

proposed rule on or before April 11, 2003. In a subsequent order the Court held that the critical habitat designated for the San Diego fairy shrimp on October 23, 2000 (65 FR 63438) should remain in place until such time as a new, final regulation becomes effective.

This proposal for critical habitat for the San Diego fairy shrimp differs from the current designation of critical habitat with respect to the mapping grid size and changes of locations of critical habitat due to new survey data. In the preparation of this proposed critical habitat we were able to reduce the minimum mapping unit from a 250 meter UTM grid to a 100 meter UTM grid. This allowed for the grid to more closely follow the watershed boundaries. Through new surveys for the San Diego fairy shrimp, the presence of San Diego fairy shrimp was confirmed in four additional vernal pool complexes in Orange County. The presence of the San Diego fairy shrimp was also reported from the Naval Radio Receiving Facility (NRRF) in Southern San Diego County and vernal pools in the City of San Marcos. However, NRRF is not proposed because of a completed and approved INRMP. Besides these additional confirmations, surveys at the Palomar Airport pools, an area previously designated as critical habitat, found the pools to be unoccupied by the San Diego fairy shrimp, thus they are no longer proposed as critical habitat. This proposal is consistent with the previous designation of critical habitat. Exclusions under 3(5)(A) and 4(b)(2) are similar to the exclusions in the existing critical habitat.

Critical Habitat

Section 3 defines critical habitat as—(i) the specific areas within the geographic 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 geographic 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” 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.

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 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat.

To be included in a critical habitat designation, habitat must be either a specific areas within the geographic area occupied by the species on which are found those physical or biological features essential to the conservation of the species (primary constituent elements, as defined at 50 CFR 424.12(b)) and which require special management considerations or protections, or be specific areas outside of the geographic area occupied by the species which are determined to be essential to the conservation of the species. Section 3(5)(C) of the Act states that not all areas that can be occupied by a species should be designated as critical habitat unless the Secretary determines that all such areas are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, “The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.”

Accordingly, we do not designate critical habitat in areas outside the geographic area occupied by the species unless the best available scientific and commercial data demonstrate that unoccupied areas are essential for the conservation needs of the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial 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 should be

the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. 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 newly discovered populations in the future, 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 and the section 9(a)(2) prohibitions, 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.

Relationship to Sections 3(5)(A) and 4(b)(2) of the Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations and protection. As such, for an area to be designated as critical habitat for a species it must meet both provisions of the definition. In those cases where an area does not provide those physical and biological features essential to the conservation of the species, it has been our policy to not include these specific areas in designated critical habitat. Likewise, if we believe, based on an