

(e) *Expedited Processing of Request.* * * *

(f) *Denial of Request.* In denying a request for records, in whole or in part, the Commission shall state the reason for denial, set forth the name and title or position of the person responsible for the denial of the request, make a reasonable effort to estimate the volume of the records denied, and provide this estimate to the person making the request, unless providing such an estimate would harm an interest protected by the exemption pursuant to which the request is denied, and, if an appeal is denied, notify the requester of the right to obtain judicial review of the Commission's action under 5 U.S.C. 552(a)(4)(B)–(G).

(g) *Partial Response to Request.* * * *

4. In section 2702.4, remove the introductory text and paragraphs (c) and (d) and revise paragraphs (a) and (b) to read as follows:

§ 2702.4 Materials available.

(a) *FOIA Reading Room.* Materials which may be made publicly available for inspection and copying at the Commission's on-site FOIA Reading Room, 601 New Jersey Ave., NW., Suite 9500, Washington, DC, include, but are not limited to:

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the agency and are not published in the **Federal Register**;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released to any person under this subpart and which, because of the nature of their subject matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(5) A general index of records referred to under this paragraph.

(b) *E-FOIA Reading Room.* Materials created on or after November 1, 1996 under paragraphs (a)(1) through (5) of this section may also be accessed electronically through the Commission's Web site at <http://www.fmshrc.gov>.

5. Revise section 2702.6 to read as follows:

§ 2702.6 Fee schedule.

(a) *Search fee.* The fee for searching for information and records shall be the salary rate (that is, basic pay plus 16%) of the employee making the search. This

hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>. Fees for searches of computerized records shall be the actual cost to the Commission but shall not exceed \$300 per hour. This fee includes machine time and that of the operator and clerical personnel. If search charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Fees may be charged even if the documents are not located or if they are located but withheld on the basis of an exemption.

(b) *Review fee.* The review fee shall be charged for the initial examination by the Chief FOIA Officer of documents located in response to a request in order to determine if they may be withheld from disclosure, and for the deletion of portions that are exempt from disclosure, but shall not be charged for review by the Chairman or the Commissioners. See § 2702.3. The review fee is the salary rate (that is, basic pay plus 16%) of the employee reviewing the records. This hourly rate is listed on the Commission's Web site at <http://www.fmshrc.gov>.

(c) *Duplicating fee.* The copy fee for each page of paper up to 8½"x14" shall be \$.15 per copy per page. Any private sector services required will be assessed at the charge to the Commission. The fee for copying photographs and other nonstandard documents will be the actual direct cost incurred by the Commission. For copies prepared by computer, such as tapes or printouts, the Commission shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If duplication charges are likely to exceed \$50, the requester shall be notified of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated.

6. In § 2702.7, revise paragraph (a) and paragraph (b)(2) to read as follows:

§ 2702.7 No fees; waiver or reduction of fees.

(a) No fees shall be charged to any requester, including commercial use requesters, if the anticipated cost of processing and collecting the fee would be equal or greater than the fee itself. Accordingly, the Commission has determined that fees of less than \$20 shall be waived.

(b) * * *

(2) The Chief FOIA Officer, upon request, shall determine whether a waiver or reduction of fees is warranted. Requests shall be made concurrently with requests for information under Sec. 2702.3. In accordance with the procedures set forth in Sec. 2702.3, appeals of adverse decisions may be made to the Commission within 5 working days. Determination of appeals will be made by the Commission within 10 working days of receipt.

Dated: October 11, 2007.

Michael F. Duffy,

Chairman, Federal Mine Safety and Health Review Commission.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU84

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Berberis nevinii* (Nevin's barberry)

AGENCY: Fish and Wildlife Service, Interior.

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

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for *Berberis nevinii* (Nevin's barberry) under the Endangered Species Act of 1973, as amended (Act). We are also using this comment period to announce revisions to proposed critical habitat subunits 1B, 1D, and 1E as described in the proposed rule published in the **Federal Register** on February 6, 2007, and announce the availability of the draft economic analysis for the proposed critical habitat designation and an amended Required Determinations section of the proposal. The draft economic analysis estimates potential costs to be approximately \$169,000 to \$172,000 in undiscounted dollars over a 20-year period in areas proposed as critical habitat and approximately \$1.7 to \$433.5 million in undiscounted dollars over a 20-year period (or 40-year period for impacts related to management of Vail Lake) in areas proposed for exclusion from critical habitat under section 4(b)(2) of

the Act. We are reopening the comment period to allow all interested parties to comment simultaneously on the proposed rule, our revisions to the proposed rule, the associated draft economic analysis, and the amended Required Determinations section. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this comment period and will be fully considered in preparation of the final rule.

DATES: We will accept public comments until November 16, 2007.

ADDRESSES: You may submit written comments and materials to us by any one of the following methods:

(1) *E-mail:* Please submit electronic comments to fw8cfwocomments@fws.gov. Include "Nevin's barberry" in the subject line. For more information, please see the Public Comments Solicited section under **SUPPLEMENTARY INFORMATION**.

(2) *Facsimile:* You may fax your comments to 760/431-5901.

(3) *U.S. mail or hand-delivery:* You may submit written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

(4) *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address listed in the **ADDRESSES** section (telephone: 760/431-9440). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We will accept written comments and information during this reopened comment period on the proposed critical habitat designation for *Berberis nevinii* published in the **Federal Register** on February 6, 2007 (72 FR 5552), the revisions to proposed critical habitat described herein (see Revisions to Proposed Critical Habitat section), and the draft economic analysis of the revised proposed designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) Critical Habitat Subunits 1B, 1D, and 1E as revised in this notice (see Revisions to Proposed Critical Habitat section).

(2) The reasons why habitat should or should not be designated as critical

habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by the designation such that the designation of critical habitat is prudent.

(3) Specific information on the amount and distribution of *Berberis nevinii* habitat; what habitat or habitat features are essential to the conservation of this species and why; which areas occupied at the time of listing containing these features should be included in the critical habitat designation and why; and which areas not occupied at the time of listing but currently occupied should be included in the final designation and why.

(4) The geographical extent, number of plants, and/or reproductive status of native *Berberis nevinii* occurrences, particularly those in the Loma Linda Hills area (vicinity of San Timoteo Canyon and Scott Canyon) in San Bernardino County and those in western Riverside County (including in the vicinity of Vail Lake, the Agua Tibia Mountain foothills on the Cleveland National Forest (CNF), in the Soboba Badlands east of the San Jacinto Wildlife Area, the Jurupa Hills area, and near the City of Temecula).

(5) Specific information on three historical *Berberis nevinii* records from Los Angeles County—two from the Arroyo Seco near the City of Pasadena (California Natural Diversity Database (CNDDDB) element occurrences 8 and 9) and one from the Big Tujunga Wash near San Fernando (CNDDDB element occurrence 10)—such as whether the species still exists in these areas and where.

(6) Whether any areas not currently known to be occupied by *Berberis nevinii*, but essential to the conservation of the species, should be included in the designation.

(7) Information that demonstrates a species-specific pollinator-plant relationship for *Berberis nevinii*; information on seed dispersal mechanisms and dispersal distance for *B. nevinii*; whether seed banks exist for this species and, if so, for how long and under what conditions; and whether such information should be applied to or considered a primary constituent element for the species.

(8) Land use designations and current or planned activities in the mapped critical habitat subunits and their possible impact on proposed critical habitat.

(9) Our proposed exclusion of *Berberis nevinii* habitat covered under the approved Western Riverside County Multiple Species Habitat Conservation

Plan (MSHCP) and whether the benefits of excluding these areas outweigh the benefits of their inclusion under section 4(b)(2) of the Act (see 72 FR 5552, "Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act" section for details on the Western Riverside County MSHCP). If the Secretary determines the benefits of including these lands outweigh the benefits of excluding them, they will not be excluded from final critical habitat.

(10) Additional information regarding management plans covering lands managed by the Bureau of Land Management (BLM) on Oak Mountain and by the U.S. Forest Service (USFS) on the CNF, and whether these plans provide specific management for *Berberis nevinii* such that consideration of exclusion of these lands under section 4(b)(2) of the Act would be appropriate.

(11) Whether the benefits of exclusion of any particular area outweigh the benefits of inclusion under section 4(b)(2) of the Act.

(12) Information on the extent to which any State and local environmental protection measures referred to in the draft economic analysis may have been adopted largely as a result of the listing of *Berberis nevinii*.

(13) Information on whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation, and information on any costs that have been inadvertently overlooked.

(14) Information on whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat.

(15) Information on whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat.

(16) Information on whether there are any quantifiable economic benefits that could result from the designation of critical habitat.

(17) Information on areas that could potentially be disproportionately impacted by designation of critical habitat for *Berberis nevinii*.

(18) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation, and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(19) Information on whether the draft economic analysis appropriately

identifies all costs that could result from the designation.

(20) Economic data on the incremental effects that would result from designating any particular area as critical habitat, since it is our intent to include the incremental costs attributed to the revised critical habitat designation in the final economic analysis.

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

Pursuant to section 4(b)(2) of the Act, an area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

All previous comments and information submitted during the initial comment period from February 6, 2007, to April 9, 2007, on the proposed rule (72 FR 5552) need not be resubmitted as they will be incorporated into the public record as part of this comment period and will be fully considered in preparation of the final rule. If you wish to comment, you may submit your comments and materials concerning proposed rule, draft economic analysis, or the amended Required Determinations provided in this document by any one of several methods (see **ADDRESSES**). Our final designation of critical habitat will take into consideration all written comments and any additional information we have received during both comment periods. On the basis of public comment on this analysis, the revised critical habitat proposal, and the final economic analysis, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and material concerning the above actions by any one of several methods (see **ADDRESSES**). If you use e-mail to submit your comments, please include "Attn: Nevin's barberry" in your e-mail subject header, preferably with 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 e-mail, contact us

directly by calling our Carlsbad Fish and Wildlife Office at (760) 431-9440.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

You may obtain copies of the proposed rule and draft economic analysis by mail from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or by visiting our website at <http://www.fws.gov/carlsbad/>.

Background

On August 10, 2004, the Center for Biological Diversity and California Native Plant Society challenged our failure to designate critical habitat for *Berberis nevinii* and four other plant species (*Center for Biological Diversity et al. v. Gale Norton, Secretary of the Department of the Interior et al.*, C-04-3240 JL, N. D. Cal.). In a court approved settlement agreement, the Service agreed to propose critical habitat for *B. nevinii*, if prudent, on or before January 30, 2007, and finalize the designation on or before January 30, 2008. On February 6, 2007, we published a proposed rule to withdraw our previous not prudent finding and designate critical habitat for *B. nevinii* (72 FR 5552), identifying approximately 417 acres (ac) (169 hectares (ha)) in Riverside County, California, that met the definition of critical habitat for this species. Of this, we proposed to exclude 385 ac (156 ha) of non-Federal land from the final designation under section 4(b)(2) of the Act because these lands are protected by an approved Habitat Conservation Plan (HCP) (see 72 FR 5552, "Relationship of Critical Habitat to Approved Habitat Conservation Plans—Exclusion Under Section 4(b)(2) of the Act" section for details), leaving a proposed final designation of 32 ac (13 ha) of Federal land.

We are now proposing revisions to three of the proposed critical habitat subunits: 1B, 1D, and 1E (see "Revisions to Proposed Critical Habitat" section); accordingly, approximately 361 ac (146 ha) in Riverside County, California, meets the definition of critical habitat for this species, a reduction of 56 ac (23 ha). Of this, we propose to exclude approximately 344 ac (139 ha) of non-Federal land protected by an approved HCP from the final designation under section 4(b)(2) of the Act. These 344 ac

(139 ha) are a subset of the 385 ac (156 ha) proposed for exclusion in the proposed rule. Other than these changes, the proposed rule of February 6, 2007, remains intact.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule as revised herein is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed critical habitat designation based on the February 6, 2007, proposed rule to designate critical habitat for *Berberis nevinii* (72 FR 5552) and subsequent revisions to the proposed rule described herein (see Revisions to Proposed Critical Habitat).

The draft economic analysis is intended to quantify the economic impacts of all potential conservation efforts for *Berberis nevinii*; some of these costs will likely be incurred regardless of whether critical habitat is designated. Potential economic impacts in areas proposed as critical habitat are estimated over a 20-year period, whereas estimated economic impacts in areas proposed for exclusion from critical habitat follow various timeframes, depending on the activity (e.g., a 5-year period for economic impacts related to administration, a 20-year period for economic impacts related to development, and a 40-year period for economic impacts related to management of Vail Lake). The draft economic analysis estimates potential costs to be approximately \$169,000 to

\$172,000 in undiscounted dollars over a 20-year period in areas proposed as critical habitat and approximately \$1.7 to \$433.5 million in undiscounted dollars over a 20-year period (or 40-year period for impacts related to management of Vail Lake) in areas proposed for exclusion from critical habitat under section 4(b)(2) of the Act. These impacts would only occur if the area proposed for exclusion is instead designated as critical habitat. The cost estimates are based on revisions to the proposed designation of critical habitat described in this notice and include costs coextensive with listing and recovery.

Discounted future costs in areas proposed as critical habitat are estimated to be approximately \$136,000 to \$139,000 (\$10,000 annualized) at a 3 percent discount rate or approximately \$107,000 to \$110,000 (\$11,000 annualized) at a 7 percent discount rate. Discounted future costs in areas proposed for exclusion from critical habitat are estimated to be approximately \$1.2 to \$232.5 million at a 3 percent discount rate (\$82,000 to \$10.1 million annualized) or approximately \$0.9 to \$118.1 million at a 7 percent discount rate (\$81,000 to \$8.9 million annualized). For areas proposed for exclusion, the economic analysis provides an analysis of potential economic impacts related to residential/urban development, management of Vail Lake, and administration, with the timeframe for analysis varying based on the activity (1–5 years, 6–20 years, and 21–40 years). Estimated discounted future costs (3 percent discount rate) associated with management of Vail Lake range from zero to \$12.2 million for the 2008 through 2012 timeframe, from zero to \$117.4 million for the 2013 through 2027 timeframe, and from zero to \$99.7 million for the 2028 through 2047 timeframe. Similarly, estimated discounted future costs (3 percent discount rate) associated with development range from \$333,000 to \$967,000 for the 2008 through 2012 timeframe and from \$873,000 to \$2.3 million for the 2013 through 2027 timeframe in areas proposed for exclusion from critical habitat. Lastly, the discounted future cost (3 percent discount rate) associated with administration is estimated at \$19,000 for the 2008 through 2012 timeframe in these same subunits.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of *Berberis nevinnii*, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to the

designation of critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for *B. nevinnii* in areas containing features essential to the conservation of the species. The draft analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The analysis measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs that have been incurred since the date *Berberis nevinnii* was listed as endangered (October 13, 1998; 63 FR 54956), and considers those costs that may occur in the years following the designation of critical habitat, with the timeframes for this analysis varying by activity. Because the draft economic analysis considers the potential economic effects of all actions relating to the conservation of *B. nevinnii*, including costs associated with sections 4, 7, and 10 of the Act and those attributable to designating critical habitat, this may result in an overestimate of the potential economic impacts of the designation.

As stated earlier, we are soliciting data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal or its supporting documents to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

Changes to the Proposed Rule

By this notice, we are also advising the public of revisions to three of the subunits described in the February 6, 2007, proposed rule (72 FR 5552): Subunit 1B (Agua Tibia Mountain Foothills), Subunit 1D (North of Vail Lake), and Subunit 1E (South of Vail Lake/Peninsula).

During the first comment period for the proposed rule, we were informed by Cleveland National Forest (CNF) that proposed Subunit 1B (Agua Tibia Mountain Foothills), which we had identified as including approximately 17 ac (7 ha) of USFS land and approximately 5 ac (2 ha) of adjacent private land, was inaccurately mapped because it was based on inexact location information for the *Berberis nevinnii* occurrence on CNF lands. Hence, we are revising the location and boundaries of proposed critical habitat Subunit 1B to reflect new location information provided by the CNF, and we are now proposing to designate less than 3 ac (1 ha) of Federal (CNF) land in Subunit 1B, rather than the approximately 22 ac (9 ha) of Federal and private land identified in the proposed rule. We delineated critical habitat based on the criteria outlined in the February 6, 2007, proposed rule, which resulted in this subunit no longer including any private land. Revised Subunit 1B was occupied at the time of listing and contains the primary constituent elements (PCEs), those physical or biological features essential to conservation of the species.

We also reevaluated proposed critical habitat subunits bordering Vail Lake based on updated aerial photographs and Vail Lake storage/volume data provided by Rancho California Water District (RCWD) for the economic analysis. We removed areas along the shoreline from subunits 1D (North of Vail Lake) and 1E (South of Vail Lake/Peninsula) that do not contain the PCEs required by *Berberis nevinnii* and are not occupied by the species due to lake-level fluctuations and recurrent, episodic inundation, sometimes for relatively long periods of time. We removed approximately 1 ac (1 ha) from proposed Subunit 1D and approximately 34 ac (14 ha) from proposed Subunit 1E, leaving approximately 21 ac (8 ha) and approximately 217 ac (88 ha) in proposed subunits 1D and 1E, respectively.

When delineating proposed critical habitat (72 FR 5552), we tried to exclude areas from proposed subunits near Vail Lake that were identified as being under water, and therefore did not contain the PCEs. We based subunit delineations in

the proposed rule on USGS 1-meter resolution color-balanced, color infrared aerial photography acquired in May/June 2002 for the Vail Lake area, western Riverside County. Based on information provided by RCWD for the draft economic analysis, the lake was storing between approximately 19,750 acre-feet (May 1, 2002) and 19,180 acre-feet (June 30, 2002) of water during this time period. However, water levels at Vail Lake can fluctuate greatly, depending on the amount of local runoff reaching the lake, both within any given year and annually, frequently exceeding the 2002 water levels for relatively long periods of time. The RCWD, the entity that owns and operates/manages Vail Dam and Vail Lake, has a surface water storage permit in the lake for up to

40,000 acre-feet from November 1 to April 30, annually. Thus, we revised proposed critical habitat boundaries for subunits bordering Vail Lake based on lake levels at RCWD's permitted storage capacity, resulting in boundary changes to proposed subunits 1D and 1E.

Water volume in Vail Lake has been known to exceed 40,000 acre-feet, even filling and surpassing lake storage capacity (50,000 acre-feet) with water flowing over the spillway. The creation of Vail Lake in 1948 may have resulted in the loss of some *Berberis nevinii* individuals; however, the occurrences that are now located closest to Vail Lake have not been inundated or affected by rising water levels and fluctuations in the recent past (Boyd 2007). Thus, the revisions to proposed critical habitat

subunits 1D and 1E are not likely to result in *B. nevinii* individuals in this area falling outside the revised subunit boundaries. These revisions will, on the other hand, more accurately represent *B. nevinii* habitat in subunits 1D and 1E.

Table 1 contains the corrected area values based on revisions to proposed critical habitat subunits 1B, 1D, and 1E. The revisions to these three proposed subunits change the legal description published in the February 6, 2007, proposed rule. This notice republishes the legal descriptions for subunits 1B, 1D, and 1E based on the revisions described herein, along with a map depicting the revised location of proposed critical habitat for *Berberis nevinii*.

TABLE 1.—AREAS PROPOSED AS CRITICAL HABITAT FOR BERBERIS NEVINII AND AREAS BEING CONSIDERED FOR EXCLUSION FROM THE FINAL CRITICAL HABITAT DESIGNATION UNDER SECTION 4(B)(2) OF THE ACT
[Area is displayed in acres (ac) (hectares (ha)).]

Critical habitat unit	Land ownership	Area proposed as critical habitat	Area proposed for exclusion from final critical habitat	Area proposed as final critical habitat
1. Agua Tibia/Vail Lake				
1A. Big Oak Mountain Summit.	BLM	14.8 ac (6.0 ha)	0 ac (0 ha)	14.8 ac (6.0 ha).
1B. Agua Tibia Mountain Foothills.	USFS	2.5 ac (1.0 ha)	0 ac (0 ha)	2.5 ac (1.0 ha).
1C. South Flank Big Oak Mountain.	Private	86.5 ac (35.0 ha)	86.5 ac (35.0 ha)	0 ac (0 ha).
1D. North of Vail Lake	Private ¹	20.8 ac (8.4 ha)	20.8 ac (8.4 ha)	0 ac (0 ha).
1E. South of Vail Lake/Peninsula.	Private ¹	216.7 ac (87.7 ha)	216.7 ac (87.7 ha)	0 ac (0 ha).
1F. Temecula Creek East	Private	19.8 ac (8.0 ha)	19.8 ac (8.0 ha)	0 ac (0 ha).
Total	361.1 ac (146.1 ha)	343.8 ac (139.1 ha)	17.3 ac (7.0 ha).

¹ Private lands in Subunits 1D and 1E include a total of 2.8 ac (1.1 ha) owned by the Rancho California Water District.

Below, we present brief descriptions of the revised proposed subunits and reasons why they meet the definition of critical habitat for *Berberis nevinii*. These revised subunit descriptions replace those provided in the February 6, 2007, proposed rule (72 FR 5552).

Unit Descriptions

Subunit 1B: Agua Tibia Mountain Foothills

Subunit 1B consists of approximately 3 ac (1 ha) of federally-owned land managed by the USFS on the CNF near the Agua Tibia Wilderness Area in southern Riverside County, California. Five *Berberis nevinii* individuals are known from this area and are located at the edge of a stream channel (PCE 1) growing in association with coast live oak and riparian woodland species (PCE 3). Nearby chaparral includes such species as *Quercus berberidifolia*, *Adenostoma fasciculatum*, and

Haplopappus squarrosus, and nearby desert species include *Yucca schidigera* (CNDDDB 2006). These *B. nevinii* plants are growing under a canopy of *Quercus agrifolia* and *Platanus racemosa* with the following species: *Heteromeles arbutifolia*, *Q. berberidifolia*, *Elymus condensatus*, *Mimulus aurantiacus*, *Lonicera subspicata*, *Pterostegia drymarioides*, and *Epilobium canum*. Soils in this area are classified as rough broken land and Visalia gravelly sandy loam, with 5 to 9 percent slopes (PCE 2) (Service GIS data 2007).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevinii* and it contains a relatively large natural occurrence of the species. Additionally, Service personnel visited this site in June 2006 while *B. nevinii* was in fruit and found that several of the fruits had three to four seeds, which may be significant for a

species that appears to rarely set seed. *Berberis nevinii* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The *Berberis nevinii* occurrence on the CNF is not as well protected as the occurrence on the Angeles National Forest (USFS 2005, p. 238). The primary threats to *B. nevinii* habitat in this area are human recreation (off-highway vehicle use, shooting); wildland fire, including an increased risk of fire ignition due to the proximity of State Highway 79 (USFS 2005, pp. 232, 237); fuels and fire management activities (USFS 2005, p. 237); and invasive, nonnative plants, including potential short-term adverse effects associated with control efforts (USFS 2005, p. 234). The CNF occurrence burned in 1996 followed by vigorous resprouting (USFS 2005, p. 237), and this location has also shown signs of disturbance from road

activities, with unauthorized use of off-highway vehicles occurring close to but not within the area occupied by the species (USFS 2005, p. 235). Nonetheless, the magnitude of impacts associated with roads and recreational activity in this area appears to be low (USFS 2005, p. 238). Also, the USFS does not anticipate substantial camping and hiking-related impacts to *B. nevinii* habitat, and these impacts will be avoided or mitigated by use of Forest Plan standards (USFS 2005, p. 234).

The February 6, 2007, proposed rule (72 FR 5552) identified the proximity of Highway 79 as a potential threat to the *Berberis nevinii* occurrence and habitat on the CNF, in part due to proposed highway widening and realignment activities. However, we no longer anticipate that these activities, if or when they occur, will affect Subunit 1B as the revised subunit is now more than one-tenth mile (160 meters) south of the highway. Invasive, nonnative plants and their management may also impact the *B. nevinii* occurrence and habitat at this site. Based on the weed management strategy in the USFS' Revised Land Management Plan for the four Southern California National Forests (USFS 2005), the CNF anticipates an eradication effort of the nonnative *Arundo* and other invasive grasses present in this subunit.

One of the greatest threats to occupied habitat and the PCEs contained therein on the CNF is from wildland fire and the management of fire and fuels (i.e., fire suppression and prevention activities). The Wildland-Urban Interface (WUI) Defense Zone overlaps about 43 percent of occupied habitat on the CNF (USFS 2005, p. 237; Service 2005, p. 127). Some plants or habitat within the WUI Defense Zone could be removed or degraded under the Revised Land and Resource Management Plan due to fuel removal for fire protection or overly frequent fuel treatments (Service 2005, p. 127). Special management considerations or protection of the PCEs may be required to minimize disturbance to the vegetation and soils within this subunit; control invasive, nonnative plants; and maintain the natural fire regime of the area.

Subunit 1B is included in the Western Riverside County Multiple Species Habitat Conservation Plan's (MSHCP) Conservation Area as existing Public/Quasi-Public (PQP) Conserved Lands. Since the CNF is not a signatory to the MSHCP and is not required to comply with the MSHCP's conservation measures, we are not proposing lands within this subunit for exclusion under section 4(b)(2) of the Act (see 72 FR 5552, "Exclusions under Section 4(b)(2)

of the Act for *Berberis nevinii*" section for a detailed discussion).

During the first comment period for the proposed rule, we were informed that the Species Management Guide for *Mahonia* [*Berberis nevinii* (Gray) Fedde (Mistretta and Brown 1989) developed for the Angeles National Forest was subsequently adopted by the CNF (Fege 1992, p. 1; Holtrop 2007, p. 2). Additionally, the CNF informed us that the species account for *Berberis nevinii* developed to support the environmental analysis for the USFS Land Management Plans for four southern California National Forests (USFS 2005) is meant to provide guidance for conservation and management of *B. nevinii* on USFS lands (Young 2007). However, these documents provide general guidance only and do not direct decisions regarding USFS site-specific project proposals. Additionally, these documents do not provide specific recommendations for the *B. nevinii* occurrence on the CNF. Therefore, as stated in the February 6, 2007, proposed rule (72 FR 5552), we are not proposing USFS lands within this subunit for exclusion under section 4(b)(2) of the Act based on these plans.

Subunit 1D: North of Vail Lake

Subunit 1D consists of approximately 21 ac (8 ha) of private land located immediately north of Vail Lake in southern Riverside County, California. The *Berberis nevinii* occurrence at this location is mapped along a canyon just above the high water line of Vail Lake, and consists of seven plants based on a 1989 survey (CNNDDB 2006). *Berberis nevinii* individuals in this area are found in sandy and gravelly soils in a drainage bottom (PCE 1 and 2). The vegetation community is classified as coastal scrub and valley foothill riparian (PCE 3) (Service GIS data 2006). At this site, *B. nevinii* is associated with *Adenostoma fasciculatum*, *Arctostaphylos glauca*, *Rhus integrifolia*, *Juniperus californica*, and *Rhamnus crocea*; to the north is a large grove of *Prosopis glandulosa* (CNDDDB 2006). Soils in this area are classified as badland (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains the features essential to conservation of *Berberis nevinii*, and it contains a relatively large natural occurrence of the species (CNDDDB 2006). This subunit is important for conserving *B. nevinii* as it is one of several relatively large occurrences in the Vail Lake area and thus has a greater potential for regeneration by seed. *Berberis nevinii* occupied this subunit at the time of

listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threat to *Berberis nevinii* habitat in this area that may require special management considerations or protection of the PCEs is urban/residential development. This subunit, as well as subunits 1C, 1E, and 1F, consists entirely of private land that may be developed, excluding flood easement lands held by the RCWD. This and the other subunits just mentioned fall within the Criteria Area of the Western Riverside County MSHCP and are targeted, in whole or in part, for acquisition and inclusion in the MSHCP Conservation Area as Additional Reserve Lands. Regardless, indirect effects of urban development could threaten *B. nevinii* habitat in this area, including human recreation activities; erosion; incursion or spread of invasive, nonnative plants; and changes to the natural fire regime (i.e., increased ignitions and fire frequency and shortened fire return intervals) that can lead to type conversion of shrublands to annual grasslands. Rising lake levels may also pose a threat, though the occurrences closest to Vail Lake have not been inundated or affected by rising water levels and fluctuations in the recent past (Boyd 2007).

We are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *Berberis nevinii* based on conservation measures for the species in the MSHCP (see 72 FR 5552, "Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan" section for a detailed discussion).

Subunit 1E: South of Vail Lake/ Peninsula

Subunit 1E consists of approximately 217 ac (88 ha) of private land located on the south and southwest side of Vail Lake in southern Riverside County, California. This site has the largest known natural occurrence of *Berberis nevinii*, collectively consisting of 134 plants based on a 1987 survey (Boyd 1987, pp. 7, 61–72; CNDDDB 2006). These plants are located in several stands along both sides of the southwest arm of Vail Lake, the south shore and peninsula, and part of the west shore of the southeast arm of Vail Lake. *Berberis nevinii* individuals in this area are found in canyons, in a wash of 15 percent slope, and on north-facing ridges and slopes between 35 and 70 percent slope (PCE 1) (Boyd 1987, p. 61–72; CNDDDB 2006), primarily in

association with coastal scrub, mixed chaparral, and valley foothill riparian communities (PCE 3) (Service GIS data 2006). Associated species include, but are not limited to: *Artemisia californica*, *Adenostoma fasciculatum*, *Eriogonum fasciculatum*, *Salvia mellifera*, *Rhamnus crocea*, *Rhus ovata*, *Encelia farinosa*, *Baccharis glutinosa*, and *Yucca* sp. (Boyd 1987, p. 61–72). Soils in this area are classified as sandy loams (Arlington and Greenfield fine sandy loams, 8 to 15 percent slopes, eroded; Cajalco rocky fine sandy loam, 15 to 50 percent slopes, eroded; Hanford coarse sandy loam, 8 to 15 percent slopes, eroded; Lodi rocky loam, 25 to 50 percent slopes, eroded; Monserate sandy loam, 8 to 15 percent slopes, eroded; Monserate sandy loam, 15 to 25 percent slopes, severely eroded; Pachappa fine sandy loam, 2 to 8 percent slopes, eroded), gullied land, riverwash, and rough broken land (PCE 2) (Service GIS data 2006).

We are proposing this subunit as critical habitat because it contains features essential to conservation of *Berberis nevini*, and it contains the largest known natural occurrence of the species (CNDDDB 2006). This location also contains the bulk of known individuals in the Vail Lake/Oak Mountain area. Additionally, we interpret that reproduction has occurred at this site in the past based on the presence of several size (age) classes during Nishida's 1987 survey of the area (Boyd 1987, p. 62). *Berberis nevini* occupied this subunit at the time of listing, as identified in the final listing rule (63 FR 54956, October 13, 1998).

The primary threat to *Berberis nevini* habitat in this area that may require special management considerations or protection of the PCEs is urban/residential development. This subunit, as well as subunits 1C, 1D, and 1F, consists entirely of private land that may be developed, excluding areas held as flood easement by the RCWD. This and the other subunits just mentioned fall within the Criteria Area of the Western Riverside County MSHCP and are targeted, in whole or in part, for acquisition and inclusion in the MSHCP Conservation Area as Additional Reserve Lands. Regardless, indirect effects of urban development—including human recreation activities; erosion; incursion or spread of invasive, nonnative plants (including annual grasses, *Tamarix* sp., *Nicotiana glauca*, and others); and changes to the natural fire regime (i.e., increased ignitions and fire frequency and shortened fire return intervals) that can lead to type conversion of shrublands to annual

grasslands—could threaten *B. nevini* habitat in this area.

This *Berberis nevini* occurrence has burned in the past, and regeneration by stump sprouting has been observed (CNDDDB 2006). Part of this area is fairly inaccessible, except by boat; however, other parts are in close proximity to roads, equestrian trails, and the boat launch area (Boyd 1987, pp. 61–72; CNDDDB 2006), and thus may be more heavily impacted by recreational activities. Rising lake levels were also identified as a potential threat to this occurrence by Nishida (Boyd 1987, pp. 61–72; CNDDDB 2006), though the occurrences closest to Vail Lake have not been inundated or affected by rising water levels and fluctuations in the recent past (Boyd 2007).

We are proposing to exclude the private lands within this subunit from the final designation of critical habitat for *Berberis nevini* based on conservation measures for the species in the Western Riverside County MSHCP (see 72 FR 5552, “Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act—Western Riverside County Multiple Species Habitat Conservation Plan” section for a detailed discussion).

Required Determinations—Amended

In our February 6, 2007, proposed rule (72 FR 5552), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the draft economic analysis. Those data are now available for our use in making these determinations. In this notice we are affirming the information contained in the proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, and the President's memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). Based on the information made available to us in the draft economic analysis, we are amending our Required Determinations, as provided below, concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211, E.O. 12630, and the Unfunded Mandates Reform Act.

Regulatory Planning and Review

In accordance with E.O. 12866, this document is a significant rule because it may raise novel legal and policy issues. Based on our draft economic analysis of the proposed designation of critical

habitat for *Berberis nevini*, costs related to conservation activities for *B. nevini* pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately \$169,000 to \$172,000 in undiscounted dollars over a 20-year period in areas proposed as critical habitat and approximately \$1.7 to \$433.5 million in undiscounted dollars over a 20-year period (or 40-year period for impacts related to management of Vail Lake) in areas proposed for exclusion from critical habitat. These impacts would only occur if the area proposed for exclusion is instead designated as critical habitat. These cost estimates are based on revisions to the proposed designation of critical habitat described in this notice and includes costs coextensive with listing and recovery.

Discounted future costs in areas proposed as critical habitat are estimated to be approximately \$136,000 to \$139,000 (\$10,000 annualized) at a 3 percent discount rate or approximately \$107,000 to \$110,000 (\$11,000 annualized) at a 7 percent discount rate. Discounted future costs in areas proposed for exclusion from critical habitat are estimated to be approximately \$1.2 to \$232.5 million at a 3 percent discount rate (\$82,000 to \$10.1 million annualized) or approximately \$0.9 to \$118.1 million at a 7 percent discount rate (\$81,000 to \$8.9 million annualized). For areas proposed for exclusion, estimated discounted future costs (3 percent discount rate) associated with management of Vail Lake range from zero to \$12.2 million for the 2008 through 2012 timeframe, from zero to \$117.4 million for the 2013 through 2027 timeframe, and from zero to \$99.7 million for the 2028 through 2047 timeframe. Similarly, estimated discounted future costs (3 percent discount rate) associated with development range from \$333,000 to \$967,000 for the 2008 through 2012 timeframe and from \$873,000 to \$2.3 million for the 2013 through 2027 timeframe in areas proposed for exclusion from critical habitat. Lastly, the discounted future cost (3 percent discount rate) associated with administration is estimated at \$19,000 for the 2008 through 2012 timeframe in these same subunits.

Therefore, based on our draft economic analysis, we have determined that the proposed designation of critical habitat for *Berberis nevini* would not result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the necessary timeline for publication in the **Federal Register**, the Office of Management and Budget

(OMB) has not formally reviewed the proposed rule or accompanying economic analysis.

Further, E.O. 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, the agency will then need to consider alternative regulatory approaches. Since the designation of critical habitat is a statutory requirement pursuant to the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

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

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based upon our draft economic analysis of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments received, this determination is subject to revision as part of the final rulemaking.

According to the Small Business Administration (SBA), small entities

include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *Berberis nevinii* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and thus will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this proposed critical habitat designation is made final, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our draft economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Berberis nevinii* and proposed designation of its critical habitat.

Impacts of conservation activities are not anticipated to affect small entities in the following categories: Fire management on Federal lands; invasive, nonnative plant species management on Federal lands; recreation management on Federal lands; and surveying, monitoring, and other activities on Federal lands. As described in Chapters 4 through 6 of the draft economic analysis, the cost associated with modifications to activities on Federal lands will be borne by the USFS and BLM. The Federal Government is not considered a small entity by the SBA. As described in Chapter 3 of the draft economic analysis, potential impacts related to management of Vail Lake will be borne entirely by the RCWD and account for the majority of the total anticipated upper-bound future impacts in areas proposed for exclusion from the final designation of critical habitat (up to \$429.1 million over the next 40 years in undiscounted dollars). The RCWD is not considered a small entity/governmental jurisdiction by the SBA because it services a population exceeding the criteria for a "small entity." Additionally, transportation projects that are reasonably foreseeable within the 20-year analysis period are not anticipated to impact areas proposed as critical habitat. Only impacts to land development activities (Chapter 2) are expected to be borne by small entities. Accordingly, the small business analysis (Appendix B of the economic analysis) focuses on the economic impacts of land development activities on private lands.

Seventy percent of the development-related impacts are expected to be borne by private landowners (\$2.3 million), with the remainder borne by local government (25 percent or \$810,000) and State and Federal government (5 percent or \$180,000). Three private landowners in Riverside County will be directly impacted by the proposed regulation, with one landowner owning the majority (approximately 85 percent or 291 ac (118 ha)) of the 341 ac (138 ha) of private (non-RCWD) lands proposed as critical habitat. Chapter 2 of the draft economic analysis concludes that some residential/commercial development is likely in or adjacent to proposed critical habitat on private lands near Vail Lake. Current zoning laws limit the type of development that may take place on these private lands to one single-family home per 10 ac (4 ha) or 20 ac (8 ha), depending on specific zoning. Also, RCWD's flood easement for Vail Lake precludes development from approximately 34 ac (14 ha) of private land within proposed critical

habitat adjacent to Vail Lake. Lastly, the topography (steepness) of much of this area makes it unlikely that the land will be used for dense development in the future. Still, the likelihood and eventual density of houses in or near proposed critical habitat, and whether such development will pose a threat to *Berberis nevinii* habitat is unknown.

The private land proposed as critical habitat for *Berberis nevinii* is located within the Criteria Area of the Western Riverside County MSHCP and is targeted, in whole or in part, for acquisition and inclusion in the MSHCP Conservation Area as Additional Reserve Lands. Based on the MSHCP, the economic analysis assumes 90 percent or approximately 277 ac (112 ha) of the privately-owned land within potential critical habitat and outside RCWD's flood easement (which is approximately 307 of 341 ac (or 124 of 138 ha) of private land) will be targeted for acquisition as Additional Reserve Lands, with compensation to the private landowners. The economic analysis considers the cost of land acquisition, reserve management (including fire, invasive species, and recreation management), biological monitoring, adaptive management, and program administration for preserving these 277 ac (112 ha) of private land with long-term conservation value for *B. nevinii* as the total economic impact of the proposed critical habitat designation as it relates to development. The total economic impact for these activities over the next 20 years is estimated to range from \$1.6 to \$4.4 million in undiscounted dollars, or \$1.2 to \$3.3 million per year and \$0.8 to \$2.3 million per year at the 3 percent and 7 percent discount rate, respectively.

Every small land subdivision and construction business in the MSHCP Plan Area is expected to be indirectly affected by conservation efforts for *Berberis nevinii* due to mitigation and density bonus fees that will be required for all new development. The economic analysis estimates that there are 3,146 small land subdivision and building construction businesses in Riverside County, but it is unknown how many of these are within the MSHCP Plan Area, which encompasses only the western part of the County. However, it is expected that these small entities would pass any additional costs associated with conservation measures to the consumer (i.e., the purchaser of the finished building), and thus we do not anticipate that this proposed regulation will result in a significant impact to a substantial number of small business entities. Please refer to our draft economic analysis of the proposed

critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether this proposed rule would result in a significant economic effect on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed designation of critical habitat for *Berberis nevinii* is considered a significant regulatory action under E.O. 12866 due to its potentially raising novel legal and policy issues. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared without the regulatory action under consideration. The draft economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the draft economic analysis, energy-related impacts associated with *B. nevinii* conservation activities within proposed critical habitat are not expected. As such, the proposed designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use, and a Statement of Energy Effects is not required.

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

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

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty

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

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

(b) We do not believe that this rule will significantly or uniquely affect small governments. As discussed in the draft economic analysis, anticipated future impacts in areas proposed for final designation as critical habitat will be borne by the Federal Government; in areas proposed for exclusion from the final designation, the majority of the

total anticipated upper-bound future impacts will be borne by the RCWD, with private landowners, local government, and Federal and State governments bearing the rest. The Federal government is not considered a small governmental jurisdiction or entity by the SBA, and neither is the RCWD because it services a population exceeding the criteria for a "small entity." Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing critical habitat for *Berberis nevini* in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for *B. nevini* does not pose significant takings implications.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see ADDRESSES).

Authors

The primary authors of this notice are the staff of the Nevada Fish and Wildlife Office and the Carlsbad Fish and Wildlife Office.

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 further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 72 FR 5552, February 6, 2007, 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. Critical habitat for *Berberis nevini* (Nevin’s barberry) in § 17.96(a), which was proposed to be added on February 6, 2007, at 72 FR 5552, is proposed to be amended by revising paragraphs (5)(ii), (5)(iv), and (5)(v), and by revising Map 1 in paragraph (5)(vii), as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering plants.

* * * * *
Family Berberidaceae: *Berberis nevini* (Nevin’s barberry)
* * * * *

(5) Unit 1. Agua Tibia/Vail Lake, Riverside County, California.
* * * * *

(ii) Subunit 1B for *Berberis nevini*, Agua Tibia Mountain Foothills Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 504200,

3702900; 504300, 3702900; 504300, 3702800; 504200, 3702800; thence returning to 504200, 3702900.

* * * * *

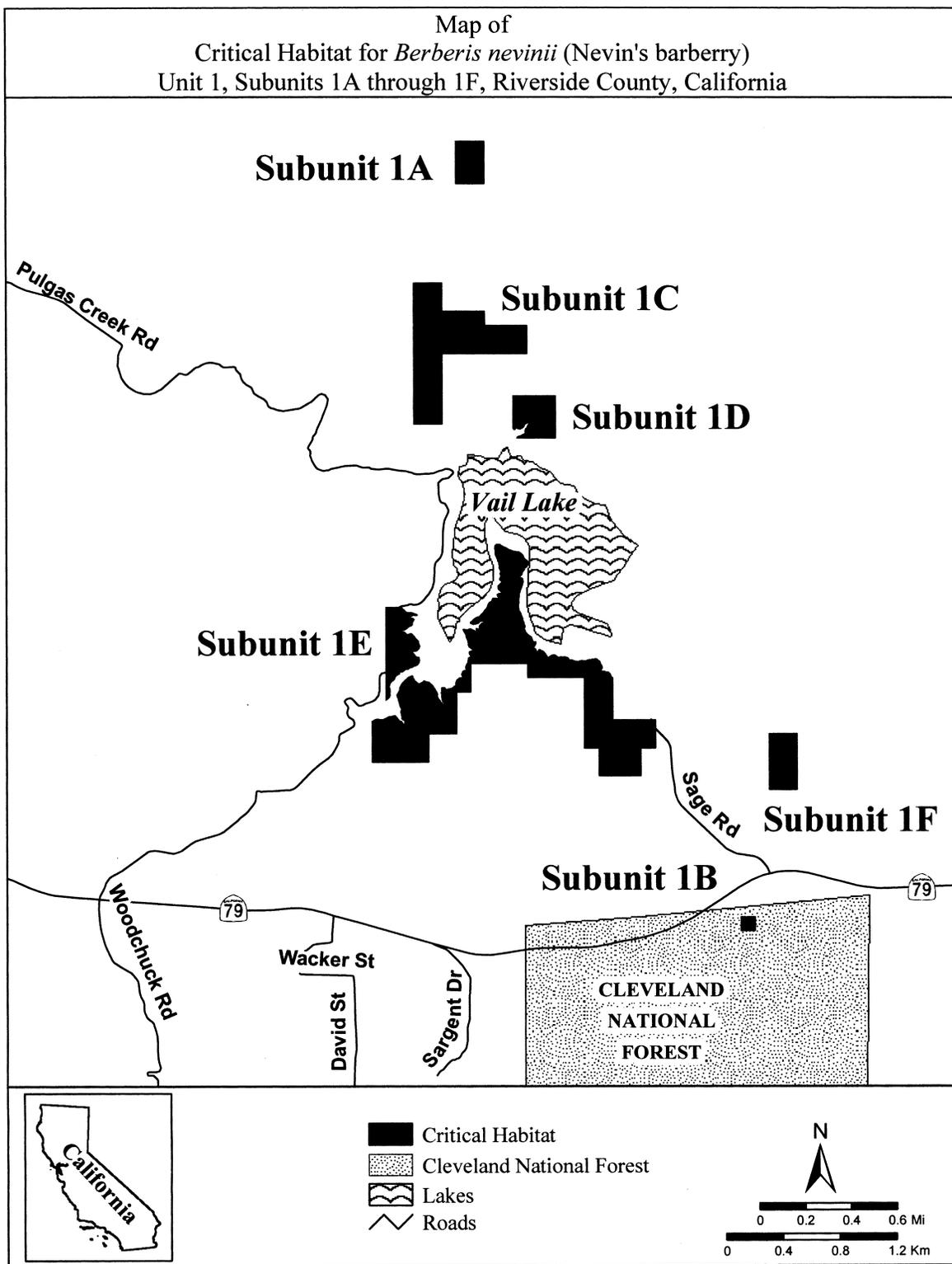
(iv) Subunit 1D for *Berberis nevini*, North of Vail Lake Subunit, Riverside County, California. From USGS 1:24,000 quadrangles Sage and Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 502600, 3706600; 502900, 3706600; 502900, 3706300; 502626, 3706300; thence follow the 1,461 foot Vail lake contour to 502600, 3706368; thence returning to 502600, 3706600.

(v) Subunit 1E for *Berberis nevini*, South of Vail Lake/Peninsula Subunit, Riverside County, California. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 503300, 3704300; 503600, 3704300; 503600, 3704100; 503500, 3704100; 503500, 3703900; 503200, 3703900; 3704100; 503100, 3704100; 503100, 3704600; 502700, 3704600; 502700, 3704700; 502300, 3704700; 502300, 3704500; 502200, 3704500; 502200, 3704200; 502000, 3704200; 502000, 3704000; 501600, 3704000; 501600, 3704290; thence follow the 1,461 foot Vail lake contour to 503300, 3704595; thence returning to 503300, 3704300. Continuing to lands bounded by the following UTM NAD27 coordinates (E, N): 501700, 3705100; 501812.94, 3705100; thence follow the 1,461 foot Vail lake contour to 501700, 370444.25; thence returning to 501700, 3705100.

* * * * *

(vii) Map of Subunits 1A through 1F (Map 1) follows:

BILLING CODE 4310–55–P



* * * * *

Dated: October 5, 2007.
David M. Verhey,
*Assistant Secretary for Fish and Wildlife and
 Parks.*
 [FR Doc. 07-5063 Filed 10-16-07; 8:45 am]
 BILLING CODE 4310-55-C