

resulting from urban development for vernal pools, are designed to ensure the continued value of vernal pools that are both within and outside of the preserve boundaries as suitable habitat for the San Diego fairy shrimp. HCPs provide for active conservation actions that positively benefit the affected species, while the maximum requirement that results from critical habitat designation is that parties subject to a Federal nexus refrain from undertaking actions that adversely modify the designated area. Active conservation measures are of greater benefit to the species than mere avoidance of harm. These measures cannot be compelled under a critical habitat designation, but must be volunteered by the parties to the HCP.

Pursuant to the terms of implementation agreements signed by the Service and permit holders in connection with approved HCPs and their associated incidental take permits, once the protection and management required under the HCPs are in place and assuming the established HCPs are functioning properly, no additional mitigation in the form of land or financial compensation may be required of the permit holders and certain identified third parties except as provided under the terms of the individual HCP. Similar assurances will be extended to future permit holders in accordance with our Habitat Conservation Plan Assurance ("No Surprises") rule codified at 50 CFR 17.22(b)(5) and (6), and 17.32(b)(5) and (6).

In light of the intensive investigation and analysis, public comment, and internal section 7 consultations undertaken prior to approval of regional and other Habitat Conservation Plans, we are confident that individual HCPs identify, protect, and provide beneficial adaptive management for essential vernal pool habitat within the boundary of HCPs. Similarly, regional HCPs also identify and will, as the plans are implemented over the life of the permits, protect and provide beneficial adaptive management for essential vernal pool habitat within their boundaries. Therefore, we have considered, but have not proposed critical habitat for the San Diego fairy shrimp within these approved HCPs pursuant to Section 4(b)(2) of the Act. We are soliciting additional public review and comment on these conclusions.

We are proposing to exclude currently proposed HCPs that cover the San Diego fairy shrimp if, prior to publication of a final rule designating critical habitat for the San Diego fairy shrimp, the plans are completed, approved, and legally

operative. We will evaluate the exclusion of these lands on the basis of the best scientific and commercial data available, and after taking into consideration the economic and any other relevant impact of designating critical habitat. Following is our preliminary analysis of the benefits of including lands within approved HCPs versus excluding such lands from critical habitat designation.

#### (1) Benefits of Inclusion

Critical habitat designation is anticipated to provide little additional benefit to the San Diego fairy shrimp within the boundaries of approved HCPs. The primary benefit of any critical habitat is that activities that require Federal funding, permitting, or authorization and which may affect critical habitat require consultation pursuant to section 7 of the Act to ensure the activity will not destroy or adversely modify designated critical habitat. Consultations would also include the associated vernal pool watershed that are designated as critical habitat. However, as a result of the United States Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), there may be limited opportunities to consult with the U.S. Army Corps of Engineers on activities that may affect vernal pools.

Currently approved and permitted HCPs are already designed to ensure the conservation of covered species within the plan area. Additionally, an HCP application must itself be consulted upon pursuant to section 7 of the Act. All HCPs address land use within the plan boundaries, and habitat issues as they relate to land use will have been addressed within the HCP through our consultation on the HCP.

Furthermore, regional HCPs typically provide greater conservation benefits to covered species than independent, project-by-project section 7 consultations because HCPs assure the long-term protection and special management needs for these species and their habitats, and the funding for such management and protections through the standards found in the 5-Point Policy for HCPs (65 FR 35242, June 1, 2000) and the HCP No Surprises regulation (63 FR 8859, February 23, 1998). These types of assurances are typically not provided by individual, project-by-project section 7 consultations because such consultations do not always commit the project proponent to long-term special management or protections; therefore, a consultation may not accord the lands it

covers the extensive benefit a regional HCP provides. It is also important to note that an HCP does not preclude the requirement for Federal agencies to consult under section 7 of the Act for projects that are proposed to occur within the plan area of HCPs, even if the proposed action is a covered activity.

Development and implementation of HCPs provide other important conservation benefits, including the development of biological information to guide conservation efforts and assist in species' recovery, and the creation of innovative solutions to conserve species while allowing for continued economic development.

The educational benefits of critical habitat, including informing the public of areas that are important to the conservation of listed species, are essentially the same as those that would occur during the process of approving an HCP. Specifically, an HCP involves public participation through public notices and public comment periods, prior to being approved. For these reasons, we believe that designation of critical habitat typically provides little additional benefit in areas covered by approved HCPs.

#### (2) Benefits of Exclusion

We have determined that the benefits of excluding lands within approved HCPs from critical habitat designation may be more substantial. The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities and counties of any additional regulatory burden that may result from such designation. Many HCPs, particularly large, regional HCPs, take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted sensitive species. Imposing an additional regulatory review after an HCP is completed solely on the basis of critical habitat designation may jeopardize conservation efforts and partnerships in many areas, and could be viewed as a disincentive to those entities developing HCPs.

A related benefit of excluding lands within HCPs from critical habitat designation is the continued ability to seek new partnerships with future HCP participants including the State of California, counties, local jurisdictions, conservation organizations, and private landowners, that together can implement conservation actions that we would be unable to accomplish