

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AV79

**Endangered and Threatened Wildlife and Plants; Critical Habitat Revised Designation for the Cape Sable Seaside Sparrow****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are revising the designation of critical habitat for the endangered Cape Sable seaside sparrow (*Ammodramus maritimus mirabilis*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 84,865 acres (ac) (34,344 hectares (ha)) fall within the boundaries of the designation. The critical habitat is located in Miami-Dade County, Florida.

**DATES:** This rule becomes effective on December 6, 2007.

**FOR FURTHER INFORMATION CONTACT:**

Tylan Dean, South Florida Ecological Services Office (see **ADDRESSES**); telephone 772-562-3909; facsimile 772-562-4288. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339, 7 days a week and 24 hours a day.

**SUPPLEMENTARY INFORMATION:****Background**

It is our intent to discuss only topics directly relevant to the revised designation of critical habitat in this rule. For more information on the Cape Sable seaside sparrow, please refer to the South Florida Multi-species Recovery Plan, available at the South Florida Ecological Services Web site <http://www.fws.gov/verobeach>, and the proposed rule to designate critical habitat published in the **Federal Register** on October 31, 2006 (71 FR 63980).

**Previous Federal Actions**

On December 20, 2000, Biodiversity Legal Foundation filed a lawsuit in the U.S. District Court for the District of Columbia alleging that the Service had not complied with the Act by failing to issue a 12-month finding as to how it planned to proceed with the petitioned revision to critical habitat and that the revision was withheld or unreasonably delayed under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*). The Court ruled that the Service complied

with the Act by issuing the finding and was exercising reasonable discretion in postponing developing a proposed rule to revise critical habitat (*Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d (D.D.C. 2003)), but ordered the Service to specify a date on which we would begin work on a rule to revise critical habitat for the Cape Sable seaside sparrow and estimate how long the process would take. The Service provided a proposed schedule for revision of critical habitat to the Court, and on December 31, 2003, the Court embodied the Service's proposed timeframe in a Court Order, directing the Service to complete the critical habitat rule no later than October 24, 2007. For more information on previous Federal actions concerning the Cape Sable seaside sparrow, refer to the proposed critical habitat designation published in the **Federal Register** on October 31, 2006 (71 FR 63980), and in our notice of availability of the draft economic analysis of the proposed revised critical habitat published on August 17, 2007 (72 FR 46189).

**Summary of Comments and Recommendations**

We requested written comments from the public on the proposed designation of critical habitat for the sparrow in the proposed rule published (71 FR 63980), and again in the notice of availability (72 FR 46189). On both occasions, we contacted appropriate Federal, State, and local agencies; Tribal interests; species' experts; and other interested parties and invited them to comment on the proposed rule. One public hearing was held on August 29, 2007, in Homestead, Florida during the second comment period.

During the first comment period that opened on October 31, 2006, and closed on January 2, 2007, we received comments from 16 entities that directly addressed the proposed critical habitat designation: 5 from peer reviewers, 1 from a Tribe, 2 from State and local governmental agencies, and 8 from organizations or individuals. We received 3 requests for a public hearing, all from entities in the Miami-Dade County, Florida, area. During the second comment period that opened on August 17, 2007, and closed on September 17, 2007, including the public hearing, we received comments from 28 entities that directly addressed the proposed critical habitat designation and/or the draft economic analysis: 1 from a peer reviewer, 2 from Federal agencies, 2 from a Tribe, 4 from State and local governmental agencies, and 19 from organizations or individuals. Nine commenters supported the designation

of critical habitat for the sparrow and 20 opposed the designation. Fifteen commenters provided suggestions or information, but did not indicate support or opposition to the critical habitat designation. Comments received were grouped into 70 issues specifically relating to the proposed critical habitat designation for the sparrow, and are addressed in the following summary and incorporated into the final rule as appropriate.

**Peer Review**

In accordance with our policy published on July 1, 1994 (59 FR 34270), we made formal requests for peer reviewers from the Florida Fish and Wildlife Conservation Commission (FWC), the South Florida Water Management District (SFWMD), and the Miccosukee Tribe of Indians of Florida. As a result, we solicited expert opinions from nine knowledgeable individuals with scientific expertise that included sparrow biology, conservation biology, endangered species issues, hydrology, and/or Everglades restoration. We received responses from five of these experts. Four of the peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. One of the peer reviewers was not in agreement with our methods or conclusions. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the sparrow, and addressed them in the following summary.

**Peer Reviewer Comments**

(1) *Comment:* Critical habitat should include all locations occupied during point count surveys, because specific locations may be contiguous with the larger meta population and subsequently essential to the conservation of the sparrow. Connectivity between occupied locations is extremely important.

*Our Response:* Critical habitat designation does not include all areas that may be used by sparrows or all areas that are important to sparrows. The units proposed for designation focused on areas that contain physical and biological features in the spatial arrangement and quantity that are essential to the conservation of the sparrow that require special management consideration or protection. Additionally, areas not

known to be occupied by sparrows that may serve to maintain connectivity among disjunct units are not readily identifiable, and we do not currently possess information about the habitat characteristics necessary to support movement by sparrows. Consequently, we cannot make the determination required by the Act to designate unoccupied habitat, that the area is essential to the conservation of the species. Therefore, such areas are not designated as critical habitat. See "Critical Habitat" section below for additional information on the methods and criteria for designating critical habitat and the regulatory protections for areas designated as critical habitat, as well as areas outside of the designation that may be important to the species.

(2) *Comment:* Specific information on what constitutes a typical sparrow territory within the marl prairie habitat type and a broad mention (based on Werner (1975) and Pimm *et al.* 2002) of the special foraging microhabitat patch-type used by Cape Sable seaside sparrows should be included along with comments on nest sites.

*Our Response:* We agree that specific information on what constitutes a "typical" territory, or information on detailed microhabitat characteristics of foraging or nesting sites, is not discussed in detail. While these characteristics may be important to sparrows, we do not think the information presented in the publications referenced has been sufficiently confirmed across the full breadth of area, habitats, and conditions occupied by sparrows to allow us to characterize these features adequately. We instead chose to describe the habitat on a broader, more general level while discussing the functions the habitat must provide (e.g., structural support for nests, cover and refugia from predators, foraging substrate under a variety of hydrologic conditions).

(3) *Comment:* Designating Unit 1 as critical habitat is crucial and well-justified to protect what historically was a major subpopulation (A) of the Cape Sable seaside sparrow, the restoration of which recent analyses suggest is essential to recovery.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have found that the benefits of excluding proposed Unit 1 outweigh the benefits of inclusion and that such exclusion will not result in the extinction of the species. Therefore, we have excluded Unit 1 from critical habitat. See "Application of section 4(b)(2) of the Act" below for further explanation.

(4) *Comment:* Unit 2 should be included in the designation as it provides the only area of what historic evidence suggests was an important habitat type for the Cape Sable seaside sparrow.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have found that the benefits of excluding Unit 2 outweigh the benefits of inclusion and that such exclusion will not result in the extinction of the species. Therefore, we have excluded Unit 2 from critical habitat. See "Application of section 4(b)(2) of the Act" below for further explanation.

(5) *Comment:* Cordgrass marshes should be designated as critical habitat to protect them for possible future reestablishment of sparrow populations.

*Our Response:* There are two areas within the range of the Cape Sable seaside sparrow (Cape Sable and Ochopee) that contain cordgrass that are no longer occupied by sparrows. The first area is the sparrow habitat in Cape Sable which has been changing significantly from cordgrass marshes to mangroves and mud flats since a 1935 hurricane, and sparrows are considered to have been extirpated from this area since 1981 (Kushlan and Bass 1983, p. 142). The second area is Ochopee, for which Werner (1975, p. 42) reported that habitat occupied by sparrows was changing from cordgrass marshes to other species, and mangroves were encroaching. Sparrows were extirpated from this area by 1981 (Kushlan and Bass 1983, p. 143), and there is little or no remaining suitable habitat in the area.

The Act provides for designating areas that are occupied at the time of listing that contain those physical and biological features essential to the conservation of the species. The Act also provides for designating areas that are unoccupied at the time of listing when such areas are essential for the conservation of a listed species. For the sparrow, an area was considered for designation as critical habitat when it supports some portion of a subpopulation and meets either of the following criteria: (1) Possesses one or more of the primary constituent elements (PCEs) and was occupied at the time of listing by sparrows, or (2) is determined to be currently occupied by the Cape Sable seaside sparrow through annual surveys conducted during the period 1981 to present. Those areas where sparrows were recorded from 1981 to present represent the areas that we have determined were occupied at the time of listing of the species. We considered designating units for the

sparrow where it is entirely extirpated from those units and determined that doing so is not essential for its conservation.

(6) *Comment:* Where are the 100,000 acres that are proposed to be eliminated from critical habitat and what is the justification for their removal?

*Our Response:* The revised critical habitat is not based on the previous designation, and all areas of potential sparrow habitat were considered equally when developing this final designation. The critical habitat boundaries in the 1977 designation were based on section-township-range boundaries, and only delineated relatively large, general areas within which sparrows were known to occur at that time. Consequently, many areas originally designated were never Cape Sable seaside sparrow habitat, such as forested areas of Long Pine Key in Everglades National Park, dwarf cypress forests (also Everglades National Park), deep water slough communities, and agricultural areas. These areas, therefore, are not being proposed for inclusion in the revised critical habitat designation, and we have instead sought to accurately delineate only the specific areas that were important to sparrows in the proposed revision. Differences may be reviewed by comparing the boundaries identified in this rule and in the 1977 (42 FR 47840) rule, and a general discussion of the differences is provided in the section titled "Critical Habitat Designation," below.

(7) *Comment:* Several commentors were either for or against the decision to include National Park Service (NPS) and State lands as critical habitat.

*Our Response:* We are designating critical habitat on NPS and State lands because these areas are within the geographical area occupied at the time of listing that contains the features essential to the conservation of the sparrow and, which may require special management considerations or protections. We excluded in this final decision two proposed units within NPS lands (Everglades National Park (ENP) and Big Cypress National Preserve (BCNP)), but other units within ENP remain in the final designation.

(8) *Comment:* The conclusion that the designation will have no impact on Tribal lands, since none are included as critical habitat, can be questioned, given the inter-connectedness of land units with the Greater Everglades Ecosystem.

*Our Response:* In the final rule, we considered potential direct and indirect impacts to Tribal lands and resources that might result from designation of critical habitat when weighing the benefits of exclusion and inclusion in the "Application of Section 4(b)(2) of

the Act” section below. In addition, potential impacts to Tribal resources were described and considered in the economic analysis associated with the critical habitat designation.

(9) *Comment*: Designation of Units 1 and 2 as critical habitat would sanction artificial drying of areas in ENP and flooding of other areas of the Everglades in perpetuity resulting in destruction of the largest expanse of sawgrass Everglades in existence in direct contravention to the Comprehensive Everglades Restoration Plan (CERP).

*Our Response*: Upon further evaluation of the proposed critical habitat designation, we have found that the benefits of excluding Units 1 and 2 from this final designation outweigh the benefits of inclusion, see “Application of section (4)(b)(2) of the Act” below for further explanation.

(10) *Comment*: The hydrological management PCE (4) is based on a hypothesis that has not been shown to be true.

*Our Response*: The specific PCEs identified for the Cape Sable seaside sparrow, including PCE4, are derived from the biological needs of the sparrows, as described in the Background and Primary Constituent Elements sections of our proposed rule (71 FR 63980). The PCEs are based on the best scientific data available and their scientific foundation is detailed in this rule and the referenced proposed rule. It should be noted that PCE 4 describes the hydrologic conditions that are required to support and maintain the vegetation composition that sparrows require, as well as those conditions that allow for successful nesting. PCE 4 is used as a basis for the evaluation during consultation under section 7 of the Act to determine whether a proposed action may result in destruction or adverse modification of designated critical habitat. It is not intended to be a specific objective.

(11) *Comment*: PCE 4 could force the Army Corps of Engineers (USACE) to manage water levels in subpopulation A at unnaturally low levels forever, to the detriment of other areas in the Everglades ecosystem. The conclusion in the proposed rule that “Water management plans continue to have the potential to result in damage to sparrow habitat in these areas, and special management of hydrologic conditions is necessary” has no apparent factual or scientific basis, and is reached based on faulty and superficial logic, misrepresentation of the facts, and ignoring the blindingly obvious.

*Our Response*: Upon further evaluation of the proposed critical habitat designation, we have excluded

Units 1 and 2 (subpopulation A) from final designation after determining that the benefits of excluding them from the final designation outweigh the benefits of inclusion (see “Application of section (4)(b)(2) of the Act” below). Regarding water management plans and their potential to damage to sparrow habitat, the Service believes this statement is accurate. The hydrologic regime affects sparrows indirectly through its effects on the vegetation community as detailed in this rule. While these effects may be a result of natural rainfall, such effects have also been the result of water management plans.

(12) *Comment*: The proposed rule states that “From 1993 to 1995, the sparrow population in subpopulation A declined precipitously, from an estimated 2,608 individuals in 1992 to 240 individuals in 1995 (Pimm, *et al.* 2002, p. 70).” This is contrary to the available evidence in that the precipitous decline occurred between 1992 and 1993 when subpopulation A went from 2,608 to 432 individuals. This information should be revised to reflect the relative certainty and uncertainties that have contributed to the decline, not speculation.

*Our Response*: Sparrow surveys do indicate that a large decline occurred between the 1992 survey and the 1993 survey. The 1994 survey was incomplete in the area of subpopulation A, and only approximately 25 percent of the area was surveyed. Consequently, the number of sparrows counted in 1994 should not be used to characterize population changes. In addition, the estimates of sparrow numbers resulting from the point counts are recognized as incorporating a significant degree of uncertainty (see Pimm *et al.* 2002, pp. 151–160). As a result of the uncertainty in individual estimates, we chose to refer to sparrow population changes across several years, which we believe are more representative of sparrow population trends.

(13) *Comment*: There is no scientific justification presented that the decline in subpopulation A resulted from the hydrologic flow regime, and, even if there was an abnormal increase in flows, which there was not, it is impossible to imagine an 84 percent drop in the population in one year because of increased flows alone. The decline is much more likely attributable to a sudden event such as a fire or hurricane.

*Our Response*: We recognize that we will not be able to ever conclusively determine the cause for the observed decline of sparrow subpopulation A. However, the specific attribution for the observed decline has been the subject of

several peer-reviewed journal articles as well as independent scientific review. In their 2000 review of sparrow science, Walters *et al.* (2000, p. 1104) indicated that “the panel views as reasonable Nott *et al.*’s (1998) conclusion that the concentrated releases of water from the S-12 structures from 1992 to 1995, above and beyond existing water depth and seasonal rainfall, directly led to the deep-water conditions west of Shark River Slough. These in turn probably caused habitat in the range of Population A to be unsuitable for breeding, and we conclude that this likely played a major role in the apparent decline of Population A.” The panel further writes that “The panel explicitly considered the possibility that Hurricane Andrew \* \* \* caused the decline, especially in Population A. However, we find Curnutt *et al.*’s (1998) arguments that Andrew was not a primary factor in the decline of Population A to be reasonable. Most importantly, Population A continued to decline for years after Andrew, whereas Population B received only slightly less extreme wind conditions than did Population A, but exhibited no decline.” The Service echoes the uncertainty inherent in their assessment, but supports their conclusions. We are not aware of additional information presented since 2000 that refutes their conclusions.

(14) *Comment*: Comprehensive Everglades Restoration Plan is not considered in the proposed rule nor is it disclosed that the PCEs require unnatural conditions.

*Our Response*: The proposed and final rules include discussions of activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by designation of critical habitat. As such we do not discuss specific projects such as CERP. However, CERP is addressed in this final rule in our discussion of exclusions pursuant to section (4)(b)(2) of the Act, which was not in the proposed rule. Designation of critical habitat is a rulemaking procedure, and as such, does not consider or accommodate future plans as we are required to make our determination on the best information available to us at the time of our decision. The Service believes that the PCEs will be maintained by natural conditions. The PCEs of Cape Sable seaside sparrow critical habitat are derived from the biological needs of the sparrows, as described in the Background and Primary Constituent Elements sections of our proposed rule (71 FR 63980). The PCEs are based on the best scientific data available and their scientific

foundation is detailed in this rule and the referenced proposed rule.

(15) *Comment:* If the proposed rule is finalized as proposed, it will make manmade structures and associated unnatural management of water essential in perpetuity. It is impossible for any person or agency to achieve PCE 4 short of totally isolating the area with a wall and constructing an engineered plumbing system; man-made controls will, in all probability, have to be increased given PCE 4 as proposed.

*Our Response:* The critical habitat designation does not require implementation of specific management measures, and favorable conditions may be achieved through a variety of means. We have modified PCE 4 to incorporate a broader array of environmental conditions that may occur under natural conditions. We do not intend or expect that PCE 4 will require intensive management of hydrology. This PCE is based on the best available science, and was derived from water levels that have been recorded within sparrow habitats throughout their range over the past 50 years. We do not think these conditions have resulted exclusively from isolating these areas.

(16) *Comment:* Over 68 percent of the tree island area in the Everglades was destroyed by 1995 primarily due to high water; this destruction will continue by designating critical habitat within subpopulation A based on the prescription of PCE 4.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have excluded Units 1 and 2 (subpopulation A) from final designation after determining that the benefits of excluding them from the final designation outweigh the benefits of inclusion (see “Application of section (4)(b)(2) of the Act” below).

(17) *Comment:* Designating critical habitat within subpopulation A is not scientifically justified, and with precise, artificial water management mandates, is inconsistent with the principle of multi-species recovery and ecosystem restoration.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have excluded Units 1 and 2 (subpopulation A) from final designation after determining that the benefits of excluding them from the final designation outweigh the benefits of inclusion (see “Application of section (4)(b)(2) of the Act” below).

(18) *Comment:* The proposed rule, with prescribed unnatural hydrological management mandates, will adversely impact the Everglades, the sparrow, and other endangered species by preventing the restoration of natural flows and

levels and the full implementation of CERP.

*Our Response:* We recognize some habitats currently occupied by sparrows, particularly in the vicinity of sparrow subpopulation A, may have been wetter historically than they are presently, and conditions may become wetter in some portions of this area under restoration. This was a consideration in our decision to exclude these areas from the designation. The critical habitat designation does not prescribe unnatural hydrological management mandates. It identifies a single hydrologic characteristic that is consistent with the occurrence of sparrows in the Everglades wetlands and is based on the best available information. This condition will be used to evaluate potential effects of Federal actions on designated critical habitat.

#### *Comments From States*

Section 4(i) of the Act states, “the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s comments or petition.” Comments received from States regarding the proposal to designate critical habitat for the sparrow are addressed below.

(19) *Comment:* Units 1 and 2 should not be designated as critical habitat.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have found that the benefits of excluding units 1 and 2 (subpopulation A) from this final designation outweigh the benefits of inclusion, see “Application of section (4)(b)(2) of the Act” below for further explanation.

(20) *Comment:* The proposed designation will detrimentally affect the abilities of the South Florida Water Management District to effectively operate the Central & Southern Florida system; will prevent the State from achieving the Minimum Flow and Level for Shark River Slough; and fails to consider SFWMD’s responsibilities for flood protection, agriculture, and the urban environment.

*Our Response:* The Service’s exclusion of critical habitat in the area of subpopulation A is expected to reduce potential impacts to water management options, including Everglades restoration. One of the purposes of designating critical habitat is to evaluate the potential impact of proposed Federal actions on habitats that support sparrows. Individual proposals will be evaluated to determine whether they will result in destruction or adverse modification of critical habitat, and such proposals will

require modification to avoid impacting areas that contain the features that are essential for the conservation of the sparrow.

(21) *Comment:* The designation will directly impact the SFWMD’s ability to operate the features constructed by the State’s Acceler8 program and fails to evaluate the impacts on the Foundation Projects, CERP, and Acceler8. The Service’s narrow focus on the sparrow contradicts CERP and restricts water flow to Everglades National Park.

*Our Response:* The exclusion of critical habitat from the area of subpopulation A is expected to reduce or eliminate potential conflicts between hydrologic restoration efforts, including CERP, and the designated critical habitat. We do not believe that any CERP components, as currently planned, will be incompatible with the designation. However, there are components of CERP that have not been planned sufficiently to date to allow evaluation and determination of whether they will be completely compatible with the designated critical habitat, and we expect CERP project designs to continue to change in the future. In the Adverse Modification Standard section of this final rule we discuss activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and, therefore, result in consultation for the sparrow. However, this does not mean that those activities cannot go forward as planned or proceed with some project modifications.

(22) *Comment:* An Avian Ecology Workshop was held in August 2007, the initial advice and recommendations from the avian ecology experts who participated in the workshop will be available in December 2007. Given the imminent release of this information, the Service is failing to consider the best scientific data available.

*Our Response:* On June 14, 2007, the Service filed a motion with the U.S. District Court for the District of Columbia to extend the deadline to complete critical habitat until December 15, 2008. The motion was based in part on waiting for the results of the Avian Ecology Workshop. On July 18, 2007, our request for an extension was denied by the Court. As a result, the Service must complete the final critical habitat rule by October 24, 2007, using the best scientific information available.

The Service participated in the avian ecology workshop, and incorporated and considered scientific and technical information into the final rule that was presented at the workshop and provided in subsequent technical reports from scientists who gave presentations at the

workshop. This information included recent results on sparrow population status and habitat, such as that cited in the final rule as Sah *et al.* 2007, and Pimm *et al.* 2007.

(23) *Comment:* Are roadway rights-of-ways part of designated critical habitat? Clarify if an excepted area should be excluded based solely on containing one of the PCEs. The units should acknowledge and accommodate the existing roads and canals.

*Our Response:* In developing our final designation, we attempted to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the sparrow on the boundaries of the designation. However, the scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. As is our normal practice, any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Federal actions within such areas would not trigger consultation under section 7 of the Act, unless they affect the species or PCEs in adjacent critical habitat. The areas outside of this designation do not include buffers around such features, and impacts to habitat immediately adjacent to roads, buildings, canals, and similar features must be considered during consultation if federally funded maintenance and development actions affect designated areas.

(24) *Comment:* Critical habitat designation must include other Federal and State listed species. The current direction of the Service to protect a single species to the detriment of other listed and non-listed species is of concern.

*Our Response:* Under the Act and its implementing regulations, there are no mechanisms associated with the proposed designation of critical habitat that consider addressing or accommodating other species besides the species for which critical habitat is designated. In accordance with section 3(5)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider the specific occupied areas that contain PCEs, and specific unoccupied areas that are essential for the conservation of the species for which we are designating critical habitat. However, we are able to consider most other species as well as other environmental concerns in our analysis of exclusions from critical habitat pursuant to section 4(b)(2). In fact, our

decision to exclude proposed Units 1 and 2 in the final rule includes consideration of such concerns. Other listed or sensitive species may also be afforded some conservation and protection, if they occur within the areas designated as critical habitat or share habitat components of the Cape Sable seaside sparrow.

(25) *Comment:* The Service should examine the hydrologic data collected in Units 1, 2, and 5 over the last 10 years to determine the feasibility of attaining PCE 4 in these particular areas.

*Our Response:* We have examined hydrologic records for the period of record for data sets across all areas occupied by sparrows. We have excluded proposed critical habitat Units 1 and 2, which correspond with sparrow subpopulation A, from the final designation (see "Application of Section 4(b)(2) of the Act" below). Further, we have clarified PCE 4 to provide for a degree of environmental variability observed in these data sets. We have determined that attaining this modified PCE 4 is feasible in the other units.

(26) *Comment:* We should clarify how PCE 4 would be applied and interpreted in areas that are expansive and have ground elevations that vary by several feet.

*Our Response:* There are numerous hydrological monitoring stations across the Everglades, including some that are in or adjacent to areas designated as critical habitat. These monitoring stations provide detailed information about the hydrological conditions in the areas near the gauges over the past decades. Obtaining information about the water levels and/or ground elevations at specific locations within critical habitat will allow estimation of the hydrologic conditions that have occurred over time by relating the conditions at the specific site to nearby hydrologic gauges. In addition, existing hydrologic models provide projections of water depths across the landscape. While these depths are understood to be generalized across relatively large spatial scales, they provide estimates of changes in water depths and the duration of specific water levels. These models can be used to evaluate whether proposed projects that are expected to alter hydrologic conditions may affect the occurrence of hydrological conditions described in PCE 4. In evaluating proposed projects that may affect hydrological conditions within critical habitat, the best available information, such as hydrological models or measured water depths and ground elevations, in combination with data from water monitoring stations, will be used to make a determination of

whether the proposed project may result in hydrologic conditions consistent with the PCE. The specific information evaluated to make this assessment may vary depending on the location of the anticipated effects relative to nearby hydrologic monitoring sites, the availability of hydrologic modeling, and other factors.

(27) *Comment:* The addition of a PCE describing an appropriate fire regime, perhaps based on soil depth characteristic, would strengthen the designation.

*Our Response:* We agree, and considered including a PCE related to fire. However, there is currently insufficient scientific information available to identify the appropriate fire frequency and seasonality necessary to maintain the characteristics of sparrow habitat that are essential to the conservation of the sparrow. We are supporting ongoing research to assist in addressing this question, but information is currently lacking.

#### Public Comments

(28) *Comment:* Units 1 and 2 should not be designated as critical habitat.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have excluded Units 1 and 2 (subpopulation A) from final designation after determining that the benefits of excluding them from the final designation outweigh the benefits of inclusion (see "Application of section 4(b)(2) of the Act" below).

(29) *Comment:* Units 3 through 7 should be designated as critical habitat.

*Our Response:* We agree and have included these areas in the final designation. However, since proposed Units 1 and 2 have been excluded from the final designation, we have renumbered the units so that proposed Units 3 through 7 are now identified as Units 1 through 5 in this final designation.

(30) *Comment:* It must be made clear if there are any portions of CERP that cannot go forward. The Service's narrow focus on the sparrow contradicts CERP and restricts water flow to ENP.

*Our Response:* The exclusion of critical habitat from the area of subpopulation A is expected to reduce or eliminate potential conflicts between hydrologic restoration efforts, including CERP, and the designated critical habitat. We do not believe that any CERP components, as currently planned, will be incompatible with the designation. However, there are components of CERP that have not been planned sufficiently to date to allow evaluation and determination of whether they will be completely

compatible with the designated critical habitat, and we expect CERP project designs to continue to change in the future. In this final rule under the Adverse Modification Standard section we discuss activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the sparrow. However, this does not mean that those activities cannot go forward as planned or proceed with some project modifications.

(31) *Comment:* Consideration of the cumulative and long-term effects of PCE 4 for Unit 1 on other avian species of concern has not been presented.

*Our Response:* Upon further evaluation of the proposed critical habitat designation, we have found that the benefits of excluding Unit 1 from this final designation outweigh the benefits of inclusion, see “Application of section (4)(b)(2) of the Act” below for further explanation.

(32) *Comment:* The PCEs need further clarification by unit and the methods by which the effects from rainfall and surface flows from surrounding natural areas were distinguished from C&SF projects operations needs further clarification.

*Our Response:* The PCEs are derived from the biological needs of the sparrows, as described in the Background and Primary Constituent Elements sections of our proposed rule (71 FR 63980) and this final rule. The PCEs are based on the best scientific data available and their scientific foundation is detailed in this rule and the referenced proposed rule. Further, critical habitat units are delineated based on the presence of one or more of the PCEs. They were not developed in reference to past, current, or future operations of the C&SF project. The effects of future projects will be evaluated using the best available information to predict whether they will occur. The specific information available to make this determination may vary among projects.

(33) *Comment:* There is no reference as to how and where water levels exceeding 7.9 inches (20 cm) (i.e., PCE 4) would be measured for each proposed critical habitat unit.

*Our Response:* Measurements of water levels that relate to this PCE can be made in any location to determine whether that PCE is present at a site. In the absence of site-specific information, the best available information should be used to determine whether the PCE is present. In evaluating future projects, PCE 4, as well as the other PCEs, will be evaluated using the best available information to determine which ones

are present and how they will be affected by the proposed project. The specific information available to make this determination may vary among projects, and the locations and extent of measurement will need to be determined based on the specific considerations of individual projects. The PCEs identified are those that are important to sparrows in general, and are not relevant to individual or specific units. The PCEs are derived from the biological needs of the sparrows, as described in the Background and Primary Constituent Elements sections of our proposed rule (71 FR 63980). The PCEs are based on the best scientific data available and their scientific foundation is detailed in this rule and the referenced proposed rule.

(34) *Comment:* One commentor suggested that we lengthen the duration for PCE 4 in the breeding season and include hydrologic triggers for the non-breeding season.

*Our Response:* We considered a broad variety of hydrologic characteristics in developing PCE 4, and we revised this PCE in the final rule (see the Primary Constituent Elements section below). The PCE that we identified is based on the best available science and detailed inspection of hydrological and meteorological data. Lengthening the period of evaluation may emphasize hydrologic characteristics that would provide better nesting habitat for sparrows, but they would not be consistent with natural hydrological and meteorological patterns and conditions. Hydrologic triggers during the non-breeding season may also be desirable, but we do not currently have detailed data on hydrological conditions and their specific effects on sparrow habitat during the non-breeding season. Consequently, we do not have sufficient information to define such a PCE and establish that it represents a feature that is essential to the conservation of the sparrow.

(35) *Comment:* Options such as mechanical vegetation control, construction of levees and pumps to protect habitat, and restoration of formerly occupied habitat have not been included or considered in the analyses.

*Our Response:* Such actions, while they may be important to managing and restoring sparrow habitat, are not addressed in the rule because critical habitat designation does not prescribe specific actions, and only establishes a baseline condition to allow evaluation of potential impacts resulting from future Federal actions. Other mechanisms, such as recovery plans and section 7 of the Act, provide for consideration of such actions.

(36) *Comment:* The proposed rule is not based on the best scientific data available.

*Our Response:* The Service’s Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. For this rule, we reviewed all available published and unpublished literature about the ecology of the sparrow, including the 1999 petition, the revised recovery plan (Service 1999a), and the previous recovery plan (Service 1983) (See “Criteria Used to Identify Critical Habitat” section). We evaluated management plans that address specific management needs of sparrows and their habitats and past section 7 consultations that addressed the needs of the sparrow. We reviewed reports received from section 7 consultations and from researchers who hold section 10(a)(1)(A) research permits. We reviewed past records of sparrow occurrence, distribution, and habitat use over time that were compiled by FWC personnel, NPS personnel, and independent researchers. We obtained and analyzed spatial information on the location of sparrow occurrences recorded on surveys from 1981 to present and spatial data that reflect vegetation type, fire history, and hydrologic conditions within these areas. We reviewed information resulting from hydrologic modeling of several water management regimes implemented in the region. We evaluated the conclusions and recommendations that resulted from an independent peer review of the science related to sparrows and their management conducted by the American Ornithologists’ Union in 1999 (Walters et al. 2000), and the recommendations and conclusions of the 2003 South Florida Ecosystem Restoration Multi-species Avian Workshop (SEI 2003). We have also reviewed available information on the habitat requirements of this species. In determining PCEs, we reviewed all available published and unpublished literature on the ecology, habitat needs, and factors limiting the sparrow’s

occurrence and distribution, including information in published, peer-reviewed journal articles; unpublished reports and theses; and preliminary results from ongoing research. The original critical habitat designation (August 11, 1977, 42 FR 40685; corrected September 22, 1977, 42 FR 47840) was evaluated thoroughly during our analysis. As such, we believe that this final designation is based on the best available scientific information available.

(37) *Comment*: The Service did not conduct the National Environmental Policy Act analysis necessary to determine the environmental impacts of this major Federal action.

*Our Response*: It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to NEPA in connection with designating critical habitat pursuant to the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position has been upheld by the U.S. Court of Appeals for the Ninth Circuit (see, *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 516 U.S. 1042 (1996)).

(38) *Comment*: The Service failed to abide by Secretarial Order 3206, Executive Order 13175 and Departmental Manual 512, Chapter 2 in completing its Trust duty to conduct meaningful, pre-decisional consultation with the Miccosukee Tribe of Indians on this action.

*Our Response*: In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. Accordingly, we provided verbal notification to the Tribe's representative in advance of publication of the proposed rule on October 26, 2006.

Shortly after publication, the Service followed up with a letter dated November 7, 2006, requesting comments from the Tribe and offering our availability to answer questions and meet with the Tribe. The Service requested and received recommendations for peer reviewers from the Tribe and a Tribal representative was asked to peer review the proposed rule. Subsequent to the publication of the proposed rule we responded to numerous email and telephone requests from the Tribe's representative. In advance of the publication of the notice of availability in August 2007, we provided verbal, email, and written notification to the Tribe, and provided advanced verbal notification as to the date, time, and location of the public hearing. In our advanced written notification to the Tribal Chairman, we requested comments from the Tribe and offered our availability to answer questions and meet. Since October 2006, we have corresponded with the Tribe or its representative regarding this issue on more than 30 occasions.

(39) *Comment*: The Service's contention that it anticipates no impacts to Tribal lands is disingenuous and inaccurate.

*Our Response*: In the final rule, we considered potential direct and indirect impacts to Tribal lands and resources that might result from designation of critical habitat when weighing the benefits of exclusion and inclusion in the "Application of Section 4(b)(2) of the Act" section below. In addition, potential impacts to Tribal resources were described and considered in the economic analysis associated with the critical habitat designation.

(40) *Comment*: The Service is not legally obligated to designate the western area of ENP as critical habitat because the sparrow is protected under the Act and ENP is a protected area. Moreover, the Service has no obligation to adopt a rule that contains a hydrologic management objective.

*Our Response*: While the existing management plans for NPS and State lands include provisions and actions intended to maintain the habitat type upon which sparrows depend, the existing plans do not provide sufficient assurances that hydrologic management in these areas will maintain sparrow habitat for the foreseeable future. Neither the NPS nor the Florida Fish and Wildlife Conservation Commission directly manage the hydrologic conditions on their properties. Inflows into the properties, as well as adjacent hydrologic conditions that affect the lands through groundwater seepage, are

regulated by other Federal and State agencies. As such, we are designating critical habitat on NPS and State lands. However, upon further evaluation of the proposed critical habitat designation, we have excluded Units 1 and 2 (subpopulation A) from final designation after determining that the benefits of excluding them from the final designation outweigh the benefits of inclusion (see "Application of section (4)(b)(2) of the Act" below). The specific PCEs, including PCE 4 (hydrologic condition), identified for the Cape Sable seaside sparrow are derived from the biological needs of the sparrows, as described in the Background and Primary Constituent Elements sections of our proposed rule published on October 31, 2006 (71 FR 63980). The PCEs are based on the best scientific data available and their scientific foundation is detailed in this rule and the referenced proposed rule.

(41) *Comment*: The peer review process was flawed in that the scientists were only given a short time to review the proposed rule and were not provided with all the "science" documents on which the Service claims it was based.

*Our Response*: Eight of the peer reviewers were sent a letter on November 2, 2006, requesting that they complete their review and provide their comments by January 2, 2007. One peer reviewer was sent a letter on November 14, 2006, requesting their review and comments by January 2, 2007. In other words, most reviewers were provided approximately 60 days to review the proposal and the information it was based on and provide their comments. This is approximately the same period of time in which the public had to review the proposal and the time period required by our ESA regulations for public comment. Moreover, the letter sent to all nine reviewers indicated that the literature used to prepare the proposed rule was available upon request.

(42) *Comment*: Management of water levels is not within the Service's jurisdiction and, thus, the hydrologic management objective is in excess of statutory authority.

*Our Response*: The final rule does not prescribe specific water management regimes or water levels, and only describes a hydrologic characteristic that allows for the conservation of the species. Potential impacts of future Federal actions on the hydrologic conditions within designated critical habitat will be evaluated at the time of the action in accordance with section 7 of the Act.



(43) *Comment*: The proposed rule violates the 5th Amendment of the U.S. Constitution (*i.e.*, the taking of private property).

*Our Response*: The mere promulgation of a regulation, like the enactment of a statute, does not take private property unless the regulation on its face denies the property owners all economically beneficial or productive use to their land (*Agins v. City of Tiburon*, 447 U.S. 255, 260–263 (1980); *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 195 (1981); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)). The Act does not restrict all uses of critical habitat, but only imposes limits under section 7(a)(2) on Federal agency actions that may result in destruction or adverse modification of designated critical habitat. This limitation does not apply to private actions that do not need Federal approvals, permits, or funding. Furthermore, if a biological opinion concludes that a proposed action is likely to result in destruction or adverse modification of critical habitat, we are required to suggest reasonable and prudent alternatives, if we are able to develop such alternatives. In accordance with Executive Order 12630, we have concluded that this designation does not have significant takings implications (see “Required Determinations” section below).

(44) *Comment*: The Service needs to state whether the rule will or will not impact access or human use in Units 1 and 2 other than during the natural sparrow nesting season.

*Our Response*: Units 1 and 2 have been excluded from this designation and, therefore, critical habitat is no longer a consideration. However, the areas that were considered in the proposed rule for designation as Units 1 and 2 (subpopulation A) contain sparrows and will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the proposed action.

(45) *Comment*: Under the proposed critical habitat designation how will the sparrow have the necessary habitat to substantially increase the population to 6,600 birds? There should be a discussion of total available habitat contrasted with critical habitat as well as how restoration of habitat can fit in with critical habitat strategies to attain the recovery goals.

*Our Response*: Recovery of sparrows is expected to occur both within and

outside of designated critical habitat, and the designation is consequently not intended to encompass all areas where sparrows may occur. There are areas outside of designated sparrow critical habitat that may currently be able to support sparrows, and additional areas where habitat may be restored through management or Everglades restoration efforts. Habitat is often dynamic, and species may move from one area to another over time. Consequently, it is difficult to accurately estimate the amount of suitable habitat that is available at a particular point in time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. We expect that some additional areas may become suitable for sparrows as Everglades restoration progresses. However, we have made the designations in this final rule consistent with the best available scientific information and are currently unable to predict the specific location or extent of such other areas. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

(46) *Comment*: In the discussion of the individual units, specific threats should be identified such as global warming or climate change, off-road vehicle use in Big Cypress National Preserve, exotic predators such as the Burmese python.

*Our Response*: Global warming and climate change may threaten all units, although the precise impacts over time are not fully understood. Proposed Units 1 and 2, which were the only units in BCNP, have been excluded for the reasons described later in this rule. Exotic predators, similar to climate change, is a general threat that may affect all units, and the degree to which this potential threat may affect sparrows remains unknown. In our descriptions of specific units, we only addressed the main factors affecting sparrow habitat within the unit that may require special management consideration or protection.

(47) *Comment*: How will critical habitat be effectively monitored and enforced?

*Our Response*: Under the Act, critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that may affect

critical habitat (see “Section 7 Consultation” section below). There are no special provisions to actively monitor critical habitat, and any monitoring will be conducted as a result of the implementation of Terms and Conditions associated with section 7 consultations that specify monitoring, and in conjunction with other research and monitoring activities.

(48) *Comment*: The habitat on Rattlesnake Ridge (subpopulations A) is no longer suitable for sparrows.

*Our Response*: Upon further evaluation of Units 1 and 2 (subpopulation A), we have found that the benefits of excluding this from the final designation outweigh the benefits of their inclusion (see “Application of Section 4(b)(2) of the Act” below).

(49) *Comment*: The sparrow is not native to the areas where it is currently nesting.

*Our Response*: The best available information suggests that sparrows have occurred for a long time in areas where they currently occur. While the sparrow was originally only known to occur on Cape Sable in a different vegetation type than where it is found today, we believe that sparrows historically occurred in the marl prairie habitat where they occur today, and their documentation only on Cape Sable resulted from limited knowledge of their distribution, and not movement from Cape Sable into the marl prairies. The first prong of the definition of critical habitat under the ESA focuses on the areas occupied by the species at the time of listing.

(50) *Comment*: The Miccosukee Tribe asserted that the Service violated the Administrative Procedure Act (APA) by not holding a public hearing on the proposed critical habitat during the first comment period.

*Our Response*: Pursuant to section 4(b)(5)(E) of the Act, we are to hold one public hearing on a proposed regulation if a request for a hearing is filed within 45 days of the publication of our proposal. Further, we are required to hold a public hearing within an open comment period, provide notice to the public of a public hearing at least 15 days prior to hearing itself, and hold the comment period open for at least 10 days following the hearing. For this rulemaking, the proposed rule was published on October 31, 2006, and the public comment period closed on January 2, 2007. We received the request for a public hearing from the Tribe by facsimile on November 30, 2006, within the 45 day time period required by the Act. It is commonly our practice, upon receiving a request for a public hearing on a proposed critical habitat, to hold at least one hearing in the general area



effected by the proposal either directly following the publication of a proposal or following the release of our draft economic analysis of the proposal. In the case of the Cape Sable seaside sparrow proposed critical habitat, there was insufficient time to coordinate, provide notice to the public and hold a public hearing on the proposal during the initial comment period.

Consequently, we held one public hearing in Homestead, Florida, on August 29, 2007, which was during the open public comment period following the release of the draft economic analysis of the proposal. As such, we have abided by the provisions of the Act and our implementing regulations.

#### Economic Analysis—Policy Issues

(51) *Comment:* Several commenters requested that the economic analysis consider those impacts attributable co-extensively to other causes and not just those that are due solely to the designation of critical habitat.

*Our Response:* The main body of the Final Economic Analysis (FEA) estimates fully co-extensive impacts associated with the proposed critical habitat designation. Appendix B of the FEA estimates the potential incremental impacts of critical habitat designation for the sparrow. It does so by attempting to isolate those direct and indirect impacts that are expected to be triggered specifically by the critical habitat designation. The incremental conservation efforts and associated impacts included in Appendix B would not be expected to occur absent the designation of critical habitat for the sparrow. Total present value potential incremental impacts are estimated to be \$64,000 (discounted at three percent). All other impacts quantified in the FEA are considered baseline impacts and are not expected to be affected by the critical habitat designation.

(52) *Comment:* One commenter states the Draft Economic Analysis should be peer reviewed.

*Our Response:* For purposes of completing this economic analysis, the Service did consider whether external peer review, beyond that conducted by internal Service economists, was necessary. In this case, the reasonably foreseeable impacts were primarily related to direct costs of conservation efforts. Thus, the circumstances of the analysis did not give rise to a need for external peer review.

(53) *Comment:* Several commenters state that potential benefits of critical habitat designation can and should be quantified and that by quantifying the costs and not the benefit of the proposed rule, public attention is focused on the

costs of critical habitat designation while making benefits invisible.

*Our Response:* Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Service's approach for estimating economic impacts includes both economic efficiency and distributional effects. The measurement of economic efficiency is based on the concept of opportunity costs, which reflect the value of goods and services foregone in order to comply with the effects of the designation (e.g., lost economic opportunity associated with restrictions on land use). Economic benefits can result when increased regulation on land has a beneficial effect due to the elimination of negative externalities caused by the regulation. For example, if designation of critical habitat results protects a viewshed thus increasing the value of the neighboring properties that benefit from the viewshed, the designation would eliminate a negative externality and have a measurable economic benefit. Our analysis considers such economic benefits, and if both economic costs and benefits can be quantified, we can measure the net economic impact. However, for the CSSS proposed critical habitat, we were unable to find any data that would allow quantification of economic benefits, nor was such information submitted during the public comment period.

Most of the benefit categories submitted by the public during through comments reflect broader social values, which are not the same as economic impacts. While the Secretary must consider economic and other relevant impacts as part of the final decision-making process under section 4(b)(2) of the Act, the Act also explicitly states that it is the government's policy to conserve all threatened and endangered species and the ecosystems upon which they depend. Thus, we believe that explicit consideration of broader social values for the sparrow and its habitat, beyond the more traditionally defined economic impacts, is not necessary as Congress has already clarified the social importance.

We note, as a practical matter, it is difficult to develop credible estimates of such values, as they are not readily observed through typical market transactions and can only be inferred through advanced, tailor-made studies that are time consuming and expensive to conduct. We currently lack both the

budget and time needed to conduct such research before meeting our court-ordered final rule deadline. In summary, we believe that society places significant value on conserving any and all threatened and endangered species and the habitats upon which they depend and thus needs only to consider whether the economic impacts (both positive and negative) are significant enough to merit exclusion of any particular area without causing the species to go extinct.

(54) *Comment:* One commenter states that the designation of critical habitat will prevent implementation of the Combined Structural and Operational Plan (CSOP) and other Everglades restoration projects and the economic analysis should quantify these impacts.

*Our Response:* The Service has indicated that it will evaluate individual CERP proposals to determine whether they will result in destruction or adverse modification of critical habitat, and any proposals that would require modification to avoid that result. The Service does not expect most proposed water management actions to reach the level of impact that may result in destruction or adverse modification of designated critical habitat. Therefore, the Service does not believe that any CERP components, as currently planned, will be incompatible with the designation. There are components of CERP that have not reached a point in the planning process sufficient to date to allow evaluation and determination of whether or not they will be completely compatible with the designated critical habitat, and CERP project designs are also expected to continue to change in the future. This does not mean that those activities cannot go forward as planned or proceed with some project modifications. Section 3 of the FEA discusses how beginning with the full implementation of CSOP and CERP (assumed for purposes of the FEA to begin around 2011), it is uncertain whether incremental conservation measures implemented for sparrow conservation will represent a significant constraint on overall water management activities. For example, under certain circumstances, overall Everglades restoration and sparrow conservation efforts may become more harmonized, thus diminishing related economic impacts. Given the current uncertainty concerning overall CERP implementation, however, no long-term impacts from sparrow conservation, and specifically critical habitat designation, are quantified, but are rather discussed qualitatively.

(55) *Comment*: One commenter states that the Service should be cautious about formally quantifying the economic costs and benefits of the proposed rule rather than using qualitative approaches in assessing economic costs.

*Our Response*: As discussed in Section 1 of the FEA, one purpose of the economic analysis is to estimate the economic impact of reasonably foreseeable actions taken to protect the sparrow. The economic analysis attempts to quantify the economic effects associated with the proposed designation of critical habitat. It does so by taking into account the cost of conservation-related measures that are likely to be associated with future economic activities that may adversely affect the habitat within the proposed critical habitat boundaries. This information is intended to assist the Secretary in determining whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. In addition, this information allows the Service to address the requirements of Executive Orders 12866 and 13211, and the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). The FEA also complies with the interpretation of the U.S. Court of Appeals for the 10th Circuit that “co-extensive” effects should be included in the economic analysis to inform decision-makers regarding which areas to designate as critical habitat.

(56) *Comment*: One commenter states that the DEA should provide an analysis of reasonable alternatives for the proposed critical habitat designation such as portions of each area being excluded and modifications to the criteria for the primary constituent elements.

*Our Response*: As discussed in Section 1, the FEA estimates the potential economic impact of designating each proposed critical habitat unit. Consideration of impacts at a unit level may result in alternate combinations of units of proposed habitat that may or may not ultimately be designated. As a result, the impacts of multiple combinations of units are available for consideration by the Service. When information is available the economic analysis attempts to estimate economic impacts at a finer geographic scale. However, information is not available to disaggregate potential economic impacts to a geographic scale finer than the critical habitat unit for the sparrow. The Service’s responsibility in developing the critical habitat unit

boundaries and the definitions of PCEs is to use the best available scientific information. There is consequently not a mechanism in this process to develop and consider alternative designs. The DEA analyzed the proposed critical habitat units that were developed based on the application of the best available information. Considering alternatives different from those proposed is not appropriate here because we have no information and analysis to support such alternatives. Additionally, under section 4(b)(2) of the Act, the Secretary has the discretion to exclude areas based on economic or other considerations, but the Act does not provide similar discretion to change the PCEs identified in conjunction with a designation.

(57) *Comment*: The Miccosukee Tribe asserted that we violated the Administrative Procedure Act (APA) by not making the draft economic analysis of the proposed designation available concurrently with the proposed rule.

*Our Response*: The draft of the economic analysis was made available to the public for review and comment on August 17, 2007 (72 FR 46189). A final economic analysis was then developed based on the public comments and is available from South Florida Ecological Services Office (see ADDRESSES). There is no law or regulation which requires publication of the draft economic analysis only concurrently with the proposed rule.

(58) *Comment*: The Miccosukee Tribe asserted that we violated the APA by not supplying the Tribe with the documents and data it requested under the Freedom of Information Act (FOIA).

*Our Response*: We received the FOIA request on November 8, 2005 and responded well before the proposed critical habitat rule for the Cape Sable seaside sparrow was published on October 31, 2006. FOIA only applies to documents in existence at the time of the response, however the Tribe and the public in general were given adequate time to review and comment on the DEA.

#### Economic Analysis—Economic Issues

(59) *Comment*: One commenter states that the DEA incorrectly assumes CSOP will be implemented in 2011.

*Our Response*: Based on communications with the U.S. Army Corps of Engineers (USACE), 2010 to 2011 is the best available estimate of when CSOP will be implemented.

(60) *Comment*: One stakeholder commented that the DEA underestimates the economic cost of past actions undertaken for the sparrow.

*Our Response*: As discussed in Section 2 of both the DEA and the FEA, conservation efforts for the sparrow are described since the listing of the sparrow as endangered in 1967. No costs are estimated for the period of 1967 to 1994 as no major conservation efforts for the sparrow occurred apart from general species management efforts. Potential impacts are quantified from 1995 until present based on available information. The total present value of pre-designation costs are estimated to be \$51.1 million (discounted at three percent). While this represents the best estimate based on available information, it is an underestimate of the total costs incurred for sparrow conservation efforts since it was listed as endangered.

(61) *Comment*: A few commenters state that the DEA unnecessarily truncates the period of analysis for future water management actions to 2011 and costs beyond 2011 should be calculated.

*Our Response*: As discussed in Section 3 of both the DEA and the FEA, beginning with the full implementation of CSOP and CERP (as described above assumed to begin around 2011), it is uncertain whether incremental conservation measures implemented for sparrow conservation will represent a significant constraint on overall water management activities. For example, under certain circumstances, overall Everglades restoration and sparrow conservation efforts may become more harmonized, thus diminishing related economic impacts. Given the current uncertainty concerning overall CERP implementation, however, no long-term impacts from sparrow conservation are quantified.

However, the USACE has determined, if it needs to modify its currently planned infrastructure modifications under CERP to maintain sparrow favorable hydrological conditions in Unit 1, the post-designation costs estimated in the DEA related to water management changes for sparrow management may be greatly underestimated. The USACE has, however, not conducted an analysis of revisions to CERP that may be required to maintain the primary constituent elements in Unit 1. Therefore, the EA does not quantify the costs associated with potential changes to infrastructure modifications planned for CERP, and the potential need to re-evaluate CERP projects.

(62) *Comment*: One commenter contends the DEA underestimates the costs of structures built by the USACE for the Interim Operational Plan for the

Protection of the Cape Sable Seaside Sparrow (IOP).

*Our Response:* Section 3 of both the DEA and the FEA estimates \$11.9 million (discounted at three percent) was spent on the construction of structures by the USACE since 2000, and no additional monies will be spent by the USACE on structures from 2007 to 2011. This cost information was provided by the USACE and is considered to be the best available.

(63) *Comment:* One commenter asserts that the DEA underestimates the costs of sparrow conservation efforts by not accounting for tree-island losses.

*Our Response:* As discussed in Section 3 of both the DEA and the FEA, higher water levels in the Water Conservation Areas (WCAs) have resulted in degradation and loss of tree-islands. Tree-islands support the habitat for several wildlife and plant species in the area, and are regarded by the Miccosukee Tribe as important cultural resources connecting them to their heritage and tradition. The loss of tree-islands due to water-management actions has been occurring since at least 1945. On average, over the 55 year period studied, 8.4 islands or 246 acres are lost each year and delayed implementation of the Modified Water Deliveries project will prolong the time needed for the restoration and recovery process for the tree islands in WCA-3. The estimated cost of full restoration of tree-islands range between \$50,000 to \$500,000 per acre.

While it is clear that tree island loss has occurred in WCA-3 since 1945, and losses will continue to occur until implementation of the Modified Water Deliveries project, the relationship between the IOP water management actions and changes in the rate of tree islands loss is unknown. Therefore, this FEA does not estimate the acres of tree island loss potentially attributable to the IOP nor the potential range in costs to restore tree island losses.

(64) *Comment:* One commenter asserts that the DEA underestimates the costs of sparrow conservation efforts by not accounting for ecological impacts to WCA-3A including the cost of restoring habitat in this area.

*Our Response:* As discussed in Section 3 of both the DEA and the FEA, the potential ecological impacts due to higher water levels in WCA-3A impacts may include degradation and loss of tree islands, increased risk of establishment of invasive plants, negative impacts on snail kite habitat and foraging opportunities, changes in salinity levels in estuaries, and changes in Everglades restoration objectives due to delay in project implementation. However, the

magnitude of marginal increases in water levels in WCA-3A attributable to sparrow conservation efforts remains controversial and uncertain. In the absence of such information, it is not possible to quantify the losses in ecological services and/or potential costs of restoration attributable specifically to sparrow conservation efforts.

(65) *Comment:* One commenter stated the DEA discusses potential impacts to the Miccosukee Tribe, recreational users, recreational and commercial fishing in the St. Lucie and Caloosahatchee estuaries and Florida Bay, and flood protection, agricultural, and urban interests but should quantify costs to these entities.

*Our Response:* As discussed in Section 3 of both the DEA and the FEA, there could be potential impacts on these activities due to sparrow conservation efforts. The Miccosukee Tribe claims that water management for the sparrow Subpopulation A has irreparably damaged tree islands and restricted access to other cultural resources in WCA-3A. Routing of excess water from near Subpopulation A (Units 1 and 2) through the South Dade Conveyance System (SDCS) has potentially resulted in changes in salinity levels in estuaries of South Florida, reducing fishing opportunities. Concerns have also been raised about the increased likelihood of floods in agricultural and urban areas of southern Miami-Dade County due to excess water in L-31N canal resulting from the re-routing of water through SDCS. The FEA acknowledges these concerns; however, due to lack of sufficient quantitative information regarding the marginal impact of sparrow conservation efforts on water levels, it is unable to quantify the potential cost of these ecological impacts.

(66) *Comment:* One commenter wrote the DEA should assess the cost of damage to Lake Okeechobee that will result if water levels are maintained at excessive stages.

*Our Response:* As discussed in Section 3 of both the DEA and the FEA, present day nutrient levels in Lake Okeechobee do not meet relevant water quality standards. Hence, flow from Lake Okeechobee, which would normally flow south under the topographic gradient, is artificially restricted from flowing into the Everglades. Instead, freshwater flows from Lake Okeechobee are routed into estuaries through the St. Lucie and Caloosahatchee rivers (which flow to the east and west coasts of Florida, respectively). It is, however, expected that in the future nutrient levels will be

reduced and water would be allowed to flow naturally from Lake Okeechobee to the Everglades. The concern is that, in the future, this natural flow of water will be precluded due to water management activities for Subpopulation A (Units 1 and 2), and that the current practice of routing excess freshwater into estuaries will continue to upset the salinity balance within those estuaries on the eastern and western coast of South Florida. These concerns are predicated on the assumption that current water management actions which close S-12 structures and prevent free flow of water between WCA-3A and western Shark River Slough will continue in the future as well. These conditions may change if the USACE's future plans are implemented which would enable more free flowing conditions near eastern Shark River Slough. Also, note that the SFWMD is considering building reservoirs near Lake Okeechobee to preclude increased freshwater flows into estuaries on the east and west coast of South Florida. The marginal impact of sparrow conservation efforts on Lake Okeechobee are uncertain. This analysis, therefore, did not quantify any economic impacts related to water quality in Lake Okeechobee.

(67) *Comment:* One commenter states that the DEA does not mention the costs of controlling invasive exotic species in tree islands in WCA-3A due to the increased stress and mortality of native trees and shrubs resulting from higher water levels.

*Our Response:* As noted in Section 4 of both the DEA and the FEA, the relationship between water management for the sparrow, and the increase in water levels in WCA-3A is not clearly understood. Despite several commenters' claims, the Service, USACE, and the National Park Service have not been able to prove or disprove that sparrow management has contributed to the increased water levels in WCA-3A. Therefore, the relationship between the increased threat of invasion of exotic plant species and sparrow conservation efforts is unknown. Hence, the FEA does not attribute any marginal costs that may be incurred for protecting against invasive plant species in WCA-3A to sparrow conservation.

(68) *Comment:* One commenter states that the DEA does not quantify the impact of the ISOP and IOP on recreation related activities in wildlife management areas (WMA).

*Our Response:* To quantify recreational losses associated with the ISOP and IOP an estimate of the number of trips that would be lost specifically due to sparrow conservation efforts is

required. As discussed in Section 4 of both the DEA and the FEA, the marginal reduction in number of trips due to sparrow conservation related efforts is unknown. Therefore, the FEA is unable to quantify the impacts of sparrow conservation efforts on recreation in those portions of the Everglades WMA that could be potentially affected by water management actions for sparrow conservation. Section 4 of the FEA, does however include information from a recent economic study released by the Florida Fish and Wildlife Conservation Commission (FWC) that provides an estimate of the range of visitation related expenditures that can be expected to occur in some parts of the Everglades WMA. The mean trip expenditure for visits to WMAs in Florida could range between \$93.21 to \$298.86. The consumer surplus associated with these trips was estimated to range between \$60.98 and \$158.61. These estimates reflect the magnitude of the value of recreation trips in WCA-3A and WCA-3B in the Everglades WMA.

(69) *Comment:* One commenter states that the DEA does not adequately quantify the costs and the uncertainty associated with future collaborative actions between different stakeholders to resolve potential conflicts between sparrow conservation efforts and the Everglades restoration projects.

*Our Response:* As mentioned in Section 3 of both the DEA and the FEA, it is expected that future consultations between agencies will be required to resolve conflicts between overall Everglades restoration objectives and sparrow conservation needs. However, there is little understanding of how frequently interagency meetings will be required, and how, and if at all, reallocation of agency resources may be required to mediate discussions with other agencies. It is therefore not possible to quantify the potential costs associated with these future changes in federal and state agency operations at this time.

(70) *Comment:* Several commenters state that the DEA fails to specify the kinds of restriction on use of designated critical habitat areas during section 7 consultations.

*Our Response:* The FEA describes potential changes in access to some parts of the proposed critical habitat areas. There are three areas where recreation may be affected due to the sparrow.

A decrease in recreation may be observed in the Everglades Wildlife Management Area due to restrictions imposed to reduce stress during high water levels resulting potentially from

water management activities instituted for sparrow conservation.

Because Subpopulation F (Unit 7) is located in the Everglades Expansion Area, some recreation groups are concerned that sparrow conservation efforts will limit recreational opportunities in this area. The Everglades National Park states that because hydrological conditions currently limit air boating within Unit 7, and because airboaters and the Miccosukee Tribe have been granted limited access in lieu of the 1989 Expansion Act, any marginal impact on recreation due to sparrow conservation is expected to be negligible in the Expansion Area. Therefore the FEA concludes that while the number of trips is not expected to change much, visitors' experiences maybe affected due to additional restrictions arising out of sparrow conservation efforts.

Sparrow management activities in Zone 4 of the Big Cypress National Preserve (BCNP) have led to closure of some areas within Unit 1, and limited access to some other areas. Wheeled vehicles are not allowed within areas that have been identified as sparrow habitat areas. Since off road vehicles may affect the vegetative structure required by sparrows for foraging, nesting, and roosting, administrative closures can prohibit airboats when and where water levels are at a stage in which their use may cause soil displacement. Thus, if the proposed rule is finalized, it is believed that the designation of critical habitat may require additional limits on access to Unit 1 and Unit 2. However, the BCNP has stated that hunting opportunities need not be reduced due to presence of the sparrow.

#### Summary of Changes From Proposed Rule

We have reconsidered our proposed critical habitat revision for the Cape Sable seaside sparrow in view of comments received during the two public comment periods and the public hearing, the economic analysis, and new information that has become available since we published the proposed rule on October 31, 2006. We have adopted the following changes from the original proposal in this final rule:

(1) We have excluded proposed Units 1, 2, and a portion of the eastern boundary of 7 from the final designation of critical habitat because we believe that the benefits of excluding these specific areas from the designation outweigh the benefits of inclusion. As required by the Act, we have determined that the exclusion of these areas from the final designation of

critical habitat will not result in the extinction of the Cape Sable seaside sparrow. These exclusions are discussed in more detail in the Application of Section (4)(b)(2) of the Act section below.

(2) We refined the boundary of proposed Unit 4, which corresponds with sparrow subpopulation C, to correct a mapping error and to more precisely align the boundary better with the PCEs actually present here. This change in boundary resulted in a reduction in area of 108 ac (43 ha) within this unit.

(3) We modified PCE number 2 (herbaceous vegetation) to correct errors and clarify the description of the method of vegetation measurements.

(4) We modified PCE number 4 (hydrologic regime) to incorporate a duration of 30 days for the hydrologic condition that was described (water levels >7.9 inches (20 centimeters)), instead of a simple exceedance of this water depth. This change resulted from several comments indicating that the hydrologic criterion would not accommodate natural environmental variation, and our additional analysis of rainfall and hydrologic data within the Everglades. This additional analysis indicated that natural rainfall events occasionally occur that may cause this criterion to be exceeded for short periods. The frequency of such rainfall events has not been sufficiently predictable to ensure that it would not result in an exceedance of this criterion. The adopted change would ensure that natural rainfall events would not lead us to erroneously conclude that hydrological conditions were incompatible with the maintenance of sparrow habitat. The revised PCE still addresses high water levels, but focuses on persistent deep water that is indicative of broader hydrologic conditions across the landscape which would render sparrow habitat unsuitable.

(5) As a result of the exclusion of proposed Units 1 and 2, the names of the remaining 5 units are being changed to reflect sequential numbering, from 1 through 5, but also indicate the associated sparrow subpopulation. For example, proposed critical habitat Unit 3 will now be referred to as Unit 1—subpopulation B.

(6) Based upon our further evaluation of the survey information regarding the designated areas, we have determined that they were occupied at the time of listing and, therefore, that they are occupied habitat under the Act. See the discussion of each critical habitat unit in the Critical Habitat Description section below.

### Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographical area occupied by a species at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means, "to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary." Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 of the Act requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by the landowner. Where the landowner seeks or requests federal agency funding or authorization that may affect a listed species or critical habitat, the consultation requirements of Section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

To be included as occupied critical habitat, it must have features that are

essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the PCEs, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. As discussed below, such areas may also be excluded from critical habitat under section 4(b)(2) of the Act. Areas outside of the geographical area occupied by the species at the time of listing may only be included in critical habitat if the areas are determined to be essential to the conservation of the species. Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. However, if we could not determine that an area was occupied at the time of listing, but the area is currently occupied by the species, it will likely be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

The Service's Policy on Information Standards Under the Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All

information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support Cape Sable seaside sparrow subpopulations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, which directs Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of listed species, and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCP), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome. Until a critical habitat designation is modified in a future rulemaking proceeding, that designation remains in effect.

### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we considered those physical and biological features (PCEs) that are essential to the conservation of the species, within areas occupied by the species at the time of listing, that may require special management considerations and protection. These include, but are not limited to, space for individual and population growth and

for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs identified for the Cape Sable seaside sparrow are derived from the biological needs of this species as described in the proposed critical habitat designation published in the **Federal Register** on October 31, 2006 (71 FR 63980).

Pursuant to the Act and its implementing regulations, we are required to identify the known physical and biological features (PCEs) within the geographical area known to be occupied at the time of listing that are essential to the conservation of the sparrow, which may require special management considerations or protections. All areas designated as critical habitat for the Cape Sable seaside sparrow were occupied at the time of listing and are occupied now, within the species' historic geographic range, and contain sufficient PCEs to support at least one life history function.

Based on our current knowledge of the life history, biology, and ecology of the sparrow, and the habitat requirements for sustaining its essential life history functions, we have determined that the PCEs for the Cape Sable seaside sparrows are:

(1) Calcitic marl soils characteristic of the short-hydroperiod freshwater marl prairies of the southern Everglades.

These soils support the unique vegetation community and probably many of the food items upon which sparrows depend. They also result from specific hydrologic conditions that are characteristic of the marl prairies. These soils are an integral component of sparrow habitat.

(2) Herbaceous vegetation that includes greater than 15 percent combined cover of live and standing dead vegetation of one or more of the following species (when measured across an area of greater than 100 ft<sup>2</sup> (9.3 m<sup>2</sup>)): Muhly grass (*Muhlenbergia filipes*), Florida little bluestem (*Schizachyrium rhizomatum*), black-topped sedge (*Schoenus nigricans*), and cordgrass (*Spartina bakeri*).

These plant species are largely characteristic of areas where sparrows occur. They act as cover and substrate for foraging, nesting, and normal behavior for sparrows during a variety of environmental conditions. Many other herbaceous plant species and low-

growing forbs also occur within sparrow habitat (Ross *et al.* 2006, pp. 10–13), and some of these may have important roles in the life history of the sparrow. However, the species identified in the PCE consistently occur in areas occupied by sparrows (Sah *et al.* 2007, p. 5).

(3) Contiguous open habitat. Sparrow subpopulations require large, expansive, contiguous habitat patches with few or sparse woody shrubs or trees.

This PCE provides the space for population and individual growth, and also provides the open, contiguous habitat that sparrows prefer.

(4) Hydrologic regime such that the water depth, as measured from the water surface down to the soil surface, does not exceed 7.9 inches (20 cm) for more than 30 days during the period from March 15 to June 30 at a frequency of more than 2 out of every 10 years.

This PCE indicates the hydrologic conditions that are required to support and maintain the vegetation composition that sparrows require, as well as those conditions that allow for successful nesting. The period of measurement coincides with the sparrow breeding season, as well as the late portion of the dry season and the early wet season. Water depths >7.9 inches (20 cm) during this period will result in elevated nest failure rates (Lockwood *et al.* 1997, p. 724; Lockwood *et al.* 2001, p.278; Pimm *et al.* 2002, pp. 24–25). If these water depths occur for short periods during nesting season, sparrows may be able to re-nest within the same season. These depths, if they occur for sustained periods (>30 days) within sparrow nesting season, will reduce successful nesting to a level that will be insufficient to support a population if they occur more frequently than 2 out of every 10 years. In addition, because the period of measurement coincides with the dry season and early wet season, and because water levels generally recede slowly, water depths greater than specified or that occur for periods longer than specified, will generally result in hydroperiods longer than those which support the vegetation composition required by the sparrow.

The above PCEs describe: (1) Soils that are widespread in the Everglades short-hydroperiod marshes and support the vegetation types that the sparrows rely on; (2) plant species that are characteristic of sparrow habitat in a variety of hydrologic conditions, that provide structure sufficient to support sparrow nests, and that comprise the substrate that sparrows utilize when there is standing water; (3) contiguous open habitat because sparrows require

large, expansive, contiguous habitat patches with sparse woody shrubs or trees; (4) hydrologic conditions that would prevent flooding sparrow nests, maintain hospitable conditions for sparrows occupying these areas, and generally support the vegetation species that are essential to sparrows; and (5) overall the habitat features that support the invertebrate prey base the sparrows rely on and the variability and uniqueness of habitat that provides, for example, periphyton mats for sparrows to survive in the southern Everglades.

Units are designated based on sufficient PCEs being present to support one or more of the species' life history functions. Some units contain all PCEs and support multiple life processes, while some units contain only a portion of the PCEs necessary to support the species' particular use of that habitat. Where a subset of the PCEs is present at the time of designation, this rule protects those PCEs and thus the conservation function of the habitat.

#### Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain the PCEs and may require special management considerations or protection. All of the areas designated as critical habitat contain one or more of the PCEs. We find that all of the PCEs in the critical habitat may require special management considerations or protection due to threats to the species or its habitat. Such management considerations or protection include: measures to prevent damaging hydrologic conditions, control of invasive exotic plant species, and measures to prevent anthropogenic fires from spreading through Cape Sable seaside sparrow habitat.

#### Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific data available in determining areas that contain the physical and biological features that are essential to the conservation of the Cape Sable seaside sparrow and other areas that are essential to the conservation of the sparrow. We reviewed all available information about the sparrow's current and historical distribution, ecology and life history, and threats. This included peer-reviewed scientific publications; data and occurrence records compiled by resource management agencies, and independent researchers contracted by the Service and the NPS; unpublished reports; notes and communications with

other qualified biologists or experts; our own data and documents; and the final recovery plan for the sparrow (Service 1999). We also evaluated the conclusions and recommendations that resulted from an independent peer review of the science related to sparrows and their management that was conducted by the American Ornithologists' Union in 1999 (Walters *et al.* 2000), and the recommendations and conclusions of the 2003 South Florida Ecosystem Restoration Multi-species Avian Workshop (SEI 2003), which was held to develop a common understanding of how four avian species, including the Cape Sable seaside sparrow, would respond to Everglades restoration. The Service also participated in the recent 2007 avian ecology workshop, and incorporated and considered scientific and technical information into the final rule that was presented at the workshop and provided in subsequent technical reports from scientists who gave presentations at the workshop. This information included recent results on sparrow population status and habitat, such as that cited in the final rule as Sah *et al.* 2007, and Pimm *et al.* 2007.

Our principal sources of information for identifying the specific areas within the occupied range of the sparrow on which are found those features essential to their conservation were: past records of sparrow occurrence, distribution, and habitat use over time; data and occurrences compiled by FWC personnel, NPS personnel, and independent researchers contracted by the Service and the NPS; as well as peer-reviewed published journal articles and unpublished technical reports.

All historical and recent locations of sparrow occurrences were mapped to better delineate sparrow habitat. Current and historical habitat data from several sources were also evaluated to identify areas outside of the known occupied range of the Cape Sable seaside sparrow that may have the potential to support sparrows. However, while historical habitat maps and historical records of sparrows identified several areas outside of the sparrow's current range where sparrows may have occurred historically, these areas no longer contain one or more habitat features (PCEs) that would support sparrows. Therefore, we did not delineate as critical habitat any areas outside the geographical areas presently occupied by the species. We are not designating critical habitat on Cape Sable, in the Ochopee area, or in agricultural areas in the vicinity of Homestead where sparrows previously occurred for this reason.

To delineate specific boundaries, we began with records of sparrow occurrence from comprehensive surveys conducted from 1981 to 2006 and identified all survey points where sparrows had been detected. Sparrow surveys were conducted in 1981 and each year from 1992 through present following a standard protocol (Pimm *et al.* 2002, p. 65–68), but every survey point was not necessarily surveyed every year. In addition, surveys cannot confirm the absence of sparrows from a survey point. To address the tendency to underestimate the occurrence and distribution of sparrows that results from incomplete surveys and inability to reliably determine absence of sparrows, a survey point was considered to be occupied if a sparrow was recorded in at least one year during the period from 1981 to 2006.

Because survey points are arranged on a 0.6 mile (mi) (1 kilometer (km)) grid and sparrows may only be detected accurately within 656 feet (ft) (200 meters (m)) of a survey point (Pimm *et al.* 2002, p. 153), some areas between survey points remain unsurveyed. We used a 2,460-ft (750-m) radius around each sparrow occurrence to account for unsurveyed areas adjacent to or between the survey points where sparrows likely occurred. The 2,460-ft (750-m) radius distance is approximately half of the distance between diagonally adjacent survey points. In addition, this distance is slightly larger than the sum of the reliable sparrow detection distance from a point (656 ft (200 m)) plus the diameter of an average non-breeding season sparrow home range (1,526 ft (465 m), assuming a circular home range based on home range sizes in Dean and Morrison 2001, p. 36). This distance consequently represents an estimate of the area of habitat that sparrows detected at a point are likely to use.

We drew a boundary that encompassed the 2,460-ft (750-m) radius around sparrow locations but also took into account the particular habitat characteristics as determined through detailed inspection of satellite imagery, aerial photography, and habitat maps. Outlying sparrow occurrences that were recorded in only one year and were not adjacent to other recorded sparrow observations were excluded. Areas along the boundary that did not contain features essential for the sparrow (such as tree islands, cypress forest, and deep-water slough communities) were excluded from the unit. The resulting boundary of each unit encompassed the core areas of habitat that have been occupied by sparrows since 1981. This approach relies on the results of multiple years of surveys and

consequently provides a robust assessment of sparrow habitat.

We believe the method we have used to delineate critical habitat encapsulates the core habitat that is important over time for all aspects of the sparrow's life history, accounting for the degree of natural variability in environmental and habitat conditions that occur within the Everglades. The criteria we employed to delineate the boundaries consistently encompass the areas where sparrows have occurred, despite the fact that sparrows may not occur at every point within unit boundaries in every year. In the variable environment of the Everglades wetlands, the size and distribution of the sparrow subpopulations may change in response to environmental conditions, fires, and other factors. In addition, the vegetation within these units may change in response to varying environmental conditions. These unit boundaries were delineated to provide sufficient area such that these subpopulations may continue to persist, even when taking into account some degree of vegetation change and changes in subpopulation size that may occur under adverse conditions. Several distinct units were delineated because flooding and the large fires may render entire units unsuitable for sparrows for extended periods (Lockwood *et al.* 2003, p. 467). When this occurs, maintaining suitable habitat that supports sparrows in other units is necessary to ensure that the impacted units could be repopulated through immigration or through active management.

The delineated areas include the majority of the remaining freshwater marl prairies that currently support the sparrow population and portions of the *Spartina* marshes that support sparrows and reflect the communities that were historically occupied by the sparrow throughout its range. Areas such as dense sawgrass marshes, pine or cypress forests, and mangroves are not included in the designation. We conducted field reconnaissance of some portions of the units and eliminated highly degraded sites, isolated fragments of potential habitat that were unlikely to contribute to the maintenance of the sparrow subpopulations, and areas where mangroves have recently encroached into marl prairie vegetation or where cypress trees are present, but not visible on aerial photographs. In the proposed rule, we delineated seven currently occupied areas that contain habitat features that are essential to the conservation of the Cape Sable seaside sparrow.

We reviewed existing management and conservation plans for these areas



and evaluated the benefits of inclusion and exclusion of each area to determine if any of the areas should be excluded under section 4(b)(2) of the Act. On the basis of this review, we determined that the benefits of exclusion of two of these areas, which currently support sparrow subpopulation A, outweigh the benefits of their inclusion. Accordingly, while these areas contain the habitat features that are essential to the conservation of the species, they are excluded from this final designation (see Application of section 4(b)(2) of the Act below).

When determining critical habitat boundaries, we made every effort to avoid including within the boundaries of the map developed areas such as buildings, paved areas, and other structures that lack PCEs for the Cape Sable seaside sparrow. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species or PCEs in adjacent critical habitat.

Five units are designated based on sufficient arrangement and quantity of the PCEs to support sparrow life processes. Some units contained all PCEs and supported multiple life processes. Some units contained only a portion of the PCEs necessary to support

the sparrow's particular use of that habitat. Where a subset of the PCEs was present (such as water depth that does not exceed 7.9 in. (20 cm) for more than 30 days during the period from March 15 to June 30 at a frequency of more than 2 out of every 10 years), these PCEs were sufficient to allow sparrows to occupy the site.

A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our supporting record for this rulemaking.

#### Critical Habitat Designation

We are designating five units as revised critical habitat for the Cape Sable seaside sparrow. The critical habitat units described below constitute our best assessment, at this time, of the areas determined to be occupied at the time of listing that contain the PCEs essential for the conservation of the species that may require special management. We are not designating any areas that were not known to be occupied at the time of listing. We consider all units as currently occupied. The area designated as critical habitat differs significantly from the original 1977 designation. The critical habitat boundaries in the 1977 designation were based on section-township-range boundaries, and only delineated relatively large, general areas within which sparrows were known to occur at that time. Consequently, many areas originally designated were never sparrow habitat, such as forested areas

of Long Pine Key and dwarf cypress forests in ENP, deep water slough communities, and agricultural areas. These areas, therefore, are not included in this critical habitat designation, and we have instead sought in this designation to accurately delineate only the specific areas in which one or more of the PCEs are present. For further information on the changes from the original designation, see the descriptions of the individual units below.

The five units proposed for designation as Cape Sable seaside sparrow critical habitat are: (1) Marl prairie habitats that support sparrow subpopulation B and lie exclusively within ENP in the vicinity of the Main Park Road, between Shark River Slough and Taylor Slough; (2) marl prairie habitat that supports sparrow subpopulation C within ENP along its eastern boundary in the vicinity of Taylor Slough; (3) marl prairie habitats that support sparrow subpopulation D within ENP and the State-owned Southern Glades Wildlife and Environmental Area to the east of Taylor Slough; (4) marl prairie habitats that support sparrow subpopulation E within ENP, along the eastern edge of Shark River Slough; and (5) marl prairies that support sparrow subpopulation F within the northern portion of ENP along its eastern boundary and lying to the east of Shark River Slough. Table 1 provides the area by unit determined to meet the definition of critical habitat for the Cape Sable seaside sparrow.

TABLE 1.—CRITICAL HABITAT UNITS FOR THE CAPE SABLE SEASIDE SPARROW

[Area estimates reflect all land within critical habitat unit boundaries]

| Critical habitat unit           | Federal acres<br>(hectares) | State acres<br>(hectares) | Total acres<br>(hectares) |
|---------------------------------|-----------------------------|---------------------------|---------------------------|
| 1. Unit 1—subpopulation B ..... | 39,053 (15,804)             | 0                         | 39,053 (15,804)           |
| 2. Unit 2—subpopulation C ..... | 7,951 (3,218)               | 0                         | 7,951 (3,218)             |
| 3. Unit 3—subpopulation D ..... | 833 (337)                   | 9,867 (3,993)             | 10,700 (4,330)            |
| 4. Unit 4—subpopulation E ..... | 22,278 (9,016)              | 0                         | 22,278 (9,016)            |
| 5. Unit 5—subpopulation F ..... | 4,883 (1,976)               | 0                         | 4,883 (1,976)             |
| Total .....                     | 74,998 (30,351)             | 9,867 (3,993)             | 84,865 (34,344)           |

Below, we provide a brief description and rationale for each unit of revised critical habitat for the Cape Sable seaside sparrow.

#### Unit 1—Subpopulation B

Unit 1—subpopulation B, consists of 39,053 ac (15,804 ha) of marl prairie and lies exclusively within ENP. The unit is bounded on the south by the long-hydroperiod *Eleocharis*-dominated wet

prairie and mangrove zone just inland of Florida Bay, on the west by the sawgrass marshes and deepwater slough communities of Shark River Slough, on the north by the pine rockland vegetation communities that occur within ENP on Long Pine Key, and on the east by the sawgrass marshes and deepwater slough vegetation community of Taylor Slough. There is a continuous elevational gradient across the site, from

the high elevations of the pine rocklands north of the unit down to the mangroves in the south. The area is bisected by the Main Park Road, which serves as the primary public access route from Homestead to Florida Bay. It is also bisected by the Old Ingraham Highway, which is an abandoned and partially restored roadway that historically provided access from Homestead to Florida Bay. Much of the

western portion of this roadway was removed and restored to grade, but the eastern portions of the road, with its associated borrow canal and woody vegetation, interrupt the contiguity of the prairies within the eastern portion of this unit. Besides the road, borrow canal, and woody vegetation, which are not critical habitat, the area consists of one large, contiguous expanse of marl prairie that contains all of the PCEs for the sparrow.

When sparrows were first recorded in the area during 1974 to 1975 surveys, they were abundant and widespread (Werner 1975, pp. 32–33). Based on their limited mobility and dispersal capabilities and the presence and persistence of suitable habitat, we believe that the sparrows have occupied this locality since at least the time of listing. These same areas have remained occupied by sparrows since their discovery over 30 years ago.

Consequently, we consider the unit to be occupied at the time of listing. The majority of this area was included in the 1977 critical habitat designation for the sparrow (42 FR 40685 and 42 FR 47840).

The area is the largest contiguous patch of marl prairie east of Shark River Slough. It is currently occupied, and has consistently supported the largest sparrow subpopulation since 1992 (Pimm *et al.* 2002, p. 70; Pimm and Bass 2006, p. 16). The natural characteristics of this area make it relatively immune to risk of flooding or frequent fires (Walters *et al.* 2000, p. 1110). Its location south of the high-elevation pine rocklands provides it a degree of protection from high water levels that do not occur within any other units. Within the southern portion of the greater Everglades watershed, water flows from north to south, with most water moving through Shark River Slough, and to a lesser extent through Taylor Slough. The pinelands block the southward flow of water across this area such that the primary influences on water levels are rainfall and overflow from the flanking sloughs. In addition, portions of the area occur on relatively high elevations and remain relatively dry. Consequently, this area is not easily flooded as a result of managed water releases or upstream events, and the high water levels that may occur within other sparrow subpopulations are dampened by its relative position and topographic characteristics.

Similarly, the area is not particularly vulnerable to fires. It is not overdrained as a result of local hydrologic management actions, and the fire frequency is primarily influenced by natural ignition and managed prescribed fire. The public road that traverses the

area could result in an increased likelihood of ignitions, but this has not occurred to date. In addition, the presence of both the Main Park Road and the Old Ingraham Highway within this unit provides human access greater than in any other unit and may allow better opportunities to manage both prescribed fires and wildfires such that they would pose a reduced risk to the persistence of the sparrow subpopulation.

#### Unit 2—Subpopulation C

Unit 2—subpopulation C consists of 7,951 ac (3,218 ha) of marl prairie habitat that lies exclusively within ENP in the vicinity of Taylor Slough, along the eastern edge of ENP. The unit consists of the prairies that flank both sides of the relatively narrow Taylor Slough. The area is bordered by the pine rocklands of Long Pine Key on the west and by isolated pine rocklands and the L-31 W canal that runs along the ENP boundary to the east. It is bordered by an area of constriction in Taylor Slough that is closely flanked on both sides by forested habitats at the southern end and by the Rocky Glades, a region of thin marl soils and exposed limestone and sparse vegetation (ENP 2005, p. 4), to the north. The area is bisected by Main Park Road in the southern portion of the unit, but the remainder of the unit consists of contiguous marl prairies.

Although, sparrows were discovered in the area in 1972 (Ogden 1972, p. 852), we consider this unit to be occupied at the time of listing. At the time of discovery, sparrows were found to be widely distributed and abundant in this area (Werner 1975, p. 32). Based on their limited mobility and dispersal capabilities and the presence and persistence of suitable habitat, we believe that the sparrows have occupied this locality since at least the time of listing. These same areas have remained occupied by sparrows since their discovery over 30 years ago. Following its discovery, the site was the location of some of the first intensive study of the sparrow's biology and its relationship to its habitat (Werner 1975, p. 17). This area lies entirely within the 1977 critical habitat designation for the sparrow (42 FR 40685 and 42 FR 47840).

During the mid-1970s, sparrows were abundant at this site (Werner 1975, p. 32), and surveys in 1981 estimated 432 sparrows in this area (Pimm *et al.* 2002, p. 70). Since 1981, the sparrow subpopulation at this site has declined and has ranged from zero to 144 sparrows between 1995 and the present (Pimm *et al.* 2002, p. 70; Pimm and Bass 2006, p. 16). When sparrows were abundant in the area, the area was in a

relatively dry condition, and water levels only rose above ground level for limited periods. Beginning in 1980, a pump station, which was installed along the eastern boundary of ENP at the approximate location of the historic slough, was operated to increase hydroperiods in the area resulting in extended hydroperiods within the portions of the area downstream from the pump station (ENP 2005, p. 39). Vegetation changed in this area from marl prairie to sawgrass marsh (ENP 2005, pp. 3–40), and sparrows ceased to occur in this area. At the same time, the northern portions of sparrow subpopulation C, above the pump station, continued to be overdrained as a result of the adjacent canal and a lowered water table in the agricultural lands immediately adjacent to ENP (Johnson *et al.* 1988, pp. 30–31; ENP 2005, p. 53). In these overdrained areas, frequent fires impacted the habitat and resulted in reduced sparrow numbers (Pimm *et al.* 2002, p. 77).

This area provides a contiguous expanse of habitat that is largely separated from other nearby subpopulations in an area that is uniquely influenced by hydrologic characteristics. The Taylor Slough basin is a relatively small system, and much of the headwaters of the Slough are cut off by canals and agricultural development to the east of ENP. Portions of this unit near the slough have deep soils (15.7 inches (40 cm)) (Taylor 1983, pp. 151–152) and support resilient vegetation that responds rapidly following fire (Taylor 1983, p. 151–152; Werner and Woolfenden 1983, p. 62). Sparrows were reported to reoccupy burned sites in this region within 1 to 2 years following fire (Werner and Woolfenden 1983, p. 62). The unit contains the vegetation characteristics upon which sparrows rely, and most of the area currently experiences hydrologic conditions that are compatible with sparrows (one or more of the PCEs). This area remains heavily influenced by hydrologic management along the eastern boundary of ENP (ENP 2005, p. 17–18). Portions of the area are also overdrained, resulting in the possibility of high fire frequency.

The location of this unit relative to other sparrow subpopulations is significant in that it occurs in the center of the five sparrow subpopulations that occur east of Shark River Slough in the vicinity of Taylor Slough (subpopulations B through F). The habitat in this area most likely plays an important role in supporting dispersal among the eastern subpopulations, acting as a “hub” that facilitates

dispersal in the region and recolonization of local areas that are detrimentally impacted.

#### Unit 3—Subpopulation D

Unit 3—subpopulation D consists of 10,700 ac (4,330 ha) of marl prairie vegetation in an area that lies on the eastern side of the lower portion of Taylor Slough. The majority of this area (9,867 ac (3,993 ha)) is within the Southern Glades Wildlife and Environmental Area, which is jointly managed by the SFWMD and FWC. The remaining 883 ac (337 ha) occurs within the boundary of ENP. The area is bordered on the south by the long-hydroperiod *Eleocharis* vegetation and mangroves that flank Florida Bay, on the west by the sawgrass marshes and deep-water vegetation of Taylor Slough, on the east by long-hydroperiod *Eleocharis* vegetation and overdrained areas with shrub encroachment in the vicinity of U.S. Highway 1, and on the north by agricultural lands and development in the vicinity of Homestead and Florida City.

When sparrows were discovered in this area, they were widespread (Werner 1975, p. 32). Based on their limited mobility and dispersal capabilities and the presence and persistence of suitable habitat, we believe that the sparrows have occupied this locality since at least the time of listing. These same areas have remained occupied by sparrows since their discovery over 30 years ago. We consequently consider this unit to be occupied at the time of listing. A portion of this area, including both Federal- and State-owned lands was included in the 1977 critical habitat designation for the sparrow (42 FR 40685 and 42 FR 47840).

This is the easternmost area where sparrows occur and is the only subpopulation that occurs on the eastern side of Taylor Slough. It is consequently unlikely to be affected by the same factors (e.g., large fires or extreme hydrologic conditions) that affect the other eastern subpopulations that lie primarily between Shark River Slough and Taylor Slough, because this area is separated from other sparrow subpopulations by Taylor Slough, and the area immediately north of this subpopulation consists of agriculture and urban/suburban areas around Homestead and Florida City. These discontinuities in the landscape would tend to prevent fires from spreading from the area which supports sparrow subpopulations B, C, E, and F into the subpopulation D area. Similarly, hydrologic conditions in this region are different than those that affect the other subpopulations because water levels

would be attenuated by Taylor Slough and influenced by flood protection and water supply infrastructure in the urban/agricultural areas to the north. Loss of suitable habitat and the sparrow subpopulation within this area would result in a reduction in the geographic range of the sparrow.

The 1981 comprehensive survey of potential sparrow habitat estimated 400 sparrows within this region (Pimm *et al.* 2002, p. 70). This was higher than any number of sparrows recorded in the area in recent years, and estimates have ranged from zero to 112 sparrows between 1992 and the present (Pimm *et al.* 2002, p. 70; Pimm and Bass 2006, p. 16). The area currently contains all PCEs, but the majority of the area is dominated by sawgrass, which indicates a wetter-than-average condition within the spectrum of conditions that support marl prairie and sparrow habitat (Ross *et al.* 2006, p. 16). The habitat in this area is divided by several canals that are part of the C-111 basin. This canal system results in relatively altered hydrologic conditions in the region (ENP 2005, p. 18) and causes extended hydroperiods during wet periods (Pimm *et al.* 2002, p. 78). These factors influencing hydrologic conditions will continue to require management in the future.

#### Unit 4—Subpopulation E

Unit 4—subpopulation E consists of 22,278 ac (9,016 ha) of marl prairie habitat in an area that lies along the eastern margin of Shark River Slough. This unit occurs entirely within ENP. The area is bordered to the south by the pine rocklands of Long Pine Key and by an area dominated by dwarf cypress trees. The sawgrass marshes and deepwater slough vegetation communities of Shark River Slough comprise the western and northern boundary of the area, and the Rocky Glades comprise the eastern boundary.

When sparrows were discovered in this area, they were relatively widespread (Werner 1975, p. 33). Based on their limited mobility and dispersal capabilities and the presence and persistence of suitable habitat, we believe that the sparrows have occupied this locality since at least the time of listing. These same areas have remained occupied by sparrows since their discovery over 30 years ago. We consequently consider this unit to be occupied at the time of listing. The majority of this area was included in the 1977 critical habitat designation for the sparrow (42 FR 40685 and 42 FR 47840). This area is currently occupied by sparrows and contains all of the PCEs.

This area supports one of the large, relatively stable sparrow subpopulations. It is centrally located among the areas supporting other subpopulations, and its central location probably plays an important role in aiding dispersal among subpopulations, particularly movements from the eastern subpopulations to the subpopulations west of Shark River Slough. Since 1997, this area has supported the second largest sparrow subpopulation, ranging from 576 to nearly 1,000 individuals in recent years (Pimm *et al.* 2002, p. 70; Pimm and Bass 2006, p. 16).

The centrality of this subpopulation helps to prevent it from being affected by managed hydrologic conditions because it is distant from canals, pumps, and water management structures that occur along the boundaries of ENP. The magnitude of any managed water releases is generally dampened by the time their influences reach this area. However, the proximity of this area to Shark River Slough may make the habitats and the sparrows that they support vulnerable to hydrologic effects during wet periods. The western portions of the area may become too deeply inundated to provide good habitat for sparrows under some deep water conditions. Large-scale hydrologic modifications, such as those proposed under the CERP, have the potential to influence habitat conditions in this area (e.g., PCEs), and may require special management attention. Large-scale fires may detrimentally affect this area, and there are no intervening features in the region that would aid in reducing the potential impacts on this subpopulation. While the area is relatively distant from ENP boundaries and potential sources of human-caused ignition, fires that are started along the eastern ENP boundary may rapidly spread into the area. The 2001 Lopez fire was a human-caused fire that affected a portion of this unit (Lockwood *et al.* 2005, p. 4). Risk from fire may also require management in this area to prevent impacts to this large sparrow subpopulation.

#### Unit 5—Subpopulation F

Unit 5—subpopulation F consists of 4,883 ac (1,976 ha) of marl prairie that lies along the eastern boundary of ENP, and is the northernmost of the units. This is the smallest of the units. It is bounded on the north and west by the sawgrass marshes and deep-water slough vegetation communities associated with Shark River Slough, and on the east by agricultural and residential development and the boundary of ENP. Its southern boundary is defined by the sparse vegetation and shallow soils of the Rocky Glades.

When sparrows were discovered in this area, they were relatively widespread (Werner 1975, p. 33). Based on their limited mobility and dispersal capabilities and the presence and persistence of suitable habitat, we believe that the sparrows have occupied this locality since at least the time of listing. These same areas have remained occupied by sparrows since their discovery over 30 years ago. We consequently consider this unit to be occupied at the time of listing. The majority of this area was included in the 1977 critical habitat designation for the sparrow (42 FR 40685 and 42 FR 47840). This area is currently occupied by sparrows, and contains all of the PCEs.

The first comprehensive surveys of potential sparrow habitat in 1981 resulted in an estimated population of 112 sparrows in this area, and most subsequent surveys have resulted in estimates lower than this, including several years when no sparrows were found (Pimm *et al.* 2002, p. 70; Pimm and Bass 2006, p. 16). However, sparrows were always found in the area in the year following a zero count (Pimm *et al.* 2002, p. 70), indicating that sparrows are consistently using the area.

This area would serve to support or recolonize subpopulations C and E (in units 2 and 4) if those areas were to become unsuitable. Loss of habitat in this area would also result in a reduction in the total spatial distribution of sparrows. Its position in the landscape results in a unique set of threats that differ from those in other subpopulations. Because of its proximity to urban and agricultural areas and its relative topographic location, this area has been consistently overdrained in recent years and remains dry for longer periods than other subpopulations. The relative dryness of the area may allow the site to remain suitable as habitat for sparrows under very wet conditions, when other subpopulations may become deeply inundated for long periods.

Because of its dryness and its proximity to developed areas, this area has been subjected to frequent human-caused fires during the past decade, resulting in periods of poor habitat quality. The PCEs within this unit may require special management consideration due to the threat from fire. In addition, the dry conditions have allowed encroachment of woody vegetation, including invasive exotic and native woody species. Invasive exotic trees, primarily Australian pine (*Casuarina* spp.), melaleuca (*Melaleuca quinquenervia*), and Brazilian pepper (*Schinus terebinthifolius*), have become established in local areas (Werner 1975,

pp. 46–47), often forming dense stands. These trees have reduced the suitability of some portions of the habitat for sparrows and have reduced the amount of contiguous open habitat. Aggressive management programs have been implemented by management agencies to address this issue, and control of woody vegetation will continue to be required.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into

consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service’s issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

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

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

Federal activities that may affect the Cape Sable seaside sparrow or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal

Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultation.

*Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to the Cape Sable Seaside Sparrow and Its Critical Habitat*

**Jeopardy Standard**

Prior to and following designation of critical habitat, the Service has applied an analytical framework for Cape Sable seaside sparrow jeopardy analyses that relies heavily on the importance of subpopulations to the survival and recovery of the sparrow. The section 7(a)(2) analysis is focused not only on these subpopulations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the sparrow in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected subpopulation(s), inclusive of associated habitat conditions, a jeopardy finding for the species is warranted, because of the relationship of each subpopulation to the survival and recovery of the species as a whole.

**Adverse Modification Standard**

For the reasons described in the Director's December 9, 2004 memorandum, the key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve the intended conservation role for the species. Generally, the conservation role of the Cape Sable seaside sparrow critical habitat units is to support viable core area populations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may

also jeopardize the continued existence of the species.

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of the designated critical habitat for the sparrow is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the sparrow include, but are not limited to:

(1) Actions that would significantly and detrimentally alter the hydrology of marl prairie habitat found in all units. Such activities could include, but are not limited to, changes to hydrological management plans that result in increased depth of inundation or duration of flooding within sparrow habitat during the breeding season or draining the areas resulting in increased fire;

(2) Actions that would allow encroachment of nonnative and invasive woody plant species. Such activities could include, but are not limited, to local or regional overdrying and introduction of nonnative woody plant species;

(3) Actions that would significantly and detrimentally alter the topography of a site (such alteration may affect the hydrology of an area or may render an area unsuitable for nesting). Such activities could include, but are not limited to, off-road vehicle use and mechanical clearing;

(4) Actions that would reduce the value of a site by significantly disturbing sparrows from activities, such as foraging and nesting; and

(5) Actions that would significantly and detrimentally alter water quality that may lead to detrimental changes in vegetation species composition and structure or productivity of prey organisms and may have direct detrimental effects on sparrows.

These activities could reduce population sizes and the likelihood of persistence within one or more sparrow subpopulations, and reduce the suitability of habitat for breeding for extended periods.

We consider all of the units designated as critical habitat to contain features that are essential to the conservation of the Cape Sable seaside sparrow. All units are within the geographic range of the species, all areas are currently occupied by sparrows (based on surveys conducted since 1981; Pimm *et al.* 2002, pp. 70–84; Pimm and Bass 2006, pp. 3–6), and all areas are likely to be used by the sparrow. Federal agencies already consult with us on activities in areas

currently occupied by the sparrow if the species may be affected by the activity to ensure that those Federal actions do not jeopardize the continued existence of the sparrow or destroy or modify its current designated critical habitat.

**Exemptions and Exclusions**

*Application of Section 4(b)(2) of the Act*

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Secretary is afforded broad discretion, and the Congressional record is clear that, in making a determination under the section, the Secretary has discretion as to which factors and how much weight will be given to any factor.

**Economics**

The primary purpose of an economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the sparrow. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species and the incremental impacts of the critical habitat designation itself. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

Economic analyses typically measure impacts against a baseline, which is normally described as the way the world would look absent the proposed action. This is often referred to as the “incremental” approach. In 2001, the U.S. Tenth Circuit Court of Appeals

found that the incremental approach provided “meaningless” results and instructed the Service to conduct a full analysis of all of the economic impacts of proposed critical habitat, regardless of whether those impacts are attributable coextensively to other causes (*New Mexico Cattle Growers Assn v. U.S.F.W.S.*, 248 F.3d 1277 (10th Cir. 2001)). However, since that decision, courts in several other cases have held or implied that an incremental analysis is proper (see *Cape Hatteras Access Preservation Alliance v. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004); *CBD v. BLM*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006)).

Accordingly, we have reevaluated the baseline used for critical habitat economic analyses. The economic analysis uses a traditional regulatory analysis approach and examines the economic impact of the regulatory change being considered. However, because there is interest by the courts and the public in seeing the total costs of regulation, the analysis also quantifies the existing regulatory baseline. When quantifying the baseline, the analysis looks back to the time of listing.

When estimating the incremental impacts of the critical habitat designation, the Service must consider that most courts have agreed with the *New Mexico Cattle Growers* court when it determined that the Service cannot simply equate adverse modification standard and the jeopardy standard and conclude that there are no economic costs. The *New Mexico Cattle Growers* court said “Congress clearly intended that economic factors were to be considered.” Therefore, when conducting this analysis, it is important to attempt to distinguish between the regulation that would exist prior to the designation of critical habitat, under the jeopardy standard, and under sections 9 and 10 of the Act, and the additional regulation that would exist with designation of critical habitat.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. This draft analysis was based on the coextensive approach only and estimated the potential future impacts associated with conservation efforts for the sparrow in areas proposed for critical habitat designation. The draft analysis was made available for public review on August 14, 2007 (72 FR 46189). We accepted comments on the draft analysis until September 17, 2007. The final economic analysis added the incremental approach, which can be found in Appendix B of the report.

According to the above described principles, the final economic analysis evaluated the potential future effects associated with the listing of the sparrow, as well as any potential effect of the designation of critical habitat above and beyond those regulatory and economic impacts associated with the listing. To quantify the proportion of total potential economic impacts attributable to the critical habitat designation, the analysis evaluated a “without critical habitat” baseline and compared it to a “with critical habitat” scenario. The “without critical habitat” baseline represented the current and expected economic activity under all modifications prior to the critical habitat designation, including protections afforded the species under Federal and State laws. The difference between the two scenarios measured the net change in economic activity attributable to the designation of critical habitat.

The economic analysis estimates total potential future impacts associated with conservation efforts for the sparrows in areas designated to be \$32.2 million over the next 20 years (undiscounted). The present value of these impacts is \$26.9 million using a discount rate of three percent, or \$22.2 million using a discount rate of seven percent. The annualized value of these impacts is \$1.8 million to \$6.70 million, using a discount rate of three percent, or \$2.1 million using a discount rate of seven percent.

The majority, or 58 percent, of the total potential costs estimated in this report are associated with potential species management efforts (e.g., surveying and monitoring, research, exotic vegetation control, etc.). The remaining costs are associated with potential water management changes to conserve the sparrow (33 percent), fire management (7 percent), and administrative costs of consultation (2 percent).

Incremental impacts of critical habitat designation are forecast to be \$64,000 (present value at a three percent discount rate). Anticipated costs of critical habitat are the value of time and effort of conducting section 7 consultations beyond those associated with the listing of the sparrow. Critical habitat designation for the sparrow is not expected to require modifications to land uses and activities above and beyond modifications that are already required under the listing. However, there are components of CERP that have not been planned sufficiently to date to allow evaluation and determination of whether or not they will be completely compatible with the designated critical

habitat, and CERP project designs are expected to continue to change in the future. Due to the uncertain nature and extent of these potential changes, the economic analysis cannot estimate the potential incremental impact of sparrow critical habitat designation on water management activities beyond 2011. Further, due to the controversial nature and complexity of consultations related to water management, the actual administrative costs of consultation may be higher than the average estimates; therefore, incremental administrative costs may be underestimated.

Because it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct research, the Service believes that the direct benefits of critical habitat designation are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking. Our economic analysis indicates potential cost resulting from the designation that may be considered measurable, but cannot be considered disproportionate. Therefore, we conclude that there are no significant economic benefits to excluding any areas from critical habitat.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, South Florida Ecological Services Office (see **ADDRESSES**).

#### Other Relevant Impacts

Under section 4(b)(2) of the Act, we must consider, in addition to economic impacts, all other relevant impacts. We consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. We also consider whether the landowners have developed any conservation plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of designation.

We have determined that the lands within the designation of critical habitat for the Cape Sable seaside sparrow are not owned or managed by the Department of Defense, there are currently no habitat conservation plans

for the sparrow, and the designation does not include any sovereign Tribal lands. The units do include areas of ENP and BCP that contain significant Tribal cultural sites and trust resources. We discuss these areas below. Similarly, the designation may result in incidental impacts to lands under perpetual lease to the Miccosukee Tribe of Indians of Florida. We anticipate no impact to national security.

The following is our analysis of the benefits, other than economics, of including all lands considered and proposed as critical habitat and the benefits of excluding such lands.

#### (1) Benefits of Inclusion

The principal regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they will not destroy or adversely modify critical habitat. In the *Gifford Pinchot* decision, the U.S. Court of Appeals for the Ninth Circuit ruled that adverse modification evaluations require consideration of impacts on the recovery of species (379 F.3d 1059, 1070–1072). With respect to conducting section 7 consultations, designation of critical habitat would provide benefit by ensuring consideration of potential habitat impacts under the adverse modification standard within designated units for actions with a Federal nexus.

A benefit of inclusion would be that in certain CERP alternative scenarios, particularly those related to sparrow subpopulation A (proposed critical habitat Units 1 and 2), consultation under section 7(a)(2) of the Act under the adverse-modification standard may result in a determination of destruction or adverse modification of designated critical habitat for some CERP components and result in implementation of Reasonable and Prudent Alternatives that would protect the sparrow habitat as it presently exists.

Similarly, a benefit of inclusion with respect to the Interim Operational Plan for the Protection of Cape Sable Seaside Sparrow (IOP) construction of a water management feature would be that 75 ac (31 ha) of proposed unit 7 (sparrow subpopulation F) within the construction footprint would allow us to reassess the project impacts and either adopt the conference opinion on the project as part of a biological opinion, or re-initiate formal consultation of the IOP under section 7 of the Act, which the specific project is a part.

However, the benefit of inclusion in the form of ensuring consideration of

sparrow habitat through section 7 consultation is small due to the comprehensive restoration and management plans, detailed below, that already consider the needs of sparrow habitat and the level of active involvement and oversight in Everglades restoration planning, and acknowledging the objectives of restoring the hydrology within the Everglades, including those areas occupied by sparrows.

IOP is a hydrologic operations plan for the southern Everglades wetlands that was enacted in 2002 in response to a Service jeopardy biological opinion on a previous water management plan and its impacts to Cape Sable seaside sparrows. The IOP is composed of implementing measures to reduce flows into sparrow subpopulation A from excessive flooding that would impact the sparrow habitat, while increasing water deliveries to the eastern portions of ENP, including sparrow subpopulations C, E, and F, which would improve sparrow habitat that had been overdrained. The IOP is expected to be replaced in coming years by the Combined Structural and Operational Plan (CSOP), an early Everglade restoration project, and ultimately by the Comprehensive Everglades Restoration Plan (CERP).

CERP has been described as the world's largest ecosystem restoration effort and includes more than 60 major components. The overarching objective of CERP is the restoration, preservation and protection of the south Florida ecosystem while providing for other water-related needs of the region. It covers 16 counties over an 18,000-square-mile area, and centers on an update of the Central & Southern Florida (C&SF) Project.

The remaining Everglades no longer exhibit the functions and richness that defined the pre-drainage ecosystem. There has been a substantial reduction in the size of the Everglades. Water volumes, flow patterns, and water quality within the Everglades ecosystem have been substantially altered. The changes that have taken place in the natural system have led to decreases in native animal and plant populations. Compartmentalization caused by construction of physical barriers such as canals, levees, and roads, or even hydrologic barriers (such as the Water Conservation Areas) has fragmented the system by creating a series of poorly connected natural areas. CERP is intended to reverse the course of the declining health of the ecosystem.

Increasing spatial extent and improving habitat quality can provide a base for improving species abundance

and diversity. Improving the connectivity of habitats may also improve the range of many animals and their prey-base and provide for a more natural balance of species within the system. The goal of Everglades restoration is to return the pattern, timing, and volume of water flows to the Everglades landscape to conditions similar to those which occurred prior to the first efforts to control the water in the Everglades, which occurred around 1900.

Service biologists participate on Comprehensive Everglades Restoration Plan project delivery teams and aid in formulating plans, developing alternatives, and evaluating project benefits to help ensure that proposed restoration projects provide benefits for listed species and other Service trust resources. The Service and other representatives of the Department of the Interior (NPS, U.S. Geological Survey, and the South Florida Ecosystem Restoration Task Force) are also actively involved in oversight of the overall Everglades restoration program to ensure that the Department's interests, including endangered species, are addressed and incorporated into restoration projects. In particular, the South Florida Ecosystem Restoration Task Force was established under the WRDA of 1996 (Pub. L. 104–303, section 528(f)) for the specific purpose of coordinating the development of consistent policies, strategies, plans, programs, projects, activities, and priorities addressing the restoration, preservation, and protection of the South Florida ecosystem. With this level of active involvement and oversight in Everglades restoration planning, and acknowledging the objectives of restoring the hydrology within the Everglades, including those areas occupied by sparrows, the benefits of inclusion in the form of ensuring consideration of sparrow habitat through section 7 consultation and improving awareness of opportunities for sparrow conservation during Everglades restoration are small.

In addition to CERP, which primarily addresses hydrologic management, all properties where sparrows currently occur, which include all areas that meet the definition of critical habitat, are managed under management plans that identify management goals and activities that will benefit sparrows and sparrow habitat.

For example, the Conceptual Management Plan (CMP) for the Southern Glades Wildlife and Environmental Area, which supports sparrow subpopulation D, includes management to maintain wildlife



species on the property, including the sparrow. The property was acquired under Florida's "Save Our Rivers" Program. The program directs the management and maintenance of lands acquired under the program to occur "in such a way that as to restore and protect their natural state and condition." (FWC 1998). The CMP identifies two wildlife management goals that relate to sparrow conservation: (1) To achieve and maintain the natural diversity, abundance, and distribution of wildlife; (2) to maintain, increase, and ensure the abundance and/or distribution of threatened and endangered wildlife to the point they are no longer threatened or endangered." A similar goal for habitat management in the CMP is "to restore altered ecosystems and wildlife communities to the species composition, abundance, and distribution of fish and wildlife characteristic of and dependent upon native plant communities." Management actions undertaken in recent years include hydrologic restoration through removal of barriers to flow, and treatment of over 250 ac (101 ha) of exotic vegetation (SFWMD 2005, p. 13).

ENP, which contains the entirety of four proposed units (3, 4, 6, and 7), and portions of three proposed units (1, 2, and 5), is currently operating under a General Management Plan (GMP) developed in 1989, which was developed in accord with the NPS Organic Act and the Everglades National Park Protection and Expansion Act of 1989 (Pub. L. 101-229). The GMP calls for maintenance of habitats and protection for threatened and endangered species. ENP is currently developing a new GMP. The Service is an active participant on the planning team for the revised GMP, and will work with ENP planners to ensure that the final plan incorporates protections to sparrows and their habitats within ENP. We will also conduct section 7 consultation on the revised plan once it is finalized.

Big Cypress National Preserve, which contains portions of proposed Units 1 and 2, is currently managed under a 1991 GMP. This GMP also addresses protection and management of threatened and endangered species habitat. It specifically addresses the Cape Sable seaside sparrow, with an emphasis on appropriate fire management to maintain both favorable vegetation and sparrows. It also includes discussion of conducting research to determine the cause of sparrow decline in the Ochopee region, efforts to reestablish sparrow populations in the Ochopee region, and

implementing exotic plant control to minimize effects on sparrows. We will also conduct section 7 consultation on any changes to the GMP that may affect sparrows, with or without a revised critical habitat designation.

In addition to the existing plans and plans in development for all of the properties that contain proposed critical habitat units, representatives of all of the agencies that manage these properties actively participate in annual meetings held for the sole purpose of reviewing sparrow monitoring results, identifying opportunities to improve sparrow habitat, and addressing sparrow management issues, and fire management in particular. Participants at these meetings help develop wildfire management strategies in sparrow habitat, develop prescribed fire plans, and discuss other sparrow habitat management activities and research and monitoring. Participants in these meetings include land management agencies, the Service, sparrow researchers, and other experts.

The sparrow occurs almost exclusively on public land managed for conservation purposes, which include the protection of listed species. Critical habitat designation alone does not require specific steps toward recovery, and protections and plans already in place on these properties provide for maintenance of sparrows and sparrow habitat on all proposed critical habitat units and all areas where sparrows currently occur. The agencies tasked with managing these lands also routinely participate in meetings to coordinate sparrow recovery, protection, and management measures. These protections and management assurances will remain in place regardless of critical habitat designation. CERP and other Everglades restoration projects provide a framework for hydrologic restoration throughout the Everglades, transforming the area that has been adversely affected by decades of hydrologic alteration to conditions that closely resemble those to which the sparrow adapted before water management changes in the 20th century. The hydrologic management plans for the region are developed in conjunction with the Service, and are subject to consultation under section 7 of the Act under the jeopardy standard. Extensive Department of the Interior involvement and oversight of Everglades restoration projects further ensures consideration of threatened and endangered species.

Inclusion of critical habitat also serves to educate landowners, State and local governments, and the public regarding the potential conservation value of the

area. This may help focus, prioritize, and revitalize conservation efforts, such as restoration projects, or more extensive monitoring of populations. In addition, designation of critical habitat could inform State agencies and local governments about areas that could be conserved under State laws or local ordinances. As described above, because all units proposed for designation for the Cape Sable seaside sparrow consist of federally- and State-owned conservation lands that have existing management plans and the management agencies routinely conduct and participate in sparrow recovery, and management and monitoring activities, such benefits of inclusion are small.

After carefully considering the existing conservation plans and strategies in place that address land management, resource management, and hydrologic management, we believe the additional regulatory benefit of inclusion, as well as the educational and informational benefit of inclusion is small.

## (2) Benefits of Exclusion

Possibly the greatest benefit of exclusion would be the removal of a potential constraint to the CERP and other Everglades restoration projects.

Because of limited documentation of the conditions that occurred prior to hydrologic alteration, as well as the large number of interacting environmental and climatic factors that will influence the outcomes of any restoration project, there is a large degree of uncertainty that is inherent in planning Everglades restoration. In addition, there is little information available on where sparrows and sparrow habitat occurred prior to alteration of the Everglades. The sparrow was not discovered until 1918 on Cape Sable, which no longer supports the sparrow, most likely as a result of changes in habitat that resulted from the hurricane of 1935. The sparrow was not documented in the freshwater marl prairies where it occurs today until the mid-1900s, many years after hydrologic alteration had begun to shape the Everglades landscape.

As Everglades restoration progresses, changes in hydrological conditions and vegetation toward those that occurred prior to hydrologic alteration are expected to occur. Consequently, changes in the extent and location of unfavorable and favorable habitat conditions for sparrows are also likely to occur. This expectation is at odds with evaluation of critical habitat under section 7 of the Act. Critical habitat designation establishes static boundaries on the landscape and

requires evaluation of proposed alterations of the habitat within the critical habitat boundaries. In certain CERP alternative scenarios, particularly those related to sparrow subpopulation A (proposed critical habitat units 1 and 2), consultation under section 7(a)(2) of the Act under the adverse modification standard may result in a determination of destruction or adverse modification of designated critical habitat for some CERP components and result in implementation of Reasonable and Prudent Alternatives that would reduce the benefits of restoration. Additionally, with the proposed critical habitat in place, planning for some proposed CERP components that bring water west of Shark River Slough is likely to be constrained to avoid an adverse modification determination during consultation. In essence, the requirement to prevent changes from occurring within designated critical habitat boundaries may prevent the change that is intended under CERP. This will likely have the result of limiting the overall environmental benefits of Everglades restoration, even though the best available scientific information states there are strong indications restoration will benefit the species (Sustainable Ecosystems Institute (SEI) 2003). Furthermore, these more favorable conditions may not require intensive hydrologic management for their maintenance. These issues are less of a concern in the eastern sparrow subpopulations, which currently support most of the sparrow population and the best available information suggests will support a large amount of sparrow habitat after CERP is complete.

New science also suggests at least parts of sparrow subpopulation A may not have historically supported the habitats sparrows use today. Recent palynological (the study of live and fossil spores, pollen grains, and similar plant structures) studies within the current marl prairie habitats of subpopulation A have suggested that the area where subpopulation A currently occurs was historically a sawgrass marsh, and is currently a marl prairie as a result of anthropogenic hydrologic change (Bernhardt and Willard 2006, p. 4). This information raises questions about the sustainability of the habitats in this area, particularly as restoration progresses and hydrologic conditions change to those more similar to a restored condition. Evaluations of predicted hydrologic conditions within these areas under restoration indicate that wetter conditions are likely to occur, though the accuracy of

predictions and degree of change expected is unclear.

Based on the best available scientific information, we believe that restoration, when complete, will provide habitat that will be sufficient to support a secure sparrow population. An effort to review the best available science on the sparrow and the Everglades restoration found that there are strong indications the restoration will benefit the species, but identified some uncertainty during transition to CERP (SEI 2003). In light of this information, exclusion of proposed Units 1 and 2, the areas within sparrow subpopulation A, would be beneficial to achieving full restoration benefits under CERP and other Everglades restoration projects. Exclusion would allow conservation efforts to focus on activities intended to advance restoration of the broader Everglades ecosystem, which includes sparrow habitat, instead of focusing resources on regulatory compliance with critical habitat.

Planning of CERP components is still under way, and only a few Everglades restoration components have been planned in detail. Consequently, the full extent to which exclusion of proposed Units 1 and 2 may allow broader consideration of alternatives to achieve Everglades restoration objectives is unclear, but potentially significant. It is clear, however, that establishing a narrowly defined set of suitable conditions within a static boundary will limit consideration of alternatives. The Service received numerous comments from the public, the Miccosukee Tribe of Indians of Florida, and other resource management agencies expressing opposition and concern about the proposed designation because of potential conflicts with restoration. Because the process of planning and implementing CERP projects is a multi-agency, multi-stakeholder collaborative process, exclusion of proposed Units 1 and 2 would provide great benefit in terms of completing the collaborative process of Everglades restoration planning with a goal of achieving a broad variety of environmental benefits, including enhancement of listed species habitats and populations. Most importantly, the best available science suggests that there are strong indications that the sparrows will benefit from restoration.

Exclusion of 75 ac (31 ha) of proposed critical habitat along the eastern edge of proposed unit 7, which corresponds to sparrow subpopulation F, would facilitate construction of a water management feature that is being implemented under the IOP to aid in maintaining sparrow habitat. This

feature is intended to aid in restoring hydrological conditions along the eastern boundary of ENP, including overdrained portions of habitat within subpopulation F. The construction of the feature is currently under way, and the Service previously completed a conference opinion as part of the IOP on the impacts to proposed critical habitat and determined that it would not result in destruction or adverse modification. If these lands are included in the final designation, we would be required to conduct a formal consultation on the project under section 7 of the Act. This could be as straightforward as adopting the results of the conference opinion or having to re-initiate formal consultation. This re-initiation would not only be on this specific project component, but the entire IOP since they are linked through the initial consultation. Therefore, any re-initiation of consultation for this project would cause a delay in the construction and operations of the feature which could delay benefits to the sparrow, its habitat, and the associated PCEs.

### (3) Benefits of Exclusion Outweigh the Benefits of Inclusion

We believe that conservation achieved through implementing management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations that consider critical habitat and are conducted at varying points in time. Management plans commit resources consistently to habitat protection, but also to long-term proactive management of habitats for listed species and conservation benefit to other species, and generally ensure consistent consideration of listed species. Section 7 consultations involving critical habitat only commit Federal agencies to prevent destruction and adverse modification to critical habitat caused by a particular project. They do not commit agencies to conservation, long-term management, or providing benefits to critical habitat or sparrow areas not affected by the proposed project. Thus, any management plan that considers enhancement, recovery, or restoration as the management standard, or which explicitly addresses the listed species, may provide more benefits for the conservation of this listed species than result from the prohibition of destruction or adverse modification of critical habitat alone.

The objectives of CERP, as defined in the Water Resources Development Act (WRDA) 2000 (Pub L. 106-541) provide precisely this commitment to restoration. By restoring the ecosystem

over time, CERP is both intended and expected to benefit the various wildlife species that adapted to the ecosystem's historical conditions, including the sparrow.

To date, many agencies, the Miccosukee Tribe of Indians of Florida, and other organizations have dedicated many years of effort toward developing the CERP, and many CERP features are now in the planning phase. The process of achieving restoration while addressing the variety of existing constraints and concerns of the many restoration partners, such as maintaining flood protection, maintaining adequate water supply for urban and agricultural areas, and maintaining high-quality natural environments within ENP, is extremely challenging. In addition, the tools available for evaluating these constraints and concerns are primarily hydrologic models. These models provide good means to compare various alternative plans and provide good general predictions of conditions, but they also have some inherent uncertainty which limits their ability to make accurate predictions, especially at very small scales.

We also recognize benefits of exclusion that apply to all proposed critical habitat units for the sparrow, but there are differences in the degree of benefit among the different areas. The benefits of exclusion are greatest in those areas where there is the greatest degree of uncertainty in the ultimate outcome of restoration and its effects on current sparrow habitat, and the greatest potential impacts in terms of the potential incompatibility with or limitation of the planned restoration of the ecosystem. These criteria describe proposed Units 1 and 2, the area that supports sparrow subpopulation A. Within this area, current hydrologic modeling indicates wetter conditions under restoration, and the historic condition of the habitat in this area is uncertain, with recent evidence suggesting that it may have supported wetter marsh vegetation instead of the marl prairie habitat type that currently occurs there. In addition, current hydrologic management suggests that the area may be sensitive to hydrologic management changes, and even relatively small increases in water deliveries or rainfall result in relatively large changes in hydroperiod and water depth. Pimm *et al.* (2007, p. 2) report that water levels have been higher than expected in this area in recent years, particularly in the southern portion of subpopulation A. These data indicate that exclusion of the area of subpopulation A would provide a large

benefit in terms of reducing constraints to CERP.

Exclusion of proposed Units 1 and 2 would allow restoration planners to work to maximize restoration benefits throughout the ecosystem which will also continue to provide for sparrow habitat needs in the larger Everglades landscape, instead of requiring maintenance of conditions within the proposed static unit boundaries. This would also provide for the maintenance of sparrow habitat through restoration of natural processes instead of through intensive hydrologic management that is quite difficult to administer. These improved opportunities to engage in collaborative and cooperative approaches to sparrow conservation and resource management instead of regulatory compliance are also beneficial. Exclusion of these areas does not remove the requirement for section 7 consultation with respect to CERP, including all Federal actions that affected this area occupied by the species, and the application of the jeopardy standard to these actions.

In addition to removal of constraints to restoration, exclusion of proposed Units 1 and 2 from critical habitat also has a large benefit in terms of enhancing the Service's cooperative working relationship with resource management agencies, the Miccosukee Tribe of Indians of Florida, and other stakeholder groups involved in developing and implementing the CERP. These areas have been a focus of concern by the resource management agencies because of their apparent sensitivity to changes in hydrologic conditions. These areas have also been a primary focus of concern for the Miccosukee Tribe of Indians of Florida. The areas are proximate to Tribal lands and critical habitat constraints in these areas may have the greatest effect on Tribal resources, though the Tribe has expressed concern about other areas as well.

It is our determination therefore that the benefits of exclusion of proposed Units 1 and 2 are significant and outweigh the benefits of their inclusion. This exclusion will provide greater overall opportunities to achieve conservation for sparrows, as well as to achieve restoration of the Everglades. This benefit of exclusion outweighs the small added regulatory and educational benefits of including critical habitat units in this area. We have therefore excluded from the proposed designation areas that support sparrow subpopulation A. These areas were included in the proposed rule (71 FR 63980) and identified as Units 1 and 2.

It is also our determination therefore that the benefits of excluding the 75 ac (31 ha) of proposed critical habitat along the eastern edge of proposed Unit 7 are significant and outweigh the benefits of inclusion. The benefits of inclusion result from the protection of 75 ac (31 ha) of habitat (approximately 1.5 percent of the proposed unit) through a possible re-initiation of the IOP consultation. Exclusion will facilitate construction of a water management feature that will aid in maintaining and benefiting PCEs within the remainder of the unit by minimizing delays through not having to re-initiate consultation on the IOP opinion. This feature will also improve hydrologic conditions in the Rocky Glades and Taylor Slough areas adjacent to the unit, resulting in reduced threats from fires and exotic vegetation encroachment. We have therefore excluded from the proposed designation the 75 ac (31 ha) area along the eastern edge of proposed Unit 7. This area was included in the proposed rule (71 FR 63980).

In the other proposed areas, we have determined not to make any exclusions.

#### (4) Exclusion Will Not Result in Extinction

The entire known current range of the Cape Sable seaside sparrow lies within Federal and State lands managed for conservation purposes, and over 90 percent of the sparrow population occurs on lands managed by NPS. Existing management plans and agreements provide for protection and management of sparrows and sparrow habitat on all lands on which they occur. The area excluded has supported less than four percent of the sparrow population over the past five years, and it is completely within the boundary of lands managed by NPS. All actions that may affect sparrows or sparrow habitat in the excluded areas will require consultation under section 7 of the Act under the jeopardy standard, and no Federal actions will be permitted which may jeopardize the continued existence of the species, regardless of whether critical habitat is designated. Further, the Service and the Department of the Interior are involved at both overarching policy and technical levels in formulating future hydrological management plans associated with the CERP. The Department of the Interior also has a key oversight role in Everglades restoration. This involvement will further ensure that proposed future plans for hydrologic management will not result in extinction of the species in the absence of the designation of these two proposed units. As a result of the combination of

the existing management plans, the fact that they fall within NPS boundaries, the requirement for section 7 consultation under the jeopardy standard for any action that may affect sparrows within the entire excluded area, we find that the exclusion of proposed Units 1 and 2 (the area that supports sparrow subpopulation A), and 75 ac (31 ha) of Unit 7 (sparrow subpopulation F) will not result in the extinction of the Cape Sable seaside sparrow. Accordingly, we exercise discretion under section 4(b)(2) of the Act to exclude areas which meet the definition of critical habitat in the area of sparrow subpopulation A, which were identified in the proposed rule as Units 1 and 2, and a portion of sparrow subpopulation F, which was identified in the proposed rule as Unit 7 from designation as critical habitat.

#### Editorial Changes

This final rule incorporates a change to the common and scientific names of the Cape Sable seaside sparrow used in the current critical habitat entry for this species at 50 CFR 17.95(b). The current critical habitat entry, established by an August 11, 1977, final rule (42 FR 40685), uses the common name "Cape Sable sparrow" and the scientific name "*Ammospiza maritima mirabilis*." Both names are outdated. The new common name is "Cape Sable seaside sparrow" and the new scientific name is "*Ammodramus maritimus mirabilis*." This change will bring the common and scientific names into agreement with those used by the scientific community, as well as names used for this species in the table at 50 CFR 17.11(h).

#### Required Determinations

##### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise legal and policy issues. Based on our economic analysis, the estimate of total potential future costs associated with conservation efforts for the sparrows in areas designated is \$32.3 million (undiscounted). The present value of these impacts is \$26.9 million using a discounted rate of three percent, or \$22.2 million using a discount rate of seven percent. The annualized value of these impacts is \$1.8 million to \$6.70 million, using a discount rate of three percent, or \$2.1 million using a discount rate of seven percent. Therefore, we do not believe that the designation of critical habitat for the Cape Sable seaside sparrow would result in an annual effect on the economy of \$100 million or more or affect the economy

in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the rule or accompanying economic analysis.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Because the determination of critical habitat is a statutory requirement under the ACT, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

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

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

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

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (such as housing development, grazing, oil and gas production, timber harvesting). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may

affect the Cape Sable seaside sparrow. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

In our economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Cape Sable seaside sparrow and proposed designation of its critical habitat. This analysis estimated prospective economic impacts due to the implementation of conservation efforts for the species, such as water management, species management, fire management, and administrative costs. We determined from our analysis that the economic impacts of conservation efforts for the sparrow are expected to be borne primarily by State and Federal agencies, including the Service, USACE, NPS, and SFWMD. None of these agencies are defined as small entities by the SBA. Consequently, the designation of critical habitat for the sparrow is not expected to impact small entities.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the State and Federal agencies that may be required to consult with us each year regarding their project's impact on the Cape Sable seaside sparrow and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer "reasonable and prudent alternatives." Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to

proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final critical habitat units, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the USACE under section 404 of the Clean Water Act;

(2) Regulation of water flows, water levels, water supply to urban and agricultural users, and flood protection activities implemented or licensed by Federal agencies;

(3) Regulation of access, recreation, and conduct of land management activities such as prescribed burning and vegetation management by NPS;

(4) Construction and maintenance of roads, buildings and facilities, and hydrologic infrastructure such as pump stations, canals, and gauging stations;

(5) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(6) Activities funded by the EPA, U.S. Department of Energy, or any other Federal agency.

It is likely that a project sponsor and action agency could modify a project or take measures to protect the sparrow. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include hydrologic management within certain constraints, conducting reduced or limited projects, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the recovery plan and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include USACE permits, operations and maintenance of USACE hydrologic infrastructure, development and maintenance of Federal facilities, and development and implementation of NPS management plans. Therefore, we are certifying that this final designation of critical habitat for the Cape Sable seaside sparrow will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis is not required.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designated critical habitat for the Cape Sable seaside sparrow is not expected to significantly affect energy supplies, distribution, or use (See Appendix C of the final Economic Analysis for further discussion). Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or Tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

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

Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, a Small Government Agency Plan is not required.

#### *Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating 84,865 ac (34,344 ha) within State- and Federally-owned conservation lands in southern Florida as critical habitat for the Cape Sable seaside sparrow in a takings implication assessment. The takings implications assessment concludes that this final designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

#### *Federalism*

In accordance with Executive Order 13132 (Federalism), the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in Florida. The designation of critical habitat in areas currently occupied by the Cape Sable seaside sparrow may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

#### *Civil Justice Reform*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the Cape Sable seaside sparrow.

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

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

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

It is our position that, outside the Jurisdiction of the Tenth Federal Circuit, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 516 U.S. 1042 (1996)).

#### *Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.

The purpose of Secretarial Order 3206 (Secretarial Order) is to "clarif(y) the responsibilities of the component

agencies, bureaus, and offices of the Department of the Interior and the Department of Commerce, when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, Tribal trust resources, or the exercise of American Indian tribal rights." If there is potential that a Tribal activity could cause either direct or incidental take of a species proposed for listing under the Act, then meaningful government-to-government consultation will occur to try to harmonize the Federal trust responsibility to Tribes and Tribal sovereignty with our statutory responsibilities under the Act. The Secretarial Order also requires us to consult with Tribes if the designation of an area as critical habitat might impact tribal trust resources, Tribally owned fee lands, or the exercise of Tribal rights.

While the critical habitat designation does not include any lands under Tribal ownership, the Miccosukee Tribe of Indians of Florida has perpetual rights to portions of ENP and Water Conservation Area 3A which they utilize for traditional purposes. We have excluded lands from the final critical habitat designation pursuant to section 4(b)(2) of the Act which we believe would have the greatest impact on Tribal resources. We recognize the Tribe's concerns that the critical habitat designation, even with the exclusions, may result in indirect impacts to Tribal resources on these lands. We are committed to continuing to work with the Tribe collaboratively to address future issues related to or affected by designation of critical habitat.

#### References Cited

A complete list of all references cited in this rulemaking is available upon request from the U.S. Fish and Wildlife Service, South Florida Ecological Services Office (see **ADDRESSES**).

#### Author(s)

The primary authors of this package are the South Florida Ecological Services Office.

#### List of Subjects in 50 CFR Part 17

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

#### Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

#### PART 17—[AMENDED]

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

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

■ 2. In § 17.95(b), revise the entry for "Cape Sable Sparrow (*Ammospiza maritima mirabilis*)" to read as follows:

#### § 17.95 Critical habitat—fish and wildlife.

\* \* \* \* \*

##### (b) Birds.

\* \* \* \* \*

#### Cape Sable Seaside Sparrow (*Ammodramus maritimus mirabilis*)

(1) Critical habitat units are depicted for Miami-Dade County, Florida, on the map at paragraph (10) of this entry.

(2) The primary constituent elements of critical habitat for the Cape Sable seaside sparrow are the habitat components that provide:

(i) Calcitic marl soils characteristic of the short-hydroperiod freshwater marl prairies of the southern Everglades;

(ii) Herbaceous vegetation that includes greater than 15 percent combined cover of live and standing dead vegetation of one or more of the following species (when measured across an area of greater than 100 ft<sup>2</sup> (9.3 m<sup>2</sup>)): Muhly grass (*Muhlenbergia filipes*), Florida little bluestem (*Schizachyrium rhizomatum*), black-topped sedge (*Schoenus nigricans*), and cordgrass (*Spartina bakeri*);

(iii) Contiguous open habitat (Sparrow subpopulations require large, expansive, contiguous habitat patches with few or sparse woody shrubs or trees.); and

(iv) Hydrologic regime such that the water depth, as measured from the water surface down to the soil surface, does not exceed 7.9 inches (20 cm) for more than 30 days during the period from March 15 to June 30 at a frequency of more than 2 out of every 10 years.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, roads, and other paved areas) and the land on which they are located on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical Habitat Map Units. Data layers defining map units were created using a GIS and adding activity areas around all Cape Sable seaside sparrow point count survey coordinates provided by the National Park Service at which sparrows have been recorded since 1981. These activity areas were merged to form one large polygon, and the boundaries were further refined by delineating suitable sparrow habitat and

excluding unsuitable habitat along the borders based on interpretation of 2004 Florida Digital Orthographic Quarter Quads and Landsat false-color satellite imagery (a mosaic of color-balanced Landsat 7 Enhanced Thematic Mapper scenes from December 2003 to April 2004 using bands 5, 4, and 3). The projection represented in all mapping of units is Universal Transverse Mercator (UTM) Zone 17 North, NAD 83 Datum.

(5) Unit 1—Subpopulation B.

(i) *General description:* Unit 1—subpopulation B consists of 39,053 ac (15,804 ha) of marl prairie habitat that lies within Everglades National Park in southwestern Miami-Dade County.

(ii) *Coordinates:* From the Long Pine Key USGS 1:24,000 quadrangle map, Florida, land and water bounded by the following UTM Zone 17 NAD 83

coordinates (E, N): 526917, 2808910; 527089, 2808114; 527308, 2808109; 528319, 2808057; 528750, 2807801; 528903, 2807333; 529236, 2806425; 529691, 2806032; 530946, 2805892; 531630, 2805875; 532441, 2805501; 532453, 2804873; 531446, 2803970; 530870, 2803902; 530241, 2803890; 529854, 2803763; 529386, 2803611; 529182, 2803097; 529144, 2802662; 529296, 2802167; 529728, 2801965; 530138, 2801955; 530767, 2801940; 531394, 2801843; 531909, 2801666; 532314, 2801438; 532312, 2801384; 532262, 2800430; 531975, 2799918; 531693, 2799543; 531425, 2798649; 531410, 2798077; 531094, 2797430; 530664, 2796649; 530325, 2796193; 529846, 2795632; 529518, 2795640; 528557, 2795500; 528065, 2795485; 527787, 2795300; 527450, 2794981; 527006, 2794692; 526591, 2794511; 526017, 2794525; 525180, 2794982; 524802, 2795155; 523987, 2795393; 522696, 2796271; 522130, 2796639; 521206, 2796853; 520557, 2797169; 520072, 2797481; 519245, 2798319; 518416, 2799104; 517970, 2799879; 517793, 2800456; 517534, 2801062; 517266, 2801260; 516889, 2801515; 516474, 2802425; 516492, 2803162; 516515, 2804116; 516430, 2805100; 516586, 2805888; 517094, 2806530; 517680, 2807007; 517877, 2807248; 518159, 2807596; 518527, 2808078; 519049, 2808174; 520226, 2808227; 520856, 2808239; 521482, 2808115; 521938, 2807749; 522335, 2807194; 522567, 2806642; 522754, 2806447; 523349, 2806159; 523785, 2806121; 524093, 2806387; 524429, 2806706; 524846, 2806996; 525021, 2807428; 525305, 2807858; 525560, 2808206; 525406, 2808619; 525663, 2809050; 526296, 2809225; 526917, 2808910.

(6) Unit 2—Subpopulation C.

(i) *General description:* Unit 2—subpopulation C consists of 7,951 ac



(3,218 ha) of marl prairie habitat that lies within Everglades National Park in western Miami-Dade County.

(ii) *Coordinates:* From the Long Pine Key USGS 1:24,000 quadrangle map, Florida, land and water bounded by the following UTM Zone 17 NAD 83 coordinates (E, N): 534909, 2812258; 535011, 2812832; 535192, 2813089; 535650, 2813200; 536001, 2813209; 536491, 2813232; 536722, 2813349; 536766, 2813714; 536778, 2814185; 536928, 2814601; 537297, 2814644; 537496, 2814936; 537501, 2815128; 537809, 2815540; 538341, 2815806; 538763, 2815900; 539200, 2815890; 539689, 2815825; 540446, 2815981; 540831, 2815972; 541166, 2816117; 541174, 2811281; 541550, 2811272; 541579, 2810820; 541603, 2810365; 541542, 2810035; 541376, 2809690; 541211, 2809380; 541133, 2809067; 541108, 2808754; 541296, 2808574; 541238, 2808331; 541146, 2808159; 540844, 2807992; 540792, 2807993; 540634, 2807979; 540542, 2807824; 540538, 2807632; 540309, 2807586; 539756, 2807879; 539132, 2808138; 538618, 2808605; 538734, 2809056; 538901, 2809401; 539067, 2809781; 538637, 2810071; 538068, 2810417; 537342, 2810784; 536684, 2811114; 536178, 2811179; 535884, 2811326; 535598, 2811787; 535253, 2811988; 534909, 2812258;

(7) Unit 3—Subpopulation D.

(i) *General description:* Unit 3—subpopulation D consists of 10,700 ac (4,330 ha) of marl prairie habitat that lies within the Southern Glades Wildlife and Environmental Area and Everglades National Park, in southern Miami-Dade County, as depicted on Map 1.

(ii) *Coordinates:* From the Royal Palm Ranger Station SE USGS 1:24,000 quadrangle map, Florida, land and water bounded by the following UTM

Zone 17 NAD 83 coordinates (E, N): 546623, 2805929; 547722, 2805064; 547780, 2804591; 548184, 2804651; 548884, 2804634; 549599, 2804511; 550164, 2804008; 550253, 2803378; 549944, 2802896; 549549, 2802504; 549138, 2802148; 549024, 2801801; 549035, 2801539; 549039, 2800997; 549140, 2800122; 549122, 2799389; 548970, 2798904; 548373, 2798813; 547483, 2798958; 546821, 2799061; 545890, 2798962; 545532, 2798621; 545114, 2798003; 544479, 2797791; 543887, 2797946; 543689, 2798405; 543750, 2799468; 543726, 2799940; 543689, 2800535; 543343, 2800736; 542783, 2800715; 542331, 2800865; 541727, 2801212; 541556, 2801356; 541478, 2801759; 541479, 2802493; 541666, 2802977; 542234, 2803313; 542611, 2803670; 542775, 2803928; 543425, 2804034; 544003, 2804037; 544423, 2804027; 544605, 2804337; 544618, 2804843; 544595, 2805350; 544742, 2805626; 545170, 2805930; 545889, 2805999; 546623, 2805929.

(8) Unit 4—Subpopulation E.

(i) *General description:* Unit 4—subpopulation E consists of 22,278 ac (9,016 ha) of marl prairie habitat that lies within Everglades National Park in central Miami-Dade County.

(ii) *Coordinates:* From the Pahayokee Lookout Tower USGS 1:24,000 quadrangle map, Florida, land and water bounded by the following UTM Zone 17 NAD 83 coordinates (E, N): 521841, 2816533; 525940, 2820239; 525968, 2820266; 526694, 2820741; 527084, 2820978; 527388, 2821080; 527374, 2821600; 527360, 2822148; 527457, 2822748; 527735, 2822906; 528070, 2823117; 528417, 2823848; 529028, 2824134; 529238, 2824841; 529250, 2825333; 529197, 2826539; 529735, 2827183; 530668, 2827160; 531953, 2826965; 532774, 2826835;

533193, 2826031; 533510, 2825530; 533777, 2825195; 534094, 2824694; 533885, 2824015; 533544, 2823558; 533230, 2823045; 533211, 2822307; 533415, 2821672; 533623, 2821174; 534292, 2820473; 534774, 2819968; 534844, 2819501; 535075, 2818811; 535283, 2818368; 534879, 2817556; 534463, 2817375; 533609, 2817259; 531442, 2817339; 530965, 2816913; 530377, 2816462; 529199, 2816545; 528179, 2816378; 527947, 2815864; 527689, 2815432; 527085, 2815447; 526289, 2815439; 525570, 2815237; 525284, 2814779; 525270, 2814177; 525195, 2813357; 525067, 2812648; 523941, 2812621; 523173, 2812640; 522612, 2813283; 521991, 2813682; 521696, 2813963; 521545, 2814542; 521562, 2815253; 521603, 2815772; 521841, 2816533.

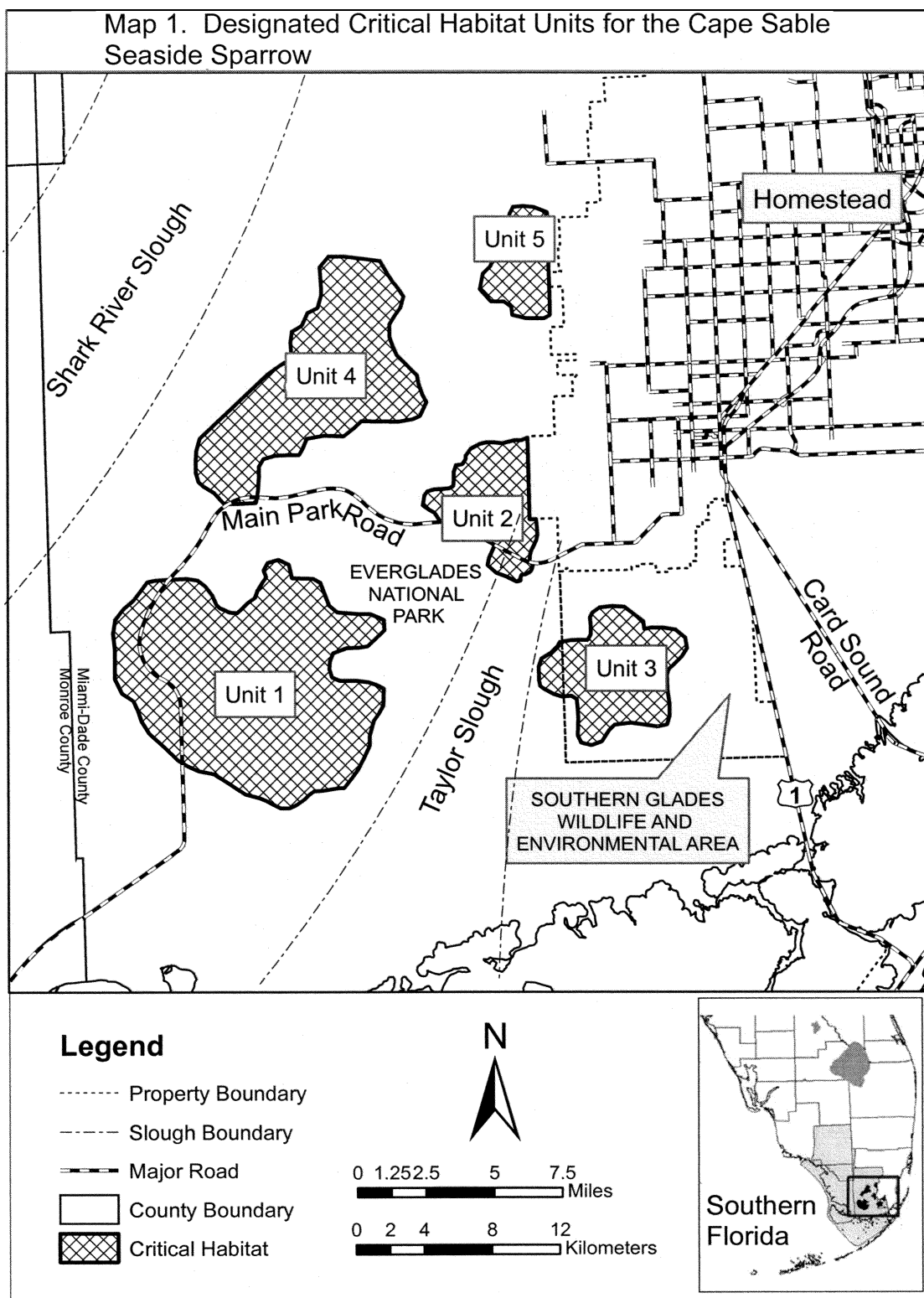
(9) Unit 5—Subpopulation F.

(i) *General description:* Unit 5—subpopulation F consists of 4,883 ac (1,976 ha) of marl prairie habitat that lies along the eastern boundary of Everglades National Park in central Miami-Dade County.

(ii) *Coordinates:* From the Grossman Hammock USGS 1:24,000 quadrangle map, Florida, land and water bounded by the following UTM Zone 17 NAD 83 coordinates (E, N): 541235, 2829890; 541864, 2829822; 542679, 2829488; 542727, 2827880; 542685, 2826187; 542686, 2825087; 542692, 2823991; 542685, 2823355; 542348, 2823192; 541263, 2823219; 540481, 2823430; 540440, 2823903; 539993, 2824245; 539241, 2824264; 538593, 2824996; 538791, 2825899; 539239, 2826324; 539702, 2827361; 539928, 2828001; 540356, 2829021; 540489, 2829454; 540691, 2829833; 541235, 2829890.

(10) *Note:* Map of Designated Units follows:

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Dated: October, 24, 2007.

**David M. Verhey,**

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

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