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Required for Submitting Release Permits

Question: *Is the release site and/or the area requiring monitoring referred to as the action area (or the area within the boundaries of the possible release/monitoring area for sites where the release has yet to be determined) within designated critical habitat for a listed threatened or endangered species or within habitat proposed for designation under the Endangered Species Act (16 U.S.C., Section 1531, Endangered Species Act (ESA) of 1973, as amended)*?

Guidance: The United States Fish and Wildlife Service (USFWS) is developing a database for public use that will provide current information on the status of critical habitat including spatial data. However, this tool is not yet fully functional and does not provide all data. For now, there is information available on the USFWS endangered species website (http://www.fws.gov) that can be used to locate critical habitat in relation to the field release site. However, the site has limitations. The critical habitat portal accessed through the site provides data to the county level, but it is incomplete. The critical habitat portal also has a mapping feature that can be used to provide more detail on the geographic location of the habitat; however, not all spatial information is available on the website and reliance on the mapping feature alone will not provide data that ensures compliance with the Act. It may be best to use the link to the webpage of the various USFWS Ecological Field Offices for more accurate information. Some local offices provide detailed critical habitat information on their websites that can be very useful. If in doubt, the office should be contacted. Below is a method that can be used to determine the presence of designated critical habitat and a couple options for determining the presence of proposed critical habitat. Their use will assure identification of critical habitat within the action area. Knowing the precise boundaries of the action area will make determinations easier. Applicants may use any method they chose provided it identifies all designated critical habitat and habitat proposed for designation within the action area.

To obtain information on species with designated critical habitat:

1. Go to the USFWS website (http://www.fws.gov) and navigate to the endangered species listing by State to view all listed species in the state.
2. Navigate to the list of all species with designated critical habitat to identify those species within the State that have critical habitat.
3. For those species that have critical habitat, use the species link to navigate to the Federal Register final rule designating the critical habitat for that species. This will provide specific information about the location of the critical habitat.

To obtain information on species with proposed critical habitat:

The USFWS website does not provide a listing of proposed critical habitat, making this task more difficult. Below are possible methods:

Method A.

1. Go to the USFWS website (http://www.fws.gov) and navigate to the link for species proposed for listing.

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2. Follow the link for individual species to the Federal Register notices for these species. Look for one proposing designated critical habitat and look to see if the release site and/or monitoring area are geographically included in the proposed designation. This will identify proposed critical habitat for species proposed for listing.
3. USFWS sometimes proposes designated critical habitat for species that have already been listed, and sometimes the rule for listing the species may be final while the decision on critical habitat is still pending. To look for these, go to the USFWS webpage that provides a State by State list of all listed species within a given state.
4. For each species, use the species link to search for a Federal Register notice proposing critical habitat and review the document to see if the release site or monitoring area are geographically included in the proposal.

Method B. Another and perhaps easier way to determine if the release site and/or area requiring monitoring is in proposed designated habitat is to look at the USFWS centralized library for Federal Register Documents. This method will likely be easier for states with many listed species.

1. Go to the USFWS website (http://www.fws.gov) and navigate to the endangered species listing by State to view all listed species in the state.
2. Navigate to the endangered species program page and to the link for "Laws and Policies." Follow the link to the USFWS centralized library for Federal Register Documents and look under proposed rules for the species identified in step 1.
3. For each species, search for a Federal Register notice proposing critical habitat and review the document to see if the release site or monitoring area are geographically included in the proposed designation. Caution: The USFWS guidelines are to reach a determination on designating the habitat as critical within one year of the proposal. However, this target is frequently not met and some may be pending for years. To assure compliance, it will be necessary to look back several years.

Perhaps the best method that can be used to obtain information on designated critical habitat and proposed critical habitat for a given area is to directly contact the USFWS. Links to the various USFWS regional and field offices can be found at http://www.fws.gov.

It is important to note that critical habitat is not limited to the geographical area occupied by the species at the time of listing, but may include other areas if determined to be essential for the conservation of the species. Critical habitat may be unoccupied for a number of reasons including the extirpation of the species from this portion of the range. Critical habitat may be in areas unsuitable for the species, but may be restored to suitability with proper management. Some critical habitat may never be occupied by the species, but was designated or proposed because it is essential for conserving the species by maintaining factors constituting the species' habitat. An example would be designating the headwaters of a stream as critical habitat in order to provide sufficient water quality for a species living downstream.

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Question: *If "Yes" to the above question, provide the genus/species name and common name for all species that have designated critical habitat or habitat proposed for designation within the release site and monitoring area.*

Guidance: Self explanatory.

Question: *If "Yes" to above question, provide an analysis of the effects of the proposed release on designated critical habitat and habitat proposed for designation. Indicate if the proposed release will have "no effect" or "may affect" the designated critical habitat and/or habitat proposed for designation.*

Guidance: Generally, if a release site is actually in or very near critical habitat, it may be best to use an alternate site. If this is not practical, the release site could still possibly be used if an effects analysis determines that the release will have "no effect" on the critical habitat.

<u>The focus of the effects analysis should be on the habitat's constituent elements, not on the presence of the species.</u> The Federal Register notice that designates particular critical habitat provides useful information on the constituent elements (biological and physical attributes that are essential to the species' conservation, such as: space; food, water and nutrition; cover or shelter; reproduction; and special habitats) that were the reason for the decision to designate or propose the habitat as critical. However, some critical habitat designations predate the requirement for identification of constituent elements or habitat qualities necessary to allow a species to survive and recover from the threat of extinction. In such cases, the analyst should use the best available scientific and commercial data to determine and document those characteristics of the designated or proposed critical habitat that support the species' survival and recovery.

If the constituent elements are not found in the release site and area being monitored, it is possible that the release would have "no effect." If the release site and area being monitored does contain constituent elements of the habitat, a "may affect" determination may be appropriate. The nature of the regulated article, related activities within the action area (staging, processing etc.), past and current land use activities, and the constituent elements of the designated habitat should be considered. Generally, it would be expected that if a release site is currently in agricultural production, there would be no effect on the habitat because there would be no change in the use. However, this needs to be carefully reviewed, as each situation is different. The nature and activities of the field trial in comparison to prior agricultural use should be considered and discussed, especially if they are a key factor supporting the final determination.

Keep in mind that the "action" includes all aspects of the release and field trial including interdependent actions (having no independent utility apart from the proposed action) and interrelated actions (part of a larger action and depend on the larger action for justification). The analysis must consider both the direct (immediate) and indirect (later in time, but reasonably certain to occur) effects.

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The effects analysis will result in either a "no effect" or "may affect" determination for the effect of the action on designated critical habitat. In supporting the determination, focus on the effects on the constituent elements of the habitat, not on the effect on the species. A "no effect" determination is made when the proposed action will not affect the designated critical habitat. "May affect" is an appropriate determination when a proposed action may have <u>any</u> effect on the designated critical habitat, even if they are entirely beneficial. If a "may affect" determination is reached, it must be determined if the action is likely or not likely to adversely affect the designated critical habitat. A "may affect, not likely to adversely affect" determination is appropriate when effects on designated critical habitat are expected to be discountable, insignificant, or completely beneficial. Discountable effects are those that are extremely unlikely to occur. Insignificant effects relate to the size of the impact. An example of this would be a situation where runoff from an agricultural field would have an effect on a constituent element of the habitat, but the field release is so minor compared to other agricultural activities in the vicinity that the added effect of the field release would be immeasurable. Beneficial effects are positive effects without any adverse effects (there can be no "balancing" wherein the benefits of the action would be expected to outweigh the adverse effects). APHIS reviews the analysis that is provided.

APHIS will be required to consult with USFWS for any "may affect" determination on designated critical habitat. If the determination is "may affect, not likely to adversely affect," an informal consultation with USFWS is required. Failure to obtain USFWS concurrence with this determination requires initiation of formal section 7 consultation as does reaching a "may affect, likely to adversely affect" determination. This determination is appropriate when the effect of the action is not discountable, insignificant, or beneficial or the overall effect is beneficial, but is also likely to cause some adverse effects. The formal consultation process will end with a decision by the USFWS (usually written in a Biological Opinion) on whether the action will result in adverse modification/no adverse modification of designated critical habitat.

For habitat <u>proposed</u> for designation, a conference with USFWS is required if the action is likely to "adversely modify" the proposed critical habitat, as opposed to the lesser threshold of "may affect" when dealing with habitat currently designated as critical habitat. The term "adverse modification" is defined by USFWS as the direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of the species. The modification to the habitat must have the effect of jeopardizing the existence or recovery of a species. Generally, it must affect all proposed designated critical habitat or a part that is vital for survival of the species.

The final analysis report should include the following:

a. A list of species in the release area and monitoring area that have designated critical habitat.

b. A list of species in the release area and monitoring area that have critical habitat proposed for designation.

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c. For each species, an effects analysis of the action on the critical habitat. Provide a brief description of the critical habitat including its constituent elements. Focus on the effect of the action on the "constituent elements" that are essential to the species. Include all activities that will be part of the action including mobilization, harvesting, processing, and demobilization.

d. Explain any proposed measures to reduce or avoid impacts.

e. Conclusions for each species, a determination of "no effect" or "may affect" designated critical habitat. If a "may affect" determination is reached, it must be determined if the action is likely or not likely to adversely affect the designated critical habitat. For proposed designated critical habitat, determine if there is "adverse modification" to the habitat or "no adverse modification."

f. Literature cited.

g. List of preparers with contact information.

h. Maps, diagrams, photos if appropriate.

Version

12/14/2011	Updates hyperlinks of Guidance Related to Critical Habitat Analysis available at http://www.aphis.usda.gov/biotechnology/permits.shtml.