

Comment 46: Dr. David Sunding, University of California, Berkeley, submitted an alternate economic analysis of our proposed designation of critical habitat for the 15 vernal pool species that questioned the accuracy and robustness of our draft economic analysis.

Our Response: We have thoroughly reviewed and address the substantive issues and concerns raised by Dr. Sunding's in his analysis in the final economic analysis for this rulemaking. Please refer to that document for a detailed discussion of Dr. Sunding's analysis and our responses.

Issue 7—Procedural Concerns

Comment 47: One commenter stated that we violated the Commerce Clause power and exceeded our jurisdiction by regulating species which are in no way involved in interstate commerce.

Our Response: The Federal government has the authority under the Commerce Clause of the U.S. Constitution to protect these species, for the reasons given in Judge Wald's and Judge Henderson's concurring opinion in *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 1185 S. Ct. 2340 (1998). See also *Gibbs v. Babbitt*, No.99–1218 (4th Cir. 2000). The Home Builders case involved a challenge to application of Act prohibitions to protect the listed Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*). As with the species at issue here, the Delhi Sands flower-loving fly is endemic to only one State. Judge Wald held that application of the Act to this fly was a proper exercise of Commerce Clause power because it prevented loss of biodiversity and destructive interstate competition.

Comment 48: One commenter stated that since the we identified the proposed rule as a significant regulatory action under Executive Order 12866, we violated it by: (1) Not submitting the economic analysis to the Office of Information and Regulatory Affairs (OIRA) along with the proposed rule prior to publication in the **Federal Register**; (2) not allowing a 60-day review period for the economic analysis; (3) not identifying changes made to the proposed rule as a result of the economic analysis; and (4) not considering the economic analysis during the proposed designation process.

Our Response: Because this rulemaking is subject to a court imposed deadline, section 6(a)(3)(D) of Executive Order 12866 allows us to comply "to the extent practicable" with OIRA submission requirements (commenter's

point 1). We have done so by submitting both the proposed rule and the economic analysis to OIRA for review as soon as was possible prior to publication. It was not practicable to complete the economic analysis prior to publication of the proposed rule, but we did complete it and utilized it in reaching this final designation (commenter's point 4).

With regard to the length of the comment period following publication of the economic analysis (commenter's point 2), section 6(a)(1) of Executive Order 12866 states that we "should, afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." The proposed regulation in this case is the proposed critical habitat designation, not the economic analysis. We provided a total of 104 days for the public to comment on the proposed critical habitat designation. Of those 104 days, 47 were after publication of the notice of availability of the economic analysis on November 21, 2002 (67 FR 70201).

With regard to the identification of changes made to the proposed rule (commenter's point 3), paragraphs 6(a)(3)(E)(ii) and (iii) of the Order require us, subsequent to publication of a proposed rule, to identify any substantive changes made to the proposed rule between submission to OIRA and to the public. We made no substantive changes to the proposed rule during that time period. Substantive changes made to the rule following public review and comment are addressed in the Summary of Changes from the Proposed Rule section of this final rule.

Comment 49: One commenter stated that due to the U.S. Supreme Court ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers* (2001) 531 U.S. 159 (SWANCC), we do not have the authority to list species or implement regulatory actions related to such listings in isolated vernal pools.

Our Response: The SWANCC decision pertained to the Corps and their authority under the Clean Water Act to take regulatory jurisdiction over wetlands which may be isolated from navigatable waters. The 15 vernal pool species will continue to receive the protections afforded them under the Act, including designation of critical habitat, regardless of whether vernal pools are determined to be regulated as waters of the United States under the Clean Water Act.

Comment 50: One commenter stated that we failed to comply with prescribed

procedures mandated by the APA by not providing access to the administrative record for the proposed rule and economic analysis.

Our Response: In the proposed rule, we stated that all supporting documentation, including the references and unpublished data used in the preparation of the proposed rule, would be available for public inspection at the Sacramento Fish and Wildlife Office. A public viewing area was made available at the Sacramento Fish and Wildlife Office where the proposed critical habitat units, superimposed on 7.5 minute topographic maps, could be inspected. In addition, we responded to each request for GIS maps and data supporting the rulemaking in a timely manner by providing copies of detailed maps and data specific to their needs. Additionally, data concerning the occurrences of the vernal pool crustaceans and vernal pool shrimp used in the analysis for the proposed designation were also made available to the public, if requested. Therefore, we believe that we have complied with provisions of the APA as it relates to this rulemaking.

Summary of Changes From the Proposed Rule

On the basis of a review of public comments received on the proposed designation of critical habitat and DEA for the 4 vernal pool crustaceans and 11 vernal pool plants in California and southern Oregon, we reevaluated our proposed critical habitat designation and made changes as necessary. In the development of our final designation of critical habitat for these 15 vernal pool species, we considered new information provided to our office after the proposed designation was published.

The refinements to the amount of land determined to be essential for the 15 vernal pool species and incorporated into this final designation resulted in a net reduction of approximately 466,504 ac (186,601 ha) of land. Most of the units received some refinement, and a few were divided into subunits depending on the amount of nonessential lands that were removed. Information regarding the extent of the changes from the proposed rule in the individual units is in the unit descriptions for each species and acreage tables.

The common name for the species *Castilleja campestris* ssp. *succulenta* was changed in the final rule (from succulent owl's-clover to fleshy owl's-clover) to reflect the name used under the listing of the species (Service 1997a). This was done to avoid