

Chapter 15: Finalizing the Habitat Conservation Plan (HCP) and Environmental Compliance Documents

15.1 Reviewing and Responding to Public Comments

15.1.1 Comments on the HCP

15.1.2 Comments on the NEPA Analysis

15.1.3 No Comments Received

15.1.4 Controversy

15.1.4.1 Public Objection

15.1.4.2 Scientific Controversy

15.2 Finalizing the HCP and NEPA Analysis

15.2.1 FWS Final Review

15.2.2 NMFS Final Review

15.3 Completing the Section 7 Biological and Conference Opinion

15.3.1 Relationship Between the Incidental Take Permit and the Incidental Take Statement

15.3.2 Conferencing on Potential ESA-Listed Species (Proposed, Candidate, or Unlisted Species)

15.3.3 Including Plants

15.4 Completion of National Historic Preservation Act Section 106 Requirements

15.5 NEPA Decision Documents

15.5.1 Environmental Action Statement

15.5.1.1 When to Prepare an Environmental Action Statement

15.5.1.2 Content of the Environmental Action Statement

15.5.1.3 Processing the Environmental Action Statement

15.5.2 Making the Decision on an Environmental Assessment

15.5.2.1 Finding of No Significant Impact

15.5.2.2 Content of the Finding of No Significant Impact

15.5.3 Making the Decision on an Environmental Impact Statement

15.5.3.1 Record of Decision Checklist

15.5.3.2 Content of the Record of Decision

15.5.4 Joint Federal-State Processes

15.1 Reviewing and Responding to Public Comments

If the Services received comments resulting from the notice of availability (NOA), meetings or hearings, workshops, etc., staff should screen the comments to determine whether any important new issues, reasonable alternatives, or mitigation measures have been suggested.

There are two options for documenting the response to comments (either may mean changing the Habitat Conservation Plan (HCP) or National Environmental Policy Act (NEPA) document (see the [HCP Handbook Toolbox](#)):

- Summary of Comments (see example in the [HCP Handbook Toolbox](#))
- Comment Matrix (see example in the [HCP Handbook Toolbox](#))

Check with the Regional HCP Coordinator for recommendations on the preferred method of responding to comments. Whatever process you use, response summaries should clearly state the name of the NEPA analysis and its date, as well as the *Federal Register* (FR) reference (volume number FR first page number: e.g., 80 FR 18226, 78 FR 38895).

A summary of comments may be a stand-alone document or an appendix to the NEPA analysis or decision document. If it is more than a few (6-8) pages, it should have a table of contents for easy reference. It should include:

- comments (in total) from each commenter;
- whether comments were on the NEPA analysis, HCP, general comments, or unrelated comments (you only need to thank them for an unrelated comment);
- how the comment was addressed; and
- where (in the appropriate document) the comment was addressed.

A comment matrix is usually an appendix to the NEPA analysis, the HCP, or both. The matrix should have a column for:

- the commenter's name and affiliation (if provided);
- a comment number (in case any commenter has more than one comment);
- whether the comment and response is on the:
 - HCP,
 - application, or
 - NEPA analysis;
- where (page or section) the comment was addressed in the HCP or NEPA analysis; and
- the Services' response (a column for each FWS and NMFS if both need to respond).

Helpful Hint: Be sure to actually address the comments in the preferred format, not just state where the issue is discussed in the HCP or NEPA analysis. If not incorporating suggestions from comments into the HCP or NEPA analysis, explain why.

15.1.1 Comments on the HCP

The Services bear the responsibility for both requesting and responding to public comments. Collaborating with the applicant may be the most efficient and effective way of developing a response to comments on the HCP, especially when the comments are about the applicant's proposed activities. An applicant's input may also strengthen the Services' permit decision, and help protect it from legal challenges. However, any formal response to public comments on the HCP will ultimately come from the Service issuing the permit.

15.1.2 Comments on the NEPA Analysis

If comments identify major substantive issues, or suggest new alternatives not adequately covered in the NEPA analysis, we must rewrite the NEPA analysis to incorporate them if:

- They are new, reasonable alternatives that are substantially different from current alternatives that also serve our purpose and need (Chapter 13.3.2.3), or
- The new issues have a cause and effect relationship to our permit action (Chapter 13.3.1).

Changes made under these circumstances mean that before reaching a permit decision we must republish the NEPA analysis for another round of public review and comment. If any of the issues point to the potential for unmitigated, significant impacts in an environmental assessment (EA), we should discuss potential mitigation with the applicant and incorporate necessary changes. If the applicant will mitigate for the significant impacts, thus bringing them to a level of insignificance, we should incorporate those changes and proceed with the EA. If the applicant is unwilling or unable to mitigate for the significant impacts, we must write a notice of intent to prepare an environmental impact statement (EIS) (Chapter 13.4.3). In either case, after authorization to publish the notice (FWS only), we must send it to the *Federal Register* for an additional 30-day review and comment period. If no substantive issues arise from comments, there is no need for a second review period.

If comments offer corrections or add factual information that does not bear on the determination of significant impact, the information should be added to the text of the NEPA analysis where possible. The combination of the NEPA analysis with revisions (if any) and the response to comments are the complete and final record on which we base the finding of no significant impact (FONSI), decision to prepare an EIS, or record of decision (ROD). If the HCP is low-effect and categorically excluded, we must provide a response to comments, attach comments and our response to the findings, and place a copy in the file. It should also be placed on our Web site along with the rest of the HCP package.

The NEPA decision document itself is not an appropriate document to use to respond to public comments. Instead, those responses are attached to the NEPA decision document to complete the record, or we summarize and address them in an appendix to a final EA or EIS. We must maintain a full administrative record of all comments and responses in the administrative file. We must make all NEPA comments and responses on an EA or EIS available to the public when the FONSI or ROD and permit decision is announced to the public.

To streamline the process, when we notify the public of the availability of the draft HCP and draft NEPA analysis, we may also make available the draft NEPA decision document (environmental action statement (EAS), FONSI, or combined findings/NEPA decision). If we do this, we include information in the NOA about when the final documents will be available and how to request them. For instance, the NOA may state that during the public comment period readers may request copies of drafts for review (EA, HCP, and FONSI), and then 30 days after the public comment period closes, readers may request copies of the final documents. That gives the Services' staff time to complete the documents before the public requests copies of final versions. We should make final, signed documents available on the Services' Web sites to satisfy the requirement to make documents available to the public. This also allows for a batched notice that announces the decision and availability of final documents on an annual, or more frequent, basis that will come out of the Headquarters office.

We can also use this streamlining method for a final EIS, ROD, and HCP, but remember that the U.S. Environmental Protection Agency (EPA) still needs to publish a notice of the final

documents and permit decision at least 30 days before the ROD and permit can become effective (see 550 FW 3).

15.1.3 No Comments Received

If there were no comments, document that fact in the NEPA decision document and in the set of findings and recommendations memorandum (FWS) or decision memorandum (NMFS).

15.1.4 Controversy

The definition of significantly (40 CFR 1508.27(b)(4)) includes controversy as an intensity factor when determining the degree of the effects on the quality of the human environment. This may enter into the decision between an EA or EIS (Chapter 13.5). The appropriate standard is not whether the project is controversial, but whether the effects on the quality of the human environment are likely to be highly controversial.

Generally, there are two types of controversy that may arise during the public comment period, public objection and disagreement within the scientific community (NEPA for National Wildlife Refuges: A Handbook, pg. 28) (see the [HCP Handbook Toolbox](#))

15.1.4.1 Public Objection

Just because members of the public oppose the project does not mean the environmental impacts of the project are controversial. To be considered such under NEPA, opposition must focus on the anticipated environmental effects. If the controversy is subjective, depending on factors such as a dislike of a project, comments do not require substantive response. On the other hand, the Services must evaluate comments on objective factors, such as the size, nature, or effects of the project on the human environment and either address the issues or provide reasonable written explanations for dismissing them.

15.1.4.2 Scientific Controversy

Scientific controversy may or may not be considered significant. Typical disagreements in the scientific community may arise over:

- proper scientific methodologies,
- the reliability of data generated,
- the interpretation of data,
- environmental impacts within or outside of an affected ecosystem,
- the advisability of pursuing a particular course of action in light of other possible alternatives, and
- the ability to calculate or reasonably estimate impacts in the face of uncertainties (e.g., some end-of-the-century or late century projections related to climate change and its direct or indirect effects may be in this category, although they may not be relevant depending on the timeframe of the HCP).

The courts have typically deferred to the Services as the subject matter experts, as long as we have given a reasonable explanation for our decisions (be sure to connect the dots). If legitimate scientific controversy raises credible points of disagreement over method or analysis, we must address those opposing views and provide support for our conclusions in the administrative record.

15.2 Finalizing the HCP and NEPA Analysis

15.2.1 FWS Final Review

To finalize the HCP and NEPA analysis, both documents need field office review and Regional office review and approval unless signature authority has been delegated to the field office. They may also need legal review (however, if draft documents were reviewed prior to the public comment period and there were no substantive changes made, it may not need further legal review). An overall review of the HCP for consistency with the NEPA analysis and other supporting documents, paying special attention to any sections where comments were addressed, should be adequate.

Unless comments raised questions about the adequacy of the NEPA analysis (leading to the conclusion that a categorical exclusion should have been an EA, or an EA should have been an EIS), a general review at this point should be adequate. Again, pay special attention to any sections where comments were addressed.

15.2.2 NMFS Final Review

For NMFS, the staff point of contact gets approval of the final NEPA analysis from the NMFS NEPA office, and in some cases may need legal review from the NOAA Office of General Counsel. If the HCP met issuance criteria and all other requirements before the public comment period, an overall review of the HCP for consistency with the NEPA analysis and other supporting documents, paying special attention to any sections where comments were addressed, should be adequate.

The staff point of contact routes the entire package with the NEPA analysis, permit application, conservation plan, and implementing agreement, if applicable, through the relevant Division, general counsel, Regional Administrator or Director, Office of Protected Resources, and NMFS Deputy Assistant Administrator for Regulatory Programs or NMFS Assistant Administrator. When the entire package is signed, the staff point of contact publishes a Notice of Issuance in the *Federal Register*.

15.3 Completing the Section 7 Biological and Conference Opinion

By this point in the process, the biological opinion (BO) for listed species or conference opinion for non-listed species (included with the BO if applicable) should be close to completion. Although the analysis should have been in development concurrent with the HCP process, the BO should not be completed and signed until the public comment period has closed so that we can ensure that all relevant issues have been considered. The BO must be signed prior to sending it to the Regional office and before issuing the incidental take permit. However, before having

the BO signed, ask the Regional HCP Coordinator whether an early review of the BO would save time and effort later.

The key to compliance with section 7(a)(2) for any proposed Federal action is ensuring that it is not likely to jeopardize the continued existence of the listed species or destroy or adversely modify designated critical habitat. Actions should be compatible with the survival and recovery needs of the affected listed species and the recovery function of any affected designated critical habitat. Characterizing those needs and the role of the area affected by the HCP in terms of conserving the affected listed species and any affected designated critical habitat is essential to making sure we have the best information for the assessment of anticipated impacts and the proposed mitigation.

Helpful Hint: An early review of the BO and conference opinion at the Regional office may ensure that there are no last minute surprises that could cause delays. As is the case with any BO, early coordination is the key to success.

15.3.1 Relationship between the Incidental Take Permit and the Incidental Take Statement

The fact that the Services issue an incidental take permit to authorize incidental take of listed species under section 10(a)(1)(B) of the Endangered Species Act (ESA) (see the [HCP Handbook Toolbox](#)) and prepare an incidental take statement following ESA section 7 consultation can be a source of confusion. The ESA gives the Services the authority to issue permits for incidental take of listed species. The incidental take permit serves to authorize such take for applicants.

As stated in section 14.12.1, under section 7 the Services do a jeopardy/adverse modification analysis. Therefore, although we do an intra-Service consultation, the BO incidental take statement does not exempt take for the applicant because the take is authorized through the incidental take permit.

Helpful Hint: The Services' intra-Service section 7 consultation prepared in conjunction with incidental take permit issuance will not include an incidental take exemption for non-HCP covered species.

Again, the Services require applicants to include as HCP covered species all ESA-listed wildlife species for which incidental take is reasonably certain to occur, unless take is addressed through a separate ESA mechanism (e.g., section 7 consultation with another Federal agency, separate incidental take permit, etc.) (see Chapter 7.0 and the [HCP Handbook Toolbox](#)). Therefore, the HCP must include and adequately consider those species for the Services to cover them under the incidental take permit. Alternatively, the HCP may be revised to include measures to avoid any take of non-covered listed species.

15.3.2 Conferencing on Potential ESA-Listed Species (Proposed, Candidate, or Unlisted Species)

HCPs may include conservation measures for non-listed species. Typically, the HCP applicant, with technical assistance from the Services, considers non-listed species that might become listed

during the term of the proposed incidental take permit so they can be covered under the HCP. A non-listed species covered in the HCP must be treated as if it were already listed and all conservation measures described in the HCP for that species must be fully implemented. If it is adequately addressed in the HCP, and we determine that section 10 issuance criteria have been met for the species, it is included on the incidental take permit and becomes effective if and when the species is listed. We must complete a conference opinion according to the provisions of 50 CFR 402.10(c)-(e) (see the [HCP Handbook Toolbox](#), to affirm that the proposed incidental take permit action is not likely to jeopardize the continued existence and recovery of the non-listed species and incorporate the conference opinion into the BO in the decision record for the incidental take permit action.

15.3.3 Including Plants

HCPs often cover listed and unlisted plants and impacts to such species should be addressed in the BO even though impacts to plants do not fall under the definition of “take” and, therefore, impacts to or loss of plants is authorized under section 10 incidental take permits. Plants adequately covered by an HCP receive No Surprises assurances (see Chapter 7.4.6).

15.4 Completion of National Historic Preservation Act (NHPA) Section 106 Requirements

We noted the early consideration of historic properties above in Chapter 3.7.4. Coordination procedures for section 106 are detailed in Appendix A. By this time in our HCP review, we should have concluded consultation with the affected State (SHPO) and Tribal (THPO) historic preservation officers, the Advisory Council on Historic Preservation (ACHP), and others as required (Appendix A.B.4). Ideally, we will have concurrence by the SHPO, THPO, ACHP, any Indian tribe or Native Hawaiian organization, or other concerned entities in our determination of cultural resource effects and any proposed resolution. These responses become part of the administrative record of our HCP review. Our section 106 consultation can be presented in the NEPA analyses and findings.

If resolution of historic properties effects requires a memorandum of agreement (Appendix A), this should be finalized for signature. If we cannot reach agreement with a SHPO or THPO, we may proceed as also described in the appendix.

15.5 NEPA Decision Documents

This section addresses the preparation of the EAS, FONSI, and ROD; and implementation of the Services’ decision. The NEPA decision documents should summarize the reasons for selecting a particular alternative. Services’ personnel involved in making and implementing decisions on an action should establish an appropriate administrative file that includes a record of the Service’s decision and rationale. The following establishes procedures to ensure that decisions and their implementation are made in accordance with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Requirements of NEPA (40 CFR 1505), Department of the Interior's NEPA Implementing Procedures (43 CFR 46; 516 DM 1-3), and DOC/NOAA/NMFS NEPA procedures (Department of Commerce Administrative Order 216-6, May 20, 1999) (see these regulations in the [HCP Handbook Toolbox](#)).

The NEPA decision documents contain not only the Services' decision, but also the rationale for it (i.e., they show your work). They may be stand-alone documents or they may be added to the findings and recommendations memorandum to streamline the process by reducing duplication and paperwork (40 CFR 1506.4). Check with the Regional HCP Coordinator for Regional guidance.

15.5.1 Environmental Action Statement

For NEPA analyses performed by FWS, an EAS briefly documents the use of a categorical exclusion or whatever other NEPA decision was reached (e.g., decision to prepare an EIS because of significant impacts brought to light during a public comment period for an EA). It also provides an appropriate administrative record of NEPA-related decisions at all management levels of the FWS (see 550 FW 3.3C).

15.5.1.1 When to Prepare an Environmental Action Statement

The Services' office responsible for preparing the NEPA analysis should prepare an EAS (see 550 FW 3.3C):

- to facilitate internal inter-program review and final approval for a FONSI that will be signed at the Regional office level;
- to document an action that is normally categorically excluded, but that may be controversial;
- when, after the review of an EA, a decision is made to publish a notice of intent to prepare an EIS in the *Federal Register*;
- when a proposed action is not approved because of unacceptable environmental damage or violation of the Services' mandates, policy, regulations, or procedures; and
- whenever additional internal review or documentation of the NEPA administrative record is desirable.

15.5.1.2 Content of the Environmental Action Statement

The EAS should be a 1-page document that includes the proposal, the Services' decision, references to supporting documents (if any), and a signature block (see 550 FW 3.3.C(3)). If doing a stand-alone EAS, it should be formatted in accordance with the example in the [HCP Handbook Toolbox](#) - Example Environmental Action Statement. However, to cut down on paperwork and streamline the process, you may add the EAS to the findings and recommendations or decision memo.

Helpful Hint: Relatively simple HCPs can be designated as low-effect. For instance, a small scale HCP where the applicant intends to remove marginal habitat for a species includes plans to mitigate by buying credits from a conservation bank that preserves high quality habitat. As noted in Chapter 13.5.1, we may consider minimization and mitigation measures in determining a CatEx.

15.5.1.3 Processing the Environmental Action Statement

The EAS must accompany the decision documents for the action through the surname and signature process. It must be signed no sooner than when the decision is made on a CatEx, or when the FONSI or ROD is signed.

15.5.2 Making the Decision on an Environmental Assessment

An EA serves as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. A positive finding requires us to develop an EIS. There are no hard-and-fast rules available to conclusively label an action as significant, or not, because determining if a Federal action will have significant effects is based on the facts for a particular case. The need to prepare an EIS is a matter of professional judgment requiring consideration of all of the issues in question, particularly all information documented in the EA.

For a negative finding (no significant impacts, so no need for an EIS), we prepare and sign a FONSI. The text of the EA should provide sufficient factual material to support the finding.

15.5.2.1 Finding of No Significant Impact

A FONSI is based on the combination of the EA and responses to public comments, which comprises the complete and final record. The Services must notify the public that the EA process has been completed and a FONSI has been issued. You can accomplish the notification requirement through mailings, publication in a visible location in the local paper of record, a *Federal Register* notice, a news release, or a meeting with concerned tribes, agencies, and individuals.

It is not necessary to notify the public that the completed EA and FONSI are available before we issue the permit, unless the following circumstances apply. In accordance with Council on Environmental Quality (CEQ) NEPA regulations 1501.4(e)(2)) and 550 FW 3, in certain limited cases we must make the draft FONSI available to the public for at least 30 days before we decide whether to implement the FONSI or prepare an EIS. Following are the situations where we have to give the public 30 days:

- It is a borderline case (i.e., there is reasonable argument for preparation of an EIS).
- It is an unusual case, a new kind of action, or a precedent-setting case (i.e., it is without precedence).
- There is either scientific or significant public controversy over the proposal (see 516 DM 2, for FWS and NOAA's Environmental Review Procedures and NOAA Administrative Order Series 216-6 for NMFS).
- The FONSI involves a proposal which is similar, or is closely similar, to one which normally requires an EIS or has required an EIS in the past.

In these limited circumstances, we should publish an NOA of the draft FONSI in the *Federal Register*, and we should also publish it in the local newspaper of record. Alternatively, the issuing office may decide to make a draft FONSI available with the draft EA for the 30-day

public review and comment period. This may streamline the public review and comment period, but keep in mind that we still can't make the decision about issuing the permit until the public comment period closes and the FONSI is signed.

Helpful Hint: There is no time limit for publishing an NOA of the signed FONSI (unless as described in the four circumstances above). As long as the draft FONSI is made available with the draft HCP and draft EA, the final notice may be published annually, or on a more frequent schedule, with the notice of permit issuance.

15.5.2.2 Content of the Finding of No Significant Impact

The content of the FONSI is discussed in 40 CFR 1508.13. See an example of a FONSI in the [HCP Handbook Toolbox](#).

A FONSI serves two functions. It documents the Agency's finding that no significant impacts would occur if the proposed HCP is implemented, and it explains the rationale used in selecting the alternative for implementation.

The FONSI states which alternative has been selected, very briefly describes other alternatives considered in the EA, and discusses how criteria were used and how they were weighed in the selection process. The FONSI should be based on the EA, comments from agencies and the public, the BO, and the findings and recommendations memorandum. However, the FONSI is separate from the EA, and it is detailed enough to stand alone. The FONSI is signed by the Deputy Regional Director (FWS), Assistant Regional Administrator (NMFS), their acting, or the delegated entity (e.g., Field Supervisor).

In most cases, 5 pages are adequate to provide the specific rationale required in a FONSI. However, if we have prepared a "mitigated EA" and the impact has been reduced to below a "significance threshold" through the use of mitigation, 5 pages may not be adequate.

Sometimes the environmentally preferable alternative is not the preferred alternative proposed in the HCP. However, if the preferred alternative in the HCP meets all other requirements and issuance criteria, the Services must issue the permit on the proposed alternative (50 CFR 17.32(b)(2)).

15.5.3 Making the Decision on an Environmental Impact Statement

Following completion of a final EIS, the Services must prepare the ROD. The ultimate choice of an alternative, mitigation measures, and the decision rationale are documented in the ROD. If the EIS is a joint agency document, each of the Services prepares its own separate ROD. The ROD is a concise public record of the decision, which may be integrated into any other record prepared by the FWS or NMFS. Procedural and substantive guidance for RODs is included in CEQ regulations (40 CFR 1505.2) and FWS policy (550 FW 3.3A.).

15.5.3.1 Record of Decision Checklist

The ROD is the NEPA decision document for an EIS level review. To help ensure that the ROD is complete, we developed a checklist (see the checklist in the [HCP Handbook Toolbox](#)). It provides more detail than CEQ regulations and we recommend you use it.

15.5.3.2 Content of the Record of Decision

CEQ regulations (40 CFR 1505.2) require that RODs:

- state the Service’s decision;
- provide a summary description of all alternatives analyzed in the EIS;
- identify the environmentally preferable alternative;
- provide the decision rationale—what the criteria were (e.g., cost, degree of environmental impacts, technical considerations, degree to which objectives were met, logistics) for selecting an alternative, how each alternative measured up against these criteria, how the criteria were weighted, and so forth;
- provide a clear statement of which mitigation measures will be implemented if they are not obviously integral to the alternative selected, and a summary of any monitoring or other enforcement programs or plans. The description of mitigation and monitoring should be specific enough to enable the public to determine whether measures have been effectively implemented, but not be so specific as to duplicate the EIS; and
- provide a statement about whether all practical means to avoid or minimize environmental harm from the selected alternative have been adopted, and if not, why not.

An average ROD should be no more than 10 pages. It should give enough information on the alternatives and their impacts, the rationale in selecting the chosen alternative, and the extent of mitigation and monitoring the public can expect so that the reader can understand these major issues without referring to the EIS. Any conditions adopted for monitoring or enforcement must be addressed in the ROD (40 CFR 1505.3). See an example ROD and NOA for a ROD that is published in the *Federal Register* in the [HCP Handbook Toolbox](#).

Helpful Hint: Public comments and the Services’ responses may be attached to the ROD, or they may be included as an appendix to the final EIS.

15.5.4 Joint Federal-State Processes

Some States have 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), Department of the Interior procedures (516 DM 4.18), and NOAA policy require us to cooperate, to the fullest extent possible, with the applicant and State and local officials to reduce duplication among NEPA, State and local environmental requirements, and ESA requirements. We 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, the Services are responsible for submitting *Federal Register* notices).

Helpful Hint: Follow the guidance above when State or local laws require a similar analysis for authorization by a State or local jurisdiction. This does not require you to include State or local jurisdictions in the NEPA process as cooperating agencies, nor does it prohibit us from doing so. The involvement of a State or local entity would typically be that of an interested party.