

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