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### **1.1 Purpose of the Habitat Conservation Plan Program**

The purpose of the Endangered Species Act of 1973 (see the [HCP Handbook Toolbox](#)), as amended (ESA), is to protect and recover threatened and endangered species and the ecosystems upon which they depend. The U.S. Congress found that some species of fish, wildlife, and plants are now extinct “as a consequence of economic growth and development untempered by adequate concern and conservation” (section 2(a)(1) of the ESA). They also found that other species are in danger of extinction. Additionally, Congress held that species have aesthetic, ecological, educational, historical, recreational, and scientific value and pledged to conserve species facing extinction. Consequently, Congress passed the ESA to “...provide a means whereby the ecosystems upon which [endangered and threatened] species depend may be conserved, to provide a program for the conservation of such...species” (section 2(b) of the ESA). The ESA specifically defines conservation as “...to use and the use of all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to this Act are no longer necessary” (section 3(3) of the ESA).

Section 9 of the ESA prohibits take of any fish or wildlife species listed as endangered. Take is defined in section 3 as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The U.S. Fish and Wildlife Service (FWS) determined that all of the prohibitions that apply to endangered species would also apply to threatened species, unless otherwise provided for through a special rule under section 4(d) of the ESA (42 FR 4656; 50 CFR 17.31(a)) (see the [HCP Handbook Toolbox](#)). The National Marine Fisheries Service (NMFS) does not have such a regulation, so it issues separate protective regulations specifying prohibitions of take for each threatened species under its jurisdiction. (We

refer to these two agencies collectively as “the Services” in the rest of this Handbook. We use the appropriate acronym when the discussion is applicable only to one specific agency.)

Before 1982, the ESA did not have mechanisms for exempting take prohibitions from Federal or non-Federal activities, except for permits to authorize take from scientific research or certain other conservation actions. Congress recognized the need for a process to reduce conflicts between listed species and economic development, so it amended the ESA in 1982 to add an exemption for incidental take of listed species that would result from non-Federal activities (section 10(a)(1)(B)). Incidental take is that which is incidental to, and not the purpose of, carrying out an otherwise lawful activity.

To obtain a permit for such take under this provision, an applicant must develop a conservation plan that meets specific requirements identified in section 10(a)(2)(A) of the ESA and its implementing regulations at 50 CFR 17.22 (endangered species) and 17.32 (threatened species), and 50 CFR 222.25, 222.27, and 222.31 (see the [HCP Handbook Toolbox](#)). Among other requirements, the plan must specify the impacts that are likely to result from the taking, the measures the permit applicant will undertake to minimize and mitigate such impacts, and the funding that will be available to implement such measures. Conservation plans under section 10(a)(1)(B) have come to be known as “habitat conservation plans” or “HCPs” for short. Although “HCPs” is most commonly used in this Handbook, we may use these terms interchangeably on occasion. Section 10(a)(2)(B) of the ESA sets forth the statutory criteria that must be satisfied before an incidental take permit can be issued.

Congress intended the HCP program to address listed and at-risk species in an ecosystem context, generate long-term commitments to conserve such species, and deliver regulatory assurances to project proponents. Congress also envisioned the HCP program as an opportunity to establish “creative partnerships” between the public and private sectors and State, municipal, and Federal agencies to conserve endangered and threatened species and their habitats (H.R. Rep. No. 97-835 (1982)) (see the [HCP Handbook Toolbox](#)). Congress intended the HCP program to function not only to authorize incidental take, but also as a process to integrate non-Federal development and land-use activities with conservation goals, resolve conflicts between protection of listed species and economic activities on non-Federal lands, and create a climate of partnership and cooperation.

In that spirit, the Services should encourage permit applicants and partners to use Congress’ intent as the foundation for working together to develop an HCP. Collaboration, flexibility, ingenuity, innovation, and thoughtful planning are key to developing effective HCPs and resolving complex and controversial issues that may arise.

Congress also intended that HCPs include, when possible, conservation measures for candidate species, proposed species, and other species not listed under the ESA at the time an HCP is developed. Covering species likely to be listed within the term of the permit can benefit the permittee by ensuring the terms of an HCP will not need to be changed 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.

## 1.2 Evolution of the HCP Program

After the 1982 amendment of the ESA creating the HCP program, momentum for developing HCPs took a few years to build, partly due to inevitable, initial difficulties as the Services, applicants, and the public explored the new program's potential. The first 10 years produced only 10 HCPs, but from 1992 to 1997 the program exploded with 225 completed plans. By 2009, more than 500 HCPs covered approximately 46 million acres of non-Federal lands. As of this writing (2016), the Services have approved approximately 1,100 HCPs nationwide, and many more HCPs are in different stages of development.

Besides growing in number, the nature and quality of the HCP program continues to evolve. Early HCPs tended to cover only one species, involve single applicants, and address small projects. The program later ventured into multi-species and regional plans that covered a variety of activities related to development. We learned that some planning efforts can become too ambitious in scope and size, and that we need to weigh the benefits against the difficulties of developing HCPs covering many species, activities, and acres. However, we strongly support a landscape-scale approach when appropriate, because it can provide more opportunities for strategically placing appropriate conservation in an ecosystem context (see Chapters 3.4 and 6.1.2 for further discussion). Today, countywide, Statewide, and even multi-State HCPs are showing conservation and economic successes.

### *1.2.1 Added Regulations and Policies*

The Services continued to improve the HCP program by establishing additional policies and regulations to promote efficiency, effectiveness, and consistency to protect at-risk species and enhance their conservation. These initiatives were based on lessons learned, as well as input from applicants, permittees, conservation organizations, and our own staff. Four of these initiatives are described below.

On February 23, 1998, the Services codified a final rule (63 FR 8859) (see the [HCP Handbook Toolbox](#)) to provide certain regulatory assurances to permittees under section 10(a)(1)(B). These assurances are called No Surprises assurances and essentially mean that “a deal is a deal.” As long as the permittee is properly implementing the HCP, the Services will not impose additional requirements or restrictions. If an unforeseen circumstance occurs, unless the permittee consents, the Services will not require him/her to commit additional land, water, or financial compensation or impose additional restrictions on the use of land, water, or other natural resources beyond the level agreed to in the HCP. The Services will honor these assurances as long as a permittee is implementing the requirements of the HCP, permit, and other associated documents in good faith, and their permitted activities will not jeopardize the species.

On June 1, 2000, the Services published the Five-Point Policy (65 FR 35242) (see the [HCP Handbook Toolbox](#)) as an addendum to the 1996 Habitat Conservation Planning Handbook. The policy focuses on the expanded use and integration of five components of the HCP program, namely (1) biological goals and objectives, (2) adaptive management, (3) monitoring, (4) permit duration, and (5) public participation. The principles and specifics of this policy have been integrated into this revised Handbook in Chapters 9.1, 10.5, 10.1, 12.9, and 13.4, respectively. As such, the revised Handbook supersedes the policy.

On October 5, 2007, the FWS Director issued a General Conservation Plan Policy to allow FWS staff to prepare general conservation plans (GCPs) (see the [HCP Handbook Toolbox](#)) to streamline the permitting process for project proponents and ensure strategic conservation for covered species. FWS staff also prepare all other required environmental compliance documents for GCPs. As a result of this policy, interested landowners can now coordinate with FWS to determine if a completed GCP is appropriate for their activities and, if so, apply for individual permits without having to prepare their own HCPs.

On May 10, 2011, the FWS Director issued a policy providing guidance related to 50 CFR 22.11 that allows ESA section 10(a)(1)(A) and 10(a)(1)(B) permits to cover take of bald or golden eagles resulting from activities that also result in take of listed species (see the [HCP Handbook Toolbox](#)). The key stipulation is that the eagle take authorization on these permits must meet the standards and requirements of the Bald and Golden Eagle Protection Act. Under the regulations and this policy, project proponents do not need to go through two different permit processes to obtain incidental take coverage for eagles and listed species.

### *1.2.2 Successes of the HCP Program*

Over the years, HCPs have addressed a wide variety of sustainable uses (e.g., forestry, water uses, rangeland management, fisheries harvest, renewable energy), development (e.g., residential, commercial, industrial, infrastructure), resource extraction (e.g., surface mining, oil and gas), and many other types of activities, even small residential projects with homeowners. As a result, the HCP program has reduced conflicts between listed species and economic development and other activities while achieving significant conservation for covered species. Partnerships created to develop and implement HCPs have helped generate community support for species conservation at multiple scales. HCPs that have established broad conservation strategies have leveraged funds for additional habitat protection beyond the requirements of the HCPs. Monitoring, adaptive management, and research programs in HCPs have produced an extensive amount of scientific information and data that are invaluable for a better understanding of how to conserve at-risk species and their habitats. Through HCP conservation measures, leveraged contributions for protection, and restoration and enhancement of habitat, the HCP program has produced conservation benefits to covered species across millions of acres.

Following are just a few examples highlighting the many successes of the HCP program. Additional examples can be found in the [HCP Handbook Toolbox](#).

#### Balcones Canyonlands Conservation Plan

The Balcones Canyonlands Conservation Plan (see the [HCP Handbook Toolbox](#)) was developed as an HCP to establish a 30,000-acre reserve for the golden-cheeked warbler, black-capped vireo, and 33 other species, while allowing for residential, commercial, and industrial development in Travis County, Texas. The City of Austin, Travis County, the Lower Colorado River Authority, The Nature Conservancy, the Travis Audubon Society, and others partnered to develop the HCP and establish and manage the reserve. As a result, the species are receiving substantial conservation benefits, the local economy is prospering, property values increased, and residents are enjoying an increased quality of life.

### Wisconsin Statewide Karner Blue Butterfly HCP

A diverse partnership of over 40 partners developed this HCP (see the [HCP Handbook Toolbox](#)) in the late 1990s and continue to work together to successfully implement it to this day. Their efforts are ensuring the continued existence of the butterfly on more than 260,000 acres in Wisconsin. The partners use innovative approaches to apply conservation measures on the ground while allowing for a variety of economic activities, such as forest management, transportation, and utility operations. This HCP also streamlines ESA coverage for small-landowners and low-impact land uses.

### North Carolina Department of Environment and Natural Resources HCP for Inshore Gillnet Fisheries

Some HCPs are successful due to the strong collaboration between the involved parties from start to finish. From the beginning stages of plan development, NMFS worked very closely with the State to complete this high-quality HCP to cover bycatch of Atlantic sturgeon from their inshore gillnet fisheries. Frequent and open communication kept all parties informed and fostered a cordial and collaborative working relationship. In the end, NMFS approved the HCP and issued the permit in a timely and efficient manner. This cooperative relationship was also key to quickly resolving the few implementation issues that arose following permit issuance.

### Washington County, Utah HCP

This HCP (see the [HCP Handbook Toolbox](#)) was the impetus for a large, collaborative effort among several partners to establish a reserve for the threatened desert tortoise in the Upper Virgin River Desert Tortoise Recovery Unit in Washington County, Utah. The HCP covered take of desert tortoises from development activities in the rapidly growing city of St. George. As the permittee and HCP administrator, Washington County contributed resources to facilitate land acquisitions, land exchanges, and conservation easements for nearly 60,000 acres for the Red Cliffs Desert Reserve. Integral partners in establishing this reserve were Washington County, nearby cities, Utah Department of Wildlife Resources, Utah Department of Parks and Recreation, Utah School and Institutional Trust Lands Administration, Utah State Parks, Bureau of Land Management, and FWS.

#### *1.2.3 Lessons Learned*

Despite the many successes of the HCP program, we have learned a variety of lessons over the three decades of implementing the HCP program. The good news is that the Services are taking stock of these experiences and are offering solutions and improvements for this revision of the HCP Handbook.

The challenge of balancing biology with economics is a complex one, but is fundamental to the HCP process. That balancing act often results in complications and protracted times to develop some HCPs. There are many reasons for delays in preparing, reviewing, and processing HCPs, and not all causes are always under the control of the involved parties. However, this Handbook includes new ways of streamlining and improving efficiencies for those portions of the process that the Services can influence. This Handbook also describes refined approaches for analyzing

take impacts and identifying relevant conservation measures, which are intended to reduce or eliminate protracted negotiations. It also identifies ways for streamlining compliance with the National Environmental Policy Act (NEPA) (see the [HCP Handbook Toolbox](#)) on the action of issuing an incidental take permit. Other improved efficiencies reduce permit processing time by eliminating unnecessary or duplicative steps. We also offer tips on “Going Fast by Starting Slowly” that embody the concept of investing thoughtful planning and establishing common understandings at the very beginning of the HCP development process to pre-empt problems and delays later (see Chapters 2.2.3 and 3.6 for further discussion). We also withdrew advice in the 1996 Handbook to combine the NEPA document with the HCP in an attempt to streamline the regulatory process. Because the HCP is the applicant’s document and the NEPA document is the Services’, keeping them separate is critical for demonstrating that each party is complying with requirements applicable to them.

Another important addition to the revised Handbook involves the need to integrate consideration of climate change effects into HCPs and related ESA section 7 and NEPA documents, which can be challenging. The scientific literature on climate change and its effects, as well as analysis tools, experience with climate adaptation measures, and related guidance are relatively new and are changing as new information becomes available. We added information in various sections of the Handbook to help HCP practitioners consider and address the effects of climate change in the development and implementation of HCPs.

### **1.3 Laws and Other Requirements Related to the HCP Program**

The Services must comply with all applicable Federal laws and regulations in carrying out the permit process. Some of these laws and regulations are tightly integrated with the HCP process, such as the ESA, NEPA, National Historic Preservation Act (NHPA), and Administrative Procedure Act (APA) (see the [HCP Handbook Toolbox](#)), while others, addressed below, may be relevant depending on the circumstances. This section is a brief introduction of the various laws, regulations, and other requirements related to the HCP process. Further information on how to comply with some of these laws during the HCP process is in other chapters of the Handbook. At the end of this section is a list of other laws that are primarily related to wildlife and other natural resources. We also included a description of court cases related to HCPs over the years in the [HCP Handbook Toolbox](#) (see the [HCP Handbook Toolbox](#)).

#### *1.3.1 Relationship and Hierarchy*

This section explains the relationship and hierarchy of the general categories of Federal laws, regulations, and other directives.

##### U.S. Constitution

Adopted in 1790, the Constitution is the supreme law of the land. It can only be amended by an act of Congress or through a Constitutional convention requested by two-thirds of State legislatures, followed by ratification by at least three-fourths of the States. It cannot be contravened or contradicted by any law, regulation, or policy.

## Statute or Law

A statute or act is enacted by the U.S. Congress and signed into law by the President of the United States or passed by Congress overriding a President's veto. Compliance is mandatory for all parties, including the applicant and the Services. The ESA, NEPA, NHPA (see the [HCP Handbook Toolbox](#)), and APA are all Federal laws.

### Federal Regulations

An enacted law may authorize the relevant members of the President's Cabinet (in the case of the ESA, the Secretaries of the Interior and Commerce) to enact Federal regulations that decree how Federal agencies must implement the statute. These regulations are written in the Code of Federal Regulations (CFR). FWS' regulations related to HCPs are found at 50 CFR 13 (general permit regulations) and 17 (ESA-specific regulations) and NMFS regulations are at 50 CFR 222. The regulations for section 7 of the ESA are found at 50 CFR 402 (joint Services regulations). See the [HCP Handbook Toolbox](#) for pertinent regulations.

### Policy

The heads of Federal departments and agencies can issue policies to inform staff and the public about how they interpret and implement specific regulations or other requirements. Other policies expand on the regulations. For instance, the FWS Director's General Conservation Plan policy (see the [HCP Handbook Toolbox](#)) is not explicitly contained in the regulations, although the regulations support it. Federal agencies are expected to comply with all formally promulgated policies that apply to their work. These policies can be issued in the form of Secretarial, Executive, or Director's Orders; agency policy manuals; memoranda; etc. FWS Regional Directors and NMFS Regional Administrators may also issue policies that apply to their jurisdictions, as long as they do not conflict with national policy.

### Guidance

Guidance consists of recommendations, directions, and advice on how to interpret or implement regulations and policies. Guidance may be formally or informally issued by any level of leadership. Formal guidance is typically in written form, such as this HCP Handbook and memorandum from a Regional Director. Staff typically must comply with formal guidance, but managers may exercise discretion to adjust to circumstances, as appropriate and with proper approvals.

#### *1.3.2 Endangered Species Act*

The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend (section 2(b)). Congress amended the ESA several times over the years, including adding the authority to exempt incidental take in 1982. Sections 6, 7, 9, and 10 are most relevant to HCPs. Here we focus the description of these four sections (not in numerical order) on how they relate to the HCP process and permit issuance.

## Section 9

Section 9 of the ESA prohibits the take of any fish or wildlife species listed as endangered. Section 9 prohibits damage or destruction of plants listed as endangered on Federal property or on non-Federal lands when doing so in knowing violation of any State law or regulation or in the course of any violation of a State criminal trespass law. Take is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” FWS further defines “harm” (50 CFR 17.3) as “...an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” The NMFS definition of “harm” (50 CFR 222.102) is very similar, but adds more specific terms related to fish. It is “...an act which actually kills or injures fish or wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavior patterns, including breeding, spawning, rearing, migrating, feeding, or sheltering.”

The FWS further defined “harass” in 50 CFR 17.3 as “...an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” On October 21, 2016, NMFS issued “Interim Guidance on the Endangered Species Act Term, Harass” employing a similar definition (see Glossary).

Although section 9 does not prohibit take of fish and wildlife species listed as threatened, the FWS promulgated a regulation (50 CFR 17.31(a)) stating that all prohibitions for endangered fish and wildlife species also apply to threatened species. The FWS may publish an ESA section 4(d) special rule for a threatened species, specifying exemptions to the take prohibitions for certain types of activities. Thus, activities exempted by a section 4(d) rule do not need to be covered in an HCP. See Chapter 3.1.3 for further discussion of section 4(d) rules.

In 1988, the ESA definition of “person” was amended to include an “...individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.” Understanding which non-Federal entities are subject to the section 9 prohibitions is important for determining when application for an incidental take permit may be necessary. States, counties, cities, municipalities and other political subdivisions that regulate or issue permits for certain activities (e.g., building permits, capital improvement projects, etc.) that could result in unauthorized take may be held equally liable for violation of section 9. To ensure ESA compliance, these entities may want to develop a programmatic HCP and seek their own incidental take permit or require applicants to seek individual permits.

## Section 10

Section 10(a) of the ESA provides exceptions to the section 9 prohibitions on take of listed species via two kinds of permits. Section 10(a)(1)(A) permits authorize the take of listed species for scientific purposes or to enhance the propagation or survival of listed species. Section



10(a)(1)(B) permits authorize the incidental take of listed species caused by otherwise lawful activities. The full set of section 10 regulations for the FWS and NMFS are in the [HCP Handbook Toolbox](#).

### Section 7

Section 7(a)(1) directs Federal agencies to use their authorities to carry out programs for the conservation of threatened and endangered species. Federal agencies must also consult with the Services, under section 7(a)(2) of the ESA, on discretionary actions they fund, authorize, or carry out that may affect a listed species or its designated critical habitat. The Services must conduct an intra-Service consultation under section 7(a)(2) when proposing to issue a permit for incidental take under section 10(a)(1)(B). As part of the consultation process, the Services produce a biological opinion that analyzes the effects of issuing the permit, together with cumulative effects (as that term is defined in the section 7 regulations), on affected listed species and critical habitat to determine whether that permit action is likely to jeopardize the continued existence of the listed species or to destroy or adversely modify designated critical habitat. If the HCP and permit also covers any proposed or candidate species or may affect proposed critical habitat, the Services also conduct such analyses of effects in the same biological opinion.

Services staff should start the section 7 process in the early stages of HCP development to inform adequate consideration of listed species and critical habitat in the HCP's conservation strategy and measures. Deferring such consideration until the back end of the process can cause delays at a time when the process to make a permit decision should move quickly.

### Section 6

Section 6 directs the Services to cooperate with the States in carrying out the ESA. Section 6(a) requires consulting with the States before acquiring any land or water for the conservation of listed species. Since mitigation measures in many HCPs include the permanent protection of habitat through acquisition of fee title or conservation easements, the Services must work with applicants to solicit affected States for early participation in the HCP development process.

Section 6(d) authorizes the Services to provide funding to States and Territories for species and habitat conservation actions on non-Federal lands. Under section 6(d), the FWS created two non-traditional grant programs related to HCPs.

HCP Planning Assistance Grants program (see the [HCP Handbook Toolbox](#)) provides funding to assist States and applicants with a number of tasks needed to develop HCPs, including, but not limited to, document preparation, analyses, modeling, baseline surveys, and outreach. These activities should be identified in the grant proposal. This grant program is typically used for larger HCPs where local or State governments are the incidental take permit applicants. These grants cannot be used for implementing the HCP after permit issuance.

HCP Land Acquisition Grants program (see the [HCP Handbook Toolbox](#)) funds acquisition of lands that will complement the conservation efforts of HCPs for which the permit has been issued. Targeted lands must be near or adjacent to the HCP plan area. Such grants must result

in important benefits to the covered species and their ecosystems. These grants cannot be used to help fulfill the HCP's mitigation requirements.

The FWS' traditional section 6 grants program can provide funding to eligible State agencies to support ongoing or new conservation activities that are only above and beyond the monitoring, minimization, and mitigation measures and other activities required in an HCP.

Because funding from section 6 grant programs must be provided directly to State wildlife agencies, the interested State must prepare proposals and send them to the FWS. Typically, States, applicants and their consultants, and FWS collaborate on preparing proposals. The timing of each Federal fiscal year's section 6 grant cycle varies, so contact your FWS Regional HCP or Section 6 Grants Coordinator for information on the grant application process. The coordinators can also provide important guidance on how to prepare proposals that will have the best chance of selection in these nationally and regionally competitive grant programs.

## Section 11

Section 11 describes the civil and criminal penalties for violating provisions of the ESA. Section 11(g) allows civil suits to enjoin any person, entity, or government agency alleged to be in violation of any provision of the ESA.

### *1.3.3 National Environmental Policy Act*

The purpose of NEPA is to promote analysis and public disclosure of environmental impacts from a proposed Federal action to support a decision that carries out the policies of the Federal government, while creating and maintaining harmony between productive human activity and the natural world. Issuance of an incidental take permit is a Federal action subject to NEPA compliance. 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 other resources, such as water quality, air quality, and cultural resources. Depending on the scope and impacts 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). More information on NEPA and details on integrating the NEPA and HCP processes are included in several chapters of this Handbook and in the [HCP Handbook Toolbox](#).

### *1.3.4 National Historic Preservation Act*

Section 106 of the NHPA (see the) requires Federal agencies to take into account the effects of their undertakings on cultural resources that are, or may be, eligible for inclusion on the National Register of Historic Places. An undertaking is a project, activity, or program under the direct or indirect jurisdiction of a Federal agency. Such jurisdiction includes funding an action in whole or in part; carrying out an action by or on behalf of a Federal agency; issuance of a Federal permit, license, or approval; and State or local regulation administered under a delegation or approval by a Federal agency. As such, implementation of an HCP and issuance of an incidental take permit are an undertaking and subject to compliance with section 106 of the NHPA. Details on complying with NHPA are in several chapters of this Handbook and in Appendix A. Field staff

should contact their Regional HCP Coordinators for guidance from Regional Historic Preservation Officers.

### *1.3.5 Administrative Procedure Act*

The APA (see the [HCP Handbook Toolbox](#)), enacted by Congress in 1946, directs Federal agencies how to propose and promulgate Federal regulations. The primary purposes of the APA are to: (1) require agencies to keep the public informed of their organization, procedures, and rules; (2) provide for public participation in the rulemaking process; (3) establish uniform standards for the conduct of formal rulemaking and adjudication; and (4) define the scope of judicial review. Courts may find Services to be “arbitrary and capricious” when litigation reveals that they did not properly address APA procedures, provide adequate public participation, or adequately support the agency decision. Staff working on HCP development should ensure adherence to all procedural and public review requirements. They should also document in an administrative record all actions taken and the rationales to support the findings and decisions made in the HCP process.

### *1.3.6 Tribal Consultation and the ESA*

Both Services have policies (Secretarial Order 3206 for FWS and NOAA Administrative Order 218-8 for NMFS) (see the [HCP Handbook Toolbox](#)) conferring significant responsibilities to consult with tribes when ESA actions may affect Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. These policies require the Services to make efforts to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of ecosystems on Indian lands. Whenever the activities under an HCP may impact tribal trust resources, the exercise of tribal rights, or Indian lands, we must consult with and seek the participation of the affected Indian tribes to the maximum extent practicable. This includes providing affected tribes with adequate opportunities to participate in data collection, consensus seeking, and other relevant HCP processes.

If field staff do not already have an established working relationship with the affected tribes, they must work with their Regional HCP Coordinators and Regional Tribal Liaisons to ensure outreach to all potentially affected tribes, including those with ancestral lands in the HCP plan area. Government-to-government consultation with the tribes is not to be done as part of the general public participation process under NEPA or section 10 of the ESA, but as its own separate process. The Services can request tribal consultation before or concurrent with the general public review process, but we recommend reaching out to potentially affected tribes as early in the HCP process as reasonable. When tribes are unable to respond to initial requests for participation due to staffing and workload issues, the Regional Tribal Liaisons strongly recommend the Services make at least a second attempt to contact the affected tribes. These tribal consultation policies do not prohibit the Services from proceeding with an HCP if a tribe does not respond to good-faith outreach efforts.

### *1.3.7 Other Related Process Laws*

#### Federal Advisory Committee Act (FACA)

The FACA (see the [HCP Handbook Toolbox](#)) was enacted in 1972 to establish the rules under which Federal agencies can convene or participate in advisory committees. It is a “sunshine” law to ensure public awareness of and participation in Federal agency decisions that rely on advice from committees they convene. The FACA emphasizes processes for open meetings, chartering, public involvement, and reporting. Typically, advisory committees involved in an HCP process are convened by and advise the applicant and are not subject to FACA. The Services must adhere to FACA if they choose to convene an advisory committee related to HCP development and a permit issuance decision if that committee has even one member who will represent a non-governmental entity. Committees whose members are comprised of all government representatives generally do not have to comply with FACA. For an FWS summary of FACA go to the [HCP Handbook Toolbox](#)).

#### Freedom of Information Act (FOIA)

The FOIA (see the [HCP Handbook Toolbox](#)) was enacted in 1966 and is also a “sunshine” law. It defines the rules under which previously undisclosed information held by the Federal Government must be disclosed when a member of the public formally requests it. Before a draft HCP is made public, either by the applicant or through the public comment process, some information in the HCP may be considered proprietary. At this stage, before responding to any FOIA request for a draft HCP or other information provided by the applicant, we should give the applicant an opportunity to identify any proprietary information and provide a justification for withholding such information from release under FOIA. However, it is the Services’ responsibility to make the final determination as to whether to withhold any information under a FOIA exemption. Services-generated internal documents that are pre-decisional or deliberative in nature and have not been shared outside of the agency are usually withheld until a permit decision is made. However, such documents must be released, if requested, after the agency makes the permit decision (unless one or more FOIA exemptions apply).

#### Privacy Act

The Privacy Act was enacted in 1974 and governs the protection of private information of individuals. We must protect personal identifying information (e.g., social security and tax identification numbers, personal home or cell phone numbers, dates of birth, etc.) given to us in application forms or other documents that are offered for public review or released under FOIA. For more information on the rules of the Privacy Act go to the [HCP Handbook Toolbox](#).

### *1.3.8 A List of Related Natural Resource Laws*

Depending on the circumstances of each proposed HCP, a number of other resource laws may apply. The following list includes laws that the Services most commonly encounter during the HCP process, but this list is not all-inclusive. Later in this Handbook we discuss how some of these laws are integrated with the HCP process. Links for the following laws are in the [HCP Handbook Toolbox](#).

- —Migratory Bird Treaty Act
- —Bald and Golden Eagle Protection Act
- —Marine Mammal Protection Act
- —Clean Water Act
- —Marine Sanctuaries Act
- —Magnuson-Stevens Fishery Conservation and Management Act--Essential Fish Habitat
- Coastal Zone Management Act

## **1.4 How to Use the HCP Handbook**

### *1.4.1 Purpose of the Handbook*

The purpose of this Handbook is to instruct Services staff how to assist applicants with developing HCPs in an efficient and effective manner while ensuring adequate conservation for listed species. It guides staff, phase by phase, through development, implementation, and environmental compliance, using streamlined approaches whenever possible. It draws on lessons learned and past experiences to apply relevant regulations and policy and to navigate the various processes for completing an HCP and the permit decision process. You can obtain other resources for guidance on the HCP program from the Services' National and Regional HCP Coordinators and the HCP course at the FWS National Conservation Training Center (NCTC) (see the [HCP Handbook Toolbox](#)). The HCP course at NCTC is also open to those outside the Services who are interested in learning how to use the HCP program. Although this Handbook is designed for Services staff, it can be helpful to other HCP practitioners, such as applicants, consultants, and partners.

### *1.4.2 Organization of the Handbook*

After Chapter 2, which provides an overview of the HCP planning process, this Handbook is organized into four parts to correspond with the four main phases of the process: (1) Pre-application; (2) Developing the HCP and Environmental Compliance Documents; (3) Processing, Making a Permitting Decision, and Issuing the Incidental Take Permit; and (4) Implementing the HCP and Compliance Monitoring. Phase 1 chapters on the pre-application phase provide guidance on considerations before embarking on the development of an HCP. Phase 2 chapters focus on the many considerations and tasks necessary to prepare a draft HCP and associated environmental compliance documents. They also include important guidance on how to conduct the various required impact analyses. Phase 3 chapters lead the Services' HCP practitioner through the steps to review and process a permit application, make a permit decision, and issue the permit. The Phase 4 chapter describes how to monitor for compliance during implementation of the HCP, as well as how to address issues that may arise.

In some cases, the HCP development and permit decision processes can be complex and lengthy. To address those types of circumstances, as well as more typical situations, we include additional information and discussion in appendices of this Handbook and the [HCP Handbook Toolbox](#). The Toolbox includes important resources, such as more detailed instructions, examples, templates, regulations, and other useful tips and advice. The appendices and HCP Handbook Toolbox are equally important to understanding the HCP program as the information in the body of the Handbook.

As noted at the beginning of this chapter, the HCP program evolves in response to lessons learned based on our experience in implementing the program, policy or regulation changes, new information, new technical capabilities for analyzing and monitoring, and new or improved conservation practices. Thus, this Handbook will be a living document to keep up with the program's evolution. We also will update the Toolbox, as needed. We will post notifications of any changes to the Handbook or Toolbox on the [FWS web site for the HCP program](#) where these are housed. Also, the Regional HCP Coordinators will alert field staff to Handbook and Toolbox changes by email or on regular conference calls.

#### *1.4.3 Tips for Using the HCP Handbook*

To access relevant documents in the Toolbox, click on hyperlinks in the Handbook. You can also navigate to different chapters and their sections within the Handbook by clicking on hyperlinks in the Table of Contents and within the text.

The Glossary in the back of the Handbook contains an extensive list of definitions, as well as sources of the definitions. We also provide a list of acronyms at the front of the Handbook. To be user friendly, we also remind the reader of the meaning of an acronym every time it is used for the first time in a chapter.

Most chapters contain "Helpful Hints" that are called out in separate boxes. Helpful Hints are meant to assist you in navigating a particular part of the HCP process. They include information, guidance, or considerations that are critical to keep in mind.