PHASE 1: Pre-Application

Chapter 3: Getting Started

3.0 Introduction

This chapter presents many of the basic considerations that need to be addressed at the beginning of Habitat Conservation Plan (HCP) negotiations. We cannot emphasize enough the importance of clarifying issues with an applicant regarding the basic who, what, when, and where in informal planning at the beginning of the process. This can be as simple as a brief conversation, but the Services or an applicant may need further study to determine what is needed to begin. This chapter reviews the key factors that go into HCP planning. We also provide a framework for "going fast by starting slow" that can help give structure to these early planning discussions.

3.1 When Are an HCP and an Incidental Take Permit Needed?

3.1.1 What is Incidental Take?

Incidental take means any taking otherwise prohibited by the Endangered Species Act (ESA) (see the HCP Handbook Toolbox) section 9 (including any of the forms of "take" defined in the ESA), if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. See Chapter 1.3.2 for a full discussion of section 9, prohibited activities. Among the forms of take, HCPs generally involve "harm" and "harass" situations (see Glossary).

Examples of typical incidental take include, but are not limited to: individuals collide with structures, fossorial or ground-denning species are entombed, active nests are destroyed, removal of inactive nest or den trees, removal of forage sources or other necessary habitat resources, and temporary disturbances like artificial lighting, noise, or vehicle traffic.

3.1.2 When to Seek an Incidental Take Permit and Develop an HCP?

A landowner or project proponent should be advised to develop an HCP and seek an incidental take permit if they are conducting (or planning to conduct) any type of activity in an area where ESA-listed species are known to occur and where their activity or activities are reasonably certain to result in incidental take. While seeking an incidental take permit is a voluntary action by an applicant, unauthorized take of an ESA-listed species is a violation of section 9 of the ESA. Therefore, if a landowner or project proponent's activities will potentially impact an ESA-listed species, they should be advised to conduct the activities in a manner that avoids take, seek an incidental take permit for take anticipated from their activities, or obtain take authorization through a different ESA mechanism (e.g., section 7 consultation if there is an appropriate Federal nexus). Note that if incidental take of ESA-listed species is not anticipated from a landowner or project proponent's activities, an incidental take permit is not needed or appropriate. Avoid processing applications submitted purely "as insurance" when take of ESA-listed species is not anticipated.

The standard for determining whether activities are likely to result in incidental take is whether take is "reasonably certain" to occur in considering both the direct and indirect impacts of the activities. The same standard applied to section 7 of the ESA, as explained in the below excerpt from the final rule on incidental take statements under section 7 (80 FR 26832) (see the HCP Handbook Toolbox), should be applied in determining whether take from a proposed non-Federal action is likely:

> As a practical matter, application of the ‘‘reasonable certainty’’ standard is done in the following sequential manner in light of the best available scientific and commercial data to determine if incidental take is anticipated: (1) A determination is made regarding whether a listed species is present within the area affected by the proposed Federal-action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (e.g., noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed species' biological response to that exposure corresponds to the statutory and regulatory definitions of take (i.e., kill, wound, capture, harm, etc.). Applied in this way, the ‘‘reasonable certainty’’ standard does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take. [...] The standard is not a high bar and may be readily satisfied as described above. See, e.g., *Arizona Cattle Growers'*, 273 F.3d at 1244 (noting that the standard the court applies in reviewing whether the Services may issue an incidental take statement is a ‘‘very low bar to meet’’) (see the HCP Handbook Toolbox).

Ultimately, landowners or project proponents need to assess whether take is reasonably certain to occur as a result of their activities to inform their decision whether to seek incidental take coverage. The Services should advise project proponents to consider both the direct and indirect effects of their activities and use the sequential approach described above. Some tools that may be helpful in establishing whether take is reasonably certain to occur, include species surveys conducted by qualified biologists; take risk models; FWS's Information for Planning and Conservation (IPaC) (see the HCP Handbook Toolbox); expertise of State wildlife agencies, county, or local government natural resources divisions; or other sources.

Without documentation and public awareness of species presence on a property, the landowner is left to evaluate for themselves, assuming they might know a listed species occurs on their property, the potential for incidental take to occur. Although it may exceed the scope of this HCP Handbook, our attempts to raise landowner awareness of potential listed species can provide incentives for a landowner to consider their potential legal risk and take the first step to approach a Service field office and investigate their need for an incidental take permit. We can increase awareness of general locations of listed, proposed, and candidate species by working with State wildlife agencies and local governments, as we implement private lands programs, participate in public outreach events for listing or recovery activity, and other means. If a project proponent asks the Services whether a species may occur in a project area where suitable habitat is present, the Services should assist the project proponent. If it is still unclear whether the species may be present, we may recommend that the project proponent contract environmental consultants to conduct surveys.

The potential for incidental take might be high for a project that would be built quickly and occupy most of the property, or most of the listed species' habitat on that property. The potential for incidental take may also change through the life of a permit depending on development phases, habitat trends in dynamic systems, or changes in species distribution in response to climate change effects. Chapter 7 explores these questions in more depth.

An incidental take permit is not appropriate when the taking serves purposes other than incidental take (per 50 CFR 17.22, 17.32, and 222.308) (see the HCP Handbook Toolbox).

Section 10(a)(1)(A) of the ESA provides for enhancement of survival permits (Table 3.5.2). For example, if a researcher collects a species for scientific research or takes it by harassment during population surveys, the take might be authorized by a "recovery permit." In addition to permits for research or recovery activities, enhancement permits also include safe harbor agreements and candidate conservation agreements with assurances. The latter two permit options may suit a landowner's activities instead of an HCP. Enhancement of survival permits have their own regulations, policy and guidance, so in this Handbook we address them only in relation to HCPs.

3.1.3 Considerations for Special Rules under Sections 4(d) and 10(j).

Some listed species are subject to alternative regulations that change what is normally prohibited under section 9. Only threatened species may be subject to a section 4(d) rule and either endangered or threatened species might be part of an experimental population established under a section 10(j) rule. Section 4(d) and 10(j) rules specify all of the prohibitions and regulatory requirements for a species or species population. Using these alternative regulations, the Services can make broad exceptions to normal section 9 prohibitions and establish special consultation or authorization requirements under sections 7 and 10. These exceptions, and any alternative requirements, completely replace the standard prohibitions and regulatory processes.

When an applicant's project might affect a threatened species or experimental population governed by a 4(d) or 10(j) rule, these rules may influence HCP development. For example, depending on how the specific 4(d) or 10(j) rule is written:

- Some species, or populations of the species, that normally would require coverage by an HCP might not require coverage.

- For a given species, some activities might require coverage in an HCP, while other activities might be exempted under the 4(d) or 10(j) rules.

Applicants have three options to address species with special rule exemptions in their HCP, as follows:

- If all take is exempted from project or HCP covered activities, applicants could take advantage of the exemptions afforded under 4(d) or 10(j) and not include those species in the HCP. The HCP should explain how the 4(d) or 10(j) rule requirements will be followed. We should inform applicants of the potential risk that exemptions may change during the term of their permit. If a 4(d) species is uplisted to endangered status or if all or part of the 4(d) or 10(j) exemptions no longer apply in the future, then the permittee would be at risk of section 9 violation for newly-prohibited activities. The permittee would need to avoid take of species that is no longer exempted and seek a new or amended incidental take permit;

- If a special rule prohibits only certain activities while others may be exempted, then we could issue a permit covering only the prohibited activities. This option would have risks similar to the above option; or

- Applicants may anticipate potential changes to 4(d) or 10(j) exemptions and instead elect to address all species and activities in their HCP, as if typical section 9 prohibitions were in effect. We should recommend that the applicant voluntarily include species with 4(d) or 10(j) exemptions if changes to the 4(d) or 10(j) exemptions are likely within the permit term. If an applicant wants incidental take coverage for a species with a 4(d) or 10(j) exemption, the applicant must develop an HCP that meets the section 10(a)(1)(B) permit issuance requirements as if no special exemption applies. Assuming that the HCP adequately addresses the 4(d) or 10(j) species and meets the issuance requirements, then the species can be included as a covered species on the incidental take permit and all applicable regulations (e.g., No Surprises assurances) would apply. This would ensure that if any 4(d) or 10(j) exemptions for HCP-covered activities no longer apply, the permittee would maintain full ESA compliance for the species and No Surprises assurances would apply, as such no further action by the permittee (e.g., amendment to the HCP or incidental take permit, etc.) would be required.

3.2 Avoiding Take and Avoiding the Need for an Incidental Take Permit

An incidental take permit may not be required if a proposed project can be designed to avoid taking listed species. Projects that may result in harassment, such as interference to a species' nighttime activity caused by artificial lighting, often can be adjusted to incorporate best management practices or other measures that would avoid any incidental take entirely. In such instances, the activity can continue without the landowner's need to obtain an incidental take permit.

Although we should encourage applicants to design a project to avoid take whenever possible, take minimization or compensatory mitigation alone will not substitute for an incidental take permit if some take is anticipated. However small, no non-Federal project is exempt from the need to obtain an incidental take permit if we are reasonably certain it will result in an action prohibited by section 9 of the ESA.

Another source of confusion arises when a minimization or avoidance measure creates a false impression that harm to a listed species in the project site has been avoided. For example, we can translocate species like tortoises or red-cockaded woodpeckers outside of a project footprint with a high degree of success to where they contribute to establishing or enhancing populations of their species. However successful these efforts might be, they do not avoid the displacement and loss of habitat caused by the project. An incidental take permit would still be needed in such a case.

3.3 Who Can Apply for an Incidental Take Permit?

Any individual, non-Federal agency, business, or other entity that has the authority to conduct activities on non-Federal property, or any State, municipal or tribal government agency that has the authority to regulate land use can apply for a section 10 permit. A qualified applicant is one who has the legal authority to execute a project on the lands proposed for coverage under an HCP, and who has enough legal control over these lands to implement the HCP. Legal control may comprise ownership of property in fee simple, an easement, a lease agreement that grants authority for the proposed project, or a similar type of legal authority to conduct the proposed

activities (50 CFR 17.22(b)(2)(F), 17.32(b)(2)(F)). Under certain conditions, see section 3.4.4 below, contractual arrangements may establish this control.

Generally, the Services rely on the applicant to affirm their authority to conduct proposed activities. The FWS's standard application form (Form 3-200-56) provides a space for this confirmation. We advise staff to discuss issues of legal control with a potential applicant at the first meeting to avoid any potential confusion. During these discussions, staff should also inform applicants about disqualifying factors for permit eligibility per FWS regulations at 50 CFR 13.21.

In addition to having legal authority to carry out the proposed project, the applicant must also have direct control over any other parties who will implement any portion of the proposed activity and the HCP (see 50 CFR 13.25; 50 CFR 222.305(b)). "Direct control" under this regulation extends to:

1. those who are employed by a permittee (e.g., contractors),
2. anyone under the regulatory jurisdiction of a permittee (e.g., the permittee is a county that issues building permits to individuals with conditions to implement the terms of the HCP), or
3. entities that have an interagency agreement establishing the permittee's legal control (more on this in section 3.4.4).

3.4 What Types of HCPs and Incidental Take Permits Are Possible?

The ESA and regulations governing HCPs and incidental take permits allow a great deal of flexibility in accommodating the needs of applicants while providing a set of comprehensive tools to address planning from less than an acre up to landscape-scale plans. We have adapted HCPs and incidental take permits to fit many different situations. Following is a comparative table of typical HCP and incidental take permit structures that are more fully described in the following sections. We emphasize that the following descriptions do not formally establish fixed categories. The permit structures we use in this Handbook simply reflect one way to organize and discuss the range of permitting options.

Table 3.4. Comparative Table of Permit/HCP Structures.

Type of Plan	Use When	Positive	Negative	Outcome
Single Applicant	Applicant technical request.	The basic permit arrangement, yet adaptable to many situations. Can be scaled up to large, complex, or recurring projects on shifting land bases.	Becomes a workload issue as numbers of small-scale projects multiply. Mitigation planning difficult and often ineffectual for small-scale projects.	Each project has one permit, administering implementation is one-on-one with landowners.
Programmatic	Regional scale planning, or expedited processing of future projects needed.	Provides efficiencies of scale; addresses small-scale projects; mitigation can be better planned, sited, and funded. Provides better public service to small landowners. Facilitates regional conservation planning, often in cooperation with other Federal and State agencies.	Planning and negotiation often involves many stakeholders, can be controversial, difficult to sell the idea to potential applicants, enforcement mechanisms must be developed, individual enrollees are overseen by permittee, not the Services. It is best to start slowly to eventually go fast.	A central permit holder administers its normal regulatory authority to convey incidental take coverage to eligible landowners. (Via local regulatory instruments or certificates of inclusion.)

Type of Plan	Use When	Positive	Negative	Outcome
General Conservation Plan	Applicant for a programmatic is not available, but expedited processing of future projects needed.	Substitute for a programmatic when an applicant has not been recruited with same positives as for programmatic. Services develop the conservation plan and define eligible projects and applicants.	Individual applications are expedited, but Services must still process and advertise each one. Special considerations in impacts analysis and administration.	General conservation plan can be adopted by eligible applicants as part of their individual application. No master permit holder, but numerous individual permittees.
Multiple Project or Applicant Plan, Umbrella Plans	Any situation where more than one applicant wants to cooperate on a project or regional plan. Possible alternatives for programmatic when non-government, industry or proponent group requests.	Provides for more comprehensive regional planning. Adaptable to many situations. Similar positives as for programmatic. Plan could be drafted by proponent group to serve an industry or similar project throughout a region. Can work very much like a general conservation plan.	Severability considerations, added complications with more than one applicant. Direct control must be considered, Services negotiate the umbrella project plan with proponent group and also review individual applications. Some untested permit structures.	Many possible outcomes dependent on the proponents and their situations. Adjacent landowners can develop a single comprehensive HCP or regional plans can incorporate several agencies/individuals. Multiple project umbrella plan can be adopted by eligible applicants as part of their individual application. Often results in a programmatic plan, but some situations do not require a master permittee. General conservation plans and umbrella plans result in numerous individual permittees.

Type of Plan	Use When	Positive	Negative	Outcome
Combined Program	Situations where programmatic applicants may have options to provide coverage via enhancement of survival permit or an HCP.	Uncommon, but has been used in programmatic plans so that the central permit holder can offer landowners options for section 10 participation. Best fits to combine safe harbor and candidate conservation options.	Must be designed to ensure a covered activity meets criteria for the given section 10 program. Landowner cannot cover a project with both an HCP and a safe harbor, must choose one or the other.	All examples have been programmatic. One central permit holder administers its normal regulatory authority to enroll eligible landowners via certificates of inclusion into appropriate section 10 program.
Integrated Plan	Accommodates other Federal agency requirements.	Same advantages as a programmatic plan, plus: better public service to provide comprehensive, consolidated Federal authorizations. Other Federal agencies can adapt to a programmatic plan after it is implemented.	May be difficult to initiate with more than one Federal agency.	One central permit holder administers its normal regulatory authority to convey incidental take coverage to eligible landowners. Eligible landowners could also fulfill their other Federal regulatory requirements.

3.4.1 Single Applicant

The simplest incidental take permit structure involves a single applicant preparing an HCP and applying for one permit. The scale of a single applicant plan encompasses a wide range of applicants and projects. We can issue a permit to an individual lot owner on a fraction of an acre. A developer might seek authority for a subdivision. Timber companies or utilities might seek incidental take coverage on a project at a given location, or they may seek a permit for a set of recurring activities across a large, multi-tract, interstate, set of properties.

If there are few uncertainties and ample mitigation options, development of these types of HCPs can proceed relatively quickly. Regardless of their size, however, single applicant plans can present challenges. Small-lot developments may occur in numbers that overwhelm staff resources. On-site mitigation is rarely feasible for small properties, and the applicants often lack the ability to provide biologically meaningful off-site mitigation. As the scale of a project increases, numbers of species, and uncertainties over impacts and providing mitigation will increase. Efforts to address these challenges have resulted in the more comprehensive, regional HCPs described in the following sections. Other tools, like in-lieu fee funds or conservation banks (Chapter 9.4) can be used to efficiently meet mitigation needs of small plans.

3.4.2 Programmatic Plans

Programmatic plans are typically landscape-scale HCPs initiated by a State, county, or local municipality. We use the term “programmatic” to refer to a program, established under an HCP and incidental take permit, that employs an applicant’s local regulatory authority so that individuals subject to the applicant’s jurisdiction can receive incidental take authorization as they comply with the applicant’s regulatory mechanisms. We have encouraged the use of programmatic incidental take permits in various forms to address a group of similar projects within a specific area, usually a political jurisdiction. Projects addressed by a programmatic plan can range in scale from single-family lots or whole subdivisions to capital improvements, utilities, and infrastructure. We often call programmatic plans regional or area-wide (State-, county-, or city-wide) plans. A programmatic HCP can efficiently address the needs of many similar projects by bringing them under one plan to create economies of scale. A local jurisdiction, such as a county, seeking a programmatic incidental take permit can often raise money to fund a conservation plan, spread costs through user fees, acquire lands, and plan strategically for species conservation and adaptive management provisions, such as adaptation to climate change effects.

Although programmatic plans may have a single applicant, we distinguish them from single applicant plans (section 3.4.1), based on who has direct control over covered activities and how that governs the provision of incidental take authority. A single applicant plan, such as for a timber or interstate pipeline company, might extend across several States and cover a complex array of activities and species rivaling any programmatic plan. Under a single applicant plan, that permittee has direct control over all sub-activities in the plan by virtue of direct ownership or corporate structure. Because of this direct control, the permittee’s employees and contractors will be covered by the incidental take permit.

In contrast, programmatic plans typically rely on a central, or master, permit holder, often a State, county, or municipality, in the area proposed for plan coverage. The Services negotiate an HCP with the central authority so that that authority receives an incidental take permit as the master permittee. Eligible applicants in the permit area can receive incidental take authority and No Surprises assurances through the master permit via local regulatory instruments (building permit, percolation test, certificate of occupancy, etc.), or through a certificate of inclusion provided for in the HCP and incidental take permit.

3.4.2.1 Challenges, Details, and Opportunities with Programmatic Plans

FWS general permit regulations at 50 CFR 13.25(d) allow persons under the "direct control" of a permittee to perform the activities authorized by the permit. Direct control means those who are employed or contracted by the permittee, for purposes authorized by the permit, to conduct the authorized activity without on-site supervision by the permittee. Under most single-applicant HCPs, persons under direct control typically include the permittee's employees and contractors (see section 3.5.5 for special considerations). Programmatic plans, however, need to consider how incidental take authority will be extended by the master permittee to those who need it for their individual projects and who likely are not employed or contracted by the master permittee. The FWS promulgated general permit regulation 50 CFR 13.25(e) to address the needs of master permittees. This regulation:

- extends direct control over people under the jurisdiction of the master permittee, and the master permit provides that those people may carry out the authorized activity, OR
- extends direct control over those who receive a permit from, or have executed a written agreement with, a master permittee who is a government entity.

Before these direct control regulations were promulgated, the Services relied on "certificates of inclusion" that were defined in the HCP and incidental take permit. These are agreements between the master permittee and individual landowners so that incidental take authority can be conveyed to the participating landowner. In most cases it is preferable and easier to rely on the 50 CFR 13.25 regulations, but certificates of inclusion can serve as the "written agreement." They may also be useful in developing multiple project plans (section 3.4.4).

Programmatic plans are the most frequently used form of expedited incidental take permitting for projects involving numerous similar activities. They are especially helpful in addressing the needs of small landowners because, by scaling up the size of the project (encompassing several small projects) mitigation planning can be consolidated to avoid isolated and more costly "postage stamp" conservation areas.

Often counties, municipalities, and other organizations have little experience with HCPs. A programmatic plan may represent a significant change in doing business for a municipality. Services staff should encourage the applicant to bring their affected constituents into the programmatic HCP development process. Establishing a collaborative effort among stakeholders who can contribute to creating a successful programmatic HCP requires a significant investment of time and resources by the prospective permit applicant and the Services, but is essential to a successful HCP. See Chapter 4 for guidance on communicating, coordinating, and collaborating with applicants and stakeholders.

The Services should take advantage of Landscape Conservation Cooperative (LCC) efforts that are providing the tools to help establish collaborative "communities of practice." Some LCCs may have already created an ecosystem governance community that can be tapped into. Utilizing existing LCC efforts can help to persuade a potential applicant to enter into an HCP planning process if they understand the potential time and cost-savings to themselves and their constituents. An economic analysis by the applicant, a stakeholder, or possibly the Services or LCC can be especially helpful to demonstrate and convince local authorities and their constituents of the economic advantages of developing an HCP instead of continuing without the assurances of an HCP regulatory framework.

Services staff can suggest to an applicant of a programmatic HCP that enlisting the assistance of a local "champion" may enable a smoother HCP development process with stakeholder engagement. This "champion" might be a local government staff-level person, a non-government organization, or an influential constituent who understands community needs and issues. Finding and partnering with such contacts can be essential to initiating and maintaining a successful planning effort.

The ability to incorporate other Federal, State, and local regulatory processes into a programmatic HCP provides another incentive for a local jurisdiction. For example, this might involve the U.S. Army Corps of Engineers (Corps) Clean Water Act wetland fill permits, as long as the applicant wishes to do this. They are not obligated to integrate their HCP with other Federal regulatory processes. See more in section 3.4.6, below.

Depending on the size and complexity of an HCP, we encourage applicants to establish a dedicated team of individuals to lead development of the HCP and to serve as the points of contact with us. The applicant's core team members may include, but are not limited to: an environmental consultant(s), project manager, legal or policy advisor, biological staff, State agencies, and our lead on the HCP. An applicant's team should incorporate the expertise and institutional knowledge required to ensure:

- efficiency during the HCP development phase,
- the HCP can be integrated into existing policy and legal frameworks,
- proper funding mechanisms can be established to support all aspects of HCP implementation and mitigation requirements, and
- the conservation program can be implemented on the ground in a practical manner.

For complex landscape level HCPs that may require sophisticated conservation strategies, we recommend the applicant involve species experts or science advisory panels on the HCP development team.

We should encourage the applicant to look beyond conservation or biological expertise and consider assistance from other types of experts. Professional facilitators or program managers can help maintain momentum throughout the HCP development process. Facilitators may also be needed for key meetings or to oversee stakeholder groups. An economist may be useful to help calculate costs and benefits of alternatives, or to help develop funding assurance measures. See section 3.8, below, for contracting.

3.4.3 General Conservation Plans

A general conservation plan provides one approach to serving numerous, similar projects. The Services prepare an HCP and related NEPA and section 7 analyses to fit the needs of potential applicants with similar species effects in a given area. We make the general conservation plan available to eligible applicants who can incorporate it into their incidental take permit application as if it were their own HCP. We use the term "general conservation plan" in reference to plans established per the FWS's October 5, 2007, *Final General Conservation Plan Policy* in the HCP Handbook Toolbox. Programmatic HCPs require a central permit holder. If a local agency cannot be found that can take on this role, a general conservation plan provides nearly all the benefits of a programmatic HCP. Neither of the Services, nor any other agency, is issued a general conservation plan "permit." Instead, a general conservation plan is used by qualifying applicants as they apply for their own incidental take permits. If the Services determines that an applicant satisfies criteria defined under the general conservation plan, and that they meet statutory and regulatory issuance criteria, we may issue an individual incidental take permit.

3.4.3.1 Challenges, Details, and Opportunities with General Conservation Plans

Although we may take advantage of the latitude provided by not having to negotiate the general conservation plan with an outside party, we must coordinate early and often with the people or organizations we hope will use it. If we seek outside advice, remember our obligations under the Federal Advisory Committee Act (Chapter 4.3.9). The general conservation plan's plan area should be tailored to the prospective covered activities and conservation needs of the affected species. The Services define the type of activity and applicant who would qualify to participate in the general conservation plan. Although the general conservation plan should be designed to meet issuance criteria for eligible applicants, the 50 CFR 13 disqualifying factors can only be evaluated at the time an individual application is under review (see Chapter 16.1.4).

Recipients of an incidental take permit issued under a general conservation plan also receive No Surprises assurances. In addition, the Services will not alter a previously-approved general conservation plan without first amending it in accordance with established permit review procedures. In accordance with No Surprises, any such amendments will have no effect on permits previously issued under that general conservation plan.

Staff should carefully consider defining the period in which a general conservation plan would be available to the public and how that would relate to the maximum duration of permits issued under the plan. These considerations directly influence the analysis of effects in the plan. Generally, it works best to consider total "build-out" in the plan area over a projected period. If effects and management risks are well known, it may be appropriate to make the general conservation plan available for a relatively long period and to issue relatively long-term permits.

We may set individual permit duration to a given number of years, or to a defined date. Where an individual incidental take permit is defined with a set number of years, then we could issue, on the last day a general conservation plan is available, a permit with the full, defined term. Where there is greater uncertainty or management risk, we could make the plan available for a short period, and the individual permits set to expire on a specific date. In this arrangement, a permit

issued on the last day of the plan's availability would have a shorter duration than one issued on the first day.

General conservation plans expedite permit reviews in several ways. Individual permit actions can tier off the plan's environmental impact statement (EIS) or environmental assessment (EA). Depending on the situation, individual actions could be cleared with a consistency determination, or they might require some lower level of NEPA review (a categorical exclusion or EA might tier from an EIS). Signature authority can be delegated to field offices, and public notices can be streamlined by batching and referencing the original notice announcing availability of the general conservation plan. See examples in the HCP Handbook Toolbox.

We evaluate the general conservation plan as if it had been submitted by an applicant. Approval of a general conservation plan does not result in a single programmatic permit. Instead, an approved plan results in a number of individual incidental take permits each with No Surprises assurances for the permittees. Compared to a programmatic HCP:

- Programmatic HCPs generally result in a single incidental take permit. The master permit holder can convey incidental take authority to eligible landowners for individual projects.

- A general conservation plan results in a number of incidental take permits as the Services make it available for use by individual applicants.

3.4.4 Plan Variations, Multiple Projects, or More Than One Applicant

Any of the permit and HCP structures described here can accommodate more than one applicant sharing an HCP and the incidental take permit as co-permittees (e.g., a city and county jointly developing an HCP for infrastructure and development permitting). In addition, more than one applicant can work together on one HCP and receive separate incidental take permits for their respective portions of a project or programmatic plan (e.g., adjacent property owners with similar, independent projects and listed species impacts). Another scenario is that a programmatic HCP might be established to allow other entities in a watershed, or similar eco-region, to adapt it to similar development and listed species circumstances in their respective jurisdictions. Our description of permit structures in this Chapter of the Handbook is not exhaustive. We do not intend to limit other possible structures that might be proposed, as long as they satisfy ESA requirements.

The FWS's April 30, 2013, *Final Guidance for Endangered Species Act Incidental Take Permits Covering Multiple Projects or Project Owners* (Multiple Project Guidance) (see the HCP Handbook Toolbox) addresses issues related to planning and implementing large-scale, multi-party, programmatic HCPs across large geographic areas. The Multiple Project Guidance highlights the ability of programmatic HCPs and general conservation plans to meet large scale planning needs and provides clarifications to facilitate their use:

- clarifies direct control (see section 3.4.2.1),
- NEPA and intra-Service consultation analyses should be inclusive enough so that individual actions can be approved with consistency determinations and appropriate public notice rather than individual NEPA and section 7 review,

- public notices may be batched for regular submittal to the *Federal Register* where this could reduce Services workloads and improve efficiencies,
- clarifies applicability of No Surprises assurances (see sections 3.4.2 and 3.4.3, above), and
- suggests issuance of an incidental take permit to a group of "co-permittees."

Industrial consortiums, primarily wind-energy so far, have begun using the Multiple Project Guidance to develop large-scale, multi-party umbrella plans that function like a general conservation plan, but any group of non-Federal entities can do the same. Services participation in reviewing and approving these multiple project plans is similar to a Programmatic HCP. We need to provide advice and negotiate our positions early and throughout plan development. Be mindful that we cannot approve any restriction on our ESA application review or permit enforcement authority.

These umbrella plans are developed much like a general conservation plan. The non-Federal entities write the plan, not the Services, and submit it to us for review prior to making it available for potential applicants. The consortium members define the plan area, the activities to be covered, and they define which projects and applicants would be eligible to participate. Under a general conservation plan, an applicant would apply to the Services for a permit. Under an umbrella plan, there may be additional requirements established by the consortium that developed the plan before the Services receive an application. Other than considerations like these, what we present above in section 3.4.3 would apply to an umbrella plan.

As any permits are implemented, the individual permit holders would be governed by the same regulations and policy as any other permit. Recipients of an incidental take permit issued under an umbrella plan also receive No Surprises assurances. In addition, the Services will not alter a previously-approved umbrella plan without first amending it in accordance with established permit review procedures. In accordance with No Surprises, any such amendments will have no effect on permits previously issued under that umbrella plan.

The Multiple Project Guidance addresses permit structures with a record of success:

- Programmatic HCPs,
- General Conservation Plans, and
- Co-permittee plans.

These permitting approaches can accommodate any likely situation. We recommend their use for multiple project plans because they are tested, and we know that they can withstand challenges if properly written and implemented.

3.4.5 Combined Section 10 Plans

It is possible to combine a programmatic HCP with a programmatic safe harbor or candidate conservation agreement with assurances. These situations occur infrequently where there is a need to address species conservation across a jurisdiction and, to date, have involved government agency applicants. An applicant for a programmatic HCP may want to add an enhancement of survival option to their plan to accommodate the situations of different landowners. Under a

combined programmatic plan, potential enrollees might have the choice of incidental take coverage, or enhancement of survival coverage depending on the nature of the activity and its proposed timing.

For an individual landowner, their take of a species might fit an HCP option, or it might fit a safe harbor, but the landowner needs to choose the appropriate conservation plan. The same activity cannot be covered under more than one section 10 incidental take authority for listed species. However, if a landowner has both listed and at-risk or candidate species on their property, it may be appropriate to enroll them under a candidate conservation plan option and one of the other programs for listed species. Combined section 10 program plans must carefully consider the regulatory and policy requirements for enhancement of survival permits as provided in separate policy and guidance for those programs (Table 3.5.2).

The Georgia Statewide red-cockaded woodpecker plan offered potential participants an HCP and a safe harbor option. There are also a handful of combined programmatic safe harbor and candidate conservation agreements.

3.4.6 Integrated Plans

The development of a Habitat Conservation Plan provides landscape level planning for a community, county, or even a State. It can set the future path for development (along with county and city growth plans) and conservation. It can also set-up the side-boards or best management practices (BMPs) through its conservation program for various kinds of development and activities within the plan area. This can also facilitate review of other Federal projects within the plan area because a programmatic HCP provides a programmatic section 7 consultation.

Section 7 and section 10 are not necessarily exclusive of each other. Our intra-Service section 7 consultation provides opportunities for other Federal action agencies to integrate their consultations with that of the Services. A programmatic HCP can incorporate programmatic section 7 consultations with another Federal agency, such as stormwater discharge or wetland fill permits. In some cases, we could cooperate with other Federal agencies to provide a nearly “one-stop” regulatory compliance process. It may be appropriate to have the other Federal agency formally cooperate in the NEPA analysis. This interagency cooperation may also be a part of a section 7(a)(1) planning effort, separate from any HCP.

Federal agencies can participate in the initial HCP planning. Alternatively, an established programmatic HCP can provide a framework for other Federal regulatory agencies to request consultation under the intra-Service section 7 consultation with the Services designated as the lead Federal agency. Or, the Federal agency requests consultation with the Services for an action, and incorporates the HCP conservation measures into their Biological Assessment (see more in Chapter 14.12.7, Integrating HCPs and Federal Actions). These three options provide pathways for Federal action agencies to streamline their consultation process by integrating their approaches and compliance with the Habitat Conservation Planning process. However, consultation under section 7 is the Federal agencies’ responsibility and therefore, how they approach it is part of their Agency discretion. In other words, how a Federal agency integrates with an HCP is purely that Agencies’ decision. The Services or the Applicant cannot force a

Federal agency to participate or define how the Agency will participate in the HCP planning process.

Integration with other Federal agency actions will complicate and add time to how long it takes to develop an HCP; however, there may be time saved in implementation of the covered activities to receive regulatory permission to proceed with projects. Careful consideration should be given before deciding to integrate or not integrate with other permit programs. Begin coordination with affected Federal agencies as early as possible.

Helpful Hint: To successfully integrate HCP planning with other Federal actions, both the applicant and the Federal agency must be willing to enter into the planning process. Also, consider whether there are sufficient resources (such as jurisdictional wetlands) in the HCP analysis area to justify the effort of integrating HCPs and Federal actions.

3.4.7 Permit Severability and Implementation Oversight of Programmatic Enrollees

In any permit structure, the Services and the applicants must consider roles and responsibilities so that any incidental take permit is enforceable, and that each permittee, or enrollee in a programmatic plan, can be held responsible for their respective implementation obligations. As the number of applicants and potential enrollees increases, these considerations become more vital to successful implementation of the plan.

Permit severability refers to the ability to suspend or revoke any one permit without jeopardizing the take authorization of other permittees. Permit severability essentially divides a plan into separate administrative processes/responsibilities, different covered species, different activities, or geographically by jurisdiction into multiple sub-plans with discrete roles for each applicant. The Services, before issuing a permit, must find that each piece of the plan is viable on its own without relying on the other pieces of the plan. While this makes it much simpler to determine how to proceed should a permittee relinquish its permit, the analyses required before issuing the severable permit may be greatly increased as we make a permit decision for each applicant.

As appropriate, divide activities and responsibilities among the applicants in the HCP(s) and incidental take permit(s). Incorporate procedures into implementation planning for when circumstances change to deal with potential compliance problems. As described below, it may be necessary for a group of non-government co-applicants to create appropriate legal instruments to allocate the rights and responsibilities of each co-permittee in order to achieve severability.

Although permit severability is highly beneficial for the Services and the applicants, it is not mandatory. There may be situations where conservation strategies rely on all permittees. Note that programmatic and general conservation plan structures achieve severability through individual local authorizations (or certificates of inclusion), or via individual incidental take permits under a general conservation or umbrella plan.

The Services' oversight of a programmatic HCP extends directly to the permittee. We normally do not have direct oversight of the enrollees (in any recipients of certificates of inclusion), or others covered by, that programmatic plan. Enrollees and other covered individuals are governed

by the procedures established by the HCP and the permit, as expressed in their certificate of inclusion, and by the local laws governing activities addressed by the HCP. In the absence of a certificate of inclusion, individuals under the jurisdiction of the master permittee will have incidental take coverage conveyed to them by a building permit, septic percolation test, occupancy certificate, or similar local authorization. Whether by certificate of inclusion, or by some local authorization, the method by which a master permittee conveys incidental take authority to individual participants in a programmatic plan must be described in the HCP or incidental take permit. The HCP or the permit should also provide a mechanism that allows us to ensure the permittee issues any local authorizations in line with the required conservation measures.

3.5 What Types of Activities Can be Covered in an HCP?

Any land use or management regime can be considered for HCP coverage. However, we must carefully consider which activities should be covered and the applicant's need for an incidental take permit, whether or not it would be prudent to expand the proposed covered activities, versus the time and cost investment to do so. While it may be prudent to limit the scope of covered activities for an HCP for a single land owner, it may be just as prudent to expand the range of covered activities for a large scale, or programmatic, HCP when we will spend substantial time and funds preparing an HCP. Covered activities should address emergency responses to predictable or likely hazards in a given area (e.g., wildfires, tropical storms, etc.). However, we cannot cover take due to illegal activities like oil spills or waste water releases. These can be addressed as changed circumstances, but any take of listed species and the mitigation of effects would be addressed under other authorities, such as the Federal Water Pollution Control Act or Natural Resource Damage Assessment and Restoration Act (see the HCP Handbook Toolbox).

3.5.1 Otherwise Lawful

To be eligible for an incidental take permit, any taking of listed wildlife must be incidental to otherwise lawful activities. While Chapter 5 discusses covered activities, there are things you can consider early in the process to avoid potential pitfalls.

"Otherwise lawful" is a key factor in determining whether we can cover an activity in an HCP. This means that applicants must have the legal authority to successfully conduct the proposed activity in order to meet issuance criteria. The Services may accept an applicant's assertions of lawfulness (see the certifications made in section D.2 on the FWS application form).

For most activities we consider in HCP review, the Services can readily accept an applicant's certification regarding the lawfulness of their activities. Typical construction, timber management, mineral extraction, or other land management activities usually do not raise questions of lawfulness. For such routine activities, we must stay mindful that we do not enforce State and local laws authorizing the activity. This means that we do not generally evaluate an applicant's compliance with local requirements (though we may refer an applicant's non-compliance to appropriate authorities), nor do we second guess a local jurisdiction's interpretation or enforcement of its requirements.

Such questions may become more important when the activity under consideration is controversial, such as a community that allows vehicles on a beach, or a State's fur trapping program. If there is local controversy or political dispute over the covered activity, we may need to ask the applicant for an explanation of their authority concerning covered activities. Having the applicant provide this background will help define our Federal action (see Chapter 13.3.2).

3.5.2 Enhancement of Survival Permits Do Not Substitute for an HCP

While the Services should strive to assist applicants with their specific needs, we must not use HCPs, safe harbors, candidate conservation agreements with assurances, or research/recovery permitting interchangeably. An HCP may incorporate some research, survey, or management activities that might separately be authorized appropriately by a recovery permit (see section 3.5.5, below), but staff must not try to expedite an incidental take application by attempting to make it something it is not. Neither should we try to use a recovery permit as an interim measure (section 3.5.6) to allow an early project start before an HCP is fully developed and reviewed. A research project must stand on its own merits to meet section 10(a)(1)(A) issuance criteria.

Likewise, safe harbor enhancement of survival permit applications must also meet certain criteria. These are voluntary agreements where the purpose is to undertake beneficial actions on behalf of covered species for a period of time to elevate the covered species status above an agreed-upon baseline. After the permittee's land management has improved habitat for the covered species (i.e., elevated the baseline), the safe harbor permit authorizes a specific amount of take that may occur in the future if the permittee returns habitat conditions to the baseline. Attempts to creatively schedule mitigation, or to over-compensate the impacts, will not transform an HCP situation into an appropriate safe harbor situation. Generally, an HCP is needed for a landowner whose first interest is to develop, harvest, or convert the habitat on their property. A safe harbor is more appropriate for a landowner who wants to maintain their management options into the future if their current or contemplated management regime enhances, or could enhance, listed species habitat.

A candidate conservation agreement with assurances (CCAA) functions similarly to a safe harbor in that the purpose is to provide a conservation benefit to the covered species. A CCAA is appropriate for a landowner who wants to maintain their management options in case a candidate species is listed in the future and is willing to address the threats to the species on their property. A landowner who wants to develop, harvest, or convert habitat now generally would not be eligible for a CCAA. In this situation, we could cover the candidate species under an HCP as if the species were listed, but only if there are also currently-listed species affected by the project. We cannot approve an HCP without at least one listed animal species.

Table 3.5.2. Endangered Species Act, section 10(a)(1) permits.

Endangered Species Act, section 10(a)(1)(A) Permits				**Endangered Species Act, section 10(a)(1)(B) Permits**
Scientific purposes	Enhancement of propagation or survival			Incidental take
		Safe harbor agreement	Candidate conservation agreement with assurances	
Application requirements at 50 CFR 17.22(a)(1), 17.32(a)(1), or 222.308		Application requirements at 50 CFR 17.22(c)(1) and 17.32(c)(1)	Application requirements at 50 CFR 17.22(d)(1) and 17.32(d)(1)	Application requirements at 50 CFR 17.22(b)(1), 17.32(b)(1), or 222.307
Applicant wants to conduct research, status surveys, captive studies, project planning, etc.	Applicant wants to benefit ESA-listed species.	Applicant wants to manage lands to provide a net conservation benefit for ESA-listed species, and to make use of those lands in the future.	Applicant wants to manage lands to provide a net conservation benefit for unlisted, at-risk species, or candidates for ESA listing, and to make use of those lands in the future.	Applicant wants to make use of lands under their control.
Permit authorizes harassment, capture, retention, harm, etc., for scientific activities in support of species recovery.	Permit authorizes land management, education, captive population management, etc., in support of species recovery.	Permit authorizes land management and incidental take that may occur in accordance with the Agreement (including a return to baseline).	Permit authorizes land management and incidental take that may occur in the future in accordance with the Agreement.	Permit authorizes incidental take and requires mitigation and monitoring that can include scientific and enhancement activities.

3.5.3 Accommodating State Requirements

As noted in Chapter 2.2.5, we should consider State interests as we advise applicants and write incidental take permit conditions. We can adopt State requirements into incidental take permit conditions that may be more restrictive than the Services' when States are implementing their requirements in accordance with their section 6 agreement, or as provided by the Migratory Bird Treaty Act (MBTA) and Bald and Golden Eagle Protection Act (BGEPA) (see the HCP Handbook Toolbox). However, we should not adopt State requirements whenever they are not consistent with our authorities under ESA, MBTA, and BGEPA, and our obligations under NHPA and NEPA.

3.5.4 Section 7 Programmatic Consultations

Non-Federal activities that have a Federal nexus, such as a required Corps wetland permit or Federal Energy Regulatory Commission (FERC) (see the HCP Handbook Toolbox) license may not need a section 10 incidental take permit because a section 7 consultation with the Federal agency can provide incidental take coverage to the non-Federal entity seeking the permit. Still, a programmatic HCP gives us an opportunity to:

- combine other Federal regulatory programs into an overarching interagency planning effort (section 3.4.7, above),
- supplement coverage of a project's incidental take when another Federal agency does not exert jurisdiction over a project's full scope of interrelated and interdependent effects, plus
- provide the section 10 additional benefit of No Surprises assurances to permittees versus section 7 where No Surprises assurances are not available.

3.5.5 Research or Recovery Permits

Other activities that the applicant may need to include in their requested take are activities that may result in additional incidental take related to monitoring the status of the species for the HCP, measuring the covered take, and any mitigation. For example, many incidental take permits require surveys of the covered species for a certain period, or for the life of the permit, to ascertain that take is not exceeded or to monitor the species status within the HCP plan area. Although take due to such activities should be covered by the incidental take permit as a covered activity of the HCP, the Services must also consider the qualifications of those who would perform such work, and we must establish methods and protocols for it. Generally, it is more efficient for us and the applicant to rely on hiring consultants whose qualifications have already been reviewed and approved under an ESA section 10(a)(1)(A) research permit review. Likewise, it may be more efficient to take advantage of methods and protocols already established through the research permits program.

3.5.6 No Temporary Authorization of Incidental Take

The Services sometimes receive requests from HCP applicants for temporary or interim incidental take authorization for the period while they develop an HCP. This situation most often occurs during the development of complex or programmatic plans. There is no alternative

instrument to provide temporary or interim incidental take authority in anticipation of issuing an incidental take permit. For applicants under time constraints relative to take coverage and the HCP planning process, the Services should:

- reach out early to applicants to avoid such situations,
- delineate allowable activities that do not cause take nor compromise our section 7(d) requirements,
- recommend interim take avoidance measures that may allow applicants to move forward with limited project activities,
- provide information in a timely manner, and
- conduct timely review of documents.

During the application process the applicant does not have ESA authorization for any take and therefore may be liable if take occurs. At any point in the application process prior to issuance of any incidental take permit, applicants may be subject to enforcement actions for any take (or potential take) of listed species under section 9. Under limited circumstances, for projects with long-term, ongoing take, and when applicants are working with the Services in good faith to obtain coverage for the take, we will consider the applicant's participation in the ITP application process in making decisions about bringing enforcement actions and about appropriate penalties.

If requests for interim take solutions occur while negotiating and planning large-scale, programmatic HCPs, one potential solution is to instead consider individual applications for incidental take permits. The immediate needs of individual landowners will compete for Services resources and individual permits might risk the incentive for a programmatic plan. However, this solution may get incidental take coverage in place more quickly for applicants that have more immediate needs for take coverage. When we issue individual permits ahead of a programmatic plan, the individual permits must stand on their own and meet ESA requirements. HCP staff should consider batching applications together to share common NEPA and section 7 analyses, and creating "fill-in-the-blank" templates of HCPs and findings.

3.5.7 Advance Mitigation

As with all mitigation proposals, advance mitigation must be approved by the Services, but it is negotiated and memorialized in an agreement instrument (e.g., letter of agreement, acquisition letter, memorandum of agreement (MOA), memorandum of understanding (MOU), points of agreement, or similar) (see the HCP Handbook Toolbox) before an HCP is developed and implemented. Advance mitigation must meet the same requirements as other types of mitigation, but implementation may begin during HCP development as soon as we have an agreement.

Helpful Hint: Although we will consider advance mitigation when we make a permit decision, the advance mitigation agreement is not a guarantee of HCP approval or permit issuance. In addition, the advance mitigation may not fully offset the impacts of the taking requested in the final HCP. The applicant needs to understand that any advance mitigation is at their own risk.

There are many reasons advance mitigation may benefit the applicant, the Services, and the covered species. Purchasing lands for mitigation may be less costly for the applicant if purchased

early before prices increase or when prices temporarily drop. If important lands are under development pressure, they may not be available for purchase, or available at a reasonable price, at a later date. Managing lands for optimal covered species habitat may be necessary to provide the applicant with the best mitigation ratio (if value of habitat will lessen without management). In most cases, the earlier mitigation is put into place, the more benefit it provides for the covered species (e.g., because it offsets, or at least lessens, temporal impacts).

One way applicants with long-term, ongoing take can show good faith during HCP development is to develop and implement agreed-upon advance mitigation.

In some rare cases, lands have been set aside for conservation purposes (e.g., recharge zone lands put under a conservation easement to protect water resources, lands set aside and protected as a buffer for a military base or State refugia) and an applicant will ask to use it as mitigation for an HCP under discussion. Generally, these lands are not eligible for inclusion as mitigation for the HCP because the mitigation has already occurred and will not provide any additional benefit to the covered species or because any benefits to covered species are incidental or both. Even if the original purpose was to benefit a covered species, it was not intended as mitigation for the HCP under discussion. However, the Services may accept these lands for mitigation purposes if there are additional measures planned to specifically meet the needs of covered species (a mitigation measure is additional when its benefits improve upon the baseline conditions of the affected resources in a manner that is demonstrably new and would not have occurred without the mitigation measure). For example, land set aside for recharge is to be left in its natural state to protect water resources, but the applicant agrees to burn underbrush on a regular basis to provide additional habitat for early-successional species (e.g., black-capped vireo) or one that needs mature pine forest with very open understory (e.g., red-cockaded woodpecker).

One great example of advance mitigation is the Pima County Multi-Species Conservation Plan's (MSCP) Maeveen Marie Behan Conservation Lands System (CLS) that is used to direct development-related impacts away from sensitive natural resources. Most projects (regardless of whether they are in or out of the CLS) are subject to protocols or regulations that seek to avoid, minimize, or mitigate impacts to on-site sensitive resources (e.g., floodplains, riparian areas, native vegetation) as well as promote a project design that avoids and minimizes impacts to off-site resources (e.g., surface and groundwater). Based on an early agreement with the Services, Pima County, over a decade or so before their permit was issued, actively acquired a land portfolio to rely upon as mitigation for impacts resulting from Covered Activities. At the time of permit issuance, they had purchased or put conservation easements on approximately 95 percent of the 116,000 acres they expected to need as mitigation over the 30-year term of the permit. For more information on the Pima County MSCP and advance mitigation program, go to the HCP Handbook Toolbox.

3.6 Going Fast by Starting Slowly

Taking the necessary time at the beginning to thoroughly plan how the HCP will be developed and ultimately implemented pays dividends in the long run. Once the decision is made by the Services and the applicant to develop an HCP, the temptation may be to dive in and start writing the HCP, but this is not always efficient. We should carefully consider and plan the *process* to develop the HCP before starting the writing.

The Services and the applicant need to develop a common understanding of each other's needs and goals for the HCP as well as their respective planning processes. In coordination with the Services, applicants should develop a realistic time schedule to prepare their HCP. The Services should work with the applicant to identify key milestones, such as when the applicant's executive managers need briefings or when their approvals are needed for planning to continue. Applicants should understand the time needed to achieve specific milestones associated with the incidental take permitting process. Important schedule components are the necessary review periods needed by the Services and their legal counsels at different points throughout the development and approval processes. Note that several later components of these processes are contingent upon the adequacy of the draft HCP, so any deficiencies will inevitably cause delays in submitting the final application package for processing. Finally, adhering to the agreed upon timelines is a critical success factor for all parties, as even minor delays can accumulate and create major delays by the end of the process.

As a possible framework for initiating these discussions, consider filling out the "Getting Started" questionnaire we offer below (or a similar tool adapted to circumstances) before the development of the HCP begins. This may not be as helpful in a smaller, single-applicant plan, but this framework will definitely assist with programmatic or multi-party plans. The questionnaire can help to develop a common understanding between the Services and the applicant on what type the HCP will be, the process to develop the plan, and the level of commitment for its development. The questionnaire need not be binding or set in stone, instead it should be a tool completed voluntarily that guides the development of an HCP.

Table 3.6. Getting Started Questionnaire to Be Used Early in HCP Development.

Sample HCP "Getting Started" Questionnaire	
HCP name:	
Items for the Service and applicant to answer together	
Has the Service given an HCP 101 presentation to the applicant? If so, did it answer the applicant's key questions?	
What are the applicant's broad goals for the HCP?	
What are the general conservation goals of the Service for the HCP?	
What is the general area the plan will cover?	
What species are being considered for coverage?	
What types of activities may have effects on species?	
What types of conservation activities are being considered?	

What key existing data, or plans can help inform development of this plan? (e.g. political, economic, social, environmental, climatic, etc.)	
What key information may be needed, but is unavailable?	
What is known about the species and area in relation to climate change effects?	
Is the plan area likely to provide refugia or movement corridors for species vulnerable to climate change effects that are either within the plan area, or that might now exist outside the plan area?	
Has a simple checklist of the specific information needs of the Service to complete the BO, make findings, and issue permits been developed and attached to this questionnaire?	
What is a reasonable timeframe for this plan to be completed?	
Has a rough timeline been created for key milestones of the plan development?	
Has a dispute resolution process been developed and attached to this planning agreement?	
In addition to the ESA permit being sought, are there other Federal permits or regulatory processes that need to be considered?	
Has a rough budget for preparation of the HCP been developed and attached to this questionnaire?	
Has the Service informed the applicant about funding opportunities (including section 6)?	
Who are the key stakeholders that should be included in the development process?	
How will key stakeholders be included in the development process?	
Who are the key stakeholder experts who can be brought in to help develop the conservation strategy?	
How will plan development be funded?	
How might plan implementation be funded?	
What permit duration is being sought and why?	
Who and how will data be managed that is developed for this plan?	

Has a data sharing plan been developed between the applicant and the Service?	
How will interim decisions be memorialized?	
How will legal counsel be involved in the process?	
How will decisions be documented clearly?	
For the Applicant to Answer	
Who will be the applicant's primary project manager and point of contact? How much time will he/she commit?	
Who will be the decision makers for the applicant?	
How will elected officials and senior managers be involved in plan development?	
How will the applicant staff be involved in development of the HCP?	
For the Services to Answer	
Who will be the decision makers for the Services?	
Who is the primary liaison for working and communicating with the applicant?	
When multiple field offices or regions of the Services are involved, how will these different offices and regions interact?	
How and when will senior managers be involved in plan development?	
How will the Services staff be involved in the development of the HCP and NEPA?	
What workload management arrangements and decisions need to be made to accommodate field staff time for working on the HCP and NEPA?	

Should the questionnaire be signed?
The Services and applicant must work together to decide if there is value in making the 'Getting Started Questionnaire' (or similar form) more formal by having it signed by both parties. Signing the document may be useful in more complex plans where commitments and process agreements are particularly important.

When to fill out the questionnaire?
Once the need for an HCP has been determined, the Services and applicant should consider filling in the 'Getting Started Questionnaire.'

How can the questionnaire help with NEPA scoping?
For HCPs where NEPA scoping through the Federal Register is warranted, completion of the questionnaire may be a good time to initiate scoping with the public. The information in the questionnaire and timing of its completion would be useful to initiate public scoping.

3.7 Other Compliance Requirements

Issuance of an incidental take permit is a Federal action and subject to other Federal laws and regulations. NEPA and NHPA are the two considered in all HCP decisions. The Services must also conduct intra-Service section 7 consultation.

A project proposal may affect other resources for which the Services are responsible. Although an applicant may not be on the "hook" for effects to listed plants, critical habitat, or migratory birds, the Services do have responsibilities for these resources under the ESA or other laws as described below.

To avoid costly delays in a project's implementation, it is extremely important to begin coordinating how these other requirements are addressed with the applicant as early in the project designing process as possible when there is maximum flexibility and no conservation options have been agreed to or eliminated from the mix.

3.7.1 Section 7 Intra-Service Consultation

In addition to the requirements of the section 10 permit regulations, detailed species and habitat information are needed for the section 7 process. All covered species, listed, candidate, or proposed, will need to be assessed under section 7 for impacts and the likelihood of jeopardy and any adverse modification of critical habitat (see Chapter 14.12.1). We can also cover non ESA-listed species in an HCP; if proposed for coverage, they must also be considered in the intra-Service consultation. For species covered by an incidental take permit, the biological opinion informs the "not appreciably reduce the likelihood of the survival and recovery of the species in the wild" issuance criterion (see Chapter 16.1.3).

Information gathered while preparing the HCP can greatly simplify the writing of a biological opinion. This is especially important when non-listed species are involved, since often there is limited information in the Services' files to use for background information.

If listed species that occur in the plan area are dropped from the covered species list for lack of information, or are not included in the HCP from the onset, they still must be addressed in the intra-Service section 7 biological opinion to determine if they may be adversely affected by the proposed covered activities. If adverse effects to a species are possible, we should encourage an applicant to include them in the HCP and permit application (see Chapter 7). If an applicant ultimately decides against covering a species, they face the risk that we would be unable to process the permit application as all species likely to be taken are to be covered by the permit.

Intra-Service consultation does not formally begin until after a complete application is received. However, there is no need to wait. We should gather information and plan the intra-Service consultation simultaneously with HCP development. As the final draft of the HCP is being compiled, just before submittal of the application, is a good time to review the HCP through the lens of an intra-Service consultation. This can identify previously unidentified gaps in the HCP. See Chapter 14.12.1 for compliance with section 7 for HCPs.

3.7.2 Listed Plants and Critical Habitat

In the Services' intra-Service consultation prepared for its incidental take permit decision, we must analyze and identify measures to conserve listed plant species as well as any designated critical habitat. Like any other Federal agency, the Services may not undertake an action that is likely to jeopardize the continued existence of listed plants, or destroy or adversely modify critical habitat. Although an applicant is not responsible for the Services' compliance with ESA section 7, it is to their benefit to address impacts to listed plants or critical habitat in their HCP to help us meet our obligations under section 7.

3.7.3 Migratory Birds and Eagles

In addition to the ESA, FWS implements the MBTA and the BGEPA. FWS staff have several options to follow when addressing migratory birds and eagles in HCP planning.

If a bird species protected by the MBTA is affected by the plan and is listed under the ESA, then it is addressed, as we describe in this Handbook, as any other ESA-listed species. See special considerations for ESA-listed migratory birds in Chapter 16.2.1.

If take of bald or golden eagles may occur, a BGEPA permit is required. See Chapter 7.4.2 for more.

Non ESA-listed, migratory birds can be covered or otherwise addressed in the HCP and incidental take permit. Options to cover the bird species, develop voluntary conservation measures, or to identify avoidance measures to incorporate into the permit are discussed in Chapter 7.4.1.

3.7.4 National Historic Preservation Act

Section 106 of the NHPA (see the HCP Handbook Toolbox) requires Federal agencies to take into account the effects of their undertakings on historic properties and afford State and tribal historic preservation offices, and the public, a reasonable opportunity to comment on such undertakings. The implementing regulations for section 106 of the NHPA, at 36 CFR 800, define how the Services can meet these requirements through a consultation process. The goal of consultation is to identify historic properties potentially affected by the Federal undertaking, assess its effects and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties. Appendix A provides an overview of section 106 compliance for FWS.

The Services' permit issuing officer has the obligation to fulfill section 106 consultation requirements. Issuance of an incidental take permit and implementation of the HCP's conservation requirements for covered species is a "Federal undertaking." We may use our public involvement procedures under NEPA or other program requirements to satisfy the public involvement requirements for NHPA. Cultural resources are a NEPA factor, and the NHPA regulations encourage coordination and incorporation of NHPA consultation with the NEPA process. Also, early coordination is advantageous as voluntary adoption of compliance requirements by the applicant may streamline NEPA (i.e., reducing uncertainty and managing for it through surveys and proper preservation may decrease the level of analysis from an EIS to a mitigated EA).

The Services may establish, in consultation with the Advisory Council on Historic Preservation, alternative consultation procedures. Although these have not been established Service-wide, Regions and field offices may develop local consultation procedures with their corresponding State and tribal historic preservation offices. As noted above, the NHPA regulations allow us to coordinate with other programs. Some States' cultural resource requirements have similar NHPA goals and can be coordinated to meet both State and Federal needs. These State consultations should be incorporated into our review to minimize duplicative effort by the Services and HCP applicants.

3.7.5 National Environmental Policy Act

NEPA (see the HCP Handbook Toolbox) requires an analysis of impacts to the same species as does the ESA, but the scope of NEPA goes beyond that of the ESA by considering the impacts of our Federal action on other aspects of the human environment such as water quality, cultural resources, other biological resources, and socioeconomic values. Because issuing an incidental take permit is a "Federal action" under NEPA, we must conduct the appropriate environmental analyses and document it in accordance with NEPA, the Council of Environmental Quality (CEQ) NEPA regulations, and Department of the Interior NEPA regulations (see the HCP Handbook Toolbox) before finalizing a permit decision. Early during HCP negotiation is the time to identify the analysis to be conducted for our NEPA review.

This Handbook relies on the Services' NEPA policy and guidance (see the HCP Handbook Toolbox) for NEPA implementation. However, conducting the HCP program requires us to adopt the point of view of a regulatory action agency, not a commenting agency.

The applicant will evaluate their project, and alternatives, from the perspective of its effects on listed species and other natural resources of concern to the Services, and provide this information in their HCP. The applicant's project provides the essential core of the proposed Federal action: issuance of an incidental take permit in response to that HCP and permit application. In our NEPA documentation, the Services evaluate issuing the permit from the perspective of its potential effects on the human environment.

When we find significant effects, we prepare an EIS. When we are uncertain of the effects of our actions or where the effects of the actions will be less than significant, we prepare an EA that results in either a Finding of No Significant Impact (FONSI), or we continue to prepare an EIS. While we encourage Services staff to consider an EA to help identify the significance of the effects of our actions (to focus the scale of analyses in an EIS, or possibly conclude with a FONSI), we also have the option of bypassing an EA and beginning with the preparation of an EIS if we know it will be necessary at the outset. If our action has effects that are individually or cumulatively not significant, it may be categorically excluded from further analysis. Note that we establish new options in this Handbook to consider conservation measures in making our categorical exclusion decision (Chapters 13.4.1, and 15.5.1.2).

Levels of NEPA review will affect HCP review timelines. A categorical exclusion can be issued by an FWS field office in a couple of months (if delegated), including the 30-day comment period, while an EIS-scale HCP requires more than one public notice, and usually more than a year to complete.

Misunderstanding the scope of the Federal action in an incidental take permit-related NEPA document often leads to an overstatement of impacts, potentially foregoing the use of our Categorical Exclusion, and encumbering applicants (and the Services) with unwarranted, costly, and time-consuming EISs. In this Handbook (see Chapter 13), we seek to clarify our NEPA analyses by:

- empowering the Services to focus the scale and extent of NEPA review,
- selecting an appropriate level of NEPA documentation,
- revising the required public notice periods for each NEPA review level,
- advising the Services on their oversight of the NEPA review when it is conducted by outside consultants (section 3.8 and Chapter 13), and
- advising Services staff on managing the HCP Planning Assistance grants program to ensure it stays focused and on track (section 3.8).

3.8 Contracted Assistance

Large scale HCPs often involve contractors hired by the applicant, or possibly by the Services.

3.8.1 Facilitators

For large-scale or regional HCPs, we strongly encourage the use of a neutral professional facilitator who is skilled at moderating committee meetings, building consensus, handling complicated projects, and working with uncooperative parties. Such professionals can help to move the HCP process forward. A facilitator can help recognize and resolve problems or use

negotiation techniques to aid a group in overcoming obstacles and meeting expectations. When working with a steering committee or other group, a facilitator can help the group to define the problem, develop alternatives, and establish ground rules to resolve differences between divergent interests. The facilitator's role is to assist the group in reaching its specified goal. They should not be involved in formulating the particulars of the HCP or in the decisions reached by the group.

3.8.2 HCP and NEPA Consultants

Consultants or contractors can be of great assistance to an HCP applicant in a number of ways. Consultants can assist with the development of the HCP, provide input into minimization and mitigation options, help formulate alternatives, and develop monitoring plans. Although an applicant can develop an HCP with minimal impacts without the aid of a consultant, we often recommend using a consultant for large complex HCPs that require expertise beyond that of the typical applicant. However, the applicant has control over HCP preparation; a consultant does not drive the applicant's decisions.

NEPA documents are sometimes prepared by the same consultant that prepares the HCP. This can lead to confusion and conflicts of interest, possibly delaying the process, and even occasionally, leading to litigation. The NEPA document associated with issuance of an incidental take permit is the Services' document. Where preparation of the NEPA document is paid for by an applicant, the Services must approve the selection of the contractor. The NEPA documentation must be neutral and objective and not influenced by the applicant's desire for a permit. If an applicant or his/her consultant is drafting the NEPA documents, they must understand that the sections of an HCP are not fully transferable into the NEPA document.

For an EIS, we generally require that consultants who prepared the HCP not be involved in the EIS development. While not required for an EA, we strongly prefer a similar degree of separation between the consultant team preparing the HCP from that preparing the EA document. Although we prefer and recommend that these teams be from different firms, if we agree, the applicant may use the same firm, but different staff on the two documents. In either case, it is important to note that compliance with NEPA is our responsibility and as such, the contractor that prepares the NEPA documents is:

1. selected by the Services, and
2. works with and for the Services (and is responsive to the Services, only), regardless of who is paying for this task (40 CFR 1506.5(c)).

We recommend that the NEPA consultant be required to sign a no conflict of interest disclosure statement (see the HCP Handbook Toolbox) prior to starting work. This is required for an EIS, but not for an EA. When a consultant prepares an EIS or EA, they should prepare a disclosure statement for inclusion in the draft and final EIS or EA to ensure the avoidance of any conflict of interest (40 CFR 1506.5(c), 43 CFR 46.105, and 516 DM 8) (see the HCP Handbook Toolbox). This helps to formalize the team separation and to establish ground rules for the preparation of the NEPA document that will ensure close coordination with the Services and an analysis that is independent from the HCP. The incentive for an applicant to fund NEPA document preparation is to expedite the development and review.

Although not preferred, we recognize that the scale of a project or the available planning resources do not always allow for separate teams in EA preparation. If this happens we must emphasize our concerns and work closely with the consultant.

In the past, we have agreed to combine some HCPs with the EA in an attempt to streamline analyses. This works in a few rare circumstances, but the majority of attempted EA-HCP combinations have been counterproductive. Combining the HCP with the NEPA documentation places the Services in the position of negotiating the content of the EA, which is our document, and blurs the distinct requirements of the two documents. Combined documents also complicate future revisions to the HCP that would otherwise not involve an EA amendment.

3.8.3 Advice to Applicants on Selecting an HCP Consultant

Because many applicants lack the necessary expertise to develop a conservation plan, we encourage them to use consultants who have experience in HCP preparation. A highly knowledgeable and professional consultant can greatly facilitate the development of an HCP, whereas a consultant who lacks adequate experience and knowledge can cause costly delays and misunderstandings. While we cannot require the applicant to hire (or refrain from hiring) any specific individual or firm to write the HCP (we do have control over NEPA documents), we offer the following considerations to applicants for them to keep in mind when they are selecting a consultant:

- What experience does the consultant have in preparing HCPs that the Services have approved?
- Do the consultant and the proposed project manager have experience in preparing HCPs with applicants similar to you (e.g., local governments, local water agencies, local transportation agencies, State agencies, industry groups, residential developers, renewable energy companies, etc.)?
- Does the consultant have experience preparing HCPs with a level of complexity similar to that expected for your HCP?
- Has the consultant been involved in the preparation of HCPs from the beginning to end, or just some portion of the process? Have the consultant provide information or references to help you confirm this.
- Does the consultant have local knowledge of the geographic area and species to be covered by the HCP?
- Does the consultant have the technical expertise needed for the issues in your HCP (e.g., in a variety of disciplines: biologists, GIS specialists, NEPA specialists, land use planners, economists, conservation biologists, climate change specialists, data modelers, project managers, project facilitators, etc.)?
- Has the consultant's team (or sub-contractors) worked together on other projects?
- How will the consultant ensure the availability of key staff for the duration of the project?
- How will the consultant control costs and manage their budgets?
- Does the consultant have experience in implementing approved HCPs? (This allows them to bring "lessons learned" in HCP implementation to the development of your HCP.)
- Ask the consultant for a list of previous HCPs and NEPA analysis documents completed, with a point of contact for each. Examine these documents if possible. Contact previous project proponents and ask if:

- the consultant was easy to work with,
- they were satisfied with the work, and
- the HCP/NEPA analysis was on time and on budget.

Even when a consultant or legal representative is involved, it is important for applicants to also maintain close coordination with the Services to ensure an accurate exchange of information and a true understanding of expectations as the HCP is in development. All parties involved should remember that it is the applicant with whom the Services are negotiating and who will be responsible for decision-making and implementation of the approved HCP, not the consultants or other representatives.

Developing an HCP requires extensive coordination between the applicant, the Services, and other involved parties (e.g., consultants, State or local agencies, tribes, or other stakeholders). The process can be complex; therefore, the key to success is close coordination with the Services early in the process, maintaining frequent contact throughout, and maintaining momentum once the commitment is made to proceed.

3.9 Planning Resources Available

As noted in Chapter 2.5.1.1, training at the FWS National Conservation Training Center (NCTC) or locally provided workshops are available for applicants and consultants. FWS is developing Web-based conservation planning tools (Chapter 8.2) that will be available for use by the Services and the public in formulating an HCP mitigation plan. The web-based Information for Planning and Conservation (IPaC) is currently available for certain species and situations focused on section 7 consultations.

HCP planning assistance is available through the FWS's Section 6 Cooperative Endangered Species Conservation Fund (see the HCP Handbook Toolbox) in the form of competitive grants we award each year. FWS awards section 6 grants to States only, so if a potential applicant wants to submit a proposal, they will need to coordinate with the appropriate State agency that holds a cooperative agreement with FWS. FWS field offices should work closely with the States and project proponents to develop competitive proposals that fit grant criteria and establish feasible schedules.

Some programmatic plans in development receive section 6 awards over consecutive years. FWS staff must oversee these to ensure work is progressing toward HCP development in a timely fashion and consistent with the grant agreement. Each fiscal year's grant objectives need to be clearly defined, and if a given task carries over from year to year, the grantee, in their proposal, must try to differentiate aspects of the task that might change from one year to the next. Creating milestones for completion of tasks is a helpful way to show and track progress. Staff must ensure that grant dollars are budgeted towards activities that result in actual progress (collect biological information, hold stakeholder meetings with defined purposes, develop outreach, draft a section of the HCP, etc.) so that we avoid funding vague, undefined purposes or an indefinite series of studies or modeling.

3.10 Making and Documenting Decisions

There are a seemingly endless series of decisions made throughout HCP development and implementation. These can be one time decisions (e.g., which species to cover), or recurrent decisions (e.g., which management action to take) that are made throughout implementation of the plan. Some decisions are more important than others. Some decisions can be made on the fly and others may require more deliberate thought to consider the options. Decisions controlling management actions or responses to changed circumstances should be based in conceptual models that have been constructed for monitoring and adaptive management. If every decision in an HCP went through an in-depth process to determine the answer, the HCP would never be completed. However, some decisions are important enough that a structured process is warranted.

Unstructured decisions might be appropriate when:

- the answer is obvious,
- there are few consequences to the decision, or
- there is little difference between options.

Structured processes to make decisions might be appropriate when there is:

- a high chance of litigation,
- a high level of uncertainty,
- significant risk to conservation of species,
- potentially significant costs to applicant,
- long term consequences from the decision, or
- transparency is particularly important.

If we determine that a structured process is appropriate, identifying the barriers to making the decision is essential in focusing the structured process. Staff must be as specific as possible about the barriers to the decision:

- Is there some aspect of the science in question, and if so, what exactly?
- Are there value differences between the decision makers? What are those differences?
- Is there a specific source of uncertainty that is impeding the decision from being made?

We must also be realistic about the barrier so staff can understand it and figure out how to work through it.

Staff should make decisions as necessary and in a timely manner. They should use the best information available and, document the logic. If, on the other hand, a decision does not have to be made and it is postponed, we should ask:

- Why was that decision postponed?
- What value does postponing the decision have?

There should be a clear rationale for postponing any decision and it should be documented so everyone can refer to it later.

Regardless of the level of deliberation, Services staff must document the outcomes and ensure all relevant personnel are informed. This can be as simple as having meeting notes circulated to all attendees, so that everyone has an opportunity to provide feedback. These types of records become more important in complex, multi-year planning efforts to minimize delays due to staff turnovers and to avoid repeated discussions over previously settled issues. Some large-scale, multi-agency agreements have used regularly-updated memoranda to document the status of their negotiation. Such memoranda can memorialize decisions made, tentative agreements, responsibilities assigned, etc. See Chapter 4.7 concerning records retention in a case file.

Simple tables with criteria used to consider which species to cover, for example, are very helpful in documenting the logic and making decisions clear. Keeping good records will help keep HCP planning on track, and it creates the Services' administrative record.