§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available. The Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written explanation of the basis for the extension.

§ 402.15 Periodic review of information.

(a) Periodic review. Each Federal agency shall conduct a periodic review of all information relating to listed species or critical habitat as it becomes available. In conducting such a review, the Federal agency shall consult with the Service in a formal consultation setting.

(b) Action by Federal agency. (1) Where the periodic review indicates that the action may affect listed species or critical habitat, the Federal agency shall seek the concurrence of the Service, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(2) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

(3) A Federal agency need not seek the concurrence of the Service if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(4) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Exception. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(d) Initiation of formal consultation. A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available. The Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written explanation of the basis for the extension.
A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to §402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service’s request for additional data is not to be construed as the Service’s opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service’s review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take may occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available.
available and will give appropriate con-
sideration to any beneficial actions
taken by the Federal agency or appli-
cant, including any actions taken prior
to the initiation of consultation.

(h) Biological opinions. The biological
opinion shall include:
(1) A summary of the information on
which the opinion is based;
(2) A detailed discussion of the ef-
fects of the action on listed species or
critical habitat; and
(3) The Service’s opinion on whether
the action is likely to jeopardize the
continued existence of a listed species
or result in the destruction or adverse
modification of critical habitat (a “jeop-
ardy biological opinion”); or, the
action is not likely to jeopardize the
continued existence of a listed species
or result in the destruction or adverse
modification of critical habitat (a “no
jeopardy” biological opinion). A “jeop-
ardy” biological opinion shall include
reasonable and prudent alternatives, if
any. If the Service is unable to develop
such alternatives, it will indicate that
to the best of its knowledge there are
no reasonable and prudent alter-
natives.

(i) Incidental take. (1) In those cases
where the Service concludes that an
action (or the implementation of any
reasonable and prudent alternatives)
and the resultant incidental take of
listed species will not violate section
7(a)(2), and, in the case of marine mam-
mals, where the taking is authorized
pursuant to section 101(a)(5) of the Ma-
rine Mammal Protection Act of 1972,
the Service will provide with the bio-
llogical opinion a statement concern-
ing incidental take that:
(i) Specifies the impact, i.e., the
amount or extent, of such incidental
taking on the species;
(ii) Specifies those reasonable and
prudent measures that the Director
considers necessary or appropriate to
minimize such impact;
(iii) In the case of marine mammals,
specifies those measures that are nec-
essary to comply with section 101(a)(5)
of the Marine Mammal Protection Act
of 1972 and applicable regulations with
regard to such taking;
(iv) Sets forth the terms and condi-
tions (including, but not limited to, re-
porting requirements) that must be
complied with by the Federal agency or
any applicant to implement the meas-
ures specified under paragraphs
(i)(1)(ii) and (i)(1)(iii) of this section;
and
(v) Specifies the procedures to be
used to handle or dispose of any indi-
dividuals of a species actually taken.

(2) Reasonable and prudent measures,
along with the terms and conditions
that implement them, cannot alter the
basic design, location, scope, duration,
or timing of the action and may in-
volve only minor changes.

(3) In order to monitor the impacts of
incidental take, the Federal agency or
any applicant must report the progress
of the action and its impact on the spe-
cies to the Service as specified in the
incidental take statement. The report-
ing requirements will be established in
accordance with 50 CFR 13.45 and 18.27
for FWS and 50 CFR 220.45 and 228.5 for
NMFS.

(4) If during the course of the action
the amount or extent of incidental tak-
ing, as specified under paragraph
(i)(1)(i) of this Section, is exceeded, the
Federal agency must reinitiate con-
sultation immediately.

(5) Any taking which is subject to a
statement as specified in paragraph
(i)(1) of this section and which is in
compliance with the terms and condi-
tions of that statement is not a prohib-
ited taking under the Act, and no other
authorization or permit under the Act
is required.

(j) Conservation recommendations. The
Service may provide with the biologi-
cal opinion a statement containing dis-
cretionary conservation recommenda-
tions. Conservation recommendations
are advisory and are not intended to
carry any binding legal force.

(k) Incremental steps. When the action
is authorized by a statute that allows
the agency to take incremental steps
toward the completion of the action,
the Service shall, if requested by the
Federal agency, issue a biological opnion
on the incremental step being con-
sidered, including its views on the en-
tire action. Upon the issuance of such a
biological opinion, the Federal agency
may proceed with or authorize the in-
cremental steps of the action if:
(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);
(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;
(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and
(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(1) 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.

§ 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 formal consultation.

Reinitiation of formal 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:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;
(b) 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;
(c) 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
(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

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