UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

Robert Abbey, Director
Bureau of Land Management,
1849 C Street NW, Room 5565
Washington, DC 20240

OCT 1 2011

Dear Mr. Abbey:

The National Marine Fisheries Service (NMFS) entered into an Alternative Consultation Agreement (ACA) for Endangered Species Act of 1973 counterpart regulations (50 CFR 402.30 to 402.34) for National Fire Plan projects with Bureau of Land Management (BLM) and Forest Service on March 4, 2004. This ACA included provisions for oversight of the BLM's implementation through periodic review of the determinations made under the authority of the counterpart regulations. NMFS has completed its review of the BLM's activities during the second, third, and fourth years of implementation (2005-2008). The attached report summarizes the general requirements of the counterpart regulations and their ACA. The report describes the approach used by NMFS to evaluate the BLM biological assessment and documents our conclusion of the evaluation.

In a letter received on June 30, 2011, the BLM requested termination of the ACA following a cursory review of the 2008-2011 biological assessments. Based on the results of this review of 2005-2008 projects, the relatively limited use of the counterpart regulations, the BLM's cursory assessment of the 2008-2011 documents, and the BLM's request to terminate the agreement, NMFS and the BLM agree to terminate the ACA.

Please direct any questions regarding this issue to Angela Somma, Chief, Endangered Species Division, at (301) 427-8474.

Sincerely,

James H. Lecky,
Director,
Office of Protected Resources

Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan

Program Review: 2005-2008

National Marine Fisheries Service and Bureau of Land Management

1.0. Introduction

1.1. The Counterpart Regulations for National Fire Plan Projects

Section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*; hereafter ESA) requires federal agencies, in consultation with and with the assistance of the Secretaries of Commerce and Interior, to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify designated critical habitat. The principles, practices, and protocols for section 7 consultations are identified in the ESA, and regulations promulgated in 1986 for implementing section 7 (50 CFR. Part 402), further expound the procedural and substantive requirements for consultation.

On December 8, 2003, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; jointly, the Services) in cooperation with the Forest Service (USFS), Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and National Park Service (NPS), issued joint counterpart regulations for section 7 consultation (Federal Register, pages 68254- 68265). Codified in 50 CFR part 402 subpart C, the counterpart regulations provide an optional alternative to the standard section 7 consultation process described in subparts A and B, and were developed specifically for agency projects that authorize, fund, or carry out actions that support the National Fire Plan. The National Fire Plan, part of President Bush's 2002 Healthy Forests Initiative, is an interagency strategy for reducing the risk of catastrophic wildland fires and restoring fire-adapted ecosystems. The intent of the counterpart regulations is to eliminate the need to obtain written concurrence from the Services following informal consultation for those National Fire Plan actions that the action agency determines are "not likely to adversely affect (NLAA)" any listed species or designated critical habitat.

According to the counterpart regulations for National Fire Plan activities, any of the participating Action Agencies may make NLAA determinations for National Fire Plan projects after entering into an Alternative Consultation Agreement (ACA) with the Services, and upon implementing the provisions of the ACA. Additional details on the procedures and roles of the agencies are outlined in the ACA, including specific requirements for reporting, training and execution of self-certification, incorporating new information in Agency decisions, and conducting periodic program monitoring of the use of the counterpart regulations. Presently, four of the five Action Agencies that participated in the development of counterpart regulations for National Fire Plan projects have signed ACAs. The Services signed joint ACAs with the USFS and BLM (together, participating agencies) in March 2004, BIA in July 2004, and the NPS in July 2005. This review was limited to the BLM. A review of USFS projects was completed concurrently.

The BIA and NPS have not reported any trained staff or projects conducted under the counterpart regulations.

1.2. Principles, Practices and Protocols of Section 7 Determinations

The ESA and its implementing regulations form the foundation for agencies to insure their actions are not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify designated critical habitat. Additional guidance and interagency policy for meeting the procedural and substantive requirements of section 7 are established within a variety of documents, including the ACAs established under the counterpart regulations, the Consultation Handbook (FWS and NMFS 1998), the National Fire Plan web-based counterpart regulations training, Interagency Policy on Information Standards of the ESA (59 FR 166, 34271-34274; July 1, 1994), Information Quality Act (Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 [Public Law 106-554; H.R. 5658]), numerous judicial decisions resulting from litigation, and the Administrative Procedure Act (5 U.S.C. 706; hereafter APA).

Section 7(a)(2) of the ESA requires federal agencies, in consultation with and with the assistance of the Services, to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify designated critical habitat. As part of the consultation process, Federal agencies determine if their actions are likely to affect listed species or critical habitat. The regulations at 50 CFR 402 provide an opportunity to complete the section 7(a)(2) consultation obligations if the action is "not likely to adversely affect" through a process defined as "informal consultation." The consultation regulations at 50 CFR 402.13 describe how Federal action agencies request concurrence from the Services on their determinations of "not likely to adversely affect." If the Services concur, consultation is concluded. The Counterpart Regulations for Implementing the National Fire Plan at 50 CFR part 402 subpart C contain their own unique procedural requirements, which include the requirements for entering into an ACA to make "may effect, not likely to adversely affect" determinations on National Fire Plan projects without the Services' concurrence. Thus, the Action Agency has the final responsibility for determining whether its actions are not likely to adversely affect threatened and endangered species or their designated critical habitat, and ensuring that the conclusions reached in reviewing the potential effects of National Fire Plan projects represent reasoned reflections of the evidence available. In order to demonstrate that an action is not likely to adversely affect listed species the reasons and evidence provided must include a clear description: 1) of the federal action, 2) of the action's direct and indirect environmental effects (including effects of interrelated and interdependent actions), 3) of the specific area that may be affected by the action (the Action Area), 4) of the listed species and their designated critical habitat. Each description in each section must include the best scientific and commercial data available. With that information, an assessment of the overlap between potential effects and the listed species and designated critical habitat (listed resources) is made such that exposure is unlikely or that responses to exposure are likely to be insignificant, discountable, or wholly beneficial. Management strategies may be incorporated into the federal action to minimize or

eliminate the adverse effects to listed species and their designated critical habitat by either reducing or eliminating exposure.

During informal consultation, the conclusion that a project is not likely to adversely affect a listed species is appropriate when effects on listed species are expected to be discountable, insignificant, or completely beneficial. Completely beneficial effects are contemporaneous positive effects without any adverse effects to the species. Insignificant effects relate to the scope of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Where uncertainty relative to the nature or likelihood of the effects exists, the benefit of the doubt should be given to the species in order to minimize the risk of significant consequences due to erroneous conclusions.

1.3. Purpose of This Report

This report reviews the BLM use of the ESA counterpart regulations for National Fire Plan activities during years 2005-2008 of implementation. The key to this review is NMFS' evaluation of the biological assessment (BA) produced by the BLM to support their determination made under the counterpart regulations. This determines whether the documentation of the decisions the BLM made under the counterpart regulations between 2005 and 2008 are consistent with the best scientific and commercial data.

This report presents the results of NMFS' evaluation. The document is structured as follows. Section 2 provides a brief summary of the reporting requirements established in the counterpart regulations and ACAs, and the 2005-2008 data on Action Agency use of the regulations. Section 3 follows with a detailed description of the approach used for evaluating the BA prepared by the BLM, and summarizes results of the evaluation. Section 4 provides a discussion of the results of this review and recommendations for future use of the regulations.

2.0. Approach to the Program Review

2.1. Use of the Counterpart Regulations

Information for this review of the alternative consultation program was obtained through correspondence with the BLM and their field units. The ACA established reporting and monitoring requirements for notifying NMFS' Director of Protected Resources, in writing, for each BLM subunit that has fulfilled the training requirements and intends to implement the counterpart regulations. Information was also provided by the BLM in support of the annual reporting requirements established within their ACA.

The BLM completed an ACA with the NMFS in March 2004, and began training and using the alternative consultation process in summer 2004. By February 28, 2005, 423 BLM personnel were certified to use the alternative consultation process. From March 2005 through February 2008, an additional 17 BLM personnel were certified to use the alternative consultation process (Table 1). Certified personnel represent staff from all regions except Region 10, Alaska Region.

Table 1. Bureau of Land Management Personnel Certified March 1, 2004 - February 28, 2008

Year	Total Certified
2004-2005	423
2005-2006	15
2006-2007	0
2007-Feb 2008	2
Total	440

Consistent with section E.8. of the ACA, each subunit that has fulfilled the training requirements notifies NMFS' Director of Protected Resources in writing before implementing the counterpart regulations. In addition, the BLM annually provides NMFS with a list of the personnel who have completed the training and passed the certification exam. Each subunit that has fulfilled the training requirements must notify the NMFS' Director of Protected Resources in Silver Spring, Maryland, in writing, prior to implementing the counterpart regulation.

2.2. Number and Description of Projects Conducted

The BLM conducted three projects with listed species and designated critical habitat under the jurisdiction of NMFS using the counterpart regulations in the first year of the ACA. Between 2005 and 2008, the BLM made one NLAA determination affecting Southern Oregon/Northern California Coast coho salmon, California Coastal Chinook salmon, and Northern California steelhead. That project proposed the silvicultural thinning of 67 acres within the Lacks Creek Management Area, within the Redwood Creek watershed.

3.0. Evaluation Results

3.1. Approach

Appendix 3 of the ACA laid out the six sections each BA must cover. Those six sections are 1) proposed action, 2) spatial and temporal patterns of effects, 3) action area, 4) threatened and endangered species present in the action area, 5) exposure of listed species to potential extent of effects, and 6) conclusions based on the best available scientific and commercial information available.

To evaluate the BLM's decision under the counterpart regulations, NMFS looked for the stated explanation of the action's potential direct and indirect effects on the environment, and the listed species and their designated critical habitat. NMFS began by reading through the BA's analysis to identify the structure of the explanation, the conclusion(s), and the reasons and evidence offered to support the conclusion.

As part of NMFS' evaluation of the document, NMFS restated the key arguments in the BA/BE that were used to conclude the action was "not likely to adversely affect" listed

species or their critical habitat. In reconstructing the analysis, NMFS gave the author the benefit of the doubt when the structure of the analysis was unclear, by reconstructing the analysis as strongly as possible while maintaining consistency with the author's perceived intent.

Once the BLM's analysis was reconstructed, NMFS evaluated whether the premises used to reach their conclusion met the following four basic criteria of a strong argument:

1. an argument should only offer reasons and evidence that are relevant to the truth of the conclusion and should not omit relevant reasons or evidence;
2. the premises are acceptable, believable, warranted;
3. the premises together constitute sufficient grounds for the truth of the conclusion; and
4. the argument provides an effective rebuttal to all reasonable challenges that would lead to alternative conclusions (Damer 2001).

NMFS' evaluations applied the fourth criterion –the rebuttal criterion—primarily by considering the degree to which the biological assessment applied or responded to best available information that might argue against the BA's conclusions. NMFS' evaluations were based solely on the information contained in the BA provided by the BLM. NMFS assumed the BA provided a summary of the information sufficient to support its conclusions. The results of NMFS' evaluation are summarized below.

3.2. Results

Table 2 summarizes the results of NMFS' evaluation of the BLM BA submitted pursuant to the counterpart regulations completed during the period of March 2005 through February 2008. The bulk of NMFS' evaluation focused on the six sections outlined in Appendix 3 of the ACA and is described in detail in the following sections. For the review of 2004 fire season projects, all of the projects contained a procedural checklist. In 2005-07, the lone BA also contained the procedural checklist as required under Appendix 3 of the ACA. The purpose of the procedural checklist is to document that line offices evaluating projects pursuant to the counterpart regulations have insured the conclusion reached in the BA is not arbitrary or capricious.

The findings for the BA NMFS evaluated are summarized for each of the six categories below.

Table 2. Summary of NMFS' Review of the BA Submitted by BLM Pursuant to the Counterpart Regulations – Years Two through Four (March 2005 – February 2008).

Product/Criterion	Yes	No
Procedural Checklist (Appendix 3 of ACA) was submitted with BA	1	0
1. Identifies proposed action clearly (includes a description of the various components of the action)	1	0
2. Identifies spatial and temporal patterns of the action's direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent actions	0	1

3. Identifies Action Area clearly (based on information in 2.)	0	1
4. Identifies all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action (includes a description of spatial, temporal, biological characteristics and constituent habitat elements appropriate to the project assessment)	0	1
5. Compares the distribution of potential effects (identified in 2) with the threatened and endangered species and designated critical habitat (identified in 4) and establishes, using the best scientific and commercial data available, that (a) exposure is improbable or (b) if exposure is likely, responses are insignificant, discountable, or wholly beneficial	0	1
6. Determination is based on best available scientific and commercial information	0	1

1. Identifies proposed action clearly (includes a description of the various components of the action)

NMFS' evaluation generally accepted that the project description (section one) was complete unless the reader was unable to understand the action at the simplest level. The BA adequately described the timber hauling and silviculture that would take place.

2. Identifies spatial and temporal patterns of the action's direct and indirect environmental effects, including direct and indirect effects of interrelated and interdependent actions

The BA did not contain an explicit description of the action's direct and indirect effects sufficient to delineate spatial and temporal patterns of effects on the environment. That is, the specific stressors and the anticipated spatial and temporal patterns of the stressor must be clearly described in order to complete this criterion. A critical component to this description is a schedule of the activities that composed the action, a statement explaining when the effects of those actions would be expected to reach adjacent waterways, the extent downstream those effects may affect species or their habitat, the duration of those effects to listed species and their critical habitat, and any anticipated latent effects. In this project, potential contaminants that might reach the water would be sediment, chemicals, or nutrients. This information informs the delineation of the Action Area and provides the basis for the remainder of the assessment.

3. Identifies Action Area clearly (based on information in 2.)

The BA did not mention the concept of an action area. The assessment should have described the action's physical, chemical, and biotic effects (stressors) across the landscape as they move, through direct and indirect pathways, and over time to identify the spatial and temporal scale of the action area. Consequently, based on the analysis of amount, extent, and duration of potential effects, the BA could not identify the action area (Table 2). The two are inherently intertwined, and form the foundation for subsequent analyses of the environmental baseline, listed species and designated critical habitat, and effects of the action on listed species.

For a project such as this one, the action area would begin at the project location, but the size of the action area would ultimately depend on the amount of sediment, nutrients, or contaminants that could potentially be introduced to nearby streams, how far downstream it could move, and over what time period effects may occur.

4. Identifies all threatened and endangered species and any designated critical habitat that may be exposed to the proposed action (includes a description of spatial, temporal, biological characteristics and constituent habitat elements appropriate to the project assessment)

The BA identified three species of listed salmonids. The BA never made the link between identifying these species and whether they would all be in the action area. Therefore, NMFS is left to assume that these three species may be affected by the action. In the 2004 review, BLM did not sufficiently analyze critical habitat in its projects. In this review, the BA noted the presence and location of critical habitat. The BA used the Matrix of Pathways and Indicators (habitat indicators; NMFS 1996) to identify the potential indirect effects to listed salmonids.

5. Compares the distribution of potential effects (identified in 3.2.2) with the threatened and endangered species and designated critical habitat (identified in 3.2.4) and establishes, using the best scientific and commercial data available, that (a) likelihood of exposure is discountable or (b) if exposure is likely, responses are insignificant or wholly beneficial

The effects analysis in this BA did a good job of describing the likely pathways different activities could affect the habitat indicators identified in NMFS (1996). Largely, the assessment could not satisfy the requirements of this criterion if the action area (and the spatial and temporal description of anticipated effects of the action; 3.2.2 and 3.2.3.) was not clearly described. Absent this information, it was impossible for NMFS to determine the overlap of probable effects (their duration, intensity, frequency, etc.) with the species and their critical habitat. Compounding the limitations of this BA's effects analysis, there were no references to justify the risks of impact as described. Many of the habitat indicator effects determinations were reached by concluding there was no causal mechanism for the contaminants to reach the river. Overland flow and erosion are common results following silvicultural operations. Precipitation is sufficient to mobilize sediment, which is one of the reasons slash is left behind (Megahan *et al.* 1991, Schuler and Briggs 2000), which is prescribed as a mitigation measure in this project. There appears to be potential for the removal of up to 50% of trees per acre to result in increased levels of sediment running off of the land, particularly if there is the potential for channelized flow. A more detailed effects analysis, coupled with the use of primary literature would provide better support for the conclusions reached and ultimately, the ESA determination made.

The project area is half a mile uphill from critical habitat for all three salmonids species and there are two ephemeral streams that when flowing, would enter critical habitat. However, the effects analysis didn't address critical habitat or primary constituent elements. Conclusions, without the support of references, were reached for various

habitat indicators, but there was no description of critical habitat to identify how each habitat indicator was important to salmonid critical habitat.

6. Determination is based on best available scientific and commercial information

In NMFS' evaluation of the BA, citations were only adequate in the status of the species section. In this section, they were not only used to describe the habitat preferences and natural history, but also to detail the status of the local population. Typically, along with the species section, the action area, baseline, and effects analysis also rely heavily on citations to provide support for those sections. Because there was no action area section, the BA did not describe the downstream amount or extent of effects. In many cases, citations of monitoring activities of previous silvicultural projects can inform the anticipated extent of effects and define the action area. In the baseline section, only two citations were provided, with one being used multiple times throughout the section and the other citation being used only once. Then, in the effects analysis, not a single citation was provided.

Ultimately in a BA, citations are important to establish the background conditions, but most importantly to analyze the likely effects of the action being conducted in an area with those background conditions. Based on the analysis, it appears activities in Unit #3 pose the greatest threat to listed species and their critical habitat. In the analysis, it would be appropriate to cite studies that have monitored the effects of similar actions in similar environments to document why this project would be not likely to adversely affect listed salmonids or their critical habitat.

A large body of evidence is available to establish sufficient reasoning to support assessments on the effects of such activities as controlled fire and timber harvest, including published studies, an agency's own gray literature and experiences from similar actions. In addition, although NMFS did not score the assessments based on this criterion, evaluations are stronger when they compare and contrast the available evidence, including evidence that supports contradictory claims, and demonstrate why alternative conclusions are not as strong as the conclusion that is advanced by the assessment (e.g., the NLAA conclusion). The evaluation of available counter-evidence and its subsequent rational dismissal provides an effective rebuttal to reasonable challenges that could lead to alternative conclusions, and further establishes that the conclusion reached had the greatest support in the best scientific and commercial data available. Absent supporting evidence, NMFS considered many of the premises of the arguments insufficient to support the conclusion as presented.

4.0. Discussion

4.1. Documenting Decisions Made from March 2005 to February 2008

As required by the ACA, the lone BA written between March 2005 and February 2008 and any supporting documents that were supplied by the BLM were examined. Based on the evaluation, the BA submitted did not use the best scientific and commercial data available.

During the first year, the number of decisions utilizing the counterpart regulations was considerably lower (three projects) than had been expected. Between 2005 and 2008, the counterpart regulations were used only once. Much like the evaluations following the first year of the ACA, this project failed to meet the requirements of criterion 2 through 6 as shown in Table 2.

As occurred during the first year, two frequently missed criteria were the identification of the action area and the determination of likelihood of exposure to the effects of the proposed action. The BA did not address potential downstream or other effects. Without fully identifying the action area and any likelihood of exposure of listed species, it is unlikely that all potential impacts to listed species and their habitat will be fully identified.

It is likely that the suggested recommendations of increased training and monitoring, as an outcome of the first year review, would improve the quality of the BA/BEs received. However, because that report was not released until January 18, 2008, the BLM was unable to implement the recommendations in time to affect the quality of the projects during this three year review. It is therefore not surprising that the result of the review of the project implemented between 2005 and 2008 was the same as the results of the 2004 projects.

In meetings between the participating agencies, we agreed that the ACA checklist works in step-wise fashion, where each criterion informs the next criterion, so if one is inadequate, the entire BA/BE will not be scored well. For instance, for every project NMFS has reviewed since 2004, the BA/BEs have failed to identify the spatial and temporal patterns of the direct and indirect effects downstream. Without identifying this aspect of the project successfully, it is not possible for the BLM to determine the size of the action area or the species present. For a BA to provide a persuasive rationale as to why a particular project warranted an NLAA determination, it needs to adequately address all of the categories that are identified in the short checklists that were included in the ACA.

Relevant citations were lacking from the BA. The purpose of the BA is to present relevant data and analysis to reach a determination(s) of effect to listed species and critical habitat, and to logically and transparently demonstrate how the determination is made. A large body of evidence is available to establish sufficient reasoning to support assessments on the effects of timber harvest, including published studies, agency gray literature, and the observations of field biologists from similar actions. Analyses are made stronger when they compare and contrast the available evidence including evidence that supports contradictory claims, and articulate why alternative conclusions are not as strong as the conclusion that is advanced by the assessment (in this case, the NLAA determination). Although NMFS did not rate the BA as to whether it evaluated contradictory data, they did explicitly examine the BA for its use of supporting evidence, and found many of the premises of its argument insufficient to support the conclusion as presented because the BLM failed to use and cite authoritative data in the assessment.

The results of the first year review indicated that BLM staff may have been transitioning from the standard consultation process to the new independent process established by the counterpart regulations. But the results through February 2008 indicate that the BLM has made no improvements through four years of training and implementation of the counterpart regulations.

After reviewing the documents produced during the first year compared with that from the following three years, the same shortcomings are present in both analyses. In all four years, every BA/BE failed to adequately fulfill the requirements of categories 2 through 6 of the table in Appendix 3 of the ACA.

The frequency with which the counterpart regulations were used also decreased. Prior to implementing the counterpart regulations, the BLM anticipated using the ACA many times each year for projects affecting both Fish and Wildlife Service and NMFS species. In 2004, the BLM utilized the counterpart regulations for only three projects affecting NMFS' species. In 2005 through 2008, the BLM used the counterpart regulations for only one project.

5.0. Conclusions

The ACA states that the BLM will consider the following standards in assessing the effects of National Fire Plan projects on individuals of a listed species or constituent elements of critical habitat: (1) the direct and indirect effects of the proposed action, (2) the effects of interrelated and interdependent actions, (3) the environmental baseline, and (4) whether the effects are insignificant, discountable, wholly beneficial, or adverse. In so doing, the BLM must consider the best scientific and commercial data available and must provide a reasoned explanation for its conclusions (Section F, Alternative Consultation Agreements).

As is outlined in the Discussion section (4.0 and 4.1), the BLM failed to fulfill the standards above. Furthermore, the BLM conducted a cursory review of the 2008-2011 BAs to evaluate whether there were improvements during those years and determined there had not been significant improvements. Based on the results of this second review, the relatively limited use of the counterpart regulations, the BLM's cursory assessment of the 2008-2011 documents, and the BLM's request to terminate the agreement, NMFS and the BLM agree to terminate the ACA.

6.0 Literature Cited

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