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50 CFR Part 17

**Endangered and Threatened Wildlife and
Plants; Designation of Critical Habitat for
the Louisiana Black Bear (*Ursus
americanus luteolus*); Final Rule**

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

[FWS-R4-ES-2008-0047; 92210-1117-0000-B4]

RIN 1018-AV52

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Louisiana Black Bear (*Ursus americanus luteolus*)**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Louisiana black bear (*Ursus americanus luteolus*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 1,195,821 acres (483,932 hectares) in Avoyelles, East Carroll, Catahoula, Concordia, Franklin, Iberia, Iberville, Madison, Pointe Coupee, Richland, St. Martin, St. Mary, Tensas, West Carroll, and West Feliciana Parishes, Louisiana, fall within the boundaries of the critical habitat designation.

DATES: This rule becomes effective on April 9, 2009.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at <http://www.regulations.gov> and at <http://www.fws.gov/lafayette>. Supporting documentation we used in preparing this final rule is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Lafayette Ecological Services Field Office, 646 Cajundome Boulevard, Suite 400, Lafayette, LA 70506; telephone 337-291-3100; facsimile 337-291-3139.

FOR FURTHER INFORMATION CONTACT: Jim Boggs, Field Supervisor, Lafayette Ecological Services Field Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:**Background**

It is our intent to discuss only those topics directly relevant to the development and designation of critical habitat for the Louisiana black bear in this final rule. For more information on the biology and ecology of the Louisiana black bear, refer to the final listing rule published in the **Federal Register** on January 7, 1992 (57 FR 588), and to our 1995 final recovery plan, which is

available from the Lafayette Ecological Services Field Office (see **ADDRESSES** section). For information on Louisiana black bear critical habitat, refer to the proposed rule to designate critical habitat for the Louisiana black bear published in the **Federal Register** on May 6, 2008 (73 FR 25354). Information on the associated draft economic analysis for the proposed rule to designate revised critical habitat was published in the **Federal Register** on November 12, 2008 (73 FR 66831).

Previous Federal Actions

We listed the Louisiana black bear (*Ursus americanus luteolus*) as threatened under the Act (16 U.S.C. 1531 *et seq.*) on January 7, 1992 (57 FR 588). In our final rule listing this subspecies, we determined that normal forest management activities supporting a sustained yield of timber products and wildlife habitats were compatible with Louisiana black bear's needs. Accordingly, we promulgated a special rule under section 4(d) of the Act, which can be found at 50 CFR 17.40(i), exempting the effects incidental to normal forest management activities within the subspecies' historic range, except for activities causing damage to or loss of den trees, den tree sites, or candidate den trees (57 FR 588). For the purposes of that exemption, normal forest management activities are those activities that support a sustained yield of timber products and wildlife habitats, thereby maintaining forestland conditions in occupied (i.e., breeding) habitat. Research has supported this decision. In fact, in some cases, such as leaving downed tree tops and creating openings, timber management can provide or enhance black bear habitat (Weaver 1999, pp. 126-128; Hightower *et al.* 2002, p. 14; Weaver *et al.* 1990, p. 344; Lindsey and Meslow 1977, p. 424). Therefore, we have not considered changing the special rule at 50 CFR 17.40.

We first proposed critical habitat for the Louisiana black bear on December 2, 1993 (58 FR 63560), but never published a final rule designating critical habitat. On September 6, 2005, Mr. Harold Schoeffler and the Louisiana Crawfish Producers Association—West filed suit in U.S. District Court for the Western District of Louisiana (Civil Action No. CV05-1573 (W.D. La.)) regarding our failure to designate critical habitat for the Louisiana black bear.

On June 26, 2007, the Court ordered the Service to withdraw the December 2, 1993, proposed critical habitat rule and create a new proposed critical habitat designation by no later than 4 months from the date of the judgment and to

publish a final designation by no later than 8 months from the date of the proposed or new rule. On September 5, 2007, following a settlement agreement, the Court revised its order to require the Service to: (1) Withdraw the December 2, 1993, proposed rule and submit a new prudency determination and, if prudent, a new proposed critical habitat designation to the **Federal Register** by April 26, 2008; and (2) submit a final critical habitat determination, if prudent, to the **Federal Register** by February 26, 2009.

On May 6, 2008, we proposed critical habitat designation for the Louisiana black bear in Avoyelles, Catahoula, Concordia, East Carroll, Franklin, Iberia, Iberville, Madison, Pointe Coupee, Richland, St. Martin, St. Mary, Tensas, West Carroll, and West Feliciana Parishes, Louisiana (73 FR 25354). Simultaneously, we announced our withdrawal of the 1993 proposal and our new prudency determination. The proposed rule described three units totaling approximately 1,330,000 acres (ac) (538,894 hectares (ha)) within Louisiana.

For more information on previous Federal actions concerning the Louisiana black bear, refer to the final rule listing this subspecies as threatened published in the **Federal Register** on January 7, 1992 (57 FR 588), and the proposed critical habitat rule published in the **Federal Register** on December 2, 1993 (58 FR 63560).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the Louisiana black bear during two comment periods. The first comment period associated with the publication of the proposed rule (73 FR 25354) opened on May 6, 2008, and closed on July 7, 2008. We also requested comments on the proposed critical habitat designation and associated draft economic analysis during a comment period that opened November 12, 2008, and closed on December 12, 2008 (73 FR 66831). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these two comment periods.

During the first comment period, we received 12 comment letters directly addressing the proposed critical habitat designation. During the second comment period, we received 15 comment letters addressing the proposed critical habitat designation or

the draft economic analysis. All substantive information provided during both comment periods has either been incorporated directly into this final determination or addressed below.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from five knowledgeable individuals with scientific expertise that includes familiarity with the subspecies, the geographic region in which the subspecies occurs, and conservation biology principles. We received responses from three of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the Louisiana black bear. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* One peer reviewer questioned the permanency of perpetual easements purchased through the Wetland Reserve Program (WRP) and the process by which such easements could be terminated.

Our Response: According to the WRP Manual, found in Title II (Conservation) of The Farm Security and Rural Investment Act of 2002 (2002 Farm Bill; Public Law 107-171), prior to making a decision regarding easement termination, the Natural Resources Conservation Service (NRCS) must: (1) Consult with the Service; (2) investigate whether reasonable alternatives to the proposed action exist; and (3) determine whether the easement modification is appropriate considering the purposes of WRP and the facts surrounding the request for easement modification or termination. Any WRP easement modification, including termination, must: (1) Be approved by the Director of the NRCS in consultation with the Service (the National WRP Program Manager must coordinate the consultation with the Service at the national level); (2) not adversely affect the wetland functions and values for which the easement was acquired; (3) result in equal or greater ecological (and economic) values to the U.S. Government; (4) further the purposes of the program and address a compelling public need; and (5) comply with

applicable Federal requirements, including the Act, the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), Executive Order 11990 (Protection of Wetlands), and related requirements. At least 90 days before taking any action to terminate an easement, the Secretary of the Department of Agriculture must provide written notice of such action to the Committee on Agriculture of the U.S. House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the U.S. Senate. Therefore, based on our assessment of these requirements, the termination of a WRP easement appears highly improbable.

In addition, our Lafayette Ecological Services Field Office has partnered with NRCS to administer WRP in Louisiana since the inception of that program in 1992. Following a comprehensive review of our local files, and a search of national WRP records, we have been unable to find a single instance of a WRP easement being terminated in the history of that program (which includes nearly 10,000 projects on approximately 2 million ac (800,000 ha) of land nationwide).

(2) *Comment:* One peer reviewer expressed concern about the potential future conversion of non-WRP forestland to agricultural uses.

Our Response: Results of recent studies indicate that there has been a reversal in the pre-1980s trend of forest conversion to agricultural use in the Lower Mississippi River Alluvial Valley (LMAV). Documentation of that reversal is limited, however, and a clear understanding of the magnitude of afforestation to date has been difficult because of the lack of collated data (Schoenholtz *et al.* 2001, p. 603). Nonetheless, available data indicates that over the past three decades, forest restoration in the LMAV portions of Louisiana, Mississippi, and Arkansas has increased dramatically, and has led to a significant removal of land from agricultural production for the purpose of hardwood forest establishment (Gardiner and Oliver 2005, p. 243). For example, in the LMAV region of Mississippi, the total forested area increased by 11 percent between 1987 and 1994, and reforestation of former agricultural lands accounted for nearly 40 percent of that increase (King and Keeland 1999, p. 352). Between 1993 and 2007, over 140,000 ac (57,000 ha) were restored to forestland via WRP, and 200,000 ac (81,000 ha) via the Conservation Reserve Program, within Louisiana black bear habitat priority areas in Louisiana (Ginger *et al.* 2007, p. 41). In summary, there is no evidence

that any significant amount of forestland will be converted to agriculture in the future, and to the contrary, there is a promising trend in the annual increase of bottomland hardwood forest (BLH) forestation across the LMAV (Schoenholtz *et al.* 2001, p. 612).

(3) *Comment:* One peer reviewer questioned whether bottomland hardwoods designated as critical habitat would be considered jurisdictional wetlands which would require permit authorization under section 404 of the Clean Water Act prior to filling for developmental, agricultural, or other purposes. That reviewer also inquired about habitat losses and associated impacts to bears should section 404 permits authorize the loss of forested wetlands within the critical habitat boundary.

Our Response: The U.S. Army Corps of Engineers (Corps) has been delegated the authority to regulate the placement of fill in wetlands and other waters of the United States. Wetland determination for regulatory purposes, such as assessments of wetland losses incurred from section 404-permitted activities, is typically done on a project-specific basis by Corps personnel. Although regional large-scale wetland determination maps have not been typically used or developed by the Corps for jurisdictional purposes, based on our knowledge of forested ecosystems in the LMAV, we believe that most bottomland hardwoods within the critical habitat boundary are jurisdictional wetlands. Because the Corps evaluates permit applications on an individual basis, it would not be possible to determine whether the Corps would issue permits and if, or to what extent, they would be modified to minimize impacts or to accurately assess the full extent of future wetland losses from permitted projects. Given the nature and extent of previously permitted activities in bottomland hardwood wetlands within this region, we do not anticipate significant habitat losses from section 404-permitted projects. Furthermore, the Corps requires that section 404 permittees provide compensatory mitigation to replace wetland functions and values that are lost via their respective projects. Compensatory mitigation area virtually always equals or exceeds impacted area and is accomplished within, or in proximity to, the watershed of the impact site. Such mitigation, although done strictly for wetland replacement, would also provide habitat benefits for bears and should exceed habitat losses experienced from permitted projects.

(4) *Comment:* One peer reviewer stated that we have not been able to

document female interchange between the Deltic Timber tracts and the Tensas River National Wildlife Refuge (TRNWR). Therefore, those populations currently function as separate populations and should be described as such.

Our Response: After reevaluating all available information related to bear populations and interchange between the Deltic Timber tracts and the TRNWR, we agree with this statement and have considered this in our analysis. It is more correct to state that the relationship between those populations “may soon begin,” rather than “have likely begun,” to function as a single population.

(5) *Comment:* One peer reviewer requested that we provide a more detailed description of the process used to approximate female bear home ranges for our breeding habitat delineation.

Our Response: Female bear home ranges were determined on a population-specific basis using published, telemetry-based research (Anderson 1997, p. 37; Beausoleil 1999, p. 60; Marchinton 1995, p. 31; Wagner 1995, p. 12; Weaver 1999, p. 70). The average home range sizes that were calculated as minimum convex polygons for each population were converted to average home range radii. Female locations (determined from telemetry data collected for the above-referenced studies) were buffered with those population-specific home range radii using a geographic information system software package to establish an approximate breeding habitat boundary. Minor modifications to that boundary were made based on the availability of contiguous habitat and the presence of movement barriers (such as large expanses of agricultural land or poor-quality habitat, waterways, highways, urban development, and other major landscape features).

(6) *Comment:* One peer reviewer stated that the estimate of minimum habitat size for black bears presented by Cox *et al.* (1994, p. 50) is probably too large for Louisiana black bears due to higher habitat quality and more agricultural crop availability for many Louisiana black bear populations.

Our Response: We concur with this statement and did not intend to suggest that the Cox *et al.* (1994) estimate would be used as a basis for our habitat requirements assessment. We used known home range sizes and habitat requirements for Louisiana black bears, on a population-specific basis (with emphasis on the TRNWR population as a stable population that relies mostly on habitat containing features as described by the primary constituent elements

(PCE) for survival), to determine the minimum required habitat size. Our mention of the Cox *et al.* (1994) publication was only intended to present other research findings related to minimum habitat requirements for black bears. Consistent with this reviewer’s comment, our minimum habitat size calculation, as described in our May 6, 2008, proposed rule (73 FR 25354, p. 25364), yielded an estimate that is significantly smaller than that of Cox *et al.* (1994).

(7) *Comment:* One peer reviewer commented on the potential value of smaller habitat fragments within larger habitat matrices, and whether those smaller forested tracts should be designated as critical habitat for the Louisiana black bear.

Our Response: We concur that smaller habitat patches provide benefits for bears, particularly to facilitate movement through corridors between populations, when they are components of a larger habitat matrix. Based on our review of available scientific literature, we determined that habitat fragments as small as 12 ac (5 ha) may be sufficient to provide linkage and facilitate movement across a fragmented landscape (Pelton and Van Manen 1997, p. 33; Beausoleil *et al.* 2005, pp. 409–410). For that reason, we included “corridors consisting of habitat patches 12 ac (5 ha) or greater in size” in our May 6, 2008, proposed rule to designate critical habitat for the Louisiana black bear (73 FR 25354, p. 25363).

(8) *Comment:* One peer reviewer requested clarification of our definition of an “actual den tree.”

Our Response: Specific language affording protection of actual den trees was included in the 1992 4(d) rule that was part of the listing of the Louisiana black bear as a threatened subspecies (57 FR 588, p. 593). That rule did not, however, define the criteria to be used for determining whether a tree is an “actual den tree.” We interpret that regulatory language to extend protection to den trees as long as bear usage is determinable (i.e., it is recognizable by visual observation of the subject tree, or was known to be used in previous denning seasons), such that those trees are protected even when bears are not actively using them. We determine bear use of a den tree by visual or audible confirmation (if it is actively being used), telemetry data, and the presence of bear claw marks.

(9) *Comment:* One peer reviewer questioned the portion of our critical habitat designation strategy that involves maintaining the viability of existing populations, stating that he

does not believe that existing populations have been proven viable.

Our Response: We concur that existing populations have not been proven to have long-term (*i.e.*, 100 years or more) viability. All known breeding populations of Louisiana black bears that were present at the time of listing, however, continue to exist more than 15 years later. Population estimates for Louisiana black bears at the time of listing appear to be lower than what recent research would indicate, and there is circumstantial evidence that the population is growing (LDWF 2007, p. 22). Therefore, we consider these populations to be viable (at least in the near term) for planning purposes related to habitat restoration and corridor establishment.

(10) *Comment:* One peer reviewer questioned the application of habitat requirements for the TRNWR subgroup, which benefits from extensive access to adjacent agricultural fields, to the Upper and Lower Atchafalaya River Basin (ARB) (Critical Habitat Units 2 and 3) populations, which have less opportunity to forage on agricultural crops. He asserted that due to agricultural crop availability and use by the TRNWR subgroup, a greater land base may be necessary for the two ARB populations to compensate for the lack of available agriculture.

Our Response: We agree that the TRNWR subgroup is situated in an area that provides greater access to agricultural crops with higher nutritional value (e.g., corn, wheat, and soybeans) than the crops that are available for the two ARB populations. The Deltic Timber area in the northern portion of the Tensas River Basin (Critical Habitat Unit 1) is a highly fragmented system of isolated forested tracts interspersed within an expansive agricultural landscape. Agricultural crops used by bears in this area is well documented and occurs at greater rates than for any other subgroup or population of Louisiana black bears. It should be noted, however, that even within this TRNWR subgroup, agricultural crops used by bears varies greatly by season and natural foods comprise most of the diet (by volume) for half of the year (Anderson 1997, p. 53). We believe that bears in both ARB populations also have access to, and will forage on, agricultural crops in their vicinity. Because sugarcane is the most commonly grown crop in this region, bears in these populations likely benefit less from the use of adjacent agriculture than bears in the TRNWR subgroup. Accordingly, we incorporated more PCE-definitional habitat into our critical habitat boundary (423,170 ac (171,251

ha) total for Units 2 and 3) for the two ARB populations than is currently inhabited by bears in the TRNWR subgroup (141,868 ac (57, 412 ha)). As explained in our proposal to designate critical habitat (73 FR 25354, pp. 25364–25365), because the TRNWR subgroup sustains itself throughout much of the year primarily on habitats containing the PCEs, and that subgroup is viable, based on the results of population viability analyses, that subgroup was used as a model to evaluate the minimum habitat requirements for maintenance of long-term population viability.

(11) *Comment:* One peer reviewer stated that the shared boundary (i.e., the corridor) between Units 2 and 3 seems relatively constricted and may not be adequate to ensure long-term connectivity and dispersal across those two units.

Our Response: We have reassessed the landscape along the southern boundary of Unit 2 and the northern boundary of Unit 3 relative to potential travel corridors for bears. As explained in the Methods section of this document, increasing the unit width in this region would incorporate primarily agricultural fields and urban development, and virtually no additional forested habitat. Accordingly, the shared boundary of these two units has not been modified from our original proposal.

(12) *Comment:* One peer reviewer had several questions regarding the use of the terms “occupied at time of listing” and “currently occupied” and the basis for critical habitat designation only in habitat that was occupied at the time of listing. Also, one public commenter expressed similar concerns.

Our Response: Louisiana black bear resource managers have commonly used the term “occupied” habitat to indicate areas with physical evidence of reproduction (e.g., young, females with young, or lactating females). Critical habitat is defined in section 3 of the Act in part as 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) which may require special management considerations or protection. Therefore, for critical habitat designation, we use the term “occupied” in a less restrictive sense to indicate the subspecies’ presence in an area without regard to reproductive information (i.e., the transient or permanent presence of male or female bears). In order to avoid confusion, we use the term “breeding areas” or

“breeding habitat” in this document to refer to areas with physical evidence of reproduction. We inadvertently used the term “currently occupied” once in the proposal when we should have used the term “current breeding habitat.” We have noted this error and revised our text.

Under the Act and its implementing regulations (50 CFR 424.12(e)), we can designate critical habitat in areas outside of the geographical area occupied by the species at the time it is listed only when (1) the inclusion of specific areas occupied at the time of listing defined by the essential physical and biological features are not sufficient to conserve the species and (2) we determine that those areas outside the geographical area occupied by the species are essential for the conservation of the species. In preparing this final critical habitat designation, we did not find any areas outside of the geographical area occupied by the Louisiana black bear at the time of listing that are essential for the conservation of the subspecies, and we believe the specific areas included in this designation are sufficient to conserve the subspecies; therefore, we are not designating areas outside of the geographical area occupied by the subspecies.

(13) *Comment:* One peer reviewer stated that coastal habitat is not superior habitat but that the small number of data points and bear use of garbage for food may have affected those estimates.

Our Response: That statement referenced a speculation made by researchers over 10 years ago (Wagner 1995, p. 25). We agree that the knowledge we have gained about the coastal population indicates the commenter is correct, and we have included that in our discussion.

(14) *Comment:* One peer reviewer requested additional information on how we will evaluate the cumulative effects of critical habitat alteration.

Our Response: Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. Under section 7 of the Act, the Federal action agency must provide an analysis of cumulative effects, along with other information, when requesting formal consultation. The Service is required to consider cumulative effects of a proposed action in formulating our biological opinion. Under the provisions of the Act, we determine destruction or adverse

modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve its intended conservation role for the species.

(15) *Comment:* One peer reviewer stated that, through the coordinated efforts of Federal, State, and private groups, remarkable progress in the protection and restoration of black bear habitat has been achieved in Louisiana in the past 10 years and was achieved without the benefit of critical habitat designation. The commenter wished to congratulate all those involved.

Our Response: We agree that the progress made in Louisiana black bear habitat protection and restoration is noteworthy. We estimate that about 600,000 ac (240,000 ha) of land have been restored or protected in the bear’s range since it was listed in January 1992. This includes lands that have been purchased by State and Federal agencies, public and private lands protected from development, and privately owned lands where bear habitat has been restored. All this was accomplished through the voluntary participation of many partners, such as the NRCS and other Federal agencies, State agencies in Louisiana and Mississippi, the Black Bear Conservation Committee (BBCC), the Louisiana Forestry Association, universities, and private citizens. We believe that designation of critical habitat will provide benefits in addition to those provided through private landowner incentive and conservation programs, and will further conservation of this subspecies.

(16) *Comment:* Two peer reviewers stated that critical habitat designation has the potential to diminish landowner support for conservation activities benefitting the Louisiana black bear. One suggested that we precede critical habitat designation with a public education campaign.

Our Response: We agree that negative perceptions associated with critical habitat designations could potentially alienate the private landowners that have been, and continue to be, so vital in the Louisiana black bear recovery. As we discuss in the “State Comments” section and in the “Benefits of Inclusion” section of this rule, we continue to recognize that designating critical habitat in areas where we have partnerships with private landowners that have led to conservation or management of listed species may impact landowners and future partnerships and conservation efforts.

Therefore, we have excluded private lands enrolled in the WRP under permanent conservation easements from critical habitat designation. Furthermore, lands that currently do not contain the physical and biological features essential to the conservation of the Louisiana black bear do not meet the definition of critical habitat and are not designated as critical habitat, nor would they be considered to be such if they were restored, or allowed to naturally regenerate, to forested habitat subsequent to this designation.

We also agree that public education regarding critical habitat is important. From the beginning of this designation process, we have made efforts to inform the public (landowners and public agencies) about critical habitat and the designation process through newspapers, fact sheets, and informal meetings. We are committed to continuing public education about the Louisiana black bear and its critical habitat.

(17) *Comment:* Two reviewers stated that our approach was logical and reasonable. One commenter indicated that we had thoroughly reviewed and appropriately interpreted the most recent scientific literature. One commenter indicated that we had designated sufficient quantity and quality in a way that encompassed all breeding populations and all primary constituent elements.

Our Response: We appreciate the peer reviewers' positive evaluation of the biological and scientific basis for our critical habitat determination.

(18) *Comment:* One commenter provided suggestions on the consistent use of terms, citations, and other grammatical inconsistencies.

Our Response: We have made those corrections where appropriate and necessary in this designation.

(19) *Comment:* One peer reviewer stated that he did not consider a density of one bear per 686 ac (278 ha) as low (even in the southeastern United States) and that, while this density is low when compared to densities on the nearby Deltic lands, it was more likely slightly higher than average across the Southeast.

Our Response: We agree and have made this correction.

(20) *Comment:* One peer reviewer requested clarification on the methods we would use to determine the presence of a breeding population in Mississippi.

Our Response: There have been only three documented occurrences of successful reproduction of Louisiana black bears in Mississippi (Ginger *et al.* 2007, p. 34); there is no overlap in the home ranges of the three female bears

that produced those litters. Based on our analysis of over 15 years of Louisiana black bear research and telemetry data, we have concluded that an isolated female bear (though she may occasionally produce a litter of cubs) does not constitute a breeding population. We have determined that a breeding population must consist of at least five adult females that are known to have successfully reproduced and that have overlapping home ranges. Evaluation of existing telemetry data indicates that habitats used by fewer than five adult females serve as temporary residences during atypical patterns of dispersal (*i.e.*, movement patterns that are most often observed in bears translocated during reintroduction programs).

(21) *Comment:* One peer reviewer questioned why it might be desirable to exclude WRP lands enrolled under a permanent easement.

Our Response: Due to the level of protection from development afforded these lands, and the potential that negative perceptions associated with critical habitat designations could potentially alienate the private landowners that have been so vital to the Louisiana black bear recovery, we have determined that the benefits of exclusion outweigh the benefits of inclusion for lands enrolled under permanent easements in the WRP. In addition, we believe that this determination will not result in the extinction of the Louisiana black bear. Please refer to the "Benefits of Exclusion" section of this rule for further information.

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 regulation consistent with the agency's comments or petition." Comments received from State agencies regarding the proposal to designate critical habitat for the Louisiana black bear are addressed below.

(22) *State Comment:* The Louisiana Department of Wildlife and Fisheries (LDWF) stated that critical habitat designation is not necessary for the successful restoration of the black bear in Louisiana.

Our Response: According to section 4(a)(3) of the Act, the Service is required to designate critical habitat for threatened and endangered species to the maximum extent prudent and determinable. Also, as a result of a lawsuit filed by Harold Schoeffler and Louisiana Crawfish Producers-West, we were ordered by the court to designate

critical habitat, if prudent, for the Louisiana black bear. We have already determined that designation of critical habitat is prudent (May 6, 2008, 73 FR 25354). Therefore, we must designate critical habitat to fulfill those statutory and legal obligations.

(23) *State Comment:* The LDWF stated that critical habitat designation for the Louisiana black bear has the potential to alienate private landowners who have habitat upon which the bear depends. They furthermore indicated that a cooperative relationship is necessary with those landowners in order to collect data and accomplish habitat restoration needed for delisting.

Our Response: We agree with the LDWF that negative perceptions associated with critical habitat designations could potentially alienate the private landowners that have been and continue to be so vital to the Louisiana black bear recovery. We also recognize that the significant strides made in habitat restoration for this subspecies are in large part due to conservation actions taken by private landowners and will continue to be needed to conserve this subspecies. As we discuss in the "Benefits of Inclusion" section of this rule, we continue to recognize that designating critical habitat in areas where we have partnerships with private landowners that have led to conservation or management of listed species may impact landowners and future partnerships and conservation efforts. Therefore, we have excluded private lands enrolled under permanent conservation easements in the WRP from critical habitat designation.

Furthermore, lands that currently do not contain features essential for the Louisiana black bear's conservation do not meet the definition of critical habitat and are not designated as critical habitat, nor would they be considered to be such if they were restored, or allowed to naturally regenerate, to forested habitat subsequent to this designation. We continue to be committed to working on habitat restoration with private landowners in the future. See our response to Comment 16 above.

(24) *State Comment:* The LDWF and several other commenters stated strong support for exempting lands enrolled in the NRCS' WRP program from critical habitat designation. They also requested that we consider exemptions for other Federal conservation assistance programs including the NRCS' Conservation Reserve Program (CRP), the Conservation Reserve Enhancement Program (CREP), and the Wildlife Habitat Incentive Program (WHIP).

Our Response: Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make the determination that the benefits of exclusion outweigh the benefits of inclusion, then we can exclude the area only if such exclusion would not result in the extinction of the species.

In the case of lands enrolled under a permanent easement in the WRP, those easement restrictions provide substantial protection and management for the Louisiana black bear and its essential habitat features in contrast to the designation of critical habitat, which only precludes destruction or adverse modification. We have determined that the benefits of exclusion outweigh the benefits of inclusion for lands enrolled under permanent easements in the WRP. In addition, we believe that this determination will not result in the extinction of the Louisiana black bear. Please refer to the "Exclusions Under Section 4(b)(2) of the Act" section of this rule, as well as responses to Comments 16 and 23, for further information.

We share the LDWF's concern and acknowledge the benefits that other private landowner incentive and conservation programs (i.e., CRP, CREP, WHIP) offer for the Louisiana black bear and other wildlife. However, landowners who enroll in those programs are not bound by an easement that permanently prohibits development or conversion of those lands. Instead, landowners sign an agreement (generally 10 to 15 years in duration) and at the end of that agreement those properties may be converted to another use. In those instances, the protection provided to those lands is not significantly different from that provided via critical habitat under section 7 of the Act (i.e., protection from adverse modification or destruction). Therefore, while we believe that excluding lands enrolled in those conservation agreements may provide benefits in terms of maintaining landowner cooperation, we have determined not to exclude them from this critical habitat designation.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that

habitat outside the designated area is unimportant or may not promote the recovery of the species. We continue to be committed to working on habitat restoration with private landowners in the future.

(25) *State Comment:* The LDWF expressed agreement with the proposed critical habitat geographic boundaries. The LDWF also indicated that those boundaries are consistent with the most current LDWF telemetry, research, and habitat data. In addition, the agency stated that while bear sightings may occur throughout Louisiana, the proposed critical habitat protects the core breeding populations and the highest quality bear habitat.

Our Response: We appreciate the LDWF's positive evaluation of the biological and scientific basis for our critical habitat determination.

Public Comments

(26) *Comment:* One commenter stated that he believed the Louisiana black bear population to be between 500 and 700 bears.

Our Response: Current Louisiana black bear population estimates vary somewhat among the professional community, primarily due to the lack of a reliable and comprehensive estimate. We used every published population estimate available (Beausoliel 1999, p. 51; Boerson *et al.* 2003, p. 203; Pelton and Van Manen 1997, p. 38; Triant *et al.* 2004, p. 653) to support our estimated current population size of 400 to 700 bears. A more comprehensive population study is currently being conducted, but will not be finalized prior to the court-ordered deadline for publication of this critical habitat designation.

(27) *Comment:* One commenter stated that a map published by the BBCC in 2006 indicated that bears had been observed in virtually every Louisiana parish. That commenter also discussed potential critical habitat designation in specific areas based on anecdotal sighting information from locations throughout Louisiana and in portions of Arkansas and Mississippi.

Our Response: We acknowledge that bears have been observed throughout Louisiana and in portions of its neighboring States. Included in those sightings are confirmed Louisiana black bear occurrences in relatively major urban areas such as Abbeville, Bossier City, Crowley, Lafayette, and New Iberia. Current breeding habitat and corridors linking breeding areas were paramount in the delineation of this critical habitat designation. We do not have data to show that these specific bear sightings suggested by the

commenter, in portions of Louisiana, Arkansas, and Mississippi, are part of a resident population, within current breeding habitat, or within a suitable travel corridor that would warrant designation as critical habitat. Therefore, we have not included these areas in our designation of critical habitat.

(28) *Comment:* One commenter briefly described the significance of corridors, expressed concern regarding our designation of corridors that only link existing populations, and stated that additional corridors in other areas should be considered. Several suggested potential corridors were described, including those that would link: (1) Felsenthal National Wildlife Refuge (NWR) in south Arkansas to the Upper Ouachita NWR in north Louisiana; (2) the Gulf of Mexico to the Town of Bogalusa in Louisiana, which would include the Pearl River and Old River Wildlife Management Areas (WMA) and the Bogue Chitto NWR; (3) Cat Island NWR and Tunica Hills WMA to St. Catherine Creek NWR in Mississippi; and (4) east-central Louisiana (i.e., Lasalle and Rapides Parish) to Texas via the Red River Alluvial Plain (incorporating various State WMAs and U.S. Forest Service parcels).

Our Response: We concur that corridors perform a significant role in the conservation of the Louisiana black bear. Accordingly, we have designated corridors between all known breeding populations of the Louisiana black bear. We also acknowledge that anecdotal Louisiana black bear sighting information exists for various locations throughout Louisiana and in portions of its neighboring States. As previously explained, such sightings are not always evidence of a resident population or of an important (or even suitable) travel corridor that would warrant designation as critical habitat. Accordingly, we do not believe that the designation of Felsenthal NWR and the Upper Ouachita NWR, including a corridor linkage, would further the conservation of the Louisiana black bear. Since 2000, over 100 bears (including both adult females and cubs) have been captured on White River NWR and neighboring lands and reintroduced to Felsenthal NWR. Those bears, however, are not considered Louisiana black bears; therefore, the regulations implementing the Act and associated critical habitat designations would not apply to that population or to Felsenthal NWR. There have been occasional bear sightings on the Upper Ouachita NWR, which have increased since the initiation of the Felsenthal NWR black bear reintroduction program (USFWS 2008,

pp. 48–50); however, we do not have any evidence of a breeding population on Upper Ouachita NWR. Consequently, we do not believe that there is justification to warrant designation of Felsenthal NWR (with a non-*U. a. luteolus* population), Upper Ouachita NWR (with no population), or a corridor linkage between those properties.

Although bear sightings are occasionally reported in the Pearl River Basin between the Gulf of Mexico to the Town of Bogalusa, there is no documented evidence of reproduction of Louisiana black bears occurring east of the Mississippi River in Louisiana. Very few bear studies have been conducted east of the Mississippi River in Louisiana due to the extremely low density of bears in this region. We are aware of just one such study, where only one confirmed bear occurrence was documented during a 5-month study involving 70 bait stations (Stinson 1996, p. 12). In addition to the Pearl River Basin not supporting a breeding population, it does not form a logical corridor between any known populations of Louisiana black bears. Accordingly, we have determined that this area does not contain the features essential to the conservation of the subspecies; therefore, it was not included within our critical habitat boundary.

Cat Island NWR and Tunica Hills WMA occur within, and St. Catherine Creek NWR occurs immediately north of, the Stinson (1996, p. 13) study area. As described above, that study confirmed speculations that this region supports very few bears. Louisiana black bear reproduction has not been documented on any of these lands, and establishing a corridor between them would serve little, if any, function for bear conservation. Therefore, we have determined that this area does not contain the features essential to the conservation of the subspecies, and it was not included within our critical habitat boundary.

Although occasional sightings are reported, there is no evidence that Louisiana black bears travel the Red River Alluvial Plain between east-central Louisiana (i.e., Lasalle and Rapides Parish) and Texas with any frequency. There is also no data to support classification of any areas within this region as Louisiana black bear breeding habitat.

In summary, as stated above, current breeding habitat was paramount in this delineation of critical habitat, and was based on known locations and home ranges of reproductive females. Corridors linking those core breeding areas were also designated based on the

best available science (primarily telemetry studies) and extensive landscape-level habitat analyses which are described in the Methods section of our previous proposal May 6, 2008, (73 FR 25354, pp. 25359) and in this Final Rule.

(29) *Comment:* Several commenters suggested that we evaluate the effect of major highways on Louisiana black bear dispersal and habitat access. Specific reference was made regarding U.S. Highway 90 (Hwy. 90) in St. Mary Parish, Louisiana and U.S. Interstate 20 (I–20) in Madison Parish, Louisiana, and their apparent lack of permeability for bear movement.

Our Response: We concur that Hwy. 90 and I–20 are major obstacles to intra- and inter-population bear movement. Over the last several years, we have organized numerous site inspections and meetings involving biologists from both the National Wildlife Refuge System and the Ecological Services Divisions of the Service, the LDWF, the Louisiana Department of Transportation and Development, the Federal Highway Administration (FHWA), private environmental and engineering firms, and the BBCC to address issues with highway-associated impacts to bears. We have completed a biological opinion on the effects of a proposed upgrade of Hwy. 90 to interstate specifications on the Louisiana black bear, which included a conservation recommendation that the FHWA “install large mammal/bear crossings at suitable locations along the subject reach of Hwy. 90.” With the assistance of the BBCC, private corporations, and major local landowners, we are currently developing a large-scale habitat restoration and protection plan to address both habitat issues and highway-associated limitations on bear conservation in this region of the State. We have designed similar plans along I–20, most of which have been successfully implemented, primarily through the designation of a WRP Special Project Area. Although I–20 in Madison Parish has numerous large bridges over river and stream crossings that allow safe passage for bears, we have developed and implemented plans to further improve the permeability of that roadway for bears. The current critical habitat boundary crosses both of the subject roadways (in addition to many others), and we believe that it fully reflects our planning and conservation efforts and is consistent with these commenters’ requests.

(30) *Comment:* One commenter stated that a single corridor or series of habitat linkages through the Mississippi River

Delta and the ARB may not be adequate for Louisiana black bear conservation.

Our Response: We determined that designating all Louisiana black bear breeding habitat, including corridors that link those habitats, would be sufficient to ensure the conservation of this subspecies. Currently, all Louisiana black bear breeding populations occur along the Atchafalaya and Lower Mississippi River Alluvial Valleys, as reflected in our critical habitat boundary and delineation of corridors. We concur with this commenter’s general position that a single habitat linkage would be insufficient for Louisiana black bear conservation purposes. For that reason, we delineated corridors to provide sufficient width to incorporate numerous potential travel and habitat linkages (e.g., small forested patches and riparian zones along streams, sloughs, and bayous) between each of the existing breeding populations.

(31) *Comment:* One commenter recommended modifications to the Louisiana Black Bear Recovery Plan including revisions to estimated population increases and home range sizes based on Taylor’s (1971) estimate for the Upper ARB population. The commenter also suggested several specific changes to our critical habitat boundary in the context of that Plan.

Our Response: Louisiana black bear population and home range sizes were determined on a population-specific basis from the most recent available scientific studies (Anderson 1997, p. 37; Beausoliel 1999, pp. 51, 57, 60; Boerson *et al.* 2003, p. 203; Marchinton 1995, p. 31; Pelton and Van Manen 1997, p. 38; Triant *et al.* 2004, p. 653; Wagner 1995, p. 12; Weaver 1999, p. 70). We will consider recommended modifications to the Louisiana Black Bear Recovery Plan when it is updated. We assume that the commenter intends for us to address critical habitat suggestions in this final rule rather than in a revised recovery plan. Accordingly, recommendations related specifically to critical habitat are addressed throughout the Public Comments section of this document.

(32) *Comment:* Two commenters expressed concern about the effects of global climate change and resultant sea level rise on the long-term viability of the Lower ARB population and of the corridor that connects the Lower and Upper ARB populations of Louisiana black bear.

Our Response: Our critical habitat designation includes the hardwood forests on three south Louisiana salt domes (i.e., Avery Island, Weeks Island, and Belle Isle). The elevations of those domes far exceed the surrounding landscape, with a maximum elevation

found on Avery Island at 152 feet (ft) (46 meters (m)) above sea level. Within Critical Habitat Unit 3, we have also included hardwood forests that are flood-protected by levees and pumps to provide a suitable travel and habitat linkage to higher-elevation habitats to the north. Within this unit, we have designated a relatively large corridor that is, to the best of our mapping capabilities, comprised of habitat containing the PCEs. We used the best available science (described in detail in the Methods section of this document) to delineate that corridor in a manner that would facilitate bear movement between the Lower ARB and higher-elevation habitats of the Upper ARB population. We will continue our negotiations with the Louisiana Department of Transportation and Development (LDOTD) and FHWA regarding highway crossings for bears on Hwy. 90 along the subject corridor (previously described in detail). We will also continue our participation in the development of a large-scale habitat restoration and protection plan to address both habitat issues and highway-associated limitations on bear conservation in the Lower ARB, which will ensure that the subject corridor can fully support dispersal from expanding bear populations and the northward migration of bears that may leave coastal habitats rendered unsuitable by sea level rise. We believe that delineating this critical habitat boundary to include higher-elevation salt dome forests, flood-protected forests, and a corridor that provides northward dispersal opportunities, in conjunction with our continued efforts to resolve highway-associated limitations to bear dispersal (including our participation in landscape-level habitat restoration and protection planning), is sufficient to address conservation challenges for the Louisiana black bear.

(33) *Comment:* One commenter recommended that we designate critical habitat in all areas that support breeding populations and that we include habitat linkages between those populations.

Our Response: We concur and appreciate this validation of our critical habitat designation strategy, which is to include all areas that contain features essential to the conservation of the Louisiana black bear. We have determined that such areas include breeding habitat with connecting corridors, and, in accordance with this recommendation, we have included all such areas in our designation.

(34) *Comment:* One commenter stated that we are proposing to designate critical habitat on too small a portion of the Louisiana black bear's present range

and that we should be allowed to designate critical habitat beyond areas where the subspecies is currently secure.

Our Response: We are unsure what the commenter means by the term "where populations are secure." However, for inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical and biological features that are essential to the conservation of the species and that may require special management consideration or protection. Under the Act, we can designate critical habitat in areas outside of the geographical area occupied by the species at the time it is listed only when (1) the inclusion of specific areas occupied at the time of listing defined by the essential physical and biological features are not sufficient to conserve the species; and (2) we determine that those areas are essential for the conservation of the species.

As stated above, current breeding habitat was paramount in this designation, and was based on known locations and home ranges of reproductive females. We are also designating corridors linking those core breeding areas based on the best available science (primarily telemetry studies) and extensive landscape-level habitat analyses, which are described in the Methods section of our previous proposal (May 6, 2008, 73 FR 25354, pp. 25359) and in this final rule. We determined that those areas are sufficient for the conservation of this subspecies.

(35) *Comment:* One commenter recommended that we reconsider our reduction of the 1993 Louisiana black bear critical habitat determination and our exclusion of the eastern portion of the ARB.

Our Response: We withdrew our 1993 proposal to designate Louisiana black bear critical habitat (58 FR 63560) concurrently with the publication of our new proposal in 2008 (73 FR 25354). In that latter proposal, we explained that the withdrawal was not only to comply with a court order, but to consider the significant amount of new information available on this subspecies and its habitat since the initial proposal published over 15 years ago. At the time of the initial critical habitat proposal, the resultant boundary was based on information (both biological and geographical) that was limited and primarily unpublished and anecdotal in nature. The current critical habitat boundary is based on numerous published studies including those by Anderson (1997), Beausoliel (1999),

Benson (2005), Boerson *et al.* (2003), Hightower *et al.* (2002), Marchinton (1995), Pelton and Van Manen (1997), Stinson (1996), Triant *et al.* (2004), Van Why (2003), Wagner (1995), and Weaver (1999). Those studies have provided new insight into Louisiana black bear biology and ecology that was not available for our 1993 proposal. Therefore, to use the 1993 critical habitat boundary as a basis for our current designation would not be incorporating the best available scientific and commercial information. Our current boundary includes portions, but not all, of the areas proposed in 1993; it also includes additional areas beyond those that were initially proposed. This is an entirely new designation, developed independently of the 1993 proposal, and it is based on sound scientific findings that were unavailable in 1993. We followed these same principles in our delineation of the boundary through the ARB. We also employed new elevation data and digital mapping technologies (described in detail in the "Criteria Used to Designate Critical Habitat" section of this document) to determine areas within the ARB that are most likely to facilitate bear movement between the Upper and Lower ARB populations. Our boundary through the ARB does not include all possible areas that a bear could travel. It includes lands that, based on recent scientific findings and the latest mapping technologies, contain the features essential for the conservation of the subspecies.

(36) *Comment:* One commenter recommended that we designate critical habitat in Mississippi, due to recently documented evidence of reproduction, and in Texas, due to reported sightings and the area's position within the historic range of the Louisiana black bear.

Our Response: As described in our response to Comment 20, we have determined that Mississippi does not support breeding populations of the Louisiana black bear. (The "Criteria Used to Designate Critical Habitat" section provides additional details regarding the classification of breeding habitat.)

We acknowledge that Louisiana black bear sightings have been reported throughout Louisiana and in portions of its neighboring States including eastern Texas. As previously explained, such sightings are not always evidence of a resident population or of an important (or even suitable) travel corridor that would warrant designation as critical habitat. Since its listing as a threatened subspecies in 1992, there has been no

documented evidence of Louisiana black bear reproduction in Texas.

(37) *Comment:* Two commenters specifically requested that lands 500 ft (152 m) from the top of the top bank of the Tensas River and lands within 1,000 ft (305 m) of the land-side toe of the Mississippi River mainline levees be excluded because of future maintenance requirements.

Our Response: The commenters did not provide sufficient information for us to evaluate the benefits of exclusion of those areas. Therefore, based on analysis, the protection provided to those lands is not significantly different from that provided via critical habitat under section 7 of the Act (i.e., protection from adverse modification or destruction). Therefore, we have not excluded those lands from critical habitat designation for the Louisiana black bear.

(38) *Comment:* Numerous commenters, including both private and governmental entities, expressed opposition to the designation of critical habitat for the Louisiana black bear. Another commenter stated that we had exaggerated potential habitat losses in making our decision. He also stated his belief that the designation of critical habitat for the Louisiana black bear was about compliance with the courts and control over land resources and not based on science or the needs of the bear. Other commenters questioned the need for critical habitat based on increased bear sightings and encounters.

Our Response: According to section 4(a)(3) of the Act, the Service is required to designate critical habitat for threatened and endangered species to the maximum extent prudent and determinable. As a result of a lawsuit filed by Harold Schoeffler and Louisiana Crawfish Producers—West, we were issued a September 5, 2007, order from the U.S. District Court for the Western District of Louisiana to: (1) Withdraw the December 2, 1993, proposed rule and submit a new prudency determination and, if prudent, a new proposed critical habitat designation to the **Federal Register** by April 26, 2008; and (2) submit a final critical habitat determination, if prudent, to the **Federal Register** by February 26, 2009. As set forth in the proposed rule, in fulfilling the Court's order, we found that critical habitat was prudent and determinable and that designation was prudent (73 FR 25354).

Furthermore, section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act,

published in the **Federal Register** on July 1, 1994 (59 FR 34271), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions represent the best scientific data available. They require our 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.

In preparing this final critical habitat designation for the Louisiana black bear, we reviewed and considered comments from the public and peer reviewers on the May 6, 2008, proposed designation of critical habitat (73 FR 25354) and the November 12, 2008, draft economic analysis (73 FR 66831). We also reviewed the most recent data for land ownership and habitat types and reevaluated the information and data used in our previous proposal.

(39) *Comment:* One commenter pointed out that we listed WRP enrollment as 55,000 ac (22,000 ha) while over 219,459 ac (88,811 ha) of land in Louisiana have been enrolled in the WRP program.

Our Response: We agree that over 200,000 ac (81,000 ha) have been enrolled in the WRP program Statewide. The 55,000 ac (22,000 ha) we reference represent the approximate amount of land enrolled in the WRP within the proposed critical habitat boundary only.

(40) *Comment:* Two commenters expressed concern about potential changes to the current forestry exemption (provided in the final rule listing the Louisiana black bear as a threatened subspecies [57 FR 588]), and the impact on silvicultural activity resulting from Louisiana black bear critical habitat designation.

Our Response: We have not removed or modified the forestry exemption as written in the final rule listing the Louisiana black bear as a threatened subspecies (January 7, 1992, 57 FR 588). In our May 6, 2008, proposal to designate critical habitat, we specifically stated that research supports our conclusion that normal silviculture (i.e., timber management that is consistent with the Louisiana Recommended Forestry Best Management Practices) is compatible with Louisiana black bear management; therefore, we did not propose any changes to that special rule under section 4(d) of the Act (at 50 CFR

17.40[i]) as part of this critical habitat designation. It should also be noted that, consistent with that special rule, there have been no restrictions, nor have there been any consultations under the Act, involving silvicultural activity and potential impacts to Louisiana black bears in the 16 years that the subspecies has been listed.

(41) *Comment:* One commenter stated opposition to the exclusion of lands enrolled under a permanent conservation easement in the WRP for several reasons and stated that these lands should not be used as a justification to curtail critical habitat boundaries. That commenter stated that: (1) The proposal is not based on an honest balancing of the positive and negative, and the Service acted illegally because it never weighed the benefits of designation against the risks of designation; (2) the Service cannot use exclusions to undermine Congress' established purpose for designating critical habitat; (3) excluding WRPs via 16 U.S.C. 1532(b)(4) is not appropriate and case law would not support the outcome; (4) the Service presents little or no evidence to support its conclusion that critical habitat designation is a deterrent to WRP enrollment; (5) private landowners may not have voluntarily enrolled into WRP without possible regulatory restrictions; and (6) the Service failed to acknowledge that landowners receive an incentive, in the form of financial support from the Federal government, to enroll in this program. The commenter urged the Service to include privately owned land held in conservation easements in our critical habitat designation, as these lands are not afforded the same level of protection as lands within a critical habitat designation.

Our Response: We have conducted a review and evaluation of the benefits of inclusion and the benefits of exclusion of lands enrolled in permanent easement under the WRP as critical habitat for the Louisiana black bear. We also presented the economic benefits that landowners who enroll in this program receive (approximately \$8,000 per ac (\$3,200 per ha)) (Economic Analysis, 2008; Exhibit 2–1 and p. 4–3). Due to the benefit provided by the level of protection from development afforded these lands and the potential that negative perceptions associated with critical habitat designations could potentially alienate the private landowners that have been so vital to continuing Louisiana black bear recovery, we have determined that the benefits of exclusion outweigh the benefits of inclusion for lands enrolled under permanent easements in the

WRP. Please see section “Benefits of Exclusion—Permanent Easement Wetland Reserve Program Lands” for a more detailed discussion. Furthermore, we have determined that such exclusion would not result in the extinction of the Louisiana black bear. Please refer to the “Exclusions Under Section 4(b)(2) of the Act” section of this rule for a more detailed discussion. We have not excluded any other lands under conservation easements.

(42) *Comment:* Several commenters expressed concern that critical habitat designation will require consultation for various landowner activities and that as a result of those consultations, landowner activities will be restricted and the Service will ultimately be determining what actions would be allowed.

Our Response: Only Federal activities that may affect the Louisiana black bear or its designated critical habitat require consultation under section 7 of the Act. Activities on State, Tribal, local, or private lands are subject to the section 7 consultation process only if they have a Federal nexus, such as activities requiring a Federal permit. 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(a)(2) consultations. Please see “Section 7 Consultation” for a more detailed discussion.

(43) *Comment:* One commenter requested that the Service consider possible economic benefits resulting from the designation, specifically noting potential benefits resulting from flood control and wetland conservation.

Our Response: As discussed in section 1.3.3 of the draft economic analysis (DEA), the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking. Where data are available to evaluate the ancillary benefits of critical habitat designation, the analysis may attempt to quantify these benefits (see section 1.3.3 of the DEA).

As noted in section 2.1 of the DEA, land use patterns in the areas proposed for critical habitat have been and continue to be shaped by Federal flood control programs in addition to local economic factors. Specifically, the DEA notes that there are substantial baseline factors that provide for conservation of wetlands and provide for flood control within the proposed critical habitat areas.

The DEA considers whether additional changes in land use and

management, above and beyond baseline conditions, would occur as a result of designation. For example, the DEA considers whether the designation would result in modifications to oil and gas development activities in the context of U.S. Army Corps of Engineers’ section 404 permitting activities (Chapter 3). These potential modifications include relocation of drill sites and directional drilling, both of which could reduce the impact of this land use on wetlands. However, the extent of wetland impact avoided (e.g., amount of area and time period), the nature of the avoided impacts, and the resultant benefits associated with wetland protection, including flood control benefits, cannot be forecast using best available information. In addition, there are no data or models that would allow development of a forecast of how designation will impact the frequency or severity of floods (i.e., how land uses will change as a result of the designation and how these changes would impact flood frequency or severity).

In the case of the Louisiana black bear, there have been no previous section 7 consultations under the Act related to flood control activities. In addition, as discussed in section 2.4 of the DEA, it is possible that participation in voluntary conservation programs will decline as a result of critical habitat designation, potentially leading to a negative impact on wetland conservation and flood control. As a result of all of these factors, potential benefits resulting from enhanced flood control or wetlands conservation are not quantified in the DEA.

(44) *Comment:* A commenter notes that designation of critical habitat could impact oil and gas development and commercial and residential development.

Our Response: A draft economic analysis (DEA) was made available to the public through the notice of availability (NOA) published November 12, 2008. Chapter 3 of the DEA discusses impacts on oil and gas development. Chapter 5 of the DEA discusses potential impacts on residential and commercial development.

(45) *Comment:* One commenter stated that designation of critical habitat can be “neutral or beneficial” in promoting participation in voluntary conservation agreements. Another commenter stated that designation will lead some landowners to stop cooperating in voluntary conservation efforts.

Our Response: Section 2.4 of the DEA provides a detailed discussion of the potential for changes in participation in

voluntary conservation agreements. The DEA concludes there may be fewer landowner enrollments in programs like the WRP that provide substantial benefits for bears, and as a result, critical habitat designation could result in a reduction of the quantity and quality of available bear habitat relative to what would have been available without designation. There was insufficient information available, however, to quantify this potential change.

(46) *Comment:* Several commenters stated that potential impacts on agricultural activities, including impacts on land uses and land values, could be greater than estimated in the DEA. In addition to the apiary fencing costs cited in the DEA, commenters believe that additional impacts could result from crop depredation, drainage impacts (i.e., impacts on the ability to clear farm and parish drainage systems), and additional requirements for pesticide registration.

Our Response: The DEA discusses potential impacts on agricultural activities in section 6.1. As noted in that section, damage to bees and hives was identified as the most costly agricultural problem associated with the Louisiana black bear. While other crop depredation may occur, no complaints have been filed with either the Service or the Louisiana Department of Wildlife and Fisheries. Therefore, there is little information available to gauge the extent or frequency of crop depredation and its resulting economic impact.

While recognizing that many local farmers and landowners may be concerned about the possible land-use restrictions, the Service has not identified current agricultural practices as a threat to the Louisiana black bear. As a result, to date, there have been no consultations under section 7 of the Act related to these activities, and no impacts are forecast to occur in the DEA.

Summary of Changes From Proposed Rule

In preparing the final critical habitat designation for the Louisiana black bear, we reviewed and considered comments from the public and peer reviewers on the May 6, 2008, proposed designation of critical habitat (73 FR 25354) and the November 12, 2008, notice of availability of the associated draft economic analysis (73 FR 66831). We also reviewed the most recent data for land ownership and habitat types and reevaluated the information and data used in our previous proposal. As a result, we made the following changes to our proposed designation:

(1) We made corrections to ensure the consistent use of terms, citations, and grammar. We also provided clarification on the use of the terms “occupied at time of listing”, “occupied”, and “breeding” populations.

(2) We made corrections to the identity of areas under Federal and State ownership by including Federal- and State-owned Farmers Home Administration (FmHA) tracts. In the proposed rule (73 FR 25354), we had incorrectly assigned those tracts to private ownership.

(3) We made one correction to clarify our description of one primary constituent element (PCE). In the proposed rule (73 FR 25354; May 6, 2008), we omitted the word “wide” for PCE 2(b). That portion of the PCE now reads as follows: (b) Forested areas greater than 150 feet (46 meters) wide along waterways and sloughs and having a diversity of plant species and age-classes of sufficient area, quality, and configuration, as described in PCE 1 above, to provide dispersal habitat between breeding populations to maintain genetic variability and promote stable or increasing populations, and to provide habitat supporting safe movement, foraging, and denning.

(4) In our May 6, 2008, proposed rule we identified 1,331,635 ac (538,894 ha) of habitat containing features essential for Louisiana black bear conservation in three units (73 FR 25354). As we continued work on the proposed designation, we made one change that affected the total area considered to meet the definition of critical habitat. We refined our mapping accuracy to better define habitat that contains essential features to minimize the inclusion of areas that do not contain PCEs for the Louisiana black bear, based primarily on a reevaluation of the information and data used in our proposal. This meant that, to the best extent possible, we removed areas that do not contain the PCEs and are not otherwise considered to provide features essential to the Louisiana black bear’s conservation. Consequently, we delineated a boundary that more accurately reflects telemetry data and known breeding habitat. No changes were made as a result of the refined mapping to the proposed critical habitat boundaries of Units 1 and 2. However, we identified lands within the proposed boundary for Unit 3 that do not contain the PCEs, including urban development, agricultural land, and poor-quality non-PCE habitats such as marsh and semi-permanently inundated swamps that do not link higher quality habitats. Although we are reporting a decrease in

the overall area of Unit 3, removal of those areas has not reduced the extent of habitat containing the PCEs in this unit. This refinement resulted in a decrease of 85,516 ac (34,607 ha) in Unit 3. As a result, we determined that 133,636 ac (54,080 ha) in Unit 3 meet the definition of critical habitat.

(5) In the proposed rule (73 FR 25354; May 6, 2008), we stated that we were evaluating the sufficiency of the permanent easement protection of the restored land from future conversion or development for the purpose of possible exclusion of private lands enrolled in the WRP via a permanent easement. We have determined that the benefits of excluding lands enrolled in a permanent easement under the WRP from critical habitat designation outweigh the benefits of including these lands, and that their exclusion will not result in extinction of this subspecies. Therefore, we are excluding 48,751 ac (19,729 ha) of Unit 1 and 1,547 ac (626 ha) of Unit 2 under section 4(b)(2) of the Act, and we are designating the remaining 628,505 ac (254,347 ha) of land in Unit 1 and 433,680 ac (175,504 ha) of land in Unit 2 as critical habitat (see “Exclusions Under Section 4(b)(2) of the Act” section of this final rule for a detailed discussion of this exclusion).

Except as previously discussed, our final designation includes all areas proposed as critical habitat for the Louisiana black bear (i.e., Units 1, 2, and 3), totaling approximately 1,195,821 ac (483,932 ha).

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

(a) essential to the conservation of the species and

(b) 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 the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under 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, 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 Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions may affect 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 to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical and biological features that are essential to the conservation of the species, and be included only if those features may require special management consideration or protection. 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 (i.e., areas on which are found those physical and biological features essential to the conservation of the species). Under the Act, we can designate critical habitat in areas outside of the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide

guidance to ensure that our decisions represent the best scientific data available. They require our 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 should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may 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.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions. They are also subject 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 Federal agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas 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, or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas occupied by the species at the time of listing to designate as critical habitat, we consider those physical and biological features essential to the conservation of the species that may require special management

considerations or protection. We consider the physical and biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These PCEs include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, and rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

We derive the specific PCEs for the Louisiana black bear from the biological needs of this subspecies as described in the Critical Habitat section of the proposed rule to designate critical habitat for the Louisiana black bear published in the **Federal Register** on May 6, 2008 (73 FR 25354).

Space for Individual and Population Growth and Normal Behavior

Louisiana black bear populations are currently found in the bottomland hardwood (BLH) forest communities and associated habitat of the Lower Mississippi River Alluvial Valley. Prime black bear habitat is characterized by relatively inaccessible terrain, thick understory vegetation, and abundant food sources in the forms of shrubs or tree-borne soft or hard mast (Pelton 1982, p. 507). BLH forest community types in the range of the Louisiana black bear, expressed in terms of dominance-codominance, include *Taxodium distichum* (bald cypress); *T. distichum-Nyssa aquatica* (bald cypress-water tupelo); *Betula nigra-Platanus occidentalis* (river birch-American sycamore); *Populus deltoides* (cottonwood); *Celtis laevigata-Ulmus americana-Fraxinus pennsylvanica* (sugarberry-American elm-green ash); *Quercus nuttallii-U. americana-F. pennsylvanica* (Nuttall oak-American elm-green ash); *Q. lyrata-Carya aquatica* (overcup oak-water hickory); *Liquidambar styraciflua-Q. nigra* (sweetgum-water oak); and *Q. michauxii-Q. falcata* (swamp chestnut oak-cherrybark oak) (BBCC 1997, p. 15). Benson (2005, p. 56, Table 4.1) described habitat types in terms of species, flooding regime, and age as: (1) Upland forests—BLH forests in relatively high elevation sites not subject to frequent flooding; and (2) lowland forest—BLH forests in

relatively low elevations subject to seasonal or annual flooding. Louisiana black bear habitat in the Lower Atchafalaya population differs from the Tensas and Upper Atchafalaya areas in that it includes, in addition to forested wetlands (e.g., deciduous forests, cypress forests, deciduous and bald cypress forests, shrub-scrub marshes), open marshes, deciduous forest spoil banks, and upland hardwood forest (Nyland 1995, p. 58). The interspersed of these communities may be important in meeting the seasonal needs of the Lower Atchafalaya Louisiana black bear (Nyland 1995, p. 58). The coastal (or wetland) habitats may provide escape cover, food sources, and secure travel corridors between other habitat types (Jones and Pelton 2003, p. 193).

The size of the area necessary for black bears may differ depending on population density, habitat quality, conservation goals, and assumptions regarding minimum viable populations (Rudis and Tansey 1995, p. 172). For example, Rudis and Tansey (1995, p. 172), citing personal communications, reported estimates of minimal areas needed to support a black bear population ranging from 79,000 ac (32,000 ha) in forested wetlands to 197,684 ac (80,000 ha) in upland forests. Cox *et al.* (1994, p. 50) estimated that a population of 200 or more bears could require a habitat base of approximately 490,000 to 980,000 ac (198,000 to 397,000 ha). Maintaining and enhancing key habitat patches within breeding habitat is a critical conservation strategy for black bears (Hellgren and Vaughan 1994, p. 276). Areas should be large enough to maintain female survival rates above the minimum rate necessary to sustain a population (Hellgren and Vaughan 1994, p. 280). Weaver (1999, pp. 105–106) documented that bear home ranges and movements were centered in forested habitat and noted that actions to conserve, enhance, and restore that habitat would promote population recovery, although no recommendations on minimum requirements were provided. Hellgren and Vaughn (1994, p. 283) concluded that large, contiguous forests are a critical conservation need for black bears.

One approach to assessing Louisiana black bear habitat needs is to look at existing densities; however, density estimates should be used with caution as they can be influenced by population estimation methodology and study area delineation. No single area-density relationship has been developed for Louisiana black bears; however, density estimates have been developed for Louisiana black bears in two locations.

Bear density for the TRNWR subgroup was estimated to be 1 bear per 686 ac (0.36 per km²). This is low compared to the adjacent Deltic subgroup with a density of 1 bear per 173 ac (1.43 per km²) (Boersen *et al.* 2003, p. 204). The unusually high densities observed on the Deltic tracts may be the result of the small size of the habitat fragments and accessibility of adjacent desirable agricultural crops (Boersen *et al.* 2003, p. 204).

Another approach to assess Louisiana black bear habitat requirements is to examine bear movements and home ranges. The home ranges of Louisiana black bears appear to be closely linked to forest cover (Marchinton 1995, p. 48). Female range size may be partly determined by habitat quality (Amstrup and Beecham 1976, p. 345), while male home range size may be determined by the distribution of females (i.e., to allow for a male's efficient monitoring of a maximum number of females) (Rogers 1987, p. 19). Male black bears commonly disperse, and adult male bears can be wide-ranging with home ranges generally three to eight times larger than those of adult females (Pelton 1982, p. 507) and that may encompass several female home ranges (Rogers 1987, p. 19). Dispersal by female black bears is uncommon and typically is a short distance (Rogers 1987, p. 43). Females without cubs generally had larger home ranges than females with newborn cubs (Benson 2005, p. 46), although this difference was observed to vary seasonally, with movements more restricted in the spring (Weaver 1999, p. 99). Following separation of the mother and yearling offspring, young female black bears commonly establish a home range partially within or adjacent to their mother's home range (Rogers 1987, p. 39). Young males, however, generally disperse from their maternal home range. Limited information suggests that subadult males may disperse up to 136 mi (219 km) (Rogers 1987, p. 44; BBCC 1997, p. 22).

Home range estimates, calculated as the minimum convex polygon (MCP), vary for the Louisiana black bear. The MCP is a way to represent animal movement data and is calculated as the smallest (convex) polygon that contains all the points a group of animals have visited. Mean MCP home range estimates for the Tensas River NWR population were 35,736 ac (14,462 ha) and 5,550 ac (2,426 ha) for males and females, respectively (Weaver 1999, p. 70). Male home ranges (MCP) in the Upper Atchafalaya population may be as high as 80,000 ac (32,375 ha), while female home ranges are approximately 8,000 ac (3,237 ha) (Wagner 1995, p. 12).

Lower Atchafalaya population home ranges (MCP) were estimated to be 10,477 ac (4,200 ha) for males, and 3,781 ac (1,530 ha) for females (Wagner 1995, p. 12). It was speculated that the smaller home ranges of Lower Atchafalaya bears when compared to Upper Atchafalaya bears may be due to superior habitat quality in the coastal area (Wagner 1995, p. 25). However, the smaller home range estimates may have been affected by the small number of data points and bear use of garbage for food in many coastal locations.

Louisiana black bears located on the Deltic lands in the Tensas River population have very small home ranges compared to other black bear populations with an estimated average home range (MCP) for males of 1,729 ac (700 ha) and 1,038 ac (420 ha) for females (Beausoleil 1999, p. 57). The smaller home ranges for this population are believed to be a result of the bears' reliance on the surrounding agricultural crops for forage (Benson 2005, p. 95) and the overall higher quality of the forested habitat (Weaver 1999, pp. 90–91). Based on observations of the Deltic populations, Benson (2005, p. 95) suggested that it may be possible for a relatively large number of bears to require less space and persist in limited forest habitat if food is sufficiently abundant and diverse.

Habitat loss, besides reducing the overall area, can result in fragmentation or isolation of habitat, as is evident for the Louisiana black bear (Clark 1999, p. 107). Habitat fragmentation can restrict bear movements both within and between populations (Beausoleil *et al.* 2005, p. 403; Marchinton 1995, p. 53; BBCC 1997, p. 23). This can result in increased mortality as bears are forced to forage on less protected sites, travel farther to forage, or cross barriers such as roads (Pelton 1982, p. 507; Hellgren and Maehr 1992, pp. 154, 155, 156). Open areas, roads, large waterways, development, and large expanses of agricultural land may affect habitat contiguity. Such features tend to impede the movement of bears (Clark 1999, p. 107). Habitat fragmentation also limits the potential for the present Louisiana black bear population to expand its current breeding range (USFWS 1995, p. 8). Habitat fragmentation can create barriers to immigration and emigration that can affect population demographics and genetic integrity (Clark *et al.* 2006, p. 12). Bear populations in a relatively large habitat patch are not ensured of long-term survival without recolonization by bears from adjacent patches (Clark 1999, p. 111). The long-term protection of habitat and interconnecting corridors or habitat

linkages between viable breeding populations is one of the recovery criteria for the Louisiana black bear (USFWS 1995, p. 14).

Habitat linkages or corridors providing vegetative cover can facilitate the movement of bears through agricultural (or other open) lands, particularly when bears reside in fragmented tracts of forest, as is the case for the Louisiana black bear (Weaver *et al.* 1990b, p. 347). Based on telemetry locations and visual observations, Marchinton (1995, p. 53) determined that wooded drainages were important travel corridors for movement between forested tracts. He noted that those drainages may facilitate movements across agricultural lands and may be important for dispersal. Likewise, Weaver (1999, p. 67) found significant black bear use of habitat linkages between larger forested tracts, including forested edges associated with bayous, their tributaries, various dry ditch bottoms, and brushy ditch and canal banks in various agricultural tracts. Bears were also observed to frequent certain areas of intact forest such as the banks of rivers, sloughs, ditches, and bayous, and Weaver (1999, p. 82) suggested that the term "habitat linkages" may be more appropriate than travel corridors when referring to the remnant habitat features that link disjunct wooded tracts.

Beausoleil (1999, p. 62) observed that female Louisiana black bears would not move between woodlots unless they were connected by a forested corridor or were closer than 1,640 feet (ft) (0.5 km) apart. Anderson (1997, p. 74 via T. Edwards, USFWS pers. communication) found that female bears would not travel across expansive agricultural fields that separated forested tracts by 4,541 ft (1.3 km) and observed that bears traveled along tree-lined ditches that were as narrow as 16 ft (5 m) in width (Anderson 1997, p. 74). Similarly, Van Why (2003, pp. 30, 46) observed Louisiana black bears using narrow strips of vegetation (less than 33 ft (10 m) in width) to travel through inhospitable habitats such as open fields. Weaver *et al.* (1990b, p. 347) recommended a 197-ft (60-m) buffer zone along waterways as a travel corridor or habitat linkage. Bears will travel through open habitat (Weaver 1999, p. 81), but they may travel farther from the forested edge when in a wooded corridor versus in an open field (Anderson 1997, p. 42).

Habitat linkages, as described in Louisiana black bear population studies, are generally described as narrow and linear in shape, most likely resulting from the fact that ditches and bayous are

the only remaining features connecting habitat fragments within a population. Non-linear habitat patches located between existing populations may also provide areas for bear movement. Such linkages increase the amount of forested habitat (Beausoleil *et al.* 2005, p. 408) and may serve not only as pathways for concealed travel, but may also provide other functions such as escape cover, bedding and denning sites, routes for juvenile dispersal, and avenues for genetic exchange (Weaver 1999, pp. 82–83). Habitat linkages ranging from 2.5 ac to 12 ac (1 ha to 5 ha) can provide cover for black bears (Pelton and Van Manen 1997, p. 33). Smaller areas (*i.e.*, 2.5 ac (1 ha)) may provide suitable movement paths for shorter, within-population movements but may not be sufficient for establishing larger movement paths between populations. Beausoleil *et al.* (2005, pp. 409–410) recommended the establishment of habitat corridors to reduce the isolation of forested habitats for black bears and suggested that corridor width should vary with length and increase with distance. Similarly, Cox *et al.* (1994, p. 35) suggested that black bears likely require broader habitat areas rather than thin corridors when connecting distant populations.

While there is scientific discussion regarding the relative importance of wildlife corridors in general, they have been shown to be important for black bears (Cox *et al.* 1994, p. 34). Furthermore, in modeling spatial landscape structure and species dispersal, King and With (2002, p. 33) found that habitat clumping may help mitigate the negative effect that habitat loss has on dispersal success. Habitat linkages (or corridors) are needed to facilitate bear movement between habitat patches within and between black bear populations (Anderson 1997, p. 82; Wagner 1995, p. 43; BBCC 1997, p. 54). Telemetry data on Louisiana black bear movements in the Tensas River Basin demonstrate that habitat linkages should be considered in management plans intended to ensure Louisiana black bear population viability in fragmented habitats and to provide for the large home ranges (particularly of males) needed for unimpeded breeding and dispersal (Weaver 1999, p. 106).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The Louisiana black bear's diet is dominated by plant material throughout the year (Pelton 1982, p. 508; Anderson 1997, p. 77; Benson 2005, p. 20). A portion of the diet is made up of animal matter, primarily beetles and other

insects (which are consumed year-round (Anderson 1997, p. 79)), and occasionally carrion (Pelton 1982, pp. 508–509; Benson 2005, p. 27). Diets vary seasonally in relation to food availability as does habitat use (Nyland 1995, p. 53). After den emergence in the spring, bears utilize remaining fat reserves (Pelton 1982, p. 509). As this is generally a time of lower food abundance, bears may lose weight but will soon take advantage of any available protein-rich foods (Pelton 1982, p. 509). On the Deltic tracts, such items include grasses, sedges, oats, wheat, and beetles (Anderson 1997, p. 49; Benson 2005, p. 26). During the summer, food abundance and diversity increases, and soft mast, found primarily in forest openings, becomes a major food source. Soft mast may include such items as blackberry, grape, mulberry, sassafras, and paw paw (Weaver *et al.* 1990b, p. 344; Anderson 1997, p. 78; BBCC 1997, p. 18; Benson 2005, p. 26). Recently timbered areas can provide foraging opportunities for bears as they allow light penetration through canopy openings and provide rotting wood that harbors beetles and grubs (Weaver *et al.* 1990b, p. 344). Louisiana black bears were also observed using early successional areas (*e.g.*, planted with trees or regenerating naturally) planted with trees (0 to 12 years) or by an open canopy and dense understory of shrubs, vines, and saplings (Benson 2005, p. 56, Table 4.1). Such areas provide food and cover similar to natural openings in forests.

Food availability during the late summer and fall is critical as bears need to increase their fat stores in preparation for winter dormancy and denning (Pelton 1982, p. 509; BBCC 1997, p. 18). Acorns and other hard mast are important food items during this period (Pelton 1986, p. 51; Benson 2005, p. 27). Extensive foraging may occur and bears may travel great distances in search of food (Pelton 1982, p. 509). It is not uncommon for a bear to gain one to two pounds of fat daily (Pelton 1986, p. 51). Bears will forage on agricultural crops, which may dominate the diet depending on availability (Nyland 1995, p. 59; Anderson 1997, p. 78; Benson 2005, p. 20).

An important factor affecting black bear populations appears to be variation in food supply and its effect on physiological status and reproduction (Rogers 1976, pp. 436–437). Black bear cub survival and development are closely associated with the physical condition of the mother (Rogers 1976, p. 434). Cub mortality rates and female infertility are typically greater in single or successive years of poor mast

production or failure (Rogers 1987, p. 53; Eiler *et al.* 1989, p. 357; Elowe and Dodge 1989, p. 964). Nutrition may affect the age of female reproductive maturity and subsequent fecundity (Pelton 1982, p. 504). Reproduction may occur as early as 2 years of age for black bears in high quality habitat; in poor or marginal habitat, reproduction may not occur until 7 years of age (Rogers 1987, pp. 51–52, Table 8). Litter size may be affected by food availability prior to denning (Rogers 1987, p. 53, Table 10). During periods of food shortages, bears range farther in search of food. This increased movement substantially increases their chances for human encounters and human-related mortality (Rogers 1976, p. 436; Pelton 1982, p. 509). These high mortality rates are suspected to be greater for yearling and subadult black bear males dispersing from the family unit, and are probably the result of starvation, accidents (*e.g.*, vehicular collisions), and poaching.

Cover or Shelter

Black bears undergo a period of winter dormancy that allows them to circumvent food shortages and severe weather (Pelton 1982, p. 508). Louisiana black bears generally enter dens in early December and emerge in mid-April (Weaver 1999, p. 116, Table 4.1). They may remain somewhat active during this period and have been observed changing den sites and foraging, although their home range sizes are reduced (Weaver 1999, p. 115; Hightower *et al.* 2002, p. 16). Louisiana black bears use trees, brush piles, and ground nests for denning (Weaver 1999, p. 118; Hightower *et al.* 2002, p. 14). An individual bear may use one or more different den types, often within the same season (Weaver 1999, p. 118). Weaver (1999, p. 120) noted that most den trees were bald cypress, but also observed bear use of other species such as overcup oak and American sycamore. Den tree cavities appeared to result from broken tops or limbs and averaged approximately 49 ft (15 m) in height (Weaver 1999, p. 121). Den trees primarily occur along permanently flooded sloughs, seasonally flooded flats, lakes, bayous, and rivers (Weaver 1999, p. 130). Ground dens were located in wooded habitat and constructed from stacked palmetto and vegetation arranged in a wreath-like manner. Many of the wreath-like dens included excavated depressions, but those created from stacked palmetto did not (Weaver 1999, pp. 121–122). Dens were observed in forested habitat and constructed against a backdrop such as a felled log, a tree top, or the base of a tree (Weaver 1999, p. 122). In the Tensas population,

13 of 17 dens were located in forested stands that were at least partially timbered within the last 5 years (Weaver 1999, p. 122). Brush pile dens were observed in residual tree tops that were felled during recent timber harvests (Weaver 1999, pp. 122; Hightower *et al.* 2002, p. 14). Trees large enough and sufficiently mature to contain useable cavities are almost always found in places inaccessible to logging (Marchinton 1995, p. 55), or are left standing due to their low economic value.

The importance of high-quality cover for bedding, denning, and escape cover increases as forests become smaller and more fragmented, and as human encroachment and disturbance in bear habitat increases (Pelton 1986, p. 52). The thick understory found in some BLH forests and adjacent areas provides high-quality escape cover, which is considered especially important where fragmented habitats put bear populations in closer proximity to humans. Bears frequently use forested areas and scrub-shrub habitat as escape cover and as resting sites or "daybeds" (Weaver *et al.* 1990b, p. 347). Daybeds are generally shallow, unlined depressions excavated in soft ground or leaf litter (Pelton 1982, p. 509; BBCC 2005, p. 13). Secure areas for bedding, denning, and escape can be found in cover that limits visibility, slows foot travel, and creates noise when traversed (Weaver *et al.* 1990b, p. 347).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The average age for first female reproduction varies widely across black bear studies; however, most describe breeding occurring between 3 years and 5 years of age (Weaver 1990, p. 5). Breeding occurs in summer and the gestation period for black bears is 7 to 8 months (Weaver 1990, p. 5). Delayed implantation occurs in the black bear; blastocysts float free in the uterus and do not implant until late November or early December (Pelton 1982, p. 505). Because of this, pregnant females are not subject to the nutritional drain of a developing fetus while they forage to increase fat reserves for winter torpor (Weaver 1990, p. 5). Additional information on female habitat requirements is described in the *Space for Individual and Population Growth and Normal Behavior* discussion above. Females give birth during the denning season. The normal litter size is two, although litter sizes of one to four cubs (and rarely five) do occur. Cubs are altricial (helpless) at birth (Weaver 1990, p. 5) and generally exit the den site with the female in April or May.

Young bears stay with the female through summer and fall, and den with her the next winter. The young disperse in their second spring or summer, prior to the female's period of estrus (Pelton 1982, p. 505). Estrus starts when the female becomes physiologically capable of reproducing again. However, not all females produce cubs every other winter; reproduction is related to physiological condition (i.e., female bears that do not reach an optimal weight or fat level may not reproduce in a given year) (Rogers 1987, p. 51).

Females give birth while in their winter dens. Den site characteristics were described in more detail in the "Cover or Shelter" discussion above. Secure den sites for reproduction are particularly important as the young would not survive without their mother should she abandon her den because of disturbance. Benson (2005, p. 84) found that female reproductive status affected den type use, as females with cubs used trees for dens more frequently than ground dens. However, Hightower *et al.* (2002, p. 14) did not detect differences in den type use by females based on their reproductive status.

Tree dens may be an important component for female reproductive success in areas subject to flooding (Hellgren and Vaughan 1989a, p. 352). Den trees located in cypress swamps would appear to provide an increase in security (e.g., decrease in disturbance) compared to ground dens. The availability of den trees, however, does not appear to be a limiting factor for reproductive success (Weaver and Pelton 1994, p. 431); den trees may not be necessary for Louisiana black bears if flooding and disturbance are minimized (Hightower *et al.* 2002, p. 15).

To afford additional protection to denning bears, when we listed the Louisiana black bear, we extended legal protection to candidate and actual den trees by promulgating a special rule under section 4(d) of the Act and found at 50 CFR 17.40(i) (57 FR 588, January 7, 1992). As the terms imply, "actual den tree" refers to any tree used by a denning bear during the winter and early spring seasons. Candidate den trees are defined in the final rule as *Taxodium distichum* (bald cypress) and *Nyssa sp.* (tupelo gum) in occupied Louisiana black bear habitat having a diameter at breast height of 36 inches (in) (92 centimeters (cm)) or greater, with visible cavities, and occurring in or along rivers, lakes, streams, bayous, sloughs, or other water bodies. Results of recent research involving Louisiana black bears indicate that they will use virtually any species of tree for a den site (including overcup oak, American

elm, sweetgum, water hickory, and sycamore), if it meets the minimum diameter and cavity presence criteria described above (Hightower *et al.* 2002, p. 16).

Habitats That Are Protected From Disturbance

Remoteness is an important spatial feature of black bear habitat. In the southeastern United States, remoteness is relative to forest tract size and the presence of roads. Examples of remoteness important for black bear habitat include: A tract of timberland 0.5 mi (0.8 km) from well-maintained roads and development (Rudis and Birdsey 1986, p. 5), a forested tract of more than 2,500 ac (1,000 ha) (Rudis and Tansey 1995, p. 172), or a tract with 0.8 mi or less of road per mile² (0.5km/km²) of forest (Pelton 1986, p. 52). Remote timberlands, by this definition, are relatively rare within the historical range of black bears and are located primarily in Louisiana (Rudis and Birdsey 1986, p. 5). Increasing road density increases the likelihood of human disturbances, which can limit habitat suitability and use for black bears.

In some cases, where remoteness does not exist, bears are adaptable and through changes in behavior can survive and thrive in proximity to humans if afforded areas of retreat that ensure little chance of close contact or visual encounters. For example, bears may shift home range locations in response to increases in road densities (Brody and Pelton 1989, p. 10). However, in areas of fragmented habitat, behavioral adjustments may not be sufficient to offset the negative effects of barriers such as roads. Approximately 38 percent of known Louisiana black bear mortalities are the result of road kills (Pace *et al.* 2000, p. 368).

Primary Constituent Elements for the Louisiana Black Bear

Under the Act and its implementing regulations, we are required to identify the physical and biological features within the geographical area known to be occupied at the time of listing that are essential to the conservation of the Louisiana black bear and which may require special management considerations or protections. The physical and biological features are the primary constituent elements (PCEs) laid out in a specific spatial arrangement and quantity to be essential to the conservation of the species. All areas designated as critical habitat for the Louisiana black bear are occupied, are within the subspecies' 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 subspecies and the requirements of the habitat to sustain the essential life history functions of the subspecies, we have determined that Louisiana black bear's PCEs are:

(1) Breeding habitat (i.e., within or contiguous to the home range of females in a core breeding population) consisting of hardwood forest areas having a diversity of age, class, and species and containing sources of hard mast (acorns and nuts) produced by such species as mature oaks, hickories, and pecan, and that may include one or more of the following:

(a) Areas containing soft mast provided by a diversity of plant species, including, but not limited to, blackberry, grape, mulberry, sassafras, paw paw, etc., occurring primarily in forest openings, on spoil banks, and in areas adjacent to forested habitat;

(b) Areas within forested habitat providing protein sources consisting of beetles and other colonial insects found in rotting and decaying wood found on the forest floor;

(c) Grasses and sedges found in forest openings, on spoil banks with open canopies, and in vegetated areas adjacent to forested habitats; and

(d) Secure areas for reproduction, winter dormancy, day bedding, and escape. These include areas with den trees (e.g., bald cypress, overcup oak, American sycamore, etc.); areas with a thick understory, shrub-scrub habitat, openings along spoil banks, vegetated areas adjacent to forests, or any vegetation that provides cover, limits visibility, slows foot travel, or creates noise when traversed; early successional forests (0 to 12 years) with an open canopy and dense understory of shrubs, vines, and saplings; or areas with vegetation such as palmetto, greenbriars, blackberry, dewberry, and downed trees.

(2) Corridors consisting of:

(a) Habitat patches 12 acres (5 hectares) or greater in size; or

(b) Forested areas greater than 150 feet (46 meters) wide along waterways and sloughs and having a diversity of plant species and age-classes of sufficient area, quality, and configuration, as described in PCE 1 above, to provide dispersal habitat between breeding populations to maintain genetic variability and promote stable or increasing populations, and to provide habitat supporting safe movement, foraging, and denning.

As described in the Primary Constituent Elements section, breeding

habitat (PCE-1) must be interspersed and connected by suitable corridors (PCE-2) to allow for movement between core populations.

This final designation is designed for the conservation of PCEs necessary to support the life history functions of the Louisiana black bear and the areas containing those PCEs in the appropriate quantity and spatial arrangement essential for the conservation of the subspecies. Because not all life history functions require all the PCEs, not all critical habitat will contain all the PCEs.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas occupied by the species at the time of listing contain the features that are essential to the conservation of the species, and whether these features may require special management consideration or protections. As stated in the final listing rule (January 7, 1992; 57 FR 588), threats to the physical and biological features essential to the conservation of the Louisiana black bear include the direct and indirect impacts of land clearing or development resulting in habitat fragmentation and land use conversion, primarily to agriculture and development. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the value of critical habitat for both the survival and recovery of the Louisiana black bear is appreciably reduced. More specifically, such activities could reduce the extent of habitat available for foraging, denning, escape, reproduction and sheltering within populations, and severely limit or prevent dispersal and genetic exchange among populations. Examples of actions that have effects on Louisiana black bear habitat include, but are not limited to:

(1) Initiation or expansion of agricultural operations; hydrocarbon exploration and development; commercial, industrial, and residential development; flood control projects that involve clearing of woody vegetation on Corps flowage easement lands; and other activities that would require the permanent removal or fragmentation of forested wetlands;

(2) Road construction, large-scale or wide-ranging development, and flood-control projects that would result in barriers that are impermeable to bears;

(3) Large-scale, temporary clearing of all woody vegetation on flowage easements within the Atchafalaya River Basin to facilitate drainage of the Mississippi and Atchafalaya Rivers

during extraordinarily high water periods. Such activities could temporarily eliminate habitat for foraging, denning, escape, reproduction, and sheltering within populations occurring in Unit 2, and severely limit or prevent dispersal and genetic exchange between populations within Units 2 and 3.

As described in more detail in the unit descriptions below, we find that the PCEs within each unit may require special management considerations or protection due to threats to the Louisiana black bear or its habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we used the best scientific data available to designate critical habitat. We only designate areas outside the geographical area occupied by a species when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)).

We have acquired and evaluated additional data since our previous proposal May 6, 2008 (73 FR 25354), and have revised the critical habitat boundary to avoid the inclusion of non-PCE land. All critical habitat units discussed in this designation are occupied by the Louisiana black bear. We use the term "occupied" to indicate the subspecies' presence in an area without regard to reproductive information (i.e., the transient or permanent presence of male or female bears). This is in contrast to the use of this same term by Louisiana black bear resource managers who have historically used it to indicate areas with physical evidence of reproduction (e.g., young, females with young, or lactating females). We use the term "breeding areas or breeding habitat" to refer to areas with physical evidence of reproduction.

Our conservation strategy is based on a review of the biological needs of this subspecies as described in the literature, and the recovery strategy outlined in the Louisiana black bear recovery plan. In proposing critical habitat, our two-fold strategy is to: (1) Reduce the potential for extinction by providing habitat in areas of sufficient composition and size to maintain the viability of existing reproducing populations (as determined by breeding habitat); and (2) ensure the demographic vigor and genetic variability of existing populations by providing habitat of sufficient composition and location to provide areas of connectivity between adjoining breeding populations. The discussion below summarizes the criteria used to

identify critical habitat. For additional information, refer to the proposed critical habitat rule published on May 6, 2008 (73 FR 25354).

We include land within the critical habitat unit boundaries contingent upon that land being occupied at the time of listing and containing the physical and biological features essential to the conservation of the Louisiana black bear, meaning that it either (1) serves as breeding habitat, or (2) serves as an immigration or emigration corridor between the core breeding populations.

We have defined breeding habitat as bottomland and upland hardwood forests and adjacent vegetated habitats having a diversity of plant species and age-classes with evidence of use by at least five adult female bears that have home ranges that partially or completely overlap (core areas). An area that is completely or partially within one or more of those home ranges, but outside of the core area, as defined above, would be considered breeding habitat if it: (1) Has demonstrated use (via radio telemetry) of at least one female bear and is larger than 5 ac (2 ha) in size; or (2) is larger than 100 ac (40 ha) in size, regardless of telemetry confirmation of female presence, and is not separated from the breeding habitat core area by a landscape feature that may negatively influence natural bear movements (e.g., a State or Federal road, or a large waterway). Evaluation of existing telemetry data suggests that forest use by fewer than five females is generally indicative of temporary residence as a result of dispersal (noted most often within, and surrounding, the reintroduction complex).

Immigration and emigration corridors between existing breeding habitats were determined primarily by the distance between existing core breeding populations. Corridor boundary width varies and was further determined by the following three factors (listed below in order of decreasing significance):

(1) The width necessary to incorporate more than one potential habitat linkage. Selection of only one path of habitat linkages would not account for the nomadic nature of bears, nor for their spatially large habitat requirements, and would assume (likely incorrectly) that all bears would select the same path while traveling the significant distance that separates existing populations. According to Cox *et al.* (1994, p. 35), “black bears likely require broader habitat areas rather than thin corridors if connecting distant populations is a goal.”

(2) The feasibility of delineating all existing forested areas that is suitable for smaller scale movements that occur

during immigration and emigration between existing populations. Anderson (1997, p. 74 via T. Edwards, USFWS, personal communication) found that bears would travel along “tree-lined ditches” that were as narrow as 16 ft (5 m) in width. Delineation of such small linkages (which are often abundant and sinuous) that provide connectivity between existing populations is not technically feasible.

(3) The presence of existing landscape features, such as large water bodies, and State and Federal highways. Placing critical habitat boundaries along large landscape features is preferable because those features often affect or direct bear movements (i.e., form the actual boundary of such movements) and because large landscape features can be clearly defined for regulatory purposes.

We re-assessed the boundaries of all three critical habitat units based on comments received on our original proposal, additional data acquired subsequent to that proposal, and the original data used in the proposal (73 FR 25354; May 6, 2008) which includes: occurrence data for the Louisiana black bear (LDWF, the Service, Louisiana State University, and the University of Tennessee); 1998, 2004, 2005, and 2007 digital raster and digital orthophoto quarter-quadrangles (DOQQ); and 1:24,000 scale digital raster graphics (DRG) of the USGS topographic quadrangles.

The nature of the landscape within Unit 1 (i.e., heavily fragmented forests) significantly reduces the latitude in delineating that boundary because it necessitates the inclusion of virtually all remnant forests to ensure that sufficient habitat (i.e., breeding habitat and corridors) is incorporated within the critical habitat boundary. Based on comments received regarding our May 6, 2008 proposal (73 FR 25354), we evaluated the potential for increasing the width of Unit 1 particularly in the corridor areas between breeding populations. Our evaluation concluded that increasing the unit width in this region would incorporate primarily agricultural fields and virtually no additional forested habitat. Including additional agricultural areas within the critical habitat boundary would not be beneficial because those areas do not contain features essential to the conservation of the subspecies.

Accordingly, the boundary of Unit 1 has not been modified from our proposal.

The landscape in the northern portion of Unit 2 resembles that of Unit 1 in regard to forest fragmentation, and provides similar limitations in delineating critical habitat. The southern portion of Unit 2, however,

traverses the ARB and presented a distinctive challenge in determining the placement of boundaries through an expansive (over 600,000 ac [242,812 ha]) and virtually uninterrupted forested system. The ARB, from U.S. Interstate 10 along its northern boundary to U.S. Highway 90 along its southern boundary, does not support reproducing females. We used the original geospatial data sets from our previous proposal, and employed additional data to determine the areas within the ARB that would most likely facilitate bear movement between those two populations. That newer data included Light Detection and Ranging (LIDAR) Data, classified digital Landsat imagery, and Louisiana black bear habitat selection preference data.

LIDAR data is derived from a remote sensing system that is used by the National Oceanic and Atmospheric Administration and National Aeronautics and Space Administration (NASA). Data are collected from a transceiver, which is mounted to a fixed wing aircraft that sends and receives laser pulses along the surface of the earth (<http://www.csc.noaa.gov/products/sccoasts/html/tutlid.htm>). The final product is a set of longitude, latitude, and elevation positions for every data point, from which a digital elevational model of ground surface can be generated. LIDAR point data are available for the entire ARB and were used to identify higher elevations that would be generally more conducive to bear usage (particularly for travel between existing populations).

The Landsat Program uses satellites to capture moderate resolution remote-sensing data of the earth's surface. Digital Landsat imagery is the product of that program, and is jointly managed by NASA and the U.S. Geological Survey (USGS). Several Landsat images for the ARB have been preliminarily classified into categories of land and water by the USGS—National Wetlands Research Center (Allen *et al.* 2008). The classification approach taken by Allen *et al.* (2008) in their ongoing study uses a tasseled cap (TCAP) transformation to reduce the original Landsat data to three transformed bands of brightness, greenness, and wetness. Images taken at many different river stages are classified into areas of land and water and are then used to demonstrate the range of expected inundation with changing river stages. We compared ARB inundation and dry land prevalence at a variety of river stages with the probability of exceedance of those river stages during each month of the year based on stage duration curves that we developed from the Corps' Atchafalaya

River gauge data. Through that comparison, we were able to use images that were classified at known river stages to temporarily evaluate ARB land that could provide suitable travel and dispersal corridors for bears (i.e., that would not be inundated), especially during the period when dispersal would be most likely to occur.

Wagner (2003) developed a landscape-scaled habitat selection function for two Louisiana black bear populations (Upper and Lower ARB) using telemetry data and classified Landsat imagery. He used a TCAP transformation, as described above for the USGS study, to classify Landsat imagery. Bear habitat selections were evaluated based on a comparison of that classification to known telemetry locations. Bear habitat preferences within the ARB are not known because very few bears, if any, permanently reside within that system. The result of Wagner's (2003) study was the development of a GIS-based model that predicts bear habitat preferences throughout the ARB, using classified imagery and known telemetry locations from the two ARB subpopulations.

Based on our evaluation of these three data sets, we determined that the boundary of Unit 2 sufficiently incorporates the best available science and was correctly delineated as shown in our May 6, 2008, proposal (73 FR 25354). Based on comments we received regarding that proposal, we also evaluated the potential for increasing the width of the southern boundary of Unit 2, where it connects to Unit 3. However, similar to the constraints noted for Unit 1, the prevalence of agriculture and urban development in

this region of the State precludes the incorporation of additional forested habitat in the southernmost extent of Unit 2. We have determined that it would not be beneficial or justifiable to incorporate large agricultural and urban expanses within the critical habitat boundary as those lands do not contain features essential to the conservation of the subspecies. Accordingly, the boundary of Unit 2 has not been modified from our May 6, 2008, proposed rule.

We have made relatively minor revisions to the Unit 3 boundary based on a reevaluation of the information and data used in our proposal (73 FR 25354). The result is a boundary that more accurately reflects telemetry data and known breeding habitat, and that minimizes the inclusion of areas that do not contain PCEs for the Louisiana black bear. Areas that have been removed from the previously proposed boundary include urban development, agricultural land, and poor-quality non-PCE habitats such as marsh and semi-permanently inundated swamps that do not link higher quality habitats. Although we are reporting a decrease in the overall acreage of Unit 3, removal of those areas has not reduced the extent habitat containing the PCEs in this unit.

All areas designated as critical habitat contain the physical and biological features essential to the conservation of the subspecies and either: (1) Currently support a breeding population of Louisiana black bears; or (2) function as corridors to maintain movement between core populations. We have determined that those areas are sufficient to conserve the Louisiana black bear.

When determining the critical habitat boundaries for this final rule, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the PCEs for the Louisiana black bear. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this critical habitat rule have been excluded by text in this final rule. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action may affect adjacent critical habitat.

Final Critical Habitat Designation

We are designating three units as critical habitat for the Louisiana black bear. The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat. Those three areas are: (1) Tensas River Basin, (2) Upper Atchafalaya River Basin, and (3) Lower Atchafalaya River Basin.

Table 1 shows both the lands designated as critical habitat and the lands being excluded from critical habitat under section 4(b)(2) of the Act. Table 2 summarizes the areas that meet the definition of critical habitat for the Louisiana black bear and areas designated as critical habitat by land ownership (Table 2).

TABLE 1—AREAS THAT MEET THE DEFINITION OF CRITICAL HABITAT FOR THE LOUISIANA BLACK BEAR, AREAS EXCLUDED FROM THIS FINAL CRITICAL HABITAT, AND AREAS DESIGNATED AS CRITICAL HABITAT

[Total area estimates reflect all land within critical habitat unit boundaries. Acre and hectare values were computer generated individually using GIS software, rounded to nearest whole number, and then summed. Totals may not match due to rounding.]

Critical habitat unit	Area that meets the definition of critical habitat in acres (hectares)	Area excluded from final critical habitat in acres (hectares)	Area designated as critical habitat in acres (hectares)
1. Tensas River Basin	677,256 (274,076)	48,751 (19,729)	628,505 (254,347)
2. Upper Atchafalaya River Basin	435,227 (176,130)	1,547 (626)	433,680 (175,504)
3. Lower Atchafalaya River Basin	133,636 (54,080)	0	133,636 (54,080)
Total	1,246,119 (504,286)	50,298 (20,355)	1,195,821 (483,932)

TABLE 2—AREA DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT FOR THE LOUISIANA BLACK BEAR AND AREAS DESIGNATED AS CRITICAL HABITAT FOR THE LOUISIANA BLACK BEAR BY LAND OWNERSHIP

[Acre and hectare values were computer generated individually using GIS software, rounded to nearest whole number, and then summed. Totals may not match due to rounding.]

Critical habitat unit	Federal in acres (hectares)	State in acres (hectares)	Local and private in acres (hectares)	Total in acres (hectares)
1. Tensas River Basin	100,649 (40,731)	119,273 (48,268)	408,583 (165,348)	628,505 (254,347)
2. Upper Atchafalaya River Basin	15,765 (6,380)	74,187 (30,022)	343,729 (139,102)	433,680 (175,504)
3. Lower Atchafalaya River Basin	7,440 (3,011)	737 (298)	125,459 (50,771)	133,636 (54,080)
Total	123,854 (50,122)	194,197 (78,588)	877,771 (355,221)	1,195,821 (483,932)

Unit Descriptions

Unit 1: Tensas River Basin

Unit 1 consists of 628,505 ac (254,347 ha) of Federal, State, and privately owned lands in the Tensas River Basin. It includes portions of Avoyelles, East Carroll, Catahoula, Concordia, Franklin, Madison, Richland, Tensas, West Carroll, and West Feliciana Parishes. Portions of this land that meet the definition of critical habitat in this area (48,751 ac (19,729 ha)) are enrolled under permanent easements in the WRP. We excluded those lands from critical habitat because we determined the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation. Furthermore, exclusion of these lands will not result in the extinction of this subspecies (see Table 1 and “Exclusions Under Section 4(b)(2) of the Act” section of this final rule for a detailed discussion of this exclusion).

This unit was occupied at the time of listing and currently provides breeding and corridor habitat for the Louisiana black bear. The perimeter of the northern portion of Unit 1 approximately coincides with the boundaries of the Deltic Timber tracts, TRNWR, and Big Lake Wildlife Management Area (WMA). The perimeter of the southern portion of Unit 1 is bounded primarily by the Red River WMA and Three Rivers Management Area on the north and east; by the Red River, Bayou Jeansonne, and Bayou des Glaises on the west; and by the Lower Old River on the south.

The central portion of this unit serves as a corridor and extends from the south boundaries of Big Lake WMA and TRNWR in Franklin and Tensas Parishes, to the north boundary of Red River WMA in Concordia Parish. The Tensas River and Bayou Cocodrie form most of the western boundary of that

corridor. The eastern boundary of that corridor includes the east property boundary of Buckhorn Wildlife WMA, and Louisiana State Highways 573, 566, and 15. This area contains features essential to the conservation of the Louisiana black bear because it serves as a corridor to maintain habitat linkages for immigration and emigration between the existing breeding populations at the northern and southern extents of this unit. Two of the three recovery criteria listed in the Louisiana black bear recovery plan (USFWS 1995, p. 14) specifically state that the eventual delisting of the Louisiana black bear is contingent upon the establishment (where absent) and long-term maintenance of such corridors. According to Clark (1999, p. 111), the stability and long-term viability of disjunct populations may be precluded in the absence of such corridors.

A significant portion of Unit 1 occurs within State and federally owned or managed lands that include TRNWR (68,909 ac (27,886 ha)), Big Lake WMA (19,587 ac (7,927 ha)), Buckhorn WMA (11,238 ac (4,548 ha)), Bayou Cocodrie NWR (13,638 ac (5,519 ha)), Lake Ophelia NWR (17,408 ac (7,045 ha)), Red River WMA (43,570 ac (17,632 ha)), Three Rivers WMA (29,863 ac (12,085 ha)), and Grassy Lake WMA (13,214 ac (5,348 ha)). Habitat restoration within Unit 1 has been primarily accomplished through the WRP, which is administered by the NRCS, and through a major carbon sequestration/habitat restoration project, initiated by Entergy Corporation, the Trust for Public Land, Environmental Synergy, Inc., and the Service. Since the Louisiana black bear was listed as a threatened subspecies in 1992, approximately 53,487 ac (21,645 ha) of marginal agricultural land has been restored in this unit as a result of the WRP program; the program includes perpetual protection through

conservation easements for most such tracts. The State of Louisiana has purchased 2,420 ac (979 ha) of Wetland Reserve Program lands as an addition to the Buckhorn WMA. As part of an ongoing carbon sequestration initiative, approximately 10,000 acres of marginal agricultural land are planned for purchase, reforestation, and transfer to the Service as an addition to the TRNWR. The first phase of this project was completed in 2005, and involved reforestation of 2,900 ac (1,174 ha) of land that were added to the TRNWR.

Unit 1 contains PCEs 1 and 2. Threats to this subspecies and its habitat that may require special management of the physical and biological features essential for the conservation of the subspecies in this unit include continued habitat fragmentation (from such sources as hydrocarbon exploration and production, transportation development, agricultural activities, and urban sprawl), and human-induced mortality (such as poaching, vehicle strikes, and nuisance abatement activities) which is exacerbated by habitat fragmentation.

Unit 2: Upper Atchafalaya River Basin

Unit 2 consists of 433,680 ac (175,504 ha) of Federal, State, and privately owned lands in the Upper Atchafalaya River Basin. It includes portions of Iberia, Iberville, Pointe Coupee, St. Martin, and St. Mary Parishes. Portions of this land that meet the definition of critical habitat in this area (1,547 ac (626 ha)) are enrolled under permanent easements in the WRP. We excluded those lands from critical habitat because we determined the benefits of excluding these lands outweigh the benefits of including these lands in a critical habitat designation. Furthermore, exclusion of these lands will not result in the extinction of this subspecies (see Table 1 and “Exclusions Under Section

4(b)(2) of the Act” section of this final rule for a detailed discussion of this exclusion).

This unit was occupied at the time of listing and currently supports breeding and corridor habitat for the Louisiana black bear. The northern half of Unit 2 is bounded primarily by Louisiana Highway 1 on the north, Louisiana Highway 1 and the East Atchafalaya Basin Flood Protection Levee on the east, the Atchafalaya River on the west, and U.S. Interstate 10 on the south. The southern portion extends from U.S. Interstate 10 in St. Martin Parish to U.S. Highway 90 in St. Mary Parish. Its east and west boundaries approximately follow the West Atchafalaya Basin Flood Protection Levee and the Atchafalaya River, respectively. The southern portion of Unit 2 serves as a corridor to maintain immigration and emigration between the existing core breeding populations in Unit 3 and in the northern half of this unit. Two of the three recovery criteria listed in the Louisiana black bear recovery plan (USFWS 1995, p. 14) specifically state that the eventual delisting of the Louisiana black bear is contingent upon the establishment (where absent) and long-term maintenance of such corridors. According to Clark (1999, p. 111), the stability and long-term viability of disjunct populations may be precluded in the absence of such corridors.

Portions of Unit 2 occur within State and federally owned and managed lands that include Atchafalaya NWR (15,762 ac (6,379 ha)), Bayou Teche NWR (3 ac (1 ha)), Sherburne WMA and the adjacent (State-managed) Corps-owned Bayou Des Ourses Area (29,883 ac (12,093 ha)), and Attakapas Island WMA (26,819 ac (10,854 ha)). Habitat restoration within Unit 2 has been relatively limited and primarily accomplished through the WRP program. Approximately 1,550 ac (627 ha) of marginal agricultural land has been restored in this unit as a result of that program; the program includes perpetual protection through conservation easements for most such tracts.

Unit 2 contains PCEs 1 and 2. Threats to the Louisiana black bear and its habitat that may require special management of the physical and biological features essential for the conservation of the subspecies in this unit include continued habitat fragmentation (from such sources as hydrocarbon exploration and production, transportation development, agricultural activities, and urban sprawl), and human-induced mortality (such as poaching, vehicle

strikes, and nuisance abatement activities), which is exacerbated by habitat fragmentation.

Unit 3: Lower Atchafalaya River Basin

Unit 3 consists of 133,636 ac (54,080 ha) of Federal, State, and privately owned lands in the Lower Atchafalaya River Basin. It lies south of U.S. Highway 90 (Hwy. 90) in Iberia and St. Mary Parishes. This unit was occupied at the time of listing by the Louisiana black bear and currently supports breeding habitat.

In addition to bottomland hardwood forests, bears within this unit also utilize upland hardwood habitats associated with four salt domes (Avery, Cote Blanche, Weeks Islands, and Belle Isle) and coastal marshes adjacent to those forests. The vast majority of Unit 3 is privately owned, with the exception of 7,440 ac (3,011 ha) of the Bayou Teche NWR, which is unique in that it is the only National Wildlife Refuge established specifically for the conservation of the Louisiana black bear. The boundaries of Unit 3 approximately coincide with U.S. Highway 90 to the north; Avery Island to the west; the Gulf Intracoastal Waterway (GIWW) to the south; then southeast along Big Wax Bayou, southeast of Belle Isle; then northeast along Big Lacassine Bayou to the GIWW; then east along the GIWW; then southeast along Hog Bayou; then northeast along the Wax Lake Outlet to the GIWW; and then east to the Lower Atchafalaya River.

A significant acreage of bottomland hardwood forests in private ownership not associated with the four salt domes is flood-protected via levees, manmade ditches, and pumps. Those flood protection features have caused such forests to lose their wetland classification and associated regulatory protection under the Clean Water Act (33 U.S.C. 1251 *et seq.*). Subsequently, there is continual development along the Hwy. 90 corridor within Unit 3, most of which is not subject to Federal regulation. The Federal Highway Administration and the Louisiana Department of Transportation have proposed an upgrade of U.S. Highway 90, within this unit, to Interstate Highway System standards as an extension of U.S. Interstate Highway 49.

Unit 3 contains PCE 1. Threats to this subspecies and its habitat that may require special management of the physical and biological features essential for the conservation of the subspecies in this unit include continued habitat fragmentation (from such sources as hydrocarbon exploration and production,

transportation development, agricultural activities, and urban sprawl), and human-induced mortality (such as poaching, vehicle strikes, and nuisance abatement activities), which is exacerbated by habitat fragmentation.

Effects of Critical Habitat Designation

Section 7 Consultation

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

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 the 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, we document compliance with the requirements of section 7(a)(2) through our 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 are likely to adversely affect listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define “Reasonable and prudent alternatives” 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,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying 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 reinstate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinstatement of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the Louisiana black bear 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 Corps under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are 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(a)(2) consultations.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical

habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the primary constituent elements to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the Louisiana black bear. Generally, the conservation role of Louisiana black bear critical habitat units is to maintain the viability of existing reproducing populations and to ensure the demographic vigor and genetic variability of existing 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 those activities that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the Louisiana black bear include, but are not limited to:

(1) Actions that would reduce the extent of habitat available for population maintenance or expansion or that would negatively alter the function of forested corridors, which facilitate genetic exchange between existing populations, through the permanent conversion or fragmentation of those forested habitats. Such activities could include, but are not limited to, initiation or expansion of agricultural operations; hydrocarbon exploration and development; commercial, industrial, and residential development; flood control projects that involve clearing of woody vegetation on Corps' flowage easement lands; and other activities that would require the permanent removal or fragmentation of forested wetlands.

(2) Actions that would create significant barriers to movement both within and among existing populations. Those activities could reduce the availability of habitat for foraging, denning, escape, reproduction, and sheltering within populations, and severely limit or prevent dispersal and genetic exchange among populations. Such actions could include, but are not limited to road construction, large-scale or wide-ranging development, and flood-control projects that would result in barriers that are impermeable to bears.

(3) Actions performed by the Corps that would result in significant habitat losses on their flowage easement lands within the Atchafalaya River Basin.

Those activities could include large-scale, temporary clearing of all woody vegetation on easement lands to facilitate drainage of the Mississippi and Atchafalaya Rivers during extraordinarily high water periods. Such activities could temporarily eliminate habitat for foraging, denning, escape, reproduction, and sheltering within populations occurring in Unit 2, and severely limit or prevent dispersal and genetic exchange between populations within Units 2 and 3.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands with a completed INRMP within the critical habitat designation.

Exclusions

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

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat 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 legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis we determine that the benefits of exclusion outweigh the benefits of inclusion, then we can exclude the area only if such exclusion would not result in the extinction of the species.

In the following sections, we address a number of general issues that are relevant to the exclusions considered in the final rule.

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those lands on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential to the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the habitat that is identified, if managed or protected, could provide for the survival and recovery of the species.

The identification of those areas that are essential for the conservation of the species and can, if managed, provide for the recovery of a species is beneficial. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine the physical and biological features essential for conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential to the conservation of the species. The designation process includes peer review and public comment on the identified physical and biological features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not be included in the Service's determination of essential habitat.

The consultation provisions under section 7(a)(2) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of the species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different, as the jeopardy analysis looks at the action's impact on survival and recovery of the species and the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater regulatory benefits to the recovery of a species than would listing alone.

There are two limitations to the regulatory effect of critical habitat. First, a consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands itself does not restrict actions that destroy or

adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species or of unoccupied areas that are essential to the conservation of the species are not appreciably reduced as the result of a Federal action. Critical habitat designation alone, however, does not require private property owners to undertake specific steps toward recovery of the species. Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then formal consultation is initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation is initiated under section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species or adverse modification of its critical habitat or both, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans institute proactive actions over the lands they encompass and are put in place to remove or reduce known threats to a species or its habitat; they therefore implement recovery actions. We believe that in many instances the regulatory benefit of critical habitat is low when compared to the conservation benefit that can be achieved through implementing habitat conservation plans (HCPs) under section 10 of the Act or other voluntary conservation efforts or management plans. The conservation achieved through such plans is typically greater than what we achieve through multiple site-by-site or project-by-project section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection for particular habitat for at

least one and possibly other listed or sensitive species. Section 7 consultations only commit Federal agencies to preventing adverse modification of critical habitat caused by the particular project, and they are not committed to provide conservation or long-term benefits to areas not affected by the proposed action. Thus, implementation of an HCP, voluntary conservation action, or management plan that incorporates enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation.

Another benefit of including lands in critical habitat is that designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the Louisiana black bear. In general, critical habitat designation always has educational benefits; however, in some cases, they may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefits of a critical habitat designation. Including lands in critical habitat also informs State agencies and local governments about areas that could be conserved under State laws or local ordinances.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (National Wilderness Institute 1995), and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting

voluntary cooperation of landowners are essential to understanding the status of species on non-Federal lands, and necessary for us to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996).

Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal Government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability. This perception results in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999; Brook *et al.* 2003).

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, and control of invasive species) are necessary for species conservation (Bean 2002). We believe that the judicious exclusion of specific

areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus the benefits of excluding areas that are covered by partnerships or voluntary conservation efforts can often be high.

Benefits of Excluding Lands With Approved Management Plans

The benefits of excluding lands with approved long-term management plans from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many conservation plans take years to develop, and upon completion, are consistent with recovery objectives for listed species that are covered within the plan area. Many also provide conservation benefits to unlisted sensitive species. Our experience in implementing the Act has found that designation of critical habitat within the boundaries of management plans that provide conservation measures for a species is a disincentive to many entities which are either currently developing such plans, or contemplating doing so in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species will be affected. Addition of a new regulatory requirement would remove a significant incentive for undertaking the time and expense of management planning. In fact, designating critical habitat for species in areas covered by a conservation plan could result in the loss of some species' benefits if participants abandon the planning process in part because of the strength of the perceived additional regulatory compliance that such designation would entail. The time and cost of regulatory compliance for a critical habitat designation do not have to be quantified for them to be perceived as additional Federal regulatory burden sufficient to discourage continued participation in developing plans targeting listed species' conservation.

A related benefit of excluding lands covered by approved management plans

from critical habitat designation is the unhindered, continued ability it gives us to seek new partnerships with future plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. Designating lands within approved management plan areas as critical habitat would likely have a negative effect on our ability to establish new partnerships to develop these plans, particularly plans that address landscape-level conservation of plant species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, both HCPs and Natural Communities Conservation Plan (NCCP)-HCP applications require consultation, which would review the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification, even without the critical habitat designation. Additionally, all other Federal actions that may affect the listed species still require consultation under section 7(a)(2) of the Act, and we review these actions for possibly significant habitat modification in accordance with the jeopardy standard under section 7 of the Act.

Exclusions Under Section 4(b)(2) of the Act

We received several public comments suggesting we exclude lands enrolled under conservation agreements, through programs such as NRCS Conservation Reserve Program (CRP), Wildlife Habitat Improvement Program (WHIP), Environmental Quality Incentives Program (EQIP), Emergency Watershed Program (EWP), and the Service's Partners for Fish and Wildlife Program (PFW), from critical habitat designation. While we believe that excluding lands enrolled in those specific conservation agreements may provide benefits in terms of maintaining landowner cooperation, landowners who enroll in those programs are not bound by an easement that permanently prohibits development or conversion of those lands. Instead, landowners sign an agreement (generally 10 to 15 years in duration) and at the end of that agreement those properties may be converted to another use. In those instances, the protection provided to those lands is not significantly different from that provided by a critical habitat designation under section 7 of the Act (i.e., adverse modification or

destruction). As indicated in our response to Comment 24 in the "Public Comments" section above we do not conclude that the benefits of excluding those specific lands outweigh the benefits of including them in the designation. Therefore, they have not been excluded from this designation.

However, after consideration under section 4(b)(2) of the Act, we are excluding approximately 50,298 ac (20,355 ha) of non-Federal lands in Units 1 and 2 enrolled under permanent/perpetual easements in the NRCS' WRP from the critical habitat designation for the Louisiana black bear.

We excluded these areas because we believe that:

(1) Their value for conservation will be preserved for the foreseeable future by existing protective actions; or

(2) They are appropriate for exclusion under the "other relevant impact" provisions of section 4(b)(2) of the Act.

In the paragraphs below, we provide a detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act.

Permanent Easement Wetland Reserve Program Lands—Exclusions Under Section 4(b)(2) of the Act

In reviewing lands enrolled under permanent easements under the WRP for potential exclusion under section 4(b)(2) of the Act, we consider (in addition to the general partnership relationships identified above) whether those easements provide for protection and appropriate management, if necessary, of essential habitat and whether the easement incorporates conservation management strategies and actions consistent with currently accepted principles of conservation biology.

The WRP is a voluntary program that provides eligible landowners the opportunity to address wetland, wildlife habitat, soil, water, and related natural resource concerns on private lands in an environmentally beneficial and cost-effective manner. The WRP is authorized by 16 U.S.C. 3837 *et seq.*, and the implementing regulations are found at 7 CFR part 1467. The first and foremost emphasis of the WRP is to protect, restore, and enhance the functions and values of wetland ecosystems to attain habitat for migratory birds and wetland-dependent wildlife, including threatened and endangered species. The WRP is administered by the NRCS (in agreement with the Farm Service Agency) and in consultation with the Service and other cooperating agencies and organizations. The Service participates in several ways, including

assisting NRCS with land eligibility determinations; providing the biological information for determining environmental benefits; assisting in restoration planning such that easement lands achieve maximum wildlife benefits and wetland values and functions; and providing recommendations regarding the timing, duration, and intensity of landowner-requested compatible uses.

Land that is eligible for enrollment in the WRP includes such areas as wetlands cleared or drained for farming, pasture, or timber production; certain adjacent lands that contribute significantly to wetland functions and values; restored wetlands that need long-term protection; and existing or restorable riparian habitat corridors that connect protected wetlands. Eligible land must be restorable and suitable for providing wildlife benefits. Thus, the WRP provides an incentive for private landowners to restore non-productive farmland (prior-converted wetlands), and in Louisiana the majority of WRP land under permanent easement is agricultural land that is being restored to its original bottomland hardwood forest habitat.

Under the WRP, there are three enrollment options available for the landowner: (1) Permanent/perpetual easement; (2) 30-year easement; and (3) restoration cost-share agreement. Under the permanent easement option, a conservation easement is placed upon the enrolled lands for perpetuity. When a landowner enrolls in an easement option, the landowner is selling a real property interest to the United States. After the easement is recorded in the local lands record office, the landowner retains ownership and responsibility for the land. The landowner controls access to the land; has the right to hunt, fish, and pursue other undeveloped recreational uses provided such use does not impact other prohibitions listed in the warranty easement deed; and may sell or lease land enrolled in the program (NRCS 2007; pp. 1–2).

Participating landowners may request other prohibited uses such as haying, grazing, or harvesting timber. When evaluating compatible uses, the NRCS evaluates whether that proposed use is consistent with the long-term protection and enhancement of the wetland resources for which the easement was established and Federal funds expended. Requests may be approved if the NRCS determines that the activity both enhances and protects the purposes for which the easement was acquired and would not adversely affect habitat for migratory birds and threatened and endangered species.

NRCS retains the right to cancel an approved compatible use authorization at any time if it is deemed necessary to protect the functions and values of the easement. According to the authorizing language (16 U.S.C. 3837a(d)), compatible economic uses, including forest management, are permitted if consistent with the long-term protection and enhancement of the wetland resources for which the easement was established. Should such a modification be considered, NRCS would consult with the Service prior to making any changes.

Benefits of Inclusion—Permanent Easement Wetland Reserve Program Lands

The inclusion of approximately 48,751 ac (19,729 ha) of land in Unit 1 and approximately 1,547 ac (626 ha) of land in Unit 2 enrolled in a permanent easement under the WRP could be beneficial because it identifies lands to be managed for the conservation and recovery of the Louisiana black bear. The process of proposing and finalizing a critical habitat provided the Service with the opportunity to determine the physical and biological features, or PCEs, essential for conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine if there were other areas essential to the conservation of the species. The designation process includes peer review and public comment on the identified features and areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat. However, identification of important habitat for the Louisiana black bear and efforts to conserve the subspecies and its habitat were initiated in the early 1990s and resulted in the development of the "Louisiana Black Bear Habitat Restoration Planning Maps" (HRPM). Those maps, developed by a collaborative multi-agency and organization group, were designed to directly address Louisiana black bear recovery criteria and designed for use with conservation programs (especially for the WRP), which encourage reforestation of marginal and nonproductive cropland in Louisiana.

Permanent easements under the WRP provide substantial protection and management for the Louisiana black bear and its essential habitat features. In contrast, the only regulatory benefit to critical habitat designation is through

the consultation provisions of section 7 of the Act, for Federal actions that may destroy or adversely modify critical habitat. Moreover, the educational benefits of designation are small and largely redundant to those derived through conservation efforts already in place or underway on the 48,751 ac (19,729 ha) of land in Unit 1 and the approximately 1,547 ac (626 ha) of land in Unit 2 that are protected under the WRP permanent easement. The process of developing the HRPM since 1992 has involved extensive input and the involvement of Federal, State, and local government partners including (but not limited to): NRCS, LDWF, BBCC, Louisiana State University, the Louisiana Nature Conservancy, and the Service. Therefore, the educational benefits of designating these private lands in Units 1 and 2 as critical habitat are minimal.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of designating lands as critical habitat. As discussed above, Federal agencies must consult with us on actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. However, for all of the approximately 50,298 ac (20,355 ha) of land in Units 1 and 2 under a WRP permanent easement, any changes to the easement would be approved only if the NRCS determines that the activity both enhances and protects the purposes for which the easement was acquired. Therefore, we do not anticipate a regulatory benefit to result from designation of those areas as critical habitat.

Benefits of Exclusion—Permanent Easement Wetland Reserve Program Lands

In contrast to the lack of an appreciable benefit by including these lands as critical habitat, their exclusion from critical habitat will help preserve the partnerships that we have developed with the NRCS, other groups and agencies, and private landowners through the development and use of the HRPMs in the implementation of WRP permanent easements. At the time of listing, approximately one-half of Louisiana black bear breeding habitat was privately owned (BBCC 1997, p. 31), making the support and participation of private landowners vital to this subspecies' recovery. As discussed above, and evident in the public comments we received, many landowners perceive critical habitat as an unfair and unnecessary regulatory burden imposed on them for conducting an activity that benefits Louisiana black

bear conservation measures such as enrolling in a WRP permanent easement. A significant amount of habitat restoration specifically designed to conserve and recover the Louisiana black bear has been accomplished through the use of the HRPMs and the voluntary cooperation of private landowners enrolled in the WRP.

Since 1992, over 55,000 ac (22,250 ha) of private lands have been enrolled in the NRCS' WRP within critical habitat, which has benefited Louisiana black bear conservation. We have no quantitative data to prove that landowner enrollment in voluntary conservation programs may decrease as the result of critical habitat designation. We received unfavorable landowner responses during the 1993–94 critical habitat proposal process when the majority of comments received were in opposition to the designation, and several landowners who had previously allowed black bear research activities on their lands subsequently denied access to researchers and agency personnel. Furthermore, the NRCS' staff and managers, who work with private landowners on a daily basis, have indicated that there would likely be negative impacts (real or perceived) to voluntary conservation activities on private property by designating existing and newly created habitat as critical habitat and thus could result in a significant detrimental effect on future voluntary habitat restoration efforts (May 29, 2008, meeting with the Service). Similarly, comments from other professionals (Louisiana Department of Wildlife and Fisheries) and peer reviewers who interact regularly with private landowners, as well as comments received from a conservation group and landowners themselves, have indicated their belief that the negative perceptions associated with critical habitat designation would have detrimental impacts on black bear conservation efforts and enrollment in voluntary landowner conservation programs. In the case of lands enrolled under a permanent easement in the WRP, those easement restrictions provide substantial protection and management for the Louisiana black bear and its essential habitat features above that provided by designation of critical habitat, which only precludes destruction or adverse modification.

Finally, landowner enrollment in the WRP has been primarily driven by the financial incentive provided to them through the easement payment and, in many instances, a desire to restore the land for Louisiana black bears or other wildlife. We know of no data that would indicate an increase in voluntary

landowner enrollment due to possible regulatory restrictions. On the contrary, the comments we have received during the comments period indicate the opposite.

Benefits of Exclusion Outweigh the Benefits of Inclusion—Permanent Easement Wetland Reserve Program Lands

We reviewed and evaluated the benefits of inclusion and the benefits of exclusion of lands enrolled in permanent easement under the WRP as critical habitat for the Louisiana black bear. We found that the benefits of inclusion were minimal since protections afforded by the WRP permanent easements currently provide just as much, if not more, protection than critical habitat designation would provide. We also found substantial benefits to excluding these areas, such as maintaining non-Federal partnerships and providing opportunities for using flexible tools for restoration of the Louisiana black bear's habitat. We believe the cooperation of private landowners to provide access to habitat and participate in restoration actions would be lost if critical habitat were designated on these lands. Based on this evaluation, we find that the benefit of excluding lands enrolled in permanent easement under the WRP lands outweighs the benefit of including those lands as critical habitat for the Louisiana black bear.

Exclusion Will Not Result in Extinction of the Species—Permanent Easement Wetland Reserve Program Lands

Exclusion of these 50,298 ac (20,355 ha) of non-Federal lands from the final designation of critical habitat will not result in the extinction of the Louisiana black bear because these lands are permanently conserved and are, or will be, managed for the benefit of this subspecies under the terms of the WRP permanent easement. The jeopardy standard of section 7 of the Act and routine implementation of habitat protection through the section 7 process also provide assurances that the subspecies will not go extinct. The protections afforded to the Louisiana black bear under the jeopardy standard will remain in place for the areas excluded from critical habitat.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. Section 4(b)(2) of the Act allows

the Secretary to exclude areas from critical habitat for economic reasons if the Secretary determines that the benefits of such exclusions outweigh the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft economic analysis (DEA) was made available for public review on November 12, 2008 (73 FR 66831). We accepted comments and information on the DEA until December 12, 2008. Following the close of the comment period, a final analysis of the potential economic effects of the designation (FEA) was developed taking into consideration the public comments and any new information.

The primary purpose of the FEA is to estimate the potential economic impacts associated with the designation of critical habitat for the Louisiana black bear. 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. The economic analysis separates the costs associated with conservation measures and economic impacts that occurred pre-designation from those that are likely to occur as a result of the designation. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. The economic analysis separated the costs associated with the areas that we proposed to exclude from the areas that we proposed to designate at the time of the May 6, 2008, proposed rule (73 FR 25354). 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.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in

the analysis as they are considered to be part of the regulatory and policy baseline.

The economic analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are "reasonably foreseeable" including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 20-year timeframe from when the proposed rule became available to the public (73 FR 25354; May 6, 2008). The 20-year timeframe was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects become increasingly speculative.

Based on our analysis, we concluded that the designation of critical habitat would not result in a significant economic impact. The present estimated value of baseline economic impacts associated with Louisiana black bear conservation efforts ranged from \$68.4 million to \$76.6 million discounted at 3 percent, or \$84.9 million to \$97 million discounted at 7 percent. The potential post-designation incremental economic impacts for the next 20 years range from \$1.5 million to \$8.6 million, applying a 3 percent discount rate, or \$1.1 million to \$6.3 million applying a 7 percent discount rate. The range in values of incremental costs is a result of the uncertainty in forecasting the number of new oil and gas wells that are likely to be drilled in the next 20 years.

Economic impacts attributable to critical habitat designation (i.e., incremental impacts) are associated entirely with oil and gas activities. Incremental costs were based on industry costs associated with the modification or relocation of above-ground well sites.

The post-designation baseline costs for the WRP were estimated to be \$6.2 million based on the assumption that WRP enrollment would continue at the same rate as the past over the next 20 years. There may be an incremental effect of decreased WRP enrollment as a result of critical habitat designation for the Louisiana black bear; however there was insufficient public data to quantify that anticipated decrease.

We do not find the economic costs to be significant. Therefore, we have not excluded any areas from this designation of critical habitat based on economic impacts.

A copy of the FEA (with supporting documents) is included in our supporting file and may be obtained by contacting Lafayette Ecological Services Field Office (see **ADDRESSES** section) or for downloading from the Internet at <http://www.regulations.gov> or <http://www.fws.gov/lafayette>.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), whenever an agency must 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 (i.e., 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. SBREFA amended RFA to require Federal agencies to provide a certification statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the Louisiana black bear will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), 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 (e.g., 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 authorized, funded, or carried out 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 subspecies is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the Louisiana black bear.

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 reinstate consultation for ongoing Federal activities (see *Application of the "Adverse Modification Standard"* section).

In our final economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Louisiana black bear and the proposed designation of critical habitat. The analysis is based on the estimated impacts associated with the proposed rulemaking as described in Chapters 2 through 7 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Oil and gas exploration and development; (2) subspecies/habitat management; (3) recreational and residential development; (4) agriculture; (5) transportation; and (6) forestry.

The final economic analysis identified 45 small entities that may be affected by the designation of critical habitat for the Louisiana black bear. All of those entities were associated with oil and gas development and exploration. The total estimated impact per small entity over 20 years would range from between 1.0 to 5.4 percent of the small entity's median revenues. Additionally, the final economic analysis estimates annualized impacts associated with conservation activities for the Louisiana black bear could range from \$25,100 to \$141,000 discounted at the 7 percent rate over the next 20 years.

The final economic analysis concludes that, with the exception of impacts related to oil and gas exploration and development, there are no incremental impacts resulting from designation of critical habitat for the Louisiana black bear that may be borne by small businesses.

In summary, we considered whether this designation would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule would not result in a significant economic impact on a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for the Louisiana black bear will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the final economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of \$100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 (E.O. 13211; "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use") on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared to not taking the regulatory action under consideration. The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with Louisiana black bear conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. 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; Aid to Families with Dependent Children 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 result in the destruction or adverse modification of critical habitat. Non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, 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 onto 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. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with E.O. 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of designating critical habitat for the Louisiana black bear in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the Louisiana black bear does not pose significant takings implications for lands within or affected by the designation.

Federalism

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Louisiana. We received comments from the Louisiana Department of Wildlife and Fisheries and the Louisiana Department of Natural Resources and have addressed them in the Response to Comments section of the rule. The designation of critical habitat in areas currently occupied by the Louisiana black bear 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 physical and biological features essential to the conservation of the subspecies are more clearly defined, and the PCEs of the habitat necessary to the conservation of the subspecies are specifically identified. This information does not alter where and what federally

sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the regulation meets the applicable standards set forth in 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 physical and biological features essential to the conservation of the subspecies within the designated areas to assist the public in understanding the habitat needs of the Louisiana black bear.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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)

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 as defined by the NEPA (42 U.S.C. 4321 *et*

seq.) in connection with designating critical habitat under 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 was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 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), E.O. 13175, and the Department of the 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. We determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation, and no unoccupied Tribal lands that are essential for the conservation of the Louisiana black bear. Therefore, we are not designating critical habitat for the Louisiana black bear on Tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Lafayette Ecological Services Field Office (see **ADDRESSES** section).

Author(s)

The primary authors of this rulemaking are the staff members of the Lafayette Ecological Services Field 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. Amend § 17.11(h) by revising the entry for “Bear, Louisiana black” under “MAMMALS” in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *
(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*	*	*
Bear, Louisiana black.	<i>Ursus americanus luteolus.</i>	U.S.A. (LA—all counties; MS—all counties south of or touching a line from Greenville, Washington County, to Meridian, Lauderdale County; TX—all counties east of or touching a line from Linden, Cass County, SW to Bryan, Brazos County, thence SSW to Rockport, Aransas County).	Entire	T	456	17.95(a)	17.40(i)
*	*	*	*	*	*	*	*

■ 3. In § 17.95, amend paragraph (a) by adding an entry for Louisiana Black

Bear (*Ursus americanus luteolus*), in the same order that the subspecies appears

in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.(a) *Mammals.*

* * * * *

Louisiana Black Bear (*Ursus americanus luteolus*)

(1) Critical habitat units are depicted for Avoyelles, East Carroll, Catahoula, Concordia, Franklin, Iberia, Iberville, Madison, Pointe Coupee, Richland, St. Martin, St. Mary, Tensas, West Carroll, and West Feliciana Parishes, Louisiana, on the maps below.

(2) The primary constituent elements of critical habitat for the Louisiana black bear are the habitat components that provide:

(i) Breeding habitat (i.e., within or contiguous to the home range of females in a core breeding population) consisting of hardwood forest areas having a diversity of age class and species and containing sources of hard mast (acorns and nuts) produced by such species as mature oaks, hickories, and pecan, and that may include one or more of the following:

(A) Areas containing soft mast provided by a diversity of plant species, including, but not limited to, blackberry, grape, mulberry, sassafras, paw paw, etc., occurring primarily in

forest openings, on spoil banks, and in areas adjacent to forested habitat.

(B) Areas within forested habitat providing protein sources consisting of beetles and other colonial insects found in rotting and decaying wood found on the forest floor.

(C) Grasses and sedges found in forest openings, on spoil banks with open canopies, and in vegetated areas adjacent to forested habitats.

(D) Secure areas for reproduction, winter dormancy, day bedding, and escape. These include areas with den trees (e.g., bald cypress, overcup oak, American sycamore, etc.); areas with a thick understory, shrub-scrub habitat, openings along spoil banks, vegetated areas adjacent to forests, or any vegetation that provides cover, limits visibility, slows foot travel, or creates noise when traversed; early successional forests (0 to 12 years) with an open canopy and dense understory of shrubs, vines, and saplings; or areas with vegetation such as palmetto, greenbriars, blackberry, dewberry, and downed trees.

(ii) Corridors consisting of:

(A) Habitat patches 12 acres (5 hectares) or greater in size; or

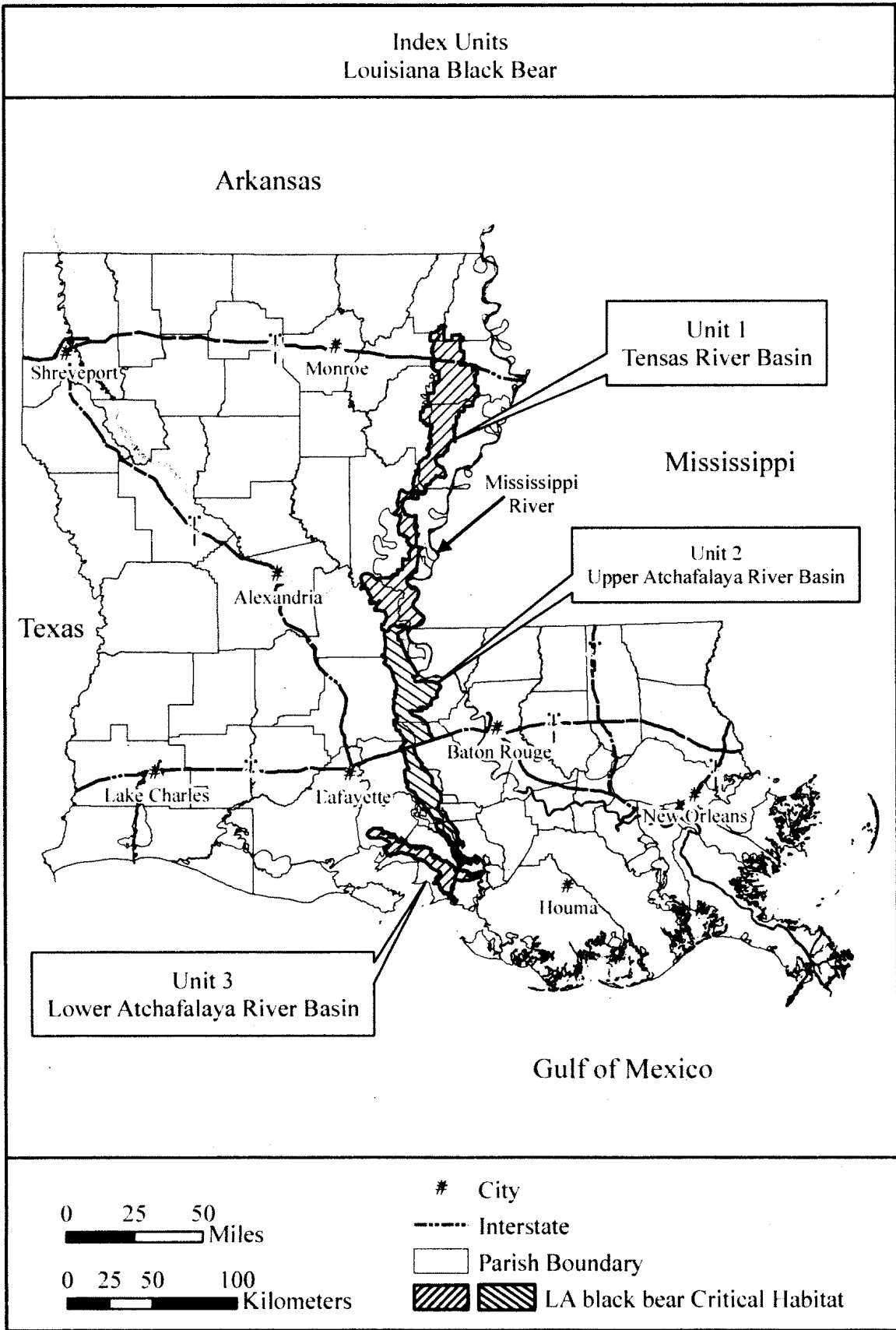
(B) Forested areas greater than 150 feet (46 meters) wide along waterways and sloughs and having a diversity of plant species and age-classes of sufficient area, quality, and configuration, as described in paragraph (2)(i) of this entry, to provide dispersal habitat between breeding populations to maintain genetic variability and promote stable or increasing populations, and to provide habitat supporting safe movement, foraging, and denning.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS digital ortho-photo quarter-quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) Zone 15N coordinates.

(5) *Note:* Index map follows:

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(6) Unit 1: Tensas River Basin, Avoyelles, East Carroll, Catahoula, Concordia, Franklin, Madison, Richland, Tensas, West Carroll, and West Feliciana Parishes, Louisiana.

(i) From USGS 1:24,000 scale digital ortho-photo quarter-quadrangles: Acme SE; Acme SW; Big Bend NE; Big Bend NW; Big Bend SE; Big Bend SW; Como NE; Como SE; Crowville NE; Crowville SE; Deer Park NW; Deer Park SW; Delhi NE; Delhi NW; Delhi SE; Delhi SW; Dunbarton NE; Dunbarton NW; Dunbarton SE; Dunbarton SW; Epps NE; Epps NW; Epps SE; Epps SW; Fairview NW; Fairview SW; Ferriday North NE; Ferriday North NW; Ferriday South NW; Ferriday South SW; Fort Adams NW; Fort Adams SE; Fort Adams SW; Fortune Fork NW; Fortune Fork SW; Foules NE; Foules NW; Foules SE; Foules SW; Frogmore NE; Frogmore NW; Frogmore SE; Frogmore SW; Gretna Green NE; Gretna Green NW; Gretna Green SE; Gretna Green SW; Ile Natchitoches NE; Ile Natchitoches NW; Ile Natchitoches SE; Ile Natchitoches SW; Indian Lake NE; Indian Lake NW; Indian Lake SE; Indian Lake SW; Innis NE; Lac Sainte Agnes NE; Lac Sainte Agnes NW; Lac Sainte Agnes SE; Lake Bruin NW; Lake Mary NW; Lake Mary SW; Lamar SE; Larto Lake South SE; Larto Lake South SW; Lower Sunk Lake NE; Lower Sunk Lake NW; Lower Sunk Lake SE; Lower Sunk Lake SW; Monterey NE; Monterey SE; Newlight NE; Newlight NW; Newlight SE; Newlight SW; Oakley NE; Oakley SE; Oakley SW; Panther Lake NE; Panther Lake NW; Panther Lake SE; Panther Lake SW; Saranac NW; Saranac SW; Simmesport NE; Simmesport NW; Slocum NE; Slocum NW; Slocum SE; Slocum SW; Somerset NW; Tallulah SW; Tendale NE; Tendal NW; Tendal SE; Tendal SW; Tensas Bluff NE; Tensas Bluff NW; Tensas Bluff SE; Tensas Bluff SW; Turnbull Island NE; Turnbull Island NW; Turnbull Island SE; Turnbull Island SW; Waterproof NE; Waterproof NW; Waterproof SE; Waterproof SW; Waverly SE NE; Waverly SE NW; Waverly SE SE; Waverly SE SW; Westwood NE; Westwood NW; Westwood SE; Westwood SW; Louisiana. Land bounded by the following UTM Zone 15N, North American Datum of 1983 (NAD83) coordinates (E, N): 627070, 3431218; 618220, 3431485; 614348, 3433932; 615247, 3438430; 612584, 3440854; 626123, 3431776; 617768, 3431231; 614471, 3434089; 615216, 3438464; 612531, 3440860; 625650, 3432072; 617606, 3431085; 614560, 3434183; 615191, 3438488; 612475, 3440863; 625406, 3432226; 617426,

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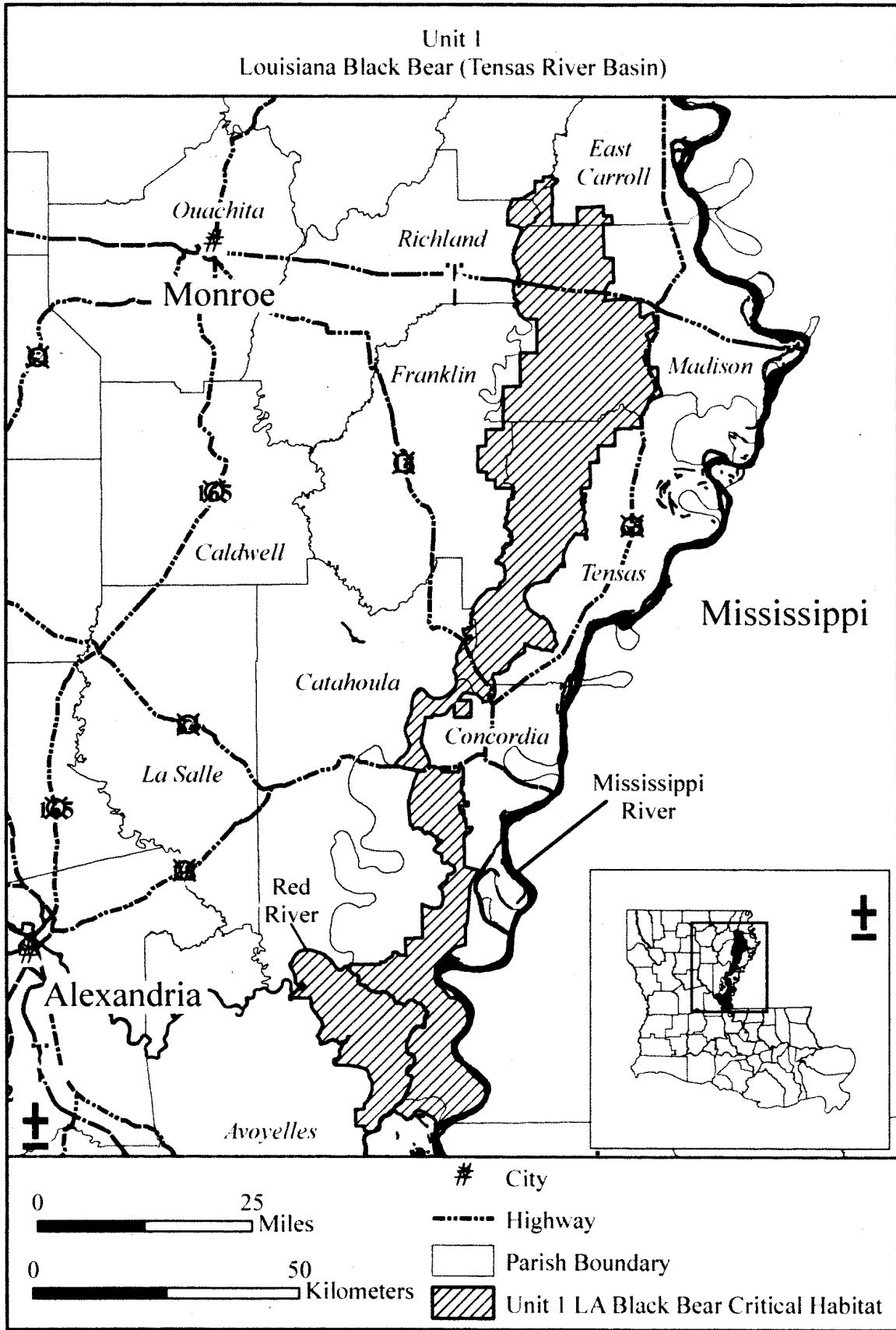
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(ii) Note: Map of Unit 1, Tensas River
Basin (Map 2), follows:
BILLING CODE 4310-55-P



(7) Unit 2: Upper Atchafalaya River Basin, Iberia, Iberville, Pointe Coupee, St. Martin, and St. Mary Parishes, Louisiana.

(i) From USGS 1:24,000 scale digital ortho-photo quarter-quadrangles: Batchelor NE; Batchelor NW; Batchelor SE; Batchelor SW; Bayou Current NE; Bayou Current NW; Bayou Current SE; Big Bend SE; Butte La Rose NE; Butte La Rose NW; Butte La Rose SE; Butte La Rose SW; Catahoula NE; Catahoula NW; Catahoula SE; Catahoula SW; Centerville NE; Centerville NE SW; Centerville NW; Centerville NW NE; Centerville NW NW; Centerville NW SE; Centerville NW SW; Centerville SE; Charenton NE; Charenton SE; Cow Bayou NW; Cow Bayou SW; Erwinville NW; Fordoche NE; Fordoche NW; Fordoche SW; Grand River SW; Innis NE; Innis NW; Innis SE; Innis Jackass Bay NE; Jackass Bay NW; Jackass Bay SE; Jackass Bay SW; Krotz Springs NE; Krotz Springs SE; Lacour SW; Lake Chicot NW; Lake Chicot SW; Lake Mongoulois NE; Lake Mongoulois NW; Lake Mongoulois SE; Lake Mongoulois SW; Loreauville NE; Lottie NE; Lottie NW; Lottie SE; Lottie SW; Maringouin NE; Maringouin NW; Maringouin NW NE; Maringouin NW NW; Maringouin NW SE; Maringouin NW SW; Maringouin SE; Maringouin SW; Melville NE; Melville NW; Melville SE; Melville SW; Morganza NE; Morganza NW; Morganza SE; Morganza SW; New Roads NW; New Roads SW; North Bend NE; Patterson NE; Patterson NW; Portage NE; Simmesport NE; Simmesport SE; Swayze Lake NE; Tiger Island NW; Tiger Island SE; Tiger Island SW; Turnbull Island SE; Turnbull Island SW; Louisiana. Land bounded by the following UTM Zone 15N, North American Datum of 1983 (NAD83) coordinates (E, N): 627070, 3431218; 622846, 3423182; 633656, 3402371; 632966, 3398656; 646698, 3394803; 624888, 3428860; 622925, 3423142; 633606, 3402336; 634014, 3398693; 646362, 3394427; 624679, 3428635; 623229, 3423055; 633535, 3402289; 635504, 3398712; 646209, 3394250; 624539, 3428524; 623782, 3422928; 633479, 3402262; 635494, 3399338; 646050, 3394104; 624367, 3428418; 623915, 3422888; 633437, 3402238; 635494, 3399372; 645933, 3393974; 624042, 3428281; 623970, 3422841; 633381, 3402196; 635496, 3399396; 645881, 3393906; 623468, 3428034; 624010, 3422775; 633347, 3402167; 635544, 3399422; 645661, 3393580; 622430, 3427587; 624036, 3422708; 633323, 3402151; 635846, 3399597; 645589, 3393480; 622200, 3427492; 624039, 3422621; 633302, 3402130;

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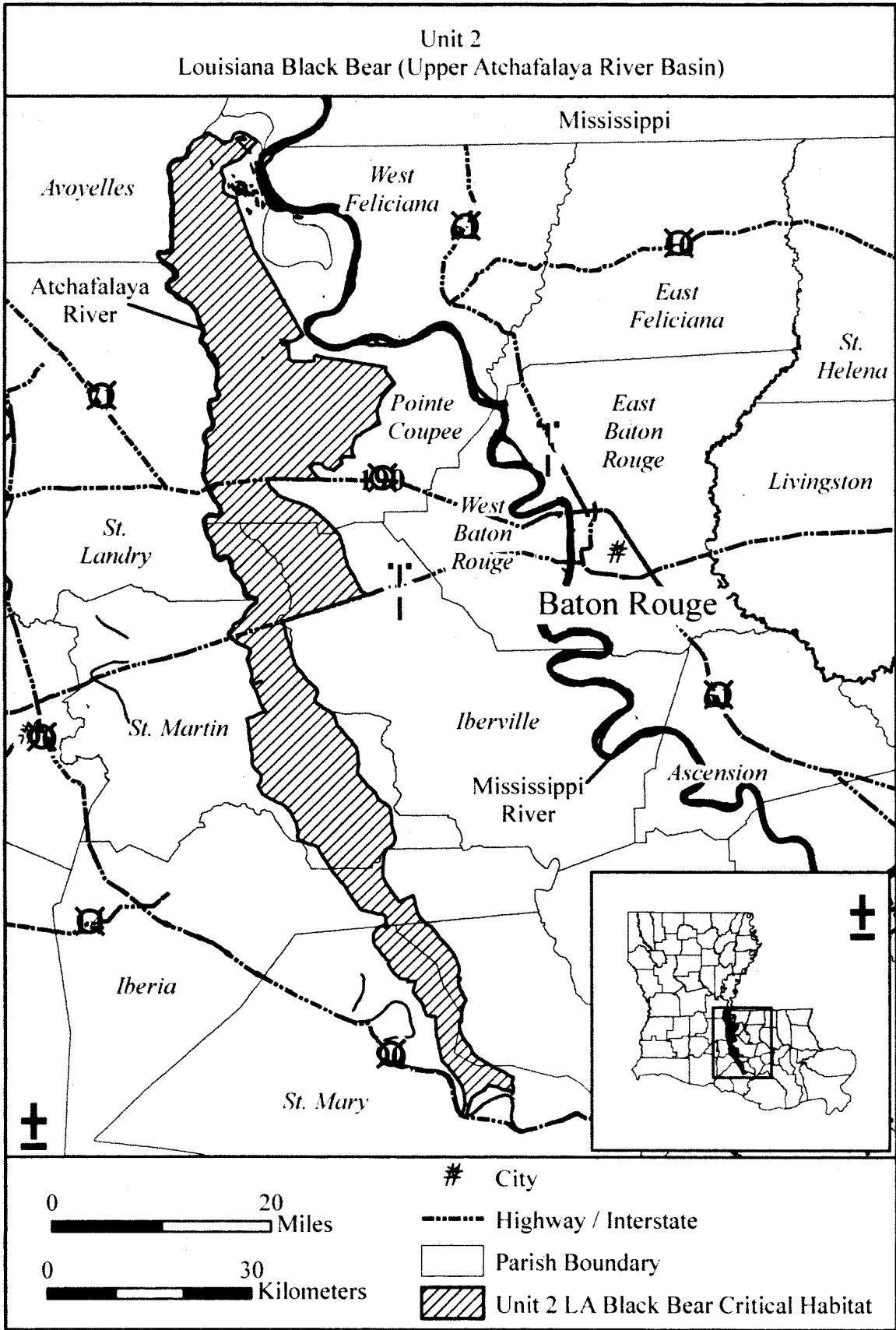
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(ii) Note: Map of Unit 2, Upper Atchafalaya River Basin (Map 3), follows:

BILLING CODE 4310-55-P



(8) Unit 3: Lower Atchafalaya River Basin, Iberia and St. Mary Parishes, Louisiana.

(i) From USGS 1:24,000 scale digital ortho-photo quarter-quadrangles: Belle Isle NE; Belle Isle NW; Belle Isle SE; Centerville SW; Delcambre SE; Ellerslie NE; Ellerslie NW; Ellerslie SE; Franklin NE; Franklin NW; Franklin SE; Franklin SW; Jeanerette SW; Kemper NE; Kemper NW; Kemper SE; Kemper SW; Morgan City NW; Morgan City SW; New Iberia South SE; New Iberia South SW; North Bend NE; North Bend NW; North Bend SE; North Bend SW; Patterson NW; Patterson SE; Patterson SW; Point Chevreuil NE; Weeks NE; Weeks NW; Weeks SE; Weeks SW; Louisiana. 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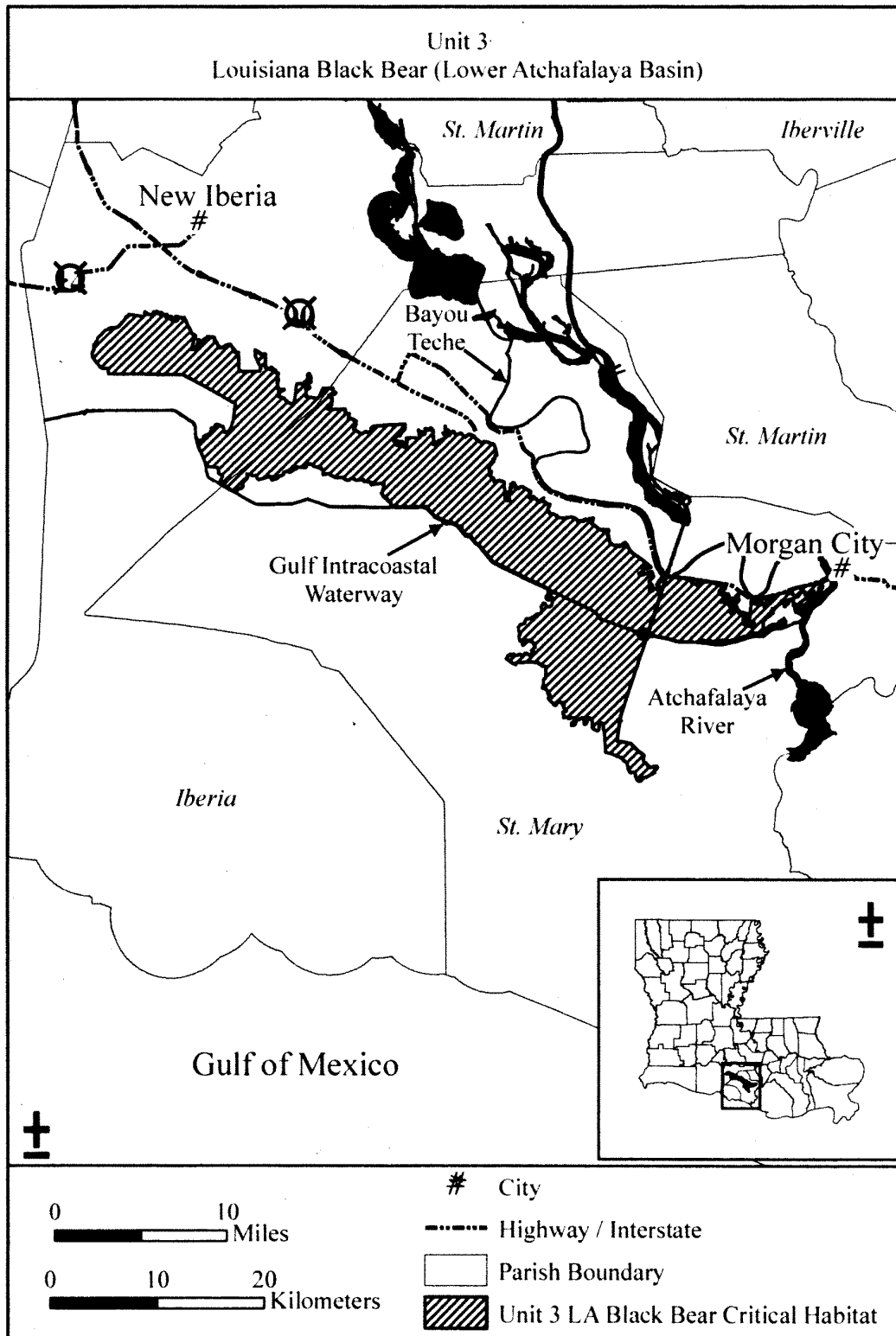
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(ii) Note: Map of Unit 3, Lower
Atchafalaya River Basin (Map 4),
follows:

BILLING CODE 4310-55-P



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Dated: February 20, 2009.
Jane Lyder,
*Assistant Deputy Secretary, Department of
 the Interior.*
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