



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

Hank Kashdan, Associate Chief
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OCT 1 2011

Dear Mr. Kashdan:

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 and Forest Service (USFS) on March 4, 2004. This ACA included provisions for oversight of the USFS's implementation through periodic review of the determinations made under the authority of the counterpart regulations. NMFS has completed its review of the USFS'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 USFS biological assessments and documents our conclusion of the evaluation.

In a letter received on June 8, 2011, the USFS determined it would be appropriate to revoke 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 USFS' cursory assessment of the 2008-2011 documents, and the USFS' recommendation to revoke the agreement, NMFS and the USFS 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 U.S. Forest Service

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. The ACA between the USFS, NMFS, and FWS is attached. This review was limited to the

USFS. A review of BLM projects will be conducted separately. The BIA and NPS have not reported having trained any staff or conducting projects 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 USFS 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 decision documents (biological assessments or evaluations; BAs/BEs) produced by the USFS to support their determinations made under the counterpart regulations. This determines whether the documentation of the decisions the USFS 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 individual project decision documents (BAs/BEs) prepared by the USFS, 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 USFS and their field units. The ACA established reporting and monitoring requirements for notifying NMFS' Director of Protected Resources, in writing, for each USFS subunit that has fulfilled the training requirements and intends to implement the counterpart regulations. Information was also provided by the USFS in support of the annual reporting requirements established within their ACA.

The USFS 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, 716 USFS personnel were certified to use the alternative consultation process. From March 2005 through February 2008, an additional 208 USFS 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. Forest Service Personnel Certified March 1, 2005 - February 28, 2008

Year	Total Certified
2004-2005	716
2005-2006	113
2006-2007	70
2007-Feb 2008	25
Total	924

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 Forest Service 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 USFS conducted seven 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, an additional 17 projects potentially affecting NMFS' species were conducted. In the past three years, the USFS made NLAA determinations for these projects, which affected six separate species (Table 2). The three NMFS species most commonly involved in Counterpart Regulations projects were the Snake River steelhead, Southern Oregon/Northern California Coast coho salmon, and Snake River spring/summer Chinook salmon (Table 3). Of the 17 projects, 76% used mechanical fuels treatment, 76% used prescribed fire treatments, 12% consisted of only road improvements, and 6% used only herbicide treatment.

Table 2: Statistics on 2005-2008 Data

Forest Service Section 7 Counterpart Regulations Projects	
Total number of different T&E species involved	6
Number of projects with only one T&E species	11
Total number of National Forests using the Section 7 Counterpart Regulations	10

Table 3: T&E Species for which a NLAA Determination was made for Forest Service Counterpart Regulations Projects, 2005-2008.

TEP Species for Which a NLAA Determination Was Made	Number of Projects Made
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Snake River steelhead	8
Southern Oregon/Northern California Coast coho salmon	7
Snake River spring/summer Chinook salmon	6
Snake River fall Chinook salmon	3
Snake River sockeye salmon	3
Mid Columbia River steelhead	2

3.0. Evaluation Results

3.1. Approach

Appendix 3 of the ACA laid out the six sections each BA/BE 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 USFS' decisions 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/BE's analyses 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 each document, NMFS restated the key arguments in the BA/BE that were used to conclude each 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. By analyzing each BA/BE in this fashion, NMFS was able to maintain consistency of reviews of the USFS' decisions under the counterpart regulations.

Once the USFS' 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 a biological assessment applied or responded to best available information that might argue against the BAS'/BEs' conclusions. NMFS' evaluations were based solely on the information contained in the BAS' BEs provided by the USFS. NMFS assumed the BAS' BEs provided a summary of the information

sufficient to support its conclusions. The results of NMFS' evaluation are summarized below.

3.2. Results

Table 4 summarizes the results of NMFS' evaluation of the 17 USFS BAs submitted pursuant to the counterpart regulations from 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 this review, 8 of the 17 BAs/BEs did not contain the procedural checklist as required under Appendix 3 of the ACA, which is down from 90% success in 2004.

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

Table 4. Summary of NMFS' Review of BAs Submitted by USFS 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	9	8
1. Identifies proposed action clearly (includes a description of the various components of the action)	9	8
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	17
3. Identifies Action Area clearly (based on information in Criteria 2.)	0	17
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	17
5. Compares the distribution of potential effects (identified in Criteria 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	17
6. Determination is based on best available scientific and commercial information	0	17

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

NMFS' evaluation generally accepted that the project descriptions (section one) were complete unless the reader was unable to understand the action at the simplest level. If, for example, NMFS could tell that silviculture, road maintenance, and prescribed burning would take place, that was satisfactory. But if the analysis of effects includes an action not previously introduced, NMFS could not be sure if the BA/BE discussed all activities that would take place. Likewise, several projects referred the reader to a separate

document for information on the proposed action, but the BA/BE should be a stand alone document.

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

An important aspect of this section that was consistently not addressed was whether there were actions that might be interrelated or interdependent to the proposed project. Even if the appropriate conclusion is that there are no interrelated or interdependent actions, each BA/BE should contain an explicit statement to this effect. As a subsection of criteria 2, only two BAs addressed interrelated and interdependent effects of an action. And in one of those cases, road maintenance, which was considered interrelated or interdependent, should have been considered part of the action because the action could not take place without it. At least three BAs mentioned that the project was part of a larger plan, suggesting that interrelated or interdependent actions should have been explored. The other 12 projects did not state whether interrelated or interdependent actions were taking place, but there was no indication within the document suggesting that there were any. In the future, a simple statement acknowledging that the Forest Service had considered the potential for interrelated and interdependent actions, but found none, would be sufficient.

None of the 17 BAs contained 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 category. 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, and any anticipated latent effects. 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.)

Sixteen BAs mentioned the concept of an action area, effects area, project location, watershed description, or defined a particular geographic area as the action area (two made no mention of the action area), but none mentioned how this area was delineated (see previous section 3.2.2). The assessments 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 information of the amount, extent, and duration of effects, no BAs satisfied the requirements of the Action Area category (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.

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)

None of the BAs completely satisfied the requirements of this category. All BAs likely identified the appropriate listed species under NMFS' jurisdiction at the basin scale, although the specific use and life stages that would occur in the action area were never mentioned. In some cases, the author noted that the upstream extent of other listed species was downstream of where the action would take place, but without an accurate description of the downstream extent of effects and clear definition of the action area (categories 2 and 3), there is no way for USFS or NMFS to be sure those listed species would not be affected. And in some cases, the listed species were so far downstream that it was equally unclear why the action would have any effect on them.

Following the 2004 review, NMFS noted that the first year analyses did not address critical habitat, and projects completed between 2005 and 2008 handle critical habitat in a similar fashion. Often, an analysis of habitat was conducted using the matrix of pathways and indicators (MPI), which are habitat features important to various life stages of salmonids. The MPI is a general tool developed by NMFS to assist other action agencies, but NMFS developed them with the knowledge that NMFS' ESA experts would review the action agency's determinations afterwards to identify any areas where the MPI was unable to specifically address effects to the listed species or their critical habitat. With the USFS conducting these consultations without NMFS' concurrence, the analysis conducted by their biologists needs to be as thorough and accurate as an analysis conducted by NMFS' biologists, which would require them to address specifically, direct, indirect, and cumulative impacts to listed species or their critical habitat. But only one BA actually attempted to show which habitat features represented which primary constituent elements (PCEs) for salmonid critical habitat. PCEs are any habitat feature that could possibly affect a salmon's ability to feed, reproduce, rear, etc. But the MPI and PCEs are not interchangeable and even in the one BA that attempted to identify the habitat features that made up a PCE, some PCEs were left undescribed. And the description of other PCEs failed to analyze all of the habitat indicators that were relevant to making a determination of the effects to critical habitat.

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

Most assessments relied on arguments that exposure to potential effects of the action is discountable. Frequently, the arguments were not well articulated. Largely, an assessment could not satisfy the requirements of this category 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. In many cases, latent or delayed effects from the project were not addressed, such as long-term erosion from streamside road improvements. In other cases, potential direct effects were not addressed. For instance, salmonids are often

adversely affected by increased turbidity in the water as it causes damage to their gills, disrupts respiration, and changes vulnerability to predation (Servizi 1990, Newcombe and Jensen 1996, Gregory and Levings 1998), but the USFS analyses instead analyzed indirect effects of increased sediment and turbidity such as increased cobble embeddedness, reduced reproductive success, reduction in food resources (Crouse *et al.* 1981, Lisle and Lewis 1992).

The issue of greatest concern was that due to incomplete analyses, NMFS believed as many as five projects may have effects to listed species beyond the NLAA threshold. Of less concern were the two projects that appeared more likely to have “no effect” on listed species. The other 10 projects did not adequately explain the amount, downstream extent, or duration of effects.

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

In NMFS’ evaluation of all 17 BAs, the most consistent problem was explaining the extent of effects downstream, which led to the action area being unclear or poorly established, and ultimately resulted in the effects analysis not identifying the likelihood of exposure or the response of listed species to that exposure. In some cases, when fish were 20 miles downstream, it was unclear why the USFS believed the project may affect salmonids and in other cases, why a culvert replacement in fish bearing systems would not adversely affect listed fish. Basing the BA/BEs on thoroughly cited scientific information would have alleviated much of this uncertainty. Most of the assessments contained very limited citations or supporting evidence on species abundances, population trends, and distribution; effectiveness of BMPs; and the conclusions reached in the effects analysis. In a few instances, the effects analyses contained no citations at all, others contained only citations to other BAs, internal gray literature, or a couple of papers about buffer strips, while only one, the Meadows Slope Project, provided sufficient citations in the effects analysis to understand the effects of the action. And even in the case of the Meadows Slope project, a lack of citations used to establish the downstream extent of effects, the action area, and the species present confounded the actual analysis to the species. As presented, many of the BAs did not present information to explain why specific riparian reserves, buffer strips and best management practices were proposed and anticipated to be effective in the circumstances associated with the particular project.

In five of the BAs, information in the effects analyses was contradictory, raising the potential for other inaccuracies in the effects analysis and conclusions, given the lack of references already discussed. The most common contradiction was to state, without any supporting references, that erosion would not lead to increased sediment and turbidity and then when discussing nutrients, to provide citations stating that erosion would lead to increased nutrients running off of recently harvested land. The nutrients would clearly be carried in soil, which would actually cause an increase in both nutrients and sediment and turbidity. In addition to these effects and potentially other effects not being considered, the other problem with these contradictions is that one potential effect of the project was

not considered when reaching a determination about the effects of the project. Overlooking these effects may have led to the wrong conclusion in the BA.

In three other BAs, the effects of the proposed action were determined to be unlikely to adversely affect listed salmonids, but based on the description of the proposed actions, those conclusions appear inappropriate. In one case, the action was split into two projects, a mine reclamation project and a road improvement project, so consultation inappropriately only occurred on the one portion of the project while the other portion was analyzed under the ACA. In another project, herbicides were used adjacent to fish-bearing systems, and the BMPs used in the BA/BE are the same as those used in every other herbicide consultation that is “likely to adversely affect” listed species. And another project looked at culvert replacements in fish-bearing habitat and determined these activities were not likely to adversely affect salmonids. Still two other projects analyzed the effects of the project against the effects of catastrophic wildfires and determined that the projects would be beneficial.

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. BA/BEs Documenting Decisions Made from March 2005 to February 2008, of Counterpart Regulations Use

As required by the ACA, the BAs/BEs written between March 2005 and February 2008 and any supporting documents that were supplied by the USFS were examined. Based on the evaluations, none of the 17 BAs/BEs submitted could be confirmed to have used the best scientific and commercial data available.

During the first year, the number of decisions utilizing the counterpart regulations was considerably lower than had been expected. Similar use of the counterpart regulations occurred during 2005 (4) through 2006 (11), but they were hardly utilized at all in 2007 (1) or 2008 (1). Much like the evaluations following the first year of the ACA, all of the projects evaluated from the past three years failed to meet the requirements of categories 2 through 6. Additionally, while the first year’s projects all provided adequate proposed action sections and only one failed to provide the ACA Appendix 3 check list, during the

past three years, approximately half of the projects failed to form an appropriate proposed action section or provide the checklist (Table 4).

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. Several BA/BEs described only the project footprint and did not address potential downstream or other effects. Others provided only a generalized location such as Township, Range and Section information. And the only BAs/BEs that described the overlap of species with the action area were projects that would directly affect fish whether by driving through a stream or by replacing culverts. 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.

The process of delineating the action area, and the rationale upon which that delineation is based, are necessary preliminary steps to the subsequent evaluation of potential effects of the action on listed species and/or their designated critical habitat. The delineation of the action area determines what listed species and critical habitat need to be evaluated in the BA/BE, and what actions and conditions need to be evaluated in the environmental baseline. By not properly delineating the action area, some BA/BEs may not have identified all of the species or critical habitat that could be affected by a proposed action.

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 USFS 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 results of the review of projects between 2005 and 2008 were 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, there is no way for the USFS to determine the size of the action area or the species present.

For a BA/BE to provide a persuasive rationale as to why a particular project warranted an NLAA determination, it needs to meet all the categories that are identified in the short checklists that were included in the ACA. Not only does this necessitate clearly identifying the action area and the rationale for that action area, but also the components of a section 7 evaluation, including interrelated and interdependent actions, and direct and indirect effects.

Relevant citations were lacking from every BA/BE analyzed by NMFS. The purpose of the BA/BE 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 such activities as controlled fire and 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 conclusion). Although NMFS did not rate the BA/BEs as to whether they evaluated contradictory data, they did explicitly examine the BA/BEs for their use of supporting evidence, and found many of the premises of the arguments insufficient to support the conclusions as presented because they failed to use and cite authoritative data in the assessment. Several BA/BEs relied primarily on preparers' intimate knowledge of the projects and watersheds being discussed. While such knowledge may have value, expert opinion must be considered in context with other relevant sources of evidence to make a comprehensible and persuasive argument that a particular project may affect, but is not likely to adversely affect listed species or designated critical habitat.

The results of the first year review indicated that USFS staff may have been transitioning from the standard consultation process to the new independent process established by the counterpart regulations, and this trend continued through 2008. 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. In fact, during the first year of the ACA, every BA/BE successfully completed category 1 (proposed action), but in the following three years, the USFS failed to complete category 1 approximately 47% of the time.

The frequency with which the counterpart regulations were used also decreased. Prior to implementing the counterpart regulations, the USFS anticipated using the ACA approximately 500 times each year for projects affecting both Fish and Wildlife Service and NMFS species. In 2004, the USFS utilized the counterpart regulations for only seven projects affecting NMFS' species. In 2005 and 2006, the USFS continued using the counterpart regulations at approximately the same rate of eight projects affecting NMFS' species per year. But in 2007 and 2008, only one project per year was evaluated through the counterpart regulation process. During the past three years combined, at most, one National Forest had three projects and all other National Forests had fewer projects.

Unlike the first year review, NMFS' analysis suggests that due to incomplete analysis and confusing or confounding statements made in the EAs/BAs, some of the NLAA conclusions may be inappropriate. For instance, two projects reached determinations to listed species by comparing the effects of the action to a catastrophic event instead of the baseline conditions. Another project proposed drafting water from fish bearing streams following NMFS' guidelines but, while a good Best Management Practice, the guidelines specifically state they may not be sufficient to avoid effects to listed species, so the USFS should provide citations to support why this action is not likely to adversely affect listed species as opposed to being likely to adversely affect listed species. Still another project proposed a culvert replacement in a fish-bearing stream. Another project proposes a stream crossing that will be used approximately 300 times through a fish

bearing stream. Another project proposes spraying herbicides adjacent to the Snake River using a 300 foot buffer without providing any references indicating that a buffer of that size will result in an insignificant effect to listed salmonids. However, NMFS writes biological opinions and provides incidental take statements for action agencies, including the USFS, on noxious weed management projects solely because pesticides and herbicides will be sprayed using a 300 foot buffer. And in addition to these examples, the other projects may also have had adverse effects to listed species, but due to the lack of information within the BA/BE, it is impossible to discern the potential effects.

5.0. Conclusions

The ACA states that the USFS 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 USFS 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 USFS failed to fulfill the standards above. Furthermore, the USFS 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 USFS' cursory assessment of the 2008-2011 documents, and the USFS' recommendation to revoke the agreement, NMFS and the USFS agree to terminate the ACA.

6.0 Literature Cited

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