

EFFECTIVE DATE: October 1, 2000.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

A. Background

In 1991, Subpart 1837.70, Acquisition of Training, was added to the NFS. Section 1837.7000, Acquisition of off-the-shelf training courses, provided that the Government Employees Training Act of 1958, 5 U.S.C. 4101 *et seq.*, could be used as the authority for acquisition of "non-Governmental off-the-shelf training courses which are available to the public." Subpart 1837.7001, Acquisition of new training courses, provided that acquisition of new training courses "developed to fill a specific NASA need" must be conducted in accordance with the FAR. This subpart is being removed because it has caused confusion within NASA about the relevance of the FAR to training service procurement.

A proposed rule was published in the **Federal Register** at 65 FR 43730, dated July 14, 2000. No comments were received, and this final rule adopts the proposed rule without change.

B. Regulatory Flexibility Act

NASA certifies that this rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because the deletion of this subpart will not alter the manner in which NASA is required to acquire training.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the NFS do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 1837

Government Procurement

Anne Guenther,

Acting Associate Administrator for Procurement.

Accordingly, 48 CFR Part 1837 is proposed to be amended as follows:

1. The authority citation for 48 CFR Part 1837 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1)

PART 1837—SERVICE CONTRACTING

2. Subpart 1837.70 is removed.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AF98

Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Alameda Whipsnake (*Masticophis lateralis euryxanthus*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat under the Endangered Species Act of 1973, as amended (Act), for the Alameda whipsnake (*Masticophis lateralis euryxanthus*). A total of approximately 164,150 hectares (406,598 acres) of land fall within the boundaries of designated critical habitat. Critical habitat for the Alameda whipsnake is located in Contra Costa, Alameda, San Joaquin, and Santa Clara counties, California. Section 7 of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. As required by section 4 of the Act, we considered economic and other relevant impacts prior to making a final decision on the size and configuration of critical habitat.

EFFECTIVE DATE: This final rule is effective November 2, 2000.

ADDRESSES: The complete administrative record for this rule is on file at the U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Suite W-2605, Sacramento, California 95825. The complete file for this rule is available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Jason Davis or Heather Bell, at the above address (telephone 916/414-6600, facsimile 916/414-6713).

SUPPLEMENTARY INFORMATION:

Background

The Alameda whipsnake is a slender, fast-moving, diurnal snake with a broad head, large eyes, and slender neck.

Alameda whipsnakes range from 91 to 122 centimeters (3 to 4 feet) in length. The dorsal surface is sooty black in color with a distinct yellow-orange stripe down each side. The forward portion of the bottom surface is orange-rufous colored, the midsection is cream colored, and the rear portion and tail are pinkish. The adult Alameda whipsnake virtually lacks black spotting on the bottom surface of the head and neck. Juveniles may show very sparse or weak black spots. Another common name for the Alameda whipsnake is the "Alameda striped racer" (Riemer 1954, Jennings 1983, Stebbins 1985).

The Alameda whipsnake is one of two subspecies of the California whipsnake (*Masticophis lateralis*). The chaparral whipsnake (*Masticophis lateralis lateralis*) is distributed from northern California, west of the Sierran crest and desert, to central Baja California. The Alameda whipsnake is restricted to a small portion of this range, primarily the inner Coast Range in western and central Contra Costa and Alameda Counties.

The distribution in California, of both subspecies, coincides closely with chaparral (Jennings 1983, Stebbins 1985). Recent telemetry data indicate that, although home ranges of Alameda whipsnakes are centered on shrub communities, whipsnakes frequently venture into adjacent habitats, including grassland, oak savanna, and occasionally oak-bay woodland. Most telemetry locations are within 50 meters (m) (170 feet (ft)) of scrub habitat, but distances of greater than 150 m (500 ft) occur (Swaim 1994). Initial data indicate that adjacent habitats may play a crucial role in certain life history and physiological needs of the Alameda whipsnake, but the full extent has yet to be determined. Telemetry data indicate that whipsnakes remain in grasslands for periods ranging from a few hours to several weeks at a time. Grassland habitats are used by male whipsnakes most extensively during the mating season in spring. Female whipsnakes use grassland areas most extensively after mating, possibly in their search for suitable egg-laying sites (Swaim 1994).

Rock outcrops can be an important feature of Alameda whipsnake habitat because they provide retreat opportunities for whipsnakes and support lizard populations. Lizards, especially the western fence lizard (*Sceloporus occidentalis*), appear to be the most important prey item of whipsnakes (Stebbins 1985; Swaim 1994; Harry Green, Museum of Vertebrate Zoology, U.C. Berkeley, pers. comm. 1998), although other prey items are taken, including skinks, frogs,

snakes, and birds (Stebbins 1985, Swaim 1994). Most radio telemetry locations for whipsnakes were within the distribution of major rock outcroppings and talus (a sloping mass of rock debris at the base of a cliff) (Swaim 1994).

Alameda whipsnakes have been found in association with a variety of shrub communities including diablan sage scrub, coyote bush scrub, and chamise chaparral (Swaim 1994), also classified as coastal scrub, mixed chaparral, and chamise-redshank chaparral (Mayer and Laudenslayer 1988). However, the type of vegetation may have less to do with preference by the whipsnake than the extent of the canopy, slope exposure, the availability of retreats such as rock outcrops and rodent burrows, and prey species composition and abundance (Swaim 1994; K. Swaim, Swaim Biological Consulting, pers. comm. 1999). Alameda whipsnakes have been sighted or found dead a significant distance from the nearest shrub community (K. Swaim, pers. comm. 1999). The reasons for such movements are unknown.

Initial studies indicated that Alameda whipsnakes occurred where the canopy was open (less than 75 percent of the total area within the scrub or chaparral community was covered by shrub crown) or partially open (between 75 and 90 percent of the total area was covered with shrub crown), and only seldom did whipsnakes occur in closed canopy (greater than 90 percent of the area was covered by shrub crown). However, trapping efforts may have been biased due to the difficulty of setting traps in dense scrub (Swaim 1994; K. Swaim, pers. comm. 1999).

Core areas (areas of concentrated use) of the Alameda whipsnake most commonly occur on east, south, southeast, and southwest facing slopes (Swaim 1994). However, recent information indicates that whipsnakes do make use of north facing slopes in more open stands of scrub habitat (K. Swaim, pers. comm. 1999).

Adult snakes appear to have a bimodal (two times of the year) seasonal activity pattern with peaks during the spring mating season and a smaller peak during late summer and early fall. Although short above-ground movements may occur during the winter, Alameda whipsnakes generally retreat in November into a hibernaculum (shelter used during the snake's dormancy period) and emerge in March. Courtship and mating occur from late-March through mid-June. During this time, males move around throughout their home ranges, while females appear to remain at or near their

hibernaculum, where mating occurs. Suspected egg-laying sites for two females were located in grassland with scattered shrub habitat. Male home ranges of 1.9 to 8.7 hectares (ha) (4.7 to 21.5 acres (ac)) (mean of 5.5 ha or 13.6 ac) were recorded, and showed a high degree of spatial overlap. Several individual snakes monitored for nearly an entire activity season appeared to maintain a stable home range. Movements of these individuals were multi-directional, and individual snakes returned to specific areas and retreat sites after long intervals of non-use. Snakes had one or more core areas within their home range, while large areas of the home range received little use (Swaim 1994).

Previous Federal Action

The September 18, 1985, Notice of Review (50 FR 37958) included the Alameda whipsnake as a category 2 candidate species for possible future listing as endangered or threatened. Category 2 candidates were those taxa for which listing as threatened or endangered might be warranted, but for which adequate data on biological vulnerability and threats were not available to support issuance of listing proposals. The January 6, 1989, Notice of Review (54 FR 554) solicited information on its status as a category 2 candidate species. The Alameda whipsnake was moved to category 1 in the November 21, 1991, Notice of Review (56 FR 58804) on the basis of significant increases in habitat loss and threats occurring throughout its range. Category 1 candidates were defined as taxa for which we had on file substantial information on biological vulnerability and threats to support preparation of listing proposals. On February 4, 1994, we published a proposed rule in the **Federal Register** (59 FR 5377) to list the Alameda whipsnake as an endangered species. On December 5, 1997, we published a final rule listing the Alameda whipsnake as threatened (62 FR 64306).

On March 4, 1999, the Southwest Center for Biological Diversity, the Center for Biological Diversity, and Christians Caring for Creation filed a lawsuit in the Northern District of California against the U.S. Fish and Wildlife Service and Bruce Babbitt, Secretary of the Department of the Interior (Secretary), for failure to designate critical habitat for seven species: The Alameda whipsnake (*Masticophis lateralis euryxanthus*), the Zayante band-winged grasshopper (*Trimerotropis infantilis*), the Morro shoulderband snail (*Helminthoglypta walkeriana*), the Arroyo southwestern

toad (*Bufo microscaphus californicus*), the San Bernardino kangaroo rat (*Dipodomys merriami parvus*), the spectacled eider (*Somateria fischeri*), and the Steller's eider (*Polysticta stelleri*) (*Southwest Center for Biological Diversity v. U.S. Fish and Wildlife*, CIV 99-1003 MMC).

On November 5, 1999, William Alsup, U.S. District Judge, dismissed the plaintiffs' lawsuit under a settlement agreement entered into by the parties. On March 8, 2000, (65 FR 12155) we proposed the designation of 7 areas within Alameda, Contra Costa, San Joaquin, and Santa Clara Counties as critical habitat for the Alameda whipsnake.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed under the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management consideration or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon determination that these areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures that are necessary to bring an endangered species or a threatened species to the point at which listing under the Act is no longer necessary.

Section 4(b)(2) of the Act requires that we base critical habitat proposals upon the best scientific and commercial data available, after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species (section 4(b)(2) of the Act).

Designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features that are essential for conservation of that species. Designation of critical habitat alerts the public as well as land-managing agencies to the importance of these areas.

Critical habitat also identifies areas that may require special management considerations or protection, and may provide protection to areas where significant threats to the species have

been identified. Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Aside from the protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat.

Section 7(a)(2) of the Act requires Federal agencies to consult with us to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of critical habitat. "Jeopardize the continued existence" (of a species) is defined as an appreciable reduction in the likelihood of survival and recovery of a listed species.

"Destruction or adverse modification" (of critical habitat) is defined as a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and recovery of the listed species for which critical habitat was designated. Thus, the definitions of "jeopardy" to the species and "adverse modification" of critical habitat are nearly identical (50 CFR 402.02). When multiple units of critical habitat are designated, each unit may serve as the basis of an adverse modification analysis if protection of different facets of the species' life cycle or its distribution are essential to the species as a whole for both its survival and recovery.

Designating critical habitat does not, in itself, lead to recovery of a listed species. Designation does not create or mandate a management plan, establish numerical population goals, prescribe specific management actions (inside or outside of critical habitat), or directly affect areas not designated as critical habitat. Specific management recommendations for critical habitat are most appropriately addressed in recovery plans and management plans, and through section 7 consultation.

We did not propose to designate critical habitat for the Alameda whipsnake within the proposed or final listing rulemaking because, at the time of listing, we knew of no Federal lands within the five whipsnake populations. We also believed that the possibility of Federal agency involvement on private and public, non-Federal lands was remote. Based on information available at the time of listing, we believed that only 20 percent of known whipsnake habitat occurred on private lands, and anticipated that urban development on private lands would occur only along

the periphery of whipsnake populations. In addition, we believed that the need for active fire management programs at this urban-wildland interface would preclude those private lands from being considered habitat essential to the conservation of the species. We found that critical habitat designation was not prudent due to lack of any significant benefit beyond that conferred by listing.

Since the Alameda whipsnake was listed, we have found that there are a greater number of Federal actions that could trigger the need for an interagency consultation than was believed at the time the Alameda whipsnake was listed. We are now aware of federally owned lands that occur within the range of the Alameda whipsnake, including Bureau of Land Management parcels in the Mount Diablo-Black Hills population area. In addition, an Alameda whipsnake was recently captured on land owned by the U.S. Department of Energy at their Site 300 facility, a Federal site not previously known to be inhabited by Alameda whipsnakes. We are also aware of a number of activities with a Federal connection on private lands within the range of the whipsnake, including activities associated with the issuance of Clean Water Act section 404 permits and Federal Emergency Management Agency fire protection projects.

We now believe that private lands play a more important role in whipsnake conservation than we originally believed. An increasing amount of private land has been found to be occupied by the Alameda whipsnake, comprising more than 20 percent of land within the five whipsnake populations. High-value Alameda whipsnake habitat occurs on private lands that are evenly distributed throughout all five whipsnake population areas. We now believe that private lands are essential to the conservation of the species.

Relationship to Recovery

The ultimate purpose of listing a species as threatened or endangered under the Act is to recover the species to the point at which it no longer needs the protections provided to the listed species. The Act mandates the conservation of listed species through different mechanisms. Section 4(f) of the Act authorizes the Service to develop recovery plans for listed species. A recovery plan includes (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species, (ii) objective, measurable criteria which, when met,

would result in a determination that the species be removed from the list, and (iii) estimates of the time required and cost to carry out those measures needed to achieve the plan's goal.

We are currently drafting a recovery plan for the Alameda whipsnake. This draft recovery plan will include a more thorough analysis of recovery needs of the Alameda whipsnake. Therefore, we may amend critical habitat at a later date based on information gained through the recovery planning process.

Primary Constituent Elements

Under section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features that are essential to conservation of the species and that may require special management considerations or protection. Such requirements include, but are not limited to, space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The primary constituent elements for the Alameda whipsnake are those habitat components that are essential for the primary biological needs of foraging, sheltering, breeding, maturation, and dispersal. The primary constituent elements are in areas that support scrub communities, including mixed chaparral, chamise-redshank chaparral, coastal scrub, and annual grassland and oak woodlands that lie adjacent to scrub habitats. In addition, the primary constituent elements for the Alameda whipsnake may be found in grasslands and various oak woodlands that are linked to scrub habitats by substantial rock outcrops or river corridors. Other habitat features that provide a source of cover for the whipsnake during dispersal or are near scrub habitats and contain habitat features (e.g., rock outcrops) that support adequate prey populations may also contain primary constituent elements for the Alameda whipsnake. Within these communities, Alameda whipsnakes require plant canopy covers that supply a suitable range of temperatures for the species' normal behavioral and physiological requirements (including but not limited to foraging, breeding, and maturation).

Openings in the plant canopy or scrub/grassland edge provide sunning and foraging areas. Corridors of plant cover and retreats (including rock outcrops) sufficient to provide for dispersal between areas of habitat, and plant community patches of sufficient size to prevent the deleterious effects of isolation (such as inbreeding or the loss of a subpopulation due to a catastrophic event) are also essential. Within these plant communities, specific habitat features needed by whipsnakes include, but are not limited to, small mammal burrows, rock outcrops, talus, and other forms of cover to provide temperature regulation, shelter from predators, egg laying sites, and winter hibernaculum. Many of these same elements are important in maintaining prey species. Adequate insect populations are necessary to sustain prey populations.

Criteria Used To Identify Critical Habitat

We considered several qualitative criteria in the selection and proposal of specific areas or units for Alameda whipsnake critical habitat. These criteria focused on designating units (1) throughout the geographic and elevation range of the species; (2) within various occupied plant communities, such as diablo sage scrub, coyote bush scrub, and chamise chaparral; (3) in areas of large, contiguous blocks of geographical areas occupied by the species; and (4) in areas that link contiguous blocks of geographical areas occupied by the species (i.e., linkage areas).

Methods

In developing critical habitat for the Alameda whipsnake, we used data on known Alameda whipsnake locations to initially identify important areas. Through the use of 1998 and 1999 aerial photos (1:12,000 scale) and 1994 digital orthophotos, we examined the extent of suitable habitat that was in the vicinity of known whipsnake locations. Critical habitat includes both suitable habitat and areas that link suitable habitat, as these links or corridors facilitate movement of individuals between habitat areas and are important for dispersal and gene flow (Beier and Noss 1998). We have determined seven separate units of critical habitat, five of which represent primary breeding, feeding, and sheltering areas, while the other two represent corridors (See attached figures). The range of these critical habitat units extends in the south from Wauhab Ridge in the Del Valle area to Cedar Mountain Ridge, in Santa Clara County; north to the northernmost extent of suitable habitat in Contra Costa County; west to the

westernmost extent of the inner Coastal Range; and in the east, to the easternmost extent of suitable habitat. We could not depend solely on federally owned lands for critical habitat designation as they are limited in geographic location, size, and habitat quality. In addition to federally owned lands, we propose to designate critical habitat on non-Federal public lands and privately owned lands, including California Department of Parks and Recreation lands, regional and local park lands, and water district lands.

Areas designated as critical habitat meet the definition of critical habitat under section 3 of the Act in that they are within the geographical areas occupied by the species, contain the physical and biological features that are essential to conservation of the species, and are in need of special management considerations or protection.

In determining areas that are essential for the survival and recovery of the species, we used the best scientific information available. This information included habitat suitability and species site-specific information. To date, only initial research has been done to identify and define specific habitat needs of Alameda whipsnakes, and no comprehensive surveys have been conducted to quantify their distribution or abundance. Limited and preliminary habitat assessment and whipsnake presence work has been conducted on the Department of Energy's Lawrence Livermore National Laboratory Site 300, East Bay Regional Park District's Tilden Park, San Francisco Public Utilities Commission's San Antonio Reservoir, Contra Costa Water District's Los Vaqueros Reservoir, East Bay Municipal Utility District's San Leandro Watershed and Siesta Valley, Pleasanton Ridge Conservation Bank, and Signature Properties' Bailey Ranch. Some small parcels have also been surveyed; however, these surveys were in conjunction with development and, in most cases, that habitat has been destroyed. -

We emphasized areas containing most of the verified Alameda whipsnake occurrences, especially recently identified locations. To maintain genetic and demographic interchange that will help maintain the viability of a regional metapopulation, we included corridor areas that allow movement between areas supporting Alameda whipsnakes. These corridors or connecting areas, while supporting some habitat suitable for foraging, shelter, breeding, and maturation, were primarily included to facilitate dispersal.

In identifying areas of critical habitat, we attempted to avoid developed areas

such as towns, intensive agricultural areas such as vineyards, and other lands unlikely to contribute to Alameda whipsnake conservation. Given the short period of time in which we were required to complete this rule and the lack of fine-scale mapping data, we were unable to map critical habitat in sufficient detail to exclude all such areas. Existing features and structures within the critical habitat boundary, such as buildings, roads, canals, railroads, large water bodies, and other features not currently containing or likely to develop these habitat components, will not contain one or more of the primary constituent elements. Federal actions limited to these areas, therefore, would not trigger a section 7 consultation, unless they affect the species and/or primary constituent elements in adjacent critical habitat. Two areas, the north and south corridors (unit 6 connecting units 1 and 2; and unit 7 connecting units 3 and 5), contain some urban development. These two corridors are extremely narrow, and, therefore, maintaining as much area within these corridors as possible to ensure the long-term connectivity between whipsnake populations is important. These two units may not provide sufficient habitat necessary to allow for breeding, and offer limited opportunities for foraging and sheltering. However, these areas provide for the vital function of dispersal among other critical habitat units.

We considered the existing status of lands in designating areas as critical habitat. Section 10(a) of the Act authorizes us to issue permits for the taking of listed species incidental to otherwise lawful activities. Incidental take permit applications must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. Currently, no approved HCPs cover the Alameda whipsnake or its habitat. However, we expect critical habitat may be used as a tool to help identify areas within the range of the Alameda whipsnake that are most critical for the conservation of the species. Development of HCPs for such areas on non-Federal lands should not be precluded, as we consider HCPs to be one of the most important methods through which non-Federal landowners can resolve endangered species conflicts. We provide technical assistance and work closely with applicants throughout development of HCPs to help identify special management considerations for the

Alameda whipsnake. We intend for HCPs to provide a package of protection and management measures sufficient to address the conservation needs of the species.

Critical Habitat Designation

The approximate area of critical habitat by county and land ownership is shown in Table 1. Critical habitat includes Alameda whipsnake habitat throughout the species' range in the United States (i.e., Contra Costa, Alameda, San Joaquin, and Santa Clara

Counties, California). Lands designated as critical habitat are under private, State, and Federal ownership, with Federal lands including lands managed by the Bureau of Land Management and the U.S. Department of Energy. Lands designated as critical habitat have been divided into seven critical habitat units.

TABLE 1. APPROXIMATE AREA ENCOMPASSING DESIGNATED CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)) BY COUNTY AND LAND OWNERSHIP

County	Federal land*	Local/State land	Private land	Total
Alameda	310 ha (767 ac)	26,440 ha (65,492 ac)	56,045 ha (138,824 ac)	82,795 ha (205,083 ac)
Contra Costa	32 ha (80 ac)	31,970 ha (79,189 ac)	35,245 ha (87,301 ac)	67,247 ha (166,570 ac)
San Joaquin	606 ha (1,500 ac)	525 ha (1,300 ac)	4,834 ha (11,975 ac)	5,965 ha (14,775 ac)
Santa Clara	NA	4,037 ha (10,000 ac)	4,106 ha (10,170 ac)	8,143 ha (20,170 ac)
Total	948 ha (2,347 ac)	62,972 ha (155,981 ac)	100,230 ha (248,270 ac)	164,150 ha (406,598 ac)

* Includes the Bureau of Land Management and Department of Energy land.

A brief description of each critical habitat unit and our reasons designating those areas as critical habitat for the Alameda whipsnake are given below:

Unit 1 Tilden-Briones Unit

Unit 1 encompasses approximately 16,074 ha (39,815 ac) within the Tilden-Briones unit and is the most northwestern unit of the five Alameda whipsnake metapopulations, and provides primary breeding, feeding, and sheltering habitat for the whipsnake. This entire unit occurs in Contra Costa County. This unit is bordered to the north by State Highway 4 and the cities of Pinole, Hercules, and Martinez; to the south by State Highway 24 and the City of Orinda Village; to the west by Interstate 80 and the cities of Berkeley, El Cerrito, and Richmond; and to the east by Interstate 680 and the City of Pleasant Hill. A substantial amount of public land exists within this unit, including East Bay Regional Park District's Tilden, Wildcat, and Briones Regional Parks and East Bay Municipal Utilities District watershed lands.

Unit 2 Oakland-Las Trampas Unit

Unit 2 encompasses approximately 21,869 ha (54,170 ac) south of the Tilden-Briones unit and north of the Hayward-Pleasanton Ridge unit, and provides primary breeding, feeding, and sheltering habitat for the Alameda whipsnake. This unit is split evenly between Alameda and Contra Costa Counties. This unit is surrounded to the north by State Highway 24 and the cities of Orinda, Moraga, and Lafayette; to the south by Interstate Highway 580 and the

City of Castro Valley; to the West by State Highway 13 and Interstate Highway 580 and the cities of Oakland and San Leandro; and to the east by Interstate Highway 680 and the cities of Danville, San Ramon, and Dublin. The Oakland-Las Trampas unit also contains substantial amounts of public land including East Bay Regional Park District's Redwood and Anthony Chabot Regional Parks, Las Trampas Regional Wilderness, and additional East Bay Municipal Utilities District watershed lands.

Unit 3 Hayward-Pleasanton Ridge Unit

Unit 3 encompasses approximately 12,923 ha (32,011 ac) south of the Oakland-Las Trampas unit and northwest of the Sunol-Cedar Mountain unit, and provides primary breeding, feeding, and sheltering habitat for the Alameda whipsnake. This unit occurs solely in Alameda County and is surrounded by Interstate Highway 580 to the north; Niles Canyon Road (State Highway 84) to the south; the cities of Hayward and Union City to the west, and Interstate Highway 680 and the City of Pleasanton to the east. This unit is bisected by Palomares Canyon Road, which runs from Interstate Highway 580 to Niles Canyon Road. Greater than 30 percent of this unit is in public ownership, including Garin, Dry Creek, and Pleasanton Ridge Regional Parks and other East Bay Regional Park District holdings. The privately owned Pleasanton Ridge Conservation Bank also occurs in the northeastern section of this unit.

Unit 4 Mount Diablo-Black Hills Unit

Unit 4 encompasses approximately 40,257 ha (99,717 ac) and completely encompasses Mount Diablo State Park and surrounding lands. The Mount Diablo-Black Hills Unit provides primary Alameda whipsnake breeding, feeding, and sheltering habitat. A majority of this unit is in Contra Costa County; however, the southern tip of this unit is in Alameda County. This unit is surrounded by State Highway 4 and the cities of Clayton, Pittsburgh and Antioch to the north; open grassland within Tassajara Valley just below the Alameda/Contra Costa County line to the south; the cities of Concord, Walnut Creek, and Danville to the west; and, to the east, by large expanses of grassland occurring west of State Highway 4, near the cities of Oakley and Brentwood. This unit contains large expanses of public lands, including two small Bureau of Land Management parcels; Mount Diablo State Park; Contra Costa Water District's Los Vaqueros Reservoir watershed; and Contra Loma, Black Diamond Mines, Morgan Territory, and Round Valley Regional Parks, and other East Bay Regional Park District holdings. Other public lands include lands owned by the City of Walnut Creek. Two large, privately owned gravel quarries occur within this unit.

Unit 5 Sunol-Cedar Mountain Unit

Unit 5 encompasses approximately 69,168 ha (171,328 ac) and is the largest and the southernmost of the seven critical habitat units. It provides primary breeding, feeding, and

sheltering habitat for the Alameda whipsnake. A majority of this unit is in Alameda County; however, it does also extend into western San Joaquin and northern Santa Clara Counties. The northern boundary of this unit runs parallel to State Highway 84 and Corral Hollow Road, south of the cities of Pleasanton and Livermore and Tesla Road. The southern boundary lies below Calaveras Reservoir and captures all of Wauhab and Cedar Ridges in Santa Clara County and stretches to the east, north of the Alameda-San Joaquin-Santa Clara-Stanislaus County intersection. The western boundary lies east of Interstate Highway 680 and the greater San Jose urban areas. The eastern boundary lies within San Joaquin County a few miles east of the Alameda County line. This unit includes East Bay Regional Park District's Sunol, Mission Peak, Ohlone, Camp Ohlone, and Del Valle complex, and State Water Project's Del Valle Reservoir watershed. In addition, the Department of Energy's Site 300 and California Department of Parks and Recreation's Carnegie Recreation Area occur within the unit.

Unit 6 Caldecott Tunnel Unit

Unit 6 encompasses approximately 2,185 ha (5,412 ac) and occurs between units 1 and 2 where State Highway 24 tunnels under the Berkeley Hills for approximately 1.2 kilometers (4,000 feet). It provides a connector between units 1 and 2. This unit is in Alameda and Contra Costa Counties. This unit encompasses lands owned by East Bay Municipal Utilities District, East Bay Regional Park District, Lawrence Berkeley Laboratory, the Cities of Berkeley and Oakland, and some private holdings.

Unit 7 Niles Canyon/Sunol Unit

Unit 7 encompasses approximately 1,673 ha (4,145 ac) and occurs between units 3 and 5 and lies south of State Highway 84 (Niles Canyon Road); north and west of Interstate 680; and east of the City of Fremont. It provides a connector between units 3 and 5. This unit is solely in Alameda County. This unit includes East Bay Regional Park District's Vargas Plateau and San Francisco Public Utilities watershed lands. Impediments to whipsnake movement between units 3 and 7 include Alameda Creek, a 0.3–0.6-meter (12–24-inch) high concrete barrier that lies south of Niles Canyon Road and north of Alameda Creek, railroad tracks that run along both sides of Alameda Creek, and heavy vehicular traffic along Niles Canyon Road.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, Federal agencies ensure that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation with us on actions for which formal consultation has been completed if those actions may affect designated critical habitat.

Activities on Federal lands that may affect the Alameda whipsnake or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Army Corps) under section 404 of the Clean Water Act, or some other Federal action, including funding (e.g., Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or regulated do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to the extent that the value of critical habitat for both the survival and recovery of the Alameda whipsnake is appreciably diminished. We note that such activities may also jeopardize the continued existence of the species. Where they appreciably reduce the value of critical habitat, such activities may include, but are not limited to:

- (1) Removing, thinning, or destroying vegetation, whether by burning or mechanical, chemical, or other means (e.g., fuels management, bulldozing, herbicide application, overgrazing, etc.) that have not been approved by the Service, exclusive of routine clearing of fuel breaks around urban boundaries that were constructed before the listing of the whipsnake on December 5, 1997;
- (2) Water transfers, diversion, or impoundment, groundwater pumping, irrigation, or other activity that causes barriers or deterrents to dispersal, inundates habitat, or significantly

converts habitat (e.g., conversion to urban development, vineyards, landscaping);

(3) Recreational activities that significantly deter the use of suitable habitat areas by Alameda whipsnakes or alter habitat through associated maintenance activities (e.g., off-road vehicle parks, golf courses, and hiking, mountain biking, and horseback riding trails);

(4) Sale, exchange, or lease of Federal land containing suitable habitat that is likely to result in the habitat being destroyed or appreciably degraded; and

(5) Construction activities that destroy or appreciably degrade suitable habitat (e.g., urban development, building of recreational facilities such as off-road vehicle parks and golf courses, road building, drilling, mining, quarrying, and associated reclamation activities).

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to "jeopardize the continued existence" of a species are those that would appreciably reduce the likelihood of the species' survival and recovery. Actions likely to "destroy or adversely modify" critical habitat are those that would appreciably reduce the value of critical habitat for the survival and recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to destroy or adversely modify critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is in the geographical areas occupied by the species concerned. In those cases, critical habitat provides little additional protection to a species, and the ramifications of its designation are few. However, if an area now occupied by the species were to become unoccupied in the future, critical habitat designation may provide additional protection than is available through a jeopardy analysis.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Designation of critical habitat could affect Federal agency activities where they appreciably reduce the value of critical habitat. Some of these activities include, but are not limited to:

(1) Sale, exchange, or lease of lands owned by the Bureau of Land Management or the Department of Energy;

(2) Regulation of activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;

(3) Regulation of water flows, water delivery, damming, diversion, and channelization by the Bureau of Reclamation and the Army Corps of Engineers;

(4) Regulation of grazing, recreation, or mining by the Bureau of Land Management;

(5) Funding and implementation of disaster relief projects by the Federal Emergency Management Agency;

(6) Funding and regulation of new road construction by the Federal Highways Administration;

(7) Clearing of vegetation by the Department of Energy;

(8) The cleanup of toxic waste and superfund sites under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by the U.S. Environmental Protection Agency; and

Relationship to Incidental Take Permits Issued Under Section 10

There are no approved HCPs within the designated critical habitat area. However, future HCPs are probable.

We anticipate that future HCPs will include the Alameda whipsnake as a covered species and provide for its long-term conservation. We expect that HCPs undertaken by local jurisdictions (e.g., counties and cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of the species. Section 10(a)(1)(B) of the Act states that HCPs must meet issuance criteria, including minimizing and mitigating any take of the listed species covered by the permit to the maximum extent practicable, and that the taking must not appreciably reduce the likelihood of the survival and recovery of the species in the wild. We fully expect that our future analysis of HCPs and Section 10(a)(1)(B) permits under section 7 will show that covered activities carried out in accordance with the provisions of the HCPs and Section 10(a)(1)(B) permits will not result in the destruction or

adverse modification of critical habitat designated for the Alameda whipsnake.

In the event that future HCPs covering the Alameda whipsnake are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of the Alameda whipsnake by either directing development and habitat modification to nonessential areas or appropriately modifying activities within essential habitat areas so that such activities will not adversely modify the primary constituent elements. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by the Alameda whipsnake. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a biologically configured system of interlinked habitat blocks.

We will provide technical assistance and work closely with applicants throughout the development of future HCPs to identify lands essential for the long-term conservation of the Alameda whipsnake and appropriate management for those lands. The take minimization and mitigation measures provided under these HCPs are expected to protect the essential habitat lands designated as critical habitat in this rule.

Summary of Comments and Recommendations

In the March 8, 2000, proposed rule, all interested parties were requested to submit comments and suggestions relative to the proposed designation of critical habitat for the Alameda whipsnake, including our economic analysis and the relationship of the designation to future HCP's (65 FR 12155). On May 15, 2000, we published a notice in the **Federal Register** (65 FR 30951) to reopen the comment period and announce a public hearing on the proposed determination. We published a notice of availability and request for comments on the draft economic analysis on June 23, 2000 (65 FR 39117), and subsequently, extended the comment periods for the proposed designation of critical habitat and the draft economic analysis to July 24, 2000. Comments received from March 8 through July 24, 2000, were entered into the administrative record.

All appropriate State and Federal agencies, county governments, scientific organizations, and other interested

parties were contacted and invited to comment. Legal notices inviting public comment were published in the Oakland Tribune. In addition, the following news releases were issued: (1) a March 8, 2000, news release announcing the proposed designation of critical habitat and soliciting public review and comment; (2) a May 15, 2000, news release announcing public hearings; and (3) a June 23, 2000, news release announcing the availability of the draft economic analysis to the public for review and comment and the extension of the comment period.

We held one public hearing on the proposed rule at San Ramon, Contra Costa County, California, on June 1, 2000. A notice of the hearing and its location was published in the **Federal Register** on May 15, 2000 (65 FR 30951). A total of 45 people provided verbal comments at the public hearing. Transcripts of this hearings are available for inspection at the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

We received a total of 45 oral and 551 written comments during the comment period. Of those oral comments, 14 supported critical habitat designation, 23 were opposed to designation, and 7 provided additional information but did not support or oppose the proposal. Of the written comments, 456 supported designation, 72 were opposed to it, and 23 provided additional information only, or were nonsubstantive or not relevant to the proposed designation. In total, oral and written comments were received from 5 Federal agencies, 5 State agencies, 11 local governments, and 532 private organizations, companies, or individuals.

All comments received were reviewed for substantive issues and new data regarding critical habitat and the Alameda whipsnake. Comments of a similar nature are grouped into 6 issues relating specifically to critical habitat. These are addressed in the following summary.

Issue 1: Biological and Physical Concerns

(1a) *Comment:* One commenter stated that not enough information is known about the total habitat requirements of the species to define critical habitat. One additional commenter stated that Unit 5 was far too large and not based on the best available scientific evidence. Several commenters questioned the scientific basis for designating specific areas as critical habitat and recommended excluding areas that did not provide all of the primary constituent elements for whipsnake

habitat and areas that reported negative Alameda whipsnake survey results.

Response: Section 4(b)(2) of the Act states "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available." Our recommendation is based on the available body of information on the biology and status of this subspecies, as well as the effects of land-use practices on its continued existence. We also utilized information on related species, including the chaparral whipsnake, if information on the Alameda whipsnake was lacking. No new information on the life history of the whipsnake was provided during the public comment periods. We agree that much remains to be learned about this species, and should credible, new information become available that contradicts the basis for this designation, we shall reevaluate our analysis and, if appropriate, propose to modify this critical habitat designation. We have considered the best scientific information available at this time, as required by the Act.

In selecting areas to be included in the designation, we identified the historic range of the whipsnake, as well as important components related to survival and recovery, including areas that provide sufficient breeding, feeding, and sheltering, as well as providing adequate movement corridors to maintain genetic connectivity and adequate space for population fluctuations. Because of the nature of the whipsnake (fast, secretive, mobile, burrow dwelling, with periods of hibernation) negative whipsnake survey results may not provide sufficient evidence that the site is not used by Alameda whipsnakes during some point in their life cycle. In addition, whipsnake surveys do not characterize whether the site provides one or all of the primary constituent elements needed by the whipsnake for survival and recovery. Because the primary constituent elements are linked to various stages of the whipsnake's life history (breeding, dispersal) or to certain physiological requirements (temperature regulation for foraging), and the whipsnake would not necessarily be engaged in all these activities concurrently, not all elements need be present for the site to be considered for designation.

(1b) *Comment:* A few commenters stated that the Service neglected to include species information and habitat data that was developed by the Alameda-Contra Costa Biodiversity Working Group.

Service Response: The Service reviewed the information prepared by the Alameda-Contra Costa Biodiversity Working Group. The working group used the Alameda whipsnake as an umbrella species for chaparral and coastal scrub habitats. The working group did not define any other habitats, including grasslands, woodlands, or riparian areas, as potential whipsnake habitat. These habitat types were mapped using false-color infrared color aerial photographs and subsequently mapped on 7.5-minute orthophotographs. As explained under the "Methods" section above, the Service used a similar approach for mapping critical habitat for the Alameda whipsnake. However, in addition to chaparral and coastal scrub habitats, the Service defined whipsnake habitat to include grassland, oak woodland, and riparian habitats that lie adjacent to and provide corridors between areas of scrub and chaparral habitat. Native grassland, oak woodland, and riparian habitats that lie adjacent to chaparral and scrub habitats provide important feeding, breeding, and sheltering sites. In addition, these habitat types facilitate movement of whipsnakes between scrub and chaparral habitat areas to ensure adequate dispersal and gene flow between subpopulations.

(1c) *Comment:* Many local fire prevention agencies commented that ongoing fuel reduction and modification that occurred before the Alameda whipsnake was formally listed on December 5, 1997, should be exempt from this rulemaking, including the Lafayette Reservoir watershed. In addition, these agencies requested that fire prevention techniques such as prescribed burning and ongoing vegetative clearing should be permitted when there is a threat to human health and property. Mount Diablo State Park specifically requested that the designation of critical habitat not preclude the use of prescribed fire to improve the biological health of the vegetative community and reduce the risk of a catastrophic wildfire.

Service Response: As stated in the "Section 7 Consultation" section above, routine clearing of fuel breaks around urban boundaries that were constructed before the listing of the whipsnake on December 5, 1997, including the Layette Reservoir Watershed, would not be affected by this designation. In addition, the designation of critical habitat for the Alameda whipsnake will have no effect on activities that occur on private property unless the activity is federally funded or requires a Federal permit. For projects that receive Federal (i.e. Federal Emergency Management Agency

(FEMA)) funding, the Service is actively working with the Federal agency and the local representative to ensure that untimely delays in project implementation do not occur. The Service agrees that Mount Diablo State Park's concerns regarding their prescribed burn program are significant. The designation of critical habitat will not require any additional restrictions for carrying out prescribed burn projects above and beyond the restrictions currently in effect due to the listing of the Alameda whipsnake as a threatened species. Furthermore, the Service will assist Mount Diablo State Park staff with the development of a Habitat Conservation Plan, or any other measures required so the Park can continue vegetation enhancement measures such as prescribed burn projects.

(1d) *Comment:* Several commenters stated that the maps supplied with the proposed rule designating critical habitat did not exclude existing infrastructure including housing developments, reservoirs, and other manmade features that are not suitable habitat for the Alameda whipsnake.

Service Response: As stated in the 'Methods' section above, given the short period of time in which we were required to complete this rule, and the lack of fine-scale mapping data, we were unable to map critical habitat in sufficient detail to exclude all such areas. Existing features and structures within the critical habitat boundary, such as buildings, roads, canals, railroads, large water bodies, and other features not currently containing or likely to develop these habitat components, will not contain one or more of the primary constituent elements.

(1e) *Comment:* Several commenters stated that activities such as recreational biking, hiking, horseback riding, and off-road highway vehicle use were unfairly placed in the same category of impacts with more significant threats to the species including urban development and golf course construction and use.

Service Response: In the proposed rule and here in the final rule, we list activities that could adversely modify critical habitat without placing specific emphasis on the relative contribution of any one activity. The use of existing trails for recreational hiking, biking, and horseback riding do not pose the same level of threats to the species as the construction and use of new trails that modify critical habitat for the whipsnake. The specific threats that result from the construction and use of new trails are likely unique to each

critical habitat unit and are best addressed in recovery plans, management plans, and section 7 consultations.

(1f) *Comment:* Many commenters were concerned about how designation of critical habitat would affect grazing and recreation activities including biking, hiking, and horseback riding.

Service Response: Designation of critical habitat does not prescribe specific management actions, but does identify areas that are in need of special management considerations. In regards to grazing, the Service does not foresee any change in the ability of private landowners to graze their property. In addition, we anticipate that many activities, including grazing and recreational trail use, presently occurring on critical habitat areas can be managed so as to be compatible with the whipsnake's needs.

(1g) *Comment:* One commenter asked whether existing utility features and the maintenance of these features are covered under the definition of critical habitat for the Alameda whipsnake.

Service Response: Yes, however, the designation of critical habitat will not require any additional restrictions for carrying out maintenance projects above and beyond the restrictions currently in effect due to the listing of the Alameda whipsnake as a threatened species. Furthermore, the Service will assist utility companies with the development of a Habitat Conservation Plan or any other measures required so that maintenance projects can continue.

(1h) *Comment:* One commenter was concerned that, given the extensive amount of land designated as critical habitat, the Service might not require surveys for whipsnake presence, eliminating a source for locality information.

Service Response: The Service does not foresee a decrease in the number of future Alameda whipsnake surveys. Future Alameda whipsnake surveys may be conducted to determine the relative abundance of Alameda whipsnakes at specific sites and to determine appropriate minimization measures. In addition, the draft recovery plan will identify the need to conduct surveys in association with a variety of recovery tasks.

(1i) *Comment:* A few commenters stated that the Service incorrectly proposed critical habitat in the eastern section of unit 5 because there are no verified Alameda whipsnake records in the area. Additional commenters stated there are no known Alameda whipsnake occurrences throughout unit 5. Also, one commenter stated the Service should not designate critical habitat in

the western section of unit 5 because of the lack of information regarding the zones of intergradation between the federally-listed Alameda whipsnake and the non-listed chaparral whipsnake.

Service Response: A live-trapping survey for the Alameda whipsnake was conducted within the eastern section of unit 5 on the Department of Energy's Lawrence Livermore Lab's Site 300 in 1998. During that survey, 14 individual California whipsnakes were captured, one of which had more taxonomic characteristics of the Alameda whipsnake than the chaparral whipsnake. The Service also has records of pure Alameda whipsnake occurrences that occur throughout unit 5, including two occurrences that lie just north of Calaveras Reservoir, within 10 miles of the western boundary of unit 5.

(1j) *Comment:* One of the peer review commenters stated that zone of intergradation between the Alameda whipsnake and the chaparral whipsnake occurs in the Del Puerto Canyon and San Antonio Valley areas of San Joaquin, Santa Clara, and Stanislaus Counties. He suggested that critical habitat be extended south and southeast of Unit 5 to encompass additional areas within western San Joaquin and Stanislaus Counties and northern Santa Clara County to capture this zone of intergradation.

Service Response: The Service will investigate these areas of intergradation to determine their extent and their relationship to the Alameda whipsnake population that occurs in Unit 5. Based on this investigation, we will decide whether critical habitat in unit 5 should be extended further south and southeast to include the Del Puerto Canyon and San Antonio Valley areas.

(1k) *Comment:* One commenter claimed that the proposed rule is internally inconsistent as it states that critical habitat was proposed on land that is occupied by the Alameda whipsnake, while it appears that unoccupied habitat has been proposed for designation.

Service Response: A range-wide survey has not been conducted for this species. As described in 'Methods' above, we used data on known Alameda whipsnake locations to initially identify important areas. We have also made the reasonable assumption that areas adjacent to these locations are also within the geographical area occupied by the species based on the suitability of the habitat. In addition, knowledge of the species biology and the need for genetic connectivity to assure species persistence directs the inclusion of movement corridors where possible.

The Service, therefore, maintains that all seven critical habitat units are geographical areas occupied by the Alameda whipsnake.

Issue 2: General Selection of Designated Critical Habitat Areas

(2a) *Comment:* Several commenters stated that private lands should be excluded from critical habitat designation. These commenters stated that the publication of maps with threatened or endangered species locations overlaid upon private land could subject private property owners to increased exposure to litigation, liability, trespass, or other activities that could interfere with privacy, and with the lawful beneficial uses of the property.

Service Response: Section 4(b)(2) of the Act states "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." The Act does not require nor suggest that private lands should be excluded from designation, unless we find that the economic or other relevant impacts outweigh the benefit of critical habitat designation.

(2b) *Comment:* Several commenters recommended excluding from designation as critical habitat areas where there were plans being formulated to construct urban improvements within or in proximity to the areas proposed as critical habitat.

Service Response: We did not exclude any areas because of speculative or proposed developments. We are available to work with project proponents to develop project alternatives that will avoid and minimize adverse effects to whipsnakes, and not result in destruction or adverse modification of critical habitat.

(2c) *Comment:* One commenter stated that, given the fact that 60 percent of the known range of the Alameda whipsnake occurs in public ownership, the loss of the 40 percent that is held in private ownership would not lead to the demise of the snake. Therefore, private lands should not be included as critical habitat.

Service Response: The range of the Alameda whipsnake has been fragmented by urban development and associated roadway construction. What remains are five distinct populations that continue to suffer significant habitat loss due to urban encroachment and related activities. Public and private lands are randomly distributed

throughout the current range of the species. The loss of all remaining private lands that provide suitable habitat for the whipsnake would further fragment the five whipsnake populations and result in significant losses of breeding, feeding, and sheltering habitats, as well as the connectivity corridors. The Service believes that both public and private lands are essential to the survival and recovery of the species. The critical habitat designation, therefore, includes both private and public lands.

Issue 3: Comments on Selection of Specific Sites

(3a) *Comment:* Several commenters expressed concern with the lack of connectivity between individual units, especially between units 2 and 3.

Service Response: The Service agrees that there is currently limited potential for movement between these two units. However, through recovery efforts, the Service proposes to research ways to promote connectivity and to determine the level of connectivity needed to prevent genetic bottlenecks. The Alameda whipsnake populations that occupy units 2 and 3 are the most threatened with extinction due to their small sizes and the continued encroachment of urban development that is further fragmenting these populations and directly removing suitable whipsnake habitat. The Service agrees with the commenters that all future opportunities for reconnecting these two populations with each other and with other whipsnake populations should be explored to ensure recovery of the species. For example, there may be opportunities for reestablishing connectivity between units 2 and 3 associated with any alterations of Interstate 580.

(3b) *Comment:* A few commenters wanted clarification as to whether their properties were included in the proposed critical habitat designation.

Service Response: Service staff discussed with the landowners their properties' relationship to the critical habitat designation.

(3c) *Comment:* One commenter was concerned that the designation of critical habitat would prevent the extraction and processing of aggregate materials at four separate facilities that occur within the critical habitat boundaries.

Service Response: The designation of critical habitat has no effect on non-Federal actions taken on private land, even if the private land is within the mapped boundary of designated critical habitat. The listing of the Alameda whipsnake as threatened, however, does

provide the whipsnake the protection afforded by the Act on both public and private lands. Critical habitat has possible effects on activities by private landowners only if the activity involves Federal funding, a Federal permit, or other Federal action. If such a Federal nexus exists, we will work with the landowner and the appropriate Federal agency to develop a project that can be completed without jeopardizing the species or destroying or adversely modifying critical habitat. In this case, reclamation activities upon facilities closure may require Federal funding, a Federal permit, or other Federal action.

(3d) Several commenters pointed out errors in locations or descriptions in the proposed rule.

Service Response: Corrections have been made in the final rule to reflect these comments, where appropriate.

Issue 4: Legal and Procedural Comments

(4a) *Comment:* Several commenters stated that the proposed critical habitat designation is based on insufficient data and the Service should withdraw its proposal given the limited amount of time it had to adequately map whipsnake critical habitat.

Service Response: As explained in 1(a) above, Section 4(b)(2) of the Act states "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . .". At this time, the Service has used the best available data to formulate the designation.

(4b) *Comment:* Several commenters stated the designation of critical habitat constitutes a major Federal action significantly affecting the quality of the human environment. An Environmental Impact Statement (EIS) should be prepared.

Service Response: We have determined that Environmental Assessments (EAs) and EISs, as defined under the authority of the National Environmental Policy Act of 1969 (NEPA), need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** in October 1983 (48 FR 49244).

(4c) *Comment:* Several commenters stated the maps and descriptions provided were vague and violate the Act.

Service Response: This final rule contains the required legal descriptions of areas designated as critical habitat. If additional clarification is necessary, contact the Sacramento Fish and Wildlife Office (see **ADDRESSES** section). As described under the "Critical Habitat

Designation" section above, we identified specific areas referenced by specific legal description, roads, waterways, and other landmarks, which are found on standard topographic maps.

(4d) *Comment:* The critical habitat proposal represents virtually all suitable or potentially suitable habitat within the species' historic range. The Act prohibits such broad designation.

Service Response: Section 3(5)(C) of the Act states that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical areas which can be occupied by an endangered or threatened species. The Alameda whipsnake population has been fragmented into five distinct populations from urban development and associated highway construction. The loss of any one of these five populations could lead to the extinction of the entire species. Therefore, we have determined that the areas designated are essential to conserve this species.

(4e) *Comment:* Several commenters asked whether projects that have obtained a biological opinion pursuant to section 7 of the Act would be required to reinitiate consultation to address the designation of critical habitat.

Service Response: For all projects that have completed section 7 consultation where that consultation did not address potential destruction or adverse modification of critical habitat for the Alameda whipsnake, and have not been constructed, section 7 consultation must be reinitiated. We expect that projects that do not jeopardize the continued existence of the Alameda whipsnake are not likely to destroy or adversely modify its critical habitat.

(4f) *Comment:* Several commenters have asked what specifically constitutes a federal nexus on private land.

Service response: A Federal nexus is invoked when a Federal agency is funding, permitting, or in some way authorizing a project. For the purposes of this rulemaking, a Federal nexus that was invoked prior to the rulemaking for a project that has been constructed or completed, would not require a section 7 consultation under the Act. If the project has not to date received Federal funding, a Federal permit, or Federal authorization, but will require such in the future, and the project might destroy or adversely modify critical habitat, the action would require a section 7 consultation. In addition, projects that have been federally funded, permitted, or authorized, but have not been fully constructed would require a section 7

consultation if the project may destroy or adversely modify critical habitat.

(4g) *Comment:* Several commenters asked whether it is prudent to designate private land as critical habitat when there is no Federal nexus.

Service Response: As stated under the "Critical Habitat" section above, designation of critical habitat can help focus conservation activities for a listed species by identifying areas that contain the physical and biological features that are essential for conservation of that species. Designation of critical habitat alerts the public as well as land-management agencies to the importance of these areas.

(4h) *Comment:* One commenter stated that the Service lacks the authority under the Commerce Clause of the Constitution to designate critical habitat on State and private land for a species that has no commercial utility.

Service Response: The Service maintains that it does have the authority to designate critical habitat for the Alameda whipsnake on private and State lands pursuant to the Act. Several court cases have confirmed this authority (*e.g., Nat. Ass'n of Home Builders of the U.S. v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997)).

(4i) *Comment:* Several commenters stated that critical habitat should not be designated until a recovery plan is completed.

Service Response: Although having a recovery plan in place is extremely helpful in identifying areas as critical habitat, the Act does not require a recovery plan to be prepared prior to such designation of critical habitat. Section 4(a)(3) of the Act specifically requires that critical habitat be designated at the time a species is listed, or within 1 year if not determinable at listing. Once a recovery plan is finalized, we may revise the critical habitat described in this final rule, if appropriate, to reflect the goals and recovery strategies of the recovery plan.

Issue 5: The incorporation of Habitat Conservation Plans (HCPs) Into the Critical Habitat Designation

Comment: In response to the Service's request that the public comment on critical habitat designation relative to future HCP's, 2 commenters support the approach that critical habitat be removed entirely from within the boundaries of HCP's automatically upon the issuance of the incidental take permit. One commenter stated that critical habitat should be retained within the boundaries of approved HCP's.

Service Response: The Service has considered several different approaches

regarding the issuance of HCP's within the critical habitat boundary. Although there are no authorized or completed HCP's that occur within the boundary of Alameda whipsnake critical habitat designation, future HCPs are probable. If, consistent with available funding and program priorities, we elect to revise this designation to reflect future HCPs, our Solicitors have advised that modifying the designation will require a subsequent rulemaking.

Issue 6: Economic Issues

(6a) *Comment:* Many commenters expressed concern that the draft economic analysis failed to quantify the effects of proposed critical habitat designation.

Service Response: Given the circumstances surrounding the preparation of the draft economic analysis, we were only able to identify the types of impacts likely to occur regarding proposed critical habitat designation. Impacts we identified that could result from critical habitat designation include new section 7 consultations, re-initiation of consultations, and perhaps some prolongment of ongoing consultations to address critical habitat concerns, as required under section 7 of the Act. In some of these cases, it is possible that we might suggest reasonable and prudent alternatives to the proposed activity that triggered the consultation, which would also be an impact. Also associated with consultations is the length of time required to carry out consultations, which may result in opportunity costs associated with project delays.

In the case of proposed critical habitat for the Alameda whipsnake, however, we have only designated habitat that is within the geographical areas occupied by the whipsnake. As a result, few of these impacts are likely to occur because Federal agencies are already required to consult with us on activities taking place on these lands that have the potential to may adversely affect the whipsnake. We believe that the only impacts to landowners whose property lies within critical habitat boundaries are due to reinitiation of completed consultations for projects not yet completed, and the designations temporary affect on real estate values. While the Act requires agencies to consult with us on activities that adversely modify critical habitat, we do not believe that within proposed critical habitat for the Alameda whipsnake there are likely to be any actions of concern that adversely modify critical habitat without also jeopardizing the whipsnake.

We also recognize that, in some instances, the designation of critical habitat could affect real estate market value, because participants may incorrectly perceive that land within critical habitat designation to be subject to additional constraints. However, we believe that this affect will be temporary.

(6b) *Comment:* Some commenters were concerned that, while we discussed impacts that are more appropriately attributable to the listing of the Alameda whipsnake than to the proposed designation of critical habitat, we did not provide quantified estimates associated with the listing (62 FR 64306).

Service Response: We are prohibited from considering economic impacts when determining whether or not a species should be added to the list of Federally protected species. As a result, we have not estimated these impacts in the past, nor were we able to do so for the draft economic analysis on proposed critical habitat.

(6c) *Comment:* Several commenters voiced concern that they were not directly contacted for their opinions on the economic impacts of critical habitat designation.

Service Response: It was not feasible to contact every potential stakeholder in order for us to develop a draft economic analysis. We believe that we were able to understand the issues of concern to the local community based on public comments submitted on the proposed rule, on transcripts from public hearings, and from detailed discussions with Service representatives. To clarify issues, we did contact representatives from other Federal, State, and local government agencies, as well as some landowners.

In regard to consultations, the Act and its implementing regulations only requires Federal agencies to consult with us on activities that they fund, authorize, or carry out that may affect a listed species or adversely modify critical habitat. As a result, only Federal agency representatives are in a position to characterize whether or not any additional or re-initiated consultations might occur as a result of critical habitat designation. The Act prohibits anyone, including private landowners, from take of a listed species without Service authorization; however, the impacts associated with this requirement are attributable to the listing of the species.

Based on what we have learned and because critical habitat was designated only in areas occupied by the whipsnake, we believe that the only impacts to landowners whose property lies within critical habitat boundaries

are due to reinitiation of completed consultations for projects not yet completed, and the designations temporary affect on real estate values.

(6d) *Comment:* Several commenters voiced concern that, while their property was within proposed critical habitat boundaries, they have never found any whipsnakes on their property, and that in many cases their property did not contain the physical elements described in the proposed rule that are required by the whipsnake.

Service Response: We recognize that not all parcels within proposed critical habitat designation will contain the primary constituent elements needed by the whipsnake. Given the short period of time in which we were required to complete this proposed rule, and the lack of fine scale mapping data, we were unable to map critical habitat in sufficient detail to exclude all such areas. Within the proposed critical habitat boundaries, only areas that contain or are likely to develop those habitat components essential for the primary biological needs of the Alameda whipsnake may be subject to section 7 consultation should a Federal nexus exist in those areas. Activities that do not involve a Federal nexus would not require section 7 consultation, even if primary constituent elements are present.

(6e) *Comment:* Some commenters felt that the economic analysis is flawed because it is based on the premise that the Service has proposed designating only occupied habitat as critical habitat.

Service Response: The determination of whether or not proposed critical habitat is occupied by the whipsnake lies beyond the scope of an economic analysis. See also our response to issue 1(k), above.

(6f) *Comment:* Critical habitat designation is so broad that some landowners will be forced to survey for whipsnake presence under Federal and State environmental laws when undertaking a project, even though some sites within designated critical habitat do not contain whipsnakes or the primary constituent elements needed by whipsnakes to occupy an area. In effect, the Service has shifted the economic burden of determining what lands are occupied by the Alameda whipsnake within the designated units to landowners within these units, irrespective of whether the lands in question have ever been occupied by the snake.

Service Response: We have determined that the geographical areas that have been identified as critical habitat are occupied by the Alameda whipsnake. We have attempted to

exclude developed lands from proposed critical habitat designation when possible. In selecting areas of proposed critical habitat, we attempted to avoid developed areas such as towns, intensive agricultural areas such as vineyards, and other lands unlikely to contribute to the Alameda whipsnake conservation. While we have been unable to avoid all such areas, actions limited to these areas will not require consultations.

(6g) *Comment:* Many landowners expressed concern about how critical habitat designation may affect their particular properties and what they would and would not be allowed to do in the future because of the designation. Some of these landowners expressed concerns that they would need to seek incidental take authorization from the Service for every type of action taken on their property.

Service Response: While the Service is sensitive to the concerns of individuals concerning their property rights, we believe that the designation of critical habitat, for the Alameda whipsnake does not impose any additional conditions on property owners within those areas designated as critical habitat, beyond those imposed due to the Alameda whipsnake being a Federally protected species. All landowners are responsible to ensure that their actions do not result in the unauthorized take of a listed species, and all Federal agencies are responsible to ensure that the actions they fund, permit, or carry out do not result in jeopardizing the continued existence of a listed species, regardless of where the activity takes place. We will work with any covered landowners to identify actions that would or would not likely result in take of Alameda whipsnakes, to identify measures to conserve the whipsnake, and, where appropriate, to develop HCPs and associated permits under section 10 of the Act to authorize incidental take of the Alameda whipsnake.

(6h) *Comment:* The draft economic analysis failed to adequately estimate the potential economic impacts to agricultural lands and how these effects would ripple through the local economy.

Service Response: In conducting our economic analysis, we acknowledged that we had received incomplete information from the agricultural industry and awaited their comments. We received several comments that suggested that we failed to adequately consider effects to the agricultural community of designating critical habitat. We have read through these comments but have concluded that the

commenters have failed to adequately explain the rationale for why they believe critical habitat designation impacts their industry.

In designated critical habitat, landowners, if subject to a Federal nexus, will have to consult with us, through the representative Federal action agency, concerning any actions that may adversely affect the Alameda whipsnake or adversely modify its critical habitat. However, because we have only designated geographical areas that are occupied by the snake, landowners and associated action agencies would still be required to consult with us on such activities regardless of critical habitat designation.

As a result, contrary to one commenter's suggestion, we chose not to consider agriculture multiplier effects in performing our economic analysis because our primary interest is in determining whether or not critical habitat designation could affect landowner activities. Because of how critical habitat was defined and the current restrictions on jeopardizing an endangered or threatened species, we have determined that we are not adding any additional burden to the industry and as a result we do not find it necessary to fully explore the importance of the agriculture industry, to the local economy in the economic analysis concerning proposed critical habitat for the Alameda whipsnake.

(6i) *Comment:* The draft economic analysis failed to adequately estimate the potential economic impacts to landowners regarding fire management practices.

Service Response: The economic analysis does address fire/fuel management concerns that were voiced by some of the stakeholders. It raises the concern that these programs are subject to a clear Federal nexus because the practice relies in part on funding from the Federal Emergency Management Agency (FEMA). However, because we have only designated geographical areas by the species as critical habitat for the whipsnake, this activity is subject to no further scrutiny by us than it normally would be because the whipsnake is a federally protected species and is protected both from any actions resulting in an unlawful take and from Federal actions that could result in jeopardizing the species.

(6j) *Comment:* Some landowners expressed concern that, because their property was located within critical habitat boundaries, they would be subject to additional constraints under the California Environmental Quality Act (CEQA).

Service Response: To the extent that the CEQA places additional constraints on property owners within designated critical habitat such constraints would be a direct effect of CEQA and not a direct result of the designation of critical habitat for the Alameda whipsnake.

(6k) *Comment:* Some commenters agreed with the statement in the economic analysis that the designation of critical habitat could have some effect on property values.

Service Response: We acknowledged in our economic analysis that the designation of critical habitat could have some effect on property values. Most of this effect, we believe, is short-term and occurs as a result of the market's uncertainty as to what critical habitat designation requires.

(6l) *Comment:* A commenter questioned whether habitat designation would provide the following benefits: (1) Preservation of a resource; (2) existence value; (3) enhancement of scenic beauty; and (4) bequest value.

Service Response: In some instances the designation of critical habitat may result in additional benefits associated with the preservation of the species and its associated habitat. Economists have traditionally recognized that such benefits can be broken down into the above categories. However, in the particular case of the designation of critical habitat for the Alameda whipsnake, these additional benefits are unlikely to occur because the designation of critical habitat does not provide any additional protection to the species beyond that provided by the listing of the whipsnake as a Federally protected species.

(6m) *Comment:* The San Francisco Public Utilities Commission believes that designation of critical habitat will lead to additional costs as they will need to determine presence/absence on new project areas.

Service Response: The Service does not anticipate any additional requirements beyond those required upon listing the Alameda whipsnake as threatened.

Summary of Changes From the Proposed Rule

Based on comments we received on the proposed rule, we made minor modifications to the critical habitat boundary to more adequately reflect the existence of urban development occurring along the periphery of the critical habitat boundary. Specifically, we made minor changes to the southern boundary of unit 4 to exclude two existing ranchettes that occur in the northern section of Tassajara Valley. In

addition, we made minor adjustments to the critical habitat boundary in the northwestern section of unit 6 to exclude existing facilities that are owned by Lawrence Berkeley National Laboratory.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

The economic effects already caused by the listing of the Alameda whipsnake as threatened is the baseline upon which we analyze the economic effects of critical habitat. The critical habitat economic analysis examined the incremental economic and conservation effects of designating a particular area. The economic effects of a designation were evaluated by measuring changes in national, regional, or local indicators in the area considered for designation. We prepared an analysis of the economic effects of the proposed Alameda whipsnake critical habitat designation in draft form and made the draft available for public review (June 23, 2000; 65 FR 39117). We concluded in the final analysis, which included review and incorporation of public comments, that no economic impacts are expected from critical habitat designation above and beyond that already imposed by listing the Alameda whipsnake. Potential economic effects of critical habitat designation are limited to impacts on activities funded, authorized, or carried out by a Federal agency. These activities would be subject to section 7 consultation if they may affect critical habitat. However, activities that may affect an area considered for critical habitat usually affect listed species, and would thus already be subject to section 7 consultation. Also, changes or minimizing measures that might increase the cost of the project would be imposed only as a result of critical habitat if the project would adversely modify or destroy that critical habitat. In most cases, a project that would adversely modify or destroy critical habitat would also likely jeopardize the continued existence of the species. In such a case, reasonable and prudent alternatives to avoid jeopardizing the

species should also avoid adverse modification of critical habitat. The areas designated as critical habitat are considered occupied by the Alameda whipsnake. Since the habitat is in geographical areas occupied by the species, Federal agencies are already required to consult with us due to the listing of the species. Thus, regulatory burdens or additional cost due to the critical habitat designation for the whipsnake are not likely to exceed those already resulting from the species' listing.

A copy of the economic analysis is included in our administrative record and may be obtained by contacting the Sacramento Fish and Wildlife Office (see ADDRESSES section).

Required Determinations

Regulatory Planning and Review

Under Executive Order 12866, this document is a significant rule and has been reviewed by the Office of Management and Budget (OMB), under Executive Order 12866.

(a) This rule will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

The areas designated as critical habitat are currently occupied by the

Alameda whipsnake. Under the Endangered Species Act, critical habitat may not be destroyed or adversely modified by a Federal agency action; the Act does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below). Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause an adverse modification of critical habitat would currently be considered as "jeopardy" under the Act. Accordingly, the designation of currently occupied areas as critical habitat does not have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal "sponsorship" of their actions are not restricted by the designation of critical habitat (however, they continue to be bound by the provisions of the Act concerning "take" of the species).

(b) This rule will not create inconsistencies with other agencies'

actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Alameda whipsnake since the listing in 1997. The prohibition against adverse modification of critical habitat is not expected to impose any additional restrictions to those that currently exist because all designated critical habitat is occupied. Because of the potential for impacts on other Federal agencies activities, we will continue to review this action for any inconsistencies with other Federal agency actions.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species and, as discussed above, we do not anticipate that the adverse modification prohibition (from critical habitat designation) will have any incremental effects.

(d) This rule will not raise novel legal or policy issues. The rule follows the requirements for determining critical habitat contained in the Endangered Species Act.

TABLE 2.—IMPACTS OF ALAMEDA WHIPSNAKE LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities potentially affected by Species Listing Only ¹	Additional Activities potentially affected by critical habitat designation ²
Federal Activities Potential Affected ³ .	Activities such as removing, thinning, or destroying Alameda whipsnake habitat (as defined in the primary constituent elements discussion), whether by burning or mechanical, chemical, or other means (e.g. fuels management, bulldozing, herbicide application, grazing, etc.); water transfers, diversion, or impoundment, groundwater pumping, irrigation, or other activity that causes barriers or deterrents to dispersal, inundates habitat, or significantly converts habitat (e.g., conversion to urban development, vineyards, landscaping); recreational activities that significantly deter the use of suitable habitat areas by Alameda whipsnakes or alter habitat through associated maintenance activities (e.g., off-road vehicle parks, golf courses, and hiking, mountain biking, and horseback riding trails); sale, exchange, or lease of Federal land that contains suitable habitat that is likely to result in the habitat being destroyed or appreciably degraded; and construction activities that destroy or appreciably degrade suitable habitat (e.g., urban development, building of recreational facilities such as off-road vehicle parks and golf courses, road building, drilling, mining, quarrying and associated reclamation activities) that the Federal Government carries out.	None

TABLE 2.—IMPACTS OF ALAMEDA WHIPSNAKE LISTING AND CRITICAL HABITAT DESIGNATION—Continued

Categories of activities	Activities potentially affected by Species Listing Only ¹	Additional Activities potentially affected by critical habitat designation ²
Private and other non-Federal Activities Potentially Affected ⁴ .	Activities such as removing, thinning, or destroying Alameda whipsnake habitat (as defined in the primary constituent elements discussion), whether by burning or mechanical, chemical, or other means (e.g., fuels management, bulldozing, herbicide application, grazing, etc.); water transfers, diversion, or impoundment, groundwater pumping, irrigation, or other activity that causes barriers or deterrents to dispersal, inundates habitat, or significantly converts habitat (e.g., conversion to urban development, vineyards, landscaping, etc.); recreational activities that significantly deter the use of suitable habitat areas by Alameda whipsnakes or alter habitat through associated maintenance activities (e.g., off-road vehicle parks, golf courses, and hiking, mountain biking, and horseback riding trails); and construction activities that destroy or appreciably degrade suitable habitat (e.g., urban development, building of recreational facilities such as off-road vehicle parks and golf courses, road building, drilling, mining, quarrying and associated reclamation activities) that require a Federal action (permit, authorization, or funding).	None.

¹ This column represents the activities potentially affected by listing the Alameda whipsnake as a threatened species (December 5, 1997; 62 FR 64306) under the Endangered Species Act.

² This column represents the activities potentially affected by the critical habitat designation in addition to those activities potentially affected by listing the species.

³ Activities initiated by a Federal agency.

⁴ Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

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

In the economic analysis (under section 4 of the Act), we determined that designation of critical habitat will not have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above, this rule is not expected to result in any restrictions in addition to those currently in existence. As indicated on Table 1 (see Critical Habitat section), we designated property owned by Federal, State, and local governments, and private property.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are:

- (1) Sale, exchange, or lease of lands owned by the Bureau of Land Management or the Department of Energy;
- (2) Regulation of activities affecting waters of the United States by the Army Corps of Engineers under section 404 of the Clean Water Act;
- (3) Regulation of water flows, water delivery, damming, diversion, and channelization by the Bureau of Reclamation and the Army Corps of Engineers;
- (4) Regulation of grazing, recreation, or mining by the Bureau of Land Management;
- (5) Funding and implementation of disaster relief projects by FEMA;
- (6) Funding and regulation of road construction by the Federal Highways Administration;

- (7) Clearing of vegetation by the Department of Energy; and
- (8) The cleanup of toxic waste and superfund sites under the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act by the U.S. Environmental Protection Agency.

Many of these activities sponsored by Federal agencies within designated critical habitat areas are carried out by small entities (as defined by the Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed above, these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities.

For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of the species remain in effect, and this rule will have no additional restrictions.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

In the economic analysis, we determined that designation of critical habitat will not cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability

of U.S.-based enterprises to compete with foreign-based enterprises.

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

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

(a) This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that any of their actions involving Federal funding or authorization must not destroy or adversely modify the critical habitat. However, as discussed above, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated to result from critical habitat designation.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year, i.e., it is not a “significant regulatory action” under the Unfunded Mandates Reform Act.

Takings

Under Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of the Alameda whipsnake. Due to current public knowledge of the species’ protection, the prohibition against take of the species both within and outside of the

designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that long-term property values will be affected by the critical habitat designation.

Federalism

Under Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, the Service requested information from and coordinated development of this critical habitat proposal with appropriate State resource agencies in California, as well as during the listing process. We will continue to coordinate any future designation of critical habitat for the Alameda whipsnake with the appropriate State agencies. The designation of critical habitat for the Alameda whipsnake imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, doing so may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

Under Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have made every effort to ensure that this final determination contains no drafting errors, provides clear standards, simplifies procedures, reduces burden, and is clearly written so that litigation risk is minimized.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any information collection requirements for which Office of Management and Budget approval under the Paperwork Reduction Act is required.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted under section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

Under the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and the Department of the Interior's requirement at 512 DM 2 we understand that recognized Federal

Tribes must be related to on a Government-to-Government basis. The designation of critical habitat for the Alameda whipsnake does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

A complete list of all references cited in this rule is available upon request from the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this notice are Jason Davis and Heather Bell, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

For the reasons given in the preamble, we amend 50 CFR part 17 as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for "Whipsnake, Alameda" under "REPTILES" to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
REPTILES							
*	*	*	*	*	*		*
Whipsnake, Alameda (=striped racer).	<i>Masticophis lateralis euryxanthus</i> .	U.S.A. (CA)	Entire	T	628	17.95(c)	NA
*	*	*	*	*	*		*

3. Amend § 17.95(c) by adding critical habitat for the Alameda whipsnake (*Masticophis lateralis euryxanthus*) in the same alphabetical order as this species occurs in § 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(c) *Reptiles.*

* * * * *

ALAMEDA WHIPSNAKE (*Masticophis lateralis euryxanthus*)

1. Critical habitat units are depicted for Alameda, Contra Costa, San Joaquin, and

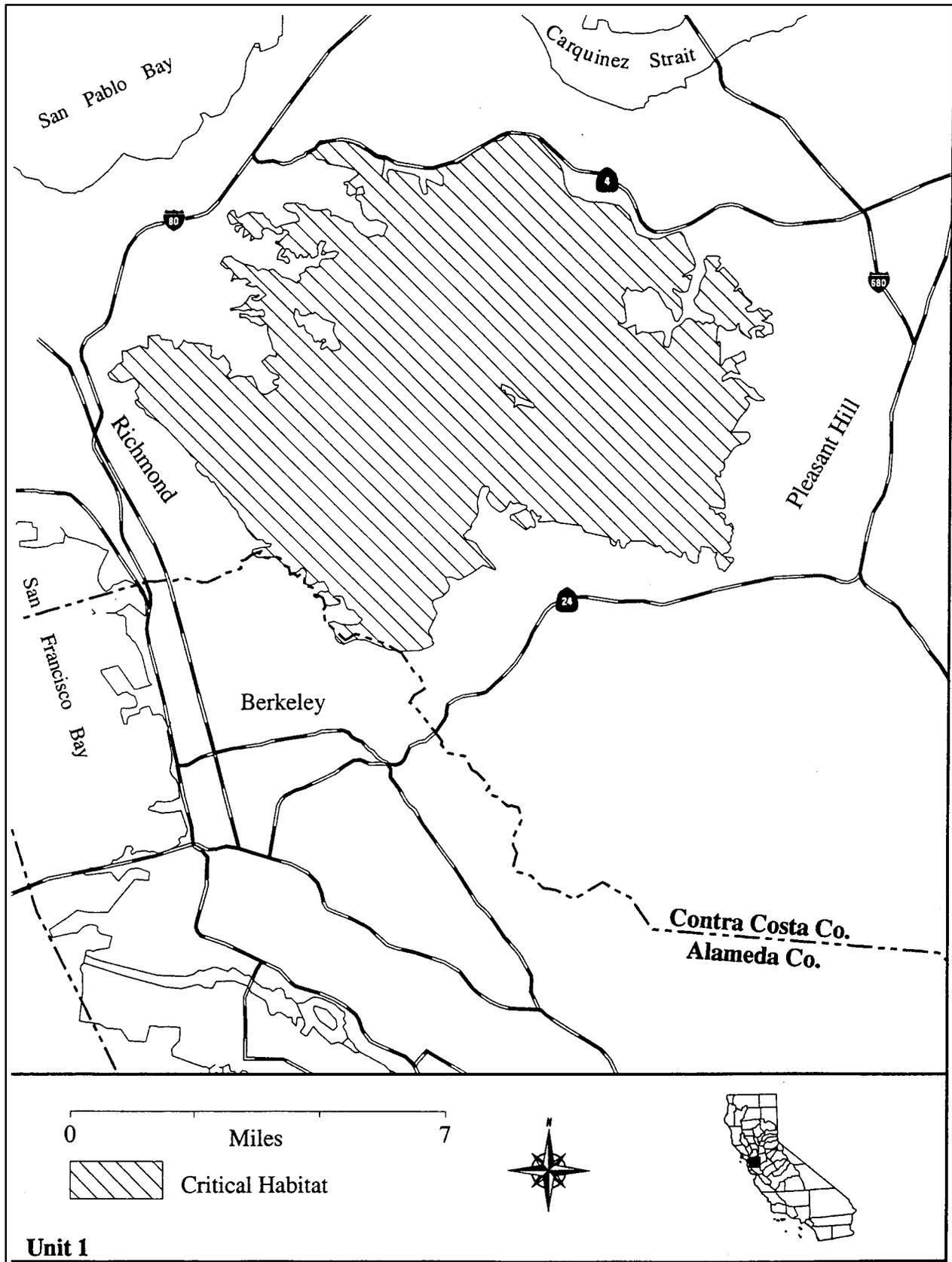
Santa Clara Counties, California, on the maps below.

2. Within these areas, the primary constituent elements are those habitat components that are essential for the primary biological needs of foraging, sheltering, breeding, maturation, and dispersal. The primary constituent elements are in areas that support scrub communities including mixed chaparral, chamise-redshank chaparral, and coastal scrub and annual grassland and various oak woodlands that lie adjacent to scrub habitats. In addition, the primary constituent elements for the Alameda whipsnake may be found in grasslands and various oak woodlands that

are linked to scrub habitats by substantial rock outcrops or riparian corridors. Other habitat features that provide a source of cover for the whipsnake during dispersal or lie in reasonable proximity to scrub habitats and contain habitat features (e.g., rock outcrops) that support adequate prey populations may also contain primary constituent elements for the Alameda whipsnake.

3. Critical habitat does not include existing features and structures, such as buildings, roads, railroads, large water bodies, and similar features and structures not containing one or more of the primary constituent elements.

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Unit 1

Map Unit 1: Contra Costa County, California. From 1992 Orthophoto quads,

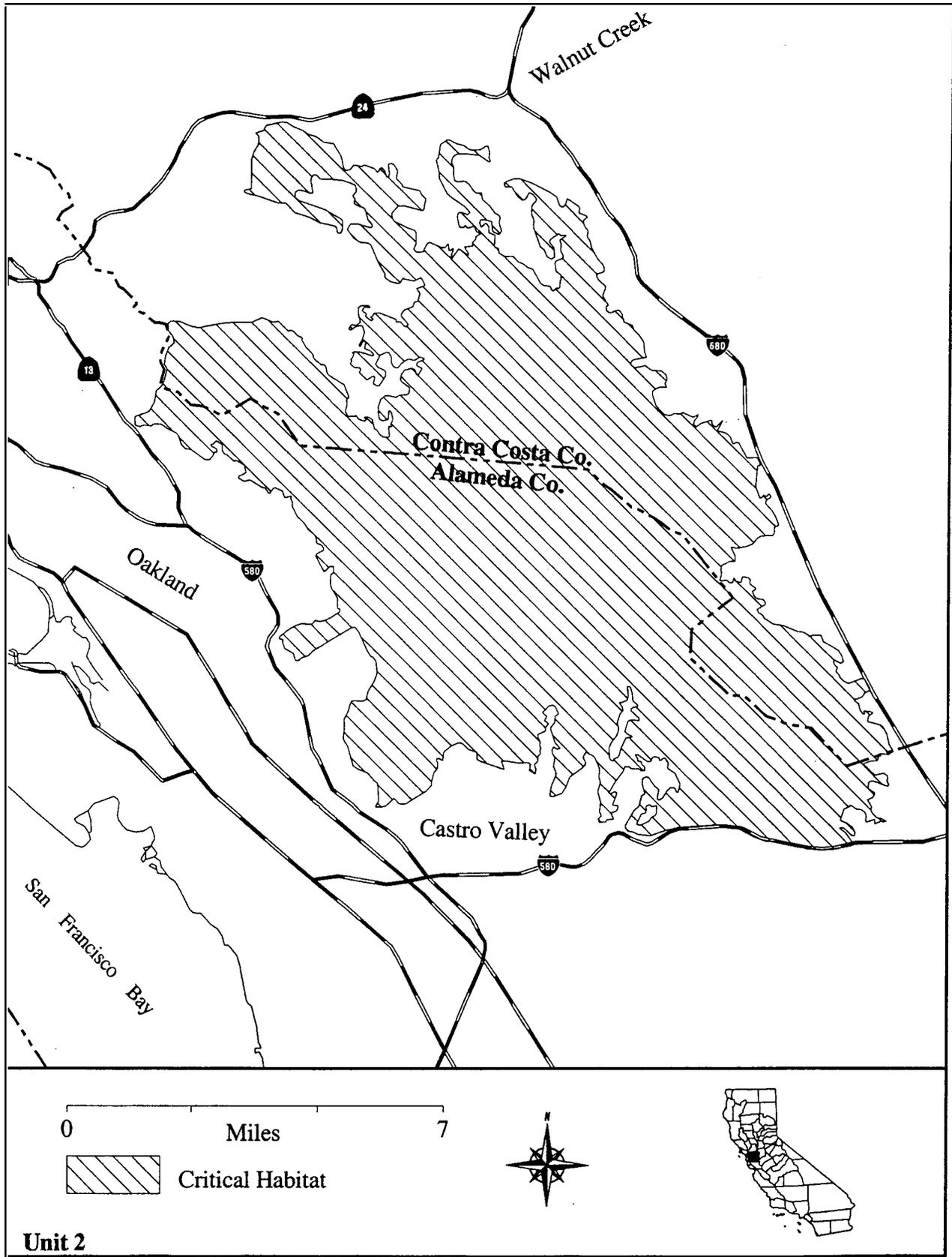
Mount Diablo Base Meridian, California: T. 2 N., R. 4 W., S $\frac{1}{2}$ sec. 13, SE $\frac{1}{4}$ sec. 23, N $\frac{1}{2}$

SE $\frac{1}{4}$ sec. 24, sec. 25, N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 26, E $\frac{1}{2}$ sec. 27, E $\frac{1}{2}$ sec. 34 secs. 35-36; T. 2 N., R.

3 W., S¹/₂ sec. 15, S¹/₂ sec. 16, SW¹/₄ sec. 18, secs. 19–22, S¹/₂ NW¹/₄ sec., 23, SW¹/₄ sec. 24, secs. 25–36; T. 2 N., R. 2 W., S¹/₂ sec. 30, sec. 31, SW¹/₄ sec. 32; T. 1 N., R. 4 W., secs. 1–2, S¹/₂ sec. 3, sec. 4, SE¹/₄ sec. 5, N¹/₂ SE¹/₄

sec. 8, secs. 9–15, N¹/₂ sec. 16, N¹/₂ SE¹/₄ sec. 21, secs. 22–26, NE¹/₄ sec. 27, N¹/₂ SE¹/₄ sec. 36; T. 1 N., R. 3 W., secs. 1–24, N¹/₂ sec. 25, N¹/₂ sec. 26, N¹/₂ sec. 27, S¹/₂ NW¹/₄ sec. 28, secs. 29–32; T. 1. N., R. 2 W., secs. 5–7, S¹/₂

NW¹/₄ sec. 8, W¹/₂ sec. 17, secs. 18–19, W¹/₂ sec. 29; sec. 30; T. 1. S., R. 3 W., N¹/₂ sec. 5, N¹/₂ sec. 6.



Unit 2

Map Unit 2: Alameda and Contra Costa Counties, California. From 1992 Orthophoto

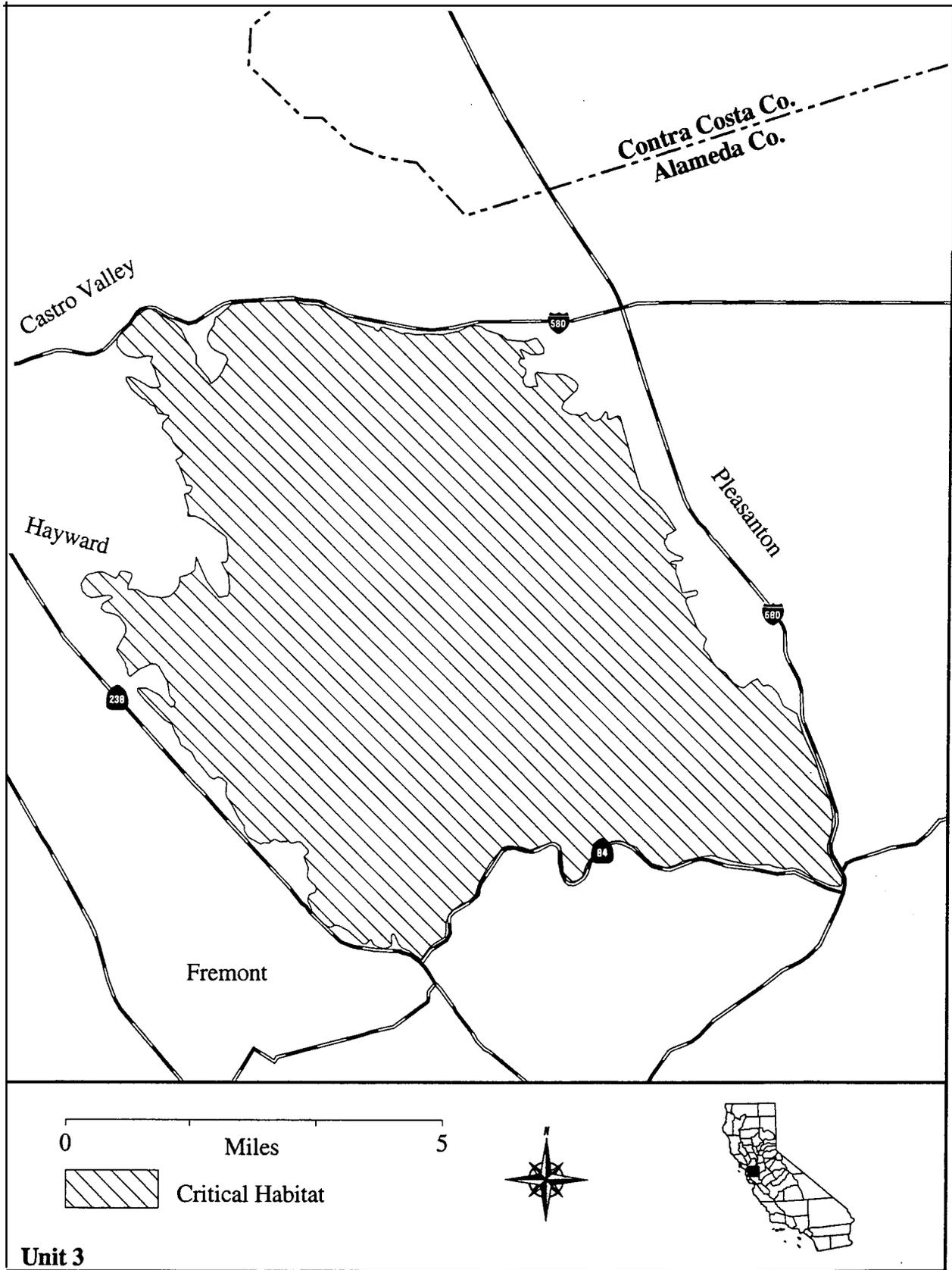
quads, Mount Diablo Base Meridian, California: T. 1 N., R. 3 W., SE $\frac{1}{4}$ sec. 35, S $\frac{1}{2}$

NW $\frac{1}{4}$ sec. 36; T. 1. N., R. 2 W., SW $\frac{1}{4}$ sec. 31, S $\frac{1}{2}$ sec. 33, SW $\frac{1}{4}$ sec. 34; T. 1 S., R. 3

W., sec. 1, E^{1/2} sec. 2, NE^{1/4} sec. 12, SW^{1/2} sec. 13, S^{1/2} sec. 14, S^{1/2} sec. 15, secs. 22-27, SE^{1/4} sec. 28, NE^{1/4} sec. 34, N^{1/2} SE^{1/4} sec. 35, sec. 36; T. 1 S., R. 2 W., S^{1/2} sec. 2, secs. 3-6, N^{1/2} SE^{1/4} sec. 7, secs. 8-11, SW^{1/4} sec. 12, S^{1/2} NW sec. 13, secs. 14-17, SE^{1/4} sec. 18, S^{1/2}

NE^{1/4} sec. 19, secs. 20-36; T. 1 S., R. 1 W., SW^{1/4} sec. 19, SW^{1/4} sec. 29, S^{1/2} NW^{1/4} sec. 30, secs. 31-32; T. 2 S., R. 3 W., N^{1/2} SE^{1/4} sec. 1, NE^{1/4} sec. 12, S^{1/2} sec. 13, N^{1/2} sec. 24; T. 2 S., R. 2 W., secs. 1-18, E^{1/2} sec. 19, secs. 20-30, N^{1/2} SE^{1/4} sec. 31, sec. 32, N^{1/2} sec.

33, N^{1/2} sec. 34, N^{1/2} SW^{1/4} sec. 35, sec. 36; T. 2 S., R. 1 W., W^{1/4} sec. 4, secs. 5-6, S^{1/2} sec. 16, secs. 17-21, S^{1/2} NW^{1/4} sec. 22, W^{1/2} sec. 26, secs. 27-34, W^{1/2} sec. 35; T. 3 S., R. 1 W., NW^{1/4} sec. 2, secs. 3-4, N^{1/2} SE^{1/4} sec. 5, N^{1/2} sec. 6; T. 3 S., R. 2 W., N^{1/2} sec. 1.



Unit 3

Map Unit 3: Alameda County, California.
From 1992 Orthophoto quads, Mount Diablo

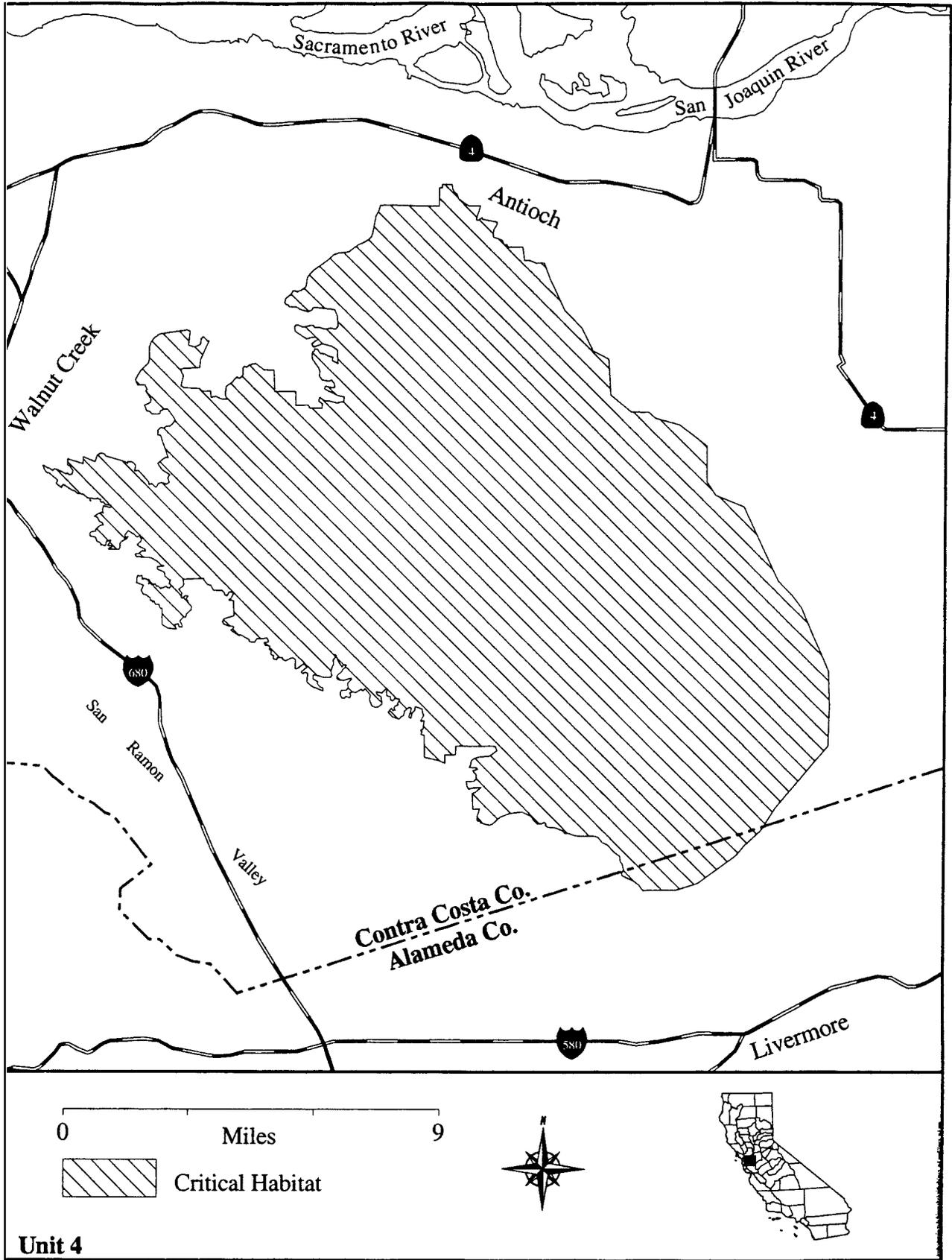
Base Meridian, California: T. 3 S., R. 2 W.,
sec. 1, sec. 12, E½ sec. 13, SW¼ sec. 24, sec.

25, NE¼ sec. 26, secs. 35-36; T. 3 S., R. 1
W., SW¼ sec. 2, S½ sec. 3, S½ sec. 4, S½

NW¹/₄ sec. 5, S¹/₂ NE¹/₄ sec. 6, secs. 7–11,
SW¹/₄ sec. 12, secs. 13–36; T. 3 S., R. 1 E.,
W¹/₂ sec. 19, S¹/₂ NW¹/₄ sec. 30, sec. 31, S¹/₂

sec. 32; T. 4 S., R. 2 W., NE¹/₄ sec. 1; T. 4
S., R. 1 W., secs. 1–6, NE¹/₄ sec. 7, secs. 8–
12, NE¹/₄ sec. 14, N¹/₂ SW¹/₄ sec. 15, sec. 16,

N¹/₂ SE¹/₄ sec. 17, NE¹/₄ sec. 21; T. 4 S., R.
1 E., W¹/₂ sec. 4, secs. 5–8, W¹/₂ sec. 9, NW¹/₄
sec. 16.



Unit 4

Map Unit 4: Alameda and Contra Costa Counties, California. From 1992 Orthophoto

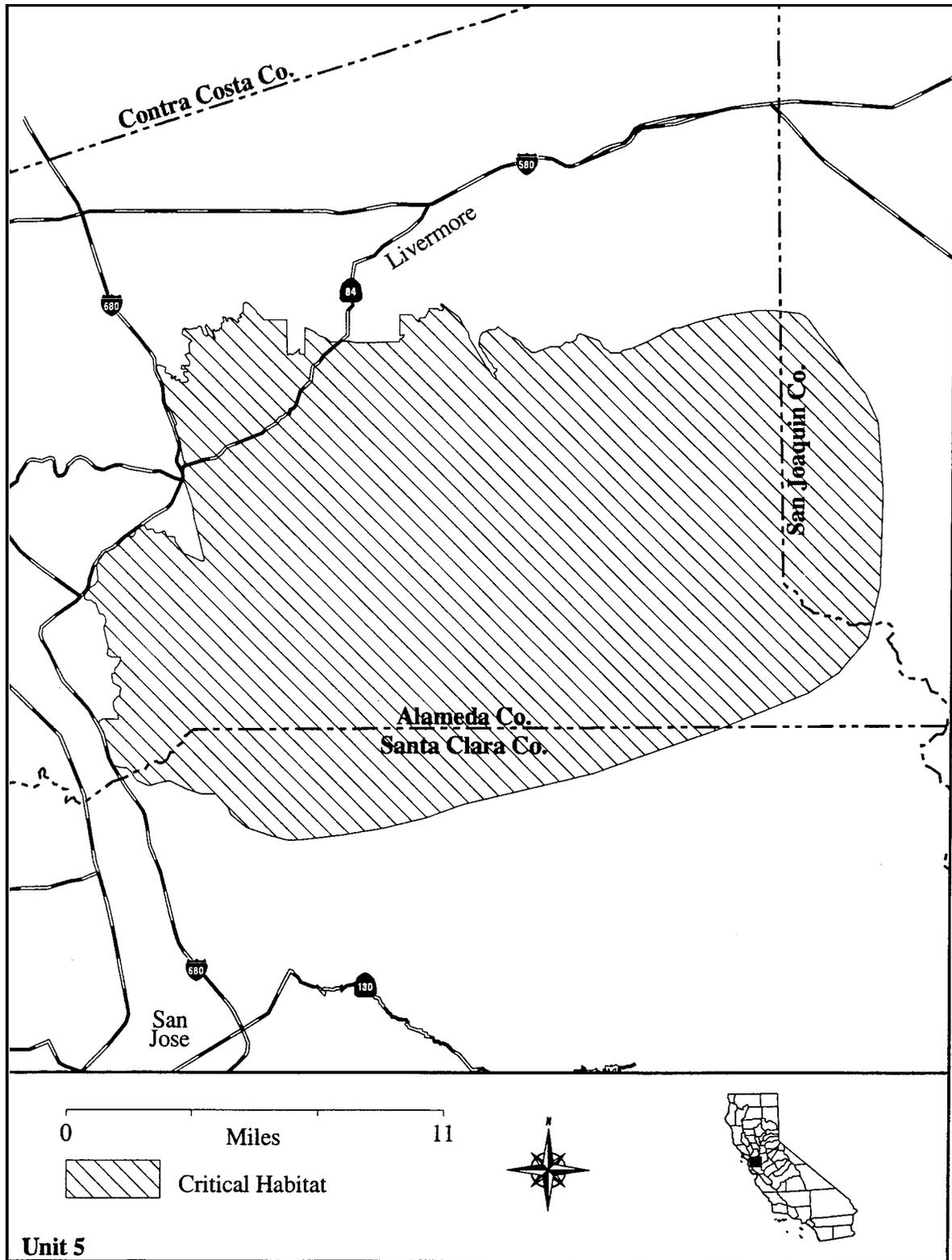
quads, Mount Diablo Base Meridian, California: T. 2 N., R. 1 W., SE $\frac{1}{4}$ sec. 36; T.

2 N., R. 1 E., S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 27, S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 28, S $\frac{1}{2}$ sec. 29, SE $\frac{1}{4}$ sec. 30, S $\frac{1}{2}$ NE $\frac{1}{4}$

sec. 31, secs. 32-34, S^{1/2} sec. 35; T. 1 N., R. 2 W., S^{1/2} sec. 25, SE^{1/4} sec. 26, N^{1/2} sec. 36; T. 1 N., R. 1 W., sec. 1, SE^{1/4} sec. 2, SE^{1/4} sec. 8, S^{1/2} sec. 9, sec. 12, N^{1/2} SE^{1/4} sec. 13, W^{1/2} sec. 14, S^{1/2} NE^{1/4} sec. 15, sec. 17, N/12 SE^{1/4} sec. 20, secs. 21-28, E^{1/2} SW^{1/4} sec. 29, S^{1/2} sec. 30, sec. 31, secs. 32-36; T. 1 N., R. 1.

E., W^{1/2} sec. 1, secs. 2-11, sec. 12, secs. 13-36; T. 1 N., R. 2 E., SW^{1/4} sec. 7, W^{1/2} sec. 18, sec. 19, S^{1/2} sec. 20, SW^{1/4} sec. 21, secs. 28-33, S^{1/2} sec. 34; T. 1 S., R. 1 W., secs. 1-5, N^{1/2} SE^{1/4} sec. 6, sec. 8, N^{1/2} SW^{1/4} sec. 9, secs. 10-15, NW^{1/4} sec. 16, NE^{1/4} sec. 17, N^{1/2} SE^{1/4} sec. 23, sec. 24, N^{1/2} sec. 25; T. 1 S.,

R. 1 E., secs. 1-29, N^{1/2} sec. 30, NE^{1/4} sec. 32, sec. 33-36; T. 1 S., R. 2 E., SW^{1/4} sec. 2, secs. 3-10, S^{1/2} NW^{1/4} sec. 11, W^{1/2} sec. 13, secs. 14-36; T. 2 S., R. 1 E., secs. 1-3, N^{1/2} sec. 10, N^{1/2} sec. 11, sec. 12; T. 2 S., R. 2 E., NW^{1/4} sec. 1, secs. 2-10, W^{1/2} sec. 11, N^{1/2} sec. 15, sec. 16-17, E^{1/2} sec. 18.



Map Unit 5: Alameda, Contra Costa, San Joaquin, and Santa Clara Counties, California. From 1992 Orthophoto quads, Mount Diablo

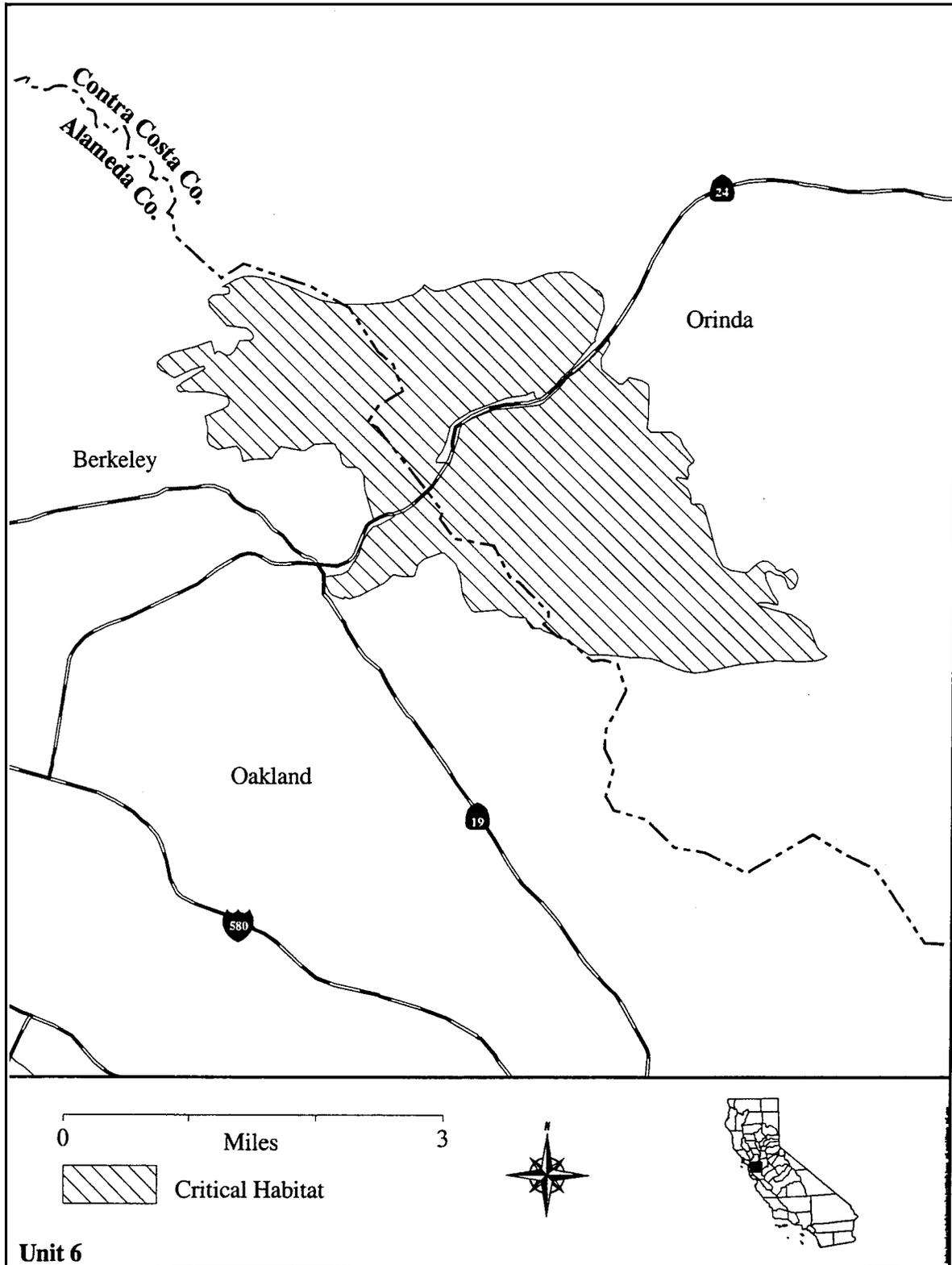
Base Meridian, California: T. 3 N., R. 1 E., SE¹/₄ sec. 21, S¹/₂ sec. 22, S¹/₂ NW¹/₄ sec. 23,

SW¹/₄ sec. 24, S¹/₂ NW¹/₄ sec. 25, secs. 26-

27, E^{1/2} sec. 28, SE^{1/4} sec. 29, NE^{1/4} sec. 32, secs. 33-36; T. 3 S., R. 2 E., SW^{1/4} sec. 19, SE^{1/4} sec. 21, S^{1/2} NE^{1/4} sec. 22, S^{1/2} NW^{1/4} sec. 23, SE^{1/4} sec. 24, secs. 25-36; T. 3 S., R. 3 E., S^{1/2} sec. 24, secs. 25-26, S^{1/2} NE^{1/4} sec. 27, S^{1/2} NW^{1/4} sec. 28, S^{1/2} NE^{1/4} sec. 29, S^{1/2} NW^{1/4} sec. 30, secs. 31-36; T. 3 S., R. 4 E., S^{1/2} sec. 19, S^{1/2} sec. 20, S^{1/2} sec. 21, SW^{1/4} sec. 27, secs. 28-33, S^{1/2} NW^{1/4} sec. 34; T. 4

S., R. 1 W., E^{1/2} sec. 25, E^{1/2} sec. 36; T. 4 S., R. 1 E., secs. 1-4, E^{1/2} sec. 9, secs. 10-15, E^{1/2} sec. 16, SE^{1/4} sec. 19, S^{1/2} sec. 20, S^{1/2} NE^{1/4} sec. 21, secs. 22-36; T. 4 S., R. 2 E., secs. 1-36; T. 4 S., R. 3 E., secs. 1-36; T. 4 S., R. 4 E., W^{1/2} sec. 2, secs. 3-10, W^{1/2} sec. 11, W^{1/2} sec. 11, W^{1/2} sec. 14, secs. 15-22, W^{1/2} sec. 23, W^{1/2} sec. 26, secs. 27-34, W^{1/2} sec. 35; T. 5 S., R. 1 E., secs. 1-29, N^{1/2} SE^{1/4} sec. 30, N^{1/2}

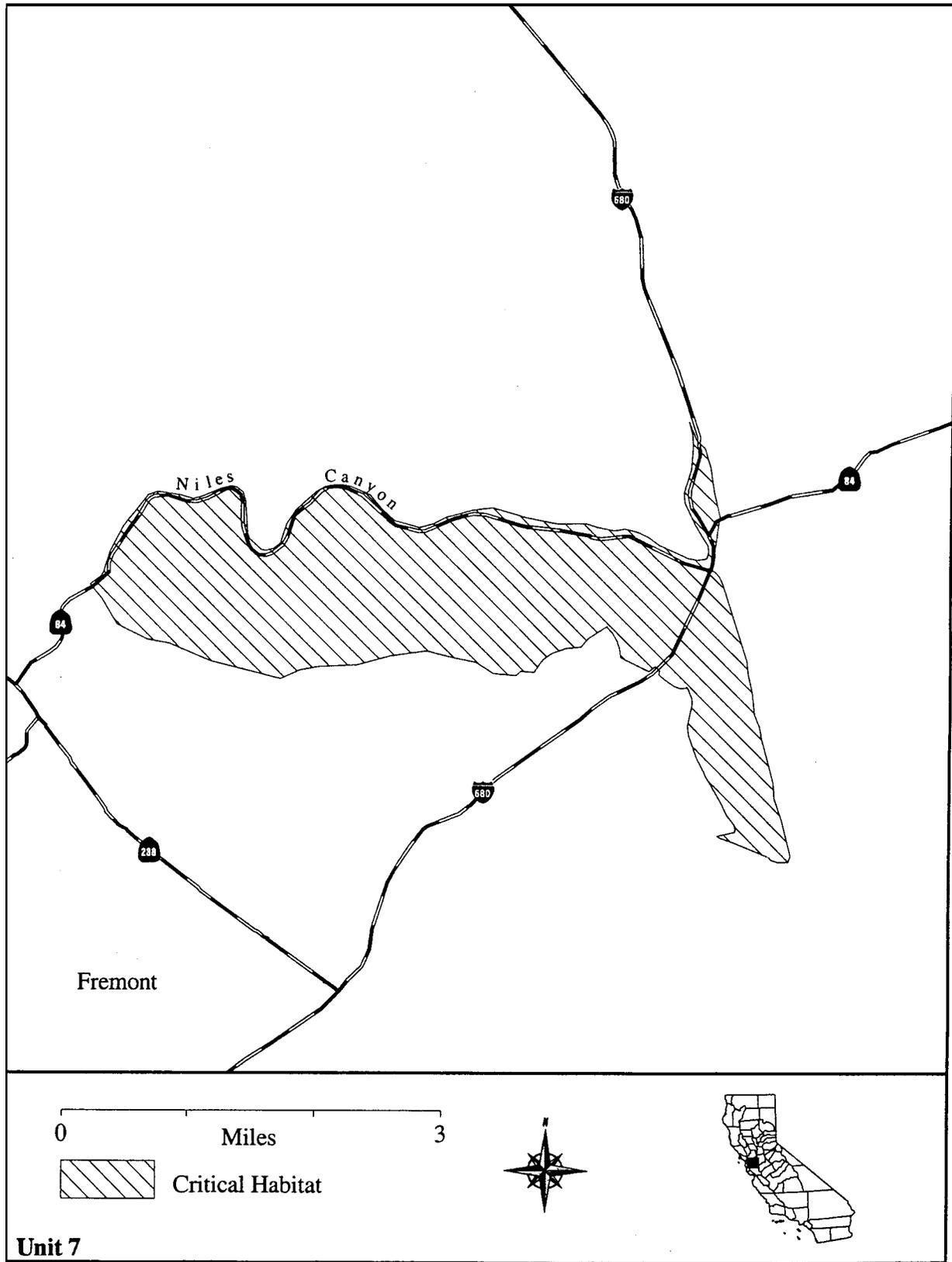
sec. 33, N^{1/2} SE^{1/4} sec. 34, secs. 35-36; T. 5 S., R. 2 E., secs. 1-35, N^{1/2} SW^{1/4} sec. 36; T. 5 S., R. 3 E., secs. 1-24, N^{1/2} sec. 26, N^{1/2} SW^{1/4} sec. 27, secs. 28-30, N^{1/2} sec. 31, N^{1/2} sec. 32; T. 5 S., R. 4 E., W^{1/2} sec. 2, secs. 3-9, N^{1/2} SW^{1/4} sec. 10, N^{1/2} SW^{1/4} sec. 16, secs. 17-18, N^{1/2} sec. 19; T. 6 S., R. 1 E., sec. 1, N^{1/2} sec. 2; T. 6 S., R. 2 E., N^{1/2} sec. 3, N^{1/2} sec. 4, N^{1/2} sec. 5, N^{1/2} sec. 6.



Map Unit 6: Alameda and Contra Costa Counties, California. From 1992 Orthophoto quads, Mount Diablo Base Meridian,

California: T. 1 N., R. 4 W., SE $\frac{1}{4}$ sec. 36; T. 1 N., R. 3 W., SW $\frac{1}{4}$ sec. 31, S $\frac{1}{2}$ sec. 33; T. 1 S., R. 4 W., S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 1, NE $\frac{1}{4}$ sec. 12;

T. 1 S., R. 3 W., W $\frac{1}{2}$ sec. 3, secs. 4-6, N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 7, secs. 8-10, secs. 14-15, N $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 16, N $\frac{1}{2}$ sec. 17, NE $\frac{1}{4}$ sec. 18.



Map Unit 7: Alameda County, California.
From 1992 Orthophoto quads, Mount Diablo
Base Meridian, California: T. 4 S., R. 1 W.,
SE¹/₄ sec. 10, S¹/₂ sec. 11, S¹/₂ sec. 12, secs.
13-14, E¹/₂ sec. 15, NE¹/₄ sec. 23, NW¹/₄ sec.

24; T. 4 S., R. 1 E., S¹/₂ sec. 7, S¹/₂ sec. 8,
sec. 9, secs. 16-18, NE¹/₄ sec. 19, NE¹/₄ sec.
20, sec. 21, W¹/₂ sec. 27, N¹/₂ sec. 28.

Dated: September 21, 2000.

Stephen C. Saunders,

*Acting Assistant Secretary for Fish and
Wildlife and Parks.*

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