

occurrences of the San Diego fairy shrimp. Due to rapid urbanization in the on both sides of the United States and Mexican border the preservation of these pools is essential for the survival of the San Diego fairy shrimp. The pools proposed for critical habitat in subunit A contain the endangered Otay mesa-mint (*Pogogyne nudiuscula*); subunit D also supports the endangered Riverside fairy shrimp (*Streptocephalus woottoni*); and subunit F include the endangered Orcutt's grass (*Orcuttia californica*) and represent vernal pools with high biological diversity. The Recovery Plan specifically identifies these vernal pools as essential for recovery of the San Diego fairy shrimp because of their role in stabilizing populations and habitat loss and in reclassifying these species in future downlisting/delisting actions. This southernmost unit is essential to the conservation of the San Diego fairy shrimp because it maintains the ecological distribution and genetic diversity of this species. Many of these vernal pools are within the MSCP, and as previously stated in this rule, we have considered, but have not proposed those vernal pools in reserve, preserve, or other lands targeted for conservation areas within approved HCPs, pursuant to section 4(b)(2) of the Act.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, permit, or carry out do not destroy or adversely modify critical habitat. Destruction or adverse modification of critical habitat occurs when a Federal action directly or indirectly alters critical habitat to the extent that it appreciably diminishes the value of critical habitat for the conservation of the species. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

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.*, 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) 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 designated or proposed. 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. Conference reports provide conservation recommendations to assist Federal agencies in eliminating conflicts that may be caused by their proposed actions. The conservation measures in a conference report 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 designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (50 CFR 402.10(d)).

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. Through this consultation, the Federal action agency would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in 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 the likelihood of jeopardizing the continued existence of listed species, or resulting in the destruction or adverse modification of critical habitat.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate 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 reinitiating of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and require that a section 7 consultation be conducted include, but are not limited to:

(1) Any activity that results in discharge of dredged or fill material, excavation, or mechanized land clearing of ephemeral and/or vernal pool basins (e.g., road and fence construction and maintenance, right-of-way designation, airport improvement activities, and regulation of agricultural activities) that constitutes jurisdictional waters of the United States under the Clean Water Act;

(2) Any activity that alters the watershed, water quality, or water quantity to an extent that water quality becomes unsuitable to support San Diego fairy shrimp, or any activity that significantly affects the natural hydrologic function of the vernal pool system; and

(3) Activities that could lead to the introduction of exotic species into San Diego fairy shrimp habitat.

Activities that may destroy or adversely modify critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the San Diego fairy shrimp is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species.

We recognize that the proposed designation of critical habitat may not