

*Overall width* means the linear distance between the exteriors of the sidewalls of an inflated tire, including elevations due to labeling, decorations, or protective bands or ribs.

*Passenger car tire* means a tire intended for use on passenger cars, multipurpose passenger vehicles, and trucks, that have a gross vehicle weight rating (GVWR) of 10,000 pounds or less.

*Ply* means a layer of rubber-coated parallel cords.

*Ply separation* means a parting of rubber compound between adjacent plies.

*Pneumatic tire* means a mechanical device made of rubber, chemicals, fabric and steel or other materials, that, when mounted on an automotive wheel, provides the traction and contains the gas or fluid that sustains the load.

*Radial ply tire* means a pneumatic tire in which the ply cords that extend to the beads are laid at substantially 90 degrees to the centerline of the tread.

*Reinforced tire* means a tire designed to operate at higher loads and at higher inflation pressures than the corresponding standard tire.

*Rim* means a metal support for a tire or a tire and tube assembly upon which the tire beads are seated.

*Section width* means the linear distance between the exteriors of the sidewalls of an inflated tire, excluding elevations due to labeling, decoration, or protective bands.

*Sidewall* means that portion of a tire between the tread and bead.

*Sidewall separation* means the parting of the rubber compound from the cord material in the sidewall.

*Test rim* means the rim on which a tire is fitted for testing, and may be any rim listed as appropriate for use with that tire.

*Tread* means that portion of a tire that comes into contact with the road.

*Tread rib* means a tread section running circumferentially around a tire.

*Tread separation* means pulling away of the tread from the tire carcass.

*Treadwear indicators (TWI)* means the projections within the principal grooves designed to give a visual indication of the degrees of wear of the tread.

*Wheel-holding fixture* means the fixture used to hold the wheel and tire assembly securely during testing.

\* \* \* \* \*

**S5.2 Performance requirements.** Each tire shall conform to each of the following:

\* \* \* \* \*

(c) Its maximum permissible inflation pressure shall be 240, 280, 300, 340, or 350 kPa.

\* \* \* \* \*

**S5.5 Tire markings.** Except as specified in paragraphs (a) through (i) of S5.5, each tire must be marked on each sidewall with the information specified in S5.5(a) through (d) and on one sidewall with the information specified in S5.5(e) through (i) according to the phase-in schedule specified in S7 of this standard. The markings must be placed between the maximum section width and the bead on at least one sidewall, unless the maximum section width of the tire is located in an area that is not more than one-fourth of the distance from the bead to the shoulder of the tire. If the maximum section width falls within that area, those markings must appear between the bead and a point one-half the distance from the bead to the shoulder of the tire, on at least one sidewall. The markings must be in letters and numerals not less than 0.078 inches high and raised above or sunk below the tire surface not less than 0.015 inches.

\* \* \* \* \*

**S5.5.4** For passenger car tires, if the maximum inflation pressure of a tire is 240, 280, 300, 340, or 350 kPa, then:

(a) Each marking of that inflation pressure pursuant to S5.5(c) must be followed in parenthesis by the equivalent psi, rounded to the next higher whole number; and

(b) Each marking of the tire's maximum load rating pursuant to S5.5(d) in kilograms must be followed in parenthesis by the equivalent load rating in pounds, rounded to the nearest whole number.

\* \* \* \* \*

**S6.1.1.1.5** Readjust the tire pressure to that specified in S6.1.1.1.2.

\* \* \* \* \*

**S6.1.2 Performance Requirements.** The actual section width and overall width for each tire measured in accordance with S6.1.1.2 shall not exceed the section width specified in a submission made by an individual manufacturer, pursuant to S4.1.1(a) or in one of the publications described in S4.1.1(b) for its size designation and type by more than:

(a) (For tires with a maximum permissible inflation pressure of 32, 36, or 40 psi) 7 percent, or

(b) (For tires with a maximum permissible inflation pressure of 240, 280, 300, 340 or 350 kPa) 7 percent or 10 mm (0.4 inches), whichever is larger.

\* \* \* \* \*

**S6.2.1.1.2** Condition the assembly at 32 to 38 °C for not less than 3 hours.

\* \* \* \* \*

**S6.4.1.1.2** After the tire is deflated to the appropriate test pressure in S6.4.1.1.1 at the completion of the

endurance test, condition the assembly at 32 to 38 °C for not less than 2 hours.

\* \* \* \* \*

**S6.6 Tubeless tire bead unseating resistance.** Each tire shall comply with the requirements of S5.2 of § 571.109. For light truck tires, the maximum permissible inflation pressure to be used for the bead unseating test is as follows:

Load Range C .....	260 kPa.
Load Range D .....	340 kPa.
Load Range E .....	410 kPa.

For light truck tires with a nominal cross section greater than 295 mm (11.5 inches), the maximum permissible inflation pressure to be used for the bead unseating test is as follows:

Load Range C .....	190 kPa.
Load Range D .....	260 kPa.
Load Range E .....	340 kPa.

\* \* \* \* \*

Issued: August 22, 2007.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AU76

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Catesbaea melanocarpa*

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (the Service), are designating critical habitat for the endangered plant *Catesbaea melanocarpa* (no common name) under the Endangered Species Act of 1973, as amended (Act). Approximately 10.5 acres (ac) (4.3 hectares (ha)) fall within the boundaries of the critical habitat designation for *C. melanocarpa* in one unit located in Halfpenny Bay in Christiansted, St. Croix, U.S. Virgin Islands (USVI).

**DATES:** This rule becomes effective on September 27, 2007.

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, Caribbean Fish and Wildlife Office, Road 301 Km. 5.1, P.O. Box 491, Boquerón, PR 00622; telephone 787-851-7297; facsimile 787-851-7440.

**SUPPLEMENTARY INFORMATION:**

## Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this rule. For more information on *Catesbaea melanocarpa*, please refer to the final listing rule published in the **Federal Register** on March 17, 1999 (64 FR 13116), and the proposed rule to designate critical habitat published in the **Federal Register** on August 22, 2006 (71 FR 48883).

## Previous Federal Actions

On September 17, 2004, the Center for Biological Diversity filed a lawsuit against the Department of the Interior and the Service [*Center for Biological Diversity v. Norton* (CV-00293-JDB) (D.D.C.)], challenging the failure to designate critical habitat for *Catesbaea melanocarpa*. In a settlement agreement dated June 3, 2005, the Service agreed to reevaluate the prudence of critical habitat for this species and, if prudent, submit a proposed designation of critical habitat to the **Federal Register** by August 15, 2006, and a final designation by August 15, 2007. For more information on previous Federal actions concerning *C. melanocarpa*, refer to the proposed critical habitat designation published in the **Federal Register** on August 22, 2006 (71 FR 48883), and in our notice of availability of the draft economic analysis published on March 14, 2007 (72 FR 11819). This final rule complies with the settlement agreement.

## Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for *Catesbaea melanocarpa* in the proposed rule published on August 22, 2006 (71 FR 48883), and again in a subsequent notice of the availability of a draft economic analysis published in the **Federal Register** on March 14, 2007 (72 FR 11819). We also contacted appropriate Federal, Commonwealth, and Territorial agencies; scientific organizations; local researchers; and other interested parties and invited them to comment on the proposed rule.

The first comment period on the proposed designation opened August 22, 2006 and closed on October 23, 2006. During that time, we received comments from three individuals: One from a peer reviewer working for the USVI government, and two from private individuals. We received one letter during the second comment period, opened from March 14 to April 13, 2007, which covered both the proposed

designation and the draft economic analysis. This comment letter was submitted by one of the private individuals who provided comments during the first comment period. In total, we received four comment letters from three individuals. One commenter supported the designation of critical habitat and one opposed the designation. The third commenter did not indicate support or opposition for the designation. We reviewed the comments for substantive issues and new information regarding critical habitat. We grouped the comments by issue and we addressed them in the following summary. We incorporated information into the final rule as appropriate. We did not receive requests for public hearings.

## Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received a response from one peer reviewer representing the USVI Department of Planning and Natural Resources, Division of Fish and Wildlife (DPNR-FW). The peer reviewer did not mention if the DPNR-FW generally concurred or not with our methods and conclusions, but provided additional information and suggestions to improve the final critical habitat rule.

## Peer Reviewer Comments

*Comment 1:* The peer reviewer expressed concern that the description of the habitat in the proposed rule had lumped the habitat on USVI and Puerto Rico (PR) together, making it seem that there is much more habitat available for the plants. The peer reviewer suggested that the habitat description be differentiated between the islands.

*Our Response:* The proposed rule published in the **Federal Register** on August 22, 2006 (71 FR 48883) described the habitat of *Catesbaea melanocarpa* in PR and the USVI separately. The description of the habitat in the Halfpenny Bay area was described based on the site-specific soil type and the vegetation as observed by the Service in 2006. The habitat characteristics of the site coincide with the previous habitat description referenced in the scientific literature. However, the introductory paragraph of the Habitat Description section provided a general discussion of the main characteristics of the subtropical dry forest life zone as described by Ewel and

Whitmore (1973, pp. 10–20). The subtropical dry forest life zone covers the Halfpenny Bay area, as well as other areas where the species has been reported in the past and is currently present in Puerto Rico (Guánica Commonwealth Forest and Peñones de Melones). The general description of the life zone does not substitute for the site-specific habitat description we provided in the proposed rule. Furthermore, the primary constituent elements (PCEs) for *C. melanocarpa* are based on the habitat components that are essential for the conservation of the species and not based on the life zones.

*Comment 2:* The peer reviewer mentioned information received from Mr. Rudy O'Reilly, District Conservationist for the U.S. Department of Agriculture National Resources Conservation Service, about two individual plants of *Catesbaea melanocarpa* previously observed on a property located to the west of the proposed designation. The commenter specified that he did not investigate the sighting report to establish if the species is still present in the area. However, the commenter suggested including this new locality in the designation of critical habitat for *C. melanocarpa*.

*Our Response:* We contacted Mr. O'Reilly, District Conservationist for the U.S. Department of Agriculture National Resources Conservation Service (NRCS) and requested additional information about the sighting mentioned by the peer reviewer. Mr. O'Reilly is the botanist who rediscovered the species in St. Croix in 1988. Mr. O'Reilly provided written information on January 23, 2007, and confirmed the information provided by the peer reviewer. Mr. O'Reilly explained that one plant of *C. melanocarpa* was observed during a casual drive-through on the west side of the South Shore Road (eastern boundary of the proposed critical habitat unit) in April, 2006. The area where the individual was observed is located outside of the proposed designation. Mr. O'Reilly mentioned that this location was the site where he first discovered the two individuals of *C. melanocarpa* reported in 1988, but that had been destroyed by a hurricane before the species was listed.

At the time of listing, we described the population near Christiansted, St. Croix consisting of about 24 individual plants. This information was obtained from Breckon and Kolterman (1993, p. 2). These authors made reference to the individuals they found in July, 1992; and revisited in December, 1992, and June, 1993. They described the locality east of the existing road (the other side of the road in reference to the site where

O'Reilly discovered the original individuals in 1988). The authors estimated the population as about 24 individuals, described the size of the plants and documented the presence of flowers and fruits. When the Service was gathering information to draft the recovery plan for the species in 2002, we surveyed the population reported by Breckon and Kolterman (1993, pp. 1–2), collected GPS points and estimated the population to be 100 individuals (Lombard 2002). The site where this population is found is located east of the existing road and corresponds to the site identified in the proposed rule (Halfpenny Bay area). Although Breckon and Kolterman (1993, pp. 1–2) made referenced to the individuals Mr. O'Reilly discovered in 1988, they mentioned that individuals were affected by Hurricane Hugo in 1989. These authors did not mention that they visited the individuals reported in the west side of the road and did not provide information supporting that the individuals were alive at the time they conducted their studies.

Based on the above information and the information currently available to us, the individual referenced by the peer reviewer was not present at the time of listing. At the time of listing, the individuals first reported by Mr. O'Reilly in 1988 were considered extirpated by previous hurricanes. Mr. O'Reilly in his letter of January 23, 2007 confirmed the information that the two individuals he discovered in 1988 were destroyed by Hurricane Marilyn, and as a consequence the site was not considered occupied at the time of listing.

Since the area was not occupied at the time of listing we would have to find it essential to the conservation of the species in order to designate it as critical habitat. Because the only evidence of the existence of the species at this location is a casual drive-by, and no surveys have recently been conducted in this area, we do not have enough information at this time to determine that the area is essential to the conservation of the species.

**Comment 3:** The peer reviewer suggested mentioning in the rule that *Catesbaea melanocarpa* is protected by the Territorial law.

**Our Response:** In the proposed rule for the designation of critical habitat for *Catesbaea melanocarpa* published in the **Federal Register** on August 22, 2006, we discussed topics directly relevant to the designation of critical habitat. However, we incorporated by reference the information of the listing final rule we published in the **Federal Register** on March 17, 1999 (64 FR

13116). In the listing rule, under the "Summary of Factors Affecting the Species" section, we stated that the territory of the USVI had amended its regulations to protect endangered and threatened wildlife and plants and considered *Catesbaea melanocarpa* to be endangered. In the listing rule, we referred to prohibitions by this local regulation under the "Available Conservation Measures" section.

#### *Public Comments Related to the Designation*

**Comment 1:** The commenter believes that the area to be designated as critical habitat was based on the ownership of private property rather than the location of the species. The commenter provided a color aerial photo of the site.

**Our Response:** The Halfpenny Bay is currently occupied by approximately 100 individuals of *C. melanocarpa*. With the assistance of the aerial photo provided by the commenter, we re-examined the boundaries of the proposed area and removed from the designation highly degraded areas dominated by pastures located south of Road 62. We also redefined the boundaries utilizing GPS-located sightings of individuals collected by Service personnel within the property (Lombard 2002). The areas within the redefined boundaries meet the criteria we used to designate critical habitat. We also confirmed that the area occupied by the species contains the PCEs essential for the conservation of the species. Therefore, we reduced the size of the designated critical habitat to 10.5 ac (4.3 ha).

**Comment 2:** The commenter mentioned information received from Mr. Rudy O'Reilly about one *Catesbaea melanocarpa* plant previously observed in a property located to the west of the proposed designation. The commenter recommended we conduct additional research and prepare the planned 5-year review of the status of the species before finalizing the proposed designation of critical habitat.

**Our Response:** The presence of one individual in a site located west of the proposed designation was also documented by the peer reviewer. We responded to comments under Peer Reviewer Comment 2. We initiated the 5-year review process for *Catesbaea melanocarpa* on September 27, 2006 (71 FR 56545), and requested information and comments from the public. The purpose of the 5-year review is to ensure that the classification of species as threatened or endangered of the Lists of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12) is accurate. A 5-year review is an

assessment of the best scientific and commercial data available at the time of the review. It does not include additional research on the species.

**Comment 3:** The commenter believes that the designation will destroy the property's economic value and result in a "taking" of private property.

**Our Response:** The designation of critical habitat does not mean that private lands would be taken by the Federal Government or continued private uses would not be allowed. The designation of critical habitat does not affect private lands if there is no Federal nexus in other words, if the landowner does not need a Federal permit or other Federal approval, or Federal funding, for his activities, then the designation will impose no Federal restriction on his property. 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. All regulatory effect of the designation of critical habitat comes from this requirement. Therefore, if a Federal permit or approval is not required, or if Federal funding is not involved, there will be no regulatory burden for actions on private lands.

If there is a Federal action that may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. When we issue a biological opinion we can include measures to reduce take of the species, or measures to offset any actions that would jeopardize the existence of the species or adversely modify critical habitat. Such measures must be consistent with the scope of the Federal agency's legal authority and jurisdiction, and must also be economically and technologically feasible.

The parcel that includes the critical habitat designation is currently zoned as District 2: Low Intensity, which permits low-density residential construction and small-scale agriculture. This zoning category allows a maximum of four residential units per acre for single and multi-family construction and a maximum of six units per acre for larger-scale condominium or hotel development. This zoning category does not prohibit development of the site.

We anticipate that any potential development could go forward on this site even if there was a Federal nexus. If we consulted on the site we would likely propose recommended conservation measures for the plants. We have identified likely recommended

measures, which would include establishing a buffer zone of 20 meters (m) (66 feet (ft)) around the existing population as a setback from the development. The buffer zone is included in the designation, and the total area to be designated is approximately 10.5 ac (4.3 ha). Given the size of the parcel and location of the plants, it is unlikely that the setback would significantly affect development plans.

#### *Public Comments Related to the Economic Analysis*

*Comment 1:* The commenter requested an extension of the public comment period opened on March 14, 2007, for a minimum of 60 days to provide additional time for the owner of the land to effectively respond to the proposed rule.

*Our Response:* We provided two comment periods, totaling 90 days, for the designation of critical habitat for *Catesbaea melanocarpa* between August 2006 and April 2007. Additionally, we contacted the commenter in February 2006 to request permission to visit the site, and we provided information about the proposed designation. Service biologists met with the commenter on March 1, 2006, and provided information about critical habitat.

*Comment 2:* The commenter requested the postponement or termination of the rulemaking process until legal review is made. He also suggests we should investigate opportunities to conserve the species on government-owned lands.

*Our Response:* We have a statutory obligation to designate critical habitat, and we are operating under a settlement agreement that requires us to finalize this designation by August 15, 2007. We are finalizing this rule in compliance with applicable legal standards.

Regarding opportunities to conserve the species on government-owned lands, the species is not currently present on government-owned lands in the USVI. The recovery plan identifies the establishment of a propagation program as the top priority for the recovery of the species. Once the appropriate propagation techniques are established and necessary funding allocated, we would direct our efforts toward the establishment of self-sustainable populations on protected lands. The recovery plan also identifies the need to establish conservation agreements with private landowners to provide protection to the existing individuals and their habitat in the USVI.

*Comment 3:* The commenter believes that the economic impact of designation

would not range from \$132,300 to \$441,000 over 20 years, as discussed in the draft economic analysis, but rather would range from \$630,000 to \$2,100,000 over 20 years.

*Our Response:* The commenter confused the economic impact of the critical habitat designation with the assessment of the market value for the site. The draft economic analysis summarized the procedure taken to assess the market value of the property. Exhibit 2 of the draft economic analysis included the market value per acre of the proposed designated area, which ranges from \$630,000 to \$2,100,000. The economic impact of the designation was based on conservation recommendations we would provide as technical assistance to a developer to conserve the species within the property, if a development project is proposed. The conservation measures would include establishing a buffer zone of 20 meters (m) (66 feet (ft)) around the existing population as a setback from the development. The buffer zone is included in the designation, and the total area to be designated is approximately 10.5 ac (4.3 ha). The calculation of the economic impact of the designation to the landowner was based on the implementation of this conservation measure and ranged from \$132,000 to \$441,000 over 20 years.

*Comment 4:* The commenter stated that the draft economic analysis recommends a modification to the designation, specifically limiting the proposed designation to 21 percent of the property.

*Our Response:* With the assistance of the aerial photo provided by the commenter during the comment period, we reexamined the boundaries of the proposed area and removed highly degraded areas dominated by pastures located south of Road 62. We also redefined the boundaries utilizing GPS recorded sightings of individuals collected by Service personnel within the property (Lombard 2002). We verified that these redefined areas meet both criteria we are utilizing to designate critical habitat, they are occupied by the species and they support the PCEs essential for the conservation of the species. We reduced the size of the designated critical habitat to 10.5 ac (4.3 ha).

*Comment 5:* The commenter stated that the draft economic analysis incorrectly states that the site is not being used for agriculture and that the site is currently subject to an agricultural lease. The commenter mentioned that the site is subject to periodic grazing, which reduces the fire

hazard and is beneficial for the protection of the species. The commenter interpreted the proposed designation as prohibiting agricultural activities in the area and stated that this would adversely affect the prospects of this population's survival.

*Our Response:* The draft economic analysis stated that the property proposed for critical habitat was no longer used for grazing activities. The revised analysis states: "The property is subject to an agricultural lease that has not been terminated, and is periodically grazed by livestock. The owner notes that this grazing activity reduces the threat of brush fires and may benefit the species."

#### *Comments From the Territory of the USVI*

Section 4(i) of the Act states that "the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition." Comments received from Territorial agencies (USVI Department of Planning and Natural Resources, Division of Fish and Wildlife) regarding the proposal to designate critical habitat for *Catesbaea melanocarpa* are addressed in the Peer Reviewer Comments section.

#### *Summary of Changes From Proposed Rule*

On the basis of comments received on the proposed rule and the draft economic analysis, we have developed our final designation of critical habitat for *Catesbaea melanocarpa*. Specifically, we adjusted the boundaries of the proposed critical habitat designation to remove the areas that were dominated by pastures, and as such did not contain the first primary constituent element and the area not currently occupied by the species. This adjustment resulted in the removal of 39.5 ac (16 ha) from the original boundaries and a final designation of 10.5 ac (4.3 ha). The boundaries of the designation were refined by utilizing an aerial photograph provided during the public comment period for the proposed rule and a layer created in GIS with the GPS readings of the sightings of the approximately 100 plants in the area. We used a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 27 (NAD 27) coordinates that, when connected, provided the boundaries of the critical habitat for *Catesbaea melanocarpa*.

In the proposed rule published on August 22, 2006 (71 FR 48883), we stated that the Guánica and the Susúa Commonwealth Forests in PR were not

included in the proposed designation because they are adequately protected under the management of the DNER and the master plan for the forests, and therefore do not require special management or protection. Under section 3(5)(A) of the Act, an area that was occupied at the time of listing on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection meets the definition of critical habitat. We have determined that these areas do meet the definition of critical habitat as there are additional management actions beyond those already in effect, that can be taken to conserve the plants in these areas. However, we believe the forests have management plans that appropriately address the conservation needs of the species and therefore minimize any benefits of designation (see "Exclusions Under Section 4(b)(2)" below). Thus, we are invoking the Secretary's discretion to exclude the two forests under section 4(b)(2) of the Act, after taking into consideration the efforts by the Commonwealth of Puerto Rico to protect habitat under its jurisdiction.

#### Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means "to use and the use of all methods and procedures which 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, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or

adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas where PCEs are found, as defined at 50 CFR 424.12(b)).

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

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide

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

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

Areas that support populations of *Catesbaea melanocarpa*, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Section 7(a)(1) directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of listed species. 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

new information available to 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 to designate as critical habitat within areas occupied by the species at the time of listing, we consider those physical and biological features that are essential to the conservation of the species (PCEs), and which may require special management considerations and protection. These include, but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing (or development) of offspring, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for *Catesbaea melanocarpa* are derived from the biological needs of this plant species and include those habitat components needed for growth and development, flower production, pollination, seed set and fruit production, and genetic exchange. Although at the present time the information on the species' biological and ecological needs is limited (USFWS 2005, p. 7), habitat characteristics supporting all three currently known localities are known. Additionally, individuals in all three localities have been documented in fruit or flower. The presence of sexual reproduction indicates that the species has the potential to produce viable populations, with the assistance of appropriate conservation strategies.

*Catesbaea melanocarpa* is currently known from both the subtropical dry forest and subtropical moist forest life zones of PR and the USVI. Except for one locality, the historical and current range of the species is within dry forest life zone. The Susúa Commonwealth Forest is the only locality that is not dry forest; however, based on our observations because of its serpentine soils, the vegetation structure and species composition are similar to dry forest habitat (Breckon and García 2001; Silander et al. 1986, p. 243). In all three localities, the species is under the canopy of trees and shrubs, and all localities in PR are forested hills associated with either limestone or serpentine soils. The locality in St. Croix, based on Service observations, is

on a coastal plain with patches or thickets of trees and shrubs characteristic of dry forest habitat.

Within the subtropical dry and moist forest life zones, *Catesbaea melanocarpa* has been reported from four discrete sites within the U.S. Caribbean: Halfpenny Bay, Peñones de Melones, the Guánica Commonwealth Forest, and the Susúa Commonwealth Forest. However, the species presently occupies only Halfpenny Bay in St. Croix, USVI, the Guánica Commonwealth Forest, PR, and the Susúa Commonwealth Forest, PR.

Vegetation at the Halfpenny Bay site is comprised of dry thicket scrub vegetation, dominated by grasses with patches of trees and shrubs (USFWS 2005, pp. 6–7). Based on Service observations during a site visit conducted on March 1 and 2, 2006, *Catesbaea melanocarpa* is an understory species, currently growing below trees and shrubs characteristic of dry forest habitat. Associated flora include introduced grass species, *Caesalpinia coriaria* (dividive), *Tamarindus indica* (tamarind), *Castela erecta* (goat-bush), *Acacia tortuosa* (acacia), *Cassia poplyphylla* (retama prieta), *Leucaena leucocephala* (tantan), *Randia aculeata* (box-briar or tintillo), and *Cordia alba* (white manjack). Soils in the Halfpenny Bay site have been described as belonging to the Glynn-Hogensborg unit, which consists of very deep, well drained, nearly level to moderately steep soils (NRCS 1998, pp. 63–64).

We observed the vegetation within the Guánica Commonwealth Forest locality in 2006 as dry forest with semi-closed canopy on limestone soils. The species is found under the canopy. In this forest type, trees often reach 33 ft (10 m). Some associated dry forest vegetation in this locality include *Coccoloba microstachya* (uvillo), *C. diversifolia* (uvilla), *Thouinia portoricensis* (quebracho), *Guettarda elliptica* (cucubano liso), *Croton lucidus* (alhelí), *Savia sessiliflora* (amansa guapo), *Pithecellobium unguis-cati* (uña de gato), *Guaiacum sanctum* (guayacán), *Leucaena leucocephala* (zarcilla), among other common species (Trejo-Torres 2001, pp. 59–63).

Susúa Commonwealth Forest is located in southwestern Puerto Rico in the municipalities of Yauco and Sabana Grande. The Susúa Forest lies between the humid Central Cordillera and the dry coastal plains typical of the south coast. The forest represents not only the influence of a climatic transition zone (dry to moist), but also a combination of volcanic and serpentine soils (Department of Natural Resources 1976,

p. 24). The majority of the forest (90 percent) is underlain by serpentine outcrop. The rest of the forest (10 percent) has nine other soil types that belong to the Caguabo-Múcaro association (Silander et al. 1986, pp. 224–226; Soil Conservation Survey 1975, p. 9). These soils are described as slightly leached, loamy and clay, sticky and plastic soils underlain by hard or weathered rock at a depth of less than 30 inches (Soil Conservation Survey 1975, p. 9). Serpentine-derived soils create stressful conditions for the establishment and growth of plants, and their associated floras are characterized by high diversity and endemism (Cedeño-Maldonado and Breckon 1996, p. 348). Two vegetation associations (dry slope forest and gallery forest) have been delineated in the subtropical moist life zone (Department of Natural Resources 1976, p. 224). The trees are slender, open-crowned, and usually less than 39.4 ft (12 m) tall. The forest floor is open because the excessively drained soil supports little herbaceous growth (Ewel and Whitmore 1973, p. 25). *Catesbaea melanocarpa* is found in the dry slope forest type. The climatic conditions and serpentine-derived soils contribute to more xeric conditions and a forest structure and species composition similar to the Guánica Commonwealth Forest based on observations by the Service and others (Silander et al. 1986, pp. 239–245; Breckon and García 2001).

#### Primary Constituent Elements for *Catesbaea melanocarpa*

The area designated as critical habitat for *Catesbaea melanocarpa* is occupied, is within the species' current and historic geographic range, and contains sufficient primary constituent elements (PCEs) to support at least one of the plant's life-history functions. Based on our current knowledge of the species and the requirements of the habitat to sustain the essential life-history functions of the species, as discussed above, we have determined that the PCEs for *C. melanocarpa* are:

(1) Single-layered canopy forest with little ground cover and open forest floor that supports patches of dry vegetation with grasses, and

(2) Well to excessively drained, limestone and serpentine-derived soils (including soils of the San Germán, Nipe, and Rosario series and Glynn and Hogensborg series).

Open forest floor, canopy, and little ground cover are important requirements for an understory species like *Catesbaea melanocarpa*. The canopy provides shade, and the open forest floor reduces competition by

herbaceous species. Limestone and serpentine-derived soils that are well to excessively drained provide essential nutrients to this plant and sustain the dry conditions needed by the species. This designation is designed for the conservation of areas supporting PCEs necessary to support the life-history functions that were the basis for the proposal. The area designated as critical habitat in this rule has been determined to contain sufficient PCEs to support one or more of the life-history functions of *C. melanocarpa*.

#### Criteria Used To Identify Critical Habitat

As required by section 4 of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of *Catesbaea melanocarpa*. We began our analysis by considering the historic distribution of the species and sites occupied by the species at the time of listing. The 1999 listing rule (64 FR 13116) identified two localities occupied by the species within the U.S. jurisdiction: a 50-ac (20-ha) privately owned parcel in Halfpenny Bay in St. Croix, USVI; and a 330-ac (132-ha) property in Peñones de Melones in Cabo Rojo, PR. Both localities are found within the subtropical dry forest life zone and support habitat for the species. The final listing rule identified two historic collections: one in Guánica, PR, in 1886, and one in Susúa Commonwealth Forest, PR, in 1974. The Guánica Commonwealth Forest is within the subtropical dry forest life zone, and Susúa Commonwealth Forest is considered within the moist forest life zone. However, the Susúa Commonwealth Forest supports slopes with dry forest vegetation due to the climatic conditions and soil type. Both forests are similar in forest structure and species composition. Although both forests support habitat for *C. melanocarpa*, the presence of the species within these two forests was not corroborated at the time of listing. The rule noted that the Susúa specimen could not be confirmed as *C. melanocarpa* because of its poor condition (64 FR 13116, March 17, 1999; Breckon and Kolterman 1993, p. 1).

We reviewed the approved recovery plan to identify new records of occupancy of the species, biological information, and habitat characteristics (USFWS 2005, pp. 3–8). The plan identifies both downlisting and delisting criteria and emphasizes the importance of protecting existing populations within the range of this

plant to prevent its extinction, decrease the threat to the species associated with catastrophic events, and to obtain sexual (seeds) and asexual (cuttings) propagation material to establish a propagation program for the species. The plan includes information provided by a peer reviewer during the comment period showing a recent collection of *Catesbaea melanocarpa* located at the Guánica Commonwealth Forest. This forest is located within the previously known distribution of the species and supports a historic collection of *C. melanocarpa*. A voucher of this collection is located in the herbarium of the University of Puerto Rico (UPR 2006).

We also reviewed other information (such as sighting records from herbariums, Department of Natural and Environmental Resources (DNER) maps, and office files) and scientific literature and reports to identify additional information available on species range and biological needs. The Service contacted all researchers that have reported the species in recent years and visited all reported sites; they confirmed sightings at all sites except the west side of the South Shore Road, which is outside of the designation. Herbarium records for Guánica and Peñones de Melones describe the species growing in low forest or the understory of dry forest vegetation in limestone soils. The herbarium voucher for the species in Susúa describes the species growing in low forest on serpentine soils (Trejo-Torres 2003). Vegetation characteristics, climatic conditions, and soil type coincide with the previously described habitat for the species. We confirmed sightings in St. Croix and Guánica Commonwealth Forest. Although additional forested areas within the dry forest life zone and the moist forest life zone are present in PR and USVI, no additional sightings for the species have been reported in these other areas.

The only areas considered for designation were those that either (1) were occupied at the time of listing (as a population or an occurrence) and possess sufficient PCEs to support the life history functions, or (2) were not occupied at the time of listing but are essential to the conservation of the species. Information gathered by the Service and data collected during field visits resulted in the consideration of only three discrete areas in the U.S. Caribbean.

The Halfpenny Bay area was occupied at the time of listing and continues to be occupied. This area contains features that are essential to the conservation of *Catesbaea melanocarpa* that may require special management or

protection. Another area that was occupied at the time of listing, located in Peñones de Melones in Cabo Rojo, PR, is not currently occupied by the species and has lost PCEs due to periodic land-clearing activities with heavy machinery; it is not being designated as critical habitat due to the lack of PCEs and the lack of conservation value for the species.

The Guánica and Susúa Commonwealth forests have current and historical records of the species presence. The presence has been documented based on recent reports (Trejo-Torres 2001, p. 62; Trejo-Torres 2003; 2006) and site visits conducted by the Service in 2006.

These three areas (Halfpenny Bay and both Commonwealth forests) represent all known populations of this species in the wild within U.S. jurisdiction (currently known to be fewer than 115 individuals). Protecting individuals in the three localities is vital to maintain genetic representation of all known localities in the U.S. Caribbean. We have determined that it is essential to prevent extinction of this plant by protecting and securing existing populations, establishing a propagation program, augmenting existing populations with propagated individuals, and establishing new self-sustainable populations in protected areas (USFWS 2005). We believe all three currently occupied areas presently contain essential habitat features for the species.

We reviewed existing management and conservation plans and management actions for *Catesbaea melanocarpa* to determine if any of the areas identified above that contained features essential to the conservation of the species could be excluded under section 4(b)(2) of the Act. On the basis of this review, we believe that essential features within both Commonwealth Forests are adequately managed and protected under the management of Puerto Rico DNER. Accordingly, while these areas collectively total 14,575 ac (5,898 ha) and contain the habitat features that are essential to the conservation of the species, they are excluded from this designation because they are being adequately managed as wildlife sanctuaries by DNER, where they are protecting wildlife and plants in perpetuity and allowing only nonconsumptive use by the public in designated areas and trails (see Application of section 4(b)(2) of the Act below).

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other



structures that lack PCEs for *Catesbaea melanocarpa*. The scale of the maps prepared under the parameters for publication within the *Code of Federal Regulations* may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the final rule and are not designated as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species or primary constituent elements in adjacent critical habitat.

The area of approximately 10.5 ac (4.3 ha) identified within the Halfpenny Bay area meets all criteria used to identify critical habitat: The site was occupied at the time of listing and contains sufficient PCEs to support the life-history functions essential for the conservation of the species that are in need of special management and protection. A brief discussion of the

Halfpenny Bay area is provided in the unit description below. Additional detailed documentation concerning the essential nature of this area is contained in our documentation record for this rulemaking.

#### Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain the PCEs that may require special management considerations or protection. As discussed in this section and in the unit description below, we find that all of the PCEs in Halfpenny Bay may require special management considerations or protection due to threats to the species or its habitat from periodic but intense grazing, human-induced fires, and potential development for a tourist project (USFWS 2005, p. 8). Such management considerations and protections include fencing off forest patches to exclude cattle, developing fire-breaks adjacent to

existing roads and farm boundaries during dry season, and establishing conservation agreements with landowners to protect habitat within the property.

#### Critical Habitat Designation

We are designating one unit in the Halfpenny Bay area in Christiansted, St. Croix, USVI as critical habitat for *Catesbaea melanocarpa*. This critical habitat area described below (see Table 1) constitutes our best assessment at this time of areas determined to be occupied at the time of listing, that contain the PCEs that are essential for the conservation of the species, and that may require special management considerations or protection. Appropriate management and protection will support reproduction, recruitment, adaptation to catastrophic events, and genetic diversity (Primack 2000, pp. 124–133; Falk et al. 1996, pp. 113–119) as identified using the best available data.

TABLE 1.—LANDS DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT FOR *CATESBAEA MELANOCARPA*, LAND OWNERSHIP, APPROXIMATE AREA (ACRES, HECTARES).

Critical habitat unit, location	Land ownership	Areas meeting the definition of critical habitat acres (hectares)
Halfpenny Bay, St. Croix, USVI .....	Private .....	10.5 (4.3)
Total .....	.....	10.5 (4.3)

Presented below is a brief description and rationale for the designated critical habitat for *Catesbaea melanocarpa*.

#### Halfpenny Bay, St. Croix

The Halfpenny Bay critical habitat area consists of an area of approximately 10.5 ac (4.3 ha) on a privately owned agricultural tract located in a dry coastal plain about 2.48 miles (4 km) south of Christiansted, St. Croix, USVI. This unit encompasses the habitat features essential to the conservation of *Catesbaea melanocarpa* and does not contain manmade structures, such as existing private homes or barns. The species is located within dry thickets of scrub vegetation in this unit, which is dominated by grasses with patches of trees and shrubs. The unit contains both PCEs and is important to conserving the genetic diversity of this plant. Since this is the locality with the highest number of individuals (100 plants), we believe that it should be considered the core population to maintain genetic representation of this plant in the U.S. Caribbean.

At the time of the 1999 listing, the population was estimated at 24

individuals, but in 2002 the population was estimated at 100 individuals (Lombard 2002). The presence of the species at this site was confirmed by the Service in March 2006. This USVI population has the highest number of plants and has been documented in its reproductive condition (with fruit and flowers). The site and the PCEs contained thereon are currently threatened by periodic but intense grazing, human-induced fires, potential development for a tourist project (USFWS 2005, p. 8), and may require special management considerations and protection as discussed in the “Special Management Considerations or Protections” section above.

#### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and

recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” However, recent court decisions have invalidated this definition (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F. 3d 434, 442 (5th Cir. 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations



implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report, while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) a concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed

species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

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

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

Federal activities that may affect *Catesbaea melanocarpa* 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 or a permit under section 10 of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or

permitted, do not require section 7 consultations.

#### *Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to Catesbaea melanocarpa and Its Critical Habitat*

##### *Jeopardy Standard*

When performing jeopardy analysis for *Catesbaea melanocarpa*, the Service applies an analytical framework that relies heavily on the importance of core area populations to the survival and recovery of this plant. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

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

##### *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 remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve its intended conservation role of the critical habitat unit for this plant is to support viable core area populations.

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

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

(1) Actions that would reduce or degrade dry thicket scrub areas

dominated by patches of trees and shrubs in the Halfpenny Bay area. Such activities could include vegetation clearing, intensive and extensive cattle grazing activities, and fire. Dry forest species in the Caribbean are not fire-resistant species.

(2) Earth movement activities using heavy machinery within critical habitat that may result in changes in quantity and quality of soils within designated critical habitat.

We consider the area designated as critical habitat, as well as those that were excluded, to contain features essential to the conservation of *Catesbaea melanocarpa*. The designated area is within the geographic range of the species, was occupied by the species at the time of listing (64 FR 13116, March 17, 1999; Proctor 1991, pp. 43–44; Breckon and Kolterman 1993, p. 1), and is currently occupied by the species. Federal agencies already consult with us on activities in areas currently occupied by *C. melanocarpa*, or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of *C. melanocarpa*.

#### *Application of Section 3(5)(A) of the Act*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species at the time of listing on which are found those physical and biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Therefore, areas within the geographical area occupied by the species at the time of listing that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species at the time of listing that do not require special management or protection also are not, by definition, critical habitat. Following a review of all areas, we have determined that each area meets the definition of critical habitat.

There are multiple ways to provide management for species habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management, as can lack of pressure for change, such as areas too remote for anthropogenic disturbance. Finally, State, local, or private management plans as well as management under Federal agencies' jurisdictions can provide protection and management to avoid the need for designation of critical habitat. When we consider a plan to determine its adequacy in protecting habitat, we

consider whether the plan, as a whole, will provide the same level of protection that designation of critical habitat would provide. The plan need not lead to exactly the same result as a designation in every individual application, as long as the protection it provides is equivalent, overall. In making this determination, we examine whether the plan provides management, protection, or enhancement of the PCEs that is at least equivalent to that provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

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

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

Under section 4(b)(2), 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 an exclusion is contemplated, then we must determine whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered.

The following is our analysis of the benefits of including lands within versus excluding such lands from this critical habitat designation.

#### (1) Benefits of Inclusion of Guánica and Susúa Commonwealth Forests

The principal regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they will not destroy or adversely modify critical habitat. In the *Gifford Pinchot* decision, the U.S. Court of Appeals for the Ninth Circuit ruled that adverse modification evaluations require consideration of impacts on the recovery of species (379 F.3d 1059, 1070–1072). Conducting section 7 consultations would provide benefits by protecting plants on lands with a Federal nexus. For example, if a federally funded road project was proposed to cross these lands that were designated as critical habitat, a consultation would need to be conducted to ensure the designated critical habitat was not destroyed or adversely modified. Section 7 consultations only commit Federal agencies to prevent adverse modification to 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 project. Thus, any management plan that considers enhancement or recovery as the management standard will always provide as much or more benefit than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision. Without a critical habitat designation, Federal agencies remain obligated under section 7 to consult with us on actions that may affect a federally listed species to ensure such actions do not jeopardize the species' continued existence. The DNER does not utilize Federal funding to manage forest reserves in PR; however, the DNER routinely consults with us on research activities and projects on the forests that may affect federally listed species to ensure that the continued existence of such species is not adversely affected. Thus, under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species. However, we believe the conservation achieved through implementing habitat management plans is typically greater than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Management plans commit resources to implement long-term management and protection to particular habitat for at

least one and possibly other listed or sensitive species.

Designation of critical habitat also serves to educate landowners, State and local governments, and the public, regarding the potential conservation value of the area. This helps focus, prioritize, and revitalize conservation efforts, such as restoration projects, or more extensive monitoring of populations. This benefit is closely related to a second, more indirect benefit: that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

However, the benefits of inclusion are low, since the forests are already managed in an appropriate manner and education of the public is already occurring. For instance, extensive management plans already cover these forests. The DNER developed a master plan for the Commonwealth forests of Puerto Rico in 1976. The master plan identified soil and land types, climate, wildlife, vegetation, land use, recreation opportunities, and future research needs for all Commonwealth forests, including Guánica and Susúa forests. The master plan also identified management recommendations to address identified issues for each forest unit.

In Guánica, the master plan identified special management considerations in accordance with the uniqueness of the forest, proposed to manage the forest and associated vegetation types for nonconsumptive use by the public, and reserved and managed the entire unit as a wildlife sanctuary (DNR 1976, pp. 56–58). Because of the forest condition, it was designated as a United Biosphere Reserve in 1981 by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

For Susúa, the master plan identified special management considerations, including locating representative areas of all plant communities and rare and endangered species and limiting public use on these areas; not issuing new permits for transmission lines; and delineating all unique areas and preserving them in their natural condition (DNR 1976, pp. 230–232).

Additionally, both forests are currently managed as wildlife sanctuaries, protecting wildlife and plants in perpetuity and allowing only nonconsumptive use by the public in designated areas and trails. Active management includes developing and maintaining fire breaks, conducting prescribed burning adjacent to roads to reduce fuel load, removing exotic plant species along roads, and promoting scientific data collection, and

conducting outreach and education activities within adjacent communities. Forest management also provides opportunities for scientific research and the use of existing trails for passive recreation and education. The Guánica Forest also provides for beach use. These current management activities have not been identified as threats for *Catesbaea melanocarpa*. Also, the DNER has an island-wide education program that produces educational materials, talks, seminars and presentations on threatened and endangered species in Puerto Rico and their conservation needs, therefore there is no appreciable educational benefit to the designation of critical habitat in these areas.

The Guánica and Susúa Commonwealth Forests and adjacent lands are designated as Critical Wildlife Areas (CWA) by the Commonwealth of Puerto Rico (DNER 2005, pp. 211 and 221). The CWA designation constitutes a special recognition by the Commonwealth with the purpose of providing information to Commonwealth and Federal agencies about the conservation needs of these areas and assisting permitting agencies in precluding negative impacts as a result of permit approvals or endorsements (DNER 2005, pp. 2–3).

We believe there may be some benefits of inclusion, but they would be low because of the ongoing efforts of the Commonwealth. Critical habitat designation alone does not require specific steps toward recovery. The benefits of including these DNER-managed lands in designated critical habitat are minimal because the land managers and landowners are currently implementing conservation actions for *C. melanocarpa* and its habitat that encompass more than a critical habitat designation would. The DNER manages the forests as wildlife sanctuaries, does not allow for economic use of the forests and conducts management activities consistent with the conservation of the species and its habitat, including educating the public. Additionally, the purpose normally served by the designation, that of informing State agencies and local governments about areas that would benefit from protection and enhancement of habitat for *Catesbaea melanocarpa*, is already well established among State and local governments and Federal agencies in those areas that we are excluding from critical habitat in this rule on the basis of other existing habitat management protections.

(2) Benefits of Exclusion of Guánica and Susúa Commonwealth Forests

Exclusion would further enhance the cooperative working relationship with the Forests by focusing on activities that are designed to protect and recover the species, and allowing resources to go toward on-the-ground efforts rather than regulatory procedures. Since 1984, the Service and DNER have a signed cooperative agreement pursuant to section 6 (c) of the Act, establishing a partnership agreement for the purpose of implementing an endangered and threatened fish, wildlife and plant species conservation program in the Commonwealth of Puerto Rico. Both parties agree that programs of the Commonwealth of Puerto Rico are designed to assist resident endangered and threatened species; it is their mutual desire to work in harmony for the common purpose of planning, developing and conducting programs to protect, manage and enhance the populations of all resident endangered and threatened fish, wildlife and plants within the Commonwealth of Puerto Rico. As stated previously, there are instances where section 7 consultation could occur. If these lands are designated, there would be an additional burden for each individual action to ensure that designated critical habitat was not destroyed or adversely modified. Given the goal of the Commonwealth to protect, manage and enhance populations, this additional burden would likely add additional time and paperwork to consultations, which is unnecessary.

Threats identified for *Catesbaea melanocarpa* on the Guánica and Susúa Commonwealth Forests are human-induced fires during dry season and cutting of vegetation for trail and powerline maintenance. The DNER has regulatory mechanisms to protect individuals of *C. melanocarpa* from these threats within the forest boundaries, and forest managers are aware of the occupied localities within the forests. We believe that management guidelines for both forests, current local laws and regulations and the close coordination and excellent working partnership with DNER will adequately address identified threats to *C. melanocarpa*, features essential to its conservation, and its habitat on DNER lands.

The DNER approved laws and regulations to protect threatened and endangered species within lands under their jurisdiction. In 1999, the Commonwealth of Puerto Rico approved Law Number 241, Wildlife Law of the Commonwealth of Puerto Rico (Ley de Vida Silvestre del Estado Libre Asociado de Puerto Rico—Ley Núm. 241 del 15 Ago. 1999). The purpose of

this law is to protect, conserve, and enhance native and migratory wildlife species; declare all wildlife species within its jurisdiction as the property of Puerto Rico; regulate permits; regulate hunting activities; and regulate exotic species. In 2004, the DNER approved Commonwealth of Puerto Rico's Regulation Number 6766, which regulates the management of threatened and endangered species in Puerto Rico (Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extinción en el Estado Libre Asociado de Puerto Rico—Núm. 6766 del 11 de Feb 2004). *Catesbaea melanocarpa* has been included in the list of protected species. Article 2.06 of this regulation prohibits collecting, cutting, and removing (among other activities) listed plant individuals within the jurisdiction of PR.

Recent surveys conducted in Guánica Commonwealth Forest have expanded the known range of other federally listed species such as *Trichilia triacantha* (bariaco) and *Ottoschulzia rhodoxylon* (palo de rosa), and other State-protected species all previously known for only a few individuals within the forest. We believe additional occurrences of *Catesbaea melanocarpa* will be found in both forests. Protection of such areas, as the Commonwealth forests, conveys stability of forest development since most forests in Puerto Rico were destroyed for agriculture. Forest reserves like Guánica, protected since 1919, provide the necessary structure to support the conservation of the species, and thus the benefit of additional regulatory requirements for the conservation of the species is extremely low.

Therefore, the benefits of exclusion are relaxation of regulatory requirements that would be imposed by the designation. Exclusion would also enhance the partnership efforts with the DNER focused on conservation of the species in the State, and secure conservation benefits for the species beyond those that could be attained through the regulatory requirements under section 7 of the Act if the area were designated as critical habitat. When landowners are already taking sufficient steps to conserve the species, the imposition of additional regulatory requirements is not necessary. Further, it may require the expenditure of funds on consultations for projects that are largely beneficial to the species. Exclusion of these lands from critical habitat designation would eliminate the need to expend these funds.

### (3) Benefits of Exclusion of Guánica and Susúa Commonwealth Forests Outweigh the Benefits of Inclusion

Thus, on the basis that Susúa and the Guánica Commonwealth Forests are being adequately managed as wildlife sanctuaries by DNER, where they are protecting wildlife and plants in perpetuity and allowing only nonconsumptive use by the public in designated areas and trails, we believe that, for these sites, the benefits of inclusion are nominal. We believe these benefits to include increased recognition concerning the status and conservation needs of the species and protection afforded through consultations with Federal action agencies under section 7 of the Act. In contrast, we believe greater benefits will be realized for the species by excluding these specific lands from designated critical habitat. These benefits include relief from the expenditure of resources to conduct consultations under section 7 of the Act with Federal action agencies, maintaining partnerships with DNER, and recognition of the on-going conservation measures that they are taking for the species. It is our determination that these combined measures will provide greater conservation benefits for *Catesbaea melanocarpa* than the benefits realized through the regulatory designation of critical habitat and will put available resources toward on-the-ground efforts rather than implementing a regulatory procedure. We have also evaluated economic impacts for this exclusion, but we do not believe there are disproportionate impacts that warrant an exclusion under section 4(b)(2) of the Act on that basis.

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

Approximately 88 percent of the known *Catesbaea melanocarpa* individuals within U.S. jurisdiction are located within the designated critical habitat. The remaining 12 percent (13 known individuals) are within the excluded areas. We anticipate that little, if any, conservation benefit to *C. melanocarpa* will be foregone as a result of excluding these areas, as both forests are currently managed as wildlife sanctuaries, protecting wildlife and plants in perpetuity, allowing only nonconsumptive use by the public in designated areas and trails, and since the forests are already managed in an appropriate manner. Additionally, the conservation status of these forests and current local laws and regulations in PR adequately protect essential *C. melanocarpa* habitat and provide

appropriate management to maintain and enhance the primary constituent elements for the species within the forests. As a result of the protection of *C. melanocarpa* and its habitat provided in both forests, and the fact that the majority of occurrences are within designated critical habitat, we find that the exclusion of these areas will not result in the extinction of *C. melanocarpa*. Accordingly, we exercise discretion under section 4(b)(2) of the Act to exclude these areas from the designation of 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. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion 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 analysis was made available for public review on March 14, 2007 (72 FR 11819). We accepted comments on the draft analysis until April 13, 2007.

The purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Catesbaea melanocarpa*. 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. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This 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 draft economic analysis estimated a potential economic cost of \$132,300 to \$441,000 over a 20-year period as a result of the critical habitat designation. The analysis, which was prepared in a manner consistent with the ruling in *N.M. Cattle Growers Ass'n v. USFWS*, 248 F3rd 1277 (10th Cir. 2001), measured lost economic efficiency associated with residential and commercial development, and public projects and activities. Potential economic impacts stem entirely from possible limitations on development of the designated property. The total potential value loss is 21 percent of the property's market value. The actual loss would depend on the future sale price, and could range from \$132,300 to \$441,000. This potential value loss is based on the implementation of the conservation recommendations, which consist of protecting existing individuals (approximately 100 plants) and maintaining a buffer of 20 meters around them as a setback from a development project. The analysis also conservatively included all potential costs attributed to consultation requirements resulting both from the listing of the species and designation of critical habitat. Overall, the analysis did not anticipate a decrease in the amount of construction activity on St. Croix as a result of the designation. As a result, small developers and construction firms are not anticipated to be affected. For Guánica and Susúa Commonwealth Forests, we evaluated the activities that we expect to occur in the forests, based on their management plans. These include nonconsumptive public recreational use, developing and maintaining fire breaks, conducting prescribed burning adjacent to roads, scientific data collecting, and removing exotic plant species. Although we have not quantified any impacts to these activities as a result of the designation, these actions are likely to have a minimal or beneficial affect to the species and therefore we expect the economic impacts to these areas would be small if they were designated as critical habitat. Based on the analysis, we have concluded that the economic impacts that may result from the designation alone are minimal.

A copy of the final economic analysis with supporting documents are

included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Caribbean Fish and Wildlife Office (see **ADDRESSES**).

Pursuant to section 4(b)(2) of the Act, we must consider relevant impacts in addition to economic ones. We determined that the lands within the designation of critical habitat for *Catesbaea melanocarpa* are not owned or managed by the Department of Defense, there are currently no habitat conservation plans for *C. melanocarpa*, and the designation does not include any Tribal lands or trust resources. We anticipate no impact to national security or Tribal lands. Our economic analysis indicates an overall low potential cost resulting from the designation. Therefore, we have not excluded any areas from this designation of critical habitat for *C. melanocarpa* based on economic impacts. As such, we have considered, but not excluded, any lands from this designation based on the potential impacts to these factors. We have excluded areas for other reasons; please see the section 4(b)(2) exclusions discussion under "Application of Section 4(b)(2) of the Act" above.

#### Required Determinations

##### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. The draft economic analysis estimated a potential economic cost of \$132,300 to \$441,000 over a 20-year period as a result of the critical habitat designation. We used the information in and results of this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2). Based on this economic analysis, we believe that there are no disproportionate economic impacts that warrant exclusion pursuant to section 4(b)(2) of the Act at this time.

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

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects 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 the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

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

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (that is, housing development, grazing, oil and gas production, timber harvesting). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. However, the SBREFA does

not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

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

In our economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Catesbaea melanocarpa* and proposed designation of its critical habitat. This analysis estimated prospective economic impacts due to the implementation of conservation efforts for the species, such as incorporating a buffer zone around the individuals into the development project plans. We determined from our analysis that the implementation of conservation measures for *C. melanocarpa* within the proposed designation may impact the private landowners, but impacts are not anticipated to small business.

Costs associated with the value of the land for residential and commercial development comprise 100 percent of the total quantified potential future impacts. Total potential costs are expected to be \$132,300 to \$441,000 over a 20-year period. These costs are related to the implementation of a buffer zone of 20 m (66 ft) around the current population as a conservation measure for private development within the critical habitat designation. This buffer

zone has the potential to affect approximately 10.5 ac (4.3 ha) of the property. Overall, the analysis does not anticipate a decrease in the amount of construction activity on St. Croix as a result of the designation. As a result, small developers and construction firms are not anticipated to be affected. Please refer to our final economic analysis for this designation for a more detailed discussion of potential economic impacts.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the private landowners of the Halfpenny Bay area if they are required to consult with us regarding the effects of projects’ impacts on *Catesbaea melanocarpa* or its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer “reasonable and prudent alternatives.” Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency’s legal authority and jurisdiction, that are economically and technologically feasible, and that would help the applicant to avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

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

information that could contribute to the recovery of the species.

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

- (1) Regulation of activities affecting waters of the United States by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act;
- (2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;
- (3) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;
- (4) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Act;
- (5) Activities authorized or funded by the Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or take measures to protect *Catesbaea melanocarpa*. The kind of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available

information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to the area designated. The most likely Federal involvement could include Federal Highway Administration funding for road improvement, Natural Resources Conservation Service funding for agricultural practices, Housing and Urban Development funding for residential development and Federal Communications Commission permits for the construction and operation of telecommunication towers. Therefore, for the above reasons and based on currently available information, we certify that the rule will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

*Energy Supply, Distribution or Use (E.O. 13211)*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Based on the information from the economic analysis, this final rule to designate critical habitat for *Catesbaea melanocarpa* 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), the Service makes 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, Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is

provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities 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, 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. As such, Small Government Agency Plan is not required.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally

Protected Private Property Rights"), we have analyzed the potential takings implications of designating 10.5 ac (4.3 ha) of lands in Halfpenny Bay area in St. Croix, USVI as critical habitat for *Catesbaea melanocarpa* in a takings implication assessment. The takings implications assessment concludes that this final designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132 (Federalism), the 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 proposed critical habitat designation with appropriate State resource agencies in Puerto Rico and the U.S. Virgin Islands. The designation of critical habitat in areas currently occupied by *Catesbaea melanocarpa* imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform (E.O. 12988)*

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

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork



Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

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

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA 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 assertion was upheld in the courts of 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 Indian Tribes (E.O. 13175)*

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

"Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands occupied at the time of listing containing the features essential for the conservation of *Catesbaea melanocarpa* and no Tribal lands that are unoccupied areas that are essential for the conservation of *C. melanocarpa*. Therefore, critical habitat for *C. melanocarpa* has not been designated on Tribal lands.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Caribbean Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

**Author(s)**

The primary authors of this package are the staff of Caribbean Fish and

Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

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

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

**Regulation Promulgation**

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

**PART 17—[AMENDED]**

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

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

■ 2. In § 17.12(h), revise the entry for "*Catesbaea melanocarpa*" under "FLOWERING PLANTS" to read as follows:

**§ 17.12 Endangered and threatened plants.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
<i>Castesbaea melanocarpa.</i>	None .....	U.S.A. (PR, VI), Antigua, Barbuda, Guadalupe.	Rubiaceae .....	E	657	17.96(a)	NA
*	*	*	*	*	*		*

■ 3. In § 17.96, amend paragraph (a) by adding in alphabetical order an entry for Family Rubiaceae consisting of *Catesbaea melanocarpa* to read as follows:

**§ 17.96 Critical habitat—plants.**

(a) \* \* \*

Family Rubiaceae: *Catesbaea melanocarpa* (no common name)

(1) Critical habitat is depicted on the map below for Halfpenny Bay, St. Croix, U.S. Virgin Islands.

(2) The primary constituent elements (PCEs) of critical habitat for *Catesbaea melanocarpa* are the habitat components that provide:

(i) Single-layered canopy forest with little ground cover and open forest floor that supports patches of dry vegetation with grasses, and

(ii) Well to excessively drained limestone and serpentine-derived soils (including soils of the San Germán,

Nipe, and Rosario series and Glynn and Hogensborg series).

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

(4) *Critical habitat map.* Data layers were created by overlaying habitats that contain at least two of the PCEs, as defined in paragraph (2) of this section, on U.S. Geological Survey (USGS) topographic maps (UTM 20, NAD 27).

(5) Critical Habitat unit: Halfpenny Bay, St. Croix, U.S. Virgin Islands.

(i) *General description:* The Halfpenny Bay unit consists of approximately 10.5 ac (4.3 ha) on privately owned property located about 2.48 mi (4 km) south of Christiansted, St. Croix, U.S. Virgin Islands. The

designated unit is located east of South Shore Road, approximately 342 m (1,122 ft) south of Road 62, approximately 600 m (1,968 ft) north of the Halfpenny Bay coast, and 70 m (230 ft) west of a local road to Halfpenny Bay. This unit encompasses the habitat features essential to the conservation of *Catesbaea melanocarpa* within Estate Granard, Christiansted, St. Croix, and does not contain any manmade structures.

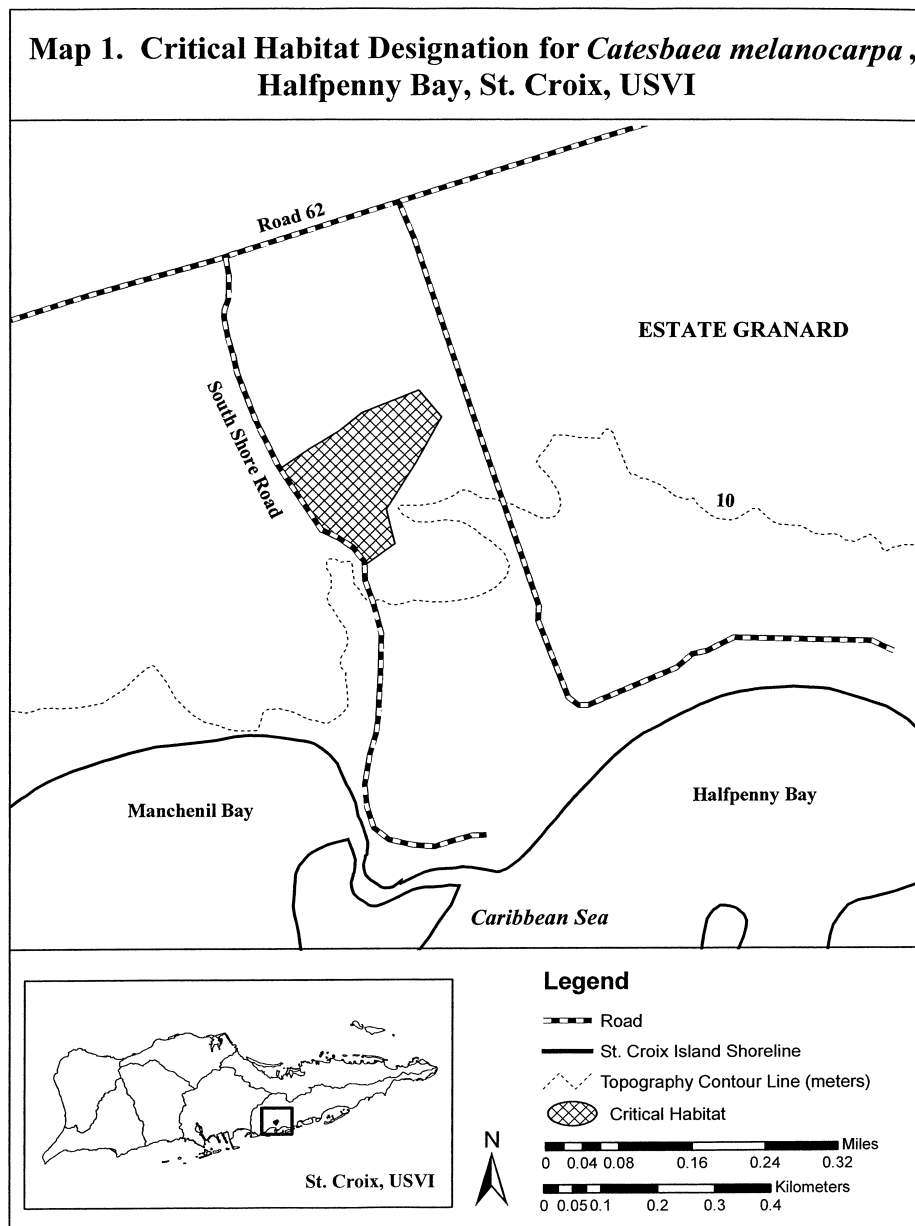
(ii) *Coordinates:* From Christiansted USGS 1:24,000 quadrangle map, St. Croix land bounded by the following UTM 20 NAD 27 coordinates (E,N):

319156.03, 1958989.97; 319205.44, 1959023.35; 319258.18, 1959055.40; 319297.57, 1959086.11; 319397.72, 1959126.83; 319437.78, 1959079.43; 319393.05, 1958998.65; 319340.97, 1958916.53; 319356.33, 1958854.44; 319307.59, 1958819.72; 319284.39,

1958851.87; 319259.52, 1958866.45;  
319226.80, 1958883.81; 319181.40,  
1958951.24; 319156.03, 1958989.97

(iii) Note: Map of Halfpenny Bay  
follows:

BILLING CODE 4310-55-P



\* \* \* \* \*

Dated: August 14, 2007.

**Mitchell J. Butler,**

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

[FR Doc. 07-4061 Filed 8-27-07; 8:45 am]

BILLING CODE 4310-55-C