

authorization through section 7 or section 10 of the Act. The regulatory requirements of section 7 consultation that are established with the listing of a species and the requirements associated with critical habitat designation are discussed in detail in the section Effects of Critical Habitat Designation. A discussion of land management activities, including prescribed burning and grazing, that are beneficial to vernal pool habitats, can be found in the section Special Management Considerations.

*State Comment 7:* Caltrans requested that we exclude transportation infrastructure, particularly operating right-of-way, from the designation because these areas are not essential to the conservation of the species.

*Our Response:* We understand the concern of the transportation agencies over having habitat within transportation infrastructure designated as critical habitat. Such areas are included in this designation for several reasons: (1) many areas contain occurrences of the listed vernal pool species and the PCEs; and (2) we did not have the time, resources, or the appropriate GIS data layers to segregate these areas from adjacent vernal pool habitat, evaluate their importance to the conservation of the 15 vernal pool species separately from adjacent vernal pool habitat that we had determined to be essential, and then produce maps and legal descriptions of essential habitat around them, but not including them. Many transportation agency activities involving right-of-way maintenance already trigger section 7 consultation requirements because they support habitat occupied by listed vernal pool species, and because of the Federal nexus provided by the Federal Highway Administration. We do not anticipate that this designation will result in a significant increase in regulatory requirements over those that have existed since the time of the listing of each of the 15 vernal pool species. A more detailed explanation of regulatory requirements of section 7 consultation that are established with the listing of a species, and the requirements associated with critical habitat designation, are discussed in the section Effects of Critical Habitat Designation.

*State Comment 8:* The HCD commented that the information and public review period for the draft economic analysis was insufficient, expressed concern over the broad standardized scale of the economic analysis, and suggested that a more discrete level of analysis is necessary to credibly project economic costs and

benefits of the designation through the 20-year analysis period.

*Our Response:* The draft economic analysis of the proposed critical habitat designation was made available to the public for review and comment on November 21, 2002, (67 FR 70201). At that time, we opened a 30-day public comment period, on both the proposal and the draft economic analysis, which closed on December 23, 2003. On March 14, 2003, we reopened the comment period for both the proposal and the draft economic analysis for an additional 14 days, ending March 28, 2003 (68 FR 12336). Consequently, the public was provided approximately 45-days to review and provide comment on the draft economic analysis. As stated in this final rule, we acknowledge the limitations imposed by conducting public rulemaking under abbreviated, court mandated schedules, and that, as a result, we are not always able to provide adequate public participation in the process.

For large designations, such as this rule, the 4(b)(2) decision will consider broad geographic areas, rather than individual parcels or projects. The level of detail provided in this analysis is appropriate to the size of areas considered for exclusion. In addition, a more detailed analysis would not necessarily produce a more accurate estimate of potential impacts. Parcel-by-parcel analysis of costs may achieve greater certainty for projects that have already been approved by local planners. However predicting the location and characteristics of future projects on a parcel-by-parcel basis using the same sources of data will result in greater uncertainty as the time frame for the analysis increases. For this rulemaking, it is unlikely that a more detailed analysis would produce a significantly different answer.

#### Other Public Comments and Responses

We address other substantive comments and accompanying information in the following summary. Relatively minor editing changes and reference updates suggested by commenters have been incorporated into this final rule or the final economic analysis, as appropriate.

#### *Issue 1—Habitat and Species Specific Information*

*Comment 1:* Several commenters, including county and local governmental representatives, stated that the designation was not based on the best scientific data available, and that we have not adequately established that the areas identified as critical

habitat contain PCEs essential for the species.

*Our Response:* We believe that we used the best scientific and commercial information available in determined those areas essential for the 15 vernal pool species that were proposed as critical habitat and subsequently finalized. However, the mapping scale that we used resulted in a more inclusive proposal. In our final determination, we had additional information available to us, including detailed aerial imagery and other information provided by commenters to assist us in refining our mapping of essential habitat. Please refer to the Background, Criteria Used to Identify Critical Habitat, and Unit Description sections of this rule for further discussion on how we determined habitat that is essential to the conservation of the 15 vernal pool species. After refining our proposal and weighing the best available information, we conclude that the areas designated by this final rule, including currently occupied and unoccupied areas, are essential for the conservation of these species.

*Comment 2:* Several commenters held that nothing has changed from the listing of the species, and that our determination that the designation of critical habitat was not prudent or determinable should remain in place. One commenter stated that we did not evaluate whether critical habitat was determinable and that an analysis needs to be performed according to regulations.

*Our Response:* As outlined in the Prudency Redetermination section of the proposed rule, at the time of the final listing determination for the 15 vernal pool species, we found that designation of critical habitat was not prudent for the vernal pool crustaceans and plants (excluding *Tuctoria mucronata*) because of potential threats, and that a designation of critical habitat was not beneficial for these species. Case law (*Conservation Council For Hawai'i v. Babbitt*, 2 F. Supp.2d 1280 (D.Hawai'i 1998) and *Natural Resources Defense Council v. U.S. Dept. of Interior*, 113 F.3d 1121 (9th Cir. 1997)) has changed how we balance the risks and benefits of critical habitat designations since we listed the 15 vernal pool species. In *Building Industry Association v. Babbitt*, 979 F Supp. 893 (1997), we were directed by the court to reevaluate our not prudent determination for the four listed vernal pool crustaceans. Our record lead us to reconsider our previous not prudent determinations for the 11 plants in light of the new case law and policy. We have