CHAPTER 1
THE ENDANGERED SPECIES ACT AND INCIDENTAL TAKE PERMITS

A. Purpose of the Habitat Conservation Planning Process

The purpose of the habitat conservation planning process and subsequent issuance of incidental take permits is to authorize the incidental take of threatened or endangered species, not to authorize the underlying activities that result in take. This process ensures that the effects of the authorized incidental take will be adequately minimized and mitigated to the maximum extent practicable.

B. Purpose of the Handbook

The purpose of this handbook is to guide the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) in processing incidental take permit applications and participating in associated habitat conservation planning efforts. The goals of the handbook are threefold: (1) to ensure that the goals and intent of the conservation planning process under the Endangered Species Act are realized; (2) to establish clear standards that ensure consistent implementation of the section 10 program nationwide; and (3) to ensure that FWS and NMFS offices retain the flexibility needed to respond to specific local and regional conditions and a wide array of circumstances. Although intended primarily as internal agency guidance, this handbook is fully available for public evaluation and use, as appropriate.

C. Background and Legal Authority

Section 9 of the Endangered Species Act of 1973, as amended (ESA), prohibits the "take" of any fish or wildlife species listed under the ESA as endangered; under Federal regulation, take of fish or wildlife species listed as threatened is also prohibited unless otherwise specifically authorized by regulation. Take, as defined by the ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

In the 1982 amendments to the ESA, Congress established a provision in section 10 that allows for the "incidental take" of endangered and threatened species of wildlife by non-Federal entities. Incidental take is defined by the ESA as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Prior to 1982, non-Federal parties undertaking otherwise lawful activities that were likely to result in take of listed species risked violating the section 9 prohibition but had no recourse under the law for exemption. Up to that time, only take occurring during scientific research and other conservation actions could be authorized under the ESA.

The "incidental take permit" process was established under section 10(a)(1)(B) of the ESA precisely to resolve this difficulty. Under this provision the Secretary of the Interior and Secretary of Commerce may, where appropriate, authorize the taking of federally listed wildlife or fish if such taking occurs incidentally during otherwise legal activities. The Secretaries of Interior and Commerce subsequently charged the Directors of the FWS and NMFS, respectively, with regulating the incidental taking of listed species under their jurisdiction.

Section 10(a)(2)(A) of the ESA requires an applicant for an incidental take permit to submit a "conservation plan" that specifies, among other things, the impacts that are likely to result from the taking and the measures the permit applicant will undertake to minimize and mitigate such impacts. Conservation plans under the ESA have come to be known as "habitat conservation plans" or "HCPs" for short. These terms are used interchangeably throughout this handbook. The terms incidental take permit, section 10 permit, and section 10(a)(1)(B) permit are also used interchangeably in the handbook. Section 10(a)(2)(B) of the ESA provides statutory criteria that must be satisfied before an incidental take permit can be issued.

Thus, section 10, as revised, provides a clear regulatory mechanism to permit the incidental take of federally listed fish and wildlife species by private interests and non-Federal government agencies during lawful land, water, and ocean use activities. However, Congress also intended this process to reduce conflicts between listed species and economic development activities, and to provide a framework that would encourage "creative partnerships" between the public and private sectors and state, municipal, and Federal agencies in the interests of endangered and threatened species and habitat conservation (H.R. Rep. No. 97-835, 97th Congress, Second Session).

This is critically important, for Congress was not instituting merely a permit procedure but a process that, at its best, would integrate non-Federal development and land use activities with conservation goals, resolve conflicts between endangered species protection and economic activities on non-Federal lands, and create a climate of partnership and cooperation.

Congress also intended that HCPs could include conservation measures for candidate species, proposed species, and other species not listed under the ESA at the time an HCP is developed or a permit application is submitted. This can benefit the permittee by ensuring that the terms of an HCP will not change over time with subsequent species listings. It can also provide early protection for many species and, ideally, prevent subsequent declines and in some cases the need to list such species.

Congress modeled the 1982 section 10(a) amendments after the conservation plan developed by private landowners and local governments to protect the habitat of two federally listed butterfly species on San Bruno Mountain in San Mateo County, California. Congress also

recognized that the circumstances surrounding the San Bruno Mountain HCP would not be universally applicable and that each HCP would be unique to its own factual setting.

The FWS published its final regulations for implementing the section 10 permit program in the Federal Register on September 30, 1985 (50 FR 39681-39691); NMFS published final regulations for the program on May 18, 1990 (55 FR 20603; see Appendix 1 for both regulations). However, because the process applies to a wide variety of projects and activities, the Services declined to promulgate "exhaustive, 'cookbook' regulations . . . detailing every possible element that could be required in conservation plans." Rather, the section 10 permit regulations reiterate ESA requirements and provide a framework for issuance and management of permits. Beyond that it is Service policy to promote "flexibility and ingenuity" in working with permit applicants and developing HCPs under the section 10 process.

In keeping with this policy, this handbook establishes detailed but flexible guidelines to be used in developing HCPs, processing section 10(a)(1)(B) permit applications, and managing ongoing HCP programs. It also attempts to correct the inevitable difficulties identified during the first 10 years of the section 10 program and to make it more efficient in the future. However, nothing in this handbook is intended to supersede or alter any aspect of Federal law or regulation pertaining to the conservation of endangered species.

D. Coordination Between FWS and NMFS

FWS and NMFS share joint authorities under the ESA for administering the incidental take permit program. Generally, the FWS is responsible for terrestrial and freshwater aquatic species while NMFS is responsible for listed marine mammals, anadromous fish, and other living marine resources. Thus, HCP efforts in which FWS is involved tend to be land-based, while HCPs in which NMFS is involved are generally aquatic, addressing either marine or anadromous species. NMFS also issues permits for incidental taking of listed fish species during other activities such as state-run hatchery operations and commercial or recreational fisheries. In some cases these responsibilities overlap and the agencies work closely together--for example, in the Pacific Northwest many HCPs are being developed which address terrestrial species and anadromous fish in the same planning effort.

This handbook is intended to serve the needs of each agency's incidental take permit program. Although to date the FWS has had a more active program, and some sections consequently are written more from the FWS's land-based perspective, it has been and is the intention of both agencies to develop and use the handbook jointly. It is also their intention to cooperate fully in joint administration of the section 10 program. However, there are procedural differences between the two agencies. Chapters 2 and 6 describe certain differences between FWS and NMFS with respect to organizational structure, permit delegation authority, and applicable Federal regulations, and Chapters 3 and 4 contain some information applicable to FWS only. All such differences are clearly indicated and unless

otherwise noted the policies and procedures described in the handbook apply jointly to FWS and NMFS.

E. Overview of the Incidental Take Permit Process

1. When is a Permit Needed?

The starting point for the section 10(a)(1)(B) permit process is a determination that "take" is likely to occur during a proposed non-Federal activity and a decision by the landowner or project proponent to apply for an incidental take permit. Federal activities and non-Federal activities that receive Federal funding or require a Federal permit (other than a section 10 permit) typically obtain incidental take authority through the consultation process under section 7 of the ESA. Thus, the HCP process is designed to address non-Federal land or water use or development activities that do not involve a Federal action that is subject to section 7 consultation.

In some cases, however, Federal agencies besides FWS or NMFS may be integrally involved in HCP efforts. In these cases, the action to be conducted by the Federal agency during the implementation of the HCP should be included as an additional element to be consulted on through the section 7 consultation conducted for the HCP. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any related and supportive Federal actions into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee. See Chapter 3, Section A.1 and A.6 for more information.

Before determining whether a section 10 permit is needed, the applicant, with Service technical assistance, should consider whether take during proposed project activities can be avoided. This is sometimes possible through relocation of project facilities, timing restrictions, or similar measures, depending on the nature and extent of the proposed activity and the biology of the species involved. If take cannot be avoided, the Services will recommend that an incidental take permit be obtained. The decision to obtain a permit lies with the prospective permit applicant. However, should the applicant ultimately elect not to obtain a permit, and an unauthorized take attributable to project activities occurs, the responsible individuals or entity would be liable under the enforcement provisions of the ESA.

2. What Kinds of Activities Can be Authorized?

A section 10(a)(1)(B) permit only authorizes take that is incidental to otherwise lawful activities. In this context, "otherwise lawful activities" means economic development or land or water use activities that, while they may result in take of federally listed species, are consistent with other Federal, state, and local laws. Take that occurs during other types of activities--i.e., take for scientific purposes, to enhance the propagation or survival of a listed species, or for purposes of establishment and maintenance of experimental populations--must be authorized by a permit under section 10(a)(1)(A) of the ESA (e.g., "Safe Harbor"or "recovery" permits). In some cases, however, take in the form of capture or harassment can be authorized under an incidental take permit, if the purpose of such actions is to minimize more serious forms of take (e.g., death or injury) or to conduct monitoring programs during activities authorized by the permit (see Chapter 7, Section B.1)

3. Phases of the Process.

Once the decision to obtain a permit has been made, the section 10 process consists of three phases: (1) the HCP development phase; (2) the formal permit processing phase; and (3) the post-issuance phase. The HCP development phase is the period during which the applicant's project or activity is integrated with species protection needs through development of the HCP. This phase is typically conducted by the applicant with technical assistance from FWS or NMFS Field Office and ends when a "complete application package" is forwarded to the appropriate permit issuing office. A complete application package consists of a permit application form, fee (if required), a completed HCP, a draft National Environmental Policy Act (NEPA) document (if required), and in some cases an Implementing Agreement (see Chapter 6, Section B.2).

The permit application processing phase involves review of the application package by the appropriate Regional Office or, in some cases, the NMFS Washington, D.C., office; announcement in the Federal Register of the receipt of the permit application and availability of the NEPA analysis for public review and comment; intra-Service consultation under section 7 of the ESA; and determination whether the HCP meets ESA statutory issuance criteria. If FWS or NMFS determines, after considering public comment, that the HCP is statutorily complete and that permit issuance criteria have been satisfied, it must issue the permit. The Field Office and Regional Office should coordinate regularly throughout these first two phases of the HCP process to avoid any renegotiation of the terms of the HCP by the Regional Office (see Chapter 6, Section C.1).

The post-issuance phase is the period during which the permittee and other responsible entities implement the HCP and its monitoring and funding programs. Service responsibilities, in addition to any identified in the HCP, are to monitor the permittee's compliance with the conservation program and other terms and conditions of the permit, and the HCP's long-term progress and success. When a permit is issued, it is also Service policy to notify the public of the outcome of the permit application through a Federal Register notice. An individual notice may be published for each permit decision, or a quarterly or

biannual list of permit decisions for that period may be published. There are also specific notification requirements under NEPA.

4. Compliance With NEPA and Section 7 of the ESA.

Issuance of an incidental take permit is a Federal action subject to National Environmental Policy Act compliance. The purpose of NEPA is to promote analysis and disclosure of the environmental issues surrounding a proposed Federal action in order to reach a decision that reflects NEPA's mandate to strive for harmony between human activity and the natural world. Although section 10 and NEPA requirements overlap considerably, the scope of NEPA goes beyond that of the ESA by considering the impacts of a Federal action on non-wildlife resources such as water quality, air quality, and cultural resources. Depending on the scope and impact of the HCP, NEPA requirements can be satisfied by one of the three following documents or actions: (1) a categorical exclusion; (2) an Environmental Assessment (EA); or (3) an Environmental Impact Statement (EIS).

An EIS is required when the project or activity that would occur under the HCP is a major Federal action significantly affecting the quality of the human environment. An EA is prepared when it is unclear whether an EIS is needed or when the project does not require an EIS but is not eligible for a categorical exclusion. An EA culminates in either a decision to prepare an EIS or a Finding of No Significant Impact (FONSI). Activities which do not individually or cumulatively have a significant effect on the environment can be categorically excluded from NEPA. Chapter 5 of the handbook discusses NEPA requirements.

Issuance of an incidental take permit is also a Federal action subject to section 7 of the ESA. Section 7(a)(2) requires all Federal agencies, in consultation with the Services, to ensure that any action "authorized, funded, or carried out" by any such agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. Because issuance of a section 10 permit involves an authorization, it is subject to this provision. Although the provisions of section 7 and section 10 are similar, section 7 and its regulations introduce several considerations into the HCP process that are not explicitly required by section 10--specifically, indirect effects, effects on federally listed plants, and effects on critical habitat. Chapter 3, Sections B.2(e)-(h) discuss these issues in detail. Chapter 6, Section C.3 explains how section 7 consultation for issuance of section 10(a)(1)(B) permits is conducted.

5. Guiding Principles.

The section 10 process is an opportunity to provide species protection and habitat conservation within the context of non-Federal development and land and water use activities. Ideally, it may also allow for the conservation and recovery of federally listed, proposed, and candidate species as well as overall biological diversity. It thus provides a

mechanism for allowing economic development that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."

While species conservation is of course paramount, the section 10 process recognizes the importance of both biological and economic factors. Biologically, it provides FWS and NMFS with a tool to minimize and mitigate the incidental take of listed, proposed, and candidate species at the local, rangewide, or ecosystem level. For landowners and local governments, it provides long-term assurances that their activities will be in compliance with the requirements of the ESA. For both sides, the HCP process promotes negotiation and compromise and provides an alternative to conflict and litigation.

The Services recognize the importance of working in partnership with non-Federal interests under section 10 of the ESA. The Services are committed to facilitating such partnerships by participating in all phases of the HCP process, providing timely assistance to permit applicants, expeditiously processing permit applications, and generally undertaking all measures necessary to ensure that the section 10 program is able to meet the growing challenges and opportunities of integrating endangered species protection with economic activities and needs. These principles are discussed further throughout this chapter and the entire handbook.

F. Overview of Permit Processing Requirements

Processing an incidental take permit application consists of announcing the HCP and NEPA analysis in the Federal Register and making them available for public review and comment; evaluating comments received, if any; conducting a consultation under section 7 of the ESA; and determining whether the HCP meets statutory issuance criteria under section 10(a)(2)(B) of the ESA. These basic steps are required for all HCPs. However, specific document and processing requirements will vary depending on the size, complexity, and impacts of the HCP involved (see sections F.2-F.5 below). Other documents or actions that may be needed depending on the HCP include the Implementing Agreement (Chapter 3, Section B.8), Environmental Action Memorandum, a brief document that provides the Service's record of NEPA compliance for categorically excluded actions (Chapter 6, Section B.2), and legal review of the application package (Chapter 6, Section C.4).

1. Expeditious Processing of Permit Applications.

In the first ten years of the section 10 HCP program (1983-1992), 14 incidental take permits were issued. As of August, 1996, 179 incidental take permits have been issued, and approximately 200 are in development. To cope with this growing section 10 workload and anticipated continued increases in the program, the Services intend to streamline the HCP process to the maximum extent practicable and allowable by law.

To accomplish this, the handbook introduces numerous improvements to the section 10 program developed by the Services and the Departments of Interior and Commerce. First, the handbook establishes a category of HCPs called "low-effect HCPs" which will apply to activities that are minor in scope and impact; these HCPs will receive expedited handling during the permit application processing phase. Second, the handbook improves guidance to Service personnel about section 10 program standards and procedures. Third, the handbook institutes numerous mechanisms to expedite the permit processing phase for all HCPs. Fourth, the handbook establishes specific time periods for processing incidental take permit applications once an HCP is submitted to the FWS or NMFS for approval.

2. The Low-effect HCP Category.

For purposes of the section 10 program, the Services establish a special category for HCPs with relatively minor or negligible impacts. This "low-effect HCP" category is defined as follows:

Low-Effect HCPs -- Those involving: (1) minor or negligible effects on federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP. Factors relevant to the determination that an activity is a low-effect activity include, but are not limited to, the effect of the activity on the distribution or the numbers of the species.

The relationship between the geographic size of a project and the scope or severity of its impacts will not always be clear-cut. Projects that are large or small in size often will have commensurately high or low effects. However, a project may be large in size, but still be categorized as low-effect if it is expected to result in minor or negligible impacts. Similarly, a project could be small in size but capable of generating very significant impacts (e.g., if it affects a species with a highly-restricted range).

The Services must consider each HCP on a case-by-case basis in determining whether it belongs in the low-effect category, taking into account all relevant factors including biological factors. The determination of whether an HCP qualifies for the low-effect category must be based on its anticipated impacts prior to implementation of the mitigation plan. The purpose of this category is to expedite handling of HCPs for activities with inherently low impacts, not for projects with significant potential impacts that are subsequently reduced through mitigation programs. However, this determination should factor in actions taken by the applicant to avoid take, such as conducting activities during specific times to avoid the nesting season or by relocating project locations.

3. Processing Low-Effect Permit Applications.

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

Consequently, an important guiding principle of the handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with Federal law.

This will be accomplished by: (1) establishing clear processing standards for all HCP permit applications; (2) eliminating or standardizing section 10 documents for low-effect projects, wherever possible; (3) eliminating unnecessary review procedures;
(4) categorically excluding low-effect HCPs from NEPA requirements; and (5) utilizing other techniques described throughout the handbook.

4. Summary of Permit Processing Requirements.

The primary documentation and processing requirements for HCPs by category are as follows. Both categories also require the permit document with applicable terms and conditions.

Low-effect HCPs require: (1) an HCP; (2) an application form and fee ($25);
(3) publication in the Federal Register of a Notice of Receipt of a Permit Application; (4) formal section 7 consultation; (5) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA; and (6) an Environmental Action Memorandum, a brief document that serves as the Service's record of NEPA compliance for categorically excluded actions by explaining the reasons the Services concluded that there will be no individual or cumulative significant effects on the environment. Implementing Agreements will not be prepared for a low-effect HCP, unless requested by the permit applicant. In such cases, acceptance of the legal terms and conditions of the permit by the applicant will provide the necessary assurance that the plan will be implemented. Low-effect projects are categorically excluded from NEPA (see Chapter 5, Section A.2).

All other HCPs require: (1) an HCP; (2) an application form and fee ($25); (3) an Implementing Agreement (optional, depending on Regional Director discretion); (4) the NEPA analysis, either an EA or EIS; (5) publication in the Federal Register of a Notice of Receipt of a Permit Application and Notice(s) of Availability of the NEPA analysis; (6) Solicitor's Office review of the application package; (7) formal section 7 consultation; and (8) a Set of Findings, which evaluates a section 10(a)(1)(B) permit application in the context

of permit issuance criteria found at section 10(a)(2)(B) of the ESA and 50 CFR Part 17. Note: For NMFS, the NOAA General Counsel's Office (either in the Region or Headquarters) reviews all documents relating to all HCPs.

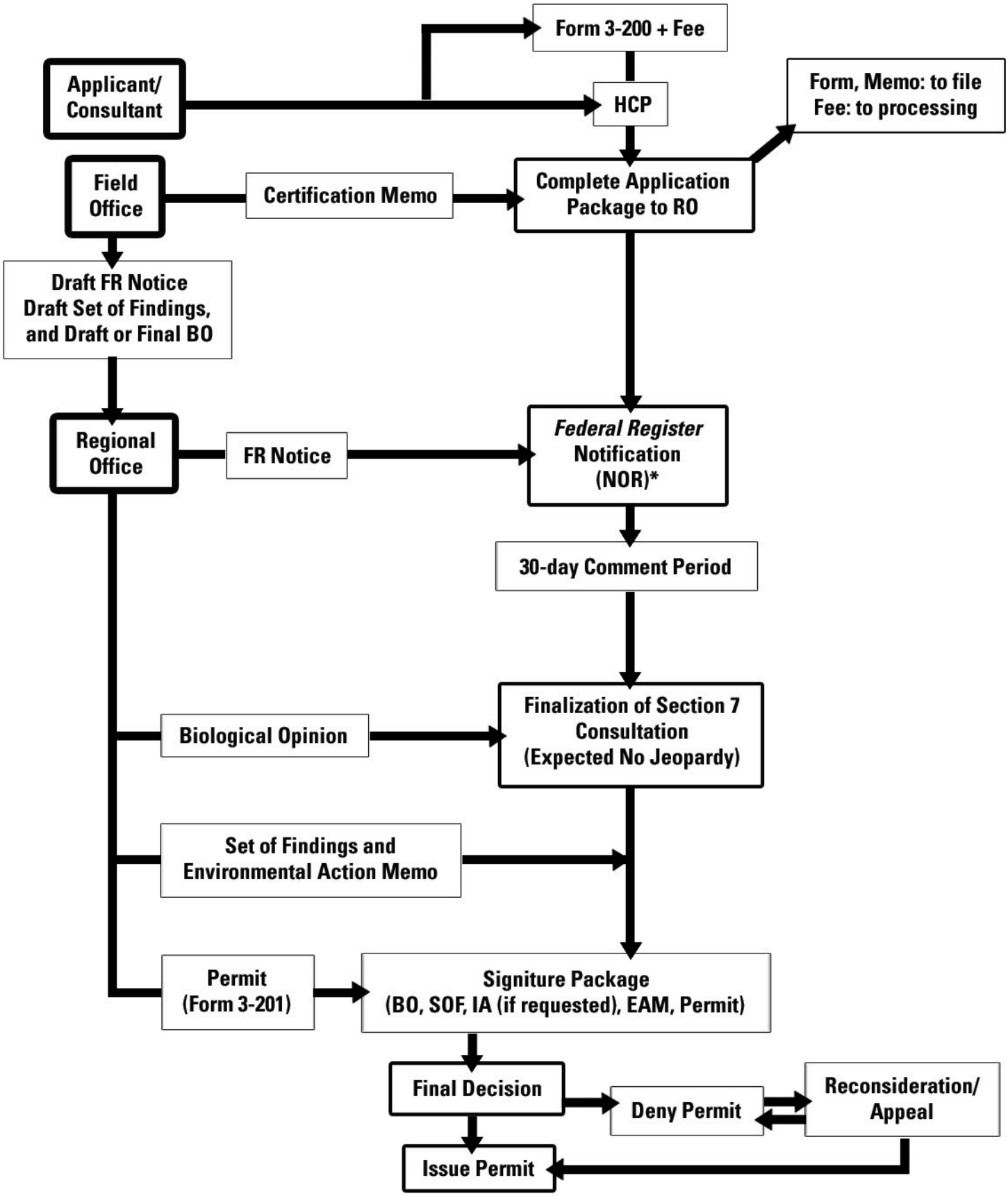
An EA will satisfy NEPA requirements for a section 10 permit application and will conclude with a Finding of No Significant Impact (FONSI), unless it is determined during preparation of the EA that approval of the project is a major Federal action significantly affecting the quality of the human environment. It is not necessary to prepare an EA first, if it is determined from the start that an EIS is necessary, although an HCP that requires an EIS should be uncommon. In the latter case, an EIS and Record of Decision (ROD) is required. For some HCPs, it may be possible to prepare the EA in accordance with 40 CFR 1501.4(e)(2), which requires that any Finding of No Significant Impact (FONSI) in an EA be made available for public review for 30 days before an agency makes its final decision and can eliminate the need for an EIS [see Chapter 5, Section A.3].

Figure 1 shows a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for a low-effect HCP that is categorically excluded from NEPA. Figures 2 and 3 show a diagram of the section 10 permit processing requirements from submission of the application package to permit issuance for an HCP that requires an EA and an EIS, respectively.

5. Target Permit Processing Times.

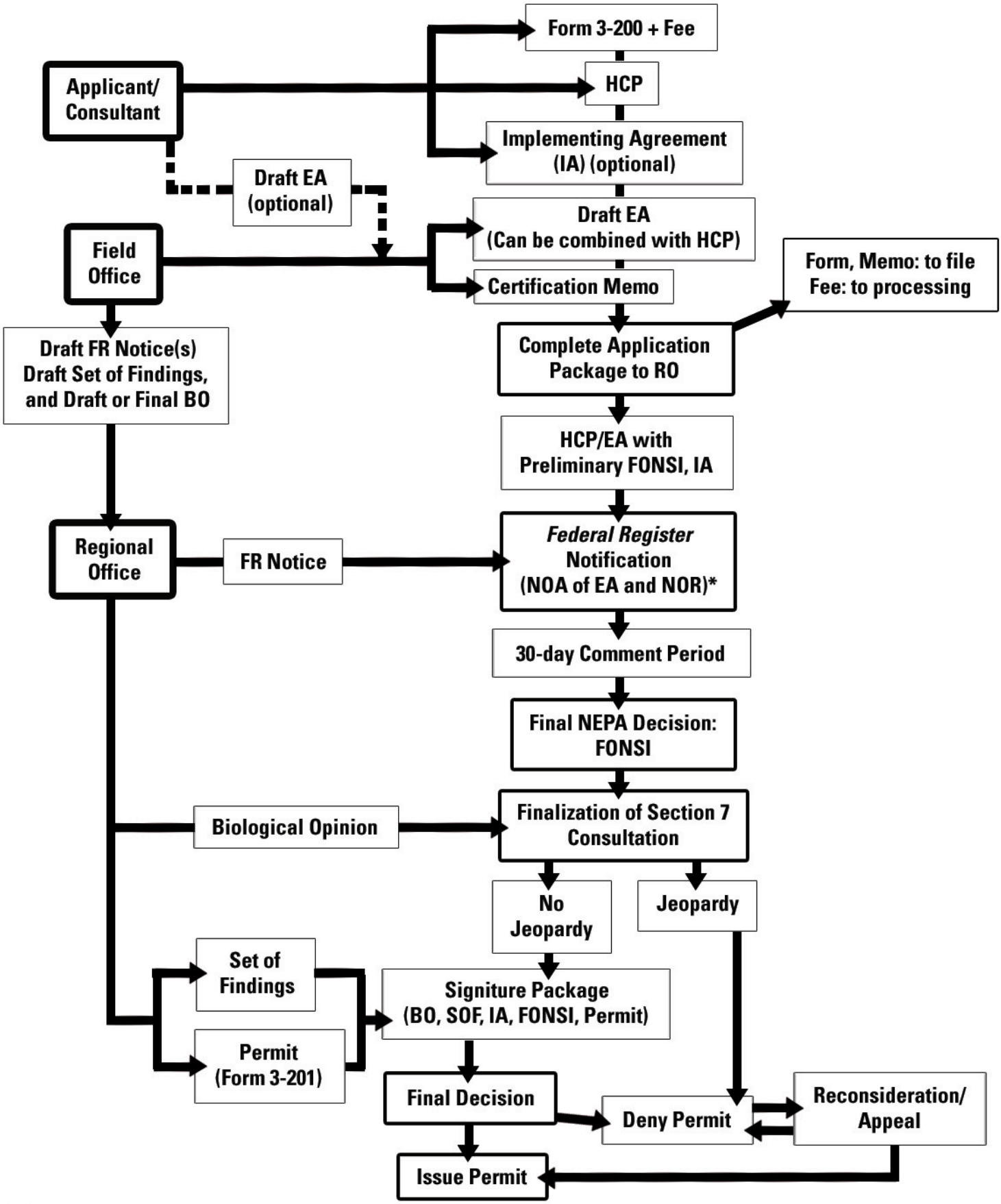
The time required to process an incidental take permit application will vary depending on the size, complexity, and impacts of the HCP involved. The Services will work to complete all steps as expeditiously as possible. Procedurally, the most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under NEPA--whether an EIS, EA, or a categorical exclusion--although other factors such as public controversy can also affect permit processing times.

Figure 1: Typical Processing Steps for Low-effect Section 10(a)(1)(B) Incidental Take Permit Applications



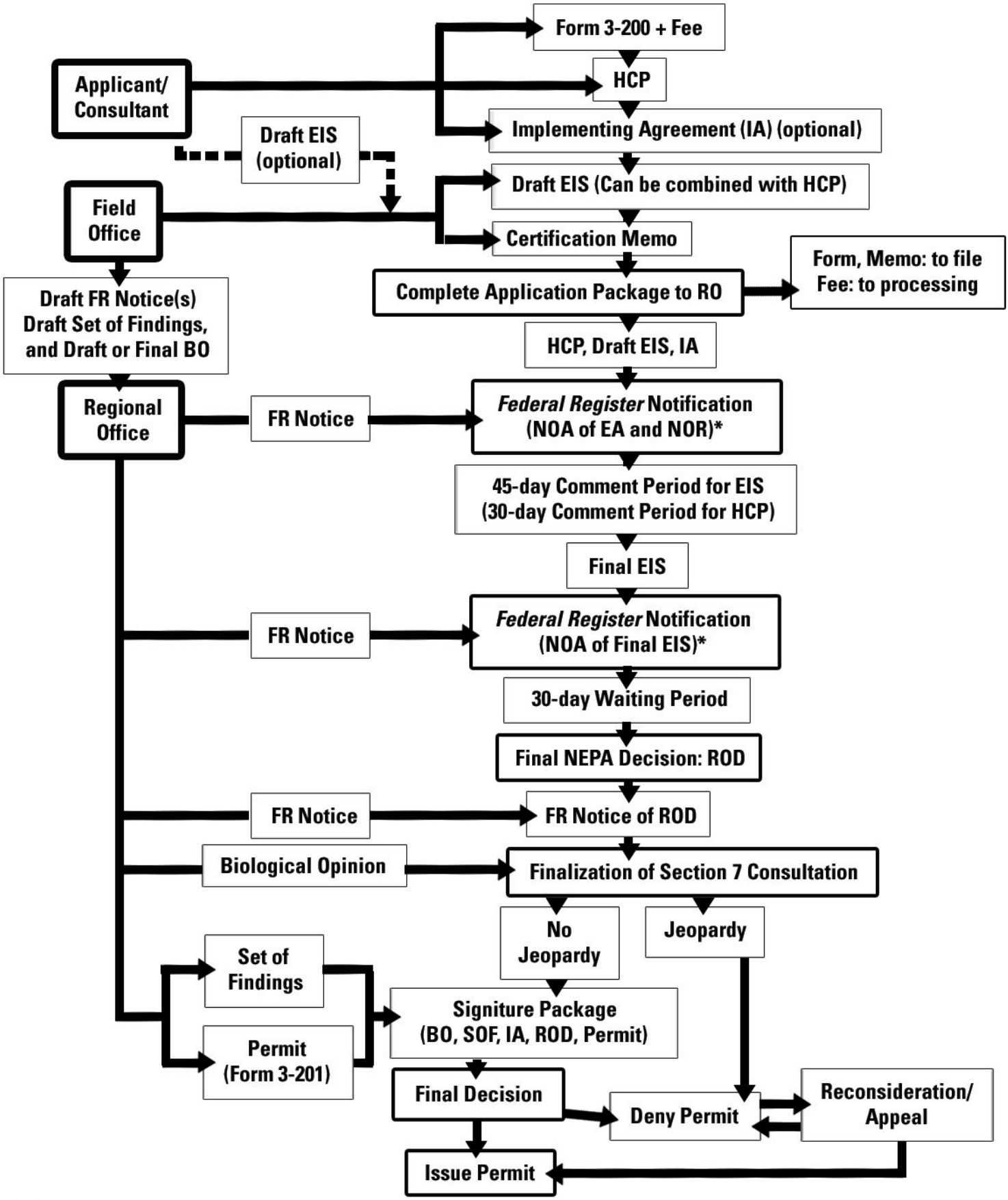
*NOR-Notice of Receipt of Permit Application

Figure 2: Typical Processing Steps for Section 10(a)(1)(B) Incidental Take Permit Applications Requiring an EA



*NOA-Notice of Availability/
NOR-Notice of Receipt of Permit Application

Figure 3: Typical Processing Steps for Section 10(a)(1)(B) Incidental Take Permit Applications Requiring an EIS



*NOA-Notice of Availability/
NOR-Notice of Receipt of Permit Application

The handbook establishes the following target permit processing requirements for HCPs based on the NEPA action. Although not mandated by law or regulation, these targets are adopted as FWS and NMFS policy and all Service offices are expected to streamline their incidental take permit programs and to meet these targets to the maximum extent practicable.

Permit processing times are defined as the period between receipt of a complete application package, as defined in Chapter 6, Section B.2(b), to the issuance of the incidental take permit, including Federal Register notifications and public comment. The targets do not include any portion of the HCP development phase.

Section 10(a)(1)(B) Permit Application Processing Times:

HCP With EIS . . . . . less than 10 months
HCP With EA . . . . . 3 - 5 months
Low-effect HCP (Categorically Excluded) . . . . . less than 3 months

These targets will apply as maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. However, in many cases it is expected actual processing times will be less than these targets and all FWS and NMFS offices are encouraged to improve on the targets whenever possible.

6. Benefits of Regional or Multi-species Conservation Planning.

Some HCP applicants may be tempted to segment (or "piecemeal") a project into parts to take advantage of reduced processing requirements for low-effect HCPs as compared to larger ones. The Services do not endorse such segmentation and will not allow use of the low-effect HCP category to avoid processing requirements without commensurate reductions in project impacts. In addition, a low-effect HCP may not be available for a segmented project or one component of a regional HCP because in determining whether an action is categorically excluded from NEPA the Services must consider cumulative effects. The Services must also consider the interrelated, interdependent, and cumulative effects analyzed through the section 7 analysis.

Potential HCP applicants considering regional or multi-species HCPs may initially conclude that such efforts are undesirable in light of more streamlined processing requirements for low-effect projects. However, regional or multi-species HCPs have many benefits. They can, for example: (1) maximize flexibility and available options in developing mitigation programs; (2) reduce the economic and logistic burden of these programs on individual landowners by distributing their impacts; (3) reduce uncoordinated decision making, which can result in incremental habitat loss and inefficient project review; (4) provide the permittee with long-term planning assurances and increase the number of species for which such assurances can be given; (5) bring a broad range of activities under the permit's legal

protection; and (6) reduce the regulatory burden of ESA compliance for all affected participants.

The cumulative total of HCP processing requirements is far greater when regional or area-wide activities are permitted individually than when addressed comprehensively under a regional HCP.

Consequently, a second guiding principle of this handbook is that FWS and NMFS will continue to encourage state and local governments and private landowners to undertake regional and multi-species HCP efforts as appropriate and will assist such efforts to the maximum extent practicable.

G. Helpful Hints

A successful HCP often requires consensus building and integration of numerous interests, especially for large-scale, regional planning efforts. Also, biological issues are not always clear-cut and sometimes are subject to interpretation. Service biologists must combine flexibility, creativity, good science, and good judgement in providing technical assistance to HCP applicants and making the section 10 program successful. The following "rules of thumb" should be helpful in meeting these challenges.

- Review recovery plans for affected species and assess the extent to which HCP mitigation programs are consistent with them. Although FWS or NMFS cannot mandate that HCPs contribute to recovery, applicants should be encouraged to develop HCPs that produce a net positive effect on a species (see Chapter 3, Section B.3). Recovery plans should be used to help identify strategies to minimize and mitigate the effects of the HCP. When recovery plans are not available, contact recovery teams or other species experts to obtain information pertinent to HCP development. When appropriate, the development of the HCP could involve more active participation by recovery team members and species experts by providing technical assistance to the applicant.

- Keep up-to-date on applicable statutes and policies, including the ESA, its implementing regulations, this handbook, and court decisions. Understand the authorities and limitations of the ESA and NEPA. Be up-to-date on new biological developments and state-of-the-art techniques such as population viability analysis. Keep reference materials on hand concerning legal and biological issues applicable to the section 10 program (Appendix 2 contains a list of reference materials).

- The HCP is initiated by the applicant and is the applicant's document, not FWS's or NMFS's. The Services should assist the applicant and help guide the process by providing sufficient staff and technical advice. However, if the applicant insists on measures that would not allow the HCP to meet the section 10 issuance criteria, the

Service will inform the applicant of the deficiencies in writing and offer assistance in developing a solution. If deficiencies are not corrected, the FWS or NMFS may ultimately have to deny the permit (see Chapter 6, Section F.1). Providing technical assistance early and continuously through the HCP development process will hopefully prevent such situations from occurring.

- Help the applicant determine early in the process what species are to be addressed in the HCP. This will depend on what species occur in the project area, whether they are likely to be affected by project activities, their listing status (listed, proposed, or candidate), the applicant's objectives, and other factors (see Chapter 3, Section A.5). The Service will encourage permit applicants to address any species in the plan area likely to be listed within the life of the permit. This can benefit the permittee in two ways: (1) the "No Surprises" policy applies to unlisted species that are adequately addressed in an HCP (see Chapter 3, Section B.5(a)); and (2) it prevents the need to revise an approved HCP should an unlisted species that occurs within the plan area but was not addressed in the HCP subsequently be listed (see Chapter 4). The Services should advise the applicant on this issue, but ultimately the decision about what species to include in the HCP is always the applicant's.

- Work with the applicant to get important issues on the table as early as possible in the HCP development stage. Make sure the applicant understands the section 10 issuance criteria and any regulatory or biological issues that will need to be addressed in the HCP. Avoid "eleventh-hour" surprises that result in delays and bad feelings on all sides.

- HCP mitigation programs will be as varied as the projects they address. Some will be simple while those for large-scale, regional planning efforts may be quite complicated. There are few ironclad rules for mitigation programs but make sure they address specific needs of the species involved and that they are manageable and enforceable. A monitoring plan should be developed that establishes reporting requirements, biological criteria for measuring program success, and procedures for addressing deficiencies in HCP implementation (see Chapter 3, Sections B.3-B.5).

- Service Field Offices and Regional Offices must coordinate regularly throughout the HCP process and work as a team, not as isolated, separate players. This is essential to ensure that FWS or NMFS, as applicable, provide consistent, dependable assistance to the applicant in developing the HCP and that internal differences in approach are resolved prior to the submission of an HCP proposal to the Regional office for formal processing (see Chapter 6, Section C.1).

- The same principle cited immediately above applies to coordination between FWS and NMFS when an HCP includes the jurisdiction of both agencies. It is also important to

obtain the views of the state wildlife and conservation agencies early and to address their comments.

- Make sure the Services' section 7 obligations as they apply to issuance of a section 10 permit are explained to the permit applicant(s) and that section 7 considerations are introduced into the HCP from the beginning of the planning process. Compliance of the HCP with section 7 and 10 of the ESA should be regarded as concurrent, integrated processes, not as independent and sequential. (see Chapter 3, Section B.2(e) and Chapter 6, Section C.3).

- The activities addressed under an HCP may be subject to Federal laws other than the ESA, such as the Coastal Zone Management Act, Archeological Resource Protection Act, and National Historical Preservation Act. Service staff should check the requirements of these statutes and ensure that Service responsibilities under these laws, if any, are satisfied, and that the applicant is notified of these other requirements from the beginning. The Service's staff should, to the extent feasible for all HCPs other than low-effect HCPs, integrate analysis done in compliance with other environmental and cultural review requirements into the NEPA analysis prepared for the proposed HCP.

- Work with the permit applicant in good faith but ensure that the HCP established clearly measurable and enforceable compliance standards, including written documentation of all applicable biological results.

- Once an incidental take permit has been issued, monitor permit compliance, and make sure monitoring activities are conducted and monitoring reports are submitted as defined by the HCP. Develop a tracking and accountability system for issued permits. Report all violations of permit conditions to the appropriate law enforcement personnel.