

2. In § 17.11(h), add an entry for “Plover, mountain” under BIRDS in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

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

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
BIRDS							
*	*	*	*	*	*	*	*
Plover, mountain	<i>Charadrius montanus</i>	U.S.A. (Western)	Entire	T		NA	NA
*	*	*	*	*	*	*	*

Dated: June 2, 2010  
**Daniel M. Ashe,**  
*Acting Director, U.S. Fish and Wildlife Service.*  
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**BILLING CODE 4310-55-S**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[Docket No. **FWS-R8-ES-2009-0069**]  
 [92210-0-0009-B4]

RIN 1018-AV89

**Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Arroyo Toad**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our October 13, 2009, proposed revised designation of critical habitat for the arroyo toad (*Anaxyrus californicus*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for the arroyo toad; revisions to proposed critical habitat; and an amended required determinations section of the proposal. We are reopening the comment period for an additional 30 days to allow all interested parties an opportunity to comment on the items listed above. If you submitted comments previously,

you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

**DATES:** We will consider public comments we receive on or before July 29, 2010. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

**ADDRESSES:** You may submit comments by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. **FWS-R8-ES-2009-0069**.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: **FWS-R8-ES-2009-0069**; Division of Policy and Directives Management; U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222, Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone (805) 644-1766; facsimile (805) 644-3958. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**Public Comments**

We intend that any final action resulting from the proposed rule will be

based on the best scientific data available and will be accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party during this reopened comment period on the proposed revised designation of critical habitat for the arroyo toad published in the **Federal Register** on October 13, 2009 (74 FR 52612), including the changes to and considerations regarding proposed revised critical habitat in Unit 15 and Subunits 6b, 11b, 16a, 16d and 19a; the draft economic analysis (DEA) of the proposed revised designation of critical habitat for the arroyo toad; and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

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

- (2) Specific information on:
- The amount and distribution of arroyo toad habitat included in the proposed revised rule,
  - What areas within the geographical area occupied by the species at the time of listing that contain physical and biological features essential to the conservation of the species we should include in the designation and why, and

• What areas outside the geographical area occupied by the species at the time of listing are essential for the conservation of the species and why.

(3) Land-use designations and current or planned activities in the subject areas and their possible effects on proposed revised critical habitat for the arroyo toad.

(4) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(6) Comments or information that may assist us in identifying or clarifying the primary constituent elements and the resulting physical and biological features essential to the conservation of the arroyo toad.

(7) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the landscapes identified as essential.

(8) Information regarding Trabuco Creek in Orange County, and any special management considerations or protection that any essential physical or biological features in this area may require.

(9) Information regarding the San Diego River in San Diego County, from just below El Capitan Reservoir downstream to the confluence with San Vicente Creek, and any special management considerations or protection that any essential physical or biological features in this area may require.

(10) Whether our exemption, under section 4(a)(3)(B) of the Act, of the lands on Department of Defense land at Marine Corps Base, Camp Pendleton, in San Diego County; Fallbrook Naval Weapons Station in San Diego County; and Fort Hunter Liggett Military Reservation in San Luis Obispo County is or is not appropriate, and why.

(11) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Western Riverside County Multiple Species Habitat Conservation Plan from final revised critical habitat is or is not appropriate and why.

(12) Whether the potential exclusion under section 4(b)(2) of the Act of non-

Federal lands covered by the San Diego Multiple Species Conservation Program—City and County of San Diego's Subarea Plans from final revised critical habitat is or is not appropriate and why.

(13) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Coachella Valley Multiple Species Habitat Conservation Plan from final revised critical habitat is or is not appropriate and why.

(14) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Orange County Central—Coastal Subregional Habitat Conservation Plan/Natural Community Conservation Plan from final revised critical habitat is or is not appropriate and why.

(15) Whether the potential exclusion under section 4(b)(2) of the Act of non-Federal lands covered by the Southern Orange County Natural Community Conservation Plan/Master Streambed Alteration Agreement/Habitat Conservation Plan (Southern Orange HCP) from final revised critical habitat is or is not appropriate and why. Please note that a portion of Subunit 10b was not discussed under our section on the Southern Orange HCP in the October 13, 2009, proposed revised critical habitat rule. This area is covered by the Southern Orange HCP and we are considering the area in Subunit 10b for exclusion (see "Habitat Conservation Plans—Exclusions Under Section 4(b)(2) of the Act" section in the proposed revised critical habitat designation (74 FR 52612)).

(16) Whether the conservation needs of the arroyo toad can be achieved or not by limiting the designation of final revised critical habitat to non-Tribal lands and why.

(17) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Rincon Band of Luiseño Mission Indians from final revised critical habitat is or is not appropriate and why.

(18) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Pala Band of Luiseño Mission Indians from final revised critical habitat is or is not appropriate and why.

(19) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Sycuan Band of the Kumeyaay Nation from final revised critical habitat is or is not appropriate and why.

(20) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Capitan Grande Band of Diegueno Mission Indians from final

revised critical habitat is or is not appropriate and why.

(21) Whether the potential exclusion, under section 4(b)(2) of the Act, of Tribal lands of the Mesa Grande Band of Diegueno Mission Indians from final revised critical habitat is or is not appropriate and why.

(22) Whether the potential exclusion, under section 4(b)(2) of the Act, of Subunit 6b from final revised critical habitat is or is not appropriate and why.

(23) Whether the potential exclusion, under section 4(b)(2) of the Act, of Department of Defense lands at the Remote Training Site Warner Springs and Camp Morena from final revised critical habitat is or is not appropriate and why.

(24) Information on the potential effects of climate change on the arroyo toad and its habitat.

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

(26) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

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

(28) Information on the accuracy of our methodology in the DEA for distinguishing baseline and incremental costs, and the assumptions underlying the methodology.

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

(30) Information on whether the proposed revised designation of critical habitat will result in disproportionate economic impacts to specific areas or small businesses, including small businesses in the land development sector in San Diego County.

(31) Information on whether the DEA identifies all costs that could result from the proposed revised designation of critical habitat for the arroyo toad.

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

(33) Whether the benefit of exclusion of any other particular area not specifically identified above outweighs the benefit of inclusion under section 4(b)(2) of the Act.

If you submitted comments or information on the proposed revised rule (74 FR 52612) during the initial comment period from October 13, 2009, to December 14, 2009, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning our proposed rule, the revisions to and considerations regarding proposed critical habitat described in this document, the associated DEA, and our amended required determinations by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

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

Comments and materials we receive (and have received), as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov> [Docket Number FWS-R8-ES-2009-0069], or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule and DEA by mail from the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**), by visiting the *Federal eRulemaking Portal*

at <http://www.regulations.gov>, or on our Web site at <http://www.fws.gov/ventura>.

### Background

It is our intent to discuss only those topics directly relevant to the proposed revised designation of critical habitat for arroyo toad in this document. For more information on previous Federal actions concerning the arroyo toad, refer to the proposed revised designation of critical habitat published in the **Federal Register** on October 13, 2009 (74 FR 52612). Additional information on the arroyo toad may also be found in the final listing rule published in the **Federal Register** on December 16, 1994 (59 FR 64859), the "Recovery Plan for the Arroyo Southwestern Toad" (recovery plan; Service 1999) (the nomenclature for the listed entity has changed to "arroyo toad (*Anaxyrus californicus*)," but this change does not alter the description or distribution of the animals), and the designation of critical habitat for the arroyo toad published in the **Federal Register** on April 13, 2005 (70 FR 19562). These documents are available on the Ventura Fish and Wildlife Office and Carlsbad Fish and Wildlife Office websites at <http://www.fws.gov/ventura> and <http://www.fws.gov/carlsbad>. However, please note that the October 13, 2009 (74 FR 52612) proposed rule incorporates new information on the distribution of arroyo toads that became available since the 2005 final critical habitat designation for this species.

On July 20, 2007 (Service 2007, pp. 1–2), we announced that we would review the April 13, 2005, final rule after questions were raised about the integrity of scientific information used and whether the decision made was consistent with the appropriate legal standards. Based on our review of the previous final critical habitat designation, we determined it was necessary to revise critical habitat; thus, our October 13, 2009, proposed rule (74 FR 52612) and this document collectively propose those revisions. On December 19, 2007, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Southern District of California challenging our designation of critical habitat for the arroyo toad (*Center for Biological Diversity v. U.S. Fish and Wildlife Service*, Case No. 07-2380-JM-AJB). On June 5, 2008, the court entered a consent decree requiring a proposed revised critical habitat rule to be submitted to the **Federal Register** by October 1, 2009, and a final revised critical habitat designation to be submitted to the **Federal Register** by October 1, 2010.

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

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact, including but not limited to the value and contribution of continued, expanded, or newly forged conservation partnerships.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species; and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of the arroyo toad, the benefits of critical habitat include public awareness of arroyo toad presence and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for arroyo toad due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on

Federal lands or for projects undertaken by Federal agencies.

When we evaluate the benefits of excluding an area being managed under an existing conservation plan, we consider a variety of factors, including but not limited to whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether the exclusion of the specific area would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we cannot exclude it from the designation.

#### Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We prepared a DEA of our October 13, 2009 (74 FR 52612), proposed revised designation of critical habitat for the arroyo toad.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised designation of critical habitat for the arroyo toad. Additionally, the economic analysis looks retrospectively at costs incurred since the December 16, 1994 (59 FR 64859), listing of the arroyo toad as an endangered species. The DEA quantifies the economic impacts of all potential conservation efforts for the arroyo toad; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised designation of critical habitat for the arroyo toad is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place

for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated and may include costs incurred in the future. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since we listed the species, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised designation of critical habitat for the arroyo toad. For a further description of the methodology of the analysis, see Chapter 1, “Approach to Estimating Economic Effects,” of the DEA.

The current DEA estimates the foreseeable economic impacts of the proposed revised designation of critical habitat for the arroyo toad by identifying the potential resulting incremental costs. The DEA describes economic impacts of arroyo toad conservation efforts associated with the following categories: (1) Real estate development; (2) changes in water supply; (3) grazing activities; (4) mining activities; (5) road construction projects; (6) utility and other infrastructure projects; (7) application of the California Environmental Quality Act (CEQA); and (8) uncertainty and delay.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for arroyo toad not attributable to designation of critical habitat and thus are expected to occur regardless of whether we designate critical habitat. Total future baseline impacts over the next 25 years (2010 to 2035) are estimated to be \$385 million (approximately \$33 million annualized) in present value terms using a 7 percent discount rate. Overall, the real estate industry (real estate development, CEQA, and delay impacts) is estimated to experience the highest cost, followed by water consumers and road construction projects. Of the 22 proposed critical habitat units, 3 are expected to incur more than \$50 million each in total baseline economic costs between 2010 and 2035. Critical habitat

Unit 16 (Santa Ysabel Creek Basin) in San Diego County has the largest total baseline impacts (\$74 million) of the units considered for designation.

The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 25 years (2010 to 2035) to be \$789 million (\$68 million annualized) in present value terms using a 7 percent discount rate. Overall, the real estate industry (real estate development, CEQA, and delay impacts) is estimated to experience the highest cost, followed by utilities and infrastructure projects. Of the 22 proposed critical habitat units, 4 are expected to incur incremental economic costs greater than \$50 million each between 2010 and 2035. Critical habitat Unit 16 (Santa Ysabel Creek Basin) in San Diego County has the largest incremental impacts (\$211 million) of the units considered for designation.

We are also including an additional 3,655 ac (1,479 ha) in the proposed revised critical habitat designation compared to the October 13, 2009, proposed revised critical habitat designation, bringing the total to 112,765 ac (45,634 ha) of proposed revised critical habitat for the arroyo toad. The additional area has not been assessed in this DEA; however, an initial evaluation reveals that approximately 70 percent of the additional area would be evaluated under the baseline scenario because it contains an overlapping 100-year flood plain or existing habitat conservation plan (HCP) boundary and is primarily publicly owned or otherwise undevelopable. The remaining 30 percent of the additional area is privately owned and does not contain an overlapping 100-year flood plain or existing HCP boundary, and survey data indicate this area is not within the 1500-meter (m) (4,921-foot (ft)) buffer surrounding known arroyo toad sites. The habitat areas most likely to involve a Federal nexus and section 7 consultation are within riparian areas, and we are using the 100-year flood plain and 1500-m (4,921-ft) buffer surrounding known arroyo toad sites to identify those riparian areas. Therefore the inclusion of this area in the proposed revised critical habitat is not anticipated to substantially increase the incremental impacts or alter the ranking of critical habitat units (in terms of total economic impacts per unit). The final economic analysis will reflect the baseline and incremental economic impacts of the additional 3,655 ac (1,479 ha).

The DEA considered both economic efficiency and distributional effects. In

the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with real estate development, changes in water supply, grazing and mining activities, road construction projects, utility and other infrastructure projects, CEQA, uncertainty, and delay, and the effects of this lost economic efficiency on Federal lands, small entities, and the energy industry. We can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as on all aspects of the proposed revised designation of critical habitat, our revisions to proposed critical habitat described in this document, and our amended required determinations. We may revise the proposed rule and/or the economic analysis to incorporate or address information we receive during this public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided the exclusion will not result in the extinction of the species.

#### Changes to Proposed Revised Critical Habitat

In this document, we are proposing further revisions to the proposed revised critical habitat in Unit 15 and Subunits 11b, 16a, and 16d, as identified and described in the proposed rule that we published in the **Federal Register** on October 13, 2009 (74 FR 52612). We received new information in the form of survey reports, survey data, and public comments indicating that we should re-evaluate the proposed boundaries of these areas. The purpose of the revisions described below is to better delineate the areas that meet the definition of critical habitat for the arroyo toad and to ensure that all areas proposed are consistent with the criteria outlined in the proposed revised rule (see “Criteria Used To Identify Critical Habitat” section in the proposed revised critical habitat designation (74 FR 52620 -

52622)). All areas added to the proposed units are within the geographical area occupied by the species at the time it was listed and contain the physical and biological features essential to the conservation of the species. Revised maps are included in the **Proposed Regulation Promulgation** section of this document. Below, we briefly describe the changes made for each of these units. As a result of these revisions, the overall area proposed for designation as critical habitat is 112,765 ac (45,634 ha), an increase of 3,655 ac (1,479 ha) from 109,110 ac (44,155 ha) in the October 13, 2009, proposal (74 FR 52612).

We are considering for exclusion all or part of Subunit 6b, and portions of Unit 15 and Subunit 19a from critical habitat under section 4(b)(2) of the Act (see Additional Areas Currently Considered For Exclusion Under Section 4(b)(2) of the Act below).

#### Changes to Critical Habitat Unit Descriptions

##### Unit 11: San Mateo Creek Basin; Subunit 11b

We received a comment from the U.S. Forest Service indicating that areas upstream of Subunit 11b along San Mateo Creek contain habitat suitable for arroyo toad. We reevaluated survey data in our files from 1999 and 2004 along San Mateo Creek and within Los Alamos Canyon (Ervin 2000, *in litt.*; ECORP 2004). We added an area to the upstream end of Subunit 11b because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Additionally, adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed rule (74 FR 52612). The northeastern expansion of the critical habitat designation boundary for Subunit 11b encompasses (1) approximately 8.3 mi (13 km) upstream along San Mateo Creek to Los Alamos Canyon, and (2) approximately 2.4 mi (4 km) of Los Alamos Canyon upstream from the confluence with San Mateo Creek. The revised subunit consists of 844 ac (341 ha) of U.S. Forest Service land, an increase of 810 ac (327 ha) from 34 ac (14 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Unit 11 now totals 1,878 ac (758 ha)—

an increase from 1,068 ac (432 ha) in the October 13, 2009, proposed rule (74 FR 52612).

##### Unit 15: Upper San Luis Rey Basin

We received new information in the form of a survey report indicating that areas upstream of Unit 15 along Cañada Aguanga contain habitat occupied by arroyo toad (Tierra Data Inc. 2007, pp. 112–113, 118–119, and 121). We added an area to the upstream end of this unit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The northern expansion of the critical habitat designation boundary for Unit 15 encompasses approximately 3.5 mi (6 km) along Cañada Aguanga and extends to just below Lake Jean. The revised unit consists of 1,467 ac (594 ha) of U.S. Forest Service land and 11,511 ac (4,658 ha) of private land—an increase of 951 ac (385 ha) from what we proposed in the October 13, 2009, proposed rule (74 FR 52612). Unit 15 now totals 12,977 ac (5,252 ha).

##### Unit 16: Santa Ysabel Creek Basin

We received information from two sources that resulted in our re-evaluation of Subunit 16a. First, we received survey data indicating that areas upstream of Subunit 16a along Santa Ysabel Creek contain habitat occupied by arroyo toad (Ramirez *in litt.* 2009). We added an area to the upstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). This northeastern expansion of the critical habitat designation boundary for

Subunit 16a encompasses approximately 1.3 mi (2.1 km) along Santa Ysabel Creek upstream from the confluence with Temescal Creek. Second, we received survey data indicating that areas downstream of Subunit 16a along Santa Ysabel Creek and portions of the San Dieguito River contain habitat occupied by arroyo toad (Haas *in litt.* 2009; U.S. Geological Survey (USGS) 2009, unpublished data). We added an area to the downstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The southwestern expansion of the critical habitat designation boundary for Subunit 16a encompasses: (1) Approximately 3.7 mi (6 km) downstream along Santa Ysabel Creek to the confluence with the San Dieguito River; and (2) approximately 1 mi (2 km) of the San Dieguito River upstream from the confluence with Santa Ysabel Creek. The revised subunit consists of 184 ac (74 ha) of U.S. Forest Service land, 6 ac (2 ha) of Bureau of Land Management land, 182 ac (74 ha) of State land, 143 ac (58 ha) of local government land, and 13,452 ac (5,444 ha) of private land—an increase of 1,831 ac (741 ha) from 12,136 ac (4,911 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Subunit 16a now totals 13,967 ac (5,652 ha).

We also received survey data indicating that areas downstream of Subunit 16d along Santa Ysabel Creek contain habitat occupied by arroyo toad (Haas 2009, *in litt.*; USGS 2009, unpublished data). We added an area to the downstream end of this subunit because it contains the physical and biological features that are essential to the conservation of the species, including aquatic habitat for breeding and nonbreeding activities and upland habitat for foraging and dispersal activities. These additional areas may require the same special management considerations or protection discussed for this Unit in the October 2009 proposed rule. Adding occupied areas on stream reaches containing suitable breeding and upland habitat is consistent with our criteria used to identify critical habitat, as outlined in the proposed revised rule (74 FR 52612). The western expansion of the critical

habitat designation boundary for Subunit 16d encompasses approximately 1.1 mi (2 km) downstream along Santa Ysabel Creek to Sutherland Reservoir. The revised subunit consists of 1,504 ac (609 ha) of private land and 23 ac (9 ha) of Tribal land—an increase of 96 ac (39 ha) from 1,431 ac (579 ha) proposed in the October 13, 2009, proposed rule (74 FR 52612). Subunit 16d now totals 1,527 ac (618 ha).

In summary, Unit 16 now totals 15,494 ac (6,270 ha)—an increase of 1,927 ac (780 ha) from 13,567 ac (5,490 ha) in the October 13, 2009, proposed rule (74 FR 52612).

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

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat 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 legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we consider all relevant impacts, including economic impacts. During the development of the final revised designation, we will consider economic impacts, public comments, and other new information, and areas (including those identified for potential exclusion in the October 13, 2009, proposed rule and new areas identified in this document) may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

We consider a number of factors, in addition to economic impacts, in a section 4(b)(2) analysis. For example, we consider whether there are lands owned by the Department of Defense where a national security impact might exist. We also consider whether landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation

partnerships that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. Additionally, we look at the presence of Tribal lands or Tribal trust resources that might be affected, and consider the government-to-government relationship of the United States with the Tribal entities. We also consider any significant social impacts that might occur because of the designation.

In our October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we identified lands in Subunit 6b, Unit 15, and Subunit 19a as meeting the definition of critical habitat for the arroyo toad. Based on comments submitted during the initial public comment period from October 13, 2009, to December 14, 2009, we are considering the following areas for exclusion from critical habitat under section 4(b)(2) of the Act: All of Subunit 6b, the portion of Unit 15 within Remote Training Site Warner Springs, and the portion of Subunit 19a within Camp Morena.

Unit 6: Upper Santa Clara River Basin; Subunit 6b

In the October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we erroneously reported that Subunit 6b consists of 159 ac (65 ha) of Federal land and 1,995 ac (807 ha) of private land. In actuality, Subunit 6b consists entirely of private land owned by the Newhall Land and Farming Company (Newhall LFC). Newhall LFC developed the Natural River Management Plan (“NRMP”) (Valencia Company 1998) for the long-term conservation and management of the biological resources within their lands, including the arroyo toad and its habitat; the NRMP was approved by the U.S. Army Corps of Engineers and California Department of Fish and Game (CDFG) in 1998. The NRMP provides management measures designed to protect, restore, monitor, manage, and enhance habitat for multiple species, including the arroyo toad, that occur along the Santa Clara River (River), Castaic Creek, and San Francisquito Creek within Subunit 6b. Of particular importance to the conservation of the arroyo toad and its habitat within Subunit 6b was the inclusion in the NRMP of substantial conservation easements, which when fully implemented, will protect almost all of the arroyo toad’s breeding habitat and riparian river corridor within Subunit 6b. At the present time, approximately 1,011 ac (409 ha) of conservation easements on Newhall LFC lands near the City of Santa Clarita in Los Angeles County within Subunit 6b have been

conveyed to the CDFG and additional easements totaling approximately 28 ac (11 ha) are awaiting approval by CDFG. The conservation easements that have been conveyed to the California Department of Fish and Game over the Santa Clara River corridor, San Francisquito Creek, and Castaic Creek will ensure that habitat within the easements will remain in a natural condition in perpetuity. Use of the property covered by the easements is confined to the preservation and enhancement of native species and their habitats, including the arroyo toad and its habitat. These conservation easements provide greater protection of crucial arroyo toad breeding and foraging habitat in this area than could be gained through the designation of critical habitat. Additionally, we have already completed section 7 consultation on the effects of the NRMP on the arroyo toad and found that it would not jeopardize the continued existence of the species.

Newhall LFC has committed to implement other protective measures for arroyo toad habitat in the NRMP, including: (1) The creation of new riverbed areas, including planting wetland mitigation sites; (2) revegetation of riparian areas; (3) removal of invasive plants such as arundo (*Arundo donax*) and tamarisk (*Tamarix* sp.); (4) protecting wetlands from urban runoff by establishing a revegetated upland buffer between developed areas and the River; (5) implementing a Drainage Quality Management Plan with Best Management Practices to ensure water quality within the River corridor; and (6) implementing the biological mitigation measures for the Newhall Ranch Specific Plan that include restricting pets and off-road vehicles from the area and restricting access to the River corridor by limiting hiking and biking to the River trail system.

Based on the many conservation measures included in the NRMP that protect the arroyo toad and its habitat on Newhall Ranch lands in Subunit 6b, the conservation easement lands that have already been conveyed to CDFG and are planned in the future in this subunit, and because of the valuable conservation partnership we have developed over the years with Newhall Ranch, we are considering the entire Subunit 6b for exclusion under section 4(b)(2) of the Act.

#### Unit 15 and Subunit 19a

In our October 13, 2009, proposed revised critical habitat designation (74 FR 52612), we identified lands in Unit 15 and Subunit 19a as meeting the

definition of critical habitat for the arroyo toad. Based on comments submitted by the U.S. Navy during the initial public comment period from October 13, 2009, to December 14, 2009, we are considering for exclusion the portion of Unit 15 within Remote Training Site Warner Springs and the portion of Subunit 19a within Camp Morena from critical habitat under section 4(b)(2) of the Act.

#### *Remote Training Site Warner Springs*

The U.S. Navy conducts training activities within the Remote Training Site Warner Springs complex, which is comprised of 6,158 ac (2,486 ha) of lands owned by, and leased from, the Vista Irrigation District and the Cleveland National Forest. Additionally, the U.S. Navy is proposing to expand its training activities onto another 6,326 ac (2,554 ha) of lands owned by the Bureau of Land Management, Cleveland National Forest, and the Vista Irrigation District, expanding the total training area to approximately 12,484 ac (5,040 ha).

The Remote Training Site Warner Springs serves as the principal venue for SERE (Survival, Evasion, Resistance, and Escape) training on the west coast. It also supports training activities for Naval Special Warfare, 1<sup>st</sup> Marine Special Operations Battalion, Naval Construction Force Amphibious Construction Battalion One Seabees, 1<sup>st</sup> Marine Expeditionary Force Training and Experimentation Group/Tactical Exercise Group, and other nonroutine training.

The U.S. Navy is currently revising the 2002 Naval Base Coronado Integrated Natural Resources Management Plan (INRMP), which we received a draft of in September 2009, to address management of the arroyo toad and its habitat at the Remote Training Site Warner Springs. Additionally, the U.S. Navy is currently implementing measures to avoid or minimize impacts to the arroyo toad, as identified in a biological opinion we issued on October 30, 2009, on the proposed expansion and realignment of training areas at Remote Training Site Warner Springs (Service 2009). These measures include, but are not limited to: (1) Avoid and minimize impacts to the on-site population of the arroyo toad within an "Arroyo Toad Management Area"; (2) permanently close two stream crossings on the San Luis Rey River; (3) educate personnel on how to avoid adverse impacts to the species; (4) prioritize nonnative, invasive plant species searches and spot treatment control efforts in riparian zones and areas of higher levels of training

activity; and (5) conduct surveys for arroyo toads at least every 3 years to determine status and location.

We received a public comment from the U.S. Navy expressing concern that designation of these lands would cause mission-critical activities to be delayed if they were required to conduct consultation due to a critical habitat designation. Mission-critical activities not previously analyzed that would likely be delayed by section 7 consultation and that directly affect national security include training activities and supporting facility construction. Delays in construction and training schedules could disrupt the ability to acquire and perform unique, tactical, special warfare skills required for personnel readiness. We will consider several factors, including impacts to national security associated with a critical habitat designation as described by the U.S. Navy, existing consultations, and conservation measures in place at this facility that benefit the arroyo toad. Of the 12,977 ac (5,252 ha) in Unit 15 proposed as critical habitat, 4,609 ac (1,865 ha) are part of the existing and proposed Remote Training Site Warner Springs that we are considering for exclusion under section 4(b)(2) of the Act.

#### *Camp Morena*

Camp Morena is a small parcel of approximately 71 ac (29 ha) used by the U.S. Navy under a year-to-year license with the City of San Diego that serves as a support facility for the nearby Camp Michael Monsoor (formerly called La Posta Mountain Warfare Training Facility). In support of Camp Michael Monsoor, the U.S. Navy requires significant base operations and logistical support at Camp Morena, including administration activities, classrooms, conference rooms, mission planning capabilities, and berthing space. Future planned use of Camp Morena includes increased training functions with more frequent training and possible construction of new facilities.

The U.S. Navy is currently revising the 2002 Naval Base Coronado INRMP, which will address management of the arroyo toad and its habitat at Camp Morena.

We received a public comment from the U.S. Navy expressing concern that designation of these lands would cause mission-critical activities to be delayed if they were required to conduct consultation due to a critical habitat designation. The U.S. Navy asserted that delays in construction and training schedules could disrupt the ability to acquire and perform unique, tactical, special warfare skills required for

personnel readiness. We will consider several factors, including impacts to national security associated with a critical habitat designation as described by the U.S. Navy, existing consultations, and conservation measures in place at

this facility that benefit the arroyo toad. Of the 5,847 ac (2,366 ha) in Subunit 19a proposed as critical habitat, 31 ac (13 ha) are part of Camp Morena that are we considering for exclusion under section 4(b)(2) of the Act.

The following table presents all of the areas we are considering for exclusion under section 4(b)(2) of the Act from the revised critical habitat designation:

Unit/Subunit	Area Considered for Exclusion Under Section 4(b)(2) of the Act
Subunit 6b. [Upper Santa Clara River Basin]	1,995 ac (807 ha)
Western Riverside County MSHCP	
Unit 9. [San Jacinto River Basin]	1,153 ac (466 ha)
Unit 13. [Upper Santa Margarita River Basin]	5,233 ac (2,117 ha)
<i>Subtotal Western Riverside County MSHCP</i>	<i>6,386 ac (2,583 ha)</i>
City of San Diego Subarea Plan under the MSCP	
Subunit 16a. [Santa Ysabel Creek Basin]	4,486 ac (1,815 ha)
Subunit 17d. [San Diego River Basin/San Vicente Creek]	106 ac (43 ha)
Subunit 19b. [Cottonwood Creek Basin]	858 ac (347 ha)
<i>Subtotal County of San Diego Subarea Plan under the MSCP</i>	<i>5,450 ac (2,205 ha)</i>
County of San Diego Subarea Plan under the MSCP	
Subunit 16a. [Santa Ysabel Creek Basin]	1,081 ac (437 ha)
Subunit 17b. [San Diego River Basin/San Vicente Creek]	1,070 ac (433 ha)
Subunit 17d. [San Diego River Basin/San Vicente Creek]	825 ac (334 ha)
Subunit 18a. [Sweetwater River Basin]	545 ac (221 ha)
Subunit 19b. [Cottonwood Creek Basin]	368 ac (149 ha)
<i>Subtotal for County of San Diego Subarea Plan under the MSCP</i>	<i>3,889 ac (1,574 ha)</i>
Orange County Central-Coastal NCCP/HCP	
Unit 8. [Lower Santa Ana River Basin]	647 ac (262 ha)
<i>Subtotal for Orange County Central-Coastal NCCP/HCP</i>	<i>647 ac (262 ha)</i>
Orange County Southern Subregion HCP	
Subunit 10a. [San Juan Creek Basin]	3,405 ac (1,378 ha)
Subunit 10b. [San Juan Creek Basin]	509 ac (206 ha)
Subunit 11a. [San Mateo Creek Basin]	1,002 ac (405 ha)
<i>Subtotal for Orange County Southern Subregion HCP</i>	<i>4,916 ac (1,989 ha)</i>
Tribal Lands	
Unit 14. [Lower and Middle San Luis Rey Basin], Rincon Reservation, Pala Reservation	2,572 ac (1,041 ha)
Subunit 16. [Santa Ysabel Creek Basin], Mesa Grande Reservation	23 ac (9 ha)
Subunit 17. [San Diego River Basin/San Vicente Creek], Capitan Grande Reservation	92 ac (37 ha)
Subunit 18. [Sweetwater River Basin], Sycuan Reservation	22 ac (9 ha)
<i>Subtotal for Tribes</i>	<i>2,709 ac (1,096 ha)</i>
Military Lands	
Unit 15. [Upper San Luis Rey River Basin], Remote Training Site Warner Springs	4,609 ac (1,865 ha)
Subunit 19a. [Cottonwood Creek Basin], Camp Morena	31 ac (13 ha)

Unit/Subunit	Area Considered for Exclusion Under Section 4(b)(2) of the Act
<i>Subtotal for Military Lands</i>	4,640 ac (1,878 ha)
Total	30,632 ac (12,396 ha)*

\* Values in this table may not sum due to rounding.

### Required Determinations—Amended

In our proposed rule dated October 13, 2009 (74 FR 52612), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (*Regulatory Planning and Review*), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, and Use), E.O. 12630 (Takings), and the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

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

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

Based on comments we receive, we may revise this determination as part of a final rulemaking.

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

To determine if the proposed revised designation of critical habitat for arroyo toad would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the arroyo toad. Federal agencies also must consult with us if their activities may affect critical habitat.

In the DEA of the proposed revised designation of critical habitat, we evaluated the potential economic effects resulting from implementation of conservation actions related to the proposed revised designation of critical habitat. The DEA identified the estimated incremental impacts associated with the proposed revised designation of critical habitat as described in sections 2 through 6, and evaluated the potential for economic impacts related to activity categories including real estate development, changes in water supply, grazing and mining activities, road construction projects, utility and other infrastructure projects, CEQA, uncertainty, and delay. The DEA concluded that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated with land development, cattle ranching, and farming. Incremental impacts are either not expected for the other types of activities considered, or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the potential impacts of the proposed revised designation of critical habitat on land developers over the next 25 years would result from lost land value, project modification costs, CEQA costs, delay costs, and administrative costs. Small land developers with projects in the proposed revised critical habitat designation are expected to bear an annual incremental impact per project of between roughly \$800 and \$857,000. The number of small business in the land development industry affected annually ranges from zero to approximately 1.0 percent per county. Of those small land developers that are affected, the average annualized cost per project ranges from less than 0.1 percent to 40.5 percent of the typical annual sales. However, the annualized cost per project for affected small land developers in each county other than San Diego County is less than 1.6

percent of the typical annual sales (see Table A-1 in the DEA).

As discussed in Appendix A of the DEA, the potential impacts of the proposed revised designation of critical habitat on cattle ranchers and farmers would result from future project modifications, such as fencing, water source development, and availability of water for irrigation and groundwater recharge. Small cattle ranching businesses and farms operating in the proposed revised critical habitat designation are expected to bear an incremental impact per project of between roughly \$6,000 and \$13,700. The number of small cattle ranching operations and farms affected annually ranges from about 0.2 percent to approximately 2.0 percent of the cattle ranching businesses and farms in each county. For those small cattle ranching businesses and farms that are impacted, the average cost per project (i.e., grazing allotment) ranges from less than 1.0 percent to approximately 2.0 percent of the typical annual sales for a small business in the sector.

In summary, we have considered whether the proposed revised designation of critical habitat would result in a significant economic impact on a substantial number of small entities. We have identified small businesses that may be affected within the ranching and farming sectors. However, we have determined that the proposed revised designation of critical habitat for the arroyo toad would not have a significant economic impact on a substantial number of small business entities in the ranching and farming sectors. While we recognize that the impacts to small businesses in the land development sector in San Diego County may be significant, we believe that the overall number of small businesses affected by the designation is not substantial.

For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised designation of critical habitat for the arroyo toad would not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required. However, we do seek specific comment on the effects to small businesses in the land development sector, in particular those in San Diego County.

*Executive Order 13211 – Energy Supply, Distribution, and Use*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order

13211 requires an agency to prepare a Statement of Energy Effects when undertaking certain actions. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A of the DEA, two criteria are relevant to this analysis: (1) Reductions in electricity production in excess of 1 billion kilowatt-hours per year or in excess of 500 megawatts of installed capacity, and (2) increases in the cost of energy production in excess of 1 percent. The DEA finds that this proposed revised critical habitat designation is expected to have minimal impacts on the energy industry.

*Executive Order 12630 – Takings*

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the arroyo toad in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the proposed revision to critical habitat for the arroyo toad does not pose significant takings implications.

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

In accordance with the Unfunded Mandates Reform Act, the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local or Tribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to state, local and Tribal governments under

entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) as a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

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

(b) As discussed in the DEA of the proposed designation of critical habitat for arroyo toad, we do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA concludes that incremental impacts may occur due to project modifications and administrative actions that may need to be made for activities, including: Real estate development (comprising land value loss, other project modifications, CEQA compliance, and delay); grazing; mining; utilities and infrastructure; and administrative costs associated with future formal and informal consultations on real estate development, water, roads, grazing, mining, infrastructure, and other projects. However, these activities are not expected to affect small governments. Consequently, we do not believe that the revised critical habitat

designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

**References Cited**

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

**Authors**

The primary authors of this rulemaking are the staff members of the Ventura Fish and Wildlife Office and the Carlsbad Fish and Wildlife Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and

recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 74 FR 52612, October 13, 2009, as follows:

**PART 17—[AMENDED]**

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

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

2. Critical habitat for the arroyo toad in § 17.95(d), which was proposed to be revised on October 13, 2009, at 74 FR

52612, is proposed to be further amended by revising:

a. Paragraph (d)(11)(ii), and the map for Units 8,10, and 11; and

b. Paragraph (d)(13)(ii), and the map for Units 12, 13, 14, 15, 16, and 17, as set forth below.

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

\* \* \* \* \*

(d) *Amphibians.*

\* \* \* \* \*

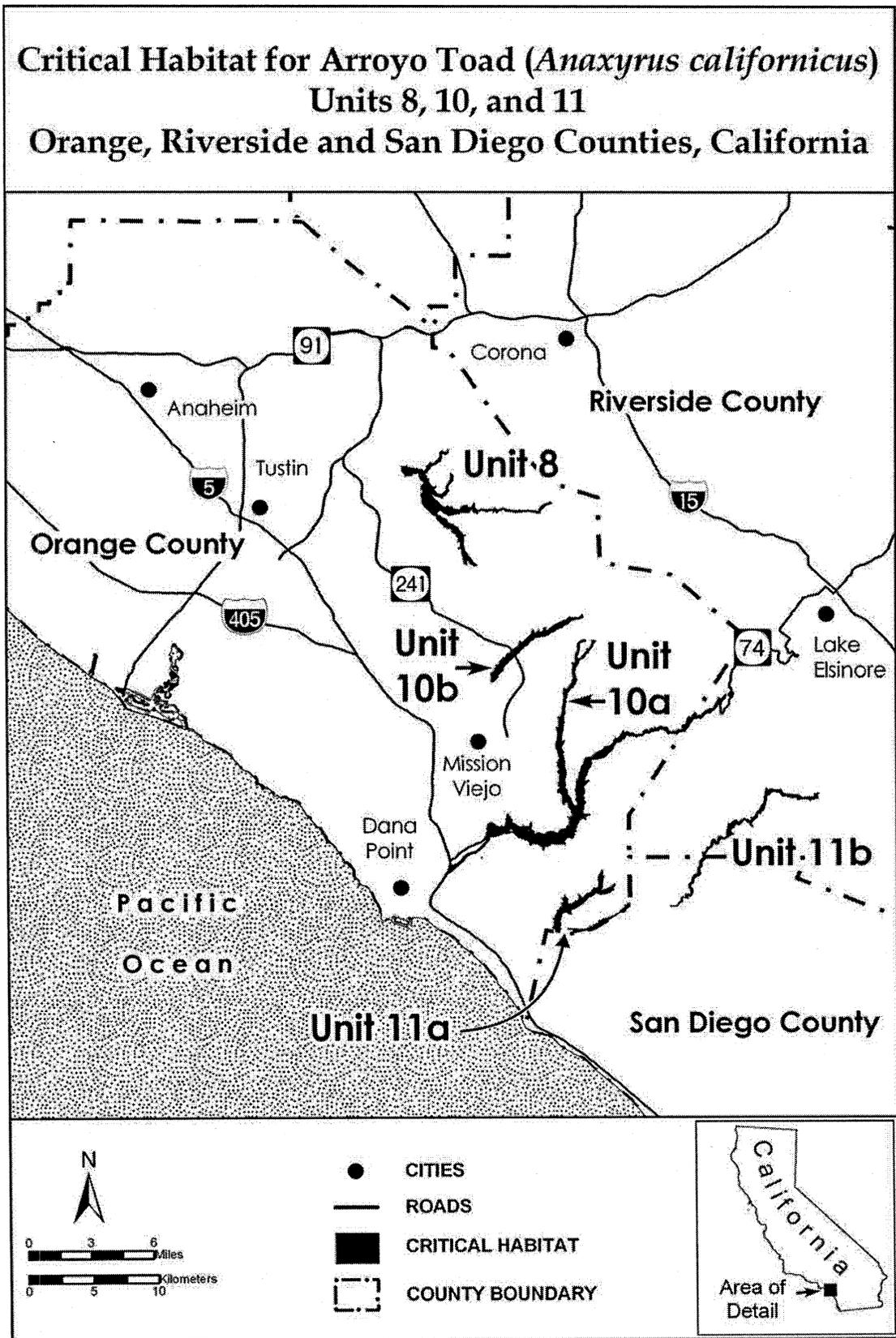
Arroyo Toad (*Anaxyrus californicus*)

\* \* \* \* \*

(11) \* \* \*

(ii) *Note:* Map of Critical Habitat for Arroyo Toad (*Anaxyrus californicus*), Units 8, 10, and 11, Orange, Riverside, and San Diego Counties, California, follows:

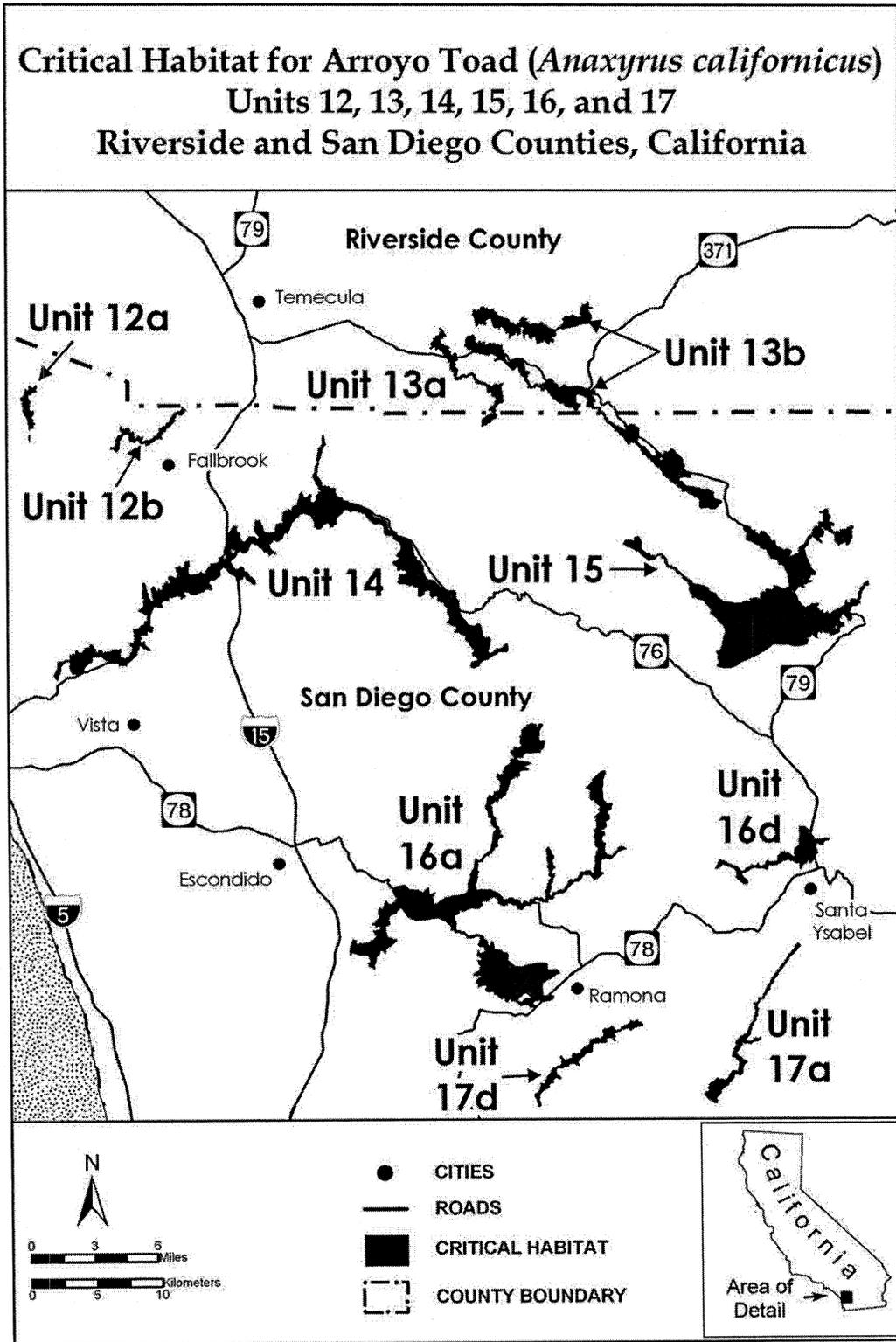
**BILLING CODE 4310–55–S**



(13) \* \* \*  
(ii) Note: Map of Critical Habitat for Arroyo Toad (*Anaxyrus californicus*),

Units 12, 13, 14, 15, 16, and 17,

Riverside and San Diego Counties, California, follows:



Dated: June 15, 2010  
**Thomas L. Strickland,**  
*Assistant Secretary for Fish and Wildlife and Parks.*  
[FR Doc. 2010-15399 Filed 6-28-10; 8:45 am]  
BILLING CODE 4310-55-C