ALTERNATIVE CONSULTATION AGREEMENT TO IMPLEMENT SECTION 7 COUNTERPART REGULATIONS

USDA FOREST SERVICE, NATIONAL MARINE FISHERIES SERVICE and U.S. FISH AND WILDLIFE SERVICE

A. Background

1. This Alternative Consultation Agreement (ACA) has been prepared pursuant to the Joint Counterpart Endangered Species Act (ESA) Section 7 Consultation Regulations issued on December 8, 2003 (Federal Register, pages 68254-68265), to support implementation of the ESA. The counterpart regulations complement the general consultation regulations at 50 CFR 402 by providing an alternative process for completing section 7 consultations for Federal agency actions that authorize, fund, or carry out projects that support the National Fire Plan (NFP).

2. The purpose of the counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for NFP projects by providing an optional alternative to the procedures found in §§ 402.13 and 402.14(b) when the Forest Service determines a project is "not likely to adversely affect" (NLAA) any listed species or designated critical habitat.

3. Implementation of the counterpart regulations and this ACA is expected to maintain the same level of protection for threatened and endangered species and designated critical habitat as under 50 CFR Part 402, Subpart B. It is expected that projects with NLAA determinations by the Forest Service would have been considered to be NLAA determinations by the National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (FWS).

B. Process and Procedures

1. The counterpart regulations (50 CFR 402.30 to 402.34) establish an alternative process for meeting the requirements of section 7 of the ESA on proposed projects that support the NFP, when the Forest Service determines that the project is NLAA any listed species and/or critical habitat. Fire Plan Projects (FPP) are actions determined by the Forest Service to be within the scope of the NFP, such as prescribed fire, 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.

C. Area of Implementation and Scope of Application

1. This agreement covers any Forest Service actions that authorize, fund, or carry out projects that support the NFP.

2. All listed threatened, endangered and proposed species and all designated and proposed critical habitat are subject to this ACA.

3. This ACA is effective upon signing by all parties.

4. The Counterpart Regulations may be used after signing of the ACA, and when the required training has been completed. This ACA will remain in effect unless revoked by any party.

5. Implementation of counterpart regulations and this ACA are subject to Forest Service Manual 2670.4 delegations of responsibilities.

D. Personnel to Make NLAA Determinations and Document ESA Compliance

1. The counterpart regulations may be used by any Forest Service biologist, botanist or ecologist who conducts section 7 effects analyses for proposed actions that are Fire Plan Projects and make determinations of effect under the ESA and has completed the required training per section E. However, journey level biologists, botanists or ecologists are responsible for ensuring adequacy of biological evaluations and biological assessments with established FSM 2672.42 policy, and will be listed in Appendix 1.

2. Responsibility for documenting compliance with the ESA under the counterpart regulations and for ensuring biologists have the required training lies with the line officer having decision authority for the project being evaluated, usually a District Ranger or a Forest Supervisor (FSM2670.45 and 2670.46). The form given in Appendix 1 will be used to document this for each applicable project.

E. Developing and Maintaining Skills Necessary

1. The FWS, NMFS and Forest Service have developed a training program to provide Forest Service personnel identified in D. with the necessary skills to ensure consistent use and application of the standards of review as described in the ESA, the section 7 implementing regulations, and the Consultation Handbook.

2. The training program will be delivered via a web based system with one national meeting for regional contacts from the Forest Service, NMFS and FWS. The web based system will be delivered within 2 months of this agreement being signed. The national meeting may be used to train a select number of Forest Service subunits.

3. The training program will include a mutually agreeable section 7 curriculum developed and approved by NMFS and FWS to ensure that the Forest Service consistently uses and applies the standards of review as described in the ESA, the section 7 implementing regulations, the Consultation Handbook, and other existing training materials.

4. Specifically, the training curriculum will consist of background on the regulation, the procedures outlined in this agreement, standards for conducting the not likely to adversely affect determination, as discussed in number E. 3. above, and developing administrative records.

5. The Forest Service will maintain the skill level of its workforce who use the Counterpart Regulations by developing and supporting the web-based training program. The web based training will be updated as needed.

6. Line officers are responsible for documenting compliance with the ESA under the counterpart regulations and for ensuring biologists, botanists and ecologists have sufficient training. These line officers will be required to take the web-based training.

7. Forest Service will identify those individuals who have completed the appropriate training on the counterpart regulations, and provide the Washington Office of the FWS and NMFS Director of Protected Resources in Silver Spring, Maryland, with a list of the names of these individuals, as well as of any additional personnel who subsequently complete this training.

8. Each subunit that has fulfilled the training requirements must notify the appropriate FWS Field Office and NMFS' Director of Protected Resources in Silver Spring, Maryland, in writing, prior to implementing the counterpart regulation.

F. Standards of Project Review

1. In assessing effects of proposed NFP actions, the Forest Service will consider the following standards in making NLAA determinations regarding individuals of the species or constituent elements of critical habitat: (1) direct and indirect effects of the proposed action, (2) effects of inter-related or inter-dependent actions, (3) the environmental baseline, and (4) whether effects are insignificant, discountable, wholly beneficial, or adverse.

2. In so doing, the Forest Service must consider the best scientific and commercial data available and must provide a reasoned explanation for its conclusions.

G. Incorporating New Information

1. National Forests and Grasslands shall maintain accurate, updated lists of threatened and endangered species and critical habitat that either occur on National Forest System (NFS) lands, or that could be affected by actions authorized, funded or carried out on NFS lands.

2. When a species or critical habitat is proposed for listing or designation the FWS or NMFS will notify the Forest Service. Prior to or at the time of final listing or designation the FWS or NMFS will provide to the Forest Service any information that would be relevant to conducting an effects analysis for that species. Upon request, NMFS and FWS will provide the Forest Service with assistance relevant to conducting effects analysis for the proposed species; however, the obligation to obtain the best available scientific and commercial data is the Forest Service's ongoing responsibility under section 7(a)(2) of the ESA.

3. The FWS and NMFS agree to share any new information on currently listed species and designated critical habitat that the FWS or NMFS receive that is relevant to conducting effects determinations. Upon request, NMFS and FWS will provide the Forest Service with assistance in determining whether their actions may affect listed species, where additional scientific and commercial data would provide a better information base from which to formulate an effects determination, and whether formal consultation is required.

4. After determinations of effect are made and during actual project implementation under the counterpart regulations, the Forest Service shall consider any significant new information

about the species, the action and the action area, as applicable, to ensure there is no new basis for different determinations of effect, additional determinations of effect, or a need to consult with the NMFS or FWS regarding ongoing projects. New species listings, and new species occurrences in project areas are two examples of such new information.

H. Maintaining a List and Record of Fire Plan Projects

1. Forest Service field units will maintain a list of NFP projects for which the counterpart consultation regulations were used. Annually, by March 1, each National Forest will provide their Regional Office with a list of NFP projects for which the counterpart regulations were used. This will include the project name, type of Fire Plan Project (e.g., thinning, prescribed fire, etc.), and a list of threatened or endangered species for which a NLAA determination was made. The Region, through the Washington Office of the Forest Service, will provide NMFS and FWS with these lists.

2. The Forest Service will document the analysis used in making the NLAA determination in a biological assessment or a biological evaluation. The biological evaluation and/or biological assessment document will be used in the monitoring and periodic program evaluation.

I. Monitoring and Periodic Program Evaluation

1. The purpose of the monitoring program is to evaluate whether the Forest Service is making NLAA determinations consistent with the best available scientific and commercial information, and in compliance with the ESA and the section 7 regulations.

2. The monitoring program will be national in scope, with samples based at the subunit level (Ranger District) and completed one year following implementation of the regulation. The monitoring program will be conducted every three years following the first year.

3. A national monitoring team (Team) will be comprised of individuals from the FWS, NMFS and Forest Service. The FWS and NMFS team members will be responsible for conducting the evaluation, with the Forest Service members available to provide any needed context and clarifications, and to answer questions on projects.

4. As part of their annual project reporting requirement, each subunit (Ranger District) that uses the counterpart regulations must complete the procedural checklist certifying that the procedural requirements have been met (Appendix 2), and submit it annually by March 1 to its respective Forest Service regional office. If the procedural requirements have not been met, the subunit will discuss the appropriate remedies in the certification memo. The Forest Service will provide the Team with this information.

5. The Team will take a random sample of projects from the Forest Service national list of fire plan projects that received NLAA determinations during the period under review. The sample will be sufficient to allow the FWS and NMFS to determine with a mutually agreed upon level of confidence that the Forest Service is making the determinations appropriately.

6. The Forest Service will provide the Team with the biological assessment or biological evaluation for each project that has been selected.

7. The Team will evaluate whether the Forest Service considered relevant information and used the best scientific and commercial data available in evaluating effects of the proposed action on listed species and critical habitat and in making the NLAA determination. It also will evaluate whether the Forest Service demonstrated a rational connection between that information, the proposed action and the NLAA determination. This includes identification of any direct effects, indirect effects, effects of any interrelated actions or interdependent actions and a description of how the effects are insignificant, discountable and/or beneficial.

8. The Team will use the Evaluation Form (Appendix 3) to document results of each project review. If all of the determinations were made appropriately then no further remedy is needed. If a determination is found to be inappropriate, more intensive sampling of that office's National Fire Plan project records may be warranted. Corrective actions will be identified by the Team.

For example, if the Team determines several determinations made for a fuel treatment project were not made consistent with the best available scientific and commercial information, the ESA, and the section 7 regulations, then the Team may recommend further focused review of determinations for similar types of projects.

9. Within 45 days of completing the evaluation, a monitoring report will be prepared by the Team. Based on the results, the FWS and NMFS Service Directors may recommend changes to the Forest Service implementation of the ACA. If necessary, NMFS and/or FWS may suspend or exclude any subunit from participating under the ACA, or otherwise terminate or suspend this ACA.

10. A Federal Register notice of monitoring report availability will be prepared by the NMFS or FWS, and the monitoring report will be posted on a NMFS and/or FWS website.

Dale N. Bosworth — 3/2/04
Dale N. Bosworth
Chief, Forest Service
Date

William T. Hogarth — 3/3/04
William T. Hogarth
Assistant Administrator for NOAA Fisheries
Date

Steve Williams — 3/3/04
Steven A. Williams
Director, U.S. Fish and Wildlife Service
Date

Appendix 1: NATIONAL FIRE PLAN PROJECT ESA COMPLIANCE STATEMENT

PROJECT COMPLIANCE WITH THE ENDANGERED SPECIES ACT CONSULTION REQUIREMENTS, USING THE COUNTERPART CONSULTATION REGULATIONS

USDA FOREST SERVICE

PROJECT NAME: _____

STATE: _____

FOREST SERVICE REGION: _____

NATIONAL FOREST/GRASSLAND: _____

RANGER DISTRICT: _____

DATE OF COMPLETED BE or BA: _____

NAME OF JOURNEY-LEVEL BIOLOGIST WHO COMPLETED THE BE or BA:

_____

As proposed this project is within the scope of, and will support, the National Fire Plan, because:

_____

The effects analysis completed and documented in the above BE or BA was done under the Section 7 counterpart regulations of the Endangered Species Act (Federal Register, December 8, 2003), and is in compliance with those regulations and the March xx, 2004 Alternative Consultation Agreement between the Forest Service, FWS and NMFS.

SIGNATURE OF LINE OFFICER: _____

NAME OF LINE OFFICER: _____

TITLE OF LINE OFFICER: _____

DATE: _____

Appendix 2: Procedural Checklist to Certify that Procedural Requirements Have Been Met, Pursuant to the ACA

(To be prepared by each Forest Service Ranger District for use by the Monitoring Team)

Region _____ **Name of Forest and District** _____

Date _____ **Certifying Line Officer** _____

	Criterion Consulting and Reviewing Biologists have:	**Yes**	**No**
1	Access to current published biological and ecological information		
2	Access to current published biological and ecological information relevant to the conservation of the threatened and endangered species and designated critical habitat		
3	Access to information on the methods and procedures for environmental assessments		
4	Access to current information on the environmental consequences of human actions on threatened and endangered species and designated critical habitat		
5	Access to current information on the success or failure of actions intended to minimize affects on threatened and endangered species and designated critical habitat		
6	Access to continued agency training and guidance on section 7		
7	Access to biological assessment template and other tools where applicable (e.g., Northwest regional consultation tools)		

Appendix 3: Evaluation of Determination of Effects Documents that Support NLAA Determinations

(To be used by the Monitoring Team)

Action Agency _____ **Name of Subunit** _____

Name of Project _____

Team Representative _____ **Date** _____

	Product/Criterion	Yes	No
1	Identifies proposed action clearly (includes a description of the various components of the action)		
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		
3	Identifies Action Area clearly (based on information in 2.)		
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)		
5	Compares the distribution of potential effects (identified in 2) with the threatened and endangered species and designated critical habitat (identified in 4) and establishes, using the best scientific and commercial data available, that (a) exposure is improbable or (b) if exposure is likely, responses are insignificant, discountable, or wholly beneficial		
6	Determination is based on best available scientific and commercial information		