

appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) *Service responsibilities.* In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

(m) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015; 84 FR 45016, Aug. 27, 2019]

#### **§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.**

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

#### **§ 402.16 Reinitiation of consultation.**

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(1) If the amount or extent of taking specified in the incidental take statement is exceeded;

(2) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

(4) If a new species is listed or critical habitat designated that may be affected by the identified action.

(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:

(1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and

(2) Five years have passed since the enactment of Public Law 115-141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later.

[51 FR 19957, June 3, 1986, as amended at 84 FR 45017, Aug. 27, 2019]

#### **§ 402.17 Other provisions.**

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on

clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) *Consequences caused by the proposed action.* To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) *Required consideration.* The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

[84 FR 45018, Aug. 27, 2019]

### Subpart C—Counterpart Regulations for Implementing the National Fire Plan

SOURCE: 68 FR 68264, Dec. 8, 2003, unless otherwise noted.

#### § 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