CHAPTER 4
TREATMENT OF UNLISTED SPECIES

Treatment of unlisted species is a crucial issue for HCPs and the section 10 process. One of the most common questions asked by permit applicants is, "What happens if a new species is listed after my section 10 permit has been issued?" Congress considered this issue during the 1982 ESA amendments and clearly intended that the section 10 process would provide for conservation of unlisted and listed species, and protect section 10 permittees from the uncertainties of future species listings:

> "Although the conservation plan is keyed to the permit provisions of the Act, which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species...In the event that an unlisted species addressed in the approved conservation plan subsequently is listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (H.R. Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691.)

A. Addressing Unlisted Species in the HCP

While HCPs are developed for listed species, they can also cover proposed, candidate or other rare or declining unlisted species. The inclusion of proposed, candidate, or unlisted species in an HCP is voluntary and is the decision of the applicant. The Services should explain to any HCP applicant the benefits of addressing unlisted species in the HCP and the risks of not doing so, and should strongly encourage the applicant to include as many proposed and candidate species as can be adequately addressed and covered by the permit. The primary reasons for addressing unlisted species with the listed species are: (1) to provide more planning certainty to the permittee in the face of future species listings; and (2) to increase the biological value of HCPs through comprehensive multi-species or ecosystem planning that provides early, proactive consideration of the needs of unlisted species. When including species other than listed species the applicant must ensure that these species are adequately covered in the HCP. (See the discussion of what it means for a species to be "adequately covered" under an HCP in the "No Surprises" policy section of this handbook and section A.3 of this Chapter).

If an unlisted species that was not addressed in an HCP becomes listed after the permit for that HCP has been issued, and if project activities are likely to result in take of the species, the permittee remains subject to the take prohibitions under section 9 or 4(d) of the ESA for the new species regardless of the fact that a permit is held for other listed species. In such a case, the permittee must either avoid take of the species or revise the existing HCP and

associated documents and obtain a permit amendment to take the newly listed species. This can result in unwanted complications and delays.

However, if the newly-listed species had been adequately addressed in the original HCP--even though it was unlisted--the permittee's situation would be different. Depending on how the unlisted species was treated in the HCP and the permit, the permittee may need to amend the permit only (not the HCP), or may need to take no additional action whatever to be in compliance with the ESA for the new species. Addressing unlisted species in an HCP provides the permittee with regulatory certainty in the event of future species listings, simplifies (or eliminates the need for) the permit amendment process, and provides the unlisted species with conservation benefits before they could be legally required under the ESA.

There are also significant biological advantages. At their best, HCPs can be comprehensive planning documents that address species conservation needs collectively on a community, habitat-type, or even ecosystem level. Increasingly, HCP applicants are turning to these types of planning efforts as an alternative to inefficient, piecemeal approaches to land-use planning, because they believe that in the long run addressing the interests of wildlife serves their interests as well (e.g., by protecting ecosystem health, protecting the natural qualities of their communities, or preventing species declines in the first place), and to increase regulatory certainty and minimize future Federal requirements.

The Services must also explain to the applicant that the primary jurisdiction over unlisted species usually rests with the affected state fish and wildlife agency, and that it is advisable to have the appropriate state agency's participation in the HCP process. This increases the likelihood that the HCP will adequately address both State and Federal mitigation requirements for the affected species in one unified set of mitigation measures, thus providing further regulatory certainty to the applicant.

1. Deciding How to Address Unlisted Species.

Procedurally, there are two possible ways to handle unlisted species: (1) do not address them at all in the HCP; and (2) address them in the HCP and name them on the permit.

With respect to unlisted species that are adequately addressed in the HCP, most applicants prefer to have such species named on the original permit albeit with a delayed effective date tied to the date of any future listing. Others prefer to leave such species off the permit and to amend the permit later if necessary. Either way is acceptable, although, an applicant is well advised to include on the permit unlisted species that are proposed or likely to be listed within the foreseeable future. If the applicant strongly opposes the inclusion of unlisted species covered under the HCP on the permit, then exceptions can be made, but are not recommended. Most applicants would be expected to prefer that all covered unlisted species be included on the permit.

To some extent, the decision whether or not to address unlisted species will be influenced by the likelihood of whether a particular species will be listed in the foreseeable future or otherwise within the life of the permit. Generally, the permit applicant is well advised to address those species most likely to be listed--e.g., species that are proposed for listing, candidate species, and other species for which conservation concerns exist. The decision may also depend on the applicant's objectives in the HCP. If the object is a comprehensive ecosystem-based HCP, the applicant may elect to address unlisted species even if they are not likely candidates for listing. In any case, if the applicant elects not to address unlisted species in the HCP and such species are subsequently listed and could be incidentally taken within the planning area, the permittee may have to substantially amend and supplement the HCP to cover that species to remain in compliance with the requirements of the ESA.

2. Addressing Unlisted Species in the HCP and Permit.

If the permittee has elected to address unlisted species in the HCP and to have them included on the permit with a delayed effective date (the date of future listing), and such species are subsequently listed, the permittee will be in full ESA compliance for those species and no further action by the permittee is required.

In such cases, the name of the unlisted species should appear directly on the permit, even though, technically, they are not protected against take and no Federal permit is needed to incidentally take them at that time. The permit terms and conditions must make clear that the permit does not become effective with respect to unlisted species named on it until they are listed. The following language is suggested:

> The permittees, and their designated agents, are authorized to incidentally take (kill, injure, harm, harass) the *[provide species common and scientific names]*, which are listed or may be listed in the future under the Federal Endangered Species Act of 1973, as amended (Act), to the extent that take of these species would otherwise be prohibited under section 9 of the Act, and its implementing regulations, or pursuant to a rule promulgated under section 4(d) of the Act. Such take must be incidental to *[name the type of activity]* as described in the permit application and associated documents and as conditioned herein. This permit is immediately effective for species currently listed under the Act. This permit shall become effective for currently unlisted species named above upon any future listing of these species under the Act.

Compliance with the entire HCP and associated documents is a condition of the permit. Furthermore, if measures described in an HCP for the conservation of unlisted species are not implemented, and the species is subsequently listed, the permittee would be found to be out of compliance with the permit with respect to that species and the incidental take of the species would therefore not be authorized. Consequently, it is in the permittee's best interests to implement conservation measures described in an HCP for unlisted species.

3. Standards for "Covering" Species Under a Permit.

Under the "No Surprises" policy (see Chapter 3, Section B.5(a)) an unlisted species is said to be "adequately covered" by an HCP and subject to the assurances of "No Surprises" when the species is addressed in the HCP "as if it was listed pursuant to section 4 of the ESA, and in which HCP measures for that species would satisfy permit issuance criteria under section 10(a)(1)(B) of the ESA if the species was listed." For purposes of this chapter the term "adequately covered" shall have the same meaning as it does under the "No Surprises" policy. Unlisted species must be "adequately covered" under the original HCP before FWS or NMFS will name (i.e., "cover") such species on a permit or provide assurances that, upon the request of the permittee, a permit will be amended to include such a species upon the listing of such species and compliance with section 7.

B. Challenges in Treating Unlisted Species

Development of HCPs that treat unlisted species as though they were listed constitutes good conservation planning, but it is not without its challenges. One problem in treating unlisted species is similar to the problem of determining the HCP plan area as discussed in Chapter 3, Section B.2(a)--i.e., balancing the need for a comprehensive plan with one that is manageable in size and scope. Here too there are no simple formulae and inclusion of candidate species may be a compromise between these two goals.

Another problem is that biological information on candidate and other unlisted species can be more limited, making it more difficult to determine project impacts, develop suitable mitigation programs, and meet the section 10 issuance criteria. There are several ways this situation can be addressed. The applicant may elect to acquire additional biological information prior to the issuance of the permit. The permittee could also agree to adaptive management provisions designed to adjust management prescriptions or land use practices to reflect enhanced information on an unlisted species. Or, HCP planners can elect to address the species to the extent that information is available, but agree to reduced coverage for that species under the permit in the absence of further study data. Remember that for legal coverage under the permit to apply for unlisted species, the species must be "adequately addressed" in the HCP--i.e., treated as if it was listed and was otherwise able to satisfy the section 10 criteria.

CHAPTER 5
ENVIRONMENTAL ANALYSIS AND DOCUMENTATION

The National Policy Act of 1969 as amended (NEPA), is this country's basic charter for the protection of the environment. It established policies, goals, and a mechanism for reaching these goals. The Council on Environmental Quality (CEQ) regulations implementing the procedural provisions of NEPA (at 40 CFR §§ 1500-1508) require all agencies to analyze the impacts of their proposed actions and to include other agencies and the public in the process.

A. General Information

The goals and mechanisms of NEPA and the ESA, as they relate to incidental take permits and HCPs are similar and functionally compatible in many respects. It is important to recognize the similarities and differences in the requirements and to integrate those requirements in a manner that provides useful information to the decisionmaker and to the public. While some NEPA compliance for proposed HCPs has been well integrated with the HCP process and the HCP documentation, in other cases, NEPA compliance has been treated as a process requiring separate public meetings and separate documentation that in large part is duplicative of work already done. Such practices are neither useful or efficient. The FWS's amended procedures implementing NEPA and this handbook provide important new direction on implementing the requirements of these two environmental statutes.

1. Scope of the NEPA Analysis.

When thinking about the NEPA analysis as it relates to an incidental take permit and an HCP, it is important to be precise about the nature of the underlying action. The purpose of an HCP process is to provide an incidental take permit to the applicant that authorizes the take of federally listed species in the context of a conservation plan. The HCP will specify the impacts that will likely result from the taking, what steps the applicant will take to minimize and mitigate such impacts, what alternative actions are not being utilized and such other measures as may be required by the Services.

The scope of the NEPA analysis therefore covers the direct, indirect, and cumulative effects of the proposed incidental take and the mitigation and minimization measures proposed from implementation of the HCP. The specific scope of the NEPA analysis will vary depending on the nature of the scope of activities described in the HCP. In some cases, the anticipated environmental effects in the NEPA analysis that address the HCP may be confined to effects on endangered species and other wildlife and plants, simply because there are no other important effects. In other cases, the NEPA analysis will focus on the effects of the minimization and mitigation actions on other wildlife and plants and will examine any alternatives or conservation strategies that might not otherwise have been considered. In

other cases, the minimization and mitigation activities proposed in the HCP may affect a wider range of impacts analyzed under NEPA, such as cultural resources or water use. It is important to keep in mind, however, that the NEPA analysis for an HCP should be directed towards analyzing direct, indirect, and cumulative impacts that would be caused by the approval of the HCP, that are reasonably foreseeable, and that are potentially significant.

2. Categorical Exclusions.

CEQ regulations (40 CFR 1508.4) define categorical exclusions as "...a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."

U.S. Fish and Wildlife Service procedures for implementing categorical exclusions are found in the Department of Interior Manual (516 DM 6, Appendix 1; and 516 DM 2, Appendix 1 & 2). The Departmental manual categorically excludes the issuance of permits involving fish, wildlife, or plants, when such permits cause no or negligible environmental disturbance. National Marine Fisheries Service procedures for implementing categorical exclusions are found in the NOAA Administrative Order Series 216-6, Sections 602b.3 and 602c.3. That order categorically excludes permits for scientific research and public display under the ESA and Marine Mammal Protection Act, and other categories of actions which would not have significant environmental impacts including routine operations, routine maintenance, actions with short-term effects, or actions of limited size or magnitude. However, a memo for the record should be made listing the categorical exclusion.

Low-effect HCPs are defined as those involving: (1) minor or negligible effects on federally listed and candidate species and their habitats; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, individually or 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.

Another consideration in meeting the requirements of this categorical exclusion is cumulative impacts. CEQ regulations define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (50 CFR 1508.7). Once the draft NEPA procedures (516 DM 6, Appendix 1) are revised, section 10 permits developed with technical assistance from the FWS may be categorically excluded from NEPA, subject to meeting specific criteria. The current NEPA procedures in 516 DM 6, Appendix 1 shall remain in effect, until the final revised procedures are published in the Federal Register. When

categorically excluding a section 10 permit application, the Services must ensure that the impacts of the project, considered together with the impacts of other permitted projects, will not be "significant." For example, if numerous low-effect projects in a given species' habitat are categorically excluded, the Services must ensure that issuance of section 10 permits for these projects does not result, over time, in cumulative habitat losses to the extent that such losses become significant.

3. Environmental Assessments.

The FWS has also determined in the proposed revised NEPA procedures that most HCPs, other than those that are low-effect, will normally require preparation of analysis that meets the requirements for an EA [516 DM 6, Appendix 1]. The purpose of an EA is to briefly analyze the impacts of a proposed action to determine the significance of the impacts and to determine whether an EIS is needed, to analyze alternatives for proposals which involve unresolved conflicts concerning uses of available resources, and to aid an agency's compliance with achieving NEPA's purposes when preparation of an EIS is not necessary.

An EA consists of a brief discussion or description of: (1) the purpose and need for the proposed action; (2) the nature of the proposed action; (3) alternatives to the proposed action that were considered; (4) the environmental impacts of the proposed action and its alternatives; and (5) a list of agencies and persons consulted in the NEPA review process. Public review procedures for EAs vary depending on the scope of the proposed action [see this chapter, Section A.3 and A.5]. The culmination of the EA process is a Finding of No Significant Impact (FONSI) or a decision to prepare an EIS.

a. Use of EAs When Mitigation Reduces Significant Impacts.

Normally, the Service believes that analysis at the level of an EA will be sufficient for HCPs. At times, an HCP that might otherwise require an EIS can be analyzed with an EA, if mitigation measures that would ensure that environmental impacts do not reach the significant level are part of the original project proposal (in this case, part of the HCP) and are enforceable. This type of EA can be used when an HCP would otherwise be expected to have significant environmental impacts but, with mitigation, those impacts can be reduced to less than significant levels. The basis for this type of EA is found at 40 CFR 1501.3(b), 1501.4(e)(2), and 1508.9(a)(2). A brief discussion of the subject also occurs in the CEQ publication, "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026-18038, Nos. 39 and 40).

Under the right conditions, EAs of this type are a useful tool for complying with NEPA and saving paperwork and time. In fact, HCPs are excellent candidates for this type of EA since most of the requirements ("up front" mitigation and enforceability) are already standard HCP components. The main differences between this type of EA and other EAs prepared for HCPs are that: (1) the impact of the project would result in significant environmental impacts

but for the mitigation program (in many EAs, the environmental effects would be less than significant even without the mitigation program); and (2) a 30-day public comment period must be observed before the decision is made not to prepare an EIS (CEQ regulations otherwise require no delay in deciding not to prepare an EIS). This 30 day period should be combined with the 30 day public notice of the proposed section 10 permit.

If the Services decide to use this provision to issue an EA and a FONSI for a particular proposed HCP, they should be able to make a clear finding that the HCP, considered together with mitigation measures that are part of the HCP submitted with the permit application and would be enforceable, will not result in significant environmental effects.

FWS and NMFS encourage preparation of this type of EA as a way of streamlining the section 10 and NEPA processes. However, FWS and NMFS staff should consult the Regional Director's Office, Environmental Coordinators in the Regional Office, or the Washington, D.C. Office before initiating this type of EA for the first time.

b. Programmatic EAs.

A programmatic EA is an EA that addresses a group of actions by different applicants as a whole, rather than one at a time in separate EAs. For example, a programmatic EA might address a group of different actions occurring in the same place, or a single action occurring in many different places. Programmatic EAs can save great amounts of staff and preparation time, but are appropriate only in certain types of situations.

The central problem in preparing a programmatic EA is having sufficient information to determine and evaluate effects when the exact number and scope of actions taking place may be uncertain. As a result, programmatic EAs typically will be successful only when the activities being addressed in proposed HCPs are relatively well-defined and not overly conjectural, are similar in nature or geography, and occur at similar points in time or within a predictable time line. Programmatic EAs can be prepared at the time a group of actions is proposed. To expedite small-scale actions, they can also be prepared prior to specific project proposals if the proposals can be defined in advance and are reasonably foreseeable.

Because of the problem of analyzing effects, FWS and NMFS staffs should consult their Regional Office Environmental Coordinator or other NEPA experts when preparing a programmatic EA.

4. Environmental Impact Statements.

If the conclusion is reached that a particular HCP will have a significant environmental impact and thus requires preparation of an EIS, refer to the procedures outlined in the FWS's NEPA guidance (30 AM 2-3 and 550 FW 3), and Director's Order No. 11, dated April 18, 1985 or for NMFS the NEPA procedures are found in the NOAA Administrative

Order Series 216-6, dated June 21, 1991. For further assistance, consult the appropriate Regional Office or NMFS, Washington Office D.C. Environmental Coordinator.

B. Techniques for Streamlining Section 10 and NEPA Planning

CEQ regulations encourage agencies to focus on the purpose of the NEPA process; making better decisions. Amassing needless detail is discouraged; integration of the analysis with the other planning and environmental review requirements so that all procedures run concurrently rather than consecutively is explicitly encouraged. The Services fully endorse these goals. All FWS and NMFS offices are expected to streamline their section 10 permit and NEPA analyses to the maximum extent practicable, while ensuring compliance with both ESA and NEPA. The process should be streamlined by integrating the analyses in the same document, to the extent possible, by running the processes concurrently, not consecutively, and by conducting joint processes with state and local agencies as applicable.

1. Combining HCP/NEPA Analysis.

The CEQ regulations specifically permit NEPA documents to be combined with other agency documents to reduce duplication and paperwork (40 CFR§§1506.4). The Services policy is to combine the HCP and NEPA analysis into a single document titled, "Proposed HCP and Environmental Assessment for the [insert name of the HCP document]."

This technique should not be viewed as preparation of two separate documents that are then published under the same cover, but rather one integrated analysis that meets the requirements of both NEPA and ESA. For example, the alternatives section of the combined document should include alternatives that satisfy both the requirements of section 10 and NEPA. Similarly, the discussion of effects should include analysis of both the impacts of the proposed HCP as well as other environmental effects that should be analyzed under NEPA.

FWS and NMFS should work closely with the applicant(s) so that any environmental documents they draft meet NEPA and section 10 permit application requirements. Appendix 8 contains a example of an integrated HCP/EA. This is one way of integrating the two documents. Another way of integrating the analysis even more would be to include the full text of the proposed HCP in the alternative section as the preferred alternative.

2. Joint Federal-State Processes.

Some states have enacted laws that parallel or expand NEPA requirements at the state or local level (e.g., the California Environmental Quality Act). CEQ regulations (40 CFR 1506.2) and Department of Interior procedures (516 DM 4.18) and NOAA require its

agencies to cooperate, to the fullest extent possible, with the applicant and state and local officials to reduce duplication between NEPA, state and local environmental requirements, and ESA requirements.

FWS and NMFS should cooperate with state and local agencies to avoid duplication and reduce the time and costs of planning by:

- Conducting joint planning;
- Conducting joint environmental research and studies;
- Conducting joint public hearings; and
- Producing joint environmental documents (however, FWS or NMFS is responsible for submitting Federal Register notices).

3. Incorporation By Reference.

Incorporation by reference can be used in an EA or EIS to avoid including bulky documents or written material in support of conclusions. Material incorporated by reference from another source into the NEPA analysis must be cited and its contents briefly described. It should not be incorporated by reference unless it is reasonably available for inspection by interested parties within the time allowed for public comment.

C. Internal Service Guidance and Assistance

FWS procedures for complying with NEPA are found in 30 AM 2-3, and 550 FW3. The Regional Environmental Coordinator should be familiar with these techniques and be able to assist Regional and Field Office personnel on NEPA matters. NMFS procedures are found in the NOAA Administrative Order Series 216-6, dated June 21, 1991.