

sampling being conducted in areas designated as critical habitat.

*Our Response:* The Gulf sturgeon is a listed species and thereby protected under the Act regardless of whether or not critical habitat has been designated, therefore permits and annual reporting may be necessary if the activities being conducted for fisheries management may result in the incidental take of a Gulf sturgeon. Given that the fish has been federally protected for 10 years and fisheries management in all states throughout the Gulf sturgeon's range has proceeded unhampered, we are unclear as to the reasons for this concern. Critical habitat designation may result in required project modifications only for activities with a Federal nexus and then only if the activity were to destroy or adversely modify the primary constituent elements contained in the designated habitat (*i.e.*, prey, spawning habitat, water quality, water quantity, sediment quality, or migratory passage).

*Comment 18:* One commenter questioned whether water quality issues may arise from the establishment of the critical habitat and another requested that the existing government databases be updated to reflect current water quality of southern rivers, since water quality has improved subsequent to the historic decline of the species.

*Our Response:* As required under section 7 of the Act, the Environmental Protection Agency (EPA) consults with us regarding water quality standards to ensure that they are protective of endangered and threatened species. The EPA anticipates consulting with us every three years as part of its triennial review of State delegated water quality standards for Alabama, Florida, Mississippi, and Louisiana under section 303(d) of the Clean Water Act. During each review period all data relative to Gulf sturgeon and water quality will be updated and reviewed to ensure that the standards continue to be protective. The EPA recently released a new database on the water quality of the nation's rivers. This information is available on its web site ([www.epa.gov](http://www.epa.gov)). Future consultations will consider impacts to Gulf sturgeon and associated critical habitat, and will take changes in water quality into account.

*Comment 19:* One commenter questioned whether the FWS provided information on flow requirements needed for critical habitat in the Apalachicola, Chattahoochee, and Flint Rivers (ACF) negotiations and whether such information was available to the public.

*Our Response:* The FWS presented information about the hydrological characteristics of potential sturgeon

spawning habitat on the Apalachicola River as a result of separate requests from the Georgia and Florida negotiators to the ACF Compact. This information is summarized in our response to comment 42. Our information was based on a single set of measurements at one potential spawning site, and for reasons summarized in our response to comment 41, we do not characterize this information as "flow requirements needed for critical habitat." This information is available to the public upon request. However, the U.S. Army Corps of Engineers (USACE) is conducting more detailed surveys intended to augment and refine our initial measurements and will use these new measurements in preparing its biological assessment of the effects of Federal reservoir operations on federally-protected species and their habitats.

*Comment 20:* One commenter requested that the Services withdraw their proposed critical habitat designation for the Gulf sturgeon and instead address any needs of the species in the context of the ongoing ACF Compact process.

*Our Response:* The ACF Compact is a Federal law that authorizes, among other things, the States of Alabama, Florida, and Georgia, but not the Federal government, to negotiate a water allocation formula for equitably apportioning the surface waters of the ACF Basin. Under the leadership of the non-voting Federal Commissioner to the Compact, Federal agencies, including the Services, have provided technical assistance to the States' negotiators on various water management issues, including the needs of species protected under the Act. The State negotiators are not obligated to act upon any such technical assistance, and the Compact does not relieve Federal agencies, including the Services, of responsibilities under other Federal statutes or court rulings. This rule designating critical habitat fulfills our requirements under the Act and the order of the United States Court of Appeals for the Fifth Circuit.

*Comment 21:* One commenter stated that by designating the Apalachicola River as critical habitat for the Gulf sturgeon, the Federal government necessarily becomes involved in the water negotiations for the ACF Compact and usurps authority from the State of Georgia to negotiate stream flows in that river basin.

*Our Response:* State and Federal roles under the ACF Compact are quite distinct, as noted in our response to comment 20, and this rule in no way alters those roles. No authority is taken

from the States, as the critical habitat provisions of the Act apply to Federal agencies and their actions only. Federal agencies acting in the ACF Basin are obligated to comply with sections 7 and 10 of the Act with or without an ACF Compact, and the States are solely empowered to negotiate a water allocation formula for the ACF Basin with or without designated critical habitat for the Gulf sturgeon.

*Comment 22:* The USACE's Mobile District expressed concern with potential requirements to alter reservoir operations at the Jim Woodruff Lock and Dam on the Apalachicola River in Florida, in order to support minimum flow for Gulf sturgeon spawning. They are concerned that a critical habitat designation could require substantial upstream flow releases.

*Our Response:* As noted in the response to comment 42, preliminary data suggest that if adjustments to reservoir operations are reasonable and prudent in the conservation of the sturgeon, such adjustments would likely occur infrequently, since it appears that flows do not limit sturgeon spawning habitat availability in most years on the Apalachicola River. Under section 7(a)(2) of the Act, Federal agencies must avoid jeopardizing the continued existence of a species or the destruction or adverse modification of designated critical habitat. During the consultation process, Federal agencies share responsibility with us for determining what operational adjustments, if any, would be reasonable and prudent for sturgeon conservation. We acknowledge that the USACE must consider its responsibilities for flood control, power generation, navigation, water quality, other fish and wildlife, etc., as well as listed species conservation, in making its operational decisions, and we appreciate the complexities of these decisions.

*Comment 23:* One commenter objected to critical habitat designation because it would impede construction of any dam deemed necessary by the public for water supply, flood control, and recreation.

*Our Response:* The Act's requirements regarding proposed and designated critical habitat apply only to Federal actions, such as constructing Federal reservoirs or issuing Federal permits for non-Federal reservoirs (*e.g.*, a Clean Water Act section 404 permit). For such actions, the Federal agency's responsibility is to consult with us to ensure that its actions are not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Reasonable and prudent alternatives to