Federal Register

Tuesday,
January 30, 2007

# Part II

# Department of the Interior

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Alabama Beach Mouse; Final Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018–AU46**

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Alabama Beach Mouse

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

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are revising critical habitat for the Alabama beach mouse (*Peromyscus polionotus ammobates*) under the Endangered Species Act of 1973, as amended (Act). The revised designation encompasses approximately 1,211 acres (ac) (490 hectares (ha)) of coastal dune and scrub habitat in Baldwin County, Alabama.

**DATES:** This rule becomes effective on March 1, 2007.

**ADDRESSES:** To review comments and materials received, as well as supporting documentation used in the preparation of this final rule, make an appointment during normal business hours with the Field Supervisor, Daphne Field Office, 1208–B Main Street, Daphne, Alabama 36526. The final rule, economic analysis, and maps are also available on the Internet at *http://www.fws.gov/daphne.*

**FOR FURTHER INFORMATION CONTACT:** Field Supervisor, Daphne Field Office, U.S. Fish and Wildlife Service, at telephone 251–441–5181 or facsimile 251–441–6222. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### Role of Critical Habitat in Actual Practice of Administering and Implementing the Act (16 U.S.C. 1531 et seq.)

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under the Act's section 4(b)(2), there are significant limitations on the regulatory effect of designation under the Act's section 7(a)(2). In brief, (1) Designation provides additional protection to habitat only where there is a Federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat would take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, only 476 species, or 36 percent of the 1,311 listed species in the United States under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,311 listed species through conservation mechanisms such as listing, section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative, non-regulatory efforts with private landowners. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

In considering exclusions of areas originally proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir 2004) (hereinafter *Gifford Pinchot*). In that case, the Ninth Circuit invalidated the Service's regulation defining ''destruction or adverse modification of critical habitat.'' In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas in this final designation. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designation of critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

### Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of

requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

**Background**

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this rule. For information on the Alabama beach mouse (ABM), please refer to the proposed rule published in the **Federal Register** on February 1, 2006 (71 FR 5516) or the final listing determination (June 6, 1985, 50 FR 23872).

**Previous Federal Actions**

Information about previous Federal actions for the ABM can be found in our proposal for critical habitat for the ABM published in the **Federal Register** on February 1, 2006 (71 FR 5516). On August 8, 2006, we announced the availability of our draft economic analysis (DEA), and we reopened the public comment period on the proposed rule and provided the time, date, and location of our public hearing, as well as updated acreage for the critical habitat units (71 FR 44976). The reopened public comment period ended on September 7, 2006.

**Summary of Comments and Recommendations**

We requested written comments from the public on the proposed critical habitat revision in the proposed rule published on February 1, 2006 (71 FR 5516) and in our August 8, 2006, **Federal Register** document (71 FR 44976). We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties, and invited them to comment on the proposed rule. We also issued press releases and published legal notices in the Press-Register and Islander newspapers. Based on 12 requests received during the public comment period, we held a public hearing and information meeting on August 24, 2006, at the Adult Activity Center in Gulf Shores, Alabama.

During the comment period that opened on February 1, 2006, and closed on April 3, 2006, we received 13 comments from organizations or individuals directly addressing the proposed revised critical habitat designation. During the comment period that opened on August 8, 2006, and closed on September 7, 2006, we received 45 comments from organizations and individuals directly addressing the proposed revised critical habitat designation and the DEA. Between February 1, 2006, and September 7, 2006, we also received 4 comments from peer reviewers. Collectively, 36 commenters supported the proposed revised designation, and 16 opposed the revised designation. Six letters were either neutral or expressed both support of and opposition to certain portions of the proposal. Comments received were grouped into eight general issues specifically relating to the proposed revised critical habitat designation and are addressed in the following summary and incorporated into the final rule as appropriate.

**Peer Review**

In accordance with our policy published on July 1, 1994 (59 FR 34270), and current Departmental guidance, we solicited expert opinions from six knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and/or conservation biology principles. We received responses from four of the peer reviewers. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Three of the four peer reviewers specifically stated that redesignation of critical habitat to include interior scrub habitat is warranted. Information provided by peer reviewers included suggestions for sampling techniques and population viability analyses that would better inform future ABM conservation efforts, as well as comments on how to best determine recovery following hurricanes. Suggestions were also made and language was provided to clarify biological information or make the proposed rule easier to follow and review.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding ABM critical habitat, and addressed them in the following summary. Several of the peer reviewers provided editorial comments that are addressed in the body of this rule. Minor editorial comments on the Background section of the proposed rule (not found in final rules) have been incorporated into the administrative record.

*Specific Peer Reviewer Comments*

(1) *Comment:* Two peer reviewers suggested that the ABM may persist in areas outside of its present known range, including open, sandy portions of Gulf State Park north of the scrub dunes and east of Lake Shelby; additional scrub habitat within central and northern portions of Little Point Clear; and sand dunes along the Bon Secour National Wildlife Refuge's (Refuge) Sand Bayou Unit.

*Our Response:* Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. We agree that the ABM may exist in areas outside of its current known range. However, we do not have trapping data indicating ABM presence in these areas at this time. Both Little Point Clear and the referenced portions of Gulf State Park have been trapped on occasion, or subjected to qualitative tracking and habitat surveys (Sneckenberger 2001, p. 13; Service 2003, p. 2; Falcy 2006, p. 1). ABM were documented in the southern portion of Little Point Clear earlier this summer (Falcy 2006, p. 1) but not in more interior areas. We are aware of one qualitative survey in the Sand Bayou Unit where no evidence of beach mice was encountered (Sneckenberger 2001, p. 14). Much of the referenced areas are thickly vegetated, contain compacted sand, are isolated from existing known ABM habitat, do not possess the requisite primary constituent elements (PCEs) identified in the proposed rule, and are therefore not found to be essential to the conservation of the species at this time. 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 this reason, critical habitat designations do not imply that habitat outside the designation is unimportant.

(2) *Comment:* One peer reviewer stated that it was inadequate to limit ABM critical habitat to those areas known to be occupied at the time of listing since much information has been learned about ABM distribution since then.

*Our Response:* Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time

it is listed, upon a determination that such areas are essential for the conservation of the species. For the purposes of this designation, we considered all frontal dunes within the proposed units to be occupied at the time of listing. Since the ABM was listed, we have learned that scrub habitat is also occupied by the subspecies and is especially important to beach mouse conservation during and after hurricane events (Swilling *et al.* 1998, pp. 294–296; Sneckenberger 2001, p. 18). Scrub habitats were included in the designation if they are presently occupied, support a core population of beach mice, and are now found to be essential to the conservation of the subspecies (contain PCEs 3 or 4 or both and are not highly fragmented, degraded, or isolated). Areas where mice may exist, but are undocumented, or areas where mice have been captured but that do not possess one or more of the PCEs or that we have determined not to be essential to the conservation of the species, were not included in the designation.

(3) *Comment:* One peer reviewer questioned whether there were references indicating the PCEs are an appropriate and adequate means to evaluate essential requirements for species.

*Our Response:* PCEs are those physical and biological features that are essential to the conservation of the species, and within areas occupied by the species at the time of listing, that may require special management considerations and protection. Such requirements include: (1) Space for individual and population growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. Our knowledge of these requirements for the ABM is not absolute, but research and practical experience do provide us with information on physical and biological needs of the subspecies.

Frontal dunes have been recognized as being essential to the conservation of the species since the earliest beach mouse research (Bangs 1898, pp. 195–200; Howell 1921, p. 239; Howell 1909, p. 61; Blair 1951, p. 21; Pournelle and Barrington 1953, pp. 133–134; Bowen 1968, p. 4), and were the main habitat type represented in the original critical habitat designation (June 6, 1985, 50 FR 23872). Trapping data continue to illustrate the importance of frontal dunes to ABM (Rave & Holler 1992, p. 248; Service 2003, pp. 1–3; Service 2004, p. 16), and therefore they are included in our PCEs (PCEs 1 and 2). Recent research, however, has illustrated that beach mice use interior scrub habitat on a permanent basis, and that this habitat serves an invaluable role in the persistence of beach mouse populations during and after storm events (Swilling *et al.* 1998, pp. 294–296; Sneckenberger 2001, p. 18). The importance of high-elevation scrub habitat to ABM is reinforced by our observations of suitable ABM habitat distribution and trapping records following hurricanes Ivan (2004) and Katrina (2005) (Service 2004, pp. 9–10; Service 2005a, pp. 10–13). Therefore, we incorporated high-elevation scrub habitat into the PCEs (PCEs 1 and 3). General research supports the effectiveness of biological corridors (Beier and Noss 1998, p. 1241), and recent population viability analysis work (Traylor-Holzer *et al.* 2005; Traylor-Holzer 2005, pp. 51–57; 2005b, pp. 29–30; Reed & Traylor-Holzer 2006, pp. 21–22), general observations (for example, extirpation of various ABM populations in Gulf State Park (Holliman 1983, pp. 125–126; Service 2005, pp. 6–9), and the City of Orange Beach (Endangered Species Consulting Services 2001, pp. 1–3) suggest the importance of functional pathways for ABM. Based on this information, habitat connectivity was prominently featured in the PCEs (PCEs 1 and 4). Anthropogenic disturbances in the form of artificial lighting (Bird *et al.* 2004, p. 1435) and the support of nonnative predator populations (such as feral cats) (Linzey 1978, p. 20; Holliman 1983, p. 128) are known to adversely affect beach mice. We incorporated these issues into PCEs 1, 2, and 5. Please refer to the ''Primary Constituent Elements'' section for full description of PCEs.

In summary, we based the PCEs on the best available information of the physical and biological needs of the subspecies. Using the PCEs, we have identified lands containing all beach mouse habitat types, lands that provide only frontal dunes, lands that provide only scrub dune habitat, lands that serve to preserve functional connections between these habitat types, and lands, within the coastal dune ecosystem, that maintain a natural light regime. We believe that these PCEs are based upon the best available science, capture those physical and biological features essential to the conservation of the species, and represent a substantial improvement over PCEs from the original designation. We believe these PCEs are an appropriate and adequate means to evaluate essential ABM habitat requirements.

(4) *Comment:* One peer reviewer suggests that we should better describe the effects of disturbance along the utility line corridor within the S.R. 180 (Fort Morgan Road) right-of-way (Unit 2 description, 71 FR 5516, February 1, 2006, p. 5526) to avoid the misinterpretation that all disturbance is beneficial to ABM.

*Our Response:* We agree and have addressed this in the discussion of Unit 2 below (see Unit Descriptions section).

(5) *Comment:* One peer reviewer suggests that feral cats should be listed as threats requiring special management consideration or attention in all units.

*Our Response:* Feral cats were originally listed as threats in Units 2 and 5. Although we agree that the potential for feral cat problems exists throughout the known range of the ABM, the special management required under critical habitat addresses threats to habitat. Therefore, control of feral cats is not specifically mentioned in this designation as a threat requiring special management consideration or attention. Currently, control of cats is required in all incidental take permits involving ABM, and feral cats will continue to be managed as part of our efforts towards conservation of the ABM.

(6) *Comment:* One peer reviewer suggests that the proposal may underemphasize the importance of non-contiguous habitat because dispersal likely occurs through inhabitable as well as uninhabitable habitat.

*Our Response:* The Act requires us to designate critical habitat on the basis of the best scientific data available. ABM have been trapped in a variety of habitat types including primary and secondary dunes, scrub habitat, immediately adjacent to ephemeral wetlands, and along sparsely vegetated sand flats associated with roadway rights-of-way (Service 2003, p. 2; Farris 2003). With our designation, we have included all of these habitat types, and attempted to maintain connectivity between them. Neither information in our files nor published literature supports other habitat types as being essential to the conservation of the ABM. ABM may use uninhabitable habitat such as lawns, maritime forest, and permanent wetlands for dispersal, but we do not have evidence of this at this time. These habitat types therefore do not meet the requirements needed to be included in the critical habitat designation. 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. Critical habitat designations therefore do not signal that habitat outside the designation is unimportant or may not be required for recovery.

(7) *Comment:* One peer reviewer stated (in reference to a comment in the proposed rule, 71 FR 5516; February 1, 2006; p. 5521) that Oli et al. (2001) did not provide any data supporting the value of multiple populations.

*Our Response:* Oli et al. (2001) performed a population viability analysis for four distinct populations of beach mice, two of which were ABM populations (Fort Morgan and Perdue Units of the Refuge). Their results indicated that even the Perdue Unit population (the most robust) was susceptible to extirpation when impacts from catastrophic events, such as hurricanes, are considered (p. 114). Later in the document, they addressed the importance of multiple populations for beach mouse conservation and warned against additional fragmentation of habitat (pp. 116–117). While this work was a population viability analysis that must be viewed with the appropriate caveats (for example, Reed et al. 1998), we believe that it emphasizes the importance of multiple core populations and habitat continuity.

(8) *Comment:* One peer reviewer, referring to the proposed rule (71 FR 5516; February 1; p. 5517), stated that Rave and Holler (1992) did not address time of activity, burrow location, or feeding habits of ABM. This reviewer suggested Bowen (1968) or Garten (1976) as better references.

*Our Response:* We concur with this comment. Bowen (1968, pp. 2–4), Sneckenberger (2001, pp. 51–52), Lynn (2000, pp. 30–33), and Moyers (1996, pp. 2, 25–26, 29) all serve as better references and collectively describe time of activity, burrow location, and feeding habits of beach mice. We have corrected our references. On the other hand, Garten (1976), addresses aggressive behavior in inland subspecies of *Peromyscus polionotus* and is, therefore, not applicable.

(9) *Comment:* Three peer reviewers and several commenters expressed concerns over the exclusion of areas under ABM habitat conservation plans (HCPs) from the proposal. Many suggested that HCPs are often inadequate, are subject to frequent violations, and/or are less protective than critical habitat.

*Our Response:* Private lands may be excluded under section 4(b)(2) of the Act if the benefits of exclusion outweigh the benefits of inclusion. In our view, legally operative HCPs covering the species, or draft HCPs that cover the species and have undergone public review and comment (pending HCPs), meet this criterion. The HCPs provide assurances that the conservation measures they outline will be implemented and effective, and the designation of critical habitat provides no additional benefits in these areas (species and their habitat are protected by the conditions of the incidental take permit (ITP) and section 9 of the Act).

There are 51 areas currently under HCP ITPs collectively containing 261 ac (105 ha) of habitat we have identified as essential to ABM conservation (see Table 2). During HCP development, we worked with all property owners to ensure that ABM impacts were avoided, minimized, or mitigated to the maximum extent practicable. Property owners with HCPs have indicated that they intend to abide by their plan and those with Service-issued ITPs based on the HCP are required to comply with the ITP. All permits and plans require controlling of cats and refuse, planting with native vegetation, minimizing developed footprints, and protecting habitat outside of approved footprints. In addition, many of the ITPs require seasonal ABM monitoring, the development of ABM interpretive materials, and the establishment of endowments for habitat restoration. The conditions of the ITPs are legally enforceable, and, therefore, ABM and their habitat are protected by section 9 of the Act. Critical habitat has no additive value in this situation. In fact, critical habitat, often incorrectly perceived to preclude development, can adversely affect existing conservation relationships. We, therefore, have found that the benefit of excluding areas covered by HCPs on 51 properties outweighs the benefit of including these properties in the final designation. Please see the ''Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act'' section for a more thorough discussion of HCP sites and critical habitat.

(10) *Comment:* One commenter, referring to information presented in the background section of the proposed rule (71 FR 5516, 5518, and elsewhere), stated that there are no known benchmarks for monitoring ABM recovery because the habitat is always in a state of flux due to hurricane impacts. The commenter suggested using pre-Ivan ABM populations to gauge ABM recovery.

*Our Response:* ABM habitat is continually changing as a result of coastal processes and impacts from tropical cyclones. The Service conducted extensive live-trapping throughout the suspected range of the subspecies in 2003 (the year prior to Hurricane Ivan) and found ABM in areas where they had never been recorded (Service 2003, pp. 1–3; Farris 2003, pp. 1–5). These trapping data led us to produce the ABM habitat maps (discussed in detail in Comment 13) and will be useful in our ongoing review of the recovery needs of the subspecies.

(11) *Comment:* One commenter, referring to the information presented in the background section of the proposed rule (71 FR 5516; February 1, 2006; p. 5522), stated that they were not aware of data supporting the formal definition of ABM population cycles beyond the seasonal variation that occurs on an annual basis.

*Our Response:* We concur with this statement, and it was our intent to provide evidence for the existence of seasonal population cycles in the proposed rule. Rave and Holler (1992, pp. 351–352) describe the seasonal variation in ABM populations at the Perdue and Fort Morgan Units of the Bon Secour National Wildlife Refuge, and Sneckenberger (2001, pp. 48–51) describes the seasonal availability of ABM food sources in the primary and secondary dunes. ABM populations likely fluctuate over a longer temporal period in response to tropical storms and hurricanes, but this has never been described in the literature to our knowledge.

*General Comments*

Comments Related to Regulatory Burden and Private Property Concerns

(12) *Comment:* Several commenters feel that the proposed critical habitat designation is a violation of their property rights. One commenter mentioned that critical habitat represents ''condemnation without compensation'' and believes that if land is designated, it cannot be developed.

*Our Response:* Critical habitat does not mean that private lands would be taken by the Federal government or that reasonable uses would be restricted. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. A critical habitat designation has no effect on situations where a Federal agency is not involved—for example, a landowner undertaking a project on private land that involves no Federal funding or permit. The Act only requires a consultation if there is a Federal nexus—that is, any activity a Federal agency funds, authorizes, or carries out that may jeopardize the survival of a threatened or endangered species. The

designation is a reminder to Federal agencies that they must make special efforts to protect the important characteristics of these areas. It does not allow government or public access to private lands. We evaluated this rule in accordance with Executive Order 12630, and we believe that this critical habitat designation for the ABM will not have significant takings implications. We do not anticipate that property values, rights, or ownership will be significantly affected by the critical habitat designation. We determined that the designation would result in little additional regulatory burden above that currently in place, as the subspecies is already federally listed and the areas designated are already occupied by the subspecies. Examples of projects that have received permits within critical habitat include two single-family homes in the Cabana Beach subdivision and the proposed Gulf State Park hotel and convention center. We have also conducted consultations on beach nourishment projects and boardwalk construction within designated critical habitat. In all of these instances, we were able to work with applicants and Federal agencies to ensure that projects are completed while still conserving critical habitat and the ABM.

(13) *Comment:* Several commenters expressed confusion between the ABM habitat maps (also known as blue maps) and critical habitat.

*Our Response:* In November 2003, after habitat assessments and an extensive review of trapping data and aerial photography, the Service completed ABM habitat maps. These maps, which currently depict 2,544 ac (1,030 ha) of potential ABM habitat, were used to show the public and local, State, and Federal agencies those areas that may be occupied by ABM, and therefore, to indicate where consultation may be required for Federal actions or incidental take permits may be recommended for private interests. These maps were made available to the general public and are on display at the City of Gulf Shores Public Works Department, the headquarters of the Bon Secour National Wildlife Refuge, and the Daphne Field Office. They show areas with ABM habitat (where incidental take may occur) and were generated by the Service at our own discretion.

The maps associated with this designation are part of a separate action. When the ABM was listed, we designated approximately 1,034 ac (418 ha) of critical habitat, spread into three zones: (1) Areas south of State Road (SR) 180 in the Fort Morgan State Historic Site and some adjacent private land, (2) areas 500 feet (ft) (150 meters (m)) inland from mean high tide from Kiva Dunes east to Laguna Key, including portions of the Bon Secour NWR, and (3) areas south of S.R. 182 in Gulf State Park. We are now revising critical habitat as a result of a December 2004 declaration filed with the U.S. District Court for the Southern District of Alabama (see ''Previous Federal Actions'' above). The revised critical habitat designation identifies the subset of ABM habitat as depicted in the 2003 habitat maps that has those features that, according to the best available science, we have found to be essential to the conservation of the species.

(14) *Comment:* Several commenters asked what additional requirements designated critical habitat placed on individuals seeking ITPs under the Act.

*Our Response:* ABM are protected from take (by section 9 of the Act) and by consultation with Federal agencies on Federal actions (under section 7 of the Act), regardless of whether critical habitat is designated. When critical habitat is designated, Federal agencies, through the section 7 consultation process, must also consult with the Service on actions that are likely to result in the destruction or adverse modification of critical habitat. For each section 7 consultation, we already review the direct and indirect effects of the proposed projects on the beach mice and currently designated habitat, and will continue to do so for revised critical habitat. A critical habitat designation does not create a separate process, and timelines do not change.

Our assessment of impacts to habitat is nothing new. In fact, we track the take of ABM through the loss of habitat and have always done this, even in areas outside of the original critical habitat designation, through the use of our ABM habitat maps (see Comment 13).

(15) *Comment:* One commenter asked if designation of critical habitat would preclude an individual from reconstructing or repairing a house following hurricanes.

*Our Response:* Just as with previous storms, homeowners can rebuild their structures within their previous footprints without the need for consultation, permits, or mitigation. If a homeowner wishes to expand the footprint of the structure during the rebuild and this will impact previously undeveloped ABM habitat, we recommend that the homeowner apply for an ITP (regardless of whether the ABM habitat is designated critical). Please contact the Daphne Field Office (see **ADDRESSES** or **FOR FURTHER INFORMATION CONTACT**) for more information on ITPs and HCPs.

(16) *Comment:* One commenter asked what would happen if a lot owner had received a ''clearance'' letter from the Service stating that no ITP was required but then has his or her property designated as critical habitat.

*Our Response:* Landowners requesting technical assistance from the Service may receive such a letter if review of their project by Service personnel (either through on-site or in-house investigation) determines that the parcel falls outside the boundaries of potential ABM habitat (see Comment 13 for more discussion on ABM habitat mapping). When areas are investigated and found to not contain ABM habitat, they are removed from our ABM habitat maps. Because the proposed critical habitat was based on these ABM habitat maps, it is not likely (though not impossible) that lots with clearance letters appeared in the proposed designation. If a lot with a clearance letter does appear, it may have been an error, and we recommend that the homeowner contact the Daphne Field Office (see **ADDRESSES**).

(17) *Comment:* One commenter questioned why the Service is designating critical habitat when we admit that we have found it to be of little value.

*Our Response:* While attention to and protection of habitat are paramount to successful conservation actions, the role that designation of critical habitat plays in protecting the habitat of listed species is often misunderstood. A designation of critical habitat does not create a preserve or refuge. It does not mandate funding for habitat protection or restoration. It simply requires that Federal agencies consult with the Service on actions that could adversely modify or destroy designated critical habitat. Federal agencies are already required to consult with the Service on proposed actions that may adversely affect or jeopardize threatened and endangered species, regardless of whether or not there is critical habitat. Furthermore, we monitor the health of ABM populations through the loss of habitat, regardless of whether or not that habitat is designated as critical. Critical habitat does provide some non-regulatory benefits to the species by informing the public of areas that are important for species recovery and where conservation actions would be most effective. However, because of the enormous time, cost, complexity, and potential for controversy associated with critical habitat, we have found that there is much more value to directing limited conservation monies to listing new species under the Act, and developing cooperative agreements to

protect them. We have been inundated with lawsuits for our failure to designate critical habitat and face a growing number of lawsuits challenging our designations. This revision of critical habitat was brought about by a petition to revise critical habitat and subsequent legal action. This cycle appears endless and keeps us from focusing scarce conservation resources where they are most needed. Nonetheless, under section 4(a) of the Act, we are required to designate critical habitat concurrently with listing a species as endangered or threatened to the maximum extent prudent and determinable.

(18) *Comment:* One commenter said that the Service was wrong in saying that a clear ''Federal nexus'' (71 FR 5516, 5530) exists on HCP/ITP sites. The commenter maintains that the only Federal involvement that remains is the Service's ability to enforce ITP conditions.

*Our Response:* We used the term nexus (a synonym for connection or link) to demonstrate that once ITPs are issued, the Service is still involved in monitoring permittee compliance with permit terms and conditions on sites and retains the ability to enforce ITP conditions. We have rewritten this text and omitted the term nexus, which is frequently used in section 7 consultations, to avoid any further confusion.

(19) *Comment:* One commenter stated that the habitat for this species is under such pressure that, unless regulations protect habitat, it is likely that the subspecies will decline.

*Our Response:* We acknowledge that loss and fragmentation of habitat is one of the main threats to ABM (71 FR 5516; February 1, 2006; p. 5518). Please refer to our response to Comment 17 for more information on the regulatory value of critical habitat.

*Specific Comments Related to Suggested Alternatives to Designating Critical Habitat*

(20) *Comment:* Several commenters believe that the Federal government presently owns sufficient habitat for ABM survival and recovery.

*Our Response:* We have determined that 2,281 ac (923 ha) of land are essential to ABM conservation. Roughly 50 percent of this is public land owned by the Federal government. The majority of this (47 percent) is owned by the Service and located on the Perdue Unit of Bon Secour National Wildlife Refuge, but lesser amounts include approximately 30 ac (12 ha) of Refuge land within Fort Morgan State Historic Site and Bureau of Land Management (BLM) properties spread throughout the middle of the Fort Morgan Peninsula. ABM habitat in the Perdue Unit does not meet the definition of critical habitat under section 3(5)(A) of the Act because it is protected under the Refuge's Comprehensive Conservation Plan (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section for more details). The remainder of the Federal lands identified as essential to the conservation of the species are included as critical habitat.

Of the various federally owned parcels on the Fort Morgan Peninsula, the Perdue Unit is the only Federal land containing all of the PCEs. It likewise sustains an ABM population. However, the Perdue Unit is just one of several ABM populations, and many studies indicate the importance of multiple populations to species recovery. Conservation of a species over a range of habitat types where it is known to occur reduces the chance of losing disjunct populations, which represent important conservation value for their adaptation to local environmental conditions and their genetic uniqueness (Fahrig and Merriam 1994, p. 50). Preservation of natural populations throughout the range of each subspecies is therefore crucial, as the loss of a population of beach mice can result in a permanent loss of alleles (Wooten & Holler 1999, p. 17). This loss of genetic variability cannot be regained through translocations or other efforts.

We believe that private lands are essential to the conservation of multiple populations and therefore essential to conservation of the subspecies. Two population viability analyses conducted on the ABM support this theory. Oli et al. (2001, pp. 113–114) suggest that when hurricanes are considered, even the stable ABM population at the Perdue Unit is at ''substantial risk.'' A Population Viability Analysis (PVA) conducted by the Conservation Breeding Specialist Group (Vortex model) likewise shows the importance of both total overall habitat, and habitat continuity. Without dispersal among public lands through private lands, the PVA results project the ABM to have a 41.2 percent ± 1.1 percent likelihood of extinction (Traylor-Holzer 2006, p. 20). If all privately owned habitat between the public lands is lost, the estimate of probability of extinction increases (Traylor-Holzer 2006, p. 20). There are many limitations with population viability analyses, and we must view estimates of extinction probability with caution (Reed et al. 2006; Morris and Doak 2002, pp. 12–13). However, we believe that these estimates emphasize the importance of core populations and habitat continuity. This maintenance of both core populations and habitat continuity would not be possible without the conservation of habitat on private lands connecting the various federally owned properties.

(21) *Comment:* Several commenters suggested that the ITPs issued to Beach Club West and Gulf Highlands developments (but currently held in abeyance) should have been excluded either because they do not meet the definition of critical habitat in 3(5)(A) or they are eligible for exclusion under 4(b)(2).

*Our Response:* These developments have been excluded from the final designation of critical habitat under section 4(b)(2) of the Act based on their conservation efforts (including the habitat conservation plan). Please see the ''Application of Exclusions Under Section 4(b)(2) of the Act'' section for more information.

(22) *Comment:* One commenter questioned why the areas south (seaward) of ADEM's Coastal Construction Control line (CCCL) were not excluded because of the baseline protections.

*Our Response:* While it is true areas seaward of the CCCL receive protection from the State, they do not qualify for exclusion under section 4(b)(2) of the Act. There is no species-specific management plan addressing ABM issues (see Comment 2 or ''Application of Exclusions Under Section 4(b)(2) of the Act'' section for more information on these criteria). Furthermore, many threats to beach mouse conservation, including artificial lighting and extensive recreational pressure, still persist there. Therefore, these areas have been included as critical habitat.

(23) *Comment:* Two commenters suggested that the Service should designate only the conservation areas of sites with a Service-approved HCP.

*Our Response:* If an area meets our criteria for designating ABM critical habitat (see Comment 2), then it is eligible for inclusion in critical habitat. If the area is covered by a Service-approved HCP, then it may be removed from the designation under section 4(b)(2) of the Act if we determine that the benefits of excluding HCPs outweigh the benefits of inclusion (see Comment 2 and ''Application of Exclusions Under Section 4(b)(2) of the Act'' section). Developed areas (for example, building footprints and parking areas) associated with the HCP do not possess natural ABM habitat and are, therefore, not even considered for designation. As such, it is specifically the conservation areas associated with HCPs that are excluded under section 4(b)(2).

(24) *Comment:* Several commenters noted that the French Caribbean development was not mentioned as critical habitat and maintain that it is eligible for exclusion under 4(b)(2) of the Act.

*Our Response:* The Service completed a formal consultation under section 7 of the Act on January 20, 2000, with the U.S. Army Corps of Engineers (USACOE) for the French Caribbean resort. We issued an incidental take exemption for all ABM within a 3.7 acre project impact area. The wetland fill permit issued for this project expired in 2005. However, the developers of Beach Club West and Gulf Highlands have agreed not to pursue this project, and the French Caribbean site will now be part of the conservation area in their HCP. It is being excluded under section 4(b)(2) of the Act (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section for more details).

(25) *Comment:* One commenter suggested that conservation efforts should be voluntary and involve partnerships instead of designating lands as critical habitat.

*Our Response:* The Service encourages voluntary conservation efforts and partnerships that would provide management or enhancement of habitat for threatened and endangered species. However, designation of critical habitat does not influence the extent of conservation efforts recommended for endangered species habitat on public lands. One benefit of the critical habitat designation process is the increased awareness to the public of the importance that public lands have for the species. This often leads to constructive interagency discussions, creative solutions to public use and habitat management issues, and strengthened partnerships.

(26) *Comment:* One commenter suggested that the proposed rangewide HCP with the City of Gulf Shores should be excluded from critical habitat under section 4(b)(2) to promote regulatory certainty and cooperative conservation.

*Our Response:* The State of Alabama was awarded monies under our Habitat Conservation Planning grants program to develop, in conjunction with the Service, a rangewide HCP for single-family home and duplex developments. The funds were provided to the City of Gulf Shores. This HCP is still in draft form and has not yet undergone public review. The draft HCP could potentially cover all future single-family and duplex projects on the Fort Morgan Peninsula (approximately 700 lots), and would substantially streamline the HCP–ITP process for this class of development. Existing landowners, and those wishing to add to their houses, would also be eligible for inclusion. Upon signing a certificate of inclusion into the rangewide program, landowners would be required to pay a one-time conservation fee that would apply towards ABM conservation projects such as cogongrass (*Imperata cylindrica*) removal or the construction of boardwalks. The rangewide HCP would, therefore, provide more mitigation funding and options than traditional, individual ITPs.

While we acknowledge the City of Gulf Shores' efforts in developing this draft plan, we are unable to exclude it from critical habitat at this time for two reasons: (1) The plan has not yet been completed or undergone public review and (2) enrollment in the plan is voluntary, and there is, therefore, no way to know which landowners will choose to enroll (this is further complicated by areas having the potential to be rezoned to higher density development). The designation of critical habitat should not jeopardize the development of the rangewide HCP. The Service, in conducting its biological review of the rangewide HCP, will simply have to determine if the proposed project will adversely modify or destroy designated critical habitat. We already have to determine whether or not the project will adversely affect or jeopardize the ABM, an action informed by analyzing impacts to ABM habitat, regardless of whether or not critical habitat is designated. We look forward to continuing our conservation relationship (and HCP–ITP streamlining efforts) with the City of Gulf Shores and working with it to ensure that the rangewide HCP does not adversely modify critical habitat.

(27) *Comment:* One commenter suggested that the Service develop a procedure for exempting (excluding) future HCPs from designated critical habitat.

*Our Response:* Critical habitat is a rulemaking process, and any future changes to critical habitat would involve additional rulemaking. Because this is expensive and consumes large amounts of already limited staff time, it is not practical to exclude every future approved HCP case by case. We can only exclude those properties that meet our standards for either exemption or exclusion under 3(5)(A) or 4(b)(2) of the Act before the publication date of this final rule.

(28) *Comment:* One commenter stated that the failure to exclude areas from critical habitat will result in a more onerous (and far less effective) Act by damaging relationships between the Service and the public and imposing unnecessary regulation.

*Our Response:* We agree that critical habitat is often misunderstood and results in controversy (see our response to Comment 17). However, we will continue to work with the general public and affected agencies to recover the ABM and assist landowners with the environmental review of their projects to the best of our ability. We are excluding 51 areas covered by HCPs–ITPs from this designation (see response to comment 9 and the ''Application of Exclusions Under Section 4(b)(2) of the Act'' section).

*Comments Related to Criteria and Methods Used To Designate Critical Habitat*

(29) *Comment:* One commenter stated that the designation appears arbitrary and questions how areas were selected for designation.

*Our Response:* We began our designation by determining those areas known to be occupied by the species at the time of listing and those found to be occupied since listing. This was determined by consulting live-trapping data, published literature, the original listing rule, and our ABM habitat map (see response to Comment 13). Within these areas, we then determined the subset of acreage that possessed one or more of the PCEs. This was determined through site visits, the review of 2001 and 2005 aerial photography, LIDAR topographic data, and hurricane storm surge models. We then removed any areas that were highly isolated, fragmented, or degraded. After this, we were left with 2,281 ac (923 ha) of ABM habitat considered to be essential to the conservation of the subspecies. After removing areas that do not meet the definition of critical habitat under section 3(5)(A) of the Act because special management is not needed, or that are eligible for exclusion under section 4(b)(2), we arrive at the current designation of 1,211 ac (490 ha) of critical habitat. Please see the ''Criteria Used To Identify Critical Habitat'' section for more information. Please note that not all ABM habitat meets these criteria. Many areas that are small and isolated (for example, along S.R. 180 north of the Perdue Unit), degraded by anthropogenic disturbances such as gravel contamination, are highly fragmented or have light pollution (for example, areas in the Little Point Clear Unit between the S.R. 180 corridor and the CCCL line) may contain mice, but may be population sinks and therefore, do not have the features that are essential to the conservation of the species. We are identifying the subset of

ABM habitat that is truly essential to the continued survival and conservation of the subspecies.

(30) *Comment:* One commenter stated that the proposed critical habitat seems to be based on the Vortex population viability analysis conducted for the subspecies, which has problems, including an unrealistically high estimated probability of persistence.

*Our Response:* Our criteria for deciding what areas would be included in the designation did not involve the Vortex model directly, but rather an analysis of trapping records in conjunction with mapping tools (please see previous comment). However, the results from Vortex, coupled with other PVAs (Oli et al. 2001) and published literature, led us to incorporate habitat continuity into the designation.

(31) *Comment:* Two commenters questioned how the exclusion of habitat on the Refuge will not result in the extinction of the subspecies.

*Our Response:* In the proposed rule, we stated that approximately 1,063 (420 ha) of ABM habitat on the Perdue Unit of the Refuge was essential to ABM conservation, but did not meet the definition of critical habitat under section 3(5)(A) of the Act (71 FR 5516, 5529). We have reduced this area to 807 ac (327 ha) based on new tracking (Leblanc D., Service, Personal Communication 2006) and trapping (Falcy 2006) data, detailed review of 2005 aerial photography, and subsequent site visits. Much of the northwestern Perdue Unit is densely vegetated and highly fragmented by wetlands and cannot be considered essential to ABM conservation at this time. The 807 acres (327 ha) that we identified as essential to the conservation of the species simply do not meet the definition of critical habitat under 3(5)(A) of the Act. These areas are part of a National Wildlife Refuge that manages specifically for ABM conservation, and therefore do not require special management considerations or protection. They are available for ABM conservation in perpetuity, and their exemption from critical habitat has no bearing on the continued survival and recovery of the species.

(32) *Comment:* Several commenters maintained that more habitat needs to be included, or that conservation is not just described in the Act as protecting the status quo but as eventually removing the subspecies from the list (recovery).

*Our Response:* Through this critical habitat revision, we have identified all of the areas that we believe, according to the best available science at this time, have the features that are essential to the conservation of the species or, for areas not occupied at the time of listing, that are essential to the conservation of the species. These areas total 2,281 acres. Of this acreage, we are designating those areas that meet the definition of critical habitat (see Comment 2) and that are not protected by secure habitat conservation plans. Some areas that are occupied by ABM are not included in the designation. These areas do not meet the criteria for inclusion and, therefore, do not have the features that are essential to the conservation of the species. The designation, when combined with ABM habitat on the Perdue Unit of the Refuge and the areas excluded because of conservation plans, represents the best remaining coastal dune and scrub habitat in coastal Alabama, and those areas that contain the physical and biological features essential to the conservation of the subspecies.

(33) *Comment:* Several commenters requested that we remove our statement that ''a benefit of excluding HCPs is to promote additional conservation agreements and actions that we would not be able to achieve without our partners.''

*Our Response:* We believe this statement to be true. There is no need to designate areas that are included in an HCP that provides conservation benefit to the species. The designation of critical habitat serves no additive value and can damage existing relationships between the permittee and our agency.

(34) *Comment:* One commenter questioned why only a small subset of the acreage identified as ABM habitat is being designated as critical habitat.

*Our Response:* Not all areas where ABM have been captured meet our criteria for inclusion into the designation. Please refer to Comments 13 and 29 for more information.

(35) *Comment:* One commenter maintains that critical habitat was designated south of the CCCL and along the S.R. 180 corridor because it was convenient. Several commenters questioned the value of the habitat south of the CCCL.

*Our Response:* Habitat was designated between S.R. 180 and the CCCL within Unit 2 because it provides natural connectivity between two core ABM populations: Fort Morgan and the Gulf Highlands-Perdue Unit. These stretches of frontal dunes, scrub habitat, and open sand flats contain less gravel debris, human structures, and artificial light than the neighborhoods between the two east-west pathways. Unit 2 was designated primarily on the basis of PCE 4, while some areas also contain PCEs 2 and 3. Areas south of the CCCL, while overwashed and flattened by multiple storms in 2004 and 2005, are recovering natural topography and vegetation and provide both ABM habitat and east-west habitat continuity (PCEs 2 and 4). See ''Primary Constituent Elements'' discussion.

(36) *Comment:* One commenter stated that the proposal does not explain PCEs in sufficient detail to allow their protection during the consultation process.

*Our Response:* The original PCEs for the ABM were defined as ''dunes and interdunal areas, and associated grasses and shrubs that provide food and cover (June 6, 1985, 50 FR 23884).'' We believe that the new PCEs contain greater detail, are more comprehensive, and represent a significant improvement over the PCEs from the original designation. They also incorporate disturbances from storms, allowing PCEs to be readily identified even following damage from tropical cyclones and freshwater flooding. We therefore believe the PCEs to be easily identified (under all conditions) during the consultation process.

(37) *Comment:* Several commenters suggested removing PCE 5 on the basis that a natural light regime could be found in any location that is not developed.

*Our Response:* Excessive artificial light has been shown to be detrimental to beach mice, and, therefore, a natural light regime is a physical feature essential to ABM conservation. An area was considered for designation where it possesses one or more of the PCEs and at least one of the following characteristics: (1) Supports a core population of beach mice; (2) was occupied by ABM at the time of listing; (3) or is currently occupied by ABM and has been determined to be essential to the conservation of the species. Therefore, no areas were identified as essential to ABM conservation based solely on a natural light regime.

*Comments Related to Mapping*

(38) *Comment:* One commenter asked how much of the Surfside Shores subdivision is within the critical habitat boundaries.

*Our Response:* We are designating approximately 75 ac (30 ha) of ABM habitat within Surfside Shores. Designated critical habitat generally stretches from the mean high water line landward to the wetland swale located between Driftwood and Palmetto Drives, and from Kiva Dunes in the east to Morgantown in the west. Housing footprints, driveways, and small areas or lots that do not contain one or more

PCEs are not included in the designation. UTM coordinates and general maps of the designation are found below. Consult our Web site at *http://www.fws.gov/daphne,* or visit the Refuge headquarters, 12295 State Highway 180, Gulf Shores, or our Daphne Field Office (see **ADDRESSES**) for detailed aerial photography outlining the designation.

(39) *Comment:* One commenter stated that the proposed rule should have contained maps and details of the original designation, so that readers could better assess changes between the original (1985) and revised designations.

*Our Response:* The original designation of critical habitat, encompassing approximately 1,034 acres of primary and secondary dunes and 10.6 miles (17 km) of coastline, was published in the **Federal Register** on June 6, 1985 (50 FR 23872). Maps of the original designation are in the public domain and, therefore, were not reprinted. These maps were available for public inspection at the field office during both comment periods.

(40) *Comment:* One commenter stated that the area north of Adair Lane in the Cabana Beach subdivision did not contain PCEs.

*Our Response:* We visited Adair Lane and agree with this assessment. Habitat north of Adair Lane consists of a wetland swale with intermixed maritime forest dominated by young pine trees. We have revised the designation in this area to include only those areas south of Adair Lane. We also removed an area along the S.R. 180 corridor between Veterans Road and Martinique that is actually maritime forest, and does not contain the requisite PCEs. These changes resulted in approximately 10 ac (4 ha) being removed from the designation. Please see the ''Summary of Changes from Proposed Rule'' section and maps for more information.

(41) *Comment:* One commenter pointed out that a small portion of land along S.R. 180 identified as not meeting the definition of critical habitat because it is part of Refuge property is actually private. Two commenters maintain there are plans to develop this property, and, therefore, it must be included in critical habitat.

*Our Response:* We have reduced the area of the Refuge identified as having the features essential to the conservation of the species from 1,063 (430) ha to 807 acres based on new information (see Comment 31 and ''Summary of Changes from Proposed Rule'' section). Approximately 20 ac (8 ha) of ABM habitat exists in the referenced area, of which approximately 13 ac (5 ha) are in private ownership. This habitat patch is approximately 0.4 miles (0.6 kilometers) east and 0.4 miles (0.6 kilometers) north of other areas identified as essential to the conservation of the subspecies, and therefore isolated. We have eliminated it from critical habitat. Trapping along the S.R. 180 right-of-way here in 2003 yielded no beach mouse captures (Farris 2003). However, this area is still included in our ABM habitat maps (see Comment 13) and any mice occurring there are protected under section 7 or section 9 of the Act. Impacts to ABM habitat there will still have to be reviewed by the Service.

(42) *Comment:* One commenter questioned our assertion that the proposed critical habitat was spread evenly throughout the historic range of the subspecies.

*Our Response:* In the proposed rule (February 1, 2006; 71 FR 5516), we suggested that critical habitat was spread evenly throughout the historic range of the subspecies. This was in error. The critical habitat is distributed throughout the western range of the subspecies, with a small portion (Unit 5) being found in the center of the historic range. Much of the eastern and central portions of the range no longer possess ABM or ABM habitat due to development.

*Comments Related to Site-Specific Areas*

(43) *Comment:* Critical habitat designation along the S.R. 180 (Fort Morgan Road) corridor would preclude utility companies from rapidly accessing lines in the event of a water or sewer line break.

*Our Response:* Critical habitat designation would not interfere with these activities. When critical habitat is designated, Federal agencies are required to confer with the Service on any action (including actions that agencies carry out themselves, fund, or authorize) that is likely to result in destruction or adverse modification of critical habitat. The routine maintenance or emergency repair of water and sewer lines adjacent to Fort Morgan Road is not a Federal action. Furthermore, utility line maintenance may actually benefit ABM conservation by thinning out dense vegetation (see Unit 2 description below).

(44) *Comment:* Several commenters questioned why Gulf State Park should be included in the proposal when there are currently no ABM and the habitat is susceptible to flooding during hurricane events.

*Our Response:* Critical habitat in Gulf State Park represents the easternmost extent of the present-day ABM range. Gulf State Park was occupied at the time of listing, and possesses all PCEs except PCE 5. While ABM have twice been extirpated from the site (see Unit 5 description below) it nonetheless possesses the physical and biological features essential to the conservation of the subspecies. Hurricanes are one of the main threats to the ABM (June 6, 1985; 50 FR 23879–80; Service 2004, 2005). Because the ABM is a narrowly endemic subspecies restricted to less than 34 miles of coastline, one major hurricane could easily affect the entire range of the species. Impacts within individual hurricanes, however, can vary greatly in intensity, and wide fluctuations in storm surge and wave run-up are possible depending on bathymetry, beach configuration, and variations in wind speed and waves within the storm. Protecting multiple populations, representative of the natural range of the subspecies, therefore, would likely increase the chance that at least one population within the range of a subspecies will survive episodic storm events and persist while vegetation and dune structure recover. The history of the closely related Perdido Key beach mouse clearly illustrates the need for multiple populations (a now potentially extirpated population was the source of the two remaining populations of the subspecies (Holler et al. 1989, pp. 398–399)). Furthermore, Gulf State Park, which, although isolated, is capable of holding a self-sustaining population of mice due to its size, could prove important in the event of unforeseen threats to connected populations on the Fort Morgan Peninsula, such as disease.

(45) *Comment:* Several commenters questioned why areas of the S.R. 180 right-of-way south of the road were designated, but areas to the north were not.

*Our Response:* The State of Alabama owns the S.R. 180 right-of-way. State ownership extends 160 ft (49 m) both north and south of the roadway centerline. Scrub habitat to the south is generally more open and, therefore, more suitable for ABM. Accordingly, it was included in this revised designation. In fact, several more open areas to the north were also included, especially in the western portions of Unit 2 and Unit 3. We have updated our Unit 2 and 3 descriptions to include commentary on these small sections north of the roadway.

(46) *Comment:* One commenter stated that feral cats are a major threat to ABM and provided an example of a cat population within Gulf State Park on Perdido Key at the entrance to Ono Island.

*Our Response:* This comment refers to a problem with a feral cat colony on Perdido Key, which is outside the range of the ABM and involves the endangered Perdido Key beach mouse (*Peromyscus polionotus trissyllepsis*). The comment was addressed in the recent final rule designating critical habitat for three Gulf Coast beach mice, which included the Perdido Key beach mouse (October 12, 2006; 71 FR 60237). We concur that feral cats are a major threat to beach mice. Cat colonies may have led to the extirpation of Alabama and Perdido Key beach mice (Linzey 1978, p. 20; Holliman 1983, p. 128). For this reason, incidental take permits issued for ABM contain conditions specifically addressing control of cats.

*Specific Comments Related to the Draft Economic Analysis (DEA)*

(47) *Comment:* Several commenters believe that the Service should not take economic impacts into consideration when designating critical habitat.

*Our Response:* 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 to consider and how much weight will be given to any factor.

(48) *Comment:* One commenter stated that the Service's failure to release the economic analysis simultaneously with the proposed rule frustrates the public's attempt to meaningfully comment on the critical habitat being proposed.

*Our Response:* We acknowledge this concern; however, the Service strives to keep the comment period on a draft economic analysis open as long as possible to allow the public time to review and comment on the draft economic analysis. The public was given a chance to comment on the DEA concerning our proposed revised critical habitat designation for ABM during our second public comment period from August 8, 2006, to September 7, 2006.

(49) *Comment:* Several commenters stated that the Service has already made exclusions based on economics prior to the availability of a DEA (and in violation of the Administrative Procedure Act).

*Our Response:* The exclusions proposed under section 4(b)(2) of the Act in the proposed rule were based on secure HCPs, not on economic data. We did not have a DEA ready for public review until August 8, 2006, and the comment period on the DEA did not end until September 7, 2006.

(50) *Comment:* One commenter states it is puzzling that the Service is imposing economic hardship in light of other Federal government tax incentives (Gulf Opportunity Zone Act of 2005).

*Our Response:* This designation is non-discretionary and was in motion well before the Gulf Zone Act of 2005. We have considered the economic impacts of the designation.

(51) *Comment:* One commenter requests the areas covered by the proposed rangewide HCP be excluded from critical habitat due to economic reasons.

*Our Response:* Please refer to Comment 26. Because enrollment in the proposed rangewide HCP would be voluntary, we do not know which areas would actually be covered by it.

(52) *Comment:* One commenter asserts the DEA does not support certification under the Regulatory Flexibility Act, and an Initial Regulatory Flexibility Analysis should be prepared and reviewed by the public.

*Our Response:* We have considered whether this designation would result in a significant economic effect on a substantial number of small entities. We have determined that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include: Corps permits, permits we may issue under section 10(a)(1)(B) of the Act (ITPs), FHA funding for road improvements, and activities funded by FEMA. A regulatory flexibility analysis is not required. Please refer to the Required Determinations section for further information.

(53) *Comment:* One commenter states the mission of the Service is to protect wildlife, not give considerations to economic impact.

*Our Response:* Although economics may not be considered when listing a species, Congress has expressly required this consideration when designating critical habitat.

(54) *Comment:* One commenter expressed concern that the estimated costs for Beach Club West and Gulf Highlands were overstated and that this may result in the two developments incorrectly being excluded from critical habitat for economic reasons.

*Our Response:* Section 3 of the final economic analysis (EA) estimates impacts to the Beach Club West and Gulf Highlands development projects. The developments were analyzed in the context of potential costs which they may incur as a result of ABM conservation efforts, but they were not excluded for economic reasons.

(55) *Comment:* Multiple commenters assert that the DEA underestimates the economic impact of critical habitat on specific projects and the local economy, as described in a study by Klages (2006). The Klages study is a report commissioned by private and public entities with an interest in development activities on the Fort Morgan Peninsula. The study estimates the impacts on the local economies of Baldwin County and Gulf Shores, Alabama, that could be generated by proposed development of properties on the Fort Morgan Peninsula potentially affected by the proposed critical habitat designation for the ABM.

*Our Response:* Section 3 of the EA provides a discussion of the Klages study. As stated in Section 3 of the EA, the Klages study provides useful context for understanding development activity along the peninsula. Both the Klages study and the EA rely upon the same information concerning the extent of developable properties and the type of development that may occur. The Klages study and the EA differ, however, in certain base assumptions and methods for quantifying impacts. Most significantly, the EA assumes that development will proceed, but that ABM conservation efforts will cause incremental delays in development activities and land set-asides, or lower the number of residential units, as well as produce other direct costs. The Klages study posits that no development will occur on vacant parcels within critical habitat designation, and then employs a form of input-output modeling to measure revenue and other effects of foregone development. In the Klages study, it is unclear what specific properties are determined to be precluded from development. Therefore, the specific study area may be different than the critical habitat designation. These differences affect the impact estimates as follows: First, the impacts identified in the Klages study are higher than those presented in the EA. The Service agrees that, while potential impacts on development are significant,

it is unlikely that all development activity would be prohibited within the bounds of critical habitat. Despite these differences in absolute impacts, however, the study and the EA are consistent with respect to ''relative'' impacts across different parcels and different types of development. That is, development locations identified as experiencing high impacts in the Klages study also experience high impacts in this economic analysis. The same result holds for locations identified as having relatively low impacts.

(56) *Comment:* Various commenters stated the economic analysis should not be based on the Klages study because it was paid for by developers and is, therefore, biased.

*Our Response:* The DEA is not based on the Klages study. Section 3 of the DEA provides a discussion of the Klages study; however, the DEA does not use the information in the Klages study to estimate impacts of conservation efforts for the ABM within critical habitat.

(57) *Comment:* One commenter states the economic analysis overestimates the economic impacts of critical habitat. Specifically, the commenter states no highway project will occur within the Highway 180 right-of-way, only a small number of projects will occur seaward of the construction control line (CCL), and there have been no residential housing units lost due to conservation efforts for the ABM.

*Our Response:* The DEA may overestimate the economic impact of critical habitat because it looks at all the costs of conserving beach mice. Some of the costs might occur even if critical habitat was not designated. However, as stated in Section 4 of the DEA, Alabama Department of Transportation plans to expand Highway 180 within the right-of-way. As discussed in the DEA, it is likely that State Route 180 can be widened within the existing right-of-way on the north side of the road with limited or no impact on ABM critical habitat, except along one quarter-mile to a half-mile of road. Second, as discussed in Appendix C, the DEA assumes no development will occur seaward of the CCL. Lastly, Section 3 of the DEA estimates ABM conservation efforts resulted in a reduction in approximately 66 residential housing units.

(58) *Comment:* One commenter writes the DEA underestimates the economic impacts of ABM critical habitat on development because it does not consider the stigma impacts on the marketability of property designated as critical habitat; does not consider the impacts of a potential reduction in the number of dwelling units which can be built; does not consider the reduction of market value of loss of proximity to beachfront; does not consider the alteration of amenities which can be packaged with the units; does not give consideration to the costs associated with delays; and does not consider costs associated with permit application.

*Our Response:* We agree that an economic analysis should incorporate costs associated with each of the categories referenced by the commenter. As described in Section 3 of the DEA, the conservation activities associated with the ABM may result in losses to developers and individual landowners by imposing the following costs: (1) Increased administrative costs to secure incidental take permits (ITPs), including associated project delay costs; (2) on-site project modification costs to protect the ABM; and (3) land value losses associated with development restrictions, i.e., required land setbacks or set-asides.

Ideally, a hedonic model of regional property values would be employed to estimate welfare losses associated with potential development constraints in critical habitat. This economic tool, that is, a hedonic model, measures the influence of amenities, disamenities, and regulations on land and housing prices and, in theory, could provide a direct measure of the effects associated with critical habitat arising from demand and supply factors (including the costs described above). To utilize a hedonic model data on property sales prices, structural and locational characteristics for the housing markets in the vicinity of ABM habitat would be required. However, these data are not available. Therefore, to estimate welfare losses associated with potential development constraints in designated areas, the economic analysis primarily relies on the direct compliance cost approach to quantify potential impacts of ABM conservation on development in critical habitat. To estimate losses associated with increased administrative costs and project modifications, we contacted area developers and other stakeholders to obtain cost information that can be applied to existing and potential development activities in units for critical habitat designation and areas proposed for exclusion. Given available information, the compliance cost approach is a reasonable method to determine the relative magnitude of conservation effort costs across parcels within critical habitat.

(59) *Comment:* One commenter asserts that the Service did not consider the economic losses associated with critical habitat in the context of hurricane recovery, specifically recovery following hurricane Katrina.

*Our Response:* The purpose of the economic analysis is to identify and analyze the potential economic impacts associated with the critical habitat designation for the federally listed ABM. Section 5 of the DEA outlines estimated past impacts from storms. It is not practicable to estimate future impacts of hurricanes for several reasons. First, although some models are available to predict storm events, these data are not sufficient to predict the likely human response to the damage and conservation efforts for the ABM. Accordingly, this analysis does not quantify costs of conservation efforts resulting from future storm damage. Second, not accounting for potential tropical storms and hurricanes is expected to have a downward impact on estimating total cost of conservation efforts for the ABM. Most responses to storm events will have little to do with the ABM critical habitat designation. For example, dune restoration and protection efforts (for example, beach nourishment) are a result of the storm event and not the ABM; however, some additional efforts may be required by the critical habitat designation, such as conducting a consultation. In addition, it is important to note that some conservation efforts for the ABM may result in dune protection to the extent that dune protection lessens storm damage.

(60) *Comment:* Several commenters request an economic analysis of proposed critical habitat for Planning District 25 only.

*Our Response:* As discussed in Section 1 of the DEA, the geographic scope of the economic analysis includes all areas proposed for critical habitat designation and areas proposed for exclusion. Therefore, the economic analysis considers impacts that may occur within Planning District 25 (Fort Morgan Peninsula) as well as outside this area (for example, Gulf State Park).

(61) *Comment:* Several commenters state the DEA underestimates the number of small entities in the development industry that may be affected and the burden the critical habitat may impose on these small entities.

*Our Response:* Because the Final Economic Analysis (FEA) is prospective in nature, we are unable to identify the specific developers undertaking projects in critical habitat in the next 20 years. The FEA assumes that project modification costs associated with ABM conservation efforts (for example, onsite set-asides, minimizing artificial lighting, and dune maintenance) will be

capitalized into the price of land and will be borne by the existing landowner, regardless of whether that landowner actually undertakes the development project themselves. Using the number of privately owned developable parcels (or lots) that intersect the revised critical habitat, approximately 137 landowners could be impacted by ABM conservation efforts. Many of these landowners may be individuals or families that are not registered businesses (for example, they may be holding the land as an investment). No North American Industry Classification System (NAICS) code exists for landowners, and the Small Business Administration does not provide a definition of small landowner. A lower bound estimate of the potential impact to small entities would be to assume that all existing landowners are not registered businesses, and, therefore, no impact on small entities is expected. To develop an upper bound estimate of the potential impacts on small entities, the FEA makes the conservative assumption that all of the private owners of developable lands in critical habitat impacted by future ABM conservation efforts will be developers. This assumption is likely to overstate the actual impacts to small development firms. The FEA estimates that less than two small developers may experience a reduction in revenues of 2.8 percent each year as a result of ABM conservation efforts in critical habitat. In addition, we acknowledge that some subcontractors to developers may meet the definition of a small business definition under the Regulatory Flexibility Act (5 U.S.C. 601–612) and may be affected by the impacts to development activities from critical habitat designation. These subcontractors are indirectly affected by ABM conservation efforts that directly affect the project proponent (the developer).

(62) *Comment:* One commenter wrote the DEA underestimates the amount of property that could potentially be developed as multi-family units.

*Our Response:* Appendix C of the DEA provides the methodology used to determine the type of development likely to occur within critical habitat. The DEA uses geographic information systems (GIS) software to estimate the maximum number of potential residential units that could be built in critical habitat under current Baldwin County, Alabama, zoning regulations, and future City of Gulf Shores, Alabama, zoning. Potential redevelopment areas are estimated using the 2003 study by Volkert & Associates, *Permitted or Potential Future Gulf-Front Multi-Family Development Locations, Fort Morgan Peninsula, Gulf Shores, Alabama.* The Volkert & Associates study identified lands that can physically and legally support multi-family development, irrespective of current zoning. No additional properties are expected to be capable of supporting multi-family development.

(63) *Comment:* Several commenters state the DEA does not consider all of the alternatives for Beach Club West and Gulf Highlands outlined in the Draft Environmental Impact Statement (DEIS) for these projects.

*Our Response:* The DEA estimates impacts based on activities that are reasonably foreseeable, which include, but are not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Section 3 of the DEA estimates costs of ABM conservation efforts for the Beach Club West and Gulf Highlands projects associated with the most reasonably foreseeable project, the Preferred Alternative provided in the DEIS.

(64) *Comment:* Several commenters assert the DEA only focuses on two developments, Beach Club West and Gulf Highlands.

*Our Response:* The DEA estimates potential impacts on many activities, including a wide range of development activities, road construction and maintenance activities, tropical storms and hurricanes, species management activities, and recreation activities. Most anticipated costs are associated with residential and commercial development (approximately 99 percent). Of these, 70 to 93 percent are associated with the Beach Club West and Gulf Highlands projects.

(65) *Comment:* One commenter stated the DEA appears to be based on the 2003 Volkert & Associates analysis. However, a 2005 study is available and should be used.

*Our Response:* As discussed in Appendix C of the DEA, Volkert & Associates developed a GIS layer identifying vacant single-family lots within ABM habitat for the City of Gulf Shores Range-Wide HCP in 2005. This information was used in the DEA to estimate the number of single family homes likely to be developed under the City of Gulf Shores Range-Wide HCP within critical habitat. In 2003, Volkert & Associates developed a separate GIS layer to identify areas on the Fort Morgan Peninsula that may legally and physically support multi-family development (irrespective of current zoning). This layer identifies parcels that are legally (for example, covenants, easements) or physically (for example, wetlands) incapable of development. The 2003 data were used to estimate the potential for redevelopment as multi-family within critical habitat. An updated (2005) version of this data layer is not available.

*Comments From States*

Section 4(i) of the Act states that the Secretary shall submit to the State agency a written justification for his failure to adopt a regulation consistent with the agency's comments or petition. Comments were received from the State of Alabama's Department of Transportation (ALDOT) and Department of Conservation and Natural Resources (ADCNR).

(66) *Comment:* ALDOT requests the exclusion of the S.R. 180 (Fort Morgan Road) right-of-way from the critical habitat because of future plans to widen the corridor to address increasing traffic volumes and safety concerns.

*Our Response:* The S.R. 180 right-of-way is owned by the State of Alabama and extends 160 ft (49 m) south of the roadway centerline. Trapping data (Farris 2003) demonstrated mice occupancy along most of the right-of-way from the Fort Morgan Historic Site to just west of The Beach Club. These areas, which consist of high elevation scrub habitat, low elevation scrub habitat, and open sandy habitat serving to connect larger, more contiguous areas designated as critical habitat, are important for east-west movement of mice along the peninsula. This area is not covered under a ABM-specific management plan and, as such, does not meet our criteria for exclusion under section 4(b)(2) of the Act due to conservation plans. We have had discussions with ALDOT regarding revised critical habitat and the widening project and will continue to work with ALDOT to ensure that projects proceed with minimal impact to designated critical habitat.

(67) *Comment:* ADCNR asked how the designation of critical habitat would affect the sale and permitting of driveway easements on State-owned land along S.R. 180.

*Our Response:* We recommend that landowners planning to construct driveways through ABM habitat apply for an ITP from the Service regardless of whether or not there is critical habitat (please see Comment 13 for a discussion of the difference between ABM habitat and critical habitat). Critical habitat only applies to Federal actions; therefore, driveway construction would not trigger consultation with the Service; however, since take of mice may occur, we recommend an ITP.

(68) *Comment:* ADCNR expressed concern that the areas proposed for exclusion from critical habitat do not match up with its proposed plans for the proposed Gulf State Park hotel and convention center.

*Our Response:* In 2004, we approved an HCP and issued an ITP for the upcoming demolition and reconstruction of a new hotel and convention center complex south of S.R. 182 on Gulf State Park. ADCNR applied for and received a modification to this permit in 2005 to allow for adjustments to proposed parking lots and building footprints. ADCNR has now applied for an additional permit modification to include moving and rebuilding the pier that was destroyed by Hurricane Ivan, and slight changes to its proposed design for the parking and hotel and convention center facilities. The Service has attended several meetings with ADCNR staff regarding project construction and the minimization of impact to both existing and revised critical habitat. In its current proposal, ADCNR has outlined plans for a combined facility that features state-of-the-art, wildlife-friendly lighting and reduces overall ABM habitat impacts by 2 ac (0.8 ha). We have modified this final rule to reflect this second permit modification. Please refer to the ''Application of Exclusions Under Section 4(b)(2) of the Act'' section and Map 6 for more information.

**Summary of Changes From Proposed Rule**

In preparing this final critical habitat designation for the ABM, we reviewed and considered comments from the public on the proposed designation of critical habitat published on February 1, 2006 (71 FR 5516). We likewise reviewed and considered comments from our announcement of revisions to the proposal, the availability of the DEA, and public hearing published on August 8, 2006 (71 FR 44976). As a result of the comments and a reevaluation of the revised proposed critical habitat boundaries, we made changes to our proposed designation, as follows:

(1) We revised the critical habitat units based on peer review, public comments, and biological information received during the public comment periods. We adjusted the boundaries of Unit 3 to remove 10 acres along the S.R. 180 right-of-way immediately west of Martinique, and in the Cabana Beach subdivision north of Adair Lane because these areas do not meet our criteria for inclusion.

(2) We realigned or reduced the area considered to be essential to the conservation of species on the Perdue Unit of the Bon Secour National Wildlife Refuge from 1,063 ac (430 ha) to 807 ac (327 ha), based on site visits, a detailed review of 2005 aerial photography, and recent tracking and trapping data (see Comment 31). However, these areas within the Perdue Unit still do not meet the definition of critical habitat under section 3(5)(A) of the Act because they are protected under the Refuge's CCP (they do not require special management considerations or protection ) (see ''Application of Section 3(5)(A) of the Act'' for more information).

(3) Under section 4(b)(2) of the Act, we did not designate the areas totaling 108 ac (44 ha) covered by the HCP for the Beach Club West and Gulf Highlands because the HCP provides for ABM conservation (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section for more detail).

(4) We have modified the boundaries of the designation for Unit 5: Gulf State Park to reflect its recent ITP modification. This modification resulted in the addition of 2 ac (0.8 ha) to Unit 5 (see Comment 68 and the ''Application of Exclusions Under Section 4(b)(2) of the Act '' section for more information).

**Critical Habitat**

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

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 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 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 on which are found the primary constituent elements, 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 pursuant to section 4(b)(2) of the Act.) Furthermore, 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 currently occupied by the species but was not known to be occupied at the time of listing will likely be essential to the conservation of the species and, therefore, typically be included in the critical habitat designation.

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

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

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

Areas that support populations, 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. 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 call for a different outcome.

## Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider those physical and biological features (PCEs) that are essential to the conservation of the species, and within areas occupied by the species at the time of listing, that may require special management considerations and protection. These include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for the ABM are derived from the biological needs of this beach mouse as described in the proposed critical habitat designation published in the **Federal Register** on February 1, 2006 (71 FR 5516).

### *Primary Constituent Elements for the Alabama Beach Mouse*

Pursuant to our regulations, we are required to identify the known physical and biological features (PCEs) essential to ABM conservation. All areas designated as ABM critical habitat are occupied or essential to the conservation of the species, within the species' historic geographic range, and contain sufficient PCEs to support at least one life history function.

This designation is designed for the conservation of PCEs necessary to support the life history functions that were the basis for the proposal. Because not all life history functions require all the PCEs, not all critical habitat will contain all the PCEs.

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

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that PCEs for the ABM are:

(1) A contiguous mosaic of primary, secondary, and scrub vegetation and dune structure, with a balanced level of competition and predation and few or no competitive or predaceous nonnative species present, that collectively provide foraging opportunities, cover, and burrow sites.

(2) Primary and secondary dunes, generally dominated by sea oats (*Uniola paniculata*), that, despite occasional temporary impacts and reconfiguration from tropical storms and hurricanes, provide abundant food resources, burrow sites, and protection from predators.

(3) Scrub dunes, generally dominated by scrub oaks (*Quercus* spp.), that provide food resources and burrow sites, and provide elevated refugia during and after intense flooding due to rainfall and/or hurricane-induced storm surge.

(4) Unobstructed habitat connections that facilitate genetic exchange, dispersal, natural exploratory movements, and recolonization of locally extirpated areas.

(5) A natural light regime within the coastal dune ecosystem, compatible with the nocturnal activity of beach mice, necessary for normal behavior, growth, and viability of all life stages.

Each of the areas designated in this rule known to be occupied at the time of listing has been determined to contain sufficient PCEs to provide for one or more of the life history functions of the ABM. In some cases, the PCEs exist as a result of ongoing Federal actions. As a result, ongoing Federal actions at the time of designation will be included in the baseline in any consultation conducted subsequent to this designation.

## Criteria Used To Identify Critical Habitat

We are designating critical habitat on lands that were occupied at the time of listing and contain sufficient PCEs to support life history functions essential to the conservation of the ABM. In a few instances, we are also proposing to designate areas that were identified as occupied after listing, but that we have determined to be essential to the conservation of the ABM.

Units known to be occupied at the time of listing were designated based on sufficient PCEs being present to support Alabama beach mouse life processes and at least one of the following characteristics: (1) Supports a core population of ABM; (2) was occupied by ABM at the time of listing; (3) is currently occupied by ABM according to Service ABM live-trapping protocol (Service 2005, p. 2) and has been determined to be essential to the conservation of the species. Some units contain all PCEs and support multiple life processes. Some units contain only a portion of the PCEs necessary to

support the ABM's particular use of that habitat. Where only a subset of the PCEs are present, it has been noted that only PCEs present at designation will be protected. Areas that are degraded, highly fragmented, isolated, or otherwise considered of questionable value to ABM conservation are not included. The Service has developed a trapping protocol for establishing absence of beach mice (see **ADDRESSES** to request a copy). In summary to document absence, this protocol requires 2 years of quarterly live-trapping with no beach mice captured. Presence of ABM, however, can be documented by the capture of one beach mouse, or the observation of beach mouse tracks or beach mouse burrows by a beach mouse expert or similarly qualified biologist.

Following the strategy outlined above, we began by mapping coastal dune communities within the historic range of the species. These areas were refined by using aerial map coverages, chiefly Baldwin County aerial photography from 2001 and 2005, and LIDAR imagery (Baldwin County 2004), to eliminate features such as housing developments and other areas that are unlikely to contribute to the conservation of ABM. We then focused on areas supporting ABM, as well as areas that contain the PCEs for the subspecies.

Because ABM habitat is dynamic and changes in response to coastal erosion, we believe that limiting the designation to areas occupied at the time of listing would not yield sufficient habitat for the persistence of ABM. The fragmentation of the species' historic habitat, coupled with the dynamic nature of coastal dune habitat due to tropical storms, makes multiple populations essential for species conservation. Consequently, we are designating units that were not occupied at the time of listing. These areas are essential for the conservation of the ABM. In addition, however, they are also currently occupied by the species, have one or more of the PCEs, and are within the historic range of the species.

The combined extent of these mapped areas defines the habitat that contains features that are essential to the conservation of the subspecies. Although these designated areas represent only a small proportion of the subspecies' historic range, they include a significant proportion of the remaining intact coastal communities and reflect the habitat types historically occupied by ABM. Areas not containing the PCEs, such as permanent wetlands and maritime forests, are not included in the designation. Field reconnaissance was done in a few areas for verification. We eliminated highly degraded tracts, and small, isolated, or highly fragmented tracts that provide no long-term conservation value. The remaining areas, totaling 2,281 ac (923 ha), were identified as containing the PCEs and essential to the conservation of the subspecies.

We reviewed existing ABM management and conservation plans to determine if any areas identified above did not meet the definition of critical habitat according to section 3(5)(A) of the Act, or could be excluded from the revised designation in accordance with section 4(b)(2) of the Act. Portions of the Perdue Unit of the Refuge are adequately protected under the Refuge's Comprehensive Conservation Plan and do not require special management or protection. While these areas, which total 808 ac (327 ha), contain the habitat features that are essential to the conservation of the subspecies, they do not meet the definition of critical habitat.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts on the species of the requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. As discussed in further detail below (see ''Application of Sections 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act''), we are excluding 51 properties that are currently protected through Habitat Conservation Plans providing ABM protection and habitat management. These excluded properties total 263 ac (106 ha). One of these areas, the development site for Beach Club West and Gulf Highlands, was also excluded based on an HCP.

The remaining 1,211 ac (490 ha) of ABM habitat being designated as critical habitat is divided into the five units described below. These five critical habitat units, all located within the coastal dune environment of Baldwin County, Alabama, are currently occupied by ABM. Although these units represent only a small proportion of the subspecies' historic range, they include a significant proportion of Alabama's best remaining coastal dune habitat, and reflect the wide variety of habitat types utilized by the ABM. The areas include all of the contiguous high elevation habitats (as determined by review of LIDAR data, storm surge model estimates, and post-Hurricane Ivan measurements) crucial to the subspecies' survival during and after major hurricane events. Because short-term occupation of habitat varies in response to tropical storm activity, ABM presence will vary spatially and temporally throughout the designated areas, and may be unevenly distributed at any given time.

When determining critical habitat boundaries, we made every effort to avoid the designation of developed areas such as buildings or houses, paved areas, gravel driveways, ponds, swimming pools, lawns, and other structures that lack PCEs for the ABM. When it has not been possible to map out all of these structures and the land upon which they are sited because of scale issues, they have been excluded by rule text. Therefore, Federal actions limited to these areas would not trigger section 7 consultations, unless they affect the subspecies or PCEs in adjacent critical habitat. It is important to note that the maps provided in this rule (see ''Regulation Promulgation'' section) are for illustrative purposes. For the precise legal definition of critical habitat, please refer to the narrative unit descriptions in the ''Regulation Promulgation'' section of this rule.

### 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 features essential to the conservation that may require special management considerations or protections. As discussed in more detail in the proposed critical habitat designation (February 1, 2006; 71 FR 5516) and in the unit descriptions below, we find that the features we are designating may require special management considerations or protections due to threats to the subspecies or its habitat. Such management considerations and protections include: management of nonnative predators and competitors, management of nonnative plants, and protection of ABM and their habitat from threats by road construction, urban and commercial development, heavy machinery, and recreational activities.

### Critical Habitat Designation

We are designating five units as critical habitat for the ABM (from west

to east): (1) Fort Morgan, (2) Little Point Clear, (3) Gulf Highlands, (4) Pine Beach, and (5) Gulf State Park. They are described below as our best assessment, at this time, of the areas determined to be occupied by the ABM at the time of listing that contain one or more of the PCEs that may require special management, and those additional areas that were not occupied at the time of listing, but are essential for the conservation of the ABM because they contain one or more of the PCEs, support core ABM populations and habitat continuity, and are currently occupied. Table 1 shows the units that were occupied at the time of listing and those that are currently occupied but were not so at the time of listing. Table 2 identifies the areas that meet the definition of critical habitat but were excluded from final critical habitat based on their ABM-specific management plans or economic data.

TABLE 1.—THE UNITS THAT WERE OCCUPIED BY ABM AT THE TIME OF LISTING OR ARE CURRENTLY OCCUPIED

| Unit | Occupied at time of listing | Occupied currently | Acres (hectares) |
|---|---|---|---|
| (1) Fort Morgan | X | X | 446 (180) |
| (2) Little Point Clear | | X | 268 (108) |
| (3) Gulf Highlands | X | X | 275 (111) |
| (4) Pine Beach | X | X | 30 (12) |
| (5) Gulf State Park | X | X | 192 (78) |

TABLE 2.—AREAS DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT FOR THE ALABAMA BEACH MOUSE BUT WERE EXCLUDED FROM FINAL CRITICAL HABITAT DESIGNATION

[Totals may not sum due to rounding]

| Geographic area | Definitional areas (acres/hectares) | Area excluded from final designation (acres/hectares) | Reason |
|---|---|---|---|
| The Dunes | 10/4 | 10/4 | HCP |
| Bay to Breakers | 2/1 | 2/1 | HCP |
| Kiva Dunes | 50/20 | 50/20 | HCP |
| Plantation Palms | 2/1 | 2/1 | HCP |
| The Beach Club | 15/6 | 15/6 | HCP |
| Beach Club West/Gulf Highlands | 108/44 | 108/44 | HCP |
| Martinique on the Gulf | 10/4 | 10/4 | HCP |
| Gulf State Park | 235/95 | 43/17 | HCP |
| 43 Single Family Homes | 21/8 | 21/8 | HCP |
| Total (Baldwin County) | 453/183 | 263/67 | |

Table 3 provides the approximate area encompassed within each critical habitat unit determined to meet the definition of critical habitat for the Alabama beach mouse.

TABLE 3.—CRITICAL HABITAT UNITS DESIGNATED FOR THE ALABAMA BEACH MOUSE

[Totals may not sum due to rounding]

| Critical Habitat Units | Federal acres/hectares | State acres/hectares | Local and private acres/hectares | Total acres/hectares |
|---|---|---|---|---|
| (1) Fort Morgan | 44/18 | 337/136 | 66/27 | 446/180 |
| (2) Little Point Clear | 16/6 | 82/33 | 170/69 | 268/108 |
| (3) Gulf Highlands | 11/4 | 44/17 | 218/88 | 275/111 |
| (4) Pine Beach | 11/4 | 0 | 19/8 | 30/12 |
| (5) Gulf State Park | 0 | 192/78 | 0 | 192/78 |
| Total | | | | 1,211/490 |

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the ABM, below.

*Unit 1: Fort Morgan*

Unit 1 (Map 2) consists of 446 ac (180 ha) and encompasses ABM habitat in the Fort Morgan State Historic Site and private lands to the east. It is located at the extreme western edge of the ABM range and consists principally of habitat that was known to be occupied at the time of listing (50 FR 23990; Holliman 1983, p. 126) south of S.R. 180 (Fort Morgan Parkway), with the exception of a single line of high scrub dunes directly north of the roadway and within the historic site boundaries. Much of Unit 1 is existing critical habitat that was designated at the time of listing (June 6, 1985; 50 FR 23885). However, the actual Fort and associated structures and developed areas that

were included in the original designation are not included in this critical habitat unit. The unit extends from mean high water line (MHWL) northward to the break between scrub dune habitat and either the maritime forest or human developed landscape (for example, grassy areas associated with Fort Morgan State Historic Site). The unit is bounded to the west by Mobile Bay, and to the east by Unit 2 (western property line of the ''Bay to Breakers'' residential development; see below). The Dunes development and several single family homes covered by Service-approved HCPs are excluded from this unit (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section).

ABM occurrence in the unit over time is well documented (Holliman 1983, p. 126; 50 FR 23990; Rave and Holler 1992, pp. 349–350; Sneckenberger 2001, pp. 12–13 and 32–36), and mice have been captured here following Hurricanes Ivan and Katrina (Endangered Species Consulting Services 2004a, p. 2; Service 2005, p. 15). This unit contains the features essential to the conservation of the subspecies. Some areas of the unit contain a contiguous mix of primary and secondary dunes, interdunal swales, wetlands, and scrub dunes (PCE 1), whereas other areas contain high quality primary and secondary dune habitat (PCE 2). While no one portion of the designated unit contains all PCEs, all five PCEs are present within the unit.

Natural areas of the Fort Morgan Historic Site are owned by the State of Alabama (Alabama State Historical Commission), but are currently managed by the Refuge according to a cooperative agreement (Service 2005) (see ''Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act'' section for further detail on management). Threats in this unit that may require special management considerations include human-generated refuse, and degraded habitat (from activities associated with recreational use).

*Unit 2: Little Point Clear*

Unit 2 consists of 268 ac (108 ha) and includes east-to-west bands of ABM habitat and connections between habitat south of the Alabama Department of Environmental Management's Coastal Construction Control Line (CCCL) (ADEM 1995, pp. 2–8 through 2–10) and along the roadway right-of-way for Fort Morgan Parkway. This Unit is bounded to the west by Unit 1 and extends eastward to the western edge of the Surfside Shores subdivision (western boundary of Unit 3). The CCCL varies in width but generally extends about 300 ft (91 m) landward of MHWL. The Fort Morgan Parkway right-of-way, which is managed by the State of Alabama (ADCNR) extends 160 ft (49 m) both south and north of the roadway centerline. The designation includes the southern sections of right-of-way and small portions of the northern right-of-way. In several places along the east west extent of this unit, additional parcels, either to the south of the Fort Morgan Parkway, or to the north of the CCCL, that contain the PCEs (see Primary Constituent Elements section) are included in the revised designation (see Map 3). Several areas covered by HCPs for single family and duplex development have been excluded. This unit was not part of the original (1985) critical habitat designation. This unit is a mix of Federal, State, local, and private ownership.

This unit, while often being inundated during storm surge events (Service 2004a; pp. 12–13; ENSR 2004, pp. 3–5 through 4–1; ACOE 2001, Service 2005a, pp. 14–15), represents the last remaining natural habitat connections between ABM populations in and around Unit 1 and Unit 3, and provides an essential link between those populations (PCE 4). Portions of this unit south of the CCCL contain PCE 2 and some sections of the right-of-way contain PCE 3. While this area was identified as being within the range of the ABM (50 FR 23872, Holliman 1983, pp. 125–126; Dawson 1983, pp. 8–11), we have no records that ABM were present at the time of listing. However, pre-hurricane Ivan trapping has verified the presence of mice south of the CCCL (Meyers 1983, pp. 5, 12–21; 50 FR 23872; Endangered Species Consulting Services 2004b, p. 2) and along the right-of-way (Sneckenberger 2001, p. 13; Farris 2003). Because the unit is presently occupied and contains two of the PCEs, and because long-term beach mouse viability depends on the existence of more populations than were documented at the time of listing, it is essential to the conservation of the subspecies. Habitat south of the CCCL consists of primary and secondary dunes, while habitat along the right-of-way consists primarily of scrub that is often temporarily disturbed by utility line maintenance. Utility line work results in a sparsely vegetated, open scrub habitat that still provides forage and cover opportunities for mice in the area.

*Unit 3: Gulf Highlands*

Unit 3 consists of 275 ac (111 ha) in the central portion of the Fort Morgan Peninsula. It includes portions of the Morgantown, Surfside Shores, and Cabana Beach subdivisions, as well as portions of the Beach Club West-Gulf Highlands development, BLM properties, and some properties along the Fort Morgan Parkway right-of-way. It is bounded to the west by Unit 2. The main portion of the unit generally stretches from MHWL landward to a natural border of wetlands to the north. This portion is bisected by ABM habitat associated with the Kiva Dunes, Plantation Palms, Beach Club, and Martinique developments and is excluded because of its HCPs (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section). The unit also contains an eastward continuation of ABM habitat adjacent to the Fort Morgan Parkway. This northern portion of Unit 3 is bounded to the west by Unit 2 and to the east by wetlands and maritime forest along the S.R. 180 and points east. Like the right-of-way corridor in Unit 2, it generally extends from the centerline of Fort Morgan Parkway 160 ft (49 m) south though a few areas of habitat north of the road are also captured. Unit 3 serves as an expansion, to encompass scrub habitat, of critical habitat Zone 2 that was designated at the time of listing (50 FR 23872; June 6, 1985). This unit contains the features essential to the conservation of the subspecies; all five PCEs are present in varying amounts throughout this unit.

This unit, combined with the neighboring Perdue Unit of the Refuge and several properties with conservation plans that are being excluded (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section), contains the largest assemblage of high elevation habitat within the range of the ABM (ACOE 2001, Plate 2–11; ENSR 2004, pp. 3–5 through 4–1; Service 2004a, pp. 9–12; Service 2004b, p. 6; Service 2005a, pp. 2–4). The largest tracts of contiguous habitat possessing a full gradient of ABM habitat (primary dunes landward to scrub dunes) are also found here. ABM occupancy is well documented both at the time of listing (Meyers 1983, pp. 5, 12–21; Holliman 1983, pp. 125–126) and recently (Endangered Species Consulting Services, LLC and ENSR Corporation 2001, p. 22; Farris 2003). ABM were found here following Hurricane Ivan (Endangered Species Consulting Services 2004, p. 2; 2004d, p. 2). Threats that may require special management include habitat degradation and fragmentation, extensive recreational pressure, post-storm cleanups, artificial lighting, predation, and human-generated refuse.

*Unit 4: Pine Beach*

This unit consists of 30 ac (12 ha) including a BLM property and 27 private inholdings within the Perdue Unit of the Refuge that are not managed under the Refuge's Comprehensive Conservation Plan. The primary and secondary dunes within this unit were part of ''Zone 2'' of the original critical habitat designation, which extended from the mean high tide line of the Gulf of Mexico landward 500 ft (152 m). ABM are well documented from the area both recently (Rave and Holler 1992, pp. 349–350; Swilling et al. 1998, pp. 289–294; Sneckenberger 2001, pp. 66–69; Service 2003, p. 1) and from the time of listing (Holliman 1983, p. 126; Meyers 1983, pp. 5, 12–21). This unit, along with adjacent Refuge lands and exclusions for single family homes covered by Service-approved HCPs (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section), contains the features essential to the conservation of the ABM because of its high elevation habitat and continuity between habitat types. It contains PCEs 2, 3, and 5, and when combined with the surrounding Refuge lands, it also includes PCEs 1 and 4. Threats that may require special management considerations on this unit may include artificial lighting from residences, human-generated refuse that may attract predators, habitat fragmentation from the design and construction of properties (and access routes) to inholdings, and primary and secondary dunefields impacted from recent storm events.

*Unit 5: Gulf State Park*

Unit 5 consists of 192 ac (78 ha) of ABM habitat in Gulf State Park, immediately east of the City of Gulf Shores and west of the City of Orange Beach. This unit retains most critical habitat designated in the 1985 listing rule (Zone 3—all primary and secondary dunes south of State Route 182) (June 6, 1985; 50 FR 23872) and adds approximately 30 ac (12 ha) of scrub habitat located directly north of S.R. 182. It extends from MHWL northward to a natural boundary consisting of brackish wetlands and maritime forest. ABM habitat covered under the 2004 HCP and subsequent HCP–ITP modifications is excluded from the designation (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' section).

This unit contains a mix of scrub and primary and secondary dune habitat, and represents the last remaining sizable block of habitat on the eastern portion of the historic range of the subspecies.

ABM were documented from the Park in the late 1960s (Linzey 1970, p. 81), but were presumed extirpated by the early 1980s (Holliman 1983, pp. 123–126; Holler and Rave 1991, p. 22–25), because of habitat isolation combined with the effects of tropical storms, predation (primarily from feral cats), and competition with house mice. This area was referred to as occupied in our final listing rule (June 6, 1985; 50 FR 23872). ABM were reintroduced to the park in 1998, and subsequent trapping confirmed their presence there (Sneckenberger S., Service, personal communication, 2005; Service 2003, p. 2). This unit was heavily impacted by Hurricane Ivan in 2004 (Service 2004a, pp. 5–6) and Hurricane Katrina in 2005 (Service 2005a, pp. 6–9), and recent trapping has not located mice (Volkert 2005, pp. 2–5). This unit contains PCEs 2 and 3 and, therefore, possesses the habitat features essential to the conservation of the subspecies. Because this unit contains several PCEs, because it is presently occupied, and because ABM recovery depends on more populations than were documented at the time of listing, it is essential to the conservation of the subspecies.

This unit is State-owned and managed by the State Parks Division of the ADCNR. It has pressures from heavy recreational use and ABM habitat here has been severely impacted by recent hurricanes. Threats to ABM habitat include loss of dune topography and vegetation from habitat destruction, human-generated refuse that could attract predators, and artificial lighting. Habitat fragmentation also threatens ABM within this unit.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition. 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 designated 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. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action because of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

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 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, and are likely to adversely affect, listed species or critical habitat.

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

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

Federal activities that may affect ABM or their 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(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

*Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to the Alabama Beach Mouse and Its Critical Habitat*

Jeopardy Standard

Prior to and following designation of critical habitat, the Service has applied an analytical framework for ABM jeopardy analyses that relies heavily on the importance of core area populations and connectivity to mouse survival and recovery. 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 Alabama beach mice 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 analytical framework described in the Director's December 9, 2004, memorandum is used to complete section 7(a)(2) analyses for Federal actions affecting ABM critical habitat. 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 the intended conservation role for the species. Generally, the conservation role of ABM critical habitat units is to support viable core area populations.

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

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for Alabama beach mice 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 Alabama beach mice include, but are not limited to:

(1) Actions that would significantly alter dune structure or the degree of soil compaction. Such activities could include, but are not limited to, permanent conversion of ABM habitat for residential or commercial purposes, excessive foot traffic, and heavy use of construction, utility, or off-road vehicles in beach mouse habitat. These activities, even if temporary, could alter burrow construction, reduce the availability of potential burrow sites, and degrade or destroy beach mouse habitat.

(2) Actions that would significantly alter the natural vegetation of the coastal dune community. Such activities could include, but are not limited to, allowing nonnative species to establish in the area, landscaping with grass or other nonindigenous plants, and landscaping that yields excessive leaf litter, mulch, or other foreign materials. These activities could alter beach mouse foraging activities and degrade or destroy beach mouse habitat.

(3) Actions that would significantly alter natural lighting. Such activities could include, but are not limited to,

allowing artificial lighting that does not comply with wildlife-friendly lighting specifications. These activities could alter beach mouse foraging activities, increase predation upon beach mice, and reduce the use of otherwise suitable beach mouse habitat.

(4) Activities that eliminate or degrade movement within and among designated critical habitat units. Actions such as bulkhead, canal, ditch, and wall construction; the permanent conversion of beach mouse habitat to residential or commercial development; changing of water elevations or flooding; the removal of vegetation; and excessive artificial lighting could effectively block east-west or north-south corridors among various habitat types, and, therefore, isolate habitat.

The five critical habitat units are currently occupied by the subspecies, based on trapping data, our 2003 habitat map, and Service trapping protocol (Service 2005b, p. 2). All of the units included in this designation contain the features that are essential to the conservation of the ABM or are found to be essential for the conservation of the subspecies. Federal agencies already consult with us on activities in areas currently occupied by the ABM. If ABM may be affected by proposed actions, Federal agencies consult with us to ensure that their actions do not jeopardize the continued existence of ABM. This happens regardless of whether or not critical habitat is designated.

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 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 geographic area occupied by the species that do not contain the features essential to the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that require no special management or protection also are not, by definition, critical habitat.

**Perdue and Fort Morgan Units of the Bon Secour National Wildlife Refuge**

The Refuge finalized its Comprehensive Conservation Plan (CCP) in November 2005. This document details proposed conservation actions for the Refuge over a 15-year period, and outlines three objectives (implement monitoring protocol and manage beach and scrub habitat for the ABM) and two projects (standardize surveys and manage and evaluate scrub habitat for the ABM) that specifically address the subspecies. Many other objectives (for example, predator management plan) and projects (for example, develop biological database) would also benefit ABM. The Service has a statutory mandate to manage the refuge for the conservation of listed species, and the CCP provides a detailed implementation plan. We believe that the CCP provides a substantial conservation benefit to the subspecies, and there are reasonable assurances that it will be implemented properly and in an effective fashion within portions of the Perdue Unit of the Refuge that contain the PCEs for the ABM. Furthermore, the Refuge, especially on the Perdue Unit, has demonstrated its resolve for ABM conservation by continually engaging in dune restoration activities (including following Hurricanes Ivan and Katrina) and semi-annual ABM trapping, and through outreach and education. Accordingly, we believe that the Perdue Unit of the Refuge does not meet the definition of critical habitat under section 3(5)(A) of the Act because a secure management plan is already in place to provide for the conservation of the ABM, and no special management or protection will be required.

The Service also either owns or manages 510 ac (206 ha) of coastal dune habitat, most of which is occupied by ABM, within the boundaries of the Fort Morgan State Historic Site. These lands, collectively, are referred to as the Fort Morgan Unit of the Refuge, but are within the Historic Site. Of the 510 ac, approximately 480 ac (194 ha) are owned by the State but are managed by the Service through a cooperative management agreement with the Alabama Historical Commission. While the CCP outlines proposed management activities within the Fort Morgan Unit, we do not know whether the cooperative management agreement will be modified or terminated in the future and, therefore, if the conservation plan outlined within the CCP will be implemented. Areas containing the PCEs within these State-owned lands (and the approximately 30 ac (12 ha) of Federal land imbedded within them), therefore, may require special management or protection, and are being designated as critical habitat.

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

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. 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.

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) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, 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.

**Conservation Partnerships on Non-Federal Lands**

Most federally listed species in the United States will not recover without the cooperation of non-Federal landowners. More than 60 percent of the United States is privately owned (EPA 2003, p. 3–3) and at least 80 percent of endangered or threatened species occur either partially or solely on private lands (USGAO 1995, p. 4). Stein et al. (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse et al. 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-Federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through the Four Cs philosophy—conservation through communication, consultation, and cooperation. This philosophy is evident in Service programs such as HCPs, Safe Harbor Agreements, Candidate Conservation Agreements, Candidate Conservation Agreements with Assurances, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can (under certain circumstances) have unintended negative consequences for the conservation of species on private lands (Wilcove et al. 1996; Bean 2002; Conner and Mathews 2002; James 2002; Koch 2002; Brook et al. 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found as illustrated by some of the public comments received on this proposal. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main et al. 1999; Brook et al. 2003).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main et al. 1999; Bean 2002; Brook et al. 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (for example, reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002).

The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone.

The Department of the Interior's Four C's philosophy of conservation through communication, consultation, and cooperation is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program provide assistance to private landowners in their voluntary efforts to protect threatened, imperiled, and endangered species, including the development and implementation of HCPs.

Conservation agreements with non-Federal landowners (for example, Habitat Conservation Plans (HCPs), contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade, we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854; December 2, 1996).

**Habitat Conservation Plans (HCPs)**

Section 10(a)(1)(B) of the Act authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The Act specifies that an application for an incidental take permit must be accompanied by a habitat conservation plan, and specifies the content of such a plan. The purpose of conservation plans is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species. There are currently 51 HCP sites containing habitat we have identified as essential to the ABM conservation (see ''Criteria Used To Identify Critical Habitat'' section). These include HCPs for 7 multifamily developments, 1 hotel and convention center complex, and 43 single family homes.

The completed HCPs and the associated ITPs issued by the Service contain management measures and protections for identified areas that protect, restore, and enhance the value of these lands as habitat for ABM. These measures include explicit standards to minimize any impacts to the ABM and its habitat. In general, HCPs are designed to ensure that the value of the conservation lands are maintained, expanded, and improved for covered species.

For HCPs that have been already approved, we have provided assurances to permit holders that once the protection and management required under the plans are in place and for as long as the permit holders are fulfilling their obligations under the plans, no additional mitigation in the form of land or financial compensation will be required of the permit holders and, in some cases, specified third parties.

A discussion of all HCP sites that we have identified as essential for the conservation of the subspecies follows.

*Multifamily Developments With HCPs and Issued ITPs*

HCPs for six multifamily developments along the Fort Morgan Peninsula were approved between 1994 and 1996. These developments include, from west to east, The Dunes, Bay to Breakers, Kiva Dunes, Plantation Palms, The Beach Club, and Martinique, all of which were issued 30-year ITPs by the Service. The HCPs covering the properties are almost identical and consist of setting aside primary and secondary dune habitat in perpetuity, and the construction of dune walkovers within protected areas to minimize pedestrian impact to habitat. These HCPs also require the use of native plants in landscaping, control of domestic and feral cats, interpretive signage, minimal outdoor lighting, trapping surveys, and annual reports. HCPs for The Beach Club and Martinique developments also include the creation of endowment funds for use in future ABM conservation activities (such as research or habitat restoration). All of these properties have been developed as permitted or are nearing completion, and the areas within the properties that we have identified as containing the features that are essential to the conservation of the ABM consist of the acreage set aside as ABM conservation zones (see Table 2 above). Most of these conservation zones were designated as critical habitat at the time ABM was listed on June 6, 1985 (50 FR 23885).

On the basis of the conservation benefits afforded the ABM from the referenced HCPs and the provisions of section 4(b)(2) of the Act, we exclude from critical habitat the areas on these properties that contain the features that are essential to the conservation of the subspecies. We have further determined that the exclusion from critical habitat of these areas would not result in the extinction of the ABM. The rationale for this determination is below (see ''Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs'').

*Proposed Beach Club West and Gulf Highlands Developments*

These projects consist of several proposed condominium towers and associated amenities. We were first approached by the proponents of Gulf Highlands in 1995 (and proponents of Beach Club West in 2000) about the development of a 187-ac (75-ha) site within Unit 3 of the designated critical habitat. While these two projects are separate, they are adjacent to one another, and we recommended they submit a joint ABM habitat conservation plan to streamline review and offer greater minimization and mitigation. The applicants submitted a habitat conservation plan for these projects in 2001, and following subsequent environmental review, the Service issued ITPs to both parties in 2002. The Sierra Club and Friends of the Earth, Inc. filed an action in the United States District Court for the Southern District of Alabama challenging our environmental review of the projects under the National Environmental Policy Act and the Administrative Procedure Act.

As a result of this litigation, the Service agreed to a voluntary remand of the environmental review and proceeded to develop an Environmental Impact Statement (EIS) to more thoroughly evaluate the impact of the proposed developments on the natural and human environments. The ITPs issued in 2002 were held in abeyance pending the outcome of this environmental review and of review of the projects under the Act. We completed our DEIS (which contained five alternatives) in early 2006 and announced its availability (and associated 90-day public comment period) in the **Federal Register** on April 28, 2006 (71 FR 25221). We held a public hearing on the DEIS in Gulf Shores on June 26, 2006. The notice announcing the availability of a final EIS and determination to sign a record of decision (ROD) on Beach Club West—Gulf Highlands was published in the **Federal Register** on November 29, 2006 (71 FR 69141). Both the ROD and modified permit instruments were signed on January 10, 2007.

The proposed developments involve the construction of six 20-story towers and a seventh smaller tower—clubhouse facility. This construction will permanently convert 40.5 ac (16.3 ha) of the total project site. With this design, the permittees have demonstrated they are minimizing the project footprint to the greatest extent possible through the clustering of the development in the eastern corner of the property, the use of parking garages, and the removal of some recreational facilities (such as tennis courts) from the original design. Construction of the projects will involve an additional 21.9 ac (8.9 ha) of temporary impacts to ABM habitat; however, according to the HCP, these areas will be restored to beach mouse habitat. Per the HCP, all other areas on the project site (with the exception of road right-of-way owned by Baldwin County) will be protected by restrictive covenants, permit and HCP conditions, or conservation easements. The permittees will permanently develop approximately 22 percent of the project site.

The HCP for these projects outlines numerous conservation measures designed specifically for ABM. These measures include, but are not limited to, wildlife-friendly outdoor lighting, control of cats and house mice, an ABM outreach program, dune walkovers, collection of trapping data, and habitat restoration. Numerous measures designed to minimize temporary construction impacts (such as signage, placement of staging areas, removal of waste) are also outlined. In addition, in association with the Gulf Highlands HCP, the permittees have agreed to set aside 96.8 ac (39 ha) of lands that would be placed into conservation status through a conservation easement or other legal protective document. A perpetual conservation easement was created on October 30, 2000, for the Gulf Highlands Condominiums portion (42.6 ac) of the conservation area in anticipation of ITP issuance and is held by the Baldwin County Commission. The Beach Club West portion (54.2 ac) of the conservation area is protected through a Declaration of Abandonment, filed with Baldwin County on April 15, 2002. The private inholdings located within the project area that will not be part of this project, are not subject to the same restrictions, and are therefore included in the designation.

Although approximately 6 ac (2 ha) of the area owned by the permittees and identified in this analysis as essential to the conservation of the subspecies is part of road rights-of-way retained by Baldwin County, these acres will be managed in accordance with the HCP for Gulf Highlands. As part of their inclusion in areas being managed with an HCP, the 6 acres surrounding these rights-of-way will have management including numerous conservation measures designed specifically for ABM. These measures include, but are not limited to, wildlife-friendly outdoor lighting, control of cats and house mice, an ABM outreach program, dune walkovers, collection of live-trapping data, and habitat restoration. Numerous measures designed to minimize temporary construction impacts (such as signage, placement of staging areas, removal of waste) are also outlined. Because these rights-of-way have not been vacated and transferred to the permittees, they could be developed in the future at the discretion of the County. However, should the County decide to pursue development of these areas, it would either have to pursue an incidental take permit or enter into section 7 consultation (depending upon the presence of a Federal nexus in the

project). Because these rights-of-way do not require additional management considerations or protection, they do not meet the definition of critical habitat under section 3(5)(A) of the Act.

On the basis of the conservation benefits afforded the ABM from the referenced HCP and the provisions of section 4(b)(2) of the Act, we exclude from critical habitat all areas within the Gulf Highlands-Beach Club West project sites containing the features essential to the conservation of the subspecies. This does not include any private inholdings as outlined above. We have further determined that the exclusion of these areas from critical habitat would not result in the extinction of the ABM. The rationale for this determination is below (see ''Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs'').

*Gulf State Park Hotel and Convention Center Complex*

In 2004, we approved an HCP for the demolition of existing Gulf State Park (GSP) and construction of a new hotel and convention center on the site. In response to hurricane impacts and the need to minimize future impacts, the ITP issued for this project was modified in 2005 to adjust the footprint of the GSP beach pavilion and parking lot. The new GSP complex will replace the current facilities (which were destroyed during Hurricane Ivan) and its construction will result in a net gain of 3 ac (1 ha) of ABM habitat due to improved siting and design of the structures and restoration work outlined in the HCP. The HCP covers both the construction and operation of the facilities; outlines an aggressive strategy for the control of roaming cats, house mice, and refuse; and includes wildlife-friendly lighting, native landscaping, and visitor outreach on the fragile coastal environment (including outreach concerning the ABM). The area covered by the HCP and ITP includes the 43 ac (17 ha) surrounding the complex. In February 2006, ADCNR informed us of new plans to consolidate the new fishing pier (the previous pier was destroyed during Hurricane Ivan) with the convention center complex. This consolidation involves demolition and restoration of the old pier (and associated parking area) and construction of a new pier 250 ft to the east. By moving the pier and associated parking eastward into the previously authorized development footprint, the revised plan reduces impacts to ABM habitat by 2 ac (1 ha). The new pier will also feature state-of-the-art, wildlife-friendly lighting (mainly shielded, low wattage-low pressure sodium lighting) and, therefore, result in much less light pollution than the old pier, thereby reducing impacts to sea turtles.

On the basis of the conservation benefits afforded the ABM from this HCP and the provisions of section 4(b)(2) of the Act, we exclude from critical habitat the 43 ac (17 ha) covered area, portions of which we have identified to contain the features that are essential to the conservation of the subspecies. We have further determined that the exclusion of this area from critical habitat would not result in the extinction of the ABM. The rationale for this determination is below (see ''Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs'').

*Single Family Homes*

Prior to August 2004, we approved HCPs for the construction of two single-family homes in the Cabana Beach subdivision. Portions of both these properties have been determined to contain the features that are essential to the conservation of the ABM. In August 2004, we approved HCPs and issued ITPs for the construction of 11 additional single family homes in occupied ABM habitat. Four of these properties have been determined to contain features essential to the conservation of the ABM (see ''Criteria Used To Identify Critical Habitat''). In September 2005, we approved HCPs for the construction of 55 more residences within occupied ABM habitat. Thirty-seven of these properties (11 of which are located within ''The Dunes'' development) have been determined to be essential to the ABM. The HCPs and ITPs covering all of these properties, while under and after construction, require a small developed footprint (typically no larger than 0.1 ac (0.004 ha)) for all structures and driveways, the construction of a dune walkover for Gulf-front lots, and the conservation of the remaining ABM habitat on the property for the duration of the ITP. The HCPs also call for wildlife-friendly lighting, landscaping with native plants, control of domestic pets (cats), and refuse control. The associated ITPs are valid for 50 years, and ITP permit conditions are transferable if property ownership changes.

On the basis of the conservation benefits afforded the ABM from the referenced HCPs and the provisions of section 4(b)(2) of the Act, we are excluding from critical habitat ABM habitat within these 43 properties that contain features essential to ABM conservation and are covered by HCPs and issued ITPs. We have further determined that the exclusion of these areas from critical habitat would not result in the extinction of the ABM. The rationale for this determination is below (see ''Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs'').

Following is our analysis of the benefits of including lands within approved HCPs versus excluding such lands from this critical habitat designation.

(1) Benefits of Inclusion of 51 Areas Protected Through Service-Approved HCPs

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 on HCP lands with a Federal nexus by helping ensure the integrity of these lands is maintained. For example, if a federally funded road project was proposed to cross HCP 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. However, the presence of ABM would trigger consultation under section 7 of the Act under the jeopardy standard regardless of whether critical habitat is designated.

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 dune restoration projects, or more extensive monitoring of beach mouse populations.

(2) Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs

We identified a number of possible benefits of excluding the area covered by the 51 HCPs from critical habitat designation. First, exclusion would reduce largely redundant administrative costs of section 7 consultation. There is no added value in designating these 51 HCP sites as critical habitat because they are subject to the legally enforceable conditions of ITPs. HCP sites are still protected by the section 7 ''jeopardy standard'' in the event a Federal action may adversely affect mice there. For instance, if a federally funded roadway project were planned to bisect an HCP site, the Federal action agency would still be required to

consult with us regarding whether or not the roadway would adversely affect ABM. Second, exclusion would help to foster an atmosphere of cooperation in the conservation of endangered species. HCPs and other conservation partnership efforts typically provide far greater conservation benefits to species than the limited benefits arising from critical habitat designation. The latter benefits are restricted to actions with a Federal nexus and can require only that the action not adversely modify the habitat. It cannot compel, and in practice may discourage, the sort of active management actions that generally are needed to recover listed species. Two of our HCP sites have provided endowments for beach mouse conservation, and these sites and other multifamily developments provide us with seasonal trapping data vital to beach mouse conservation efforts. Through the HCP program, we also retain the permission to live-trap and monitor habitat on private land, something that a critical habitat designation does not confer. Conservation areas within HCP sites we have identified as essential to the conservation of the species are protected from predators, subject to rules restricting uncontained human refuse and excessive artificial light, and conservation subject to a host of other beneficial requirements that are not conveyed by critical habitat designation. Through developing positive conservation relationships with property owners along the Alabama coastline, we are able to partner with private landowners in habitat restoration, conduct beach mouse translocations, and monitor populations, thereby facilitating recolonization of previously inhabited areas, encouraging and providing suitable habitat for the long-term persistence of beach mice, obtaining more information on the subspecies, and improving and discovering new techniques and opportunities that will assist in ABM recovery. While these activities are admittedly required by HCPs and associated ITPs, our relationships with permittees and other private stakeholders, which are extremely important for ABM conservation (see ''Conservation Partnerships'' section above), could be damaged by unnecessary regulation. Exclusion would provide an incentive for participation in the development of new HCPs and non-HCP-related ABM conservation activities. The exclusion of HCP lands from critical habitat designations is an important incentive for participation in the HCP program; on the other hand, failure to exclude HCP lands could undermine the conservation benefits provided by the HCP program, and, more generally, the partnerships required to conserve most listed species.

It is possible, although unlikely, that Federal action will be proposed that would be likely to destroy or adversely modify the essential habitat within the area governed by these HCPs. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for ABM (we monitor take through habitat loss), it would likely also jeopardize the continued existence of the species. In addition, we expect that the benefit of informing the public of the importance of this area to ABM conservation would be slight due to the fact that there was a previous designation of critical habitat for ABM in many of these areas (that underwent public notice and comment), the HCPs themselves underwent public review and comment, and this designation has undergone public review and comment. It is now public knowledge that conservation areas within many areas with Service-sponsored HCP sites contain the physical and biological features essential to the conservation of the species. Therefore, we assigned relatively little weight to the benefits of designating this area as critical habitat.

In contrast, although the benefits of encouraging participation in HCPs, (particularly large-scale HCPs) and helping to foster cooperative conservation are indirect, enthusiastic HCP participation and an atmosphere of cooperation are crucial to the long-term effectiveness of the endangered species program.

(3) Benefits of Exclusion of 51 Areas Protected by Service-Approved HCPs Outweigh the Benefits of Inclusion

We have assigned great weight to the benefits of excluding certain lands from this critical habitat designation, since we believe conservation is best fostered in a voluntary environment. To the extent that there are regulatory benefits of including these lands as critical habitat, the associated costs could be avoided by excluding the areas from designation. We expect the regulatory benefits to be slight, because these areas are currently occupied, and consultation will occur regardless of critical habitat designation.

We have determined that the benefits of inclusion of the areas covered by these 51 HCPs are small, while the benefits of exclusion are substantial. Through these measures identified above, we believe that for these 51 sites, the benefits of exclusion outweigh the benefits of inclusion.

(4) Exclusion Will Not Result in Extinction

Because we anticipate that little, if any, conservation benefit to the ABM will be foregone as a result of excluding these areas (ABM in these areas are protected by sections 7 and 9 of the Act regardless of whether critical habitat is designated), the exclusion will not result in the extinction of the ABM. Accordingly, we exercise discretion under section 4(b)(2) to exclude the areas covered by these HCPs from the designation of critical habitat for the ABM.

**General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process**

The most direct, and potentially largest, 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 are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation of the species are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally when the Service concurs in writing that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the Service determines through informal consultation that adverse impacts are likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may

contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory reasonable and prudent alternatives to the proposed Federal action would only be issued when the biological opinion results in a jeopardy or adverse modification conclusion.

We also note that for 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot,* the Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. The Court ruled that the Service could no longer equate the two standards and that adverse modification evaluations require consideration of impacts on the recovery of species. 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 conservation plans (HCPs) or other 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. 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 HCP or 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.

The information provided in this section applies to all the discussions below that discuss the benefits of inclusion and exclusion of critical habitat in that it provides the framework for the consultation process.

**Educational Benefits of Critical Habitat**

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the ABM. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefit of a critical habitat designation. 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, we believe that there would be little additional informational benefit gained from the designation of critical habitat for the exclusions we are making in this rule because these areas were included in the proposed rule as having habitat containing the features essential to the conservation of the species. Consequently, we believe that the informational benefits are already provided, even though these areas are not designated as critical habitat. 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 the ABM, 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.

The information provided in this section applies to all the discussions herein that discuss the benefits of inclusion and exclusion of critical habitat.

**Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if he determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. Congress has granted this discretionary authority to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required their consideration when designating critical habitat.

In making the exclusions, we have, in general, considered that all of the costs and other impacts predicted in the economic analysis may not be avoided by excluding the area, because most or all of the areas in question are currently occupied by the listed species or considered essential to the conservation of the species, and there will be requirements for consultation under section 7 of the Act, or for permits under section 10 (henceforth ''consultation''), for any take of these species, and other protections for the species exist elsewhere in the Act and under State and local laws and regulations. In conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's ruling in the New Mexico Cattle Growers Association case (248 F.3d at 1285), which directed us to consider all impacts, ''regardless of whether those impacts are attributable co-extensively to other causes.'' As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, some elements of the analysis may also overstate some costs.

Conversely, the Ninth Circuit has recently ruled *(Gifford Pinchot,* 378 F.3d at 1071) that the Service's regulations defining ''adverse modification'' of critical habitat are invalid because they define adverse modification as affecting both survival and recovery of a species. The Court directed us to consider that determinations of adverse modification should be focused on impacts to recovery. While we have not yet proposed a new definition for public review and comment, compliance with the Court's direction may result in additional costs associated with the designation of critical habitat (depending upon the outcome of the rulemaking). In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the Act, and should encompass costs that would be considered and evaluated in light of the *Gifford Pinchot* ruling.

In addition, we have received several credible comments on the economic analysis contending that it underestimates, perhaps significantly, the costs associated with this critical habitat designation. Both of these factors are a balancing consideration against the possibility that some of the costs shown in the economic analysis might be attributable to other factors, or are overly high, and so would not necessarily be avoided by excluding the area for which the costs are predicted from this critical habitat designation.

**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 August 8, 2006 (71 FR 44976). We accepted comments on the draft analysis until September 7, 2006.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of ABM critical habitat. 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 found that costs associated with conservation activities for the ABM are forecast to range from $18.3 million to $51.9 million in undiscounted dollars over the next 20 years. Adjusted for possible inflation, the costs would range from $16.1 million to $46.9 million over 20 years, or $1.1 million to $3.1 million annually using a three percent discount; or $14.2 million to $41.8 million over 20 years, or $1.3 million to $3.9 million annually, using a seven percent discount. Although disproportionate impacts may exist, the areas that may suffer these impacts are already being excluded due to other reasons (see ''Application of Exclusions Under Section 4(b)(2) of the Act'' for more detail). Therefore, the Service did not exclude any areas based on economics.

A copy of the final economic analysis with supporting documents is included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES**) or by downloading from the Internet at *http://www.fws.gov/daphne.*

**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. We used 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), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, 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.

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

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

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

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

potentially affected, we also consider whether their activities have any Federal involvement.

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

In our economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of ABM and proposed designation of its critical habitat. This analysis estimated prospective economic impacts due to the implementation of ABM conservation efforts in five categories: residential and commercial real estate development activities, road construction and maintenance, tropical storms and hurricanes, species management and habitat protection activities, and recreation. We determined from our analysis that in four of these five categories, impacts of the ABM conservation efforts are not anticipated to impact small business. The small business entities that may be affected are private developers. Costs associated with residential and commercial development comprise 99 percent of the total quantified future impacts. Total costs are expected to be $18.1 to $51.3 million (undiscounted) over the next 20 years. Conservation effort costs include land preservation (set-asides), monitoring, and predator control that may be required of new development activity on private land. Approximately 99 percent of developers in the region are considered small; thus, 1.6 small developers could be impacted each year. For those projects likely to be undertaken by a small entity, beach mouse conservation costs are estimated to be approximately $471,000 per typical developer. Assuming the annual revenues of an average small developer are $16.8 million (see the economic analysis for explanation of assumptions), the average annualized cost per project is roughly 2.8 percent of the typical annual sales. Therefore, we do not believe that the designation of critical habitat for the ABM will result in a disproportionate effect to small business entities. Please refer to our economic analysis of the critical habitat 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 approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on ABM and their habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

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

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

(1) Regulation of activities affecting waters of the United States by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act;

(2) The Service's incidental take permitting program;

(3) Road construction and maintenance funded by the Federal Highway Administration (FHA); and

(4) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency (FEMA).

It is likely that a developer or other project proponent could modify a project or take measures to protect ABM. The kinds 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 the 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 our designation of critical habitat for ABM would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include: Corps permits, permits we may issue under section 10(a)(1)(B) of the Act (ITPs), FHA funding for road improvements, and activities funded by

FEMA. A regulatory flexibility analysis is not required.

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

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

*Executive Order 13211*

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

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

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

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

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

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

*Federalism*

In accordance with Executive Order 13132 (Federalism), the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with the Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in Florida and Alabama. The designation of critical habitat in areas currently occupied by ABM may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the 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*

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 Endangered Species Act. This final rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the ABM.

*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*

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 Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this

determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation and no Tribal lands that are unoccupied areas that are essential for the conservation of the ABM. Therefore, designation of critical habitat for the ABM has not been designated on Tribal lands.

**Takings**

In accordance with Executive Order 12630, (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating 1,211 ac (490 ha) of lands in Baldwin County, Alabama as critical habitat for the Alabama beach mouse 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.

**References Cited**

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

**Author(s)**

The primary author of this package is the Daphne Field Office of the U.S. Fish and Wildlife Service.

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

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

**Regulation Promulgation**

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

## PART 17—[AMENDED]

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

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

■ 2. In § 17.95(a), revise the entry for ''Alabama Beach Mouse (*Peromyscus polionotus ammobates*)'' to read as follows:

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

(a) *Mammals.*

* * * * *

**Alabama Beach Mouse (*Peromyscus polionotus ammobates*)**

(1) Critical habitat units are depicted for Baldwin County, Alabama, on the maps below.

(2) The primary constituent elements of critical habitat for the Alabama Beach Mouse are the habitat components that provide:

(i) A contiguous mosaic of primary, secondary, and scrub vegetation and dune structure, with a balanced level of competition and predation and few or no competitive or predaceous nonnative species present, that collectively provide foraging opportunities, cover, and burrow sites.
secondary dunes, generally dominated by sea oats (*Uniola paniculata*), that despite occasional temporary impacts and reconfiguration from tropical storms and hurricanes, provide abundant food resources, burrow sites, and protection from predators.

(iii) Scrub dunes, generally dominated by scrub oaks (*Quercus* spp.), that provide food resources and burrow sites, and provide elevated refugia during and after intense flooding due to rainfall and/or hurricane-induced storm surge.

(iv) Unobstructed habitat connections that facilitate genetic exchange, dispersal, natural exploratory movements, and recolonization of locally extirpated areas.

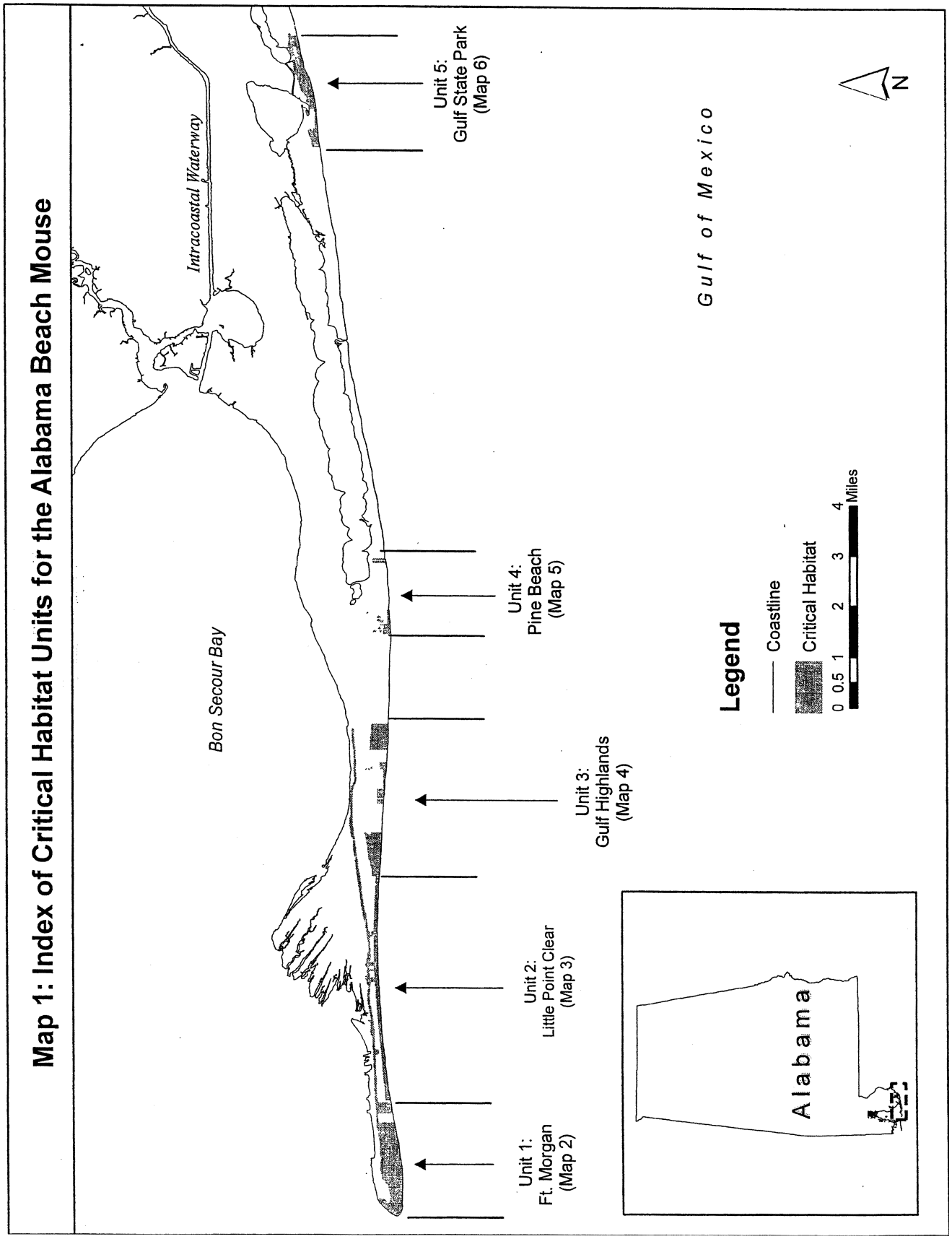
(v) A natural light regime within the coastal dune ecosystem, compatible with the nocturnal activity of beach mice, necessary for normal behavior, growth, and viability of all life stages.

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

(4) Critical habitat map units. Data layers defining map units were created by delineating habitats that contained one or more of the PCEs defined in paragraph (2) of this entry, over 2005 Baldwin County, Alabama color photography (UTM 16, NAD 83).

(5) Note: Index Map (Map 1) follows:

BILLING CODE 4310–55–P

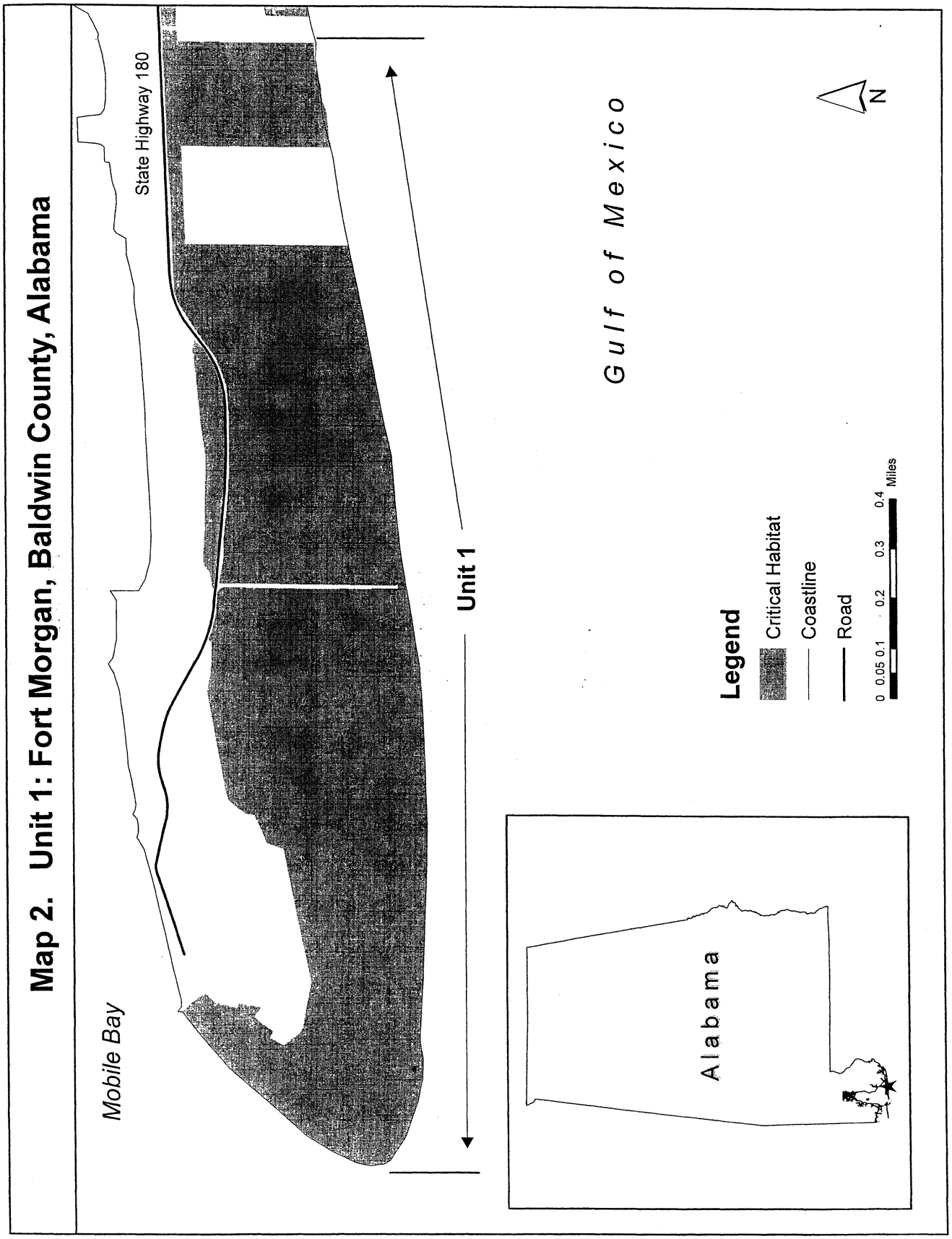

Map 1: Index of Critical Habitat Units for the Alabama Beach Mouse
Intracoastal Waterway
Bon Secour Bay
Gulf of Mexico
N
Unit 5: Gulf State Park (Map 6)
Unit 4: Pine Beach (Map 5)
Unit 3: Gulf Highlands (Map 4)
Unit 2: Little Point Clear (Map 3)
Unit 1: Ft. Morgan (Map 2)
Legend
Coastline
Critical Habitat
0 0.5 1 2 3 4 Miles
Alabama

(6) Unit 1: Fort Morgan, Baldwin County, Alabama.

(i) *General Description:* Unit 1 consists of 446 ac (180 ha) at the extreme western tip of the Fort Morgan Peninsula in Baldwin County, Alabama. This unit encompasses essential features of Alabama beach mouse habitat within the boundary of the Fort Morgan State Historic Site and adjacent properties west of the Bay to Breakers development. The southern and western extents are the mean high water level (MHWL). The unit extends northward to either the seaward extent of maritime forest, developed features associated with the Fort Morgan State Historic Site, or Ft. Morgan Parkway.

(ii) *Coordinates:* From the Fort Morgan and Saint Andrews Bay USGS 1:24,000 quadrangle maps, Alabama, land bounded by the following UTM 16 NAD 83 coordinates (E, N): 401473.62, 3344763.21; 401547.57, 3344692.62; 401513.96, 3344669.09; 01503.87, 3344514.47; 401369.42, 3344440.53; 401577.82, 3344356.49; 402008.06, 3344443.89; 402169.41, 3344622.04; 402525.70, 3344682.54; 403820.62, 3344782.93; 404628.95, 3344823.00; 404623.54, 3344330.64; 404288.09, 3344287.36; 403970.48, 3344745.87; 403970.48, 3344230.37; 403292.55, 3344087.17; 402583.77, 3343995.19; 401269.00, 3343995.19; 400971.42, 3344125.04; 400976.83, 3344206.20; 401301.47, 3344628.22; 404286.32, 3344756.22; 402854.33, 3344659.30; 402903.74, 3344669.55; 402929.27, 3344691.88; 403288.24, 3344682.82; 403627.98, 3344721.72; 403654.87, 3344714.12; 403590.33, 3344665.04; 403546.85, 3344641.30; 403501.91, 3344628.03; 403337.34, 3344622.77; 403056.19, 3344638.97

(iii) Note: Map of Unit 1, Fort Morgan (Map 2), follows:




BILLING CODE 4310–55–C

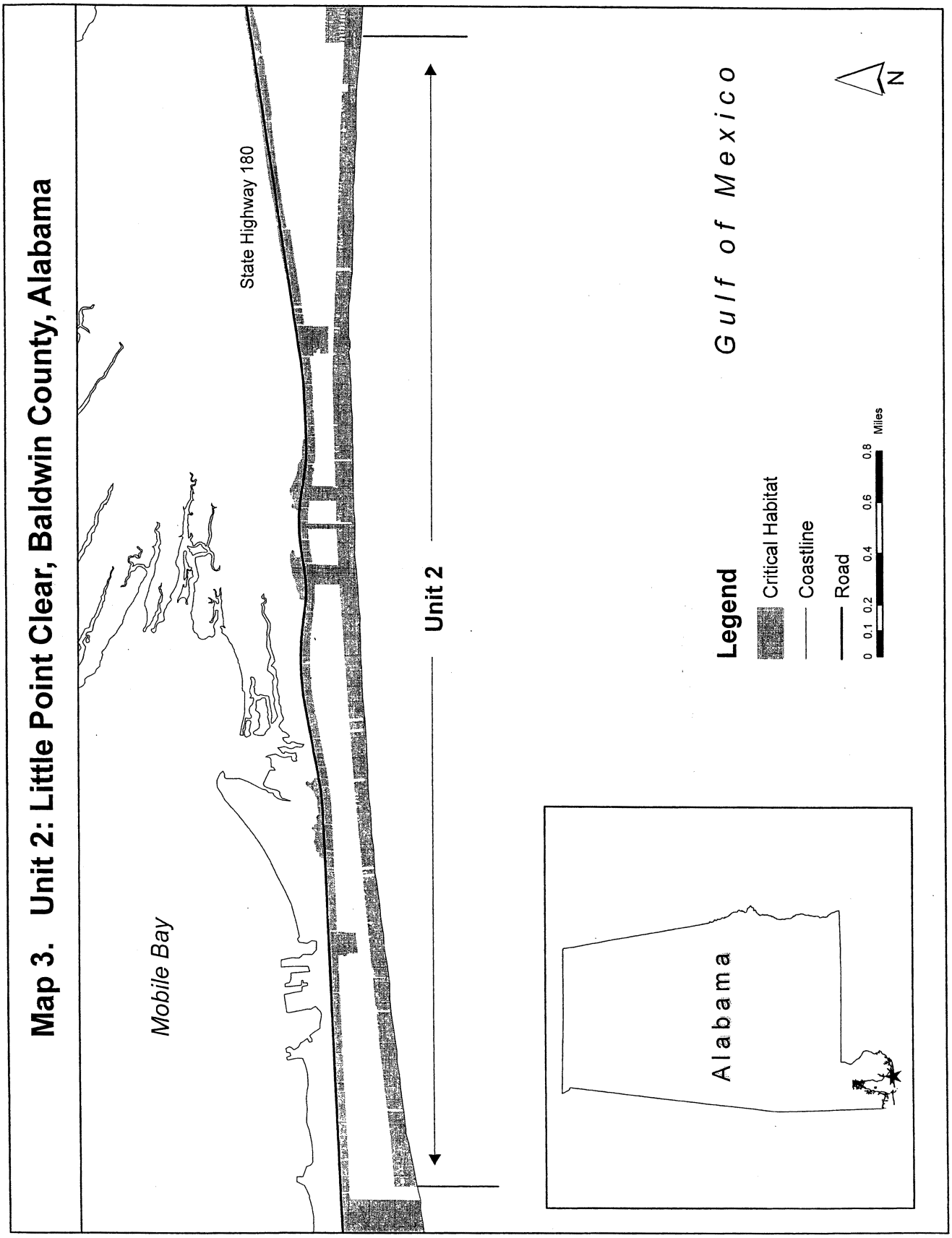
(7) Unit 2: Little Point Clear, Baldwin County, Alabama.

(i) *General Description:* Unit 2 consists of 268 ac (108 ha) on the Fort Morgan Peninsula in Baldwin County, Alabama. This unit encompasses essential features of Alabama beach mouse habitat north of the mean high water line (MHWL) and south of the Alabama Department of Environmental Management Coastal Construction Control Line (as defined in Alabama Administrative Code of Regulations 335–8–2–0.8) from the eastern property boundary of Bay to Breakers eastward to the western boundary of the Surfside Shores subdivision. This unit also includes essential features of Alabama beach mouse habitat 160 ft south (except where otherwise noted) of the centerline of Fort Morgan Parkway, from the eastern boundary of Bay to Breakers east to the western boundary of the Surfside Shores subdivision, and associated areas as depicted on Map 3 in paragraph (7)(iii) of this entry and in the coordinates provided in paragraph (7)(ii) of this entry.

(ii) *Coordinates:* From the Saint Andrews Bay USGS 1:24,000 quadrangle map, Alabama, land bounded by the following UTM 16 NAD 83 coordinates (E, N), except those areas covered by incidental take permits shown in the maps: 408673.97, 3345088.73; 408690.96, 3345050.98; 408964.63, 3345069.85; 408992.95, 3345115.15; 409098.64, 3345124.59; 409260.96, 3345071.74; 409306.26, 3345047.20; 409421.39, 3345039.65; 409421.39, 3345018.89; 409839.57, 3345038.68; 410450.38, 3345133.36; 410638.20, 3345180.70; 411632.04, 3345331.96; 411819.06, 3345348.96; 411819.06, 3345276.71; 411455.65, 3345227.83; 411423.77, 3345234.20; 411115.62, 3345195.95; 410735.21, 3345138.57; 410735.21, 3345117.32; 410129.52, 3345030.18; 405929.15, 3344870.87; 406790.26, 3344915.69; 406790.26, 3344944.50; 406889.49, 3344986.11; 406915.10, 3344986.11; 406947.11, 3344973.31; 406972.72, 3344998.92; 406998.33, 3344960.50; 407039.95, 3344973.31; 407065.56, 3344950.90; 407148.55, 3344960.50; 407232.02, 3345008.52; 407238.42, 3345034.13; 407289.64, 3344954.10; 407918.85, 3345054.48; 408411.28, 3345026.14; 408414.83, 3345068.65; 408687.61, 3345125.34; 408723.04, 3345107.62; 406397.69, 3344654.51; 408502.15, 3344816.39; 408502.15, 3344974.12; 408369.32, 3344978.29; 408074.61, 3345003.18; 407842.17, 3344994.88; 407194.65, 3344878.65; 406327.13, 3344837.15; 406318.83, 3344720.92; 406181.85, 3344716.77; 406165.25, 3344837.15; 404625.30, 3344770.73; 408639.12, 3344982.42; 408850.81, 3345011.48; 408626.67, 3344828.84; 408904.77, 3345015.63; 409021.00, 3345003.18; 409033.45, 3344837.15; 410127.40, 3344881.42; 409942.50, 3345003.19; 409321.94, 3344964.94; 409122.17, 3344994.69; 409122.17, 3344839.55; 411303.93, 3344704.32; 410054.54, 3344754.13; 410029.64, 3344741.68; 409992.28, 3344745.83; 409963.23, 3344758.28; 408879.87, 3344720.92; 407157.29, 3344642.06; 406011.67, 3344509.23; 405044.53, 3344417.91; 404700.02, 3344343.20; 404624.32, 3344815.46; 404709.17, 3344488.16; 405203.36, 3344433.41; 405813.57, 3344509.70; 406027.79, 3344616.83; 406662.44, 3344675.99; 406677.12, 3344600.23; 407261.66, 3344729.73; 407664.18, 3344758.57; 407637.12, 3344658.32; 408856.44, 3344833.42; 408903.73, 3344832.33; 409944.78, 3344975.70; 409961.53, 3344931.31; 409960.68, 3344885.70; 409940.98, 3344852.55; 410474.83, 3344831.25; 411896.05, 3344778.56; 411897.06, 3344677.82; 411898.98, 3345357.59; 411899.47, 3345349.16; 411899.92, 3345333.36; 411898.69, 3345292.29

(iii) Note: Map of Unit 2, Little Point Clear (Map 3), follows:

BILLING CODE 4310–55–P




BILLING CODE 4310–55–C

(8) Unit 3: Gulf Highlands, Baldwin County, Alabama.

(i) *General Description:* Unit 3 consists of 275 ac (111 ha) on the Fort Morgan Peninsula in Baldwin County, Alabama. This unit encompasses essential features of Alabama beach mouse habitat north of the mean high water line (MHWL) to the seaward extent of interdunal wetlands as depicted on Map 4 in paragraph (8)(iii) of this entry and in the coordinates in paragraph (8)(ii) of this entry. This unit also includes essential features of Alabama beach mouse habitat 160 ft south of the centerline of Fort Morgan Parkway (except some areas to the north as noted in paragraphs (8)(ii) and (8)(iii) of this entry). Unit 3 is bounded to the west by the eastern property line of the Morgantown subdivision and to the east by the western property line of Martinique on the Gulf.

(ii) *Coordinates:* From the Pine Beach and Saint Andrews Bay USGS 1:24,000 quadrangle maps, Alabama, land bounded by the following UTM 16 NAD 83 coordinates (E, N), except those areas covered by incidental take permits shown in the maps:

(A) Surfside Shores—412122.39, 3344896.76; 412230.61, 3344952.19; 412407.44, 3344970.66; 412407.44, 3344997.06; 413286.34, 3345139.58; 413283.70, 3344598.52; 411897.20, 3344677.62; 411896.72, 3344778.70; 411901.40, 3344895.52; 412585.68, 3344637.82; 413286.36, 3345090.20; 413224.06, 3345080.28; 413224.52, 3344927.47; 413284.56, 3344937.39

(B) Gulf Highlands—414393.00, 3344536.62; 414393.00, 3344732.11; 414676.12, 3344736.60; 415529.98, 3344440.00; 414671.87, 3344524.00; 414736.29, 3344520.49; 414736.41, 3344546.27; 415324.89, 3344541.53; 415326.46, 3344653.21; 415533.04, 3344653.83; 415290.55, 3345011.54; 415327.74, 3345011.79; 415327.61, 3344980.39; 415290.42, 3344981.38; 415308.84, 3344940.80; 415327.02, 3344940.72; 415327.30, 3344910.13; 415308.70, 3344910.21; 415358.01, 3344940.99; 415376.61, 3344940.91; 415376.48, 3344910.33; 415357.88, 3344910.41; 415291.27, 3345081.38; 415309.04, 3345081.30; 415309.47, 3345085.02; 415291.28, 3345084.28; 415326.74, 3345051.69; 415326.74, 3345039.99; 415181.66, 3345041.16; 415184.00, 3345052.86; 415174.64, 3345051.69; 415174.64, 3345041.16; 414954.68, 3345042.33; 414954.68, 3344655.06; 414920.74, 3344656.23; 414920.74, 3344761.53; 414735.88, 3344762.70; 414735.88, 3344773.23; 414921.91, 3344772.06; 414921.91, 3344831.73; 414737.05, 3344832.90; 414737.05, 3344843.43; 414921.91, 3344842.26; 414923.08, 3344903.10; 414735.88, 3344903.10; 414735.88, 3344915.97; 414924.25, 3344913.63; 414921.91, 3344972.13; 414738.22, 3344974.47; 414738.22, 3344983.83; 414921.91, 3344982.66; 414923.08, 3345043.50; 414738.22, 3345043.50; 414738.22, 3345054.03; 414921.91, 3345054.03; 414921.91, 3345071.59; 414953.51, 3345073.93; 414953.51, 3345052.86; 414953.51, 3344876.19;

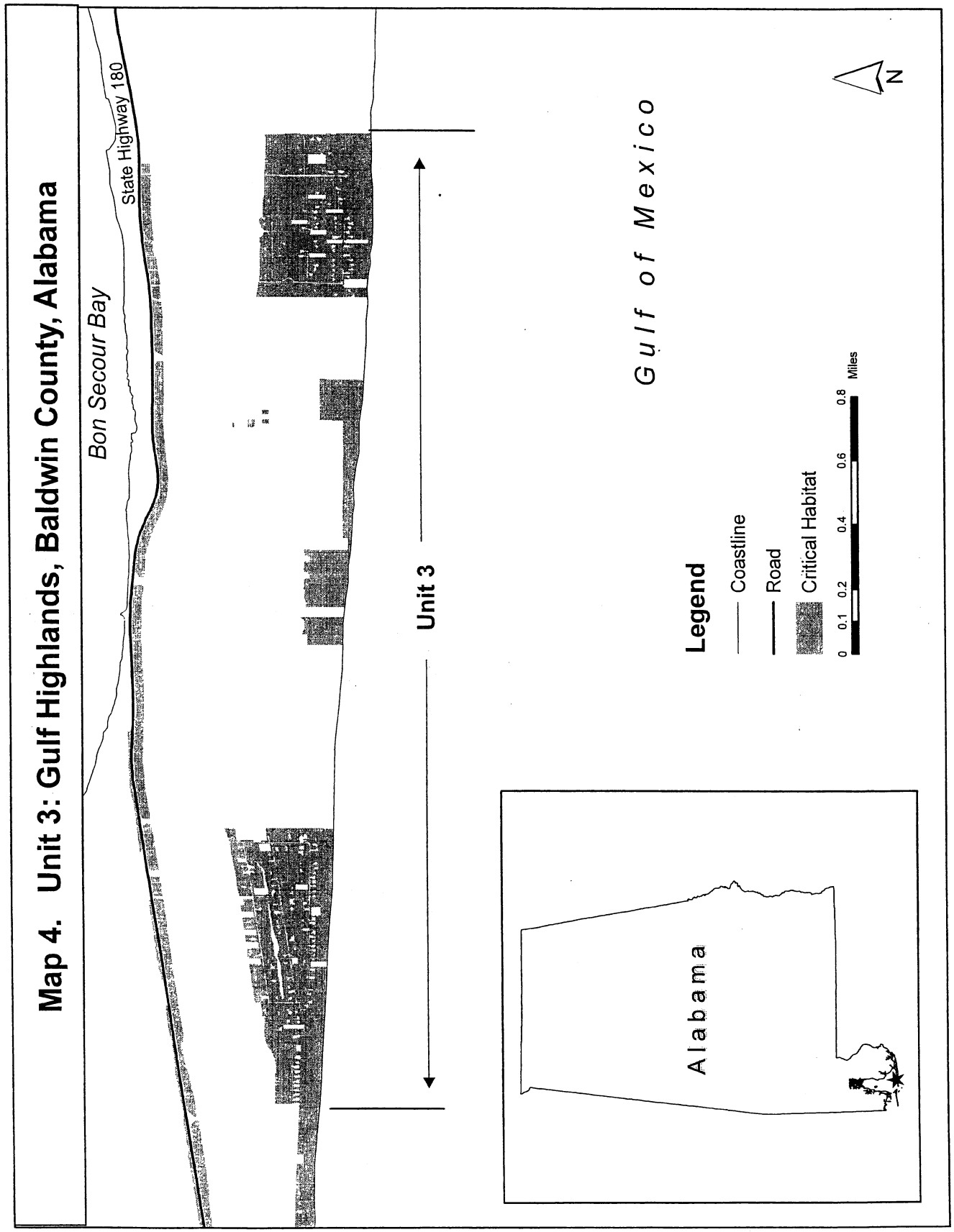
(C) Gulf Shores Plantation—414204.25, 3344552.35; 414204.25, 3344725.37; 414343.57, 3344754.58; 414341.32, 3344543.36

(D) Cabana Beach—415938.37, 3344420.63; 416333.53, 3344954.65; 416756.08, 3344395.60; 416750.70, 3344919.13; 415945.72, 3344968.29

(E) ROW—413472.87, 3345602.80; 413767.66, 3345609.58; 413781.21, 3345585.86; 414496.15, 3345582.47; 414760.44, 3345545.20; 414973.90, 3345460.49; 415278.85, 3345487.60; 416224.19, 3345470.66; 415654.96, 3345426.61; 414973.90, 3345402.89; 414533.42, 3345521.48; 413621.96, 3345538.42; 411899.45, 3345292.57; 411899.63, 3345333.23; 411898.97, 3345349.21; 411898.28, 3345357.92; 416599.61, 3345528.80; 416603.89, 3345480.95

(iii) Note: Map of Unit 3, Gulf Highlands (Map 4), follows:

BILLING CODE 4310–55–P

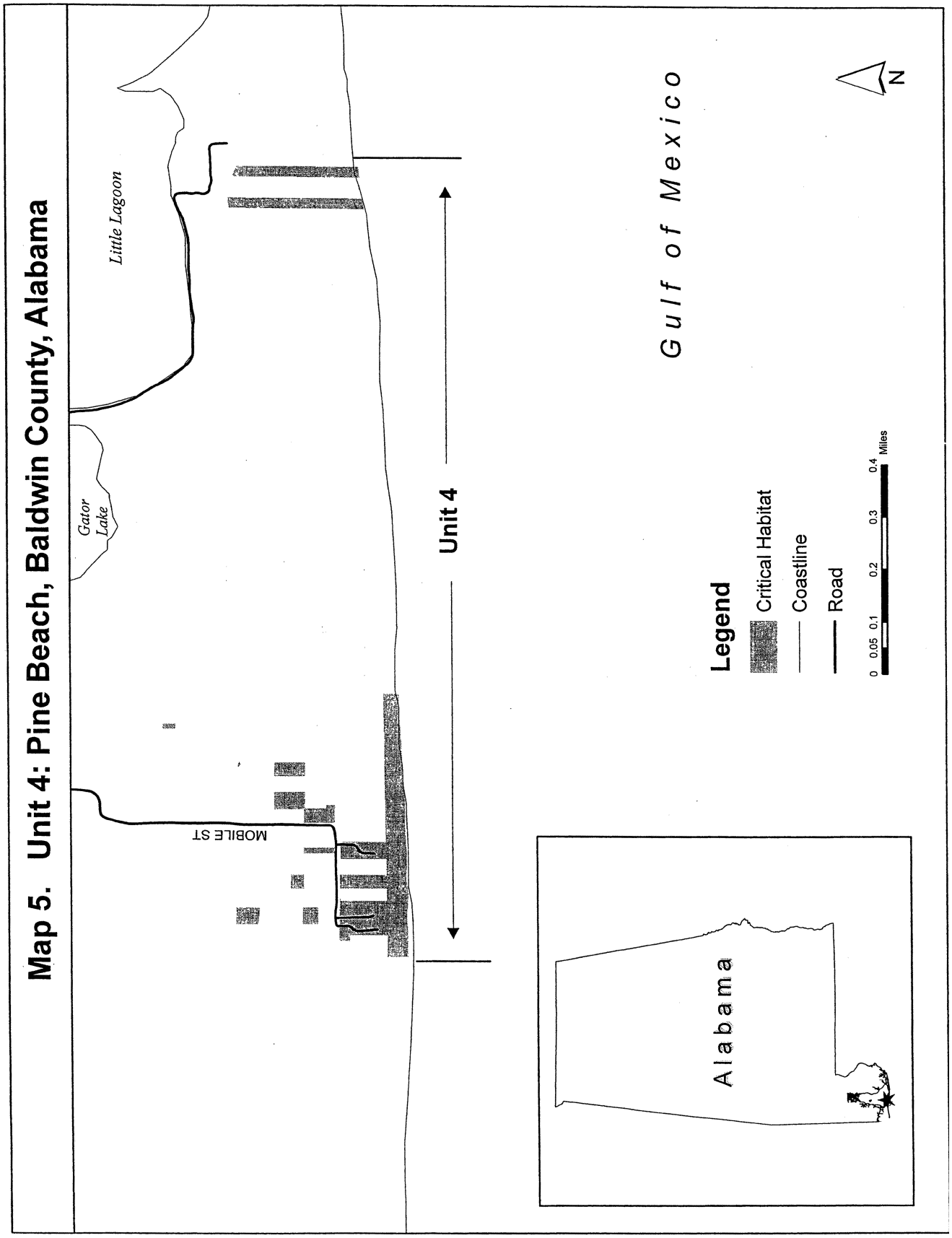

Map 4. Unit 3: Gulf Highlands, Baldwin County, Alabama
Bon Secour Bay
State Highway 180
Unit 3
Gulf of Mexico
N
Legend
Coastline
Road
Critical Habitat
0 0.1 0.2 0.4 0.6 0.8 Miles
Alabama

(9) Unit 4: Pine Beach, Baldwin County, Alabama.

(i) *General Description:* Unit 4 consists of 30 ac (12 ha) on 27 inholdings within the Perdue Unit of the Bon Secour National Wildlife Refuge as depicted on Map 5 in paragraph (9)(iii) of this entry and in the coordinates in paragraph (9)(ii) of this entry.

(ii) *Coordinates:* From the Pine Beach USGS 1:24,000 quadrangle map, Alabama, land bounded by the following UTM 16 NAD 83 coordinates (E, N), except those areas covered by incidental take permits shown on the map in paragraph (9)(iii) of this entry: 419890.08, 3344529.29; 419946.90, 3344389.62; 420406.15, 3344394.35; 420401.42, 3344342.27; 419587.07, 3344320.96; 419589.44, 3344384.88; 419658.09, 3344384.88; 419655.72, 3344503.25; 419636.78, 3344503.25; 419639.15, 3344534.02; 419783.19, 3344531.65; 419783.55, 3344384.88; 419803.49, 3344384.88; 421930.69, 3344448.80; 421895.18, 3344446.43; 422030.12, 3344465.37; 419842.74, 3344635.81; 419797.76, 3344640.55; 419688.86, 3344841.77; 419740.94, 3344841.77; 419688.86, 3344645.28; 419743.31, 3344642.92; 419740.94, 3344593.20; 419688.86, 3344595.57; 420294.50, 3345060.66; 420306.84, 3345060.44; 420306.62, 3345022.12; 420294.28, 3345022.34; 420148.12, 3344725.77; 420190.73, 3344725.77; 420188.36, 3344633.45; 420150.49, 3344633.45; 420046.32, 3344728.14; 420098.40, 3344728.14; 420098.40, 3344635.81; 420046.32, 3344635.81; 420046.32, 3344567.16; 420058.16, 3344567.16; 420058.16, 3344545.86; 420003.71, 3344545.86; 420003.71, 3344638.18; 419906.65, 3344638.18; 419927.96, 3344638.18; 419927.96, 3344545.86; 419906.65, 3344548.22; 419690.90, 3344778.02; 419740.44, 3344772.85; 419801.19, 3344677.57; 419842.01, 3344675.40; 421902.16, 3344854.73; 421932.71, 3344858.24; 421999.30, 3344843.90; 422029.66, 3344830.25; 421996.44, 3344462.00

(iii) Note: Map of Unit 4, Pine Beach (Map 5), follows:

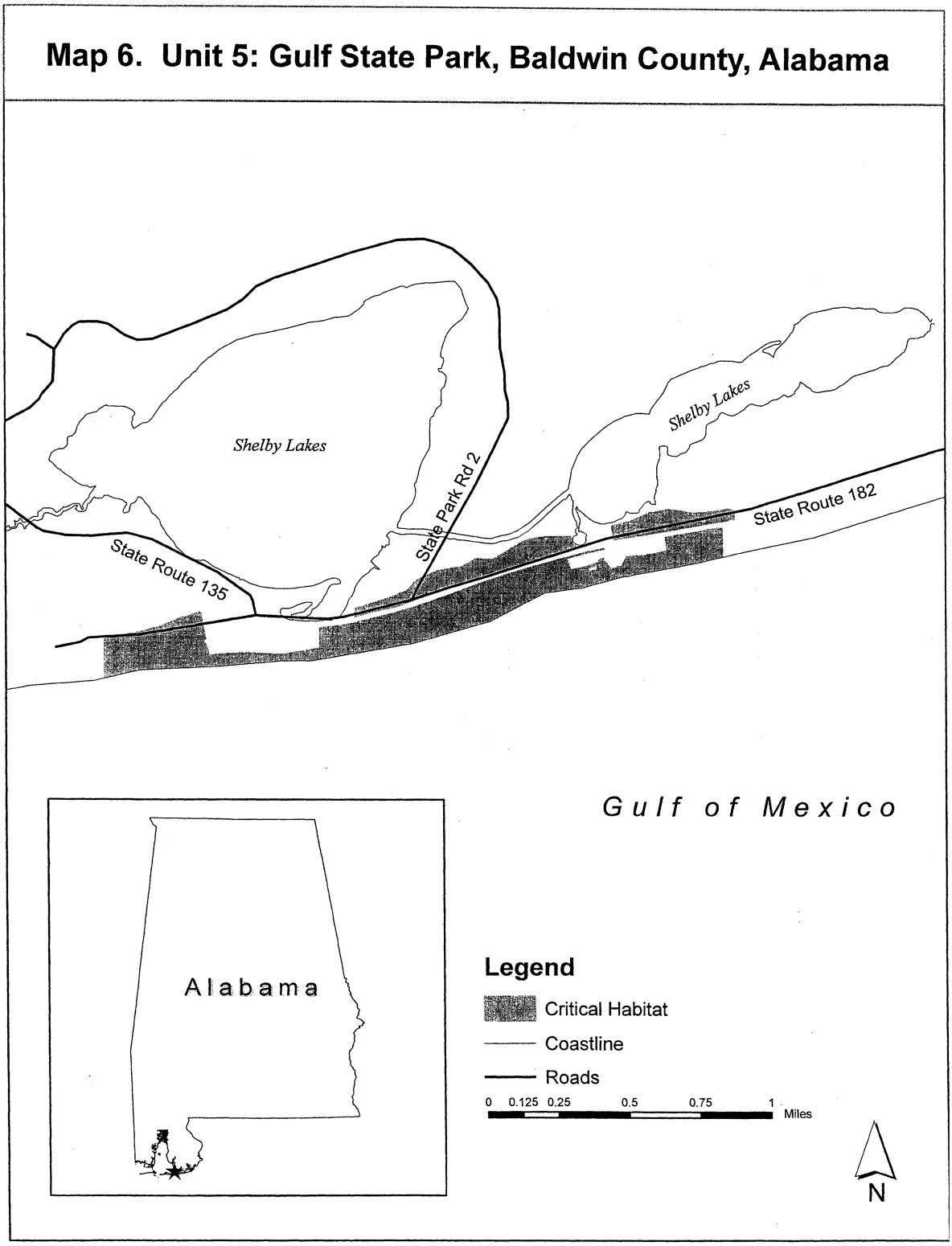

Map 5. Unit 4: Pine Beach, Baldwin County, Alabama
Little Lagoon
Gator Lake
MOBILE ST
Unit 4
Gulf of Mexico
N
Legend
Critical Habitat
Coastline
Road
0 0.05 0.1 0.2 0.3 0.4 Miles
Alabama

(10) Unit 5: Gulf State Park, Baldwin County, Alabama.

(i) *General Description:* Unit 5 consists of 192 ac (78 ha) in Gulf State Park east of the City of Gulf Shores in Baldwin County, Alabama. This unit encompasses essential features of Alabama beach mouse habitat north of the mean high water line (MHWL) to the seaward extent of either coastal wetlands, maritime forest, or Alabama beach mouse habitat managed under the 2004 Gulf State Park habitat conservation plan. Exact boundaries are depicted on Map 6 in paragraph (10)(iii) of this entry and in the coordinates in paragraph (10)(ii) of this entry.

(ii) *Coordinates:* From the Gulf Shores USGS 1:24,000 quadrangle map, Alabama, land bounded by the following UTM 16 NAD 83 coordinates (E, N), except those areas identified as developable in the current incidental take permit for the Alabama Department of Conservation and Natural Resources: 438247.09, 3347462.61; 438384.26, 3347485.47; 438504.29, 3347456.89; 438738.63, 3347479.75; 438738.63, 3347411.17; 438681.48, 3347405.45; 438675.76, 3347193.97; 437681.24, 3346988.21; 436938.21, 3346702.43; 436349.50, 3346599.55; 435377.85, 3346548.11; 435160.66, 3346490.95; 435166.37, 3346736.72; 435606.47, 3346856.75; 436572.41, 3346828.17; 36572.41, 3346913.91; 436881.06, 3347033.94; 436909.64, 3347068.23; 437612.66, 3347325.43; 437818.42, 3347319.72; 437829.85, 3347251.13; 438035.61, 3347308.29; 438041.33, 3347394.02; 435699.17, 3346883.42; 435754.39, 3346634.94; 435940.75, 3346652.19; 436154.72, 3346638.39; 436368.69, 3346683.25; 436368.69, 3346790.24

(iii) Note: Map of Unit 5, Gulf State Park (Map 6), follows:




* * * * *

Dated: January 12, 2007.

**Todd Willens,**

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

[FR Doc. 07–270 Filed 1–29–07; 8:45 am]

**BILLING CODE 4310–55–C**