

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: September 15, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2008-0089;
81420-1117-8B10 B4]

RIN 1018-AV90

Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the California Red-Legged Frog (*Rana aurora draytonii*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, availability of revised draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our September 16, 2008, and April 28, 2009, proposal to revise the designation of critical habitat for the California red-legged frog under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a revised draft economic analysis (DEA). We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revision of critical habitat and the associated revised DEA. Comments previously submitted on this rulemaking do not need to be resubmitted. These comments have already been incorporated into the public record and will be fully considered in preparation of the final rule.

DATES: We will accept comments received on or before November 9, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-R8-ES-2008-0089.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R8-

ES-2008-0089; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT:

Susan Moore, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W-2605, Sacramento, CA 95825; telephone 916-414-6600; facsimile 916-414-6712. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revision to critical habitat for the California red-legged frog published in the **Federal Register** on September 16, 2008 (73 FR 53492), and revised in the **Federal Register** on April 28, 2009 (74 FR 19184), and the current revised DEA (IEc 2009b) of the proposed revised designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the subspecies from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

- The amount and distribution of California red-legged frog habitat,
 - Locations within the geographical area occupied at the time of listing that contain features essential to the conservation of the subspecies that we should include in the designation and why, and
 - Locations not within the geographical area occupied at the time of listing that are essential to the conservation of the subspecies and why.
- (3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat.
- (4) Probable economic, national security, or other relevant impacts of

designating particular areas as critical habitat. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) The potential exclusion from final revised critical habitat, and whether such exclusion is appropriate and why, of non-Federal lands:

- Covered by the East Contra Costa County Habitat Conservation Plan (ECCHCP),
- Owned and managed by the East Bay Regional Park District within the boundaries of the ECCHCP,
- Covered by the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), and
- Covered by the Bonny Doon Settlement Ponds Habitat Conservation Plan.

(6) Whether the lands proposed as critical habitat on Department of Defense land at Vandenberg Air Force Base in Santa Barbara County and Camp San Luis Obispo in San Luis Obispo County should be exempted under section 4(a)(3) of the Act or excluded under section 4(b)(2) of the Act and why.

(7) Whether the U.S. Forest Service lands managed under the Sierra Nevada Forest Plan Amendment within the units being proposed as critical habitat should be excluded under section 4(b)(2) of the Act and why.

(8) Whether Unit CAL-1 (Young's Creek) in Calaveras County should be excluded under section 4(b)(2) of the Act and why.

(9) Whether changes made to the proposed critical habitat Unit MEN-1 in Mendocino County appropriately reflect the current knowledge of the subspecies distribution and occurrence within the area and whether that area should be designated as critical habitat.

(10) Information on the extent to which any Federal, State, and local environmental protection measures we reference in the revised DEA were adopted largely as a result of the subspecies' listing.

(11) Information on whether the revised DEA identifies all Federal, State, and local costs and benefits attributable to the proposed revision of critical habitat, and information on any costs or benefits that we may have overlooked.

(12) Information on whether the revised DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate revised critical habitat.

(13) Information on whether the revised DEA correctly assesses the effect on regional costs associated with any land use controls that may result from

the revised designation of critical habitat.

(14) Information on areas that the revised critical habitat designation could potentially impact to a disproportionate degree.

(15) Information on whether the revised DEA identifies all costs that could result from the proposed revised designation.

(16) Information on any quantifiable economic benefits of the revised designation.

(17) Whether the benefits of excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(18) Economic data on the incremental costs of designating a particular area as revised critical habitat.

(19) Whether we could improve or modify our approach to designating critical habitat to provide for greater public participation and understanding, or assist in accommodating public concerns and comments.

(20) Any foreseeable impacts on energy supplies, distribution, and use resulting from the proposed designation and, in particular, any impacts on electricity production, and the benefits of including or excluding areas that exhibit these impacts.

If you submitted comments or information on the proposed revised rule (73 FR 53492) during the initial comment period from September 16, 2008, to November 17, 2008, or the comment period on the revised proposal (74 FR 19184) from April 28, 2009, to May 28, 2009, please do not resubmit them. These comments are included in the public record for this rulemaking, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within those proposed do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning the proposed revised rule or DEA by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted

on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed revised rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed revision of critical habitat and associated DEA on the Internet at <http://www.regulations.gov>, on the Sacramento Fish and Wildlife Office Web page at <http://www.fws.gov/sacramento>, or by contacting the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

Critical habitat for the California red-legged frog was first designated on March 13, 2001 (66 FR 14625), and has been revised several times since then. For more information on previous Federal actions concerning the California red-legged frog, refer to the proposals to revise the designation of critical habitat published in the **Federal Register** on September 16, 2008 (73 FR 53492), and on April 28, 2009 (74 FR 19184). Comments received on our previous Draft Economic Analysis (DEA) (IEC 20009a) during the second public comment period led to this revised DEA.

On December 12, 2007, the Center for Biological Diversity filed a complaint in the U.S. District Court for the Northern District of California challenging our designation of critical habitat for the California red-legged frog (*Center for Biological Diversity v. Kempthorne, et al.*, Case No. C-07-6404-WHA). On April 2, 2008, the court entered a consent decree requiring a proposed revised critical habitat rule to be submitted to the **Federal Register** by August 29, 2008, and a final revised critical habitat designation to be submitted to the **Federal Register** by August 31, 2009. The consent decree was modified on August 31, 2009, and now requires that we submit a final revised critical habitat designation to the **Federal Register** by March 1, 2010.

Section 3 of the Act defines critical habitat as the specific areas within the

geographical 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 essential to the conservation of the species which may require special management considerations or protection, and specific areas outside the geographical 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. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Under section 4(b)(2) of the Act, we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. In making a decision to exclude areas, we consider the economic impact, impact on national security, or any other relevant impact of the designation.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a revised DEA of our April 28, 2009 (74 FR 19184), proposed rule to revise designated critical habitat for the California red-legged frog.

The intent of the revised DEA (IEC 2009b) is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for the California red-legged frog. Additionally, the economic analysis looks retrospectively at costs incurred since the May 23, 1996 (61 FR 25813), listing of the California red-legged frog as threatened. The revised DEA quantifies the economic impacts of all potential conservation efforts for the California red-legged frog; some of these costs will likely be incurred regardless of whether we designate revised critical habitat. The economic impact of the proposed revised critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without

critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the subspecies (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the subspecies. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the subspecies. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the subspecies was listed, and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat.

The revised DEA estimates the reasonably foreseeable economic impacts of the proposed revised critical habitat designation. The economic analysis identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to the subspecies being listed within the Act. The revised DEA describes economic impacts of California red-legged frog conservation efforts associated with the following categories of activity: (1) Residential and Commercial Development; (2) Water Management; (3) Agriculture; (4) Ranching and Grazing; (5) Timber Harvest; (6) Transportation; (7) Fire Management; (8) Utility and Oil and Gas Pipeline Construction and Maintenance; and (9) Habitat and Vegetation Management.

The baseline economic impacts are those impacts that result from listing and other conservation efforts for the California red-legged frog. Conservation efforts related to development activities constitute the majority of total baseline costs (approximately 77 to 82 percent) in areas of proposed revised critical habitat. Impacts to agriculture make up the majority of the remainder of the costs associated with the proposed revised designation. The total future baseline impacts (potential costs related to the subspecies being listed and other conservation-related activities) are estimated to be \$510 million to \$1.34

billion (\$46.1 million to \$121 million on an annualized basis), assuming a 7 percent discount rate, through the year 2030.

The majority of incremental impacts attributed to the proposed revised critical habitat designation are expected to be related to development (approximately 90 percent) followed by agricultural impacts (approximately 10 percent). Impacts to all other activities represent less than one percent of the total incremental impacts. The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the next 22 years (2009 to 2030) to be \$183 million to \$566 million (\$16.5 to \$51.2 million annualized) in present value terms using a 7 percent discount rate. For development, the estimated incremental impacts range from \$124 million to \$507 million, assuming a 7 percent discount rate; for agriculture, the estimated incremental impacts range from \$58.3 million to \$80.9 million, assuming a 7 percent discount rate.

The revised DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (e.g., lost economic opportunities associated with restrictions on land use). The revised DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The revised DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the revised DEA, as well as on all aspects of the proposed revised critical habitat rule. The final revised critical habitat rule may differ from the proposed revised rule based on new information we receive during the public comment periods. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical

habitat, provided the exclusion will not result in the extinction of the subspecies.

Required Determinations—Amended

In our proposed rule dated September 16, 2008 (73 FR 53492), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the revised designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the revised DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, the National Environmental Policy Act, and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the DEA data, we revised our required determinations concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed revised designation is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies’ actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory

flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our revised DEA of the proposed revised designation, we provide our analysis for determining whether the proposed revised rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for the California red-legged frog would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the subspecies is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the California red-legged frog. Federal agencies also must consult with us if their activities may affect revised designated critical habitat.

In the revised DEA of the proposed revision to critical habitat, we evaluate the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed revision to critical habitat for the California red-legged frog. The revised DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in Chapters 4 through 13 of the revised DEA, and evaluates the potential for economic impacts related to activity categories including urban development, water management, agriculture, grazing and ranching, timber harvest activities, transportation, utility pipeline construction and maintenance, fire management activities, and habitat management. The revised DEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated with urban development and agriculture. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the revised DEA, the largest impacts of the proposed rule result from section 7 consultations with the Service on development projects not subject to an existing habitat conservation plan, and to a lesser degree, similar types of costs resulting from the California Environmental Quality Act (CEQA) review of development projects lacking a Federal nexus. The analysis assumes full build-out of all areas identified as likely to be developed (as defined in Chapter 4 of the DEA; IEC 2009b) within the next 22 years. The DEA (Exhibit 4–5) identifies approximately 2,226 ac (860 ha) of projected development in areas likely to experience impacts as a result of the designation of critical habitat (incremental impact).

This analysis assumes incremental development-related costs will be borne either by developers or current landowners, depending on the

developers' ability to offset critical habitat costs by paying lower prices for developable acres at the outset of projects. Current landowners may be individuals or families that are not legally considered to be businesses. As shown in Exhibit A–2, nearly all developers in the counties overlapping proposed critical habitat are, by definition, small entities. To understand the potential impact development-related costs on small entities, the IRFA assigns all costs to small development firms. This assumption is likely to overstate the actual impacts to such entities.

Assuming a 100-acre (40-hectare) average development size yields approximately 22 affected development projects over the next 22 years, or approximately 1 project annually. The incremental impact due to critical habitat is estimated to range from \$11.2 to \$45.9 million on an annualized basis, assuming a 7 percent discount rate.

The incremental costs attributed to agriculture are explained in Chapter 6 of the DEA. As described in Chapter 6, a stipulated injunction issued by the U.S. District Court for the Northern District of California restricts pesticide application in designated critical habitat. This analysis assumes these restrictions will continue through 2030 as a result of future section 7 consultation between the Service and U.S. Environmental Protection Agency. The analysis assumes that the lands affected by this prohibition will be taken out of production; to the extent that there are alternative beneficial uses of agricultural land (such as organic farming or grazing), or the section 7 consultation process results in less prohibitive use of pesticides, this analysis may overstate future economic impacts.

To estimate the potential incremental impact on small farmers, we began by estimating the probability that affected areas are likely to be found on small farms based on the percentage of total cropland in each county cultivated by small entities. We divided the resulting areas by the median farm size per county to estimate that a minimum of 217 small farms are likely to be affected. If less than 100 percent of these farms overlaps affected areas, then the number of farms affected could be higher. Total annualized impacts associated with these areas are anticipated to be as high as \$2.7 million (see Exhibit A–6), assuming a 7 percent discount rate, or \$500 to \$168,000 per farm, depending on the type of crops affected. Note that, if the number of small farms affected is greater than 217, the per farm impacts will be lower.

In summary, we have considered whether the revised proposed rule would result in a significant economic impact on a substantial number of small entities. As a result of the uncertainty that exists regarding both the numbers of entities that may be impacted by the revised proposed rule and the degree of impact on individual entities, we have developed an Initial Regulatory Flexibility Analysis (IRFA) (DEA 2009b, Appendix A). However, due to the number of uncertainties identified in the DEA, we have prepared this IRFA without first making the threshold determination of whether the revised proposed critical habitat designation could be certified as not having a significant economic impact on a substantial number of small entities. This IRFA is intended to improve the Service's understanding of the effects of the proposed rule on small entities and to identify opportunities to minimize these impacts in the final rulemaking.

Executive Order 13211—Energy Supply, Distribution, and Use

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions that may affect the supply, distribution, and use of energy. This proposed revision to critical habitat for the California red-legged frog is not considered a significant regulatory action under E.O. 12866. OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As highlighted in Chapter 10 (Exhibits 10-2 and 10-3), a number of oil and gas companies own and operate pipelines that pass through the proposed revised critical habitat, and Waste Management and the Linde Group plan to build the world's largest landfill gas plant in Unit ALA-2. However, the incremental impact to these entities over the next 22 years is solely attributable to the costs of section 7 consultation and no measurable impacts to the quantity or cost of energy production and distribution are likely to result from the revised designation of critical habitat (such as a reduction in electricity production or an increase in the cost of energy production or distribution), and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

Critical habitat designation does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action that may destroy or adversely modify critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they

receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The revised DEA concludes incremental impacts may occur due to project modifications that may need to be made for development and tribal activities; however, these are not expected to affect small governments as the costs attributed to development is limited to private lands and not those owned by local governments. Consequently, we do not believe that the revised critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing revised critical habitat for the California red-legged frog in a takings implications assessment. Our takings implications assessment concludes that the proposed revision to critical habitat for the California red-legged frog does not pose significant takings implications.

References Cited

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at <http://www.regulations.gov> or by contacting the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Authors

The primary authors of this rulemaking are the staff members of the Sacramento Fish and Wildlife Office.

Dated: September 29, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

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