

implemented under section 7(a)(1), the regulatory protections afforded by the section 7(a)(2) jeopardy standard, and the applicable prohibitions of section 9 of the Act, as determined on the basis of the best available information at the time of the action. Federally funded or assisted 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 should not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

The action of designating critical habitat does not automatically lead to recovery of a listed species, but it may contribute to species long-term conservation. Critical habitat units are not preserve areas; designation does not target and establish specific preserves and their boundaries. Critical habitat is designated to make Federal agencies aware that these areas are critical to the species. Although the designation of critical habitat can identify areas where a variety of conservation strategies may be developed to ensure the survival and recovery of target species, the development of these strategies are most appropriately taken through local planning efforts, such as the development of HCPs. The action of designating critical habitat does not result in the creation of management plans, establish numerical population goals, or prescribe specific management actions, whether inside or outside of such designated critical habitat. Specific management recommendations for areas designated as critical habitat are most appropriately addressed in recovery, conservation, and management plans, and through consultations and permits under section 7 and section 10 of the Act.

### Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such

threat to the species, or (2) such designation of critical habitat would not be beneficial to the species. At the time of the final listing determinations (62 FR 34029; 62 FR 14338; 59 FR 48136; 57 FR 24192), we found that designation of critical habitat was not prudent for the vernal pool crustaceans and plants (excluding *Tuctoria mucronata*). At the time of final listing of *Tuctoria mucronata* (43 FR 44810), we did not make any determination about whether or not designation of critical habitat was prudent.

However, in the past few years, several of our determinations that the designation of critical habitat would not be prudent have been overturned by court decisions. For example, in *Conservation Council for Hawaii v. Babbitt*, the United States District Court for the District of Hawaii ruled that the Service could not rely on the “increased threat” rationale for a “not prudent” determination without specific evidence of the threat to the species at issue (2 F. Supp. 2d 1280 [D. Hawaii 1998]). Additionally, in *Natural Resources Defense Council v. U.S. Department of the Interior*, the United States Court of Appeals for the Ninth Circuit issued a ruling that limited the application of the no benefit justification and required the Service to balance the potential threats against any benefits to the species of designating critical habitat 113 F. 3d 1121, 1125 (9th Cir. 1997).

The courts also have ruled that, in the absence of a finding that the designation of critical habitat would increase threats to a species, the existence of another type of protection, even if it offers potentially greater protection to the species, does not justify a not prudent finding (*Conservation Council for Hawaii v. Babbitt* 2 F. Supp. 2d 1280).

On the basis of these court decisions and the decision specific to these species, we have re-evaluated our original prudency determinations for the 14 vernal pool species for which we had made a determination, using the information available at the time we made our final listing decisions and that which has become available since. We further evaluated the prudency of designation critical habitat for *Tuctoria mucronata* in light of these court decisions.

If critical habitat is designated for the 15 vernal pool species, Federal agencies will be required to consult with us on actions they carry out, fund, permit, or authorize, to ensure that their actions will not destroy or adversely modify critical habitat. It may also provide information to Federal agencies and the general public of the importance of the vernal pool species and their habitat

and the need for special management considerations or protection. A critical habitat designation may assist Federal agencies in planning future actions because it establishes, in advance, those habitats that will be reviewed in section 7 consultations.

We have determined that the instances of likely vandalism, discussed in the final listing rules as the rationale for why we did not believe critical habitat to be prudent, though real, have been relatively isolated since the species have been listed. Consequently, we conclude that designating critical habitat will not increase incidences of habitat vandalism above current levels for these species. Accordingly, we withdraw our previous determinations that the designation of critical habitat is not prudent. We find that designation of critical habitat is prudent and determinable for the 15 vernal pool species addressed herein because there is not likely to be increased threats to the species that may result from the critical habitat designation. Therefore, we are subsequently designating critical habitat for the four vernal pool crustaceans and 11 vernal pool plants in this final rule.

### Methods

As required by section 4(b)(2) of the Act and regulations at 50 CFR 424.12, we are to use the best scientific and commercial data available to determine areas that contain the physical and biological features essential for the conservation of the 15 vernal pool species. This included data and information contained in, but not limited to, the final rules listing the 15 species addressed herein, the Vernal Pools of Southern California Final Recovery Plan (Service 1998), the Delta Green Ground Beetle and Solano Grass Recovery Plan (Service 1985), the California Vernal Pool Assessment Preliminary Report (Keeler-Wolf 1998), Report of Science Advisors for the Eastern Merced County Natural Community Conservation Plan Habitat Conservation Plan (Noss *et al.* 2002a), research and survey observations published in peer reviewed articles, vernal pool mapping and other data collected for the development of HCPs, reports submitted by biologists holding section 10(a)(1)(A) recovery permits, biological assessments provided to us through section 7 consultations, data collected for the development of a Wetland Conservation Plan in Oregon, reports and documents that are on file in our field offices, and personal discussions with experts outside of our agency with extensive knowledge of vernal pool species and habitats.