

Overview of HCP Development Process

Summarized here are the basic steps for development of a Habitat Conservation Plan (HCP) to obtain an Incidental Take Permit (ITP) issued by the U.S. Fish and Wildlife Service (Service) under the federal Endangered Species Act (ESA). HCP development can be a complex process with numerous iterations among the Applicant, the Service, and other stakeholders. No two HCPs are alike, but most involve the basic steps described below.

1. Select and Retain Counsel and Consultant(s). Typically biological/regulatory consultant(s) (usually one consultant) take the largest role in preparation of the HCP. The consultant(s) first task is a desk top review of species and habitat information, usually followed by species and habitat field surveys. From the information gathered in the review and surveys, the consultant(s) provide advice to the Applicant on whether take can reasonably be avoided or application for an ITP (with preparation of an HCP) is appropriate. If the decision is made to seek an ITP, the primary task of the consultant(s) is to draft the HCP. The consultant(s) also prepare a document (Environmental Assessment (EA) or Environmental Impact Statement (EIS)) under the National Environmental Policy Act (NEPA), as described in step 5. (This paper assumes that only an EA is necessary.) Service policy is that a consultant not involved in the preparation of the HCP must prepare the EIS, but the same consultant which prepares the HCP may prepare an EA. However, Service offices can take different positions on one versus two consultants; inquiry on this point should be made to the Service early on in the process (usually in the introductory kick-off meeting described in step 4). Applicants sometimes select consultants through direct procurement or, particularly if the applicant is a governmental entity, through competitive procurement. Once the selection is made, the Applicant and the consultant(s) enter into appropriate contracts.

The counsel's primary role is to assist the Applicant and the consultant(s) in addressing any issues with legal implications that arise with the Service or stakeholders during the HCP preparation process, to review all documents prepared for the ITP application to ensure legal sufficiency and reduce the likelihood of litigation, to prepare with a representative of the Department of the Interior Solicitor's Office an Implementing Agreement (if the Service seeks one; see step 10), and to be a sounding board for the Applicant and the consultant(s) during their internal deliberations over HCP drafts. The counsel usually accompanies the Applicant and the consultant(s) to the first, kick-off meeting with the Service (see step 4), but then may hold pre-meeting preparation calls with the Applicant and consultant(s) in lieu of attending all subsequent meetings or calls with the Service as the HCP is developed, unless the need arises to discuss critical issues with the Service. In other cases, counsel may attend all or most such meetings at the Applicant's request, particularly if multiple actual or potential disagreements or issues between the Service and the consultant(s) or the Applicant appear likely (or the counsel has not previously worked, and become familiar, with the consultant(s)).

2. Establish and Appoint an Advisory Committee. Some Applicants decide to establish, and select the members of, an advisory committee that may contain representatives of certain stakeholders and persons with relevant scientific expertise. This is done for such purposes as to draw in, and possibly gain the support of stakeholders; to provide scientific support for, and validity to, the conservation program (minimization and mitigation measures) in the HCP; and to generate broader momentum behind the HCP preparation effort. This advisory committee approach may be appropriate or inappropriate depending on the specific circumstances and context involved with each HCP effort and the comfort level of the Applicant. Contingent on the particular purpose(s) of the advisory committee, it is formed either before or after the next step.

3. Establish Basic Parameters. In order to take the further steps below, the Applicant and consultant(s) must establish the basic parameters of the planned HCP. This is sometimes done in coordination with the Service and, when the Applicant considers it appropriate and likely beneficial, other stakeholders. Key parameters include covered species, covered activities, methods for estimating impacts of authorized incidental take, elements of the conservation program (minimization and mitigation measures), plan area, ITP term, and alternatives to be considered.

4. Hold Introductory Kick-Off Meeting with the Service. Once the basic parameters of the HCP have been identified, the Applicant, consultant(s), and counsel typically meet with either or both the Service's state-based Ecological Services Office (often referred to as field or local office) and Regional Office. This step allows the Applicant to gain early insight as to how the Service will view the prospective elements of the HCP and reduces the likelihood that the Service is later surprised by, and therefore more easily finds fault with, the HCP preparation effort or the Applicant encounters "last minute" demands by the Service.

5. Develop Preliminary Draft HCP and NEPA Document. This is typically a lengthy, iterative process involving the Applicant, its consultant(s) and counsel, the Service, and often other stakeholders. The duration of the process depends on the relative complexity of the HCP and the degree of surrounding controversy or opposition; however, with few exceptions, this is the most time-consuming step in the HCP preparation process. The output is a Preliminary Draft HCP and a Preliminary Draft EA. (Note that, where an EIS is determined to be necessary, the process can be more involved and may include one or more formal public scoping meetings.)

6. Identify and Select Compensatory Mitigation Measures and Possibly a Third-Part Mitigation Entity. Often an HCP's conservation program will include measures to provide mitigation for the impacts of the incidental take to be authorized by the ITP. If that mitigation includes habitat acquisition or restoration, the Applicant frequently selects a third party (typically with the Service's concurrence) – e.g., a land trust, conservation bank, or restoration specialist – to conduct the acquisition and/or restoration. The Applicant enters into a contract with the mitigation entity. Rarely, but sometimes when an HCP with an EIS is involved, the Service requests that the mitigation entity sign a memorandum of agreement with the Service to allow the Service to advise the entity on specific mitigation actions the entity intends to take. More often, the Service seeks to be third party beneficiary of the agreement between the Applicant and the mitigation entity.

7. Submit Preliminary Draft Documents. Once the consultant(s) have completed the Preliminary Draft HCP and Preliminary Draft EA, the consultant(s) submit these documents to the Service for at least one round of pre-application comments. Should the Service identify significant issues related to the draft HCP and make recommendations that would reduce the utility or raise the costs of the HCP/ITP, the Applicant then likely calls a special meeting with the Service to discuss those issues. The Applicant is accompanied by the consultant(s) and, if desired, counsel. Should the issues persist, the Applicant and counsel may need to seek the assistance of the next higher Service office (Regional Office if the initial meeting had been with the Ecological Services Office; Service D.C. headquarters if the meeting had been with the Regional Office).

8. Submit Application for an ITP, Draft HCP, and Draft EA; Public Notice. This submission by the Applicant of the draft HCP and EA to the Ecological Services Office begins the Service's formal HCP review process. Once the Service finds the documents to be in order (which is usually the case as the application normally is submitted only after the Applicant has been apprised that all issues have been resolved with the Service), the Service prepares and publishes in the Federal Register a notice of the availability of the documents and solicits public comments for a period typically of 60-90 days. Occasionally, upon request, the Service will hold one or more public hearings.

9. Address Public Comments. After the close of the public comment period, the Service and the Applicant usually work together to address any public comments in the record.

10. Final Processing and Issuance. After the Service addresses the public comments, it prepares the final documentation package, which will include, in addition to the HCP and EA, a findings memorandum and possibly a separate Finding of No Significant Impact, an internal biological opinion on the prospective federal agency action of ITP issuance ("internal" because the Service prepares the biological opinion on its own action), and the ITP itself. Some regions of the Service also prefer that the Applicant and the Service enter into an Implementing Agreement which allows the Service to enforce adherence to the HCP/ITP through application of contract law. If that is to be the case, the Service and Applicant should make sure a draft of the Implementing Agreement is available during the public comment period. Once the Ecological Services Office finalizes the ITP package, it forwards the package to the Regional Office, where the package undergoes a "surname review." Sometimes at this stage, depending in part on the degree of communication between the Ecological Services Office and the Region in step 8, additional comments are generated by the Regional Office that may warrant changes in the ITP package. Once the surname review is complete, the Regional Director signs the ITP and it is sent to the Applicant.