PHASE 3: Processing, Making a Permitting Decision, and Issuing the Incidental Take Permit

Chapter 14: Completing and Reviewing the Permit Application and NEPA Compliance Documents

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14.0 Introduction

After helping applicants develop a draft Habitat Conservation Plan (HCP) that will cover their actions that are likely to result in take, you'll tell them it's time for them to submit an application, including their HCP. Then, we will review the documents associated with the application and HCP, beginning in the field office and moving up through the Regional office (unless authority to process certain HCPs has been delegated to the field office), and through the solicitor's/general counsel's office.

You will need to ensure that the draft HCP meets all requirements. You will also need to ensure that the National Environmental Policy Act (NEPA) (see the HCP Handbook Toolbox) analysis is appropriate and complete. Following document review, we must make drafts available to the public through the *Federal Register*. This chapter will help you through the process.

14.1 Documents Required to Complete the Application

The application package consists of the documents listed below, which the applicant should submit to the Services once all the draft documents are complete. The responsibility for producing these documents may vary by Regional practice. The U.S. Fish and Wildlife Service (FWS) Manual procedures also allow Regions latitude in assigning some of the Services' tasks below:

- Applicant: FWS or National Marine Fisheries Service (NMFS) permit application form(s), or both, filled out and signed by the applicant;
- Applicant: the appropriate processing fee (FWS only);
- Applicant: draft HCP, which should be statutorily complete before it formally goes to the Services' Regional office;
- Applicant: implementing agreement (if there is one - see section 14.11);
- Field office: certification from the FWS or NMFS field office that the HCP is statutorily complete (contains all of the required elements);
- Field office: draft NEPA analysis, which is our document, is often contracted and paid for by the applicant, but any contractor producing a NEPA analysis must be under the supervision of and responsive only to the Services;
- Field office: draft notice of availability (NOA) of the receipt of application and draft NEPA analysis, which is drafted at the Services' field office; and
- Field or Regional Office as appropriate: cover letter to the Office of the *Federal Register* certifying that the disk contains a true unsigned copy of the signed hard copy NOA, and is usually drafted at the Services' Regional office.

Helpful Hint: The *Federal Register* NOA and cover letter may be signed by the Regional Director, acting Regional Director, or by whomever signature authority was delegated to (for FWS) or the Assistant Administrator (for Fisheries), Regional Administrator, or another designated official (for NMFS). Check with the Regional HCP Coordinator if in doubt of the appropriate official.

Guidance in this chapter assumes that applicants have been coordinating closely with the Services throughout HCP development. For larger plans, Services' staff should request that the applicant submit sections (or chapters) as they are completed for early review, to help ensure the applicant is headed in the right direction and potentially to shorten the review time. When their HCP is complete, applicants should send a complete draft to the field office (see section 14.3 below). The field office will tell the applicant when to submit their application and application fee (FWS only), if applicable. State and local government agencies and any individual or institution under contract for the proposed activities to a State or local agency are exempt from the fee. Applicants should always submit documents to the field office with whom they have been working, unless instructed to send them to the appropriate Regional office. See section 14.3 for more information regarding field office review of the HCP and application.

The draft NEPA analysis (which is the NEPA screening document that is the basis for making a decision on whether the project needs an environmental action statement (for a categorical exclusion), environmental assessment (EA), or environmental impact statement (EIS)) should be completed and ready for review about the same time as the HCP.

After field office review of the application form, draft HCP, and draft NEPA analysis, the field office should prepare the *Federal Register* NOA (see the HCP Handbook Toolbox). If the field office has requested early review from the Regional office, the NOA may be prepared during that review. When the NOA package is complete, the field office should send the application package to the Regional office for review and further processing (see section 14.8 for more information regarding the Regional office and legal counsel reviews).

In some cases, the field office may request the Regional office to conduct early review of certain documents. Early reviews may help to expedite final reviews or settle issues on certain sections of a document (e.g., mitigation strategies, unusual conservation measures). They may also ask for early legal counsel review, among other reviews.

Note: Authority to process certain application packages (e.g., low-effect HCPs with categorical exclusion-level NEPA analysis) has been delegated to field offices in some Regions. If this is the case, the field office also handles processing publication of the *Federal Register* NOA. Field office staff should follow the instructions below that otherwise would occur at the Regional office.

Helpful Hint: Consistency matters. Write the *Federal Register* NOA according to the *Office of the Federal Register Document Drafting Handbook*. Write and review all other documents according to the *Government Printing Office (GPO)* Style Manual. Use consistent terminology within and among documents for an application package.

14.2 Permit Application Forms, Application Fees, and Instructions

Applicants must submit a completed permit application form along with their HCP that meets general and specific permit requirements, and the applicable processing fee (FWS only) to the field office. The official processing timeframe begins when the Regional office receives the complete application package from the field office. If the FWS' Regional Director has delegated authority to the field office, the timeframe begins when the field office receives a complete package. See the List of Service Regional Offices in the FWS application (see the HCP Handbook Toolbox).

14.2.1 FWS Application Form

Applicants must complete and submit a Federal Fish and Wildlife Permit Application (form 3-200-56) (see the HCP Handbook Toolbox), as required at 50 CFR 17.22(b)(1) and 17.32(b)(1), for all applications for a new, renewed, or amended incidental take permit. Submitting a 3-200-56 also provides information needed for any transfer or succession of a valid permit. Following are instructions for this form, which also appear on the form. If the applicant is an individual, he/she must sign the application and complete blocks A and D of the form. If the applicant is a tribe, city, county, business, consortium, or similar group, the appropriate authority responsible for actions granted under the permit must complete blocks B and D and sign the form. There must always be an original signature and date in blue ink in the certification block. We do not consider the application complete without the original, signed form.

Helpful Hint: The applicant must have authority to implement the HCP and permit. This means that the applicant must have the authority to regulate or control (e.g., owns the permit area, has a lease on the property to implement the HCP activities) all or applicable parts of the HCP so the conditions of the HCP and permit are enforceable.

By signing form 3-200-56, the applicant for a permit is certifying that:

- the information submitted in the application is complete and accurate,
- the applicant understands that any false statements may result in criminal penalties, and
- the applicant has read and is familiar with applicable regulations.

Applicants must send their completed application package to the field office they have been working with throughout the development of the HCP. The field office will review the package and send it to the Regional office along with a certification that they found the HCP to be statutorily complete (the HCP includes all mandatory elements). The field office may fax or e-mail an application form to the Regional office to begin the permit processing phase, but only if the original application with an original signature is submitted immediately afterward.
Until the form itself is revised, instruct applicants to ignore the space for the appropriate Regional office address and phone number at the top of the form where it reads "Return to: U.S. Fish and Wildlife Service (USFWS)." If applicants send an application package directly to the Regional office, it will cause a delay because the Regional office will send it to the field office for review and processing.

14.2.2 NMFS Applications

There are three different NMFS permit applications, depending on the type of species the applicant expects to take. Applicants should contact the NMFS Headquarters office at (301) 427-8400 for the most current application forms for marine mammals, sea turtles, and other listed species. Alternatively, applicants can go to the links found in the HCP Handbook Toolbox).

1. Marine Mammals
2. Sea Turtles
3. Other listed species

14.2.3 Incomplete or Insufficient Application

Applicants must provide all required information and certify that it is complete and accurate to the best of their knowledge (on the FWS form 3-200-56, this is at block D, number 3). Although field office staff may do early reviews to help ensure that the HCP is on track, we do not begin the official review process until we receive a complete application package from the applicant (application, processing fee (as appropriate), and HCP).

Helpful Hint: It is very important to keep a good record of incomplete, insufficient, or improperly executed applications; our communication with, and recommendations to applicants; and their responses (or lack of response) for the administrative record. Our record will show that we performed our regulatory duty and protect Services' staff from litigation due to any apparent inaction.

FWS - Incomplete Application

If the 3-200-56 form is not completely and correctly filled out, FWS staff must notify the applicant in writing and put a copy of the correspondence in the project file, or by phone and write a memo to the file for the project file and administrative record. If the FWS requests information (e.g., required information is missing or unclear), we must notify the applicant that if the information is not received within 45-days of the date of notification, we will consider the application abandoned (50 CFR 13.11(e)). To ensure the administrative record is complete, the Service should send a letter to the applicant at the end of the 45-day period confirming that the application is considered abandoned and the applicant must submit a new application and fee if they want to obtain an incidental take permit.

NMFS - Insufficient or Improperly Executed Application

For NMFS, if the application is insufficiently or improperly executed, NMFS staff must notify the applicant. The applicant has 60 days to supply the deficient information or otherwise correct the deficiency. If they do not, the application will be considered abandoned (50 CFR 222.302(c)(1)).

14.2.4 FWS Application Processing Fee

The FWS application fee, as stated in 50 CFR 13.11(d), is for processing the application, not for the permit, so it is not refundable if the application is abandoned or the permit is denied. FWS

may only refund the fee if the applicant withdraws the application, in writing, before FWS begins processing the application. Money orders or checks should be made payable to the U.S. Fish and Wildlife Service. If the check or money order has been sent to the Denver Finance Center, the Regional office must request a refund to the applicant. Checks and money orders must be safeguarded as if they were cash and placed in a fireproof safe, except when being processed by employees designated as collection officers. Application fees should be deposited in a timely manner.

The required processing fees can be found in section E of the permit application. As of this writing, the FWS processing fee for a new permit application is $100.00.

Tribes, State, or local government agencies (counties, cities, etc.), and any individual or institution under contract to such an entity to conduct the proposed activities are exempt from paying the fee.

Helpful Hint: There is no processing fee for NMFS permit applications.

14.3 Field Office Review of the HCP

We must clearly state our expectations, the section 10 HCP requirements, and permit issuance criteria to applicants at the beginning of an HCP development effort. If an applicant has closely coordinated with the field office throughout development of the HCP, the plan should have all the right components, have an acceptable mitigation strategy, and preliminarily meet all requirements. If this is the case, the field office will be able to tell the applicant when the draft HCP and related documents are ready to submit as a complete, adequate application for a permit. When such close coordination happens, the review of the draft HCP will be thorough, but it will also be relatively easy.

Helpful Hint: Remember that the HCP is the applicant's document. If any substantive changes are needed, the applicant must approve them or make them itself.

If, on the other hand, an applicant submits a draft HCP without close coordination with the Services or insists on submitting an HCP that doesn't meet field office recommendations, the field office review may take additional time. If there are issues to be resolved or negotiated (e.g., inadequate mitigation, a listed species not covered or not adequately covered), field office staff should coordinate with the applicant and document all discussions and decisions for the file. Disagreement between the applicant and field office staff may also be elevated to the Regional office for assistance. The field office may also want to elevate any questionable issues before making final agreements with an applicant.

Helpful Hint: During the review of the HCP (and associated documents), use the information provided to start (or add to) both the draft section 7 biological opinion (BO) and the section 10 findings and recommendations memo (also known as "set of findings", "HCP findings", or "findings"). Although these documents may not be completed until the public comment period has closed and any comments submitted have been addressed, collecting information during this review will save time and effort later. If an HCP is changing substantively, only include sections of draft BO and findings that are not likely to change.

Things to consider when reviewing the HCP at the field office:

- if the HCP is low-effect, ensure that it meets the statutory requirements for a NEPA categorical exclusion (use the screening form for low-effect incidental take permits and NEPA environmental action statement located in the HCP Handbook Toolbox);
- whether the draft HCP is statutorily complete and meets applicable regulatory and policy requirements (to the best of your understanding);
- ensure all required sections are in the HCP–see the required HCP elements and recommended HCP format in Appendix C;
- ensure that climate change considerations (changes in climate and related direct and indirect effects) are adequately addressed;
- make sure numbers add up and are consistent among all documents;
- make sure maps are correct, show the HCP and permit areas (if they're different), and indicate where they are on the larger landscape;
- ensure all definitions in the HCP meet Endangered Species Act (ESA) definitions (as opposed to NEPA definitions);
- make sure all negotiated points are presented in the HCP as agreed upon (if not, clarify with the applicant);
- ensure the publication-ready quality of all draft documents that will be sent to the Regional office;
- manage materials for the official administrative record (although at this point the documents are part of the file record, we advise that you maintain them with the possibility of future litigation in mind—maintaining well-organized files is a standard practice);

For FWS:

- enter the HCP into the Environmental Conservation Online System (ECOS) (entry of HCP information to ECOS) (see the HCP Handbook Toolbox); and
- route the application package to the Regional office using the Data Tracking System (DTS) (if the Region uses DTS) or whatever data tracking system is in use. If the HCP is low-effect and signature authority has been delegated to the field office, the field office completes the process as described as Regional office duties, below.

14.3.1 ESA Requirements

FWS ESA HCP application requirements are described in 50 CFR 13 and 17.22(b)(1) for endangered species and 17.32(b)(1) for threatened species (see the HCP Handbook Toolbox) and include:

- a physical address or location of activities, such as section/township/range, county tax parcel number, or some other formal legal description (50 CFR 13.12(a)(2)). The applicant must also provide shapefiles of the plan area and permit area (if they're different). The field office will provide the applicant with specific requirements;
- a complete description of the activity(ies) for which incidental take will be authorized;
- the common and scientific names of the species requested for the permit to cover, as well as the number, age, and sex of such species, if known; and
- a conservation plan that specifies:
  - the impact that will likely result from the incidental taking (ESA section 10(a)(2)(A)(i)). This is not a tally of how many individuals (or surrogate, e.g., acres of habitat) will be taken, but instead is a robust analysis of what impact the taking of those individuals will have on the species or population, as appropriate;
  - what steps the applicant will take to monitor, minimize, and mitigate such impacts; the funding that will be available to implement such steps; and the procedures that they will use to deal with unforeseen circumstances (ESA section 10(a)(2)(A)(ii));
  - what alternative actions to such incidental taking have been considered and the reasons the applicant rejected those alternatives (ESA section 10(a)(2)(A)(iii)). The alternatives to the taking are not the same as the NEPA alternatives, but may be similar. The ESA required alternatives are described, not analyzed,
    - applicants need to tell the story of why they need a permit, describe the situation and state why other options don't work for them. For instance, at least one reason an applicant would reject a no action alternative is that not doing the project doesn't meet the applicant's needs (and it wouldn't provide benefits to the species); and
- other measures that the Director may require as being necessary or appropriate for the purposes of the plan (ESA section 10(a)(2)(A)(iv)).

NMFS ESA Permit Application Procedures are outlined in 50 CFR 222.307(b) (see the HCP Handbook Toolbox) and include:

- the type of application (marine mammals, sea turtles, or other listed species);
- the applicant's name, address, and telephone number;
- the species or stocks, by common and scientific name, and a description of the status, distribution, seasonal distribution, habitat needs, feeding habitats, and other biological requirements;
- a detailed description of the proposed activity; and
- a conservation plan that specifies:
  - the impact that will likely result from the incidental taking (ESA section 10(a)(2)(A)(i); 50 CFR 222.307(b)(5)(i));
  - the anticipated impact of the proposed activity on the habitat of the species or stocks (CFR 222.307(b)(5)(ii));

- what steps the applicant will take to monitor, minimize, and mitigate such impacts, the funding that will be available to implement such steps; and measures (ESA section 10(a)(2)(A)(ii); 50 CFR 222.307(b)(5)(iii));
- what alternative actions to such incidental taking have been considered and the reasons these alternatives are not being used (ESA section 10(a)(2)(A)(iii); 50 CFR 222.307(b)(5)(iv)). The alternatives to the taking are not necessarily the same as the NEPA alternatives, although they may be nearly the same (e.g., a no-action alternative does not meet the applicant's needs and doesn't provide benefits to the species, or an applicant considers moving or decreasing a development project that would result in no take or significantly reduced take, but those alternatives are not financially viable options). The applicant describes these alternatives in the HCP, but doesn't have to analyze them; and
- a list of all data sources used in preparation of the plan (50 CFR 222.307(b)(5)(v)).

14.3.2 Issuance Criteria

After the opportunity for public comment, the Services must find that the following requirements are met [(ESA section 10(a)(2)(B); 50 CFR 17.22(b)(2), 17.32(b)(2), and 50 CFR 222.307(c)(2)]:

- the taking will be incidental to, and not the purpose of, carrying out an otherwise lawful activity (50 CFR 17.3);
- the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings;
- the applicant will ensure that adequate funding for the conservation plan (implementation and mitigation) and procedures to deal with changed circumstances will be provided (including what the applicant will do in the face of changed circumstances and the funding to implement those actions);
- the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
- FWS:
  - such other measures that the Director may require as being necessary or appropriate for purposes of the plan; and
  - the Director has received such other assurances that the plan will be implemented.
- NMFS:
  - the applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate; and
  - there are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator.

14.3.3 Disqualifying Factors

When the Services get an adequate draft HCP that meets all requirements, with a complete and correctly filled out application for a permit, we process the HCP through the steps described in this handbook and eventually issue a permit unless the HCP does not meet issuance criteria or there are disqualifying factors.

Helpful Hint: During initial discussions, staff should also inform applicants about disqualifying factors. Do not wait until an HCP has been developed (see section 3.3). Applicants must self-certify that they do not have any disqualifying factors in block D.3.

For FWS, review the factors described in 50 CFR 13.21(b) and (c). If the applicant does not qualify for a permit because of any of the disqualifying factors, we should notify the applicant in writing and put a memo to the file in the administrative record.

Disqualifying factors or reasons to deny a permit for NMFS are identified in 15 CFR 904 and 50 CFR 222.303(e)(1) (see the HCP Handbook Toolbox). We may deny a permit because of violations of law or settlement agreements, nonpayment of fines, or other circumstances listed in the regulations.

14.3.4 Incomplete or Inadequate HCP

Although rare, despite our best efforts, some applicants may choose to prepare and submit a draft HCP without coordinating with the Services. If the HCP is incomplete (missing one or more required elements), then the application is incomplete. If an applicant submits an incomplete draft HCP, we must notify the applicant as soon as possible after receipt of the application. We should send a letter to the applicant to explain all of the inadequacies and request that the applicant revise the HCP to make it complete. If, on review, it is unlikely that the HCP will meet issuance criteria, we must issue a notification letter to the applicant that specifically details how the HCP would likely not meet issuance criteria. Be sure to include all of the issues in the notification; it is unfair to applicants to piecemeal requests and will increase workload for staff. It may be better to meet with applicants to help them get through the issues, but it is important to keep good records of any meetings, discussions, or decisions for the administrative record. If the application is complete, we must process it and make a permit decision.

Helpful Hint: If the applicant does not correct the inadequacies in a timely manner, consider establishing a deadline, generally 30 days, after which we would consider the application abandoned.

Any notification of denial we give to the applicant should be in a formal letter, signed by the permit signatory or Deputy Regional Director or Assistant Regional Administrator, stating that we are denying the permit and the basis for denial. As an alternative, we may attach a letter of denial (for the record), which will be effective in 30 days if the applicant doesn't respond, to a letter providing guidance on how to resolve the inadequacies. This gives them the opportunity to do so if they choose to continue.

- Where possible, provide guidance on how any issues may be addressed to meet issuance criteria and resolve any other inadequacies.
- State that the applicant is responsible for providing a response to the Service within 30 days as to whether or not they plan to address the identified issues.
- State that if the applicant does not respond within 30 days, the Services will consider the permit application denied.
- If the applicant notifies the Services that it will not revise the application, we must send a letter of permit denial to the applicant within 30 days. The permit denial letter should also explain the bases for denying the permit application.

- The permit denial letter must inform the applicant of the right to request reconsideration (see below). Such an administrative appeal is required by FWS regulations before the applicant can sue the FWS in Federal court.
- Provide information on what they need to supply in the appeal.

The FWS Regional office may coordinate with the Regional solicitor's office on a denial determination, as appropriate. The FWS does not have to publish a notice of permit denial in the *Federal Register*.

NMFS must use the process in 50 CFR 222.303(e)(2) to deny permits. NMFS must notify the applicant in writing of the denial of the permit request and include the reasons for it. If authorized to do so in the notice of denial, the applicant may submit further information or reasons the permit should not be denied. Such further information is not a new application. NMFS must publish a notice of denial in the *Federal Register* within 10 days after the date of the denial (50 CFR 222.303(d)).

If the applicant responds with the intent to address the inadequacies, the Services should work closely with them to help resolve issues in a timely manner and to prevent further delays. During this collaborative process, Services' staff should document attempts to resolve inadequacies and provide any interim determinations or resolutions to the applicant in writing. These written communications inform and contribute to the administrative record if we cannot resolve problems and have to deny the permit application. In addition, these written communications provide support for our changes in position regarding the adequacy of the application, which is a very important part of the administrative record.

14.3.5 Certification of Application by the Field Office that the HCP is Statutorily Complete

When field office staff are ready to send the application package to the Regional office, they must include a memo stating that they have reviewed the HCP and that they believe it is statutorily complete and otherwise meets regulatory and policy requirements applicable to a permit application (see an example Field Office Certification in the HCP Handbook Toolbox.

If authority to issue permits has been delegated to the field office, include a memo to the file with the certification signed by at least one supervisory level below the field supervisor.

14.4 Field Office Review of the NEPA Analysis

Whether the Service wrote the draft NEPA analysis or a consultant developed the draft NEPA analysis in close coordination with the Service, the field office review of the draft should be relatively easy. See Chapter 13 for more information on NEPA and NEPA contractors.

Helpful Hint: The NEPA analysis is the Services' document. No matter who wrote it, we can make any changes we deem necessary.

Things to consider when the field office reviews the NEPA analysis:

- If the NEPA analysis is a screening form, it must be brief, but also must contain enough information for a decision maker to determine that it does indeed meet the categorical exclusion level of NEPA.
- The summary section (as described in 40 CFR 1502.12 for an EIS) must adequately and accurately summarize the NEPA analysis (EA or EIS) by:
    - stressing the major conclusions,
    - highlighting areas of controversy (including issues raised by agencies and the public), and
    - highlighting the issues to be resolved (including the choice among alternatives).

Helpful Hint: although the summary section is only required for an EIS, also include it for a CatEx or EA for quick reference.

- Verify that the draft in review is likely the proper level of NEPA for the HCP.
- An environmental assessment (EA) is a concise document and should not contain long descriptions or detailed data (should be no more than 10-15 pages long) (40 CFR 1508.9, 40 Questions (36 a-b) (see the HCP Handbook Toolbox).
- An environmental impact statement (EIS) should be less than 150 pages, or for a very complex HCP or one with an unusual scope the EIS should be less than 300 pages (40 CFR 1502.7).
- The NEPA analysis must be written in the Service's voice.
- All required sections must be in the NEPA analysis (see Section 4. Writing NEPA Documents in *NEPA for National Wildlife Refuges: A Handbook* in the HCP Handbook Toolbox.
- All definitions in the document must meet NEPA definitions.
- Verify that numbers add up and are consistent among all documents.
- Make sure maps are correct, show the HCP and permit areas (if they're different), and show where they are on the larger landscape.
- Ensure that all draft and final documents forwarded to the Regional office are publication-ready.
- Manage materials for the official administrative record.
- Be sure the purpose and need is the Service's purpose and need (see section 13.1.1 for a template purpose and need statement).
- There must be a reasonable range of alternatives considered, based on the purpose and need for the proposed action.
- Be sure the impacts are actually analyzed, not just described.
- The cumulative effects section must consider all actions (Federal and non-Federal) that have occurred, are occurring, and are reasonably certain to occur.
- The analysis must consider whether impacts are significant (includes context and intensity) and provides the reason (i.e., it is [or is not] significant because . . .).
- Ensure that the analysis makes sense (connect the dots).
- Mitigation measures for impacts to the human environment must consider why, what, who, where, and when.
- All conclusions in the NEPA document must be rationally connected to the facts used to reach those conclusions.

14.5 Federal Register Notices

Under section 10(c) of the ESA and Federal regulations (50 CFR 17.22 and 17.32 or 50 CFR 222.302 and 222.303), the Services must publish in the *Federal Register* a notice of receipt for each section 10 permit application received (remember that the HCP is part of the application package, so we make the HCP available for public review). NEPA regulations (40 CFR 1506.6 and 43 CFR 46.435) and our policy also require publication of an NOA of our NEPA analysis. We fulfill both these requirements with a single NOA. A *Federal Register* NOA should be brief, but it should provide enough information to agencies and the public so they will know whether they want to review and comment on available documents (see the approved short NOA in the HCP Handbook Toolbox). In addition to the NOA we publish for each HCP and application, if the NEPA analysis leads to an EIS, the U.S. Environmental Protection Agency (EPA) publishes a notice that an EIS is available for review. See the EIS Filing Instructions in the HCP Handbook Toolbox for more information.

14.5.1 Purpose

Federal Register notices regarding HCPs may announce scoping, the receipt of applications, the availability of documents for review and comment, meetings, or final permitting decisions (e.g., issuance, denials, revocations). The Services may also request comments on specific elements of an HCP (e.g., adequacy of the mitigation plan, the conservation measures).

14.5.2 Timing of the Notice

Federal Register NOAs should be published as soon as possible after submission of the complete application package and final review of the application package by Regional office staff.

For FWS NOAs, other than those for low-effect HCPs with categorical exclusions, they must be reviewed and surnamed by the solicitor's office. The Division of Policy, Performance, and Management Programs (PPM) must also review and send them to the FWS Director's and Secretary of the Interior's offices for authorization to publish the NOA. See PPM's Web site in the HCP Handbook Toolbox).

NMFS NOAs must be approved and cleared for publication through the relevant Regional Protected Resources Division or Assistant Regional Administrator. Check with the Regional HCP Coordinator for specific routing and process.

14.5.3 Composition and Content of Federal Register Notices

A *Federal Register* NOA generally consists of several parts, including the billing code, headings, text, and a signature block. See *Federal Register Notices* (HCP Handbook Toolbox) that expands on the guidance provided in the *Office of the Federal Register Document Drafting Handbook* (HCP Handbook Toolbox) for how to write a *Federal Register* NOA. It describes what the NOA should include, and includes examples of billing codes, department names, and subagency names. A short NOA, already reviewed and approved by the PPM is also available in the HCP Handbook Toolbox) (short NOA).

There are slight differences between FWS NOAs, NMFS NOAs, and joint agency NOAs. When filing a joint agency NOA there are additional specific coordination issues to consider. See the Coordination Process and Example of a Joint *Federal Register* Notice in the HCP Handbook Toolbox).

14.5.4 Format of the Notice of Availability

Formatting for a *Federal Register* NOA is very specific (see Federal Register Notices in the HCP Handbook Toolbox) for specific formatting examples. *Federal Register* NOAs must be written according to the *Office of the Federal Register Document Drafting Handbook* first, and where that is silent, then use the *GPO Style Manual* (see the HCP Handbook Toolbox). In addition, if the signature block isn't correct, the Office of the Federal Register will reject it. If that happens, you have to get new signature copies and repeat much of the process. Seek a courtesy review by PPM to be sure you won't have problems that delay your process.

14.6 Required Public Comment Periods

The information received by the Services as part of an application package (e.g., application, HCP, maps, background information, standard operating procedures, etc.) must be made available for public review (ESA section 10(c)). We have established requirements for the length of the public review/comment period for NOAs. If we involved other agencies and the public by doing early scoping or public meetings, we must offer the public at least 30 days to comment on the HCP and application supported by a categorical exclusion, EA, or mitigated EA (i.e., we consider mitigation measures in an EA to avoid or lessen potentially significant environmental effects of proposed actions that would otherwise need to be analyzed in an EIS). Service policy requires at least a 60-day comment period for a draft EIS, or on an EA for HCPs that are large-scale or regional. If the public hasn't been involved, we may need to add 30 days to the comment period. For HCPs that are exceptionally complex or precedent-setting, we recommend a 90-day public review/comment period. If we anticipate a lot of interest in an HCP, it may be prudent to add 30 or 60 days to the comment period so you don't have to reopen or extend it. Discuss this with the Regional HCP Coordinator.

14.7 Review by Regional Office and Legal Counsel

Helpful Hint: When Regional office staff and legal counsel are reviewing and commenting on the draft HCP, any substantive changes must be returned to the field office. Field office staff must seek approval by the applicant, and typically the applicant makes those changes.

14.7.1 Regional Office Application Processing

Processing an incidental take permit application at the Regional office consists of reviewing the application, draft HCP, and draft NEPA analysis. When the Regional office is satisfied that the documents are complete, they announce receipt of the application and availability of the draft NEPA analysis and draft HCP in the *Federal Register* and request public review and comment on the draft HCP, draft NEPA analysis, and the application.

The FWS - Regional Office:

- gets an application number from the Service Permit Issuance and Tracking System (SPITS) and works with the HCP Coordinator;
- reviews the HCP and NEPA analysis according to the same considerations that the field office uses, meaning that they must ensure it meets all statutory, regulatory, and policy requirements (or document where requirements are not likely to be met);
- reviews the *Federal Register* NOA;
- sends the draft HCP, implementing agreement (if there is one), draft NEPA analysis, and NOA to the Regional solicitor's office for review and surname. This request may be formal or informal, depending on Regional guidance (check with the Regional HCP Coordinator); and
- processes the NOA by publishing it in the *Federal Register* by:
    - putting the NOA on surname for concurrence and signature (in DTS if your Region uses DTS);
    - after signature, getting PPM to provide a courtesy review; and
    - processing the NOA as appropriate according to the NEPA level:
        - Categorical exclusion, EA, or mitigated EA: send the NOA package to the *Federal Register* with a cover letter and a CD with the MS Word version of the NOA with the signer's name and title typed in under the signature line (see *Federal Register* Notices in the HCP Handbook Toolbox);
        - EIS: upload the EIS to the EPA's e-portal (CDX) (see EIS Filing and Distribution in the HCP Handbook Toolbox); and
            - send the NOA package (i.e., NOA, cover letter, and a CD with the MS Word version of the NOA with the signer's name and title typed in under the signature line) to the *Federal Register*. Include a letter to request publication on a certain date (to correspond with EPA's publication date).

NMFS - Regional Office

- ideally, NMFS field office staff will work with the applicant to develop a permit application and conservation plan before it is submitted to the relevant Regional office;
- gets an application number from the Authorizations and Permits for Protected Species (APPS);
- reviews the application and works with the applicant to make necessary changes or requests additional information;
- after the application is complete and sufficient, NMFS publishes a notice of receipt and request for comments in the *Federal Register*; and
- prepares the draft NEPA analysis document, and publishes an NOA of a draft EA (or EIS) and request for comments in the *Federal Register*.

14.7.2 Review by the Office of the Regional Solicitor and General Counsel

Legal review of the permit application package ensures that the draft HCP and associated documents meet the legal requirements of the ESA and NEPA. It is especially important to get

legal review for large-scale, regional, multi-regional, or joint-agency HCPs, which are often complex and address a variety of activities and species.

For FWS, the need for legal review of low-effect HCPs is less critical, and they may not need legal review since these projects are by definition minor in scope and impact (e.g., permanent impacts to a small area of low quality habitat within the plan area or temporary impacts to habitat as long as they have minor or negligible effects on covered species). Although not standard practice, and even if permit signature authority has been delegated to a Field Supervisor, a low-effect HCP and associated documents may need legal review. Seek advice from your Regional HCP Coordinator. For NMFS, legal review of low-effect HCPs should be discussed with the legal counsel to determine whether review is needed.

If we use an implementing agreement, it should have legal review. Though implementing agreements are not contracts and have no independent legal force and effect, they are incorporated into the incidental take permit as terms and conditions. A failure to comply with one or more terms of an implementing agreement may be grounds for considering the revocation of the incidental take permit. In all cases, the terms of an incidental take permit are controlling.

FWS Legal Review

It is FWS policy to require Department of the Interior (DOI) solicitor's office (legal counsel) review of all ESA section 10 permit application packages. However, solicitor's review of HCPs may be waived if the HCP meets all applicable criteria for low-effect HCPs and is categorized as such. For other exceptions, discuss the HCP with the Regional HCP Coordinator.

The Regional office may request the solicitor's review of certain parts of the HCP package, formally or informally, and you should coordinate with the solicitor to determine which parts of the package he or she should receive to complete an adequate legal review (or you may provide the entire package). Typically that includes:

- the draft HCP (and implementing agreement if there is one),
- draft NEPA analysis,
- NOA, and
- eventually for the signature package, you must include the public comments, Service response to comments, BO, findings, incidental take permit, NEPA decision document, and real property documents, such as conservation easements, that will be used to implement the plan.

Other than NOAs for low-effect HCPs with categorical exclusion level NEPA analysis, all draft *Federal Register* NOAs must be reviewed and surnamed by the solicitor's office. PPM also must review all NOAs prior to publication.

Helpful Hint: It is important for the solicitor's office to review comments and responses to comments because the comments often forecast potential litigation.

- Coordination with the solicitor's office on a permit application package should begin as soon as possible in the permit processing phase and ideally during the development phase of unique, large, unusually complex, or precedent-setting HCPs.
- The Regional HCP Coordinator (or field office staff, depending on the process in each Region) should contact the Regional solicitor's office either by official memorandum (see example in the HCP Handbook Toolbox) or via email to request primary legal counsel for review of a specific permit application package.
- The FWS can furnish a template implementing agreement to the applicant for initial development (see template in the HCP Handbook Toolbox), and then the FWS and the solicitor's office will work with the applicant and the applicant's counsel, if any, to craft the final implementing agreement.
- The legal counsel reviews the documents, as necessary, throughout the HCP process to ensure regulatory and statutory compliance and to avoid problems found at the last minute in documents submitted for final approval.
- In some Regions the solicitor's office will forward a memorandum to the appropriate official stating that the review is done and that the documents meet statutory and regulatory requirements (or not), and if applicable, have been surnamed. Alternatively, the solicitor may send an e-mail stating that the reviewed documents meet statutory and regulatory requirements and the e-mail serves as a surname. Some Regional solicitors do not send such memos or surname documents. Each Regional HCP Coordinator can provide information on the process in his or her Region.

Helpful Hint: If the solicitor puts comments in track changes in a document you have provided for review, those comments are protected by the attorney-client privilege and should NOT be released outside the FWS. Solicitor comments are directed to the FWS. If comments are on the HCP, the field office should coordinate with the solicitor to determine the appropriate way to communicate the issues to the applicant. Generally, restating the comments using the FWS's voice and removing the solicitor's comments is sufficient.

NMFS Legal Review

A NMFS section 10(a)(1)(B) incidental take permit application package, including supporting ESA and NEPA analysis documents, must have legal review by the NOAA office of the general counsel (legal counsel) either in the appropriate Regional office of the general counsel or the General Counsel-Fisheries and Protected Resources Section. Legal review of low-effect HCPs should be discussed with the legal counsel to determine whether review is needed.

Documents that should receive legal review include:

- HCPs,
- implementing agreements,
- incidental take permits,
- NEPA analyses, and
- ESA section 7 consultations.

Early involvement of the general counsel, starting in the HCP/incidental take permit planning stage, is valuable to help steer development of the HCP and accompanying documents in a direction that will assure that they meet the statutory and regulatory requirements for section 10(a)(1)(B) permits. Additionally, general counsel will provide guidance on compilation of the administrative record. General counsel involvement in discussions with the applicant and NMFS throughout the development process is helpful for the review process because the documents will be developed in a legally sufficient manner, avoiding last minute issues in documents submitted for approval.

In particular, NMFS will:

- contact the Regional NOAA general counsel office or NOAA General Counsel - Fisheries and Protected Resources Section as appropriate, to learn which attorney will be advising NMFS and reviewing the HCP and associated documents when a potential applicant appears to be seriously interested in developing an HCP;
- involve the attorney in the development of the HCP, BO, NEPA analysis, implementing agreement, incidental take permit, agency decision document, and response to comments. The attorney should take the lead in developing the implementing agreement; and
- request and receive general counsel clearance of the HCP, BO, implementing agreement, NEPA analysis (and corresponding finding of no significant impact (FONSI) or record of decision (ROD), as applicable), incidental take permit, and decision memo before issuing the permit and approving the associated documents.

The responsible attorney, after reviewing these documents, provides the requesting official written clearance, stating that the incidental take permit and associated documents are legally sufficient under applicable laws and regulations.

14.8 Getting Federal Register Notices Signed and Published

The Services have different procedures for getting *Federal Register* NOAs signed and published.

If you are using regulations.gov to collect public comments, for your convenience PPM will publish the associated documents (see the HCP Handbook Toolbox).

14.8.1 FWS Procedures for Federal Register Notices

This section describes the procedures that the FWS Regional office should follow once they have a draft NOA ready for publication. See the Federal Register Notices & (Entire) Process for Publishing an NOA in the HCP Handbook Toolbox for additional information. The NOA must go through the normal routing for the appropriate official's signature. Check with the Regional HCP Coordinator to determine who should sign the NOA.

1. The Regional HCP Coordinator, or assigned staff, reviews and edits the draft *Federal Register* NOA of the:
    - draft surname package, including the draft NEPA analysis (or screening document), draft HCP, implementing agreement (if any), and receipt of an application for an incidental permit, and

- final surname package, including the final NEPA analysis (or screening document), final HCP, and draft decision documents (findings memo and EAS, FONSI, or ROD, or combined findings memo and NEPA decision document).

The Regional office then submits it to PPM for a courtesy review and requests a notice tracking number (N#), by e-mail. An N# is appropriate for an HCP package where you don't expect a lot of comments. If you expect a lot of comments and will be using regulations.gov to collect and compile those comments, request a docket number via FWS Form 3-2198 (see the HCP Handbook Toolbox).

2. PPM will return the NOA with the N# or docket number.

3. The Regional office staff or HCP Coordinator makes changes to the NOA (final before publication) and submits the surname package (in the following order) to:

   i. Branch Chief, or acting (surname process goes through DTS if your Region uses it);
   ii. Division Chief, or acting
   iii. Assistant Regional Director – Ecological Services, or acting; and
   Iv. any other affected Assistant Regional Director.

**Where the Regional office has delegated signature authority to field offices, check with the Regional HCP Coordinator for the correct routing.

**Other documents include a note to reviewers, routing/surname sheet (if not part of the note to reviewer), and the communications plan. Some Regions also include a news release, White House/week-ahead report, and communication strategy. Check with the Regional HCP Coordinator for the specific documents needed in the surname package.

4. The Regional office gets the appropriate officer's signature on:
   - 3 copies of the NOA (in blue ink), and
   - Disk certification memo to the director of the *Federal Register*.

5. The Regional office staff types in the signer's name and title on the hard copy and on the electronic copy of the NOA. If a date is put on the hard copies, the same date must be typed into the electronic copy. The hard copies and electronic copy must have identical information in the signature block.

6. See the Federal Register Notices & (Entire) Process for Publishing an NOA in the HCP Handbook Toolbox for additional information prior to completing the steps below.

To publish an NOA for an EA go to step 11.

If the NEPA analysis is an EIS, the following steps are also required:

7. The Regional office prepares the EIS filing documents (to publish an NOA for an EA go to step 11);

8. Get signatures of the appropriate official on EIS filing documents, including the letter from the Region to the correct EPA regional office and memos to the DOI Library and the NEPA Coordinator at Headquarters;

9. Upload the EIS onto e-NEPA at ***https://cdx.epa.gov*** (see e-NEPA Electronic Submittal instructions in the HCP Handbook Toolbox);

    - Ensure that courtesy copies of the EIS and NOA have been or are being sent to the appropriate parties prior to publication:
        - 2 copies (1 paper, 1 CD) of the EIS and courtesy photocopy of the NOA to the EPA's Regional office (see the list of offices in the HCP Handbook Toolbox,
        - 2 copies (CDs) of the EIS and courtesy photocopy of the NOA to the National NEPA Coordinator, and
        - 2 copies (1 paper, 1 CD) of the EIS (plus HCP and implementing agreement, if appropriate) and courtesy photocopy of the NOA for the DOI Natural Resources Library.

11. The Regional office submits the NOA to the *Federal Register* so it will publish on the same date as EPA's notice. The submission must include:
    - 3 copies of the NOA (single-sided & double spaced) with each signed by the appropriate official;
    - CD with MS Word file on it (only). The name and title of the signer (and the date if it is included on the signed copies) must be typed into the e-copy;
    - A letter to the Office of the *Federal Register* certifying the Word version on the CD, and in the letter are the same; and
        - If the NEPA analysis is an EIS, a letter requesting a specific date for publication to correspond with the EPA's notice (which may be signed by the Assistant Regional Director – Ecological Services or field supervisor).

12. The Office of the Federal Register publishes the NOA.

14.8.2 NMFS Procedures for Federal Register Notices – Headquarters

The Regional office must ensure that all memoranda/letters/notices, etc., have been prepared according to guidance in the Examples Package for NMFS Federal Register Documents (see the link in the HCP Handbook Toolbox), Federal Register Document Drafting Handbook, Operational Guidelines, and other policies and procedures issued by the Assistant Administrator (AA) or NMFS/NOAA related to the review and clearance of regulatory actions, including Protected Resources (PR) Intranet Writing Regulations (see the HCP Handbook Toolbox).

14.9 The Freedom of Information Act and the Privacy Act

14.9.1 The Freedom of Information Act (5 U.S.C. 552)

The Freedom of Information Act (FOIA) (see the HCP Handbook Toolbox) gives any person the right, enforceable in court, to obtain access to Federal agency records, unless those records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of

three special law enforcement record exclusions. People can make FOIA requests for any agency records.

Prior to us publishing an NOA of the draft HCP, the HCP and supporting documents are not generally made available to the public in the absence of a FOIA request. The applicant may release their HCP if they so choose, but unless we're doing so in response to a FOIA request, we should not. The NEPA analysis can be withheld under FOIA until released under the NOA, unless we release it to the applicant in which case it is no longer protected.

Most information cannot be protected after we take possession of the data including species occurrence locations, which are often thought of as sensitive data. The following are examples of exemptions that we can typically use to withhold proprietary, financial, and personal information from being released when a FOIA request is submitted (not all [i.e., (1), (2), (7), and (8)] exemptions are relevant and thus are not presented here):

> (3) covered by a statute, which means information specifically exempted from disclosure by another statute, such as the National Parks Omnibus Management Act of 1998, the Archaeological Resources Protection Act of 1979, the Federal Cave Protection Act of 1988, or the National Historic Preservation Act Amendments of 1966, as amended through 2006;
>
> (4) trade secrets, commercial or financial information (confidential business information);
>
> (5) deliberative/predecisional and attorney-client privileged documents;
>
> (6) personal information affecting an individual's privacy; and
>
> (9) geological and geophysical information, including maps, concerning wells.

Note that any determination we make to withhold information can be appealed in accordance with each Department's FOIA appeals process. Refer applicants or requesters to your FOIA officer.

To access information about FOIA and the Services (see the HCP Handbook Toolbox).

14.9.2 The Privacy Act of 1974 (5 U.S.C. 552a)

The Privacy Act (see the HCP Handbook Toolbox) establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals that Federal agencies maintain in systems of records. A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some other identifier assigned to the individual. The Privacy Act prohibits the disclosure of a record about an individual from a system of records without the written consent of the individual, unless the disclosure is covered by one of twelve statutory exceptions (see the full list of exceptions in the HCP Handbook Toolbox. For our purposes, we must not release personal identifying information (e.g., social security/tax identification numbers, personal home or cell phone numbers, dates of birth) provided to us in application forms.

14.10 Tracking Databases

14.10.1 FWS Databases

The FWS uses several databases for tracking HCP information and permit numbers.

ECOS: The Environmental Conservation Online System (ECOS) tracks impacts and conservation on the ground through both a conservation plans module and the Tracking and Integrated Logging System (TAILS), which is the module that tracks impacts and conservation through consultations (at this time TAILS does not include a section 10 module, but does include a section 7 module). See Updating ECOS in the HCP Handbook Toolbox for specific instructions.

The field office should enter the required information on each HCP into ECOS as soon as possible in the planning stage. The Regional office will validate the information and add it to the anticipated workload for the Region. If you need assistance with ECOS, discuss it with the Regional HCP Coordinator.

TAILS: TAILS is the Service-wide tracking system for section 7, conservation planning, and contaminants activities. Currently, tracking authorized take under section 7 in support of HCPs is required at the field office level. We anticipate that eventually an HCP module will assist in tracking authorized take and conservation in HCPs. If you need assistance with TAILS, discuss it with the Regional HCP Coordinator.

DTS: The Data Tracking System is a national database for tracking documents as they move through the FWS and the Department of the Interior. Discuss the use of DTS with the Regional office administrative staff.

SPITS: The Service Permit Issuance Tracking System is the national database from which the Regional office generates permit numbers. You may discuss SPITS with the Regional HCP Coordinator. Generally, only Regional HCP Coordinators and Regional office staff have SPITS access. However, some field office staff have read-only access to SPITS to help them track incidental take permits and research permits for which they have implementation responsibilities. If you need such access, contact the Regional HCP Coordinator.

14.10.2 NMFS Databases

The NMFS uses several databases for tracking and permit numbers.

ECOS: ESA-listed species for which NMFS has jurisdiction appear in ECOS; however, NMFS does not use this system as widely for HCP purposes as FWS does.

APPS: The Authorizations and Permits for Protected Species is the NMFS-wide protected resources permit tracking system. This online application system covers NMFS permits and authorizations for federally protected species under the ESA and Marine Mammal Protection Act (MMPA). It also covers Oregon State scientific taking permits.

RTS: The Department of Commerce Regulatory Tracking System tracks the status of each Department of Commerce rulemaking, facilitates the transmission of rulemaking documents to Commerce, and collects regulatory information for submission to the Office of Management and Budget (e.g., data required for the Unified Agenda of Regulatory and Deregulatory Activities). These functions help streamline the agency's development and implementation of regulatory actions.

14.11 Implementing Agreements

Implementing agreements are joint Service/applicant documents that clarify the provisions of an HCP and specify how the HCP will be carried out. Implementing agreements are not required under Section 10 and are typically reserved for more complex, or multi-party plans. There is no need for an implementing agreement where all of the agreed-upon measures are spelled out in the HCP and permit. In many cases, legal counsel takes the lead in negotiating implementing agreements, which are appended to the HCP. If the applicant wants an IA or you think we need one, check with the Regional HCP Coordinator to determine the path forward.

We use these agreements at times between the Services and applicants or among applicants where there are multiple parties involved in an HCP. Although implementing agreements are technically not contracts, and have no independent legal force and effect, they must have legal counsel review before we can sign them. When used, implementing agreements are incorporated by reference into the incidental take permit as a term and condition and failure to comply with the implementing agreement may be grounds for suspending or revoking the incidental take permit. The terms of an incidental take permit are always controlling.

An implementing agreement can give the applicant or the Services a chance to clarify the minimization and mitigation commitments in the HCP, the time frames for completion of specific tasks, and the role assigned to the Services in reviewing and approving post-HCP documents, such as required management plans, contours of specific covered activities, etc., to minimize future disputes. However, it's important to note that this information should also be clear in the HCP and permit. Because the HCP is the applicant's document and is written from the applicant's perspective, it may require clarification. While we may include all clarifying provisions in the permit itself, doing so will typically require an amendment to the permit if the Services and permittee later seek to modify the provision, whereas it can be easier to make those changes to an implementing agreement as long as the Services and permittee agree.

Well-crafted implementing agreements may be incredibly helpful in sorting out the actual commitments of the HCP. Legal counsel review almost always forces the applicant and the Services to clarify the parameters, requirements, timeframes, and funding obligations. Developing an implementing agreement can be a time-consuming process, but it forces clarity, which is key for long-term, complex HCPs. If the HCP is filled with "should" and "mays" and imprecise language, the ambiguity can be cleared up in the permit terms. However, since the permit is drafted at the end of the process and implementing agreements are drafted early on, it may be prudent to use an implementing agreement for complex, regional HCPs to fix the problems (e.g., spell out who is responsible for each activity and when those activities must be done) early.

If the Services and an applicant decide to use an implementing agreement, all parties must agree on its contents. If a draft implementing agreement is included with the application, it should be made available for public review when the NOA for the draft HCP and draft NEPA analysis is published.

14.12 Services' Tasks During the Public Comment Period

After the NOA is published in the *Federal Register* and during the public comment period, the field office should prepare drafts of the BO, findings and recommendations, and NEPA decision document (EAS, FONSI, or ROD). These documents are only preliminary and are subject to revision after we review public comments received on the draft HCP and draft NEPA analysis. However, for large, complex HCPs, where there are numerous covered species or where there are staffing constraints (e.g., same staff members are working on multiple documents), the following documents may take considerably longer than the public comment period.

14.12.1 Compliance with Section 7

Section 7(a)(2) of the ESA requires Federal agencies to ensure their actions, such as the issuance of an incidental take permit for an approved HCP, are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. When a Federal agency determines their proposed action may affect listed species and critical habitat, they must consult with the Services. If the agency determines their proposed action may affect, but is not likely to adversely affect species and the Services concur, the consultation process is complete. However, if the proposed action is likely to adversely affect listed species or designated critical habitat, we must develop and issue a BO that reaches a jeopardy or no jeopardy (or adverse modification or no adverse modification) finding. A BO for an HCP must consider both listed and non-listed, covered species; non-covered listed wildlife and plants species where adverse effects are likely; and any designated critical habitat within the plan area.

The content and format of a BO are briefly discussed below. The section 7 consultation process is discussed in detail in the *Endangered Species Consultation Handbook* (*Consultation Handbook*) (see the HCP Handbook Toolbox), U.S. Fish and Wildlife Service and National Marine Fisheries Service, 1998, and in our recent final rule revising the Definition of Destruction or Adverse Modification of Critical Habitat (81 FR 7214). In addition, Regions 4 and 6 have developed guidance for section 7 documents (R4 - Tips for Writing Biological Opinions and Conference Opinions and R6 - Advice for Writing and Reviewing Endangered Species Consultation Documents - both are available in the HCP Handbook Toolbox.

The Jeopardy Analysis

In accordance with policy and regulations, the jeopardy analysis in a BO addressing the Services' proposed issuance of an incidental take permit relies on four components:

1. the *Status of the Species*, which evaluates the range-wide condition, the factors responsible for that condition, and the survival and recovery needs of the affected species;

2. the *Environmental Baseline*, which evaluates the past and present factors influencing the current condition of the species, its habitat, and ecosystem within the area likely to be affected by the proposed action (i.e., the action area), the factors responsible for that condition, and the relationship of the action area to the survival and recovery of the species;
3. the *Effects of the Action*, which assesses the direct and indirect impacts of the proposed Federal action and the effects of any interrelated or interdependent activities on the species; and
4. *Cumulative Effects*, which evaluates the effects of future, non-Federal activities reasonably certain to occur within the action area on the species.

We make the jeopardy determination by evaluating the effects of the proposed Federal action in the context of the species' current status, taking into account any cumulative effects. This helps us to determine if implementation of the proposed action is likely to cause an appreciable reduction in the likelihood of the survival and recovery of the species in the wild.

The jeopardy analysis in the BO should emphasize consideration of the range-wide survival and recovery needs of the species and the role of the action area relative to those needs. This is the key context for us to evaluate the significance of the effects of the proposed Federal action and cumulative effects.

An example of a jeopardy analysis in a BO addressing an HCP permit action is presented in the HCP HCP Handbook Toolbox.

The Destruction or Adverse Modification Analysis

In accordance with policy and regulation, the destruction/adverse modification analysis in a BO relies on the following four components:

1. the *Status of Critical Habitat*, which evaluates the range-wide condition of the affected critical habitat in terms of its physical or biological features, the factors responsible for that condition, and the intended recovery function of the critical habitat overall, as well as the intended recovery function in general of critical habitat units;
2. the *Environmental Baseline*, which evaluates the condition of the critical habitat in the action area, the factors responsible for that condition, and the recovery role of critical habitat units in the action area;
3. the *Effects of the Action*, which assesses the direct and indirect impacts of the proposed Federal action and the effects of any interrelated or interdependent activities on the critical habitat in terms of how the physical or biological features (PBF), are likely to be affected and how that impact is likely to influence the recovery support function of any affected critical habitat units; and
4. *Cumulative Effects*, which evaluates the effects of future, non-Federal activities reasonably certain to occur in the action area on the critical habitat in terms of how the PBFs are likely to be affected and how that impact is likely to influence the recovery support function of affected critical habitat units.

Although the FWS formerly considered primary constituent elements (PCE), we now consider the PBFs that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. Features may:

- be a single habitat characteristic or a more complex combination of habitat characteristics;
- include habitat characteristics that support ephemeral or dynamic habitat conditions;
- be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Be aware that when assessing effects to critical habitat designated in older critical habitat rules, many critical habitat designations may not include a detailed identification of physical or biological features that are essential for the conservation of the listed species, or rely on PCEs to identify such features. In consultations on actions that involve this type of critical habitat designations, it may be necessary to use other best available scientific and commercial data to more fully determine and document these elements or habitat qualities.

For the adverse modification determination, we evaluate the effects of the proposed Federal action on the critical habitat in the context of the range-wide condition of the critical habitat. To do this we take into account any cumulative effects to determine if that habitat would remain functional (or would retain the current ability for the PBFs to be functionally established in areas of currently unsuitable but potential suitable habitat) to serve its intended recovery role for the listed species.

The destruction/adverse modification analysis in the BO should place an emphasis on using the intended range-wide recovery function of the critical habitat and the role of the action area relative to that intended function. This helps us to evaluate the significance of the effects of the proposed Federal action and any cumulative effects to make our adverse modification determination.

14.12.2 Drafting the HCP-Specific Biological Opinion – Format

For the most part, the following only addresses intra-Service specifics that differ from other BOs. Refer to the *Consultation Handbook* for general instructions and either "Tips for Writing Biological Opinions and Conference Opinions" (R4 – January 5, 2015) or "Advice for Writing and Reviewing Endangered Species Act Consultation Documents" (R6 – July 2015) for more specific advice. Both documents are in the HCP Handbook Toolbox.

The timeframes and data requirements in the following procedures are the same for all Federal agencies and follow the section 7 consultation regulations at 50 CFR 402, except that as an internal policy, Service actions must include consideration of candidate species as though proposed for listing.

Helpful Hint: Every BO for an HCP should be as concise as possible while including all required sections (show the analysis, show your work, connect the dots). Therefore, limit information to that which is necessary and important for the decision maker. Incorporate background information by reference.

Helpful Hint continued: Where possible, use tables or figures to illustrate complex information with brief explanations, rather than extensive blocks of text.

Cover Memo – Since a BO for an HCP is intra-Service, it needs a brief cover memo (as opposed to a cover letter) from the Service official signing it (the field office working with the applicant) to the "action agency" official receiving it (generally the Regional office that issues the permit, unless signature authority has been delegated to the field office). For FWS, be sure to include the full TAILS number (e.g., 02E00000-2015-F-0001) on the memo and the title page of the BO.

Title Page – Although this requirement depends on which Region you're in, adding a full title page to precede the body of the BO is more professional. Include a signature block and date near the bottom of the title page (or at the end of the BO, depending on Regional preference). A signature and date on both the transmittal document and the title page of the BO is a redundancy, but it is also practical because:

- it allows the BO to stand alone as an official report apart from the transmittal document;
- it immediately verifies that this is the final version; and
- if it is on the title page, the signature isn't buried somewhere later in the document.

This approach can require the manager signing a BO to sign both the cover memo and the title page. If both the cover memo and title page are dated, the dates should match. Also, depending on the Region, there may be a requirement for a concurrence/non-concurrence signature line for the "action agency" official processing the consultation and making the permit decision. Check with the Regional HCP Coordinator for the Region in which the proposed action occurs.

Table of Contents (TOC) – Consider including a TOC if the BO exceeds 15 pages. It makes the document more professional and shows the reader at a glance its overall structure. Our BOs are increasingly distributed widely in electronic formats. Headings marked for inclusion in a word processor-generated TOC can also become electronic bookmarks for quick navigation in the document. For readers who are focused on particular aspects of a BO, this convenience is one easy way to limit the frustration they may otherwise experience because the document can be lengthy.

Executive Summary – Consider writing a short (no more than 1 page) summary of the action, overview of the findings regarding adverse effects, and our conclusion. Including this section for large and complex BOs is a useful and courteous addition for some of our higher level reviewers and approving officials who have a limited opportunity to review biological opinions.

Consultation History – Since these BOs are intra-Service and for HCPs, this section is not usually necessary, but Regional variations occur. If it is used, it should include the date formal consultation is requested.

Description of the Proposed Action – The proposed action is the Service issuance of a section 10(a)(1)(B) permit to the applicant. It is necessary to state which species we will authorize incidental take for and which species are otherwise covered under the plan (e.g., plants). The activities that would cause take or impacts to the species are those proposed in the HCP, and mandatory conditions (permit terms and conditions) are part of the Services' proposed action.

Briefly state what activities are covered in the HCP and refer to the HCP and NEPA analysis for detailed descriptions.

The species-specific subsections include:

- Status of the Species,
- Environmental Baseline,
- Effects of the Action (be sure to consider a discussion of the effects pathway methodology),
- Cumulative Effects, and
- Conclusion.

These are standard sections, and they should not include everything known about the species. Ensure that the species lead is involved with development or review of all species-specific information.

Incidental Take Statement – The Federal action taken in this instance is issuance of the incidental take permit. We are required to do an intra-Service consultation to ensure that issuance is not likely to result in jeopardy to a species or adverse modification of critical habitat. Because incidental take is reasonably certain to occur as a result of issuing an incidental take permit, an incidental take statement must be included with the BO. We use the following standard language with respect to species covered in an HCP and associated ITP:

> "The proposed [*name*] HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions of any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are incorporated herein by reference as reasonable and prudent measures and terms and conditions within this incidental take statement as stated in 50 CFR 402.14(i). Such terms and conditions are non-discretionary. The amount or extent of incidental take anticipated under the proposed [*name*] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)B) permit(s)."

Helpful Hint: Although the standard language above is slightly different from that suggested in the *Consultation Handbook*, we recommend using this language to prevent confusion.

The "Amount or Extent of Take" and "Effect of the Take" sections are standard as described in the *Consultation Handbook.*

Reasonable and Prudent Measures and Terms and Conditions – For an HCP, use the following standard language for covered species:

> "The HCP permit contains all measures necessary to avoid, minimize, and mitigate incidental take of [insert names of covered species] to the maximum extent practicable and requires that the HCP be fully implemented. Monitoring will be conducted as stated

in section (X) of the HCP. Therefore, no additional reasonable and prudent measures and terms and conditions are necessary for [insert names of covered species]."

Reinitiation Notice (use standard language from the Consultation Handbook)

Literature Cited – The "Literature Cited" section reflects the best available scientific and commercial data that the Services relied on to prepare the BO.

14.12.3 FWS Intra-Service Consultation

For purposes of the section 7 consultation, the Regional office is typically treated as the "Federal action agency" and the lead field office is recognized as the "consulting agency." The field office that led the negotiation of the HCP usually conducts the intra-Service consultation and ultimately signs the BO and the Regional office concurs (or not) to finalize the BO. However, each FWS Region has established initiation and coordination requirements for when formal consultation is initiated, and the levels of surname and signature of the BO, which varies.

This framework does not apply in situations where the Regional Director has delegated signature authority to field office Project Leaders. In such cases, the FWS Regional Director must provide guidance and procedures for implementing the delegated signature authority, including conducting intra-Service consultation, at the time of delegation. Consultations for low-effect HCPs must be consistent with national FWS policy as described in the *Endangered Species Consultation Handbook* (FWS and NMFS 1998).

14.12.4 NMFS Intra-Service Consultation

For NMFS, the Regional (or Headquarters) office overseeing HCP development and related processes conducts the consultation. All NMFS inter- or intra-agency consultations under ESA section 7 are governed by a national policy directive (NMFS No. 02-110-12, December 12, 2005) issued in 2005 (see the HCP Handbook Toolbox). The policy directive delegates the conduct of formal and informal consultation to each of the five NMFS Regional Administrators, where applicable, and establishes process requirements for delegated consultations.

If unforeseen circumstances arise or new information becomes available after permit issuance, and it leads NMFS to believe that the effects of the permittee's activities on a covered species will be sufficiently more severe than originally analyzed in the BO and may jeopardize the species, NMFS shall proceed as follows:

1. it shall utilize its resources to conserve the species;
2. it shall work with the permittee to voluntarily reduce the effects of covered activities on the species; and
3. NMFS shall reinitiate section 7 consultation on the permit and shall document its analysis of the new effects in a biological opinion.

Conservation efforts undertaken by NMFS or the permittee shall be considered in the analysis, as well as any information provided by the permittee regarding the probability of jeopardy. If

reinitiation of consultation results in a finding that covered activities are likely to jeopardize the species, then NMFS will:

(i) consult with the permittee to identify a reasonable and prudent alternative (RPA), and modify the HCP accordingly; or

(ii) remove that species from the ITP, after which any prohibitions against take would apply.

14.12.5 Inter-Agency Consultation Between the Services

The covered activities in a proposed HCP may affect species or critical habitat under the jurisdiction of FWS and NMFS. In those situations, the Services should work together to ensure that the impacts to all listed species are addressed. For example, if the proposed covered activities in an HCP application submitted to FWS may also result in take of NMFS species, FWS should notify the applicant of the need to contact NMFS and obtain an incidental take permit from NMFS as well. Applicants should not assume that take of NMFS species will be exempted through an inter-service Section 7 consultation between FWS and NMFS on the FWS incidental take permit application, and it may be necessary to obtain authorization through an incidental take permit that NMFS issues separately.

14.12.6 Integrating the Section 7 Compliance Process with Development of an HCP

In an effective application of the HCP process, we should provide technical assistance to the applicant early in the process to guide the development of the HCP and to facilitate the simultaneous preparation of key sections of the BO. We must ensure consistency between the two documents and use the best available information and analytical findings. If it's possible, it is best to have a different biologist working on the BO than the one working with the applicant on the HCP, but it's not absolutely necessary (especially given workload and staffing constraints).

Based on an understanding of the area likely to be affected, directly or indirectly, by the proposed covered activities (i.e., the action area), and as a result of early coordination with the applicant, we can develop a list of the species and critical habitats known or likely to occur within the action area.

Relying on that list, we coordinate with the applicant to evaluate the condition of affected listed species and critical habitat in the action area, the factors influencing that condition, and the role of the affected area in the survival/recovery of those species and the recovery support function of critical habitat. That evaluation constitutes the "Environmental Baseline" section of the BO and will give us better information to help with the assessment of the status of covered species in the HCP area, which is included in the HCP.

The baseline and status assessments provide key context for evaluating the significance of the effects of the proposed HCP on those species for which the applicant is requesting coverage. It also helps with the evaluation of the measures the applicant includes in the HCP to monitor, minimize, and mitigate such impacts. In turn, these mandatory sections of the HCP give us better information as we analyze the effects on listed species and critical habitat in the BO. This integration should maximize consistency between these two documents.

14.12.7 Integrating HCPs and Federal Actions

HCPs can set up the side boards or best management practices (BMPs) through their conservation program for various kinds of development and activities within the plan area. They can also offer streamlined approaches for Federal projects within the plan area. Not considering other Federal agencies where overlap may result in delays. Taking the time and effort to explain and collaborate closely with another Federal agency may be useful, but we should consider how an approved HCP could inform or expedite a future related section 7(a)(2) consultation.

There are three basic approaches for including Federal Projects in an HCP or streamlining section 7 compliance through the HCP process.

1. Including affected Federal agencies in the HCP and planning process. Federal agencies cannot be provided with No Surprises assurances through a section 10(a)(1)(B) incidental take permit, but they can be included in the HCP (but do not receive a permit; for an example, see the Lower Colorado River Multi-Species Conservation Plan). This has been done on several occasions, including the NiSource MSHCP and the Lower Colorado River Multi-Species HCP. The Federal agencies are fully involved with the development and implementation of the HCP. In processing the HCP package, their actions are included in the HCP, the NEPA analysis and decision, and the intra-Service section 7 consultation, findings, etc.

2. Federal agencies request consultation under the intra-Service section 7 consultation with the Service designated as the lead Federal agency. This approach is best used when the Federal agency does similar actions as covered by the HCP, but was not completely involved in the development of the HCP. This situation may come about due to the lack of resources to commit to the HCP planning process, the agency's desire to maintain some separation from the HCP, or the agency is just not sure of the utility of early involvement in the HCP process. Regardless of how it happens, this is a second chance for an agency to gain a programmatic approach to its actions within an HCP planning area. It is best used when the conservation plan in the HCP matches with the BMPs the agency uses for its actions (i.e., industry standards). To use this approach the Federal agency would send a letter to the Service requesting consultation for the actions they carry out that are covered in the HCP, and including a statement that they accept all conservation measures in the HCP and designate the Service as the lead agency for the consultation.

3. A Federal agency requests consultation with the Service for an action, and incorporates the HCP conservation measures into their Biological Assessment. This approach is useful if the action agency did not want to be involved in the HCP, but after the incidental take permit was issued decided that participation would streamline the process. This is commonly done with the Army Corps of Engineers and Federal Highway Administration projects. Since the effects of the action have already been analyzed in the HCP intra-Service consultation, all that may be required is an update to the species status and the incidental take statement in the BO for the HCP.

These three options provide pathways for Federal agencies to streamline their consultation process by integrating their approaches and compliance with the HCP process. There are a few things to keep in mind.

- First, consultation under section 7 is the Federal agency's responsibility. Assuming that the applicant desires an HCP integrated with other Federal actions, the other Federal agency has their own discretion in implementing their section 7 responsibility. The Services or the Applicant cannot force a Federal agency to participate or define how the Agency will participate in the HCP planning process.
- Second, the consultation process for the Federal agency must be complete before it can commit any irreversible and irretrievable commitment of funds or other resources that may foreclose the formulation or implementation of any reasonable and prudent alternative measures in accordance with section 7(d) of the ESA. That means that if the Agency uses option 3 above, prior to the start of any action or mitigation the consultation must be concluded.
- Finally, one of the concerns of the Federal Agency may be that participation in HCP planning process may lock them in and limit their options on future actions. While the goal would be for the majority of their projects to be covered through these approaches, nothing in the process removes the Federal agencies' discretion. Therefore, if a project comes in that includes activities that are not covered activities in the HCP or the conservation program of the HCP, the Federal agency could initiate section 7 consultation as it normally would without an HCP covering the project area.

14.12.8 Drafting the Findings and Recommendations Memo

Service staff should also draft the findings and recommendations memorandum during the public comment period (see the findings and recommendations memo template in the HCP Handbook Toolbox). This draft document is preliminary and should not be completed until after thorough review and consideration of public comments submitted during the public review period to ensure all relevant issues have been addressed.

14.12.9 Drafting the NEPA Decision Document

If the Service hasn't started work on the NEPA decision document, we should begin during the public comment period (see the NEPA decision documents template in the HCP Handbook Toolbox). However, keep in mind that this document is preliminary and should not be completed until after thorough review and consideration of public comments submitted during the public review period to ensure all relevant issues have been addressed.