

substantial number of small entities. Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), we want to assist small entities in understanding this rule so that they can better implement it.

#### Collection of Information

This final rule does not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### Federalism

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule does not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the consultation requirements of Executive Order 13132 do not apply.

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) and E.O. 12875, Enhancing the Intergovernmental Partnership, (58 FR 58093; October 28, 1993) govern the issuance of Federal regulations that impose unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those costs. This final rule would not impose an unfunded mandate.

#### Taking of Private Property

This final rule does not result in a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### Civil Justice Reform

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### Protection of Children

We have analyzed this final rule under E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety as defined by the Executive Order that may disproportionately affect children.

#### Environment

This rulemaking is not a major Federal action significantly affecting the quality of the human environment under the National Environmental Policy Act and, therefore, an environmental impact statement is not required.

#### Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

#### List of Subjects in 49 CFR Part 71

Time zones.

■ For the reasons discussed above, the Office of the Secretary amends Title 49 part 71 to read as follows:

#### PART 71—[AMENDED]

■ 1. The authority citation for part 71 continues to read as follows:

**Authority:** Secs. 1-4, 40 Stat. 450, as amended; sec. 1, 41 Stat. 1446, as amended; secs. 2-7, 80 Stat. 107, as amended; 100 Stat. 764; Act of Mar. 19, 1918, as amended by the Uniform Time Act of 1966 and Pub. L. 97-449, 15 U.S.C. 260-267; Pub. L. 99-359; Pub. L. 106-564, 15 U.S.C. 263, 114 Stat. 2811; 49 CFR 1.59(a).

■ 2. Paragraph (b) of § 71.5, *Boundary line between eastern and central zones*, is revised to read as follows:

#### § 71.5 Boundary line between eastern and central zones.

\* \* \* \* \*

(b) *Indiana-Illinois.* From the junction of the western boundary of the State of Michigan with the northern boundary of the State of Indiana easterly along the northern boundary of the State of Indiana to the east line of LaPorte County; thence southerly along the east line of LaPorte County to the north line of Starke County; thence east along the north line of Starke County to the west line of Marshall County; thence south along the west line of Marshall County; thence west along the north line of Pulaski County to the east line of Jasper County; thence south along the east line of Jasper County to the south line of Jasper County; thence west along the south lines of Jasper and Newton Counties to the western boundary of the State of Indiana; thence south along the western boundary of the State of Indiana

to the north line of Gibson County; thence easterly and northerly along the north line of Gibson County to the west line of Pike County; thence south along the west line of Pike County to the north line of Warrick County; thence east along the north line of Warrick and Spencer Counties to the west line of Perry County; thence easterly and southerly along the north and east line of Perry County to the Indiana-Kentucky boundary.

\* \* \* \* \*

Issued in Washington, DC on: September 19, 2007.

**Mary E. Peters,**  
*Secretary.*

[FR Doc. 07-4721 Filed 9-20-07; 1:38 pm]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU77

#### Endangered and Threatened Wildlife and Plants; Prudency Determination for the Designation of Critical Habitat for *Trichostema austromontanum* ssp. *compactum*

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of final determination.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have reconsidered whether designating critical habitat for *Trichostema austromontanum* ssp. *compactum*, a plant, is prudent. We listed this taxon as threatened under the Endangered Species Act of 1973, as amended (Act), in 1998; at that time, we determined that designation of critical habitat was not prudent, because designation would increase the degree of threat to the taxon and would not benefit the taxon. As a consequence of a settlement agreement, we withdrew our previous not-prudent determination, and agreed to reevaluate the prudency of designating critical habitat. However, based on our review and evaluation of the best scientific and commercial information available, we believe that designation of critical habitat continues to be not prudent for *T. a. ssp. compactum*.

**DATES:** This rule becomes effective on October 25, 2007.

**ADDRESSES:** Comments and materials we receive, as well as supporting documentation used in the preparation of this determination, will be available for public inspection, by appointment,

during normal business hours, at the Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011 (telephone 760-431-9440). The final determination will also be available via the Internet at <http://www.fws.gov/carlsbad>.

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, telephone, 760-431-9440; facsimile, 760-431-9624.

#### SUPPLEMENTARY INFORMATION:

##### Background

It is our intent to discuss only those topics directly relevant to the final prudency determination. For more information on biology, ecology, and taxonomy of *Trichostema austromontanum* ssp. *compactum*, refer to the final rule listing this taxon as threatened published in the **Federal Register** on September 14, 1998 (63 FR 49006), and the notice of proposed prudency determination for the designation of critical habitat for this taxon published in the **Federal Register** on September 26, 2006 (71 FR 56094).

##### Taxonomy and Description

*Trichostema austromontanum* ssp. *compactum*, a member of the Lamiaceae (mint family), was described by F. Harlan Lewis (1945, pp. 275-303) based on specimens collected in 1941 by M. L. Hilend in Riverside County, California. The taxon occurs on the margins of a single vernal pool (Bauder 1999, p. 13; Fraga and Wall 2007, p. 11). *Trichostema austromontanum* ssp. *compactum* is a compact, soft-villous (with long, shaggy hairs) annual plant, approximately 4 inches (10 centimeters) tall, with short internodes (stem segments between leaves) (Lewis 1945, pp. 284-386, Lewis 1993, p. 732), elliptic leaves, and blue flowers in a five-lobed corolla. The two stamens are blue. The fruit consists of four smooth, basally joined nutlets. This taxon flowers from July to November (Fraga and Wall 2007, pp. 2-5).

##### Threats

For a discussion of the threats to this species please refer to the final rule listing this taxon as threatened (September 14, 1998; 63 FR 49006), our July 28, 2006, 5-year review (available at <http://www.fws.gov/carlsbad>), and the notice of proposed prudency determination for the designation of critical habitat for this taxon published in the **Federal Register** on September 26, 2006 (71 FR 56094).

##### Previous Federal Actions

On September 13, 2004, the Center for Biological Diversity (CBD) and

California Native Plant Society (CNPS) challenged our failure to designate critical habitat for this taxon and five other plant species (*Center for Biological Diversity, et al. v. Gale Norton, Secretary of the Department of the Interior, et al.*, ED CV-04-1150 RT (SGLx) C. D. California). The CBD and CNPS alleged that we failed to provide evidence in the final listing rule supporting our determination that designation of critical habitat would not be beneficial to the species, and that we failed to establish how the publication of critical habitat maps would increase the threat to the species. Without reaching any conclusions on the merits of the previous decision, we agreed to submit for publication in the **Federal Register** a withdrawal of our previous not-prudent determination, and a proposed designation of critical habitat, if prudent and determinable, on or before September 20, 2006, and a final rule by September 20, 2007. On September 26, 2006, we published a notice proposing a new not-prudent determination for the designation of critical habitat for *Trichostema austromontanum* ssp. *compactum*, and announced the opening of a 60-day public comment period on the proposed determination (71 FR 56094). This notice of final determination complies with the April 14, 2005, settlement agreement.

For a discussion of the Federal actions that occurred prior to the 2006 proposed determination, please refer to the "Previous Federal Actions" section in the final rule listing this taxon as threatened (September 14, 1998; 63 FR 49006), and the notice of proposed prudency determination for the designation of critical habitat for this taxon published in the **Federal Register** on September 26, 2006 (71 FR 56094).

##### Summary of Comments and Recommendations

We requested written comments from the public during a 60-day comment period on the notice of proposed prudency determination for the designation of critical habitat for *Trichostema austromontanum* ssp. *compactum* on September 26, 2006 (71 FR 56094). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed determination.

During the comment period that opened on September 26, 2006, and closed on November 27, 2006, we received four comments directly addressing the proposed determination: three from peer reviewers and one joint

comment letter from the Center for Biological Diversity and the Native Plant Conservation Campaign. In the following summary, we have addressed the comments we received; we have also incorporated these comments into the prudency determination as appropriate. We did not receive any requests for a public hearing.

##### Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from four knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from three of the peer reviewers. The peer reviewers generally concurred with our methods and found our information to be accurate. Peer review comments are addressed in the following summary and incorporated into this final prudency determination as appropriate.

##### Peer Reviewer Comments

1. *Comment:* The proposed prudency determination stated that *Trichostema austromontanum* ssp. *compactum* is distributed on the northwestern edge of its vernal pool habitat and that the plants flower in July and August. One peer reviewer commented that the plant is found most frequently along the northern margin but that the plant is also distributed on the northeastern and eastern edge of the vernal pool as well as the northwestern edge. The commenter also stated that the peak bloom for this species may be in July and August, but that the plant was also found in flower from July through November of 2006.

*Our Response:* We have incorporated this information on the distribution and flowering period of this taxon into the "Taxonomy and Description" section of this final prudency determination.

2. *Comment:* The peer reviewers had differing opinions about our assertion that the publication of critical habitat could bring more visitors to the location where the plant grows. Two peer reviewers agreed that the best way to protect the species is to reduce traffic to the area and lower its visibility. However, one peer reviewer stated that the publication of critical habitat maps would not significantly increase visitation to the area because this taxon is not a showy plant, is not sought after by hobbyists or professional botanists, and is unlikely to draw casual visitors.

*Our Response:* We continue to conclude that designation of critical habitat is not prudent at this time.

Direct threats associated with unregulated visitation to the area have apparently decreased as a result of management actions initiated by the California Department of Parks and Recreation (CDPR). While this taxon may not be sought after by a large number of hobbyists or professional botanists, the vernal pool occupied by the taxon was impacted by recreation and plants were lost to trampling prior to the installation of barriers by the CDPR. Since the ecosystem where *Trichostema austromontanum* ssp. *compactum* grows is vulnerable to disturbance, and is the only known location where this unique ecosystem is found within the San Jacinto Mountains, all possible actions should be taken to protect this ecosystem from further degradation and disturbance. We believe that the act of designating critical habitat could bring additional visitors to the area because its location would be published with explicit geographic coordinates. An increase in visitation would increase the degree of threat to the taxon from trampling and would directly contradict the efforts of the CDPR to restrict visitation to this area and conserve this species.

3. *Comment:* One peer reviewer stated that the Service should provide quantifiable and verifiable examples of where past designations of critical habitat, or other actions that publicize the location of a listed species, have resulted in damage to a species or its habitat from tremendous increases in visitation and trampling.

*Our Response:* The District Superintendent of the Inland Empire District of California State Parks (CDPR) has expressed concern to us that the critical habitat designation process may place this plant at increased risk via increased visitation (Watts 2006). Prior to its listing under the Act, *Trichostema austromontanum* ssp. *compactum* was impacted by trampling associated with recreational use of its habitat. In recent years, this threat has been reduced by conservation measures implemented by the CDPR, which include installing barriers, removing signs, and removing the location of this area from maps of the park. Because these measures have been successful in reducing threats to the taxon, we believe that any action that contravenes these measures can be expected to increase threats to the taxon. We believe that publication of specific locations and maps associated with a critical habitat designation for this taxon, with the attendant publicity that a designation would likely generate, can be expected to increase interest in the area where the taxon is found because of the interest that the public

and scientific community have in rare, threatened, and endangered species, and in unique ecosystems. We believe that this interest could lead to increased visitation to the only area where *T. a.* ssp. *compactum* is found, thereby increasing the threat of trampling to this species.

We know of one specific example of a case where the designation of critical habitat resulted in higher visitation to an area and higher collection pressure. In the prudency determination for the rock gnome lichen (66 FR 51445; October 9, 2001), we cited the case of another federally listed North Carolina mountain plant for which critical habitat was designated; the taxon was severely impacted by collectors immediately after the critical habitat maps were published. This collection happened even though this plant was not previously known to be desired by rare plant collectors and had never been offered for sale in commercial trade. For the rock gnome lichen itself (66 FR 51445; October 9, 2001), we documented that after the species was listed, an illegal collection occurred at a location within a National Park, and another population outside the Park was vandalized for unknown reasons (the lichens were scraped off the rock to form graffiti). Thus, although *Trichostema austromontanum* ssp. *compactum* may not be sought after by a large number of hobbyists or professional botanists at present, critical habitat designation could increase interest and lead to increased visitation.

Due to the rarity of *Trichostema austromontanum* ssp. *compactum* and its fragile nature, we do not want to increase the threats to it by drawing attention to its location. In years when climatic conditions are unfavorable to the taxon, only a few individuals may be present at any one time or location and it would be relatively easier for a small amount of activity to destroy the majority of the plants. In another study of an endangered plant, demographic modeling results indicated that when the effects of trampling and bad climatic conditions were coupled, extinction was accelerated (Maschinski et al. 1997). The fact that CDPR has invested money and effort to minimize the visibility of this area to recover this species and its unique habitat indicates that CDPR shares our concern about impacts associated with increased visitation to the area.

4. *Comment:* One peer reviewer agreed that the only way to protect *Trichostema austromontanum* ssp. *compactum* was to reduce traffic to the area and to lower its public visibility; however, the peer reviewer stated that

critical habitat should be designated because a future Federal project may impact this area. While acknowledging that a Federal project in this area appears unlikely, this peer reviewer gave examples of three California State Parks where unexpected projects with a Federal nexus have been proposed: the power line through Anza-Borrego State Park (Sunrise Powerlink Project); the toll road through San Onofre State Park; and the expansion of the border fence (US/Mexico Border Infrastructure Project) in Border Field State Park. The peer reviewer stated that none of these projects were foreseen, but the presence of critical habitat could provide additional protection on State lands against unforeseen Federal projects.

*Our Response:* The locations of the State Parks cited by the peer reviewer may have contributed to the “unforeseen” projects being proposed in those areas. For example, Border Fields State Park is directly on the United States/Mexico border and San Onofre State Park is adjacent to residential development and Interstate 5; the proximity of these parks to existing infrastructure may make these parks more vulnerable to the expansion of existing infrastructure. Also, the alignment for the Sunrise Powerlink Project through Anza-Borrego State Park is proposed within an existing utility easement.

On the basis of a review of current infrastructure and regional planning efforts and projections, the area occupied by *Trichostema austromontanum* ssp. *compactum* is not adjacent to existing or proposed urban development or large-scale infrastructure, nor is it traversed by any existing or planned utility easements. Also, the steep terrain surrounding the State Park (on Mount San Jacinto) makes future utility and infrastructure projects unlikely. In addition, as discussed in the “Benefits to the Species from Critical Habitat Designation” section of the proposed determination, the specific area where this plant is found is a designated State of California Natural Preserve, which means that protection and management of sensitive resources is the highest priority for this area. As a result of these factors, we do not foresee any future Federal projects that would result in destruction or adverse modification of the habitat for this taxon.

However, if a Federal project was proposed that could negatively impact *Trichostema austromontanum* ssp. *compactum*, a section 7 consultation would be required. The designation of critical habitat would benefit the species by ensuring that a Federal project would

not result in the destruction or adverse modification of the critical habitat. However, because of the low likelihood of a project with a Federal nexus occurring in the taxon's habitat, we believe that the increased threat to the plant due to potential increased human visitation outweighs the benefits of designating critical habitat for this taxon (see "Prudency Determination" section below for a detailed discussion).

5. *Comment:* One peer reviewer commented that an alternate location with suitable habitat should be sought so that an introduced population could be created and sustained.

*Our Response:* In the preparation of this determination, we asked individuals knowledgeable about the area where *Trichostema austromontanum* ssp. *compactum* is found if they knew of any additional vernal pool habitat where another population may currently exist or where a population could be introduced. No additional vernal pool habitat is known to occur within or adjacent to San Jacinto State Park.

#### Public Comments

6. *Comment:* One commenter disagreed with our statement in the proposed determination that information on the location of *Trichostema austromontanum* ssp. *compactum* and its habitat is no longer available on the internet and provided links to two Web sites containing postings on rare plant habitat. The commenter also stated that interested parties could easily access additional information on the location on internet-accessible herbarium databases.

*Our Response:* We acknowledge that information regarding the location of the taxon and its habitat is available; however, the location information has never been presented to the public at the level it would be through the publicity that accompanies the publication of a critical habitat rule. One of the Web sites the commenter cited provides aerial maps and information about user-specified locations. However, the location information provided on the Web site is somewhat general and would likely be difficult to use to find the area where the taxon occurs. Also, the information on the Web site states that there is no official State Park map because the area is a wildlife preserve and the Park tries to limit the number of visitors. The second Web site that the commenter provided contains general information about the species and only regional and county-level information about the location of the area occupied by this taxon. As noted by the commenter,

online herbaria also provide textual information about the location of this species. However, location information provided by these types of databases is often general. Also, these online herbarium databases do not include mapped information and are not likely visited by the public at large.

Therefore, currently available location information is limited and unlikely to be sought out by the general public. The designation of critical habitat, however, would result in a single document—including precise information about the species, where it is found, and a map with geographic coordinates—being published in the **Federal Register**. A primary purpose of the **Federal Register** is to make information readily accessible to the public, in a form that is easy to understand, regarding decisions made by the Federal government.

7. *Comment:* One commenter stated that possible increases in the number of visitors to the area where *Trichostema austromontanum* ssp. *compactum* grows following designation of critical habitat could be minimized through a variety of mechanisms after designation.

*Our Response:* The commenter did not provide any suggestions of the type of mechanisms that could be used to minimize visitation following the publication of critical habitat maps.

8. *Comment:* One commenter stated that the analysis for the prudency determination does not address the issue of global climate change. The commenter stated that species like *Trichostema austromontanum* ssp. *compactum* are vulnerable to the effects of global climate change because of their small population size and their location at high altitudes (Parmesan 2006).

*Our Response:* The article cited by the commenter (Parmesan 2006) reviews several cases where climate change has resulted in shifts in species' phenology, distribution, and in some cases extinction or extirpation. We are not currently aware of any species-specific information indicating that global climate change is a potential threat for *Trichostema austromontanum* ssp. *compactum*, nor did the commenter provide any species-specific information. At this time, we do not know how climate change will affect *T. a. ssp. compactum*. Currently, the habitat where this taxon is found is isolated and a function of the local topography. If changes in climate shift the timing or the amount of precipitation or the amount of evaporation at this location, *T. a. ssp. compactum* could be affected; however, we do not currently have information on how and to what extent the taxon might

be affected. Furthermore, including an attempt to address any potential impacts of global climate change to *T. a. ssp. compactum* would not alter our critical habitat prudency analysis in this situation. An analysis of such a potential threat would not change our conclusion that the identification of critical habitat for *T. a. ssp. compactum* can be expected to increase the degree of threat from trampling, and that any benefits resulting from a designation are outweighed by that expected increase in human threat to the taxon.

9. *Comment:* One commenter stated that critical habitat allows for a set of checks and balances that support rare species conservation under unforeseen future changes in management.

*Our Response:* If a Federal project was proposed that could negatively impact *Trichostema austromontanum* ssp. *compactum*, a section 7 consultation would be required. The designation of critical habitat would benefit the species by ensuring that a Federal project would not result in the destruction or adverse modification of the designated critical habitat. However, because of the low likelihood of a project with a Federal nexus occurring in the taxon's habitat, we believe that the increased threat to the plant due to potential increased human visitation outweighs the benefits of designating critical habitat for this taxon (see "Prudency Determination" section below for a detailed discussion). In addition, we do not foresee any changes in management that would result in destruction or adverse modification of the habitat for this taxon, based on: (1) The considerable management effort that CDPR has already undertaken to conserve *T. a. ssp. compactum*; (2) CDPR's commitment to work with us, California Department of Fish and Game, California Native Plant Society and Rancho Santa Ana Botanic Garden to establish a long-term conservation strategy for this taxon; and (3) the fact that specific area where this plant is found is a designated State of California Natural Preserve, which means that protection and management of sensitive resources is the highest priority for this area.

#### Summary of Changes From the Proposed Prudency Determination

We made changes in this final prudency determination on the basis of public or peer review comments and information received during the open comment period. Specifically we:

1. Added information related to the distribution and time of flowering for the species (see response to Comment 1 and the "Background" section);

2. Added information about the need for future Federal projects to consult under section 7(a)(2) of the Act (see response to Comment 4); and

3. Clarified the suggestion that no information is available on the internet relating to the location where this species occurs (see response to Comment 6).

These revisions added clarity and specificity to the rule; however we did not change our determination that the designation of critical habitat is not prudent at this time.

## Prudency Determination

### Background

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is determined to be endangered or threatened. Regulations under 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other human activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) such designation of critical habitat would not be beneficial to the species.

In our September 14, 1998 final listing rule (63 FR 49006), we determined that a designation of critical habitat could increase the degree of threat to *Trichostema austromontanum* ssp. *compactum*, and that such designation also would not be beneficial to the taxon. In the final listing rule (63 FR 49019) we stated:

(1) *Trichostema austromontanum* ssp. *compactum* occurs only in a wilderness area on State [CDPR] lands with little potential for Federal involvement. Trails, signage, map notations, and references to the habitat area have been removed by the State to reduce impacts to this highly localized taxon;

(2) Designation of critical habitat would have little benefit to this taxon and would not increase the commitment or management efforts of the State; and

(3) Designation of critical habitat likely would be detrimental to this taxon because publishing maps and descriptions of the exact locality identifies the site as a unique area. Such a distinction may encourage recreational use of the area and negatively impact the taxon.

Pursuant to the Court's April 14, 2005, stipulated settlement agreement and order, and as announced in our September 26, 2006, proposed not-prudent determination (71 FR 56094),

we have withdrawn our previous not-prudent determination. Consistent with the requirements of the Act and our aforementioned settlement agreement and order, we are now finalizing our new determination of not prudent for *Trichostema austromontanum* ssp. *compactum*. The determination involves a weighing of the expected increase in threats associated with a critical habitat designation against the benefits gained by a critical habitat designation. An explanation of this "balancing" evaluation follows.

We listed *Trichostema austromontanum* ssp. *compactum* under the Act on the basis of threats of trampling associated with recreational activities and low numbers of individual plants. Before the CDPR took steps to minimize the visibility of the sensitive habitat that supports *T. a. ssp. compactum*, there was a clearly marked trail to the location. The area was used for many different types of recreational uses. These activities impacted the sensitive vegetation in the area by trampling live plants and creating multiple footprints in the wet soil around the margin of the vernal pool, further impacting habitat through soil compaction and alteration of hydrology (Hamilton 1983, pp. 75–88; 63 FR 49006). Since listing, the CDPR has continued to implement management actions designed to reduce visitation to this area. It has removed reference to the area from its trail maps and signs, and removed all markers for trails to this area in order to reduce recreational use. Although the only known location was publicly available in the past, the currently available location information is limited and unlikely to be sought out by the general public. In contrast, the public notice requirements of the Act, including publication of precise site location information and a map in the **Federal Register** and the publicity that accompanies the publication of a critical habitat rule, are intended to make information readily accessible to the general public in a form that is easy to understand.

The CDPR has continued its efforts to address the threats from trampling by further excluding recreational users from the area. In 2000, CDPR erected a barrier on the trail to the area to exclude horses and pack animals from this sensitive area. In 2002, they designated the vernal pool and the surrounding area as a Natural Preserve (CDPR 2002 p. 62). A Natural Preserve is a State designation that prioritizes resource protection within the area over recreational use and, therefore, measures can be taken to ensure the long-term survival of *Trichostema*

*austromontanum* ssp. *compactum*. Recent visits to the site by the Service suggest that there has been a decrease in equestrian use of the area as a result of the barrier installed along the trail (Snapp-Cook 2006; Wallace 2003, 2005).

As part of the process of determining the prudence of designating critical habitat for *Trichostema austromontanum* ssp. *compactum*, we met with CDPR to discuss management activities now being conducted for this taxon. Ongoing and past actions that CDPR has initiated, partially due to the listing of this taxon, appear to be adequate to protect and maintain the plant's habitat. On a 2006 field visit to the site, we only found minimal signs of human use at the vernal pool, reflected in a worn trail passing the upper boundary of the vernal pool. However, we did not see evidence of more damaging activities such as trash or fire pits that would be associated with camping, nor hoof prints or horse manure that would be associated with equestrian use (Snapp-Cook 2006). This observation contrasted with the condition of the site prior to the CDPR implementing management actions for this plant and the condition of the site described at the time of listing (Hamilton 1983; 63 FR 49006). We were able to observe *T. a. ssp. compactum* around the margins of the vernal pool and none of the plants showed any signs of damage from trampling on that particular site visit.

To support the effectiveness of the management measures that CDPR has put in place, a formal study to monitor the recreation use of the area is needed. The Service has recently helped the State of California secure funding to conduct a study to determine the condition of the population and the effectiveness of the management by CDPR. Funding has also been secured to survey and sign the legal boundaries of the established Natural Preserve so the regulations of the Natural Preserve can be enforced. In addition, a seed banking program that includes collection of seeds, a conservation strategy, and a monitoring program will be established. Through this funding, we are committed to work with CDPR, California Department of Fish and Game, California Native Plant Society and Rancho Santa Ana Botanic Garden to establish a long-term conservation strategy for *Trichostema austromontanum* ssp. *compactum*. These conservation actions were previously recommended in a research project that focused on *T. a. ssp. compactum* (Bauder 1999, p. 38), and should provide additional protection and help conserve this taxon.

While the primary threat to *Trichostema austromontanum* ssp. *compactum*—trampling—appears to have been minimized, little information exists on the status of the taxon. To obtain all available information on this taxon, we initiated a 5-year status review in accordance with section 4 of the Act. We published a notice announcing the initiation of this 5-year review and the opening of the first 60-day comment period in the **Federal Register** on July 7, 2005 (70 FR 39327). We published another notice reopening the comment period for an additional 60 days in the **Federal Register** on November 3, 2005 (70 FR 66842). As part of our review, we evaluated the federally listed status of this taxon based on the threats to the plant and its habitat, and recommended that no change be made to the listing status until a few specific conservation actions under way by the CDPR have been concluded. The completed 5-year review for this taxon is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section) or for downloading from the following Web site: <http://www.fws.gov/carlsbad>.

#### *Increased Threat to the Taxon by Designating Critical Habitat*

The process of designating critical habitat can be expected to increase human threats to *Trichostema austromontanum* ssp. *compactum* by increasing the visibility of this plant and its location. Along with maps published in the **Federal Register**, a critical habitat designation generally results in the news media publishing articles in local newspapers and/or special interest Web sites, usually with maps of the critical habitat and photos of the rare species. This type of publicity could generate increased interest in the species by both the public and the scientific community. In this particular case, *T. a.* ssp. *compactum* occurs within a State Park with a high rate of visitation. We are concerned that the publication of maps outlining the only location of this rare taxon will result in increased visitation to the area.

*Trichostema austromontanum* ssp. *compactum* is small and hard to see because it blends in with other short herbaceous plants on the ground. Careful and detailed training is needed to identify this taxon. It is likely that people visiting the critical habitat would not find the plant and, in the act of looking for it, disturb its sensitive habitat. In addition, because this area has been designated as a Natural Preserve and CDPR manages the area to minimize recreational use, no signed

trails or observation areas are in place that could allow for interested persons to observe the plant from a non-intrusive location. Thus, even well-meaning and informed visitors may cause significant damage by inadvertently trampling these tiny plants and adversely affecting the habitat.

The District Superintendent of the Inland Empire District of California State Parks has expressed concern to the Service that the critical habitat designation process may place this plant at increased risk via increased visitation (Watts 2006). Our publication of a critical habitat map identifying the location and subsequent publicity of this action would be counter to conservation actions taken by CDPR to make the area less visible. Prior to these actions to minimize recreational impacts to this taxon, it was apparent that the plant was in danger of going extinct as a consequence of impacts associated with visitation to the areas and recreational use of the taxon's habitat. The small size and delicate structure of this plant make it especially vulnerable to trampling by people and animals (Lewis 1945, pp. 284–386; Hamilton 1996). Adverse impacts to this taxon associated with visitation to the area and recreational use of this taxon's habitat led to the listing of *Trichostema austromontanum* ssp. *compactum*. The actions undertaken by CDPR once these concerns were evident began to reverse the negative impacts to the taxon from recreational activities. Following the listing of this plant, CDPR continued to provide measures that were designed to recover it. These actions primarily consisted of removing the location of the taxon's habitat from information available to the public at this State Park. It is important that these and further conservation efforts continue so that this taxon no longer requires the protections afforded it under the Act. We believe that identification of critical habitat for this taxon would again provide specific information to the public about the taxon's location, undermining the conservation efforts and progress achieved by CDPR, and can be expected to increase the degree of threat to this plant from human activity.

In addition to increasing threats to this taxon and countering past and ongoing conservation actions by the State of California, designating critical habitat for this plant would not support our ongoing partnership with CDPR. Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. Stein *et al.* (1995, p. 400)

found that only about 12 percent of listed species were found almost exclusively on Federal lands (i.e., 90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all. Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998, p. 1407; Crouse *et al.* 2002, p. 720; James 2002, p. 271). Building partnerships and promoting voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands and are necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection. Therefore, to achieve the conservation of *Trichostema austromontanum* ssp. *compactum*, it is necessary to maintain our partnership with CDPR, and to support CDPR's conservation efforts, including the efforts to minimize the availability of information regarding the plant's location.

#### *Benefits to the Species From Critical Habitat Designation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Court of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

The regulatory effect is significantly limited in this case. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat.

Second, it only limits destruction or adverse modification of critical habitat. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

In regard to the question of a Federal nexus, we are not aware of any proposed projects (with or without a Federal nexus) that would negatively impact *Trichostema austromontanum* ssp. *compactum* and its habitat, nor are any projects expected (see Response to Comment 4 above). The San Jacinto Mountains have been botanically explored for more than 100 years and only one population of this taxon has been found. Because of its association with vernal pool margins, other areas of suitable habitat likely do not exist in this mountain range. The Mount San Jacinto State Park Wilderness is protected from uses that would degrade or destroy natural resources. The specific area where this plant is found is designated by the State of California as a Natural Preserve, which means that protection and management of sensitive resources is the highest priority for this area. It is unlikely that a future project with a Federal nexus will occur within the habitat for this taxon because the habitat is within a Natural Preserve in a State Park, and no changes in land-use are planned for the foreseeable future. In fact, the Service has not engaged in any section 7 consultations for *T. a. ssp. compactum* since its listing in 1998.

However, if a federally funded or authorized project with potential to impact this taxon or its habitat did occur, a section 7 consultation would be required. We anticipate that any Federal project that involves grading, digging, or construction that would impact the watershed of the vernal pool where this plant occurs would trigger a section 7 consultation because it would either directly or indirectly impact this taxon. Under section 7(a)(2) of the Act, project impacts would be analyzed and a determination would be made as to whether or not the project would jeopardize the continued existence of the taxon. The designation of critical habitat would ensure that a Federal project would not result in the destruction or adverse modification of the designated critical habitat. However, in the absence of critical habitat, areas that support *Trichostema austromontanum* ssp. *compactum* will continue to be subject to conservation

actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as appropriate. Federally funded or permitted projects affecting listed species outside designated critical habitat areas may still result in jeopardy findings. In this case, we believe that impacts to the taxon and its habitat associated with any Federal project would be adequately assessed and modified, if necessary, to address the conservation needs of this plant through application of the jeopardy standard under section 7(a)(2) of the Act, particularly since this taxon occurs at a single location.

Another potential benefit to *Trichostema austromontanum* ssp. *compactum* from designating critical habitat is that such a designation serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. Generally, providing this information helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the affected species. In this circumstance, the landowner (CDPR) is well aware of the areas important to *T. a. ssp. compactum*, and is actively implementing measures to conserve this taxon. Furthermore, designation of critical habitat for *T. a. ssp. compactum* will likely undermine the conservation efforts by CDPR and cause harm to *T. a. ssp. compactum*. The designation of critical habitat often generates increased interest in a species and inspires people to study the species and visit the habitat. As discussed above, *T. a. ssp. compactum* is small and blends in with other short herbaceous plants. Thus, someone attempting to learn more about this plant and its habitat by visiting the site without proper training is likely to harm members of the population in the process. Therefore, we do not find that there is any benefit to the taxon derived from educating landowners, State and local governments, and the public regarding the potential conservation value of areas that would be designated as critical habitat.

#### *Increased Threat to the Species Outweighs the Benefits of Critical Habitat Designation*

Upon reviewing the available information, we have determined that the designation of critical habitat can be expected to increase the degree of threat from human activity to *Trichostema austromontanum* ssp. *compactum*, and that this expected increase in the degree of threat outweighs the benefits of

designating critical habitat for this taxon. As discussed above, the designation of critical habitat may result in negative effects to the habitat because the dissemination of location information could be expected to result in increased trampling of the plant and its habitat. The unique area where the plant occurs was adversely impacted by a higher level of recreational use in the past. We believe that publication of specific locations and maps associated with a critical habitat designation for this taxon, with the attendant publicity that a designation would likely generate, can be expected to increase interest in the area where the taxon is found because of the interest that the public and scientific community have in rare, threatened, and endangered species, and in unique ecosystems. The sensitive nature of this taxon makes it vulnerable to even a slight increase in the amount of trampling. In a drought year, this species may have less than 100 flowering individuals and a limited amount of activity could damage the majority of the population. The CDPR has implemented measures to decrease visitation and thereby decrease impacts to the area occupied by *T. a. ssp. compactum*, and these measures have proven successful in reducing impacts. Designation of critical habitat will undermine the conservation actions that CDPR has already put into place for this taxon. The sensitive nature of this taxon makes it vulnerable to even a slight increase in the amount of trampling. In a drought year, this species may have less than 100 flowering individuals and a limited amount of activity could damage the majority of the population. These ongoing conservation actions appear to have minimized the primary threat to this taxon and we believe that designation of critical habitat would reverse these efforts and increase the threat of trampling to this plant.

Furthermore, we have determined that there is no overall benefit of critical habitat designation to *T. a. ssp. compactum* because: (1) The regulatory benefit of a critical habitat designation for this taxon is unlikely to be realized because we do not foresee any future projects (either federal or non-federal) that will negatively impact this taxon; (2) the general educational benefits afforded by critical habitat designation are minimal for this particular taxon; and (3) designation of critical habitat would undermine ongoing conservation efforts and hinder our partnership with CDPR. Therefore, based on our determination that critical habitat designation would increase the degree of threats to *T. a. ssp. compactum* and,



at best, provide nominal benefits for this taxon, we find that the increased threat to *T. a. ssp. compactum* from the designation of critical habitat far outweighs any benefit of designation.

#### Prudency Determination

Pursuant to the Court's April 14, 2005, stipulated settlement agreement and order, and as announced in our proposed not-prudent determination (71 FR 56094), we have withdrawn our previous not-prudent determination. On the basis of our review of the best scientific and commercial information available, we again find that designation of critical habitat is not prudent for *Trichostema austromontanum* ssp. *compactum*. We came to this determination after weighing the potential increased threats associated with identifying specific areas as critical habitat against the benefits gained by a critical habitat designation. We have determined that the designation of critical habitat can be expected to increase the degree of threat to this taxon from human activity and would undermine the conservation actions that CDPR has already put into place for this taxon. These ongoing conservation actions appear to have minimized the primary threat to *T. a. ssp. compactum*, and as discussed above, we believe that designation of critical habitat may reverse these efforts and increase the threat of trampling to this taxon. Furthermore, we have determined that there are minimal benefits of critical habitat designation for *T. a. ssp. compactum*. We have concluded that, even if some benefit from designation may exist, the increased threat to the

plant from human activity far outweighs any potential benefit to the taxon. We have, therefore, determined that it is not prudent to designate critical habitat for *T. a. ssp. compactum* at this time.

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

This determination does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This determination will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.)*

It is our position that, outside the Tenth Federal Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit Court of Appeals (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996).]

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994,

"Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. Because we have determined that designation of critical habitat for *Trichostema austromontanum* ssp. *compactum* is not prudent, and because *T. a. ssp. compactum* and its habitat do not occur on Tribal lands, no Tribal lands will be affected by this determination.

#### References Cited

A complete list of all references cited in this finding is available upon request from the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

#### Author

The primary author of this document is staff of the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: September 14, 2007.

**David M. Verhey,**

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

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