

the United States. The commenter gave no specific mention of actual quarries, and, after consulting with an official at Region 2 of the California Water Quality Control Board, we are not aware of any quarries on or near the habitat units proposed for Marin County. Hence, no consultations or project modifications are likely to occur as no plans exist for additional quarries.

(19) *Comment:* A commenter thought the economic analysis should include the cost of suing us for improperly designating critical habitat.

*Our Response:* We have followed all of the legal requirements pertaining to the designation of critical habitat and believe we have made the designation properly, and consequently do not believe it is necessary or appropriate to engage in speculation regarding the potential for litigation and costs that might be associated with it. It is possible that litigation may be initiated in response to the rulemaking and if that happens, the court will determine whether the plaintiff(s) should be reimbursed for any of the costs of litigation, and if so, what the level of reimbursement should be.

(20) *Comment:* A commenter thought we should try to balance the economic impacts of the designation against the benefit to the species.

*Our Response:* In designating critical habitat, section 4(b)(2) of the Act requires us to take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat, and allows us to exclude any area if the benefits of exclusion outweigh the benefits of designation, unless we determine that the failure to designate such an area will result in the extinction of the species. We have estimated the costs associated with the critical habitat designation in our economic analysis, and do not find that the benefits of exclusion, as indicated by the avoided costs, would outweigh the benefits to the species of designating the six units of critical habitat.

#### Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from three knowledgeable individuals with expertise in one or several fields, including familiarity with the species, familiarity with the geographic region in which the species occurs, and familiarity with the principles of conservation biology. One of the three reviewers responded, providing us with comments that are summarized here.

Overall the peer reviewer supported the designation, finding that the proposed rule “is well written and appears justified” (J. Koontz, *in litt.*, 2002). He provided us with information regarding further habitat southeast of Unit L1 which appears to contain the primary constituent elements for *Delphinium luteum*. Although we do not believe that, in the absence of any new occurrences of the plant, the extension of the unit to include this area is essential to the conservation of the species at this time, we will keep the area in mind while developing a recovery plan. We will evaluate the value of this area for species recovery during the development of the recovery plan for these species.

The peer reviewer also suggested certain changes and additions which we have incorporated into the Background, Primary Constituent Elements, and Critical Habitat Designation sections of the rule, as appropriate. These changes include an updated estimate of the number of plants remaining, a more inclusive list of community associates for *Delphinium bakeri* and *D. luteum*, information regarding the mowing of the *D. bakeri* population in May 2002, and information regarding the possible hybrid origin of *D. luteum*. He also included updated or corrected citations for some of the points made in the proposed rule, and provided useful background information and opinion, such as contact information for other species experts and an overview of the costs and benefits to the species of designating critical habitat in the amounts proposed. Finally, he emphasized the importance of field reconnaissance and questioned the extent to which we were able to do this for the proposed units. We addressed this comment in our responses to comments 8 and 9.

#### Summary of Changes From the Proposed Rule

In response to comment 3 (above) we redefined the primary constituent elements of the species to more clearly indicate that slope and aspect are separate requirements. Based on comment 6 (above), we refined our mapping with the result of eliminating approximately 24 ha (60 ac) of land proposed to be designated for Unit L3. The eliminated areas include the northernmost peninsular area of the unit, which contains several buildings and is heavily silted, and another peninsular area at the southwestern end of the unit, which contains a wastewater treatment and disposal system. These areas do not contain *Delphinium bakeri* and *D. luteum* plants, nor do they

contain the primary constituent elements for these species. We have also incorporated changes suggested by our peer reviewer (see Peer Review section above).

#### Critical Habitat

Section 3 of the Act defines critical habitat as—(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with section 4 of this Act, upon a determination that such areas are essential for the conservation of the species. “Conservation,” as defined by the Act, means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Section 7(a)(2) of the Act requires that Federal agencies shall, in consultation with us, insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Section 7 also requires conferences on Federal actions that are likely to jeopardize the continued existence of any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, and consequently critical habitat designation does not afford any additional regulatory protection under the Act under those circumstances.

Critical habitat also provides non-regulatory benefits to the species by informing the public and private sectors of areas that are important for species recovery, and where conservation actions would be most effective. Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features essential for the conservation of that species, and can alert the public, as well as land-managing agencies, to the importance of those areas. Critical