NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 02-110-07
NOVEMBER 4, 1996

Protected Resources Management
Endangered Species Act -- Procedures

HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK

NOTICE: This publication is available at:
http://www.nmfs.noaa.gov/directives/.

OPR: F/PR **Certified by:** F/PR
Type of Issuance: Renewed July 2014

SUMMARY OF REVISIONS:

Signed _____
[Approving Authority name] Date
[Approving Authority title]

HABITAT CONSERVATION PLANNING

AND

INCIDENTAL TAKE PERMIT PROCESSING

HANDBOOK

November 4, 1996

U.S. Department of the Interior
Fish and Wildlife Service

U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service

TABLE OF CONTENTS

Section Page

Preface i

Chapter 1 - The ESA and Incidental Take Permits 1-1
A. Purpose of the Habitat Conservation Planning Process 1-1
B. Purpose of the Handbook 1-1
C. Background and Legal Authority 1-1
D. Coordination Between FWS and NMFS 1-3
E. Overview of the Incidental Take Permit Process 1-4
1. When is a Permit Needed? 1-4
2. What Kinds of Activities Can Be Authorized? 1-5
3. Phases of the Process 1-5
4. Compliance With NEPA and Section 7 of the ESA 1-6
5. Guiding Principles 1-7
F. Overview of Permit Processing Requirements 1-7
1. Expeditious Processing of Permit Applications 1-8
2. The Low-effect HCP Category 1-8
3. Processing Low-Effect Permit Applications 1-9
4. Summary of Permit Processing Requirements 1-9
5. Target Permit Processing Times 1-10
6. Benefits of Regional Conservation Planning 1-14
G. Helpful Hints 1-15

Chapter 2 - Overview of FWS and NMFS Roles and Responsibilities 2-1
A. Delegation of Permit Authority 2-1
B. Roles and Responsibilities 2-1
1. Applicant 2-1
2. Field Office 2-2
3. Regional Office 2-3
4. Washington Office 2-7
5. Solicitor’s Office/General Counsel Office 2-7

Chapter 3 - Pre-application Coordination and HCP Development 3-1
A. Getting Started 3-1
1. Who Can Apply for a Section 10 Permit? 3-1
2. Determining the Appropriate Applicant 3-2
3. Steering Committees 3-3
4. The Services' Role on Steering Committees & HCP Efforts 3-4
5. Preparing the HCP Species List 3-7
6. Involving Other Federal and State Agencies 3-8
7. Treaty Rights and Trust Responsibilities 3-
B. Developing the HCP 3-
1. Mandatory Elements of an HCP 3-

TABLE OF CONTENTS (CONT.)

Section Page

2. Identifying Project Impacts 3-
a. Delineation of HCP Boundaries 3-
b. Collection and Synthesis of Biological Data 3-
c. Determination of Proposed Activities 3-
d. Determining Anticipated Take Levels 3-
e. Coordinating the HCP With Section 7 of the ESA 3-
f. Addressing Indirect Project Effects 3-
g. Consideration of Plants in the HCP and Permit 3-
h. Addressing Effects on Critical Habitat 3-
3. Mitigation Programs & Standards 3-
a. Regulatory Standards & Relationship to Recovery 3-
b. Must an HCP Benefit the Species? 3-
c. Mitigation For Habitat Loss 3-
d. Funding Recovery Measures as Mitigation 3-
e. Mitigation for Small-Scale, Low-Effect Projects 3-
f. Consistency in Mitigation Standards 3-
g. Adaptive Management 3-
4. Monitoring Measures 3-
5. Unforeseen/Extraordinary Circumstances 3-
a. The "No Surprises" Policy 3-
b. HCP Amendments 3-
6. Funding 3-
7. Analyzing Alternatives 3-
8. Additional Measures-Implementing Agreements 3-
C. Alternative HCPs 3-
1. Addressing Species Through Habitat-Based HCPs 3-
2. Programmatic HCPs 3-
D. Addressing Migratory Birds and Eagles (FWS Only) 3-
E. Coordinating HCPs With National Wildlife Refuges (FWS Only) 3-
F. "Safe Harbor" Policy 3-

Chapter 4 - Treatment of Unlisted Species 4-1
A. Addressing Unlisted Species in the HCP 4-1
1. Deciding How to Address Unlisted Species 4-2
2. Addressing Unlisted Species in the HCP and Permit 4-2
3. Standards for "Covering" Species Under a Permit 4-4
B. Challenges in Treating Unlisted Species 4-4

Chapter 5 - Environmental Analysis and Documentation 5-1
A. General Information 5-1

TABLE OF CONTENTS (CONT.)

Section Page

1. Scope of the NEPA analysis 5-1
2. Categorical Exclusions 5-2
3. Environmental Assessments 5-3
   a. Use of EAs When Mitigation Reduces Significant Impacts 5-3
   b. Programmatic EAs 5-4
4. Environmental Impact Statements 5-4

B. Techniques for Streamlining Section 10 and NEPA Planning 5-5
1. Combining NEPA/HCP Documents 5-5
2. Joint-Federal State Process 5-5
3. Incorporation by Reference 5-6

C. Internal Service Guidance and Assistance 5-6

Chapter 6 - Application Requirements and Processing Procedures 6-1

A. Guidance to the Applicant 6-1
1. What to Provide the Applicant 6-1
2. Application Form and Instructions 6-2
3. Name of Applicant 6-2
4. Application Fee 6-2
5. Providing the General Permit Requirements 6-3

B. Processing the Application 6-3
1. Processing Times 6-3
2. Timing of Document Preparation and Submission 6-4
   a. Description of Required HCP Documents 6-4
   b. Submitting the Complete Application Package 6-5
   c. Certification of Application by the Field Office 6-6
   d. Timing of Other Application Documents 6-6
   e. Labeling the Documents as Draft/Final 6-7
   f. Dating Section 10 Documents 6-8
   g. Finalizing the Implementing Agreement 6-8
3. Who Submits the Application Package? 6-9
4. Judging the Application for Completeness 6-9
5. Problems Identified During HCP Development 6-9
6. FWS Law Enforcement LEMIS System 6-10

C. Internal FWS/NMFS Review 6-10
1. Early Coordination Between Field and Regional Office 6-10
2. Distribution of the Application Package 6-12

TABLE OF CONTENTS (CONT.)

Section Page

3. Internal Section 7 Consultation 6-13
a. Role of the Section 7 Consultation 6-13
b. Who Conducts the Section 7 Consultation? 6-14
c. Conferences on Proposed Species 6-15
d. Biological Opinion Formats/Requirements 6-16
4. Legal Review of the Application Package 6-19
5. Preparing the Signature Package 6-19
6. New Policies or Legal Questions 6-20
D. Federal Register Notices of Receipt 6-20
1. Timing of the Notice 6-20
2. Content of the Notice 6-21
3. Submission of the Notice 6-21
4. Providing HCP Documents to the Public/FOIA Considerations 6-22
5. Objection to the Permit 6-24
6. Notice of Permit Issuance, Denial, or Abandonment 6-24
E. Permit Issuance Conditions & Reporting Requirements 6-25
1. Permit Conditions 6-25
2. Permit Duration 6-25
3. Distribution of Copies of the Permit 6-26
4. Reporting Requirements 6-26
F. Permit Denial, Review, and Appeal Procedures 6-
1. Permit Denial 6-27
2. Review Procedures 6-27
3. Requests for Reconsideration 6-27
4. Appeal 6-28
5. Copies of Denials 6-28
G. Permit Amendments 6-29
H. Permit Renewal 6-29
I. Permit Transferals 6-30
J. Permit Violations, Suspensions, and Revocations 6-31
1. Notifying Law Enforcement 6-31
2. Permit Suspension/Revocation 6-32

Chapter 7 - Issuance Criteria for Incidental Take Permits 7-1
A. General Permit Issuance Criteria 7-1
B. Endangered/Threatened Species Permit Issuance Criteria 7-2
1. Taking Will Be Incidental 7-2
a. Authorizing Take Associated With Mitigation Activities 7-2
b. Authorizing Take for Scientific Purposes 7-3
2. Applicant Will Minimize and Mitigate Impacts 7-3
3. Will Ensure Adequate Funding/Unforeseen Circumstances 7-4

TABLE OF CONTENTS (CONT.)

Section Page

4. Will Not Reduce Likelihood of Survival & Recovery 7-4
5. Other Measures Required Will Be Provided 7-5
6. Assurances That the HCP Will Be Implemented 7-5

Chapter 8 - Definitions 8-1

LIST OF APPENDICES

Appendix 1: Section 10 Regulations: 50 FR 39681, September 30, 1985 (FWS); 55 FR 20603, May 18, 1990 (NMFS).

Appendix 2: Reference List of Publications on HCPs and Conservation Biology

Appendix 3: Example of an HCP Memorandum of Understanding

Appendix 4: "Template" Implementing Agreement

Appendix 5: FWS Guidance on Addressing Migratory Birds and Eagles (FWS Only)

Appendix 6: FWS Guidance on Integrating HCPs With National Wildlife Refuges (FWS Only)

Appendix 7: Safe Harbor Policy

Appendix 8: Example of an Integrated HCP/EA

Appendix 9: FWS Fish and Wildlife Permit Application Form 3-200 With Privacy Act Notice, Instructions, and Notice of Permit Application Fee; and NMFS Incidental Take Application Instructions

Appendix 10: General Permit Conditions: 50 CFR Part 13 (FWS); 50 CFR Parts 217, 220, and 222 (NMFS)

Appendix 11: Endangered and Threatened Species Permit Conditions: 50 CFR Part 17 excerpts (FWS); 50 CFR 222.22 (NMFS)

Appendix 12: List of FWS/NMFS Washington, D.C. and Regional Offices

Appendix 13: Examples of a Set of Findings

Appendix 14: FWS Director's Order No. 11 and Examples of an Environmental Action Memorandum

Appendix 15: Federal Fish and Wildlife Permit (Form 3-201)

Appendix 16: Examples of Federal Register Notice of Receipt of Permit Application and Notice of Availability of NEPA Document

Appendix 17: Examples of Issued Incidental Take Permits

Appendix 18: "Template" Federal Register Notices of Permit Issuance

PREFACE

The habitat conservation planning (HCP) program under section 10(a)(1)(B) of the Endangered Species Act (ESA) has grown rapidly in recent years. In the first 10 years of the program (1983-1992), 14 incidental take permits were issued. As of the end of August, 1996, 179 incidental take permits had been issued and approximately 200 HCPs were being developed. In just a few years the HCP process has been transformed from a relatively little used option under the ESA to one of its most important and innovative conservation programs.

Another pattern has begun to emerge, as evidenced by the growing number of HCPs being developed and by the size of the conservation planning areas involved. As of late 1995, most HCPs approved were for planning areas less than 1,000 acres in size. However, of the HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres in size, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process adopted primarily to address single developments to a broad-based, landscape level planning tool utilized to achieve long-term biological and regulatory goals. It also suggests that the underlying spirit of the HCP process has begun to take hold.

These large-scale, regional HCPs can significantly reduce the burden of the ESA on small landowners by providing efficient mechanisms for compliance, distributing the economic and logistic impacts of endangered species conservation among the community, and bringing a broad range of landowner activities under the HCPs' legal protection. In addition, the Services have helped reduce the burden on small landowners and have made it easier for them to be involved in the HCP process through streamlining measures in the HCP process.

The HCP process was patterned after the San Bruno Mountain HCP--an innovative land-use planning effort in California's San Francisco Bay area that began in the mid-1970s with a classic conflict between development activities and endangered species protection and culminated in the issuance of the first incidental take permit in 1983. What made the San Bruno Mountain case unusual was that it attempted to resolve these conflicts through negotiation and compromise rather than continued litigation. This fundamental approach was endorsed and codified by Congress when it incorporated the HCP process into the ESA in 1982.

One of the great strengths of the HCP process is its flexibility. Conservation plans vary enormously in size and scope and in the activities they address--from half-acre lots to millions of acres, from forestry and agricultural activities to beach development, and from a single species to dozens of species. Another key is creativity. The ESA and its implementing regulations establish basic biological standards for HCPs but otherwise allow the creative potential of HCP participants to flourish. As a result, the HCP program has begun to produce some remarkably innovative natural resource use and conservation programs.

The challenge of balancing biology with economics is a complex one, but is fundamental to the HCP process. Policy and procedure have at times frustrated HCP users and hampered the program's ability to meet its full potential. The HCP process was historically viewed as procedurally difficult; permit approvals took too long in some cases and long-term regulatory certainty under HCPs was widely desired by applicants but rarely available.

However, the U.S. Fish and Wildlife Service and National Marine Fisheries Service have made significant improvements in the HCP program in recent years. We have increased section 10 staff and improved guidance about section 10 objectives and standards, clarified and streamlined permit processing requirements, and substantially raised the certainty provided to HCP permittees. This handbook incorporates all these improvements and reflects updated policies and procedures in the HCP program.

The handbook is organized as follows. Chapter 1 provides a summary and overview of the HCP process. Chapter 2 summarizes the roles of the applicant and the Fish and Wildlife Service and National Marine Fisheries Services' Field, Regional, and Washington Offices. Chapter 3 explains the process of developing an HCP. Chapter 4 explains how unlisted species may be addressed in an HCP. Chapter 5 deals with section 10 NEPA requirements. Chapter 6 explains how to process and review an incidental take permit application. Chapter 7 explains the section 10 permit issuance criteria. Finally, Chapter 8 contains a glossary of important terms used throughout the handbook.

The handbook also contains numerous appendices, which include pertinent Federal regulations and policies; a reference list of publications about HCPs; "template" HCP documents that can be used as guides; and examples of HCP documents such as a permit application form and Federal Register notices. The handbook is organized to make information readily available. All important issues have labeled sections or subsections. The reader can find specific subjects of interest by scanning the Table of Contents and turning to the appropriate page.

Acting Director
U.S. Fish and Wildlife Service

Assistant Administrator for Fisheries
National Marine Fisheries Service

CHAPTER 1
THE ENDANGERED SPECIES ACT AND INCIDENTAL TAKE PERMITS

A. Purpose of the Habitat Conservation Planning Process

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

B. Purpose of the Handbook

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

C. Background and Legal Authority

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

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

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

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

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

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

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

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

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

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

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

D. Coordination Between FWS and NMFS

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

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

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

E. Overview of the Incidental Take Permit Process

1. When is a Permit Needed?

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

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

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

2. What Kinds of Activities Can be Authorized?

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

3. Phases of the Process.

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

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

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

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

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

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

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

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

5. Guiding Principles.

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

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

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

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

F. Overview of Permit Processing Requirements

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

1. Expeditious Processing of Permit Applications.

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

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

2. The Low-effect HCP Category.

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

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

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

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

3. Processing Low-Effect Permit Applications.

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

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

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

4. Summary of Permit Processing Requirements.

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

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

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

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

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

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

5. Target Permit Processing Times.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. Helpful Hints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 2
OVERVIEW OF FWS AND NMFS ROLES AND RESPONSIBILITIES

A. Delegation of Permit Authority

In the past, the FWS's Office of Management Authority (OMA) in the Washington, D.C. area processed and issued all section 10(a)(1)(A) and 10(a)(1)(B) permits. Effective February 12, 1992, the FWS Director delegated incidental take permit responsibilities to the Regional Directors. For NMFS, the responsibility for issuing incidental take permits is divided between the Office of Protected Resources in Silver Spring, Maryland (Washington, D.C. area), and its west coast Regions.

B. Roles and Responsibilities

FWS and NMFS offices at the regional, field, and Washington, D.C. level, and the permit applicant, all have specific responsibilities in implementing the HCP program. This section summarizes the roles and responsibilities of each of these participants.

Keep in mind that specific HCP procedures may vary somewhat between FWS Regions or between FWS and NMFS. This is because the circumstances faced by individual HCP participants may differ widely across regional boundaries or agency jurisdictions, and this handbook, while establishing consistent program standards, also seeks to maintain the flexibility to adjust to specific local needs. Thus, while fundamental legal and policy issues will be consistent nationwide, individual procedures (e.g., document handling requirements) may vary depending on the decisions of FWS Regional Directors or the NMFS Regional or Washington, D.C. Offices.

1. Applicant.

The applicant is responsible for compliance with the take prohibition and exceptions under sections 9, 4(d), and 10(a) of the ESA. Once the decision to obtain a permit has been made, the applicant is also responsible for preparing the HCP and, if approved, for implementing it. Requesting technical assistance from FWS, NMFS, and other interests during preparation of the HCP is strongly recommended to ensure the HCP ultimately submitted for approval is biological sound and meets statutory requirements. The applicant:

- Should coordinate with FWS, NMFS, affected Federal and state agencies, tribal governments, and where appropriate, affected private interests and organizations in preparing an HCP that satisfies the requirements of section 10(a)(1)(B) of the ESA and Federal regulations.

- o Generally, develops a draft Environmental Assessment (EA) with technical assistance from the Services, and draft Federal Register notices for Service use during the permit processing phase. Normally, EISs are also prepared by the applicant, or through a contractor, or an HCP applicant, under certain circumstances and strict guidance from FWS or NMFS, can assist in developing an EIS. However, FWS or NMFS is ultimately responsible for the content of all section 10 NEPA documents.

- o Submits a permit application (Form 3-200), a $25 application fee (unless applicant is fee exempt), a completed HCP, draft NEPA analysis (optional) and an IA (as needed) to the appropriate FWS Field or Regional Office or NMFS Regional or Washington, D.C. Office (see Chapter 6, Section B.3).

  For FWS applications, note that Federal regulation [50 CFR 13.11(b)] calls for the application to be submitted to the Arlington, Virginia office; however, these regulations are being amended to reflect delegation of the permit program to the Regional Directors. NMFS regulations [50 CFR 222.22] state that applications should be sent to the Silver Spring, Maryland Office, but applications involving west coast anadromous fish should be submitted to the Southwest or Northwest Regional Directors.

- o During the permit processing phase, coordinates with the appropriate FWS or NMFS Field Office to amend or correct the HCP or associated documents, as necessary. Also should provide the Field Office with additional information necessary for the Services to respond to public comments when appropriate.

- o If the permit is issued, implements all measures and programs required by the HCP permit and submits all documentation, monitoring reports, etc. as required over the life of the permit.

2. Field Office.

FWS Responsible Party - Field Supervisor.

NMFS Responsible Party - Field Supervisor.

The Field Office is responsible for assisting the applicant in preparing the HCP; ensuring that the HCP and associated documents are complete; and coordinating with the appropriate Regional Office (or NMFS Washington, D.C. Office) throughout HCP development, approval, and implementation. The Field Office:

- o Provides technical assistance to the permit applicant and serves as applicant's point of contact for information concerning HCP, permit processing, and NEPA

requirements during the HCP development phase. Provides assistance to the applicant's HCP steering committee, if any, as requested (see Chapter 3, Section A.3).

- Encourages permit applicant to include affected state and Federal agencies and tribal governments to participate in the HCP process. Other Federal agencies might be involved, for example, if they are involved in adjacent planning areas or would administer mitigation lands under the HCP. Inclusion of affected state agencies insures efficient consideration of any additional requirements of state law.

- Coordinates review of HCP development with FWS or NMFS Law Enforcement agents involved in enforcing permit conditions.

- Stays informed on planning progress, problems, significant issues, and decisions; routinely advises the Regional Office of HCP progress on key policy and substantive issues (see Chapter 6, Section C.1).

- Reviews drafts of the HCP and IA for adequacy and comments as necessary. Draft HCPs should be returned to the permit applicant within 30 days of submission, to the maximum extent possible.

- Prepares NEPA analysis, or reviews draft documents if prepared by the applicant or contractor. Draft NEPA analysis should also be returned to the permit applicant within 30 days of submission, to the maximum extent possible.

- Certifies to the Regional Office in writing that HCP documents have been reviewed by Field Office staff and are found to be statutorily complete, when the "complete application package" is transmitted to the Regional Office (see Chapter 6, Section B.2).

- Reviews public comments received, if any, and coordinates necessary changes to the HCP or IA with the FWS or NMFS Regional HCP Coordinator during the permit application processing phase; notifies applicant(s) of recommended revisions to the draft HCP or IA, if any, identified as a result of legal or public review; and discusses remedies. Coordinates with FWS or NMFS Regional Office Environmental Coordinator, NMFS Washington, D.C. Office HCP Coordinator, or the applicant or applicant's contractor to make revisions to the NEPA document, if necessary.

- For FWS, briefs the Regional Director, appropriate Assistant Regional Director, ARD for Law Enforcement, and the Solicitor's Office concerning HCP issues as

requested. For NMFS, briefs the Regional Director, Deputy Director, Law Enforcement, and General Counsel's Office, as requested.

- Drafts the following documents (see Chapter 6, Section B.2):

  NEPA analysis, either an EA or EIS that is integrated with the proposed HCP (unless drafted by the applicant or contractor).

  Federal Register Notice of Receipt of permit application and Notice(s) of Availability of EA or EIS.

  Biological opinion concluding formal section 7 consultation. The biological opinion concluding formal section 7 consultation may be done by the FWS or NMFS office that assisted in HCP development or by another office. To avoid possible biases, the staff member conducting the section 7 consultation should not be the section 10 biologist providing technical assistance to the HCP applicant. This will help ensure that the intra-Service section 7 consultation is an independent analysis of the proposed HCP. If, because of staff time constraints, this is not possible, then the biological opinion should be reviewed by another knowledgeable biologist before it is signed by the approving official. It is very important that the staff member that completes the section 7 consultation be involved in the initial stages of the HCP process. This will help ensure that the section 7 requirements are addressed in the HCP and that the two processes are integrated which will help expedite the permitting process. If the Regional Director has delegated the authority, the biological opinion may be signed by an approving official in the Field Office.

  Set of Findings (see Chapter 6. Section B.2).

  An Environmental Action Memorandum for low-effect HCPs that are categorically excluded from NEPA, Finding of No Significant Impact (FONSI) for the EA, or Record of Decision (ROD) for the EIS.

  News releases as appropriate or requested by the Regional Office.

  Responses to comments, as necessary.

  Permit Terms and Conditions for inclusion in the permit (FWS's Form 3-201), if requested by the Regional Office or NMFS Washington, D.C. Office.

- Monitors compliance with HCP provisions and permit terms and conditions and evaluates success of the HCP at least annually. Arranges for independent biological peer review, as appropriate.

- Provides an accounting of fund expenditures administering the section 10 program to the Regional Office as requested.

3. Regional Office.

FWS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD); appropriate Assistant Regional Director (ARD); and Assistant Regional Director for Law Enforcement (ARD-LE).

NMFS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD).

For FWS, the Regional Office oversees and administers the incidental take permit program for its respective region. For NMFS, this is true for the Northwest and Southwest Regions only, and only for activities concerning west coast anadromous fish species; the Washington, D.C. Office administers the balance of the permit program. Currently, the only HCPs in development in these NMFS regions are for anadromous species. The FWS and applicable NMFS Regional Office is responsible for coordinating with the Field Office throughout the HCP process, reviewing and processing the permit application; and issuing or denying the permit. It is also responsible for ensuring that permit processing targets described in Chapter 1 and Chapter 6 are met. The Regional Office:

- Receives complete permit application package with supporting documents from the Field Office or applicant, and accounts for fee processing (see Chapter 6, Section B.3).

- Processes application check.

- Coordinates with ARD-LE to have permit number assigned through LEMIS (Law Enforcement Management Information System); coordinates review of permit application by ARD-LE, as necessary (FWS only).

- Reviews permit application package for adequacy and reports any deficiencies to the Field Office (Section 10 Coordinator reviews HCP and IA; Environmental Coordinator reviews NEPA analysis) (see Chapter 6, Section B.4 and C.1). Prior periodic Field Office review and reporting on key policy and substantive issues should result in the identification and elimination of most deficiencies prior to formal Regional Office review.

- Transmits Federal Register notices to the Office of the Federal Register for publication (see Chapter 6, Section D).

- Files copies of any draft and final EIS with the Environmental Protection Agency [see Chapter 5, Section A.4].

- Reviews draft and finalizes internal section 7 consultation, if the biological opinion was drafted by the Field Office that participated in HCP development, or incorporates biological opinion completed by the Field Office into the administrative record.

- Reviews and finalizes Set of Findings (unless finalized by the Field Office).

- Prepares the Environmental Action Memorandum (EAM) for low-effect HCP permit applications (see Chapter 6, Section B.2).

- Coordinates with the Assistant Director for Ecological Services for major policy issues to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP program.

- Briefs the Director or Washington, D.C. Office on all significant HCP developments, permit application processing, and post-issuance efforts, as necessary. Reports HCPs in development and section 10 permits issued to Washington Office, as requested.

- Coordinates with lead Region responsible for the species prior to issuance of the permit to ensure agency-wide consistency for species that overlap more than one FWS or NMFS Region.

- Prepares permit and associated documents (IA, FONSI, ROD, EAM) for RD or DRD signature, as necessary or requested (see Chapter 6, Section C.5).

- Issues or denies the permit and (FWS only) updates LEMIS. Sends the signed permit with terms and conditions or a denial letter to the permittee or applicant. Sends copies of these documents to the Field Office, other affected offices, and Division of Endangered Species (FWS) and Office of Protected Resources (NMFS) in Washington, D.C.

- Sends Notice of Permit Issuance to the Office of the Federal Register for publication on a quarterly or biannual basis.

- Coordinates Freedom of Information Act (FOIA) requests.

4. Washington Office.

FWS Responsible Parties - Director; Assistant Director of Ecological Services (AES); and Chief, Division of Endangered Species (DTE).

NMFS Responsible Parties - Director, Office of Protected Species; Chief, Endangered Species Division.

The FWS Washington Offices provide guidance and oversight to the Regional and Field Offices. It is responsible for nationwide administration of the program:

- Develops regulations and national policy guidance.
- Assists in resolving issues or disputes when requested by the Regional Offices.
- Briefs Director or other authorities or coordinates such briefings as necessary.
- Prepares HCP, NEPA, and other related training and technical assistance to Regional Offices and Field Offices, as needed.
- Maintains and updates national list or data base of HCPs in development and permits issued.

The NMFS Washington, D.C. Office of Protected Resources has the same functions as described for FWS. It also processes all permit applications and issues or denies all permits, except for those concerning anadromous species in the Northwest or Southwest Regions. NMFS permits for activities such as state fish hatcheries, and commercial or recreational fisheries must comply with all statutory provisions of section 10(a)(1)(B) of the ESA, but may have fewer documentation requirements than other types of incidental take permits. (Refer to NMFS final regulations for the program contained in Appendix 1 (55 FR 20603)). The NMFS Washington, D.C. Office should be contacted for assistance in handling any such permits. Generally, all other NMFS-issued incidental take permits are subject to the documentation requirements described in this handbook.

5. Solicitor's Office/General Counsel Office.

FWS Responsible Parties - Solicitor's Office

NMFS Responsible Parties - General Counsel's Office

For FWS, the Solicitor's Office need review only those parts of the permit application package that the Regional Director request be reviewed--typically the HCP and Implementing Agreement. Coordination with the Regional Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and during the HCP development phase. After Solicitor review is complete, the

Regional Solicitor's office should forward a memorandum to the RD or appropriate ARD stating that he or she has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements. The Regional Solicitor's Office should review the documents, as necessary, throughout the HCP process to ensure regulatory and statutory compliance and to avoid "last minute" identification of problems in documents submitted for final approval. For NMFS, the General Counsel's Office (either in the Region or Headquarters) must review the entire application package and all supporting ESA and NEPA documentation.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the strict requirements of the ESA and its regulations. This is especially important for the HCP, which has specific legal requirements, and the Implementing Agreement, which legally binds the applicant to complying with the HCP and permit terms. For NMFS, legal review of all documents must be conducted by either the Headquarters or Regional General Counsel's Office.

CHAPTER 3
PRE-APPLICATION COORDINATION AND HCP DEVELOPMENT

Congress intended the HCP process to be used to reduce conflicts between federally listed species and non-Federal development and land use, and to provide a framework for "creative partnerships" between the public and private sectors in endangered species conservation. Congress also intended the FWS and NMFS to be not just regulators of the HCP program, but active participants in providing technical assistance, and that "comprehensive" HCPs could be developed jointly by the FWS, NMFS, the private sector, and local, state, and Federal agencies, with the Services as a technical advisor (H.R. Rep. No. 97-835, 97th Congress, Second Session).

This chapter discusses the Services' roles in the HCP process during the pre-application and HCP development phase. From a technical standpoint, this involves advising the permit applicant on the biological needs of the species involved, statutory HCP requirements and permit issuance criteria, NEPA requirements, and other technical issues.

The Services also have an important "leadership" role to play in the HCP program, which involves not only technical expertise but attitude and philosophy. Although FWS or NMFS typically do not initiate HCP efforts, they can and should encourage them and once initiated support them to the maximum extent possible. This means being actively involved during HCP development; providing advice on mitigation programs, monitoring measures, and reserve designs; providing timely review of draft documents; helping find solutions to contentious issues; and generally helping bring the HCP together.

A. Getting Started

Once a private or non-Federal entity (or entities) has decided to obtain a section 10(a)(1)(B) permit the first task that it needs to undertake are determining the appropriate applicant, deciding whether or not to establish a steering committee, and preparing a list of species to be addressed in the HCP.

1. Who Can Apply For a Section 10 Permit?

Section 10 permits can be issued to state, municipal, or tribal governments, corporations or businesses, associations, and private individuals. They can also be issued to entities that are a combination of these, such as joint power authorities, watershed councils, and other planning authorities.

The standard method of authorizing take for Federal agencies is through the section 7 consultation process. Actions authorized, funded, or carried out by Federal Agencies must go through the section 7(a)(2) consultation process. There are cases where a Federal agency

is a partner in an HCP, and has a minor, but integral role in the HCP. Examples of these types of HCPs would include HCPs where a Federal agency is involved in a cooperative planning effort in which both Federal and private lands are addressed under a single HCP but the Federal agency is not the applicant or the primary partner in the plan. In these cases, the specific identified actions to be conducted by the Federal agency during the implementation of the HCP should be consulted on as part of the section 7 consultation conducted for the HCP. This allows the Services to conduct one formal consultation that incorporates the actions for the HCP and any specified or identified cooperative Federal action into one biological opinion. The biological opinion developed for the HCP should also incorporate the necessary biological analysis on the Federal action as well as the actions in the HCP to help eliminate duplication. Thus, the single biological opinion issued by the Services would address both the Federal action and the non-Federal action, and it would include an incidental take statement that authorizes any incidental take by the Federal agency and an incidental take permit that authorizes any incidental take by the section 10 permittee.

Before processing a section 10 permit application involving a Federal agency, Service staff should consult with the appropriate Regional Director's or Solicitor's Office (FWS), or the Regional Director's Office or Washington, D.C. Office of Protected Resources Office (NMFS).

2. Determining the Appropriate Applicant.

The first step is to determine who the applicant is who ultimately will hold the permit. In many cases this is relatively straightforward--the applicant is the land or other natural resource owner who proposes the project or activity and is responsible for implementing the HCP.

In regional HCPs, the plan often relies upon local or regional authorities to implement the plan and regulate the taking of listed species addressed in the plan. The permittee must therefore be capable of overseeing HCP implementation and have the authority to regulate the activities covered by the permit. For large-scale planning efforts involving only one or two landowners or types of activities, the landowners themselves are usually the appropriate permittee. For planning efforts involving numerous property owners and activities, the permittee is usually a local public agency--e.g., a city or county government or several local agencies acting jointly. In other cases, a state agency may obtain and hold a section 10 permit for certain types of state-regulated private activities (e.g., forestry activities).

When no government agency is available or interested in assuming the responsibility for an HCP, private groups wishing to obtain a permit for large-scale or multi-faceted projects may initiate an HCP without government involvement. They may, for example, form a consortium to develop the HCP, in which case the consortium would be the permittee. Or, they may jointly fund development of the HCP but maintain their individual identities by applying for separate permits, using the same HCP or individual HCPs modified from a

jointly-developed "template." Either approach is acceptable so long as the permittees have the authority to regulate or control all or applicable parts of the HCP program and the conditions of the HCP are enforceable.

3. Steering Committees.

An HCP "steering committee" is a group of persons who represent affected interests in a broad-scale HCP planning area and generally oversee HCP progress and development. Steering committees are not required by law and the Services do not require them, although they have proven useful to applicants in a variety of HCP settings. However, the Services cannot be the entities which establish them without compliance with the Federal Advisory Committee Act. It is important to remember that a steering committee's purpose is to advise the applicant in the development of the HCP, not to advise the Service on permit issuance.

The steering committee approach may not be appropriate for all situations. For some applicants, it may be too formal or complicated, or they may view it as giving "outside interests" too much access to proprietary data involving private lands. If this is the case during the pre-application phase, the Services should encourage the applicant to provide opportunities to brief or inform representatives of interested parties of key elements or issues to be addressed in the proposed HCP. This can be accomplished in several ways, such as formal or informal meetings, newsletters, etc.

When used in the HCP process, steering committees are usually appointed by the permit applicant and can fulfill several roles--they can assist the applicant in determining the scope of the HCP (size of the planning area, activities to include, etc.), help develop the mitigation program and other HCP conditions, provide a forum for public discourse and reconciling conflicts, and help meet public disclosure requirements. Steering committees are particularly useful in regional HCPs, especially those in which the prospective permittee is a state or local government agency, and are recommended for these types of HCP efforts. However, they are generally not utilized for low-effect HCPs or most single landowner projects.

Ideally, a steering committee should include representatives from the applicant; state agencies with statutory authority for endangered species; state or Federal agencies with responsibility for managing public lands within or near the HCP area (including other Service program areas such as the FWS's Refuges Division); tribal interests where applicable;
affected industries and landowners (especially those with known or possible endangered species habitats); and other civic or non-profit groups or conservation organizations with an interest in the outcome of the HCP process.

For regional HCPs it is not practical to include every affected landowner or interest group on the steering committee. Instead, industry groups should be encouraged to assign a professional or trade organization to the committee to represent them--e.g., a farm bureau, cattlemen's association, or building industry association--though corporations with extensive

land holdings in the plan area may want to represent themselves. The steering committee needs to be representative, but its size must be manageable.

Another way to control numbers of participants in the HCP process is by using sub-committees. Sub-committees act as small working groups on behalf of the main committee and are an excellent means of addressing specific issues and developing specific components of the HCP. Sub-committees are more efficient than the larger steering committee for conducting certain tasks and generally help move the HCP process forward.

Prior to initiating an HCP effort, the newly-appointed steering committee may elect to develop a Memorandum of Understanding (MOU) or similar document to record "up front" the goals of the HCP, the composition of the committee, expectations of HCP participants, and other information unique to the locality or defined by the committee. Appendix 3 shows the MOU developed by participants of the Kern County, California HCP.

The question of whether to establish a steering committee may be difficult for non-governmental applicants. State or local governments typically embrace the steering committee idea early in the process because of their desire to obtain consensus from the community. On the other hand, private landowner applicants may feel that creation of a steering committee will lead to confrontation or the intrusion of outside interests into proprietary or sensitive economic matters. However, applicants should be aware of the potential benefits of a steering committee. These include identification and resolution of issues before they cause delays later in the process, development of an HCP that enjoys greater support in the community, and the cooperation of agencies or private conservation organizations that may be needed to help implement the conservation program. Permit applicants ultimately must weigh the risks of establishing or not establishing a steering committee with the expected benefits.

For large-scale or regional HCPs, one of the main functions of the steering committee is to build consensus among diverse organizations and interests, so it is important to promote good working relationships among committee participants. This does not mean that reaching agreement in complex HCP efforts will be easy! Often it is not. However, development of the HCP will be most effective when all interests in the community are represented in steering committee activities and their views and needs are given a fair hearing. A few suggestions:

- Steering committee meetings should be open to the public. This allows interested persons who do not actually sit on the committee to attend meetings, monitor progress, and generally feel they are part of the process.

- HCP participants should avoid creating an impression that they are pursuing unstated agendas or negotiating in bad faith. The trust developed between diverse and sometimes antagonistic HCP participants can be fragile, and this

impression can be damaging to a productive HCP even if untrue. Participants need to be sensitive to perception and avoid the impression of bad faith.

- The FWS and NMFS should not assign inexperienced staff to provide technical assistance to large-scale or regional HCP steering committees. This can result in mistakes, lost opportunities, and suggests to the applicants that the agencies are disinterested in the planning process. Inexperienced staff should learn the HCP process by working on small HCPs and by assisting other staff on larger efforts. If no staff have specific HCP experience, then individuals who are otherwise seasoned FWS or NMFS professionals should be assigned. If such individuals are not available, other staff should be sent to monitor HCP progress but not to actively participate. In such cases, staff sent to monitor the HCP should make clear to the applicants the limitations of their participation and resist rendering advice on important issues. However, they can and should act as liaisons to more experienced staff in the Field Office in answering questions or obtaining advice.

- The composition of the steering committee will depend on the type of HCP involved. Regional HCPs involving numerous activities and in which the applicant is a government entity ideally should include representatives from all affected interests. Steering committees for non-government HCPs can be organized according to the specific needs of the applicant, but at the least should include representatives from each permit applicant.

- A good facilitator or consultant who is skilled at moderating committee meetings, building consensus, and handling uncooperative parties can help significantly to move the HCP process forward.

4. The Services' Roles on Steering Committees & HCP Efforts.

Neither the FWS nor NMFS is required by statute or regulation to serve on HCP steering committees. Nevertheless, it is strongly advised that section 10 applicants invite the Services to participate as technical advisors on their steering committees. This will help ensure that adequate biological standards are incorporated into the HCP and that the HCP and associated documents meet procedural requirements when the permit application is

submitted. An HCP prepared in the absence of Service technical participation could be judged inadequate late in the process and unnecessary delays could result. The same caveat applies to all HCPs, regardless of size or whether a steering committee is established.

However, a careful balance needs to be drawn between constructive Service involvement in HCP efforts and overly aggressive involvement. Too little involvement can leave the impression that FWS or NMFS are disinterested or unhelpful, while too much can create the perception that the Services are inflexible in their approach to the HCP process, rigidly dictating the mitigation program.

To avoid either impression, Service HCP representatives need to understand their role and make that role clear to the applicant and the steering committee. Their function as agency representatives is to provide guidance about statutory and policy standards and to help facilitate development of a suitable mitigation program that satisfies the requirements of section 10; it is not to dictate every element in the HCP. The option to ignore or modify Service recommendations remains with the applicant; of course, doing so might result in subsequent difficulties during the permit application processing phase and the disapproval of an inadequate HCP. Service representatives at the Field Office level cannot pre-approve an HCP because section 10 permits are issued by the Regional Office (or, for NMFS, the Washington, D.C. Office), and, although advance coordination between the Field and Regional Offices should ensure their agreement on the HCP's adequacy, the permit application must still be evaluated fully during the public comment period.

The Services' steering committee members should also abstain from formal voting procedures on HCP issues if the committee conducts such votes. This will prevent confusion and reinforce the Services' proper role as advisor. Until the HCP is completed and submitted for approval, specific HCP development decisions are up to the steering committee and the applicant.

During the HCP development phase, the Services should be prepared to advise section 10 applicants on the following (regardless of whether there is a steering committee):

- Preparing the species list and identifying project scope and impacts.
- Biological studies and data needed to assess project impacts;
- NEPA requirements and the applicant's potential role in developing the NEPA analysis.
- Applicability of state endangered species law and requirements, and any other Federal laws that may be applicable, if any.

- Project modifications that would minimize take and reduce impacts, or, ideally, and with concurrence of the applicant, would generate an overall measurable net benefit to the affected species;

- Design of mitigation, habitat enhancement, or mitigation programs;

- Reserve design criteria and assistance in population viability assessments, if desired.

- Methods for monitoring HCP progress and project impacts on affected species;

- Biologically acceptable take limits and how to define them;

- Criteria to track or determine success of the HCP; and,

- Procedural and other HCP issues as requested by the committee.

5. Preparing the HCP Species List.

In many HCPs, there are one or two primary species that "trigger" the need for an incidental take permit (e.g., the northern spotted owl or salmon in the Pacific Northwest, desert tortoise in southwestern deserts, or red-cockaded woodpecker in the southeast), though other listed species may occur in the same planning areas. After the decision has been made to obtain a permit, one of the first decisions an HCP applicant must make is what species to address in the plan. Generally, permit applicants should be advised to include all federally listed wildlife species likely to be incidentally taken during the life of the project or permit. If the applicant does not address such species, it may not be possible to issue the permit (if the issuance of a more limited permit would violate section 7(a)(2) for the listed species not covered) or the project activities could be stopped or delayed after the permit has been issued if a listed species that was not addressed in the HCP is likely to be taken during project activities.

There are also advantages in addressing unlisted species in the HCP (proposed and candidate species as a minimum), particularly those that are likely to be listed within the foreseeable future or within the life of the permit. Doing so can protect the permittee from further delays--e.g., having to revise the HCP and amend the permit--should species that were not listed at the time the original HCP was approved subsequently become listed. In addition, the "No Surprises" policy (see below, Section B.5(a)), applies to listed as well as unlisted species if they are adequately addressed in the HCP.

The more species addressed in the HCP, the more potentially complicated the HCP may become. For example, in most state systems, primary jurisdiction over candidate species rests with the affected State fish and wildlife agency, thereby increasing the advisability of

that agency's participation in the HCP process. Thus, selecting the species list can become an exercise in balancing the need to obtain maximum regulatory certainty, with practical considerations such as manageability, availability of biological information, and cost. The Services should be prepared to advise the applicant about which listed species should be highest priority in the HCP, which unlisted species are most likely to be listed in the future, and which species, listed or unlisted, can otherwise be advantageously addressed in the HCP. Ultimately, the decision about what species to address in the HCP lies with the applicant. In any case, the species list should be developed and agreed upon early in the HCP process, since it forms much of the basis for future plan development.

When preparing the species list the applicant should be informed that the ESA generally does not prohibit the incidental take of federally listed plants. Nevertheless, the Services should encourage the applicants to consider including listed plants in HCPs because, although incidental take of plants may not be prohibited by section 9, the section 7(a)(2) prohibition against jeopardy does apply to plants. If the section 7 consultation on a section 10 permit application concludes that issuance of the HCP permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To avoid this outcome, the applicant should ensure that actions proposed in the HCP are not likely to jeopardize any federally listed plant species. In addition, not all species under the jurisdiction of NMFS listed as threatened are subject to the section 9 take prohibitions. Such prohibitions are applied through regulation, on a case-by-case basis. Therefore, an incidental take permit may not be required for these species. Specific regulations are provided at 50 CFR Part 227.

6. Involving Other Federal and State Agencies.

During the development stage of an HCP, the Services will provide technical assistance and information concerning regulatory and statutory requirements to the applicants to ensure completeness of the application. Throughout this developmental process, the Services will encourage applicants to invite and include other Federal and State agencies who can utilize their existing authorities, expertise, or lands, in support of the HCP development and implementation process. It is particularly important to encourage participation of other Federal and State agencies that manage nearby lands into the HCP development process, if the applicant is willing to do so. However, the Service must ensure that activities are not identified in the HCP that obligate other agencies to conduct mitigation or minimization activities for species covered by the HCP, unless specifically negotiated with the agency, and the agency was a partner in the development and implementation of the HCP.

The "No Surprises" policy, which provides the applicant with regulatory certainty, calls for the Services to assist with correcting any unforeseen circumstance that may arise. This means that in the face of unforeseen circumstances the FWS and NMFS will not require additional mitigation in the form of additional lands or funds from any permittee who is adequately implementing or has implemented an approved HCP. Once the permit is issued and its terms

are being complied with, the applicant will not be required to accept additional obligations of this type. The policy also protects the permittee from other forms of additional mitigation except in cases where "extraordinary circumstances" exist.

The Services can, however, encourage other Federal or State agencies to assist with any unforeseen circumstances. Other agencies will be better able to assist if they have been involved throughout the entire HCP development. Any Federal or State agency that could ultimately be affected by the implementation of an HCP will be notified during the developmental process, and once the HCPs are completed and the incidental take permit is issued the Services will provide copies to the affected agencies. This will help these agencies effectively manage their lands in a way that could support the HCP and promote the conservation and recovery of listed and unlisted species.

7. Treaty Rights and Trust Responsibilities.

A unique and distinctive relationship exists between the United States and Native American Tribes, as defined by treaties, executive orders, statutes, court decisions, and the United States Constitution. This relationship differentiates tribes from other entities that deal with, or are affected by, the Federal government.

Indian tribes are recognized under Federal law as separate sovereigns with governmental rights over their lands and people. These governmental rights and authorities extend to natural resources that are reserved by or protected in treaties, executive orders, and Federal statutes. Such reserved rights may include off-reservation rights to hunt, fish, or gather trust resources.

The United States has a Federal trust obligation towards Indian tribes to preserve and protect these rights and authorities. The Federal Indian trust responsibility is a legal enforceable fiduciary obligation, on the part of the United States, to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian tribes and Alaskan Natives.

During habitat conservation planning negotiations with non-Federal landowners, the Services must consider whether proposed plans might affect tribal rights to trust resources. Whenever the Services have a reasonable basis for concluding that such effects might occur, they must notify the affected tribes and consult government to government in a meaningful way. Consultation with the affected tribe shall be completed within a timely manner. After careful consideration of the tribe’s concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the government’s trust responsibilities. In light of this obligation, it is important that the Services identify and evaluate during the planning process, any anticipated effects of a proposed HCP upon Indian trust resources.

B. Developing the HCP

1. Mandatory Elements of an HCP.

Under the Endangered Species Act [Section 10(a)(2)(A)] and Federal regulation [50 CFR 17.22(b)(1), 17.32(b)(1), and 222.22], a conservation plan submitted in support of an incidental take permit application must detail the following information.

- Impacts likely to result from the proposed taking of the species for which permit coverage is requested;

- Measures the applicant will undertake to monitor, minimize, and mitigate such impacts; the funding that will be made available to undertake such measures; and the procedures to deal with unforeseen circumstances;

- Alternative actions the applicant considered that would not result in take, and the reasons why such alternatives are not being utilized; and,

- Additional measures FWS or NMFS may require as necessary or appropriate for purposes of the plan.

Each of these conservation plan elements are discussed in detail in the sections below. NMFS regulations (50 CFR 222.22) also require a list of all sources of data used in preparation of the plan.

Section 10 HCP requirements and permit issuance criteria must be clearly explained to any prospective permit applicant at the outset of an HCP effort. This is essential to ensure that the applicant understands the HCP process and that the HCP is developed within required legal parameters.

2. Identifying Project Impacts.

Four subtasks must be completed to determine the likely effects of a project or activity on federally listed or candidate species: (a) delineation of the HCP boundaries or plan area; (b) collection and synthesis of biological data for species to be covered by the HCP; (c) identifying activities proposed in the plan area that are likely to result in incidental take; and (d) quantifying anticipated take levels. To help expedite the section 7 process, the HCP should also assist the Services in: (e) satisfying the requirements of section 7 of the ESA; (f) addressing significant indirect effects of the project on federally listed species, if any; (g) addressing jeopardy to federally listed plants, if anticipated; and (h) addressing effects on critical habitat, if any. Section 7 should be addressed as early as is practicable in the HCP development process.

a. Delineation of HCP Boundaries. HCP boundaries should encompass all areas within the applicant's project, land use area, or jurisdiction within which any permit or planned activities likely to result in incidental take are expected to occur. HCP boundaries should also be as exact as possible to avoid later uncertainty about where the permit applies or where permittees have responsibilities under the HCP. For low-effect and many other HCPs, the plan area is usually synonymous with the project or land use site or the landowner's property. For regional HCPs, the size and configuration of the plan area will depend on various factors. Sometimes a regional HCP boundary will simply be a county line because a county government is the applicant. In other cases, it will be drawn to deliberately include or exclude certain areas or activities, depending on the participants' objectives [see Section B.2(c) below].

Generally, HCP applicants should be encouraged to consider as large and comprehensive a plan area as is feasible and consistent with their land or natural resource use authorities. Regional and other large-scale HCPs allow the permittee to address a broad range of activities and to bring them under the "umbrella" of the permit's legal protection. They also allow analysis of a wider range of factors affecting listed species, maximize flexibility needed to develop innovative mitigation programs, and minimize the burden of ESA compliance by replacing individual project review with comprehensive, area-wide review.

On the other hand, considering a large and complicated planning area has its own potential difficulties. Attempts to satisfy too many land use or endangered species issues in one effort can be frustrated by excessive complexity, shortages of biological information, and difficulties in securing the consensus of HCP participants. However, these are judgment calls, and the final size and configuration of an HCP planning area will often be a compromise between the need to be as comprehensive as possible and the inherent risks of an over-extended, protracted HCP effort.

Regional HCPs sometimes can be simplified by dividing the planning area into separate planning units with different conditions and requirements for each area. This approach was adopted in the San Bruno Mountain HCP. Coordination with individual landowners and local land use authorities will help determine when subdivision of a plan area will yield substantial advantages.

In any case, neither the ESA nor its implementing regulations limits the size of an HCP planning area. No matter how large or small, HCP areas are acceptable so long as the HCP is statutorily complete and meets the section 10 issuance criteria. With respect to small projects, the FWS section 10 regulations state that, "The Service believes that Congress did not intend to exclude projects from the incidental take provisions of section 10(a) merely because the projects were of more limited duration or geographical scope [than the San Bruno Mountain HCP]" (50 FR 39681-39691).

The HCP plan area might also include areas necessary for the mitigation. The exception to this general rule may be where the mitigation consists of reserves apart from the area in which incidental take is authorized. This will entail various considerations--e.g., the distance from permitted activities to reserve areas (see below, Section B.2(c)) and the ability of the permit applicant or its designee to regulate activities inside the reserve. Private, state, or locally-owned lands should never be considered for inclusion in HCPs as reserves without the concurrence of the landowners or their representatives.

b. Collection and Synthesis of Biological Data. Preparing an acceptable HCP requires the availability of up-to-date biological information on the species being considered within the plan area. First, the applicant should collate and review existing information about species distribution, occurrence, and ecology. FWS or NMFS can assist in this process by directing the applicant to available information. Second, the applicant should determine whether the available information is adequate to proceed with the planning process. If not, FWS or NMFS should recommend the type, scope, and design of biological studies that can reasonably be developed to support the HCP. However, research efforts on behalf of an HCP should be confined to distribution studies or other studies with a direct bearing on the needs of the HCP. Permit applicants should not be expected to undertake studies that do not directly affect the outcome of the HCP. Determining the availability of existing information is especially important for regional HCPs, since they may involve species whose biology is not well known. Low-effect HCPs typically will not require additional studies beyond surveys needed to determine the distribution of the species within the plan area.

Another approach to consider for HCPs is habitat-based HCPs (see Chapter 3, Section C.1) in which the presence of a particular species can be assumed based on the presence of its habitat type; if that habitat type is then addressed in the HCP and included in the mitigation program, additional distribution studies may not be necessary.

c. Determination of Proposed Activities. The applicant should be encouraged to include in the HCP a description of all actions within the planning area that: (1) are likely to result in incidental take; (2) are reasonably certain to occur over the life of the permit; and (3) for which the applicant or landowner has some form of control. For many HCPs, this will usually involve a specific well-defined project (e.g., home construction; water use development) or land use activity (e.g., forestry). For regional and other large-scale planning efforts, the applicants will need to determine what activities they wish to include in the HCP and, if necessary, which ones they wish to exclude. Generally, applicants should be encouraged to include as comprehensive a set of activities in the HCP as is practicable. This will maximize the permittee's long-term planning assurances, broaden legal coverage, and minimize the possibility that some future activity will not be covered by an issued permit.

What is being authorized in a section 10 permit is incidental take, not the activities that result in the take. Similarly, a violation of the permit occurs only if the amount or extent of authorized take is exceeded or if the terms and conditions of the HCP or the permit are not

implemented, not necessarily because some unspecified activity has occurred. The legality of an incidental take occurring during a specific activity will depend on how the HCP is structured. In some regional HCPs, the permit may specify that a certain number of habitat acres may be modified during construction activities, but the specific types of construction are unspecified--in which case the construction type *per se* would not affect the legality of any resulting incidental take. However, other HCPs may analyze incidental take in the context of a specified activity to be conducted across the HCP area, such as forest management. In such cases, incidental take is only authorized in association with specifically analyzed activities.

Even in the former case, an activity type that is not implicitly or explicitly covered by an HCP should not be allowed to "use" portions of the incidental take authorization at the expense of activities that are described. Unless broadly defined types of activities are described in the HCP (e.g., timber harvest, agriculture, or construction activities), then incidental take occurring during such activities within the plan area generally would not be authorized. In any case, the specificity with which activities are described in the HCP will depend on the applicant's objectives. They should be sufficiently described (as included or excluded) that the permittee or landowners subject to the permit can determine the applicability of the incidental take authorization to the activities they undertake.

Determining appropriate activities to include in the HCP can involve the same considerations as those described in Section B.2(a) concerning the HCP boundary. Here again the desire for a comprehensive HCP must be balanced against the risk of over-complicating the plan. Also a factor is the willingness of any particular group to participate in the HCP process. No group can be forced to participate. <u>Of course, not participating in the responsibilities of the HCP also means not enjoying the benefits of protection from the incidental take prohibition and regulatory streamlining.</u>

In some cases, specific landowners or industries may be reluctant to become involved in the HCP process. In such cases, Service representatives should assist the remaining participants in good faith, while encouraging "sideliners" to observe the benefits of the program. Of course, "non-participants" should understand that if their activities are not addressed in the HCP, either specifically or generically, they will not be covered by the incidental take permit. Moreover, if the permit applicant is a state, regional, or local governmental agency, "non-participants" may ultimately be affected by the terms and conditions of an HCP once the permittee begins to implement the HCP through the exercise of its regulatory powers. In other cases, a landowner may elect not to participate in an HCP for other reasons--for example, if they are negotiating a separate agreement or are operating under an existing permit.

These factors can result in HCPs with unusual inclusions and exclusions. For example, in the Metropolitan Bakersfield HCP in California, oil development activities are specifically excluded from the planning area but are proposed for inclusion in the Kern County HCP,

which overlays the Bakersfield HCP (see Appendix 3). Sometimes a new HCP will overlay multiple existing HCPs, or some applicants may elect to pursue an HCP on their own even though a regional HCP is being developed in the same area. Also, more than one regional HCP may occur near each other within the same bio-regional province, or two such HCPs may occur within the range(s) of the same species. Such inclusions and exclusions are perfectly acceptable. Nevertheless, participants should be aware of coordination problems that can develop between HCPs in these types of cases. For example, it is important to ensure that mitigation programs for the same species are identical in adjacent HCPs. Also, the Services should not issue more than one permit for identical activities in the same area at the same time, since this could result in two differing sets of conditions for the same activities. In cases where a new HCP overlays an existing one, neither the Services nor the new permit-holder can force existing permittees to adopt conditions of the new permit without their consent--(however, there may be exceptions, such as when the new permittee is a state or local government with its own regulatory authority). Generally, however, the Services will not seek additional mitigation from existing HCP permit holders for the same activities affecting the same species under a broad regional plan.

d. Determining Anticipated Incidental Take Levels. In determining the amount of incidental take that will be authorized during the life of the permit, three things must be determined: (1) how incidental take will be calculated; (2) the level of incidental take and related impacts expected to result from proposed project activities; and (3) the level of incidental take that the section 10 permit will actually authorize.

The first depends on the ability of HCP participants to determine, to the extent possible, the number of individual animals of a covered species occupying the project or land use area or the number of habitat acres to be affected. Depending on this information, proposed incidental take levels can be expressed in the HCP in one of two ways: (1) in terms of the number of animals to be "killed, harmed, or harassed" if those numbers are known or can be determined; or (2) in terms of habitat acres or other appropriate habitat units (e.g., acre-feet of water) to be affected generally or because of a specified activity, in cases where the specific number of individuals is unknown or indeterminable. The latter is typically expressed as all individuals occupying a given area of habitat, in whatever habitat unit is being used.

The next aspect depends on the number of animals or habitat units that occur in the project or planning area, and the likelihood that any given activity will result in take. This can be determined by first "overlaying" data on proposed activities--often in the form of maps--with biological data compiled from existing sources and collected in the field by the applicant. When this is completed, the effects of particular activities on species occupying project areas can be analyzed.

Under Federal regulation (50 CFR 17.3), "harm" in the definition of take can include "significant habitat modification or degradation where it actually kills or injures wildlife by

significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." Therefore, habitat modification or destruction, to the extent the above effects occur, can constitute take and must be detailed in the HCP and authorized by the permit.

"Harassment" is defined by regulation as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." As with "harm," any action qualifying as harassment under this definition must be described in the HCP and authorized by the permit (see Chapter 7, Section B.1).

After expected take levels have been estimated based on a comparison of proposed activities with species distribution in the plan area, the applicant and the Services can begin to determine the final outcome of the HCP. In general terms, this is done by determining what incidental take levels can be authorized that are consistent with the section 10 issuance criteria (i.e, that will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild"), and developing a mitigation program that is also consistent with the issuance criteria (i.e., that will minimize and mitigate "to the maximum extent practicable"). If, in the Services' judgment, initially anticipated incidental take levels exceed what can be permitted under the section 10 issuance criteria, additional take avoidance and other mitigation measures must be developed.

These processes--determining anticipated incidental take, development of the mitigation program, and establishing authorized incidental take levels--are dynamic and do not necessarily occur in consecutive order as the above description might infer.

e. Coordinating the HCP With Section 7 of the ESA. Section 7(a)(2) of the ESA requires all Federal agencies "in consultation with and with the assistance of the Secretary" to ensure that "any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. The section 7 implementing regulations (50 CFR Part 402) require, among other things, analysis of the direct and indirect effects of a proposed action, the cumulative effects of other activities on listed species, and effects of the action on critical habitat, if applicable.

Consultation under section 7 of the ESA is the Federal agency's responsibility, not the applicant's. In the case of issuance of a section 10(a)(1)(B) permit, FWS or NMFS must conduct an intra-Service (or internal) consultation to ensure compliance of permit issuance with the provisions of section 7. However, although the consultation responsibilities is not the permit applicants, the applicant should help ensure that those considerations required of the Services by section 7 have been addressed in the HCP. Otherwise, the Services' section 7 consultation on proposed permit issuance might result in a jeopardy or adverse modification finding with respect to indirect or cumulative effects, listed plants, or critical habitat if the HCP has inadequately considered these issues.

However, despite these additional considerations, in most cases the applicant will not actually experience a significant increase in responsibilities under the HCP because of the Services' associated section 7 responsibilities. This is because there are relatively high thresholds under section 7 (i.e., jeopardy), and many of the same relevant biological considerations are already integrated into the HCP process [see Sections B.2(f)-(h) below].

In many cases, the procedural aspects of the section 7 consultation are more important to the applicant's interests than its substantive outcome. In the past, some have viewed the section 7 consultation for a section 10(a)(1)(B) permit as an independent review process that occurs after the HCP has been prepared and during the permit application processing phase. However, this approach left the permit applicant with no guarantee that the process of meeting the requirements of section 10(a)(1)(B) would result in issuance of the permit, since a section 7 consultation conducted late in the process could result in the discovery of unresolved issues, the return of an inadequate HCP to the applicant, or a jeopardy biological opinion.

To avoid this, it is now Service policy to begin integrating the section 7 and section 10 processes from the beginning of the HCP development phase, and to regard them as concurrent and related, not independent and sequential, processes.

In procedural terms, this means that considerations of section 7 consultation requirements should start at the beginning of the HCP development phase, not during the permit processing phase. It also means that if the Services and the applicant work together to develop an adequate HCP--one that meets the section 10 issuance criteria as well as the Services' applicable section 7 standards--then a "no jeopardy" biological opinion at the close of the section 7 consultation should be virtually assured. Service representatives should explain to HCP applicants at the outset of any HCP effort the Services' section 7 obligations, how those obligations affect the applicant, and how the two processes (sections 7 and 10) will be integrated.

f. Addressing Indirect Project Effects. In some cases, it may be determined that activities being considered in an HCP would be likely to result in indirect effects to listed species. The implementing regulations of section 7 of the ESA define indirect effects as "those that are caused by the proposed action and are later in time, but still are reasonably certain to occur." In the HCP context, this would typically mean that activities under the HCP are expected to affect species outside the HCP plan area, or species that are inside the plan area but are not otherwise directly covered by the terms of the HCP. If expected indirect effects are serious enough to result in jeopardy or result in adverse modifications to critical habitat, and they have not been adequately treated in the HCP, the Services would have to deny the permit. Thus, indirect effects issues must be treated carefully during any HCP negotiation process.

From a practical standpoint, one problem is that large-scale projects of the type addressed in many HCPs can have "ripple" effects that continue long past their point of origin. Following

a causation chain of indirect effects from their point of origin to some specific effect, or vice versa, can be difficult, and assigning responsibility for all potential subsequent effects to the originator of a particular action may not be justified or practical.
For example, some species addressed in HCPs occupy small habitat areas or have narrow habitat requirements and are therefore unusually vulnerable to biotic and abiotic factors such as fire, vegetation succession, predation, and interspecific competition. In these cases, human alteration of the landscape in and around such habitats can have heightened adverse effects or specific indirect effects that must be addressed if the habitats are to be considered viable and affected populations are to persist. A good example is development in endangered beach mice habitat, which results in increased pet populations and then increased predation on beach mice. The HCP in such cases must address these types of effects. In the southeast, for example, some approved HCPs have been predicated on the successful control of post-project, human-induced effects on endangered species populations that remain or are protected after development of adjacent areas. Permittees have agreed to provide funding to control predators and competitors of listed species, nuisance or exotic vegetation, or pollution, and to meet education and information needs in the local community.

With these considerations in mind, the following guidance is provided about how to address indirect effects issues in HCPs. If a species is likely to be jeopardized as a result of the indirect effects of activities proposed in an HCP, the Services may not issue the permit unless these effects are adequately addressed. However, before an HCP is required to contain additional requirements to adequately address indirect effects under section 7: (1) the risk of jeopardy should be clear and reasonably certain to occur; and (2) the indirect effects in question must be reasonably foreseeable and a proximate consequence of the activities proposed under the HCP. The standard for imposing additional requirements on an HCP is the likelihood of jeopardy, not just the existence of indirect effects.

g. Consideration of Plants in the HCP and Permit. The take prohibition for federally listed plants under the ESA is more limited than for listed animals. Section 9(a)(2)(B) prohibits the removal of listed plants or the malicious damage of such plants on areas under Federal jurisdiction, or the destruction of listed plants on non-Federal areas in violation of state law or regulation. Thus, the ESA does not prohibit the incidental take of federally listed plants on private lands unless the take or the action resulting in the take is a violation of state law (which in most cases eliminates the need for an incidental take permit for plants).

Nevertheless, the Services recommend that permit applicants consider listed plants in HCPs. This is because the section 7(a)(2) prohibition against jeopardy applies to plant as well as wildlife species; and if the section 7 consultation on a section 10 permit application concludes that issuance of the permit for wildlife species would jeopardize the existence of a listed plant species, the permit could not be issued. To avoid this outcome, the applicant should ensure that actions proposed in the HCP are not likely to jeopardize any federally listed plant species.

However, if it is determined that the proposed HCP is not likely to jeopardize the continued existence of any federally listed plant species, then any such plants present within the HCP area that are on private or other non-Federal lands are protected against incidental take only to the extent that state law applies. Beyond that the applicant has no further responsibility with respect to listed plants. In the spirit of the conservation planning process, however, the Services will encourage applicants to address endangered or threatened plants in their HCPs.

Although take of listed plants does not require a section 10 permit in most cases, the names of any plants addressed in the HCP can be placed on the permit at the request of the applicant when it is issued. This might be done: (1) because a particular plant is protected by state law and is subject to the section 9 take prohibition; or (2) to protect the permittee's interests should the legal status of any plant change during the life of the permit as a result of changes to the ESA. This approach is acceptable and is encouraged if the permit applicant requests it or it otherwise increases the applicant's confidence in the long-term assurances under the permit. It is also consistent with the treatment of unlisted wildlife species in section 10 permits as described in Chapter 4.

h. Addressing Effects on Critical Habitat. Section 7(a)(2) prohibits the "destruction or adverse modification" of designated critical habitat by any action authorized, funded, or carried out by a Federal agency. The section 7 regulations define "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." The regulations for section 4 of the ESA (50 CFR 424.12) describe the "constituent elements" of critical habitat as "those that are essential to the conservation of the species" including, but not limited to, "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."

Thus, in issuing section 10 permits, the Services must ensure that the constituent elements of critical habitat will not be altered or destroyed by proposed activities to the extent that the survival and recovery of affected species would be appreciably reduced. However, these section 7 obligations typically impose few restrictions on the HCP applicant in addition to those required by section 10, because the section 10 issuance criteria also prohibit appreciably reducing the "likelihood of the survival and recovery of the species in the wild" [section 10(a)(2)(B)]. In other words, the inherent biological value of areas designated as critical habitat typically would prevent significantly greater alteration of their constituent habitat elements under section 10 than would be permissible under section 7. Nevertheless, to the extent that a proposed HCP might result in impacts to critical habitat, such impacts should be described and evaluated in the biological opinion concluding section 7 consultation on the permit application.

Some HCPs encompass areas that have been or have the potential to be designated as critical habitat. To fulfill the Service’s section 7 compliance responsibilities, all HCPs must be

reviewed to determine whether they are likely to jeopardize the continued existence of the species or cause adverse modification to designated critical habitat. The Services will provide technical assistance and work closely with the applicant throughout the development of the HCP to reduce the probability of developing an HCP that would not meet these criteria.

It is possible to approve an HCP that authorizes land use or development activities within an area designated as critical habitat. The activities approved under an HCP could include a variety of land or natural resource use activities that modify critical habitat on a large scale without the activities being deemed an adverse modification contrary to the requirements of section 7(a)(2). The authorization of activities in critical habitat through the HCP process is possible because the adverse modification of critical habitat is analyzed by determining the effects on the entire area designated as critical habitat or an administrative part or unit of the critical habitat, not on a smaller scale of particular individual acres. In addition, the HCP permittee must minimize and mitigate for any effects caused by the authorized activity, which would offset or reduce the significance of adverse effects to the critical habitat. Thus, the overall net affect of authorized land use activities for a particular HCP can be brought within the range of effects which is allowable under section 7.

3. Mitigation Programs & Standards.

Mitigation programs under HCPs and section 10 permits are as varied as the projects they address. Consequently, this handbook does not establish specific "rules" for developing mitigation programs that would limit the creative potential inherent in any good HCP effort. On the other hand, the standards used in developing HCPs must be adequate and consistent regardless of which Service office happens to work with a permit applicant. Mitigation programs should be based on sound biological rationale; they should also be practicable and commensurate with the impacts they address. This section sets forth some fundamental standards for mitigation programs and suggests some broad mitigation strategies, but leaves the development of specific programs to individual applicants and Service personnel.

Mitigation actions under HCPs usually take one of the following forms: (1) avoiding the impact (to the extent practicable); (2) minimizing the impact; (3) rectifying the impact; (4) reducing or eliminating the impact over time; or (5) compensating for the impact. For example, project effects can be (1) avoided by relocating project facilities within the project area; (2) minimized through timing restrictions and buffer zones; (3) rectified by restoration and revegetation of disturbed project areas; (4) reduced or eliminated over time by proper management, monitoring, and adaptive management; and (5) compensated by habitat restoration or protection at an onsite or offsite location. In practice, HCPs often use several of these strategies simultaneously or consecutively. Other types of mitigation not mentioned may also be used.

a. Regulatory Standards & Relationship to Recovery.

Issuance criteria under section 10 of the ESA require that the HCP applicant "minimize and mitigate" the impacts of any incidental taking authorized by a section 10 permit, and that issuance of the permit not "appreciably reduce the likelihood of the survival and recovery of the species in the wild" (see Chapter 7). Section 7(a)(2) of the ESA requires that issuance of a permit does not "jeopardize the continued existence of" any federally listed species, or result in "destruction or adverse modification" of designated critical habitat. The implementing regulations of section 7 define "jeopardize" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the species in the wild by reducing the reproduction, numbers, or distribution of that species"--this is essentially identical to the section 10 issuance criterion cited above. Section 7(a)(2) also requires use of "the best scientific and commercial data available" in fulfilling its provisions. No other specific mitigation standards for HCPs are specified under the ESA.

Issuance of a section 10 permit must not "appreciably reduce" the likelihood of the survival <u>and</u> <u>recovery</u> of the species in the wild. Note that this does not explicitly <u>require</u> an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan. This reflects the fact that HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools.

However, recovery is nevertheless an important consideration in any HCP effort. This is because, some HCPs may encompass all or much of a species' range and address crucial biological issues; because of the inherent biological significance of such planning areas, a poorly designed HCP could readily trigger the "appreciably reduce" or "jeopardize" standard. Second, many HCPs, even smaller ones, can be said to contribute to recovery to the extent that individually or collectively they provide for dependable conservation actions and long-term biological protections. Thus, contribution to recovery is often an integral product of an HCP, but it is not an explicit statutory requirement.

To put this in practical terms, applicants should be encouraged to develop HCPs that produce a net positive effect for the species or contribute to recovery plan objectives. The Services should also assess the extent to which an HCP's mitigation program is consistent with recovery plans. In general, conservation plans that are not consistent with recovery plan objectives should be discouraged.

Similarly, HCPs that might preclude a significant recovery option, unless they otherwise contribute substantially to the goal of recovery should also be discouraged. In cases where a recovery plan is not available, the Services must use other available biological information and its best judgement to encourage the development of HCPs that would aid in a species' recovery.

b. <u>Must An HCP Benefit the Species</u>?

Whether or not an HCP must benefit a species is similar to its relationship to recovery objectives. No explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species. However, just as they can contribute to recovery, HCPs can also benefit the species they address because of the conservation programs they establish and the long-term assurances they provide. This is especially true of regional and other large-scale HCPs that address all or much of a species' range. Wherever feasible, the FWS and NMFS should encourage HCPs that result in a "net benefit" to the species.

c. Mitigation for Habitat Loss.

Activities conducted under HCPs frequently involve permanent habitat losses (or temporary habitat disturbances), for which the permittee mitigates by acquiring or otherwise protecting replacement habitat at an onsite or offsite location. Commonly referred to as "habitat mitigation," this strategy is acceptable under the HCP process so long as such mitigated habitat losses are consistent with the section 10 issuance criteria.

One form of habitat mitigation is the "habitat bank" approach, in which habitats are "banked" (protected through conservation easement or other means) prior to a project. These lands are then utilized as needed for mitigation purposes. A variation on this scheme is the "mitigation credit" system--in which "banked" habitats are established as "credits" (usually on a per-acre basis), and the habitat banker then uses the credits as needed or sells them to other parties requiring mitigation lands at a fair market price. The latter system has considerable promise as a mitigation strategy because: (1) it allows owners of endangered species habitat to derive economic value from their land as habitat; (2) it allows parties with mitigation obligations to meet their obligations rapidly (mitigation lands are simply purchased as credits); and (3) the mitigation lands are provided prior to the impact (eliminating uncertainty about whether a permittee might fail to fulfill the HCP's obligations after the impact has occurred). Still another approach is the "mitigation fund," in which a permittee pays a cash amount as determined by the HCP into an account administered by a suitable entity, and where other such contributions are pooled into a habitat acquisition fund.

The type of mitigation habitat and its proximity to the area of impact will need to be considered. Generally, the location of replacement habitats should be as close as possible to the area of impact; it must also include similar habitat types and support the same species affected by the HCP. However, there may be good reason to accept mitigation lands that are distant from the impact area--e.g., if a large habitat block as opposed to fragmented blocks can be protected or if the mitigation lands are obtained through a mitigation fund. Ultimately, the location of mitigation habitat must be based on individual circumstances and good judgement.

Potential types of habitat mitigation include, but are not limited to: (1) acquisition

of existing habitat; (2) protection of existing habitat through conservation easements or other legal instruments; (3) enhancement or restoration of disturbed or former habitats; (4) prescriptive management of habitats to achieve specific biological characteristics; and (5) creation of new habitats. Here again, the specific strategy or combination of strategies used will depend on the species and type of habitat involved. In some cases, acquisition of high-quality existing habitat will be the best approach--for example, where the habitat type takes years to develop (e.g., old-growth forest). However, if such habitat is continually being lost, a strategy based on this method alone could result in net loss of habitat value. In other cases, restoring degraded habitat or creating new ones is the best strategy--for example, where the habitat type is relatively easy to manipulate (e.g., grasslands). Where affected species depend on natural disturbance regimes that can be replicated through management regimes (e.g., prescribed fire or flooding), prescriptive management may be preferable to habitat acquisition or protection alone.

Certain caveats may apply to these strategies, however. For example, when a mitigation program involves creation of new habitat or restoration of degraded habitats, HCP participants should ensure that techniques used are proven and reliable or, if relatively new, that contingency measures or adaptive management procedures are included to correct for failures.

Sometimes, the HCP applicant may need to conduct activities prior to the time when replacement habitats can be provided. This is acceptable so long as the HCP provides legal or financial assurances that the permittee will fulfill the HCP's obligations. One way to accomplish this is through Letters of Credit controlled by the government until the mitigation lands have been provided. Another method is requiring a specified cash payment into a mitigation fund prior to commencement of HCP activities. However, such payments alone are not regarded as acceptable mitigation. Unless the fund is ultimately used and habitat is otherwise acquired. Mitigation funds have often been used in regional HCPs in which the responsible party for habitat mitigation under the HCP is a state or local government agency. Other examples are mitigation funds or other well-established mitigation programs utilized by small-landowners [see below, Section B.3(d)]. In such cases, the responsibilities of individual contributors may end with the payment, and any additional performance requirement would either be waived or would belong to the permitted agency.

One common issue raised during HCP negotiations is how long mitigation lands must be conserved. When habitat losses permitted under an HCP are permanent, protection of mitigation lands normally should also be permanent (i.e., "in perpetuity"). Mitigation for temporary habitat disturbances can be treated more flexibly; however, management logistics and other considerations may still dictate permanent mitigation for temporary impacts, though typically at a lesser rate than for permanent ones.

d. Funding Recovery Measures as Mitigation.

Another issue in cases where habitat is lost during HCP activities is whether funds contributed for purposes other than habitat acquisition or protection--e.g., species research--can serve as habitat mitigation. First and foremost, mitigation should address compensate for habitat lost through the permitted activities of the HCP by establishing suitable habitat for the species that will be held in perpetuity, if possible. For example, the mitigation requirement for low-effect HCPs that have a negligible effect on habitat could be to enhance existing habitat so that it meets the species' requirements. Generally, research is not considered a preferred mitigation strategy, since the type of mitigation is usually related directly to the type of effect.

It is acceptable in some cases for funding to be provided to State or Federal agencies to implement recovery actions within critical habitat, to restore degraded habitat, to address anthropogenic influences, and for conservation actions on larger, more secure populations of the affected species on public lands. In some cases, matching Federal/private funding has been developed under HCPs for such purposes.

e. Mitigation for Small-Scale, Low-Effect Projects.

It is important that methods be established by state and Federal wildlife agencies and other organizations that allow proponents of small projects or small-scale land use proposals to participate in larger HCPs, or that make convenient mitigation strategies accessible to low-effect HCPs. For example, it is often difficult for an individual to locate and acquire a few acres of mitigation habitat, since lands are usually sold by the lot or in large segments. A good way to accommodate this problem is to establish mitigation fund accounts that accumulate funds until relatively large-scale acquisitions can be effected [see above, Section B.3(c)]. Habitat banks are another good way to handle this situation. Avoid requiring permittees to meet habitat mitigation requirements without a practical, accessible means of meeting that requirement. In general, flexibility is needed in addressing the unique circumstances often associated with small landowners and small-scale, low-effect HCPs.

f. Consistency in Mitigation Standards.

Mitigation measures required by individual FWS or NMFS offices should be as consistent as possible for the same species. This can be challenging when a species encompasses multiple offices or regions, but is essential. The first step is good communication between offices. The next is establishment of specific standards--e.g., for survey methods, buffer zones, or mitigation methods--and consistent implementation of those standards. Field Offices should coordinate these standards between biologists in the same office; Regional Offices should ensure consistency among Field Offices. Mitigation standards should also be developed in coordination with state wildlife agencies. The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained. Consistent mitigation strategies help streamline the

HCP development process--especially for smaller HCPs--by providing readily available standards which applicants can adopt in their HCPs.

g. Adaptive Management.

The Services often incorporate adaptive management concepts into the HCP process to minimize the uncertainty associated with listed or unlisted species where there are gaps in the scientific information or their biological requirements. Over the years, there has been an increase in the diversity and geographical size of HCPs. As of late 1995, most HCPs approved were for planning areas of less than 1,000 acres. However, of the 200 HCPs being developed as of early 1996, approximately 25 exceed 10,000 acres, 25 exceed 100,000 acres, and 18 exceed 500,000 acres. This suggests that HCPs are evolving from a process developed primarily to address single developments to broad-based, landscape level planning tools utilized to achieve long-term conservation goals for listed and unlisted species, while allowing applicants to proceed with their land use and development.

For some species, not all of the scientific information needed to develop comprehensive long-term conservation strategies to conserve species may be available at the time of HCP development. Where these data gaps occur, not all of the questions regarding the long-term effects of implementing these HCPs can be answered. When significant uncertainty exists, it can be addressed through the incorporation and implementation of adaptive management measures into HCPs. For those HCPs with significant uncertainty, incorporating adaptive management provisions into the HCP becomes important to the planning process and the long-term interest of affected species. For example, an applicant's commitment to conduct watershed analyses (scientifically examining the conditions within watersheds and making site-specific recommendations) and then adjusting management strategies based on the results of the analyses for part or all of their lands is one form of adaptive management that has been applied to HCPs in the Pacific Northwest.

Through adaptive management, the biological objectives (or goals) of a conservation strategy are defined using techniques, such as models of the ecological system that includes its components, interactions, and natural fluctuations. If existing data makes it difficult to predict exactly what mitigation is needed to achieve a biological objective, then an adaptive management approach can be used in the HCP. The primary reason for using adaptive management in HCPs is to allow for changes in the mitigation strategies that may be necessary to reach the long-term goals (or biological objectives) of the HCP, and to ensure the likelihood of survival and recovery of the species in the wild. Under adaptive management, the mitigation activities of the HCP could be monitored and analyzed to determine if they are producing the required results (e.g., properly functioning riparian habitats). If the desired results were not being achieved, then adjustments in the mitigation strategy could be considered through an adaptive management clause of the HCP.

Research can fill data gaps and/or test the effectiveness of management and mitigation strategies, which can then be modified as new information is obtained. Adaptive management, if used, can provide a reliable means for assessing the mitigation and minimizing strategies outlined in HCPs, producing better ecological knowledge, and developing appropriate modifications that would improve the mitigation strategy for a species.

The base mitigation strategy or initial minimization and mitigation measures which are implemented must be sufficiently vigorous so that the Service may reasonably believe that they will be successful. An adaptive management approach is particularly useful when significant questions remain regarding an HCP's initial mitigation strategy. The Services should not approve an HCP using conservation strategies that have a low likelihood of success.

Monitoring is an important tool in an adaptive management approach and should be designed in a way that ensures data will be properly collected, analyzed, and used to adjust mitigation strategies, as appropriate. A key element of adaptive management is the establishment of testable hypotheses linked to the conservation strategies and their biological objectives. If monitoring determines that biological conditions are outside specific parameters or thresholds, which are defined in the HCP, the conservation strategies should be reviewed. The "thresholds" for review should be linked to key elements of the HCP and should be obtainable through monitoring data collected during the implementation of the HCP. These "threshold" levels should be clearly defined in the HCP and should be based upon measurable criteria, and monitoring should be clearly linked to those measurable criteria. The establishment of measurable criteria would dictate the type of monitoring including the number of samples, distribution of samples, and use of controls.

Prior to the issuance of a permit, there should be a clear understanding and agreement between the Services and the permittee as to the mitigation range of adjustments which might be required as a result of any adaptive management provisions. A mechanism for determining the magnitude of strategy change to be employed, based upon the results of the monitoring and the level of deviation significance from the desired condition, should be developed in advance so all parties are clear in this regard and can react at the appropriate time.

Corrective actions to any of the conservation strategies in the HCP should be based on significant "non-achievement" of the HCP's base mitigation. This does not preclude the Services from working with the applicant to develop a strategy to compensate for external factors (e.g., catastrophic fires) or requesting the applicant to voluntarily increase the base mitigation strategy because of these external factors.

4. <u>Monitoring Measures</u>.

The section 10 regulations require that an HCP specify the measures the applicant will take to "monitor" the impacts of the taking resulting from project actions [50 CFR 17.22(b)(1)(iii)(B) and 50 CFR 222.22(b)(5)(iii)]. Monitoring measures described in the HCP should be as specific as possible and be commensurate with the project's scope and the severity of its effects.

For regional and other large-scale HCPs, monitoring programs should include periodic accountings of take, surveys to determine species status in project areas or mitigation habitats, and progress reports on fulfillment of mitigation requirements (e.g., habitat acres acquired). Monitoring plans for HCPs should establish target milestones, to the extent practicable, or requirements throughout the life of the HCP, and where appropriate, adaptive management options (see Chapter 3, Section B.3(g)).

The following steps are logical elements for consideration in developing HCP monitoring programs for regional or other large-scale HCPs:

- Develop objectives for the monitoring program. Any monitoring program associated with HCPs should answer specific questions or lead to specific conclusions. If the objectives are well-developed, they will help shape a complete monitoring program.

- Describe the subject of the monitoring program--e.g., effects on populations of affected species, effects on the habitat of the species, or effects on both.

- Describe variables to be measured and how the data will be collected. Make sure these are consistent with the objectives of the monitoring program.

- Detail the frequency, timing, and duration of sampling for the variables. Determining how frequently and how long to collect data is important to the success or failure of the monitoring program. If the interval between samples is too long or too short, the monitoring program may not detect an effect. The frequency, timing, and duration of the sampling regimen should also relate to the type of action being evaluated, the species affected by the action, and the response of the species to the effects produced by the action.

- Describe how data are to be analyzed and who will conduct the analyses. A monitoring program is more effective when analytical methods are integrated into the design. For example, parametric and non-parametric statistical analyses require different sample sizes, which affect the frequency, timing, and duration of sampling.

- Monitoring must be sufficient to detect trends in species populations in the plan area but should be as economical as possible. Avoid costly monitoring schemes that divert funds away from other important HCP programs, such as mitigation.

- Monitoring programs can be carried out by a mutually-identified party other than the permittee, so long as this is specified in the HCP, funding is provided, and the party is qualified.

The FWS and NMFS also have a responsibility to monitor the implementation and success of HCPs. The Services may agree to specific monitoring responsibilities under the HCP, Implementing Agreement, or as part of the incidental take statement issued in conjunction with the section 7 biological opinion. Even if not specified in this manner, the agency still has the responsibility to monitor compliance with the terms of particular HCPs, including any adaptive management commitments incorporated into the HCP, and the section 10 program generally. One way to achieve this is to ensure that requirements for monitoring and status reports are included in HCPs where needed and by ensuring that such reports are submitted by permittees and reviewed by FWS or NMFS staff.

For regional HCPs, another way is to establish technical review teams to periodically evaluate HCP compliance and the success of adaptive management programs. Such teams could include species experts and representatives of the permittee, FWS, NMFS, and other affected public agencies. To maintain the credibility of the HCP, it may be beneficial to submit the technical team's findings to occasional review by recognized experts in pertinent fields (e.g., conservation biologists, re-vegetation specialists, etc.).

Not all of the above steps are necessary for small-scale, low-effect HCPs, and should only be used as appropriate.

5. Unforeseen Circumstances/Extraordinary Circumstances.

Congress recognized in the section 10 amendments that "...circumstances and information may change over time and that the original plan might need to be revised. To address this situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances." (H.R. Rep. No. 97-835, 97th Congress, Second Session). Accordingly, Federal regulation requires such procedures to be detailed in the HCP [50 CFR 17.22(b)(1)(iii)(C)]. At the same time the legislative history states that:

> The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be

> adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act." (H.R. Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691.)

This Congressional history illustrates the potential tension between two primary goals of the HCP program: (1) adequately minimizing and mitigating for the incidental take of listed species, and (2) providing regulatory assurances to section 10 permittees that the terms of an approved HCP will not change over time, or that necessary changes will be minimized to the extent possible, and will be agreed to by the applicant. How to reconcile these objectives remains one of the central challenges of the HCP program.

"Unforeseen circumstances," also referred to as "extraordinary circumstances," in the past have been broadly defined to include a variety of changing circumstances that may occur over the life of an ongoing HCP. However, it is important to distinguish between the terms "unforeseen circumstances," or "extraordinary circumstances," versus "changed circumstances." "Changed circumstances" are not uncommon during the course of an HCP and can reasonably be anticipated and planned for (e.g., the listing of new species, modifications in the project or activity as described in the original HCP, or modifications in the HCP's monitoring program). "Unforeseen circumstances" or "extraordinary circumstances" however, means changes in circumstances surrounding an HCP that were not or could not be anticipated by HCP participants and the Services, that result in a substantial and adverse change in the status of a covered species.

With respect to anticipated and possible changed circumstances, the HCP should discuss measures developed by the applicant and the Services to meet such changes over time, possibly by incorporating adaptive management measures for covered species in the HCP. HCP planners should identify potential problems in advance and identify specific strategies or protocols in the HCP for dealing with them, so that adjustments can be made as necessary without having to amend the HCP.

The "Unforeseen/Extraordinary Circumstances" section of the HCP should be more limited. It should discuss how those changes in the circumstances surrounding the HCP that cannot effectively be anticipated by HCP negotiators will be dealt with in the future. It must also be consistent with the Department of Interior's and Department of Commerce's "No Surprises" policy.

a. <u>The "No Surprises" Policy</u>.

To address the problem of maintaining regulatory assurances and providing regulatory certainty in exchange for conservation commitments, the Department of the Interior (DOI) and Department of Commerce (DOC) have jointly established a "No Surprises" policy for HCPs.

The "No Surprises" policy sets forth a clear commitment by the FWS, NMFS, DOI, and DOC that, to the extent consistent with the requirements of the Endangered Species Act and other Federal laws, the government will honor its agreements under an approved HCP for which the permittee is in good faith implementing the HCP's terms and conditions. The specific nature of these provisions will vary among HCPs depending upon individual habitat and species needs.

The "No Surprises" policy provides certainty for private landowners in ESA Habitat Conservation Planning through the following assurances:

- In negotiating "unforeseen circumstances" provisions for HCPs, the Fish and Wildlife Service and National Marine Fisheries Service shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS and NMFS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstances.

This means that if unforeseen circumstances occur during the life of an HCP, the FWS and NMFS will not require additional lands, additional funds, or additional restrictions on lands or other natural resources released for development or use, from any permittee, who in good faith, is adequately implementing or has implemented an approved HCP. Once a permit has been issued and its terms are being complied with, the permittee may remain secure regarding the agreed upon cost of mitigation, because no additional mitigation land, funding, or land use restrictions will be requested by the Services. The policy also protects the permittee from any <u>other</u> forms of additional mitigation, except where extraordinary circumstance exist.

Other methods of responding to the needs of the affected species, such as government action and voluntary conservation measures by the permittee, remain available to assure the requirements of the ESA are satisfied.

Consequently, the "No Surprises" policy also provides that:

- If additional mitigation measures are subsequently deemed necessary to provide for the conservation of a species that was otherwise adequately covered under the terms of a properly functioning HCP, the obligation for such measures shall not rest with the HCP permittee.

This means that in cases where the status of a species addressed under an HCP worsens, the primary obligation for implementing additional conservation measures would be borne by the Federal government, other governmental agencies, private conservation organizations, or other private landowners who have not yet developed an HCP.

"Adequately covered" for listed species refers to any species addressed in an HCP which has satisfied the permit issuance criteria under section 10(a)(2)(B) of the ESA. For unlisted species, the term refers to any species which is addressed in an HCP as if it were listed pursuant to section 4 of the ESA, and in which HCP conditions for that species would satisfy permit issuance criteria under section 10(a)(2)(B) of the ESA if the species were listed. "No Surprises" assurances apply only to species that are adequately covered in the HCP. Species should not be included in the HCP permit if data gaps or insufficient information makes it impossible to craft conservation/mitigation measures for them. Such data gaps can be overcome, however, through the inclusion of adaptive management clauses in the HCP (See Chapter 3, Section 3.B(g)).

- If extraordinary circumstances warrant the requirement of additional mitigation from an HCP permittee who is in compliance with the HCP's obligations, such mitigation shall maintain the original terms of the HCP to the maximum extent possible. Further, any such changes shall be limited to modifications within Conserved Habitat areas or to the HCP's operating conservation program for the affected species. Additional mitigation requirements shall not involve the payment of additional compensation or apply to parcels of land available for development or land management under the original terms of the HCP without the consent of the HCP permittee.

This means that if extraordinary circumstances are found to exist, the Services will consider additional mitigation measures; however, such measures must be as close as possible to the terms of the original HCP and must be limited to modifications within Conserved Habitat areas or the HCP's operating conservation program or to lands that are already protected by the HCP. New mitigation measures should not include requirements for additional land protection, payment of funds, or apply to lands available for development or use under the HCP, unless the permittee consents to such additional measures. "Modifications within Conserved Habitat areas or to the HCP's operating conservation program" means limiting such changes to plan areas explicitly designated for habitat protection or other conservation uses, or redirecting or increasing the intensity, range, or effectiveness of conservation efforts in such areas, provided that any such changes do not impose new restrictions or financial compensation on the permittee's activities. For example, if a developer had agreed to dedicate a certain amount of funding annually in support of a particular conservation program (e.g., habitat restoration) but subsequent research demonstrated that greater conservation benefits could be achieved by redirecting funding into depredation control, and extraordinary circumstances warranted such a shift, the No Surprises policy would allow the modification since it would impose no new funding burden on the permittee.

The policy also sets out criteria for determining whether and when extraordinary circumstances arise where the government could request review of certain aspects of the HCP's conservation program.

- The FWS and NMFS shall have the burden of demonstrating that such extraordinary circumstances exist, using the best scientific and commercial data available. Their findings must be clearly documented and based upon reliable technical information regarding the status and habitat requirements of the affected species.

- In deciding whether any extraordinary circumstances exist which might warrant requiring additional mitigation from an HCP permittee, FWS and NMFS shall consider, but not be limited to, the following factors: (a) size of the current range of affected species; (b) percentage of range adversely affected by the HCP; (c) percentage of range conserved by the HCP; (d) ecological significance of that portion of the range affected by the HCP; (e) level of knowledge about the affected species and the degree of specificity of the species' conservation program under the HCP; (f) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and (g) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the affected species in the wild.

The first of these two measures, on the burden of proof, is self-explanatory. The second identifies some factors to be considered by the Services in determining whether extraordinary circumstances exist. Generally, the primary focus of inquiry would be level of biological peril to species covered by the HCP in question, and the degree to which the welfare of those species is tied to a particular HCP. For example, if the species is declining rapidly, and the HCP in question encompasses an ecologically insignificant portion of the species' range, then extraordinary circumstances typically would not exist. Conversely, if the HCP in such circumstances encompasses a majority of the species' range, then extraordinary circumstances justifiably could be said to exist.

- The FWS and NMFS shall not seek additional mitigation for a species from an HCP permittee where the terms of a properly functioning HCP agreement were designed to provide an overall net benefit for that species and contained measurable criteria for the biological success of the HCP which have been or are being met.

This provision means that the Services will not attempt to impose additional mitigation measures <u>of any type</u> where and HCP was intentionally designed to have a net positive impact upon a species. It is intended to encourage HCP applicants to develop HCPs that provide an overall net benefit to affected species. It does not mean that any HCP must in

fact have already achieved a net benefit before the "No Surprises" policy applies. Rather, the achievement of such benefits should be measured through a clearly articulated set of biological goals and an adequate monitoring program for measuring progress for achieving those goals.

"Properly functioning HCP" means any HCP whose provisions have been or are being fully implemented by the permittee and in which the permittee is in full compliance with the terms and conditions of the permit.

- Nothing in this policy shall be construed to limit or constrain the Services or any other governmental agency from taking additional actions at its own expense to protect or conserve a species included in an HCP.

This means the Services can intercede on behalf of a species at their own expense at any time and be consistent with the assurances provided the permittee under this policy and the permit. Neither is there anything in the "No Surprises" policy that prevents the Services from requesting a permittee to voluntarily undertake additional mitigation on behalf of affected species, though of course the permittee is under no obligation to comply.

FWS and NMFS have a wide array of authorities and resources that can be utilized to provide additional protection for threatened or endangered species included in an HCP. Therefore, in meeting their commitment under the "No Surprises" policy (consistent with their obligations under the ESA), it is extremely unlikely that the Services would have to resort to protective or conservation action requiring new appropriations of funds by Congress. In such an unlikely event, such actions would necessarily be subject to the requirements of the Anti-Deficiency Act and the availability of funds appropriated by the Congress.

Sample language for including "No Surprises" assurances in the HCP or Implementing Agreements is provided in Sections 8.4 and 13.3(a) of the "template" Implementing Agreement in Appendix 4.

b. HCP Amendments.

Amendment of a section 10(a)(1)(B) permit is required when the permittee wishes to significantly modify the project, activity, or conservation program as described in the original HCP. Such modifications might include significant boundary revisions, alterations in funding or schedule, addition of a species to the permit that was not addressed in the original HCP, or adjustments to the HCP necessitated by unforeseen circumstances. A permit amendment consists of the same process as the original permit application, requiring an amendment to the HCP addressing the new circumstance(s), a Federal Register notice, NEPA compliance, and an intra-Service section 7 consultation.

Some amendments to an HCP commonly needed over the life of a permit are minor and can be incorporated in a more expedited fashion. These types of amendments include corrections in land ownership; minor revisions to survey, monitoring, or reporting protocols; and minor changes in reserve boundaries that result in no net loss of reserve land or do not otherwise alter the effectiveness of the HCP. They can be incorporated into the HCP in one of two ways.

First, the HCP and permit can be formally amended just as with more significant changes. However, documentation requirements are often less for a permit amendment than for the original permit application. For example, the NEPA analysis for the amendment can be tiered off the NEPA analysis for the original permit (40 CFR 1502.20), or the original NEPA analysis can be incorporated by reference into the amendment's supporting documents (50 CFR 1502.21). Also, where an original permit application required an EIS, the amendment application might require an EA only. Where appropriate, a permit amendment can also be treated as a low-effect HCP, which is categorically excluded from NEPA [see Chapter 1, Section F.2].

The HCP can also be amended administratively without formal amendment of the permit itself. This type of expedited amendment procedure is encouraged, but only when: (1) the amendment has the unanimous consent of the permittee and FWS or NMFS; (2) the original HCP established specific procedures for incorporating minor amendments so that the public had an opportunity to comment on the process, and such amendments are consistent with those procedures; (3) the HCP defines what types of amendments are considered minor; (4) a written record of any such amendments is prepared; and (5) the net effect on the species involved and level of take resulting from the amendment is not significantly different than analyzed under the original HCP and the Service's decision documents.

It is important to distinguish between amendments to the HCP and amendments to the permit itself. Changed circumstances might require an amendment to both, but an amendment to either the HCP or the permit without an associated amendment to the other is possible. Minor changes in the HCP can be completed administratively without amending the permit. Similarly, amendment to the permit without a change in the HCP can also occur--for example, when an unlisted species that was addressed in the HCP is subsequently listed and is added to the permit, though permit amendments in such cases are not always necessary. Chapter 4 describes the procedures for addressing unlisted species in section 10 permits. Chapter 6, Section G contains further discussion about permit amendments generally.

6. Funding.

The ESA requires that the HCP detail the funding that will be made available to implement the proposed mitigation program. Measures requiring funding in an HCP typically include onsite measures during project implementation or construction (e.g., pre-construction surveys, biological monitors, exclusion fences, etc.), as well as onsite and offsite measures

required after completion of the project or activity (e.g., revegetation of disturbed areas and acquisition of mitigation lands). Large-scale, regional HCPs should require funds for long-term needs such as biological monitoring and habitat acquisition programs. Some will even require perpetual funding mechanisms to support long-term management of mitigation lands or for monitoring. For low-effect HCPs with minor impacts, funding needs may be limited to activities such as pre-construction, post-construction, habitat restoration, or surveys and payment into a mitigation fund; longer-term funding measures typically are not needed.

For relatively small- to medium-sized projects involving only one or two applicants, the funding source is usually the permittee and funding is provided immediately before project activities commence, immediately after, or in stages. However, when habitat modification or other take occurs before mitigation measures (e.g., acquisition of mitigation lands) are implemented, completion of the mitigation requirements should be ensured through a Letter of Credit or other means [see above, Section B.3].

Funding of regional HCPs can be more complicated because they generally cover large areas, many activities, and require significant budgets. Consequently, regional HCPs usually are funded jointly rather than by any single contributor. Funding strategies for regional HCPs can include: (1) development fees paid on a per-acre (or other) basis;
(2) other types of mitigation fees (e.g., water surcharges, fees targeted to specific activities or industries); (3) funds contributed by non-profit or private interests; (4) state or Federal funds; (5) assessment districts under state law or county ordinance; and (6) tax check-off programs.

Because of their size and scope, regional HCPs often face two funding challenges--the costs of developing and implementing the HCP. Funding problems for these HCPs can be especially difficult during the HCP development phase, which typically occurs before funding mechanisms for the completed HCP are in place. Where appropriate, FWS and NMFS personnel should assist local governments in seeking out HCP funding assistance. However, the demand for such funds is likely to grow and the availability of funds to be limited; consequently, guarantees cannot be provided to any particular HCP applicant that funding would be available. <u>Consistent with the requirements of the Anti-Deficiency Act, any commitment of Federal funding is always subject to the availability of appropriated funds.</u>

When perpetual funding is needed, the HCP must establish programs or mechanisms to generate such funds. One way of achieving this is through payment of development fees by the applicant or other affected parties into an interest-bearing bank account, from which the interest, not the principal, is used to fund the program. The HCP should detail fund collection and management mechanisms for this purpose, as well as remedies for failure to meet funding obligations by signatory members. <u>The IA must always contain a provision stating that any Federal funding is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds.</u>

Whatever the proposed funding mechanism is, failure to demonstrate the requisite level of funding prior to permit approval or to meet funding obligations after the permit is issued are grounds for denying a permit application or revoking or suspending an existing permit, respectively.

In some cases, conservation funds may be transferred to a government agency to be utilized in furthering the purposes of the HCP. FWS or NMFS can accept contributed funds for mitigation purposes, monitoring, research, permit administration, and other activities. However, because of Federal procedural requirements in administering such funds and the potential for an appearance of a conflict of interests, the FWS Administrative Services Division and Department of the Interior Solicitor's Office (or equivalent office for NMFS) should be consulted before agreeing to any such mechanism.

7. Alternatives Analyzed.

Some applicants find this a difficult element of the HCP because they are uncertain about which or how many alternatives to consider. In some cases, the HCP process may not be initiated until the applicant has planned the project, only to discover that endangered species are present on the project site and an incidental take permit is needed.

The Act requires a description of "alternative actions to such taking." Thus two alternatives commonly included in the "Alternatives Analyzed" section of the HCP are: (1) any specific alternative, whether considered before or after the HCP process was begun, that would reduce such take below levels anticipated for the project proposal; and (2) a "no action" alternative, which means that no permit would be issued and take would be avoided or that the project would not be constructed or implemented. For low-effect HCPs in which the project or impact on endangered or threatened species is minor or negligible, a "no action" alternative alone may suffice.

For some HCPs, several alternatives may have been considered during project development. Each should be discussed in the "Alternatives Analyzed" section; or, where they are too numerous, the principal ones should be discussed. The applicant also must explain in this section why these alternatives were not adopted. If the applicant ultimately selects an alternative that the FWS or NMFS agrees will not result in take, no section 10 permit or NEPA compliance is needed. Chapter 3, Section B.7 explains how the alternatives analysis requirements under section 10 and NEPA compare.

Permit applicants commonly ask whether economic considerations can be cited as a reason for rejecting project alternatives. Such considerations are permissible, especially when the effects on the applicant would be significantly adverse or economically infeasible. However, if economic considerations are the basis for rejecting alternatives, data supporting this decision must be provided to the extent that it is reasonably available and non-proprietary. While applicants may be hesitant to provide such information, it can be important in making

the required finding that the HCP represent minimization and mitigation to the maximum extent practicable.

Neither the FWS nor NMFS have the authority to impose a choice among the alternatives analyzed in the HCP. The Services' role during the HCP development phase is to advise the applicant in developing an acceptable HCP, and, when necessary to try to dissuade the applicant from selecting alternatives not consistent with permit issuance criteria. Nevertheless, if the applicant proceeds with such an alternative, recognizing the increased chance of denial of the permit, the Services must process the application and provide an opportunity for Federal Register notice and public comment (see Chapter 6, Section D).

8. Additional Measures - Implementing Agreements.

Whether or not an Implementing Agreement should be prepared for a given HCP will depend on the size and scope of the HCP and the wishes of either the Services or the applicant. Implementing agreements are not required for low-effect HCPs, and should be done only when one is requested by the permit applicant. In other HCPs, the development of the IA is left to the discretion of the Regional Director. Implementing Agreements are recommended for regional or other large-scale HCPs that address significant portions of a species range or involve numerous activities or landowners, for HCPs with long-term mitigation and monitoring programs, or where habitat protection programs are complicated or have other special features.

Section 10(a)(2)(B) of the ESA--which describes issuance criteria for incidental take permits--authorizes the Services to obtain "such other assurances as [they] may require that the plan will be implemented." This provision allows the Services broad latitude to require measures as necessary to accommodate the wide variety of circumstances often encountered in HCPs.

Implementing Agreements can help assure the government that the applicant will implement the mitigation program and other conditions of the HCP, while assuring the applicant that agreed upon procedures will be followed for any changes in the conditions of the permit or the conservation measures for species addressed in the HCP. Although the Services and permit applicant possess these rights and responsibilities under the permit, both sides may prefer the additional specificity of an Implementing Agreement because the Agreement is tailored for the HCP in question, can be more detailed than the permit conditions, and is signed by all parties, thus providing the explicit consent of each party to abide by the terms of the HCP.

Implementing Agreements can also strengthen a Finding of No Significant Impact under NEPA by ensuring implementation of the mitigation program. This can be especially important for "mitigated EAs" [see Chapter 5, Section A.3(a)]. They can also extend responsibilities under an HCP beyond the life of the permit itself (e.g., by requiring perpetual

protection of mitigation lands) and can set out a process for implementing the assurances under the "No Surprises" policy [see above, Section B.5(a)].

Typically, an Implementing Agreement includes one or more of the following elements: (1) defines the obligations, benefits, rights, authorities, liabilities, and privileges of all signatories and other parties to the HCP; (2) assigns responsibility for planning, approving, and implementing specific HCP measures; (3) specifies the responsibilities of the FWS, NMFS, or other state and Federal agencies in implementing or monitoring the HCP's conservation program; (4) provides for specific measures when habitat acquisition, transfer, or other protections are part of the HCP's mitigation program; (5) establishes a process for amendment of the HCP, where necessary; and (6) provides for enforcement of HCP measures and for remedies should any party fail to perform on its obligations under the HCP.

The handbook delegates to the Regional Directors (or, where appropriate, the NMFS Director, Office of Protected Resources in Washington, D.C.) the discretion to decide if HCP Implementing Agreements are beneficial on a case-by-case basis. IAs are not done for low-effect HCPs unless requested by the applicant. Each Regional Director or the NMFS Office of Protected Resources Director shall determine the circumstances under which Implementing Agreements may be required for HCPs under his or her respective jurisdiction.

Chapter 6, Section B.2(g) provides further information about developing and processing Implementing Agreements. Appendix 4 contains a "template" Implementing Agreement that can be used to develop Agreements for individual projects. The template is intended to expedite development of Implementing Agreements for HCPs, because it identifies the basics needed for developing Agreements. The template has all necessary legal elements for Agreements for HCPs except project-specific information, which can be filled in as indicated.

C. Alternative HCPs

1. Addressing Species Through Habitat-Based HCPs.

Most of the HCPs that are being developed address the requirements of section 10(a)(2) on a species-by-species basis. A smaller number of HCPs, however, have focused on specific types of habitat rather than on a particular listed species. The rationale for a habitat-based approach is that if certain habitat-types are scientifically selected and assessed, and adequately protected under the terms of the HCP, the HCP could protect a broader range of species than the few "target" species that might otherwise be addressed by a conventional HCP. This approach may address all species within habitat-types within the plan area, or habitat-types in conjunction with a specific list of species that will be covered by the permit.

HCPs developed in conjunction with the Natural Communities Conservation Program in Southern California are examples of habitat-based HCPs. The State of California, under the Natural Community Conservation Planning Act of 1991 (NCCP), has initiated a program to

conserve populations of California native animal and plant species and their habitats in areas large enough to ensure their long-term viability. The initial NCCP effort is focusing on the coastal sage scrub community in southern California for the development of subregional HCPs.

In the habitat-based approach, a particular habitat type within a planning area is selected and then adequately addressed in the HCP, based on criteria agreed to by the Services and the applicant. The Service and the applicant generally use indicator species to set management parameters for the covered habitat in the HCP. A further test must be completed to ensure that the needs of all endemic and sensitive species (listed, proposed, candidate, or species of concern) associated with the covered habitat types are adequately addressed in the HCPs.

An entire list of known covered species (listed and unlisted) adequately addressed in the habitat-based HCP could also be included on a permit. This list may include proposed and candidate species; however, since such species are only subject to State--as opposed to Federal--jurisdiction, there should be a delayed effective date for the permit for such species. That delayed effective date should be the date the affected species is subsequently listed. Including an unlisted species on the permit in this way requires that the Services analyze the effects of the proposed HCP on that species under sections 7 and 10 of the ESA, just as if that species were listed. Under this method, the assurances of the "No Surprises" policy would apply to all covered species associated with the habitat-type as described in the list of species that are adequately covered in the HCP. If an unlisted species, which was adequately covered by the HCP and listed on the permit, is subsequently listed after permit issuance, the HCP permit <u>would</u> <u>not</u> have to be formally amended because all procedural permit requirements for these species were met when the permit was originally issued and the species was included on the permit with the delayed effective date (the subsequent date of listing). However, if an unlisted species associated with a habitat-type adequately covered in the HCP is subsequently listed, and it was not originally included on the permit, the Services would have to formally amend the permit and satisfy all procedural permit amendment requirements before it could authorize incidental take.

Prior to amending the permit, the applicant would have to make sure the species was adequately addressed in the HCP, and the Services would have to conduct independent assessments of the proposed actions under section 7 of the Act, make findings under section 10 of the ESA, and also ensure that the HCP complies with NEPA. Including covered species (listed and unlisted) in the original permit will help eliminate additional work associated with amending the permit, minimize duplication of effort, and minimize the cost associated with developing an HCP.

Habitat-based HCPs are new to the section 10 program and the Service is exploring this approach carefully. Adaptive management clauses (see Chapter 3, Section B.3(g)) may be helpful in defining where data gaps or uncertainty exists and, thus, areas where the Service and the applicant agree future modifications to the HCP may be needed. For further

information about habitat-based HCPs, contact the Washington, D.C. Division of Endangered Species Section 10 Coordinator (FWS) or the Washington, D.C. Office of Protected Resources (NMFS).

2. Programmatic HCPs.

The programmatic HCP is a relatively new concept that has begun to emerge recently in HCPs developed with the FWS. The FWS has begun to develop programmatic HCPs for County and State governments, such as the "state-wide" HCP being developed with the State of Georgia for the red-cockaded woodpecker. The programmatic HCP allows numerous entities to be involved in the HCP through "Certificates of Inclusion" or "Participation Certificates," which convey the take authorization of the official section 10(a)(1)(B) permit to the certificate recipient. A programmatic HCP can be used to address a group of actions as a whole, rather than one at a time in separate HCPs. For example, a programmatic HCP might address a single related action occurring in many different places (e.g., the development of single family houses in the same vicinity or the harvesting of trees in the presence of red-cockaded woodpeckers), or address a group of different actions occurring in the same place. Programmatic HCPs can reduce staff and preparation time, but are appropriate only in certain types of situations.

The central problem in preparing a programmatic HCP is having sufficient information to determine and evaluate effects when the exact number and scope of actions taking place may be uncertain. As a result, programmatic HCPs will be successful only when the activities being addressed are well-defined, similar in nature, and occur within a described geographical area or at similar points in time.

Because this is a relatively new concept, the Service strongly encourages that programmatic HCPs be developed in conjunction with the Regional and Washington Office. In addition, this type of a section 10(a)(1)(B) permit should not be issued to representatives of Federal agencies since section 7 is the correct avenue for dealing with "may effect" situations and possible incidental take by Federal agencies.

NMFS provides for "Certificates of Inclusion" in its regulations (50 CFR 222.22(f)). Certificates are issued by NMFS to any individual who wishes to conduct an activity covered by a general incidental take permit. The general permit can be applied for by any group or organization whose members conduct the same or similar activity and have the same or similar impacts on endangered marine species. For example, a fisheries organization or a state regulatory agency may apply for a general incidental take permit so that "Certificates of Inclusion" would then be required by its members or regulated entities. These groups also may apply for a standard permit. Applicants should discuss the alternatives with NMFS to determine which is the most appropriate.

D. Addressing Migratory Birds and Eagles (FWS Only)

In the past, section 10 applicants faced an additional issue when listed migratory birds or bald eagles occurred in an HCP planning area. The Migratory Bird Treaty Act (MBTA) and Bald and Golden Eagle Protection Act (BGEPA) prohibit the take of migratory birds and bald eagles, respectively. Consequently, questions have arisen as to whether a section 10 permittee remained legally liable for the incidental take of listed species protected by the MBTA and BGEPA, if take of the same species was authorized by an ESA section 10 permit.

This situation has now been clarified. The FWS has concluded that under certain conditions, a section 10 permit for listed migratory birds is sufficient to relieve an HCP permittee from liability under the MBTA and BGEPA for those species covered by the HCP permit. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR § 21.27. For BGEPA, it is accomplished by utilizing the FWS's prosecutorial discretion to state that FWS would not prosecute an incidental take under the BGEPA if such take is in compliance with an ESA section 10 permit. However, the following conditions must be satisfied before either of these protections apply: (1) any species to be so treated with respect to the MBTA and BGEPA must also be listed under the ESA; and (2) the incidental take of any such species must be authorized, subject to applicable terms and conditions, under section 10(a)(1)(B) of the ESA (see Appendix 5). The Service believes that this approach is warranted because the permittee already would have agreed to a package of mitigation measures designed to minimize and mitigate the take of the listed species of migratory birds to the maximum extent practicable.

In qualifying cases, the following language concerning MBTA- and BGEPA-protected species shall be included in the terms and conditions of a section 10 permit when the above conditions have been satisfied:

> *[For listed species other than the bald eagle]* This permit also constitutes a Special Purpose Permit under 50 CFR § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712).
>
> *[For the bald eagle]* The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

E. Coordinating HCPs With National Wildlife Refuges (FWS Only)

National Wildlife Refuges (NWRs) occur nationwide, and HCPs are now being developed in most areas of the country. When planning efforts under these two programs occur in the same geographic vicinity, it creates significant opportunities for joint NWR/HCP habitat protection programs in which the two programs can support and complement each other. However, it also raises important questions regarding the relationship between the two programs--e.g., what are the government's and permittee's respective roles and responsibilities in such joint NWR/HCP efforts, and how should such programs be jointly managed?

The FWS has developed a policy to assist its offices and staff in integrating the NWR and HCP programs. In brief, the policy states that the primary objective of integrating any NWR with an HCP is to increase benefits to the species involved, and that a NWR is not to be established or integrated with an HCP merely to substitute for the mitigation responsibilities of the section 10 permittee. This policy and additional guidance about integrating HCPs with National Wildlife Refuges is provided in Appendix 6.

F. "Safe Harbor" Policy: Linking Safe Harbor Assurances to Habitat Conservation Plans

The "Safe Harbor" approach is a strategy that provides private landowners, who undertake voluntary conservation actions on their lands, assurances that their future land-use activities will not be restricted further as a result of these proactive conservation efforts. If a landowner voluntarily enters into an agreement to manage his or her lands in a manner that attracts endangered or threatened species or otherwise increases their presence, the "Safe Harbor assurances" guarantee no additional regulatory requirements for those lands will be imposed on the landowners as a result of the proactive conservation measures. The purpose of the "Safe Harbor" approach is to reduce the disincentives (e.g., fear of regulatory restrictions) that often cause landowners to avoid or prevent land use practices that would otherwise benefit endangered species.

If it is determined that it is appropriate to link Safe Harbor assurances with HCPs, specific directions for incorporating will be described in a forthcoming final Safe Harbor policy (see Appendix 7). [Note: If the draft Safe Harbor policy has not been published in the Federal Register by the time this guidance is published, Appendix 7 will be reserved for this policy.]

The Services are currently considering whether, and if so, under what circumstances, it may be appropriate to allow a landowner to link a Safe Harbor Agreement to an HCP. The Services intend to submit this issue for further public analysis and comment.

CHAPTER 4
TREATMENT OF UNLISTED SPECIES

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

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

A. Addressing Unlisted Species in the HCP

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

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

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

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

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

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

1. Deciding How to Address Unlisted Species.

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

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

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

2. Addressing Unlisted Species in the HCP and Permit.

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

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

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

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

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

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

B. Challenges in Treating Unlisted Species

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

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

CHAPTER 5
ENVIRONMENTAL ANALYSIS AND DOCUMENTATION

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

A. General Information

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

1. Scope of the NEPA Analysis.

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

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

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

2. Categorical Exclusions.

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

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

Low-effect HCPs are defined as those involving: (1) minor or negligible effects on federally listed and candidate species and their habitats; and (2) minor or negligible effects on other environmental values or resources. "Low-effect" incidental take permits are those permits that, individually or cumulatively, have a minor or negligible effect on the species covered in the HCP. Low-effect HCPs may also apply to habitat-based HCPs if the permitted activities have minor or negligible effects to the species associated with the habitat-types covered in the HCP.

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

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

3. Environmental Assessments.

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

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

a. Use of EAs When Mitigation Reduces Significant Impacts.

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

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

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

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

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

b. Programmatic EAs.

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

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

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

4. Environmental Impact Statements.

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

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

B. Techniques for Streamlining Section 10 and NEPA Planning

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

1. Combining HCP/NEPA Analysis.

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

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

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

2. Joint Federal-State Processes.

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

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

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

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

3. Incorporation By Reference.

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

C. Internal Service Guidance and Assistance

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

CHAPTER 6
APPLICATION REQUIREMENTS AND PROCESSING PROCEDURES

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this chapter--particularly with respect to permit denial, suspension, and revocation procedures--may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Except where noted, the procedures described in this chapter apply to both FWS and NMFS. For NMFS, 50 CFR 222.22 contains regulations specific to incidental take permits. General permit procedures are found in 50 CFR 217, 220, as well as 222. NMFS is also in the process of revising its ESA regulations at 50 CFR parts 217-227. Therefore, citations to NMFS regulations may change from those provided in this handbook.

A. Guidance to the Applicant

1. What to Provide the Applicant.

The following documents should be provided to any prospective permit applicant or applicant's consultant.

- For FWS, Federal Fish and Wildlife License/Permit Application (Form 3-200) with "Incidental Take Permit Application" supplement, instructions, and Notice of Permit Application Fee/Privacy Act Notice (Appendix 9).

- For NMFS, incidental take application instructions (Appendix 9).

- This handbook, if appropriate (some applicants may find it too technical; although it may be useful to experienced consultants).

- List of candidate, proposed, endangered, and threatened species of wildlife and plants for the prospective planning area.

- List of appropriate local, state, and federal contacts, such as state conservation agencies.

- General Permit Procedures - for FWS, 50 CFR Part 13; for NMFS, 50 CFR 217, 220, and 222 (Appendix 11).

- Endangered and Threatened Wildlife and Plant Permit procedures - for FWS, excerpts from 50 CFR Part 17; for NMFS, 50 CFR 222.22 (Appendix 11).

2. Application Form and Instructions.

For FWS, an applicant must complete and submit an official Form 3-200 [50 CFR 17.22(a)(1)]. Instructions for this form are provided below and in Appendix 9. The appropriate Regional Office address and phone number should be typed on the top of the form where it reads "Send Application To." NMFS does not have an official permit application form but provides instructions for what information the applicant needs to submit and where (see Appendix 9). A list of FWS and NMFS Regional Offices is provided in Appendix 12.

3. Name of the Applicant.

For FWS, if the applicant is an individual, that person must sign the application and complete block 4 of Form 3-200. If the applicant is a city, county, business, or consortium, the application must be signed by the appropriate authority responsible for actions granted under the permit and block 5 must be completed. In all cases, there must be an **original** signature and date in the certification block. An application form may be faxed to begin the permit processing phase, but only if the original application with an original signature is submitted immediately afterward. The application will not be considered complete without the original application form. For NMFS, the applicant should follow the application instructions in Appendix 9.

4. Application Fee.

The processing fee for FWS and NMFS is $25.00 for each new permit application, amendment request, or renewal, except as noted below. Money orders or checks should be made payable to the "U.S. Fish and Wildlife Service" or "National Marine Fisheries Service." The fee is for processing the application, not for the permit, and therefore is non-refundable if the application is abandoned or the permit is denied. The fee may be refunded only if the applicant withdraws the application in writing before any significant processing of the application has occurred. For FWS, if the check has been forwarded to the Denver Finance Center, request the Finance Center to send a refund to the applicant. State or local government agencies or any individual or institution under contract to such agency to conduct proposed activities are fee exempt.

Checks and money orders must be safeguarded as if they are cash; they should be placed in a fire-proof safe except when being processed by employees designated as collection officers.

Application fees need to be deposited in a timely manner and each Regional Office should establish deposit procedures. For FWS, since Regional Division of Law Enforcement offices already have such procedures, the Assistant Director for Ecological Services may wish to coordinate with the Assistant Director for Law Enforcement in handling application fees.

5. Providing the General Permit Requirements.

The applicant should be provided copies of the general permit procedures and pertinent excerpts from the procedures for endangered and threatened species permits. By signing Form 3-200, the applicant is certifying (1) that the applicant has read and is familiar with applicable regulations; (2) that the information submitted in the application is complete and accurate; and (3) that the applicant understands that any false statements may result in criminal penalties.

50 CFR Part 13 provides conditions for the general administration of FWS's fish, wildlife, and plant permit program. 50 CFR Part 17 provides conditions for endangered and threatened species incidental take permits specifically. It should be explained to the applicant that if any general provision of Part 13 is inconsistent with Part 17 or with provisions of section 10(a) of the ESA governing incidental take permits, it is the intention of the FWS to seek regulatory clarifications which would provide that the more specific provisions of Part 17 or the statute apply. This also applies to NMFS, except that 50 CFR Part 222 takes precedent over Parts 217 and 220. The FWS is currently drafting language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future.

B. Processing the Application

1. Processing Time.

No mandatory time frames for processing incidental take permit applications have been established under Section 10 or its implementing regulations. However, this handbook establishes the following target processing times, depending on the type of NEPA action associated with the permit application [see Chapter 1, Section F.1].

Permit processing times are defined as the period between receipt of a complete application package by the responsible Regional Office and issuance of the incidental take permit, including Federal Register public comment notifications. The targets do not include any portion of the HCP development phase.

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

These targets will apply as the maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. All affected FWS and NMFS offices are expected to streamline their incidental take permit programs and to meet these processing targets to the maximum extent practicable. In many cases it is expected actual processing times will be less than these targets and Service offices are encouraged to improve on the targets whenever possible.

2. Timing of Document Preparation and Submission.

The Section 10 permit process consists of three phases: (1) the HCP development phase; (2) the formal permit application processing phase; and (3) the post-issuance phase.

The length of the HCP development phase will vary depending on the complexity and scope of the project and length of time required to prepare the HCP. It concludes when a "complete application package" with a Field Office certification that it has reviewed the HCP and found it to be statutorily complete is forwarded to the appropriate Regional Office [see below, Sections B.2(b)-(c)]. The formal permit application processing phase begins with receipt of the complete application package by the Regional Office. Permit processing requirements will also depend on the scope and complexity of the HCP.

a. Description of Required HCP Documents.

The following documents are needed (or are optional as indicated) to apply for and issue an incidental take permit:

Must be Provided Before Federal Register Notice Can Be Published

- A Habitat Conservation Plan including the elements required by section 10(a)(2)(A) of the ESA.

- For FWS, a permit application form (3-200) and fee (see Appendix 9). For NMFS, an application according to the instructions in Appendix 9.

- A NEPA analysis (either an EA or EIS, unless the HCP is categorically excluded) pursuant to the National Environmental Policy Act. The section 7 biological opinion should be prepared in conjunction with the NEPA analysis.

- Certification by the Field Office that assisted the applicant with the HCP to the issuing Regional Office that the HCP and associated documents are statutorily complete.

- An Implementing Agreement, if requested by the applicant or otherwise required by Regional Director policy (see Chapter 3, Section B.8).

- Federal Register Notices; a Notice of Receipt of a Permit Application and Notices of Availability of the NEPA analysis (see Appendix 16).

Can Be Prepared During or After the Public Comment Period

- A biological opinion concluding formal section 7 consultation and providing the Services' findings with respect to the effects of the action on federally listed species.

- If required by Regional Director policy, a Set of Findings documenting how the HCP meets statutory issuance criteria and optionally including the Field Office's recommendation about whether to issue the permit [see Section B.2(d) below and Appendix 13).

- For FWS, an Environmental Action Memorandum (EAM) describing what action the FWS took with respect to NEPA and explaining the reasons why the action is considered categorically excluded. (For low-effect, categorically excluded HCPs only (see Appendix 14 and definition in Chapter 8)). Public comments will be addressed and, if applicable, will help shape the final decision.

- For FWS, the draft permit (Form 3-201) with proposed terms and conditions; for NMFS, the permit is printed on agency letterhead with terms and conditions and a cover letter. The draft permit and terms and conditions must be further reviewed in light of any substantive public comments received.

b. Submitting a Complete Application Package.

The formal application phase begins with receipt by the appropriate Regional Office of a "complete permit application" package consisting, at a minimum, of the application form, application fee (if applicable), the proposed HCP, the Implementing Agreement (if required), draft NEPA analysis (EAM, EA, or EIS), which was submitted by the applicant, and a certification by the Field Office that it has reviewed these documents and finds them to be statutorily complete. Prompt submission of each of these documents is essential to efficient processing of the permit application because they either initiate the processing phase or are required for the Federal Register notice initiating the 30-day public comment period.

The Implementing Agreement (if required) should be submitted as part of the complete application package and is usually included as an appendix to the HCP. Since the IA can help enforce the implementation of the HCP, it should be included with the complete package so the public can get a sense of how implementation of the HCP will be managed. It should also be included when the HCP is provided to persons wishing to comment on the permit application.

c. Certification of Application Documents By the Field Office.

When the Field Office that assisted the applicant in developing the HCP forwards the application package to the Regional Office for processing, it should include a certification memo. The Regional Office should not initiate the formal permit processing phase without this certification. (see below, Section B.5 for a discussion of what to do when the Field Office believes the HCP to be inadequate but the applicant wishes to submit the package for formal processing against Field Office recommendation). This certification should include: (1) a statement that the Field Office has conducted a preliminary review of the application package and believes it to be complete; (2) the date of the HCP documents to which the memo refers; (3) a recommendation by the Field Office that the HCP qualifies for the "low-effect" category, if applicable [see Chapter 1, Section F.2]; (4) exceptions to standard processing procedures it recommends, if any, and the reason for those exceptions; and (5) other pertinent information as needed. The Field Office certification can be in memorandum format, a signed standardized form, or any other format mutually agreed to by the Field and Regional Offices.

d. Timing of Other Application Documents.

Another document needed early in the process is the Notice of Receipt of an Incidental Take Permit Application for publication in the Federal Register. Typically, this is drafted and forwarded to the Regional Office by the Field Office. The Regional Office then finalizes and signs the notice and sends it to the Federal Register (see below, Section D). The draft Federal Register notice is not a required part of the complete application package. It can be prepared while the HCP, NEPA analysis, and Implementing Agreement are being reviewed in the Regional office so long as it is completed when these documents are ready for transmission to the Federal Register. To expedite the public notification process, the Federal Register Notice of Availability of the NEPA analysis should be published jointly with the Notice of Receipt of the permit application (see Appendix 16).

In addition to the above documents, processing the permit application will require a: biological opinion on the proposed incidental take; Set of Findings; for FWS, an Environmental Action Memorandum (EAM) for categorically excluded HCPs only; and the permit (for FWS, Form 3-201) or permit letter (for NMFS). The Set of Findings provides an administrative record of how the HCP program satisfies each of the section 10(a)(2)(B) issuance criteria, responses to public comments received, if any, and may include a recommendation from the appropriate ARD to the Regional Director's Office (for FWS) whether to issue or deny the permit. However, it is not required by regulation or Director's Order and whether to include it as a processing requirement is at the discretion of the Regional Directors (see Appendix 13 for examples of a Set of Findings). The EAM is a record of FWS's NEPA decision and is required by Director's Order No. 11, but only for HCPs that are categorically excluded (see definition, Chapter 8, and Appendix 14).

How these documents are handled may vary. Typically, the Field Office drafts the biological opinion [see below, Section C.3(b)], FONSI or ROD, and Set of Findings, and forwards the draft documents to the Regional Office to be finalized. The applicant should not draft these documents because they involve internal Service decisions. The Regional Office typically prepares the EAM and permit. The permit usually includes an attachment incorporating terms and conditions of the HCP and referencing applicable Federal regulations and other conditions, including the permitted incidental take levels and terms and conditions.

In the interests of efficient processing, the Field Office should prepare a draft biological opinion and draft Set of Findings and forward them to the Regional Office as soon as possible during the permit processing phase--typically during or immediately after the close of the 30-day public comment period. The biological opinion can be finalized by the Field Office. The Regional Office should not finalize and sign the biological opinion, FONSI or ROD, or Set of Findings until after the public comment period has terminated and public comments have been addressed.

To meet the target section 10 permit processing times, it is essential that formal application processing steps overlap, not run consecutively. The formal processing phase begins when the Regional Office receives the application form, fee (if applicable), HCP, IA (if required), draft NEPA analysis, and certification memo from the Field Office. Publication of a notice in the Federal Register requires the HCP, IA, NEPA analysis, and Federal Register notice. Issuing the permit requires all the above plus the biological opinion, signed FONSI or ROD, Environmental Action Memorandum (for low-effect HCPs only), Set of Findings, and the permit.

Try to complete each document as early as possible in the process, but do not hold up one stage while waiting for non-essential components of the previous stage. Whenever possible, complete the components of one stage while another is underway. The Field Office can begin drafting the FR Notice while the Regional Office reviews the application package; the Field Office can draft the biological opinion and Set of Findings during the public comment period; and so on.

e. Labeling the Documents as Draft/Final.

The HCP and IA (if required) are subject to change during Regional Office review and the public comment period, and for this reason they need to be labeled as "drafts" and dated when submitted for processing. The EA should be labeled draft until the Regional Office Environmental Coordinator or HCP Coordinator has reviewed the document, and until the public comments, if any, are incorporated; the accompanying FONSI should be labeled as "preliminary" until public comment, if any, are incorporated into the HCP and EA. An EIS must always be announced in the Federal Register as a draft and final EIS and must be so labeled.

f. Dating Section 10 Documents.

Since HCPs can go through many drafts during the HCP development phase, all HCP copies, draft and final, should bear a date on the front page or inside title page that includes the month, year, and day. This will confirm at any stage in the process what HCP draft or version is being referenced in correspondence or discussions and which is the most up-to-date.

To ensure a complete administrative record, the Field Office and Regional Office should state in writing what measures and revisions they recommend to the applicant or Field Office, respectively, throughout the HCP development and formal application processing phases. Also, all Offices should reference the date of the specific HCP to which it refers in any written correspondence or other records.

g. Finalizing the Implementing Agreement.

The following process should be followed, if the applicant and Regional Director have decided to complete an IA; remember this document is optional, left to the discretion of the Regional Director, and not required for a low-effect HCP. The timing of finalization of the Implementing Agreement is essential, because improper handling of the Agreement can result in unnecessary delays. All signatories to the Implementing Agreement should have reviewed draft versions of the Agreement and all non-federal signatories should have agreed to its provisions before it is forwarded to the Regional Office with the complete application package. It should not be signed at that point because it must still be submitted for public comment with the HCP and may require Solicitor's Office review. If the Agreement was already signed when submitted with the application package, and subsequent changes are required, re-circulation for a second signing may be necessary. This is frustrating for permit applicants, particularly when the Agreement requires approval by local authorities (e.g., a county Board of Supervisors), which must then re-approve the Agreement. However, the Agreement must be signed prior to permit issuance. The Implementing Agreement should be circulated for signature after the public comment period has closed and changes to the HCP or IA, if any, have been incorporated. An original signature copy of the Implementing Agreement should be provided to each signatory to the Agreement. For FWS, signature authority for the Implementing Agreement lies with the Regional Director's Office. For NMFS, this authority lies with either the Regional Director or the Director of the Office of Protected Resources, Washington, D.C.

3. Who Submits the Application Package?

There are several ways the complete application package can be submitted to the Regional Office. The HCP, IA, and draft NEPA analysis (if not prepared by the FWS or NMFS), can be forwarded by the applicant to the Field Office, and the Field Office then forwards these materials, together with its certification memo, to the Regional Office. Or, the Field Office

and applicant can forward to the Regional Office, respectively, the documents for which they are responsible; in this case the Regional Office would compile the complete application package and supply the Field Office with the final versions of the HCP and IA. There are other possible variations; however, most FWS Offices prefer that the Field Office submit the entire application package to the Regional Office.

This handbook delegates to the Regional Offices the task of establishing specific methods by which permit application packages will be submitted. Each Regional Office must develop clear protocols for this procedure, and notify all affected Field Offices.

4. Judging the Application for Completeness.

The applicant must provide all information requested on the application form or in the application instructions for NMFS (Appendix 9). If the form has not been completed correctly, the applicant should be notified, in writing or by phone with an accompanying memo that should be filed in the administrative record, and asked to correct the deficiency or submit additional information. Requests for information should include notification that if the information is not received within the allotted time, the application will be deemed inactive [50 CFR 13.11(e) or 50 CFR 220.13]. The applicant should refer to the inactive application if he or she reapplies in the future. This paragraph refers only to data required on the application form; it does not apply to requests for further biological information or other information upon which a substantive decision with respect to the permit application would be made.

To determine whether the HCP is complete, see Chapter 3, Section B.1, B.8, and Chapter 6, Section B.4. To determine whether the NEPA analysis is complete, see Chapter 5, Sections A.1-4. In most HCPs, however, the adequacy of these documents will be evaluated during the HCP development phase, not after the permit application is submitted. Only in relatively rare cases--e.g., when an applicant has prepared the HCP without Service assistance--will their adequacy need to be evaluated for the first time at the beginning of the formal permit processing phase.

5. Problems Identified During the HCP Development.

Problems identified during the HCP development phase should be elevated to the Regional Offices early in the process for suggestions that might be helpful to the applicant and the Field Office for resolving differences. Even if the Services perceive that problems remain, the applicant is entitled to submit a permit application. The Services should publish a Notice of Receipt of the permit application in the Federal Register and duly process the application. However, prior to announcing receipt of such an application in the Federal Register, FWS or NMFS may detail the HCP's deficiencies and the reasons for them to the applicant in writing.

The above discussion applies to biological issues and issues of scientific judgement only. The Services need not process a permit application that lacks statutory HCP components or other application components required by Federal regulation.

6. FWS Law Enforcement LEMIS System.

For FWS, all permits and permit numbers issued under the ESA must be issued through LEMIS (Law Enforcement Management Information System), managed by the FWS Law Enforcement Division. LEMIS contains the following information for each permit and permit application:

- Basic information on the permit applicant (e.g., name, address, telephone number);
- Pertinent dates (e.g., application receipt date, issuance and expiration dates, report due dates, and revocation dates);
- Permit authorizations and/or conditions;
- Species involved;
- Location of the authorized activities; and,
- Identity of the permit issuing office.

Once the application review process is complete and a decision is made to issue the permit, the permit must be issued with a LEMIS number and the issuance must be recorded in LEMIS. The terms and conditions that go with the permit are often printed on a separate sheet of paper and are attached to the permit (see Appendix 15 for a sample permit form and Appendix 17 for examples of issued permits).

C. Internal FWS/NMFS Review

1. Early Coordination Between the Field and Regional Office.

To ensure timely processing of permit applications, the Regional Office, Field Office, Solicitor's Office (FWS) or General Counsel's Office (NMFS), and in some cases the NMFS Office of Protected Resources, should begin communicating about an HCP effort as soon as possible after serious discussions on the HCP begin. Early coordination helps avoid processing delays by identifying and resolving internal disagreements and other problems before the HCP is completed. This allows Regional Office staff to provide technical assistance to the Field Office as needed, and ensuring Regional Office familiarity with the HCP when the application is received by that office and formal permit processing begins.

Management should always be involved early in the process. Under no circumstances should the Field Office and Regional Office find themselves in serious disagreement on the substantive aspects of an HCP after a permit applicant who has requested Field Office assistance in developing the HCP has submitted the application to the Regional Office for approval.

There are various ways that coordination between the Field Office and Regional Office on a developing HCP can occur: (1) periodic briefing statements from the Field Office to the Regional Office; (2) meetings between Field Office and Regional Office staff; (3) joint Field/Regional review of HCP drafts; and (4) participation by Regional Office staff management in important meetings (sometimes referred to as "milestone" meetings). Specific methodologies are left to the discretion of the individual Regions.

At a minimum, during the HCP development phase the Field Office should regularly apprise the Regional Office about: (1) the proposed project or activity; (2) the species involved; (3) current status of the planning effort including primary features of the mitigation program; (4) positions with respect to the planning effort of affected public and private interests; (5) any obvious or underlying controversies or issues that could affect the final outcome of the HCP or the permit processing phase; and (6) any pertinent information that would help the Regional Office understand the HCP and process the application when it is submitted. Questions about HCP policy interpretation or procedure by the Field Office should be elevated quickly to the Regional Office when they arise. The Regional Office should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the Assistant Director for Ecological Services to ensure the interpretation of the policy is sufficient and within the overall National policy guidance for the HCP program. The Regional Office should also keep the Solicitor's or General Counsel's Office informed and request assistance on legal issues promptly when needed.

If the Regional Office, Solicitor's Office, or General Counsel's Office has specific concerns about ongoing or pending HCPs or foresees any problems with pending permit applications in light of section 10 permit issuance criteria or other requirements, it should notify the Field Office as soon as possible. The Field Office and Regional Office must then jointly resolve any outstanding internal concerns. Briefing statements and other written records of coordination between the Field and Regional Office during the HCP development phase should be maintained as part of the administrative file. They may also be forwarded to other FWS/NMFS Regions to aid inter-Regional awareness of HCP activities.

2. Distribution of the Application Package.

The Regional Office that receives the permit application package should send the package to the following offices for review, generally requesting comments within 30 days; this should be done as early as possible so that this review period can run concurrently with the 30-day public comment period:

- The appropriate Solicitor's (FWS) or General Counsel's (NMFS) Office with a written request for review, unless legal review is waived (see Section C.4 below).

- For FWS, the Assistant Regional Director(s) of Law Enforcement with jurisdiction over the applicant's Region of residence, and the Region(s) where the proposed taking would occur. The appropriate ARD and ARD-LE should jointly determine whether, and under what circumstances, FWS law enforcement personnel need to review the entire application package. Such review is advised if there are questions about the enforceability of the HCP or the HCP involves other potential law enforcement issues.

  For FWS, check with Law Enforcement whether LEMIS gives a "PRIOR INVESTIGATION RECORD" warning about the applicant. If such a warning appears, a permit may not be issued until the ARD-LE approves.

  For NMFS, the Regional Law Enforcement Division with jurisdiction over the applicant's Region of residence, and the Region where the proposed taking would occur. The Regional Director and Law Enforcement Division will determine whether further review is necessary.

- If the application package is submitted to a Regional Office other than the Regional Office with lead responsibility for the affected species, comments from the lead Region and other Regions in the species' range should be requested.

- The Field Office conducting the internal section 7 consultation, if that office is different than the Field Office that assisted in developing the HCP [see Section C.3(b) below].

- The state fish and wildlife conservation agencies of states in which the proposed taking will occur, as well as any Federal agencies that are directly involved in or affected by the HCP program. This may not be necessary if these agencies received the package directly from the permit applicant.

- Where appropriate, technical scientific comment could be solicited from species experts within or outside the Services and from the recovery team if one is available.

3. Internal Section 7 Consultation.

Under section 7 of the ESA, issuance of an incidental take permit by FWS or NMFS is a Federal action subject to section 7 compliance. This means the Services must conduct an internal (or intra-Service) formal section 7 consultation on permit issuance. For FWS, this

can be conducted between the Regional Director's office, which issues the permit, and the Ecological Services office, which is responsible for the endangered species program. It may also be conducted between the Assistant Regional Director for Ecological Services and the Field Office that assisted the applicant in developing the HCP. It is strongly encouraged to include the section 7 biologist in the developmental process of the HCP, so that the section 7 requirements can be addressed early in the process to eliminate possible difficulties or the potential call of jeopardy at the end of the process. The Services regard these two processes as concurrent and related.

For NMFS, consultation may be conducted between the Field Office and the Regional Director or between the Endangered Species Division and the Office of Protected Resources in Washington, D.C. In the HCP context, informal consultation may be considered to include all Service Field Office/Regional Office coordination and assistance to the applicant during the HCP development phase. Formal consultation on a section 10 permit typically is not initiated until the permit processing phase.

a. Role of the Section 7 Consultation.

The purpose of any formal consultation is to insure that any action authorized, funded, or carried out by the Federal government is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species. Formal consultation terminates with preparation of a biological opinion, which provides the Services' determination as to whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Internal consultation on a section 10 action ensures that issuance of the permit meets ESA standards under section 7. In practice, because one of the section 10 issuance criteria is the same as the regulatory definition of jeopardy under section 7 (see Chapter 7, Section B.4), the section 7 consultation represents a last internal "check" that the fundamental standard of avoiding jeopardy has been satisfied.

Another purpose of formal section 7 consultation is to develop reasonable and prudent measures and terms and conditions to minimize anticipated incidental take, or, if necessary, reasonable and prudent alternatives to eliminate the risk of jeopardy. These are included with the biological opinion. However, since the Services ordinarily will have provided technical assistance in developing the HCP, and included all necessary mitigation, reasonable and prudent measures or alternatives rarely will need to be developed during the section 7 consultation. This should be necessary only in cases where an applicant did not consult with the FWS or NMFS in developing the HCP or did not incorporate Service recommendations and such measures or alternatives are necessary to satisfy the requirements of section 7.

Reasonable and prudent measures are defined as required actions identified during formal intra-Service consultation which the Regional Director believes necessary or appropriate to minimize the impacts of incidental take. Reasonable and prudent measures, if necessary, can

be used to modify the HCP. However, such adjustments should be made only if they are minor in scope, and they ensure compliance with the requirements of the ESA. There should be very few cases where the Services introduce reasonable and prudent measures at the end of the HCP process since such matters should have been fully discussed with the permit applicant prior to the submission of the HCP. Any changes necessitated by the reasonable and prudent measures should be discussed in advance with the applicant.

b. Who Conducts the Section 7 Consultation?

The Services must be held to the same rigorous consultation standards that other Federal agencies are required to meet under section 7. This means, in part, that internal consultations on section 10 permit applications should be as impartial as possible. However, it is also important that section 7 consultation on a permit application does not result in otherwise avoidable delays when meeting target permit processing times. Such delays may result if the section 7 consultation is assigned to an office too far removed from the location and circumstances of the HCP. The biological opinion concluding formal section 7 consultation may be done by the FWS or NMFS office that assisted in HCP development or by another office. To avoid possible biases, the staff member conducting the section 7 consultation should not be the section 10 biologist providing technical assistance to the HCP applicant. This will help ensure that the intra-Service section 7 consultation is an independent analysis of the proposed HCP. If, because of staff time constraints, this is not possible, then the biological opinion should be reviewed by another knowledgeable biologist before it is signed by the approving official. It is very important that the staff member that completes the section 7 consultation be involved in the initial stages of the HCP process.
This will help ensure that the section 7 requirements are addressed in the HCP and that the two processes are integrated which will help expedite the permitting process. If the Regional Director has delegated the authority, the biological opinion may be signed by an approving official in the Field Office. The biological opinion is then reviewed and finalized by the Regional Office processing the permit application. This ensures a good balance between independent review and timely permit processing. The biological opinion may also be finalized and signed by the Field Office, if the Regional Director has delegated the authority to do so.

This handbook allows FWS and NMFS Regional Offices and Field Offices the discretion to use any reasonable method for conducting internal section 7 consultations, so long as (1) the resulting determination is reviewed or finalized by Service staff other than the Field Office staff HCP representative; and (2) the method does not result in failures to meet permit processing times described on pages 1-14 and 6-3.

c. Conferences on Proposed Species.

Under Section 7(a)(4) of the ESA and 50 CFR 402.10, a Federal agency must "confer" with the FWS or NMFS "...on any agency action which is likely to jeopardize the continued

existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." Thus, the Services must confer, formally or informally, on any HCP and section 10 permit application that addresses proposed species or proposed critical habitat. Technically, this needs only be done if issuance of the permit is likely to result in jeopardy to a proposed species or adverse modification of proposed critical habitat; this should not occur if the FWS or NMFS has assisted the applicant in preparing the HCP. Nevertheless, the Services should document any conclusion reached that issuance of the section 10 permit is not likely to jeopardize proposed species or adversely modify proposed critical habitat. This information can be included with the biological opinion prepared for listed species addressed in the HCP, thus avoiding the need for a second section 7 document. The FWS/NMFS section 7 handbook contains further information about preparation of section 7 conference documents.

For purposes of section 10 permit applications, FWS and NMFS will treat candidate species or any species (e.g., unlisted species) that are adequately covered in an HCP (see Chapter 4, Section A) in the same manner as proposed species with respect to conferencing procedures. This will ensure that such species have been addressed by the Services with respect to section 7 requirements should they become listed after the permit has been issued. Refer to the FWS's Endangered Species Act Intra-Service Consultation Handbook for further guidance.

d. Biological Opinion Formats/Requirements.

It is essential that section 7 consultation on a section 10 permit application be expeditiously completed and that the resulting biological opinion is legally sound. The following suggestions are provided.

Incorporation by Reference between the Biological Opinion & Set of Findings A biological opinion for an HCP and the Set of Findings (which describes how the HCP meets statutory issuance criteria) can also be duplicative. To avoid this, the Set of Findings may incorporate the biological opinion by reference to the extent that they duplicate each other. This may include incorporating the description of the project and the jeopardy analysis.

Cross Referencing An HCP contains many of the same components typically provided in biological opinions--including a project description, assessment of impacts, and description of a mitigation program. Significant consolidations to the HCP, through cross referencing, should be avoided since the HCP must meet the statutory requirements of section 10(a)(2)(A) and be a stand alone document, however, the biological opinion can be treated more flexibly. When possible without the loss of clarity or legal adequacy, the biological

opinion could cross-reference technical information provided in the HCP rather than repeat the same information.

Requirements of the Biological Opinion Under Federal regulation [50 CFR 402.14(h)-(i)] and section 7(b)(3) and 7(b)(4) of the ESA, the biological opinion for a section 10(a)(1)(B) permit application must contain, at a minimum:

- A summary of the information on which the opinion is based. This should include a brief description of the HCP and other documents prepared with the HCP, including memoranda of understanding, biological reports, and the NEPA analysis.

- A detailed discussion of the effects of the action on listed species or critical habitat.

- The Services' opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. This constitutes the Service's "jeopardy" or "no jeopardy" determination with respect to the permit application.

In most cases, reasonable and prudent measures and terms and conditions will simply require compliance with the permit, HCP, or IA, since these documents typically have identified the equivalent of such measures and ensured their implementation. The only exception to this is if the Services determine that additional measures are needed to minimize the impact of taking, or the Services and applicant agree to include additional terms and conditions not otherwise specified in the HCP. Reasonable and prudent alternatives are only needed in those rare cases when the Services determine that permit issuance would be likely to jeopardize the continued existence of the species involved.

The Incidental Take Statement Section 7(o)(2) states that "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section [referring to the terms and conditions] shall not be considered to be a prohibited taking of the species concerned." This "incidental take statement" provides a take authorization mechanism for Federal actions similar to section 10(a)(1)(B) for non-Federal actions.

What is the role of the incidental take statement in a biological opinion for an HCP application? This can create considerable confusion among HCP reviewers since the take proposed under an HCP ultimately is authorized by the section 10(a)(1)(B) permit, not the incidental take statement. At the same time, the section 7 implementing regulations [50 CFR 402.14(i)] require an incidental take statement in a biological opinion where the Federal action is expected to result in take but will not violate section 7(a)(2).

Clearly, the Service action of issuing an incidental take permit will result in take. Thus, inclusion of an incidental take statement with a biological opinion for an HCP application is necessary to avoid any uncertainty about regulatory compliance with 50 CFR 402.14(I). At the same time, any reasonable and prudent measures or terms and conditions included with an incidental take statement for an HCP application should be consistent with the conservation program in the HCP and any terms and conditions included with the permit except in instances described above. It is also wise to avoid unnecessary duplication between the terms and conditions of the permit and those of the incidental take statement.

With these considerations in mind, the following language is recommended for the incidental take statement for any section 10(a)(1)(B) permit application:

> Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the proposed action is not considered to be prohibited taking under the Act provided that such taking is in compliance with this Incidental Take Statement.
>
> The proposed [*name*] HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions described in any associated Implementing Agreement and any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR 402.14(I). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed [*name*] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit[*s*].

In some cases, the Service(s) must specify authorized levels of incidental take in the incidental take statement as well as in the HCP and permit. However, the incidental take

levels specified in the HCP and permit and those specified in the incidental take statement should be consistent with each other. In such cases, the following introductory paragraph should be included:

> Based on the proposed [*name*] HCP and on the analysis of the effects of the proposed action provided above, the Service[*s*] anticipates that the following take may occur as a result of the proposed action:

If requested by the applicant, the following paragraph may be included where plants are addressed in the HCP and are named on the permit.

> Generally, section 9 take prohibitions do not apply to listed plant species on non-Federal lands. Therefore, listed plants typically do not have to be included in the incidental take permit. However, State law may have take prohibitions associated with the HCP. In addition, the Service must review the effects of its own actions on listed plants, even when those listed plants are found on private lands. In approving an HCP and issuing an incidental take permit during the intra-Service section 7 consultation, the Service must determine that the permit will not "jeopardize the continued existence" of listed plants. In the interest of conserving listed plants, the Service may request that the landowner voluntarily assist the Service in restoring or enhancing listed plant habitats that are present within the area covered by the HCP.

4. Legal Review of the Application Package.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the legal requirements of the ESA. This is especially important for an HCP, which has specific requirements, and for Implementing Agreements which address unique or first impression issues. It is also important for large-scale or regional HCPs which are often complex and address a variety of activities. The need for legal review of "low-effect" HCPs is less critical, since these projects are by definition minor in scope and impact (see Chapter 8).

For NMFS, all section 10 permit applications must receive legal review by the General Counsel's Office. For FWS, it is agency policy to require Solicitor's Office review of all section 10 permit applications, with the exception noted below. This will be true unless additional exceptions are allowed by a line authority no lower than the Assistant Regional Director for Ecological Services. However, Solicitor's review of HCPs categorized as "low-effect" can be waived if the HCP meets all applicable criteria for low-effect HCPs as defined in Chapter 1, Section F.2. The template in Appendix 4 can be used as a basis for developing Implementing Agreements for HCPs that are not low-effect, though Solicitor's Office review would be required in such cases.

For FWS, the Solicitor's Office need review only those parts of the permit application package that the Regional Director request be reviewed--typically the HCP and Implementing Agreement. Coordination with the Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and ideally during the HCP development phase. After Solicitor review is complete, the Solicitor's Office should forward a memorandum to the RD or appropriate ARD stating that it has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements.

5. Preparing the Signature Package.

When all HCP and NEPA analyses have been completed and reviewed by appropriate Service staff, the Regional Ecological Services Office (FWS), or Endangered Species Division or Environmental and Technical Services Division (NMFS), should sign those for which it has signature authority and assemble those and all others that are necessary for permit issuance into a "signature package." This package is then forwarded to the Regional Director's Office for finalization and signature (for FWS), or to the Regional Director's Office or Office of Protected Resources in Washington, D.C. (for NMFS). Signature authority for HCP documents may vary somewhat from Region to Region. Typically, for FWS documents requiring signature by the appropriate ARD are the: (1) biological opinion (unless signed by the Field Office) and (2) Set of Findings. Documents requiring signature by the Regional Director or Deputy Regional Director are the: (1) Implementing Agreement; (2) NEPA decision document (EAM, FONSI, or ROD); and (3) the permit. The signed biological opinion and Set of Findings should be attached to the signature package for the Regional Director's or Deputy Regional Director's reference. Where applicable, the Solicitor's memorandum stating that the HCP and associated documents meet statutory requirements also should be attached to the signature package. For NMFS, the permit documents will require the signature of the Chief, Endangered Species Division, and Director, Office of Protected Resources, if the permit is issued in Washington, D.C., or the Regional Director and Environmental and Technical Services Division if it is issued by the Regional Office. All of the supporting documents must be signed prior to the issuance of the permit.

The incidental take permit is considered effective as of the date and time the permit is signed. Immediately upon signature, the original permit and one original copy of the Implementing Agreement (if required) must be forwarded to the new permittee.

6. New Policies or Legal Questions.

Both FWS and NMFS should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the appropriate legal counsel and the Assistant Director for Ecological Services (FWS) to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP

program or the new policy. Additionally, it is imperative to discuss any legal questions (e.g., statutory or regulatory issues) or uncertainties with the appropriate legal counsel (the Solicitor for FWS and the General Counsel for NOAA) early in the permit development or permit processing phases.

D. Federal Register Notices of Receipt

1. Timing of the Notice.

Under section 10(c) of the ESA and Federal regulation [50 CFR 17.22 and 17.32(b)(1) (ii) or 50 CFR 217], publication of a Notice of Receipt of a permit application in the Federal Register is required for each section 10 permit application received by the FWS or NMFS. NEPA regulations or FWS policy also require publication of Notices of Availability of NEPA analysis (see Chapter 5, Section A). These Federal Register notices should be published after submission of the complete application package and final review of the application package by Regional Office staff, but as early in the formal processing phase as possible. The notices must offer the public at least 30 days to comment on the documents where an EA is being prepared. A longer review is required for a draft EIS.

To streamline the public review process, the Notice of Receipt of a Permit Application and Notice of Availability of the NEPA analysis should be published concurrently.

2. Content of the Notice.

The Federal Register Notice of Receipt of an Incidental Take Permit Application must include the following information (see Appendix 16 for sample Notices of Receipt):

- Applicant's name and city and state of residence;
- For FWS, the application file number (PRT-____) as issued by LEMIS;
- A brief description of the proposed activity, the species involved, estimated number of individual animals or habitat quantity to be taken, affected locations, and proposed length of the permit, if known;
- Length of the comment period (minimum is 30 days from date of publication); for a draft EIS, a minimum 45-day comment period is required;
- Name and mailing address of the office(s) from which a copy of the application package may be obtained; street address and business hours where persons may view the application in person; and address of office where comments are to be submitted, including FAX number, if available;

- The name, address, and telephone number of a Service employee to contact for further information; and

- Supplementary information including a brief description of the measures the applicant will implement to minimize, mitigate, and monitor the incidental taking; a summary of the alternatives considered; a description of long-term funding, if any; and a summary of significant environmental effects. The notice should be brief but of sufficient detail to convey the main aspects of the proposed activity.

3. Submission to the Office of the Federal Register and PDM.

For FWS, when the Federal Register notice is ready for publication, **three** copies of the notice with **original** signatures by the appropriate ARD on all copies, and the name and title of the signatory below the signature, must be submitted to the Office of the Federal Register at the address below. A transmittal letter is usually included.

U.S. Mail
National Archives & Records Administration
Office of the Federal Register
Washington, D.C. 20408
(Telephone 202/523-3187)

Overnight/Courier Delivery
Office of the Federal Register
Room 700
800 North Capitol Street, Northwest
Washington, D.C. 20002
(Telephone 202/523-3187)

Federal Register notices generally are published within 3 working days after receipt by the Office of the Federal Register, if received prior to 2:00 p.m.

A copy of the Federal Register notice, with the originating office's billing code, should also be sent to the FWS Division of Policy and Directives Management (PDM) in Washington, D.C. at the address below. The notice should be sent to PDM no later than the time it is sent to the Office of the Federal Register. The purpose of this is to allow the Washington D.C., PDM Office to assist in prompt publication of the notice in case questions arise after the notice has been submitted.

U.S. Fish and Wildlife Service
Division of Policy and Directives Management
ARLSQ-224
4401 N. Fairfax Drive

Arlington, VA 22203
FAX: 703-358-2269

For NMFS, all Federal Register notices must be cleared through the Office of Fisheries Conservation and Management in Washington, D.C. (see Appendix 12 for address).

If the Regional Office believes an HCP permit application is potentially controversial, faces a likelihood of legal challenge, or otherwise address issues deserving of Secretarial attention, it should notify the Regional Public Affairs Office and request the Regional Public Affairs Officer to coordinate with appropriate FWS or Department personnel in Washington, D.C. For NMFS, the Office of Protected Resources should be notified (see Appendix 12 for address).

4. Providing HCP Documents to the Public/FOIA Considerations.

Once a permit application is received, the Service should encourage the applicant to involve all appropriate parties. This is especially true for complex and controversial projects. The Service should also notify interested parties when documents (e.g., NEPA analysis or HCP) become available for public review. In addition, during the public comment period the Service may wish to hold informational meetings and answer questions that members of the public may have regarding the HCP or permit issuance.

During the comment period, the Services should provide the permit application package to those requesting copies. The Services should provide information that documents compliance with the requirements of section 10 (a)(2) of the ESA. The Service should not release confidential, proprietary, or individual privacy information which may be protected under 43 CFR 2.13(c)(4) and (6) respectively. If the applicant is a business or sole proprietorship, the Services should review the application for any information that may be deemed "confidential business information" or could cause "competitive harm." In such cases, the program should release information in accordance with guidance found in 43 CFR 2.15(d). If the applicant is an individual, the information in block 4 of the application (date of birth, social security number, etc.) must be blocked out before mailing in accordance with the Privacy Act and FOIA (see Appendix 11). The program should also review the remainder of the application for information that could invade personal privacy.

In both cases, the Services should send the requestor a note explaining what was deleted and that it may be available under the FOIA. If the requestor filed a FOIA request initially for the information, the program in consultation with the Solicitor's office, must provide an explanation of what material was exempted and why; and provide appeal rights to the requestor in accordance with the FOIA.

Documents that reflect intra-agency or inter-agency deliberations are most likely exempt under the FOIA. Exemption would depend on whether the agency can show such

information is predecisional and deliberative, foreseeable harm will result in their release; and apply to both the deliberations and any other information which is not reasonably segregated from them.

After the comment period, the Services should provide copies of applications and related material to those requesting a copy. Though a FOIA request is not required to receive information, release of the information should still be done in accordance with the FOIA.

The application package, including the NEPA analysis, must be provided to all affected interests who request the package or have a record of significant interest in the planning program. For EISs it is wise to prepare a distribution list before the EIS is printed, since an adequate number of copies must be printed to meet the demand. For HCPs, Field Offices should estimate the number of copies needed to send to commenters and the affected public and arrange for duplication.

When requested, copies of the application package should be mailed immediately since the public has a limited time to review documents and submit comments.

If additional significant information is submitted by the applicant after the 30-day comment period has closed, which requires a change to the application, the comment period should be reopened through a second Federal Register notice.

The Services are not obligated to consider comments received after the 30-day comment period has closed, but may elect to do so, especially if they contain significant biological information or if discussions with the applicant have continued after the close of the comment period. All late comments must then be considered, however. If any new information received from either commenters or the applicant is of relevance to the decision regarding issuance of the permit, it will be necessary to reopen the public comment period.

5. Objection to the Permit.

Any individual may object to issuance of an incidental take permit for an **endangered** species during the 30-day comment period. An objection should be in writing, refer to the permit application number, and provide specific, substantive reasons why the individual believes the application does not meet the permit issuance criteria or other reasons why the permit should not be issued. For FWS, if the objector requests notification of the final action in writing and the FWS decides to issue the permit, the agency must notify the objector in writing that the permit will be issued. A reasonable effort must be made to accomplish this notification at least 10 days before permit issuance. If notification is verbal, it must later be followed in writing. If notification prior to permit issuance could lead to harm to the endangered species or population involved, or unduly hinder proposed activities to be authorized, FWS may dispense with prior notification; however, written explanation for doing so must be provided to the objector following permit issuance.

The objection process described above does not apply to **threatened** species. Under 50 CFR 17.32(b)(1)(ii), the FWS must publish notice in the Federal Register for each application to incidentally take a threatened species, and the notice should invite written comments from interested parties during a 30-day comment period. The FWS is not required to address objections to permit issuance for threatened species in the manner described above, though doing so is recommended.

6. Notice of Permit Issuance, Amendment, Denial, or Abandonment.

Although not required by law or Federal regulation, it is FWS policy to notify the public of their section 10 permit application decisions. NMFS is required by its regulations at 50 CFR 222.24(c) to publish a notice of the decision within 10 days after the date of issuance or denial. Notices of permit issuances, denials, and amendments should be published in the Federal Register on a quarterly or biannual basis. A 45-day waiting period is recommended prior to publication of permit denial notices to allow time for appeals by the applicant. Appendix 18 contains "templates" for preparing Notices of Issuance for a single permit and for multiple permits. Notice of the abandonment of a permit application by the applicant need not be published.

E. Permit Issuance Conditions and Reporting Requirements

The permit (for FWS, Form 3-201; for NMFS, agency letterhead) must identify the species, stipulate the activities authorized, and indicate the location(s) where the activities can be conducted. The permit, together with its attached terms and conditions, must contain sufficient information so that no question remains by the permittee or an enforcement officer as to the scope of the authorized taking. Appendix 17 contains examples of issued FWS incidental take permits.

1. Permit Conditions.

The Services have the authority to impose terms and conditions in the permit necessary to carry out the purposes of the permit, including but not limited to, monitoring and reporting requirements necessary for determining whether such terms and conditions are being complied with. The terms and conditions placed in the permit should be the same as, or a re- statement of, those described in the final HCP, with the exception of standard conditions that go into all permits. However, in some cases FWS or NMFS may need to incorporate additional conditions resulting from the section 7 consultation. Reasonable and prudent alternatives, if provided in the section 7 consultation to avoid jeopardy, as well as reasonable and prudent measures and terms and conditions, if included in the incidental take statement, must be included in the permit conditions. Permits should also identify protocols for handling dead and/or injured specimens of protected species taken under authority of the permit.

2. Permit Duration. [See 50 CFR 13.21(f) or 50 CFR 222.22(e)]

The Conference Report for the 1982 Section 10 amendments states, "The Secretary is vested with broad discretion in carrying out the conservation plan provision to determine the appropriate length of any section 10(a) permit issued pursuant to this provision in light of all of the facts and circumstances of each individual case" (H.R. Rep. No. 97-835, 97th Congress, Second Session).

Thus, the allowable duration of a permit is flexible but an expiration date **must** be specified (for FWS, in block 7 of the permit Form 3-201). The duration of planned activities, the potential positive effects to listed species provided under the permit, and the potential negative effects to the species that may result from premature permit expiration should be considered in determining permit length. Also, local government agencies may wish to tie the permit expiration date to local land use plans. Development or land use activities and the conservation program proposed in the HCP may require years to implement. The Services must assure the applicant that authorizations under the permit will be available for the life of the project, and the public that conservation measures under the permit will remain in effect for as long as necessary to implement the conservation program.

3. Distribution of Copies of the Permit.

A copy of the issued permit should be provided to the Endangered Species Division in Washington, D.C. (FWS and NMFS), applicable Field Offices, other Federal agencies involved in the HCP, and affected state wildlife and conservation agencies.

4. Reporting Requirements. [See 50 CFR 13.45; 50 CFR 17.22(b)(3) and 17.32(b)(3) or 50 CFR 222.22(d)(1)]

The permit should include reporting requirements necessary to track take levels occurring under the permit and to ensure the conservation program is being properly implemented. Federal regulation (50 CFR 13.45) requires annual reports unless otherwise specified by the permit. The HCP itself will often specify reporting requirements. Unless reporting requirements in addition to those in the HCP are deemed to be necessary, reporting requirements in the HCP and the permit should be the same. Failure to submit adequate reports as required by the permit is a violation of the permit and may lead to permit suspension or revocation.

- Each permittee must file a report, even if no activity was conducted under the permit in that reporting interval.

- No permittee should be required to include in a report information of a private or personal nature (for individuals). Sensitive business information or information

that is otherwise considered proprietary (for businesses) should also generally not be required.

- If a report required by the permit is not submitted or is inadequate, the permittee should be notified in writing and offered at least 30 days to demonstrate compliance. If the permittee fails to comply within the allotted time, permit suspension procedures (50 CFR 13.27) or revocation procedures (50 CFR 13.28 for FWS, 50 CFR 222.27 for NMFS) should be initiated.

- Report due dates should be flexible and wherever possible tailored to the activities being conducted under the permit (e.g., due at the end of a particular stage of the project). If possible, the due date should also be coordinated with other (e.g., state) reporting requirements so the permittee can satisfy more than one reporting requirement with a single report. For low-effect HCPs in which the project or activity is completed in less than a year or in which annual reporting is otherwise deemed to be unnecessary, a single "post-activity" or "post-construction" report is often adequate.

- A copy of the report, or a notice that it is available should be sent to state wildlife agencies and other appropriate parties, either by the applicant or the FWS or NMFS.

- Reports should be monitored closely to ensure that they contain adequate information and the permittee is complying with the authorizations and conditions of the permit. For FWS, information about apparent violations should be forwarded to the appropriate ARD-LE Office and Law Enforcement special agent. The Regional Office, in coordination with Law Enforcement, should immediately notify the permittee of apparent noncompliance and request an explanation. For NMFS, permit violations should be reported to the appropriate Regional Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation.

F. Permit Denial, Review, and Appeal Procedures

1. Permit Denial.

If the HCP and associated documents do not satisfy issuance criteria under the ESA and Federal regulation, the permit application must be denied. The applicant must be notified of the denial in writing and the reasons for the denial, of applicable regulations resulting in the denial, and of the applicant's right to request reconsideration of the permit application. For NMFS, denials must be made in accordance with 15 CFR part 904.

2. Review Procedures. [See 50 CFR 13.29 or 50 CFR 220.21]

A section 10 applicant has access to a two-tiered system of review of a permit denial within the issuing office: (1) if the permit is denied, the applicant can request reconsideration of the permit application; and (2) if the request for reconsideration is denied, the applicant can appeal the decision. To ensure independent review of a permit denial at each stage, review decisions and signature authority should be as follows:

- For FWS, initial permit denials should be signed by the appropriate Assistant Regional Director;

- Decisions on requests for reconsideration should be signed by the Deputy Regional Director (DRD);

- Appeal decisions (the final administrative action) should be signed by the Regional Director (RD).

For NMFS, the above decisions must be signed by the Regional Director or the Director of the Office of Protected Resources Division in Washington, D.C.

3. Requests for Reconsideration. [See 50 CFR 13.29(a)-(d) or 50 CFR 220.21]

For FWS, a permit applicant may request reconsideration of (1) denial of a permit application, renewal, or amendment request; and (2) amended, suspended, or revoked permits, except for permit actions required by changes in statute or regulations. The applicant's request must meet the criteria outlined in 50 CFR 13.29, be in writing, be signed by the applicant or a designated representative, and be addressed to the Deputy Regional Director.

When the DRD's office receives a request for reconsideration, the ARD that issued the denial must forward a copy of the applicant's file, along with a summary of the file's pertinent points, to the DRD. If the DRD determines that permit issuance criteria have been satisfied, the denial is reversed and a permit may be issued. If the denial is sustained, the DRD must notify the applicant of the decision within 45 calendar days of receipt of the request. This notification must be in writing, state the reasons for the decision, and describe the evidence used to make it. The letter must also provide information concerning the applicant's right to appeal, the office to which the appeal should be made, and the procedures for making the appeal.

For NMFS, procedures for requests for reconsideration are addressed in 50 CFR 220.21.

4. Appeal. [See 50 CFR 13.29(e)-(f)]

For FWS, an applicant may appeal a second denial of the permit in accordance with 50 CFR 13.29(e)-(f). The written appeal request must be signed by the applicant or a designated

representative and be addressed to the Regional Director. Before a decision is made, the appellant may present oral arguments before the RD if the RD believes this could clarify issues raised in the written record.

The RD shall provide the appellant with written notification of the appeal decision within 45 calendar days of receipt of the request. This time frame may be extended with good cause if the appellant is notified of and concurs with the extension. The RD's decision on a permit appeal constitutes the final administrative decision of the Department of the Interior.

5. Copies of Denials.

For FWS, a copy of all section 10 permit denials, including denial of reconsideration and appeal requests, should be sent to all affected Field Offices, the ARD-LE, and the Division of Endangered Species in Washington, D.C. For NMFS, copies should be sent to affected Field Offices and Regional Offices and the Endangered Species Division in Washington, D.C.

G. Permit Amendments [See 50 CFR 13.23 or 50 CFR 222.25]

For FWS, amendment of existing permits may be requested by a dated letter signed by the applicant and referencing the permit number. The $25 application fee is required unless the applicant is fee exempt (see Appendix 10). Procedurally, a permit amendment application is treated in the same way as the original permit application. However, documentation needed in support of a permit amendment will vary depending on the nature of the amendment and the content of the original HCP. If the amendment involves an action that was not addressed in the original HCP, Implementing Agreement, or NEPA analysis, these documents may need to be revised or new versions prepared addressing the amendment submitted. If the circumstances necessitating the amendment were addressed in the original documents (e.g., a previously unlisted species adequately addressed in the HCP is subsequently listed), then only amendment of the permit itself is generally needed. See Chapter 4 for a discussion of how previously unlisted species are treated if they are listed.

For NMFS, applications to modify a permit are subject to the same issuance provisions as an original permit application as provided in 50 CFR 222.22.

H. Permit Renewal [See 50 CFR 13.22 or 50 CFR 220.24]

For FWS, Federal fish and wildlife permits may be renewed if indicated in block 4 of the permit. Whether or not the permit is renewable should be determined by the Regional Office when the permit is issued.

If the permittee files a renewal request and the request is on file with the issuing FWS office at least 30 days prior to the permit's expiration, the permit will remain valid while the renewal is being processed, provided the existing permit is renewable. The permittee may

not take listed species beyond the quantity authorized by the original permit, however. A renewal request must:

- Be in writing;
- Reference the permit number;
- Certify that all statements and information in the original application are still correct or include a list of changes;
- Provide specific information concerning what take has occurred under the existing permit and what portions of the project are still to be completed; and
- Request renewal.

If a permittee fails to file a renewal request 30 days prior to permit expiration, the permit becomes invalid after the expiration date. If the permittee seeks extension of the expiration date only and proposes no additional taking, a public comment period generally is required. A permittee must have complied with annual reporting requirements to qualify for renewal.

For NMFS, requirements for permit renewal are contained in 50 CFR 220.24.

I. Permit Transferals

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this section may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Congress amended section 10(a)(1) of the Act in 1982 to authorize new incidental take permits associated with HCPs. Many HCP permits involve long-term conservation commitments that run with the affected land for the life of the permit. The Services negotiate such long-term permits recognizing that a succession of owners may purchase or resell the affected property during the term of the permit. In other HCP situations, the HCP permittee may be a State or local agency that intends to issue subpermits that authorize the incidental take for the permit to those entities involved in the HCP.

The Services do not view these situations as problems since the terms of such permits frequently run with the land, binding successive owners to the terms of the HCP. Landowners similarly do not view this as a problem as long as the Services can easily transfer incidental take authorization from one purchaser to another. However, the new landowners must be able and willing to assume the responsibilities associated with the permit (i.e., the minimization/mitigation strategy and the terms and conditions of the permit) to receive the assurances of the permit.

If a landowner, who is a section 10(a)(1)(B) permittee, transfers ownership of the land that occurs within an approved HCP, the Services will regard the new owner as having the same rights with respect to the permit as the original landowner, provided that the new owner agrees to be bound by the terms and conditions of the original permit. Actions taken by the new landowner resulting in the incidental take of species covered by the permit would be authorized if the new landowner agrees to the permit and continues to implement the minimization and mitigation strategies of the HCP.

To ensure that original permittees inform new landowners of their rights and responsibilities, a section 10(a)(1)(B) permit must commit the permittee to notify the Services of any transfer of ownership of any lands subject to the permit before the transfer is finalized. The Services should attempt to contact the new landowner to explain the prior permit, and determine whether the new landowner would like to continue the original permit or enter into a new permit. In addition, the original permittee needs to work with the new landowner(s) to ensure they understand the obligations associated with permit transfer. The Services will provide any technical assistance necessary to ensure that all parties understand their rights and responsibilities.

If, however, the new landowner <u>does not</u> agree to the terms and conditions of the original permit, the original permittee must work with the Services to determine whether, and under what circumstances, the permit can be terminated. In order to terminate the permit, the Services must determine if the minimization and mitigation measures that were conducted up to that point were commensurate with the amount of incidental take that occurred during the term of the permit. If the incidental take occurred during the initial stages of implementing the permit, but the minimization and mitigation measures occur throughout the term of the permit, the Services shall require that the remainder of the minimization and mitigation measures be implemented before the permit is terminated. In this fashion, the Services will be able to ensure that there is adequate and sufficient minimization and mitigation for the incidental take that occurred during the term of the permit.

J. Permit Violations, Suspensions, and Revocations

On occasion, the Services may find that a permittee has violated conditions of the permit. This may become evident through review of a permittee's annual report, a field inspection, or

other means. Implementing Agreements sometimes contain provisions concerning the failure of signatory parties to perform their assigned responsibilities under an HCP.

1. Notifying Law Enforcement.

In the event of a known or suspected permit violation, the appropriate ARD-LE and Law Enforcement Special Agent must be notified before any official action is taken (for FWS). If the violation is deemed technical or inadvertent in nature, the ARD-LE may advise that the permittee be sent a notice of noncompliance by certified mail or may recommend alternative action to regain compliance with the terms of the permit. Concurrence from the ARD-LE should be obtained before mailing any correspondence concerning an alleged permit violation to avoid wording that could compromise a current or future investigation. For NMFS, the appropriate Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation should be notified.

2. Permit Suspension/Revocation. [See 50 CFR 13.27 and 13.28]

The Services may suspend or revoke all or part of the privileges authorized by a permit, if the permittee does not:

- Comply with conditions of the permit or with applicable laws and regulations governing the permitted activity; or
- Pay any fees, penalties, or costs owed to the government.

If the permit is suspended or revoked, incidental take must cease and wildlife held under authority of the permit must be disposed of in accordance with Regional Office instructions. For further information, consult the regulations on procedures to suspend or revoke permits.

CHAPTER 7
ISSUANCE CRITERIA FOR
INCIDENTAL TAKE PERMITS

Upon receiving a permit application and conservation plan completed in accordance with the requirements of section 10(a)(2)(A) of the ESA and Chapter 3 above, FWS and NMFS must consider the issuance criteria described at section 10(a)(2)(B) of the ESA in determining whether to issue the permit. All applicable criteria must be satisfied before a permit may be issued. If the application fails to meet <u>any</u> of the criteria, the permit must be denied. In addition, the FWS must ensure that general permit issuance criteria described at 50 CFR 13.21 and criteria specific to section 10(a)(1)(B) permits described at 50 CFR 17.22(b)(2) and 50 CFR 17.32(b)(2) are satisfied. However, issuance criteria under at 50 CFR Part 17 are essentially identical to those under the ESA. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222. For NMFS, general permit criteria in 50 CFR 217 and 220 must be met in addition to criteria specific to incidental take permits in 50 CFR 222, and denials of permits must be made pursuant to Subpart D of 15 CFR part 904.

A. General Permit Issuance Criteria

The FWS cannot issue a permit if any of the following apply:

(1) The applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, if such assessment or conviction evidences a lack of responsibility;

(2) The applicant has failed to disclose material information, or has made false statements as to any material fact in connection with the application;

(3) The applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility;

(4) The authorization requested threatens the continued existence of a wildlife or plant population.

(5) The FWS finds through further inquiry or investigation, or otherwise, that the applicant is not qualified to conduct the proposed activities.

In addition to the above, FWS regulations cite four factors relating to felony violations of national wildlife laws and violation of conditions within other permits that could disqualify an

applicant from receiving a section 10 permit. These factors are described at 50 CFR 13.21(c). NMFS regulations describe similar conditions under which a permit could not be issued (see 50 CFR 220.21).

B. Endangered/Threatened Species Permit Issuance Criteria

Section 10(a)(2)(B) of the ESA requires the following criteria to be met before the FWS or NMFS may issue an incidental take permit. If these criteria are met and the HCP and supporting information are statutorily complete, the permit must be issued.

1. The taking will be incidental.

Under the ESA, all taking of federally listed fish and wildlife species as detailed in the HCP must be incidental to otherwise lawful activities and not the purpose of such activities. For example, deliberate shooting or wounding a listed species ordinarily would not be considered incidental take and would not qualify for an incidental take permit. Conversely, the destruction of an endangered species or its habitat by heavy equipment during home construction or other land use activities generally would be construed as incidental and could be authorized by an incidental take permit.

a. Authorizing Take Associated With Mitigation Activities.

Mitigation and monitoring programs sometimes require actions that, strictly speaking, may be construed as a deliberate take. A good example is trapping endangered or threatened animals at a project site to re-locate or protect them in some fashion or to monitor their presence or activities.

Generally, actions that result in deliberate take can be conducted under an incidental take permit, if: (1) the take results from mitigation measures (e.g., capture/relocation) specifically intended to minimize more serious forms of take (e.g., killing or injury) or are part of a monitoring program specifically described in the HCP; and (2) such activities are directly associated in time or place with activities authorized under the permit. Examples include capture of endangered animals from a project site and removal to adjacent or nearby habitat, capture and release of animals accidentally entrapped at the site (e.g., in a pipeline trench), capture/release studies for monitoring purposes, even permanent capture for purposes of donation to a captive breeding or research facility. However, where such activities require special qualifications, the HCP should require written FWS or NMFS authorization before any individual is permitted to conduct the work.

b. Authorizing Take For Scientific Purposes.

Other types of activities cannot be authorized by an incidental take permit because they include actions that are not generally needed to implement an HCP or include long-term components that are not "incidental" to the activity described in the HCP. Examples of these types of activities include holding endangered or threatened animals in captivity for propagation purposes or scientific research; euthanizing them for research purposes; and taking tissue samples for laboratory testing. However, such activities qualify as take for "scientific purposes" or purposes of "enhancement of propagation or survival" and can be authorized under section 10(a)(1)(A) of the ESA.

If an HCP calls for activities of this type, the applicant should specify that the project will result in incidental take and take for scientific purposes or for purposes of enhancement of propagation or survival. Application requirements for scientific permits must then be addressed. These are described at 50 CFR 17.22(a)(1)(i-ix) for endangered species and 50 CFR 17.32(a)(1)(i-ix) for threatened species (FWS) and 50 CFR 217, 220, and 222 (NMFS). In addition, FWS must address issuance criteria under 50 CFR 17.22(a)(2) for endangered species and 50 CFR 17.32 (a)(2) for threatened species to issue permits for these purposes. Generally, if proposed activities are well-described in the HCP, including those requiring a scientific permit, and if all incidental take permit application requirements have been met, the only additional information needed for a scientific permit is resumes of individuals who would be conducting permitted activities. The permit issued can be a joint section 10(a)(1)(A) section 10(a)(1)(B) permit--i.e., only one permit need be issued.

2. The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.

The applicant decides during the HCP development phase what measures to include in the HCP (though, obviously, the applicant does so in light of discussions with and recommendations from FWS or NMFS). However, the Services ultimately decide, at the conclusion of the permit application processing phase, whether the mitigation program proposed by the applicant has satisfied this statutory issuance criterion.

This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. Analysis of the alternatives that would require additional mitigation

in the HCP and NEPA analysis, including the costs to the applicant is often essential in helping the Services make the required finding.

3. The applicant will ensure that adequate funding for the HCP and procedures to deal with unforeseen circumstances will be provided.

These issuance criteria are identical to HCP requirements discussed in Chapter 3. The Services must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. Without such findings, the section 10 permit cannot be issued. Examples of funding mechanisms and methods of ensuring funding are discussed in Chapter 3, Section B.6.

The "Unforeseen or Extraordinary Circumstances " discussion in the HCP must be consistent with the joint Department of Interior/Department of Commerce "No Surprises" policy and should impose no higher standard on the permit applicant with respect to unforeseen circumstances than that described under this policy (see Chapter 3, Section B.5(a)).

4. The taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild.

This is a critically important criterion for incidental take permits because it establishes a fundamental "threshold" standard for any listed species affected by an HCP. Furthermore, the wording of this criterion is identical to the "jeopardy" definition under the section 7 regulations (50 CFR Part 402.02), which defines the term "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."

Congress was explicit about this link, stating in the Conference Report on the 1982 ESA amendments that the Services will determine whether or not to grant a permit, "in part, by using the same standard as found in section 7(a)(2) of the ESA, as defined by the [Services'] regulations." Congress also directed the Services to "consider the extent to which the conservation plan is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem." (H.R. Report No. 97-835, 97th Congress, Second Session).

Thus, since the issuance of a section 10 permit is a Federal action subject to section 7 of the ESA (see Chapter 3, Section B.2(e)), the law prohibits any non-Federal activity under an HCP from "jeopardizing" a species under two standards: (1) the section 7 jeopardy standard; and (2) the incidental take permit issuance criteria. There is one difference between these two standards--the section 10 issuance criteria apply only to listed fish and wildlife species (because listed plants typically are not protected against take on non-Federal lands), while

the jeopardy standard under section 7(a)(2) applies to plants as well as animals. However, the practical effect is the same--the ESA requires a "no-jeopardy" finding for all affected federally listed species as a precondition for issuance of an incidental take permit. The basis for this finding is the Service's biological opinion.

5. The applicant will ensure that other measures that the Services may require as being necessary or appropriate will be provided.

This criterion is equivalent to the requirement that HCPs include other measures as necessary or appropriate for purposes of the plan. Because the HCP process deals with numerous kinds of proposals and species, this criterion authorizes the Services to impose additional measures to protect listed species where deemed necessary. Although these types of measures should have been discussed during the HCP development phase and incorporated into the HCP, FWS or NMFS must ensure that the applicant has included all those measures the Services consider necessary "for purposes of the plan" before issuing the permit. The principal additional measure that the Services may require at this time is the Implementing Agreement. Other measures the Services might recommend during HCP negotiations could include those necessary to guarantee funding for the mitigation program and monitoring and reporting requirements to ensure permit compliance. Also, any incidental take permit issued will be subject to the general permit conditions described at 50 CFR Part 13, Subpart D (FWS) or 50 CFR Part 220 (NMFS) regarding the display of permits, maintenance of records, filing of reports, etc.

6. The Services have received such other assurances as may be required that the HCP will be implemented.

The applicant must ensure that the HCP will be carried out as specified. Since compliance with the HCP is a condition of the permit. The authority of the permit is a primary instrument for ensuring that the HCP will be implemented. When developed, Implementing Agreements also provide assurances that the HCP will be properly implemented. Where a local government agency is the applicant, the Agreement should detail the manner in which local agencies will exercise their existing authorities to effect land or water use as set forth in the HCP. Under an HCP, government entities continue to exercise their duly constituted planning, zoning, and permitting powers. However, actions that modify the agreements upon which the permit is based (e.g., rezoning an area contrary to land uses specified in the HCP) could invalidate the permit. In addition, failure to abide by the terms of the HCP and Implementing Agreement (if required) is likely to result in suspension or revocation of the permit.

Some HCPs may involve interests other than the applicant or permittee. In these cases, the applicant must have specific authority over the other parties affected by the HCP and be willing to exercise that authority, or must secure commitments from them that the terms of the HCP will be upheld. In the latter case, agreements between the FWS or NMFS and the

other groups, or legally binding contracts between the applicant and such individuals or interests, may be necessary to bind all parties to the terms of the HCP.

Any Implementing Agreement submitted in support of an HCP should be consistent with the discussion in Chapter 3, Section B.8, and, where applicable, with the Implementing Agreement "template" in Appendix 4.

CHAPTER 8 - DEFINITIONS

Candidate species - Under FWS's ESA regulations, "...those species for which the Service has on file sufficient information on biological vulnerability and threat(s) to support proposals to the list them as endangered or threatened species. Proposal rules have not yet been issued because this action is precluded..." (See Federal Register, Volume 61, No. 49, page 7598.) For those species under the jurisdiction of NMFS, candidate species means a species for which concerns remain regarding their status, but for which more information is needed before they can be proposed for listing.

Categorical exclusion - Under NEPA regulations, a category of actions that does not individually or cumulatively have a significant effect on the human environment and have been found to have no such effect in procedures adopted by a Federal agency pursuant to NEPA. (40 CFR 1508.4)

Complete application package - Section 10 permit application package presented by the permit applicant to the Field Office or Regional Office for processing. It contains an application form, fee (if required), HCP, EA or EIS. In order to begin processing, the package must be accompanied by a certification by the Field Office that it has reviewed the application documents and finds them to be statutorily complete.

Conservation plan - Under section 10(a)(2)(A) of the ESA, a planning document that is a mandatory component of an incidental take permit application, also known as a Habitat Conservation Plan or HCP.

Conservation plan area - Lands and other areas encompassed by specific boundaries which are affected by the conservation plan and incidental take permit.

"Covered species" - Unlisted species that have been adequately addressed in an HCP as though they were listed, and are therefore included on the permit or, alternately, for which assurances are provided to the permittee that such species will be added to the permit if listed under certain circumstances. "Covered species" are also subject to the assurances of the "No Surprises" policy.

Cumulative impact or effect - Under NEPA regulations, the incremental environmental impact or effect of the action together with impacts of past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions. (40 CFR 1508.7) Under ESA section 7 regulations, the effects of future state or private activities not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02).

Delist - To remove from the Federal list of endangered and threatened species (50 CFR 17.11 and 17.12) because such species no longer meets any of the five listing factors provided under section 4(a)(1) of the ESA and under which the species was originally listed (i.e., because the species has become extinct or is recovered).

Development or land use area - Those portions of the conservation plan area that are proposed for development or land use or are anticipated to be developed or utilized.

Downlist - To reclassify an endangered species to a threatened species based on alleviation of any of the five listing factors provided under section 4(a)(1) of the ESA.

Effect or impact - Under NEPA regulations, a direct result of an action that occurs at the same time and place; or an indirect result of an action which occurs later in time or in a different place and is reasonably foreseeable; or the cumulative results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions (40 CFR 1508.8). Under ESA section 7 regulations, "effects of the action" means "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline (50 CFR 402.02).

Endangered species - "...any species [including subspecies or qualifying distinct population segment] which is in danger of extinction throughout all or a significant portion of its range." [Section 3(6) of ESA]

Endangered Species Act of 1973, as amended - 16 U.S.C. 1513-1543; Federal legislation that provides means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, and provides a program for the conservation of such endangered and threatened species.

Environmental Action Memorandum (EAM) - A FWS document prepared to explain the Service's reasoning in finalizing an action that is categorically excluded form NEPA; decisions based on EAs for which a notice is not published in the Federal Register; emergency actions under CEQ's NEPA regulations (40 CFR 1506.11); EAs which conclude that an EIS is necessary (since no FONSI is prepared in such cases); and any decision where additional documentation of the Service's decision is desirable (Director's Order No. 11).

Environmental Assessment (EA) - A concise public document, prepared in compliance with NEPA, that briefly discusses the purpose and need for an action, alternatives to such action, and provides sufficient evidence and analysis of impacts to determine whether to prepare an Environmental Impact Statement or Finding of No Significant Impact (40 CFR 1508.9).

Environmental impact statement (EIS) - A detailed written statement required by section 102(2)(C) of NEPA containing, among other things, an analyses of environmental impacts of a proposed action and alternative considered, adverse effects of the project that cannot be avoided, alternative courses of action, short-term uses of the environment versus the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitment of resources (40 CFR 1508.11 and 40 CFR 1502).

Finding of no significant impact (FONSI) - A document prepared in compliance with NEPA, supported by an EA, that briefly presents why a Federal action will not have a significant effect on the human environment and for which an EIS, therefore, will not be prepared (40 CFR 1508.13).

Formal permit application phase - The phase of the section 10 process that begins when the Regional Office receives a "complete application package" and ends when a decision on permit issuance is finalized.

Habitat - The location where a particular taxon of plant or animal lives and its surroundings, both living and non-living; the term includes the presence of a group of particular environmental conditions surrounding an organism including air, water, soil, mineral elements, moisture, temperature, and topography.

Habitat conservation plan (HCP) - See "conservation plan."

"Harm" - Defined in regulations implementing the ESA promulgated by the Department of the Interior as an act "which actually kills or injures" listed wildlife; harm may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." (50 CFR 17.3) NMFS has not defined "harm" by regulation.

"Harass" - Defined in regulations implementing the ESA promulgated by the Department of the Interior as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, and sheltering." (50 CFR 17.3) NMFS has not defined "harass" by regulation.

Implementing Agreement - An agreement that legally binds the permittee to the requirements and responsibilities of a conservation plan and section 10 permit. It may assign the responsibility for planning, approving, and implementing the mitigation measures under the HCP.

Incidental take - Take of any federally listed wildlife species that is incidental to, but not the purpose of, otherwise lawful activities (see definition for "take") [ESA section 10(a)(1)(B)].

Incidental take permit - A permit that exempts a permittee from the take prohibition of section 9 of the ESA issued by the FWS or NMFS pursuant to section 10(a)(l)(B) of the ESA. In this handbook, also referred to as a section 10(a)(1)(B) or section 10 permit.

Listed species - Species, including subspecies and distinct vertebrate populations, of fish, wildlife, or plants listed as either endangered or threatened under section 4 of the ESA.

Mitigation - Under NEPA regulations, to moderate, reduce or alleviate the impacts of a proposed activity, including: a) avoiding the impact by not taking a certain action or parts of an action; b) minimizing impacts by limiting the degree or magnitude of the action; c) rectifying the impact by repairing, rehabilitating or restoring the affected environment; d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; e) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

National Environmental Policy Act (NEPA) - Federal legislation establishing national policy that environmental impacts will be evaluated as an integral part of any major Federal action. Requires the preparation of an EIS for all major Federal actions significantly affecting the quality of the human environment (42 U.S.C. 4321-4327).

Person - "...an individual, corporation, partnership, trust association, or any other private entity; or any officer, employee, agent, department or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States" [Section 3(12) of the ESA].

Plan area - See "conservation plan area."

HCP development phase - The period in the section 10 process during which the applicant works with the FWS or NMFS Field Office to develop the HCP and associated documents. This phase ends when the Field Office forwards a "complete application package" to the Regional Office.

Proposed action - Under NEPA regulations, a plan that has a goal which contains sufficient details about the intended actions to be taken or that will result, to allow alternatives to be developed and its environmental impacts to be analyzed (40 CFR 1508.23).

Proposed species - A species for which a proposed rule to add the species to the Federal list of threatened and endangered species has been published in the Federal Register.

Record of Decision - Under NEPA regulations, a concise public record of decision prepared by the Federal agency, pursuant to NEPA, that contains a statement of the decision, identification and discussion of all factors used by the agency in making its decision,

identification of all alternatives considered, identification of the environmentally preferred alternative, a statement as to whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted (and if not, why they were not), and a summary of monitoring and enforcement measures where applicable for any mitigation (40 CFR 1505.2).

Section 7 - The section of the ESA which describes the responsibilities of Federal agencies in conserving threatened and endangered species. Section 7(a)(1) requires all Federal agencies "in consultation with and with the assistance of the Secretary [to] utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species." Section 7(a)(2) requires Federal agencies to "ensure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of..." designated critical habitat.

Section 9 - The section of the ESA dealing with prohibited acts, including the "take" of any listed species without specific authorization of the Fish and Wildlife Service or the National Marine Fisheries Service for species under the jurisdiction of each agency.

Section 10 - The section of the ESA dealing with exceptions to the prohibitions of section 9 of the ESA.

Section 10(a)(1)(A) - That portion of section 10 of the ESA that allows for permits for the taking of threatened or endangered species for scientific purposes or for purposes of enhancement of propagation or survival.

Section 10(a)(1)(B) - That portion of section 10 of the ESA that allows for permits for incidental taking of threatened or endangered species.

Set of Findings - FWS document (also used by NMFS) that evaluates, for the administrative record, a section 10(a)(1)(B) permit application in the context of permit issuance criteria found at section 10(a)(2)(B) of the ESA and 50 CFR Part 17.

Species - "...any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature" [Section 3(15) of the ESA].

Steering committee - Group or panel of individuals representing affected interests or stakeholders in a conservation planning program, the private sector, and the interested public, which may be formed by the applicant to guide development of the HCP, recommend appropriate development, land use, and mitigation strategies, and to communicate progress to their larger constituencies. FWS and NMFS representatives may participate to provide information on procedures, statutory requirements, and other technical information.

Take - Under section 3(18) of the ESA, "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" with respect to federally listed endangered species of wildlife. Federal regulations provide the same taking prohibitions for threatened wildlife species [50 CFR 17.31(a)].

Threatened species - "...any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range" [Section 3(19) of the ESA].