

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

[FWS-R8-ES-2008-0006; 92210-1117-0000 B4]

RIN 1018-AV23

**Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Quino Checkerspot Butterfly (*Euphydryas editha quino*)****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule; reopening of comment period, 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 our January 17, 2008, proposed revised designation of critical habitat for the Quino checkerspot butterfly under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA), a revision to proposed critical habitat Unit 2, and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revision of critical habitat (including the changes to proposed critical habitat Unit 2), the associated DEA, and the amended required determinations section. If you submitted comments previously, then you do not need to resubmit them because they are included in the public record for this rulemaking and we will fully consider them in preparation of our final determination.

**DATES:** We will accept comments received on or before January 20, 2009.**ADDRESSES:** You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV23; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the

“Public Comments” section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760/431-9440; facsimile 760/431-5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Public Comments**

We will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the Quino checkerspot butterfly published in the *Federal Register* on January 17, 2008 (73 FR 3328), as revised by this notice, the DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the subspecies from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

- The amount and distribution of Quino checkerspot butterfly habitat,
- Locations within the geographical area occupied at the time of listing that contain features essential to the conservation of the subspecies that we should include in the designation and why, and
- Locations not within the geographical area occupied at the time of listing that are essential to the conservation of the subspecies and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.

(4) Probable economic, national security, or other impacts of designating particular areas as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The potential exclusion of non-Federal lands covered by the City of Chula Vista Subarea Plan (under the San

Diego County Multiple Species Conservation Program) from final revised critical habitat, and whether such exclusion is appropriate and why.

(6) The potential exclusion of non-Federal lands covered by the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) from final revised critical habitat, and whether such exclusion is appropriate and why. (Please note that although Tribal lands and Metropolitan Water District of Southern California (MWDSC) lands are located within the geographic boundary/area covered by the MSHCP, they are not a part of the MSHCP).

(7) Inclusion of all proposed MWDSC lands in the final critical habitat designation, and whether inclusion is appropriate and why. Through a mapping error we included MWDSC lands in Figure 2 of the proposed revised rule (73 FR 3328, January 17, 2008) that depicted areas considered for exclusion from critical habitat. Our intent was not to group these non-Federal lands with other lands considered for exclusion. We did not specify in the proposed revised rule that MWDSC would not be excluded from the final critical habitat designation. As noted in question 6 above, MWDSC is not a signatory to the MSHCP even though their non-Federal lands occur within the MSHCP plan area.

(8) Whether we should include or exclude Tribal lands of the Cahuilla Band of Mission Indians (preferred name “Cahuilla Band of Indians”) and Ramona Band of Cahuilla Mission Indians of California (preferred name “Ramona Band of Cahuilla Indians”) in Riverside County, and Campo Band of Diegueno Mission Indians (preferred name “Campo Band of Kumeyaay Indians”) in San Diego County from final revised critical habitat and why. Economic impacts to the Cahuilla Band of Indians and the Campo Band of Kumeyaay Indians are analyzed in this DEA. During the first public comment period for proposed revisions to critical habitat that opened January 17, 2008, and closed March 17, 2008, we received a letter from the Ramona Band of Cahuilla Indians informing us that land proposed for critical habitat included tribally-owned fee lands of the Ramona Band of Cahuilla Indians. These tribally owned fee lands were classified as privately owned in Table 2 of the proposed revisions to critical habitat, therefore economic impacts to the Ramona Band of Cahuilla Indians are not analyzed in the DEA. However,

economic impacts to the Ramona Band of Cahuilla Indians will be analyzed in the final EA, and will be taken into consideration for possible exclusion from the final revised critical habitat.

(9) Whether there are areas we previously designated, but did not include in our proposed revision to critical habitat, that should be designated as critical habitat.

(10) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the DEA were adopted largely as a result of the subspecies' listing.

(11) Information on whether the DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we may have overlooked.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate revised critical habitat.

(13) Information on whether the DEA correctly assesses the effect on regional costs associated with any land use controls that may result from the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Information on whether the DEA identifies all costs that could result from the proposed revised designation.

(16) Information on any quantifiable economic benefits of the revised designation.

(17) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(18) Economic data on the incremental costs of designating a particular area as revised critical habitat.

(19) Whether we could improve or modify our approach to designating critical habitat to provide for greater public participation and understanding, or assist us in accommodating public concerns and comments.

(20) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed designation and, in particular, any impacts on electricity production, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information on the proposed revised rule (73 FR 3328) during the initial comment period from January 17, 2008, to March 17, 2008, please do not resubmit them. These comments are

included in the public record for this rulemaking and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning the proposed revised rule or DEA by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed revised rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed revision of critical habitat and the DEA on the Internet at <http://www.regulations.gov>, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

### Background

For more information on previous Federal actions concerning the Quino checkerspot butterfly, refer to the proposed revised designation of critical habitat published in the **Federal Register** on January 17, 2008 (73 FR 3328). In March 2005, the Homebuilders Association of Northern California, *et al.*, filed suit against us challenging the merits of the final critical habitat designations for several species, including the Quino checkerspot butterfly. In March 2006, a settlement

was reached that required us to re-evaluate five final critical habitat designations, including critical habitat designated for the Quino checkerspot butterfly. The settlement (as modified by subsequent court-approved amendments) stipulated that any proposed revisions to the Quino checkerspot butterfly critical habitat designation would be submitted for publication to the **Federal Register** on or before January 8, 2008, and the final critical habitat determination would be submitted on or before June 6, 2009.

Section 3 of the Act defines critical habitat 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 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, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. In making a decision to exclude areas, we consider the economic impact, impact on national security, or any other relevant impact of the designation.

### 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 our January 17, 2008 (73 FR 3328), proposed revised rule to designate critical habitat for the Quino checkerspot butterfly.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed

revised critical habitat designation for the Quino checkerspot butterfly. Additionally, the economic analysis looks retrospectively at costs incurred since the January 16, 1997 (62 FR 2313), listing of the Quino checkerspot butterfly as endangered. The DEA quantifies the economic impacts of all potential conservation efforts for the Quino checkerspot butterfly; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat.

The current DEA estimates the foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs coextensive with listing. The DEA describes economic impacts of Quino checkerspot butterfly conservation efforts associated with the following categories of activity: (1) Residential development; (2) Tribal activities; (3) habitat management; and (4) non-residential development.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for the Quino checkerspot butterfly. Conservation efforts related to development activities constitute the majority of total baseline costs (approximately 97 percent) in areas of proposed revised critical

habitat. Impacts to Tribal activities and habitat management compose the remaining 3 percent of impacts. Total future baseline impacts are estimated to be \$967 to \$973 million (\$52.08 to \$52.48 million annualized) in present value terms using a 3 percent discount rate, and \$686 to \$691 million (\$55.34 to \$55.74 million annualized) in present value terms using a 7 percent discount rate over the next 23 years (2008 to 2030) in areas proposed as revised critical habitat.

Almost all incremental impacts attributed to the proposed revised critical habitat designation are expected to be related to development (approximately 61 to 86 percent) and Tribal activities (approximately 38 to 14 percent). The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 23 years (2008 to 2030) to be \$18.4 million to \$70.7 million (\$1.09 million to \$4.17 million annualized) in present value terms using a 3 percent discount rate, and \$13.1 million to \$50.4 million (\$1.09 to \$4.18 million annualized) in present value terms using a 7 percent discount rate.

The DEA 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 (e.g., lost economic opportunities associated with restrictions on land use). The DEA 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 DEA 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. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed revised critical habitat rule and our amended required determinations. The final revised rule may differ from the proposed revised rule based on new information we receive during the public comment periods. 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 the exclusion will not result in the extinction of the subspecies.

#### *Additional Areas Currently Considered for Exclusion Under Section 4(b)(2) of the Act*

##### Tribal Lands

In the proposed revised critical habitat designation published on January 17, 2008 (73 FR 3328), we identified Tribal lands in Units 6 and 9 as meeting the definition of critical habitat for the Quino checkerspot butterfly. At that time, we indicated the inclusion of Tribal lands in these units would serve to ensure the persistence of Core Occurrence Complexes in those units and would contribute to the conservation and recovery of the subspecies overall. However, we also indicated that we recognized the importance of government-to-government relationships with Tribes, and we solicited public comment on the appropriateness of the inclusion or the exclusion of those lands in the final designation of critical habitat. With the availability of the DEA, we are now considering exclusion of approximately 1,203 acres (ac) (487 hectares (ha)) of Tribal lands of the Cahuilla Band of Indians within proposed Unit 6, and 3,156 ac (1277 ha) of Tribal lands of the Campo Band of Kumeyaay Indians within proposed Unit 9. As discussed in section 6 of the DEA, socioeconomic data demonstrate a high impact to Tribal economies and economic vulnerability of the Tribes. Using a 3 percent discount rate, approximately \$7.07 to \$9.81 million in incremental impacts are anticipated to be incurred by the Campo Band of Kumeyaay Indians over the next 23 years (2008 to 2030); using a 7 percent discount rate, those impacts are approximately \$5.04 to \$6.99 million. The cost of conservation efforts for the butterfly and its habitat on the Cahuilla Band of Indians' Tribal lands are not estimated because their development plans do not yet specify implementation programs and dates for specific projects, thus no project modifications can be forecast. There will likely be costs, but these cannot be forecast at this time. Although projections provided by the Southern California Association of Governments Western Riverside Council of Governments for purposes of the DEA estimated no residential development impacts to the Cahuilla Band of Indians, Tribal members indicated to the Service at meetings and during telephone conversations that they have economic

plans similar to those of the Campo Band of Kumeyaay Indians, and the DEA indicated similar economic vulnerability for the Cahuilla Band of Indians as well.

#### Department of Defense Lands

Based on comments submitted during the initial public comment period from January 17, 2008, to March 17, 2008, we are also considering exclusion of the San Diego Air Force Space Surveillance Station (Surveillance Station; 109 ac (44 ha) within the 36,726-ac (14,862-ha) Unit 8) and the Navy-owned La Posta Mountain Warfare Training Facility (La Posta Facility; 1,083 ac (438 ha) within the 8,393-ac (3,397-ha) Unit 9) from critical habitat. Under section 4(a)(3)(B)(i) of the Act, the Secretary is prohibited 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 Integrated Natural Resources Management Plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. However, the Surveillance Station and the La Posta Facility do not currently have INRMPs that meet these requirements. Therefore, we are considering excluding these areas under section 4(b)(2) of the Act for reasons of national security, as explained below.

The Surveillance Station is a U.S. Air Force (Air Force) installation used for space surveillance. The Air Force's mission of the Surveillance Station is to detect, track, and identify man-made objects in near-earth and deep space orbits as part of a series of receiving stations equipped with linear antenna arrays. Activities on the grounds of the Surveillance Station consist of occasional equipment inspection, maintenance, and mowing of nonnative plants to reduce the risk of fire damage. The need for additional consultations and possible conservation restrictions would limit the amount of natural infrastructure available for ongoing and future mission execution and training needed for national security. Short-notice, mission-critical activities not previously analyzed may be delayed in order to conduct section 7 consultation.

The Service already consulted with the Air Force regarding all current and foreseen activities and issued a biological opinion concluding that the Air Force is not likely to destroy or adversely modify the existing critical habitat, assuming identified conservation measures are

implemented. An Integrated Natural Resources Management Plan (INRMP) is currently being prepared in coordination with the Service and the California Department of Fish and Game that will ensure conservation of the subspecies. The Air Force must implement the INRMP in accordance with the Sikes Act (16 U.S.C 670a), and must comply with the Sikes Act to provide for the conservation and rehabilitation of natural resources on military installations. Because the INRMP is not yet final and approved by the Secretary, the statutory prohibition on designation of these lands as critical habitat is inapplicable. However, the lands may be excluded from designation as critical habitat if the Secretary determines that the benefits of exclusion, including the benefits with respect to national security, outweigh the benefits of such designation.

The Navy-owned La Posta Facility provides training for Navy Special Operations Forces (SOF) to deploy to the U.S. Pacific and Central Commands in support of missions in the global war on terrorism. The La Posta Facility contains areas for critical, mission-essential training for these SOF troops prior to deployment into hostile areas of the world. With the closure of several contract sites previously conducting U.S. Navy Sea, Air and Land Forces (SEAL) Unit Level Training, the La Posta Facility is now the sole training site for Naval Special Warfare (NSW) commands and military support functions in the San Diego region for developing small, well-trained, highly mobile, and independent operational units. The La Posta Facility is also the only semi-remote, NSW-controlled complex supporting Assault and Tactical Weapons Training, and the only cold weather/mountain warfare site that provides training in unconventional warfare and special tactical intelligence in the San Diego region.

Delays in construction schedules due to additional environmental regulations would disrupt mission-critical training and the ability to acquire and perform special warfare skills. The SEAL training schedule is extremely concentrated and does not allow for any shifting of training blocks. By Department of Defense training policy, SEALs require a remote range built specifically for the skill set required, close to home, and without distractions. Attempts to duplicate this training at sites outside the San Diego area, either by contract forces or other military owned and operated sites, would not provide the qualified personnel needed

for the NSW commitment to the global war on terrorism.

Aside from these additional areas now being considered for exclusion from the final revised critical habitat designation, the remainder of the exclusion discussion presented in the proposed rule remains unchanged.

#### Changes to Proposed Revised Critical Habitat

In this document we are proposing revisions to the area of proposed revised critical habitat in Unit 2 as described in the January 17, 2008, proposed rule (73 FR 3328). This revision involves removal of approximately 27 acres of proposed revised critical habitat from two areas along the shoreline of Lake Skinner in Riverside County. Based on new GIS database information, we determined these two areas do not contain the features essential to the conservation of the Quino checkerspot butterfly because they are primarily wetlands. Removal of these areas from proposed revised critical habitat does not alter the textual description of Unit 2 as described in the January 17, 2008, proposed rule (73 FR 3328). A revised legal description and revised map for proposed critical habitat Unit 2 are included with this notice.

#### Required Determinations—Amended

In our proposed rule dated January 17, 2008 (73 FR 3328), 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 became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revised our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

#### *Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant and has not reviewed this proposed rule under

Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

*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)), 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 on our DEA of the proposed revised 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 we receive, we may revise this determination as part of a 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 revised designation of critical habitat for the Quino checkerspot butterfly would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimate the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the Quino checkerspot butterfly. Federal agencies also must consult with us if their activities may affect critical habitat.

In the DEA of the proposed revision to critical habitat, we evaluate the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the Quino checkerspot butterfly. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in sections 2 through 7 of the DEA, and evaluates the potential for economic impacts related to activity categories including residential development, Tribal activities, habitat management, and non-residential development. The DEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be

associated only with residential development. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the largest impacts of the proposed rule on small businesses would result from section 7 consultations with the Service on development projects not subject to an existing or proposed habitat conservation plan. In the 23-year time frame for the analysis, 14 developers may experience significant impacts. Furthermore, approximately 6 developers per year will experience impacts that likely represent less than 1 percent of the value of a new home. In the high estimate scenario, 5 projects in Unit 9 and 9 projects in Unit 10 are likely to require consultation with the Service as a result of the proposed rule. Conservatively assuming that each project is undertaken by a separate entity, as many as 14 developers are likely to be affected over the 23-year time frame of the analysis. At the high-end, the one-time costs resulting from the consultation process, including administrative time spent by the businesses, compensation costs, and the value of time delays, total approximately \$16.1 million for the projects in Unit 9 and \$26.8 million for the projects in Unit 10. Additionally, over the 23-year time frame, a high-end estimate of 131 projects (approximately 6 projects per year) will experience additional administrative costs as a result of the consultation. These costs result from the need to address adverse modification in a consultation that would occur even in the absence of critical habitat. These additional administrative costs are estimated to be \$1,000 per project. No information regarding the probability that these businesses are small entities is available. However, assuming they are small businesses, the number of small entities significantly affected is not likely to be substantial.

In summary, we considered whether the proposed rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revision to critical habitat would not 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 revision to critical habitat for the Quino checkerspot butterfly is not considered a significant regulatory action under E.O. 12866. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A, the DEA finds that none of these criteria are relevant to this analysis. The DEA identified Calpine Corporation, San Diego Gas and Electric, and Southern California Edison as entities involved in the production of energy; however, designation of critical habitat is not expected to lead to any adverse outcomes (such as a reduction in electricity production or an increase in the cost of energy production or distribution), 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. "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."

Critical habitat designation 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. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that 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 would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA concludes incremental impacts may occur due to project modifications that may need to be made for development and Tribal activities; however, these are not expected to affect small governments. Incremental impacts stemming from various species conservation and development control are expected to be borne by the Campo Band of Kumeyaay Indians, the Ramona Band of Cahuilla Indians, and the Cahuilla Band of Indians, which are not considered small governments. Consequently, we do not believe that the revised 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 revised critical habitat for the

Quino checkerspot butterfly in a takings implications assessment. Our takings implications assessment concludes that the proposed revision to critical habitat for the Quino checkerspot butterfly does not pose significant takings implications.

**References Cited**

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at <http://www.regulations.gov> or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

**Authors**

The primary authors of this rulemaking are the staff members of 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 73 FR 3328, January 17, 2008, as follows:

**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 the Quino checkerspot butterfly (*Euphydryas editha quino*) in § 17.95(i), which was proposed to be revised on January 17, 2008, 73 FR 3328, is proposed to be amended by revising paragraph 7(i), and map of Units 1 and 2 (Warm Springs Unit and Skinner/Johnson Unit).

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*

(i) *Insects.*

\* \* \* \* \*

Quino Checkerspot Butterfly  
(*Euphydryas editha quino*)

\* \* \* \* \*

(7) Unit 2, for Quino checkerspot butterfly, Skinner/Johnson Unit, Riverside County, California. From USGS 1:24,000 quadrangles Murrieta, Bachelor Mountain, Winchester, Sage, and Hemet.

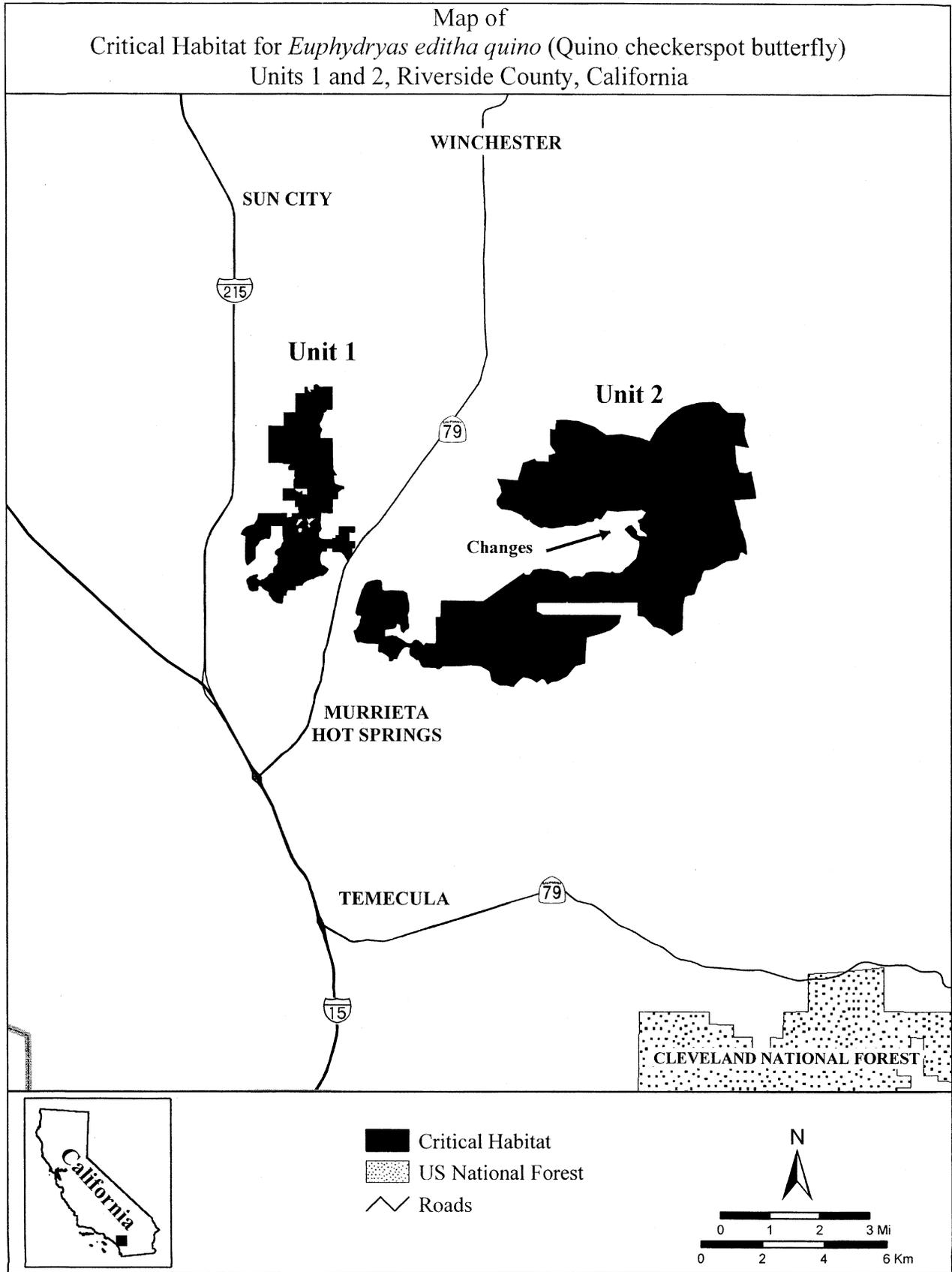
(i) Unit 2, for Quino checkerspot butterfly, Skinner/Johnson Unit, Riverside County, California. From USGS 1:24,000 quadrangles Murrieta,

Bachelor Mountain, Winchester, Sage, and Hemet. Land bounded by the following Universal Transverse Mercator (UTM) North American Datum of 1927 (NAD27) coordinates (E, N):

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BILLING CODE 4310-55-P



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Dated: December 8, 2008.

**Lyle Laverly,**

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8-29671 Filed 12-18-08; 8:45 am]

BILLING CODE 4310-55-C

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 0808041027-81574-01]

RIN 0648-AX08

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Space Vehicle and Test Flight Activities from Vandenberg Air Force Base (VAFB), California**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS has received a request from the U.S. Air Force (USAF) for authorization for the take of marine mammals, by harassment, incidental to launching space launch vehicles, intercontinental ballistic and small missiles, and aircraft and helicopter operations at VAFB. By this document, NMFS is proposing regulations to govern that take. In order to issue a Letter of Authorization (LOA) and issue final regulations governing the take, NMFS must determine that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses. NMFS must also prescribe the means of effecting the least practicable adverse impact on such species or stock and their habitats.

**DATES:** Comments and information must be received no later than January 5, 2009.

**ADDRESSES:** You may submit comments, identified by 0648-AX08, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources,

National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225.

**Instructions:** All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the application containing a list of references used in this document and the Draft Environmental Assessment (EA) may be obtained by writing to the above address, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT**, or on the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. Documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at the above address. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713-2289, ext. 156.

**SUPPLEMENTARY INFORMATION:****Background**

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA); 16 U.S.C. 1361 *et seq.* direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and that the permissible methods of taking and requirements pertaining to the

mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as:

an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108-136) removed the “small numbers” and “specified geographical region” limitations and amended the definition of “harassment” as it applies to a “military readiness activity” to read as follows (Section 3(18)(B) of the MMPA):

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

**Summary of Request**

On March 21, 2008, NMFS received an application from the USAF requesting authorization for the take of four species of marine mammals incidental to space vehicle and test flight activities from VAFB, which would impact pinnipeds on VAFB and the Northern Channel Islands (NCI). NMFS proposes regulations to govern these activities, to be effective from February 7, 2009, through February 6, 2014. These regulations, if implemented, would allow NMFS to issue annual LOAs to the USAF. The current regulations and LOA expire on February 6, 2009. These training activities are classified as military readiness activities. Marine mammals may be exposed to continuous noise due mostly to combustion effects of aircraft and launch vehicles and impulsive noise due to sonic boom effects. The USAF requests authorization to take four pinniped species by Level B Harassment.

**Description of the Specified Activity**

VAFB (see Figure 1 in the USAF application) is headquarters to the 30th Space Wing (SW), the Air Force Space Command unit that operates VAFB and the Western Range. VAFB operates as a missile test base and aerospace center, supporting west coast space launch activities for the USAF, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. VAFB is the main west coast launch facility for placing commercial, government, and military