MHz band. Notwithstanding references to voluntary negotiation periods elsewhere in this section, relocation of FMS licensees in the 2180–2200 MHz band by Mobile-Satellite Service (MSS) licensees (including MSS licensees providing Ancillary Terrestrial Component ''ATC'' service) will be subject to mandatory negotiations only. Mandatory negotiations will commence on January 7, 2004. Mandatory negotiations will be conducted with the goal of providing the fixed microwave licensee with comparable facilities, defined as facilities possessing the following characteristics:

* * * * *

■ 12. Section 101.79 is amended by revising the section heading and paragraph (a) to read as follows:

§ 101.79 Sunset provisions for licensees in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands.

(a) FMS licensees will maintain primary status in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands unless and until an ET (including MSS/ATC) licensee requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.* ten years after the voluntary period begins for the first ET licensees in the service; or, in the case of the 2180–2200 MHz band, ten years after the mandatory negotiation period begins for MSS/ATC licensees in the service). Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA Bulletin 10-F (for terrestrial-to-terrestrial situations) or TIA Bulletin TSB–86 (for MSS satellite-to-terrestrial situations) or any standard successor. ET licensee notification to the affected FMS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the FMS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the FMS licensee to continue to operate on a mutually agreed upon basis.

* * * * *

■ 13. Section 101.99 is redesignated as § 101.82.

[FR Doc. 03–30310 Filed 12–5–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3641, MM Docket No. 99–277, RM–9666]

Digital Television Broadcast Service; Corpus Christi, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Channel 3 of Corpus Christi, Inc., substitutes DTV channel 8 for DTV channel 47 at Corpus Christi. *See* 64 FR 50055, September 15, 1999. DTV channel 8 can be allotted to Corpus Christi in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 27–39–30 N. and 97–36–04 W. with a power of 160, HAAT of 289 meters and with a DTV service population of 491 thousand. Since the community of Corpus Christi is located within 275 kilometers of the U.S.-Mexican border, concurrence by the Mexican government has been obtained for this allotment. With this action, this proceeding is terminated.

DATES: Effective January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 99–277, adopted November 13, 2003, and released November 19, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY–B402, Washington, DC, 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail *qualexint@aol.com.*

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under Texas, is amended by removing DTV channel 47 and adding DTV channel 8 at Corpus Christi.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–30308 Filed 12–5–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

RIN 1018–AJ02

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. 030506115–3298–02]

RIN 0648–AR05

Joint Counterpart Endangered Species Act Section 7 Consultation Regulations

AGENCIES: U.S. Fish and Wildlife Service, Interior; Bureau of Land Management, Interior; National Park Service, Interior; Bureau of Indian Affairs, Interior; Forest Service, Agriculture; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: This final rule codifies joint counterpart regulations for consultation under section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), to streamline consultation on proposed projects that support the National Fire Plan (NFP), an interagency strategy approved in 2000 to reduce risks of catastrophic wildland fires and restore fire-adapted ecosystems. These counterpart regulations were developed, as part of the President's Healthy Forests Initiative announced in August 2002, by the U.S. Department of the Interior's Fish and Wildlife Service (FWS) and the U.S. Department of Commerce's National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) (singly or jointly, Service), in cooperation with the U.S. Department of Agriculture's Forest Service (FS) and the Department of

Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and National Park Service (NPS). These counterpart regulations, authorized in general at 50 CFR 402.04, provide an optional alternative to the existing section 7 consultation process described in 50 CFR part 402, subparts A and B. The counterpart regulations complement the general consultation regulations in part 402 by providing an alternative process for completing section 7 consultation for agency projects that authorize, fund, or carry out actions that support the NFP. The alternative consultation process contained in these counterpart regulations eliminates the need to conduct informal consultation and eliminates the requirement to obtain written concurrence from the Service for those NFP actions that the Action Agency determines are ''not likely to adversely affect'' (NLAA) any listed species or designated critical habitat.

DATES: This rule is effective on January 7, 2004.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery and State Grants, at the above address (Telephone 703/358–2171, Facsimile 703/358–1735) or Phil Williams, Chief, Endangered Species Division, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301/713–1401; facsimile 301/713–0376).

SUPPLEMENTARY INFORMATION:

Background

Implementation of National Fire Plan

In response to several years of catastrophic wildland fires throughout the United States culminating in the particularly severe fire season in 2000, when over 6.5 million acres of wildland areas burned, President Clinton directed the Departments of the Interior and Agriculture to develop a report outlining a new approach to managing wildland fires and restoring fire-adapted ecosystems. The report, entitled Managing the Impact of Wildfires on Communities and the Environment, was issued September 8, 2000. This report set forth ways to reduce the impacts of fires on rural communities, a short-term plan for rehabilitation of fire-damaged ecosystems, and ways to limit the introduction of invasive species and address natural restoration processes. The report, and the accompanying budget requests, strategies, plans, and direction, have become known as the NFP. The NFP is intended to reduce risk to communities and natural resources from wildland fires through rehabilitation, restoration and maintenance of fire-adapted ecosystems, and by the reduction of accumulated fuels or highly combustible fuels on forests, woodlands, grasslands, and rangelands.

In August 2002, during another severe wildland fire season in which over 7.1 million acres of wildlands burned, President Bush announced the Healthy Forests Initiative. The initiative was intended to accelerate implementation of the fuels reduction and ecosystem restoration goals of the NFP in order to minimize the damage caused by catastrophic wildfires by reducing unnecessary regulatory obstacles that have at times delayed and frustrated active land management activities. Because of nearly a century of policies to exclude fire from performing its historical role in shaping plant communities, fires in our public forests and rangelands now threaten people, communities, and natural resources in ways never before seen in our Nation's history.

Many of the Nation's forests and rangelands have become unnaturally dense as a result of past fire suppression policies. Today's forests contain previously unrecorded levels of fuels, while highly flammable invasive species now pervade many rangelands. As a result, ecosystem health has suffered significantly across much of the Nation. When coupled with seasonal droughts, these unhealthy forests and rangelands, overloaded with fuels, are vulnerable to unnaturally severe wildland fires. The geographic scope of the problem is enormous, with estimates approaching 200 million acres of forest and rangeland at risk of catastrophic fire. The problem has been building across the landscape for decades. Its sheer size makes it impossible to treat all the acres needing attention in a few years or even within the next decade.

In 2002 alone, the Nation experienced over 88,000 wildland fires that cost the Federal Government $1.6 billion to suppress. Many of these wildfires significantly impacted threatened or endangered species. The Biscuit Fire burned an area of 499,570 acres in Oregon and California that included 49 nest sites and 50,000 acres of designated critical habitat for the threatened northern spotted owl, and 14 nesting areas and 96,000 acres of designated critical habitat for the threatened marbled murrelet. The estimated fire suppression cost was $134,924,847. The Rodeo-Chediski fire in Arizona, the largest fire in the State's post-settlement history, burned through 462,614 acres, including 20 nesting areas for the threatened Mexican spotted owl. Unless fuel loads can be reduced on the thousands of acres classified at high risk of catastrophic wildfires, more adverse effects like those of the 2002 fire season are certain to occur.

The long-term strategy for the NFP is to correct problems associated with the disruption of natural fire cycles as a result of fire suppression policy or the presence of fire-prone non-native invasive species and to minimize risks to public safety and private property due to the increase in amount and complexity of the urban/wildland interface. The NFP calls for a substantial increase in the number of acres treated annually to reduce unnaturally high fuel levels, which will decrease the risks to communities and to the environment caused by unplanned and unwanted wildland fire. These types of preventative actions will help ensure public safety and fulfill the goals of the President's Healthy Forests Initiative.

The FS, BIA, BLM, and NPS, as Federal land management agencies, play an important role in implementing actions under the NFP that will reduce the potential risks of catastrophic wildland fire. The FWS also develops and carries out actions in support of the NFP on National Wildlife Refuges or National Fish Hatcheries. These five agencies constitute the Action Agencies who may use the counterpart regulations contained herein. The types of projects being conducted by these agencies under the NFP include prescribed fire (including naturally occurring wildland fires managed to benefit resources), mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. Prompt implementation of these types of actions will substantially improve the condition of the Nation's forests and rangelands and substantially diminish potential losses of human lives and property caused by wildland fires. The Service and the Action Agencies are adopting these counterpart regulations to accelerate the rate at which these types of activities can be implemented so that the likelihood of catastrophic wildland fires is reduced.

Federal Fuels Treatment Activities

Each of the Action Agencies has substantial experience in planning and implementing projects that further the goals of reducing risks associated with wildland fires, while improving the condition of our public lands and wildlife habitat. The FS works collaboratively with its partners to design and implement projects to meet a variety of land and resource management objectives, including projects to improve habitat for wildlife and fish species. Through several hundred rehabilitation, restoration and hazardous fuels reduction projects under the NFP, the FS treats over 2 million acres each year to benefit natural resources, people, and communities. All of these projects have long-term multiple resource benefits, and several have short-term wildlife benefits as well. On the Winema and Fremont National Forests in Oregon, a thousand acres of forest were thinned and underburned to protect stands and large trees from wildfire, and to increase the longevity of those trees used by bald eagles for nesting and roosting. On the Santa Fe National Forest in New Mexico, after habitat loss due to the Cerro Grande Fire, ground cover in the form of large fallen woody material was restored to benefit the Jemez Mountain salamander. Habitat that had been damaged by post-wildland fire debris flows has been restored to reduce erosion and benefit Yellowstone cutthroat trout on the Custer National Forest in Montana. On the Jefferson National Forest in Virginia, prescribed fire is used every 3 years on Mt. Rogers to maintain the grassy bald area in a grass-forb stage and prevent woody vegetation from becoming established that would out compete rare plant species. Similarly, on the National Forests in Mississippi, prescribed burning reduces woody vegetation and fuels, encourages fire-dependent perennials, and restores and expands remnants of native prairie.

The BIA has planned many beneficial projects under the NFP that are designed to reduce wildland fire risk on Indian lands and to increase public safety around tribal and non-tribal communities. For example, one project will utilize both mechanical treatments and prescribed fire in lodgepole pine and Engelmann spruce forests to reduce fuel loadings and protect residents and residences around the Blackfeet Indian Reservation communities of East Glacier, Little Badger, Babb, St. Mary, Heart Butte, and Kiowa, in northwestern Montana. A second project would also utilize mechanical treatments and prescribed fire to reduce fuel loadings in Douglas-fir, ponderosa pine, and grass fuel types that pose a high level of risk to the residents around the Rocky Boy's Indian Reservation communities of Box Elder Village, Box Elder Creek, Rocky Boy Townsite, Duck Creek, and Parker Canyon, in Central Montana. A third project would reduce fuels in about 1,300 acres of pine, juniper, oak, and grasses, by combining prescribed fire with mechanical fuels treatment techniques on Zuni Tribal forest and woodland resources in New Mexico. This project would create fuel breaks in large contiguous fuels that are at high risk for catastrophic wildfires. Finally, a fourth project will stabilize and rehabilitate 276,000 acres of White Mountain Apache Tribal lands severely damaged in the Rodeo-Chediski Fire. This project will reduce the potential threats to human life and property in surrounding communities, along with threats to cultural resources, water quantity and quality, and soil productivity.

Across the Nation, NPS is implementing numerous projects to support the goals of the NFP. Park superintendents use prescribed fire (including wildland fire), mechanical fuels treatments, and invasive species control to restore or maintain natural ecosystems, to mitigate the effects of past fire suppression policies, and to protect communities from catastrophic wildfires. NPS fire management and restoration efforts generally focus on restoring ecosystem processes rather than on the management of specific species. However, these projects provide important long-term habitat benefits to a variety of threatened or endangered species. For example, Great Smoky Mountains National Park is completing a 1,034-acre yellow pine restoration burn, the largest prescribed burn in the Park's history. The central purpose of the Park's use of fire is to replicate as nearly as possible the role that naturally occurring fires played in shaping and maintaining the Park's biologically diverse ecosystems, while also minimizing the risk of future wildfires. At Washita Battlefield National Historic Site, the use of prescribed fire is intended to restore and maintain grassland/prairie habitats in a healthy condition. The operation was an interagency effort between the FS and the NPS. Similarly, Gulf Islands National Seashore has conducted prescribed burns for habitat restoration and to reduce hazardous fuels. These burns both restore key vegetative communities and provide habitat for relocated gopher tortoises. Other projects have improved habitat for red-cockaded woodpeckers at Big Thicket National Preserve and bald eagles at Lavabeds National Monument. All of these fuels treatment projects will enhance public safety for the communities around the Parks.

The BLM is proceeding with many NFP projects to restore dense pinyon pine and juniper forests and woodlands, nearly devoid of understory shrubs, grasses, and forbs, to a more natural savannah, or open woodland conditions. In the Farmington Field Office, New Mexico, the Pump Mesa project is a multiple phase project to open up the pinyon pine and juniper forest canopy by thinning, wood removal, and prescribed burning, to make space, sunlight, water, and nutrients available for the manual seeding of native understory species that were formerly present on the site. Densities of trees in the pinyon pine systems have increased to the point that large proportions of these woodlands have become highly combustible, supporting crown fires that can produce catastrophic habitat loss for wildlife and high risk to nearby communities. In the Richfield Field Office, the Praetor Slope Fuel Reduction project will mechanically displace patches of juniper and sagebrush to reduce the risk created by large, dense contiguous areas of fuel, while creating valuable deer and elk range, complete with islands and feathered woodlands that provide necessary animal cover. In the Central Montana Fire Management Zone, a number of small and moderate-sized prescribed burns, such as in Cow Creek, Little Bull Whacker, and Fergus Triangle, have been completed to increase wildlife habitat diversity, reduce fuel loads, and increase forage for both livestock and wildlife.

Endangered Species Act Section 7 Consultation

Section 7(a)(2) of the ESA requires that each Federal agency shall, in consultation with and with the assistance of the Service, insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any listed species or result in destruction or adverse modification of designated critical habitat. Section 7(b) of the ESA describes the consultation process, which is further developed in regulations at 50 CFR 402.

The existing ESA section 7 regulations require an action agency to complete formal consultation with the Service on any proposed action that may affect a listed species or designated critical habitat, unless following either a biological assessment or informal

consultation with the Service, the action agency makes a determination that a proposed action is ''not likely to adversely affect'' any listed species or designated critical habitat and obtains written concurrence from the Service for the NLAA determination. The alternative consultation process contained in these counterpart regulations will allow the Service to provide training, oversight, and monitoring to an Action Agency through an alternative consultation agreement (ACA) that enables the Action Agency to make an NLAA determination for a project implementing the NFP without informal consultation or written concurrence from the Service.

Using the existing consultation process, the Action Agencies have consulted with the Service on many thousands of proposed actions that ultimately received written concurrence from the Service for NLAA determinations. Those projects had only insignificant or beneficial effects on listed species or posed a discountable risk of adverse effects. The concurrence process for such projects has diverted some of the consultation resources of the Service from projects in greater need of consultation. With the anticipated increase in fire plan projects, the concurrence process could cause delays. These counterpart regulations are being implemented to proactively reduce these anticipated delays and to increase the Service's capability to focus on Federal actions requiring formal consultation by eliminating the requirement to provide written concurrence for actions within the scope of these counterpart regulations.

The Action Agencies have engaged in thousands of formal and informal consultations with the Service in the 30 years since the passage of the ESA, and have developed substantial scientific, planning, mitigation, and other expertise to support informed decision-making and to meet their responsibilities under ESA section 7 to avoid jeopardy and contribute to recovery of listed species. To meet their obligations, the Action Agencies employ large staffs of qualified, experienced, and professional wildlife biologists, fisheries biologists, botanists, and ecologists to help design, evaluate, and implement proposed activities carried out under land use and resource management plans. All of the Action Agencies consult with the Service on actions that implement land use and resource management plans that contribute to the recovery of proposed and listed species and the ecosystems upon which they depend. In particular, the informal consultation and concurrence process has given the Action Agencies considerable familiarity with the standards for making NLAA determinations for their proposed actions.

The Action Agencies have developed familiarity with the standards over time through various activities. The Action Agencies develop proposals and evaluate several thousand actions for possible effects to listed species and designated critical habitat. Agency biologists are members of listed species recovery teams, contribute to management plans that provide specific objectives and guidelines to help recover and protect listed species and designated critical habitat, and cooperate on a continuing basis with Service personnel. In many parts of the country, personnel from the Action Agencies and the Service participate in regular meetings to identify new management projects and the effects to proposed and listed species through formalized streamlined consultation procedures.

The Action Agencies' established biological expertise and active participation in the consultation process provides a solid base of knowledge and understanding of how to implement section 7 of the ESA. By taking advantage of this expertise within the Action Agencies, the counterpart regulations process will help ensure more timely and efficient decisions on planned NFP actions while retaining the protection for listed species and designated critical habitat required by the ESA and other applicable regulations. The Service can rely upon the expertise of the Action Agencies to make NLAA determinations that are consistent with the ESA and its implementing regulations. Moreover, the Action Agencies are committed to implementing this authority in a manner that will be equally as protective of listed species and designated critical habitat as the current procedures that require written concurrence from the Service.

The Healthy Forests Initiative builds from the recognition that more timely environmental reviews of proposed fire plan projects will provide greater benefits to the range, forest lands, and wildlife by reducing the risk of catastrophic wildfire while the reviews are pending. These counterpart regulations provide an additional tool for accomplishing faster reviews. Streamlining the NLAA concurrence process offers a significant opportunity to accelerate NFP projects while providing equal or greater protection of the resources. Under current procedures, the Action Agencies must already complete and document a full ESA analysis to reach an NLAA determination. The counterpart regulations permit a project to proceed following an Action Agency's NLAA determination without an overlapping review by the Service, where the Service has provided specific training and oversight to achieve comparability between the Action Agency's determination and the likely outcome of an overlapping review by the Service. These counterpart regulations should significantly accelerate planning, review, and implementation of NFP actions, and by doing so, should contribute to achieving the habitat management and ecosystem restoration activities contemplated under the NFP.

Summary of Comments Received

On June 5, 2003 (68 FR 33806), we proposed the rule that would establish the joint counterpart regulations for consultation under section 7 of the ESA to streamline consultation on proposed projects that support the NFP. The comment period closed on August 4, 2003. On October 9, 2003 (68 FR 58298), we reopened the comment period on the proposed rule and provided a notice of availability for the Environmental Assessment. The second comment period closed on November 10, 2003. During these two comment periods, the Service received more than 50,000 comments on the proposed rule from a large variety of entities, including State, County, Tribal agencies, industry, conservation groups, religious groups, coalitions, and private individuals. The Service and the Action Agencies considered all of the information and recommendations received from all interested parties on the proposed regulation during the public comment period and appreciated the comments received on the proposed rule. The Service received numerous comments on the scope of the National Fire Plan, for example, appropriate fire cycles, thinning and restoration practices, which were beyond the narrow scope of the proposed rulemaking for the counterpart regulations.

The following is a summary of the comments on the proposed counterpart regulations, and the Service's response.

State and Tribe Comments

We received comments from three States and two Tribal agencies.

Issue: One State recommended including the State fish and wildlife agencies during the development of the ACAs and, where appropriate, during the development of documentation in support of NLAA determinations. Including the States would better ensure

that the best available scientific information is used during the determination analysis by the Action Agencies.

Response: We agree that the State agencies likely have biological information that will be relevant in making an NLAA determination. The Services currently have a joint policy (59 FR 34275) in which we request any information from the State that might be relevant, as well as notify the State of any action that might adversely affect any proposed or listed species or designated critical habitat. The Service will encourage each of the Action Agencies to embrace this policy as a component of the ACA.

Issue: One State, and several commenters, expressed concern that this proposed regulation does not go far enough to improve the overall efficiency of the consultation process and, therefore, should be opened up to all projects, not just fire plan projects. A few commenters suggested including the Corps of Engineers and Environmental Protection Agency in the list of Action Agencies.

Response: These counterpart regulations have been proposed as part of the President's Healthy Forests Initiative to accelerate the rate at which fire plan projects can be implemented. Once these counterpart regulations are adopted and implemented, the Services believe that other agencies may decide that similar counterpart regulations would help to expedite other types of actions. The EPA has already published an advance notice of rulemaking for developing counterpart regulations for pesticides (68 FR 3785, January 24, 2003). The Services will take up any such proposals from other agencies in the future as circumstances may warrant.

Issue: One State and several commenters were concerned that these counterpart regulations relieve the Service of its duties and the resources that will be spent creating a new process could be used more efficiently by the Service to carry out its duties under the ESA.

Response: We agree that the Services will likely experience a small short-term increase in administrative burden as they begin to implement the training and oversight components of the regulations and ACAs. However, this short term burden will be more than balanced out by a substantial long term increase in Service efficiency resulting from a reduction in resources required to review projects that ultimately receive a NLAA concurrence letter. We believe that by removing the need to provide NLAA concurrence letters on NFP projects, the Services will be able to devote greater resources to analyzing and coordinating on projects that do have adverse effects on listed species and designated critical habitat. We believe this shift in resources will not only accelerate NFP projects, but will also generally expedite consultations on other projects, which will make the most efficient use of the Services time. This will ultimately provide more conservation to listed species, thus fulfilling the objectives of the ESA.

Issue: The two Tribal comments stated that the Action Agency will still need to complete a biological assessment for its action. In addition, both tribal commenters requested government-to-government consultation.

Response: We agree that an Action Agency will still need to complete a biological assessment for an action when required by the ESA. The regulations at 50 CFR 402.12 require the preparation of a biological assessment for those Federal actions that are ''major construction activities.'' Given that these counterpart regulations only address those fire plan projects that are not likely to adversely affect listed species or critical habitat, we do not anticipate that a large majority of these actions would otherwise require preparation of a biological assessment.

The standards for making an NLAA determination remain unchanged by these counterpart regulations. These counterpart regulations do not change the analysis that is conducted for determining how a proposed project affects listed species or critical habitat. Therefore, this counterpart regulation will maintain the same level of protection for listed species or designated critical habitat. As such, we do not believe that tribal resources will be affected by implementation of this rule and government-to-government consultation is not necessary at this stage in the process.

General Comments

Issue: Many commenters felt that the proposed counterpart regulations will give some interest groups, such as logging companies and other commercial interests, free reign over public land, which will increase commercial timber sales, and that this result is not in the best interest of the species or the public.

Response: This regulation will apply only to those projects that are within the scope of the NFP and are not likely to adversely affect listed species or critical habitat. Commercial timber sales that adversely affect listed species and designated critical habitat will still need to be analyzed through formal consultation. We believe that implementation of the counterpart regulations will allow the Service to focus its efforts on Federal actions that are likely to adversely affect listed species and critical habitat. This will ultimately benefit listed species.

Issue: Several commenters noted that the proposed rule has failed to offer any empirical evidence substantiating the claim that the regulatory obstacles have unnecessarily delayed active land management activities.

Response: The Healthy Forests Initiative is intended to accelerate implementation of the fuels reduction and ecosystem restoration goals of the NFP in order to minimize damage caused by catastrophic wildfires. Accordingly, the issue is not whether the regulatory process has delayed NFP projects, but rather whether it can be streamlined so as to expedite the projects. The number of consultations conducted for NFP projects is currently relatively low; however the Service anticipates that the number of consultations requested for projects that implement the NFP will increase substantially in the future, as additional funding and effort is directed toward implementation of the NFP. Due to the beneficial effects that this initiative will have to fish and wildlife resources, the Services are ensuring that actions supporting the NFP that are NLAA listed species or critical habitat are not delayed.

Issue: Many commenters believe that the Action Agencies do not have the expertise to make the determinations without concurrence from the Service. They believe that the Service is the expert agency and without the Service's input many of the decisions will have a negative impact on listed species. In particular, the commenters believe that the Action Agencies do not know the biology of the species or the other indirect or cumulative effects that should be factored into the analysis.

Response: The Action Agencies employ large staffs of professional wildlife biologists, botanists, and ecologists to meet their obligations under the Act and other natural resource management laws they implement. The primary responsibility of these professionals is to evaluate how proposed projects will affect listed species and critical habitat.

The counterpart regulations contain a process for making sure that the Action Agencies have the necessary skills to make the NLAA determinations without Service concurrence. First, the Service and the Action Agencies will jointly develop a training program that will

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

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

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

with the terms of the ACA. If, through the periodic review and monitoring program, the Service determines that implementation of this regulation is not consistent with the best available information, the ESA, or the section 7 regulations, then the Service will work with the Action Agency to correct the issue. If the consistency issues persist, the Service Director has the ability to terminate the ACA for an individual sub-unit of the Action Agency. This should not call into question any of the other sub-units' determinations or any of the determinations prior to the issue at hand. The Service Director always retains discretion to terminate the ACA with the Action Agency if it fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the ACA. The terms of the ACA are intended to be enforceable only through the remedies available to the Services under the counterpart regulations.

Revisions to the Proposed Rule

In § 402.31, we changed ''The purpose of these counterpart regulations is to improve the consultation * * *'' to read, ''The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation * * *.'' The change is made to clarify that the intent of these counterpart regulations is to accelerate the rate at which fire plan projects are processed without changing the section 7 consultation standards.

Description/Overview of the Final Rule

Regulations at 50 CFR 402.04 provide that ''the consultation procedures may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service.'' The preamble to the 1986 regulations for implementing section 7 of the ESA states that ''such counterpart regulations must retain the overall degree of protection afforded listed species required by the [ESA] and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7.'' The approach in these counterpart regulations is consistent with § 402.04 because it leaves the standards for making NLAA determinations unchanged. The joint counterpart regulations establish an optional alternative process to conduct consultation under section 7 of the ESA for actions that the FS, BIA, BLM, FWS, or NPS might authorize, fund, or carry out to implement the NFP. The procedures outlined in these counterpart regulations differ from the existing procedures in 50 CFR part 402 subparts A and B, § 402.13 and § 402.14(b), by allowing an Action Agency to enter into an ACA with the Service that will allow the Action Agency to make an NLAA determination on a proposed NFP project without informal consultation or written concurrence from the Service. Further, Action Agencies operating under these counterpart regulations retain full responsibility for compliance with section 7 of the ESA.

Under the counterpart regulations, the Action Agencies will enter into an ACA with either FWS, NMFS or both. The ACA will include: (1) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations; (2) a program for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency; (3) provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis on proposed actions; (4) provisions for the Action Agency to maintain a list of fire plan projects that received NLAA determinations under the agreement; and (5) a mutually agreed upon program for monitoring and periodic program evaluations. By following the procedures in these counterpart regulations and the ACA, the Action Agencies fulfill their ESA section 7 consultation responsibility for actions covered under these regulations.

The purpose of the jointly developed training program between the Action Agency and the Service is to ensure that the Action Agency consistently interprets and applies the relevant provisions of the ESA and the regulations (50 CFR part 402) relevant to these counterpart regulations with the expectation that the Action Agency will reach the same conclusions as the Service. We expect that the training program will be consistent among Action Agencies, subject to differing needs and requirements of each agency, and will rely upon the ESA Consultation Handbook as much as possible. The training program may include jointly developed guidelines for conducting the ESA section 7 effects analysis for the particular listed species and critical habitat that occur in the jurisdiction of the Action Agency requesting the agreement. Training may also emphasize the use of project design criteria for listed species where they have been developed between the Service and the Action Agency.

Because the Service maintains information on listed species, the Service may supply any new information it receives that would be relevant to the effects analysis that the Action Agencies will conduct to make the NLAA determinations. In addition, the Service will coordinate with the Action Agency when new species are proposed for listing or new critical habitat is proposed.

The Service will use monitoring and periodic program reviews to evaluate an Action Agency's performance under the ACA at the end of the first year of implementation and then at intervals specified in the ACA. The evaluation may be on a subunit basis (*e.g.*, a particular National Forest or BLM district) where different subunits of an Action Agency begin implementation of the ACA at different times. The Service will evaluate whether the implementation of this regulation by the Action Agency is consistent with the best available scientific and commercial information, the ESA, and section 7 regulations. The result of the periodic program review may be to recommend changes to the Action Agency's implementation of the ACA. These recommendations could include suspending or excluding any participating Action Agency subunit, but more likely may include additional training. The Service will retain discretion for terminating the ACA if the requirements under the counterpart regulations are not met. However, any such suspension, exclusion, or termination will not affect the legal validity of NLAA determinations made prior to the suspension, exclusion, or termination.

Upon completion of an ACA, the Action Agency and the Service will implement the training program outlined in the ACA. At the Action Agency's discretion, the training program may be designed such that some subunits may begin implementing the ACA before agency personnel in other subunits are fully trained. The Action Agency will assume full responsibility for the adequacy of the NLAA determinations that it makes.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal or policy issues, and was reviewed by the Office of Management and Budget

(OMB) in accordance with the four criteria discussed below.

(a) This counterpart regulation will not have an annual economic effect of $100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The counterpart regulations do not pertain to commercial products or activities or anything traded in the marketplace.

(b) This counterpart regulation is not expected to create inconsistencies with other agencies' actions. FWS and NMFS are responsible for carrying out the Act.

(c) This counterpart regulation is not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, we certified to the Small Business Administration that these regulations would not have a significant economic impact on a substantial number of small entities. The purpose of the rule is to increase the efficiency of the ESA section 7 consultation process for those activities conducted to implement the NFP. The changes will lead to the same protections for listed species as the section 7 consultation regulations at 50 CFR part 402 and will only eliminate the need for the Action Agency to conduct informal consultation with and obtain written concurrence from the Service for those NFP actions that the Action Agency determines are ''not likely to adversely affect'' (NLAA) any listed species or designated critical habitat.

Regulations at 50 CFR 402.04 provide that ''the consultation procedures may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service.'' The preamble to the 1986 regulations for implementing section 7 states that ''such counterpart regulations must retain the overall degree of protection afforded listed species required by the [ESA] and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7.''

Under the counterpart regulations, the Action Agencies will enter into an Alternative Consultation Agreement (ACA) with either or both of the Services as appropriate. The ACA will include: (1) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations; (2) a program for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency; (3) provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis on proposed actions; (4) provisions for the Action Agency to maintain a list of fire plan projects that received NLAA determinations under the agreement; and (5) a mutually agreed upon program for monitoring and periodic program evaluations. The purpose of the training program is to ensure the Action Agency consistently interprets and applies the relevant provisions of the ESA and regulations (50 CFR 402), with the expectation that the Action Agency will reach the same conclusion as the Service.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (1) The joint counterpart ESA section 7 regulations apply only to ESA section 7 determinations made by one of the five Federal Action Agencies that implement the NFP; (2) the rule will only remove the requirement for the Action Agencies to conduct informal consultation with and obtain written concurrence from FWS or NMFS on those NFP actions they determine that are NLAA listed species or designated critical habitat; and (3) the regulations are designed to reduce potential economic burdens on the Services and Action Agencies by improving the efficiency of the process. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small businesses, organizations, or governments pursuant to the RFA.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) These counterpart regulations will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. We expect that these counterpart regulations will not result in any significant additional expenditures.

(b) These counterpart regulations will not produce a Federal mandate on State, local, or tribal governments or the private sector of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. These counterpart regulations impose no obligations on State, local, or tribal governments.

Takings

In accordance with Executive Order 12630, these counterpart regulations do not have significant takings implications. These counterpart regulations pertain solely to ESA section 7 consultation coordination procedures, and the procedures have no impact on personal property rights.

Federalism

In accordance with Executive Order 13132, these counterpart regulations do not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Commerce regulations under section 7 of the ESA, we coordinated development of these counterpart regulations with

appropriate resource agencies throughout the United States.

Civil Justice Reform

In accordance with Executive Order 12988, this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We promulgate these counterpart regulations consistent with 50 CFR 402.04 and section 7 of the ESA.

Paperwork Reduction Act

This rule would not impose any new requirements for collection of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose new record keeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

National Environmental Policy Act

These counterpart regulations have been developed by FWS and NMFS, jointly with FS, BIA, BLM, and NPS according to 50 CFR 402.04. The FWS and NMFS are considered the lead Federal agencies for the preparation of this rule, pursuant to 40 CFR 1501. We have analyzed these counterpart regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6 and have determined, after preparation of an environmental assessment, that the action does not have any significant effects. A Finding Of No Significant Impact has been prepared.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); E.O. 13175; and the Department of the Interior's 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to Government basis. These counterpart regulations do not directly affect Tribal resources. These counterpart regulations may have an indirect effect on Native American Tribes as the Bureau of Indian Affairs may, at its discretion, implement the procedures outlined in the counterpart regulations for those activities affecting Tribal resources that they may authorize, fund, or carry out under the NFP. The analysis that is conducted for determining how a proposed project affects listed species or critical habitat remains unchanged by these counterpart regulations. Therefore, tribal resources will be unaffected by implementation of this rule and government-to-government consultation is not necessary.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Final Regulation Promulgation

■ For the reasons set forth in the preamble, the Service amends part 402, title 50 of the Code of Federal Regulations as follows:

PART 402—[AMENDED]

■ 1. The authority citation for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. Add a new Subpart C to read as follows:

Subpart C—Counterpart Regulations For Implementing the National Fire Plan

Sec.
402.30 Definitions.
402.31 Purpose.
402.32 Scope.
402.33 Procedures.
402.34 Oversight.

Subpart C—Counterpart Regulations for Implementing the National Fire Plan

§ 402.30 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

Action Agency refers to the Department of Agriculture Forest Service (FS) or the Department of the Interior Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), or National Park Service (NPS).

Alternative Consultation Agreement (ACA) is the agreement described in § 402.33 of this subpart.

Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined in this section.

National Fire Plan (NFP) is the September 8, 2000, report to the President from the Departments of the Interior and Agriculture entitled ''Managing the Impact of Wildfire on Communities and the Environment'' outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto.

Service Director refers to the FWS Director or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

§ 402.31 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects by providing an optional alternative to the procedures found in §§ 402.13 and 402.14(b) of this part. These regulations permit an Action Agency to enter into an Alternative Consultation Agreement (ACA) with the Service, as described in § 402.33, which will allow the Action Agency to determine that a Fire Plan Project is ''not likely to adversely affect'' (NLAA) a listed species or designated critical habitat without formal or informal consultation with the Service or written concurrence from the Service. An NLAA determination for a Fire Plan Project made under an ACA, as described in § 402.33, completes the Action Agency's statutory obligation to consult with the Service for that Project. In situations where the Action Agency does not make an NLAA determination under the ACA, the Action Agency would still be required to conduct formal consultation with the Service when required by § 402.14. This process will be as protective to listed species and designated critical habitat as the process established in subpart B of this part. The standards and requirements for formal consultation under subpart B for Fire Plan Projects that do not receive an NLAA determination are unchanged.

§ 402.32 Scope.

(a) Section 402.33 establishes a process by which an Action Agency may determine that a proposed Fire Plan Project is not likely to adversely affect any listed species or designated critical habitat without conducting formal or informal consultation or obtaining written concurrence from the Service.

(b) Section 402.34 establishes the Service's oversight responsibility and the standard for review under this subpart.

(c) Nothing in this subpart C precludes an Action Agency at its discretion from initiating early, informal, or formal consultation as described in §§ 402.11, 402.13, and 402.14, respectively.

(d) The authority granted in this subpart is applicable to an Action Agency only where the Action Agency

has entered into an ACA with the Service. An ACA entered into with one Service is valid with regard to listed species and designated critical habitat under the jurisdiction of that Service whether or not the Action Agency has entered into an ACA with the other Service.

§ 402.33 Procedures.

(a) The Action Agency may make an NLAA determination for a Fire Plan Project without informal consultation or written concurrence from the Director if the Action Agency has entered into and implemented an ACA. The Action Agency need not initiate formal consultation on a Fire Plan Project if the Action Agency has made an NLAA determination for the Project under this subpart. The Action Agency and the Service will use the following procedures in establishing an ACA.

(1) *Initiation:* The Action Agency submits a written notification to the Service Director of its intent to enter into an ACA.

(2) *Development and Adoption of the Alternative Consultation Agreement:* The Action Agency enters into an ACA with the Service Director. The ACA will, at a minimum, include the following components:

(i) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations under this subpart C.

(ii) Procedures for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency.

(iii) A description of the standards the Action Agency will apply in assessing the effects of the action, including direct and indirect effects of the action and effects of any actions that are interrelated or interdependent with the proposed action.

(iv) Provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis of proposed actions.

(v) A mutually agreed upon program for monitoring and periodic program evaluation to occur at the end of the first year following signature of the ACA and periodically thereafter.

(vi) Provisions for the Action Agency to maintain a list of Fire Plan Projects for which the Action Agency has made NLAA determinations. The Action Agency will also maintain the necessary records to allow the Service to complete the periodic program evaluations.

(3) *Training:* Upon completion of the ACA, the Action Agency and the Service will implement the training program outlined in the ACA to the mutual satisfaction of the Action Agency and the Service.

(b) The Action Agency may, at its discretion, allow any subunit of the Action Agency to implement this subpart as soon as the subunit has fulfilled the training requirements of the ACA, upon written notification to the Service. The Action Agency shall at all times have responsibility for the adequacy of all NLAA determinations it makes under this subpart.

(c) The ACA and any related oversight or monitoring reports shall be made available to the public through a notice of availability in the **Federal Register**.

§ 402.34 Oversight.

(a) Through the periodic program evaluation set forth in the ACA, the Service will determine whether the implementation of this subpart by the Action Agency is consistent with the best available scientific and commercial information, the ESA, and section 7 regulations.

(b) The Service Director may use the results of the periodic program evaluation described in the ACA to recommend changes to the Action Agency's implementation of the ACA. If and as appropriate, the Service Director may suspend any subunit participating in the ACA or exclude any subunit from the ACA.

(c) The Service Director retains discretion to terminate the ACA if the Action Agency fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the ACA. Termination, suspension, or modification of an ACA does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

Dated: November 26, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

Dated: December 3, 2003.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 03–30393 Filed 12–5–03; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031126295–3295–01; I.D. 111703B]

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands Area; Interim 2004 Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule.

SUMMARY: NMFS issues interim 2004 total allowable catch (TAC) amounts for each category of groundfish, Community Development Quota (CDQ) reserve amounts, American Fisheries Act (AFA) pollock allocations and sideboard amounts, and prohibited species catch (PSC) allowances and prohibited species quota (PSQ) reserves for the groundfish fisheries of the Bering Sea and Aleutian Islands management area (BSAI). The intended effect is to conserve and manage the groundfish resources in the BSAI.

EFFECTIVE DATE: The interim harvest specifications are effective from 0001 hours, Alaska local time (A.l.t.), January 1, 2004, until the effective date of the final 2004 harvest specifications for BSAI groundfish, which will be published in the **Federal Register**.

ADDRESSES: Copies of the Environmental Assessment (EA) prepared for this action, the final 2002 Stock Assessment and Fishery Evaluation (SAFE) report, dated November 2002, and the final 2003 SAFE report, dated November 2003, are available from the North Pacific Fishery Management Council, West 4th Avenue, Suite 306, Anchorage, AK 99510–2252 (907–271–2809) or from its home page at *http://www.fakr.noaa.gov/npfmc*.

FOR FURTHER INFORMATION CONTACT: Mary Furuness, 907–586–7228, or *mary.furuness@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

Federal regulations at 50 CFR part 679 implementing the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) govern the groundfish fisheries in the BSAI. The North Pacific Fishery Management Council (Council) prepared the FMP, and NMFS approved it under the Magnuson-Stevens Fishery