

- 18 AAC 50.311. Nonattainment Area Major Stationary Source Permits (effective 10/01/04)
- 18 AAC 50.316. Preconstruction Review for Construction or Reconstruction of a Major Source of Hazardous Air Pollutants (effective 10/01/04) except (c)
- 18 AAC 50.326. Title V Operating Permits (effective 10/01/04) except (j)(1), (k)(3), (k)(5), and (k)(6)
- 18 AAC 50.345. Construction and Operating Permits: Standard Permit Conditions (effective 1/18/97)
- 18 AAC 50.346. Construction and Operating Permits: Other Permit Conditions (effective 10/01/04)

Table 7. Emission Unit or Activity, Standard Permit Condition

#### Article 4. User Fees

- 18 AAC 50.400. Permit Administration Fees (effective 1/18/97) except (a), (b), (c)(1), (c)(3), (c)(6), (i)(2), (i)(3), (m)(3) and (m)(4)
- 18 AAC 50.403. Negotiated Service Agreements (effective 1/29/05) except (8) and (9)
- 18 AAC 50.405. Transition Process for Permit Fees (effective 1/29/05)
- 18 AAC 50.410. Emission Fees (effective 1/18/97)
- 18 AAC 50.499. Definition for User Fee Requirements (effective 1/29/05)

#### Article 5. Minor Permits

- 18 AAC 50.502. Minor Permits for Air Quality Protection (effective 10/1/04) except (b)(1), (b)(2), (b)(3) and (b)(5)
- 18 AAC 50.508. Minor Permits Requested by the Owner or Operator (effective 10/1/04)
- 18 AAC 50.509. Construction of a Pollution Control Project without a Permit (effective 10/1/04)
- 18 AAC 50.540. Minor Permit: Application (effective 10/1/04)
- 18 AAC 50.542. Minor Permit: Review and Issuance (effective 10/1/04) except (b)(1), (b)(2), (b)(5), and (d)
- 18 AAC 50.544. Minor Permits: Content (effective 10/1/04)
- 18 AAC 50.546. Minor Permits: Revisions (effective 10/1/04)
- 18 AAC 50.560. General Minor Permits (effective 10/1/04) except (b)

#### Article 9. General Provisions

- 18 AAC 50.990. Definitions (effective 1/18/97)

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU76

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

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the endangered plant *Catesbaea melanocarpa* (no common name) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 50 acres (ac) (20.2 hectares (ha)) fall within the boundaries of the proposed critical habitat designation for *C. melanocarpa* in one unit located in Christiansted, St. Croix, U.S. Virgin Islands. If made final, this proposal may result in additional requirements under section 7 of the Act for Federal agencies. No additional requirements are expected for non-Federal actions. The Service seeks comments on all aspects of this proposal from the public.

**DATES:** We will accept comments from all interested parties until October 23, 2006. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by October 6, 2006.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information by mail or hand-delivery to Edwin E. Muñiz, Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Fish and Wildlife Office, Road 301 Km. 5.1, P.O. Box 491, Boquerón, Puerto Rico 00622.

2. You may send comments by electronic mail (e-mail) to [marelisa\\_rivera@fws.gov](mailto:marelisa_rivera@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

3. You may fax your comments to 787-851-7440.

4. You may submit comments via the Federal E-Rulemaking Portal at <http://www.regulations.gov>.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Caribbean Fish and Wildlife

Office, Road 301 Km. 5.1, Boquerón, Puerto Rico (telephone 787-851-7297).

#### FOR FURTHER INFORMATION CONTACT:

Marelisa Rivera, Caribbean Fish and Wildlife Office (see **ADDRESSES**), telephone 787-851-7297 ext. 231; facsimile 787-851-7440.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of *Catesbaea melanocarpa* habitat, including areas occupied by *C. melanocarpa* at the time of listing and containing features essential to the conservation of the species, and areas not occupied at the listing that are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) We have not included lands containing features essential to the conservation of *C. melanocarpa* within the Guánica and Susúa Commonwealth Forests in Puerto Rico in this proposed designation because we believe that the Commonwealth Forests provide conservation management and protection for these features such that the specific areas do not meet the definition of critical habitat. We are seeking specific comments related to:

(a) Whether our determination to not include these specific areas in critical habitat is appropriate, and

(b) if our determination is not appropriate, then how should we define the specific areas essential to conservation of this plant.

(5) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(6) Whether our approach to designating critical habitat could be improved or modified in any way to

provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit electronic comments to [marelisa\\_rivera@fws.gov](mailto:marelisa_rivera@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: *Catesbaea melanocarpa*" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your message, contact us directly by calling our Caribbean Fish and Wildlife Office at phone number 787-851-7297.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. We will not consider anonymous comments, and we will make all comments available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Caribbean Fish and Wildlife Office (see **ADDRESSES**).

#### **Role of Critical Habitat in Actual Practice of Administering and Implementing the Act**

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 section 4(b)(2) of the Act, there are significant limitations on the regulatory effect of designation under section 7(a)(2) of the Act. 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 475 species or 36 percent of the 1,310 listed species in the U.S. under the jurisdiction of the

Service, have designated critical habitat. We address the habitat needs of all 1,310 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 these measures may make the difference between extinction and survival for many species.

In considering exclusions of areas proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force v. U.S. 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 proposed 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**

We intend to discuss topics directly relevant to the designation of critical habitat in this proposed rule. For more

information on *C. melanocarpa*, including characteristics and life history, refer to the final listing rule published in the **Federal Register** on March 17, 1999 (64 FR 13116) and the final recovery plan (July 15, 2005).

*C. melanocarpa* is a perennial spiny shrub of the Madder family (Rubiaceae). Most members of this family are found in the tropics. The genus *Catesbaea* consists of 10 or more other species of spiny shrubs and is generally confined to the Antilles, but some may extend into the Bahamas and the Florida Keys (Breckon and Kolterman 1993, p. 1). *C. melanocarpa* is found in both dry and moist forest life zones in the Caribbean on the island of Puerto Rico (PR) and in the U.S. Virgin Islands (USVI). The dry forest life zone in PR and USVI occupies about 165,030 ha (407,798 acres) or 18 percent of PR and USVI. The moist forest life zone occupies 548,220 ha (1,354,681 acres) or 58 percent of PR and USVI.

#### Life History

*C. melanocarpa* is a branching shrub that may reach approximately 9.8 feet (ft) (3.0 meters (m)) in height. Spines are from 0.39 to 0.78 inches (in) (1.00 to 2.00 centimeters (cm)) long. Leaves are small, from 0.19 to 1.0 in (5.00 to 25.00 millimeters (mm)) long, and 0.07 to 0.58 in (2.00 to 15.00 mm) wide, often opposite. The flowers are white, solitary or paired, and almost lacking a stalk in the axils (angle formed by a leaf or branch with the stem) (Proctor 1991, p. 44).

Biological and ecological information on *C. melanocarpa* is scarce. In July 1992, Breckon and Kolterman (1993, p. 2) measured stem height and basal diameter for the 24 individuals known from St. Croix. Stem height ranged from 0.36 to 9.91 ft (0.11 to 3.02 m) and averaged 2.59 ft (0.79 m). Basal stem diameter ranged from 0.16 to 2.20 in (0.40 to 5.60 cm). In December 1992, reproduction was checked, and while no flowers were observed, many adults (greater than 1.64 ft (0.50 m) in height) were in fruit (Breckon and Kolterman 1993, p. 2). In St. Croix, we observed the species with fruit in early March 2006.

Only a few seed germination and propagation experiments have been conducted on *C. melanocarpa* (Breckon and Kolterman 1993, p. 2). In August 1988, seeds and plants were collected from the St. Croix location. Most of the transplanted seedlings have survived, and two have produced flowers and fruits. Of 57 seeds collected in December 1990, 92 percent germinated, but only five of the seedlings survived. In 1993, two fruits were collected. Ten seeds were obtained from these two

fruits, but none germinated. Two plants previously germinated from St. Croix seeds were donated to the Guánica Commonwealth Forest. These plants died before being planted. Fairchild Tropical Garden in Miami, Florida, collected seeds in 1994 or 1995 and had good germination and survival results (O'Reilly 2004).

#### Distribution and Abundance

The historical and current range of this species includes Halfpenny Bay in St. Croix, USVI; Guánica and Susúa Commonwealth Forests and Peñones de Melones, PR; and Barbuda, Antigua, and Guadeloupe islands. Prior to 1995, *C. melanocarpa* was only known from Guánica, PR; St. Croix in the USVI; and Barbuda, Antigua, and Guadeloupe (Liogier and Martorell 1982, p. 172; Proctor 1991, p. 44; Breckon and Kolterman 1993, p. 1). Little was known about the status of this plant on the islands of Antigua, Barbuda, and Guadeloupe. One specimen, apparently originating from the Susúa Commonwealth Forest in Sabana Grande and Yauco, PR, was collected in 1974 and is located in the herbarium of the University of Puerto Rico in San Juan, PR. Because of the poor condition of the specimen, it was not possible to confirm its identification as *C. melanocarpa* (Breckon and Kolterman 1993, p. 1).

In St. Croix, USVI, *C. melanocarpa* was first collected in 1881 by the Danish collector Baron H.F.A. von Eggers (Proctor 1991, p. 43). The species was re-discovered in Halfpenny Bay by Rudy G. O'Reilly, Jr., who found a small population (approximately seven individuals) in a dry coastal plain located about 2.5 miles (4 km) south of Christiansted in August 1988 (Breckon and Kolterman 1993, pp. 1–2). Voucher specimens of these plants were collected by G.R. Proctor on September, 1988 (Proctor 1991, p. 43). The voucher describes the plants growing in pasture, shaded by *Cassia poplyphylla* (retama prieta) and other tall shrubs in the subtropical dry forest life zone. This population was estimated to consist of 24 individuals in July 1992 (Breckon and Kolterman 1993, p. 2). In October 2002, one hundred individuals were estimated to occur at this same location (Lombard 2002).

In Guánica, PR, *C. melanocarpa* was first collected by the German collector Paul Sintenis in 1886 (Proctor 1991, p. 43). Based on information in the Natural Heritage Program of the Puerto Rico Department of Natural and Environmental Resources (DNER), two historical collections are reported from Guánica: one in Cerro Montalva, west to

Providencias Saltflats; and another at Punta Meseta, close to the Guánica Lighthouse within the Guánica Commonwealth Forest. Service biologists visited the last location on March 7, 2006 with personnel from the DNER and did not observe the species in the area. In 2001, *C. melanocarpa* was rediscovered at the Guánica Commonwealth Forest (Trejo-Torres 2001, p. 62; Axelrod 2004; Trejo-Torres 2006) in the subtropical dry forest life zone. Service biologists visited the site in March 2006, and confirmed the presence of the species in a slope facing northwest of the Fuerte Trail. Approximately 12 individuals were found within the deciduous forest type. However, this does not represent a population estimate for this species at the Guánica Commonwealth Forest. This forest contains habitat that is difficult to traverse. It is composed of dry shrub—scrub vegetation that is essentially a dense, thorny thicket of vegetation. Comprehensive surveys of the entire forest have not been conducted to determine all the locations of *C. melanocarpa*. Surveys thus far have been limited due to habitat constraints and resources to existing trails within the forests and have not been specifically designed yet to systematically look for *C. melanocarpa*. Axelrod (2004) anticipates, though, that this plant will be found in more locations in Guánica Commonwealth Forest and other places as more inventories are conducted.

Within the subtropical moist forest life zone, the species has only been reported from the Susúa Commonwealth Forest. *C. melanocarpa* has been reported in Susúa twice in thirty years: in 1974 by Woodbury (Breckon and Kolterman 1993, p. 1) and in 2003 (Trejo-Torres 2003, 2006). The occurrence of *C. melanocarpa* in Susúa Commonwealth Forest was confirmed in 2003 when Trejo-Torres found the species in flower at the forest (Trejo-Torres 2003, 2006). Trejo-Torres submitted the collection voucher and the photography of the individual to the Service. Similar to the Guánica Commonwealth Forest, we do not have a comprehensive population estimate for the Susúa Commonwealth Forest because systematic surveys of all suitable habitat have not been conducted. This forest also is composed of dense vegetation, making it difficult to traverse.

At the time of listing in 1999, *C. melanocarpa* was known from one individual located on the Peñones de Melones in Cabo Rojo, PR (about 16 miles (mi) or 25 kilometers (km) from Guánica); about 24 individuals located

on one privately owned farm in Halfpenny Bay near Christiansted in St. Croix, USVI; and an undetermined number of individuals on Barbuda, Antigua, and Guadeloupe (64 FR 13116, March 17, 1999; Puerto Rico Planning Board 1995, p. 29; Proctor 1991, p. 44; Breckon and Kolterman 1993, p. 1; USFWS 2005, p. 3). At the time of listing, Susúa Commonwealth Forest was recognized as part of the historical distribution of the species; however, the occurrence within the forest could not be confirmed since the collection material deposited at the herbarium in San Juan was in poor condition.

Currently, we have observed that the species, within U.S. jurisdiction (PR and USVI), occupies three discrete localities: (1) Approximately 100 individuals at a privately owned farm in Halfpenny Bay (Lombard 2002); (2) approximately 12 individuals located at the Fuerte Trail in Guánica Commonwealth Forest, Guánica, Guayanilla, and Yauco, PR (Axelrod 2004; Trejo-Torres 2001, p. 62), and (3) one individual located at the Susúa Commonwealth Forest, Sabana Grande and Yauco, PR (Trejo-Torres 2006).

The site in Peñones de Melones, where the species was reported in 1995, has experienced periodic land clearing activities and road construction based on our observations in 2002 and 2006 (Foote 2002; Axelrod 2004; Axelrod 2006). Several survey efforts have been conducted in the area by the Service and others; however, to date, no individuals of *C. melanocarpa* have been located (Foote 2002; Axelrod 2004; Axelrod 2006; Oikos Environmental Services 2005, p. 27).

#### Habitat Description

*C. melanocarpa* has been found to occur only in the subtropical dry and subtropical moist forest life zones. Based on our field observations, the currently occupied sites for this plant all fall into these forest life zones, and have similar habitat characteristics. The subtropical dry forest is considered the driest life zone in PR and the USVI, receiving a mean annual rainfall ranging from 24 to 40 in (60 to 100 cm). Ewel and Whitmore (1973, pp. 10–20) described the vegetation in this zone as deciduous on most soils with most tree species dropping leaves during the dry season. The vegetation usually consists of a nearly continuous single-layered canopy with little ground cover. The leaves of dry forest species are often succulent or coriaceous (leathery), and species with spines and thorns are common. The vegetation in these areas is more xerophilous (drought resistant), and cacti are more abundant. Some

common tree or shrub species of subtropical dry forest include: *Prosopis juliflora* (mesquite or bayahonda), *Bursera simaruba* (almácigo), *Cephalocereus royerii* (sebucán), *Bucida buceras* (úcar), and *Guaiaecum officinalis* (guayacán). Tree heights usually do not exceed 49.2 ft (15 m), and crowns are typically broad, spreading, and flattened. Successional vegetation includes grasses, and the accumulated organic debris serves as fuel for human-induced fires (Ewel and Whitmore 1973, pp. 10–29). Extensive areas of this life zone in Puerto Rico lie over limestone. Within the subtropical dry forest life zone, the species currently occurs in Guánica Commonwealth Forest in PR and Halfpenny Bay in St. Croix, USVI.

In Halfpenny Bay, the currently known population consists of about 100 individuals located in a dry, coastal plain with soils belonging to the Glynn-Hogensborg Unit (NRCS 1998, pp. 63–64). The vegetation as observed by the Service in 2006 is composed of patches of dry woody vegetation (trees and shrubs), surrounded by grasses and *C. melanocarpa* is found under the canopy of these forested patches. The habitat characteristics of the site coincide with previous habitat descriptions for the species (Liogier and Martorell 1982, p. 172; USFWS 2005, p. 6). The average annual precipitation in the area ranges from 30.0 to 54.7 in (762.0 to 1389.0 mm) (NRCS 1998, pp. 63–64).

The currently known population in the Guánica Commonwealth Forest consists of approximately 12 individuals located on a slope northwest of the Fuerte Trail. In 2006, we observed that the vegetation within this locality is characterized by dry forest with semi-closed canopy on limestone soils and the species is found under the canopy. The Guánica Commonwealth Forest is located in southwestern PR in the municipalities of Guánica, Guayanilla, and Yauco. The forest was designated as a forest reserve in 1919 and a United Nations Biosphere Reserve in 1981. It is managed by the DNER. The Guánica Forest supports a variety of vegetation types, including cactus scrub, littoral forest, deciduous forest, and semi-evergreen forest (Silander *et al.* 1986, pp. 60–66). The forest is underlain by limestone sedimentary rocks of Tertiary Period origin, and soils are shallow, well-drained, and alkaline (Silander *et al.* 1986, p. 51). Outcrops cover much of the area. Mean annual precipitation in the Guánica area is approximately 31 in (790 mm). *C. melanocarpa* is found in the deciduous forest. In this forest type, trees often reach 33 ft (10 m). Some

associated tree and shrub species in this vegetation type are *Bucida buceras* (úcar), *Bursera simaruba* (almácigo), *Coccoloba microstachya* (uvillo), *C. krugii*, and *Reynosia uncinata* (chicharrón) (Silander *et al.* 1986, p. 69).

*C. melanocarpa* is currently known from Susúa Commonwealth Forest, which is within the subtropical moist life zone of Puerto Rico. The subtropical moist forest is delineated by a mean annual rainfall ranging from 39 to 86 in (100 to 220 cm) (Ewel and Whitmore 1973, pp. 20–29). Vegetation associations within this life zone are characterized by trees up to 65.6 ft (20 m) tall with rounded crowns. Many of the woody species are deciduous during the dry season and epiphytes are common. Some common tree or shrub species of subtropical moist forest include: *Roystonea borinquena* (palma real), *Tabebuia heterophylla* (roble blanco), *Nectandra* spp. (laurel), *Erythrina poeppigiana* (bucayo gigante), *Inga vera* (guaba), *Inga laurina* (guamá), and *Didymopanax morototoni* (yagrumo macho) (Ewel and Whitmore 1973, pp. 20–29). The Susúa Commonwealth Forest represents not only the influence of a climatic transition zone (dry to moist), but also a combination of volcanic and serpentine soils. Two vegetation associations (dry slope forest and gallery forest) have been delineated in the subtropical moist life zone (DNR 1976, p. 224). *C. melanocarpa* is found within the dry slope forest type. The climatic conditions and serpentine-derived soils contribute to more xeric conditions and a forest structure and species composition very similar to the Guánica Commonwealth Forest. In 2001, Trejo-Torres (2003, 2006) rediscovered the species in the Susúa Commonwealth Forest. One individual in flower was located in the forest. The individual was found on a rocky ravine west of Quebrada los Peces, at the southwestern corner of the public forest. The habitat is described as low forest on serpentine soil.

In Peñones de Melones, Cabo Rojo, PR, *C. melanocarpa* was discovered by Dr. F. Axelrod of the University of Puerto Rico in February 1995 (PRPB 1995, p. 29). The collection voucher deposited in the University of Puerto Rico in San Juan describes the location in Boquerón Ward, Cabo Rojo, PR, at the upper west slopes of Peñones de Melones from 164 to 295 ft (50 to 90 m) above sea level. The voucher described the habitat as dry forest on limestone, and the collection was made from a 7 ft (2 m) shrub with green globose (spherical) fruit. The Peñones de Melones area consists of several chains of limestone hills and drainages

(ravines) surrounded by mangrove forests, mud flats, saltwater and freshwater lagoons, wooded lands, extensive pastures, and residential projects. The elevation ranges from 3.3 to 347.7 ft (1 to 106 m) above sea level. The limestone hill soils belong to San Germán Series (San Germán Stony Clay Loam or SmE) described as shallow and very shallow, strongly sloping and steep, well-drained, cobbly and stony soils on the limestone hills and mountains (Soil Conservation Survey 1965, pp. 114–115). Average annual precipitation in Cabo Rojo is approximately 34 in (874 mm) (USFWS 2004).

Several vegetation surveys have been conducted in the Peñones de Melones area in the last 20 years. Dr. Axelrod reported 84 vascular plant species at the site in 1995 (PRPB 1995, pp. 25–29). In 2005, Dr. H.E. Quintero conducted a flora and fauna study at the site and found that vegetation types are not uniform and there were patches of distinct forests, woodlands, shrub lands, and grasslands (Oikos Environmental Services 2005, p. 10). In August 2002, Service biologists visited the Peñones de Melones area with Dr. Axelrod to identify the site where the species was discovered in 1995. The main part of the drainage, where *C. melanocarpa* was previously observed, showed signs of disturbance from periodic land clearing and road construction. They observed in August 2002 that the area had not been disturbed for several years and showed excessive growth of *Acacia* sp. in disturbed areas exposed to more sunlight. They noted that the area was covered with secondary vegetation with such species as *Acacia farnesiana* (aroma) and *Prosopis juliflora* (mesquite). Although the species was not found, Service biologists concluded that *C. melanocarpa* may be present, but the conditions of the habitat were not suitable to appropriately locate and identify the species (Foote 2002).

In 2004, Dr. Axelrod provided comments to the Service regarding the occurrence of the species in the Peñones de Melones area. He reported that, since his report of the species on the north side of Punta Melones, he found it once again in 2002 in a ravine on the south side of Punta Melones. He reported that, when he returned to the site in 2004, the ravine on the south had been entirely bulldozed. In March 2006, Service biologists visited these two sites on three occasions. The drainage area facing north of the Peñones de Melones (area reported by Axelrod in 1995) was searched for the species, as well as the hills, the slopes, and drainages facing south of the hills. The original site, the

drainage area facing north, demonstrates vegetation characteristics consistent with previous land clearing activities. The area consists of dense woodland dominated by mesquite trees. The ravine and hillsides located to the south of Peñones de Melones have also been cleared by bulldozing activities and consist of dense woodlands dominated by mesquite trees in the lower area and a solid stand of fire bush (*Croton lucidus*) on the hillsides. Based on Service observations, the secondary dry forest vegetation that supported habitat for *C. melanocarpa* has been eliminated.

#### Summary of Threats

*C. melanocarpa* is threatened by small population sizes characterized by the limited number of individuals and distribution, habitat destruction or modification for residential and tourist development, fire, and catastrophic natural events such as hurricanes (USFWS 2005, p. 8). Periodic land-clearing activities have been documented by the Service and others in the Peñones de Melones area in Cabo Rojo (Foote 2002; Axelrod 2004; 2006). The Halfpenny Bay site is a privately owned agricultural tract that is subject to intense but periodic grazing. Based on information gathered during our site visit, most of the site was burned by a human-induced fire in 1997 (Hamada 2006). This population is subject to impacts from cattle grazing activities as well as pressure for a golf course development (USFWS 2005, p. 8). The limited number of individuals and restricted distribution make the species vulnerable to catastrophic events, such as hurricane damage and human-induced fires.

#### Previous Federal Actions

For more information on previous Federal actions concerning *C. melanocarpa*, refer to the final listing rule (64 FR 13116, March 17, 1999). We listed *C. melanocarpa* as endangered under the Act on March 17, 1999 (64 FR 13116) and approved a final recovery plan for this plant on July 15, 2005 (USFWS 2005). In the 1999 final listing rule, we determined designation of critical habitat was not prudent. On September 17, 2004, the Center for Biological Diversity filed a lawsuit against the Department of the Interior and the Service [*Center for Biological Diversity v. Norton* (CV–00293–JDB) (D.D.C.)], challenging the failure to designate critical habitat for *C. melanocarpa*. In a settlement agreement dated June 3, 2005, the Service agreed to reevaluate the prudence of critical habitat for this species and, if prudent, submit a proposed designation of

critical habitat to the **Federal Register** by August 15, 2006, and a final designation by August 15, 2007.

#### 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 under the Act are no longer necessary.

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.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time it was listed 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 (PCEs), as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. [As discussed below, such areas may also be excluded from critical habitat.] 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 that was not known to be occupied at the time of listing but is currently occupied by the species will likely be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

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

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

Areas that support populations, 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 calls for a different outcome.

#### Prudency Determination

Section 4(a)(3) of the Act and its implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is listed as endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) such designation of critical habitat would not be beneficial to the species. In our March 17, 1999, final rule (64 FR 13116), we determined that designating critical habitat was not prudent for *C. melanocarpa* because it would result in no known benefit to the species and could further pose a threat to the species through publication of site-specific localities.

We are already working with Federal and State agencies, private individuals, and organizations in carrying out conservation activities for *C. melanocarpa*, conducting surveys for additional occurrences, and assessing habitat conditions. However, critical habitat designation may be beneficial by providing additional information to individuals, local and State governments, and other entities engaged in long-range planning, because areas with features essential to the conservation of the species are clearly delineated and, to the extent currently feasible, the primary constituent elements of the habitat essential for conservation of the species are specifically identified. Furthermore, although the low numbers of this plant make it unlikely that its populations could withstand even moderate collecting pressure or vandalism, we do not have specific evidence of taking, collection, vandalism, trade, or unauthorized human disturbance and

thus, we cannot say that designation would increase the likelihood of take.

Accordingly, we withdraw our previous determination that the designation of critical habitat will not benefit *C. melanocarpa* and will increase the degree of threat to the species. We determine that the designation of critical habitat is prudent for this species. At this time, we have sufficient information necessary to identify specific areas that meet the definition of critical habitat and are, therefore, proposing critical habitat for *C. melanocarpa*.

#### Methods

As required by section 4(b) of the Act, we use the best scientific data available in determining areas that were occupied at the time of listing that contain the features that are essential to the conservation of *C. melanocarpa* and other areas that are essential to the conservation of this species. We reviewed the approach to conservation of the species undertaken by local, State, and Federal agencies operating within the species' range since its listing, as well as the actions necessary for this plant's conservation as identified in the final recovery plan (USFWS 2005). We reviewed available information that pertains to the habitat requirements of this species. This information included: data from our files that we used for listing the species; peer-reviewed scientific publications; biological field surveys and reports; resource agencies' and universities' unpublished status reports; information and GIS maps (forest boundaries, topography, drainages, roads) from the Puerto Rico Planning Board and Puerto Rico Department of Natural and Environmental Resources; soil maps and manuals from Natural Resources Conservation Service (former Soil Conservation Service); U.S. Geological Survey topographic maps (scale 1:20,000); recent aerial photography; unpublished data and observations collected by Service biologists during recent field surveys; forest management plans from local agencies; the *C. melanocarpa* recovery plan; information received from and discussions with local (PR and USVI) botanists and researchers working with the species and its habitat; and herbarium collections. We also made several recent visits to all currently known localities (Halfpenny Bay, Peñones de Melones, Guánica Commonwealth Forest, and Susúa Commonwealth Forest) to gather abundance and distribution data and conduct habitat observations. Information from all sources was utilized to determine the species' range

and habitat features needed to support life history functions essential to the conservation of the species.

Fewer than 115 individuals are known to occur in three discrete localities throughout PR and the USVI, and no additional sightings for the species have been reported in other areas. The locality where the majority of the individuals occur (about 100 plants) is a relatively small (50 ac, or 20 ha) privately owned cattle grazing parcel under current threat of development pressure in St. Croix. The two other localities are publicly owned and support the only known individuals of *C. melanocarpa* in PR. In the three areas, *C. melanocarpa* is associated with dry woody vegetation occupying the understory strata. The conservation of *C. melanocarpa* depends upon the protection of existing populations and the maintenance of ecological functions within these sites, including vegetation and soils characteristics essential to the conservation of the species. Therefore, we considered, but are not proposing any areas outside the geographical area presently occupied by the species.

#### Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat determinations on the best scientific data available and to consider within areas occupied by the species at the time of listing those physical and biological features that are essential to the conservation of the species (PCEs), and that may require special management considerations or 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 reproduction, germination, or seed dispersal; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for *C. melanocarpa* are derived from the biological needs of the species, and include those habitat components needed for growth and development, flower production, pollination, seed set and fruit production, and genetic exchange. Although at present time the information on the species' biological and ecological needs is limited (USFWS 2005, p. 7), habitat characteristics supporting all three currently known localities are known. Additionally, individuals in all three localities have been documented in fruit or flower. The

presence of sexual reproduction indicates that the species has the potential to produce viable populations, with the assistance of appropriate conservation strategies.

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

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

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

We observed the vegetation within the Guánica Commonwealth Forest locality in 2006 as dry forest with semi-closed canopy on limestone soils. The species is found under the canopy. In this forest type, trees often reach 33 ft (10 m).

Some associated dry forest vegetation in this locality include uivillo (*Coccoloba microstachya*), *C. diversifolia* (uvilla), *Thouinia portoricensis* (quebracho), *Guettarda elliptica* (cucubano liso), alhelí, *Croton lucidus*, *Savia sessiliflora* (amansa guapo), *Pithecellobium unguicati* (uña de gato), *Guaiacum sanctum* (guayacán), *Leucaena leucocephala* (zarcilla), among other common species (Trejo-Torres 2001, pp. 59–63).

Susúa Commonwealth Forest is located in southwestern Puerto Rico in the municipalities of Yauco and Sabana Grande. The Susúa Forest lies between the humid Central Cordillera and the dry coastal plains typical of the south coast. The forest represents not only the influence of a climatic transition zone (dry to moist), but also a combination of volcanic and serpentine soils (Department of Natural Resources 1976, p. 24). The majority of the forest (90 percent) is underlain by serpentine outcrop. The rest of the forest (10 percent) has nine other soil types that belong to the Caguabo-Múcaro association (Silander *et al.* 1986, p. 224–226; Soil Conservation Survey 1975, p. 9). These soils are described as slightly leached, loamy and clay, sticky and plastic soils underlain by hard or weathered rock at a depth of less than 30 inches (Soil Conservation Survey 1975, p. 9). Serpentine-derived soils create stressful conditions for the establishment and growth of plants, and their associated floras are characterized by high diversity and endemism (Cedeño-Maldonado and Breckon 1996, p. 348). Two vegetation associations (dry slope forest and gallery forest) have been delineated in the subtropical moist life zone (Department of Natural Resources 1976, p. 224). The trees are slender, open-crowned, and usually less than 39.4 ft (12m) tall. The forest floor is open because the excessively drained soil supports little herbaceous growth (Ewel and Whitmore 1973, p. 25). *C. melanocarpa* is found in the dry slope forest type. The climatic conditions and serpentine-derived soils contribute to more xeric conditions and a forest structure and species composition similar to the Guánica Commonwealth Forest based on observations by the Service and others (Silander *et al.* 1986, pp. 239–245; Breckon and García 2001).

#### Primary Constituent Elements for *C. melanocarpa*

In accordance with our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of *C. melanocarpa*. All proposed critical habitat for *C. melanocarpa* is occupied, within the species' current and historic



geographic range, and contains sufficient PCEs to support at least one life history function.

Based on our current knowledge of the species and the requirements of the habitat to sustain the essential life history functions of the species, as discussed above, we have determined that *C. melanocarpa*'s PCEs are:

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

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

Open forest floor, canopy, and little ground cover are important requirements for an understory species like *C. melanocarpa*. Canopy provides shade and open forest floor reduces competition by herbaceous species. Limestone and serpentine derived soils that are well to excessively drained provide essential nutrients to this plant and sustain the dry conditions needed by the species. The proposed critical habitat in this rule has been determined to contain sufficient PCEs to support at least one life history function of *C. melanocarpa*.

#### Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that contain the features that are essential to the conservation of *C. melanocarpa*. We began our analysis by considering the historic distribution of the species and sites occupied by the species at the time of listing. The 1999 listing rule (64 FR 13116) identified two localities within U.S. jurisdiction as then occupied by the species: A 50-ac (20-ha) privately owned parcel in Halfpenny Bay in St. Croix, USVI; and a 330-ac (132-ha) property in Peñones de Melones in Cabo Rojo, PR. Both localities are found within the subtropical dry forest life zone and support habitat for the species. The final listing rule identified two historic collections: one in Guánica, PR, in 1886, and one in Susúa Commonwealth Forest, PR, in 1974. The Guánica Commonwealth Forest is within the subtropical dry forest life zone, and Susúa Commonwealth Forest is considered within the moist forest life zone. However, the Susúa Commonwealth Forest supports slopes with dry forest vegetation due to the climatic conditions and soil type. Both forests are similar in forest structure and species composition. Although both

forests support habitat for *C. melanocarpa*, the presence of the species within these two forests was not corroborated at the time of listing. The rule noted that the Susúa specimen could not be confirmed as *C. melanocarpa* because of its poor condition (64 FR 13116, March 17, 1999; Breckon and Kolterman 1993, p. 1).

We reviewed the approved final recovery plan to identify new records of occupancy of the species, biological information, and habitat characteristics (USFWS 2005, pp. 3–8). The plan identifies both downlisting and delisting criteria and emphasizes the importance of protecting existing populations within the range of this plant to prevent its extinction, decrease the threat to the species associated with catastrophic events, and to obtain sexual (seeds) and asexual (cuttings) propagation material to establish a propagation program for the species. The plan includes information provided by a peer reviewer during the comment period showing a recent collection of *C. melanocarpa* located at the Guánica Commonwealth Forest. This forest is located within the previously known distribution of the species and supports a historic collection of *C. melanocarpa*. A voucher of this collection is located in the herbarium of the University of Puerto Rico (UPR 2006).

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

An area was considered for designation where it supported a population or occurrence and either (1) Possesses sufficient PCEs to support at least one life history function and was

occupied at the time of listing or (2) is currently occupied. Information gathered by the Service and data collected during field visits resulted in this proposal regarding only three discrete areas in the U.S. Caribbean.

The Halfpenny Bay area was occupied at the time of listing and continues to be occupied currently. This area contains features that are essential to the conservation of *C. melanocarpa* that may require special management or protection. Another area that was occupied at the time of listing, located in Peñones de Melones in Cabo Rojo, PR, is not currently occupied by the species and has lost PCEs due to periodic land clearing activities with heavy machinery; it is not being proposed as critical habitat for the species due to lack of PCEs and lack of conservation value for the species.

The Guánica and Susúa Commonwealth forests have historical records of the species, and are currently occupied. Both areas are currently occupied by the species based on recent reports (Trejo-Torres 2001, p. 62; Trejo-Torres 2003; 2006) and site visits conducted by the Service in 2006.

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

We reviewed existing management and conservation plans and management for *C. melanocarpa* to determine if any areas identified above as containing features essential to the conservation of the species did not meet the definition of critical habitat according to section 3(5)(A) of the Act. On the basis of this review, we believe that essential features within both Commonwealth Forests are adequately protected under the management of Puerto Rico DNER and the master plan for the Forests and do not require special management or protection. While these areas, which collectively total 14,575 ac (5,898 ha) contain the habitat features that are essential to the



conservation of the subspecies, they are not being included in this proposal (see Application of section 3(5)(A) of the Act section) because they do not meet the definition of critical habitat under section 3(5)(A) of the Act.

When determining proposed critical habitat boundaries, we made every effort to avoid including within the boundaries of the map contained in this proposed rule areas already developed such as buildings, paved areas, and other structures in areas where the PCEs for *C. melanocarpa* are not present. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species or primary constituent elements in adjacent critical habitat. To the extent feasible, we will continue, with the assistance of other State, Federal, and private researchers, to conduct surveys, research, and conservation actions on the species and its habitat in areas designated and not designated as critical habitat. We anticipate that the boundaries of the mapped units may be refined based on additional information received during

the public comment period. If additional information becomes available on the species' biology, distribution, and threats, we will evaluate the need to revise critical habitat, or refine the boundaries of critical habitat as appropriate. Sites that are occupied by this plant that are not being designated for critical habitat will continue to receive protection under the Act's section 7 jeopardy standard where a Federal nexus may occur (see "Critical Habitat" section).

We are proposing to designate critical habitat on lands in need of special management or protection and on those that we have determined to be currently occupied by the species or occupied at the time of listing and which contain sufficient PCEs to support life history functions essential for the conservation of the species.

#### Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing contain the PCEs that may require special management considerations or protection. As discussed in detail here and in the unit descriptions below, we find that all of the PCEs in Halfpenny Bay may require special management considerations or protection due to threats to the species or its habitat. Such management considerations and protections include: fencing off forest patches to exclude cattle, developing

fire-breaks adjacent to existing roads and farm boundaries during dry season, establishing conservation agreements with landowners to protect individuals within the property, collecting seeds and cuttings to establish a propagation program, and establishing additional patches of forest vegetation to plant additional individuals to augment existing populations within the site

#### Proposed Critical Habitat Designation

We are proposing Halfpenny Bay in Christiansted, St. Croix, USVI as critical habitat for *C. melanocarpa*. This critical habitat unit described below constitutes our best assessment at this time of areas we determined to be occupied at the time of listing, containing the primary constituent elements, and which may require special management. All of the areas identified in this rule as occupied, including those in the Commonwealth Forests managed by DNER that do not meet the definition of critical habitat (see Application of Section 3(5)(A) of the Act section), are necessary to conserve the species. Appropriate management and protection will support reproduction, recruitment, adaptation to catastrophic events and genetic diversity (Primack 2000, pp. 124–133; Falk et al. 1996, pp. 113–119) as identified using the best available data.

Table 1 provides the approximate area (acres, hectares) and land ownership of lands determined to meet the definition of critical habitat and proposed.

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

Critical habitat unit, location	Land ownership	Definitional area acres (hectares)
Halfpenny Bay St. Croix, USVI .....	Private .....	50 (20.23)
Total .....	.....	50 (20.23)

Below we provide a brief description and rationale for the proposed unit of critical habitat for *C. melanocarpa*.

#### Halfpenny Bay, St. Croix

The Halfpenny Bay critical habitat unit consists of an approximately 50-ac (20.23-ha) area on a privately owned agricultural tract located in a dry coastal plain about 2.48 miles (4 km) south of Christiansted, St. Croix, USVI. The area is delimited by Road 62 to the north, South Shore Road to the west, the local road to Halfpenny Bay to the east, and by the 10-meter (m) (33 ft) topographic contour line to the south. This unit encompasses the habitat features essential to the conservation of *C. melanocarpa* and does not contain

manmade structures, such as existing private homes or barns. The species is located within dry thickets of scrub vegetation in this unit, which is dominated by grasses with patches of trees and shrubs. The unit contains PCEs 1 and 2 and is important to conserving the genetic diversity of this plant. Since this is the locality with the highest number of individuals (100 plants), we believe that it should be considered the core population to maintain genetic representation of this plant in the U.S. Caribbean. Propagation material, both sexual and asexual, should be collected from this population to augment the number of individuals in existing populations and

establish new sustainable populations in protected areas in PR and the USVI.

At the time of the 1999 listing, the population was estimated at 24 individuals, but in 2002 the population was estimated at 100 individuals by a Service biologist (Lombard 2002). The presence of the species at this site was confirmed by the Service in March 2006. This population is the only one known in the U.S. Virgin Islands, has the highest number of individuals, and it has been documented in reproductive condition (with fruit and flowers). The site is currently threatened by periodic but intense grazing, human-induced fires, and potential of development for a tourist project (USFWS 2005, p. 8),

and may require special management considerations or protection as discussed in the "Special Management Considerations or Protections" section above.

### Effects of Critical Habitat Designation

#### Section 7 Consultation

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

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

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. 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 proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

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

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

When we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification

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

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

Federal activities that may affect *C. melanocarpa* or its designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act or a permit under section 10(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 C. melanocarpa and Its Critical Habitat*

Jeopardy Standard

Prior to and following designation of critical habitat, the Service has applied an analytical framework for *C. melanocarpa* jeopardy analyses that relies on the importance of core area populations to the survival and recovery of *C. melanocarpa*. 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 *C. melanocarpa* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is 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 *C. melanocarpa* 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 PCEs to be functionally established) to serve the intended conservation role for the species. Generally, the conservation role of *C. melanocarpa* 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 *C. melanocarpa* is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical

habitat and therefore result in consultation for *C. melanocarpa* include, but are not limited to:

(1) Actions that would reduce or degrade dry thicket scrub areas dominated by patches of trees and shrubs in the Halfpenny Bay area. Such activities could include vegetation clearing, intensive and extensive cattle grazing activities, and fire. Dry forest species in the Caribbean are not fire-resistant species.

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

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

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

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

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

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

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act; (2) there is a reasonable expectation that the conservation management strategies and actions will be implemented based on past practices, written guidance, or regulations; and (3) the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

**Guánica and Susúa Commonwealth Forests: Commonwealth of Puerto Rico**

We have determined that the lands containing the features essential to the conservation of *C. melanocarpa* within the Guánica and Susúa Commonwealth forests do not meet the definition of critical habitat under section 3(5)(A) of the Act as those features do not require special management or protections. As such, they are not being included in this proposal. Both forests are public lands owned by the Commonwealth of Puerto Rico and managed by the DNER.

The DNER developed a master plan for the Commonwealth forests of Puerto Rico in 1976. The master plan identified soil and land types, climate, wildlife, vegetation, land use, recreation opportunities, and future research needs for all Commonwealth forests, including Guánica and Susúa forests. The master plan also identified management recommendations to address identified issues for each forest unit.

In Guánica, the master plan identified special management considerations in accordance with the uniqueness of the forest, proposed to manage the forest and associated vegetation types for non-consumptive use by the public, and reserved and managed the entire unit as

a wildlife sanctuary (DNR 1976, pp. 56–58). Because of the forest condition, it was designated as a United Biosphere Reserve in 1981 by the United Nations Educational, Scientific and Cultural Organization (UNESCO).

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

Both forests are currently managed as wildlife sanctuaries, protecting wildlife and plants in perpetuity and allowing only non-consumptive use by the public in designated areas and trails. Active management includes developing and maintaining fire breaks, conducting prescribed burning adjacent to roads to reduce fuel load, removing exotic plant species along roads, and promoting scientific data collection, and conducting outreach and education activities within adjacent communities. Forest management also provides opportunities for scientific research and the use of existing trails for passive recreation and education. The Guánica Forest also provides for beach use. These current management activities have not been identified as threats for *C. melanocarpa*.

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

Since 1984, the Service and DNER have a signed cooperative agreement pursuant to section 6(c) of the Act, establishing a partnership agreement for the purpose of implementing an endangered and threatened fish, wildlife and plants species conservation program in the Commonwealth of Puerto Rico. Both parties agree that programs of the Commonwealth of Puerto Rico are designed to assist resident endangered and threatened species; it is their mutual desire to work in harmony for the common purpose of planning, developing and conducting programs to protect, manage and

enhance the populations of all resident endangered and threatened fish, wildlife and plants within the Commonwealth of Puerto Rico.

The DNER approved laws and regulations to protect threatened and endangered species within lands under their jurisdiction. In 1999, the Commonwealth of Puerto Rico approved Law Number 241, Wildlife Law of the Commonwealth of Puerto Rico (Ley de Vida Silvestre del Estado Libre Asociado de Puerto Rico—Ley Núm. 241 del 15 Ago. 1999). The purpose of this law is to protect, conserve, and enhance native and migratory wildlife species; declare all wildlife species within its jurisdiction as the property of Puerto Rico; regulate permits; regulate hunting activities; and regulate exotic species. In 2004, the DNER approved Commonwealth of Puerto Rico's Regulation Number 6766, which regulates the management of threatened and endangered species in Puerto Rico (Reglamento para Regir el Manejo de las Especies Vulnerables y en Peligro de Extinción en el Estado Libre Asociado de Puerto Rico—Núm. 6766 del 11 de Feb 2004). *C. melanocarpa* has been included in the list of protected species. Article 2.06 of this regulation prohibits collecting, cutting, and removing (among other activities) listed plant individuals within the jurisdiction of PR.

Threats identified for *C. melanocarpa* on the Guánica and Susúa Commonwealth forests are human-induced fires during dry season and cutting of vegetation for trail and powerline maintenance. The DNER has regulatory mechanisms to protect individuals of *C. melanocarpa* from these threats within the forest boundaries, and forest managers are aware of the occupied localities within the forests. We believe that management guidelines for both forests, current local laws and regulations and the close coordination and excellent working partnership with DNER will adequately address identified threats to *C. melanocarpa*, features essential to its conservation, and its habitat on DNER lands. Therefore, we do not believe that special management or protection is required for *C. melanocarpa* and its primary constituent elements.

Recent, more extensive surveys conducted in Guánica Commonwealth Forest have expanded the known range of other federally listed species such, as bariaco (*Trichilia triacantha*) and palo de rosa (*Ottoschulzia rhodoxylon*), and other State-protected species all previously known for only a few individuals within the forest. These surveys were conducted in areas not

previously accessed and are a result of a graduate student's thesis work that has not been published yet. As stated earlier in this rule, past collections exist for Guánica Commonwealth Forest. We believe additional occurrences of *C. melanocarpa* will be found in both forests. For example, when Trejo-Torres went to Guánica in 2001, specifically to search for and identify the species, he accomplished confirmation on an individual. When Service biologists returned to Guánica Commonwealth Forest with this species' expert in 2006 to specifically search for this plant, they found 12 additional individuals in the vicinity.

We believe that extensive surveys in the Susúa Commonwealth Forest would also result in additional sightings of the species. It has been the Service's experience that, if extensive surveys are conducted additional individuals or populations may be found. For example, the endemic plant *Calliandra locoensis* was discovered in the Susúa Forest in 1991 (García and Kolterman 1992, pp. 57–60), and only one population was known at the time (Breckon and Kolterman 1994, p. CL–1). Recent additional survey efforts have resulted in three additional localities and about 1,000 individuals (González 1998, pp. 41–42; Breckon and Kolterman 2000). Protection of such areas as the Commonwealth forests conveys stability of forest development, since most forest land in Puerto Rico was destroyed for agriculture. Forest reserves like Guánica, protected since 1919, provide the necessary structure to support the conservation of the species.

Thus on the basis that Susúa and the Guánica Commonwealth Forests are being adequately managed as wildlife sanctuaries by DNER, where they are protecting wildlife and plants in perpetuity and allowing only non-consumptive use by the public in designated areas and trails, we have determined that features essential to the conservation of *C. melanocarpa* on lands within these forests do not require special management considerations or protection. As such, these lands do not meet the definition of critical habitat for *C. melanocarpa* as defined in section 3(5)(A) of the Act and are not included in the proposal.

#### 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 (National Wilderness Institute 1995) and at least 80 percent of endangered or

threatened species occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12 percent of listed species were found almost exclusively on Federal lands (90 to 100 percent of their known occurrences restricted to Federal lands) and that 50 percent of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-Federal landowners (Wilcove and Chen 1998; Crouse *et al.* 2002; James 2002). Building partnerships and promoting voluntary cooperation of landowners 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 from 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 Habitat Conservation Plans (HCPs), Safe Harbors, 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. 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. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999; Bean 2002; Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (such as reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002).

Cooperative conservation is the foundation of the Service's actions to protect species, and the Service has many tools by which it can encourage and implement partnerships for 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 Habitat Conservation Plans.

Conservation agreements with non-Federal landowners (such as 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 other methods (61 FR 63854; December 2, 1996).

### Economic Analysis

An analysis of the economic impacts of proposing critical habitat for *C. melanocarpa* is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.southeast.fws.gov> or by contacting

the Caribbean Fish and Wildlife Office directly (see **ADDRESSES**).

### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), and based on our implementation of the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek the expert opinions of at least five appropriate and independent peer reviewers regarding the science in this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

### Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing within 45 days of publication of this proposal in the **Federal Register**. We intend to schedule a public hearing on this proposal, if any are requested, once the draft economic analysis is available so that we can receive public comment on the draft economic analysis and proposed rule simultaneously. However, we can schedule a public hearing prior to that time, if specifically requested. We will announce the date, time, and place of the hearing in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or

reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

## 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 it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the "Adverse Modification Standard" section. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. When it is completed, the draft economic analysis can be obtained from the internet Web site at <http://www.southeast.fws.gov> or by contacting the Caribbean Fish and Wildlife Office directly (see **ADDRESSES**).

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

when promulgating a designation of critical habitat.

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

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared in accordance with section 4(b)(2) of the Act and Executive Order 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant

economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *C. melanocarpa* is a significant regulatory action under Executive Order 12866 as it may raise novel legal and policy issues. However, it 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. We will further evaluate this in our draft economic analysis and revise this assessment if appropriate.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of

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

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

(b) We do not believe that this rule will significantly or uniquely affect small governments because the publicly owned units are owned by the Commonwealth of Puerto Rico, which does not fit the definition of “small governmental jurisdiction.” As such, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

#### Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this

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

#### Civil Justice Reform

In accordance with Executive Order 12988, 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 propose designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated area to assist the public in understanding the habitat needs of *C. melanocarpa*.

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

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

#### National Environmental Policy Act

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 containing the features essential for the conservation of *C. melanocarpa* and no Tribal lands that are unoccupied areas that are essential for the conservation of *C. melanocarpa*. Therefore, critical habitat for *C. melanocarpa* has not been proposed for designation on Tribal lands.

#### References Cited

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

#### Author(s)

The primary authors of this package are the staff of Caribbean Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

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

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

#### Proposed Regulation Promulgation

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

#### PART 17—[AMENDED]

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

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

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

#### § 17.12 Endangered and threatened plants.

\* \* \* \* \*

(h) \* \* \*



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

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

**§ 17.96 Critical habitat—plants.**

(a) \* \* \*

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

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

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

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

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

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

(4) *Critical habitat map.* Data layers were created by overlaying habitats that

contain at least two of the PCEs, as defined in paragraph (2) of this section, on U.S. Geological Survey (USGS) topographic maps (UTM 20, NAD 27).

(5) Halfpenny Bay, St. Croix, U.S. Virgin Islands.

(i) *General description:* The Halfpenny Bay unit consists of approximately 50-ac (20.23-ha) on privately owned property located about 2.48 mi (4 km) south of Christiansted, St. Croix, U.S. Virgin Islands. The area is delimited by Road 62 to the north, South Shore Road to the west, the local road to Halfpenny Bay to the east, and by the 33-ft (10-m) topography contour line to the south. This unit encompasses the habitat features essential to the conservation of *C. melanocarpa* within Estate Halfpenny, Christiansted, St. Croix, and does not contain any manmade structures.

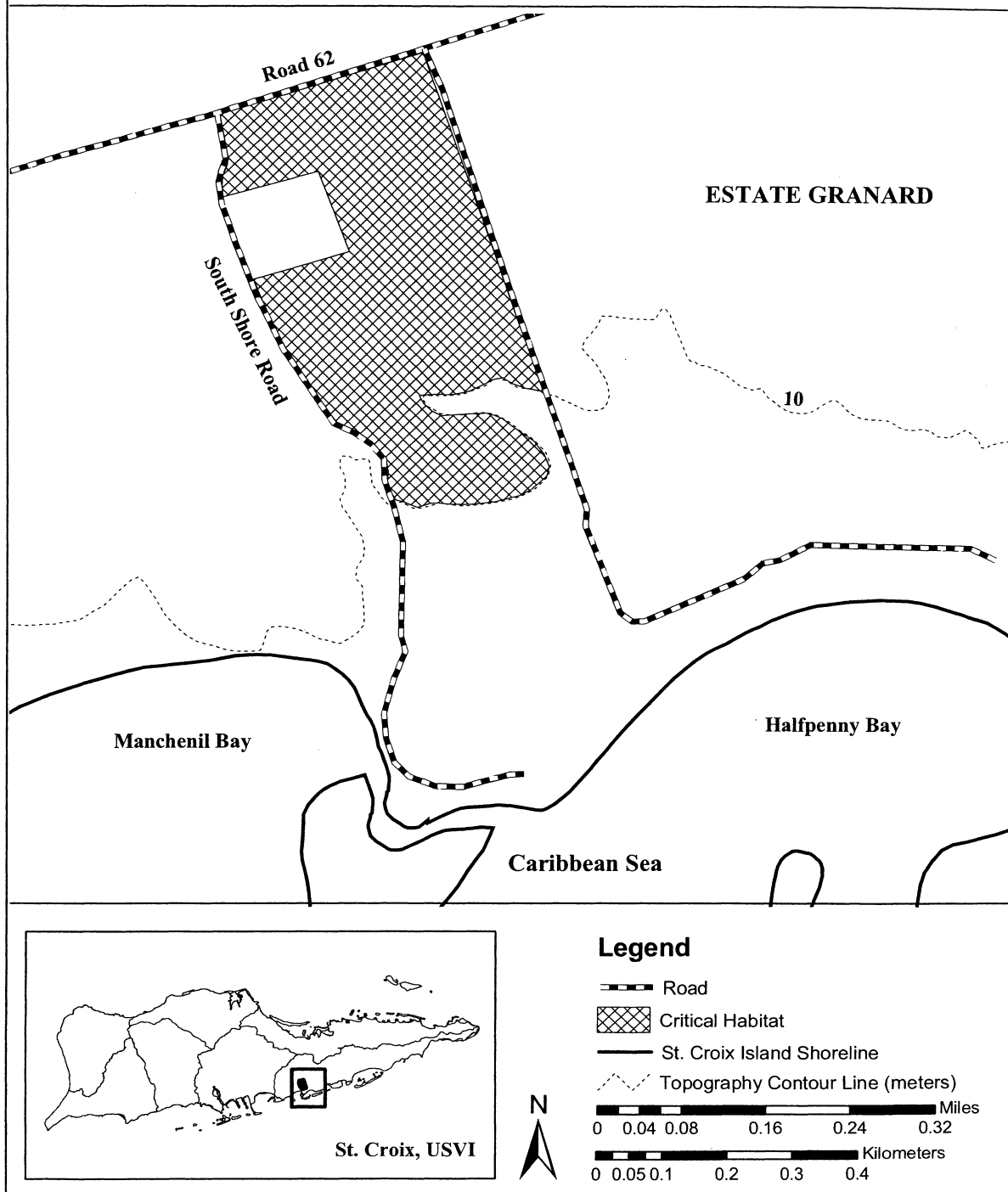
(ii) *Coordinates:* From Christiansted USGS 1:24,000 quadrangle map, St. Croix land bounded by the following UTM 20 NAD 27 coordinates (E,N): 319053.46, 1959358.06; 319363.69, 1959455.15; 319476.85, 1959132.82; 319505.42, 1959046.53; 319551.84, 1958916.00; 319534.20, 1958929.38; 319519.91, 1958929.38; 319498.48, 1958938.91; 319484.19, 1958946.05; 319458.00, 1958943.67; 319434.19, 1958934.15; 319405.61, 1958927.00; 319372.28, 1958924.62; 319372.28,

1958915.10; 319391.33, 1958905.57; 319412.76, 1958900.81; 319446.09, 1958893.67; 319462.76, 1958893.67; 319484.19, 1958884.14; 319500.86, 1958874.62; 319534.20, 1958850.80; 319548.49, 1958831.75; 319558.01, 1958812.70; 319558.01, 1958793.65; 319534.20, 1958774.60; 319512.77, 1958767.46; 319477.05, 1958753.17; 319438.95, 1958750.79; 319407.99, 1958750.79; 319391.33, 1958753.17; 319381.80, 1958746.03; 319355.61, 1958748.41; 319332.84, 1958757.39; 319322.93, 1958759.64; 319311.66, 1958776.76; 319308.51, 1958787.58; 319310.36, 1958805.56; 319306.26, 1958826.78; 319291.31, 1958843.66; 319271.56, 1958860.13; 319253.53, 1958870.94; 319231.78, 1958879.38; 319220.24, 1958896.22; 319208.81, 1958913.94; 319199.67, 1958924.80; 319172.23, 1958965.37; 319153.20, 1958993.68; 319141.29, 1959019.87; 319124.63, 1959053.21; 319115.10, 1959077.02; 319105.58, 1959103.22; 319250.83, 1959146.08; 319203.21, 1959269.90; 319059.77, 1959230.54; 319057.97, 1959244.96; 319058.87, 1959263.88; 319066.98, 1959282.81; 319064.72, 1959303.09; 319059.77, 1959323.82; 319055.57, 1959353.25; 319053.46, 1959358.06.

(iii) *Note:* Map of Halfpenny Bay follows:

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# Map 1. Halfpenny Bay, St. Croix Critical Habitat for *Catesbaea melanocarpa*



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Dated: August 15, 2006.

**David M. Verhey,**

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

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