Dated: August 27, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 070717355–91122–02]

RIN 0648–AV74

Endangered and Threatened Species; Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), issue a final rule to designate critical habitat for the U.S. distinct population segment (DPS) of smalltooth sawfish (*Pristis pectinata*), which was listed as endangered on April 1, 2003, under the Endangered Species Act (ESA). The critical habitat consists of two units: the Charlotte Harbor Estuary Unit, which comprises approximately 221,459 acres of coastal habitat; and the Ten Thousand Islands/Everglades Unit (TTI/E), which comprises approximately 619,013 acres of coastal habitat. The two units are located along the southwestern coast of Florida between Charlotte Harbor and Florida Bay.

DATES: This rule becomes effective October 2, 2009.

ADDRESSES: The final rule, Final Regulatory Flexibility Analysis, and Final 4(b)(2) Report used in preparation of this final rule, as well as comments and information received, are available on the NMFS Web site at *http://www.sero.noaa.gov/,* or *http://www.regulations.gov,* or by contacting the National Marine Fisheries Service's Southeast Regional Office, 263 13th Avenue, South, St. Petersburg, FL 33701.

FOR FURTHER INFORMATION CONTACT: Shelley Norton, NMFS, Southeast Regional Office, at 727–824–5312; or Lisa Manning, NMFS, Office of Protected Resources, at 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

Under the ESA, we are responsible for determining whether certain species are threatened or endangered and for designating critical habitat for such species (16 U.S.C. 1533). On April 1, 2003, we listed the U.S. DPS of smalltooth sawfish (''the species'') as endangered (68 FR 15674). At the time of listing, we also announced that critical habitat was not then determinable because we were completing ongoing studies necessary for the identification of specific habitats and environmental features important for the conservation of the species. Subsequently, we have sponsored additional research on the species, its habitat use, and its conservation needs. Additionally, NMFS has developed a recovery plan (NMFS, 2009) for the species pursuant to section 4(f) of the ESA. We have reviewed the best available scientific data and identified specific areas in the species' occupied range on which are located those physical and biological features essential to the conservation of the species that may require special management considerations or protection. We published a proposed critical habitat designation for the smalltooth sawfish on November 20, 2008 (73 FR 70290), and requested comments by January 20, 2009. On December 9, 2008, we published a notice in the **Federal Register** (73 FR 74681) announcing the dates, times, and locations of two public hearings to receive public comments on the proposed critical habitat rule. In addition to the **Federal Register** notice announcing the public hearings, we advertised the public hearings in the local newspapers (News-Press of Ft. Myers on December 8, 2008, and in the Naples-News on December 14, 2008). During the public comment period we received several requests to extend the public comment period. On January 29, 2009, we reopened the public comment period until February 13, 2009 (74 FR 5141).

The key conservation objective we have identified for the species is the need to facilitate recruitment into the adult sawfish population by protecting juvenile nursery areas. We determined the location of nursery areas by applying a model developed for identifying elasmobranch nursery areas to smalltooth sawfish encounter data. Additionally, we determined that the habitat features essential to the conservation of the species (also known as the essential features) are red mangroves and shallow euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). These essential features are necessary to facilitate recruitment of juveniles into the adult population, because they provide for predator avoidance and habitat for prey in the areas currently being used as juvenile nursery areas. We determined these features may require special management considerations or protection due to human and natural impacts to the features, including development, marine construction, and storms. We proposed designating two specific areas that are nursery areas and contain the essential features necessary to the species conservation. The two areas are: the Charlotte Harbor Estuary Unit, which comprises approximately 221,459 acres (346 mi^2) of coastal habitat; and the Ten Thousand Islands/Everglades Unit (TTI/E), which comprises approximately 619,013 acres (967 mi^2) of coastal habitat. The two units are located along the southwestern coast of Florida between Charlotte Harbor and Florida Bay.

Smalltooth Sawfish Natural History

The following discussion of the distribution, life history, and habitat use of the U.S. DPS of smalltooth sawfish is based on the best available commercial and scientific information, including information provided in the Status Review (65 FR 12959; March 10, 2000) and the Smalltooth Sawfish Recovery Plan (January 2009).

Distribution and Range

Smalltooth sawfish are tropical marine and estuarine elasmobranch (*e.g.,* sharks, skates, and rays) fish that are reported to have a circumtropical distribution. The historic range of the smalltooth sawfish in the United States extends from Texas to New York (NMFS, 2009). The U.S. region that has historically harbored the largest number of smalltooth sawfish is south and southwest Florida from Charlotte Harbor to the Dry Tortugas. Most historic capture records along the Atlantic coast north of Florida are from spring and summer months and warmer water temperatures. Most specimens captured along the Atlantic coast north of Florida were also large (greater than 10 ft or 3 m) adults and thought to represent seasonal migrants, wanderers, or colonizers from a core or resident population(s) to the south rather than being resident members of a continuous, even-density population (Bigelow and Schroeder, 1953). Historic records from Texas to the Florida Panhandle suggest a similar spring and summer pattern of occurrence. While less common, winter

records from the northern Gulf of Mexico suggest a resident population, including juveniles, may have once existed in this region.

The Status Review Team (NMFS, 2000) compiled information from all known literature accounts, museum collection specimens, and other records of the species. The species suffered significant population decline and range constriction in the early to mid 1900s. Encounters with the species outside of Florida have been rare since that time.

Since the 1990s, the distribution of smalltooth sawfish in the United States has been restricted to peninsular Florida (Seitz and Poulakis, 2002; Poulakis and Seitz, 2004; Simpfendorfer and Wiley, 2005a; Mote Marine Laboratory's Sawfish Encounter Database; and the FLMNH National Sawfish Encounter Database [FLMNHNSED]). Encounter data indicate smalltooth sawfish encounters can be found with some regularity only in south Florida from Charlotte Harbor to Florida Bay. A limited number of reported encounters (one in Georgia, one in Alabama, one in Louisiana, and one in Texas) have occurred outside of Florida since 1998.

Peninsular Florida is the main U.S. region that historically and currently hosts the species year-round because the region provides the appropriate climate (subtropical to tropical) and contains the habitat types (lagoons, bays, mangroves, and nearshore reefs) suitable for the species. Encounter data and research efforts indicate a resident, reproducing population of smalltooth sawfish exists only in southwest Florida (Simpfendorfer and Wiley, 2005a).

Life History

Smalltooth sawfish are approximately 31 in (80 cm) in total length at birth and may grow to a length of 18 ft (540 cm) or greater. A recent study by Simpfendorfer *et al.* (2008) suggests rapid juvenile growth occurs during the first 2 years after birth. First year growth is 26–33 in (65–85 cm) and second year growth is 19–27 in (48–68 cm). Growth rates beyond 2 years are uncertain; however, the average growth rate of captive smalltooth sawfish has been reported between 5.8 in (13.9 cm) and 7.7 in (19.6 cm) per year. Apart from captive animals, little is known of the species' age parameters (*i.e.,* age-specific growth rates, age at maturity, and maximum age). Simpfendorfer (2000) estimated age at maturity between 10 and 20 years, and a maximum age of 30 to 60 years. Unpublished data from Mote Marine Laboratory (MML) and NMFS indicate male smalltooth sawfish do not reach maturity until they reach 133 in (340 cm).

No directed research on smalltooth sawfish feeding habits exists. Reports of sawfish feeding habits suggest they subsist chiefly on small schooling fish, such as mullets and clupeids. They are also reported to feed on crustaceans and other bottom-dwelling organisms. Observations of sawfish feeding behavior indicate that they attack fish by slashing sideways through schools, and often impale the fish on their rostral (saw) teeth (Breder, 1952). The fish are subsequently scraped off the teeth by rubbing them on the bottom and then ingested whole. The oral teeth of sawfish are ray-like, having flattened cusps that are better suited to crushing or gripping.

Very little is known about the specific reproductive biology of the smalltooth sawfish. As with all elasmobranchs, fertilization occurs internally. The embryos of smalltooth sawfish, while still bearing the large yolk sac, resemble adults relative to the position of their fins and absence of the lower caudal lobe. During embryonic development, the rostral blade is soft and flexible. The rostral teeth are also encapsulated or enclosed in a sheath until birth. Shortly after birth, the teeth become exposed and attain their full size, proportionate to the size of the saw. Total length of the animal at birth is approximately 31 in (80 cm), with the smallest free-living specimens reported during field studies in Florida being 27–32 in (69–81 cm) (Simpfendorfer *et al.,* 2008). Documentation on the litter size of smalltooth sawfish is very limited. Gravid females have been documented carrying between 15–20 embryos; however, the source of these data is unclear and may represent an over-estimate of litter size. Studies of largetooth sawfish in Lake Nicaragua (Thorson, 1976) report brood sizes of 1–13 individuals, with a mean of 7 individuals. The gestation period for largetooth sawfish is approximately 5 months, and females likely produce litters every second year. Although there are no such studies on smalltooth sawfish, their similarity to the largetooth sawfish implies that their reproductive biology may be similar. Genetic research currently underway may assist in determining reproductive characteristics (*i.e.,* litter size and breeding periodicity).

No confirmed breeding sites have been identified to date since directed research began in 1998. Research is underway to investigate areas where adult smalltooth sawfish have been reported to congregate along the Everglades coast to determine if breeding is occurring in the area.

Life history information on the smalltooth sawfish has been evaluated using a demographic approach and life history data from the literature on smalltooth sawfish, largetooth sawfish, and similar species. Simpfendorfer (2000) estimates intrinsic rates of natural population increase of 0.08 to 0.13 per year and population doubling times from 5.4 to 8.5 years. These low intrinsic rates of population increase are associated with the life history strategy known as ''k-selection.'' K-selected animals are usually successful at maintaining relatively small, persistent population sizes in relatively constant environments. Consequently, they are not able to respond effectively (rapidly) to additional and new sources of mortality resulting from changes in their environment. Musick (1999) and Musick *et al.* (2000) noted that intrinsic rates of increase less than ten percent were low, and such species are particularly vulnerable to excessive mortalities and rapid population declines, after which recovery may take decades. Thus, smalltooth sawfish populations are expected to recover slowly. Simpfendorfer (2000) concluded that recovery was likely to take decades or longer, depending on how effectively sawfish could be protected.

Habitat Usage

At the time of listing, very little information was known about the habitat usage patterns of the species. The Status Review (NMFS, 2000) and the final listing rule identified habitat loss and degradation as the secondary cause of the species' decline. The primary reason for the species' decline was bycatch in various commercial and recreational fisheries.

The Status Review described sawfish habitat usage as: ''Sawfish in general inhabit the shallow coastal waters of most warm seas throughout the world. They are found very close to shore in muddy and sandy bottoms, seldom descending to depths greater than 32 ft (10 m). They are often found in sheltered bays, on shallow banks, and in estuaries or river mouths.'' In the years since the status review, additional research on habitat use by smalltooth sawfish has been undertaken. This research confirmed the general characterization of habitat use for smalltooth sawfish and revealed a more complex pattern of habitat use than previously known, with different life history stages having different patterns of habitat use.

A variety of methods have been used to study habitat use patterns of smalltooth sawfish, including acoustic telemetry (Simpfendorfer, 2003),

acoustic monitoring (Simpfendorfer, unpublished data; Poulakis, unpublished data), public encounter databases (Seitz and Poulakis, 2002; Poulakis and Seitz, 2004; Simpfendorfer and Wiley, 2005a), and satellite archival tagging (Simpfendorfer and Wiley, 2005b). The majority of this research has targeted juvenile sawfish, but some information on adult habitat use has also been obtained.

MML and the Florida Fish and Wildlife Research Institute (FWRI) manage encounter databases containing data on sightings and captures of smalltooth sawfish from commercial and recreational fishermen, research efforts, and other sources (*e.g.,* divers and boaters). These databases provide insight into the habitat use patterns of smalltooth sawfish. To request reporting of sightings/captures from the public, MML and FWRI (1998–2008) have engaged in various outreach efforts. These efforts include placing flyers at boat ramps and tackle/dive shops, media releases, articles in fishing magazines, interviews with recreational fishing guides and commercial fishers, Web sites, and personal contacts with researchers. Standard questionnaires are used to collect encounter data (water depth, location, tidal states, gear information, size of animal, and various other physical and environmental features). Outreach efforts were initially focused primarily in Florida but have expanded into areas along the southeastern coasts of the United States between Texas and North Carolina.

Based on our historic and current knowledge of where smalltooth sawfish are encountered (coastal areas), we believe recreational fishers who primarily fish in coastal areas represent the best source of occurrence data for the species. Additionally, Simpfendorfer and Wiley (2005a) analyzed the number of registered fishers in Florida by county to see if fishing effort affects the distribution of the encounters. No strong correlation between the distribution of fishers and encounter locations was found. Based on Simpfendorfer and Wiley (2005a), we believe that the encounter data are not geographically biased.

Directed research programs conducted by FWRI, MML, FLMNH, and NMFS are also a source of encounter data. Directed-research efforts on the species are also primarily focused in coastal areas but are limited to southwest Florida between Charlotte Harbor and the Florida Keys. The sampling methodologies for the directed research efforts are not random or stratified: Research efforts are focused in areas where sawfish have been encountered, primarily southwest Florida. We anticipate future sampling efforts for these and other areas will use a random-stratified approach. Research is underway to determine habitat usage patterns, site fidelity, movement patterns, and various genetic relationships.

Encounter and research data provide some insight into adult smalltooth sawfish habitat usage patterns. Information on adult smalltooth sawfish comes from encounter data, observers aboard fishing vessels, and pop-up satellite archival tags (PAT). Data on adult male (at least 134 in (340 cm) in length) and adult female (142 in (360 cm) in length) smalltooth sawfish are very limited. The encounter data suggest that adult sawfish occur from shallow coastal waters to deeper shelf waters. Poulakis and Seitz (2004) observed that nearly half of the encounters with adult-sized sawfish in Florida Bay and the Florida Keys occurred in depths from 200 to 400 ft (70 to 122 m). Simpfendorfer and Wiley (2005a) also reported encounters in deeper water off the Florida Keys, noting that these were mostly reported during winter. Observations on commercial longline fishing vessels and fishery independent sampling in the Florida Straits show large sawfish in depths of up to 130 ft (40 m) (Carlson and Burgess, unpublished data).

Seitz and Poulakis (2002) reported that one adult-sized animal, identifiable by its broken rostrum, was captured in the same location over a period of a month near Big Carlos Pass. This suggests that adults may have some level of site fidelity for relatively short periods; however, the historic occurrence of seasonal migrations along the U.S. East Coast also suggests that adults may be more nomadic than juveniles with their distribution controlled, at least in part, by water temperature.

In summary, there is limited information on adult sawfish distribution and habitat use. Adult sawfish are encountered in various habitat types (mangrove, reef, seagrass, and coral), in varying salinity regimes and temperatures, and at various water depths. Adults are believed to feed on a variety of fish species and crustaceans. No known breeding sites have been identified. Encounter data have identified river mouths as areas where many people observe both juvenile and adult sawfish. Seitz and Poulakis (2002) noted that many encounters occurred at or near river mouths in southwest Florida. Simpfendorfer and Wiley (2005b) reported a similar pattern of distribution along the entire west coast of Florida. Along the Everglades coastal region, Simpfendorfer and Wiley (2005b) report a strong association of smalltooth sawfish with the Chatham, Lostmans, Rodgers, Broad, Harney, and Shark Rivers.

Most of the research and encounter data on habitat usage of smalltooth sawfish have been obtained on juveniles less than 79 in (200 cm) in length. Juveniles in this size class are most susceptible to predation and starvation (Simpfendorfer, 2006). Like other species of elasmobranchs, smalltooth sawfish appear to use nursery areas because of the reduced numbers of predators and abundant food resources such areas can provide (Simpfendorfer and Milward, 1993).

Much of the research on smalltooth sawfish juveniles indicates some differences in habitat use based on the length of the animals, between what are characterized as very small (less than 39 in (100 cm)) and small (39–79 in (100–200) cm) juveniles. Most encounters of both very small and small juveniles have been within 1,641 ft (500 m) of shore (Simpfendorfer, 2006).

Very small juvenile smalltooth sawfish show high levels of site fidelity, at least over periods of days and potentially for much longer (Simpfendorfer, 2003; 2006). Limited acoustic tracking studies (five animals) have shown that, at this size, sawfish will remain associated with the same shallow mud bank over periods of several days (Simpfendorfer, 2003). Very small juveniles spend a large portion of their time on the same shallow mud or sand banks in water less than 1 ft (30 cm) deep. Since water levels on individual mud banks vary with the tide, the movements of these small animals appear to be directed toward remaining in shallow water. The mud banks are very small, and preliminary home range size for the tracked animals is estimated to be 1,076–10,763 ft^2 (100–1,000 m^2) (Simpfendorfer, 2003). The longer-term fidelity to these sites is poorly understood, and ongoing research is expected to provide more insight into determining how much habitat very small juveniles use on a daily basis. Simpfendorfer (2001) concludes that shallow coastal waters represent key habitat for the species, and in particular that waters less than 3.3 ft (1 m) may be very important as nursery areas. The primary purpose of staying in such shallow water is likely to avoid predators, such as bull sharks. Additionally, these shallow waters provide warm water temperatures that may be utilized to maximize growth rates (Simpfendorfer, 2006).

Simpfendorfer (2001) concludes that most smalltooth sawfish (adults and juveniles) show a preference for water temperatures greater than 17.8 °C (64 °F).

In addition to shallow mud banks, very small juveniles also use red mangrove prop root habitats in southern Florida (Simpfendorfer and Wiley, 2005a). Animals in this size class spend the vast majority of their time in very shallow water less than 1 ft (30 cm) deep, and they tend to move into mangrove prop roots during periods of high tide. Red mangrove habitats also provide foraging opportunities for very small and small juveniles, because the prop root system provides nursery areas for various fish and crustacean species.

Small juveniles have many of the same habitat use characteristics seen in the very small sawfish. Their association with very shallow water (less than 1 ft (30 cm) deep) is slightly weaker, possibly because they are better suited to predator avoidance due to their larger size and greater experience (NMFS, 2006). They do still have a preference for shallow water, remaining in depths mostly less than 3.3 ft (1 m). Most encounters of small juveniles also occur near red mangroves. Site fidelity has also been studied for small juvenile sawfish. Several sawfish, approximately 59 in (150 cm) in length and fitted with acoustic tags, have been relocated in the same general areas over periods of several months, suggesting a high level of site fidelity (Simpfendorfer, 2003). The daily home range for these animals, based on data from a few animals, appears to be much larger than that of very small juveniles (0.386–1.93 mi^2 or 1–5 km^2). The recent implementation of acoustic monitoring systems to study the longer term site fidelity of sawfish has confirmed these observations and also indicates that changes in environmental conditions such as salinity may be important in driving changes in local distribution and, therefore, habitat use patterns (Simpfendorfer, unpublished data).

Simpfendorfer and Wiley (2005) documented that no encounters occurred within habitat in permanent freshwater areas. Many encounters occur near river mouths or near sources of freshwater inflow, and encounter data suggest that estuarine habitats may be an important factor affecting the species' distribution. Simpfendorfer (2001) suggests that smalltooth sawfish occur in river mouth areas because of the lower salinity, submerged vegetation, or abundant prey. We analyzed MML and FWRI encounter data from 1998–2008 for juveniles, and the data indicate the majority of the juvenile encounters occurred within euryhaline or estuarine waters. Euryhaline/estuarine waters are highly productive areas that contain a variety of food sources for the smalltooth sawfish. Mullet, clupeids, and various crustacean species that are known food sources for the smalltooth sawfish are commonly found in estuarine areas.

Juvenile smalltooth sawfish may require specific salinity regimes with specific freshwater inputs, but, at this time, data on specific salinity regime requirements for the species do not exist. Ongoing studies of habitat use patterns of very small and small juveniles in the Caloosahatchee River are expected to provide more insight into the habitat used by or necessary for an individual juvenile (less than or equal to 79 in (200 cm) in length) smalltooth sawfish. At this time, however, there are insufficient data available to determine whether specific salinity ranges are requirements of small juveniles.

Data on large (greater than 79 in (200 cm) in length) juvenile smalltooth sawfish are limited, and more information is needed to determine the habitat usage patterns and site fidelity characteristics of this size class of smalltooth sawfish.

Summary of Comments and Responses

We requested comments on the proposed rule to designate critical habitat for the endangered U.S. DPS of smalltooth sawfish on November 20, 2008 (73 FR 70290), and on January 29, 2009 (74 FR 5141), we reopened the comment period until February 13, 2009. We held two public hearings to facilitate public participation, the proposed rule was available on our regional Web-page, and comments were accepted via standard mail, facsimile, and through the Federal eRulemaking portal. In addition to the proposed rule, the draft impact report required under Section 4(b)(2) of the ESA was posted. We obtained independent peer review on both the scientific information in the proposed rule and on the Draft 4(b)(2) Report (NMFS, 2008).

We have considered all peer review and public comments, and those that are responsive to the designation are addressed in this final rule and discussed in the following summary. We have assigned public comments to major issue categories and, where appropriate, have combined similar comments.

Peer Review Comments

Comment 1: Two reviewers stated NMFS used the best available information on the species and also stated the areas proposed for designation were justified by the available data.

Comment 2: One reviewer noted the daily home range area for small juveniles was calculated incorrectly for small juveniles. The home range value of 1–5 km^2 equates to 0.386–1.93 mi^2.

Response: We corrected the home range value in our discussion in this rule.

Comment 3: One reviewer stated that NMFS should revise the critical habitat rule if new data identify additional nursery areas, discrete areas used by other size classes of animals, or mating aggregations.

Response: NMFS will consider revising the critical habitat designation if new data identify areas containing features essential for the conservation of the species, or areas in the species' unoccupied range that are essential for the conservation of the species.

Comment 4: A reviewer stated that NMFS should monitor freshwater flow regimes (salinity fluctuations, dissolved oxygen, flow rates), and nutrients, red mangroves, and submerged aquatic vegetation in the designated areas.

Response: NMFS is required to consult under section 7 of the ESA on Federal actions that may affect listed species, including the smalltooth sawfish, or their designated critical habitat. Therefore, NMFS would consult under section 7 of the ESA on the effects from alterations of freshwater flow regimes on the sawfish and its designated critical habitat. Ongoing research is also investigating habitat use and movements of juvenile sawfish in relation to salinity regimes.

Comment 5: A reviewer stated that we should consider designating other areas that contain the same essential features included in the two nursery areas in southwest Florida, and specifically suggested Tampa Bay and the Indian River Lagoon. This peer reviewer stated that we did not appropriately consider the amount of suitable habitat that remains outside of the proposed critical habitat areas, specifically within Tampa Bay and the Indian River Lagoon, given that the species may need additional nursery areas in the future for recovery.

Response: We do recognize that the sawfish may need additional nursery areas for its recovery, that red mangroves and shallow euryhaline habitats exist outside the designated areas, and that smalltooth sawfish were historically common in some of those areas (*e.g.,* Indian River Lagoon). However, sawfish also historically appear to have used areas that do not contain mangroves as nursery areas. The key conservation function of the critical

habitat designation is to facilitate recruitment into the adult population by protecting juvenile nursery areas. Based on the best available data and our understanding of what constitutes a nursery area for sawfish, the areas designated as critical habitat are the only areas that are currently nursery areas. We cannot predict with any certainty what new nursery areas may be established by the species. If new information identifies nursery areas outside of the designated critical habitat, NMFS will consider revising this rule.

Comment 6: A reviewer suggested a more complete Executive Summary in the 4(b)(2) Report that includes the conclusions of the Economic and Other Relevant Impacts sections of the report.

Response: We have revised the Executive Summary in the Final 4(b)(2) Report to include the conclusions of all three impact sections of the report.

Comment 7: A reviewer requested more detail on the increased probability of recovery of listed species as a result of designating critical habitat and requested a long-term study of the relationship between recovery rates of listed species and critical habitat designation.

Response: The commenter's suggestion is noted. NMFS does evaluate the recovery progress of listed species, including submitting reports to Congress every 2 years on the status of efforts to develop and implement recovery plans for listed species under our purview, and on the status of all species for which recovery plans have been developed under section 4(f)(3)) of the ESA. Between October 1, 2006, and September 30, 2008, of the 59 domestic endangered or threatened species listed under the ESA, 22 (37 percent) were stabilized or improving; 17 (29 percent) were known to be declining; and 20 (34 percent) were unknown or mixed in their status (*http://www.nmfs.noaa.gov/pr/pdfs/laws/esabiennial2008.pdf*). A recent study suggests listed species with designated critical habitat for 2 or more years may be more than twice as likely to have an improving population trend and less than half as likely to be declining compared to listed species without designated critical habitat (Taylor *et al.*, 2005). Of the 59 domestic listed species under NMFS' purview, 39 have designated critical habitat, and 16 of these species were judged to be stable or improving in the 2008 report discussed above. Most of these designations have not been in place for 2 years or longer, and it is likely too early in the recovery process to judge the contribution of critical habitat to the recovery of these species. It should also be noted that though critical habitat protects features essential to a species' conservation from destruction or adverse modification by Federal actions, critical habitat is not intended to be the sole activity that brings about species' recovery.

Comment 8: A reviewer asked if saving the smalltooth sawfish would save the local fishing industry and whether the rule protects mangroves or smalltooth sawfish.

Response: Our primary goal is to support the key conservation objective for the species by protecting the essential features in its nursery areas. The rule is not intended to directly protect smalltooth sawfish from harm, but rather is intended to promote its recovery by preventing destruction or adverse modification of the physical and biological habitat features essential to its conservation that may result from Federal actions. The Final 4(b)(2) Report considered, in the analysis of other relevant impacts, that the critical habitat designation is likely to provide additional protections to mangrove habitat and the fisheries that depend on those habitats. The fishing industry may, therefore, also benefit from this designation.

Public Comments

A. Comments on Providing the Public Adequate Notice on the Proposed Rule

Comment 1: We received several comments stating we did not provide adequate notice for public review and comment on the proposed rule.

Response: NMFS published the proposed critical habitat rule for the smalltooth sawfish on November 20, 2008 (73 FR 70290), and requested pubic comments by January 20, 2009. On December 9, 2008, we published a notice in the **Federal Register** (73 FR 74681) announcing the dates, times, and locations of two public hearings to receive public comments on the proposed critical habitat rule. In addition to the **Federal Register** notice announcing the public hearings, we advertised the hearings in relevant local newspapers (News-Press of Ft. Myers on December 8, 2008; Naples-News on December 14, 2008). During the public comment period, NMFS received several requests to extend the public comment period. On January 29, 2009 (74 FR 5141), NMFS extended the public comment period to February 13, 2009. We believe the public received adequate opportunity to review and comment on the proposed rule.

B. Comments on the Available Data for the Designation

Comment 2: Several commenters reacted to the statements in the proposed rule describing the incomplete information on the habitat usage patterns of the species, particularly adults, and suggested we have incomplete information on which to base the designation. Another commenter suggested we should do more research on the species before we designate critical habitat. Several commenters expressed concern about basing the rule on data from 2003 or earlier.

Response: The ESA requires we use the best available scientific information to support the proposed designation. It also provides that we may take up to 1 additional year after a species is listed, if critical habitat is not determinable at the time of listing. Beyond that year, during which NMFS further studied the species' habitat needs, we may not wait to designate critical habitat to conduct more research. We used all available information sources (literature, research data, government agencies, and public encounter data) to identify the specific areas and the essential features. No other sources of data on the species were identified during the public comment period. In contrast to the lack of information on specific habitat usage that currently precludes designation of critical habitat areas for adult smalltooth sawfish, we believe the available information provides a sound basis for designating nursery areas used by juveniles as critical habitat. Finally, the rule is based on juvenile encounter data from 1998 through the present; a NMFS staff member misstated the applicability of the ''time of listing'' provision in the statute at one of the public hearings—that applies to identifying the occupied range of the species.

Comment 3: A commenter suggested we re-evaluate the critical habitat designation in 5 years to determine the habitat needs for adults.

Response: We have not identified adult aggregation, mating, and/or pupping areas, and no information on historic aggregation, mating, and/or pupping sites exists, but these aspects of the species' life history are being investigated by researchers. If information on adult smalltooth sawfish becomes available which suggests areas that may be essential to the conservation of the species, we will consider revising the critical habitat designation.

Comment 4: A commenter requested information on how the encounter data were collected and how far the animals travel up the Cape Coral canals.

Additionally, the commenter wanted to know which canals smalltooth sawfish are using.

Response: Smalltooth sawfish encounter data from FWCC and MML's were used to develop the proposed rule. Encounter data are reported by the public and by researchers. Recreational and commercial fishers, boaters, divers, and the general public report smalltooth sightings and captures to the FWCC and MML. The encounter reports may include information such as the date, location, size of animal, water depth, benthic habitat in the area, the type of fishing gear used, and photographs, *etc.* Information gathered by researchers is similar to what the public reports but may include more details about the animal and may include specific movement information for tagged animals. Encounter data and FWCC directed research have documented smalltooth sawfish use of multiple canals within the Cape Coral canal system; each canal is not named thus we cannot list them specifically. Ongoing smalltooth sawfish research conducted by the FWCC has shown that tagged animals travel deep into the canals and may use the canals for months at a time, making daily excursions into the Caloosahatchee River. Existing encounter data support the usage of the Cape Coral canal system where it is accessible to smalltooth sawfish.

Comment 5: One commenter questioned the credibility of sightings and encounter data, reported by fishermen, as a basis for the rule.

Response: There are a number of indices of the reliability and suitability of encounter and sightings data available for this designation. First, the encounter reporting programs are longstanding and the researchers involved have established trust and personal relationships with a good portion of the fishing community involved in reporting encounters or recommending to others that they report encounters. MML and FWCC only include encounter reports in their databases when the reports have met some measures of credibility, for example, if the description of the fish is consistent with the morphological characteristics of the species. The encounter data have also been validated in a number of respects by scientific research carried out by the organizations that maintain the encounter databases.

Comment 6: Several commenters stated they had never seen and/or caught a smalltooth sawfish in some of the areas (San Carlos Bay and southwest Florida) proposed for designation.

Response: Encounter data, which includes reports from recreational and commercial fishers, researchers, and snorkelers, indicate the species is encountered within San Carlos Bay and that most encounters of juveniles occur in southwest Florida. Sawfish are highly endangered benthic fish, and it is not surprising that even long-time local residents have never seen one.

C. Comments on Existing Resource Protections, Regulatory Burdens, and Rulemaking Requirements Generally

Comment 7: A commenter asked if the President's Executive Order on Regulatory Review (74 FR 4435; January 26, 2009) would stop NMFS from publishing the critical habitat rule.

Response: No, President Obama's Memorandum to the Heads of Executive Departments and Agencies, dated January 20, 2009, regarding additional administration review of rules published prior to January 21, 2009, does not apply to this rule because the timing of the proposed and final smalltooth sawfish critical habitat rules is mandated under a court-approved settlement agreement.

Comment 8: Several commenters stated that existing laws and regulations, including State laws, are currently in place to protect habitats covered by the proposed designation, and that an additional layer of government regulation should be avoided.

Response: The commenter is correct in part. Existing laws and regulations are in place to protect marine and estuarine habitats, including mangroves. However, none of the laws or regulations applicable to the habitats included in the proposed designation provide complete protection to the habitats. In a wide variety of circumstances, existing laws and regulations allow for destruction of habitat, and in instances where mitigation may be required, off-site and out-of-kind mitigation are possible outcomes. Additionally, existing laws and regulations do not expressly require consideration of the conservation needs of the smalltooth sawfish in determining whether impacts to habitat are allowable or mitigations are acceptable. This final rule will provide unique additional protections to the critical habitat features essential to the sawfish's conservation, resulting in project modifications where existing laws would not require such modifications.

Comment 9: A commenter stated that we did not need to protect habitat for the smalltooth sawfish because the Florida net ban has eliminated deaths from bycatch.

Response: Florida voters approved a constitutional amendment banning the usage of most types of inshore nets in 1995. The net ban is extremely important in addressing a major threat to smalltooth sawfish, because their saws become entangled in the nets, and fishers often killed and/or removed the saw from captured animals. The net ban eliminated a great deal of smalltooth sawfish bycatch; however, the species is still caught as bycatch in several fisheries (shrimp trawling, bottom long-line fisheries, *etc.*). In addition to measures to prevent or limit take of listed species, the ESA requires NMFS to designate areas that meet the statute's definition of critical habitat, with discretion to consider excluding certain areas from a designation based on specific findings about the costs and benefits of a designation. As stated in the proposed rule, juvenile smalltooth sawfish use highly specific nearshore areas as nursery areas for the first several years of their lives, where vulnerable juveniles find protection from predators and ample food resources for early stage growth. In the areas we have identified as existing nursery areas, juvenile sawfish need several essential physical and biological features: red mangroves and shallow, euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at Mean Lower Low Water. These features are essential to the conservation of the species because they support the key conservation function of facilitating recruitment of juveniles into the adult population. This conservation objective is not accomplished by the inshore net ban.

Comment 10: A commenter stated they are concerned about the length of time it takes to complete section 7 consultations under the ESA, that NMFS takes a long time to complete section 7 consultation, and that these times will increase with designation of critical habitat.

Response: Federal agencies are currently required to consult on actions that may affect the fish, including in the areas proposed for designation, in order to ensure their actions are not likely to jeopardize the continued existence of the species. Designated critical habitat does require a second, distinct analysis of potential effects of Federal actions: Federal agencies must ensure their actions are not likely to destroy or adversely modify critical habitat. Our analysis of impacts of the designation indicates that the designation will not require consultations for categories of Federal actions that are not already subject to consultation to avoid jeopardizing the species. Delays can occur during the section 7 review

process when NMFS is lacking the pertinent information needed to determine the effects on a species or its designated critical habitat. NMFS does not expect delays in the section 7 consultation process if we receive the necessary information to complete our analysis of the effects on the species and/or designated critical habitat. We will also work with interested Federal agencies to evaluate whether streamlined section 7 consultation procedures can be adapted for evaluating Federal actions that may affect the smalltooth sawfish, its designated critical habitat, or both.

Comment 11: A commenter stated that since existing critical habitat for the American crocodile provides protection for the smalltooth sawfish, the proposed rule has overlapping protections and asked us how we would deal with the overlapping protections.

Response: This is not correct. Smalltooth sawfish may use some of the same habitats utilized by the American crocodile along the Everglades coast, but the critical habitat designation and the listing protections for the American crocodile are established to promote the recovery and conservation of that species specifically. American crocodile designated critical habitat does not protect the physical and biological features essential for the conservation of the smalltooth sawfish. The U.S. Fish and Wildlife Service (FWS) has jurisdiction over the American crocodile, and NMFS has jurisdiction over the smalltooth sawfish. NMFS and FWS will consult under section 7 of the ESA for their respective species even though the critical habitat designation may over-lap geographically.

D. Comments on the Critical Habitat Boundaries and Areas Included or Omitted From the Designation

Comment 12: One commenter suggested we used arbitrary boundaries (*e.g.,* roads, county lines, *etc.*) in establishing the unit boundaries and suggested we should instead use habitat-based boundaries (*e.g.,* creeks and mangroves). The commenter also suggested we include entire creeks and canal systems that are accessible to smalltooth sawfish near the proposed Charlotte Harbor Estuary Unit. The commenter proposed four specific changes in this regard: (1) The boundary located near the Myakka River should be moved up-river where the mangroves end at approximately 27°4.500′ N; (2) the boundary near Harborview Road, U.S. 41, and SR 776 should include Shell Creek extending to the dam and upriver to 27°4.500″ N; (3) The southern extent of the Charlotte Harbor Estuary Unit boundary should be Wiggins Pass/Calcohatchee River instead of the Charlotte/Lee County line; and (4) ''back bay'' boundaries should include entire creek and canal systems in the Charlotte Harbor Estuary Unit.

Response: We elected not to make the requested changes to the unit boundaries. The boundaries were chosen by first applying the Heupel *et al.* (2007) model for defining nursery areas to the juvenile sawfish encounter data. After broad areas being used as nursery areas were identified, the essential physical and biological features within these nursery areas were identified. The boundaries of the critical habitat units were identified in accordance with our regulations at 50 CFR 424.02(c), using reference points and lines on topographic maps to describe the specific boundaries of the nursery areas. Roads, man-made structures, and county line or park boundaries were used instead of habitat boundaries (*e.g.,* extent of red mangroves or entire creek systems) because they are easily identifiable by the public and because they represent the boundaries of the nursery areas.

Comment 13: A commenter suggested we consider expanding the critical habitat designation to include unoccupied areas that could be essential to the species' conservation, and noted that the species used to be found in coastal areas as far distant from peninsular Florida as New York and Texas.

Response: ESA section 3(5)(A)(ii) defines critical habitat to include specific areas outside the geographical area occupied at the time of listing if the areas are determined by the Secretary to be essential for the conservation of the species. Regulations at 50 CFR 424.12(e) specify that we shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. Habitat-based recovery criteria in the recovery plan suggest areas outside the current occupied range may be important to the species' recovery. However, based on the best available information, we cannot identify unoccupied areas that are currently essential to the conservation of the species. If information on essential features or habitats for the species becomes available, we will consider revising this critical habitat designation.

Comment 14: A commenter suggested we include Estero Bay to Marco Island in the critical habitat designation because the area contains the essential features, and the areas are connected to the Charlotte Harbor Estuary Unit and the Ten Thousand Islands/Everglades Unit.

Response: Areas within Estero Bay and Marco Island do contain some of the essential features described within the proposed critical habitat designation; however, red mangroves are much sparser and salinity is much more fully marine than in the designated units. We determined that this area between the designated units does not meet the definition of a nursery area for sawfish, and that juvenile sawfish are not likely to use the area to travel between the two designated nursery areas. Juvenile smalltooth sawfish are rarely encountered within these areas, and juvenile encounters in the area do not have a higher density than the mean density outside the area. Encounter data do not indicate juveniles repeatedly use the area over years, and no site fidelity pattern exists in the area. If new data indicate these areas are indeed nursery areas, we will consider revising the critical habitat designation.

Comment 15: A commenter stated the scope of the designation is too broad and includes habitats that are not shallow or near mangrove roots. Two other commenters suggested the designation should be limited to targeted areas where NMFS has documented specific use of the areas.

Response: As stated in the proposed rule, the features can be found unevenly dispersed throughout the proposed critical habitat boundaries. Limits on existing mapping methodologies make it infeasible to define the specific areas more finely than described herein. Therefore, there are locations within the critical habitat boundaries where the essential features do not exist (*e.g.,* deep water areas). The regulatory impact of the critical habitat designation, however, flows entirely from the requirement to consult on Federal actions that may affect the critical habitat's essential features. If an action only impacts locations which do not contain either essential feature, the action would pose no effect to the critical habitat, and no section 7 consultation would be required. We also believe that limiting the designation to areas where use has been documented at a specific place and time would not be an appropriate application of the ESA. Single encounter points would not encompass the full home ranges used by juveniles. Moreover, the ESA requires designation of critical habitat containing features essential to a species' conservation, and thus contemplates inclusion of areas containing features necessary for population growth.

Further, the available information on sawfish almost certainly does not document the existence of every juvenile using the nursery areas. We therefore disagree that the scope is too broad: the units are appropriately defined as the areas containing (but not composed entirely of) the essential features, and there is no regulatory impact of including embedded locations without the essential features.

E. Comment on Essential Features

Comment 16: A commenter stated they had never seen seagrasses in the Cape Coral canals and could not understand why NMFS identified seagrasses as an essential component of the critical habitat.

Response: Seagrasses are not an essential feature of the critical habitat.

F. Comments on the Draft 4(b)(2) Report and the Analysis of Economic Impacts

Comment 17: One commenter noted an error in the Draft 4(b)(2) Report in the estimated values for mangrove-dependent fish species for 2005.

Response: NMFS acknowledges that these calculations were inaccurate, and they have been corrected in the Final 4(b)(2) Report. The value in the ''Pounds'' column label was listed in 1,000s of pounds but actually represented pounds. We removed the 1,000 from the column, and the column now reflects the correct poundage of landings. Additionally, the commenter noticed an error in the ''Value'' column which also indicated the values were in thousands of dollars. We corrected the errors in Tables 5, 7, 9, and 11 to reflect the correct values for both ''Pounds'' and ''Value.''

Comment 18: Several commenters expressed unspecific concerns about potential economic impacts on communities and quality of life expected from the designation. A few commenters stated that NMFS did not address the economic impacts on the marine construction, real estate, and residential construction industries in the proposed rule and asked why the economic impacts cannot be more precisely measured.

Response: The 4(b)(2) Report identifies and analyzes the expected economic impacts, including monetary costs on marine construction activities where feasible, associated with the proposed rule. Federal guidance on estimating the costs and benefits of proposed rules allows presenting economic impacts in qualitative metrics if monetization is not feasible or reliable (EO 12866). Administrative costs to Federal and third parties (*e.g.,* permit applicants) expected to result from ESA section 7 consultations required by the designation were estimated by projecting the number of future consultations associated with the proposed rule. Projected future costs resulting from potential project modifications that may be required to avoid destruction or adverse modification of the designated critical habitat cannot be determined with any certainty given the uncertainty in, among other things, predicting the precise location and scope of future projects. The total incremental administrative costs for Unit 1 are estimated to range from $1,039,500 to $1,386,000 (depending on complexity of the consultation) over the 10-year planning period. The total incremental administrative costs for Unit 2 are estimated to range from $108,000 to $144,000 (depending on complexity of the consultation) over the 10-year planning period. Most of these costs will be borne by Federal agencies involved in ESA section 7 consultation; maximum total projected administrative costs to third parties (*e.g.,* permit applicants) due to all 85 future consultations are estimated to be $136,200 to $170,000 over the next 10 years. The commenters did not provide us with specific information to determine any other potential future economic impacts from the proposed rule. We believe the 4(b)(2) Report provides the best information on predicting future section 7 consultation economic costs from the final rule. We have also responded to concerns about the rule's potential to impact specific existing activities in affected communities in the following section.

Comment 19: One commenter stated that the analysis of potential economic impacts to single-family dock construction/repair projects identified in the 4(b)(2) report is inadequate because we did not identify costs for some of the potential project modifications that might be recommended to dock projects during section 7 consultation. The commenter stated that it is inappropriate for NMFS to decide not to consider exclusions from Unit 1 due to economic impacts in the absence of such information. The commenter suggested we could estimate economic impacts associated with the ''average percentage decrease in number of docks constructed per year due to time delays associated with the consultation process and as well as the percentage decrease in cost for construction due to reduced size.''

Response: As we have explained in the rule and 4(b)(2) report, specific costs that may result from project modifications recommended by NMFS to avoid destruction or adverse modification of critical habitat cannot be determined in all instances because such costs are highly variable and depend on such unknown future variables as the specific scope and location of future projects. We think the commenter's suggested surrogate for future economic impacts associated with costs of dock project modifications would be too speculative. Further, a measure of the costs to third parties such as dock permit applicants from participation in the consultation process is provided in the 4(b)(2) report; this would include any costs due to delays. As stated in the rule and 4(b)(2) report, we believe the information available to project the numbers, types, and distribution of potential future Federal actions that may trigger ESA section 7 consultation, and identify the types of potential project modifications often associated with these types of projects, provides a reasonable basis for evaluating potential economic impacts of the designation, even though some of the impacts are only qualitatively identified. Our assessment projects that a limited scope of impacts will result from the designation (about 8 consultations per year in Unit 1). Consultation would be required for those projects even in the absence of the critical habitat designation, to protect the sawfish. Finally, the conservative approach to the assessment likely overestimates numbers of formal consultations and project modifications that may be required. On these bases, we do not believe evidence of economic impacts warrants our exercise of our discretion to consider excluding areas from the designation.

Comment 20: One commenter stated that the rule has the potential to impact private property rights in dock/seawall replacement permits or new permits, and in dredging of canals to the extent that may constitute a taking of private property.

Response: The takings implications of the rule were evaluated. The rule will not result in a physical invasion of private property, or a complete denial of all use or value of any private property interest. Based on the importance of the societal interest in designating critical habitat for endangered species, and the limited nature of impacts to private property that may result from the designation identified in the 4(b)(2) report, we determined that the designation will not result in a regulatory taking of private property.

Comment 21: One commenter stated that we did not justify nor provide documentation for our conclusion that secondary costs to local or regional

economies are unlikely to result from the designation.

Response: We disagree. We believe the 4(b)(2) impacts report supports our determination that impacts to the scale that affects local or regional economies are not likely to result from the designation. We do not expect measurable reductions in regional revenues or employment or growth to result from the types of project modifications that may be required to federally permitted actions to avoid destruction or adverse modification of critical habitat. We received no information to the contrary from this or other commenters, including Federal agencies most likely to be required to consult with NMFS as a result of the designation. We contacted relevant planning agencies in developing our impacts report, and received no reports of planned projects or developments over the next 10 years that would require ESA consultation and that would be of a scale to have impacts on local or regional economies if they required modifications due to the critical habitat designation.

G. Comments on Potential Impacts of the Designation on Ongoing Activities

Comment 22: The U.S. Army Corps of Engineers (ACOE) requested we exclude authorized Federal channels (Gordon Pass/Naples to Big Marco, Key West Harbor, Everglades Harbor, Largo Sound, Charlotte Harbor, Key West Bight & Garrison Bight, Ft. Myers Beach/Matanzas Pass, and the Intracoastal Waterway Caloosahatchee River to Anclote River) and existing residential canals from the critical habitat designation. Two municipalities also requested that residential canals and waterways in their boundaries be excluded where these systems are maintained at depths greater than 3 ft. (0.9 m) at MLLW, and do not provide the essential features. Several commenters requested exemptions for dredging of channels or canals in existence at the time of the designation.

Response: Exclusions from a critical habitat designation may be proper where the benefits of exclusion outweigh the benefits of inclusion of areas in a designation. Exclusions are not applicable to areas, like those proposed by the ACOE, which will not be impacted by the designation because they do not provide the essential features of critical habitat and will not require section 7 consultation for activities in those areas. As stated in the proposed rule, all existing man-made structures such as boat ramps, docks, pilings, maintained channels or marinas that do not provide the essential features that are essential to the species' conservation are not part of this designation. The three existing federally authorized channels located within the proposed designation are the Charlotte Harbor, Ft. Myers Beach (Matanzas Pass), and portions of the Intracoastal Waterway in the Caloosahatchee River. These existing Federal channels have been authorized to be dredged and maintained to depths greater than 3 ft (0.9 m) at MLLW. The channels may contain the euryhaline component of the shallow habitat essential feature, but they do not contain the water depth component, or the red mangrove essential feature, and thus would not be impacted by the designation. This also applies to residential canals, or portions of these canals, that have been authorized and dredged and maintained to depths greater than 3 ft (0.9 m) at MLLW. However, it is also important to note that the edges or banks of maintained channels or canals outside the footprint authorized to be dredged and maintained, may provide the essential features.

Comment 23: The ACOE requested a description of what is considered a maintained channel.

Response: We consider a maintained channel to be a channel that is dredged periodically, as necessary, to maintain its original authorized dimensions (depth, width, *etc.*).

Comment 24: Several commenters expressed concern that the designation of smalltooth sawfish critical habitat would prohibit marine construction or maintenance of existing private or public infrastructure (*i.e.,* maintenance dredging, docks, piers, jetties, boat ramps and seawalls *etc.*).

Response: If a proposed project authorized, funded, or carried out by a Federal agency includes construction of a new structure, and the structure may affect a listed species or its designated critical habitat, the standard ESA section 7 consultation requirement would apply. Proposed projects may require modifications, if they would destroy or adversely modify critical habitat. Projects would only be prohibited if there were no modifications or alternatives to the proposed project that would avoid destruction or adverse modification of critical habitat. If future projects in the areas covered by the designation are similar in nature as past activities, based on our analysis of impacts, we believe modifications should be available to allow projects to be implemented.

Comment 25: The ACOE requested an exemption from the rule for activities that are managed under the Comprehensive Everglades Restoration Program (CERP) program in the proposed areas because water discharges from Lake Okeechobee may be necessary when water levels pose a threat to property and human lives, and responding to this type of emergency could be impeded by having to consult under the ESA.

Response: The essential features in the proposed critical habitat areas may be affected by future and current activities authorized and/or funded through the CERP program. Federal agencies are required to consult under section 7 of the ESA to ensure their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of their critical habitat. CERP projects like those described by the commenter may affect the designated critical habitat by, for example, altering the euryhaline nature of the shallow habitat areas included in the designated units. Future CERP projects may also benefit the species by restoring habitats that may be utilized by smalltooth sawfish. We believe the section 7 consultation process provides the best process for evaluating effects from future and ongoing CERP activities, and there are a number of mechanisms that will allow consultation without impeding the ACOE's response to water level emergencies, such as emergency consultations or programmatic consultations. The ESA allows for particular areas to be excluded from a critical habitat designation on the basis of economic, national security, or other relevant impacts; it does not provide for exempting classes of activities from consultation requirements. Based on the information provided by the ACOE on this issue, NMFS cannot identify a basis for excluding critical habitat areas from the designation based on potential future CERP and Lake Okeechobee discharge activities.

Comment 26: A few commenters stated that residential canals and waterways should be excluded from critical habitat designation if these canal systems are not accessible to the species because of water control structures such as weirs and dams.

Response: As stated in the proposed rule, areas behind water control structures that are not accessible to smalltooth sawfish are not part of the designation. Areas located within existing canals or waterways that are not accessible to smalltooth sawfish because access is prohibited by a weir or dam in existence at the time of the designation are not part of the designation even though they may be located within the critical habitat boundaries; installation

of new weirs or dams in the future may require section 7 consultation under the ESA if a Federal permit is required for the structure and installation of the structure could affect the essential features of sawfish critical habitat.

Comment 27: Several commenters expressed concerns that the designation of critical habitat would result in restriction on boating and fishing activities and other public use of waterways within the critical habitat boundaries.

Response: Nothing in the rule states that boater access or fishing activities will be restricted within smalltooth sawfish critical habitat. As stated in the proposed rule, the primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies consult with NMFS to ensure their actions are not likely to result in destruction or adverse modification of critical habitat. Furthermore, a critical habitat designation does not result in the creation of closed areas, preserves, or refuges. There are no individual prohibitions on any activities within critical habitat. The transit through or anchoring of a vessel within designated critical habitat is not prohibited. Additionally, the designation of critical habitat does not create any closed fishing areas. Recreational boating and fishing would only be affected by the designation if the activity involved requires a Federal permit of some kind and the permitted activity has the potential to adversely affect one of the essential features on which the designation is based, red mangroves or shallow, euryhaline coastal habitats.

Comment 28: NMFS received multiple comments requesting that the commercial aquaculture production of shellfish be excluded from the designation of critical habitat. Additionally, commenters expressed concern that the harvesting or culturing of shellfish was not considered in NMFS' economic analysis.

Response: As discussed in response to Comment 22, particular areas may be excluded from a designation on the basis of economic, national security, or other relevant impacts. The ESA does not provide for exempting classes of activities from the requirements of section 7 applicable to designated critical habitat. Although we have no past record of section 7 consultation regarding Federal permitting of commercial shellfish aquaculture activities, the commenters acknowledge that Federal permits may be required for placement of aquaculture materials in navigable waters. Thus, we have added a discussion in the Final 4(b)(2) Report regarding shellfish aquaculture and one anticipated future formal section 7 consultation with the ACOE for these activities that may occur in designated critical habitat for the smalltooth sawfish. Additionally, the commercial shellfish aquaculture may occur in areas that do not provide the critical habitat features. Information provided by one commenter suggests that a majority of these actions take place in water depths greater than 3 ft (0.9m) at MLLW. Therefore, they do not contain the water depth component of the essential features and would not be affected by the designation. In areas where critical habitat features are present and may be impacted by a proposed activity, we believe that the section 7 consultation process is the appropriate mechanism for evaluating effects to proposed critical habitat resulting from these activities. Based on our impacts analysis for the single projected future consultation for hard clam aquaculture activities, we did not find a basis for exercising our discretion to consider excluding any areas from the designation due to impacts on these activities. We expect the potential consultation administrative costs to increase by $18,000 for this formal consultation. We cannot determine the specific modification costs that may be associated with this consultation since we do not know the future locations and specific habitat conditions or potential project sites. We expect project modifications may involve project relocations to deeper water and/or monitoring.

Comment 29: One commenter stated that mangrove removal should not be permitted within designated critical habitat.

Response: The rule does not prohibit mangrove removal per se. The proposed rule requires Federal agencies to consult under section 7 of the ESA for activities occurring within proposed critical habitat that may affect the essential features including, but not limited to, red mangrove impacts. If activities that involve removal of mangroves require a Federal permit or use Federal funding, the effect of that mangrove removal will be evaluated during section 7 consultation to determine whether the proposed removal can and should be modified to avoid adversely affecting or destroying or adversely modifying critical habitat. Not every adverse impact on the essential features of designated critical habitat will constitute destruction or adverse modification of critical habitat; whether an adverse impact rises to that level depends on factors including, but not limited to, the type of project, the area, the usage by sawfish, the nature and extent of the impacts, the nature of critical habitat in areas adjacent to the project, *etc.*

Comment 30: One commenter wanted to know how the designation of critical habitat would affect an existing ''blanket permit'' received from the ACOE to remove vegetation for seawall installation within Cape Coral interior canals.

Response: Our regulations at 50 CFR 402.16 require reinitiation on completed consultations if critical habitat is designated that may be affected by an ongoing action covered by a completed consultation. Thus, the ACOE may reinitiate section 7 consultation on the existing federally authorized activities if ongoing or future actions covered by the permit to which the commenter is referring may affect the sawfish's critical habitat features.

Summary of Changes From the Proposed Critical Habitat Designation

Based on the comments received and our review of the proposed rule, we have made the following changes from the proposed rule and Draft 4(b)(2) Report to the final rule and its Final 4(b)(2) Report.

1. We have corrected the error in the pounds and values associated with the ''Commercial Landings of Florida Mangrove-Dependent Species'' in Tables 5, 7, 9, and 11 in the 4(b)(2) report. *See Comment 17* for an explanation of the change.

2. We have increased the number of potential future section 7 consultations for general permits issued by the ACOE by one to account for a consultation on Florida's shellfish aquaculture program. Additionally, we have changed the administrative costs of future consultations and acknowledged that project modification costs may be associated with the consultation.

3. We have corrected the home range values for small juveniles identified by a peer reviewer.

4. We clarified critical habitat boundaries by inserting additional roads and text to the location of the boundaries.

Critical Habitat Identification and Designation

Critical habitat is defined by section 3 of the ESA as ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management

considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.'' This definition provides us with a step-wise approach to identifying areas that may be designated as critical habitat for the endangered smalltooth sawfish.

Geographical Area Occupied by the Species

The best available scientific and commercial data identify the geographical area occupied by the smalltooth sawfish at the time of listing (April 1, 2003) as peninsular Florida. Based on our regulations, we interpret ''geographical area occupied'' in the definition of critical habitat as the range of the species at the time of listing (45 FR 13011; February 27, 1980). The range was delineated at the time of listing from data provided by existing literature and encounter data. Because only a few contemporary encounters (one in Georgia, one in Alabama, one in Texas, and one in Louisiana) have been documented outside of Florida since 1998, we consider peninsular Florida to be the species' occupied range at the time of listing. At this time, we do not consider the limited observations outside of Florida as indicating that the species has re-established either its occupation of Gulf coast waters or its seasonal migrations up the east coast of the U.S. outside of Florida.

Specific Areas Containing Physical or Biological Features Essential to Conservation

The definition of critical habitat further instructs us to identify the specific areas on which are found the physical or biological features essential to the species' conservation. Our regulations state that critical habitat will be defined by specific limits using reference points and lines on standard topographic maps of the area, and referencing each area by the State, county, or other local government unit in which it is located (50 CFR 424.12(c)).

According to the definition of critical habitat, the physical and biological features essential to conservation must be identified (hereafter also referred to as ''essential features''). Section 3 of the ESA (16 U.S.C. 1532(3)) defines the terms ''conserve,'' ''conserving,'' and ''conservation'' to mean: ''to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.'' Our regulations at 50 CFR 424.12(b) provide guidance as to the types of habitat features that may be used to describe critical habitat.

The recovery plan developed for the smalltooth sawfish represents the best judgment about the objectives and actions necessary for the species' recovery. We reviewed the recovery plan's habitat-based recovery objective for guidance on the habitat-related conservation requirements of the species. This objective identifies the need to protect and/or restore smalltooth sawfish habitats and discusses adult and juvenile habitats separately. Habitats, especially those that have been demonstrated to be important for juveniles, must be protected and, if necessary, restored. Protected, suitable habitat throughout the species' range will be necessary to support recruitment of young individuals to the recovering population. Without sufficient habitat, the population is unlikely to increase to a level associated with low extinction risk and delisting.

The recovery plan also identifies specific recovery criteria that must be met to satisfy each objective. As stated in the plan, adult habitat-based recovery criteria for the species require the identification and protection of adult aggregation, mating, and/or pupping areas. Information on historic aggregation, mating, and/or pupping sites does not exist. Currently, no aggregation or mating areas have been identified for adults. Additionally, no information is available on specific pupping locations for gravid females. Tracking data on gravid females is lacking, but newborn juveniles still possessing their protective sheaths and newly pupped animals have been documented close to shore. Encounter and site fidelity data suggest juveniles are pupped in these areas, but this has not been validated. No known specific areas where adults perform any particular function, including feeding, are known. Adults are considered opportunistic feeders and forage on a variety of fish and crustacean species. Based on the available information on the habitat usage patterns of adults, we cannot identify physical or biological features essential to the species' conservation, or identify any areas on which such features may be found.

In contrast to the paucity of information available on adult smalltooth sawfish, more detailed information on habitat usage patterns of juveniles is available, and more specific habitat-based recovery criteria are identified in the recovery plan. The habitat-based recovery criterion for juveniles identifies mangrove shorelines, non-mangrove nursery habitats, and freshwater flow regimes as important features for juveniles. As stated earlier, the habitat-based recovery objective for the species focuses on protecting areas that have been identified as important for juveniles (*i.e.,* nurseries). This objective also stresses the need to protect suitable habitats for juveniles to support their recruitment into the adult population. Juveniles are especially vulnerable to predation and starvation (Simpfendorfer and Wiley, 2005). Protection of the species' nurseries is crucial because the rebuilding of the population cannot occur without protecting the source (juvenile) population and its associated habitats. The recovery plan states that the recovery of the smalltooth sawfish depends on the availability and quality of nursery habitats and that protection of high-quality nursery habitats located in southwest Florida is essential to the species.

We conclude that facilitating recruitment into the adult population by protecting the species' juvenile nursery areas is the key conservation objective for the species that will be supported by the designation of critical habitat.

As stated in the recovery plan, smalltooth sawfish, like many sharks and rays, use specific habitats commonly referred to as nurseries or nursery areas. The recovery plan does not identify specific locations for nursery areas but does state that protecting nursery areas within southwest Florida is important to the recovery of the species. Nursery areas in addition to those in southwest Florida are also identified as important for recovery but locations of these additional areas were not specified. Thus, to identify specific areas that may meet the definition of critical habitat, we focused on specifically defining what constitutes a ''nursery'' area for smalltooth sawfish. We then identified those physical or biological features that are essential to the conservation of the species because they provide nursery area functions to the species in these areas.

We evaluated information in the recovery plan, historical information on habitat use by sawfish, and available encounter data and scientific literature, as well as sought expert opinion, to determine where or what constitutes a ''nursery area'' for the species. Historical information on the species only provides limited, mostly anecdotal, information on the location of juvenile

animals and does not discuss specific habitat usage patterns for them. Historical information indicates that juveniles were found in the lower reaches of the St. Johns River, the Indian River Lagoon, southwest Florida, and in areas along the Gulf coast between Florida and Texas. Using historic location information alone would not provide a reasonable basis for identification of nursery areas, given the qualitative nature of the information. Further, because most of these areas have been so physically altered, conditions present historically may not be present today, and thus features that may have provided nursery area functions in the past may be absent.

We then reviewed juvenile encounter data from the MML and FWRI databases to see whether the data alone indicates the existence of nursery areas. In summary, juvenile sawfish have been encountered in the Florida Panhandle, the Tampa Bay area, in Charlotte Harbor and the Caloosahatchee River, throughout the Everglades region and Florida Bay, the Florida Keys, and in scattered locations along the east coast of Florida south of the St. Johns River. However, apart from the Charlotte Harbor, Caloosahatchee River, and Ten Thousand Islands/Everglades (TTI/E) areas, many of these encounters are represented by a single individual in a single year.

Heupel *et al.* (2007) are critical of defining nursery areas for sharks and related species such as sawfish based solely on the presence of single occurrences of individual juvenile fish. Instead, these authors argue that nursery areas are areas of increased productivity which can be evidenced by natal homing or philopatry (use of habitats year after year) and that juveniles in such areas should show a high level of site fidelity (remain in the area for extended periods of time). Heupel *et al.* (2007) propose that shark nursery areas can be defined based on three primary criteria: (1) Juveniles are more common in the area than other areas, *i.e.,* density in the area is greater than the mean density over all areas; (2) juveniles have a tendency to remain or return for extended periods (weeks or months), *i.e.,* site fidelity is greater than the mean site fidelity for all areas; and (3) the area or habitat is repeatedly used across years whereas other areas are not. Scattered and infrequent occurrences of juveniles may indicate a lack of features that provide the necessary functions of a nursery area, and an area with only scattered or infrequent occurrences is not viewed by the authors as constituting a nursery area. Heupel *et al.* (2007) do not assume that that all sharks have nursery areas. The authors discuss that size-at-birth, rate of growth, time to maturity, litter size and frequency of breeding may be important factors dictating whether a shark species utilizes a nursery or not. Shark species with high growth rates, early maturity, and annual reproduction may not benefit as much from utilizing a nursery area. In contrast, the authors predict that species that have small size at birth and slow juvenile growth rates may be more likely to utilize nursery areas because they may be more susceptible to juvenile predation. We believe this paper provides the best framework for defining a ''nursery area'' for the smalltooth sawfish because they are small at birth, slow to mature, and existing data on tracked juveniles indicates their limited movements and ranges are directed toward avoiding predation by sharks foraging in deeper waters.

Using the Heupel *et al.* (2007) framework, we evaluated available juvenile encounter data for patterns in juvenile density, site fidelity, and repeat usage over years. Encounter data indicate three types of distributions of individual juvenile sawfish. The first group consists of scattered or single encounters. Encounters occurring in areas north of Charlotte Harbor, including a few in the panhandle of Florida and along the east coast of Florida, are included in this group. Encounters in these areas were scattered individual encounters, and no indication of repeat or multiple use of an area was evident. The second group of encounters consists of encounters that had multiple individuals in an area, but these encounters were geographically scattered and not repeated over years. These encounters occurred in the Florida Keys. Encounters in this group were located on different sides of various Keys, and no consistent or continuous pattern of repeat usage over years could be identified. In fact, in 2008, juvenile encounters were largely lacking throughout much of the Keys. The third group of encounters exhibit repeat usage of the same location by both single and multiple individuals, notably higher density of encounters than the other groups, and usage occurring year after year. These encounters occurred in areas from Charlotte Harbor south through the Everglades and Florida Bay.

Based on this analysis, the juvenile encounters in the third grouping discussed above, from Charlotte Harbor through the Everglades, are the only encounters that suggest these areas meet the nursery area criteria set forth by Heupel *et al.* (2007). Juvenile sawfish are more commonly encountered in these areas than in other areas, *i.e.*, density in the area is greater than the mean density over all areas, and the area is repeatedly used across years, whereas other areas are not. Available information about site fidelity of juveniles is limited and does not allow quantitative comparisons among the apparent nursery areas and all other areas. However, as discussed above, available information indicates that small and very small juveniles show high fidelity to shallow nearshore areas where they have been acoustically tracked. Data from juveniles tracked in the TTI/E area indicate they exhibit site fidelity and residency patterns between 15 and 55 days (Wiley and Simpfendorfer, 2007). Tracking data also suggest that juveniles exhibit specific movement patterns to avoid predation. A juvenile tracked in the Everglades National Park (ENP) in the Shark River spent its time moving between a shallow mud bank during low tide and mangrove roots during high tide (Simpfendorfer, 2003). Tracking data in Mud Bay (ENP) and Faka Union Bay (TTI) indicate juveniles remain in very shallow waters (0.9 ft (0.3 m)) over several weeks. Tracking data in the Charlotte Harbor Estuary is limited to the Caloosahatchee River and its adjacent canals. Juvenile tracking data from a 60 in (153 cm) juvenile in this area indicates that the animal remained within water depths less than 3 ft (0.9 m) along a highly modified shoreline (Simpfendorfer, 2003). Tracking data indicate the animal spent the majority of its time within man-made canals and adjacent to docks and marinas within the river.

Juvenile encounters outside of the area between Charlotte Harbor and the Everglades and Florida Bay do not fit the Heupel *et al.* framework and are not considered nursery areas at this time. Anecdotal information indicates that juvenile size animals have been encountered throughout portions of their historic range, and our recovery plan indicates that the establishment of nursery areas outside of southwest Florida is necessary for the species to recover. However, we cannot determine at this time the temporal or spatial distribution of future sawfish nursery areas. To more specifically delineate the boundaries of the nursery area or areas, we used Geographical Information System (GIS) software to map the density of all juvenile (length less than or equal to 200 cm) encounters (MML and FWRI) located along peninsular Florida within 500 m of land, documented between the years of 1998–

2008, with all years combined. Two density maps were generated to determine the mean density for all encounters and the density for all encounters excluding the research encounters. We used 1 km² density grids (same grid size and locations used by Simpfendorfer (2006)) to determine density levels and distributions. Juvenile densities were very similar between the two maps. However, to remove any bias from the research efforts, we used the juvenile density map excluding research effort. The overall nursery area between Charlotte Harbor and Florida Bay breaks naturally into two areas between Ten Thousand Islands and the Caloosahatchee River, based on a long stretch of sandy beach habitat in the Naples area that is lacking encounters with densities greater than the mean density overall. Next we mapped juvenile encounters in these two areas by year (1998–2008), to verify where repeat usage occurred over years. This produced several groupings of 1 km² grids with higher mean juvenile densities compared to mean juvenile density throughout peninsular Florida: 1 grouping within Charlotte Harbor, 1 grouping encompassing the Caloosahatchee River, and 3 groupings from the Ten Thousand Islands area through Florida Bay. We do not believe either the Charlotte Harbor Estuary or the TTI/E nursery areas should be subdivided into multiple smaller nursery areas for several reasons. First, the Heupel *et al.* (2007) framework does not indicate whether or how discrete nursery areas within a large area of juvenile use might be identified. Second, our knowledge about juvenile sawfish movements and ranges is very limited. Third, both areas consist of interconnected environmental systems and no environmental barriers exist to prohibit juvenile sawfish movement throughout the system. Finally, limiting nursery area boundaries to discrete habitat grids represented only by past encounters with juveniles would not best serve the conservation objective of facilitating population growth through juvenile recruitment. The specific boundaries of the two nursery areas were then derived by locating the nearest publicly identifiable boundary (*e.g.,* boundaries of established parks or preserves) or structure external to the outermost boundary of the juvenile density grids where the mean density is greater than the density in the surrounding areas. We identified reference points and lines on standard topographic maps of the areas to describe the specific boundaries of the nursery areas. The Charlotte Harbor Estuary nursery area includes Charlotte Harbor, Gasparilla Sound, Pine Island Sound, Matlacha Pass, San Carlos Bay, Estero Bay, and the Caloosahatchee River in Charlotte and Lee Counties. The nursery area is bounded by the Peace River at the eastern extent of the mouth of Shell Creek and the northern extent of the Charlotte Harbor Preserve State Park. At the Myakka River the nursery area is bounded by the SR–776 Bridge, in Gasparilla Sound by the SR–771 Bridge. The COLREGS–72 lines between Gasparilla Island, Lacosta Island, North Captiva Island, Captiva Island, Sanibel Island, and the northern point of Estero Island are used as the coastal boundary for the nursery area. The southern extent of the area is the Estero Bay Aquatic Preserve, which is bounded on the south by the Lee/Collier County line. Inland waters are bounded at SR–867 (McGregor Boulevard) from Punta Rassa Road to SR–80 near Fort Myers, then by SR–80 (Palm Beach Boulevard) to Orange River Boulevard, then by Orange River Boulevard to Buckingham Road, then by Buckingham Road to SR–80, and then following SR–80 until it is due south of the Franklin Lock and Dam (S–79), which is the eastern boundary on the Caloosahatchee River and a structural barrier for sawfish access. Additional inland water boundaries north and west of the lock are bounded by North Franklin Lock Road to North River Road, then by North River Road to SR–31, then by SR–31 to SR–78 near Cape Coral, then by SR–78 to SR–765, then by SR–765 to US–41, then by US–41 to US–17 (Marion Avenue) in Punta Gorda, then by US–17 to Riverside Drive, and then by Riverside Drive to the eastern extent of the Peace River. From the northern extent of the Charlotte Harbor Preserve State Park, inland waters are bounded westward along that extent to Harbor View Road, then by Harbor View Road to US–41, then by US–41 to SR–776, then by SR–776 to the Myakka River Bridge. The Charlotte Harbor nursery area is graphically displayed at the end of this document.

The Ten Thousand Islands/Everglades (TTI/E) nursery area is located within Collier, Monroe, and Miami-Dade Counties, Florida. The Everglades nursery area includes coastal and inshore waters within Everglades National Park (ENP), including Florida Bay, in the vicinity of Everglades City, within the Cape Romano-Ten Thousand Islands Aquatic Preserve (AP), and within the portion of Rookery Bay AP south of SR–92. The boundaries match the portion of Rookery Bay AP south of SR–92, and the Cape Romano-Ten Thousand Islands AP. The nursery area boundaries closely match the ENP boundaries with the following two exceptions: (1) The nursery area boundary connects points 55 and 57 of the critical habitat map for the ENP/TTI Unit, which extend beyond the ENP boundary to include accessible nursery areas; and (2) The nursery area boundary is located inside the ENP boundary between points 77 and 2 illustrated on the critical habitat map, omitting the northeastern portion of the ENP. The area is omitted because it is not accessible to sawfish. The TTI/E nursery area is graphically displayed at the end of this document.

Having identified the nursery areas, we next identified the physical or biological features found in these areas that are essential to the species' conservation because they provide nursery area functions to the sawfish.

Simpfendorfer (2006) analyzed MML's smalltooth sawfish encounter data to determine the importance of habitat factors to juveniles less than 79 in (200 cm) in length. Depth data are consistently reported by fishers and are accurately reported because most fishers use depth finders, so depth data were extracted from the encounter database. Simpfendorfer examined the proximity of encounters to habitat features that could be evaluated from geographic information system (GIS) databases. These features were: mangroves (GIS mangrove coverages do not distinguish between mangrove species), seagrasses, freshwater sources, and the shoreline. Simpfendorfer (2006) used GIS shapefiles for the features to determine the shortest distance from the encounter to the feature. The encounter data were converted to encounter density by gridding the data, and the results of the analysis were then used in a habitat suitability model. The model indicates that water depths less than 3 ft, mangrove buffers or shorelines, and euryhaline habitat areas (areas with wider salinity ranges and receiving freshwater input) have the strongest correlation with juvenile smalltooth sawfish encounters. Additionally, most encounters were documented within a distance of 1641 ft (500 m) from shore. The Simpfendorfer (2006) model suggests that areas of high suitability for juvenile sawfish contain all three of these features. Large areas coded as ''highly suitable'' habitat for juveniles are located in the areas we determined meet the Heupel *et al.* (2007) framework criteria for a nursery area, as applied to the sawfish.

Based on the natural history of the species, its habitat needs and the key conservation objective of protecting

juvenile nursery areas, two physical and biological features are identified as essential to the conservation of the smalltooth sawfish because they provide nursery area functions. The two features are: red mangroves and shallow euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). As discussed above, the prop root system and the location of red mangroves (close to shore), and shallow water depths provide refuge from predators. Red mangroves and shallow mud or sand bank euryhaline habitats are also highly productive and provide ample, diverse foraging resources. Among elasmobranchs, smalltooth sawfish are one of the few species known to inhabit euryhaline habitats, which may provide several benefits for the species. Euryhaline habitats are very productive environments that support an abundance and variety of prey resources that can only be accessed by species that inhabit their systems. Additionally, the risk of predation may be reduced in these euryhaline habitats because very few species of sharks (potential predators) are capable of inhabiting these habitats.

Based on the best available information, we conclude red mangroves and adjacent shallow euryhaline habitats and the nursery area functions they provide facilitate recruitment of juveniles into the adult population. Thus, these features are essential to the conservation of the smalltooth sawfish. While some studies cite 1.0 meter as the preferred depth limit, others (Simpfendorfer 2006), cite 3.0 ft. For this rule, the water depth feature will be defined as 3 ft (0.9 m) because the NOAA Navigational Charts depth contour lines and most GIS databases use English units of measure.

Based upon the best available information, we cannot conclude that any other sufficiently definable features of the environment in the two nursery areas, other than red mangroves and adjacent shallow euryhaline habitats, are essential to smalltooth sawfish conservation.

Based on the boundaries of the two nursery areas and GIS data information on the location of the features, the Charlotte Harbor Estuary and the TTI/E nursery areas contain the features essential to the conservation of smalltooth sawfish because they facilitate recruitment into the adult population. In this rule, we designate these two specific areas, referred to as critical habitat ''units,'' as critical habitat for the smalltooth sawfish.

There are areas outside of the two nursery areas, including areas on the east and west coasts of Florida that contain some of the same features identified as essential features in our two nursery areas. Habitat areas outside the specific nursery areas also meet Simpfendorfer's (2006) classification of highly suitable habitat for juveniles because they contain these features, notably areas in Tampa Bay and in the Indian River Lagoon. Because the features are essential to the conservation of the species based on the nursery functions they provide, we determined that these features are essential to the conservation of smalltooth sawfish only when present in nursery areas. None of these other areas meet the Heupel *et al.* (2007) definition of a nursery area. Encounters in these areas are rare and no pattern of repeat usage could be identified. Lack of repeat or high-density usage of these other areas by juveniles may be a function of the limited current size of a reproducing population that does not yet need additional nursery areas. Even so, we have no basis to conclude that other areas, even those containing shallow euryhaline habitats and mangroves, will be used as nursery areas in the future. Nursery areas cannot be located based solely on the co-location of shallow depths and euryhaline salinity regimes, and juveniles are not commonly or repeatedly found everywhere these features are present. Mangroves may also not be determinative of nursery area function for the sawfish; the Florida Keys contain mangrove resources, yet juvenile sawfish use of the Keys as evidenced by encounter data has been highly variable, including near absence in certain recent years. Additionally, historic anecdotal information on locations of small animals suggests they were found in the lower St. Johns River, which does not support mangroves. Based on the best available scientific information, we identified two specific areas for the species where red mangroves and adjacent shallow euryhaline habitats provide nursery functions and are therefore essential to the conservation of the species. We therefore designate the Charlotte Harbor Estuary and TTI/E Units.

The boundaries of the two specific areas are the same as the Charlotte Harbor Estuary and TTI/E nursery area boundaries. GIS bathymetry data, mangrove coverage data, and salinity data were used to verify the distribution of the essential features within the nursery areas. We have identified reference points and lines on standard topographic maps of the areas to describe the specific boundaries of the two units in the regulatory text.

The essential features can be found unevenly dispersed throughout the two areas. The limits of available information on the distribution of the features, and limits on mapping methodologies, make it infeasible to define the specific areas containing the essential features more finely than described herein. Existing man-made structures such as boat ramps, docks, pilings, maintained channels or marinas do not provide the essential features that are essential for the species' conservation. Areas not accessible (*i.e.,* areas behind water control structures existing at the time of this final designation that prevent sawfish passage) to sawfish are not part of this designation. As discussed here and in the supporting impacts analysis, given the specificity of the essential features, determining whether an action may affect one or both of the features can be accomplished without entering into an ESA section 7 consultation.

Unoccupied Areas

ESA section 3(5)(A)(ii) further defines critical habitat to include specific areas outside the geographical area occupied if the areas are determined by the Secretary to be essential for the conservation of the species. Regulations at 50 CFR 424.12(e) specify that we shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species. Habitat based recovery criteria in the smalltooth sawfish recovery plan suggest areas outside the current occupied range may be important to the species' recovery. However, based on the best available information we cannot identify unoccupied areas that are currently essential to the conservation of the species. If information on essential features or essential areas in the species' unoccupied range becomes available, we will consider revising this critical habitat designation.

Special Management Considerations or Protection

Specific areas within the geographical area occupied by a species may be designated as critical habitat only if they contain physical or biological features essential to the conservation of the species that ''may require special management considerations or protection.'' A few courts have interpreted aspects of this statutory requirement, and the plain language

aids in its interpretation. For instance, the language clearly indicates the features, not the specific area containing the features, are the focus of the ''may require'' provision. Use of the disjunctive ''or'' also suggests the need to give distinct meaning to the terms ''special management considerations'' and ''protection.'' Generally speaking, ''protection'' suggests actions to address a negative impact or threat of a negative impact. ''Management'' seems plainly broader than protection, and could include active manipulation of a feature or aspects of the environment. Two Federal district courts, focusing on the term ''may,'' ruled that features can meet this provision based on either present requirements for special management considerations or protections, or on possible future requirements. See *Center for Biol. Diversity* v. *Norton,* 240 F. Supp. 2d 1090 (D. Ariz. 2003); *Cape Hatteras Access Preservation Alliance* v. *Dep't of the Interior,* 344 F. Supp. 108 (D.D.C. 2004). The Arizona district court ruled that the provision cannot be interpreted to mean that features already covered by an existing management plan must be determined to require ''additional'' special management, because the term ''additional'' is not in the statute. Rather, the court ruled that the existence of management plans may be evidence that the features in fact require special management. *Center for Biol. Diversity* v. *Norton,* at 1096–1100. NMFS' regulations define ''special management considerations or protections'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species'' (50 CFR 424.02(j)).

Based on the above, we evaluated whether the essential features in the two sawfish nursery areas may require special management considerations or protections by evaluating four criteria:

a. Whether there is presently a need to manage the feature;

b. Whether there is the possibility of a need to manage the feature;

c. Whether there is presently a negative impact on the feature; or

d. Whether there is the possibility of a negative impact on the feature.

In evaluating present or possible future management needs for the features, we recognized that the features in their present condition must be the basis for a finding that these are essential to the smalltooth sawfish's conservation. In addition, the needs for management evaluated in (a) and (b) were limited to managing the features for the conservation of the species. In evaluating whether the essential features meet either criterion (c) or (d), we evaluated direct and indirect negative impacts from any source (*e.g.,* human or natural). However, we only considered the criteria to be met if impacts affect or have the potential to affect the aspect of the feature that makes it essential to the conservation of the species. We also evaluated whether the features met the ''may require'' provision separately for the two ''specific areas'' proposed for designation.

Red mangroves and adjacent shallow euryhaline habitats are both susceptible to impacts from human activities because they are located in areas where urbanization occurs. The smalltooth sawfish status review (NMFS 2000) states that habitat destruction is one of the key factors affecting the present distribution of the species. The continued urbanization of the southeastern U.S. has resulted in substantial habitat losses for the species. Coastal areas including the two nursery areas are subject to various impacts from activities including, but not limited to, dredging and disposal activities, coastal maritime construction, land development and associated runoff, alteration of natural freshwater discharges to coastal habitats, and installation of various submerged pipelines. The impact from these activities combined with natural factors (*e.g.,* major storm events) can significantly affect the quality and quantity of the two features listed above and their ability to provide nursery area functions (*i.e.,* refuge from predators and abundant food resources), to juvenile smalltooth sawfish to facilitate recruitment into the population. Dredging projects modify water depths to accommodate navigation needs, mangroves are removed to construct docks and various maritime structures, and water control structures are installed to modify water flows in various areas, which can alter salinity regimes downstream. Based on our past section 7 consultation database records we know that coastal areas in southwest Florida will continue to experience impacts from coastal construction projects and that the essential features will continue to experience negative impacts in the future. Based on our past consultation history, fewer Federal actions may affect habitats in the TTI/E Unit than in the Charlotte Harbor Estuary Unit, because much of the TTI/E Unit is held in public ownership by the Department of the Interior. However, coastal storm impacts to mangroves, salinity, and water depth still occur within this area, and salinity regimes as well as mangroves in this area may be altered in the future by projects implemented under the Comprehensive Everglades Restoration Project. Thus, the two essential features currently needed and will continue to require special management and protection in both of the two specific areas.

Activities That May Be Affected by the Designation

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or adversely modify such habitat or that may be affected by such designation. A variety of activities may affect critical habitat that, when carried out, funded, or authorized by a Federal agency, will require an ESA section 7 consultation. Such activities include, but are not limited to, dredging and filling, other in-water construction (docks, marinas, boat ramps, *etc.*), installation of water control structures, and hard clam aquaculture activities. Notably, all the activities identified that may affect the critical habitat may also affect the species itself, if present within the action area of a proposed Federal action.

We believe this final critical habitat designation will provide Federal agencies, private entities, and the public with clear notification of the nature of critical habitat for smalltooth sawfish and the boundaries of the habitat. This designation will allow Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if ESA section 7 consultations with NMFS are needed, given the specific definition of the two essential features. Consistent with recent agency guidance on conducting adverse modification analyses (NMFS, 2005), we will apply the statutory provisions of the ESA, including those in section 3 that define ''critical habitat'' and ''conservation,'' to determine whether a proposed future action might result in the destruction or adverse modification of critical habitat.

Application of ESA Section 4(a)(3)(B)(i)

Section 4(a)(3)(B) prohibits designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DOD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP), if we determine that such a plan provides a benefit to the sawfish species (16 U.S.C. 1533(a)(3)(B)). We solicited information from DOD and received responses indicating that no DOD facilities or managed areas are located

within the specific areas identified as critical habitat.

Application of ESA Section 4(b)(2)

The foregoing discussion described the specific areas within U.S. jurisdiction that fall within the ESA section 3(5) definition of critical habitat because they contain the physical and biological features essential to the sawfish's conservation that may require special management considerations or protection. Before including areas in a designation, section 4(b)(2) of the ESA requires us to consider the economic, national security, and any other relevant impacts of designation of any particular area. Additionally, we have the discretion to exclude any area from designation if we determine the benefits of exclusion (that is, avoiding some or all of the impacts that would result from designation) outweigh the benefits of designation based upon the best scientific and commercial data available. We may not exclude an area from designation if exclusion will result in the extinction of the species. Because the authority to exclude is discretionary, exclusion is not required for any particular area under any circumstances.

The analysis of impacts below summarizes the comprehensive analysis contained in our Final 4(b)(2) Report (NMFS, 2009), considering the economic, national security, and other relevant impacts that we projected would result from including the two units in the critical habitat designation. This consideration informed our decision on whether to exercise our discretion to exclude particular areas from the designation. Both positive and negative impacts were identified and considered (these terms are used interchangeably with benefits and costs, respectively). Impacts were evaluated in quantitative terms where feasible, but qualitative appraisals were used where that was more appropriate to particular impacts.

The ESA does not define what ''particular areas'' means in the context of section 4(b)(2), or the relationship of particular areas to ''specific areas'' that meet the statute's definition of critical habitat. As there was no biological basis to subdivide the two specific critical habitat units into smaller units, we treated these units as the ''particular areas'' for our initial consideration of impacts of designation.

Impacts of Designation

The primary impacts of a critical habitat designation result from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining these impacts is complicated by the fact that section 7(a)(2) also requires that Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. An incremental impact of designation is the extent to which Federal agencies modify their proposed actions to ensure they are not likely to destroy or adversely modify the critical habitat beyond any modifications they would make because of listing and the jeopardy prohibition. When a modification would be required due to impacts to both the species and critical habitat, the impact of the designation may be co-extensive with the ESA listing of the species. Our Draft 4(b)(2) Report projected administrative and project modification costs that would be incremental impacts of the designation, based on our consultation history for the species and on the assumption that formal consultations would not be required to avoid adverse effects to the species itself. Past consultations on projects in the range of the species have all concluded the species was not likely to be adversely affected, due to the mobility and perceived lack of specific habitat use by the species. However, recent section 7 consultations have determined that it may not be appropriate to conclude that juvenile sawfish forced to vacate nursery habitat due to project activities will not be harmed by these effects, given juveniles' specific habitat requirements and high site fidelity. In some recent consultations, limitations on removal of red mangroves and shallow habitat areas were implemented to avoid take of juvenile sawfish using project areas. Because such projects are directly impacting features that have been identified as critical habitat and may be indirectly affecting the listed species, it is possible that critical habitat considerations will be the more important factor in shaping future consultations. Thus, in the Final 4(b)(2) Report, we have retained the conservative assumption that the identified costs and benefits will be incremental impacts of the critical habitat designation.

The Final 4(b)(2) Report begins with a description of the projected future Federal activities that would trigger section 7 consultation requirements because they may affect one or both of the essential features. Additionally, the report describes the project modifications we identified that may reduce impacts to the essential features. Positive impacts that may arise from avoiding destruction or adverse modification of the species' habitat, and education of the public to the importance of an area for species conservation, are also described. The report discusses the lack of expected impacts on national security and other relevant impacts. This report is available on NMFS' Southeast Region Web site at *http://sero.nmfs.noaa.gov/pr/SmalltoothSawfish.htm.*

Economic Impacts

As discussed above, economic impacts of the critical habitat designation result through implementation of section 7 of the ESA in consultations with Federal agencies to ensure their proposed actions are not likely to destroy or adversely modify critical habitat. These economic impacts may include both administrative and project modification costs; economic impacts that may be associated with the conservation benefits of the designation are characterized as other relevant impacts and described later.

Because the smalltooth sawfish has been listed for 5 years, a consultation history exists for the species that allowed formulating predictions about the types of future Federal activities that might require section 7 consultation in the next 10 years (the typical time period for section 4(b)(2) reports). We examined our consultation records compiled in our Public Consultation Tracking System (PCTS) database, to identify types of Federal activities that have the potential to adversely affect either both the smalltooth sawfish and its critical habitat, or just the critical habitat (actions that require consultation due to effects solely on the fish are not impacts of the designation of critical habitat). The PCTS database contains information dating from 1997, providing a consultation history for sawfish and co-located listed species spanning 10 years. Consultation data for smalltooth sawfish began when the species was listed in 2003, and available information indicates that the number of consultations increased over time as Federal agencies recognized those projects that might affect the species and thus require consultation. Based on our outreach efforts to Federal agencies about the need to consult on the species, we believe that our data from 2005 to the present represents the level of future actions that may trigger consultation in the two areas designated as critical habitat from which to estimate the number of future actions that may trigger consultation. Thus we extrapolated the number of consultations that occurred over a three-year period between 2005 and the

present that required consultation due to the presence of the sawfish into the number of future consultations. We also considered information provided by Federal action agencies on future consultations.

We identified four categories of activities that would require consultation due to potential impacts to one or both of the essential features: marine construction activities that require a Federal permit (*e.g.,* docks, piers, boat ramps, dredging, shoreline stabilization, *etc.*); general permits (including shellfish aquaculture activities) authorizing specified categories and locations of construction activities without the need for individual project-specific permits; water control structure repair and replacement; and road/bridge expansions, repairs and removals. No categories of future Federal actions are expected to require consultation due solely to impacts on one or both of the critical habitat features; all categories of projected future actions may trigger consultation because they have the potential to adversely affect the essential features and the species itself. Therefore, we do not predict this designation will result in an increase in the number of consultations that would be required due solely to the presence of the species in the two specific units. Moreover, fewer than half of the past projects that required consultation due to effects on sawfish had actual impacts on one or both of the features determined as critical habitat. A total of 77 consultations in the Charlotte Harbor Estuary Unit and a total of 8 consultations in the TTI/E Unit are predicted over the next ten years due to the designation. The ACOE is projected to be the Federal action agency for the majority of future projects requiring consultation due to adverse effects to critical habitat in both units; the U.S. Coast Guard and/or the Federal Highways Administration may be co-action agencies that may also be involved in three consultations in the Charlotte Harbor Estuary Unit over the next ten years. Although the TTI/E unit largely overlaps the Everglades National Park, due to limitations on habitat-altering activities in the park, we project only one consultation will be required with the Department of Interior (DOI) over the next 10 years as a result of this designation.

As explained above, to be conservative and avoid underestimating impacts of the designation, we assumed that although all future projects will trigger consultation due to both the species and the critical habitat, the consultations will be formal and require a biological opinion based on potential adverse impacts on one or both of the essential features of the critical habitat. Thus, we have estimated the maximum potential incremental administrative costs of each consultation that will result from the designation, as the difference in average costs of an informal and formal consultation. We have estimated the total costs for each unit as a range, reflecting the possible range in complexity and cost of consultations. The maximum potential incremental administrative costs for the Charlotte Harbor Estuary Unit are estimated to range from $1,039,500 to $1,386,000 (depending on complexity) over the 10-year planning period. The maximum potential incremental administrative costs for the TTI/E Unit are estimated to range from $108,000 to $144,000 (depending on complexity) over the 10-year planning period.

We next considered the range of modifications we may recommend to avoid adverse modification from projected future activities in the smalltooth sawfish critical habitat. We assumed in our analysis that the costs of project modifications to avoid destroying or adversely modifying critical habitat would not be costs that are co-extensive with the listing of the species. Although recently completed consultations indicate that project modifications may be required in the future to avoid take of juvenile sawfish using their nursery areas, as discussed above, it is conceivable that critical habitat considerations will be the more important factor shaping the outcome of future consultations and selection of project modifications. Similarly, we assumed that the costs of project modifications required to avoid destruction or adverse modification of critical habitat will not be costs that are co-extensive with another existing regulatory requirement. Though there are numerous existing Federal, State, or local laws and regulations that protect natural resources including the essential features to some degree, none of these laws focuses on avoiding the destruction or adverse modification of these features, which provide sawfish nursery area functions, thus facilitating sawfish recovery. As a result, we believe the designation will provide unique, additional protections to the critical habitat features that would result in project modifications where existing laws would not require such modifications.

We identified eight potential project modifications that we may recommend during section 7 consultation to avoid or reduce impacts to the essential features. To be conservative in estimating impacts, we assumed that project modifications would be recommended to address adverse effects from all projected future agency actions requiring consultation. Although we made the assumption that all potential project modifications would be recommended by NMFS, not all of the modifications identified for a specific category of activity would be necessary for an individual project, but we are not able to identify the exact modification or combinations of modifications that would be required for all future actions. Conversely, more than one project modification may be required for individual future projects where both essential features may be adversely affected by a project, and multiple project modifications are required to avoid such impacts.

Table 1 provides a summary of the estimated costs, where possible, of individual project modifications. The Final 4(b)(2) Report provides a detailed description of each project modification, actions for which it may be recommended, and whether it may be useful in avoiding adverse impacts to one or both of the essential features.

TABLE 1—SUMMARY OF TYPES OF POTENTIAL PROJECT MODIFICATIONS

Project modification	Cost	Unit	Range	Approx. totals
Project Relocation	Undeterminable	N/A	N/A	N/A.
Horizontal Directional Drilling (HDD).	$1.39–2.44 million	per mile	0.2–31.5 Miles	$278,000–$76,900,000.
Restriction of Utility/Road Corridor Widths.	Roadway Retained Sides, 2 Lane = $1,875. Roadway Retained Sides, 4 Lane = $2,150.	Linear Foot	N/A	$1,875–$5,050 per linear foot.

TABLE 1—SUMMARY OF TYPES OF POTENTIAL PROJECT MODIFICATIONS—Continued

Project modification	Cost	Unit	Range	Approx. totals
	Roadway Bridge, 2 Lane = $3,370. Roadway Bridge, 4 Lane = $5,050.			
Alternative Shoreline Stabilization Methods.	Undeterminable	N/A	N/A	N/A.
Limitations on Dock Widths and Sizes.	Undeterminable	Sq. Foot	N/A	N/A.
Limitations/Restrictions on Modifying Freshwater Flow.	Undeterminable	N/A	N/A	N/A.
Sediment and Turbidity Controls	Staked Silt Fence = $2 Floating Turbidity Barrier = $12	Linear Foot	N/A	$2–$12 per linear foot.
Conditions Monitoring	Undeterminable	N/A	N/A	N/A.

Note: Where information was available, the estimated ranges (extents) of the impacts are included.

National Security Impacts

Previous critical habitat designations have recognized that impacts to national security may result if a designation would trigger future ESA section 7 consultations because a proposed military activity ''may affect'' the physical or biological feature(s) essential to the listed species' conservation. Anticipated interference with mission-essential training or testing or unit readiness, either through delays caused by the consultation process or through requirements to modify the action to prevent adverse modification of critical habitat, has been identified as a negative impact of critical habitat designations (see, *e.g.,* Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover, 71 FR 34571, 34583 (June 15, 2006); and Proposed Designation of Critical Habitat for Southern Resident Killer Whales; 69 FR 75608, 75633 (December 17, 2004)).

These past designations have also recognized that national security impacts do not result from a critical habitat designation if future ESA section 7 consultations would be required for a jeopardy analysis even if no critical habitat was designated, in which case the critical habitat designation would not add new burdens beyond those related to the jeopardy consultation.

On April 11, 2008, we sent a letter to DOD requesting information on national security impacts of the proposed designation. We received responses from the Departments of the Army, Navy, and Air Force indicating that they have no facilities or managed areas located within the proposed critical habitat areas. Thus, consultations with respect to activities on DOD facilities or training are unlikely to be triggered as a result of the final critical habitat designation, and no national security impacts are anticipated as a result of this critical habitat rule.

Other Relevant Impacts

Past critical habitat designations have identified three broad categories of other relevant impacts: educational awareness benefits, conservation benefits, both to the species and to society as a result of the avoidance of destruction or adverse modification of critical habitat, and impacts on governmental or private entities that implement existing management plans in the areas covered by the designation. Our Final 4(b)(2) Report discusses these impacts of designating the specific areas as critical habitat for smalltooth sawfish.

As summarized in the Final 4(b)(2) Report, there are potential educational benefits resulting from the designation. Particularly in Florida, the designation may expand the awareness raised by the listing of the smalltooth sawfish. Mangrove shoreline areas are often used for recreational activities such as kayaking, and provide habitat for viewable wildlife. Additionally, Federal and State protected areas, such as Everglades National Park, Rookery Bay National Estuarine Preserve, Cape Romano-Ten Thousand Islands Aquatic Preserve, and Collier-Seminole State Park may benefit from the added awareness of the endangered smalltooth sawfish within their boundaries, and from the protection critical habitat designation affords.

Implementation of ESA Section 7 to avoid destruction or adverse modification of critical habitat is expected to increase the probability of recovery for listed species. In addition to contributing to sawfish recovery, benefits associated with project modifications required through section 7 consultation to minimize or avoid the destruction or adverse modification of the essential features, would include minimizing or avoiding loss of the ecosystem services that these features provide. By definition, the physical and biological features are ''essential to the conservation'' of the smalltooth sawfish; in other words, conservation of the species as defined in the ESA is not possible without the presence and protection of the features. As discussed above, we have determined that the two areas included in the critical habitat designation are juvenile nursery areas. The essential features of these areas, red mangroves with their prop root systems, and adjacent shallow euryhaline habitats, provide protection from predators and abundant and diverse prey resources, and thus provide key nursery area functions for the sawfish.

Because the smalltooth sawfish has limited commercial and recreational value, and because the species' recovery is expected to take decades, we can predict no direct or indirect monetary value that may result from the designation because of its contribution to the recovery of the smalltooth sawfish. However, as discussed in the following paragraphs, other benefits are expected to accrue to society in the course of protecting the essential features of the sawfish's critical habitat from destruction or adverse modification.

Mangrove ecosystems provide a range of important uses and services to society. As these benefits currently exist, we do not interpret them as resulting from the critical habitat designation per se. However, protection of the critical habitat from destruction or adverse modification may at a minimum prevent loss of the benefits provided by these resources, and would contribute to any benefits associated with increased future abundance of the smalltooth sawfish as it recovers. As we discuss in the Final 4(b)(2) Report, we believe that the critical habitat designation will provide unique, additional protections to mangroves in

the areas covered by the designation, relative to existing laws and regulations.

The additional protection of mangroves offered through the critical habitat designation ensures that mangroves in the areas covered by the final designation can continue to function as critical components of the ecosystem. The Final 4(b)(2) Report discusses benefits of mangroves including benefits to biodiversity, benefits to fisheries, benefits to air and water quality protection, shoreline protection, and benefits to recreation and tourism. Most of these benefits are described in non-monetary metrics. Where economic values are presented, we note that they are derived from a variety of sources and studies and are provided for context in support of our conclusion that non-negligible economic benefits are expected to result from the designation, because protection of the critical habitat from destruction or adverse modification is expected at minimum to prevent loss of existing benefits the habitat provides.

While the shallow water euryhaline habitat feature offers important ecosystem services to various juvenile fish, invertebrates, and benthic and epibenthic organisms as described in the Final 4(b)(2) Report, their conservation benefits are interrelated with the benefits offered by conservation of red mangroves. Consequently, the Final 4(b)(2) Report focuses on the benefits of mangroves, and the interrelated benefits of the shallow water euryhaline habitat are not discussed in detail.

Very little impact on entities responsible for natural resource management or conservation plans that benefit listed species, or on the functioning of those plans, is predicted to result from the critical habitat designation in the areas covered by the plans. Though the TTI/E unit largely overlaps with the Everglades National Park, our discussions with park managers identify only one park management project that will require consultation during the next 10 years.

Synthesis of Impacts Within the Specific Areas

For the reasons set forth below, based on our consideration of positive and negative economic, national security and other relevant impacts predicted to result from the designation, we do not exercise our discretion to exclude all or any part of either the Charlotte Harbor Estuary Unit or the Ten Thousand Islands/Everglades Unit from the designation. No impacts on national security are projected to result from the designation. Very little negative impact on existing resource management activities is projected to result from the designation. Negative economic impacts resulting from section 7 consultation requirements are projected to be limited. A total of 85 Federal actions over the next ten years are projected to require section 7 consultation to address predicted adverse effects to one or both of the physical or biological features of designated critical habitat. Seventy-seven of these actions are projected for the Charlotte Harbor Estuary Unit, or approximately eight per year on average. Only eight future consultations are projected to be required in the TTI/E Unit over the next ten years due to impacts on the critical habitat features, or approximately one per year on average. All of these projects would have required consultation due to the listing of the sawfish, even in the absence of the designation. We have projected that incremental section 7 costs will be associated with the designation, in the form of increased administrative costs of more complex, formal consultations, and in project modification costs. Estimated costs for these project modifications are provided in the Final 4(b)(2) Report, though we could not predict the total cost of modifications resulting from the designation given the lack of information on project design and locations. However, we may have overestimated impacts in our assumption that all modification costs will be necessary and will be incremental impacts of the designation rather than baseline impacts of existing State, local or other Federal laws or regulations that protect natural resources or co-extensive impacts of the listing of the sawfish. We do not project that any required project modifications will have secondary impacts on local or regional economies. The majority of project modifications are projected to be recommended to avoid adverse effects to the red mangroves in the critical habitat areas. We expect that the designation will provide unique, additional protections to mangroves because existing laws and regulations in these areas do not avoid the destruction or adverse modification of mangroves for the purpose of facilitating recovery of the sawfish. The final designation is expected to, at minimum, prevent the loss of societal benefits that mangroves and shallow euryhaline habitats currently provide in the two specific areas included in the proposal.

Critical Habitat Designation

We are designating approximately 840,472 acres in two units of critical habitat occupied by the U.S. DPS of smalltooth sawfish at the time of its listing. The two units determined for critical habitat designations are: the Charlotte Harbor Estuary Unit, which comprises approximately 221,459 acres of habitat; and the Ten Thousand Islands/Everglades Unit (TTI/E), which comprises approximately 619,013 acres of habitat. The two units are located along the southwestern coast of Florida between Charlotte Harbor and Florida Bay.

These specific areas contain the following physical and biological features that are essential to the conservation of this species and that may require special management considerations or protection: red mangroves and shallow euryhaline habitats characterized by water depths between the MHW line and 3 ft (0.9 m) measured at Mean Lower Low Water (MLLW). No unoccupied areas are included in the final designation of critical habitat.

Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Pub. L. 106–554), is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005.

To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the scientific information included in the proposed critical habitat designation, including the Draft 4(b)(2) Report and incorporated the peer review comments prior to dissemination of the proposed rulemaking. The peer review comments and our responses are summarized above.

Classification

The State of Florida determined this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida. This determination is required under section 307 of the Coastal Zone Management Act.

This final rule has been determined to be significant under Executive Order (E.O.) 12866. We have integrated the regulatory principles of the E.O. into the development of this rule to the extent consistent with the mandatory duty to

designate critical habitat, as defined in the ESA.

We prepared a final regulatory flexibility analysis (FRFA) pursuant to section 603 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), which describes the economic impact this rule may have on small entities.

This rule may affect small businesses, small nonprofit organizations, and small governmental jurisdictions that engage in activities that would affect the essential features identified in this designation, if they receive funding or authorization for such activity from a Federal agency. Such activities would trigger ESA section 7 consultation requirements, and potential modifications to proposed activities may be required to avoid destroying or adversely modifying the critical habitat. The consultation record from which we have projected likely actions occurring over the next ten years indicates that applicants for Federal permits or funds may include small entities. For example, marine contractors may require ACOE permits for dock construction; some of these contractors may be small entities. According to the Small Business Administration, businesses in the Heavy and Civil Engineering Construction subsector (NAICS Code 237990), which includes firms involved in marine construction projects such as breakwater, dock, pier, jetty, seawall and harbor construction, must have average annual receipts of no more than $31 million to qualify as a small business (dredging contractors that perform at least 40% of the volume dredged with their own equipment, or equipment owned by another small concern are considered small businesses if their average annual receipts are less than or equal to $18.5 million). Our consultation database does not track the identity of past permit recipients or whether the recipients were small entities, so we have no basis to determine the percentage of grantees or permittees that may be small businesses in the future.

Small businesses in the tourist and commercial fishing industries may benefit from the rule because avoiding the destruction or adverse modification of the critical habitat features, particularly mangroves, is expected to at minimum prevent loss of current direct and indirect use of, and values derived from, these habitats within the areas included in the designation.

A review of historical ESA section 7 consultations involving projects in the areas designated are described in Section 3.2.2 of the Final 4(b)(2) Report prepared for this rulemaking. We projected that, on average, about eight Federal projects with non-Federal grantees or permittees will be affected by implementation of the critical habitat designation, annually, across both areas included in the critical habitat designation. Some of these grantees or permittees could be small entities, or could hire small entities to assist in project implementation. Historically, these projects have involved dock/pier construction and repair, water control structure installation or repair, bridge repair and construction, dredging, cable installation, and shoreline stabilization. Potential project modifications we have identified that may be required to prevent these types of projects from adversely modifying critical habitat include: project relocation; environmental conditions monitoring; horizontal directional drilling; road/utility corridor restrictions; alternative shoreline stabilization methods; dock size and width limits; restrictions on structures that modify freshwater flows; and sediment and turbidity control measures. See Table 15 of the Final 4(b)(2) Report.

Even though we cannot determine relative numbers of small and large entities that may be affected by this rule, there is no indication that affected project applicants would be limited to, nor disproportionately comprised of, small entities.

It is unclear whether small entities would be placed at a competitive disadvantage compared to large entities. However, as described in the Final 4(b)(2) Report, consultations and project modifications will be required based on the type of permitted action and its associated impacts on the essential critical habitat feature. Because the costs of many potential project modifications that may be required to avoid adverse modification of critical habitat are unit costs such that total project modification costs would be proportional to the size of the project, it is not unreasonable to assume that larger entities would be involved in implementing the larger projects with proportionally larger project modification costs.

It is also unclear whether the rule will significantly reduce profits or revenue for small businesses. As discussed throughout the Final 4(b)(2) Report, we made assumptions that all future consultations will be formal, that all will require project modifications, and that all costs of project modifications will be incremental impacts of the designation and not a requirement of other existing regulatory requirements including ESA requirements for protection of the sawfish itself. These assumptions likely overestimate the impacts of the designation. In addition, as stated above, though it is not possible to determine the exact cost of any given project modification resulting from consultation, the smaller projects most likely to be undertaken by small entities would likely result in relatively small modification costs.

There are no record-keeping requirements associated with the rule. Similarly, there are no reporting requirements other than those that might be associated with reporting on the progress and success of implementing project modifications. However, third party applicants or permittees would be expected to incur incremental costs associated with participating in the administrative process of consultation along with the permitting Federal agency, beyond the baseline administrative costs that would be required for consultations based on the sawfish itself. Estimates of the cost to third parties from consultations were developed from the estimated Section 7 costs identified in the *Economic Analysis of Critical Habitat Designation for the Gulf Sturgeon* (IEc 2003) inflated to 2009 (March) dollars. The maximum potential incremental third party cost for each consultation would be the difference between the cost of an informal consultation required solely for the presence of the sawfish and a formal consultation required to avoid destroying or adversely modifying the critical habitat ($2,000 difference per low complexity consultation and $1,600 difference per high complexity consultation). The total impact on third party costs would be the incremental cost of the formal consultation multiplied by the increased number of formal consultations. The maximum incremental third party costs for both Units are estimated to range from $136,200 to $170,000 (depending on complexity) over the 10-year planning period.

No Federal laws or regulations duplicate or conflict with the final rule. Existing Federal laws and regulations overlap with the final rule only to the extent that they provide protection to natural resources including mangroves generally. However, no existing laws or regulations specifically prohibit destruction or adverse modification of critical habitat for, and focus on the recovery of, the smalltooth sawfish.

The alternatives to the designation considered consisted of three alternatives: no-action, our preferred alternative, and an alternative with varying numbers of units. NMFS would not designate critical habitat for the smalltooth sawfish under the no action (status quo) alternative. Under this

alternative, conservation and recovery of the listed species would depend exclusively upon the protection provided under the ''jeopardy'' provisions of Section 7 of the ESA and implementation of the recovery plan. Under the status quo, there would be no increase in the number of ESA consultations or project modifications in the future that would not otherwise be required due to the listing of the smalltooth sawfish. However, the physical and biological features forming the basis for our final critical habitat designation are essential to sawfish conservation, and conservation for this species will not succeed without the availability of these features. Thus, the lack of protection of the critical habitat features from adverse modification could result in continued declines in abundance of smalltooth sawfish, and loss of associated values sawfish provide to society. Further, this alternative is not consistent with the requirement of the ESA to designate critical habitat to the maximum extent prudent and determinable.

Under the preferred alternative two specific areas that provide nursery functions for juvenile sawfish are included in the final critical habitat designation. These areas are located along peninsular Florida, encompassing portions of Charlotte, Lee, Collier, Monroe, and Miami-Dade counties. These two areas contain the physical and biological features essential to the conservation of the U.S. DPS of smalltooth sawfish. The essential features are red mangroves and shallow euryhaline habitats characterized by water depths between the MHW line and 3 ft (0.9 m) measured at MLLW that provide nursery area functions to smalltooth sawfish. The preferred alternative was selected because it best implements the critical habitat provisions of the ESA, by defining the specific features that are essential to the conservation of the species, and due to the important conservation benefits expected to result from this alternative relative to the no action alternative.

Under the varying number of units alternative, we considered both combining the Charlotte Harbor Estuary Unit and the TTI/E Unit into a single unit for designation, and alternatively we considered splitting both units into multiple smaller units.

Under the first scenario, the unit would include the Naples beach area between the two units, and thus would encompass a larger total area than the two units. Though juveniles have been encountered in the Naples beach area, they have not been encountered in high densities. We also do not believe that juveniles move between the Charlotte Harbor Estuary and TTI/E Units along this stretch of beach. Furthermore, while red mangroves exist along this area (though they are much more sparsely distributed than in the two units), the salinity regimes are much more purely marine than estuarine, and the features are not considered to provide the nursery functions essential to the conservation of the species in these areas. Thus, we rejected this alternative in our final critical habitat designation because the Naples Beach area is not considered to meet the definition of a nursery area.

Under the second scenario, we considered options to split both the Charlotte Harbor Estuary Unit and the TTI/E Unit into multiple smaller units. We considered designating Charlotte Harbor and the Caloosahatchee Rivers as separate units, including limiting the sizes of each of these areas strictly to locations of past high density encounters of juveniles. We considered the same type of partitioning of the TTI/E Unit into smaller isolated units based on past high density encounters alone. We rejected the alternative of separating Charlotte Harbor and the Caloosahatchee River because State and local water resource managers consider the systems as a single integrated aquatic system. For both units, we rejected the alternative of multiple smaller units drawn around past high density juvenile encounters because we believe it would have omitted habitat that is almost certain nursery habitat for the sawfish between the separated small units. In addition, the essential features are continuously distributed from the harbor into the river, so this option would have omitted areas that meet the definition of critical habitat. Moreover, a designation limited to past encounters would not take into account the limits of this type of data in defining the extent of habitat use by the sawfish, and it would not provide protection for expanded nursery habitat needed for a recovering population. In addition, it was not clear that designating multiple smaller units would result in lower economic impacts of the designation, as the precise location of future consultations within these areas cannot be predicted based on available information.

An environmental analysis as provided for under National Environmental Policy Act for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Pursuant to the Executive Order on Federalism, E.O. 13132, the Assistant Secretary for Legislative and Governmental Affairs provided notice of this action and requested comments from the appropriate official(s) of the State of Florida. As mentioned above, Florida found the regulation consistent with its approved coastal management programs.

This action has undergone a pre-dissemination review and determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (Section 515 of Pub. L. 106–554).

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

References Cited

A complete list of all references cited in this rulemaking can be found on our Web site at *http://sero.nmfs.noaa.gov/pr/SmalltoothSawfish.htm* and is available upon request from the NMFS Southeast Regional Office in St. Petersburg, Florida (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: August 27, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 226 as set forth below:

PART 226—DESIGNATED CRITICAL HABITAT

1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. Add § 226.218, to read as follows:

§ 226.218 Critical habitat for the U.S. DPS of smalltooth sawfish (Pristis pectinata). Critical habitat is designated for the U.S. DPS of smalltooth sawfish as described in this section. The textual descriptions in paragraph (b) of this section are the definitive source for determining the critical habitat boundaries. The maps of the critical habitat units provided in paragraph (d) of this section are for illustrative purposes only.

(a) *Physical and biological features essential to the conservation of the endangered U.S. DPS of smalltooth sawfish.* The physical and biological features essential to the conservation of the U.S. DPS of smalltooth sawfish, which provide nursery area functions are: red mangroves and shallow euryhaline habitats characterized by water depths between the Mean High Water line and 3 ft (0.9 m) measured at

Mean Lower Low Water (MLLW). These features are included in critical habitat within the boundaries of the specific areas in paragraph (b) of this section, except where the features were not physically accessible to sawfish at the time of this designation (September 2009); for example, areas where existing water control structures prevent sawfish passage to habitats beyond the structure.

(b) *Critical habitat boundaries.* Critical habitat includes two areas (units) located along the southwest coast of peninsular Florida. The northern unit is the Charlotte Harbor Estuary Unit and the southern unit is the Ten Thousand Islands/Everglades (TTI/E) Unit. The units encompass portions of Charlotte, Lee, Collier, Monroe, and Miami-Dade Counties.

(1) *Charlotte Harbor Estuary Unit.* The Charlotte Harbor Estuary Unit is located within Charlotte and Lee Counties. The unit includes Charlotte Harbor, Gasparilla Sound, Pine Island Sound, Matlacha Pass, San Carlos Bay, Estero Bay, and the Caloosahatchee River. The unit is defined by the following boundaries. It is bounded by the Peace River at the eastern extent at the mouth of Shell Creek at 81°59.467′ W, and the northern extent of the Charlotte Harbor Preserve State Park at 26°58.933′ N. At the Myakka River the unit is bounded by the SR–776 Bridge and in Gasparilla Sound by the SR–771 Bridge. The COLREGS–72 lines between Gasparilla Island, Lacosta Island, North Captiva Island, Captiva Island, Sanibel Island, and the northern point of Estero Island are used as the coastal boundary for the unit. The southern extent of the unit is the Estero Bay Aquatic Preserve, which is bounded on the south by the Lee/Collier County line. Inland waters are bounded by SR–867 (McGregor Boulevard) from Punta Rassa Road to SR–80 near Fort Myers, then by SR–80 (Palm Beach Boulevard) to Orange River Boulevard, then by Orange River Boulevard to Buckingham Road, then by Buckingham Road to SR–80, and then following SR–80 until it is due south of the Franklin Lock and Dam (S–79), which is the eastern boundary on the Caloosahatchee River and a structural barrier for sawfish access. Additional inland water boundaries north and west of the lock are bounded by North Franklin Lock Road to North River Road, then by North River Road to SR–31, then by SR–31 to SR–78 near Cape Coral, then by SR–78 to SR–765, then by SR–765 to US–41, then by US–41 to US–17 (Marion Avenue) in Punta Gorda, then by US–17 to Riverside Drive, and then by Riverside Drive to the eastern extent of the Peace River at 81°59.467′ W. From the northern extent of the Charlotte Harbor Preserve State Park at 26°58.933′ N, inland waters are bounded westward along that latitude to Harbor View Road, then by Harbor View Road to US–41, then by US–41 to SR–776, then by SR–776 to the Myakka River Bridge.

(2) *Ten Thousand Islands/Everglades Unit (TTI/E).* The TTI/E Unit is located within Collier, Monroe, and Miami-Dade Counties, Florida. The unit includes waters within Everglades National Park (ENP), including Florida Bay, in the vicinity of Everglades City, within the Cape Romano-Ten Thousand Islands Aquatic Preserve (AP), and within the portion of Rookery Bay AP south of SR–92. The boundaries match the portion of Rookery Bay AP south of SR–92, and the Cape Romano-Ten Thousand Islands Aquatic Preserve AP. The unit boundaries also closely match the ENP boundaries with the following two exceptions: the unit boundary connects points 55 and 57 as illustrated in the critical habitat map that follows, which extend beyond the ENP boundary; and the unit boundary is located inside the ENP boundary between points 77 and 2, omitting the northeast portion of the ENP. The boundary of the unit is comprised of the following connected points, listed by point number in the ID field, degrees North latitude, degrees West longitude, and brief description of the boundary.

TABLE 2—LIST OF LATITUDE AND LONGITUDE BOUNDARY POINTS

ID	Latitude	Longitude	Description
1	25.2527	−80.7988	Main Park Road (SR–9336) at Nine Mile Pond.
2	25.2874	−80.5736	Everglades National Park boundary.
3	25.2872	−80.4448	Everglades National Park boundary at US–HWY 1.
4	25.2237	−80.4308	Everglades National Park boundary at US–HWY 1.
5	25.1979	−80.4173	Everglades National Park boundary at US–HWY 1.
6	25.1846	−80.3887	Everglades National Park boundary at US–HWY 1.
7	25.1797	−80.3905	Everglades National Park boundary at US–HWY 1.
8	25.1480	−80.4179	Everglades National Park boundary at Intercoastal Waterway (ICW).
9	25.1432	−80.4249	Everglades National Park boundary at ICW.
10	25.1352	−80.4253	Everglades National Park boundary at ICW.
11	25.1309	−80.4226	Everglades National Park boundary at ICW.
12	25.1282	−80.4230	Everglades National Park boundary at ICW.
13	25.1265	−80.4268	Everglades National Park boundary at ICW.
14	25.1282	−80.4432	Everglades National Park boundary at ICW.
15	25.0813	−80.4747	Everglades National Park boundary at ICW.
16	25.0676	−80.4998	Everglades National Park boundary at ICW.
17	25.0582	−80.5218	Everglades National Park boundary at ICW.
18	25.0373	−80.5178	Everglades National Park boundary at ICW.
19	25.0326	−80.5188	Everglades National Park boundary at ICW.
20	25.0168	−80.5487	Everglades National Park boundary at ICW.
21	25.0075	−80.5578	Everglades National Park boundary at ICW.
22	24.9990	−80.5609	Everglades National Park boundary at ICW near Plantation.
23	24.9962	−80.5648	Everglades National Park boundary at ICW.
24	24.9655	−80.6347	Everglades National Park boundary at ICW.
25	24.9430	−80.6585	Everglades National Park boundary at ICW.
26	24.9388	−80.6716	Everglades National Park boundary at ICW.
27	24.9124	−80.7255	Everglades National Park boundary at ICW.
28	24.9006	−80.7348	Everglades National Park boundary at ICW.
29	24.8515	−80.8326	Everglades National Park boundary at COLREG–72.
30	24.8730	−80.8875	Everglades National Park boundary at Arsenic Bank Light.
31	24.9142	−80.9372	Everglades National Park boundary at Sprigger Bank Light.
32	25.0004	−81.0221	Everglades National Park boundary.

TABLE 2—LIST OF LATITUDE AND LONGITUDE BOUNDARY POINTS—Continued

ID	Latitude	Longitude	Description
33	25.0723	−81.0859	Everglades National Park boundary.
34	25.0868	−81.0858	Everglades National Park boundary.
35	25.1567	−81.1620	Everglades National Park boundary at Middle Cape Sable.
36	25.2262	−81.2044	Everglades National Park boundary.
37	25.3304	−81.1776	Everglades National Park boundary at Little Shark River.
38	25.4379	−81.1940	Everglades National Park boundary.
39	25.5682	−81.2581	Everglades National Park boundary.
40	25.7154	−81.3923	Everglades National Park boundary at Pavillion Key.
41	25.8181	−81.5205	Everglades National Park boundary.
42	25.8326	−81.5205	Everglades National Park boundary at Cape Romano—Ten Thousand Islands Aquatic Preserve.
43	25.8315	−81.7450	Rookery Bay Aquatic Preserve boundary (southwest corner).
44	25.9003	−81.7468	Rookery Bay Aquatic Preserve boundary.
45	25.9030	−81.6907	Rookery Bay Aquatic Preserve boundary.
46	25.9380	−81.6907	Rookery Bay Aquatic Preserve boundary at SR–92.
47	25.9378	−81.6834	Rookery Bay Aquatic Preserve boundary at SR–92.
48	25.9319	−81.6718	Rookery Bay Aquatic Preserve boundary at SR–92.
49	25.9330	−81.6508	Rookery Bay Aquatic Preserve boundary at SR–92.
50	25.9351	−81.6483	Rookery Bay Aquatic Preserve boundary at SR–92.
51	25.9464	−81.6433	Rookery Bay Aquatic Preserve boundary at SR–92.
52	25.9470	−81.6200	Cape Romano—Ten Thousand Islands Aquatic Preserve boundary.
53	25.9615	−81.6206	Cape Romano—Ten Thousand Islands Aquatic Preserve boundary.
54	25.9689	−81.6041	Cape Romano—Ten Thousand Islands Aquatic Preserve boundary.
55	25.9130	−81.4569	Cape Romano—Ten Thousand Islands Aquatic Preserve boundary.
56	25.8916	−81.4082	Everglades National Park boundary west of Everglades City.
57	25.8630	−81.3590	Everglades National Park boundary east of Everglades City.
58	25.8619	−81.2624	Everglades National Park boundary.
59	25.8040	−81.2602	Everglades National Park boundary.
60	25.8040	−81.2126	Everglades National Park boundary.
61	25.7892	−81.2128	Everglades National Park boundary.
62	25.7892	−81.1969	Everglades National Park boundary.
63	25.7743	−81.1966	Everglades National Park boundary.
64	25.7740	−81.1803	Everglades National Park boundary.
65	25.7591	−81.1803	Everglades National Park boundary.
66	25.7592	−81.1641	Everglades National Park boundary.
67	25.7295	−81.1638	Everglades National Park boundary.
68	25.7299	−81.1165	Everglades National Park boundary.
69	25.7153	−81.1164	Everglades National Park boundary.
70	25.7154	−81.1002	Everglades National Park boundary.
71	25.6859	−81.0997	Everglades National Park boundary.
72	25.6862	−81.0836	Everglades National Park boundary.
73	25.6715	−81.0835	Everglades National Park boundary.
74	25.6718	−81.0671	Everglades National Park boundary.
75	25.6497	−81.0665	Everglades National Park boundary.
76	25.6501	−81.0507	Everglades National Park boundary.
77	25.6128	−81.0497	Everglades National Park boundary.

(c) *Areas not included in critical habitat.* Critical habitat does not include the following particular areas where they overlap with the areas described in paragraph (b) of this section:

(1) Pursuant to ESA section 3(5)(A)(i), all areas containing existing (already constructed) federally authorized or permitted man-made structures such as channels or canals maintained at depths greater than 3 ft. at MLLW, boat ramps, docks, and marinas deeper than 3 ft. at MLLW.

(2) Pursuant to ESA section 3(5)(A)(i), all waters identified as existing (already constructed) federally authorized channels as follows:

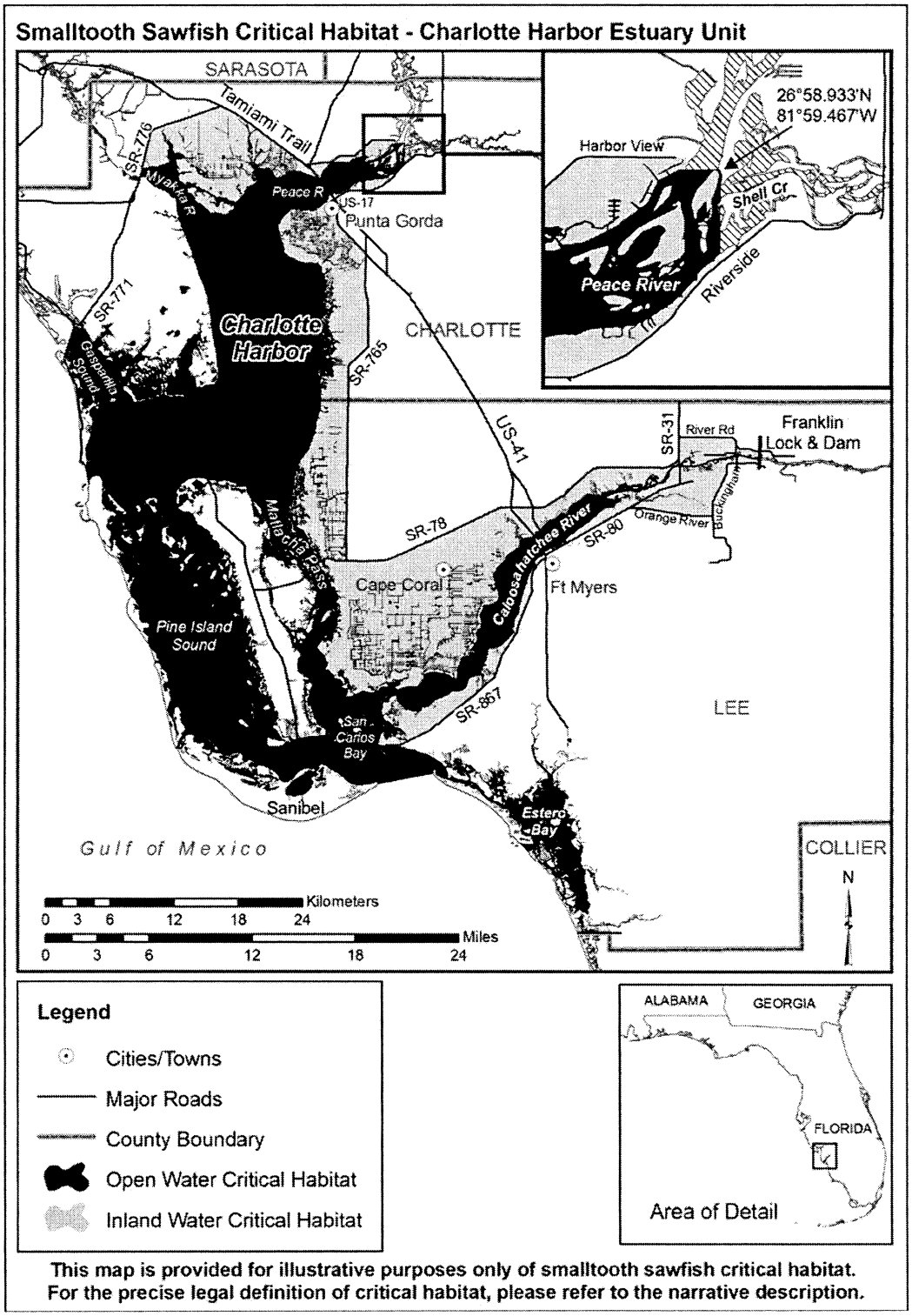
(i) Charlotte Harbor.

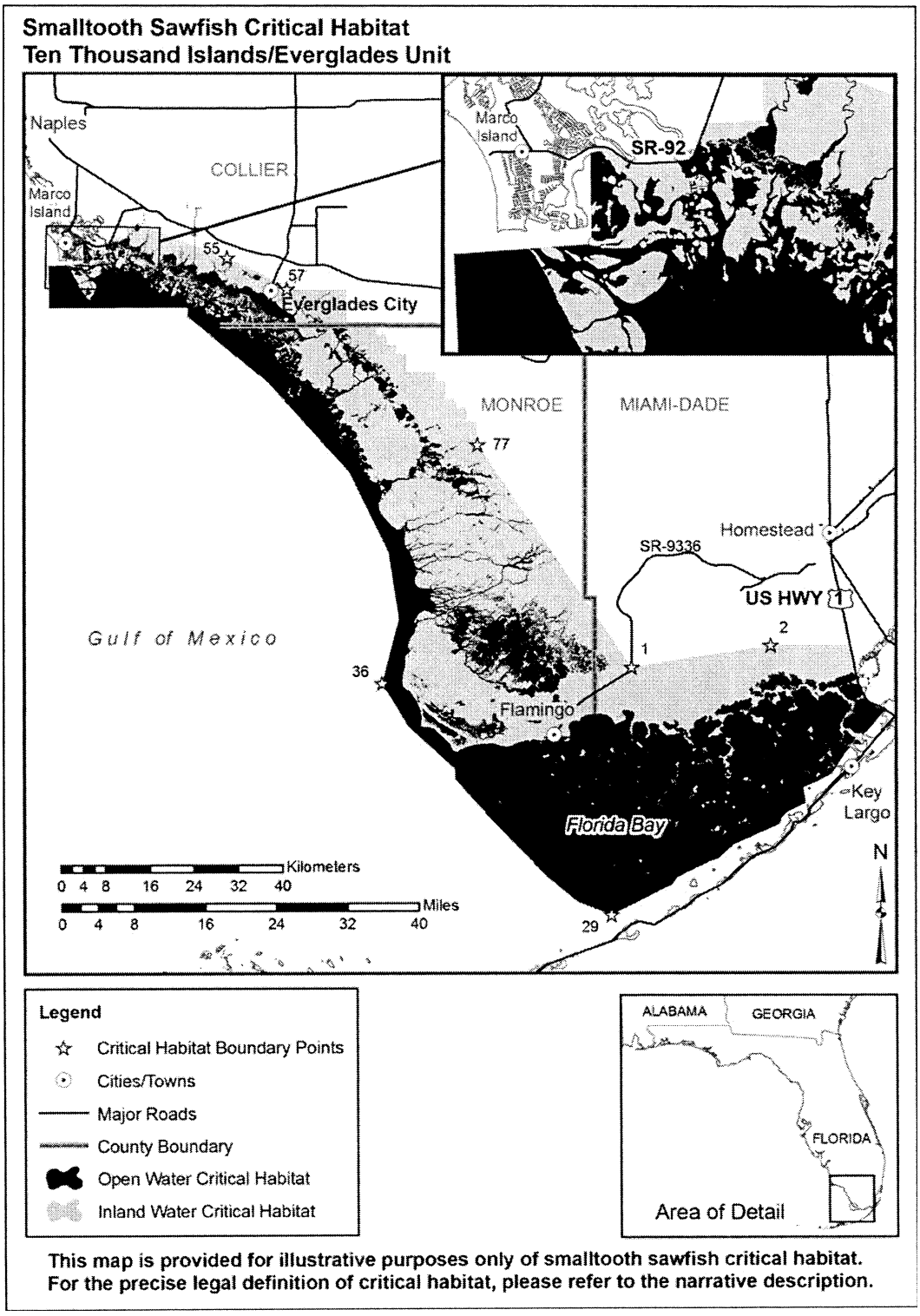
(ii) Ft. Myers Beach (Matanzas Pass).

(iii) Portions of the Gulf Intracoastal Waterway in the Caloosahatchee River.

(d) *Maps.* Overview maps of designated critical habitat for the U.S. DPS of smalltooth sawfish follow.

BILLING CODE 3510–22–P


Smalltooth Sawfish Critical Habitat - Charlotte Harbor Estuary Unit
SARASOTA
Tamiami Trail
SR-776
Myakka R
Peace R
US-17
Punta Gorda
26°58.933'N
81°59.467'W
Harbor View
Shell Cr
Peace River
Riverside
SR-771
Charlotte Harbor
CHARLOTTE
SR-765
Gasparilla Sound
US-41
SR-31
River Rd
Franklin Lock & Dam
Buckingham
Orange River
SR-78
SR-80
Caloosahatchee River
Matlacha Pass
Cape Coral
Ft Myers
Pine Island Sound
San Carlos Bay
SR-867
LEE
Sanibel
Estero Bay
Gulf of Mexico
COLLIER
N
Kilometers
0 3 6 12 18 24
Miles
0 3 6 12 18 24
Legend
Cities/Towns
Major Roads
County Boundary
Open Water Critical Habitat
Inland Water Critical Habitat
ALABAMA
GEORGIA
FLORIDA
Area of Detail
This map is provided for illustrative purposes only of smalltooth sawfish critical habitat.
For the precise legal definition of critical habitat, please refer to the narrative description.


Smalltooth Sawfish Critical Habitat
Ten Thousand Islands/Everglades Unit
Naples
COLLIER
Marco Island
55
57
Everglades City
Marco Island
SR-92
MONROE
MIAMI-DADE
77
Homestead
SR-9336
US HWY 1
2
1
36
Flamingo
Gulf of Mexico
Florida Bay
Key Largo
29
N
Kilometers
0 4 8 16 24 32 40
Miles
0 4 8 16 24 32 40
Legend
Critical Habitat Boundary Points
Cities/Towns
Major Roads
County Boundary
Open Water Critical Habitat
Inland Water Critical Habitat
ALABAMA
GEORGIA
FLORIDA
Area of Detail
This map is provided for illustrative purposes only of smalltooth sawfish critical habitat.
For the precise legal definition of critical habitat, please refer to the narrative description.

[FR Doc. E9–21186 Filed 9–1–09; 8:45 am]
BILLING CODE 3510–22–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910091344–9056–02]

RIN 0648–XR33

Fisheries of the Economic Exclusive Zone Off Alaska; Shallow-Water Species Fishery by Vessels Using Trawl Gear in the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for species that comprise the shallow-water species fishery by vessels using trawl gear in the Gulf of Alaska (GOA). This action is necessary because the fourth seasonal apportionment of the 2009 Pacific halibut bycatch allowance specified for the shallow-water species fishery in the GOA has been reached.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), September 2, 2009, through 1200 hrs, A.l.t., October 1, 2009.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The fourth seasonal apportionment of the 2009 Pacific halibut bycatch allowance specified for the shallow-water species fishery in the GOA is 150 metric tons as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009), for the period 1200 hrs, A.l.t., September 1, 2009, through 1200 hrs, A.l.t., October 1, 2009.

In accordance with § 679.21(d)(7)(i), the Administrator, Alaska Region, NMFS, has determined that the fourth seasonal apportionment of the 2009 Pacific halibut bycatch allowance specified for the trawl shallow-water species fishery in the GOA has been reached. Consequently, NMFS is prohibiting directed fishing for the shallow-water species fishery by vessels using trawl gear in the GOA. The species and species groups that comprise the shallow-water species fishery are pollock, Pacific cod, shallow-water flatfish, flathead sole, Atka mackerel, skates and ''other species.'' This inseason action does not apply to fishing for pollock by vessels using pelagic trawl gear in those portions of the GOA open to directed fishing for pollock. This inseason action does not apply to vessels fishing under a cooperative quota permit in the cooperative fishery in the Rockfish Pilot Program for the Central GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of the shallow-water species fishery by vessels using trawl gear in the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of August 26, 2009.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.21 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 27, 2009.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–21172 Filed 8–28–09; 4:15 pm]
BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0910091344–9056–02]

RIN 0648–XR37

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Subject to Amendment 80 Sideboard Limits in the Western Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2009 Pacific cod sideboard limit established for Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 28, 2009, until 2400 hrs, A.l.t., December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 679.

The 2009 Pacific cod sideboard limit established for Amendment 80 vessels subject to sideboard limits in the Western Regulatory Area of the GOA is two percent of the total allowable catch (TAC) according to § 679.20 table 37 (*http://www.alaskafisheries.noaa.gov/rr/tables/tabl37.pdf*). Two percent of the TAC for Pacific cod in the Western Regulatory Area of the GOA is 324 metric tons (mt), as established by the final 2009 and 2010 harvest specifications for groundfish of the GOA (74 FR 7333, February 17, 2009) and