, the U.S. District Court for the Southern District of California directed us to reconsider our not prudent finding and publish a proposed critical habitat rule for *N. fossalis,* if prudent, on or before January 30, 2004. In a motion to modify the July 1, 2002 order, the DOI and we requested that the due date for the proposed rule for *N. fossalis* be extended until October 1, 2004. This motion was granted on September 9, 2003. This proposed rule complies with the court's ruling.

Critical Habitat

Section 3(5)(A) of the Act defines critical habitat as: (i) The specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the provisions of section 4 of [the] Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the provisions of section 4 of [the] Act, upon a determination that such areas are essential for the conservation of the species (Endangered Species Act (Act) 1973 (as amended)). ''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 (Act 1973).

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat.

To be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Occupied habitat may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).)

Our regulations 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'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271) and our U.S. Fish and Wildlife Service Information Quality Guidelines (2002) provide criteria, establish procedures, and provide guidance to ensure that our decisions represent the best scientific and commercial data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Critical habitat designations do not signal that habitat outside the designation is unimportant to

Navarretia fossalis. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1), and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(2) of the Act, we use the best scientific data available in determining areas that are essential to the conservation of *Navarretia fossalis*. The Recovery Plan for Vernal Pools of Southern California (Recovery Plan) outlines areas essential to the conservation of seven species, including *Navarretia fossalis* (as well as San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), *Eryngium arstulatum* var. *parishii* (San Diego button-celery), *Pogogyne nudiuscula* (Otay mesa mint), *Pogogyne abramsii* (San Diego mesa mint), *Orcuttia californica* (California Orcutt grass)) (Service 1998). The Recovery Plan also outlines steps necessary to stabilize and recover these species to the point where protection under the Act is no longer required. The Recovery Plan uses Management Areas to define regional conservation needs. We have used these Management Areas to aid in identifying habitat essential to the conservation of the species. The areas essential for conservation of this species are detailed in appendices F and G of the Recovery Plan. This and additional information gathered after the completion of the Recovery Plan, are the basis for identifying the essential habitat for *Navarretia fossalis*.

To map and define the areas listed in the Recovery Plan we used research and survey observations published in peer-reviewed articles, regional Geographic Information System (GIS) vegetation, soil, and species coverages, and data compiled in the CNDDB. Information about *Navarretia fossalis* was mapped using GIS and refined indicating the essential habitat associated with each of the occurrences. Areas not containing the primary constituent elements were not included in the boundaries of proposed critical habitat, whenever possible. After creating a GIS coverage of the essential areas, we created legal descriptions of the essential areas. We used a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the essential areas.

The areas of essential habitat were then analyzed with respect to sections 4(a)(3) and 4(b)(2) of the Act, and any areas that should not be included or excluded from proposed critical habitat were identified.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; water, air, light, minerals, or other nutritional or physiological requirements; space for growth, development and reproduction, including the space necessary for pollinators to live; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific biological and physical features, otherwise referred to as the primary constituent elements, which comprise *Navarretia fossalis* habitat are based on specific components that provide for the essential biological needs of the species as described below.

Individual and Population Growth, Including Sites for Germination, Pollination, Reproduction, Pollen and Seed Dispersal, and Seed Dormancy

Navarretia fossalis is primarily associated with vernal pools (Day 1993; Service 1998) at elevations between sea level and 4,250 ft (1,300 m), and on flat to gently sloping terrain. *N. fossalis* occurs in vernal pools in alkali grassland habitat along the San Jacinto River in Riverside County (Bramlet 1993). The species also occasionally occurs in ditches and other artificial depressions in degraded vernal pool habitat (Moran 1977).

Areas That Provide Basic Requirements for Growth, Such as Water, Light, and Minerals

Navarretia fossalis requires areas that are ephemerally wet in the winter and spring months and dry in the summer and fall months. This type of ephemeral habitat does not allow either upland plants that live in a dry environment year round or wetland plants that require year round moisture to become established (Keeler-Wolf *et al.* 1998). These habitats then allow for specialized plants, such as the *N. fossalis*, to benefit from the exclusion of strictly upland and wetland plants.

Areas That Support Populations of Pollinators and Seed Dispersers

Navarretia fossalis flowers from May through June. This species has evolved mechanisms to self-pollinate (Spencer 1997). The fruit of this species consists of indehiscent (*i.e.*, not opening spontaneously at maturity to release seeds) capsules 2 to 3 millimeters long containing 5 to 25 seeds. The seeds develop a sticky, slimy coating when wet, which may retain moisture and aid in germination (Moran 1977). After fruiting, the species dries out and loses its color rapidly, and can be difficult to detect late in the dry season or in dry years. The number of individuals of *N. fossalis* at a given population site varies annually in response to the timing and amount of rainfall and temperature (Service 1998).

Sufficient studies to reveal possible pollinators of *Navarretia fossalis* have not yet been conducted. Seeds of this plant are likely dispersed locally by the flow of water throughout the vernal pool or alkali wetlands in which this plant occurs. More distant dispersal is most likely accomplished by the spiney flowerheads clinging to the fur of larger mammals or via mud containing seeds stuck to birds that visit these wetlands (pers. comm. with E. Bauder 2004)

Habitats That Are Representative of the Historic Geographical and Ecological Distribution of the Species

The distribution of *Navarretia fossalis* ranges from northwestern Los Angeles County and western Riverside County, south through coastal San Diego County, California to northwestern Baja California, Mexico (Day 1993; Munz 1974; Reiser 2001, CNPS 2001; CNDDB 2003). One population has been reported from San Luis Obispo County, however, the identification of this population is thought to be in error (pers. comm. with Spencer 2004). Fewer

than 45 populations exist in the United States (CNDDB 2004). Nearly 60 percent of the known populations are concentrated in three locations: Otay Mesa in southern San Diego County, along the San Jacinto River in western Riverside County, and near Hemet in Riverside County (Service 1998). In Mexico, *N. fossalis* is known from fewer than 10 populations clustered in three areas: Along the international border, on the plateaus south of the Rio Guadalupe, and on the San Quintin coastal plain (Moran 1977).

Pursuant to our regulations, we are required to identify the primary constituent elements essential to the conservation of *Navarretia fossalis*, together with a description of proposed critical habitat. In identifying primary constituent elements, we used the best available scientific data. The physical ranges described in the primary constituent elements may not capture all of the variability that is inherent in natural systems that support *N. fossalis*. The primary constituent elements determined essential to the conservation of *N. fossalis* are:

(1) Vernal pool, alkali grassland, alkali playa, or alkali sink habitats, at elevations between sea level and 4,250 ft (1,300 m), and on flat to gently sloping terrain.

(2) Clay soils that retain water for sufficient amounts of time, especially in the winter and spring months, to support vernal pool, alkali grassland, alkali playa, or alkali sink habitats; and

(3) Watershed area immediately surrounding vernal pool, alkali grassland, alkali playa, or alkali sink habitats with hydrology necessary to maintain these specialized habitats.

Description of Essential Habitat

The majority of extant populations of *Navarretia fossalis* exist in the United States (CNDDB 2004), and are concentrated in three locations: Otay Mesa in southern San Diego County, along the San Jacinto River in western Riverside County, and near Hemet in Riverside County (Service 1998). We have determined that 26 areas totaling approximately 31,086 ac (12,580 ha) are essential to the conservation of the species. Seventeen of these areas essential to the conservation of the *N. fossalis*, totaling approximately 26,785 ac (10,839 ha), are not included in (pursuant to section 4(a)(3)) or are excluded from (pursuant to section 4(b)(2)) proposed critical habitat: Lands on Marine Corps Air Station Miramar (MCAS, Miramar); ''mission-critical'' training areas on Marine Corps Base, Camp Pendleton (Camp Pendleton); areas within approved subareas of San Diego Multiple Species Conservation Program (MSCP); and areas within the approved Western Riverside Multiple Species Habitat Conservation Plan (MSHCP). Where appropriate, these areas are described briefly in the unit descriptions in the Proposed Critical Habitat Designation section. They are also shown on the maps in the Proposed Regulation Promulgation section. Military lands not included in the proposal pursuant to section 4(a)(3) are shown on the maps for information purposes only.

All areas of essential habitat for *N. fossalis* in the Western Riverside County Management Area occur within the Western Riverside MSHCP area, and, therefore, have been excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act. These six areas are in the vicinity of Perris, Hemet, Lake Elsinore, and Temecula. The six areas are shown on a map in the Proposed Regulation Promulgation section.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protection. Many of the sites where *Navarretia fossalis* occur require special management and protection. Habitat destruction and loss is the greatest threat to this species (CNDDB 2004), followed by disruption of natural hydrologic regimes that support populations of *N. fossalis*. Projects that occur adjacent to or distant from the location of a population of *N. fossalis* can alter the hydrology and thereby impact the fitness of the population (Service 1998). In some locations encroachment of exotic plants pose a threat to *N. fossalis*; special management is needed to limit this threat (Bramlet 1996; Service 1998).

Proposed Critical Habitat Designation

Proposed critical habitat includes *Navarretia fossalis* essential habitat in Los Angeles and San Diego Counties, California. Areas proposed as critical habitat are under Federal, State, local, and private ownership. The approximate area of proposed critical habitat by county and land ownership is shown in Table 1. Certain lands that are considered essential to *Navarretia fossalis* have not been included or have been excluded from proposed critical habitat based on our 4(a)(3) and 4(b)(2) analyses; these are summarized in Table 2.

TABLE 1.—APPROXIMATE PROPOSED CRITICAL HABITAT AREA (ACRES(ac); HECTARES (ha) FOR *Navarretia fossalis* IN CALIFORNIA BY COUNTY AND LAND OWNERSHIP.

[Estimates reflect the total area within critical habitat unit boundaries.]

County	Federal*	Private	Total
Los Angeles	0 ac (0 ha)	596 ac (241 ha)	596 ac (241 ha)
Riverside	(**)	(**)	(**)
San Diego	178 ac (72 ha)	3,527 ac (1,427 ha)	3,705 ac (1,499 ha)
Total	178 ac (72 ha)	4,123 ac (1,669 ha)	4,301 ac (1,741 ha)

* Federal lands include Department of Defense and other Federal land.

** Not Applicable because all lands in Riverside County that are essential for *Navaretia fossalis* are excluded under 4(b)(2) of the Act.

TABLE 2.—APPROXIMATE ESSENTIAL HABITAT, EXCLUDED ESSENTIAL HABITAT, AND PROPOSED CRITICAL HABITAT (ACRES (ac); HECTARES (ha) FOR *Navarretia fossalis* IN LOS ANGELES, SAN DIEGO, AND RIVERSIDE COUNTIES, CALIFORNIA

Total essential habitat identified for *Navarretia fossalis*	31,086 ac (12,580 ha)
Essential habitat not included in the proposed critical habitat designation pursuant to section 4(a)(3) of the Act due to an INRMP that benefits *Navarretia fossalis* (Marine Corps Air Station (MCAS), Miramar).	774 ac (3,313 ha)
Essential habitat excluded from the proposed critical habitat designation pursuant to section 4(b)(2) of the Act: Completed and pending HCPs (San Diego Multiple Species Conservation Program (MSCP) and Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)).	25,944 ac (10,499 ha)
Essential habitat excluded from the proposed critical habitat designation pursuant to section 4(b)(2) of the Act: ''Mission-critical'' Department of Defense lands (Marine Corps Base (MCB), Camp Pendleton).	67 ac (27 ha)
Total essential habitat excluded from proposed critical habitat	26,785 ac (10,839 ha)
Total essential habitat proposed as critical habitat	4,301 ac (1,741 ha)

Lands proposed as critical habitat are divided into five units (Units 1 through 5) based on the Management Areas in which the species occurs as identified in the Recovery Plan (Service 1998). Units 1, 4, and 5 were further divided into subunits (1A, 1B, 4A, 4B, 4C, 4D, 4E, 5A, 5B, 5C, 5D) based on their geographical location. Unit boundaries were delineated based on geographical location of vernal pools, soil types, associated watersheds, and local variation of topographic position (*i.e.*, coastal mesas, inland valley). Descriptions of each unit and the reasons for proposing lands within each unit as critical habitat are presented below.

Unit 1 (Subunits 1A, 1B): Transverse Range Critical Habitat Unit, Los Angeles County, California (596 ac (241 ha))

The occurrences of *Navarretia fossalis* in northern Los Angeles County represent isolated occurrences at the northern most extent of the range of the species. Conservation biologists have demonstrated that populations at the edge of a species' distribution can be important sources of genetic variation and represent the best opportunity for colonization or re-colonization (Gilpin and Soulé 1986; Lande 1999). Although the populations of *N. fossalis* in Los Angeles County are far removed from other known locations, these pools are possible sources of unique genetic information that will aid this species in its ability to adapt to future changes in the environment. Such characteristics may not be present in other parts of the species' range (Lesica and Allendorf 1995). For these reasons the unit is essential to the conservation of the species.

The proposed Transverse Range Critical Habitat Unit encompasses 596 ac (241 ha) within the Transverse Management Area as identified in the Recovery Plan, and includes the occupied vernal pools at Cruzan Mesa in Los Angeles County (Service 1998). *Navarretia fossalis* also occurs in a vernal pool in nearby Plum Canyon. Vernal pools at both sites are currently under private ownership. These vernal pools are the last remaining vernal pools in Los Angeles County. The area proposed as critical habitat in Unit 1 contains the primary constituent elements relating to the pooling basins, watersheds, underling soil substrate and topography associated with occupied vernal pools at Cruzan Mesa and Plum Canyon in Los Angeles County.

Unit 2: San Diego North Coastal Mesas Critical Habitat Unit, San Diego County, California (143 ac (64 ha))

The San Diego North Coastal Mesas Critical Habitat Unit encompasses 143 ac (64 ha) within the San Diego North Coastal Mesas Management Area as identified in the Recovery Plan and includes occupied vernal pools on Camp Pendleton and one occupied pool complex in the City of Carlsbad (Service 1998). Essential habitat within training areas defined by the Department of Defense as ''mission critical'' in the Stuart Mesa area of the Oscar One Training Area on Camp Pendleton have been excluded from the proposed critical habitat designation pursuant to section 4(b)(2) of the Act.

Within the jurisdiction of the City of Carlsbad, one occupied vernal pool complex is located at the Poinsettia Lane train station. This complex is associated with a remnant of coastal terrace habitat and is considered essential for the conservation of the species in northern San Diego County. This pool is one of the last remaining coastal occurrences of *Navarretia fossalis* outside the boundaries of MCB Camp Pendleton. The City of Carlsbad is developing a subarea plan as part of the Draft Multiple Habitat Conservation Program (MHCP) in northwestern San Diego County. However, the Poinsettia Lane vernal pool complex is not currently covered in the City of Carlsbad's draft subarea plan. The area being proposed as critical habitat in Unit 2 contains the primary constituent elements described above relating to the pooling basins, watersheds, underling soil substrate and topography associated with the Poinsettia Lane vernal pool complex in the City of Carlsbad.

Unit 3: San Diego Central Coastal Mesas Critical Habitat Unit, San Diego County, California (143 ac (64 ha))

The San Diego Central Coast Mesas Critical Habitat Unit encompasses 143 ac (64 ha) within the San Diego Central Coast Mesas Management Area as identified in the Recovery Plan (Service 1998), and includes occupied vernal pools.

All four areas essential for the conservation of *Navarretia fossalis* in the Central Coast Mesas Management Area are not included in or are excluded from the proposed designation. The majority of pools in this area are on MCAS Miramar and are managed as part of the base's INRMP. Miramar's INRMP places vernal pools and vernal pool habitat in management areas where vernal pool conservation is a high priority. Therefore, areas considered essential for the conservation of *N. fossalis* at Miramar MCAS have not been included in proposed critical habitat pursuant to section 4(a)(3) of the Act.

Other pools in the Central Coast Mesas Management Area are included in the San Diego MSCP. This plan details a policy of ''no-net-loss'' for vernal pools (City of San Diego 1997). There is currently an effort to develop a management plan for vernal pools within the MSCP that provides conservation benefit to *N. fossalis.* Areas considered essential for the conservation of *N. fossalis* within the MSCP are being excluded from

proposed critical habitat pursuant to section 4(b)(2) of the Act. The area being proposed as critical habitat in Unit 3 contains the primary constituent elements described above relating to the pooling basins, watersheds, underling soil substrate and topography associated with occupied vernal pools.

Unit 4 (Subunits 4A, 4B, 4C, 4D & 4E): San Diego Inland Valleys Critical Habitat Unit, San Diego County, California (3,027 ac (1,225 ha))

The San Diego Inland Valleys Critical Habitat Unit encompasses 3,027 ac (1,225 ha) within the San Diego Inland Valleys Management Area as identified in the Recovery Plan (Service 1998). The five subunits proposed as critical habitat for *Navarretia fossalis* contain one or more occupied vernal pool complexes within the jurisdiction of the City of San Marcos and the community of Ramona.

In the community of Ramona, one of the complexes is within the boundaries of Ramona Airport. These vernal pool complexes are isolated from maritime influence and are representative of vernal pools associated with alluvial or volcanic type soils (Keeler-Wolf *et al.* 1998; Service 1998). The vernal pools in San Marcos are associated with native grassland and a unique association of multiple species of *Brodiaea* (Service 1998). The Recovery Plan specifically identifies these vernal pools as essential for recovery of *N. fossalis* because of their role in stabilizing populations and preventing habitat loss (Service 1998). This unit includes vernal pools within the easternmost edge of the geographical distribution of the species. Conservation of vernal pools in this unit will help maintain the diversity of vernal pool habitats and their unique geological substrates, and will retain the genetic diversity of these geographically distinct populations. The areas being proposed as critical habitat in Unit 4 contain the primary constituent elements described above relating to the pooling basins, watersheds, underling soil substrate and topography associated with occupied vernal pools.

Unit 5 (Subunits 5A, 5B, 5C & 5D): San Diego Southern Coastal Mesas Critical Habitat Unit, San Diego County, California (392 ac (159 ha))

The San Diego Southern Coastal Mesas Critical Habitat Unit encompasses 392 ac (159 ha) within the Southern Coastal Mesas Management Area as identified in the Recovery Plan (Service 1998), and contains several vernal pools and other physiavl features essential to the conservation of *Navarretia fossalis.* Three of the four subunits (5A, 5B, 5C) proposed as critical habitat contain occupied vernal pools. The majority of the land in this unit provides the essential watershed primary constituent element that contributes to the pooling basins that support *N. fossalis.*

The majority of pools in this Unit are part of the San Diego MSCP. There is currently an effort to develop a management plan for vernal pools within the MSCP which will provide further conservation benefit to *N. fossalis.* Areas considered essential for the conservation of *Navarretia fossalis* within the MSCP have been excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act. Of the essential locations, only the vernal pools and their watersheds that occur on lands not protected by the MSCP are proposed as critical habitat. The four subunits for this region include the J15 complex or Arnie's Point and the watershed, vernal pools, and ephemeral ponds that occur on east Otay Mesa that are in the Major and Minor Amendment Areas of the MSCP.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, 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.'' We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that the permitted actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat.

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

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

We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the

critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (*see* 50 CFR 402.10(d)).

Activities on Federal lands that may affect *Navarretia fossalis* 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 Army 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 or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that appreciably reduce the value of critical habitat to *Navarretia fossalis.* We note that such activities may also jeopardize the continued existence of the species.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to ''destroy or adversely modify'' critical habitat are those that would appreciably reduce the value of critical habitat to the listed species.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Removing, thinning, or destroying *Navarretia fossalis* habitat (as defined in the primary constituent elements discussion), whether by burning, mechanical, chemical, or other means (*e.g.*, plowing, grubbing, grading, grazing, woodcutting, construction, road building, mining, mechanical weed control, herbicide application, etc.);

(2) Activities that appreciably degrade or destroy *Navarretia fossalis* habitat (and its primary constituent elements) include, but are not limited to, livestock grazing, clearing, disking, farming, residential or commercial development, introducing or encouraging the spread of nonnative species, off-road vehicle use, and heavy recreational use;

(3) Activities that appreciably diminish habitat value or quality through indirect effects (*e.g.*, edge effects, invasion of exotic plants or animals, or fragmentation); and

(4) Any activity, including the regulation of activities by the Corps of Engineers under section 404 of the Clean Water Act or activities carried out by or licensed by the Environmental Protection Agency (EPA), that could alter watershed or soil characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain *Navarretia fossalis* habitat. These activities include, but are not limited to, altering the natural fire regime either through fire suppression or by using prescribed fires that are too frequent or poorly-timed; development, including road building and other direct or indirect activities; agricultural activities, livestock grazing, and vegetation manipulation such as clearing or grubbing in the watershed upslope from *Navarretia fossalis*.

(5) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities, or any activity funded or carried out by the Department of Transportation or Department of Agriculture that could result in discharge of dredged or fill material, excavation, or mechanized land clearing of *Navarretia fossalis* habitat;

(6) Licensing of construction of communication sites by the Federal Communications Commission or funding of construction or development activities by the U.S. Department of Housing and Urban Development that could result in discharge of dredged or fill material, excavation, or mechanized land clearing of *Navarretia fossalis* habitat; and

(7) Funding and implementation of disaster relief projects by the FEMA and the Natural Resource Conservation Service's Emergency Watershed Program, including erosion control, flood control, and stream bank repair to reduce the risk of loss of property that could result in discharge of dredged or fill material, excavation, or mechanized land clearing of *Navarretia fossalis* habitat or that could alter watershed or soil characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain *Navarretia fossalis* habitat.

All lands proposed as critical habitat are within the geographical area occupied by the species and are essential for the conservation of *Navarretia fossalis.* Federal agencies already consult with us on actions that may affect *N. fossalis* to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate substantial additional regulatory protection will result from critical habitat designation.

Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations, we have used the provisions outlined in section 4(b)(2) of the Act to evaluate lands essential to the conservation of the subject species for possible exclusion from proposed critical habitat. Lands which we have either excluded from or not included in critical habitat based on those provisions include those covered by: (1) Legally operative HCPs that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (2) draft HCPs that cover the species, have undergone public review and comment, and provide assurances that the conservation measures for the species will be implemented and effective (*i.e.*, pending HCPs); (3) Tribal conservation plans that cover the species and provide assurances that the conservation measures for the species will be implemented and effective; (4) State conservation plans that provide assurances that the conservation measures for the species will be implemented and effective; and (5) Service National Wildlife Refuge System

Comprehensive Conservation Plans that provide assurances that the conservation measures for the species will be implemented and effective.

Relationship of Critical Habitat to Approved Habitat Conservation Plans

Regional HCPs

As described above, section 4(b)(2) of the Act requires us to consider other relevant impacts, in addition to economic and national security impacts, when designating critical habitat. Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed wildlife species incidental to otherwise lawful activities. Development of an HCP is a prerequisite for the issuance of an incidental take permit pursuant to section 10(a)(1)(B) of the Act. An incidental take permit application must be augmented by an HCP that identifies implementable conservation measures to implement for the species to minimize and mitigate the impacts of the permitted incidental take.

Some areas occupied by *Navarretia fossalis* involve complex HCPs that address multiple species, cover large areas, and have many participating permittees. Many of the large regional HCPs in southern California have been, or are being, developed to provide for the voluntary and cooperative conservation of numerous federally listed species and rare species and their habitat. Over time, areas in the planning area are addressed per the HCP, and key areas are acquired, managed, and monitored. These HCPs are designed to implement conservation actions to address future projects that are anticipated to occur within the planning area of the HCP, to reduce delays in the permitting process.

Approved regional HCPs (*e.g.*, those sponsored by cities, counties or other local jurisdictions) where *Navarretia fossalis* is addressed, provide for the protection and management of habitat essential for the conservation of the species while shifting development to non-essential areas. Regional HCP development processes provide an intensive data collection and analysis regarding habitat of *N. fossalis.* The process also enables us to develop a reserve system that provides for the biological needs and long-term conservation of the species (Schwartz 1999).

Completed HCPs and their accompanying Implementing Agreements (IA) contain management measures and protections for identified preserve areas that protect, restore, and enhance the value of these lands as habitat for *Navarretia fossalis.* These measures include explicit standards to minimize impacts to the addressed species and its habitat. In general, HCPs are designed to ensure that the value of the conservation lands are maintained, expanded, and improved for the species that they cover.

In approving these HCPs, we have provided assurances to permit holders that once the protection and management required under the plans are in place and for as long as the permit holders are fulfilling their obligations under the plans, no additional mitigation in the form of land or financial compensation will be required of the permit holders and in some cases, specified third parties.

Navarretia fossalis is covered under the San Diego MSCP and the Western Riverside MSHCP. Portions of the proposed critical habitat units warrant exclusion from the proposed designation of critical habitat under section 4(b)(2) of the Act based on the management and protection afforded under the approved and legally operative San Diego MSCP subarea plans and the Western Riverside MSHCP. We have determined that the benefits of excluding essential habitat areas within these legally operative HCPs from the proposed critical habitat designations will outweigh the benefits of including them.

Western Riverside Multiple Species Habitat Conservation Plan (MSHCP)

Areas of essential habitat for *N. fossalis* in the Western Riverside County Management Area occur within the Western Riverside MSHCP area, and have been excluded from proposed critical habitat pursuant to section 4(b)(2) of the Act. The Western Riverside MSHCP was developed over a period of eight years. Participants in this HCP include 14 cities, the County of Riverside (including the Riverside County Flood Control and Water Conservation Agency, Riverside County Transportation Commission, Riverside County Parks and Open Space District, and Riverside County Waste Department), the California Department of Parks and Recreation, and the California Department of Transportation. The Western Riverside MSHCP is a subregional plan under the State's NCCP and was developed in cooperation with the California Department of Fish and Game. The MSHCP establishes a multi-species conservation program to minimize and mitigate the expected loss of habitat values of ''covered species'' and, with regard to covered animal species, their incidental take. The intent of the MSHCP is to provide avoidance, minimization, and mitigation measures for the impacts of proposed activities on covered species and their habitats. Within the 1,260,000 ac (510,000 ha) Plan Area of the MSHCP, approximately 153,000 ac (62,000 ha) of diverse habitats are to be conserved. The proposed conservation of 153,000 ac (62,000 ha) will complement other existing natural and open space areas (*e.g.*, State Parks, Forest Service, and County Park Lands). *Navarretia fossalis* is a covered species under the MSHCP. The MSHCP has five objectives to conserve and monitor *Navarretia fossalis* populations: (1) To include within the MSHCP conservation area at least 6,900 ac of suitable habitat; (2) include within the MSHCP conservation area at 13 of the known locations of the species at Skunk Hollow, the Santa Rosa Plateau, the San Jacinto Wildlife Area, floodplains of the San Jacinto River from the Ramona Expressway to Railroad Canyon, and upper Salt Creek west of Hemet; (3) to conduct surveys for the species; (4) to include with the MSHCP conservation area the floodplain of the San Jacinto River consistent with Objective 1, and maintain floodplain processes along the river to provide for the distribution of the species to shift over time as hydrologic conditions and seed bank sources change; and (5) to include with the MSHCP conservation area the floodplain along Salt Creek generally in its existing condition from Warren Road to Newport Road and the vernal pools in Upper Salt Creek west of Hemet, and maintain floodplain processes along the river to provide for the distribution of the species to shift over time as hydrologic conditions and seed bank sources change.

San Diego Multiple Species Conservation Program (MSCP)

Portions of Units 3 and 5 are excluded from proposed critical habitat because they are within the San Diego MSCP in southwestern San Diego County. The San Diego MSCP effort encompasses approximately 582,000 ac (236,000 ha) and reflects the cooperative efforts of the local jurisdictions, the State, the building industry, and environmentalists. The San Diego MSCP provides for the establishment over the permit term of approximately 171,000 ac (69,573 ha) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species. The San Diego MSCP and approved subarea plans provide measures to conserve *Navarretia fossalis* populations on Otay Mesa. Surveys for *N. fossalis* are required in suitable habitat (*i.e.*, vernal pools, ephemeral

wetlands, and seasonally ponded areas). These lands are to be permanently maintained and managed for the benefit of *N. fossalis* and other covered species. The eastern portion of Otay Mesa includes Major and Minor Amendment Areas. These areas require a special permitting process; therefore, we included them in this critical habitat proposal.

Other Regional NCCPs and HCPs

There are other regional NCCP/HCP efforts under way in southern California that have not yet been completed but which, upon approval, will provide conservation benefits to *Navarretia fossalis.* Lands within these HCPs are not excluded from consideration for proposed critical habitat. The Draft Multiple Habitat Conservation Program (MHCP) in northwestern San Diego County includes approximately 112,000 ac (45,324 ha) within the study area. Currently, seven cities are participating in the development of the MHCP: Carlsbad, Encinitas, Escondido, San Marcos, Oceanside, Vista, and Solana Beach. Coverage for *N. fossalis* has not yet been determined for this plan and, therefore, we propose critical habitat within the planning area.

(1) Benefits of Inclusion. The principal effect of designated critical habitat is that federally funded or authorized activities within critical habitat may require consultation under section 7 of the Act. Consultation ensures that action entities avoid adverse modification of critical habitat. Currently approved and permitted HCPs and NCCP/HCPs ensure the long-term survival of addressed species. HCPs or NCCP/HCPs and IAs include management measures and protections for conservation lands designed to protect, restore, and enhance their value as habitat for covered species and thus provide benefits to the species well in excess of those that would result from a critical habitat designation.

(2) Benefits of Exclusion. The benefits of excluding lands within HCPs from critical habitat designation include carrying out the assurances provided by the Service to landowners, communities, and counties in return for their voluntary adoption of the HCP, including relieving them of the additional regulatory burden that might be imposed by critical habitat. Many HCPs become the basis for regional conservation plans consistent with the recovery objectives for listed species covered within the plan area. Many of these HCPs provide conservation benefits to unlisted, rare species. Imposing additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process because it may result in an additional regulatory burden requiring more of them than of other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of approved HCPs it is likely to be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future.

A related benefit of excluding lands within HCPs from critical habitat designation is the continued ability by the Service to seek new partnerships. These may include future HCP participants, such as States, counties, local jurisdictions, conservation organizations, and private landowners. These entities together may implement conservation actions that we would be unable to accomplish otherwise.

An HCP or NCCP/HCP application must undergo section 7 consultation. While this consultation does not address adverse modification to critical habitat, it will determine if the HCP jeopardizes the species in the plan area. Federal actions not covered by the HCP, but in areas occupied by listed species, still require consultation under section 7 of the Act. HCPs and NCCP/HCPs typically provide greater conservation benefits to an addressed listed species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5-Point Policy for HCPs (64 FR 35242). Such assurances are typically not provided by ordinary section 7 consultations which are limited to requiring that the specific action being consulted upon not jeopardize the continued existence of the species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion. The San Diego MSCP in southwestern San Diego County and the Western Riverside MSHCP both include *Navarretia fossalis* as a covered species. HCPs and NCCP/HCPs provide protection for *N. fossalis* and its associated habitat by securing the land where this plant occurs and developing a management plan for vernal pool ecosystems. The educational benefits of critical habitat, including informing the public of areas that are essential for the long-term survival and conservation of the species, are still accomplished from material provided on our Web site and through public notice and comment procedures required to establish an HCP or NCCP/HCP. We have also received input from the public through the public participation that occurs in the development of many regional HCPs or NCCP/HCPs. For these reasons, we believe proposing critical habitat has little additional benefit in areas covered by HCPs, provided that the HCP or NCCP/HCP specifically and adequately covers the species for which critical habitat is being proposed. We do not believe that this exclusion would result in the extinction of the species because the essential habitat within these HCPs will be conserved, and we have already consulted on these HCPs under section 7 of the Act.

Relationship to Department of Defense Lands

The Sikes Act Improvements Act of 1997 (Sikes Act) requires each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resources Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. INRMPs include an assessment of the ecological needs on the installation, including needs to provide for the conservation of listed species; a statement of goals and priorities; a description of management actions to be implemented to provide for these ecological needs; a monitoring plan, and an adaptive management plan.

Section 318 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136) amended the Endangered Species Act to address the relationship of INRMPs to critical habitat by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. MCAS Miramar has an INRMP in place that provides a benefit for *Navarretia fossalis.* Camp Pendleton has an INRMP in place that provides a framework for managing natural resources.

Marine Corps Air Station Miramar

MCAS Miramar completed a final INRMP in May 2000 that provides a benefit to *Navarretia fossalis.* MCAS

Miramar has identified management areas with different resource conservation requirements and management concerns, and identifies them with five separate levels that correspond to their sensitivity. The majority of vernal pools and habitats that support vernal pool species, including the single known occurrence of *N. fossalis,* are located in ''Level I Management Areas (MAs).'' Preventing damage to vernal pool resources is the highest conservation priority in Management Areas with the ''Level I'' designation. The conservation of vernal pools in this MA is achieved through education of base personnel, proactive measures to avoid accidental impacts, and maintenance of an updated inventory of vernal pool basins and the associated vernal pool watersheds.

Since the completion of MCAS Miramar's INRMP, we have received reports on Miramar's vernal pool monitoring and restoration program and correspondence detailing the installation's expenditures on the objectives outlined in its INRMP. MCAS Miramar continues to monitor and manage its vernal pool resources; programs include a study in progress on the effects of fire on vernal pool resources, vernal pool mapping and species surveys, and a study of Pacific bentgrass *(Agrostis avenaceae),* an invasive exotic grass found in some vernal pools on the base. We believe this INRMP benefits this species. The pools on MCAS Miramar which support *Navarretia fossalis* are considered essential for the conservation of this species. In accordance with section 4(a)(3) of the Act, these lands that are essential to the conservation of *N. fossalis* on MCAS Miramar have not been included in the proposed designation of critical habitat because the INRMP provides a benefit to the species.

Marine Corps Base Camp Pendleton

Under 4(b)(2) of the Act, we have considered the effect of a critical habitat designation on national security and have determined that the benefits of exclusion outweigh the benefits of inclusion. We are, therefore, not proposing critical habitat on ''mission-critical'' training areas on Camp Pendleton. In this proposal we refer to areas designated as training areas on maps created by MCB, Camp Pendleton as ''mission-critical'' training areas.

The Marine Corps undertakes section 7 consultation of the Act for activities that may affect federally threatened or endangered species on Camp Pendleton. On March 30, 2000, a formal consultation was initiated between the Marine Corps and the Fish and Wildlife Service regarding their activities on upland areas of Camp Pendleton. The upland consultation that addresses vernal pool habitat, *Navarretia fossalis,* and other species is not yet complete. We are currently working cooperatively with Camp Pendleton to facilitate the completion of this consultation.

To continue its critical training mission pending completion of the consultation, the Marine Corps has implemented measures to avoid jeopardy of *Navarretia fossalis* and other listed species within the uplands area. In particular, the Marine Corps is implementing a set of ''programmatic instructions'' to avoid adverse effects to *N. fossalis.*

(1) Benefits of Inclusion

The primary benefit of proposing critical habitat is to identify lands essential to the conservation of the species which, if critical habitat was designated, would require consultation to ensure activities would not adversely modify critical habitat or jeopardize the continued existence of the species. We are in formal consultation with the Marine Corps on upland activities to ensure current and proposed actions will not jeopardize the species' continued existence. Therefore, we do not believe that designation of ''mission-critical'' training areas on Camp Pendleton as critical habitat will appreciably benefit *Navarretia fossalis* beyond the protection already afforded the species under the Act. Exclusion of these lands will not result in the extinction of the species because the conservation of *N. fossalis* populations will be addressed through our uplands consultation with the Marine Corps. The lands involved in this consultation are ''mission-critical'' training areas, and essential populations of *N. fossalis* occupy them.

(2) Benefits of Exclusion

There are benefits to excluding areas on Camp Pendleton from critical habitat designation. Essential habitat for *Navarretia fossalis* within ''mission-critical'' training areas on Camp Pendleton are occupied by the species, and Section 7 consultations have been completed or are in progress. If essential habitat that occurs within ''mission-critical'' training areas is proposed as critical habitat, the Marine Corps would be required to determine if activities would adversely modify or destroy proposed critical habitat. If such a determination was made, the Marine Corps would be compelled to conference with us pursuant to the requirements of section 7 of the Act.

If proposed critical habitat within training areas is included in a final designation, the Marine Corps would likely be compelled to review completed or in progress consultations to determine if activities may affect designated critical habitat. If 'may affect' determinations were made, the Marine Corps would be further obligated to initiate or reinitiate consultations with us.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We consider specific lands that provide benefits to *Navarretia fossalis* essential for its conservation. For areas proposed as critical habitat not considered ''mission-critical'' training areas or are leased to the State of California, we will complete the balancing analysis under section 4(b)(2) in the final rule. We have considered and excluded lands in ''mission-critical'' training areas on Camp Pendleton from proposed critical habitat. Maps delineating habitat for *N. fossalis,* overlaid with ''mission-critical'' training areas on Camp Pendleton, are available for public review and comment at the Carlsbad Fish and Wildlife Office (*see* **ADDRESSES** section) or on the Internet at *http://carlsbad.fws.gov.* These maps are provided to allow the public the opportunity to adequately comment on these exclusions. We do not believe that this exclusion would result in the extinction of the species because the Marine Corps undertakes section 7 consultation of the Act for activities that may affect federally threatened or endangered species on Camp Pendleton, and because the Marine Corps has implemented measures to avoid jeopardy of *N. fossalis* and other listed species within the uplands area.

Economic Analysis

An analysis of the economic impacts of proposing critical habitat for *Navarretia fossalis* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment for a period not to exceed 30 days. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://carlsbad.fws.gov,* or by contacting the Carlsbad Fish and Wildlife Office directly (*see* **ADDRESSES** section).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three

appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

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

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days of the date of publication of the proposal in the **Federal Register**. Such requests must be made in writing and be addressed to the Field Supervisor (*see* **ADDRESSES** section). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is significant in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or affect the economy in a material way. The Office of Management and Budget (OMB) has not reviewed this rule. We are preparing a draft economic analysis of this proposed action, and will use the results of this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat and possibly excluding any area from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying such areas as part of the critical habitat, unless failure to designate such area as critical habitat will lead to the extinction of *Navarretia fossalis.* This analysis will also be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation. We will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Navarretia fossalis* is a significant regulatory action under Executive Order 12866 in that it may raise novel legal or policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of federal assistance. ''It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates

to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because all of the areas designated for critical habitat are occupied by *Navarretia fossalis* and would have required consultation if a Federal nexus was present regardless of this critical habitat designation. As such, Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of *Navarretia fossalis.* Due to current public knowledge of the species' protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the proposed critical habitat designation. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term. Additionally, critical habitat designation does not preclude development of HCPs and issuance of incidental take permits. Owners of areas that are included in the designated critical habitat will continue to have opportunity to use their property in ways consistent with the survival of the *N. fossalis.*

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Navarretia fossalis* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed 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 *Navarretia fossalis.*

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of *Navarretia fossalis.*

References Cited

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

Author

The primary authors of this notice are the staff of the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h) revise the entry for ''*Navarretia fossalis*'' 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							
*	*	*	*	*	*		*
Navarretia fossalis	Spreading navarretia	U.S.A. (CA), Mexico (Baja, California).	Polemoniaceae—Phlox Family.	T	650	17.96(a)	NA
*	*	*	*	*	*		*

3. In § 17.96(a), add critical habitat for *Navarretia fossalis* in alphabetical order under Family Polemoniaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering plants.

* * * * *

Family Polemoniaceae: *Navarretia fossalis* (Spreading Navarretia)

(1) Critical habitat units and excluded essential habitat for *Navarretia fossalis* are depicted for San Diego, Riverside and Los Angeles Counties, California, on the maps below.

(2) The primary constituent elements of critical habitat for *Navarretia fossalis* are:

(i) Vernal pool, alkali grassland, alkali playa, or alkali sink habitats, at elevations between sea level and 4,250 ft (1,300 m), and on flat to gently sloping terrain.

(ii) Clay soils that retain water for sufficient amounts of time, especially in the winter and spring months, to support vernal pool, alkali grassland, alkali playa, or alkali sink habitats.

(iii) Watershed area immediately surrounding vernal pool, alkali grassland, alkali playa, or alkali sink habitats with hydrology necessary to maintain these specialized habitats.

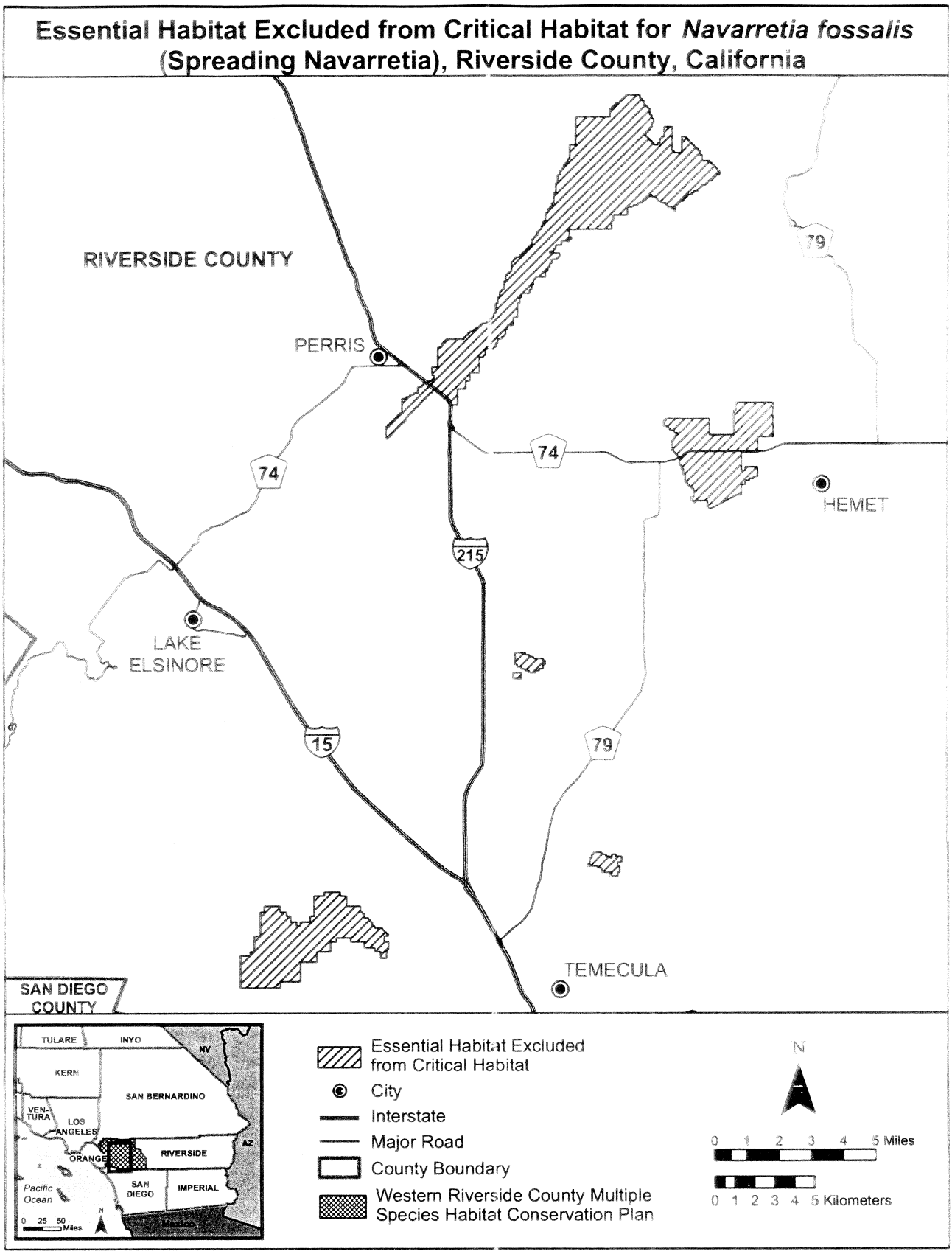
(3) Critical habitat for *Navarretia fossalis* does not include existing features and structures, such as buildings, roads, aqueducts, railroads, airport runways and buildings, other paved areas, lawns, and other urban landscaped areas not containing one or more of the primary constituent elements.

(4) Lands determined to be essential to the conservation of *Navarretia fossalis* and that have been excluded from this proposed designation, are described below:

(i) All essential habitat where an operational Habitat Conservation Plan provides for the conservation of *Navarretia fossalis*. These lands consist of non-federal lands within the Western Riverside Multiple Species Habitat Conservation Plan and preserved lands in the San Diego Multiple Species Conservation Program.

(ii) **Note:** Map of essential habitat for *Navarretia fossalis* that is being excluded from critical habitat designation within the Western Riverside MSHCP conservation area follows:

BILLING CODE 4310–55–P

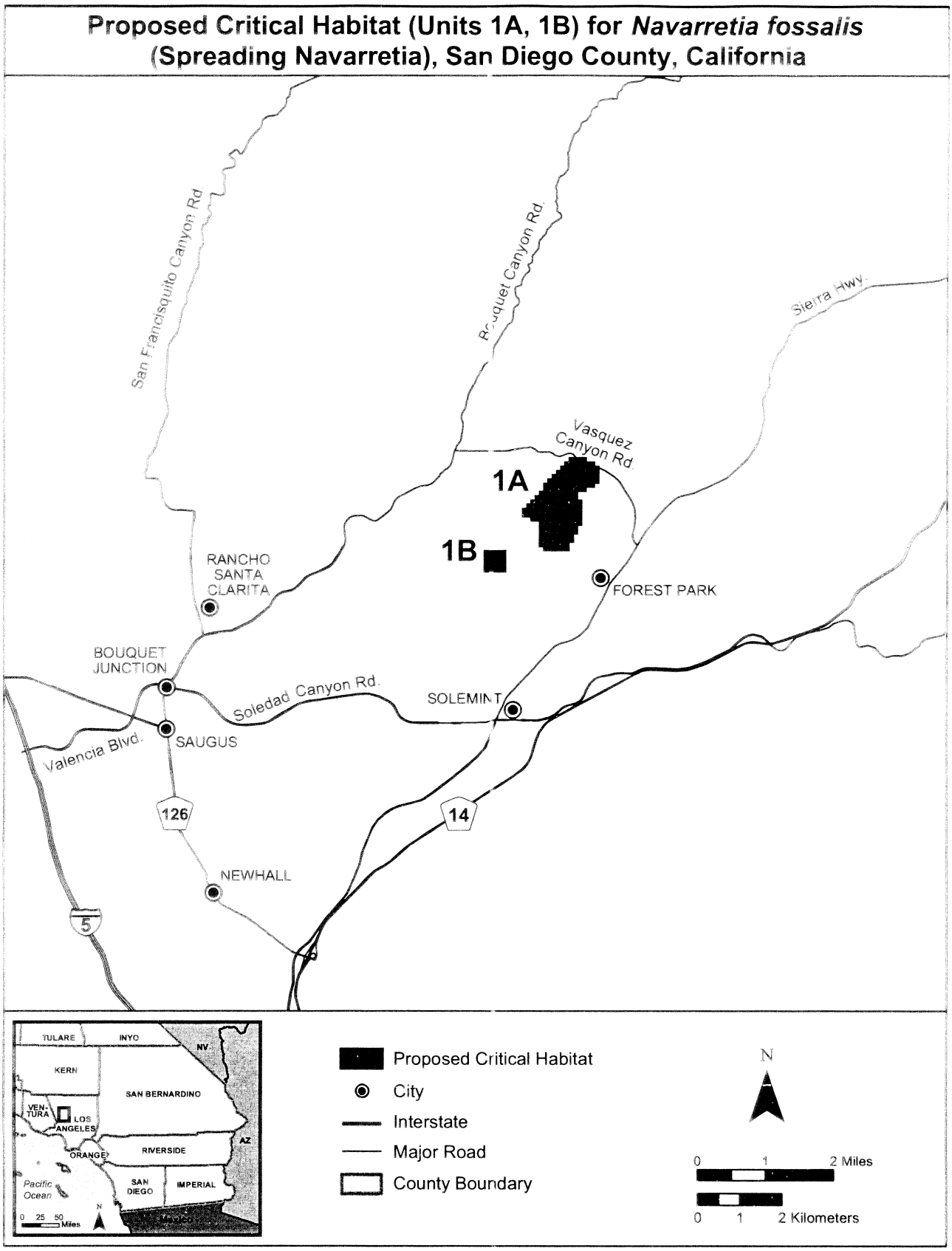

Essential Habitat Excluded from Critical Habitat for *Navarretia fossalis* (Spreading Navarretia), Riverside County, California
RIVERSIDE COUNTY
PERRIS
74
74
79
HEMET
215
LAKE ELSINORE
15
79
TEMECULA
SAN DIEGO COUNTY
TULARE
INYO
NV
KERN
SAN BERNARDINO
VEN-TURA
LOS ANGELES
ORANGE
RIVERSIDE
AZ
Pacific Ocean
SAN DIEGO
IMPERIAL
0 25 50 Miles
Essential Habitat Excluded from Critical Habitat
City
Interstate
Major Road
County Boundary
Western Riverside County Multiple Species Habitat Conservation Plan
N
0 1 2 3 4 5 Miles
0 1 2 3 4 5 Kilometers

(5) Unit 1: Transverse Range Unit. Los Angeles County, California. From USGS 1:24,000 quadrangle map Mint Canyon, California.

(i) Unit 1A: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 368000, 3815300; 368400, 3815300; 368400, 3815200; 368600, 3815200; 368600, 3815100; 368700, 3815100; 368700, 3814700; 368600, 3814700; 368600, 3814600; 368400, 3814600; 368400, 3814500; 368200, 3814500; 368200, 3814300; 368300, 3814300; 368300, 3813700; 368200, 3813700; 368200, 3813500; 368100, 3813500; 368100, 3813300; 368000, 3813300; 368000, 3813100; 367400, 3813100; 367400, 3813200; 367300, 3813200; 367300, 3813800; 367100, 3813800; 367100, 3813900; 366900, 3813900; 366900, 3814100; 367000, 3814100; 367000, 3814200; 367100, 3814200; 367100, 3814300; 367200, 3814300; 367200, 3814400; 367300, 3814400; 367300, 3814500; 367400, 3814500; 367400, 3814700; 367500, 3814700; 367500, 3814800; 367600, 3814800; 367600, 3814900; 367700, 3814900; 367700, 3815000; 367800, 3815000; 367800, 3815100; 367900, 3815100; 367900, 3815200; 368000, 3815200; returning to 368000, 3815300.

(ii) Unit 1B: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 366000, 3813100; 366500, 3813100; 366500, 3812600; 366000, 3812600; returning to 366000, 3813100.

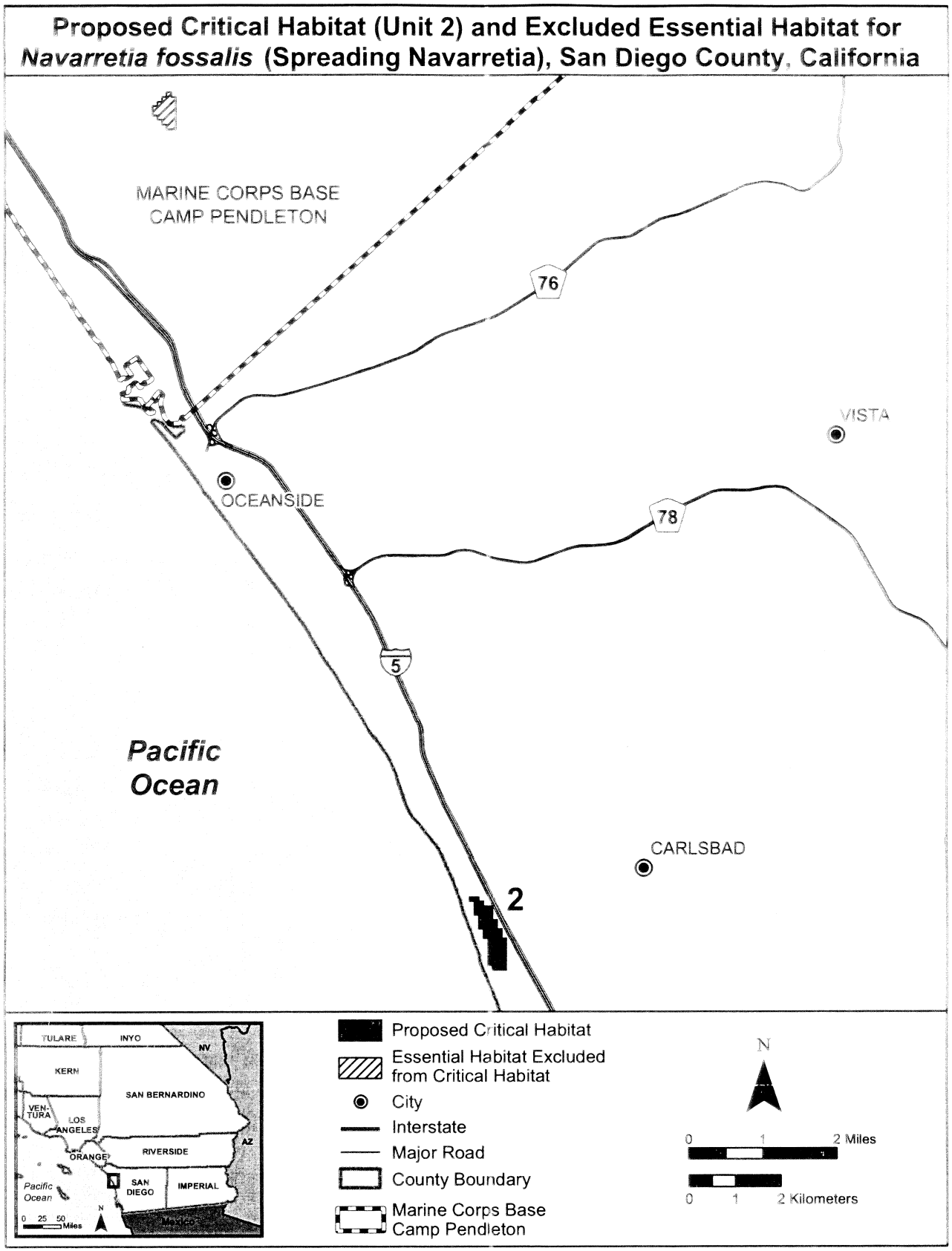
(iii) **Note:** Map of critical habitat unit 1 for *Navarretia fossalis* follows:


Proposed Critical Habitat (Units 1A, 1B) for Navarretia fossalis (Spreading Navarretia), San Diego County, California
San Francisquito Canyon Rd.
Bouquet Canyon Rd.
Sierra Hwy.
Vasquez Canyon Rd.
1A
1B
RANCHO SANTA CLARITA
FOREST PARK
BOUQUET JUNCTION
Soledad Canyon Rd.
SOLEMINT
SAUGUS
Valencia Blvd.
126
14
NEWHALL
5
TULARE
INYO
NV
KERN
SAN BERNARDINO
VEN-TURA
LOS ANGELES
ORANGE
RIVERSIDE
AZ
Pacific Ocean
SAN DIEGO
IMPERIAL
Mexico
0 25 50 Miles
N
Proposed Critical Habitat
City
Interstate
Major Road
County Boundary
N
0 1 2 Miles
0 1 2 Kilometers

(6) Unit 2: San Diego, North Coastal Mesas Unit. San Diego County, California. From USGS 1:24,000 quadrangle map Encinitas, California, land bounded by the following UTM 11 NAD27 coordinates (E, N): 470000, 3663800; 470200, 3663800; 470200, 3663700; 470300, 3663700; 470300, 3663600; 470500, 3663600; 470500, 3663300; 470600, 3663300; 470600, 3663100; 470700, 3663100; 470700, 3662900; 470800, 3662900; 470800, 3662200; 470500, 3662200; 470500, 3662300; 470400, 3662300; 470400, 3662900; 470300, 3662900; 470300, 3663100; 470200, 3663100; 470200, 3663400; 470100, 3663400; 470100, 3663700; 470000, 3663700; returning to 470000, 3663800.

(i) **Note:** Map of critical habitat unit 2 for *Navarretia fossalis* follows:

(ii) (reserved)


Proposed Critical Habitat (Unit 2) and Excluded Essential Habitat for
Navarretia fossalis (Spreading Navarretia), San Diego County, California
MARINE CORPS BASE
CAMP PENDLETON
76
VISTA
OCEANSIDE
78
5
Pacific
Ocean
CARLSBAD
2
TULARE
INYO
NV
KERN
SAN BERNARDINO
VEN-
TURA
LOS
ANGELES
AZ
ORANGE
RIVERSIDE
SAN
DIEGO
IMPERIAL
Pacific
Ocean
0 25 50
Miles
N
Proposed Critical Habitat
Essential Habitat Excluded
from Critical Habitat
City
Interstate
Major Road
County Boundary
Marine Corps Base
Camp Pendleton
N
0 1 2 Miles
0 1 2 Kilometers

(7) Unit 3: San Diego, Central Coastal Mesas Unit. San Diego County, California. From USGS 1:24,000 quadrangle map Rancho Santa Fe, California, land bounded by the following UTM 11 NAD27 coordinates (E, N): 485200, 3653600; 485600, 3653600; 485600, 3653200; 485700, 3653200; 485700, 3652900; 485300, 3652900; 485300, 3653000; 485200, 3653000; 485200, 3652700; 485000, 3652700; 485000, 3652800; 484700, 3652800; 484700, 3653200; 485000, 3653200; 485000, 3653500; 485200, 3653500; returning to 485200, 3653600; excluding lands approved within the San Diego-area Multiple Species Conservation Program, County of San Diego Subarea Plan.

(8) Unit 4: San Diego, Inland Valleys Unit. San Diego County, California. From USGS 1:24,000 quadrangle maps Ramona, San Marcos, and San Pasqual, California.

(i) Unit 4A: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 481800, 3667300; 482000, 3667300; 482000, 3667100; 481800, 3667100; returning to 481800, 3667300.

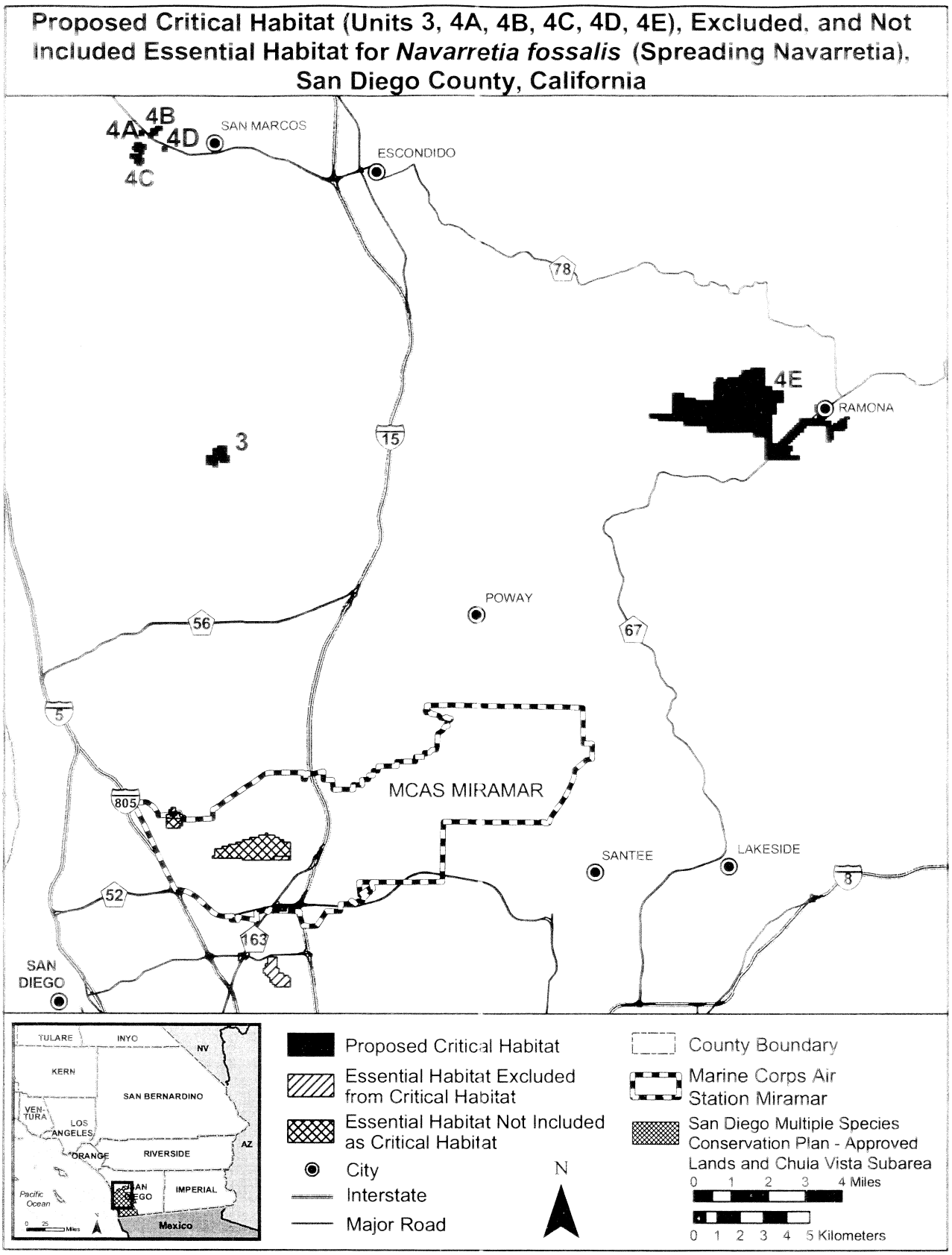
(ii) Unit 4B: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 482500, 3667500; 482800, 3667500; 482800, 3667300; 482600, 3667300; 482600, 3667100; 482400, 3667100; 482400, 3667000; 482200, 3667000; 482200, 3667200; 482300, 3667200; 482300, 3667400; 482500, 3667400; returning to 482500, 3667500.

(iii) Unit 4C: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 481600, 3666800; 481900, 3666800; 481900, 3666700; 482100, 3666700; 482100, 3666500; 482000, 3666500; 482000, 3666300; 481900, 3666300; 481900, 3666100; 482000, 3666100; 482000, 3665900; 481900, 3665900; 481900, 3665800; 481700, 3665800; 481700, 3665900; 481600, 3665900; 481600, 3666100; 481400, 3666100; 481400, 3666300; 481800, 3666300; 481800, 3666400; 481600, 3666400; 481600, 3666500; 481500, 3666500; 481500, 3666600; 481600, 3666600; returning to 481600, 3666800.

(iv) Unit 4D: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 482800, 3666600; 483000, 3666600; 483000, 3666400; 482800, 3666400; returning to 482800, 3666600.

(v) Unit 4E: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 508400, 3657000; 509000, 3657000; 509000, 3656200; 509300, 3656200; 509300, 3656000; 509800, 3656000; 509800, 3655500; 509500, 3655500; 509500, 3655000; 509300, 3655000; 509300, 3653700; 509600, 3653700; 509600, 3653800; 509700, 3653800; 509700, 3653900; 509800, 3653900; 509800, 3654000; 509900, 3654000; 509900, 3654100; 510000, 3654100; 510000, 3654200; 510100, 3654200; 510100, 3654300; 510200, 3654300; 510200, 3654400; 510300, 3654400; 510300, 3654500; 510400, 3654500; 510400, 3654600; 510500, 3654600; 510500, 3654800; 511300, 3654800; 511300, 3655100; 511200, 3655100; 511200, 3655400; 511400, 3655400; 511400, 3655300; 511500, 3655300; 511500, 3655100; 511600, 3655100; 511600, 3655200; 511800, 3655200; 511800, 3655000; 511700, 3655000; 511700, 3654800; 511600, 3654800; 511600, 3654700; 511900, 3654700; 511900, 3654500; 512000, 3654500; 512000, 3654600; 512200, 3654600; 512200, 3654700; 512300, 3654700; 512300, 3654800; 512500, 3654800; 512500, 3654900; 512700, 3654900; 512700, 3654800; 512600, 3654800; 512600, 3654400; 512500, 3654400; 512500, 3654300; 512000, 3654300; 512000, 3653900; 511900, 3653900; 511900, 3653800; 511700, 3653800; 511700, 3654500; 510800, 3654500; 510800, 3654400; 510700, 3654400; 510700, 3654200; 510500, 3654200; 510500, 3654100; 510400, 3654100; 510400, 3654000; 510300, 3654000; 510300, 3653900; 510200, 3653900; 510200, 3653800; 510100, 3653800; 510100, 3653700; 510000, 3653700; 510000, 3653600; 510200, 3653600; 510200, 3653400; 510100, 3653400; 510100, 3653200; 510500, 3653200; 510500, 3653000; 509000, 3653000; 509000, 3654000; 508500, 3654000; 508500, 3654200; 506500, 3654200; 506500, 3654500; 505500, 3654500; 505500, 3654700; 504400, 3654700; 504400, 3654800; 504000, 3654800; 504000, 3655000; 505000, 3655000; 505000, 3655900; 505500, 3655900; 505500, 3655700; 506000, 3655700; 506000, 3655600; 506800, 3655600; 506800, 3656400; 506900, 3656400; 506900, 3656600; 507200, 3656600; 507200, 3656500; 507400, 3656500; 507400, 3656600; 507900, 3656600; 507900, 3656700; 508000, 3656700; 508000, 3656900; 508400, 3656900; returning to 508400, 3657000.

(vi) **Note:** Map of critical habitat units 3–4 for *Navarretia fossalis* follows:


Proposed Critical Habitat (Units 3, 4A, 4B, 4C, 4D, 4E), Excluded, and Not Included Essential Habitat for Navarretia fossalis (Spreading Navarretia), San Diego County, California
4A
4B
4C
4D
4E
3
SAN MARCOS
ESCONDIDO
RAMONA
POWAY
MCAS MIRAMAR
SANTEE
LAKESIDE
SAN DIEGO
78
15
56
67
5
805
52
163
8
TULARE
INYO
NV
KERN
SAN BERNARDINO
VEN-TURA
LOS ANGELES
ORANGE
RIVERSIDE
AZ
IMPERIAL
Pacific Ocean
Mexico
Proposed Critical Habitat
Essential Habitat Excluded from Critical Habitat
Essential Habitat Not Included as Critical Habitat
City
Interstate
Major Road
N
County Boundary
Marine Corps Air Station Miramar
San Diego Multiple Species Conservation Plan - Approved Lands and Chula Vista Subarea
0 1 2 3 4 Miles
0 1 2 3 4 5 Kilometers

(9) Unit 5: San Diego, Southern Coastal Mesas Unit. San Diego County, California. From USGS 1:24,000 quadrangle maps Imperial Beach, Jamul Mountains, and Otay Mesa, California.

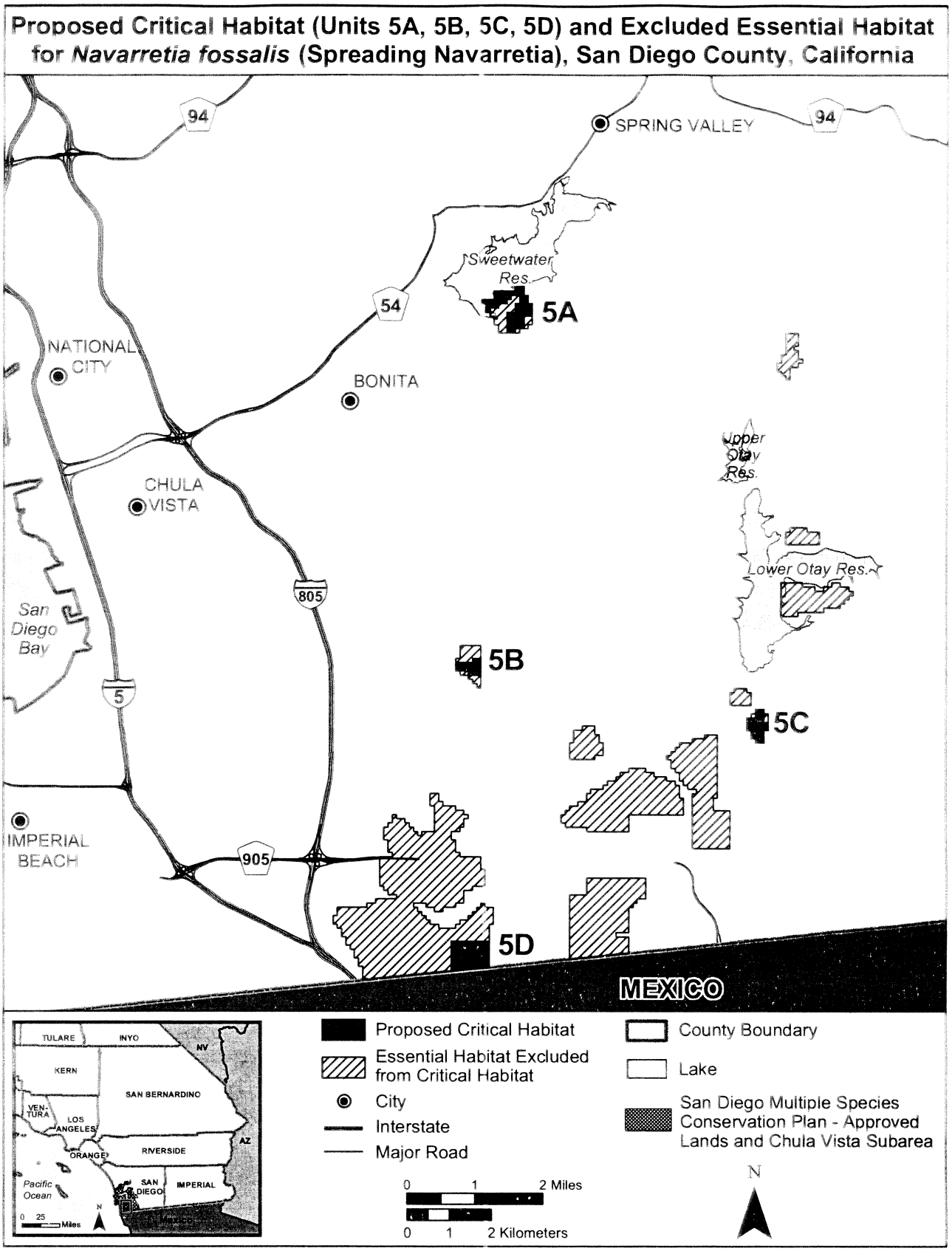
(i) Unit 5A: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 501000, 3616800; 501200, 3616800; 501200, 3616600; 501300, 3616600; 501300, 3616400; 501400, 3616400; 501400, 3616100; 501200, 3616100; 501200, 3615800; 501000, 3615800; 501000, 3615700; 500800, 3615700; 500800, 3616200; 501000, 3616200; 501000, 3616400; 501100, 3616400; 501100, 3616600; 500900, 3616600; 500900, 3616500; 500800, 3616500; 500800, 3616400; 500600, 3616400; 500600, 3616300; 500400, 3616300; 500400, 3616200; 500300, 3616200; 500300, 3616400; 500200, 3616400; 500200, 3616500; 500500, 3616500; 500500, 3616700; 501000, 3616700; returning to 501000, 3616800; excluding lands approved within the San Diego Multiple Species Conservation Program.

(ii) Unit 5B: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 500000, 3608000; 500200, 3608000; 500200, 3607600; 499900, 3607600; 499900, 3607700; 499600, 3607700; 499600, 3607900; 500000, 3607900; returning to 500000, 3608000; excluding lands approved within the San Diego Multiple Species Conservation Program.

(iii) Unit 5C: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 506700, 3606800; 506900, 3606800; 506900, 3606500; 507000, 3606500; 507000, 3606300; 506900, 3606300; 506900, 3606000; 506700, 3606000; 506700, 3606100; 506600, 3606100; 506600, 3606300; 506500, 3606300; 506500, 3606600; 506700, 3606600; returning to 506700, 3606800; excluding lands approved within the San Diego Multiple Species Conservation Program.

(iv) Unit 5D: Land bounded by the following UTM 11 NAD27 coordinates (E, N): 499500, 3601300; 500400, 3601300; 500400, 3600600; 499700, 3600600; 499700, 3600500; 499500, 3600500; returning to 499500, 3601300; excluding lands approved within the San Diego-area Multiple Species Conservation Program, City of San Diego Subarea Plan.

(v) **Note:** Map of critical habitat unit 5 for *Navarretia fossalis* follows:


Proposed Critical Habitat (Units 5A, 5B, 5C, 5D) and Excluded Essential Habitat for Navarretia fossalis (Spreading Navarretia), San Diego County, California
SPRING VALLEY
94
54
Sweetwater Res.
5A
NATIONAL CITY
BONITA
Upper Otay Res.
CHULA VISTA
Lower Otay Res.
805
San Diego Bay
5B
5
5C
IMPERIAL BEACH
905
5D
MEXICO
TULARE
INYO
NV
KERN
SAN BERNARDINO
VEN-TURA
LOS ANGELES
AZ
ORANGE
RIVERSIDE
Pacific Ocean
SAN DIEGO
IMPERIAL
0 25 Miles
Proposed Critical Habitat
Essential Habitat Excluded from Critical Habitat
City
Interstate
Major Road
County Boundary
Lake
San Diego Multiple Species Conservation Plan - Approved Lands and Chula Vista Subarea
0 1 2 Miles
0 1 2 Kilometers
N

Dated: October 1, 2004.

Julie MacDonald,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–22541 Filed 10–6–04; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT78

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the San Miguel Island Fox, Santa Rosa Island Fox, Santa Cruz Island Fox, and Santa Catalina Island Fox

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: The San Miguel Island fox, Santa Rosa Island fox, Santa Cruz Island fox, and Santa Catalina Island fox were listed as endangered species under the Endangered Species Act of 1973, as amended (Act), on March 5, 2004. We do not find any habitat on the four islands occupied by the foxes that meets the definition of critical habitat under the Act. Because there is no habitat that meets the definition of critical habitat for the island fox subspecies, there is none to propose, and we are proposing that zero critical habitat be designated.

We solicit data and comments from the public on all aspects of this proposed finding. Unless we receive information during the comment period that indicates there is habitat which meets the definition of critical habitat, we will not be preparing an economic analysis.

DATES: We will consider comments received by December 6, 2004.

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

1. You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003.

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

3. You may send comments by electronic mail (e-mail) to: *fw1islandfox@r1.fws.gov.* Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our Internet connection is not functional, please submit comments by the alternate methods mentioned above.

4. You may fax your comments to 805/644–3958.

The complete file for this finding is available for public 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: For the San Miguel Island fox, Santa Rosa Island fox, and Santa Cruz Island fox, contact Diane Noda, Field Supervisor, Ventura Fish and Wildlife Office at the address given above (telephone 805/644–1766; facsimile 805/644–3958). For the Santa Catalina Island fox, contact Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA (telephone 760/431–9440; facsimile 760/431–9624).

SUPPLEMENTARY INFORMATION:

Preamble

Designation of Critical Habitat Provides Little Additional Protection to Species

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

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

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 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, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that a recent 9th Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service,* has invalidated the Service's regulation defining destruction or adverse modification of critical habitat. We are currently reviewing the decision to determine what effect it may have on the outcome of consultations pursuant to Section 7 of the Act.

Procedural and Resource Difficulties in Designating Critical Habitat

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

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

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially-imposed deadlines. This in turn fosters a second round of litigation in which