

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