

**Wyoming Streamlined Consultation Procedures
for Section 7 of the Endangered Species Act
May 2005**



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Acronyms

BA	Biological Assessment
BE	Biological Evaluation
BLM	Bureau of Land Management
BO	Biological Opinion
CFR	Code of Federal Regulations
DOI	Department of the Interior
EA	Environmental Assessment
ESA	Endangered Species Act
FS	Forest Service
FWS	Fish and Wildlife Service
IDT	Interdisciplinary Team
LAA	Likely to Adversely Affect
LRMP	Land and Resource Management Plan (FS)
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NE	No Effect
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NFP	National Fire Plan
NLAA	Not Likely to Adversely Affect
NMFS	National Marine Fisheries Service
ROD	Record of Decision
RMP	Resource Management Plan (BLM)
RCTT	Regional Coordination and Technical Team

Wyoming Guidance and Streamlined Consultation Procedures for Section 7 of the Endangered Species Act

I. INTRODUCTION, PURPOSE, AND PROCESS

In 2000, four federal agencies [Forest Service (FS), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS)] developed a Memorandum of Agreement (MOA) to improve the efficiency and effectiveness of plan and programmatic level section 7 consultation processes under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*) and enhance the conservation of imperiled species while delivering goods and services provided by lands and resources managed by the signatory agencies. In 2002, three- Level 1 teams, and one-Level 2 team were formed to address this MOA and to expand the use of streamlining into Wyoming. A similar initiative was started in Colorado at the same time. The geographic areas covered by the Level 1 teams and the memberships of all teams are provided in Attachments 3 and 4. In addition, a Regional Coordination and Technical Team (RCTT) was formed to provide technical assistance, coordination, and promote consistency for Level 1 and 2 teams in Wyoming and Colorado.

It is the intent of these teams to establish a general framework for a “streamlined” (ie. easier and more effective) process for interagency cooperation in the exercise of their responsibilities under the Act and provide guidelines and procedures for formal and informal consultations, as well as consideration of candidate species conservation during plan development. While this process is not mandatory, the key to the streamlining process is early interagency communication and coordination, full participation, and agreement on timelines, information needs, and analyses. Intensive up-front coordination between the agencies will allow for early identification and resolution of issues prior to the actual consultation.

Purpose

The overall purpose of the streamlined consultation procedures is similar to that described for early consultation in 50 CFR § 402.11: “to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions.”

The intent of streamlined consultation procedures are:

To further the conservation of listed, proposed, and candidate species by utilizing applicable plans and guidance to provide increased beneficial effects, avoid or minimize adverse effects and reduce levels of incidental take; and

To enable the section 7 process, including review, analysis and documentation, to proceed as quickly and efficiently as possible and efficiently conclude consultation on actions that comply with management plans and programmatic consultations.

Early planning is key to the success of the streamlining process. This includes, where possible interagency participation in initial stages of planning, project/action design meetings, preliminary effects determinations, and preparation of preliminary BA documents. Regulatory agency personnel are expected to participate to the extent possible in the early planning process to help address concerns with listed species. Those individuals involved in early planning efforts may or may not be the same staff as Level 1 regulatory agency team members

Streamlined Consultation Process

A Level 1 team is typically an interagency group of field staff with a variety of expertise and agency responsibility. The team will communicate regularly, typically at least quarterly. They will meet as needed to review actions, plans, BAs, and draft BOs, as well as on an ad hoc basis if needed for urgent or unforeseen high priority actions. The goal of this process is to produce adequate BA/BEs that will facilitate and expedite issuance of a BO or concurrence letter as well as to communicate about upcoming issues related to listed species and proposed actions.

The streamlined consultation process can be described in the terms of the following three steps:

Step 1 - Review/Discussion of preliminary determinations of effect and preliminary BA/BE documents.

Step 2 - Preparation of final BA/BEs by the action agencies.

Step 3 - Preparation of BOs or concurrence letters by the regulatory agencies.

Step 1 - Review of preliminary determinations of effect and preliminary BA documents

The role of the Level 1 team in Step 1 is to:

- **Review project/action design and preliminary effects determinations.** As described above, **all actions proposed by the action agencies and brought to the Level 1 team for Section 7 consultation will be consistent with the appropriate management plans** including existing FS LRMPs or BLM RMPs. Actions inconsistent with pertinent management plans may not be a part of the streamlining process but will proceed under timeframes prescribed in 50 CFR Part 402. Level 1 teams are not intended to be compliance review bodies. **The key compliance issue for the Level 1 team is the extent to which the potential project's noncompliance with the Land Use Plan may affect the species under consultation.** It is the responsibility of the action agency to ensure that all actions are consistent with management plans and programmatic consultations relevant to the species and critical habitats under consultation.
- **Review the current status of listed, proposed, and candidate species in the action planning area.** The action review will focus on listed species. To the extent possible, and based on the desire of the action agencies, other status species including candidate and proposed species will be considered.
- **Organize actions by effect determinations to facilitate Step 2.** Level 1 teams need only review "may affect" actions. Although some preliminary determinations may change based on the review of the Level 1 team, the majority of Phase 1 effect determinations are expected to remain consistent throughout the streamlining process because of early interagency planning at the field level.

- **Identify the consultation information needed for each action, action batch, or program of activities.** In the past, much consultation time was spent resolving incomplete BA/BEs and requests by the regulatory agencies for more information. This information transfer added weeks or months to conclusion of a consultation. One of the purposes of proactive Level 1 communication is to eliminate this inefficiency. Through the early planning process, the action agency should have already developed a draft BA/BE or Environmental Assessment (EA) to be reviewed and built upon during the streamlined consultation process. The desired outcome of Level 1 review is that the team agree by consensus on the information included in the final BA/BE (including the determination).

Step 2 - Preparation of final BA/BEs by the action agencies

In Step 2, the action agencies prepare a final BA/BE based on the effects determinations and information needs identified at the conclusion of Phase 1. **A complete BA/BE, agreed on by the Level 1 team, is necessary to conclude informal consultation/conference within 30 days and formal consultations/conferences within 90 days (calendar days).** BA/BEs which are received outside of the Streamlining process will be accorded the timeframes as defined under 50 CFR 402. Level 1 team members continue to work together to further refine information needs largely identified during Step 1. The interactions of the regulatory and action agency personnel in Level 1 teams should lead to identifying and including only that information required to render a BO. Other documents, such as previous BAs and pertinent watershed analyses, should be tiered to or referenced to reduce paperwork and expedite the process. These documents can be appended to the BA and should be included or otherwise made available to the regulatory agency upon initiation of consultation.

Listed below are Section 7 effects determinations for actions and general steps to follow to complete streamlined consultation.

No Effect (NE): No Section 7 consultation required.

- The action agency documents "NE" determinations as part of normal environmental review procedures. No consultation is necessary.

Level 1 team review or regulatory agency technical assistance may be requested by the action agency when the distinction between "NE" and "may affect" is unclear.

Not Likely to Adversely Affect (NLAA): Informal consultation required.

- Information needs for regulatory agency concurrence should be identified, to the greatest possible extent, during Step 1. The action agency should receive preliminary agreement from the regulatory agency during Step 1 prior to making a written request for concurrence (see Question 3 in Section II.F).
- The action agency prepares a final BA/BE with a written request to the regulatory agency for concurrence of NLAA determination. Written requests for a concurrence letter should accompany the BA/BE and reference results of Level 1 team meetings (ie. The project was reviewed by the Northwest Level 1 team on March 8, 2003).

Likely to Adversely Affect (LAA): Formal consultation required.

- The action agency will complete a BA/BE based on issues and information needs raised by the Level 1 team in Step 1. This assessment may incorporate National Environmental Policy Act (NEPA) documents. When these documents are combined it is preferred that the ESA portion be separate from the rest of the document allowing for ease of regulatory review, however as long as all required information is included this is not required.
- The action agency may provide a draft BA/BE to the Level 1 team for review and preliminary acceptance of the information and effect determinations. **The objective is to ensure that the BA is complete and will not result in additional requests for information after final submission. If a draft BA/BE is not provided, the BA/BE has not fully gone through the Streamlining process and shortened timelines and other abbreviated processes do not apply. However even discussions of project affects early on without a completed biological assessment in hand have the ability to facilitate streamlining through identifying potential issues and clarifying solutions.**
- The action agency will submit the final BA/BE with a written request for consultation and reference to results of Level 1 team meetings. If possible, an electronic copy of the final BA/BE should be submitted to facilitate regulatory agency response.
- Because of the early Level 1 coordination, it is expected that BA/BEs will be complete when submitted to the regulatory agency. **The regulatory agency will review the consultation package for adequacy within two weeks of receipt and, if inadequate, notify the action agency in writing that the 90-day timeframe has not started.** The notification will identify the information needed to correct the inadequacy. If the action agency is not notified of an incomplete BA/BE within two weeks, it will be assumed the document is complete and that the 90-day period started when the BA was submitted.

Step 3 - Preparation of BOs or concurrence letters by regulatory agencies

For regulatory agencies, the Level 1 team member will be the official contact person for actions submitted for consultation (see attachment 1). This person will be responsible for identifying and clarifying any information needs additional to Steps 1 and 2, and for carrying the action through the regulatory agency's portion of the consultation process in a timely manner.

DISPUTE RESOLUTION:

- **Involve the Level 2 (should the RCTT be involved prior to Level 2's involvement?) team when one or more of the following situations exist:** Only issues that the *entire* team feels is a problem or can't resolve go forward to the RCTT and Level 2 teams.
 - **Issues not resolvable by the Level 1 team arise about:**
 - Information needed to complete a BA and consultation on an action.
 - Determinations of effect or incidental take minimization measures for an action.
 - Whether an action is consistent with the relevant guidance.
 - Decision space available for developing proposed actions.

- **Direction is needed concerning consultation timeframes and workload priorities.**
- **Guidance is needed on feasible mitigation or incidental take minimization measures and legal, policy, or managerial constraints.**
- **A briefing of pending or ongoing consultations is desirable.**

Informal Consultation/Conference

The regulatory agency will send a concurrence letter within 30 days of receipt of a completed BA.

Formal Consultation/Conference

The regulatory agency will prepare a draft BO/Conference Opinion within 90 days of receipt of a complete BA. The regulatory agency retains statutory responsibility to develop reasonable and prudent measures and terms and conditions to avoid or minimize incidental take. However, such requirements are expected to be generally based on previous Level 1 team discussions of possible measures to minimize adverse effects to listed species. The regulatory agency will share this draft BO (to avoid inaccuracies, questions, and surprises) with the action agencies for their consideration prior to issuance.

Conclusion

The streamlined consultation process is intended to contribute to the goal of making Section 7 consultation more efficient and effective. The process will be updated as new information and issues develop. Participants are encouraged to be innovative in their solutions and approaches to the streamlining process and ESA consultation.

More (?) on

1. Land and Resource Management Plan Consultations
2. Programmatic Consultations

Questions and Answers - Streamlined Section 7 Consultation

II. GENERAL QUESTIONS AND ANSWERS

A. *Description of Streamlined Consultation Levels of Teams*

1. *What is the function of Level 1 teams?*

The Level 1 teams are the core component of the streamlined consultation process. Level 1 teams are composed of biologists and botanists designated by their respective agencies as team members (see Question 2 in Section II.B) whose role is to assist land management agencies in designing programs and activities to minimize adverse impacts to listed and proposed species. The Level 1 teams are intended to function as a team. Findings must be by consensus. All potentially contentious issues are expected to be aired at this level, and most or all will be resolved before elevation is necessary (see Section II.G). General duties of Level 1 teams:

- Identify information needs for the BA/BE.
- Recommend scale of BA/BE (see Question 7 in Section II.F).
- Review adequacy of BA/BEs and effects determinations and develop framework for consultation.
- Recommend process to sort, batch, and prioritize actions.
- Report consultation progress (see Section II.D).
- Serve as advisors to Level 2 teams and other line officers; and elevate issues as necessary (see Question 1 in Section II.G).

Personnel assigned to Level 1 teams are listed in Attachment 4.

2. *What is the function of Level 2 teams?*

Level 2 teams are composed of field unit line officers, or their alternates. The Level 2 teams will:

- Ensure that Level 1 teams have adequate resources and time to complete their duties as described in this document.
- Identify priorities for consultation efforts.
- Monitor performance of Level 1 teams (e.g., by attending Level 1 meetings, reviewing annual reports).
- Resolve disputed issues involving effects determinations, information needs for BA/BEs, and compliance with management plans and/or programmatic consultations (see Question 1 in Section II.G).
- Elevate unresolved issues to the Regional Executive level (see Question 2 in Section II.G).

Personnel assigned to Level 2 teams are listed in Attachment 4.

3. *What is the function of the Regional Coordination Technical Team (RCTT)?*

This team provides overall procedures oversight and technical assistance. The Regional Coordination Technical Team is composed of regional technical specialists; they are typically not line officers or decision makers. Action level and policy decisions are made by Level 2 teams and Regional Executives. Duties of the RCTT include:

- Incorporate and identify improvements and needed revisions to the streamlining process.
- Maintain and update streamlined consultation procedures.
- Upon request from Interagency Coordinators (ICs) or Regional Executives, address issues about implementation of these procedures, particularly those affecting more than one team or issues of state and regional concern.
- Facilitate procedures consistency and communication among teams and states, as necessary.
- Serve as primary advisors on the streamlined consultation process to the Level 2 team and Regional Executives.
- Provide advice, feedback, and support to Level 1 and 2 teams, upon request.

Personnel assigned to this team are listed in Attachment 4.

4. *What is the role of the Regional Executives ??*

This team provides resolution to issues if they have not been resolved at lower levels. Membership is the Bureau of Land Management's Wyoming State Director, the Fish and Wildlife Service and Park Service Regional Directors and the Forest Service's Regional Foresters for Regions 2 and 4.

B. *Team Operations*

1. *How can Level 1 teams operate most efficiently?*

Based on the Level 1 teams' experiences, the following points have proven successful in creating an efficient interagency environment for Level 1 team operations:

- Ensure that regulatory agency personnel meet or are represented early in the planning process.
- Communicate regularly and often--in person, via phone, e-mail, fax, etc.
- When necessary, use an independent facilitator for larger meetings.
- Select a logistical leader to organize meeting schedule and coordinate the process.
- Send out project information in advance for team member review.
- Only review project compliance with relevant programmatic consultations and management plans or other binding agency documents.
- Ensure adequate detail is provided on rationale for effects determinations.
- Limit discussions on assessments (BE/BA0) to points of clarification and focus on concurrence or conditional agreement.
- Resolve all issues prior to submittal of a final BA/BE.
- Resolve all intra-agency issues prior to level 1 meetings
- Maintain clear, concise records of team meetings, consensus agreements (e.g., when a BA/BE is complete), and other key decisions.
- Identify agendas that are focused and efficient.

- Involve appropriate resource specialist staff as needed (see Question 3 in Section II.B), to provide additional background and data for action review.
- Regularly apprise Level 2 team of Level 1 team process and progress, and request their guidance on workload, priorities, and timeframes, as necessary.
- When appropriate and timely, discuss upcoming issues (ie. wind farms and effects to listed species, interpretation of lynx conservation strategy and habitat issues etc...)

2. *How can Level 2 teams operate most efficiently and effectively?*

The Level 2 teams resolve issues, provide direction concerning the consultation timeframe and workload priorities, and provide guidance on feasible mitigation and legal, policy, or managerial constraints. Level 2 teams must function as a collaborative entity in order for the Level 1 team to succeed. The Level 2 team should respond promptly to Level 1 team's requests to minimize delays, conflicts, and other complications in the streamlining process. The Level 2 team should communicate and/or meet regularly to develop strong working relationships, trust, understanding of issues, and to keep apprised of their Level 1 team's efforts. Quarterly or more frequent meetings of the Level 2 team are recommended, contingent on the consultation issues and workload.

3. *What is the role of non-Level 1 and 2 team members (e.g., FS District Rangers and district biologists, BLM Field Managers, FWS/National Marine Fisheries Service (NMFS) staff biologists, and other specialists) in the streamlined consultation procedures?*

District Rangers, Field Managers, FWS/NMFS field supervisors, FS district and BLM resource area biologists and other specialists, such as fire management specialists, range conservationists and silviculturists, are integral to the success of streamlined consultation.

For instance, FS district biologists and BLM resource area biologists who may not be Level 1 team members often draft BA/BEs and are frequently more familiar with specific action details than are members of the Level 1 team. Because of their expertise, these biologists should be involved in Level 1 meetings to ensure the team has the best available information. Level 1 teams will ensure that the expertise of FS district biologists, BLM resource area biologists, and other NMFS (National Marine Fisheries Service) or FWS biologists is appropriately incorporated into the streamlined consultation process.

Likewise, the Level 1 team may have questions, perhaps regarding action feasibility or implementation capabilities, that may be best answered by other specialists such as timber sale administrators or engineers. The Level 1 team may need participation of various specialists to fully understand the flexibility of constraints in action design relating to protecting species and their habitats. Specialists with expertise to share with a Level 1 team should attend relevant portions of their meetings.

FS District Rangers and BLM Field Managers who are often decision-makers for actions that Level 1 teams discuss, may attend at their discretion. For example, the Level 1 team may have concerns about potential impacts of a proposed action and an array of proposed methods to reduce the impacts. The team may request a FS District Ranger or BLM Field Manager to listen to the presentation of Level 1 team concerns so the decision-maker can consider these concerns and possible solutions during the decision-making process. In addition, the team may request a

meeting with the decision-maker to discuss proposed solutions and hear the decision-maker's views regarding the feasibility of potential methods for reducing impacts from proposed actions. If disagreements arise about effects determinations or an action's consistency with plan guidance, the issue should be quickly elevated to Level 2 (see Question 1 in Section II.G).

Addressing large programmatic or batched consultations should begin by requesting input from various individuals who may be involved in the proposed activities including specialists, biologists, and line managers. This process will help ensure all activities are brought forward for consultation and everyone is aware of the timeframes, commitments, and constraints in the consultation process. Teams may also benefit from contacting teams with similar projects and issues to take advantage of their experience with streamlined consultation.

In summary, any person involved in the design, implementation, or monitoring of actions may be asked by the Level 1 team to attend relevant portions of the Level 1 team meeting to offer expertise and ideas to meet the goal of streamlined consultation.

5. *Are Level 1 streamlined consultation team meetings open to the general public, special interest groups, state agencies, tribes, or other groups and, if so, under what circumstances?*

Occasionally, the general public or special interest groups have expressed interest in attending or interacting with Level 1 teams during team meetings. The primary objective for creating Level 1 teams is to streamline the ESA Section 7 consultation process for BLM, FS, FWS, and NMFS. Unlike NEPA, which is built on public participation and involvement, the ESA Section 7 regulations limit outside interested parties to action applicants (see Question 1 in Section II.H) at specific intervals in the Section 7 process. Where outside parties express an interest in participation, line officers should explain the background and purpose of Level 1 teams, the role of applicants (see Question 1 in Section II.H) under Section 7, and the role of the public in the NEPA process.

Level 1 streamlined consultation meetings are not considered open meetings to the general public. However, in some instances, representatives of state wildlife agencies or tribes have participated in Level 1 team meetings. Outside involvement is tied to land management responsibilities and information needed to develop BA/BEs and evaluations. In these cases, public participation should occur during the NEPA phase of action development. In other cases, for example, if the interested parties are questioning how Level 1 teams function or apply programmatic guidelines on the ground, Level 1 teams can schedule a special session, either in the office or field, to address specific questions or concerns.

If non-federal applicants are involved in the process as applicants it is important to remember our Federal Advisory Committee Act (FACA) responsibilities. FACA regulates the way Federal officials obtain advice and recommendations from non-Federal persons. In particular, the role of non-federal parties is informational only. They may not participate or have influence on decision making (ie. effect determinations, etc...). In order to be compliant with this law, if non-federal entities have information regarding a project or species, they may be given a specific time to attend the Level 1 meetings and be asked to leave immediately after their presentation is complete and any questions responded to. This will allow the Level 1 teams access to this information while remaining in compliance with FACA.

C. *Completion Times for Consultation*

1. ***Are the 30 and 90-day timeframes to be used as guidance, or will the agencies be required to meet these deadlines?***

These timeframes are considered deadlines. However, they are not in effect until complete BA/BEs, which have undergone Level 1 team review and concurrence, are received by the regulatory agencies for formal or informal consultation. Normal timelines (as defined in 50 CFR 402.14) are accorded projects which are outside of the Streamlining process. The date on which a complete BA/BE (as determined by interagency review) is received by the regulatory agencies dictates the start of the 30 or 90-day timeframes (see Introduction).

2. ***What constitutes a beginning date for timeframes specified in the process, and do time limits restart for issues elevated to Level 2 teams?***

The beginning date for consultation is the day a completed BA/BE is received by the regulatory agency (agreed upon by all involved members of the Level 1 team) along with a written request for consultation. The action agency must submit only complete BA/BEs deemed adequate by all Level 1 team members. Official timeframes will not be activated if an issue is unresolved and subsequently elevated to the Level 2 team, because a BA/BE will not have been agreed upon by all members of the Level 1 team. After the issue is resolved by the Level 2 team, an agreed upon BA/BE can be submitted and the appropriate deadline will begin.

3. ***Is it acceptable to exceed the 90-day response timeframe for BOs and, if so, when?***

Yes, in **very limited** and **specific situations**, a 90-day turnaround for the BO may be exceeded. One principal reason and goal of the streamlined consultation procedures was to establish and ensure quicker response times. However, exceeding 90 days may be acceptable if the consultation is very large scale and complex such as a multi-year, multiple administrative unit, resource management plan, or programmatic type requiring extensive regulatory agency analysis and review to complete the BO. For instance typically BOs associated with RMPs and LRMPs will exceed this timeline. The 90-day response may also be unlikely or uncertain in other situations, such as applicant involvement or elevation of issues beyond the Level 1 team.

4. ***What conditions would prompt reinitiation of consultation, and what would the corresponding timeframes be for completing consultation as a result of a request for reinitiation?***

There are four general conditions that require reinitiation of consultation as per 50 CFR § 402.16:

- New information reveals effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered.
- Action is modified in a manner causing adverse effects to listed species or critical habitat *not previously considered*.
- A new species is listed or critical habitat designated that may be affected by the action.
- Amount or extent of incidental take is exceeded.

Additionally, in the case of multi-year programmatic consultation, reinitiation and consultation

would be required when the BO has expired. The same 30 and 90-day timeframes discussed previously would apply to reinitiated consultations.

D. Reporting on the Streamlined Consultation Process

1. How will the process be tracked and evaluated?

The RCTT has developed a simple reporting form (see Attachment 8). The purpose of the form is to summarize the status and activity level of the streamlined consultation process. This form should be completed by the team leader at each meeting and sent to the designated person on the RCTT at the end of the year. The RCTT will summarize the results and distribute them to all field units in their respective agencies. Level 1 teams are also encouraged to develop, if needed, tracking procedures specific to their level of detail and information needs. In addition to the reporting form, submission of explanatory notes to clarify the information on the form is encouraged.

Submissions should also include brief write-ups on innovative or prototype consultation techniques or documents, beneficial and effective approaches to team operations, resolution of technical and process issues, and other information beneficial to other teams. When appropriate, a name and contact information should be provided so others can obtain more complete information, copies of the documents, etc.

2. How should multiple effects determinations be reported on the form?

For both action-level and programmatic consultations, one project may have multiple effects determinations addressing multiple species. In those cases, include the total number of effects determinations by call (i.e., NE, NLAA, LAA) and by species on the form. For example, a right-of-way consultation that addresses three projects with separate effects determinations for four different species (grizzly bear, bald eagle, Canada lynx, gray wolf) for each project would result in a total of 12 different effects determinations.

3. What is the definition of "project" in the "Team Review Report" table on the reporting form?

Projects are equivalent to individual actions. For example, a single consultation request for grazing activities might involve grazing permits on several different allotments. Count these allotments individually because they may occur in different parts of the Forest/District (potentially affecting different species), it is important to track the individual projects reviewed to reflect the actual workload.

4. Does the above reporting satisfy requirements for Section 7 consultation by monitoring and tracking impacts of a project, particularly incidental take?

No. The streamlined consultation tracking process is an administrative function related to implementation of the process and is not designed to track the effects of projects or the extent of incidental take.

5. *What are the requirements under Section 7 for monitoring and tracking impacts of an action, particularly incidental take?*

All agencies requesting formal consultation for actions involving incidental take of a listed species must monitor the impacts of incidental take as required by the ESA: agencies “must report the progress of the action and its impact on the species” (50 CFR 402.14 (i)(3)). This type of reporting provides regulatory agencies with essential information for assessing effects of various actions on listed species and designated critical habitat. By tracking and evaluating all actions that may adversely affect listed species, regulatory agencies are able to refine environmental baseline data, BOs, reasonable and prudent measures, and terms and conditions.

At a minimum, the monitoring report should be designed to:

- Track adverse effects resulting from a proposed action.
- Identify when the level of anticipated incidental take is approached.
- Detect when the level of anticipated take is exceeded.
- Determine the effectiveness of reasonable and prudent measures.

With large-scale provincial/programmatic consultations, a monitoring report will help action agencies to determine their progress/accomplishments as outlined in their BA/BE. The Level 1 team should work cooperatively to develop monitoring report format and content, if not yet done. Reporting dates for monitoring reports should be negotiated by the Level 1 teams, but are typically due at least annually.

6. *Does this streamlined process apply to all consultations ?*

Although the streamlined consultation procedures agreement is applicable to all consultations involving FS and BLM activities in Wyoming, the process is not mandatory.

E. *Early Planning and the ESA*

1. *What is the relationship between the streamlining procedures for consultation and the early planning process?*

In instances where it is determined the draft preferred alternative emerging from the early planning process (e.g., NEPA) “may affect” a federal listed or proposed species, the streamlined consultation procedures can be activated. The procedures are used to facilitate both informal and formal consultation where letters of concurrence or BOs, respectively, provide additional information for feedback into the early planning process prior to finalizing the preferred alternative and signing the decision document.

Successfully integrating the need for consideration of listed and proposed species into the design of management actions is greatly enhanced by involving regulatory personnel in the early planning and design of the action. During the early planning process, one or more alternative(s) will be designed to meet existing plan guidance and regulatory requirements. This alternative should incorporate all applicable measures to reduce incidental take. **FWS and NMFS personnel should participate in this “early planning” step of the process to the greatest extent possible.** This involvement can be accomplished by regulatory agency staff in roles as early planning biologists or those who are members of the Level 1 team. Different approaches

are utilized by teams. Whatever the approach, the involvement and input must be timely relative to the action agency's planning efforts, timeframes, and development of the preferred alternative.

If regulatory personnel cannot be directly involved, action agency personnel (IDT biologists and botanists) should contact FWS and NMFS personnel during the IDT process to solicit their recommendations about ESA considerations.

F. Information Needs and Approaches for Consultation

1. What constitutes a "complete" or adequate BA/BE?

A complete BA/BE is one that **Level 1 team members agree is sufficient to permit a scientifically credible BO** (that is, it satisfies 50 CFR § 402.12(f) and 50 CFR § 402.14(c)). The specific contents of such assessments will vary depending on the species being considered; these contents will be identified and agreed to by all Level 1 team members. The BA/BE should include a discussion of how the action is consistent with relevant management plans.

2. What types of actions will the team review?

Level 1 teams will review all actions that "may affect" listed or proposed species. The regulations (50 CFR § 402.02) define "effects of the action." It is also helpful for Action agencies to bring actions to the team for consideration if the certainty of the effects determination (including no effect determinations) is in question and the action agency is seeking advice of the Level 1 team in addressing the uncertainty. In initial streamlining stages, it may be useful for the action agency to bring forward some NE actions to develop a team consensus on what types of actions meet the criteria for NE determinations. However concurrence is not required for no effect determinations and their review is not required through this process. In some cases, information on candidate species may be reviewed and advice offered as applicable (see Question 4 in Section II.F).

3. Will regulatory agencies be expected to concur with NLAA determinations during the Level 1 team review if a BA/BE has not yet been prepared?

BA/BEs will be prepared by the action agencies for all actions that may affect listed species, and action agency biologists need to clearly document the rationale for effects determinations. The regulatory agency team member will use his or her discretion to provide **preliminary** agreement with the action agency's **preliminary** effects determination. The ability to provide such an agreement will depend on the complexity of the action and the level of information presented at the Level 1 meetings. Some agreements should be relatively simple and straightforward, but review for others will require a completed BA/BE and additional consideration before an effects determination can be made and agreed to. It is important to note that consultation is not complete until written concurrence, per 50 CFR § 402.13, has been received from the regulatory agencies.

4. To what extent will Level 1 teams evaluate effects of proposed actions on candidates?

Evaluation of effects on Federal candidates should be considered to the extent possible as part of the early planning effort. The action agencies have policies and mandates to address these

species. FS Manual 2670.22 directs that actions must be developed and implemented to ensure that sensitive species do not become threatened or endangered because of FS actions. The BLM 6840 policy requires that the agency not take an action that contributes to the need to list Federal candidate, state listed, and BLM sensitive species.

The Level 1 team process can provide one forum for interagency technical coordination and assistance on candidates. The amount of time and effort spent on these species is at the discretion of the Level 1 and 2 teams. **It should not hinder the timely completion of consultation on the Federally listed or proposed species and critical habitats.**

There are other opportunities and mechanisms besides the Level 1 teams to incorporate regulatory agency input on these species. The interdisciplinary forums during NEPA processes and other early analysis and planning efforts often require addressing these species for adequate and appropriate activity mitigation. Regulatory agency staff input is a key source of input on these species and should be solicited and considered at this time (see Question 1 in Section II.E).

Designing actions to fully protect the needs of candidates is strongly recommended as a long-term investment that will result in significant benefit to species conservation and efficiency in action implementation. When an action has been designed to protect the needs of these species, it moves quickly through the consultation process if species become listed. Analysis of candidates in a multi-species context at a landscape scale should be considered. Many candidate species populations are declining, and management actions should be implemented to help prevent the need for listing. The most significant and proactive approach is conserving these species and minimizing future or proposed listings through action planning and design.

5. *Will teams review actions for compliance with the programmatic guidance of relevant management plans, Conservation Strategies (ie. Lynx Conservation Assessment Strategy) or other programmatic actions that have already undergone Section 7 consultation?*

The primary purpose of this process is to streamline Section 7 consultation. Therefore, teams will review action agency findings or compliance with land management plans only to the extent necessary to evaluate effects of a proposed action on listed or proposed species and candidate species, if time permits. It is assumed that all actions brought to the Level 1 team for consultation will be designed to comply with relevant management plans and programmatic consultations, particularly where these overarching actions have previously had consultation. If questions of interpretation arise during Level 1 review, all effort should be made to resolve them at this level. The Level 1 team may request, and the action agency representative will provide, an explanation of how the action complies with the plan, strategy or opinion. It may be prudent in some cases to include this explanation in the BA/BE or as part of the administrative record.

If the Level 1 team agrees that an action is not consistent with the relevant plan or previous BO, the action will be returned to the action agency for review and modification. Obviously, projects which include associated proposals to amend the relevant plan are not part of this response. If the team does not agree on action consistency, then it should follow the elevation procedures (see Question 1 in Section II.G).

It is important to recognize that the Level 1 team is not a plan compliance review body with responsibilities to review all actions against all aspects of existing plans. It is the

responsibility of the action agency to ensure that all actions brought to the Level 1 team for consultation comply with management plans and programmatic consultations. **The key compliance issue for the Level 1 team is the extent to which the potential project's noncompliance with the Land use plan (and previous section 7 consultation) may affect the species under consultation.** If the Level 1 team determines that although an action is not consistent with some aspect of the existing land management plan, the inconsistency does not affect species under consideration, streamlining can move forward. If the potential noncompliance does not directly affect the regulatory agencies' ability to complete consultation, the noncompliance issue should be noted and elevated to Level 2 for their information. Differences in compliance interpretation for a few actions should not disrupt consultation on a majority of actions clearly consistent with the relevant plan or previous BO.

6. *What does the action agency do if the Level 1 team decides that they cannot concur with the preliminary effects determination for an action?*

In this event, the action agency may:

- Provide additional information in support of their determination.
- Accept the consensus opinion of effects of the Level 1 team.
- Modify the action with the assistance of the Level 1 team and approval of respective deciding officials or Level 2 team members.

G. *Elevation of Issues*

1. *What is the process for elevating issues for resolution from Level 1 teams?*

Issues should be elevated to Level 2:

- When differences in interpretation prevent Level 1 members from reaching a workable consensus.
- To clarify policy and direction.
- If substantial progress toward resolution of the issue(s) is not forthcoming.

There should be no stigma attached to elevation to Level 2. **Such elevation should not be considered a "failure,"** but rather a sign that the system is working to identify problems of conflicting policy or interpretation of standards. The intent of elevating issues is to avoid surprises or unnecessary delays. Elevation of an issue should not prevent the team from working on consultation or other actions independent of that issue.

Level 1 and 2 teams have flexibility to further refine the elevation process by developing a particular team's operating guidelines; these should be documented. Elevation can be accomplished by a short letter signed by members of the Level 1 team. Appendices 5a and 5b provide an example of an optional outline for written elevation documents for use by the Level 1 and Level 2 teams. The letter will simply state the disagreement or concern about an issue and that the issue needs to be elevated. This elevation letter need not describe the issue in detail or necessarily discuss solutions. However, this elevation letter will be accompanied by a succinct position statement written by the Level 1 member(s) who is/are elevating the issue. The letter should clarify why consensus cannot be reached by the Level 1 team. If appropriate, these statements may include suggested remedies to the situation offered by respective Level 1 team

members. This information will better enable the Level 2 team--or Regional Executives if necessary--to make an informed decision.

The Level 2 team should meet or hold a conference as soon as possible, typically within two weeks of receipt of the letter. The goal of the meeting should be to: review the issue, determine a course of action (e.g., hold joint Level 1 and 2 discussions or identify other agency personnel that should be involved), and identify a timeframe for reaching a Level 2 decision. The elevation to Level 2 should result in one of the following: either resolution of the issue and guidance to the Level 1 team or elevation to the Regional Executives (see below). Level 2 resolution may result in dropping, modifying, or continuing with the originally designed action

The outcome should be documented in a letter to the Level 1 team.

If a Level 2 member has an unresolved issue with a particular consultation, the issue should be elevated to all members of the Level 2. The Level 2 team should make every attempt to resolve the issue, prior to considering further elevation (see Question 2 in Section II.G).

2. *What is the process for elevating issues from the Level 2 teams?*

Level 2 teams should strive to reach resolution of an issue. If resolution is not reached, a Level 2 team or member will elevate the issue to the Regional Executives with a simple letter notifying them of an issue and need for resolution. Appendix 5c provides an example of an optional outline for the written elevation document for the Level 2 teams to the Executives. The Executives may designate staff (such as the RCTT) to assist in resolution. The elevation document should include the Level 1 position statements, as well as other material the Level 2 team provides.

The Regional Executives or designees will then make an interagency decision and instruct the Level 1 and 2 teams how to proceed on the issue. When resolved, the action will be routed back to the Level 1 and 2 teams for further processing. The outcome of elevated issues will be documented by a RCTT member, who will include this information, when appropriate, in reporting form summaries distributed to BLM, FS, and FWS, on an annual basis or as needed.

H. *Role of Applicants*

1. *Who is an applicant under ESA? What are the responsibilities of the agencies and Level 1 team to an applicant?*

Under 50 CFR § 402.02, an applicant is defined as any person who requires formal approval or authorization from a Federal agency as a prerequisite to conducting an action. Applicants would include those seeking permits, licenses, leases, letters of authorization, and any other form of authorization or approval issued by a Federal agency as a prerequisite for carrying out the action.

Applicants can be involved in the consultation process by:

- Submitting written information for consideration during the consultation.
- Reviewing and providing written comments on draft BOs.
- Discussing potential reasonable and prudent alternatives with the action and regulatory agencies.

- Either consenting to or rejecting greater than 60-day extensions of the consultation period (per 50 CFR § 402.14). The agencies must recognize that some actions require applicant agreement prior to action modification.

An action agency must determine who will be given applicant status under the ESA and identify applicants to the regulatory agency. Applicants must be included in the consultation process under Section 7 of the ESA. Whenever consultation/conferencing is being initiated, the applicant should be informed of the fact (per 50 CFR § 402.11 and 402.14)

Level 1 and 2 teams should be made aware of the existence of an action with an applicant at the initiation of the streamlining process. Early applicant involvement is crucial in those instances where it becomes apparent to the Level 1 team that modifications to the action are necessary to comply with ESA. Level 1 teams need to develop a timeframe and strategy for applicant involvement. Whenever applicants are involved in the process, teams must maintain clear records on when the streamline processes commenced and the type and level of communications with the applicant.

The accelerated schedule for completing consultation under the streamlining process make it imperative for the agencies to involve applicants early in the process and to develop efficient ways to incorporate their comments. Applicants should be advised of the shortened timeframes and be prepared to respond accordingly.

If it becomes apparent that applicant involvement could delay the streamline consultation processes and turnaround times, the Level 1 team should consider separating out those actions that may result in significant delays to the overall streamlining effort. If team progress on the consultation falls outside of streamlining timeframes, both agencies must nevertheless comply with the 50 CFR § 402.14 regulatory timeframes (refer to Question 3 in Section II.C).

III. GUIDANCE SPECIFIC TO OTHER ORDERS, ACTS, OR POLICIES

A. Access

1. Is there an interagency policy on ESA consultations concerning access across federal lands?

Yes. Attachment 5 is the January 2003, interagency memorandum that describes specific consultation procedures for actions involving access across Federal lands. Level 1 biologists and other consultation participants should refer to this document when dealing with this issue.

B. Secretarial Order 3206 on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the ESA

The following Q&As provide information about the Secretarial Order and the existing guidance of the agencies on tribal consultation and coordination.

1. What is Secretarial Order 3206?

The Order was signed on June 5, 1997, by the Secretaries of the Interior and Commerce Departments (DOI and DOC, respectively). Its purpose is to clarify responsibilities of DOI/DOC

agencies when actions taken under the authority of the ESA and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. It also acknowledges the trust responsibility and treaty obligations of the United States toward tribes and its government-to-government relationship in working with tribes.

The Order does not alter the legal or regulatory responsibilities of DOI or DOC agencies. The Order requires DOI/DOC agencies to "consult" with, and seek the participation of, affected tribes to the maximum extent practicable when their planned actions involving the ESA may affect Indian lands, tribal trust resources, or the exercise of tribal rights. This tribal consultation includes "providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes." The Order requires DOI/DOC agencies to use tribal conservation and management plans that both govern activities on Indian lands and that address the conservation needs of listed species.

Under the Order, if a DOI/DOC agency determines that conservation restrictions affecting tribes are necessary to protect listed species, the affected tribes shall be given written notification of such as far in advance as practicable. If a conservation restriction is directed at a tribal action involving potential for incidental take of a listed species, the DOI/DOC agency shall include in its notice to the affected tribes an analysis and determination that all of the following "conservation standards" have been met:

- Restriction is reasonable and necessary for conservation of the species.
- Conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities.
- Measure is the least restrictive alternative available to achieve the required conservation purpose.
- Restriction does not discriminate against Indian activities, either as stated or applied.
- Voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

When the FWS or NMFS enter into formal consultations with agencies not in DOI or DOC on a proposed action which may affect tribal rights or tribal trust resources, FWS or NMFS shall notify the affected tribes and encourage the action agency to invite the tribes and the Bureau of Indian Affairs to participate in the consultation process.

2. *What direction currently exists to involve the tribes in agency actions, and how does it relate to the Secretarial Order?*

The Order builds on policy and direction already specified in recent guidance compelling agency coordination and tribal consultation with Indian tribes. A "tribe" is a federally recognized American Indian government. An updated listing of recognized tribes is provided periodically in the Federal Register (see Vol. 62, No. 205, pp. 52270-75, October 23, 1997, for the most recent listing). A variety of acts and orders provide guidance.

Specific agency guidance is provided in BLM Manual 8160 and the associated handbook and in the 1995 Forest Service National Resource Book on American Indian and Alaska Native Relations. The range of topics subject to tribal consultation is broad to include identification and

protection of sacred sites; human burials; archaeological sites; listed, proposed and candidate species; traditional use locations; and the exercise of treaty rights.

Tribal consultation is more of a process than an event, constituting an ongoing dialogue between respective decision-makers and the staff of agencies and tribes. Consequently, if a government-to-government dialogue has already been established between an agency's field office and a tribe, concerns over potential affects on listed and other special status species should be integrated within the range of other tribal issues identified above. Two key elements of tribal consultation are: (1) field office managers are the primary contacts for the agencies with the appropriate line officer taking the lead in intergovernmental discussion; and (2) agency managers should seek equitable solutions with tribes on resource issues. Other common elements of tribal consultation include sharing of scientific and technical expertise and information exchange. The primary means of ensuring success in tribal consultation over the long term is establishment of protocols specifying the various aspects of expected communication between the agency and a tribe.

3. *How and when should tribes be involved in agency actions?*

The Secretarial Order states that a tribe should be involved whenever an agency becomes aware that their actions may affect tribal trust resources, the exercise of tribal rights, or Indian lands. Those tribes with reserved rights to resources on public lands primarily include tribes with specific treaties negotiated, signed, and ratified by Congress in the mid-19th century. The right to harvest species includes a wide range of native plants and animals. The ongoing dialogue between agencies and tribes should address anticipated agency actions and programs, ideally during the period of action/program formulation but at least before initiating public scoping on the larger agency efforts. Federal Advisory Committee Act concerns have been formally waived regarding such tribal government participation. The nature of tribal involvement, tribal information provided to the agency, and how the information is used should be documented in the corresponding NEPA document and referenced in the resulting BA for further guidance in transmitting documents.

C. *Joint Counterpart Endangered Species Act Section 7 Consultation Regulations*

See Attachments 6a,b, and c.

Attachment 1

United States Department of Agriculture Forest Service	United States Department of the Interior Bureau of Land Management	United States Department of the Interior Fish and Wildlife Service
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Memorandum

Date: January 28, 2003

To: Forest Service Forest Supervisors (Wyoming)
Bureau of Land Management Field Managers (Wyoming)
Fish and Wildlife Service Field Supervisor (Cheyenne)

From: Regional Foresters, U.S. Forest Service, Regions 2 and 4
Wyoming State Director, Bureau of Land Management
Regional Director, Fish and Wildlife Service, Region 6

Subject: Endangered Species Act Section 7 Consultation Streamlining Process for Wyoming

In August 2000, a Memorandum of Agreement (Attachment 1) went into effect that directed the use of a streamlined Endangered Species Act (ESA) consultation process for program level activities, such as land use plans. The Memorandum was signed by the Forest Service (USFS) Chief, Bureau of Land Management (BLM) Director, Fish and Wildlife Service (FWS) Director, and National Marine Fisheries Services (NMFS) Administrator. More recently, the BLM, USFS, NMFS and FWS developed a streamlined process for consultation on National Fire Plan projects in the northwestern United States, including western Wyoming, which relies upon the same type of interagency approach to consultation described in the MOA.

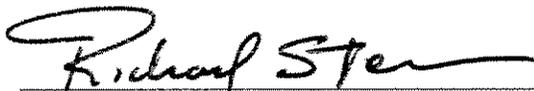
These streamlining approaches rely on the use of interagency "Level I" and "Level II" teams. Level I teams generally are comprised of field-level, District-level, or Forest-level biologists and serve as a forum for information exchange and joint evaluation of proposed projects beginning at the earliest stages of planning. The Level II teams are comprised of agency managers and function primarily as an issue resolution body in those infrequent instances when Level I teams are unable to reach consensus on project effect determinations or workload priorities. Three Level I teams and one Level II team have been assembled in Wyoming. The geographic areas covered by the Level I teams and the memberships of all teams are provided in Attachments 2 and 3, respectively. In addition, a Regional Coordination and Technical Team has been formed to provide technical assistance and coordination for Level I and Level II teams in Wyoming and Colorado.

Consultation streamlining simply makes good sense in these times of increased workloads associated with energy development, the National Fire Plan, and myriad other activities. Streamlining offers an excellent opportunity to speed up the consultation process, while at the

same time improving the quality of consultations and interagency relationships, assisting the recovery of listed species, and proactively conserving candidate species in an effort to preclude the need for ESA protection.

For these reasons, we wholeheartedly support these efforts, and expect that each of you will assist to the fullest extent possible with the continued development and implementation of consultation streamlining in Wyoming. While implementation of this new approach may cause some degree of discomfort initially, we believe the interagency commitment to make it work and the increased efficiencies it offers will soon allay any concerns you may have at the outset. We also recommend Level I teams make use of consultation materials (e.g., species effects screens) developed for use on National Fire Plan projects in the northwest, and which may be useful in streamlining consultations on other projects in Wyoming. These materials are available at: <http://www.or.blm.gov/fcp/>.

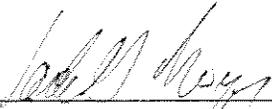
We thank you in advance for your commitment to consultation streamlining. If you have questions regarding the mechanics of the process, the following agency contacts are available to answer questions: USFS - Peter McDonald, Region 2 (303/275-5029), and Bill Noblitt, Region 4 (801/625-5664); BLM - Jeff Carroll, Wyoming State Office (307/775-6090); and FWS - Paul Winkle, Region 6 (303/236-7400 ext. 277).



Richard Stem, Deputy Regional Forester, Region 2, U.S. Forest Service

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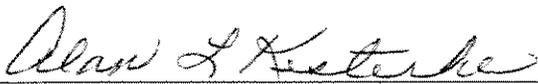
Date



Jack Troyer, Regional Forester, Region 4, U.S. Forest Service

2/19/03

Date



for Bob Bennett, State Director, U.S. Bureau of Land Management, Wyoming

2/21/03

Date



Ralph Morgenweck, Regional Director, Region 6, U.S. Fish and Wildlife Service

2-4-03

Date

Attachments (3)

**MEMBERSHIP OF LEVEL 1, 2 AND
REGIONAL COORDINATION AND TECHNICAL TEAMS IN WYOMING
UPDATED MAY 2005**

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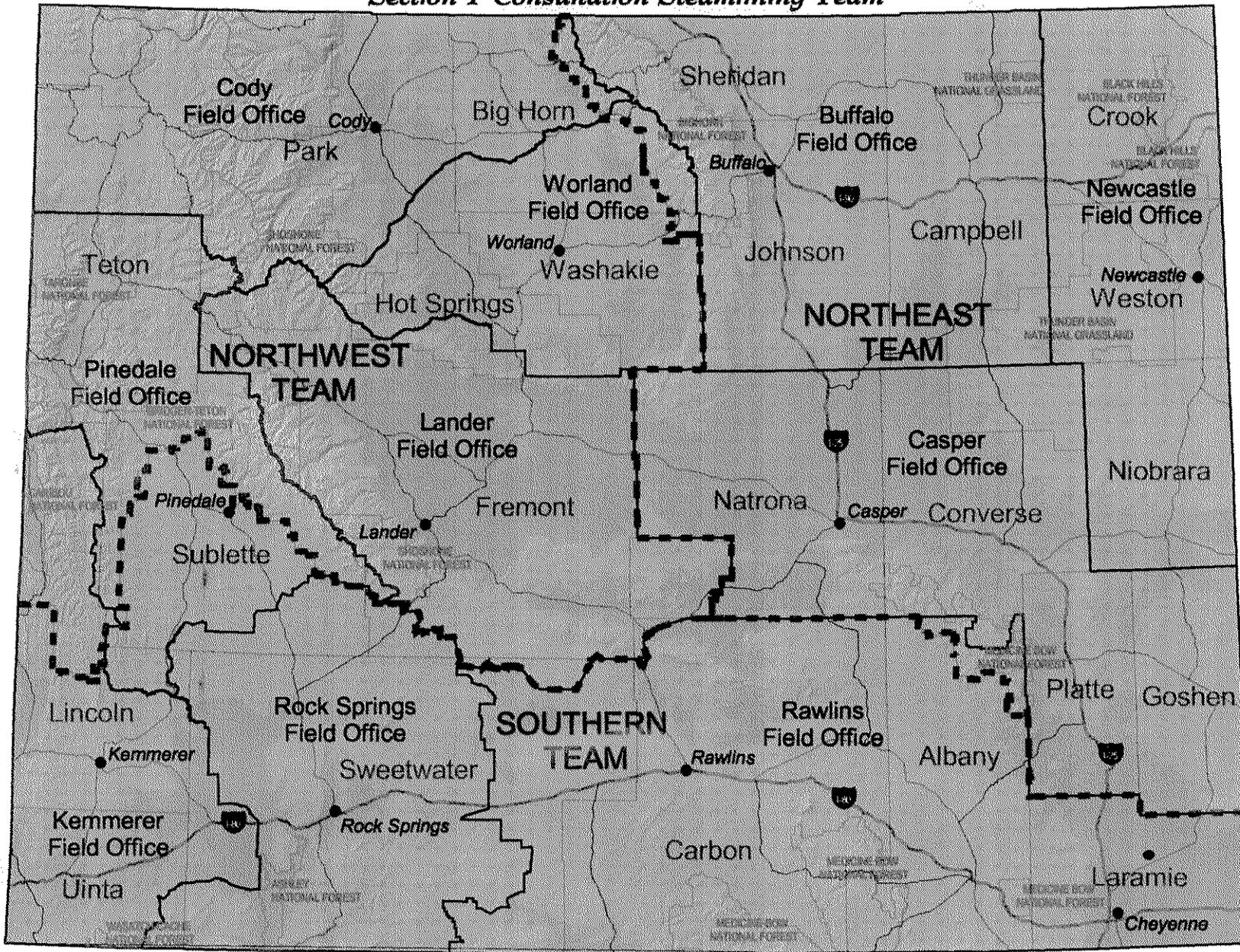
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WYOMING

Section 7 Consultation Steamlining Team



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| | Wyoming County | | State Highway |
| | National Forest | | |

Map compiled by
Bureau of Land Management
State Office
Geographic Science
John Neesloney
April 1, 2001

File Code: 2670

Date: January 16, 2001

Route To: 1900

Subject: Transmittal of the Final Memorandum of Agreement, Endangered Species Act Section 7 Programmatic Consultations and Coordination among Bureau of Land Management, Forest Service, National Marine Fisheries Service, and Fish and Wildlife Service

To: Regional Foresters

This memorandum transmits the Memorandum of Agreement (MOA) on Section 7 Programmatic Consultations and Coordination among the Forest Service, Bureau of Land Management, Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS). The MOA was signed on August 30, 2000. It is effective immediately, and region's are expected to fully implement the programmatic consultation process outlined in the MOA within one year of the signature date. This MOA should be inserted into your 1998 FWS/NMFS Endangered Species Consultation Handbook as Appendix H.

After the 9th Circuit Court of Appeals ruled in *Pacific Rivers Council vs. Thomas* (1994), that Forest Service Land and Resource Management Plans "constitute continuing agency action requiring consultation under 7(a)(2) of the Endangered Species Act," the four signatory agencies determined that a process was needed to better facilitate completion of the increased programmatic consultation workload in an effective and timely manner. The MOA meets this objective by establishing a "streamlined" procedure for completing section 7 programmatic consultations on land use plans and other programmatic-level documents (e.g., Land and Resource Management Plans, Resource Management Plans, and Management Framework Plans). The MOA establishes a general framework for an efficient interagency cooperation process during plan development and provides guidelines and procedures for formal and informal consultations, as well as consideration of candidate species conservation during plan development. The key to the cooperative process is early interagency communication, coordination, and concurrence on participation, timelines, information needs, and analyses. Intensive up-front coordination between the agencies will allow for early identification and resolution of issues prior to the actual consultation.

To facilitate implementation of the streamlined process, the MOA establishes interagency teams, called working groups, at various levels of management. The MOA also creates an issue resolution procedure to facilitate interaction between the working groups and between the agencies. This dispute resolution process directs working groups to elevate issues to the next higher issue resolution working group if consensus cannot be reached on what information is needed to complete consultation on a plan/program, the determination of effects, the adequacy of plan standards and guides, compliance with existing guidance, etc. The issue resolution process is not to be used to elevate disagreements regarding the consulted agencies' (FWS and NMFS) biological determinations during formal consultation (i.e., jeopardy analysis).

Enclosed in the MOA is implementation guidance for carrying out consultations at the plan and programmatic level. The agencies have agreed to use this guidance when implementing the terms of the MOA. As future needs are identified, revised guidance reflecting changes agreed to by the agencies may be issued with the approval of the heads of the four agencies.

As part of the initial efforts to implement the MOA, the agencies are working together to provide training for the staff and managers who will be directly involved in implementation of the MOA at the regional and forest levels. All employees who will be implementing the MOA are expected to attend the training. Eight sessions have been planned at various locations across the country starting in October 2000, continuing through April 2001. An earlier memorandum was sent out on August 8, 2000, regarding this training process. Please refer to that memorandum for further information on the workshops.

This MOA is effective immediately. It applies to all lands managed by the Forest Service or Bureau of Land Management. The provisions of this MOA will remain in effect until it is amended, superseded, or revoked.

Please contact Marc Bosch, TES Program Leader (202-205-1220) with any questions regarding the MOA.

/s/ Paul Brouha for

JAMES R. FURNISH
Deputy Chief for
National Forest System

Enclosure

cc:
Director, EMC
Deputy Chief, Research and Development
Deputy Chief, State & Private Forestry
Jan Poling, OGC

August 30, 2000

MEMORANDUM OF AGREEMENT

**ENDANGERED SPECIES ACT
SECTION 7 PROGRAMMATIC CONSULTATIONS
AND COORDINATION**

among

**BUREAU OF LAND MANAGEMENT,
FOREST SERVICE,
NATIONAL MARINE FISHERIES SERVICE**

and

FISH AND WILDLIFE SERVICE

Goal

The goal of the Memorandum of Agreement (MOA) is to improve the efficiency and effectiveness of plan and programmatic level section 7 consultation processes under the Endangered Species Act, and enhance conservation of imperiled species while delivering appropriate goods and services provided by lands and resources managed by the signatory agencies.

Purpose

The purpose of this interagency Memorandum of Agreement (MOA) is to establish a general framework for a "streamlined" (i.e., easier and more effective) process for interagency cooperation among the Bureau of Land Management (BLM), U.S. Forest Service (FS), U.S. Fish and Wildlife Service (FWS), and National Marine Fisheries Service (NMFS) in the exercise of their responsibilities under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531-1544) and the 1994 Memorandum of Understanding on the conservation of species which are tending towards federal listing (94-SMU-058), which all four agencies signed. In particular, this MOA outlines guidance and procedures for section 7 consultations as well as consideration of candidate species conservation in land management plans and other programmatic level proposals prepared by the BLM and FS. The guidance and procedures outlined in this MOA will enhance existing procedures for conducting section 7 consultations. Nothing in this MOA is intended to amend 50 CFR part 402. This streamlined process will provide a number of efficiencies, allowing the agencies to better achieve compliance with the ESA and the regulations at 50 CFR part 402 without altering or diminishing the agencies' existing responsibilities under the ESA or its regulations. Although consultation already occurs on land management plans and site-specific land management activities, guidance is needed to ensure consistency and efficiency. The result will be increased up-front coordination on biological assessments including conservation measures for candidate, proposed, and listed species and proposed and designated critical habitat. It will also result in a shortened time frame for the appropriate consultation response (a goal of 30 days or less for concurrence letters and 90 days or less to complete formal consultation) once an agreed to biological assessment has been received by the FWS or NMFS. This agreement in no way alters the commitment of the action agencies to

consult at the site-specific level.

The term "action" as used in section 7 of the ESA includes land use plans under the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*) and resource management plans under the Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 1600 *et seq.*) as amended by the Forest Management Act (16 U.S.C. 1600 *et seq.*).

The BLM and FS (action agencies) will consult and confer, as outlined in the following sections, on land management plans, both during development of a new, amended, or revised plan, and on an existing plan if a new species is listed or critical habitat designated, or significant new information becomes available, and, where appropriate, consult on other programmatic level proposals (e.g., recreation program, grazing program, riparian strategy), habitat management plans, multi-year projects aggregated as a program, grouped permits or activities, or plan objectives, standards and guidelines, such as the Pacific Anadromous Fish Strategy (PACFISH) interim standards and guidelines. The action agencies also agree to include candidate species in biological assessments/evaluations provided during the plan consultation/conference process.

The BLM, FS, FWS, and NMFS agree to promote the conservation of candidate, proposed, and listed species and to informally and formally consult/confer as specified in 50 CFR 402 on listed and proposed species, and designated and proposed critical habitat during planning: (1) To assure that activities implemented under these plans minimize or avoid adverse impacts to such species and any critical habitat; (2) to assure that such activities implemented under these plans do not preclude future conservation opportunities; (3) to use, where possible, formal conference procedures specified in 50 CFR 402 to avoid conflicts between elements contained in plans and the requirements for conservation of proposed species and proposed critical habitat; and (4) to analyze the effects of the plan on candidate species pursuant to agency planning regulations.

This MOA establishes interagency commitment to and guidance for the following: (1) Early interagency communication, coordination, consultation, and conferencing on candidate, proposed, and listed species to take place prior to and during plan/program proposal development; (2) consultations/conferencing on land management plan adoption, revision, amendment and on ongoing plans where reinitiation is required; (3) implementation guidance for plan and programmatic level consultation; (4) efficiency through a consistent programmatic interagency cooperative consultation process; (5) ensuring that ongoing activities do not jeopardize listed species, result in the destruction/adverse modification of designated critical habitat, or result in unauthorized take during consultations on an existing land management plan; and (6) consulting or conferencing on both land management plans and other programmatic level proposals for species listed or critical habitat designated since the adoption of a plan.

Context of Agreement

As part of their land management planning processes, the FS prepares Land and Resource Management Plans and the BLM prepares Resource Management Plans and, in the past, has also prepared Management Framework Plans (hereinafter, these plans will be collectively called "plans"). Plans identify general land-use purposes or allocations; future conditions that are desired on specific lands; goals and objectives for resource conditions on specific lands; and standards, guidelines, or other mechanisms that establish the management framework for all the activities conducted and allowed on lands managed by these agencies. Plans are developed over a period of several years and site-specific management actions are developed and carried out to

implement the plan.

Because a plan does not normally prescribe the specific timing and location of expected land management activities, there is a significant level of uncertainty associated with the potential environmental consequences of plans. This uncertainty extends to effects on candidate, proposed, endangered and threatened species and designated critical habitat. Although the precise location and timing of site-specific effects of management actions and land uses are not often known when a plan is adopted, amended, or revised, BLM and FS, by signing this MOA, agree to consult with FWS and NMFS so that future activities formulated and allowed under the parameters of the plan are not likely to jeopardize the continued existence of listed species or result in the destruction/adverse modification of designated critical habitat. Additionally, because of the conservation mandate of section 7(a)(1) of the ESA, plans can be very helpful in recovery of listed species. The action agencies, by signing this agreement, affirm that planning for conservation of candidate, proposed, and listed species is key to the accomplishment of the federal land stewardship role. Successful implementation of this MOA will enhance plans and programmatic level proposals by promoting the incorporation of conservation objectives and guidelines for proposed and listed species.

Plans may be operational for a period covering many years, new species may be added to the list of threatened and endangered species, or significant new information may become available, triggering reinitiation of formal consultation and the need for reevaluation of the effects of plan implementation on listed or proposed species, and on designated or proposed critical habitat. This provides an additional impetus to cooperate under this MOA.

Under new FWS guidance issued on December 5, 1996 (61 FR 64481), candidate species are those species for which FWS has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposed rule to list, but issuance of the proposed rule is precluded by higher listing priorities. NMFS also maintains a list of candidate species that are being considered for listing. Since it is highly likely that most candidate species will become proposed and/or listed during the life span of the plan or program under consultation, it is prudent to receive conservation recommendations for candidates to use in the development of alternatives during the NEPA process or programmatic level consultations. These recommendations for candidate species will facilitate development of objectives, standards and guidelines, or conservation measures at the plan/programmatic level which can help streamline future project level conferences/consultations for these species when they acquire formal protection under the ESA. In some cases this early coordination may avoid the need to list the species.

Scope

The scope of this MOA includes Land and Resource Management Plans prepared by the FS pursuant to the National Forest Management Act of 1976 [16 U.S.C. 1601-1614] and Resource Management Plans and Management Framework Plans prepared by the BLM pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701-1784]. The MOA may also be applied to other programmatic level proposals. These may include, but are not limited to, a recreation or grazing program, riparian restoration strategy, multi-year forest management activities, recovery strategy or other proposals.

Elements of plans that will undergo section 7 consultation/conference pursuant to this MOA

include:

1. Management goals, objectives, standards, and guidelines;
2. Designation of special management areas, management area direction and prescriptions, and designation of allowable resource uses;
3. Broad-scale monitoring and evaluation requirements for listed, proposed, and other species of concern; and
4. Site-specific or forest-wide management decisions included in the plan and/or Record of Decision.

Consultation Procedures

Action and consulting agencies agree to maintain and exchange information on (1) the biology, ecology, distribution, and abundance of threatened, endangered, proposed, and candidate species and proposed and designated critical habitat and (2) planning schedules, status, and priorities for the land management activities. Successful implementation of this MOA depends on full cooperation and coordination. The BLM and FS should have access to FWS and NMFS candidate species lists, proposals to list species as threatened or endangered, proposals to designate critical habitat, and recovery planning documents. Regular exchanges of information examining the status, biology, and ecology of listed species and their habitat needs should occur. Similarly, BLM and FS will coordinate with FWS and/or NMFS on planning schedules and priorities that will require a commitment of FWS and/or NMFS staff resources.

Coordination and consultation early in the planning process will result in the identification of potential impacts to species and critical habitat, allowing resource managers to make appropriate adjustments. This early cooperation will help to ensure that species conservation is achieved with a minimum of adverse impacts on proposed activities. When plans or programs that may affect listed species and/or designated critical habitat involves more than one planning area, it may be more efficient to consult on ecosystem level strategies, species range wide, or species-specific strategies under the jurisdiction of all the agencies rather than on individual plans or site-specific activities. The agencies may agree to address multiple plans as one consultation package.

Action agencies will make a determination of effects through a biological assessment/evaluation of the plan, the adequacy of conservation measures, and the effects of the land-use allocation and management direction on listed, proposed, and, as appropriate, candidate species and proposed or designated critical habitat. This assessment will determine whether consultation is needed, and if needed, whether informal or formal consultation or conference is appropriate.

Action agencies will include appropriate protection and conservation elements for listed, proposed, and candidate species and proposed or designated critical habitat in land use plans, habitat management plans, or in interim standards and guidelines that are consistent with land use plans.

Consideration of these conservation elements will help resource managers improve beneficial

effects and avoid and minimize adverse effects at subsequent planning and project levels. Projects that conform to the protection and conservation elements (such as standards and guidelines) developed through programmatic consultation are likely to receive a "not likely to adversely affect" determination and concurrence or, at a minimum, an expedited Biological Opinion from the consulting agency, in the absence of new information that would change the environmental baseline or effects determination, or other changed circumstances.

Action agencies will review all scientific and other information used in the planning process to ensure that it is reliable, credible, and represents the best scientific and commercial data available. Sources of biological data will include, but are not limited to, recovery plans, conservation assessments, conservation strategies, conservation agreements, and scientific documents. This reflects the policy stated in 59 FR 34271 (July 1, 1994).

Action agencies will follow, where appropriate, the conference process for candidate species when standards and guidelines for candidate species conservation are included in programmatic documents. Inclusion of candidate species recognizes that there is tremendous benefit in early coordination between the agencies, saving time, effort and money. If, or when, the species is listed, informal conferencing on candidate species and formal conferencing on proposed species or on proposed critical habitat accomplishes the following objectives: (1) Identifies plan elements or ongoing activities that, if implemented, could adversely affect species when listed or critical habitat when designated; (2) provides the opportunity to modify the plan elements and/or ongoing activities to remove the adverse effects and thus reduce the likelihood that future activities would be in conflict with the ESA after a species is listed; (3) identifies plan elements that benefit/promote the conservation of proposed or candidate species or proposed critical habitat; and, (4) if done under formal conference procedures, provides a conference opinion for proposed species that can be confirmed as a biological opinion once the species is listed; and (5) identifies measures to help avoid a jeopardy determination.

Following the procedures and measures prescribed by this MOA will promote the conservation of species, and should result in minimizing incidental take of listed species as a result of implementing a planned activity. Incidental take statements must be issued for any action for which such take is anticipated. When sufficient information is available to anticipate the amount or extent of take incidental to plan or program implementation, the provisions of sections 7(b)(4) and 7(o)(2) (exemptions from takings) will apply to consultations conducted on a plan or programmatic level proposal. If incidental take is not anticipated for the activities implementing a plan or programmatic level proposal, an incidental take statement will state that conclusion. Subsequent "tiered" consultations performed on individual project activities, groups of similar projects, or annual programs, where specific effects on species can be determined within the context of a local geographic area, will contain incidental take statements identifying the anticipated amount of incidental take from the site-specific action under consultation.

When action agencies formally consult on existing plans they are required to ensure that any ongoing activities, including site-specific activities, resulting from or consistent with plans, do not result in any irreversible or irretrievable commitment of resources that have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives that could result from the programmatic consultation. This will be accomplished by conducting early and complete agency collaboration, followed by a timely and coordinated consultation process.

Compliance with section 7(d) of the ESA will be assured at the plan level because the agencies

agree to conference on a plan as soon as a species is proposed for listing. If the conference opinion adequately addresses plan level effects and the conservation of the species, then the conference opinion should allow for an easy conversion to a biological opinion or concurrence when the species is listed. Absent any change in circumstances, no further consultation would be required. Furthermore, the action agencies will implement a logical and documented process to jointly "screen" site-specific projects prior to reinitiation of plan consultations following a new listing (if conferencing has not been completed). The screening process should identify any projects which could result in an irreversible or irretrievable commitment of resources that might foreclose the formulation or implementation of reasonable and prudent alternatives to avoid jeopardy. These projects will be modified, suspended, or halted during the programmatic consultation. The final determination of section 7(d) compliance will be the action agency's responsibility, but it is expected that close coordination with the consulting agencies will occur.

Procedural Guidance

Attached is implementation guidance for carrying out consultations at the plan and programmatic level. The agencies agree to use this guidance when implementing the terms of this memorandum. From time to time, the agencies may find it necessary or advisable to alter the procedures described in the attachment; if this occurs, a revised procedural guidance reflecting changes agreed to by the agencies may be issued with the approval of the heads of the four agencies.

This MOA and guidance does not supersede or preclude the use of the May 31, 1995, interagency agreement for streamlining section 7 consultation in the Pacific Northwest. Nothing in this MOA constrains the obligations of the agencies in carrying out their authorities under applicable laws. There is no effect on non-federal interests.

Authority

Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1544)
National Forest Management Act of 1976 (16 U.S.C. 1601-1614)
Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-1784)
MOU on the conservation of species that are tending towards federal listing (94-SMU-058),
January 25, 1994

Funding and Resources

Nothing in this MOA shall be construed as obligating any of the parties to the expenditure of funds in excess of appropriations authorized by law. It is understood that the level of resources to be expended under this MOA will be consistent with the level of resources available to the agencies to support such efforts.

Effective Date

This MOA is effective immediately. Its provisions will remain in effect until it is amended, superseded, or revoked, whichever occurs first.

**INTERAGENCY MEMORANDUM OF AGREEMENT FOR
PROGRAMMATIC ENDANGERED SPECIES ACT SECTION 7 CONSULTATIONS**

/s/ Tom Fry

Tom Fry
Director, Bureau of Land Management

/s/ Jamie Rappaport Clark

Jamie Rappaport Clark
Director, U.S. Fish and Wildlife Service

/s/ Mike Dombeck

Mike Dombeck
Chief, U.S. Forest Service

/s/ Alan Risenhoover

Alan Risenhoover
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration

Implementation Guidance: Streamlining Programmatic Consultation for BLM/FS Land Use Plans and Programs

I. Introduction

This document specifies the level of management commitment, direction, and support, and identifies the critical elements necessary for successful implementation of the streamlined process of ESA section 7 consultation on land-use plans and their programs as established in the July 27, 1999, MOA by the BLM, FS, NMFS and FWS. Implementation of the following critical elements should help achieve this goal:

- introduction of the process through interagency workshops
- development of consultation outlines to address specific consultation streamlining needs
- early coordination between the land management and consulting agencies when entering into the consultation process
- establishment of a dispute resolution process
- establishment of procedures to evaluate and refine the process

The agencies will ensure these critical elements are met. However, this process is designed to recognize the inherent flexibility and adaptive approach necessary to meet the critical elements that will enhance the consultation/conference process while simultaneously meeting area-specific needs.

II. Overall Approach

The specific intent of streamlined consultation procedures and guidance is two fold:

- 1) To further the conservation of listed, proposed, and candidate species by utilizing applicable plans and guidance to provide increased beneficial effects, avoid or minimize adverse effects and reduce levels of incidental take; and
- 2) to enable the section 7 process, including review, analysis and documentation, to proceed as quickly and efficiently as possible.

The streamlined consultation process involves three basic phases:

Phase 1: Interagency participation in early planning, program guidance meetings, and the review of preliminary determinations of effect.

Phase 2: Preparation of biological assessments (BAs) or biological evaluations (BEs) by the action agencies using the working group, technical support group, and if necessary, issue resolution team.

Phase 3: Preparation of biological opinions (BOs) or concurrence letters by the consulting agencies.

III. Workshops

The agencies will provide interagency workshop opportunities to guide streamlining consultation efforts. The workshops will be tailored to each region, highlighting national as well as local issues, and designed to provide guidance and recommendations for improving consultation, coordination, and interagency working relationships.

Workshops will emphasize the benefits and process necessary for implementing improved consultation and enhanced working relationships between the consulting and action agencies. These workshops will be scheduled for biologists/botanists, line officers, and related planning and resources staff who are regularly involved in completing the interagency consultation process. It is expected that within one year of implementation of the MOA all regions will complete workshops.

Workshops will be conducted by cadres of biologists and land managers with expert knowledge in section 7 consultation efforts.

IV. Management Support and Direction: Development of a Consultation Agreement

To accomplish the objectives described in the MOA, the action agencies and consulting agencies agree to develop and apply consultation agreements for programmatic consultations conducted under this guidance that do the following:

- Determine the scope of the planned action, the appropriate level of signature authority (REGION, FOREST, AREA) and scale of analysis necessary to accomplish programmatic consultation.
- Designate staff and responsibilities
- Determine the necessary time frames
- Initiate early interagency staff coordination
- Establish a dispute resolution process in keeping with that outlined above

An example is attached.

V. Scope

The action agencies will clarify the priority list of activities to be covered in the consultation effort. They should identify, for instance, which actions or plans, which administrative units or geographic areas, and suggest which species or critical habitats must be covered within the designated time frame, as well as any other appropriate issues.

VI. Staffing

The implementation of this process should not require additional staffing. Rather, this approach

is designed to utilize staff that are already interacting with their interagency counterparts, but in a more efficient way to achieve the goals of streamlining programmatic consultation efforts.

VII. Process for Working Groups and Framework for Dispute Resolution

The following working groups will be established in a manner that will facilitate implementing the MOA:

Program Level ESA Working Groups - Interagency teams of biologists responsible for ESA coordination and oversight of determination of effects at the plan/program level. The working group, which may consist of as few as two individuals (e.g., FWS biologist and FS biologist), is the basic operational unit of the streamlined programmatic consultation process. The group is responsible for ensuring that the best available scientific and commercial information on listed, proposed, and candidate species, or proposed or designated critical habitat, is considered in the decision making process, and facilitating achievement of ESA compliance in the shortest time possible. One team member should be identified as a logistical leader to schedule and facilitate meetings, etc. An individual should also be given the responsibility for tracking the consultation process and reporting outcomes to the regional technical support contact (see Regional/State Technical Working Group). Teams will communicate on a regular basis and meet as needed to facilitate the interagency coordination on ESA compliance. It is expected that most, if not all, potentially contentious ESA issues will be discussed and resolved at this level. Findings made in the Biological Assessment and other group decisions will be made by consensus.

Working group members may include Forest or BLM District/Resource Area wildlife or fisheries biologists and/or botanists, FWS Field Office wildlife or fisheries biologists and/or botanists, and NMFS biologists. Specific representation may vary by forest or resource area, administrative unit, or species involved, but these teams must have applicable agency representation to ensure that consensus can be achieved among the agencies involved in the MOA. For example, these teams could be established for each Forest or BLM District/Resource Area, or groups of Forests or BLM Districts/Resource Areas based on ecological provinces, watersheds, common issues, species, etc.

These teams will provide input to the design of proposed plans/programmatic activities to incorporate species habitat needs, identify programmatic proposals that may result in adverse impacts to species and critical habitat, and screen ongoing activities to ensure that reasonable and prudent alternatives to avoid jeopardy are not foreclosed.

Local Issue Resolution Working Groups - Interagency teams of decision makers at the Forest, BLM District/Resource Area, or state levels for other agencies, responsible for first level dispute resolution (Forest Supervisors, BLM District/Area Managers, FWS State Supervisors, NMFS designated supervisors). These teams would normally meet on an *ad hoc* basis to resolve issues elevated from the program level working group. Most effective use of these working groups will include early guidance on priorities, expectations, and policy as well as support for staffing. These teams could also be useful for working out coordination issues to help gain efficient use of program level working groups. Specific team representation depends upon the agency administrative units involved in the issue.

Regional/State Issue Resolution Working Group - Interagency teams of regional or state agency heads, i.e., the Regional Forester, BLM State Director, FWS Regional Director, and NMFS Regional Director. These teams will meet on an *ad hoc* basis to resolve issues elevated from the Local Issue Resolution Working Groups. Specific team representation depends upon the agency administrative units involved in the issue.

Regional/State Technical Support Working Group - In addition to the three level teams, interagency regional experts will be available for technical support to the other working groups. These individuals may consist of species biology experts, planners, program management experts, ecologists, etc. and are responsible for the overall technical oversight during the consultation process. This core technical support working group should meet on a regular basis to ensure that the process is functioning as intended. This working group may also have to meet on an *ad hoc* basis to respond to specific technical issue questions raised by the other working groups or enlist the support of other *ad hoc* members to provide additional expertise.

National Issue Resolution Working Group - Interagency teams of appropriate representatives of the FS, BLM, FWS, and NMFS responsible for resolution of issues not resolved by the Regional/State Issue Resolution Working Group. These teams will be appointed by the agency heads.

VIII. Time frames

The agencies have agreed to commit to completion of informal consultation within 30 days and formal consultation within 90 days. However, circumstances may dictate that the individual units may establish time frames that are appropriate to a specific action by mutual consent.

IX. Early Coordination

Early interagency coordination is the key to the streamlining consultation process. Coordination with consulting agencies early in the planning process, before initiation of consultation, will result in the identification of potential impacts to species and critical habitat. This will allow resource managers to make appropriate adjustments in proposed activities during the design phase. This early coordination will enable proposed plans/programmatic activities to incorporate species habitat needs, and will facilitate and expedite the consultation process. Issues to be resolved include:

1. Section 7 (d) of the ESA

Section 7 (d) of the ESA states that federal agencies “...shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable or prudent alternative measure” after the initiation of consultation. When action agencies formally consult on existing plans the agencies are required to ensure that any ongoing activities, including site-specific activities, resulting from or consistent with plans, do not result in any irreversible or irretrievable commitment of resources that have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives that could result from the programmatic consultation.

Compliance with section 7(d) of the ESA will be assured at the plan level because the agencies agree to conference on a plan as soon as a species is proposed for listing. If the conference opinion adequately addresses plan level effects and the conservation of the species, then the conference opinion should allow for an easy conversion to a biological opinion or concurrence when the species is listed. Absent any change in circumstances, no further consultation would be required. Furthermore, the action agencies will implement a logical and documented process to jointly "screen" site-specific projects prior to reinitiation of plan consultations following a new listing (if conferencing has not been completed). The screening process should identify any projects which could result in an irreversible or irretrievable commitment of resources that might foreclose the formulation or implementation of reasonable and prudent alternatives to avoid jeopardy. These projects will be modified, suspended, or halted during the programmatic consultation. The final determination of section 7(d) compliance will be the action agencies' responsibility, but it is expected that close coordination with the consulting agencies will occur.

2. Species coverage

Agencies will consult/conference on listed species and designated critical habitat, proposed species, proposed critical habitat, and include candidate species as a part of the analysis of effects.

3. Agreement on the information needs for the development of the BA/BE

The program level working groups will review and make available current information on candidate, proposed and listed species and proposed or designated critical habitat within the planning areas. This should include information on status, population trends, response to management, disturbance regimes needed, interagency and state coordination measures required, and conservation opportunities.

Land management plan standards and guidelines (S&G's); programmatic recovery or conservation strategies (such as the Northwest Forest Plan, PACFISH, INFISH and the longterm red-cockaded woodpecker strategy); recovery plans; or applicable biological opinions from other consultations can serve as the basic foundation for programmatic consultations using the streamlined process. Land management plans/programs incorporating conservation S&G's will be more likely to provide beneficial effects to species. The basic goal is that land management plans/programs offering the protection of these S&Gs would not jeopardize listed or proposed species, or move candidate species closer to listing. Furthermore, to achieve the most conservation benefits from the planning process, the program level working group should identify programmatic conservation strategies helpful in formulating plan alternatives to minimize or avoid adverse effects to listed, proposed, or candidate species and, where possible, to assist in the conservation and recovery of these species per the Interagency MOU of 1994. These alternatives should be evaluated and reformulated into a consensus description of the proposed Federal action (the land management plan or program plus any additional agreed upon measures needed to work toward conservation of these species). For existing plans or programs, these conservation measures may be within the scope of the plan or program or may require plan amendment or modifications of the program. This process will comply with applicable laws and regulations for all agencies.

Agencies must agree on the level of information necessary in the BA/BE to be able to render a BO of sufficient detail. An agreed upon BA/BE is critical to ensure that the streamlined consultation process works and that the identified time frames are met. The beginning date for consultation is the day a BA/BE that is agreed upon by all members of the team is received by the consulting agency, accompanied by a written request for consultation or conference. It is imperative that the action agency submit only final BAs/BEs that all cooperating agencies deem adequate.

4. Agreement on the effects analysis and determination

The Program level working groups will identify parameters, or criteria that normally would result in "no effect", "not likely to adversely affect", "likely to adversely affect" and "likely to jeopardize" determinations on plan level effects analysis. This will be extremely useful in sorting, screening and reaching consensus on the BA/BE "determination of effects". This process will allow the team to reach rapid agreement on many aspects of the plan. More problematic elements (certain Standards and Guidelines (S&Gs), etc.) will then become the team's focus. If these problem areas need additional modification in the plan, these changes may be outlined in the description of action and the BA/BE. For example, if an additional objective or S&G is needed in an existing plan, the action to be consulted on would consist of the proposed new measure, in the context of the current S&Gs, and the actions needed to amend the plan and adopt the new measure. If the team cannot agree on the adequacy of the BA/BE, on the determination of effects, or information needed to complete the BA/BE, etc., the issue resolution process will be initiated.

5. Biological Assessment preparation

All anticipated environmental effects and mitigation and monitoring requirements will be disclosed in the BA/BE. This includes analysis of effects on listed, proposed, or candidate species or designated or proposed critical habitat from the plan/program analyzed.

ESA compliance is required regardless of the level of NEPA documentation required for a plan or program. A BA/BE for a plan or program that has an EA rather than an EIS, could be very short and simple, but the Program Level ESA Working Group should be used to help identify the level of documentation needed and appropriateness of the determination for all plan/program BA/BEs. Coordination requirements and conservation recommendations must be identified early in the decision making process so they can be incorporated into the plan/program under consultation, incorporated later as a plan amendment, or clarified as program direction.

The agreed upon elements of a BA/BE are:

- a. description of the action: reference the description of the proposed action section of the plan/program (do not duplicate it in the BE/BA, but incorporate by reference any needed documents and include them in the consultation package);
- b. description of the area that may be directly or indirectly affected by the action: if possible, refer to the appropriate action(s) of the plan/program rather than duplicating it in the BE/BA;

- c. description of any listed, proposed or candidate species, or designated or proposed critical habitat that may be affected;
- d. description of the manner in which the action may affect listed, proposed or candidate species; or proposed or designated critical habitat (direct effects);
- e. analysis of indirect and cumulative effects;
- f. analysis of effects of interrelated and interdependent actions;
- g. analysis of effects of interrelated and interdependent actions;
- h. determination of effects statement; and
- i. may include any measures to minimize incidental take, as well as specifying measures to handle or dispose of any individuals actually taken.

The action agency will prepare a BA/BE based on the above agreements in the cooperative spirit of the MOA and will submit it to the consulting agency (a joint meeting between the action agencies and the consulting agencies may be the most efficient way to develop these BA/BEs). The consulting agency will then review the BA/BE for adequacy within two weeks of receipt. Because of the early interagency coordination described above, this is not likely to result in the identification of substantial issues. However, if the BA/BE is deemed inadequate, the consulting agency will notify the action agency in writing detailing specific issues and indicating that the time frame for the formal consultation or concurrence letter has not started.

6. Biological Opinion Preparation

The consulting agency will provide a draft of their consultation response for action agency review no later than two weeks before the end of the agreed upon consultation period. Any reasonable and prudent measures and terms and conditions for incidental take should be discussed and agreed to by the interagency consultation team prior to issuance of a final BO or conference opinion.

X. Dispute Resolution Process

The use of interagency working groups and a National Issue Resolution working group are designed to ensure that any disagreements on completeness of the BA/BE, determination of effects, or contents of a draft BO or conference opinion are resolved in a coordinated and timely manner.

If the Program Level ESA Working Group cannot reach consensus on what information is needed to complete consultation/conference on a plan/program, determination of effects, the adequacy of the plan standards and guides, compliance with existing guidance, conservation strategies, etc., a review will be conducted by the Local Issue Resolution Working Group. The employment of regional section 7 consultation specialists may be useful in resolving such disputes. If the Local Issue Resolution Working Group cannot resolve the issue or if there is disagreement between one of the agencies and the consensus findings of the Program Level ESA

Working Group (team is in agreement) a Regional/State Issue Resolution Working Group review will be initiated. If this group cannot resolve the issue, it will be elevated to the National Issue Resolution Working Group.

All issue resolution working group (or panel) reviews should be initiated by request of the applicable working group, or a specific agency. The request should include: (1) A concise summary of issues in dispute and decisions that need to be made; (2) agency position statements on each of the issues; (3) all supporting rationale and documentation for consideration; and (4) a brief chronology of key actions taken to resolve the dispute. Resolution should be pursued as quickly as possible. The National Issue Resolution Working Group decisions are the final and binding resolution of disputes. Issue resolution working groups are encouraged to use the assistance of the Regional/State Technical Support Working Group in the resolution process.

Each stage of the issue resolution process will not exceed 15 days.

XI. Evaluation and Refinement

To facilitate a process of the utmost utility to the agencies, The Regional/State Technical Support Working Group should implement measures to track the progress of the process described above and propose any refinements necessary to further the goals of the MOA to agency heads.





Application of the Endangered Species Act to proposals for access to non-federal lands across lands administered by the Bureau of Land Management and the Forest Service

Effective immediately, the following applies to proposals for access to non-federal land across federal land administered by the Bureau of Land Management (BLM) and the Forest Service (FS) (hereinafter referred to as "federal land").

Not all proposals for access to non-federal land across federal land (hereinafter "rights-of-way" or "ROW") are the same. Application of the ESA to a ROW proposal depends on the discretion available to BLM and the FS under applicable statutory ROW authorities and on the nature of legal rights held by the applicant. If BLM or the FS has a mandatory duty to issue a ROW with no discretion under applicable law, no consultation is required under the ESA. This does not affect the applicability of other provisions of the ESA or other federal or State laws protecting species and habitat.

When BLM or the FS has discretionary authority to issue or condition a ROW, the agency must determine whether the proposed federal action "may affect" listed species or designated critical habitat. If a "no effect" determination is made, ESA compliance is complete. This finding should be placed in the record and processing of the application may continue in accordance with agency authority.

When the BLM or the FS cannot make a "no effect" determination, the agencies will consult either formally or informally with the Fish and Wildlife Service and/or the National Marine Fisheries Service (the "Service") when considering whether to authorize access to private lands across public land. The following applies during such consultation:

- The "proposed federal action" is the authorization of access across federal land and includes the location and method of access, e.g., the character of the road, where it will lie, the method of road building and the use of the right of way. The proposed federal action does not include any private action on private land.

- * The "action area" is the area that will be affected directly or indirectly by the proposed action.
- * The "effects of the action" are the direct and indirect effects to the species caused by the access across federal lands. Indirect effects are those effects to the species that are caused by the proposed action, are later in time, and are reasonably certain to occur.
- * "Reasonably certain to occur" requires existence of clear and convincing information establishing that an effect that will be caused by the proposed action is reasonably certain to occur. This is a rigorous standard; it is not based on speculation or the mere possibility that effects to the species may occur. Nor is this a foreseeability standard as is commonly used in NEPA analysis. If no such information exists, or is speculative or not credible, then that effect is not reasonably certain to occur and should be disregarded. In no event should a conclusion be reached that some effect is reasonably certain to occur absent clear and convincing information to support that finding in the record.
- * A finding that an "indirect effect" is "caused by a federal proposed action" requires an actual cause-effect relationship between the proposed federal action to authorize access across federal land and the effect to the species. When the authorization of access is essential in causing an effect to the species, the effect should be viewed as an indirect effect subject to consultation if it is reasonably certain to occur. If the authorization of access is not essential in causing an effect to the species, but merely facilitates such an effect, then it is not an effect subject to consultation. Consequently, the effect to a species from subsequent action on non-federal land that is facilitated, but not actually caused by the authorization of access, is not an effect of the proposed federal action.

Informal consultation may result in a determination by the BLM or the FS that the proposed federal action "may affect, is not likely to adversely affect" listed species or critical habitat, with written concurrence from the Service in this determination. As a part of this process, the BLM and the FS may suggest modifications to the proposed action the applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat, but these suggestions must be limited to the federal action itself – the right-of-way across federal lands. The modification or regulation of activities on private lands is not authorized unless the applicant requests the consultation to include activities on private land, as discussed below. Written concurrence of the Service terminates the consultation process and no further action is necessary. This finding and concurrence should be placed in the record and processing of the application may continue in accordance with agency authority.

A finding of "may affect, likely to adversely affect" requires formal consultation. Formal consultation resulting in a no jeopardy conclusion may include discretionary conservation recommendations. Conservation recommendations must be limited to the proposed federal action itself – the right-of-way across federal lands. Recommendations with regard to activities on non-federal lands are not authorized unless the applicant requests that the consultation include activities on non-federal land, as discussed below.

Formal consultation resulting in a finding of jeopardy or likely to adversely modify designated critical habitat includes the Service's recommendation of "reasonable and prudent alternatives" unless there are no reasonable and prudent alternatives. The Service is required to utilize the expertise of BLM, the FS and the applicant in identifying these alternatives. Alternatives must be consistent with the intended purpose of the proposed federal action and within the scope of the BLM's or FS's legal authority.

Jeopardy and no jeopardy determinations also will include a statement concerning incidental take if take is anticipated. An incidental take statement includes reasonable and prudent measures the Service considers necessary or appropriate to minimize the impact of incidental take. Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes. Further, both the reasonable and prudent measures and the terms and conditions must serve the purpose of minimizing the take of the proposed federal action under consideration. BLM and FS authorities and the nature of the "action" itself also will affect the reasonable and prudent measures and terms and conditions that may be a part of an incidental take statement.

An applicant has a right to receive an incidental take statement, with reasonable and prudent measures, if take is anticipated from the access itself. The applicant also may desire to include reasonable and prudent measures in the incidental take statement for take resulting from activities on non-federal land. If the applicant requests an incidental take statement for take resulting from activities on non-federal lands, the activities on non-federal land may be analyzed in the section 7 consultation for the access application. If the applicant chooses to be covered through the section 7 consultation, then the incidental take statement can include reasonable and prudent measures related to activities on non-federal land. If the applicant abides by these measures, the applicant has ESA coverage for any associated take. If the applicant chooses not to include activities on non-federal land, then there is no ESA coverage from the access consultation for any take associated with those activities.

Except when requested by the applicant, the consultation process associated with the proposed federal action to authorize access across federal land may not be used to condition activities on non-federal land. BLM and the FS may not deny or condition access across federal lands based on the implementation of measures or conditions related to the use of non-federal land. Further, the Service may not request re-initiation of consultation based on subsequent activities on non-federal land.

Consultation also includes consideration of the destruction or adverse modification of critical habitat. For this purpose, only habitat formally designated as "critical habitat" by a Service rule making is included. Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. The concept of "take" does not apply to critical habitat, but only to the listed species itself.

Approved by:



Dale N. Bosworth, Chief
Forest Service
Department of Agriculture

1/27/03
Date



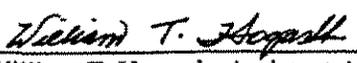
Kathleen Clarke, Director
Bureau of Land Management
Department of the Interior

Jan 13, 2003
Date



Steven A. Williams, Director
U.S. Fish & Wildlife Service
Department of the Interior

1/17/03
Date



William T. Hogarth, Assistant Administrator for Fisheries
National Marine Fisheries Service
National Oceanic & Atmospheric Administration

1/30/03
Date

MHz band. Notwithstanding references to voluntary negotiation periods elsewhere in this section, relocation of FMS licensees in the 2180–2200 MHz band by Mobile-Satellite Service (MSS) licensees (including MSS licensees providing Ancillary Terrestrial Component “ATC” service) will be subject to mandatory negotiations only. Mandatory negotiations will commence on January 7, 2004. Mandatory negotiations will be conducted with the goal of providing the fixed microwave licensee with comparable facilities, defined as facilities possessing the following characteristics:

* * * * *

■ 12. Section 101.79 is amended by revising the section heading and paragraph (a) to read as follows:

§ 101.79 Sunset provisions for licensees in the 1850–1990 MHz, 2110–2150 MHz, and 2180–2200 MHz bands.

(a) FMS licensees will maintain primary status in the 1850–1990 MHz, 2110–2150 MHz, and 2180–2200 MHz bands unless and until an ET (including MSS/ATC) licensee requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.* ten years after the voluntary period begins for the first ET licensees in the service; or, in the case of the 2180–2200 MHz band, ten years after the mandatory negotiation period begins for MSS/ATC licensees in the service). Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10-F (for terrestrial-to-terrestrial situations) or TIA Bulletin TSB–86 (for MSS satellite-to-terrestrial situations) or any standard successor. ET licensee notification to the affected FMS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the FMS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the FMS licensee to continue to operate on a mutually agreed upon basis.

* * * * *

■ 13. Section 101.99 is redesignated as § 101.82.

[FR Doc. 03–30310 Filed 12–5–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3641, MM Docket No. 99–277, RM–9666]

Digital Television Broadcast Service; Corpus Christi, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Channel 3 of Corpus Christi, Inc., substitutes DTV channel 8 for DTV channel 47 at Corpus Christi. *See* 64 FR 50055, September 15, 1999. DTV channel 8 can be allotted to Corpus Christi in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 27–39–30 N. and 97–36–04 W. with a power of 160, HAAT of 289 meters and with a DTV service population of 491 thousand. Since the community of Corpus Christi is located within 275 kilometers of the U.S.-Mexican border, concurrence by the Mexican government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99–277, adopted November 13, 2003, and released November 19, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail qualexint@aol.com.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Texas, is amended by removing DTV channel 47 and adding DTV channel 8 at Corpus Christi.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–30308 Filed 12–5–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

RIN 1018–AJ02

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. 030506115–3298–02]

RIN 0648–AR05

Joint Counterpart Endangered Species Act Section 7 Consultation Regulations

AGENCIES: U.S. Fish and Wildlife Service, Interior; Bureau of Land Management, Interior; National Park Service, Interior; Bureau of Indian Affairs, Interior; Forest Service, Agriculture; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: This final rule codifies joint counterpart regulations for consultation under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), to streamline consultation on proposed projects that support the National Fire Plan (NFP), an interagency strategy approved in 2000 to reduce risks of catastrophic wildland fires and restore fire-adapted ecosystems. These counterpart regulations were developed, as part of the President's Healthy Forests Initiative announced in August 2002, by the U.S. Department of the Interior's Fish and Wildlife Service (FWS) and the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) (singly or jointly, Service), in cooperation with the U.S. Department of Agriculture's Forest Service (FS) and the Department of

Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and National Park Service (NPS). These counterpart regulations, authorized in general at 50 CFR 402.04, provide an optional alternative to the existing section 7 consultation process described in 50 CFR part 402, subparts A and B. The counterpart regulations complement the general consultation regulations in part 402 by providing an alternative process for completing section 7 consultation for agency projects that authorize, fund, or carry out actions that support the NFP. The alternative consultation process contained in these counterpart regulations eliminates the need to conduct informal consultation and eliminates the requirement to obtain written concurrence from the Service for those NFP actions that the Action Agency determines are "not likely to adversely affect" (NLAA) any listed species or designated critical habitat.

DATES: This rule is effective on January 7, 2004.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, at the above address (Telephone 703/358-2171, Facsimile 703/358-1735) or Phil Williams, Chief, Endangered Species Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301/713-1401; facsimile 301/713-0376).

SUPPLEMENTARY INFORMATION:

Background

Implementation of National Fire Plan

In response to several years of catastrophic wildland fires throughout the United States culminating in the particularly severe fire season in 2000, when over 6.5 million acres of wildland areas burned, President Clinton directed the Departments of the Interior and Agriculture to develop a report outlining a new approach to managing wildland fires and restoring fire-adapted ecosystems. The report, entitled *Managing the Impact of Wildfires on Communities and the Environment*, was issued September 8, 2000. This report set forth ways to reduce the impacts of fires on rural communities, a short-term plan for rehabilitation of fire-damaged

ecosystems, and ways to limit the introduction of invasive species and address natural restoration processes. The report, and the accompanying budget requests, strategies, plans, and direction, have become known as the NFP. The NFP is intended to reduce risk to communities and natural resources from wildland fires through rehabilitation, restoration and maintenance of fire-adapted ecosystems, and by the reduction of accumulated fuels or highly combustible fuels on forests, woodlands, grasslands, and rangelands.

In August 2002, during another severe wildland fire season in which over 7.1 million acres of wildlands burned, President Bush announced the Healthy Forests Initiative. The initiative was intended to accelerate implementation of the fuels reduction and ecosystem restoration goals of the NFP in order to minimize the damage caused by catastrophic wildfires by reducing unnecessary regulatory obstacles that have at times delayed and frustrated active land management activities. Because of nearly a century of policies to exclude fire from performing its historical role in shaping plant communities, fires in our public forests and rangelands now threaten people, communities, and natural resources in ways never before seen in our Nation's history.

Many of the Nation's forests and rangelands have become unnaturally dense as a result of past fire suppression policies. Today's forests contain previously unrecorded levels of fuels, while highly flammable invasive species now pervade many rangelands. As a result, ecosystem health has suffered significantly across much of the Nation. When coupled with seasonal droughts, these unhealthy forests and rangelands, overloaded with fuels, are vulnerable to unnaturally severe wildland fires. The geographic scope of the problem is enormous, with estimates approaching 200 million acres of forest and rangeland at risk of catastrophic fire. The problem has been building across the landscape for decades. Its sheer size makes it impossible to treat all the acres needing attention in a few years or even within the next decade.

In 2002 alone, the Nation experienced over 88,000 wildland fires that cost the Federal Government \$1.6 billion to suppress. Many of these wildfires significantly impacted threatened or endangered species. The Biscuit Fire burned an area of 499,570 acres in Oregon and California that included 49 nest sites and 50,000 acres of designated critical habitat for the threatened northern spotted owl, and 14 nesting

areas and 96,000 acres of designated critical habitat for the threatened marbled murrelet. The estimated fire suppression cost was \$134,924,847. The Rodeo-Chediski fire in Arizona, the largest fire in the State's post-settlement history, burned through 462,614 acres, including 20 nesting areas for the threatened Mexican spotted owl. Unless fuel loads can be reduced on the thousands of acres classified at high risk of catastrophic wildfires, more adverse effects like those of the 2002 fire season are certain to occur.

The long-term strategy for the NFP is to correct problems associated with the disruption of natural fire cycles as a result of fire suppression policy or the presence of fire-prone non-native invasive species and to minimize risks to public safety and private property due to the increase in amount and complexity of the urban/wildland interface. The NFP calls for a substantial increase in the number of acres treated annually to reduce unnaturally high fuel levels, which will decrease the risks to communities and to the environment caused by unplanned and unwanted wildland fire. These types of preventative actions will help ensure public safety and fulfill the goals of the President's Healthy Forests Initiative.

The FS, BIA, BLM, and NPS, as Federal land management agencies, play an important role in implementing actions under the NFP that will reduce the potential risks of catastrophic wildland fire. The FWS also develops and carries out actions in support of the NFP on National Wildlife Refuges or National Fish Hatcheries. These five agencies constitute the Action Agencies who may use the counterpart regulations contained herein. The types of projects being conducted by these agencies under the NFP include prescribed fire (including naturally occurring wildland fires managed to benefit resources), mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. Prompt implementation of these types of actions will substantially improve the condition of the Nation's forests and rangelands and substantially diminish potential losses of human lives and property caused by wildland fires. The Service and the Action Agencies are adopting these counterpart regulations to accelerate the rate at which these types of activities can be implemented so that the likelihood of catastrophic wildland fires is reduced.

Federal Fuels Treatment Activities

Each of the Action Agencies has substantial experience in planning and implementing projects that further the goals of reducing risks associated with wildland fires, while improving the condition of our public lands and wildlife habitat. The FS works collaboratively with its partners to design and implement projects to meet a variety of land and resource management objectives, including projects to improve habitat for wildlife and fish species. Through several hundred rehabilitation, restoration and hazardous fuels reduction projects under the NFP, the FS treats over 2 million acres each year to benefit natural resources, people, and communities. All of these projects have long-term multiple resource benefits, and several have short-term wildlife benefits as well. On the Winema and Fremont National Forests in Oregon, a thousand acres of forest were thinned and underburned to protect stands and large trees from wildfire, and to increase the longevity of those trees used by bald eagles for nesting and roosting. On the Santa Fe National Forest in New Mexico, after habitat loss due to the Cerro Grande Fire, ground cover in the form of large fallen woody material was restored to benefit the Jemez Mountain salamander. Habitat that had been damaged by post-wildland fire debris flows has been restored to reduce erosion and benefit Yellowstone cutthroat trout on the Custer National Forest in Montana. On the Jefferson National Forest in Virginia, prescribed fire is used every 3 years on Mt. Rogers to maintain the grassy bald area in a grass-forb stage and prevent woody vegetation from becoming established that would out compete rare plant species. Similarly, on the National Forests in Mississippi, prescribed burning reduces woody vegetation and fuels, encourages fire-dependent perennials, and restores and expands remnants of native prairie.

The BIA has planned many beneficial projects under the NFP that are designed to reduce wildland fire risk on Indian lands and to increase public safety around tribal and non-tribal communities. For example, one project will utilize both mechanical treatments and prescribed fire in lodgepole pine and Engelmann spruce forests to reduce fuel loadings and protect residents and residences around the Blackfoot Indian Reservation communities of East Glacier, Little Badger, Babb, St. Mary, Heart Butte, and Kiowa, in northwestern Montana. A second project would also utilize mechanical treatments and

prescribed fire to reduce fuel loadings in Douglas-fir, ponderosa pine, and grass fuel types that pose a high level of risk to the residents around the Rocky Boy's Indian Reservation communities of Box Elder Village, Box Elder Creek, Rocky Boy Townsite, Duck Creek, and Parker Canyon, in Central Montana. A third project would reduce fuels in about 1,300 acres of pine, juniper, oak, and grasses, by combining prescribed fire with mechanical fuels treatment techniques on Zuni Tribal forest and woodland resources in New Mexico. This project would create fuel breaks in large contiguous fuels that are at high risk for catastrophic wildfires. Finally, a fourth project will stabilize and rehabilitate 276,000 acres of White Mountain Apache Tribal lands severely damaged in the Rodeo-Chediski Fire. This project will reduce the potential threats to human life and property in surrounding communities, along with threats to cultural resources, water quantity and quality, and soil productivity.

Across the Nation, NPS is implementing numerous projects to support the goals of the NFP. Park superintendents use prescribed fire (including wildland fire), mechanical fuels treatments, and invasive species control to restore or maintain natural ecosystems, to mitigate the effects of past fire suppression policies, and to protect communities from catastrophic wildfires. NPS fire management and restoration efforts generally focus on restoring ecosystem processes rather than on the management of specific species. However, these projects provide important long-term habitat benefits to a variety of threatened or endangered species. For example, Great Smoky Mountains National Park is completing a 1,034-acre yellow pine restoration burn, the largest prescribed burn in the Park's history. The central purpose of the Park's use of fire is to replicate as nearly as possible the role that naturally occurring fires played in shaping and maintaining the Park's biologically diverse ecosystems, while also minimizing the risk of future wildfires. At Washita Battlefield National Historic Site, the use of prescribed fire is intended to restore and maintain grassland/prairie habitats in a healthy condition. The operation was an interagency effort between the FS and the NPS. Similarly, Gulf Islands National Seashore has conducted prescribed burns for habitat restoration and to reduce hazardous fuels. These burns both restore key vegetative communities and provide habitat for relocated gopher tortoises. Other

projects have improved habitat for red-cockaded woodpeckers at Big Thicket National Preserve and bald eagles at Lavabeds National Monument. All of these fuels treatment projects will enhance public safety for the communities around the Parks.

The BLM is proceeding with many NFP projects to restore dense pinyon pine and juniper forests and woodlands, nearly devoid of understory shrubs, grasses, and forbs, to a more natural savannah, or open woodland conditions. In the Farmington Field Office, New Mexico, the Pump Mesa project is a multiple phase project to open up the pinyon pine and juniper forest canopy by thinning, wood removal, and prescribed burning, to make space, sunlight, water, and nutrients available for the manual seeding of native understory species that were formerly present on the site. Densities of trees in the pinyon pine systems have increased to the point that large proportions of these woodlands have become highly combustible, supporting crown fires that can produce catastrophic habitat loss for wildlife and high risk to nearby communities. In the Richfield Field Office, the Praetor Slope Fuel Reduction project will mechanically displace patches of juniper and sagebrush to reduce the risk created by large, dense contiguous areas of fuel, while creating valuable deer and elk range, complete with islands and feathered woodlands that provide necessary animal cover. In the Central Montana Fire Management Zone, a number of small and moderate-sized prescribed burns, such as in Cow Creek, Little Bull Whacker, and Fergus Triangle, have been completed to increase wildlife habitat diversity, reduce fuel loads, and increase forage for both livestock and wildlife.

Endangered Species Act Section 7 Consultation

Section 7(a)(2) of the ESA requires that each Federal agency shall, in consultation with and with the assistance of the Service, insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in destruction or adverse modification of designated critical habitat. Section 7(b) of the ESA describes the consultation process, which is further developed in regulations at 50 CFR 402.

The existing ESA section 7 regulations require an action agency to complete formal consultation with the Service on any proposed action that may affect a listed species or designated critical habitat, unless following either a biological assessment or informal

consultation with the Service, the action agency makes a determination that a proposed action is "not likely to adversely affect" any listed species or designated critical habitat and obtains written concurrence from the Service for the NLAA determination. The alternative consultation process contained in these counterpart regulations will allow the Service to provide training, oversight, and monitoring to an Action Agency through an alternative consultation agreement (ACA) that enables the Action Agency to make an NLAA determination for a project implementing the NFP without informal consultation or written concurrence from the Service.

Using the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations. Those projects had only insignificant or beneficial effects on listed species or posed a discountable risk of adverse effects. The concurrence process for such projects has diverted some of the consultation resources of the Service from projects in greater need of consultation. With the anticipated increase in fire plan projects, the concurrence process could cause delays. These counterpart regulations are being implemented to proactively reduce these anticipated delays and to increase the Service's capability to focus on Federal actions requiring formal consultation by eliminating the requirement to provide written concurrence for actions within the scope of these counterpart regulations.

The Action Agencies have engaged in thousands of formal and informal consultations with the Service in the 30 years since the passage of the ESA, and have developed substantial scientific, planning, mitigation, and other expertise to support informed decision-making and to meet their responsibilities under ESA section 7 to avoid jeopardy and contribute to recovery of listed species. To meet their obligations, the Action Agencies employ large staffs of qualified, experienced, and professional wildlife biologists, fisheries biologists, botanists, and ecologists to help design, evaluate, and implement proposed activities carried out under land use and resource management plans. All of the Action Agencies consult with the Service on actions that implement land use and resource management plans that contribute to the recovery of proposed and listed species and the ecosystems upon which they depend. In particular, the informal consultation and

concurrence process has given the Action Agencies considerable familiarity with the standards for making NLAA determinations for their proposed actions.

The Action Agencies have developed familiarity with the standards over time through various activities. The Action Agencies develop proposals and evaluate several thousand actions for possible effects to listed species and designated critical habitat. Agency biologists are members of listed species recovery teams, contribute to management plans that provide specific objectives and guidelines to help recover and protect listed species and designated critical habitat, and cooperate on a continuing basis with Service personnel. In many parts of the country, personnel from the Action Agencies and the Service participate in regular meetings to identify new management projects and the effects to proposed and listed species through formalized streamlined consultation procedures.

The Action Agencies' established biological expertise and active participation in the consultation process provides a solid base of knowledge and understanding of how to implement section 7 of the ESA. By taking advantage of this expertise within the Action Agencies, the counterpart regulations process will help ensure more timely and efficient decisions on planned NFP actions while retaining the protection for listed species and designated critical habitat required by the ESA and other applicable regulations. The Service can rely upon the expertise of the Action Agencies to make NLAA determinations that are consistent with the ESA and its implementing regulations. Moreover, the Action Agencies are committed to implementing this authority in a manner that will be equally as protective of listed species and designated critical habitat as the current procedures that require written concurrence from the Service.

The Healthy Forests Initiative builds from the recognition that more timely environmental reviews of proposed fire plan projects will provide greater benefits to the range, forest lands, and wildlife by reducing the risk of catastrophic wildfire while the reviews are pending. These counterpart regulations provide an additional tool for accomplishing faster reviews. Streamlining the NLAA concurrence process offers a significant opportunity to accelerate NFP projects while providing equal or greater protection of the resources. Under current procedures, the Action Agencies must

already complete and document a full ESA analysis to reach an NLAA determination. The counterpart regulations permit a project to proceed following an Action Agency's NLAA determination without an overlapping review by the Service, where the Service has provided specific training and oversight to achieve comparability between the Action Agency's determination and the likely outcome of an overlapping review by the Service. These counterpart regulations should significantly accelerate planning, review, and implementation of NFP actions, and by doing so, should contribute to achieving the habitat management and ecosystem restoration activities contemplated under the NFP.

Summary of Comments Received

On June 5, 2003 (68 FR 33806), we proposed the rule that would establish the joint counterpart regulations for consultation under section 7 of the ESA to streamline consultation on proposed projects that support the NFP. The comment period closed on August 4, 2003. On October 9, 2003 (68 FR 58298), we reopened the comment period on the proposed rule and provided a notice of availability for the Environmental Assessment. The second comment period closed on November 10, 2003. During these two comment periods, the Service received more than 50,000 comments on the proposed rule from a large variety of entities, including State, County, Tribal agencies, industry, conservation groups, religious groups, coalitions, and private individuals. The Service and the Action Agencies considered all of the information and recommendations received from all interested parties on the proposed regulation during the public comment period and appreciated the comments received on the proposed rule. The Service received numerous comments on the scope of the National Fire Plan, for example, appropriate fire cycles, thinning and restoration practices, which were beyond the narrow scope of the proposed rulemaking for the counterpart regulations.

The following is a summary of the comments on the proposed counterpart regulations, and the Service's response.

State and Tribe Comments

We received comments from three States and two Tribal agencies.

Issue: One State recommended including the State fish and wildlife agencies during the development of the ACAs and, where appropriate, during the development of documentation in support of NLAA determinations. Including the States would better ensure

that the best available scientific information is used during the determination analysis by the Action Agencies.

Response: We agree that the State agencies likely have biological information that will be relevant in making an NLAA determination. The Services currently have a joint policy (59 FR 34275) in which we request any information from the State that might be relevant, as well as notify the State of any action that might adversely affect any proposed or listed species or designated critical habitat. The Service will encourage each of the Action Agencies to embrace this policy as a component of the ACA.

Issue: One State, and several commenters, expressed concern that this proposed regulation does not go far enough to improve the overall efficiency of the consultation process and, therefore, should be opened up to all projects, not just fire plan projects. A few commenters suggested including the Corps of Engineers and Environmental Protection Agency in the list of Action Agencies.

Response: These counterpart regulations have been proposed as part of the President's Healthy Forests Initiative to accelerate the rate at which fire plan projects can be implemented. Once these counterpart regulations are adopted and implemented, the Services believe that other agencies may decide that similar counterpart regulations would help to expedite other types of actions. The EPA has already published an advance notice of rulemaking for developing counterpart regulations for pesticides (68 FR 3785, January 24, 2003). The Services will take up any such proposals from other agencies in the future as circumstances may warrant.

Issue: One State and several commenters were concerned that these counterpart regulations relieve the Service of its duties and the resources that will be spent creating a new process could be used more efficiently by the Service to carry out its duties under the ESA.

Response: We agree that the Services will likely experience a small short-term increase in administrative burden as they begin to implement the training and oversight components of the regulations and ACAs. However, this short term burden will be more than balanced out by a substantial long term increase in Service efficiency resulting from a reduction in resources required to review projects that ultimately receive a NLAA concurrence letter. We believe that by removing the need to provide NLAA concurrence letters on

NFP projects, the Services will be able to devote greater resources to analyzing and coordinating on projects that do have adverse effects on listed species and designated critical habitat. We believe this shift in resources will not only accelerate NFP projects, but will also generally expedite consultations on other projects, which will make the most efficient use of the Services time. This will ultimately provide more conservation to listed species, thus fulfilling the objectives of the ESA.

Issue: The two Tribal comments stated that the Action Agency will still need to complete a biological assessment for its action. In addition, both tribal commenters requested government-to-government consultation.

Response: We agree that an Action Agency will still need to complete a biological assessment for an action when required by the ESA. The regulations at 50 CFR 402.12 require the preparation of a biological assessment for those Federal actions that are "major construction activities." Given that these counterpart regulations only address those fire plan projects that are not likely to adversely affect listed species or critical habitat, we do not anticipate that a large majority of these actions would otherwise require preparation of a biological assessment.

The standards for making an NLAA determination remain unchanged by these counterpart regulations. These counterpart regulations do not change the analysis that is conducted for determining how a proposed project affects listed species or critical habitat. Therefore, this counterpart regulation will maintain the same level of protection for listed species or designated critical habitat. As such, we do not believe that tribal resources will be affected by implementation of this rule and government-to-government consultation is not necessary at this stage in the process.

General Comments

Issue: Many commenters felt that the proposed counterpart regulations will give some interest groups, such as logging companies and other commercial interests, free reign over public land, which will increase commercial timber sales, and that this result is not in the best interest of the species or the public.

Response: This regulation will apply only to those projects that are within the scope of the NFP and are not likely to adversely affect listed species or critical habitat. Commercial timber sales that adversely affect listed species and designated critical habitat will still need

to be analyzed through formal consultation. We believe that implementation of the counterpart regulations will allow the Service to focus its efforts on Federal actions that are likely to adversely affect listed species and critical habitat. This will ultimately benefit listed species.

Issue: Several commenters noted that the proposed rule has failed to offer any empirical evidence substantiating the claim that the regulatory obstacles have unnecessarily delayed active land management activities.

Response: The Healthy Forests Initiative is intended to accelerate implementation of the fuels reduction and ecosystem restoration goals of the NFP in order to minimize damage caused by catastrophic wildfires. Accordingly, the issue is not whether the regulatory process has delayed NFP projects, but rather whether it can be streamlined so as to expedite the projects. The number of consultations conducted for NFP projects is currently relatively low; however the Service anticipates that the number of consultations requested for projects that implement the NFP will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP. Due to the beneficial effects that this initiative will have to fish and wildlife resources, the Services are ensuring that actions supporting the NFP that are NLAA listed species or critical habitat are not delayed.

Issue: Many commenters believe that the Action Agencies do not have the expertise to make the determinations without concurrence from the Service. They believe that the Service is the expert agency and without the Service's input many of the decisions will have a negative impact on listed species. In particular, the commenters believe that the Action Agencies do not know the biology of the species or the other indirect or cumulative effects that should be factored into the analysis.

Response: The Action Agencies employ large staffs of professional wildlife biologists, botanists, and ecologists to meet their obligations under the Act and other natural resource management laws they implement. The primary responsibility of these professionals is to evaluate how proposed projects will affect listed species and critical habitat.

The counterpart regulations contain a process for making sure that the Action Agencies have the necessary skills to make the NLAA determinations without Service concurrence. First, the Service and the Action Agencies will jointly develop a training program that will

allow each Action Agency's staff to develop and maintain the same skills that the Service has in making the NLAA determinations. Second, the ACA will include provisions for incorporating new information on currently listed species and new species and critical habitat into the Action Agency's effects analysis of proposed actions. These two provisions of the ACA will provide the Action Agency with the same expertise and information that the Service possesses. This process will maximize the use of the Service and Action Agencies' resources by incorporating this additional knowledge into the Action Agencies' current wealth of expertise.

Issue: One commenter noted that both the Service and NMFS have policies regarding the use of high quality scientific and commercial data in making decisions. FS and BLM do not have similar policies presenting a challenge to prevent them from making the best decisions possible. One commenter noted that streamlining to speed up accomplishments of one goal may result in decisions being made on inadequate data, lack of perspective on other goals and values, and lack of knowledge of other alternatives, therefore risking failure of making sound and wise decisions. Many commenters believe that, by eliminating the Service, the Action Agencies will not make sound decisions; that is, they will not be considering all of the facts and possible ramifications.

Response: Section 7 of the ESA requires that each agency shall use the best available scientific and commercial information. This standard applies to any analysis that the Action Agency may make, as well as the Service. It is the responsibility of the Action Agency to become aware of all of the information necessary to make the determinations. In signing the ACA, the Action Agency is agreeing to take on the responsibility of making decisions using the best scientific and commercial data available. It is common practice for the Service and the Action Agency to share information in the field, and we expect this practice will continue with the implementation of these counterpart regulations.

The jointly developed training program will allow the Action Agency staff to develop and maintain the same skills that the Service has in making the NLAA determinations. In addition, the Service will retain oversight authority and, through the periodic review and the monitoring program, will evaluate whether the Action Agency has implemented the regulation consistent with the best available scientific and

commercial information, the ESA, and the section 7 regulations.

Issue: Several commenters stated that the definition of NFP project is overly broad and the Action Agencies could grant discretion to undertake projects that are directly at odds with the philosophy and purpose of the NFP.

Response: The definition according to the counterpart regulations of a fire plan project is "an action determined by the Action Agency to be within the scope of the NFP as defined in this section." The Action Agency will have the responsibility to justify whether any action it is undertaking falls within the NFP scope. Several examples of typical projects, such as mechanical treatments or prescribed fire, are listed in the preamble for the regulation. While the definition is broad, the Action Agency will ultimately have to determine if the action will further the goals of the NFP to reduce risks associated with wildland fires, while improving the condition of our public lands and wildlife habitat.

Issue: Many commenters believe that the different missions between the Action Agencies and the Service will not allow the Action Agencies to make decisions that would be "equally as protective of listed species and critical habitat." In fact many commenters noted that historically, the action agencies have pursued environmentally damaging projects that were in direct conflict with their own policy. Many commenters suggested that eliminating the Service concurrence is like asking the fox to watch the henhouse. One State noted that they believe the elimination of oversight and environmental review will allow the Action Agencies to abuse the discretion.

Response: The Action Agencies are legally obligated to implement the ESA, and have large staffs of professional biologists fully able to do so. These counterpart regulations do not change the standards that apply in assessing the effects of the action. As stated in § 402.31 of the counterpart regulations, the process established in the counterpart regulation will be as protective to listed species and designated critical habitat as the process established in subpart B of the regulations.

As discussed in the oversight section, § 402.34, the Service Director retains discretion to terminate the ACA if the Action Agency fails to comply with the requirements of the counterpart regulations, section 7 of the Act, or the terms of the ACA. Therefore, we believe that sufficient training, monitoring, and oversight is built in to the process to ensure that the Action Agencies will appropriately implement their

responsibilities under section 7 and these regulations.

Issue: Several commenters noted that informal consultation allows the Service to work with the Action Agency to reduce the adverse effects of a project on listed species or critical habitat. Those instances where the Service does not concur with the Action Agencies are the very reason for the consultation with the expert wildlife agencies. Many commenters summarized this thought by stating that the counterpart regulations will eliminate the checks and balances inherent in the Act.

Response: These proposed counterpart regulations do not eliminate the Action Agency's ability to request informal consultation or to engage in day-to-day technical assistance with the Service when making NLAA determinations on fire plan projects. Some commenters may have misconstrued the ultimate use of this authority, which is for actions that support the NFP that are NLAA only. The section 7 standards remain unchanged by the counterpart regulations.

In addition, through the oversight provisions of § 402.34, the Service will work with the Action Agencies to determine whether the Action Agency is implementing the regulation accordingly.

Issue: A couple of commenters thought the Service should make organizational or structural changes to expedite the review process. One commenter suggested a process comprised of a series of stages that would increase the complexity of analysis, if warranted. Another commenter suggested that the process could be further streamlined by using a programmatic consultation approach.

Response: The Service considered administrative changes and agreements that would help streamline reviews in the Environmental Assessment for the Counterpart Regulations, September 30, 2003. As discussed in the EA, the Service and the Action Agencies currently have several agreements in place. While such agreements streamline the process significantly by improving coordination between the consulting agencies, the process still requires involvement of the Service in the concurrence decisions on projects that are NLAA listed species or critical habitat. These types of streamlining processes can work well to meet statutory timelines, but they still encumber the Service's biologists in requiring concurrences for NLAA actions and thereby diverting their attention from actions that require formal consultation. We believe these

counterpart regulations will accelerate the process of approval for fire plan projects and allow the Service to devote more time to analyzing and coordinating on projects that have adverse effects on listed species and designated critical habitat.

Issue: A few commenters suggested using the counterpart regulation to also modify the timeline for formal consultation. At a minimum, it was suggested to set a deadline that is shorter than 90 days for the consultation and 45 days for preparation of the biological opinion.

In addition, a couple of commenters suggested that the counterpart regulation is governed only by the statute and therefore the final regulation could change the NLAA standard such that any project with net benefits is not likely to adversely affect. The commenters noted that, without this modification, the proposed rule will likely be inefficient to streamline consultation. In addition, the rule should be allowed to change the threshold levels for "may affect."

Response: The focus of the counterpart regulations was to provide an optional alternative to the standard section 7 consultation process that would be consistent with 50 CFR 402.04. The Service is not constrained by the statutory language in that it may (and often does) complete consultations in less than 90 days. The Service has already issued clarifying policy about the importance of considering the long-term benefits of fuel reduction projects such that revising the NLAA standards as part of these regulations is unnecessary to accomplish the goal of streamlining for the Healthy Forests Initiative.

Issue: Contractors of the Action Agency and local governments should be allowed to be a full participant in the consultation process from beginning to end.

Response: This regulation does not change the statutory or regulatory process for applicants to participate in the consultation. We expect that applicants will continue to have participation in the areas of the consultation process that are appropriate.

Issue: Many commenters believe that adoption of this counterpart regulation violates the plain language of the statute, which states that "each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action * * *". Specifically, they assert that the proposed counterpart regulations violate sections 7(a)(2), 7(a)(4) and 7(b). By allowing the Action Agencies to reach

their own conclusions without the Service concurrence, the Service would not be allowed to provide reasonable and prudent alternatives, reasonable and prudent measures, or to conduct a jeopardy analysis.

Response: The Services have concluded that the counterpart regulation does not violate the language or spirit of the ESA. The counterpart regulation makes no changes to the statutory requirement for formal consultation on agency actions that are likely to adversely affect listed species or designated critical habitat. The counterpart regulation builds upon the fundamental distinction in the current Subpart B consultation regulations between the formal consultation required for more significant projects and the lesser form of consultation required for actions that are not likely to adversely affect listed species or designated critical habitat. Neither informal consultation nor NLAA concurrence is specified in the ESA. The counterpart regulation creates a new, carefully-structured training, monitoring and oversight relationship between the Service and the Action Agency as an alternative for the individual project-based concurrence system that was created in the Subpart B regulatory framework. The counterpart regulation creates a system where the Action Agency is trained and supervised to perform NLAA determinations just as the Service would in a concurrence letter, with less delay and equal protection for listed species and designated critical habitat.

The Service believes that through implementation of the ACA and through the oversight discussed in § 402.34, the counterpart regulations comply with the statute, and the Action Agencies are insuring, in consultation with and with assistance of the Secretary, that any action is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Through the periodic review and monitoring program, the Service will provide assistance to the Action Agency by recommending changes to the Action Agency's implementation of the ACA, if necessary. Consultation will continue to occur through the implementation of the ACAs and the ongoing review and monitoring program.

Issue: One commenter believed that the proposed rule violates section 7(c)(1) of the ESA. The commenter suggested that 7(c) places a mandatory duty on Federal Action Agencies to initiate consultation and communication with the Service on all projects.

Response: Section 7(c) of the Act requires each Federal Agency to prepare a biological assessment for the purpose of identifying any endangered or threatened species, which is likely to be affected by an action. Consistent with congressional intent (H.R. Conf. Rep. 96-697, 1979), the regulations at 50 CFR 402.12 specify that this requirement applies only to those Federal actions that are "major construction activities." Given that these counterpart regulations address only those fire plan projects that are not likely to adversely affect listed species or critical habitat, we do not anticipate a large majority of these actions would otherwise require preparation of a biological assessment.

Section-by-Section Analysis

Procedures

Issue: Several commenters suggested that the ACAs should be subject to a 60-day public review and comment period. A few commenters noted that the rule is also unclear as to whether the ACAs are subject to NEPA. Many commenters were concerned that the timetable for developing the ACAs would prolong the implementation of the rule. One commenter suggested that the ACAs should be developed prior to finalization of the counterpart regulations.

Response: The ACAs will be made available to the public as stated in the proposed rule. The details of the individual ACAs will conform to the elements described in the procedures section. The individual ACAs will most likely be categorically excluded from the NEPA requirements. However, with any categorical exclusion, conditions at the time may warrant more environmental analysis consistent with the Action Agencies' requirement to identify extraordinary circumstances under 40 CFR 1508.4. The NEPA determination will be made at the time the individual ACAs are proposed. The Service anticipates that development of the ACAs, for those Action Agencies that want to implement the counterpart regulations, will begin immediately following finalization of the counterpart regulations.

Issue: Many commenters believed that the details outlined in the regulations regarding training, standards, incorporating new information, and the periodic monitoring and program evaluation should be specified in the regulation and not the ACA.

Response: The Service and the Action Agencies wanted to allow maximum flexibility for each individual Action Agency's needs with regard to the specific requirements in the ACA. For

instance, the training program for the Forest Service nationwide, which has had extensive experience with section 7 consultation, may be different from the BIA nationwide in which several districts may have more experience than others. Allowing the details of, the training program for example, to be further discussed in the ACA allows for the program to be tailored for each particular Action Agency.

Staff Positions

Issue: One commenter believes that the ACA should list the Action Agency staff making the determinations by name including their academic and professional experience. Then the Service should make sure their skill level is appropriate to make the determinations.

Response: The counterpart regulations and the subsequent ACAs have established a system whereby the Action Agency can make the determinations without concurrence by the Service. The Action Agencies are committed to implementing this authority in a manner that will be equally protective of listed species and critical habitat as the current procedures. In implementing the ACA, the Action Agency will retain full responsibility for compliance with section 7 of the ESA. Given that responsibility, the Action Agency will determine the appropriate skill level for making the determinations.

Training

Issue: Several commenters acknowledged that the Action Agencies already employ the biological expertise necessary to make the NLAA determination; therefore, the training program does not need to be complex, and instead there should be a procedure to certify personnel without training. One commenter suggested just having periodic refresher courses.

Response: While we agree that the Action Agencies already have familiarity with the standards for making an NLAA determination, we believe that a focused training program that discusses how the Service analyzes the NLAA determination when concurrence is requested will achieve an even higher level of protection for listed species and designated critical habitat.

Issue: One commenter suggested that the training program should include principles of conservation biology, the life history of the species of which the determinations will be made, animal ecology, plant ecology, and environmental impact analysis.

Response: The Action Agencies currently make the NLAA determinations based on the recommendations from professional biologists who are employed or contracted by the Action Agencies. The training program envisioned in the counterpart regulation will focus on the fundamental aspects of section 7 that the Action Agency staff will need to understand when making the NLAA determination without the Service concurrence.

Standards

Issue: One State and a few other commenters suggested that uniform national standards should be in the regulation not the ACA, including the specific standards and procedures for implementing the ACA and assuring that the direct and indirect effects of the proposed action will not have an adverse effect on listed species.

Response: The overall standards for making an NLAA determination remain unchanged by these counterpart regulations. The ACA will include specific standards that the individual Action Agency will be applying in assessing the effects of the action. Since the ACAs are between the Service and the individual Action Agency, the specific standards in each ACA can be more individualized for the fire plan projects that each Action Agency may undertake.

Issue: Several commenters noted that any standard developed for effects analysis should not result in a new consultation process that produces unnecessarily lengthy, detailed analyses or require analyses that seek data that are nonexistent or unreliable.

Response: The Service and the Action Agencies agree. The purpose of the counterpart regulations is to accelerate the process of approving NFP projects by reducing the time and effort needed to conduct a consultation for NFP activity that is not likely to adversely affect listed species or designated critical habitat. These counterpart regulations will not change the section 7 standards, only the process by which consultation is conducted.

Monitoring

Issue: One commenter suggested that the periodic review and monitoring program should have on-site audits that occur quarterly and audits of the NLAA decisions that are conducted monthly, with a corrective action plan prepared by the Action Agency, if warranted. If the corrective action plan is not submitted on time, the ACA is automatically void.

Response: The Service and the Action Agencies will determine the most appropriate periodic review and monitoring program for each individual Action Agency. The counterpart regulations do contemplate, if appropriate, the termination of the ACA.

Issue: One commenter suggested that the Action Agencies should conduct the monitoring and periodic review program and then provide the Service with a report.

Response: The Service believes that, to maintain oversight over the program, the periodic review and monitoring must be done jointly between the Service and the Action Agency. This will allow the Service to recommend whether the terms of the ACA should be modified.

Oversight

Issue: The two State commenters, the tribes, and a number of other commenters believe that specific information should be included to clarify under what conditions an Action Agency's ACA may be suspended or revoked should the Action Agencies fail to meet their new ESA responsibilities.

Response: We anticipate that the ACA will provide the detail, specific to each Action Agency, for the periodic review and monitoring program. The agencies anticipate that the details of such items as timing and procedures will be described in the ACA. In addition, the ACA will specify the information that will be necessary to provide for the periodic review. Section 402.33(a)(2)(vi) specifically states that the Action Agency will be responsible for maintaining the necessary records to allow the Service to complete the periodic program evaluation. The Oversight section of the counterpart regulations discusses the standards that the Service will use to evaluate the Action Agencies' implementation of the regulation.

Issue: Several commenters believe that enforcement of the ACA will be problematic because suspension of an ACA resulting from failure to comply will not affect the validity of prior NLAA determinations. If an Action Agency is found violating the mandate of section 7, such a violation will have no bearing upon past projects enabled by the violation. One commenter suggested simply changing 402.34 to "Service Director is required to terminate the ACA if * * *"

Response: We disagree that enforcement will be an issue. The Action Agencies must comply with the terms of the ACA and the counterpart regulations prescribe the remedy for any failure by an Action Agency to comply

with the terms of the ACA. If, through the periodic review and monitoring program, the Service determines that implementation of this regulation is not consistent with the best available information, the ESA, or the section 7 regulations, then the Service will work with the Action Agency to correct the issue. If the consistency issues persist, the Service Director has the ability to terminate the ACA for an individual sub-unit of the Action Agency. This should not call into question any of the other sub-units' determinations or any of the determinations prior to the issue at hand. The Service Director always retains discretion to terminate the ACA with the Action Agency if it fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the ACA. The terms of the ACA are intended to be enforceable only through the remedies available to the Services under the counterpart regulations.

Revisions to the Proposed Rule

In § 402.31, we changed "The purpose of these counterpart regulations is to improve the consultation * * *" to read, "The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation * * *." The change is made to clarify that the intent of these counterpart regulations is to accelerate the rate at which fire plan projects are processed without changing the section 7 consultation standards.

Description/Overview of the Final Rule

Regulations at 50 CFR 402.04 provide that "the consultation procedures may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service." The preamble to the 1986 regulations for implementing section 7 of the ESA states that "such counterpart regulations must retain the overall degree of protection afforded listed species required by the [ESA] and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7." The approach in these counterpart regulations is consistent with § 402.04 because it leaves the standards for making NLAA determinations unchanged. The joint counterpart regulations establish an optional alternative process to conduct consultation under section 7 of the ESA for actions that the FS, BIA, BLM, FWS, or NPS might authorize, fund, or carry

out to implement the NFP. The procedures outlined in these counterpart regulations differ from the existing procedures in 50 CFR part 402 subparts A and B, § 402.13 and § 402.14(b), by allowing an Action Agency to enter into an ACA with the Service that will allow the Action Agency to make an NLAA determination on a proposed NFP project without informal consultation or written concurrence from the Service. Further, Action Agencies operating under these counterpart regulations retain full responsibility for compliance with section 7 of the ESA.

Under the counterpart regulations, the Action Agencies will enter into an ACA with either FWS, NMFS or both. The ACA will include: (1) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations; (2) a program for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency; (3) provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis on proposed actions; (4) provisions for the Action Agency to maintain a list of fire plan projects that received NLAA determinations under the agreement; and (5) a mutually agreed upon program for monitoring and periodic program evaluations. By following the procedures in these counterpart regulations and the ACA, the Action Agencies fulfill their ESA section 7 consultation responsibility for actions covered under these regulations.

The purpose of the jointly developed training program between the Action Agency and the Service is to ensure that the Action Agency consistently interprets and applies the relevant provisions of the ESA and the regulations (50 CFR part 402) relevant to these counterpart regulations with the expectation that the Action Agency will reach the same conclusions as the Service. We expect that the training program will be consistent among Action Agencies, subject to differing needs and requirements of each agency, and will rely upon the ESA Consultation Handbook as much as possible. The training program may include jointly developed guidelines for conducting the ESA section 7 effects analysis for the particular listed species and critical habitat that occur in the jurisdiction of the Action Agency requesting the agreement. Training may also emphasize the use of project design

criteria for listed species where they have been developed between the Service and the Action Agency.

Because the Service maintains information on listed species, the Service may supply any new information it receives that would be relevant to the effects analysis that the Action Agencies will conduct to make the NLAA determinations. In addition, the Service will coordinate with the Action Agency when new species are proposed for listing or new critical habitat is proposed.

The Service will use monitoring and periodic program reviews to evaluate an Action Agency's performance under the ACA at the end of the first year of implementation and then at intervals specified in the ACA. The evaluation may be on a subunit basis (e.g., a particular National Forest or BLM district) where different subunits of an Action Agency begin implementation of the ACA at different times. The Service will evaluate whether the implementation of this regulation by the Action Agency is consistent with the best available scientific and commercial information, the ESA, and section 7 regulations. The result of the periodic program review may be to recommend changes to the Action Agency's implementation of the ACA. These recommendations could include suspending or excluding any participating Action Agency subunit, but more likely may include additional training. The Service will retain discretion for terminating the ACA if the requirements under the counterpart regulations are not met. However, any such suspension, exclusion, or termination will not affect the legal validity of NLAA determinations made prior to the suspension, exclusion, or termination.

Upon completion of an ACA, the Action Agency and the Service will implement the training program outlined in the ACA. At the Action Agency's discretion, the training program may be designed such that some subunits may begin implementing the ACA before agency personnel in other subunits are fully trained. The Action Agency will assume full responsibility for the adequacy of the NLAA determinations that it makes.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal or policy issues, and was reviewed by the Office of Management and Budget

(OMB) in accordance with the four criteria discussed below.

(a) This counterpart regulation will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The counterpart regulations do not pertain to commercial products or activities or anything traded in the marketplace.

(b) This counterpart regulation is not expected to create inconsistencies with other agencies' actions. FWS and NMFS are responsible for carrying out the Act.

(c) This counterpart regulation is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, we certified to the Small Business Administration that these regulations would not have a significant economic impact on a substantial number of small entities. The purpose of the rule is to increase the efficiency of the ESA section 7 consultation process for those activities conducted to implement the NFP. The changes will lead to the same protections for listed species as the section 7 consultation regulations at 50 CFR part 402 and will only eliminate the need for the Action Agency to conduct informal consultation with and obtain written concurrence from the Service for those NFP actions that the Action Agency determines are "not likely to adversely affect" (NLAA) any

listed species or designated critical habitat.

Regulations at 50 CFR 402.04 provide that "the consultation procedures may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service." The preamble to the 1986 regulations for implementing section 7 states that "such counterpart regulations must retain the overall degree of protection afforded listed species required by the [ESA] and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7."

Under the counterpart regulations, the Action Agencies will enter into an Alternative Consultation Agreement (ACA) with either or both of the Services as appropriate. The ACA will include: (1) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations; (2) a program for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency; (3) provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis on proposed actions; (4) provisions for the Action Agency to maintain a list of fire plan projects that received NLAA determinations under the agreement; and (5) a mutually agreed upon program for monitoring and periodic program evaluations. The purpose of the training program is to ensure the Action Agency consistently interprets and applies the relevant provisions of the ESA and regulations (50 CFR 402), with the expectation that the Action Agency will reach the same conclusion as the Service.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) The joint counterpart ESA section 7 regulations apply only to ESA section 7 determinations made by one of the five Federal Action Agencies that implement the NFP; (2) the rule will only remove the requirement for the Action Agencies to conduct informal consultation with and obtain written concurrence from FWS or NMFS on those NFP actions they determine that are NLAA listed species or designated critical habitat; and (3) the regulations are designed to reduce potential economic burdens on

the Services and Action Agencies by improving the efficiency of the process. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small businesses, organizations, or governments pursuant to the RFA.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) These counterpart regulations will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. We expect that these counterpart regulations will not result in any significant additional expenditures.

(b) These counterpart regulations will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. These counterpart regulations impose no obligations on State, local, or tribal governments.

Takings

In accordance with Executive Order 12630, these counterpart regulations do not have significant takings implications. These counterpart regulations pertain solely to ESA section 7 consultation coordination procedures, and the procedures have no impact on personal property rights.

Federalism

In accordance with Executive Order 13132, these counterpart regulations do not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Commerce regulations under section 7 of the ESA, we coordinated development of these counterpart regulations with

appropriate resource agencies throughout the United States.

Civil Justice Reform

In accordance with Executive Order 12988, this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We promulgate these counterpart regulations consistent with 50 CFR 402.04 and section 7 of the ESA.

Paperwork Reduction Act

This rule would not impose any new requirements for collection of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

National Environmental Policy Act

These counterpart regulations have been developed by FWS and NMFS, jointly with FS, BIA, BLM, and NPS according to 50 CFR 402.04. The FWS and NMFS are considered the lead Federal agencies for the preparation of this rule, pursuant to 40 CFR 1501. We have analyzed these counterpart regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6 and have determined, after preparation of an environmental assessment, that the action does not have any significant effects. A Finding Of No Significant Impact has been prepared.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951); E.O. 13175; and the Department of the Interior's 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to-Government basis. These counterpart regulations do not directly affect Tribal resources. These counterpart regulations may have an indirect effect on Native American Tribes as the Bureau of Indian

Affairs may, at its discretion, implement the procedures outlined in the counterpart regulations for those activities affecting Tribal resources that they may authorize, fund, or carry out under the NFP. The analysis that is conducted for determining how a proposed project affects listed species or critical habitat remains unchanged by these counterpart regulations. Therefore, tribal resources will be unaffected by implementation of this rule and government-to-government consultation is not necessary.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Final Regulation Promulgation

■ For the reasons set forth in the preamble, the Service amends part 402, title 50 of the Code of Federal Regulations as follows:

PART 402—[AMENDED]

■ 1. The authority citation for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. Add a new Subpart C to read as follows:

Subpart C—Counterpart Regulations For Implementing the National Fire Plan

Sec.	
402.30	Definitions.
402.31	Purpose.
402.32	Scope.
402.33	Procedures.
402.34	Oversight.

Subpart C—Counterpart Regulations for Implementing the National Fire Plan

§ 402.30 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

Action Agency refers to the Department of Agriculture Forest Service (FS) or the Department of the Interior Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), or National Park Service (NPS).

Alternative Consultation Agreement (ACA) is the agreement described in § 402.33 of this subpart.

Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined in this section.

National Fire Plan (NFP) is the September 8, 2000, report to the President from the Departments of the Interior and Agriculture entitled "Managing the Impact of Wildfire on Communities and the Environment" outlining a new approach to managing

fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto.

Service Director refers to the FWS Director or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

§ 402.31 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects by providing an optional alternative to the procedures found in §§ 402.13 and 402.14(b) of this part. These regulations permit an Action Agency to enter into an Alternative Consultation Agreement (ACA) with the Service, as described in § 402.33, which will allow the Action Agency to determine that a Fire Plan Project is "not likely to adversely affect" (NLAA) a listed species or designated critical habitat without formal or informal consultation with the Service or written concurrence from the Service. An NLAA determination for a Fire Plan Project made under an ACA, as described in § 402.33, completes the Action Agency's statutory obligation to consult with the Service for that Project. In situations where the Action Agency does not make an NLAA determination under the ACA, the Action Agency would still be required to conduct formal consultation with the Service when required by § 402.14. This process will be as protective to listed species and designated critical habitat as the process established in subpart B of this part. The standards and requirements for formal consultation under subpart B for Fire Plan Projects that do not receive an NLAA determination are unchanged.

§ 402.32 Scope.

(a) Section 402.33 establishes a process by which an Action Agency may determine that a proposed Fire Plan Project is not likely to adversely affect any listed species or designated critical habitat without conducting formal or informal consultation or obtaining written concurrence from the Service.

(b) Section 402.34 establishes the Service's oversight responsibility and the standard for review under this subpart.

(c) Nothing in this subpart C precludes an Action Agency at its discretion from initiating early, informal, or formal consultation as described in §§ 402.11, 402.13, and 402.14, respectively.

(d) The authority granted in this subpart is applicable to an Action Agency only where the Action Agency

has entered into an ACA with the Service. An ACA entered into with one Service is valid with regard to listed species and designated critical habitat under the jurisdiction of that Service whether or not the Action Agency has entered into an ACA with the other Service.

§ 402.33 Procedures.

(a) The Action Agency may make an NLAA determination for a Fire Plan Project without informal consultation or written concurrence from the Director if the Action Agency has entered into and implemented an ACA. The Action Agency need not initiate formal consultation on a Fire Plan Project if the Action Agency has made an NLAA determination for the Project under this subpart. The Action Agency and the Service will use the following procedures in establishing an ACA.

(1) *Initiation*: The Action Agency submits a written notification to the Service Director of its intent to enter into an ACA.

(2) *Development and Adoption of the Alternative Consultation Agreement*: The Action Agency enters into an ACA with the Service Director. The ACA will, at a minimum, include the following components:

(i) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations under this subpart C.

(ii) Procedures for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency.

(iii) A description of the standards the Action Agency will apply in assessing the effects of the action, including direct and indirect effects of the action and effects of any actions that are interrelated or interdependent with the proposed action.

(iv) Provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis of proposed actions.

(v) A mutually agreed upon program for monitoring and periodic program evaluation to occur at the end of the first year following signature of the ACA and periodically thereafter.

(vi) Provisions for the Action Agency to maintain a list of Fire Plan Projects for which the Action Agency has made NLAA determinations. The Action Agency will also maintain the necessary records to allow the Service to complete the periodic program evaluations.

(3) *Training*: Upon completion of the ACA, the Action Agency and the

Service will implement the training program outlined in the ACA to the mutual satisfaction of the Action Agency and the Service.

(b) The Action Agency may, at its discretion, allow any subunit of the Action Agency to implement this subpart as soon as the subunit has fulfilled the training requirements of the ACA, upon written notification to the Service. The Action Agency shall at all times have responsibility for the adequacy of all NLAA determinations it makes under this subpart.

(c) The ACA and any related oversight or monitoring reports shall be made available to the public through a notice of availability in the **Federal Register**.

§ 402.34 Oversight.

(a) Through the periodic program evaluation set forth in the ACA, the Service will determine whether the implementation of this subpart by the Action Agency is consistent with the best available scientific and commercial information, the ESA, and section 7 regulations.

(b) The Service Director may use the results of the periodic program evaluation described in the ACA to recommend changes to the Action Agency's implementation of the ACA. If and as appropriate, the Service Director may suspend any subunit participating in the ACA or exclude any subunit from the ACA.

(c) The Service Director retains discretion to terminate the ACA if the Action Agency fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the ACA. Termination, suspension, or modification of an ACA does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

Dated: November 26, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

Dated: December 3, 2003.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 03-30393 Filed 12-5-03; 8:45 am]

BILLING CODE 3510-22-P; 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031126295-3295-01; I.D. 111703B]

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Area; Interim 2004 Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule.

SUMMARY: NMFS issues interim 2004 total allowable catch (TAC) amounts for each category of groundfish, Community Development Quota (CDQ) reserve amounts, American Fisheries Act (AFA) pollock allocations and sideboard amounts, and prohibited species catch (PSC) allowances and prohibited species quota (PSQ) reserves for the groundfish fisheries of the Bering Sea and Aleutian Islands management area (BSAI). The intended effect is to conserve and manage the groundfish resources in the BSAI.

EFFECTIVE DATE: The interim harvest specifications are effective from 0001 hours, Alaska local time (A.l.t.), January 1, 2004, until the effective date of the final 2004 harvest specifications for BSAI groundfish, which will be published in the **Federal Register**.

ADDRESSES: Copies of the Environmental Assessment (EA) prepared for this action, the final 2002 Stock Assessment and Fishery Evaluation (SAFE) report, dated November 2002, and the final 2003 SAFE report, dated November 2003, are available from the North Pacific Fishery Management Council, West 4th Avenue, Suite 306, Anchorage, AK 99510-2252 (907-271-2809) or from its home page at <http://www.fakr.noaa.gov/npfmc>.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907-586-7228, or mary.furuness@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

Federal regulations at 50 CFR part 679 implementing the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) govern the groundfish fisheries in the BSAI. The North Pacific Fishery Management Council (Council) prepared the FMP, and NMFS approved it under the Magnuson-Stevens Fishery



United States
Department of
Agriculture

Forest
Service

Washington Office

14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

File Code: 2670/5100

Date: May 10, 2004

Route To:

Subject: Counterpart Regulations for Consultation under the Endangered Species Act

To: Regional Foresters, Station Directors, Area Director, IITF Director, and WO Staff

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (the "Services") in cooperation with the Forest Service, Bureau of Land Management (BLM), Bureau of Indian Affairs (BIA), and National Park Service (NPS), have issued joint counterpart regulations for consultation under Section 7 of the Endangered Species Act (ESA) to streamline consultation on proposed projects that support the National Fire Plan (NFP). These counterpart regulations, authorized by 50 CFR 402.04, were published in the Federal Register on December 8, 2003, and complement the consultation process by providing an alternative process for completing Section 7 consultation for projects that authorize, fund or carry out actions that support the NFP.

The counterpart regulations allow the Forest Service to make "not likely to adversely affect" (NLAA) determinations for listed species or designated critical habitat without consulting with or obtaining written concurrence from the Services for proposed actions that support the NFP. The purpose of this memorandum is to inform field personnel of how the Forest Service will implement the counterpart regulations.

On August 22, 2002, the President announced his Healthy Forests Initiative: *An Initiative for Wildfire Prevention and Stronger Communities*. The Healthy Forests Initiative recognizes that faster environmental reviews of proposed land management projects may provide greater benefits to humans, the range, forest lands, and wildlife by reducing the risk of catastrophic wildfire while the reviews are pending. To this end, the counterpart regulations were drafted to expedite the informal Section 7 consultation process. The concurrence process for NLAA determinations has diverted some resources from projects in greater need of limited agency resources. The counterpart regulations may be utilized for proposed projects that support the NFP, such as prescribed fire, hazardous fuels reduction, ecosystem restoration and maintenance of fire adapted ecosystems.

Implementation of the counterpart regulations requires each action agency to develop an Alternative Consultation Agreement (ACA) with the Services. The Forest Service signed an ACA with the Services on March 3, 2004 (Enclosure 1). The ACA makes it possible for any Forest Service biologist, botanist or ecologist who has completed the required training to conduct Section 7 effects analyses and make NLAA determinations of effect for proposed actions that are within the scope of the NFP. However, journey-level biologists, botanists or ecologists are responsible for ensuring and documenting adequacy of the BE/BA with existing policy, and line officers are responsible for documenting compliance with the ESA and counterpart regulations.

All biologists, ecologists, botanists and line officers ("end users") who will use the counterpart regulations are required to be certified as having successfully completed this mandatory training. Training is provided through a web-based interactive module, and is available to end users through the internet at their computer work station (Enclosure 2).

A 1-day training and orientation session for regional threatened, endangered and sensitive species program leaders was held March 24, 2004, in Phoenix, Arizona. This session was attended by Forest Service, BLM, BIA, NPS, FWS and NMFS State/Regional personnel. The purposes of the session were to explain the role and responsibilities of agency personnel, ensure State/Regional personnel providing oversight understand the counterpart regulations and the ACA, and train/certify various Arizona-based end users who attended the session.



It is imperative that end users review the counterpart regulations and the ACA, and take the appropriate training prior to implementation for NFP projects. The counterpart regulations provide greater interagency efficiencies for developing, analyzing, approving and implementing NFP projects. The Forest Service also assumes greater responsibility for ensuring that our actions do not jeopardize the continued existence of listed species or adverse modification of designated critical habitat, and for ESA compliance. It is anticipated that through proper use and implementation of the counterpart regulations and the ACA, increased consultation efficiencies will be realized.

Complete legal defensibility of our ESA effects analysis and documentation for such projects is now Forest Service responsibility. It is critical that we meet the conditions of the ACA and maintain a complete project record for NFP projects implemented under the counterpart regulations.

The counterpart regulations and ACA can be viewed at the following site:
<http://endangered.fws.gov/consultations/forestplan.html>

If you have any questions regarding the counterpart regulations or ACA, please contact Marc Bosch, TES Program Leader, 202-205-1220, or respective regional contacts (See Enclosure 3).

/s/ Thomas L. Tidwell
TOM L. THOMPSON
Deputy Chief for National Forest System

Enclosures:

1. Alternative Consultation Agreement
2. Training/Timeframe Info
3. Frequently Asked Questions and Contacts

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

April 8, 2004

In Reply Refer To:
6841, 1782, 9211 (WO-230) P

EMS TRANSMISSION 04/09/2004
Information Bulletin No. 2004-088

To: All Field Officials
From: Assistant Director, Renewable Resources and Planning
Subject: Counterpart Regulations and Alternative Consultation Agreement

The U.S. Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) (collectively referred to as the Services) in cooperation with the Bureau of Land Management (BLM), Forest Service (FS), Bureau of Indian Affairs (BIA), and National Park Service (NPS) have issued joint counterpart regulations for consultation under Section 7 of the Endangered Species Act (ESA) to streamline consultation on proposed projects that support the National Fire Plan (NFP). These counterpart regulations, authorized by 50 CFR 402.04, complement the consultation process by providing an alternative process for completing Section 7 consultation for projects that authorize, fund or carry out actions that support the NFP. The counterpart regulations eliminate the need to conduct informal consultations and obtain written concurrence from the Services for those NFP actions that the action agency determines are "not likely to adversely affect" (NLAA) listed species or designated critical habitat. The purpose of this bulletin is to inform managers and staff on how the BLM proposes to implement these counterpart regulations.

On August 22, 2002, the President announced his Healthy Forests Initiative: *An Initiative for Wildfire Prevention and Stronger Communities*. The Healthy Forests Initiative recognizes that faster environmental reviews of proposed land management projects may provide greater benefits to humans, the range, forest lands, and wildlife by reducing the risk of catastrophic wildfire while the reviews are pending. To this end, the counterpart regulations were drafted to expedite the informal Section 7 consultation process. The concurrence process for NLAA determinations has caused delays in implementation of critical projects and diverted resources from projects in greater need. The counterpart regulations may be utilized for proposed projects that support the NFP, such as hazardous fuels reduction, rehabilitation and restoration and maintenance of fire adapted ecosystems. The Final Rule for the counterpart regulations was published in the Federal Register on December 8, 2003, and became effective on January 7, 2004.

Attachment 1-1

Implementation of the counterpart regulations requires each action agency to develop an Alternative Consultation Agreement (ACA) with the Services. The BLM signed an ACA with the Services on March 3, 2004. Components of the ACA are: (1) A list or description of the staff positions within the agency that will have authority to make NLAA determinations; (2) a program for developing and maintaining the skills necessary within the agency to make NLAA determinations, including a jointly developed training program based on the needs of the action agencies; (3) provisions for incorporating new information and newly listed species or designated critical habitat in the agency's effects analysis on proposed actions; (4) provisions for the agency to maintain a list of NFP projects that receive NLAA determinations under the agreement; and (5) a mutually agreed upon program for monitoring and periodic program evaluations.

The ACA permits any BLM biologist, botanist or ecologist, who has completed the required training, to conduct Section 7 effects analyses and make determinations of effect for proposed actions that are NFP projects under the counterpart regulations. However, journey level biologists, botanists or ecologists are responsible for ensuring and documenting adequacy of the BE/BA with existing policy, and line officers are responsible for documenting compliance with the ESA and counterpart regulations. All biologists, ecologists, botanists and line officers (end users) who will use the counterpart regulations are required to be certified as having successfully completed the mandatory training. Training will be provided through a web-based interactive session, available through the internet from your computer work station around the beginning of May 2004.

A one-day training/orientation session for BLM State program leaders who have responsibility for Section 7 consultation was held March 24, 2004, in Phoenix, Arizona. This session was attended by BLM, FS, FWS and the National Marine Fisheries Service State/Regional personnel. The purpose of the session was to explain the roles and responsibilities of the agencies, ensure State/Regional personnel providing oversight understand the counterpart regulations and ACA, and train/certify end users attending the session. End users from Arizona were encouraged to attend to test the web-based training module in development.

The Alternative Consultation Agreement can be viewed at the following sites: <http://www.blm.gov/nhp/text/index.htm> or <http://www.blm.gov/nhp/index.html>, and the counterpart regulations can be viewed at <http://endangered.fws.gov/consultations/forestplan.html>.

Although this may represent new work for the BLM, it is anticipated that through proper implementation of the ACA, increased efficiencies in the consultation process will be realized. It is critical that BLM meet the conditions of the ACA and maintain a complete project record for NFP projects implemented under the counterpart regulations. Complete legal defensibility of our analysis and documentation is now a BLM responsibility.

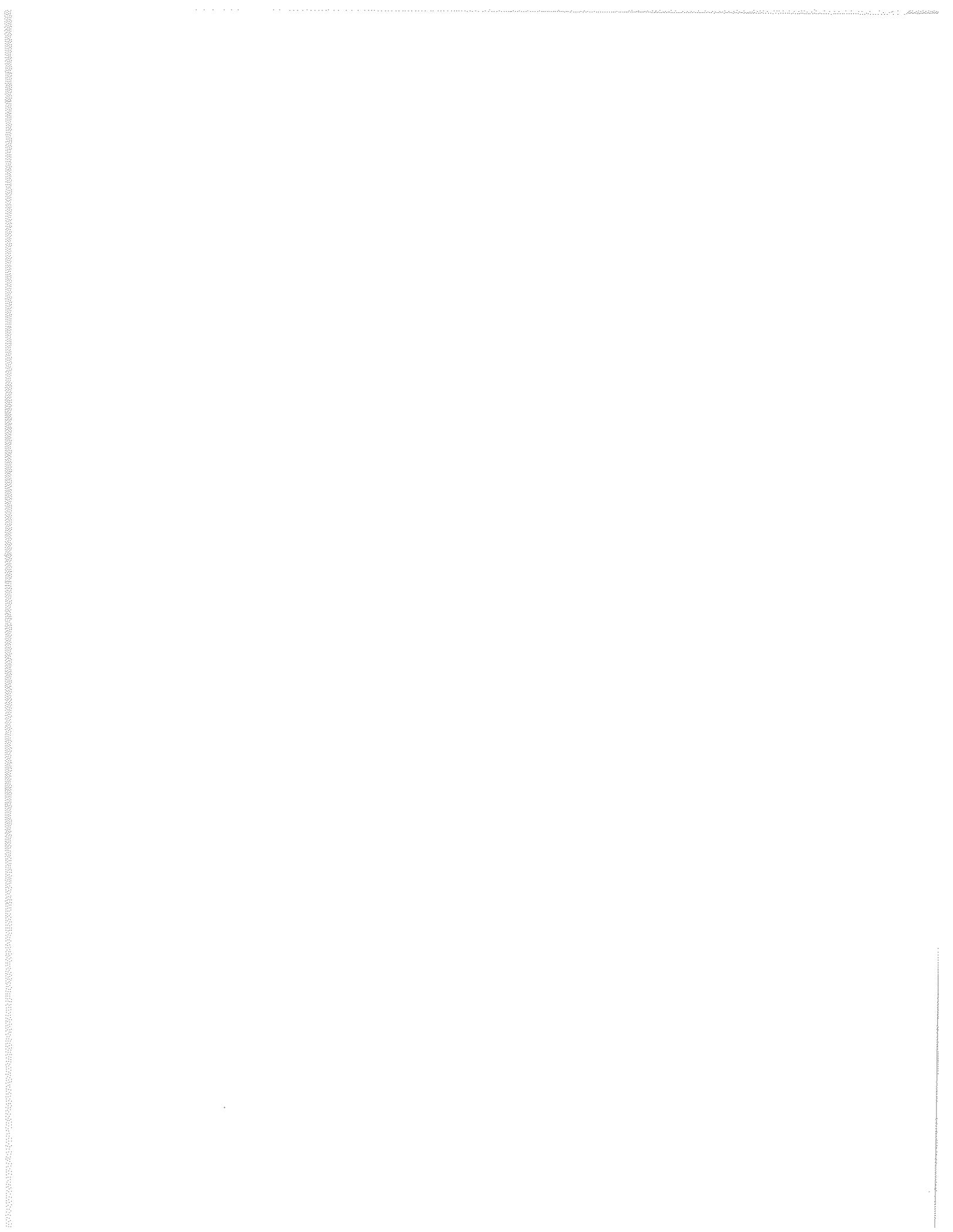
If you have any questions regarding the counterpart regulations or ACA, please contact Peggy Olwell, Senior T&E Specialist, Fish, Wildlife and Botany Group (WO-230) at (202) 452-7764.

Signed by:
Thomas H. Dyer
Acting Assistant Director
Renewable Resources and Planning

Authenticated by:
Barbara J. Brown
Policy & Records Group, WO-560

1 Attachment

1 – Alternative Consultation Agreement (See Websites)



Example of Optional Outline for Level 1 Action or Issue Elevation

Forest/District (Action Location): _____ Date: _____

Action Name: _____ Type of Activity: _____

I. Background:

II. Specific Issues Being Elevated:

A.

B.

III. Alternatives Recommended (If any):

A.

B.

C.

D.

IV. Enclosures:

V. Recommended Response Date From Level 2:

VI. Level 2 Team: Forward to:

VII. Level 1 Team:

1. /s/ _____

2. /s/ _____

3. /s/ _____

4. /s/ _____

VIII. Manager/Supervisor Comment. (If the elevation is at the request of the Manager or Supervisor.)

**Example of Optional Outline for
Level 2 Response to Level 1 Elevation**

Forest/District (Action Location): _____ Date:

Action Name: _____ Type of Activity:

I. Direction to Level 1 Team for Action/Issue Resolution:

II. Rationale for the Decision:

III. Level 2 Team signatures:

1. /s/ _____

2. /s/ _____

3. /s/ _____

4. /s/ _____

Column title	Explanation of Information requested
Project title and NEPA ID, if applicable	Name of project. Include agency NEPA identification code, if applicable. Include all Forest Service, BLM and NPS projects presented to the Level 1 Team. When projects were discussed, but did not receive further consideration by the Team (i.e. projects considered "no effect") and no consultation was conducted, the remaining columns are left blank.
Action agency ID	Name or agency code of office submitting the project
Project type	Brief description, such as: fuels reduction, fire management plan, trail construction, range allotment, timber sale, etc.
Species addressed	List all federal candidate, proposed and listed species and critical habitats addressed in the consultation documents.
If batched, # of individual actions	If the consultation represents a compilation of several actions, give the number of total activities.
If programmatic, "X"	If the consultation represents a programmatic effort, check "X"
Level 1 Review (Y or N)	Was the project reviewed and discussed by the Level 1 Team?
Date BA Accepted	The date when the FWS and the action agency agree that the BA (or similar document) has sufficient information for FWS to prepare their analysis.
Date of NLAA Concurrence	The date on the letter from FWS with their concurrence with Not Likely to Adversely Affect determination of the action agency.
Date of Biological Opinion	The date on the letter from FWS with their Biological Opinion.