

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of a list species or result in the destruction or adverse modification of 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, in a March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit (*Sierra Club v. U.S. Fish and Wildlife Service et al.*, 245 F.3d 434), the Court found our definition of destruction or adverse modification to be invalid. In response to this decision, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a)(2) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as endangered or threatened and with respect to its critical habitat, if any is designated. Activities on Federal lands that may affect the listed karst invertebrates or their designated critical habitat will require section 7 consultation with the Service. Federal agencies also must consult with the Service under section 7 with regard to actions they authorize (permit) or fund that occur on private, State, or other non-Federal lands if the action may affect listed species or designated critical habitat. Actions authorized, funded, or implemented by Federal agencies that affect listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Federal actions that do not affect the species or designated critical habitat, as well as actions on non-Federal lands that are not federally funded or permitted, will not require section 7 consultation. 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 on any action likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports

provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations are advisory. We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat was designated. We may adopt the formal conference report as the biological opinion when the species is listed or 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)).

If we issue a biological opinion, resulting from a section 7 consultation, concluding that a Federal action is likely to result in the destruction or adverse modification of critical habitat, we also would provide reasonable and prudent alternatives to the action, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during formal 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 we believe would avoid destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions under certain circumstances, including instances where critical habitat is subsequently designated 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 designated critical habitat.

Activities on Federal lands that may affect any of the nine karst invertebrates or the designated critical habitat will require consultation under section 7 of the Act. Activities on private, State, or other non-Federal lands that involve a Federal action such as a permit (e.g., a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act or a Construction General permit from the U.S. Environmental Protection Agency), or Federal funding (e.g., from the Federal Highway Administration, Federal Aviation Administration, Federal Emergency Management Agency,

Natural Resources Conservation Service, or Housing and Urban Development) also will continue to be subject to the section 7 consultation process. Federal actions that do not affect listed species or critical habitat, as well as actions on non-Federal lands that are not federally funded or permitted, do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities which, if undertaken, may adversely modify such habitat or that may be affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of any of the seven karst invertebrates is appreciably reduced. These activities may occur outside the designated critical habitat and still result in destruction or adverse modification; for example, activities in the drainage area or locations adjacent to the critical habitat that impacts the karst environment within the designated critical habitat. Activities that may directly or indirectly adversely affect critical habitat for these karst invertebrates include, but are not limited to:

(1) Removing, thinning, or destroying perennial surface vegetation, with the exception of landscaping associated with existing human-constructed, above-ground, impervious structures, occurring in any critical habitat unit, whether by burning, mechanical, chemical, or other means (for example, wood cutting, grading, overgrazing, construction, road building, pipelines, mining, herbicide application);

(2) Alteration of the surface topography or subsurface geology within any critical habitat unit that results in significant disruption of ecosystem processes that sustain the cave environment. This may include, but is not limited to, such activities as filling cave entrances or otherwise reducing airflow, which limits oxygen availability; modifying cave entrances, or creating new entrances that increase airflow and result in drying; altering natural drainage patterns (surface or subsurface) in a manner that alters the amount of water entering the cave or karst feature; removal or disturbance of native surface vegetation that may alter the quality or quantity of water entering the karst environment; soil disturbance that results in increased sedimentation in the karst environment; increasing impervious cover that may decrease water quantity entering the karst