

Frequently Asked Questions
Final Critical Habitat revision for the Cape Sable seaside sparrow
November 6, 2007

Q: Why is the Service revising critical habitat for the Cape Sable seaside sparrow now?

A: In 1999, we were petitioned by Biodiversity Legal Foundation, Florida Biodiversity Project, Brian Scherf, Rosalyn Scherf, and Sidney B. Maddock to revise the critical habitat designated in 1977. In 2001, we announced in our “12-month” finding that revision of critical habitat for the Cape Sable seaside sparrow is warranted (66 FR 53573). Work on the revision, however, was precluded because of budgetary constraints and higher priority listing and critical habitat actions. A complaint was filed by the petitioners alleging that we had failed to indicate in our “12-month” finding how we planned to proceed with the petitioned revision to critical habitat. In September 2003, the U.S. District Court for the District of Columbia ruled that we were exercising reasonable discretion in postponing development of a proposed rule to revise critical habitat, but ordered the Service to specify a date on which we would begin work on a rule to revise critical habitat and estimate how long the process would take. On November 28, 2003, the Service notified the Court that a proposed rule to revise critical habitat would be submitted to the *Federal Register* by October 24, 2006, and a final rule would be completed within 12 months of the publication of the proposed rule.

Q: How does the final designation differ from the proposed designation?

A: The final rule incorporates six changes from the proposed rule. We modified the two eastern boundary units associated with sparrow subpopulations C and F, aligning them more accurately with habitat the species needs to survive, and removed an area from the designation that is currently the site of ongoing reservoir construction. Those changes resulted in a reduction of 183 acres. We also corrected the description herbaceous vegetation to correct errors and clarify the description of the method of vegetation measurements. We modified the 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 additional review and analysis of rainfall and hydrologic data within the Everglades. The most significant change is that we are invoking the Secretary’s discretion under section 4(b)(2) of the Act to exclude proposed critical habitat units 1 and 2, which correspond with sparrow subpopulation A. This reduces the acreage of the designation by 71,294 acres. As a result of the exclusion, the names of the remaining 5 units are being changed.

Q: How does the final designation differ from the previously designated critical habitat?

A: Critical habitat for the Cape Sable seaside sparrow was originally designated in 1977. It included approximately 197,260 acres and boundaries were based on Township-Range-Section boundaries in areas where sparrows occurred. The 1977 designation did not identify the essential habitat the species needs to survive and thrive. The current designation replaces the 1977 designation. In the current designation, unit boundaries were drawn based on the habitat and the specific locations where sparrows have occurred, and eliminated many areas of

unsuitable habitat for sparrows, such as pine forests, deep water slough communities, and agricultural lands, from the designation. The final rule designates 84,865 acres as critical habitat, and these areas include about 95 percent of the sparrow population. The entire designation lies within Everglades National Park and the Southern Glades Wildlife and Environmental Area.

Q: Will the revised critical habitat designation affect the Comprehensive Everglades Restoration Plan (CERP) and is that included in the economic analysis?

A: The critical habitat designation will help guide CERP projects, but the Service does not believe it will significantly affect the outcome. Under section 7(a)(2) of the Endangered Species Act, Federal agencies are required to consult on any Federal action, including CERP projects, that affects sparrows or designated sparrow critical habitat to ensure that proposed projects do not jeopardize the continued existence of the sparrow, or destroy or adversely modify its critical habitat. The Service will carefully review potential impacts to critical habitat and develop measures to avoid and minimize the impacts.

The Service also chose to exclude two units – known as subpopulation A – west of Shark River Slough from the critical habitat designation. Some new science suggests at least some parts of this area may have historically more closely resembled a sawgrass marsh, and not the conditions that support the species' habitat of choice today. In addition, we also know that up-to-date modeling for Everglades restoration projects indicates this area will become wetter to some degree as restoration progresses. Some locations may revert to conditions that do not support sparrow habitat, and others may reemerge and provide conditions that support the species. In addition, the best available science suggests restoration will benefit the sparrow.

Given the uncertainties in the historical conditions and vegetation changes that will be caused by Everglades restoration in this area, we do not believe designating fixed habitat lines was a sensible restoration and recovery strategy. Furthermore, the areas supporting sparrows west of Shark River Slough fall exclusively within the boundaries of Big Cypress National Preserve and Everglades National Park. As a result, these locations will continue to receive significant protections now and in the future even without the critical habitat designation. After a careful weighing of the benefits of designating versus excluding subpopulation A, we determined the benefits of exclusion were significantly greater. In addition, we do not believe the remaining areas of critical habitat are likely to significantly affect CERP.

The potential effects of the designation on CERP were discussed qualitatively in the economic analysis, but were not quantified because the precise effects cannot be predicted with reliability. On August 13-15, 2007, the Service participated in an Avian Ecology Workshop, which was convened to improve the understanding of the potential effects that Everglades restoration may have on several imperiled avian species, including the sparrow. In coming months, a report, prepared by an independent panel of scientists, will provide further assessment and recommendations related to conserving these avian species during Everglades restoration.

Q: Since critical habitat will not be designated in sparrow subpopulation A, can the S-12 structures remain open year-round?

Everglades restoration in the southern part of the ecosystem cannot begin until key projects are in place that provide a more natural distribution of flows through the Water Conservation Areas and into northeast Shark River Slough. Current water management in that region is guided by the Interim Operational Plan for the Protection of the Cape Sable seaside Sparrow (IOP). This plan includes seasonal closures of the S-12 structures that were implemented to provide hydrological conditions that allow for successful sparrow breeding. We believe that these protections remain necessary to provide protections for sparrows regardless of the designation of critical habitat. Until IOP is replaced by another approved water management plan that has undergone consultation under the Endangered Species Act, IOP operations will remain in place.

Q: What is critical habitat?

A: Critical habitat is a term defined and used in the Endangered Species Act of 1973, as amended. It refers to specific geographic areas with features that are essential to the conservation of threatened or endangered species and may require special management consideration or protection or areas that are essential to the conservation of the species. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. It does not allow government or public access to private lands.

Q: Does critical habitat provide additional protection for the species?

A: Federal agencies must consult with the Service on activities they permit, fund, or carry out that may affect critical habitat. However, the Endangered Species Act prohibits unauthorized take of listed species and requires consultation for activities that may affect them, including habitat alteration, regardless of whether critical habitat has been designated.

Q: Do Cape Sable seaside sparrows occur outside of critical habitat?

A: Yes. Critical habitat designations generally do not include all areas where a species occurs.

Q: Are Cape Sable seaside sparrows located outside of the designated critical habitat areas still protected?

A: Yes. Because the Cape Sable seaside sparrow is an endangered species, it is protected regardless of whether it is inside or outside of an area designated as critical habitat. When a species is listed, it is protected from “take” throughout its range and federal agencies must consult with the Service on activities they permit, fund, or carry out that may affect a listed species. “Take” is defined to include harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these. When critical habitat is designated, federal agencies are also required to ensure that their activities or those they permit or authorize will not destroy or adversely modify critical habitat.

Q: What constitutes destruction or adverse modification of critical habitat?

A: “Destruction or adverse modification of designated critical habitat” is defined as a direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of the species (50 CFR 402.02). Such alterations include, but are not limited to,

adverse changes to the physical or biological features (i.e., the primary constituent elements that were the basis for determining the habitat to be critical).

The relationship between a species' survival and its recovery has been a source of confusion to some in the past. We believe that a species' ability to recover depends on its ability to survive into the future when its recovery can be achieved; thus, the concepts of long-term survival and recovery are intricately linked. However, in the March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434) regarding our previous not prudent finding, the Court found our definition of destruction or adverse modification as currently contained in 50 CFR 402.02 to be invalid. This finding was reached again on August 6, 2004, by the United States Court of Appeals for the Ninth Circuit (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, No. 03-35279). We are reviewing our regulatory definition of adverse modification in response to these decisions.

Q: Will the critical habitat designation delay federal decisions on permits or funding?

A: No. Under the Endangered Species Act, we have specific time frames in which to complete the consultation process with action agencies. These time frames remain the same whether or not there is critical habitat within the project area. Designation of critical habitat for the Cape Sable seaside sparrow notifies the federal action agencies and the public that federally authorized and funded activities within these designated critical habitat areas must comply with section 7 consultation requirements. For each section 7 consultation, we already review the direct and indirect effects of the proposed projects on the sparrow and its critical habitat designated in 1977, and will do so for revised critical habitat. This revised critical habitat designation will not create a separate process and timelines will not change.

Q: Are all areas within the designated critical habitat boundaries for Cape Sable seaside sparrow considered critical habitat?

A: In order for an area to be designated as critical habitat, the area has to contain primary constituent elements (PCEs) which are the physical and biological elements essential to support the life cycle needs of the species. The PCEs for the sparrow include specific vegetation conditions, hydrologic conditions, and landscape characteristics. When determining critical habitat boundaries, we make every effort to avoid the designation of developed areas such as buildings, roads, driveways, ponds, canals, and other structures that lack PCEs for the sparrow. Any such structures inadvertently left inside critical habitat boundaries, and the land (footprint) upon which they are sited, are not considered part of the unit.

Q: How can areas be excluded from a critical habitat designation?

A: The Endangered Species Act allows some areas to be excluded from a critical habitat designation. In evaluating and considering such exclusions, the Secretary of Interior is afforded broad discretion in determining what benefits are relevant, and the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such areas as critical habitat, provided that the exclusion will not result in the extinction of the species. Exclusions are generally possible for public and private lands that have secure, long-term conservation plans in place that benefit the Cape Sable seaside sparrow, and for economic and other relevant reasons.

Q: What is an economic analysis?

A: When designating critical habitat for a federally listed species, the Endangered Species Act, requires the U.S. Fish and Wildlife Service (Service) to estimate economic and other impacts associated with designating any particular area as critical habitat. An economic analysis is conducted to estimate economic impacts that may potentially result from conservation activities associated with the proposed designation. The economic analysis offers a potential economic impact over a twenty-year period using a series of models drawn from various studies and an assessment of those future actions that are likely to occur. It cannot and does not predict actual costs.

Impacts identified in an economic analysis may be used by the Secretary of the Interior to determine if certain areas should be excluded from critical habitat based on a comparison of the benefits of exclusion versus the benefits of including a particular area as critical habitat. However, economic impacts are not used to determine whether or not a species should be listed under the Act – decisions to list species under the Act are based solely on an assessment of a species' status using the best available scientific and commercial information.

Q: Why did the Service decide to use the incremental approach in the final economic analysis?

A: 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.); *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 should use a traditional regulatory analysis approach and examine 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 quantifies the existing regulatory baseline. When quantifying the baseline, the analysis looks back to the time of listing at all the impacts that occur coextensively. The final economic analysis for the Cape Sable seaside sparrow critical habitat designation includes both coextensive and incremental impacts.

Q: What does the Economic Analysis say?

A: The economic analysis identifies that the majority of the total potential costs estimated are associated with species management efforts such as surveying and monitoring, research, exotic vegetation control, and similar activities. The remaining costs are associated with potential water management changes to conserve the sparrow, fire management, and administrative costs of consultation. The final Economic Analysis estimates potential future costs associated with conservation efforts for the sparrow in areas designated to be \$32.2 million over the next 20 years. 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, using a discount rate of three percent, or \$2.1 million, using a discount rate of seven percent. The final economic analysis also includes an appendix that estimates incremental impacts of critical habitat designation that are forecast to be \$64,000 over 20 years. These incremental impacts consist of additional administrative effort in considering adverse modification in section 7 consultation. All other impacts quantified in the Economic Analysis are baseline impacts not expected to be affected by the critical habitat rulemaking.

This analysis assumes that conservation efforts for the Cape Sable seaside sparrow may result in changes to water management, and that these changes may result in both direct costs associated with water management and associated opportunity costs, or changes in economic efficiency. This analysis does not, however, make assumptions or recommendations regarding whether or how such changes in water use and management could occur. Post-designation costs of sparrow conservation efforts are expected to arise from continued sparrow surveying and monitoring efforts, exotic vegetation control, and fire management for the sparrow. The National Park Service is expected to incur most of these future costs related to species and fire management efforts.

Q: What is the critical habitat designation that the economic analysis was based on?

A: On October 31, 2006, we published a proposed rule to revise the designated critical habitat for the Cape Sable seaside sparrow (71 FR 63980). The economic analysis considers the economic impacts of this proposed designation. Because economics is one of the factors that the Secretary of Interior must consider in determining whether exclusions are appropriate, the final economic analysis provides information on all areas considered for designation as critical habitat. Consequently, the economic analysis considers the impact of designating all seven units considered in the proposed rule, while the final designation identifies only five units. The rule, maps of the units, and the economic analysis can be found at www.fws.gov/verobeach/.

Q: How does the designation of critical habitat potentially result in economic impacts?

A: Section 7 of the Endangered Species Act requires Federal agencies to consult with the Service if an action that is carried out, funded, or authorized by them may affect a federally listed species or its designated critical habitat. The purpose of a consultation is to ensure that such actions will not jeopardize the continued existence of a listed species or adversely modify its designated critical habitat. Through the consultation process impacts to species or designated critical habitat can be minimized or offset by the development of appropriate conservation measures. Implementation of conservation measures and the process of conducting a consultation itself involve costs to Federal agencies, including the Service, and to project applicants.

Q: What types of activities occur in the areas designated as critical habitat and how are they addressed in the economic analysis?

A: The critical habitat revision almost exclusively includes lands owned and managed by the National Park Service, South Florida Water Management District, and the Florida Fish and Wildlife Conservation Commission. The public activities that occur in these areas include hunting, fishing, airboating, hiking, and some other similar activities. In addition, agencies responsible for the managing the land and water in the area of the proposed critical habitat units conduct natural resources management activities such as prescribed burning and control of

wildfires, control of invasive plant species, water management, and similar activities. The economic analysis described the current uses and activities that occur in these areas in greater detail, and described the economic impacts that the revision of critical habitat may have, which include estimates of potential costs for sparrow conservation in the area.

Q: Can I still comment on the critical habitat and the economic analysis?

A: No. The public comment period for both of these documents closed on September 17, 2007. However, if you have questions or concerns not addressed here, please contact the South Florida Ecological Services Office at 772-562-3909 for further information.

Q: Did the Service consider public comments when developing the final designation?

A: Yes. The Service invited public comments during the development of this rule, including two public comment periods (90 days total) and one public hearing. We received many comments from the public and a variety of organizations, agencies, and private individuals that we took into account in finalizing this designation. In the final rule, we summarize the public comments that we received, and provide responses to those comments.

Q: What is the Cape Sable seaside sparrow?

A: The Cape Sable seaside sparrow is a small, secretive, non-migratory bird that remains in southern Florida year-round. Sparrows occupy short-hydroperiod freshwater marl prairies that flank the deeper sloughs of the southern Everglades, or the tidally-influenced cordgrass marshes that occur within a narrow band of the coast just landward from the mangrove communities. Sparrows generally begin nesting in early March and finish in August. They typically build their nests 6.7 to 7.1 inches above the ground surface. Nests are woven into clumps of dense vegetation and are well-concealed. The majority of the sparrow's diet is comprised of invertebrates (mostly insects), though they may also consume seeds when available.

Q: Where does the Cape Sable seaside sparrow live?

A: The Cape Sable seaside sparrow is currently thought to live only in Everglades National Park, Big Cypress National Preserve, and Southern Glades Wildlife and Environmental Area in Miami-Dade and Monroe Counties, Florida.

Q: Have past actions to conserve sparrows negatively affected snail kites?

A: Compartmentalization of the Everglades has negatively affected many species of wildlife. We do not think that water management actions implemented to protect sparrows have been the primary cause of population and habitat declines for the Everglade snail kite. The snail kite population and habitat have been affected by broad hydrologic patterns within the Everglades and regional drought conditions, which were not a direct result of efforts to protect the sparrow. However, we recognize that changes in hydrologic management to provide favorable conditions for sparrow breeding can affect kites and kite habitat. We are working with our partners to minimize these effects and find solutions in the form of water management strategies that provide benefits for kites, sparrows, and the variety of other Everglades-dependent fish, wildlife, and plants.

Q: Where can I find more information about this critical habitat revision?

A: The proposed and final rules, the economic analysis, maps of the proposed and final units, and other information about critical habitat can be found at: www.fws.gov/verobeach/. For other questions about the Cape Sable seaside sparrow, contact the U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, Florida 32960, or telephone 772/562-3909.