

TABLE 4.—ADJACENT RIPARIAN LAND OWNERSHIP IN PROPOSED CRITICAL HABITAT UNITS (RKM/RMI) IN THE TENNESSEE AND CUMBERLAND RIVER BASINS—Continued

| Critical habitat units | Private | State | Federal |
|------------------------|---------|-------|---------|
| 13. Laurel Fork | 8/5 | | |
| Totals | 689/434 | 32/20 | 170/107 |

Effects of Critical Habitat Designation

ESA Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which apply only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Individuals, organizations, States, local governments, and other non-Federal entities are not affected by the designation of critical habitat unless their actions occur on Federal lands, require Federal authorization, or involve Federal funding.

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, 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.

Conference for Proposed Critical Habitat

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to result in the destruction or adverse modification of proposed critical habitat. During a conference on the effects of a Federal action on proposed critical habitat, we make nonbinding recommendations on ways to minimize or avoid adverse effects of the action. We document these recommendations and any conclusions

reached in a conference report provided to the Federal agency and to any applicant involved. Also, if we conduct a formal consultation during conference, we may adopt an opinion issued at the conclusion of the conference as our biological opinion when the critical habitat is designated by final rule, but only if new information or changes to the proposed Federal action would not significantly alter the content of the opinion.

Consultation for Designated Critical Habitat

If a Federal action may affect a listed species or its designated critical habitat, the action agency must initiate consultation with us (50 CFR 402.14). Through this consultation, we would advise the agency whether the action would likely jeopardize the continued existence of the species or adversely modify its critical habitat, or both. The Services' Consultation Handbook states that the destruction or adverse modification analysis focuses on the entire critical habitat area designated unless the critical habitat rule identifies another basis for the analysis, such as discrete units or groups of units necessary for different life cycle phases or units representing distinctive habitat characteristics or gene pools, or units fulfilling essential geographic distribution requirements. The extent of the five mussels' decline, the fragmentation and isolation of their habitats, and continuing impacts upon their habitats, and the importance of every unit to the recovery of the species suggests that individual units or groups of units that are used by populations which fulfill essential geographic distribution requirements are the appropriate scale for the analysis. An action occurring only within a unit or group of units may appreciably reduce the value of the critical habitat for the recovery of the species and therefore result in a determination of adverse modification.

When we issue a biological opinion that concludes that an action is likely to result in the destruction or adverse modification of critical habitat, we must provide reasonable and prudent alternatives to the action, if any are identifiable. Reasonable and prudent

alternatives are actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the proposed action, are consistent with the scope of the action agency's authority and jurisdiction, are economically and technologically feasible, and would likely avoid the destruction or adverse modification of critical habitat (50 CFR 402.02).

Reinitiation of Prior Consultations

A Federal agency may request a conference with us for any previously reviewed action that is likely to destroy or adversely modify proposed critical habitat and over which the agency retains discretionary involvement or control, as described above under “Conference for Proposed Critical Habitat.” Following designation of critical habitat, regulations at 50 CFR 402.16 require a Federal agency to reinitiate consultation for previously reviewed actions that may affect critical habitat and over which the agency has retained discretionary involvement or control.

Federal Actions That May Destroy or Adversely Modify Critical Habitat for the Five Mussels

Section 4(b)(8) of the Act requires us, in any proposed or final rule designating critical habitat, to briefly describe and evaluate those activities that may adversely modify such habitat, or that may be affected by such designation.

Federal actions that, when carried out, funded or authorized by a federal agency, may destroy or adversely modify critical habitat for the five mussels include, but are not limited to:

(1) Actions that would alter the minimum flow or the existing flow regime to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the species. Such activities could include, but are not limited to, impoundment, channelization, water diversion, water withdrawal, and hydropower generation.

(2) Actions that would significantly alter water chemistry or temperature to a degree that appreciably reduces the value of the critical habitat for both the long-term survival and recovery of the