

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AT92

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Monardella linoides* ssp. *viminea* (Willow Monardella)**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for *Monardella linoides* ssp. *viminea* (willow monardella) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 73 acres (ac) (30 hectares (ha)) fall within the boundaries of the critical habitat, all in San Diego County, California.

DATES: This rule becomes effective on December 8, 2006.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours, at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011 (telephone 760-431-9440). The final rule, economic analysis, and map of critical habitat will also be available via the Internet at <http://www.fws.gov/carlsbad/>.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (telephone 760-431-9440; facsimile 760-431-9624).

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

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under section 4(b)(2) of the Act, there are significant limitations on the regulatory effect of designation under section 7(a)(2) of the Act. In brief, (1) designation provides additional protection to habitat only where there is a Federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat

would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, only 475 species, or 36 percent of the 1,310 listed species in the United States under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,310 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, the Section 10 incidental take permit process, and cooperative, nonregulatory efforts with private landowners. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

In considering exclusions of areas originally proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force v. United States Fish and Wildlife Service (Gifford Pinchot)*. In that case, the Ninth Circuit invalidated the Service's regulation defining "destruction or adverse modification of critical habitat". In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas in this final designation. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designation of critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven

by litigation and courts rather than biology, and made at a time and under a timeframe that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Procedural and Resource Difficulties in Designating Critical Habitat

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

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

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs

of compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

Background

In this document, it is our intent to discuss only those topics directly relevant to the development and designation of critical habitat or relevant information obtained since the final listing. For more information on the biology and ecology of *Monardella linoides* spp. *viminea*, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54938), and the proposed critical habitat rule published in the **Federal Register** on November 9, 2005 (70 FR 67956).

Previous Federal Actions

Previous Federal actions for *Monardella linoides* ssp. *viminea* can be found in the proposed critical habitat rule published on November 9, 2005 (70 FR 67956). On September 26, 2001, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the California Native Plant Society (CNPS) alleging, in part, that the Service improperly determined that designation of critical habitat for *Monardella linoides* ssp. *viminea* was not prudent (*CNPS v. Norton*, No. 01–CV–1742IEG (JAH)). The Service entered into a settlement agreement with the plaintiffs, under which we agreed to reconsider our “not prudent” finding, and, if prudent, publish a proposed critical habitat rule for *M. l.* ssp. *viminea* in the **Federal Register** on or before October 30, 2005, and publish a final critical habitat rule on or before October 30, 2006. The proposed rule was published November 9, 2005 (70 FR 67956). This final rule complies with the June 2, 2003, settlement agreement.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Monardella linoides* ssp. *viminea* during two comment periods, one associated with the publication of the proposed critical habitat rule on November 9, 2005 (70 FR 67956), and the second associated with the publication of a notice of availability for the draft economic analysis (DEA) of the proposed critical habitat designation, published in the **Federal Register** on June 1, 2006 (71 FR 31137). We contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested

parties and invited them to comment on the proposed rule and the DEA.

During the first comment period that opened on November 9, 2005, and closed on January 9, 2006, we received six comments directly addressing the proposed critical habitat designation, four from peer reviewers and two from organizations or individuals. We did not receive any requests for a public hearing. During the comment period that opened on June 1, 2006, and closed on July 3, 2006, we received one additional comment addressing the proposed critical habitat designation and/or the DEA.

Overall, two commenters supported the designation of critical habitat for *Monardella linoides* spp. *viminea* and none opposed the designation. Five letters included comments or information, but did not express support or opposition to the proposed critical habitat designation. Comments received were grouped into general issue categories relating to the proposed critical habitat designation and the DEA and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from six knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from four peer reviewers. The peer reviewers generally disagreed with our decision not to treat the southern populations of the species as a separate subspecies, our decision to exempt areas from critical habitat under section 4(a)(3) of the Act, and our proposal to exclude areas from critical habitat under section 4(b)(2) of the Act. Additionally, peer reviewers provided information, clarifications, and suggestions to improve the final critical habitat rule, particularly the primary constituent elements (PCEs). We address peer reviewer comments in the following summary and incorporated them into the final rule as appropriate.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the *Monardella linoides* spp. *viminea*, and we address them in the following summary.

Peer Reviewer Comments

(1) *Comment:* Three peer reviewers commented on the taxonomic

identification of *Monardella linoides* spp. *viminea*. These comments emphasized that *M. l.* spp. *viminea* should be split into two species with the southern population designated as a new species, *M. stoneana*, based on Elvin and Sanders (2003).

Our Response: We are aware of the taxonomic change and split proposed by Elvin and Sanders (2003). The Service evaluated this information and concluded that, although the authors may be correct in their assessment of these populations, they did not provide adequate supportive evidence in their paper (Bartel and Wallace 2004). We have concluded that, until a more comprehensive taxonomic paper is published that examines all of the relevant taxa or the genus *Monardella* at a broader scale, we will continue to use the taxonomic identification of *Monardella linoides* spp. *viminea* as identified in the final listing rule.

(2) *Comment:* Three peer reviewers recommended that the Service analyze all canyons occupied by the species for inclusion as critical habitat, including the upper watershed portions of Unit 1 (Sycamore Canyon), Unit 2 (Sycamore, West Sycamore, San Clemente Canyon, Rose, Elanus, and Spring Canyons), and Unit 4 (San Clemente Canyon), regardless of Service policy on exclusions and exemptions.

Our Response: Section 4 of the Act requires that we designate critical habitat based on the best scientific or commercial information available. Therefore, all habitat known to be occupied and potentially occupied by the subspecies was analyzed to determine which areas may contain the features that are essential to the conservation of *Monardella linoides* spp. *viminea*. Habitat occupied at the time of listing may be included in critical habitat only if the essential features required by the species may require special management or protection. We do not include areas where existing management is sufficient to conserve the species.

Section 4(b)(2) of the Act directs us to consider the economic impact, national security impact, and any other relevant impacts of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such an area as critical habitat will result in the extinction of the species. As discussed in the proposed rule (70 FR 67956), we have determined that the benefits of excluding non-Federal lands covered by the San Diego Multiple

Species Conservation Plan (MSCP) outweigh the benefits of including non-Federal lands as critical habitat. We have included a more detailed analysis of the benefits of this habitat conservation plan (HCP) in this final rule under the Conservation Partnerships on Non-Federal Lands section below.

Additionally, section 4(a)(3) of the Act prohibits the Service from designating as critical habitat any lands or other geographic 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 of the Interior determines, in writing, that such plan provides a benefit to the species for which critical habitat is proposed for designation. As discussed in the proposed rule, the lands at Marine Corps Air Station (MCAS) Miramar are covered by an approved INRMP that identifies sensitive natural resources, including *Monardella linoides* spp. *viminea*, and imposes conservation requirements and monitoring and management actions to protect the species. Therefore, the INRMP provides a benefit to *M. l.* spp. *viminea*. For more information, see the Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) section below for a detailed discussion.

(3) *Comment:* Three peer reviewers commented on the lack of primary constituent elements (PCEs) applying to Unit 7 (Marron Valley), Unit 8 (Otay Lakes), and Unit 9 (Cedar Canyon).

Our Response: We appreciate the peer reviewers' comments regarding the ecology of Units 7, 8, and 9 (Marron Valley, Otay Lakes, and Cedar Canyon, respectively), and have amended the information in the PCEs as they relate to *Monardella linoides* spp. *viminea*. Specifically, we added boulders, stones and cracks of bedrock in rocky gorges to describe the growing substrate needed for growth, reproduction, and dispersal in the southern range of *M. l.* spp. *viminea*. For more information see the Primary Constituent Elements section below.

(4) *Comment:* One peer reviewer recommended the addition of "unaltered ephemeral wash ecosystem with no development" to the PCEs.

Our Response: PCE 2 includes ephemeral drainages as a habitat requirement for the subspecies. The importance of a natural hydrologic regime needed to maintain washes, sandbars, and rocky gorges where *Monardella linoides* spp. *viminea* grows

was also discussed in the Water and Physiological Requirements section of the proposed critical habitat rule (70 FR 67956) and in the final listing rule (63 FR 54938).

(5) *Comment:* One peer reviewer recommended the addition of "continuous ephemeral wash habitat between plants in the upper-most and lower-most reaches" to the list of PCEs.

Our Response: The ephemeral wash habitat between known occurrences is important for the conservation of *Monardella linoides* spp. *viminea* and was one of the criteria used to identify proposed critical habitat for this species. The importance of this area was also discussed in the Primary Constituent Elements section of the proposed rule. We appreciate the comment and have clarified this point in this final rule. For more information, see the Criteria Used To Identify Critical Habitat section below.

(6) *Comment:* One peer reviewer recommended the addition of "pollinators and sufficient habitat for pollinators to survive" to the list of PCEs.

Our Response: As stated in the proposed critical habitat rule, we are unaware of any studies documenting specific pollinators of *Monardella linoides* spp. *viminea*. We did not determine the area needed to maintain pollinators to be essential in the proposed or this final critical habitat designation.

(7) *Comment:* One peer reviewer commented that part of Unit 2 (San Clemente Canyon part of the Sycamore, West Sycamore, San Clemente Canyon, Rose, Elanus, and Spring Canyons), below I-15, might not be essential habitat because the canyon is now a perennial stream due to alterations in the hydrological system.

Our Response: According to recent survey information, the stream flowing through this canyon still functions as an ephemeral stream, although the ground water may be higher in this area than other locations along the stream. Occurrences in this part of Unit 2 were present at the last survey in 2002 (Kassebaum, 2006, p. 3).

(8) *Comment:* One peer reviewer recommended that the Service renegotiate with the plaintiffs to produce a new proposed designation of critical habitat that splits *Monardella linoides* spp. *viminea* into two species and have peer review occur earlier in the proposal stage.

Our Response: We believe we used the best available information in the development of the proposed critical habitat rule. With the exception of comments received regarding the

taxonomic identification of the southern population of *Monardella linoides* spp. *viminea* (see our response to comment #1), we did not receive information during the comment periods to suggest that the information used in the development of the proposal was flawed. Since the Service continues to recognize the taxonomic identification of *M. l.* spp. *viminea* as presented in the final listing rule, the areas we determined to be essential to the conservation of the subspecies would have been the same as those outlined in the proposed critical habitat rule, regardless of the taxonomic issue.

(9) *Comment:* One peer reviewer commented that the Service should recheck data for Elanus Canyon, because the INRMP indicates that the subspecies does not occur in this canyon.

Our Response: We received no information to refute the INRMP. Comments received in response to publication of the proposed critical habitat rule from MCAS Miramar (Pharris 2006, p. 1) indicate that the information in their INRMP regarding occupied habitat on their land is up-to-date and correct, including information that the species occurs in Elanus Canyon.

(10) *Comment:* One peer reviewer provided additional information on the benefits of the MCAS Miramar's INRMP. Besides *Monardella linoides* spp. *viminea* being managed under a level II conservation effort, MCAS Miramar has developed a long-term monitoring plan including monitoring and a habitat enhancement project to be initiated in 2006.

Our Response: We appreciate the additional information regarding MCAS Miramar's ongoing management and monitoring actions for the subspecies and have included the new information in this final rule. For more information see the Relationship of Military Lands to Critical Habitat—Application of Section 4(a)(3) section below.

(11) *Comment:* One peer reviewer commented that the source reference for survey data on lands owned by the City of San Diego and under private ownership outlined in Table 1 of the proposed rule was incorrectly referenced to GIS data from MCAS Miramar.

Our Response: We appreciate the correction and have provided the corrected citations. Private lands in Sycamore Canyon (pre-2000), City of San Diego lands in the West Sycamore Canyon (pre-2000), and State lands in Otay Lakes (2000) had incorrect references to the GIS layer provided by MCAS (no date). The correct references are CNDDB (2005) for the private lands

in Sycamore Canyon (pre-2000), and GIS layer from the Service (2000) for the City of San Diego lands in the West Sycamore Canyon (pre-2000) and State lands in Otay Lakes (2000).

(12) *Comment:* One peer reviewer recommended that the Service review current California Department of Fish and Game Natural Diversity Database (CNDDB) and herbarium specimens at Rancho Santa Ana Botanic Garden, University of California (UC)-Riverside, UC-Irvine, and the San Diego Natural History Museum to identify any additional occurrences before finalizing critical habitat boundaries.

Our Response: We reviewed the most current CNDDB records (2006) and herbarium specimens from the four organizations listed above and found four new or expanded records for this species that were submitted to CNDDB after the publication of the proposed rule (70 FR 67956). These records were recorded for *Monardella stoneana* (occurrence numbers 1, 2, 7, and 9), which we consider as *Monardella linoides* spp. *viminea* (see response to comment #1). Each of the four new occurrences are within areas identified as habitat essential for the conservation of *M. l. spp. viminea* in the proposed rule. Therefore, this new information does not change the final critical habitat designation.

(13) *Comment:* One peer reviewer commented that the final rule should clearly state that the consequence of the *Gifford Pinchot* decision reflects the Director of the Service's guidance and that this guidance should be spelled out clearly.

Our Response: The Service has provided clarification of the consequence of the *Gifford Pinchot* decision in this final rule. For more information, see Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to *Monardella linoides* spp. *viminea* and Its Critical Habitat section below.

(14) *Comment:* One peer reviewer recommended deleting paragraphs that describe section 3(5)(A) of the Act since that section is not applicable to the rule.

Our Response: We have not included the paragraphs describing section 3(5)(A) of the Act in this final rule because no habitat was determined not to meet the definition of critical habitat under section 3(5)(A) of the Act.

(15) *Comment:* One peer reviewer recommended that the explanation of the new Section 4(a)(3)(b) should quote the statute instead of paraphrasing, and should explain what constitutes a "benefit" under the law or Service guidelines.

Our Response: In this final rule, we quote the statute and provide clarification of what constitutes a benefit under section 4(a)(3)(b) (see section titled Relationship of Military Lands to Critical Habitat—Application of Section 4(a)(3)). As stated below, MCAS Miramar's INRMP will benefit the species by providing species management under a level II conservation effort that includes avoiding or minimizing the effect of planning action on endangered species and wetlands. In addition to the station-wide population census, MCAS Miramar has a long-term monitoring plan in place, and has planned a habitat enhancement project to be implemented in 2006.

(16) *Comment:* One peer reviewer commented that the Service has not made a clear statement about the determination of habitat being exempted on MCAS Miramar. The Service has shown a benefit, because the core of the northern population is located on the base, but the Service should show that *Monardella linoides* spp. *viminea* is adequately protected.

Our Response: We believe the level II conservation effort adequately protects the subspecies. Additionally, the MCAS Miramar conducts a station-wide population census under a long-term monitoring plan and has initiated a habitat enhancement project that will benefit the species. Refer to section entitled Relationship of Military Lands to Critical Habitat—Application of Section 4(a)(3) for more information on this exemption.

(17) *Comment:* One peer reviewer recommended adding a summary table that shows acres of occupied habitat broken down by acres protected, planned for protection, and acres not targeted for protection.

Our Response: A summary table outlining this information is provided in Table 1 of the draft economic analysis (DEA) of the proposed critical habitat designation for willowy monardella (CRA International 2006). In this final rule, we have provided acreages for occupied areas exempted from proposed critical habitat and excluded from final critical habitat based on benefits provided by MCAS Miramar's INRMP, the San Diego County MSCP, and the Bureau of Land Management's (BLM) Otay Mountain wilderness designation. For more information, see Relationship of Military Lands to Critical Habitat—Application of Section 4(a)(3) section below for a detailed discussion.

(18) *Comment:* One peer reviewer commented that our conclusion that "any management plan will almost always provide more benefit than the

critical habitat designation" is not reasonable.

Our Response: As stated in the Supplementary Information section of the proposed critical habitat rule, section 7(a)(2) of the Act limits adverse effects to the species either through jeopardy or destruction or adverse modification of its habitat where there is a Federal nexus. It does not affect purely State or private actions on State or private land, nor does it require positive habitat improvements or enhancement of the species' status. Thus, the Service believes that any management plan that has enhancement or recovery as the management standard will almost always provide more benefit than the designation of critical habitat.

(19) *Comment:* One peer reviewer commented that the Service and BLM should work together to prepare a fire suppression plan for the wilderness area (Otay Mountain) that would minimize the likelihood of fire suppression activities destroying plants. The peer reviewer also recommended adding a discussion of how designation of critical habitat could help accomplish the development of such a plan.

Our Response: The Service agrees that development of a fire suppression plan could minimize impacts to *Monardella linoides* spp. *viminea* plants and other sensitive species and their habitats, and looks forward to working with BLM to prepare a fire suppression plan for the wilderness area (Otay Mountain). Because occupied habitat for *M. l. spp. viminea* on Otay Mountain is well known to BLM, designation of critical habitat would not appreciably improve identification of the species and its habitat. Moreover, the designation of critical habitat would not impose any requirement on BLM to develop a fire suppression plan. The Service will carefully consider the impacts of fire suppression plans on the species and its habitat on Otay Mountain in future consultations with BLM under section 7 of the Act.

Public Comments Related to Distribution and Status

(20) *Comment:* One commenter indicated that *Monardella linoides* ssp. *viminea* still occurs in Carroll Canyon, because the Environmental Impact Report for the Carroll Canyon Business Park states that not all plants were to be removed. The commenter also thought that harvested plants from Carroll Canyon were going to be planted back to Rose Canyon in addition to other options, but not at Lopez Canyon because that canyon already had its own source of local plants, grown from seed, which are being re-established.

Our Response: The Service's biological opinion for the Carroll Canyon Business Park states that all plants, estimated to total 122 in number, would be removed from Carroll Canyon, and that these plants should be considered for transplantation to Lopez Canyon (USFWS 2003, pp. 7 and 8). Rose Canyon was not part of the proposed action for the Carroll Canyon Business Park consultation. The final sites for transplantation will depend on the outcome of genetic testing currently underway (USFWS 2003, p. 7).

(21) *Comment:* One commenter indicated that Murphy Canyon may still have *Monardella linoides* ssp. *viminea* outside of MCAS Miramar.

Our Response: As stated in the proposed rule, we are aware of only two documented occurrences of the subspecies in Murphy Canyon, both located on MCAS Miramar (CNDDDB 1997, occurrence numbers 15 and 30; CNDDDB 2001, occurrence numbers 15 and 30). However, the subspecies has not been documented there since 2002, and is believed to have been extirpated (Kassebaum 2005).

(22) *Comment:* One commenter indicated that Cemetery Canyon contains suitable habitat, and it should be designated as unoccupied critical habitat.

Our Response: *Monardella linoides* ssp. *viminea* is believed to have been extirpated from Cemetery Canyon prior to the species' listing in 1998 (CNDDDB 2001, occurrence number 3; Elvin and Sanders 2003, p. 428). This site is documented as having an altered drainage pattern (CNDDDB 2001), and is, therefore, unlikely to contain the PCEs required by this species. Thus, Cemetery Canyon is not considered to have habitat with features essential to the conservation of this subspecies. Additionally, we feel there is sufficient habitat designated for critical habitat without designating Cemetery Canyon; the habitat of all known populations is already protected or will be designated as critical habitat.

(23) *Comment:* One commenter suggested that overgrazing, not fire, may have caused the loss of *Monardella linoides* ssp. *viminea* in the vicinity of Otay Lake.

Our Response: The statement in the proposed critical habitat rule regarding the fire at Otay Lake was intended to demonstrate that, although severe fire could be detrimental to the plant, *Monardella linoides* ssp. *viminea* is adapted to fire and survey observations support this (City 2004). We do not have any information to suggest that overgrazing may have caused the loss of

the subspecies in the vicinity of Otay Lake.

(24) *Comment:* One commenter suggested that hydrology changes and lack of weed management caused the decline of *Monardella linoides* ssp. *viminea* observed in Sycamore Canyon, rather than drought as mentioned in the proposed rule.

Our Response: The statement in the proposed critical habitat rule that drought may have contributed to the subspecies' decline in Sycamore Canyon is based on survey reports written by the City of San Diego (City). According to these reports, observations from the yearly surveys suggest that rainfall patterns have influenced the population at Sycamore Canyon (City 2002, p. 3; City 2003, p. 3; City 2004, p. 3). Observations included other sites, but the greatest numbers of dormant or dead plants were found at the Sycamore Canyon survey site in 2002. While changes in hydrology or lack of weed management may have affected the species in Sycamore Canyon, the survey reports did not contain any information relating the subspecies' decline to these potential impacts.

(25) *Comment:* Three commenters suggested that *Monardella linoides* ssp. *viminea* should be split into two species with the southern population being designated as a new species, based on Elvin and Sanders (2003).

Our Response: Please refer to our response to comment # 1.

Public Comments Related to Protection Provided by Critical Habitat

(26) *Comment:* One commenter disagreed with the statement that designating critical habitat provides little additional protection to species, based on an article in *BioScience* (Taylor *et al.* 2005, pp. 360–367) that indicates otherwise.

Our Response: As discussed in the Supplementary Information section and other sections of this rule, we believe that, in most cases, various conservation mechanisms provide greater incentives and conservation benefits than does the designation of critical habitat. These include the section 4 recovery planning process, section 6 funding to the States, and cooperative programs with private and public landholders and Tribal nations. Critical habitat designation can provide an additional level of species protection by focusing specifically on the impacts to habitat loss, and can address cumulative effects of habitat loss in certain circumstances, but this protection can only be provided if there is a Federal nexus for agencies that are planning actions that may impact the designated critical habitat. It is our

experience that landowners generally react negatively to having their property designated as critical habitat, and they are less inclined to cooperate in the conservation of the species in question as a consequence. Conversely, cooperative conservation efforts in the absence of critical habitat often provide greater conservation benefits to the species.

Comments Related to Exclusions and Exemptions From Critical Habitat

(27) *Comment:* One commenter stated that critical habitat should be designated on all extant populations regardless of an existing HCP or INRMP. Additionally, the commenter stated that INRMPs do not provide adequate protection since political pressure can allow impacts that are not anticipated.

Our Response: Refer to our responses to comments #2, #10, and #15. Our experience under the MCAS Miramar INRMP is that the Marine Corps has demonstrated a continuing commitment to implement the plan.

Summary of Changes From Proposed Rule

In preparing the final critical habitat designation for *Monardella linoides* ssp. *viminea*, we reviewed and considered comments from peer reviewers and the public on the proposed designation of critical habitat published on November 9, 2005 (70 FR 67956), as well as public comments on the DEA published on June 1, 2006 (71 FR 31137). As a result of comments received on the proposed rule and the DEA, and a reevaluation of the proposed critical habitat boundaries, we made changes to our proposed designation, as follows:

(1) The PCEs were modified to include the range in variability of habitat for all known populations of *Monardella linoides* ssp. *viminea*. The modifications in this final rule include adding a description of habitat with essential features in the southern portion of the range of *M. l.* ssp. *viminea* to the sections entitled Space for Individual and Population Growth and Normal Behavior, Water and Physiological Requirements, and Primary Constituents for *Monardella linoides* ssp. *viminea*. PCE 1 was revised to include boulders and stones and cracks of bedrock in rocky gorges to describe the growing substrate needed for growth, reproduction, and dispersal of *M. l.* ssp. *viminea* in the southern portion of its range. PCE 2 was revised to include rocky gorges to describe the drainages needed to maintain the necessary dynamic habitat processes for the southern range of *M. l.* ssp. *viminea*. PCE 3 was revised to include the

chaparral habitat type to describe the adjacent habitat that allows for adequate sunlight for nutrient uptake for photosynthesis in the southern range of *M. l. spp. viminea*.

(2) We re-evaluated areas determined to contain habitat with essential features in Unit 1 (Sycamore Canyon), and removed areas that did not contain the PCEs for the subspecies. These revisions resulted in the removal of the 1 ac of land owned by the Padre Dam Municipal Water District, and the removal of 42 ac (17 ha) of private land, reducing the final critical habitat acreage for Unit 1 from 115 ac (47 ha) to 73 ac (30 ha).

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) 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 (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. Conservation is a process which contributes to improving the status of the species. Individual actions may still be considered conservation even though in and of themselves they do not remove the species' need for protection under the Act.

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

designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

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

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Areas outside of the geographic areas occupied by the species at the time of listing may be included in critical habitat only if we determine that such areas are essential for the conservation of the species. Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically would be included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to

use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

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

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider those physical or biological features (primary constituent elements, PCEs) that are essential to the conservation of

the species, and within areas occupied by the species at the time of listing that may require special management considerations or protection. These include, but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The known primary constituent elements required for *Monardella linoides* spp. *viminea* are derived from the biological needs of the *M. l.* spp. *viminea* as described below and in the proposed critical habitat designation published in the **Federal Register** on November 9, 2005 (70 FR 67956).

Primary Constituent Elements for Monardella linoides spp. *viminea*

Under our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of the *Monardella linoides* spp. *viminea*. All areas considered for designation as critical habitat for *M. l.* spp. *viminea* were within the geographical areas occupied by the species at the time it was listed and contain sufficient PCEs to support at least one life history function.

Based on our current knowledge of the life history, biology, and ecology of the subspecies and the requirements of the habitat to sustain the essential life history functions of the subspecies, we have determined that the *Monardella linoides* spp. *viminea*'s PCEs are:

(1) Coarse, rocky, sandy alluvium on benches, stabilized sandbars, channel banks, sandy washes, and/or among boulders and stones, and/or in cracks of bedrock in rocky gorges along and within the ephemeral drainages that provide space for growth, reproduction, and dispersal;

(2) Ephemeral drainages where water flows only after peak seasonal rains and major flooding events that periodically scour riparian vegetation and redistribute alluvial material by eroding and developing stream channels, benches, sandbars, and rocky gorges, thus maintaining the necessary dynamic habitat processes for *Monardella linoides* spp. *viminea*; and

(3) Coastal sage, riparian scrub, or chaparral with an open and semi-open canopy and little or no herbaceous understory situated along ephemeral drainages and adjacent floodplains to ensure that *Monardella linoides* spp.

viminea receives adequate sunlight for nutrient uptake for photosynthesis.

This designation is designed for the conservation of those areas containing PCEs necessary to support the life history functions that were the basis for the proposal. Because not all life history functions require all the PCEs, not all critical habitat will contain all the PCEs.

Units are designated based on sufficient PCEs being present to support one or more of the species' life history functions. Some units contain all PCEs and support multiple life processes, while some units contain only a portion of the PCEs necessary to support the species' particular use of that habitat. Where a subset of the PCEs is present at the time of designation, this rule protects those PCEs and thus the conservation function of the habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of *Monardella linoides* spp. *viminea*. This includes data in the final rule listing the species as endangered (published in the **Federal Register** on October 13, 1998 (63 FR 54938)), reports submitted during section 7 consultations, research published in peer-reviewed articles and agency reports, and regional Geographic Information System (GIS) coverages. We have also reviewed available information that pertains to the habitat requirements of the subspecies. The material included data in reports submitted during section 7 consultations; research published in peer-reviewed articles and agency reports; and regional Geographic Information System (GIS) coverages. We designated no areas outside the geographical area occupied by the species at the time of listing.

We used the following criteria to identify habitat that contains the features essential to *Monardella linoides* spp. *viminea*: (1) Areas known to be occupied at the time of listing or known to be currently occupied; and (2) ephemeral washes and drainage areas associated with documented occurrences.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the *Monardella linoides* spp. *viminea* within the boundaries of critical habitat. The scale of the maps prepared under the parameters for publication within the *Code of Federal Regulations* may not

reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species or adjacent critical habitat.

We are designating critical habitat in areas that we determined were occupied at the time of listing, and that contain sufficient primary constituent elements (PCEs) to support life history functions essential for the conservation of the species. Lands were designated based on sufficient PCEs being present to support life processes of *Monardella linoides* spp. *viminea*. Some lands contain all PCEs and support multiple life processes. Some lands contain only a portion of the PCEs necessary to support *M. l.* spp. *viminea*'s particular use of that habitat.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. Often HCPs also incorporate conservation measures to benefit listed plant species although take of plant species is not prohibited under the Act. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat where we determine that the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act.

A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our supporting record for this rulemaking.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing that contain one or more PCEs may require special management considerations or protections. As stated in the final listing rule (63 FR 54938), threats to *Monardella linoides* ssp. *viminea* include habitat alteration resulting from

urban development, sand and gravel mining, human activities (*i.e.*, off-road vehicle (ORV) use and trampling), and invasion of nonnative species. These activities could impact the PCEs determined to be essential for conservation of *M. l. ssp. viminea*, and thus require special management considerations or protections.

Urban development and sand and gravel mining upstream of *Monardella linoides ssp. viminea* occurrences may alter the hydrologic regime needed to maintain the habitat characteristics required by *M. l. ssp. viminea*. Conversion of intermittent water flows to persistent water flows may increase scour and erode terraces and benches, washing away rooted plants and reducing available habitat (PCEs 1 and 2). Kelly and Burrascano (2006, p. 4) attribute the disappearance of terraces in Lopez Canyon to increased erosion associated with urban runoff from upstream development. The use of pesticides or herbicides in residential and commercially landscaped areas within the watershed may impact water quality if used upslope or above a stream (PCE 2). Water diversion, such as water removal from the drainage system occupied by the subspecies, could reduce the amount of water flowing downstream following seasonal flooding events. Such reductions in downstream water flow may result in decreased deposition of alluvial material and a subsequent reduction in the amount of

available habitat (PCEs 1 and 2). Disruption of the hydrologic cycle could also result in a decrease in the number of seeds that could have been transported downstream during seasonal flooding events, thereby fragmenting populations (PCE 2). Special management may be required to reduce impacts to *M. l. ssp. viminea* habitat resulting from alterations in the hydrologic regime associated with development in the local watershed. Such management may include bank replacement or stabilization to maintain the substrate, restoration of intermittent water flows, erosion and runoff control measures, and prohibitions against grading during the rainy season.

Alteration of the hydrologic regime can also lead to an increase in native and nonnative plant species throughout riparian areas where *Monardella linoides ssp. viminea* occurs. Increased water flow associated with urban runoff has led to dense stands of riparian vegetation in the upper reaches of Lopez Canyon where *M. l. ssp. viminea* once occurred (Kelly and Burrascano 2006, p. 39). Increases in riparian vegetation within ephemeral drainages may also be responsible for losses of *M. l. ssp. viminea* in lower San Clemente Canyon. Conversely, decreased water availability may result in conversion of habitat from mesic to xeric, in which more drought tolerant plants could expand into *M. l. ssp. viminea* habitat and create unnaturally high canopy cover or dense

riparian vegetation, rendering the habitat unsuitable for *M. l. ssp. viminea*. Invasive species control may be required to maintain an open or semi-open canopy of coastal sage and riparian scrub with minimal herbaceous understory, as is required for *M. l. ssp. viminea* (PCE 3) to persist.

Human activities (*e.g.*, ORV activities and trampling) along streams can change the character of the riparian area and associated vegetation in ways that make portions of the riparian corridor less suitable for *Monardella linoides ssp. viminea* habitat. For example, heavy trampling may erode or denude stream banks and washes, thereby reducing or eliminating available habitat (PCE 1). Special management (*i.e.*, bank replacement or stabilization) and prohibitions against ORV use during the rainy season may be required to maintain the substrate and reduce impacts to *M. l. ssp. viminea* habitat resulting from human use within the local watershed.

Critical Habitat Designation

The areas described below constitute our best assessment of areas occupied at the time of listing that meet the definition of critical habitat. Table 1 outlines the area determined to meet the definition of critical habitat, including the area excluded from the final critical habitat designation, and the one area designated as final critical habitat for *Monardella linoides ssp. viminea*.

TABLE 1.—AMOUNT OF LAND DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT, AMOUNT OF LAND EXCLUDED FROM THE FINAL CRITICAL HABITAT DESIGNATION, AND AMOUNT OF LAND DESIGNATED CRITICAL HABITAT FOR *MONARDELLA LINOIDES SPP. VIMINEA*

Geographic area	Land meeting the definition of critical habitat	Land excluded or exempted from critical habitat	Critical habitat
Unit 1 Sycamore Canyon	73 ac (30 ha)	0 ac (0 ha)	73 ac (30 ha)
Unit 2 MCAS Miramar	1,863 ac (754 ha)	1,863 ac (754 ha)*	0 ac (0 ha)
Unit 3 Sycamore, West Sycamore and Spring Canyons ...	207 ac (84 ha)	207 ac (84 ha) ¹	0 ac (0 ha)
Unit 4 San Clemente Canyon	9 ac (4 ha)	9 ac (4 ha) ¹	0 ac (0 ha)
Unit 5 Elanus Canyon	13 ac (5 ha)	13 ac (5 ha) ¹	0 ac (0 ha)
Unit 6 Lopez Canyon	77 ac (31 ha)	77 ac (31 ha) ¹	0 ac (0 ha)
Unit 7 Marron Valley	42 ac (17 ha)	42 ac (17 ha) ¹	0 ac (0 ha)
Unit 8 Otay Lakes	146 ac (59 ha)	146 ac (59 ha) ¹	0 ac (0 ha)
Unit 9 Otay Mountain	67 ac (27 ha)	67 ac (27 ha) ²	0 ac (0 ha)
Totals	2,497 ac (1,011 ha)	2,424 ac (981 ha)	73 ac (30 ha)

*Exempted from critical habitat under section 4(a)(3) of the Act in the proposed rule (70 FR 67956).

¹ Excluded from final critical habitat under section 4(b)(2) based on the San Diego MSCP.

² Excluded from final critical habitat under section 4(b)(2) based on the BLM's Wilderness designation and Memorandum of Understanding (MOU) with the MSCP.

Below, we present a brief description of the area included in the final designation and reasons why this area meets the definition of critical habitat for *Monardella linoides ssp. viminea*.

Unit 1: Sycamore Canyon

Unit 1 consists of 73 ac (30 ha) in the Sycamore Canyon area and supports one of the largest occurrences of *Monardella linoides ssp. viminea* (CNDDDB 2001). This unit was known to be occupied at

the time of listing and is currently known to be occupied. Unit 1 contains all of the PCEs identified for *M. l. ssp. viminea* and represents 1 of the 10 specific areas in San Diego County that support this species and 1 of only 15

occurrences of *M. l. ssp. viminea* (see proposed critical habitat designation for more information on species distribution; 70 FR 67956). Given the restricted range and low numbers of occurrences, this unit is necessary to minimize the risk of extinction from random events and urban development. In Unit 1, habitat with features essential to the conservation of *Monardella linoidea* ssp. *viminea* may require special management to minimize impacts by nonnative invasive weeds; fire; indirect and direct effects of development, including altered hydrology; and recreational activities. The majority of lands within Unit 1 are in an area proposed to be set aside as an on-site preserve to benefit *M. l. ssp. viminea* conservation in this section of Sycamore Canyon.

All of Unit 1 is located on private lands within the City of Santee. These private lands are the site of the being proposed for the Fanita Ranch development project. Fanita Ranch is currently developing an HCP that will serve as the foundation for the City of Santee's subarea plan under the MSCP. As stated in the proposed critical habitat rule (70 FR 67956), we would have considered excluding this area from the final designation if we had received a proposed or approved HCP that provides benefits for *Monardella linoidea* ssp. *viminea*, or had entered into an approved conservation agreement with Fanita Ranch that provides assurances of adequate conservation measures to be implemented by Fanita Ranch to protect and manage for the species on their lands. We did not receive an HCP or enter into a conservation agreement, and, thus, we are not excluding lands owned by Fanita Ranch from this final designation of critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this

definition. Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report; while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR

402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

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

Regulations at 50 CFR 402.16 require Federal agencies to reinstate consultation on previously reviewed actions in certain circumstances, including where a new species is listed or critical habitat is subsequently designated that may be affected, if the Federal agency has retained discretionary involvement or control

over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect *Monardella linoides* spp. *viminea* or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the Army Corps of Engineers (Corps) under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally-funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to Monardella linoides spp. *viminea* and Its Critical Habitat

Jeopardy Standard

Prior to designation of critical habitat, the Service has applied an analytical framework for *Monardella linoides* spp. *viminea* jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the *M. l.* spp. *viminea*. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Monardella linoides* spp. *viminea* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

Adverse Modification Standard

For the reasons described in the Director's December 9, 2004, memorandum, the key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve its intended conservation role for the species. Generally, the conservation role of *M. l.* spp. *viminea* critical habitat units is to support viable core area populations.

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

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for *Monardella linoides* spp. *viminea* is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the *M. l.* spp. *viminea* include, but are not limited to:

(1) Actions that would significantly alter the natural hydrologic pattern of intermittent flows and peak seasonal flooding necessary to support *Monardella linoides* spp. *viminea*. These activities could include Federal authorization for urban and agricultural development in the watershed that changes the amount, timing, frequency, and magnitude of stream flows. Increased and/or more frequent water flows associated with urban runoff could lead to dense stands of riparian vegetation that may out-compete *M. l.* spp. *viminea*. Changes in the magnitude of seasonal flooding may increase scouring and erosion of terraces, banks, and benches and thereby reduce the quality and availability of suitable soils and habitat. Conversely, reduced water flow could result in more xeric conditions that would limit plant growth and reproduction and thereby allow more drought-tolerant plants to compete with *M. l.* spp. *viminea*.

(2) Actions associated with sand and gravel mining, stream channelization, flood channel management, highway construction, and dredging that would

remove alluvium from stream channels or change the physical structure of the stream channel by altering floodplains, benches, sand bars, and stream channels. Federal authorization for projects that physically alter the stream channel may remove suitable alluvium from stream channels and result in the loss and degradation of habitat for *Monardella linoides* spp. *viminea*.

We consider the single unit designated as critical habitat, as well as those that have been excluded or not included, to contain features essential to the conservation of the *Monardella linoides* spp. *viminea*. All units are within the geographic range of the species and all were occupied by the species at the time we proposed critical habitat (based on observations made within the last 6 years). Federal agencies already consult with us on activities in areas currently occupied by *M. l.* spp. *viminea*, or if the subspecies may be affected by the action, to ensure that their actions do not jeopardize the continued existence of *M. l.* spp. *viminea*.

Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3)

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management, fish and wildlife habitat enhancement or modification, wetland protection, enhancement, and restoration where necessary to support fish and wildlife, and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not

designate 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 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."

We consult with the military on the development and implementation of INRMPs for installations with listed species. The INRMP developed by MCAS Miramar, the only military installation located within the range of the critical habitat designation for *Monardella linoides* spp. *viminea*, was analyzed for non-inclusion under the authority of 4(a)(3) of the Act.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in MCAS Miramar's INRMP will provide benefits to *Monardella linoides* spp. *viminea* occurring in habitats within or adjacent to MCAS Miramar. Approximately 1,863 ac (754 ha) of essential habitat was exempted from this critical habitat designation under section 4(a)(3) of the Act.

Under MCAS Miramar's INRMP, the species is managed under a level II conservation effort that includes avoiding or minimizing the effect of planning action on endangered species and wetlands. In addition to the station-wide population census, MCAS Miramar has a long-term monitoring plan in place and has a habitat enhancement project to benefit *Monardella linoides* spp. *viminea* to be implemented in 2006.

Exclusions Under Section 4(b)(2)

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Secretary is afforded broad discretion and the Congressional record is clear that in making a determination under the section the Secretary has

discretion as to which factors and how much weight will be given to any factor.

Under section 4(b)(2), in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without the cooperation of non-federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (i.e., 90 to 100 percent of their known occurrences restricted to Federal lands), and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through the Four Cs philosophy—conservation through communication, consultation, and cooperation. This philosophy is evident in Service programs such as HCPs, Safe Harbors, CCAs, CCAAs, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting

evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (e.g., reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002).

The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species' recovery and provide a superior level of conservation than critical habitat alone. The Department's Four Cs philosophy—conservation through communication, consultation, and cooperation—is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant Program and Landowner Incentive Program provide assistance to private land owners in their voluntary efforts to protect threatened, imperiled, and endangered species, including the development and implementation of HCPs.

Conservation agreements with non-Federal landowners (e.g., Habitat Conservation Plans (HCPs), contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species' conservation by extending species' protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854; December 2, 1996).

In our critical habitat designations, we use the provisions outlined in section 4(b)(2) of the Act to evaluate those specific areas that we propose to designate as critical habitat. We have determined that non-federal lands within the plan area of the City of San Diego subarea plan and the County of San Diego subarea plan, both of which are approved HCPs tied to the San Diego Multiple Species Conservation Program, should be excluded under section 4(b)(2) of the Act. A detailed analysis of our use of these provisions is provided in the following paragraphs.

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation under section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are

likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any reasonable and prudent measures or terms and conditions. Mandatory measures and terms and conditions to implement such measures are only specified when the proposed action would result in incidental take of a listed animal species. Reasonable and prudent alternatives to the proposed Federal action would only be suggested when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Service conflated the jeopardy standard with the standard for destruction or adverse modification of critical habitat when evaluating Federal actions that affect currently-occupied critical habitat. The Court ruled that the two standards are distinct and that adverse modification evaluations require consideration of impacts on the recovery of species. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we believe the conservation achieved through implementing habitat conservation plans (HCPs) or other habitat management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to prevent adverse modification to critical habitat caused by the particular project, and not to provide conservation or long-term benefits to areas affected by the proposed project. Thus, any HCP or management plan which considers enhancement or recovery as the

management standard will often provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

Educational Benefits of Critical Habitat

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for *Monardella linoides* spp. *viminea*. In general, the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. This benefit is closely related to a second, more indirect benefit: that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are making in this rule because these areas are identified in this notice as having habitat containing the features essential to the conservation of the species. Consequently, we believe that the informational benefits are already provided even though these areas are not designated as critical habitat. Additionally, the purpose normally served by the designation of informing State agencies and local governments about areas which would benefit from protection and enhancement of habitat for *Monardella linoides* spp. *viminea* is already well established among State and local governments and Federal agencies in those areas that we are excluding from critical habitat in this rule on the basis of other existing habitat management protections.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

Benefits of Excluding Lands With HCPs or Other Approved Management Plans From Critical Habitat

The benefits of excluding lands with HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation. Most HCPs and other conservation plans take many years to develop and, upon completion, are consistent with the recovery objectives for listed species that are covered within the plan area. In fact, designating critical habitat in areas covered by a pending HCP or conservation plan could result in the loss of some species' benefits if participants abandon the planning process, in part because of the strength of the perceived additional regulatory compliance that such designation would entail. This is particularly true in the case of plants, such as *Monardella linoides* spp. *viminea*. Although plants are not subject to the prohibition on take in section 9 of the Act, the Service encourages applicants to include them as covered species in HCPs by incorporating measures to protect them and their habitat under the plans. If as a result of the Federal nexus created by such inclusion, plants are subjected to increased numbers of consultations under section 7 due to designation of critical habitat, applicants will likely be discouraged from incorporating conservation measures for plants in their HCPs. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in plans targeting listed species' conservation.

Many conservation or management plans provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. Designation of critical habitat within the boundaries of management plans that provide conservation measures for a species could be viewed as a disincentive to those entities currently developing these plans or contemplating them in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species are affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning.

A related benefit of excluding lands within management plans from critical habitat designation is the unhindered, continued ability to seek new partnerships with future plan participants including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within approved management plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of species and habitats. By preemptively excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, the Service's decision to approve an HCP or NCCP/HCP application is subject to the consultation requirement. Such a consultation would review the effects of all activities covered by the HCP which might adversely impact the species under a jeopardy standard, even without the critical habitat designation. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act and would be reviewed for possibly significant habitat modification.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat.

Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act

San Diego Multiple Species Conservation Program (MSCP)

Below, we first provide some general background information on the San Diego MSCP, followed by an analysis under section 4(b)(2) of the Act of the benefits of including San Diego MSCP lands within the critical habitat designation, an analysis of the benefits of excluding these lands, and an analysis of why we believe the benefits of exclusion are greater than those of inclusion. Finally, we provide a determination that exclusion of these lands would not result in extinction of *M. l. ssp. viminea*.

We are excluding from the final critical habitat designation approximately 494 ac (200 ha) of non-Federal lands within the City of San Diego subarea plan and the County of

San Diego subarea plan of the San Diego MSCP under section 4(b)(2) of the Act. *M. l. ssp. viminea* is a covered species under these two approved and legally operative subarea plans. These HCPs provide special management and protection for the physical and biological features essential for the conservation of *M. l. ssp. viminea* that exceed the level of regulatory control that would be afforded this subspecies by the designation of critical habitat. We believe that the benefits of excluding essential habitat covered by these HCPs from the critical habitat designation would outweigh the benefits of including them as critical habitat, and that the exclusion under consideration would not result in the extinction of *M. l. ssp. viminea*.

In southwestern San Diego County, the MSCP effort encompasses more than 582,000 ac (236,000 ha) and anticipates the participation of 12 jurisdictions. Under the broad umbrella of the MSCP, each of the 12 participating jurisdictions prepares a subarea plan that implements the goals of the MSCP within that particular jurisdiction. Three of the 12 jurisdictions cover lands that support *M. l. ssp. viminea*. Two of the jurisdictions, the County of San Diego and the City of San Diego, have completed subarea plans. The third jurisdiction, the City of Santee, is currently preparing its subarea plan. We conduct a consultation on each subarea plan and associated permit under section 7 of the Act to ensure they are not likely to result in jeopardy, or adversely modify or destroy the designated critical habitat, of any covered species. We also review the plans under Section 10 of the Act to ensure they meet the criteria for issuance of an incidental take permit and are consistent with the terms and goals of the MSCP. We completed these analyses for the City of San Diego and County of San Diego subarea plans prior to issuing incidental take permits to those jurisdictions.

The regional MSCP is also a regional subarea plan under the State of California's Natural Communities Conservation Plan (NCCP) program and was developed in cooperation with California Department of Fish and Game (CDFG). Over the 50-year term of the City and County permits, the MSCP provides for the establishment of approximately 171,000 ac (69,573 ha) of preserve lands within the Multi-Habitat Planning Area (MHPA) (City of San Diego) and Pre-Approved Mitigation Areas (PAMA) (County of San Diego) to benefit the 85 federally listed and sensitive species, including *M. l. ssp. viminea*, covered under the plan. Private lands within the MHPA and

PAMA lands are subject to special restrictions on development and, as they are committed to the preserve, must be legally protected and permanently managed to conserve the covered species. Public lands owned by the City and County and by the State of California and Federal government that are identified for conservation under the MSCP must also be protected and permanently managed to protect the covered species. The MSCP requires the City and County to develop broad framework and site-specific management plans, subject to the review and approval of the Service and CDFG, to guide the management of all preserve lands under City and County control. The plans incorporate requirements to monitor and adaptively manage *M. l. ssp. viminea* habitats over time. Under the MSCP, the State and Federal governments have also committed to provide similar management for their preserve lands.

As discussed above, each take authorization holder prepares a framework management plan as a condition of its implementing agreement. The framework management plan provides general direction for all preserve management issues within the subarea plan's boundaries. Area-specific management directives are developed for managing lands that are conserved as part of the reserves. The framework and area-specific management plans are comprehensive and address a broad range of management needs at the preserve and species levels. These plans include the following: (1) Fire management; (2) public access control; (3) fencing and gates; (4) ranger patrol; (5) trail maintenance; (6) visitor/interpretive and volunteer services; (7) hydrological management; (8) signage and lighting; (9) trash and litter removal; (10) access road maintenance; (11) enforcement of property and homeowner requirements; (12) removal of invasive species; (13) nonnative predator control; (14) species monitoring; (15) habitat restoration; (16) management for diverse age classes; (17) use of herbicides and rodenticides; (18) biological surveys; (19) research; and (20) species management conditions (Final MSCP Plan 1998). These management measures benefit *Monardella linoides* ssp. *viminea* and reduce the threats to this species. The MSCP also provides for a biological monitoring program, and *M. l. ssp. viminea* is identified as a first priority plant species for field monitoring (Final MSCP Plan 1998). Species prioritized for field monitoring (such as *M. l. ssp. viminea*) face the greatest threats to their

viability, and detailed field monitoring assesses both immediate threats and long-term population trends. The City of San Diego monitors *M. l. ssp. viminea* on an annual basis (City of San Diego 2000, pp. 1–11; 2001, pp. 1–6; 2002, pp. 1–7; 2003, pp. 1–6; and 2004, pp. 1–9). Moreover, the rare plant monitoring plan under the MSCP is being updated with the assistance of the U.S. Geological Survey Biological Research Division and a three-member independent scientific advisory group.

In addition to the restrictions on development and conservation obligations that apply within the MHPA and PAMA, the MSCP incorporates processes to protect sensitive species of limited distribution, including *Monardella linoides* ssp. *viminea*, within the plan area. Under the City of San Diego's subarea plan, impacts to narrow endemic species inside the MHPA will be avoided and outside the MHPA will be protected as appropriate by (1) avoidance, (2) management, (3) enhancement, or (4) transplantation to areas identified for preservation. Under the County of San Diego's subarea plan, narrow endemic plants, including *M. l. ssp. viminea*, would be conserved under their Biological Mitigation Ordinance using a process that (1) requires avoidance to the maximum extent feasible, (2) allows for a maximum 20 percent encroachment into a population if total avoidance is not feasible, and (3) requires mitigation at the 1:1 to 3:1 (in kind) for impacts if avoidance and minimization of impacts would result in no reasonable use of the property. Thus, these processes to protect narrow endemic plants, including *M. l. ssp. viminea*, whether located on lands targeted for preserve status within the MHPA and PAMA or located outside of those areas, ensure these limited distribution species are protected wherever they occur. Considered as a whole, the protection and management of *M. l. ssp. viminea* provided under the City and County subarea plans will ensure the permanent conservation of this species and its habitat within the areas covered by the plans.

We are therefore excluding from critical habitat a portion of Sycamore Canyon and all of West Sycamore and Spring Canyons (Unit 3 in Table 1), San Clemente Canyon (Unit 4 in Table 1), Elanus Canyon (Unit 5 in Table 1), Lopez Canyon (Unit 6 in Table 1), Marron Valley (Unit 7 in Table 1), and Otay Lakes (Unit 8 in Table 1) under section 4(b)(2) of the Act because they are covered by the City and the County subarea plans. All of the populations of *Monardella linoides* ssp. *viminea* anticipated to be conserved by the

MSCP under the City of San Diego and County of San Diego subarea plans occur in these geographical areas. These populations will be conserved and will be managed and monitored pursuant to or consistent with the MSCP. The framework and area-specific management plans (described above) provide management and monitoring of *M. l. ssp. viminea*.

The portions of Sycamore Canyon (Units 3A, 3B, and 3C) that we are excluding from critical habitat are under either city and county ownership and are within the reserve design of the MHPA and PAMA under the city's and county's subarea plans. The majority of the county-owned PAMA lands in Sycamore Canyon has already been conserved and is being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, consistent with the framework and area-specific management plans described above. The remaining county-owned lands and city-owned lands in Sycamore Canyon have not yet been formally committed to the preserve but will continue to be protected through the city's and county's subarea plans' processes to protect narrow endemic species (described above) until these lands become part of the preserve.

Lands in West Sycamore Canyon (Unit 3D) that we are excluding from critical habitat are under city ownership and are within the reserve design of the MHPA. These lands have been already conserved and are being managed for the conservation of covered species consistent with the framework and area-specific management plans described above, including *Monardella linoides* ssp. *viminea* under the city's subarea plan.

Lands in Spring Canyon (Unit 3E) that we are excluding from critical habitat are under private ownership but are within the reserve design of the MHPA and are targeted for preservation under the city's subarea plan. The private lands in Spring Canyon have not yet been formally committed to the preserve, but are within an area that calls for 100 percent conservation of *Monardella linoides* ssp. *viminea*. The City of San Diego has recently acquired private lands in Spring Canyon through the MSCP that will benefit *M. l. ssp. viminea*. Populations of *M. l. ssp. viminea* on the remaining private lands will continue to be protected through the city's subarea plan process described above to protect narrow endemic species until these private lands become part of the preserve.

Lands in San Clemente Canyon (Unit 4) that we are excluding from critical habitat are under city ownership. The

majority of these lands is within the reserve design of the MHPA, has been committed to the preserve, and is being managed for the conservation of covered species consistent with the framework and area-specific management plans described above, including *Monardella linoides* ssp. *viminea*, under the city's MSCP subarea plan. A small portion of these lands is on city-owned lands that are not within the MHPA. Populations of *M. l. ssp. viminea* on the remaining city-owned lands will continue to be protected through the city's subarea plan process described above to protect narrow endemic species.

Lands in Elanus Canyon (Unit 5) that we are excluding from critical habitat are under city ownership and are within the reserve design of the MHPA. They are committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the city's subarea plan.

Lands in Lopez Canyon (Unit 6) that we are excluding from critical habitat are under city ownership and are within the reserve design of the MHPA. The lands are committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the city's subarea plan.

Lands in Marron Valley (Unit 7) that we are excluding from critical habitat are under city and State ownership and are within the reserve design of the MHPA. The city-owned lands have been committed to the preserve and are being managed for the conservation of covered species, including *Monardella linoides* ssp. *viminea*, under the city's subarea plan. State Lands are being managed pursuant to commitments made by the State of California to implement the MSCP on State-owned lands.

Lands in Otay Lakes (Unit 8) that we are excluding from critical habitat are under City of San Diego, City of Chula Vista, State of California, and private ownership. These lands are also within the MHPA and PAMA, and are either already committed to the preserve or are targeted for 100 percent preservation under the city's and county's subarea plans. The lands owned by the City of Chula Vista were formerly owned by Otay Ranch and were conveyed to the city as mitigation for the Otay Ranch development. These lands are conserved within the County of San Diego's subarea plan. The preserve lands are being managed for the conservation of the covered species, including *Monardella linoides* ssp. *viminea*, under the city's and county's subarea plans and pursuant to commitments made by the State of California to implement the

MSCP on State-owned lands. Those lands not yet formally committed to the preserve will continue to be protected through the county's subarea plan process described above to protect narrow endemic species until these lands become part of the preserve.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We expect the MSCP to provide substantial protection and management of the PCEs within essential habitat for *Monardella linoides* ssp. *viminea* on MSCP conservation lands. We expect the MSCP to provide active management for *M. l. ssp. viminea* on non-Federal lands in contrast to designation of critical habitat, which would only preclude their destruction or adverse modification. Moreover, the educational benefits that would result from critical habitat designation, including informing the public of areas that are necessary for the long-term conservation of the subspecies, are already in place as a result both of material provided on our website and through public notice-and-comment procedures required to establish the MSCP and specific subarea plans.

In contrast to the lack of an appreciable benefit of including these lands as critical habitat, the exclusion of these lands from critical habitat will help preserve the partnerships that we have developed with the local jurisdictions and project proponents in the development of the MSCP. As discussed above, many landowners perceive critical habitat as an unfair and unnecessary regulatory burden given the expense and time involved in developing an implementing complex regional HCPs, such as the MSCP. For these reasons, we believe that designating critical habitat has little benefit in areas covered by the MSCP and such minor benefit is outweighed by the benefits of maintaining partnerships with local jurisdictions and private landowners with lands covered by the MSCP.

We have reviewed and evaluated the benefits of inclusion and the benefits of exclusion of lands as critical habitat for *Monardella linoides* ssp. *viminea*. Based on this evaluation, we find that the benefits of excluding lands in the planning area for the MSCP outweigh the benefits of including those lands as critical habitat for *M. l. ssp. viminea*.

Exclusion Will Not Result in Extinction of the Species

Exclusion of these 494 ac (200 ha) of non-Federal lands will not result in extinction of *Monardella linoides* ssp. *viminea* because these lands will be

conserved and managed for the benefit of this species pursuant to the approved MSCP subarea plans. The jeopardy standard of section 7 and routine implementation of habitat protection through the section 7 process also provide assurances that the species will not go extinct.

Relationship of Critical Habitat Within the Bureau of Land Management—Exclusion Under Section 4(b)(2) of the Act

Federal lands managed by the Bureau of Land Management (BLM) are an integral part of the conservation strategy of San Diego MSCP. However, BLM, like any other Federal agency, is not a permittee under the section 10(a)(1)(B) permit for the San Diego MSCP. The BLM, Service, CDFG, City of San Diego, and County of San Diego, in cooperation with the San Diego Association of Governments (SANDAG), signed a Memorandum of Understanding (MOU) in June 1994, committing to cooperate in habitat conservation planning and management related to the San Diego MSCP. Under the MOU, BLM agreed to take the following actions to assist in implementing the MSCP's conservation goals and objectives: (1) To make maintenance and management of the area's unique biological diversity a principal goal in the design and implementation of its conservation programs; (2) to coordinate with the other signatory parties regarding assessment of the wildlife values of those lands managed by BLM within San Diego County; (3) to coordinate with signatory parties to resolve any BLM, State, regional or local land management prescriptions that are inconsistent with existing or proposed conservation objectives; (4) to work with the County, the City, SANDAG, CDFG, and Service in identifying the lands it manages for inclusion within the region's habitat conservation systems; and (5) to work with signatory parties to acquire key habitat areas using a variety of techniques. Thus, while not a permittee to the section 10(a)(1)(B) permit for the San Diego MSCP, BLM lands, in particular those on Otay Mountain that support a variety of listed and sensitive covered MSCP species, are a key component of the overall reserve design for the MSCP.

At the time of the MOU (and at the time of listing), *Monardella linoides* ssp. *viminea* was not known to occur on BLM lands at Otay Mountain. Since the development and approval of the San Diego MSCP, new information has identified a previously unknown population of *M. l. ssp. viminea* on BLM lands at West Otay Mountain. Surveys

in 2000 counted 202 clumps of *M. l. ssp. viminea*, making this occurrence the fourth largest population at that time. The populations of *M. l. ssp. viminea* on BLM lands at Otay Mountain are within the area covered by the MOU. Congress formally designated BLM lands on Otay Mountain as the Otay Mountain Wilderness in 1999 (Otay Mountain Wilderness Act, Pub. L. 106-145, December 9, 1999). The occurrences of *M. l. ssp. viminea* on Otay Mountain are within the designated boundaries of the Otay Mountain Wilderness. The inclusion of these occupied habitats within a designated wilderness provides additional significant protection for this area and complement BLM's objective to manage these public lands to provide protection and enhancement for biological values.

The Wilderness Act of 1964 (16 U.S.C. 1131 *et seq.*) restricts vehicles, new developments, chainsaws, mountain bikes, leasing, and mining from the wilderness area. Grazing is permitted within the wilderness area; however, no grazing allotments currently exist. Thus, the population and habitat of *Monardella linoides ssp. viminea* on BLM land receives conservation protection consistent with the Otay Mountain Wilderness, MOU, and San Diego MSCP. Our analysis below examines the benefits of inclusion and benefits of exclusion of approximately 67 ac (27 ha) of Federal lands managed by the BLM from critical habitat Unit 9 under section 4(b)(2) of the Act. These lands are within the designated Otay Mountain Wilderness that is targeted for conservation under the MOU for the San Diego MSCP.

Benefits of Inclusion

We believe there would be minimal benefit from designating critical habitat for *Monardella linoides ssp. viminea* on BLM lands because the habitat essential for this species on Otay Mountain is already conserved within the Otay Mountain Wilderness and is targeted for conservation under the MOU for the San Diego MSCP as explained above.

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) for *M. l. ssp. viminea* that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of a listed species. Under the *Gifford Pinchot*

decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the adverse effects that occur as opposed to a requirement to provide a conservation benefit.

The inclusion of these 67 ac (27 ha) of Federal land in critical habitat designation is unlikely to provide any additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Inclusion of this area in critical habitat would require Federal agencies to ensure that their actions on these Federal lands are not likely result in the destruction or adverse modification of critical habitat. The potential benefits resulting from this additional analysis to determine destruction or adverse modification of critical habitat are likely to be minimal to nonexistent because the extensive restrictions on permitted uses and the prohibition on development of designated wilderness lands virtually eliminates the possibility of future Federal actions likely to negatively impact essential habitat for *Monardella linoides ssp. viminea* within this area.

Another potential benefit of critical habitat would be to signal the importance of these lands to Federal agencies, scientific organizations, State and local governments, and the public to encourage conservation efforts to benefit *M. l. ssp. viminea* and its habitat. However, as discussed above, the importance of protecting the biological resource values of these lands, including *M. l. ssp. viminea*, has already been clearly and effectively communicated to Federal, State, and local agencies and other interested organizations and members of the public through designation of the lands as wilderness, through the 1994 MOU, and through the MSCP approval and implementation process.

In short, we expect BLM's MOU for the San Diego MSCP to result in special management of the PCEs, and the MOU, in conjunction with the wilderness designation, to result in substantial protection within habitat with features essential for the conservation of *Monardella linoides ssp. viminea* on Federal lands on Otay Mountain. We expect the MOU to provide a greater level of management for *M. l. ssp. viminea* on Federal lands than would designation of critical habitat.

Benefits of Exclusion

In contrast to section 7(a)(2) of the Act, the wilderness designation and 1994 MOU committing the BLM to manage its lands for the benefit of *M. l. ssp. viminea* and other covered species go well beyond a simple requirement to avoid adverse modification of critical habitat. BLM has demonstrated its proactive commitment to the conservation goals and objectives of the MSCP by entering into the 1994 MOU and thereby becoming a key partner in the MSCP. Excluding these 67 ac (27 ha) of BLM lands from critical habitat designation recognizes BLM's commitment under their MOU to manage their lands consistent with the MSCP, and provides additional incentive to BLM to maintain and strengthen the partnerships created by its official participation in the MSCP planning process, especially considering the high level of cooperation by the participants in the MSCP to conserve this taxon. BLM's commitment to species' conservation under the MSCP is in line with the agency's requirement to utilize its programs for the furtherance of the purposes of the Act under section 7(a), and may exceed the conservation value provided by a critical habitat designation alone since BLM, as a partner in an existing conservation program, is able focus limited Federal resources toward proactive conservation of sensitive species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that the benefits of exclusion of the lands containing features essential to the conservation of *Monardella linoides ssp. viminea* within the designated Otay Mountain Wilderness, although minimal, outweigh the even more minimal benefits of inclusion of these lands as critical habitat. We have therefore excluded essential habitat for *M. l. ssp. viminea* on lands owned by the BLM on Otay Mountain from this final critical habitat designation.

Exclusion Will Not Result in Extinction of the Species

Exclusion of these 67 ac (27 ha) of Federal lands will not result in extinction of *Monardella linoides ssp. viminea* because these lands will be permanently protected for the benefit of this species and its essential habitat pursuant to the Otay Mountain Wilderness Act and will be actively managed pursuant to the 1994 MOU for the San Diego MSCP. The protection of the Otay Mountain population of *M. l. ssp. viminea* and its habitat, along with

the conservation of the remaining populations and essential habitat of this species under the San Diego MSCP and MCAS Miramar INRMP, will ensure the species' continued existence.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct.

Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act

Section 4(b)(2) allows the Secretary to exclude areas from critical habitat for economic reasons if he determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. This is a discretionary authority Congress has provided to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required their consideration when designating critical habitat.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on June 1, 2006 (71 FR 31137). We accepted comments on the draft analysis until July 3, 2006.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Monardella linoides* spp. *viminea*. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

The analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State

and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis estimates that because all of the essential habitat proposed as critical habitat is conserved or will be conserved under the MSCP and there are only minor effects to future development, there are negligible, unquantifiable potential economic impacts anticipated from the critical designation as proposed. Therefore, no habitat was excluded due to economic impacts.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section) or for downloading from the Internet at <http://www.fws.gov/carlsbad/>.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues. However, because the economic analysis indicates that the potential economic impacts associated with the proposed designation of critical habitat are negligible, we conclude that this final rule will not have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review the final rule.

Further, Executive Order 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 need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement under 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 under

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 combined thereof, in a designation constitutes our regulatory alternative analysis.

As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2).

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

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the 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. The SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

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; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than

\$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting). We apply the “substantial number” test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted 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 *Monardella linoides* spp. *viminea*. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinstitute consultation for ongoing Federal activities.

The economic analysis determined there will be no effects on small business because there are no reasonable foreseeable economic effects.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small

businesses, on average, that may be required to consult with us each year regarding their project’s impact on *Monardella linoides* spp. *viminea* and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer “reasonable and prudent alternatives”. Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency’s legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed plant species, we may identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species. However, these recommendations are advisory only.

Based on our experience with consultations under section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule (63 FR 54938) and this critical

habitat designation. Within the final critical habitat units the types of Federal actions or authorized activities that we have identified as potential concerns are:

- (1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;
- (2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;
- (3) Regulation of timber harvest, grazing, mining, and recreation by the U.S. Forest Service and BLM;
- (4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;
- (5) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency; and
- (6) Activities funded by the Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect *Monardella linoides* spp. *viminea*. The kinds of actions that may be included in future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule (63 FR 54938) and proposed critical habitat designation (70 FR 67956). These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act, and Federal Highway Administration funding for road improvements. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation

is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for *Monardella linoides* spp. *viminea* is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates". These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance". It also excludes "a duty arising from participation in a voluntary Federal program", unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority", if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were:

Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program".

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

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, Small Government Agency Plan is not required.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in California. The designation of critical habitat in areas currently occupied by *Monardella linoides* spp. *viminea* may impose nominal additional regulatory restrictions to those currently in place

and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Endangered Species Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of *Monardella linoides* spp. *viminea*.

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

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

National Environmental Policy Act

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

Government-to-Government Relationship With Tribes

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

have not designated critical habitat for *M. l.* spp. *viminea* on Tribal lands.

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 section).

Author(s)

The primary authors of this package are staff 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.

Regulation Promulgation

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

PART 17—[AMENDED]

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

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

■ 2. In § 17.12(h), revise the entry for "*Monardella linoides* spp. *viminea*" under "FLOWERING PLANTS" to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	*
<i>Monardella linoides</i> <i>ssp.viminea.</i>	Willowy monardella	U.S.A. (CA), Mexico	Lamiaceae	E	649	17.96(a)	NA
*	*	*	*	*	*	*	*

■ 3. In § 17.96(a), add critical habitat for *Monardella linoides* spp. *viminea* in alphabetical order under Family Lamiaceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering plants.

* * * * *

Family Lamiaceae: *Monardella linoides* spp. *viminea* (willow monardella)

(1) Critical habitat is depicted for San Diego, California, on the map below.

(2) The primary constituent elements of critical habitat for *Monardella linoides* spp. *viminea* are the habitat components that provide:

(i) Coarse, rocky, sandy alluvium on benches, stabilized sandbars, channel banks, sandy washes, and/or among boulders and stones, and/or in cracks of bedrock in rocky gorges along and within the ephemeral drainages that provide space for growth, reproduction, and dispersal;

(ii) Ephemeral drainages where water flows only after peak seasonal rains and major flooding events that periodically scour riparian vegetation and redistribute alluvial material by eroding and developing stream channels, benches, sandbars, and rocky gorges, thus maintaining the necessary dynamic

habitat processes for *Monardella linoides* spp. *viminea*; and

(iii) Coastal sage, riparian scrub, or chaparral with an open and semi-open canopy and little or no herbaceous understory situated along ephemeral drainages and adjacent floodplains to ensure that *Monardella linoides* spp. *viminea* receives adequate sunlight for nutrient uptake for photosynthesis.

(3) Critical habitat does not include manmade structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, aqueducts, airports, and roads, and the land on which such structures are located.

(4) Data layers defining the map unit were created on a base of USGS 7.5' quadrangles, and the critical habitat unit was then mapped using a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates which, when connected, provided the boundaries of the unit.

(5) Unit 1: Sycamore Canyon, consisting of private lands within the City of Santee, San Diego County, California.

(i) From USGS 1:24,000 quadrangle San Vicente Reservoir, lands bounded by the following UTM NAD27

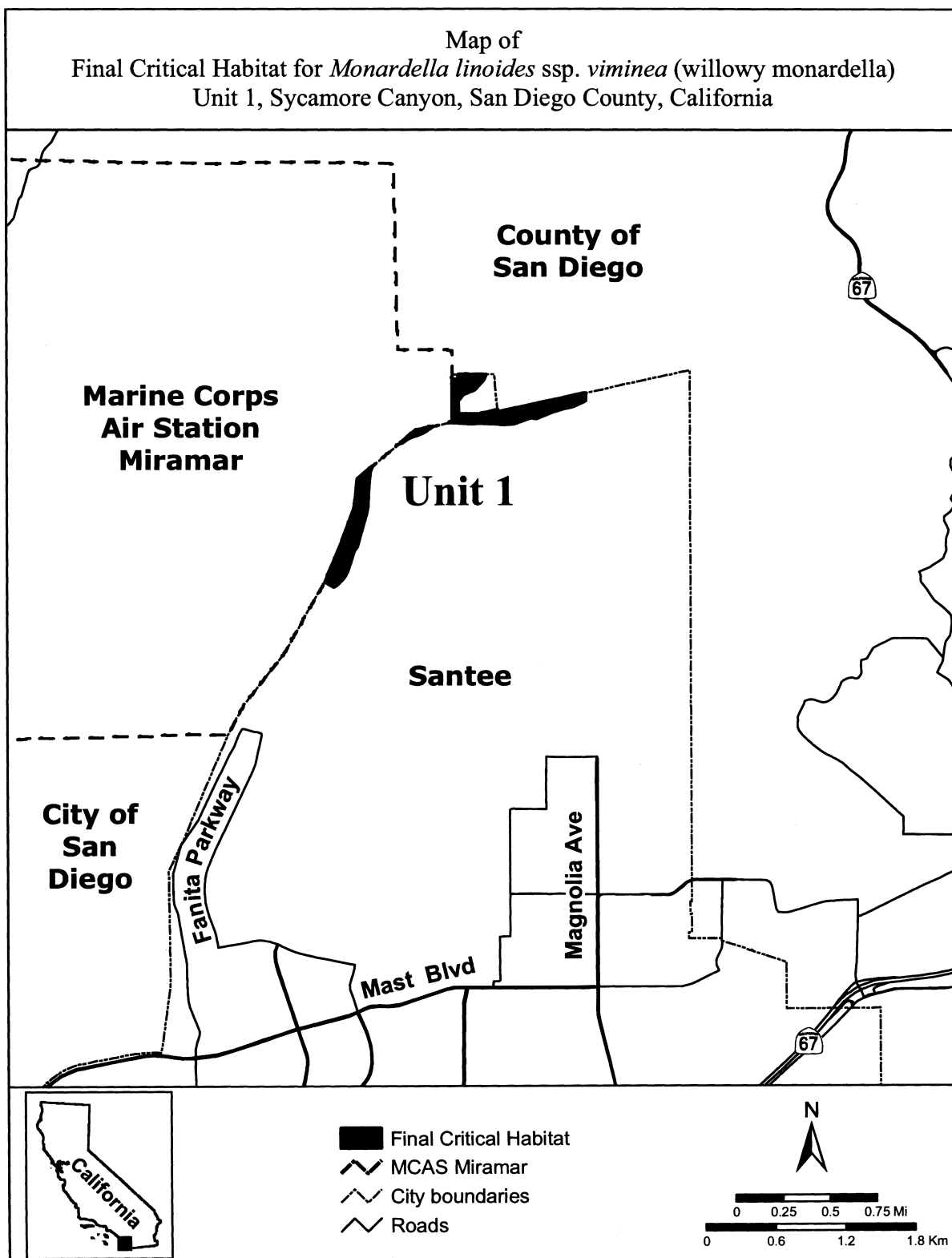
coordinates (E, N): 501841,3640342; 501821, 3640300; 501819, 3640294; 501800, 3640274; 501743, 3640211; 501719, 3640200; 501700, 3640200; 501700, 3640192; 501645, 3640169; 501600, 3640115; 501587, 3640100; 501600, 3640100; 501600, 3640000; 501700, 3640000; 501800, 3640000; 501800, 3640009; 501844, 3640015; 501900, 3640028; 501940, 3640038; 501942, 3640017; 502000, 3640030; 502100, 3640052; 502200, 3640074; 502300, 3640096; 502301, 3640096; 502319, 3640100; 502400, 3640118; 502500, 3640140; 502600, 3640162; 502614, 3640165; 502700, 3640184; 502700, 3640117; 502667, 3640101; 502666, 3640100; 502600, 3640071; 502591, 3640067; 502530, 3640052; 502500, 3640044; 502431, 3640025; 502400, 3640012; 502369, 3640000; 502300, 3639972; 502277, 3639963; 502226, 3639968; 502202, 3639959; 502200, 3639958; 502100, 3639922; 502089, 3639918; 502000, 3639911; 501900, 3639917; 501801, 3639920; 501800, 3639920; 501701, 3639918; 501700, 3639918; 501600, 3639924; 501540, 3639927; 501552, 3639929; 501552, 3639930; 501552, 3639939; 501551, 3639974; 501551, 3640000; 501551, 3640030; 501551, 3640036; 501551, 3640041; 501551, 3640043; 501551, 3640069; 501551, 3640100;

501550, 3640135; 501550, 3640183;
501550, 3640200; 501550, 3640214;
501550, 3640236; 501549, 3640295;
501549, 3640300; 501600, 3640300;
501600, 3640343; 501689, 3640345;
501700, 3640344; 501800, 3640343;
thence returning to 501841, 3640342.
Lands bounded by the following UTM
NAD27 coordinates (E, N): 501382,
3639892; 501318, 3639846; 501300,
3639838; 501243, 3639812; 501200,
3639801; 501199, 3639800; 501168,
3639786; 501112, 3639749; 501100,
3639748; 501120, 3639764; 501162,
3639800; 501177, 3639813; 501200,
3639832; 501233, 3639860; 501238,
3639861; 501279, 3639870; 501300,
3639874; 501314, 3639877; 501321,

3639879; 501331, 3639881; thence
returning to 501382, 3639892. Lands
bounded by the following UTM NAD27
coordinates (E, N): 500864, 3639549;
500842, 3639500; 500833, 3639419;
500832, 3639400; 500827, 3639300;
500822, 3639200; 500821, 3639185;
500806, 3639117; 500800, 3639101;
500800, 3639100; 500798, 3639096;
500772, 3639000; 500745, 3638900;
500744, 3638900; 500728, 3638852;
500702, 3638808; 500700, 3638802;
500699, 3638800; 500668, 3638700;
500648, 3638637; 500630, 3638600;
500626, 3638594; 500600, 3638565;
500554, 3638515; 500530, 3638500;
500524, 3638500; 500500, 3638515;
500452, 3638545; 500454, 3638550;

500465, 3638576; 500466, 3638579;
500475, 3638600; 500477, 3638605;
500500, 3638659; 500515, 3638695;
500517, 3638700; 500541, 3638757;
500559, 3638800; 500583, 3638857;
500600, 3638898; 500601, 3638900;
500606, 3638912; 500637, 3639000;
500642, 3639013; 500664, 3639074;
500673, 3639100; 500700, 3639176;
500706, 3639193; 500707, 3639200;
500718, 3639299; 500718, 3639300;
500729, 3639400; 500732, 3639427;
500733, 3639439; 500763, 3639464;
500800, 3639495; 500806, 3639500;
500823, 3639515; thence returning to
500864, 3639549.

(ii) Note: Map of Unit 1 (Map 1)
follows:



* * * * *

Dated: October 25, 2006.

David M. Verhey,Acting Assistant Secretary for Fish and
Wildlife and Parks.

[FR Doc. 06-9095 Filed 11-7-06; 8:45 am]

BILLING CODE 4310-55-P