

destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define “jeopardize the continued existence” as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR 402.02). “Destruction or adverse modification of designated critical habitat” is defined as a direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of the species (50 CFR 402.02). Such alterations include, but are not limited to, adverse changes to the physical or biological features, *i.e.*, the primary constituent elements, 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)(4) 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 the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations 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 critical habitat were designated. We may adopt the formal conference report as the biological opinion when 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 a species is listed or critical habitat is designated, section 7(a)(2) 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 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 would 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 Service’s Regional Director believes would avoid the 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 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 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.

There are no known populations of *Arabis perstellata* occurring on Federal lands. However, activities on private, State, or city lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (USACE) under section 404 of the Clean Water Act, a permit under section 10(a)(1)(B) of the Act from us, or some other Federal action—including funding (*e.g.*, from the Federal Highway Administration (FHWA), Federal Aviation Administration, or Federal Emergency Management Agency); permits from the Department of Housing and Urban Development; activities funded by the U.S. Environmental Protection Agency (EPA), Department of Energy, or any other Federal agency; and construction of communication sites licensed by the Federal

Communications Commission—will be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

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 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 *Arabis perstellata* is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat include, but are not limited to:

(1) Ground disturbances that destroy or degrade primary constituent elements of the plant (*e.g.*, clearing, tilling, grading, logging, construction, and road building);

(2) Activities that directly or indirectly affect *Arabis perstellata* plants or underlying seed bank (*e.g.*, herbicide application that could degrade the habitat on which the species depends, incompatible introductions of non-native herbivores, incompatible grazing management, clearing, tilling, grading, construction, and road building);

(3) Activities that encourage the growth of *Arabis perstellata* competitors (*e.g.*, widespread fertilizer application, road building, clearing, logging); and

(4) Activities that significantly degrade or destroy *Arabis perstellata* pollinator populations (*e.g.*, pesticide applications).

Previous Section 7 Consultations

Several section 7 consultations for Federal actions affecting *Arabis perstellata* and its habitat have preceded this critical habitat proposal. The action agencies have included the USACE, U.S. Department of Agriculture Rural Development, FHWA, and EPA.

Since listing, we have conducted 33 informal and no formal consultations involving *Arabis perstellata*. The informal consultations, all of which concluded with a finding that the proposed Federal action would not affect or would not likely adversely