PHASE 4: Implementing the HCP and Compliance Monitoring

Chapter 17: Implementing the HCP, Compliance Monitoring, and Making Changes, If Necessary

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Creating a Habitat Conservation Plan (HCP) and issuing an incidental take permit does not mean the process is over. With implementation, we begin a management process with the permittee and stakeholders. Smaller, single applicant plans might not take long to implement, but for larger scale, longer term plans, permit issuance begins an ongoing partnership to deliver regulatory certainties and conservation benefits. By this stage, we expect that the HCP has been crafted to foster this partnership. We must hold up our end of the deal to ensure this hard-earned partnership does not devolve into an adversarial relationship.

17.1 Implementation and Administration of the HCP

Just as for HCP review and incidental take permit issuance, the Services' field offices take the lead in overseeing implementation and coordination with permittees in accordance with any established implementation schedules. The FWS has spelled out field and Regional office roles in the Service Manual (730 FW 1 and the associated *Procedures*). Regional offices share information and assist in evaluating problems or questions that arise. Regional offices become directly involved if decisions over permit suspension or revocation are elevated by the field.

To identify the implementation roles and processes we describe below, our first resources will be the HCP and the incidental take permit. The HCP, the permit conditions, and possibly an

implementing agreement, should provide the implementation steps, adaptive management, monitoring, reporting requirements, and scheduled reviews (also see Chapter 10).

In HCPs where land acquisitions take place over time, the HCP should describe opportunities for the Services to review and approve management plans to ensure consistency with its biological goals and objectives. Similarly, as preserved land is added to the HCP, we should also have a role in review and approval of monitoring plans. The need for Services approval of each management or monitoring plan can be scaled in proportion to the size and complexity of the HCP. Larger programmatic plans may establish a "framework resource management plan" that governs individual land acquisitions so that the Services would not need to approve each individual plan.

17.2 HCP Monitoring Program: Ensuring the Funding, Conservation Commitments, Mitigation, and All Other Aspects of the HCP Are Being Fulfilled; Review of Annual Reports

After we issue an incidental take permit, the compliance and implementation monitoring measures built into the HCP and incidental take permit get set into motion. Services' field offices must now keep on top of implementation schedules for the incidental take permits in their assigned work areas.

Compliance monitoring, otherwise known as "implementation monitoring," is integral to the HCP's conservation plan (see Chapter 10.1). Compliance monitoring is a process we use to verify that the permittee or an enrolled landowner is conforming to and correctly implementing the HCP or their site-specific plan, any terms and conditions of the site plan, and the permit.

Who we monitor and coordinate with will vary depending on the incidental take permit structure (see Chapter 3.4). The permittee named on the face of the incidental take permit is responsible for fulfilling the HCP obligations. This may be modified for programmatic plans or if there are co-permittees. In such cases, a lead permittee contact should be specified in the HCP or the permit by their position title.

The purpose of compliance monitoring is not only to identify permittees or other covered individuals who may be incorrectly implementing their plan, but also to:

- identify the activity that may have gone wrong or was incorrectly implemented,
- identify what factors led to the potential non-compliance, and
- find steps to remedy those factors so that non-compliance is less likely to occur in the future.

17.2.1 Biological Effectiveness Monitoring

Effectiveness monitoring provides the evaluation of whether the effects of implementing the HCP's conservation program is consistent with the assumptions and predictions made when the HCP was developed and approved. We use effectiveness monitoring to determine if the permittee(s) are achieving the biological goals and objectives in the HCP.

To determine if the conservation goals and objectives are being met, review the monitoring outputs (see Chapter 10.4.3). Is the plan meeting expectations? Have any trigger points been tripped that might require action by the permittee? Will we need to implement adaptive measures (see Chapter 10.5) or contingency plans (see Chapter 11.1.5)?

Our monitoring of incidental take permit implementation does not occur in a vacuum. The species and habitats affected by the HCP will be tracked by our species status assessment processes for future recovery planning and project review. Tracking may involve inter-agency review teams for resources, such as wetlands, regulated by other federal and state agencies.

17.2.2 Incidental Take Permit Compliance Monitoring

The Services are responsible for ensuring that the permittee meets the terms and conditions of the incidental take permit and the accompanying HCP (i.e., compliance monitoring). In most cases we will require that the permittee produce an annual report (or a report at some other interval) that documents the status of their HCP and compliance with the associated permit (see Chapter 10.1.3). We must review the annual reports to verify adherence to the terms and conditions of the permit, HCP, and any implementing agreements to ensure incidental take of covered species does not exceed the level authorized under the permit. Levels of take discussed in the report should use the same units as are in the HCP and the permit. This information must also be recorded in the Environmental Conservation Online System (ECOS) or the Tracking and Integrated Logging System (TAILS), as appropriate (see HCP Handbook Toolbox).

These reports help us determine whether the permittee is properly implementing the terms and conditions of the HCP, its incidental take permit, and any implementing agreement. They provide a principle part of the long-term documentation in the administrative record under the incidental take permit.

In addition to reviewing reports submitted by the permittee, it is important for the Services to make field visits to verify the accuracy of monitoring data submitted. These visits allow us to develop a relationship with the permittee, verify information in annual reports, and assist the permittee as a conservation partner. As highlighted in Chapter 10.4, our compliance monitoring has to be planned ahead of our permit decision. If we fail to maintain a visible oversight, we risk undermining public perceptions and the goodwill of permittees. We must keep up with the work and be able to provide consistent support and fair enforcement.

Once an HCP is completed, field office staff and managers should meet to discuss how they will put the monitoring plan (see Chapter 10.4) into effect. Consider addressing the following to define the approach to monitoring compliance of an HCP:

1. Estimate time needed to track plan compliance.
2. Assign staff to track compliance.
   There are a couple different ways to approach the staffing decision. You can assign:
   a. an intern,
   b. the staff lead who developed the HCP, or
   c. separate staff.

3. Use existing or develop a tracking tool (e.g., spreadsheet, database, etc.) to keep tabs on plan compliance. Consider tracking the following areas:
    a. plan commitments
        i. funding,
        ii. timing of implementing specific tasks or expending funds, and
        iii. rough step of conservation and impacts
    b. conservation and impacts (habitat or individuals impacted),
    c. species status in the plan area, and
    d. progress or milestones in achieving goals and objectives.
4. Develop a compliance check timeline for when the field office lead needs to evaluate compliance throughout the year.
5. Evaluate compliance:
    a. read annual reports,
    b. verify annual reports
        i. field visits,
        ii. remote sensing or aerial imagery.
6. Enter appropriate compliance information into tracking tool (from #3 above).
7. For long term permits, periodic check-ins with the permittee may be needed so that we can better track their status. Do they still own the property, or has their ability to implement the plan diminished? See Chapter 17.4.3.

17.3 Adaptive Management, Changed Circumstances, and No Surprises in Practice

As we describe in Chapters 9.6 and 10.3, adaptive responses to changed circumstances are incorporated into the HCP and become part of the operating conservation program. Adaptive management measures become a permit requirement just as much as any restriction on earth-moving or tree-cutting. Like other aspects of the conservation program, the effectiveness of management actions in reducing the effects of changed circumstances can be improved through implementation of the monitoring and adaptive management programs.

However, there are limits to the changes we can expect from a permittee. No Surprises assurances limit the scope of possible changes to an operating HCP after we issue the permit. No Surprises assurances do not restrict changes to the HCP that result from the plan's adaptive management program or that consist of responses to changed circumstances identified in the plan. Instead, they limit our ability to require measures beyond those provided for in the HCP's operating conservation program if changed circumstances that were not identified in the HCP or unforeseen circumstances occur.

These are the expectations for performance under No Surprises assurances:

- *Changed circumstances provided for in the HCP*: Adaptive measures provided for in the HCP will be implemented by the permittee as specified in the HCP.
- *Changed circumstances not provided for in the HCP*: The Services may suggest adaptive measures, but they are not required without the permittee's consent.
- *Unforeseen circumstances*: Adaptive measures that are outside the scope of the HCP's operating conservation program can be negotiated, but will not be required without the permittee's consent. However, we may require additional measures, if any, limited to

modifications within the conserved habitat areas or to the HCP's operating conservation program, and that maintain the original terms of the HCP to the maximum extent possible, if those modifications do not result in the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources. The Services must demonstrate that unforeseen circumstances exist.

The adaptive measures or changed circumstances sections of the HCP should have established notice and coordination procedures so that the Services and permittee can each propose changes and reach agreement on how to implement what's needed. There may be scheduled reviews linked to periodic performance reports, or a stakeholder might at any time identify an issue that needs attention from the Services and the permittee.

We must determine whether unforeseen circumstances have occurred, based on the HCP's plan for identifying and addressing changed circumstances (see Chapter 9.6). FWS staff must alert the Regional Director (RD), through the Assistant RD-Ecological Services, to allow the RD at least 10 days to review a finding of unforeseen circumstances before it is finalized (730 FW 1, see HCP Handbook Toolbox). We will notify the permittee about the need to discuss possible responses and, if there are available responses, whether the permittee is willing to implement them regardless of their No Surprises assurances (see Chapter 9.6.2 through 9.6.4). We can require certain changes that remain within the scope of the HCP's conservation plan if they do not require increased expenditures of funds, lands, or waters than what the permittee previously agreed. Reinitiation of the intra-Service section 7 consultation in response to the unforeseen circumstances can help provide a basis to discuss potential changes with the permittee. We can think of this as redirecting previously agreed-upon strategies as long as the redirection is consistent with the scope of previously established adaptive management provisions. The No Surprises rule does not prevent the permittee from voluntarily taking action or committing additional land, water, and financial resources to help remedy the situation.

We will work with other Federal agencies, the States, and appropriate parties to muster available resources to help respond to the impacts from unforeseen circumstances. To maintain interagency cooperation under section 6 of the Endangered Species Act (ESA), we will use the expertise and solicit information and participation from involved State agencies in all aspects of the HCP planning process, including dealing with unforeseen circumstances.

If continuation of the permit is likely to jeopardize the continued existence of a covered species, and even if the permit is being properly implemented, we may revoke it because of an unforeseen circumstance. This is a last resort that we should only take if all our efforts cannot prevent jeopardy of a covered species. We should do all we can in recruiting other Federal and State agencies, interested parties, and available resources to remedy the situation before taking this step.

17.4 Permit Amendments, Renewals, Transferals

Many incidental take permits extend for years or decades, so the HCP should give consideration to the potential for changes, renewals, or possible permit transfers. The HCP or incidental take permit should address the possibility for amending the HCP or the permit and cite the statutory and regulatory provisions of ESA sections 7 and 10 and the National Environmental Policy Act

(NEPA) that govern changes to operations and documents. Beware of language that develops processes or decisions that exceed the scope of our ESA implementing and permitting regulations.

Any time we sign a new section 10 permit instrument for an amendment, renewal, or transfer, we must satisfy all of the review requirements needed for section 10 permit issuance (see Chapters 13 through 16). As described in Chapter 17.5, we must evaluate whether a permit amendment requires additional public notice, section 7 review, or NEPA analysis. Even if we determine that the original notice and analyses do not require updating, we must note that in our findings for the specific action. An applicant for a permit renewal, amendment, or transfer will also have their record of compliance to consider. We cannot renew, amend, or transfer a permit where there are compliance deficiencies.

17.4.1 Changes to HCP Implementation

Each revision of the HCP, section 7, NEPA, or other documents or processes established under the HCP will not necessarily result in amending the incidental take permit. The need to amend the permit depends on the nature of the HCP changes, how those changes need to be reflected in the permit, and whether they would trigger additional section 7 or NEPA review.

Evaluate requested interpretations or changes to the HCP or permit in relation to the analyses that supported issuance of the current permit:

- Do the proposed changes need to be incorporated into an amended permit?
- Do the proposed changes exceed the scope of what has already been analyzed and advertised to the public?

Any degree of change should be memorialized in the permit's case file. This may be an exchange of correspondence, replacing a faulty document page with a corrected one, or a range of more or less extensive permit amendments.

17.4.1.1 Interpretations, Corrections, Clarifications, or Missing Details

As a permittee begins its project, questions often arise over interpretation of permit and HCP requirements. Sometimes an HCP will need clarification to address small errors, omissions, or language that may be too general or too specific for practical application. It is common for parts of an HCP covering many activities across large landscapes to be general. Where clarifications to the HCP will affect future implementation, the Services and the permittee should memorialize the interpretation in writing and retain them in the administrative record. These clarifications should also be distributed to other affected parties.

17.4.1.2 HCP and Incidental Take Permit Amendments

Changes in implementation of the HCP may require amendments to the HCP, incidental take permit, implementing agreement, or other implementation-related documents. Either party can initiate amendments, but it is up to the Service to decide the level of review needed to satisfy ESA statutory and regulatory requirements.

Amendments might be approved by an exchange of formal correspondence, addenda to the HCP, revisions to the HCP, or permit amendments. However, as the scale or scope of any amendment increases, it becomes more likely that we will need to publish public notice and amend the NEPA and section 7 analyses.

In general, as we memorialize our decision to amend documents, we will specify the old text, proposed new text, the reason for the change, intended effects, and justification for the modification. Except for a permit amendment, we may not need to reprint the entire affected document. It is important to put the permit number on all formal correspondence and to retain it in the permit file.

We usually will not need to advertise an amended HCP when levels of incidental take do not increase and the activity does not expand in ways not analyzed in the original NEPA or section 7 documents. Changes to an HCP of this level will need to be reflected in an amended permit. The types of activities that require permit amendment, and publication in the *Federal Register* include, but are not limited to:

- addition of new species, either listed or unlisted,
- increased level or different form of take for covered species,
- changes to funding that affect the ability of the permittee to implement the HCP,
- changes to covered activities not previously addressed,
- changes to covered lands, and
- significant changes to the conservation strategy, including changes to the mitigation measures.

If the permit has been written to reference or incorporate HCP provisions, it will minimize the need to amend the permit as it is implemented. Coordination procedures should also have been built into the adaptive management measures of the HCP or the permit so that the permittee and the Services may reach mutual agreement on corrective revisions to make without having to submit a formal amendment request. Some examples of these HCP and permit changes where the take levels and project activities are not substantively altered include:

- correcting insignificant mapping errors,
- slightly modifying avoidance and minimization measures,
- modifying annual reporting protocols,
- making small changes to monitoring protocols,
- making changes to funding sources, and
- changing the names or addresses of responsible officials.

Any permit actions finalized this way must be made public. We can satisfy this requirement by posting all permit actions on field office Web sites, and including any such permit amendments in our routine batch notice of issued permits (see Chapter 16.3).

As noted above, any permit amendment must satisfy section 10 review requirements. As the scale and scope of any amendment increase, other responsibilities may be triggered. If this happens, it's important that we conduct a careful review and internal scoping to ensure all such steps and responsibilities are addressed, such as tribal trust or cultural resource responsibilities.

17.4.2 Renewals

Any ESA section 10 permit is eligible to be renewed before the term expires if so stated on the permit. FWS regulations at 50 CFR 13.22 and NMFS regulations at 50 CFR 222.304 allow a permit to remain in effect while we consider a renewal request, but only if the renewal request is received at least 30 days before expiration (see HCP Handbook Toolbox).

Although it might not be likely that we need to renew large HCPs with terms lasting for decades, renewing incidental take permits is a practical concern. A permittee may not always begin covered activities before their permit nearly expires. In such cases, we should review the HCP to determine if changes are necessary. Revisions depend on how much of the originally covered activity has been completed, whether the mitigation has kept pace with impacts, or possibly if the status of covered species has changed. The effects of climate change, or other factors, may lead us to recommend new species or habitat surveys to identify potential HCP amendments. As we consider renewal requests we will honor No Surprises assurances as much as practicable, but any renewed permit must satisfy applicable statutory and regulatory requirements in force as of the date of the approval of the renewal request. Permit renewals must be advertised in the *Federal Register* before we make our decision, even if there are no revisions.

Permit renewal sometimes offers an opportunity for an adaptive management strategy. We might issue an incidental take permit for a relatively short time period to identify implementation issues. These issues can then be addressed in a renewed permit with a significantly longer term than the original. In this case, revised or entirely new HCP, section 7, and NEPA analyses will likely be needed. If this strategy is employed, we should make this clear in our initial public notice for the original permit action, and the HCP should describe this as well.

17.4.3 Permit Transfers

Permit transfers usually are the result of an exchange in ownership of the covered lands. The new owner will assume the responsibilities associated with the HCP and will also expect to receive the benefits of the permit. An assumption agreement is a key component of such a transaction. It outlines the roles and responsibilities of all the parties including the Service. The assumption agreement addresses any outstanding obligations and how they will be completed. An assumption agreement, at its simplest, is a joint submittal by the transferor and transferee as prescribed by 50 CFR 13.25 and 50 CFR 222.305, or it can resemble a memorandum of understanding (see HCP Handbook Toolbox).

A partial permit transfer works the same way, except that only a portion of the HCP responsibilities or permit area will change ownership, generally with the remainder of the HCP continuing under the original permittee. This may get complicated depending on the number of covered species, their distribution in the permit area, and specific concerns for each covered species involved. The original permittee and transferee might not each be responsible for all of the species once the permit and the property are divided. How this division occurs must be addressed in the assumption agreement and in the incidental take permits.

Permit transfer is a distinct action compared to an amendment or renewal. Nevertheless, the administrative process to transfer a permit is effectively the same as for an amendment, but it

does not require *Federal Register* notice until finalized. This is true even for partial transfers where a new permit is issued to the new partial owner of the original project.

- In a complete transfer, we issue an amended permit to the new owner.
- In a partial transfer we issue an amended permit to the original permittee and a new permit to the new owner.

Any permit we issue as a result of a partial or full transfer will retain the expiration date of the original permit. The permittee/transferee may request renewal to alter the expiration date.

For FWS, we request the transferee submit an FWS application form, 3-200-56 (see HCP Handbook Toolbox), to meet the certification requirements of 50 CFR 13.25, and so we can complete the case file for their permit. The transferee must meet all of the qualifications required to receive an incidental take permit, which means demonstrating the capacity to implement the HCP or that portion they are assuming responsibility for, the legal ability to perform the authorized project, and providing funding assurances.

For NMFS permit transfers, regulations at 50 CFR 222.305(a)(3) specify the process (see HCP Handbook Toolbox). Incidental take permits issued under50 CFR 222.307(see HCP Handbook Toolbox) may be transferred in whole or in part through a joint submission by the permittee and the proposed transferee. For a deceased permittee, the deceased permittee's legal representative and the proposed transferee may make a joint application, provided NMFS determines in writing that the proposed transferee: (1) meets all qualifications for holding a permit; (2) has provided adequate written assurances that it will provide sufficient funding for the conservation plan or other agreement or plan associated with the permit and will implement the relevant terms and conditions of the permit, including any outstanding minimization and mitigation requirements; and (3) has provided such other information as NMFS determines is relevant to process the transfer.

FWS regulations at 50 CFR 13.24 and NMFS regulations at 50 CFR 222.305(a)(2) (see HCP Handbook Toolbox) authorize certain successors of the original permittee to carry out a permitted activity for the remainder of the permit term in cases of foreclosure, bankruptcy, inheritance by family members, etc. To obtain authorization, the successor must notify us within 90 days of the date the successor begins to carry out the permitted activity and obtain our written endorsement. To give them authorization we must determine that the successor meets the qualifications to hold the permit, is capable of implementing the permit, including all outstanding minimization and mitigation measures, has provided adequate assurances of funding, and has provided any other relevant information requested. Transfer of a permit in accordance with 50 CFR 13.25 satisfies the "endorsement" requirement. If the permitted activities have gotten under way, we must reach out to the permittee's successor as soon as possible so that the successor is made aware of the incidental take permit, its obligations, and the requirements of 50 CFR 13.24.

17.5 When Additional NEPA, Section 7, or NHPA Compliance Is Needed

While NEPA and section 7 will be considered anytime we issue a new permit instrument, we most often revise these analyses for permit amendments that would increase the amount of take or otherwise exceed what was originally reviewed. In the simplest cases (small amendments, simple renewals, or transfers), we often do not need to amend these documents. We must, however, state in our findings that we reviewed the section 7 and NEPA requirements and determined that the existing analyses remain valid. Older section 7 and NEPA documents should be reviewed for possible updates due to changing background conditions (i.e., climate change effects, human population growth, etc.).

Documentation requirements are often less for an amendment than for the original permit application, depending on the extent or complexity of the proposed change. 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 (40 CFR 1502.21). If the original permit application required an environmental impact statement (EIS), the amendment may require nothing more than an environmental assessment (EA).

We may be able to prepare addenda to the original section 7 consultation or NEPA document. The more extensive the changes, however, the more desirable it becomes to start over with new review documents. In general, the determining factors for the level of NEPA compliance are the effects upon the human environment and the level of previous analysis. While the level of NEPA compliance is somewhat independent of the extensiveness of proposed changes, we still expect that less extensive amendments will not require a supplemental EA or supplemental EIS.

National Historic Preservation Act (NHPA) (see HCP Handbook Toolbox) compliance comes under consideration if new lands are to be added to the permit area, or if the intensity or extent of previously covered activities increases within the permit area. Especially consider conducting new or additional NEPA, section 7, and NHPA analyses whenever a permit renewal with amendments is under review, or if the HCP has been completely rewritten.

17.6 Permit Compliance Problems, Notifying Law Enforcement, Suspensions, and Revocations

The permittee enjoys No Surprises assurances as long as they implement the permit and HCP properly. If we become aware of a deficiency in implementation, either of the project or the mitigation, of activities not covered by the incidental take permit, or of take in excess of that authorized, we should notify the permittee. What we describe here is an escalation of notice, administrative measures, law enforcement investigation, suspension, revocation, and civil or criminal processes.

These steps are only suggestive. Use your best judgment about giving a permittee the benefit of the doubt versus resorting early to more formal processes, or even early referral to solicitors or general counsel or law enforcement. There may be more than one round of communication at each phase, but unresolved issues must not be left to linger. The urgency of resolving compliance problems depends on such factors as the permittee's track record of compliance and the risk and

level of additional effects to covered species or other resources. Going through a series of progressive process of notices like this will help build the administrative record in support of our actions to resolve implementation problems.

The FWS has an August 22, 2016, *National Protocol for Addressing Take and Potential 'Take' of Endangered Species through Habitat Modification* (see HCP Handbook Toolbox). As we follow this protocol, ensure that law enforcement is aware of any HCP and incidental take permit that might influence our response to an enforcement situation.

The tone of communications with permittees is vitally important to maintaining good working relationships with them. All communications should be crafted, commensurate with the gravity of the situation, while considering maintaining a long-term working relationship with the permittee. In any communications, refrain from using variations of the terms "violate" or "violation" unless cleared by a solicitor. Instead, use words like "non-compliance," "inconsistent," "not authorized," "shortcomings," "exceeds" or similar terms.

If a good working relationship is established by this time, the initial notice to the permittee may be appropriately handled by a staff member via telephone or e-mail. It is usually appropriate to frame this first communication in terms of asking if the permittee needs assistance and pointing out that certain activities are lagging. The permittee may have encountered unexpected difficulties in the permit or HCP requirements. We must memorialize this communication in writing and retain it in the project file.

If the response by the permittee is inadequate, we should consider a formal notice in writing. The notice should describe the situation as the Services understand it. List the specific permit conditions and HCP provisions that are not being implemented correctly. State specifically what needs to be done to bring implementation of the HCP and permit back into compliance. The Service may be willing to consider alternatives to the remedies we propose, but we suggest coordinating this with the Regional Office before offering options to the permittee.

If the permittee still fails to respond satisfactorily, then consult with the Regional HCP Coordinator to contact the solicitors or general counsel and, if we have not yet, consider referral to law enforcement for investigation. Any further communications with the permittee should involve solicitor or general counsel advice. The Regional Office will need copies of all documented communication and correspondence between the field office and permittee.

17.6.1 Permit Suspension and Revocation

Criteria and processes for incidental take permit suspension and revocation are found in FWS general permit regulations of 50 CFR 13.27 and 13.28, respectively and in NMFS regulations at 50 CFR 222.306 (see HCP Handbook Toolbox). Specific criteria for FWS revocation appear at 50 CFR 17.22(b)(8) and 17.32(b)(8) and for NMFS at 50 CFR222.306(e). The field office cannot suspend or revoke a permit. Authority over permit suspension and revocation decisions is retained at the Regional Office level for all permits, even those that field offices issue. Suspension and revocation can be lengthy processes that begin with a proposal to suspend or revoke. At each step along the way, there are prescribed periods in which a permittee can object or appeal our actions. These are the same appeal processes used in our permit decisions (see

Chapter 16.7). It is not necessary to suspend a permit before proposing revocation. Considering the revocation criteria, however, we expect that failure to correct deficiencies of a suspended permit would be the most likely situation leading to proposed revocation.

You should not consider permit suspension or revocation as the first step in compliance enforcement. We recommend that implementation measures built into the HCP address communications, so that misunderstandings or occasional shortcomings do not snowball into a proposed suspension or revocation. Still, these processes provide the administrative mechanism for formally addressing non-compliance. A permittee who has had a permit revoked is disqualified from receiving or exercising the privileges of a similar permit for a period of 5 years from the date of the final agency decision on the revocation (50 CFR 13.21(c)(2) and (d)). To date, we have suspended only one incidental take permit, but we have issued proposals to suspend in a small number of cases.

In addition to suspension and revocation, we can seek civil or criminal penalties under the ESA for permit violations. To do so requires coordination with and investigation by the Office of Law Enforcement. We should get law enforcement involved early to facilitate any civil or criminal case we might make, especially if we suspect harm of listed species. Even if we do not pursue civil or criminal penalties, having law enforcement officers investigate demonstrates due diligence in support of any action we take.

The regulations require us to send proposals and certain other correspondence by certified mail. We recommend that you simultaneously send a copy by an overnight courier service so that timelines are unambiguously established, and so that we receive confirmation of the permittee's receipt. A recipient of certified mail can refuse to accept delivery, and the U.S. Postal Service will eventually return the undelivered correspondence. Sending a separate copy ensures that our correspondence reaches the permittee.

In our initial proposal, we should instruct the permittee to stop any actions that cause unauthorized take. If appropriate, we should suggest remedial measures. Given that a field office can usually transmit correspondence to a permittee faster than a proposal from the Regional Office, it may be useful for the field office to send a short letter recommending that the permittee cease the problematic actions while the Services considers its formal response at the Regional level.

If the permit is not suspended or revoked after issuing a proposal, we can still impose remedial measures. The regulations at 50 CFR 13.23(b) (see HCP Handbook Toolbox) allow us to amend permits with just cause upon a written "finding of necessity," consistent with No Surprises assurances. No Surprises assurances apply only to properly implemented activities affecting adequately covered species. No Surprises assurances do not apply to unauthorized activities. We should document in writing the deficiencies that provide just cause for amendment, such as:

- permittee's failures to properly implement the permit,
- species impacts that are not adequately covered,
- actions that are not authorized by the permit, and
- the determination that No Surprises assurances have lapsed.

The finding of necessity should then list and describe the necessary measures to remediate or correct these deficiencies so that the permittee can come into compliance with the ESA and implementing regulations. This finding of necessity can be incorporated into our findings on any amended incidental take permit, or it may be appropriate to include it with the initial proposal.

17.6.2 Summary of FWS Suspension and Revocation Process Step by Step

1. The issuing officer (Deputy Regional Director (DRD) in most Regions) sends a proposal to suspend. Required contents of the proposal are provided at 50 CFR 13.27(b).
2. Once the proposal is received, the permittee has 45 days to submit a written objection to the proposal (50 CFR 13.27(b)(2)).
3. After the permittee's objection period ends, the DRD has 45 days to issue a decision on the proposal (50 CFR 13.27(b)(3)).
4. Under Part 13.29, the permittee has 45 days from the date of the suspension decision to request reconsideration by the DRD. The DRD then has 45 days to notify the permittee of the results of the reconsideration. During the reconsideration period, we may conduct a "separate inquiry" (50 CFR 13.29 (b) through (d)).
5. If the request for reconsideration is denied, the permittee may appeal to the RD within 45 days. This appeal must be in writing, and the permittee "may present oral arguments before the [RD] … if the [RD] judges oral arguments are necessary to clarify issues raised in the written record" (50 CFR 13.29(e) and (f)).
6. The FWS must notify the permittee in writing of the RD's decision within 45 calendar days of receipt of the appeal. The RD's decision is the final administrative decision of the Department (50 CFR 13.29(f)(2) and (3)). Note that an administrative appeal is required by FWS regulations before the applicant can sue FWS in Federal court.

Helpful Hint: Permits should be signed by the DRD or below because the final administrative decision on any permit suspension or revocation is issued by the RD.

7. Once all reconsiderations and appeals are exhausted, the permittee must surrender the permit to the DRD after being notified that the permit has been suspended (50 CFR 13.49).
8. Failure to correct deficiencies that were the cause of the suspension within 60 days of the suspension is grounds for revocation of the permit (50 CFR 13.28(a)(2)). The processes and schedule for permit revocation and appeal of an adverse decision are the same as those for permit suspension (1 through 7, above). (50 CFR 13.28, 29, and 49; also 17.22(b)(8) and 17.32(b)(8)) (for the complete set of the suspension and revocation regulations, see HCP Handbook Toolbox).

17.6.3 Summary of NMFS Suspension and Revocation Process

The NMFS suspension and revocation process will begin when a violation of 50 CFR 222, 223, or 224 occurs; when a violation of the ESA occurs; or if a violation of a term and condition of the permit occurs. Subpart D to 15 CFR 904 provides permit sanctions for violation or noncompliance (see HCP Handbook Toolbox).

17.7 Permit Abandonment or Relinquishment

Should a permittee choose to terminate their covered activities and relinquish the permit, we must meet with the permittee to determine the appropriate courses of action. The HCP may have addressed early termination of covered activities, so there may be responses already provided. Fundamentally, the permittee must ensure that the mitigation required under the HCP for all the incidental take that has occurred is carried out, including any ongoing conservation funding and implementation assurances. We will not cancel the permit until we determine that all outstanding minimization and mitigation measures for past take have been implemented (50 CFR 17.22(b)(7) and 17.32(b)(7) (see HCP Handbook Toolbox)).