

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