

Chapter 13: National Environmental Policy Act Compliance

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13.0 Introduction

In phase two of Habitat Conservation Plan (HCP) planning, we have to concentrate on the HCP and National Environmental Policy Act (NEPA) compliance documents. Our preparation of the NEPA documents should progress along with the HCP as we gather and analyze data. Although Chapter 3 provided some preliminary considerations for an HCP's NEPA review, this chapter discusses considerations specific to HCPs intended to complement the Services' general NEPA policy and guidance. Also see the [HCP Handbook Toolbox](#) for general NEPA regulations and policy.

It is critical to the NEPA process that we carefully define the proposed Federal action to ensure that we properly address impacts and alternatives and that we do not unnecessarily analyze impacts that are not a result of our action and over which we do not have regulatory authority. Being careful about this analysis will help ensure proper use of ours' and the applicant's resources.

13.1 Purpose and Need

As we begin our NEPA analysis, we must define its "purpose and need." NEPA purpose and need statements articulate the goals and objectives that we intend to fulfill by taking an action under the Endangered Species Act (ESA) (see the [HCP Handbook Toolbox](#)). Our review of an

HCP and issuance of an incidental take permit in accordance with the ESA and its implementing regulations provide the underlying purpose and need to which we are responding by proposing alternatives including the proposed action (40 CFR 1502.13).

Applicants must provide a project description and alternatives they considered in their HCP (Appendix B). This description defines the applicant's proposed activity that would result in incidental take - the possible incidental take is the underlying "need" for our proposed Federal action. However, we consider our purpose and need as being distinct from that of the applicant (43 CFR 46.420, or 40 CFR 1502.13). We do not consider the need for a particular development or land use, but rather our more narrow need to determine whether this non-Federal activity complies with the ESA. We can define the purpose and need as follows:

- Our purpose is to fulfill our section 10(a)(1)(B) conservation obligations under the ESA.
- Our need is to fulfill these legal obligations in response to an applicant's HCP and request for an incidental take permit.

When we cooperate or share the lead with other Federal agencies, the purpose and need may expand to encompass that agency's actions, and we might use a joint purpose and need statement. An agreed-upon purpose and need statement can prevent later disagreement or confusion that may delay completion of the NEPA process. We should invite other Federal agencies to cooperate early in our project review so that we can benefit from their expertise in areas such as wetlands, water quality, etc., and so that other Federal agencies can make their decisions based on the expanded review of the EA or EIS.

We provide the following two subsections (13.1.1 and 13.1.2) as suggested template language for drafting NEPA documentation for HCP reviews. Also see the samples from completed actions provided in the [HCP Handbook Toolbox](#).

13.1.1 Template NEPA Purpose Statement for Incidental Take Permit Applications

Suggested Template Language: The Service's purpose in considering the proposed action is to fulfill our authority under the Endangered Species Act (ESA), section 10(a)(1)(B). Non-Federal applicants, whose otherwise lawful activities may result in take of ESA-listed wildlife, can apply to the Service for incidental take authority so that their activities may proceed without potential violations of section 9.

To carry out these responsibilities, we must comply with a number of environmental laws and regulations, Executive Orders (EO), and agency directives and policies. As the Service fulfills these responsibilities and obligations, we will:

- ensure that issuance of the incidental take permit and implementation of the HCP achieve long-term species and ecosystem conservation objectives at ecologically appropriate scales, and [*Consider ecosystem partnerships or prior obligations to other agencies. What do we want for the covered species in the plan area?*]
- ensure that the conservation actions approved with issuance of the incidental take permit occur within a spatially explicit Landscape Conservation Design capable of supporting

species mitigation projects over the long-term, or for a period commensurate with the nature of the impacts. [*Consider any available formal recovery planning for the species or affected species population, results of any Landscape Conservation Planning, resiliency to climate change effects, etc. How do our purposes related to the application fit into our greater ecosystem responsibilities?*]

13.1.2 Template NEPA Need Statement for Incidental Take Permit Applications

Suggested Template Language: Section 10 of the ESA specifically directs the Service to issue incidental take permits to non-Federal entities for take of endangered and threatened species when the criteria in section 10(a)(2)(B) are satisfied by the applicant. Once we receive an application for an incidental take permit, we need to review the application to determine if it meets issuance criteria. We also need to ensure that issuance of the incidental take permit and implementation of the HCP complies with other applicable Federal laws and regulations. We must ensure our permit decision complies with the National Historic Preservation Act; treaties; and Executive Orders 11998, 11990, 13186, 12630, and 12962. In addition, the Service enforces the Bald and Golden Eagle Protection Act (BGEPA), the Migratory Bird Treaty Act (MBTA), and other requirements of the ESA in addition to section 10. If we issue an incidental take permit, we may condition the permit to ensure the permittee's compliance with BGEPA, MBTA, and all ESA requirements.

On [date], the Service received an application from [applicant] for an incidental take permit under the authority of section 10(a)(1)(B) of the ESA. If the application is approved and the Service issues a permit, the incidental take permit would authorize [applicant] to take [covered species][as appropriate, any permit may also contain other measures to mitigate (avoid, minimize, and compensate) adverse effects to other Service-jurisdiction resources, such as listed plants, marine mammals, migratory birds, or eagles] as a result of their [list and describe proposed covered activities]. The Service has prepared this [NEPA document name] to inform the public of our proposed action and the effects of the proposed action and its alternatives, seek information from the public, and to use information collected and analyzed to make better informed decisions concerning this incidental take permit application.

13.2 Proposed Federal Action

NEPA and its implementing regulations require agencies to analyze the environmental impacts of proposed Federal actions and to prepare an environmental impact statement (EIS) for any major Federal action "significantly affecting the quality of the human environment." Interior Department regulations (43 CFR 46.30 and 46.100) provide that our proposed action is subject to the procedural requirements of NEPA if it would cause effects on the human environment (40 CFR 1508.14).

Defining the proposed Federal action is the first step to properly determine the scope of impacts we must consider, and to identify the alternatives we must evaluate. For purposes of decisions we make under ESA section 10, the definition of a "major Federal action" is relatively straightforward. The regulations define "major Federal actions" as including "actions approved by permit" 40 CFR 1508.18(b)(4). The Services are responding to an "application for a proposed Federal action;" the requested Federal action ultimately being an issuance of an

incidental take permit based on implementation of conservation measures provided in the associated HCP. Some of the multiple project or applicant structures described in Chapter 3.4 may need special consideration in defining the Federal action. For example, if we develop a general conservation plan (GCP) on our own initiative then there is no applicant seeking to become the central, master permit holder (see Chapter 3.4.3). In addition, the specific activity that a section 10 permit authorizes, the incidental take of endangered species, may be merely one component of a large project involving non-Federal activities that do not require Federal review or authorization. Determining whether our NEPA analysis should consider the impacts of that larger activity requires analysis of the extent of our “control and responsibility” over the applicant’s overall project (40 CFR 1508.18).

Properly defining the action subject to our control and responsibility requires a qualitative assessment of the applicant’s project and the role of the Service with respect to that project. The Service’s ability to exercise discretion over an ESA permit applicant’s non-Federal activities is limited to ensuring the non-Federal entity’s permit application meets the statutory and regulatory criteria in section 10(a)(2)(B) of the ESA and 50 CFR 17.22 (b)(1) and 17.32(b)(1). This means that our ability to exercise control and responsibility over an applicant’s non-Federal activities under the ESA is limited to what is “necessary or appropriate for purposes of the plan” (50 CFR 17.22 (b)(1)(iii)(D)). This interpretation is consistent with the basic tenet that the Service does not authorize the applicant’s activities causing the incidental take, but rather the take resulting from the applicant’s activities. We have control over the Federal action via our ESA authority to determine whether an application complies with ESA and to place modifying conditions on the incidental take permit to ensure ESA compliance. Sometimes the species at issue may be limited to a small geographic area of a larger project. Given the definition of “purpose and need,” the Services’ limited regulatory role, and, possibly, our limited geographic nexus with a project, we may not have an obligation to assess impacts of the entire private undertaking.

The extent of the Service’s environmental review under NEPA is dictated by the environmental effects triggered by the federal action – issuance of the ITP and required conservation actions of the HCP. HCPs proposed by applicants can range from small (less than an acre) single-developer HCPs to large regional HCPs that cover a myriad of Covered Activities over millions of acres. Decisions concerning the appropriate scope of analysis under NEPA must therefore be made on an HCP-by-HCP basis.

For all HCPs, the Service’s range of analysis must address the impacts of the activity(ies) for which ITP coverage is requested (i.e., the Covered Activities).

In determining whether additional NEPA analysis is required, the extent of the Service’s NEPA obligations can be considered at two ends of a spectrum. In both cases, we must consider whether the federal action, in this case the ITP, is the legally relevant cause of the effects which must be analyzed. Simple “but for” causation is not enough. There must be a reasonably close causal relationship between issuance of the ITP and the effects under consideration to require analysis under NEPA. On one end, if the issuance of the ITP for a portion of the project is sufficient to grant legal control over a large portion or all of the project, then all the resulting environmental effects of the project may need to be considered under NEPA. If a project’s viability is founded on the Services’ issuance of the ITP, then all the resulting environmental

effects of the project may need to be considered under NEPA. For example, the geographic location of the Covered Species may be so integral to the project (e.g., the species occur on a portion of the project site that is critical to the entire project) that the ITP is required for the project to proceed. Thus the Services' analysis for NEPA purposes may include portions of the project beyond where the Covered Species occur.

At the other end of the spectrum, if a major portion of the project could proceed without the ITP, then the Services' analysis may be more limited (for example, where the Covered Species occur only in a peripheral area of the project site that is not critical to the viability of the project). Because the ITP would not be needed for the project to occur in this case, the Service generally would not need to analyze the effects of the entire project under NEPA, and would issue an ITP that only covers the limited area of the project site. Thus the scope of analysis can be narrow at this end of the spectrum, limited to the impacts of the activity(ies) associated with issuance of the ITP and required conservation actions of the HCP.

When implementing our ESA authority, it is also within our jurisdiction to ensure that activities covered by the permit will be in compliance with other laws under our authority, for example the Migratory Bird Treaty Act (MBTA), Marine Mammal Protection Act, and Bald and Golden Eagle Protection Act (see these laws in the [HCP Handbook Toolbox](#)). We must also consider other Federal authorizations necessary for elements of a non-Federal project when defining the proposed Federal action and identifying the scope of impacts to consider, as discussed further below.

The Federal action for NEPA purposes includes consideration of the following components:

- The covered activities that cause incidental take,
- The mitigation plan,
- Other procedures to support implementation of the permit and HCP, and
- Other measures as required (e.g., measures for MBTA, etc.).

13.2.1 Template Proposed Action Statement for Incidental Take Permit Applications

Suggested Template Language: The proposed action being evaluated by this [*environmental assessment (EA) or environmental impact statement (EIS)*] is the issuance of an Endangered Species Act incidental take permit by the Service that would authorize take of [*covered species*], incidental to [*covered activities*], and implementation of the conservation plan in the associated HCP, in accordance with the statutory and regulatory requirements of the ESA.

13.3 Scope and Alternatives

Under NEPA, “scope” refers to the “range of actions, alternatives, and impacts to be considered” in an environmental document (40 CFR 1508.25). The definition of “scope” applies to EISs, but the same concepts are applicable to EAs. Scoping may be helpful during preparation of an environmental assessment, but is not required (43 CFR 46.235(a)). The scope of the NEPA document includes the impacts of the specific activity requiring the incidental take permit, i.e. incidental take resulting from the covered activities and the impacts of the plan’s conservation program.

13.3.1 Scope

Scoping helps us to identify the significant issues for detailed analysis. We should only analyze issues in an environmental document if they are related to potentially significant effects of the Federal action, or if they help lead to a reasoned choice among the alternatives. Not all issues that the public raises require our analysis. For us to analyze an issue, it must have a cause and effect relationship with the proposed action. Not analyzing an issue raised by the public does not diminish the value of their input. In such circumstances, we should document and explain that the proposed Federal action does not have the potential to significantly impact the resource that is of concern to the public.

For each element or aspect of the Federal action (section 13.2) we identify the following for possible analyses:

- Direct effects caused by the Federal action at the immediate time and place (40 CFR 1508.8),
- Indirect effects caused by the Federal action later in time, or at a distance, but are reasonably foreseeable (40 CFR 1508.8 and 43 CFR 46.30), and
- Cumulative effects due to the incremental impact of the Federal action when added to other past, present, and reasonably foreseeable future actions (40 CFR 1508.7).

The direct, indirect, and cumulative effects within the scope of our analyses must be a reasonably foreseeable result of the Federal action; they must have a causal connection to our action to analyze their significance under NEPA. Once the extent of the Federal action is identified, we identify the direct, indirect, and cumulative effects as described above. These effects must have a reasonably foreseeable causal connection to our Federal action for us to analyze their significance under NEPA. As we consider the significance of the relevant environmental effects, we should not automatically prepare an EIS whenever there is uncertainty. NEPA regulations provide approaches for dealing with incomplete information (40 CFR 1502.22) that consider the extent of the uncertainties. If we are still unsure about certain effects, preparing and circulating an EA for public review can help identify the significance of environmental effects. By doing so, we can potentially reduce uncertainty, analyze fewer effects in an EIS, or possibly conclude our analyses with a finding of no significant impact (FONSI).

13.3.2 Alternatives

Alternatives (43 CFR 1502.14) explore other ways of meeting the purpose and need for an action. Analysis of alternatives presents the environmental impacts of the proposal and the alternatives in comparative form, to define the issues and provide a basis for choice among options available to the Service. As we consider a range of alternatives to include in the NEPA environmental document we can dismiss, without detailed analysis, any alternative that fails to meet our action's purpose and need. We usually do not need to consider a wide range of alternatives, but only a reasonable range that meet the purpose and need for the Federal action.

Alternatives are distinguished based on differences in their approach to resolving the purpose and need for action and the environmental impacts of implementing them, not on mere differences in cost, technical elements, etc. Put another way, alternatives should represent substantively different options for the decision maker to consider, as opposed to simply

representing different designs of a substantively equivalent option. In some smaller project sites, or for certain projects, where any project alternative would make the site unsuitable for the covered species, it may be appropriate to analyze only a “no-action alternative” and an “action as proposed.” This is especially so if the applicant lacks options to move the project to another potential site.

13.3.2.1 No-Action

A “no-action” alternative must be described in each EA and EIS for HCPs. No-action means no Federal action. What would likely happen if we did not issue an incidental take permit? How might the applicant's proposed activities and effects change without an incidental take permit? The “no-action” analysis gives us a benchmark to compare the magnitude of environmental effects of the action alternatives. We use the difference in effects between the no-action and the action alternatives to determine the significance of effects resulting from our permit issuance.

The “no-action” alternative can have different meanings depending on the situation. There are two distinct interpretations of “no-action” that depend on the nature of the proposed project activities under evaluation (43 CFR 46.30):

- First, “no-action” may mean “no change” from an ongoing management direction or level of management intensity (e.g., activities will continue at the no take level).
- Second, “no-action” may mean “no project.”

In either of these situations, consider what an applicant might do if we denied their incidental take permit. They could continue with existing land uses at “no-take” levels, they could modify their proposed project to avoid incidental take, or if there is no way for the project to avoid take, the project would not go forward

The first situation might involve an action such as updating an applicant’s land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no-action" is "no change" from current management direction or level of management intensity, assuming the existing management does not result in take. Because constructing an alternative that is based on no management at all is a useless academic exercise, we may think of the "no-action" alternative in terms of continuing with the present course of action until that action is changed. Consequently, we would compare projected impacts of alternative management proposals in our NEPA analyses to those impacts projected for the existing situation. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development. In the case of an HCP amendment proposal, “no-action” might mean “no amendment” with continued implementation of a current incidental take permit.

If the project does not involve development, but rather some operation or maintenance regime, no-action generally means the applicant will continue to operate in a way that avoids take. Examples of this version of “no-action” include timber harvesting in a manner that avoids take, parkland operation and maintenance that avoids take, utility operation and maintenance that avoids take, operation of wind turbines in a way that avoids take, etc.

In the second situation, if you use “no-action” to mean no project, three different scenarios may result: (1) no development occurs, (2) the applicant might be able to reconfigure their project to take advantage of another Federal requirement so that incidental take could be exempted under section 7 of the ESA, or (3) they can change or reduce their development project to avoid take. In the last scenario, “no-action” includes the portions of a project that would not require an incidental take permit and are reasonably likely to move forward without the rest of the project. In our NEPA document, we need to describe and analyze the “no-action” scenario that is most likely to occur without the HCP and permit.

13.3.2.2 Proposed Action

The proposed action is issuance of a permit authorizing take that would result from the project, and implementation of conservation measures to mitigate that take, as contained in the draft HCP that we have received from the applicant, or that the applicant has developed through negotiations with us. It should include any permit conditions we might want to ensure compliance with the ESA and implementation of the HCP. If the applicant provides sufficient assured conservation actions, to avoid significant impacts on the environment, we may be able to comply with NEPA’s procedural requirements by issuing an EA and a Finding of No Significant Impact (FONSI), or mitigated FONSI.

13.3.2.3 Additional Alternatives

The alternatives considered in addition to the no-action and proposed action alternatives must take into consideration the applicant’s project purpose and means to implement potential alternatives. If an HCP meets issuance criteria, we are obliged to issue a permit. This requirement affects what we might consider as reasonable when developing a range of alternatives (43 CFR 46.420(c)). We may consider more alternatives as might be identified by public comments; or we might use additional alternatives to evaluate unresolved conflicts concerning project impacts, mitigation plans, or alternative uses of available resources. Our NEPA analysis in an EA does not need to identify any alternative as “Service preferred” or “environmentally preferred.” However, unless another law prohibits the expression of a preference, a draft EIS should identify the agency’s preferred alternative, if one or more exists (43 CFR 46.250(a)); a final EIS must identify the agency’s preferred alternative (43 CFR 46.425(b)).

Additional alternatives might be:

- Other reasonable courses of action necessary or appropriate for the HCP that meet ESA requirements. We might modify or develop alternative components of the applicant’s HCP, such as alternative permit duration, alternative covered lands, an alternative composite of covered activities, alternative covered species, alternative conservation program, etc.
- Other reasonable courses of action necessary or appropriate for the HCP that cause the least damage to the environment and best protect, preserve, and enhance the human environment. These environmentally preferable alternatives (43 CFR 46.30) would also

include any potential mitigation measures not already included in the proposed action or other alternatives.

- Applicants tend to highlight the avoidance measures built into a proposal. We can compare this in our review to an alternative that does not incorporate any avoidance or other conservation measures.

13.4 Public Participation

13.4.1 Public Participation Requirements

The June 1, 2000, Five-Point Policy addendum to the previous HCP Handbook established specific required public review times for each NEPA level of review. We believe that our implementation of the program since then has increased public acceptance. Likewise, our increased emphasis on public outreach in support of Service programs, including the guidance presented in this Handbook, has improved our public engagement in ways that often surpass that provided by a *Federal Register* notice.

Therefore, in this revised Handbook, we establish new public comment periods for review of draft NEPA and HCP documents.

- Low-effect and EA-level HCPs need only the 30-day notice period as required by ESA section 10(c).
- Preparation of an EIS requires:
 - a notice of intent to prepare an EIS,
 - scoping public notice (can combine with notice of intent)(30 days),
 - a notice of availability of the proposed HCP and the draft EIS (60 days), and
 - notice of availability for the HCP, final EIS, and Record of Decision (30 days).

Also, for an EIS, we must coordinate with the U.S. Environmental Protection Agency (EPA) on concurrent notices that they publish. We require a minimum 60-day notice of availability of the proposed HCP and draft EIS. In some unusual situations, we may want to advertise for longer periods (Chapter 14.6).

13.4.2 Let Interested Parties Know about The Application's Comment Period

During the public comment period, any member of the public may review and comment on the HCP and the accompanying NEPA document, if applicable. If an EIS is required, the public can also participate during the scoping process. We announce all complete applications received in the *Federal Register*. When practicable, the Services will announce the availability of HCPs in electronic format and in local newspapers of general circulation.

13.4.3 Incorporating Public Participation During the Development of an HCP

The Services will strongly encourage potential applicants to allow for public participation during the development of an HCP, particularly if non-Federal public agencies (e.g., State Fish and

Wildlife agencies) are involved. Although the development of an HCP is the applicant's responsibility, the Services will encourage applicants for most large-scale, regional HCP efforts to provide extensive opportunities for public involvement during the planning and implementation process. The Services encourage the use of scientific advisory committees during the development and implementation of an HCP. The integration of a scientific advisory committee and perhaps other stakeholders improves the development and implementation of any adaptive management strategy. Advisory committees can assist the Services and applicants in identifying key components of uncertainty and determining alternative strategies for addressing that uncertainty. We also encourage the use of peer review for an HCP. An applicant, with guidance from the Services, may seek independent scientific review of specific sections of an HCP and its operating conservation strategy to ensure the use of the best scientific information.

13.4.4 Considering Tribal Interests in an HCP

We recommend that applicants include participation by affected Native American tribes during the development of the HCP. If an applicant chooses not to consult with Tribes, under the Secretarial Order on Federal-Tribal Trust Responsibilities and ESA (see the [HCP Handbook Toolbox](#)), the Services will consult with the affected Tribes to evaluate the effects of the proposed HCP on tribal trust resources. We will also provide the information gained from the consulted tribal government to the HCP applicant prior to the submission of the draft HCP for public comment and will advocate the incorporation of measures that will conserve, restore, or enhance Tribal trust resources. After consultation with the tribal government and the applicant and after careful consideration of the Tribe's concerns, we will clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

13.5 Levels of NEPA Review

Based on the magnitude of the action and, especially, on the significance of the anticipated effects, different processes and associated documentation are required to satisfy NEPA requirements (e.g., an EA or EIS). If a project does not qualify for a low-effect HCP, and thus a categorical exclusion, then an EA or EIS is required. As discussed above, the scope of NEPA review should focus on the effects of our Federal action. We should employ the lowest level of NEPA review that meets the requirements of our NEPA analysis. Depending on Regional U.S. Fish and Wildlife Service (FWS) procedures, signature authority for low-effect and certain EA-level HCPs may be delegated to FWS Assistant Regional Directors or field office Project Leaders.

The NEPA review level controls much of the time and effort put into development of the HCP and review of the incidental take permit application.

13.5.1 Categorical Exclusion

The Council on Environmental Quality (CEQ) defines 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 [accordance with] procedures adopted by a Federal agency in implementation of these [CEQ] regulations and for which,

therefore, neither an environmental assessment nor an environmental impact statement is required."

For an HCP to qualify for a categorical exclusion, none of the "extraordinary circumstances" listed in 43 CFR 46.215 can apply. These include:

- (a) Have significant impacts on public health or safety?
- (b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (EO 11990); floodplains (EO 11988); national monuments; migratory birds; and other ecologically significant or critical areas?
- (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)]?
- (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks?
- (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects?
- (f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects?
- (g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by the bureau?
- (h) Have significant impacts on species listed, or proposed to be listed, on the list of endangered or threatened species or have significant impacts on designated critical habitat for these species?
- (i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment?
- (j) Have a disproportionately high and adverse effect on low income or minority populations (EO 12898)?
- (k) Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (EO 13007)?
- (l) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and EO 13112) (see [the HCP Handbook Toolbox](#)).

FWS definitions for categorical exclusions are found at 516 Departmental Manual (DM) 8 (see the [HCP Handbook Toolbox](#)). Section 8.5 of that directive says, "Categorical exclusions are classes of actions which do not individually or cumulatively have a significant effect on the human environment. Categorical exclusions are not the equivalent of statutory exemptions." The list of permit and regulatory functions that qualify as categorical exclusions encompass "the issuance of ESA section 10(a)(1)(B) "low-effect" incidental take permits that, individually or cumulatively, have a minor or negligible effect on the species covered in the habitat conservation plan." Therefore, although take is likely to occur under HCP implementation, accounting for the minimization and mitigation measures proposed in the HCP would result in impacts so minor as to be negligible.

FWS has a screening form to determine if a project qualifies as a categorical exclusion. Service staff must complete this form and include sound justification for the answer to each question on the form (see the Low-Effect screening form in the [HCP Handbook Toolbox](#)).

National Marine Fisheries Service (NMFS) has a categorical exclusion for low-effect HCPs at NOAA Administrative Order Series 216-6, Section 6.03e.3(d) (see the [HCP Handbook Toolbox](#)). NMFS's extraordinary circumstances would preclude a categorical exclusion for actions that involve a geographic area with unique characteristics, are the subject of public controversy based on potential environmental consequences, have uncertain environmental impacts or unique or unknown risks, establish a precedent or decision in principle about future proposals, may result in cumulatively significant impacts, or may have any adverse effects upon endangered or threatened species or their habitats (NAO 216-6, 5.05c).

13.5.2 Environmental Assessment

An EA is a concise public document, prepared in compliance with NEPA that briefly discusses the purpose and need for an action, and alternatives to such action. It provides sufficient evidence and analysis of impacts to determine whether to prepare an EIS or a FONSI. If we have already determined that an EIS is warranted, we do not need to prepare an EA.

The purpose of preparing an EA is to determine whether the proposed action would result in significant effects to the human environment. To determine whether a proposed Federal action would require an EIS, we must consider two distinct factors: context and intensity.

- Context refers to the significance of a proposed action in different settings. What are the possible impacts to local, regional, or national interests that might result from our action? Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
- Intensity is the severity of the impacts relative to these different, affected settings. We should consider the following in evaluating intensity (40 CFR 1508.27):
 - Impacts that may be both beneficial and adverse. A significant effect may exist even if we believe that on balance the effect will be beneficial.
 - The degree to which the proposed action affects public health or safety.
 - Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
 - The degree to which the effects on the quality of the human environment are likely to be highly controversial.
 - The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
 - The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

- Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under
- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The EA process culminates with a decision by the Regional Director on one of several alternatives developed in response to the proposed Federal action. Once the Regional Director selects an alternative, he or she will decide whether issuance of the incidental take permit, including subsequent implementation of the covered activities and the conservation plan described in the HCP, will significantly affect the quality of the human environment, as defined by the NEPA.

An EA should be prepared in any one of these situations:

- an action is not listed as a categorical exclusion, or the action is not listed as an action normally requiring an EIS, and a decision to prepare an EIS has not been made;
- additional analysis and public input are needed to know whether the potential for significant impact exists;
- preliminary analysis indicates there is no scientific basis to believe significant impacts would occur, but some level of scientific controversy exists;
- the action is described on the list of actions normally categorically excluded, but one of the extraordinary circumstances applies; or
- potential significant effects that might otherwise require an EIS could be substantially mitigated with proven mitigation measures or alternatives with proven mitigation incorporated into it.

CEQ has advised agencies to keep the length of EAs to approximately 10-15 pages. This may not always be possible, but to avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues. We should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 and where it is extremely difficult to determine whether the proposal could have significant environmental effects.

13.5.3 Environmental Impact Statement

CEQ regulations at 40 CFR 1502.1 state “the primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government.” In

practice, it is a detailed written statement required by section 102(2)(C) of NEPA that analyzes the environmental impacts of a proposed action, adverse effects of a 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).

Preparation of an EIS takes significantly more effort than for an EA. Public notices are required to announce scoping for the EIS. Public notice for the availability of the draft EIS is generally combined with the public notice of availability of the HCP as required under ESA. We must also coordinate with EPA on EISs as they publish their own public notices that we must time with ours. Procedures for this coordination are in Chapter 14.5.

The text of final EISs should normally be less than 150 pages, and for proposals of unusual scope or complexity, less than 300 pages.

Our EAs and EISs can be more focused and concise by applying these strategies:

- *Scoping*: Determine exactly what decision we must make, and tailor the document to provide the information necessary for that decision. Clearly defined purpose and need will focus analyses on appropriate alternatives and impacts.
- *Relevance*: Describe only aspects of the human environment that are relevant to the proposed Federal action and the environmental effects to be analyzed.
- *Readability*: Use plain language, and keep it simple and consistent. Move technical analyses into appendices.
- *Appendices*: Only material prepared for that particular NEPA review, or another relevant NEPA review, should be considered for inclusion, and only include material essential for understanding the NEPA document.

13.6 Preparation of NEPA Document by Consultants

EAs or EISs associated with an HCP almost always are prepared by a contractor paid by the applicant, because the Services typically do not have adequate resources to meet the applicant's timing needs. No matter who prepares the NEPA document, we are ultimately responsible for supervising its preparation and content, and the eventual conclusion and permitting decision. The Services need to provide leadership, direction, guidance, and supervision when consultants prepare our NEPA documents. We want to keep document preparation on track and focused on necessary analyses.

In accordance with 40 CFR 1506.5, 43 CFR 46.105, and 516 DM 8, contractors execute a disclosure statement prepared by us, or a cooperating agency, specifying that they have no financial or other interest in the outcome of the project. The disclosure statement specifying that the contractor has no financial or other interest in the outcome of the project must be included in the draft and final NEPA document to memorialize and ensure there has been no conflict of interest. Under certain circumstances, an applicant that is a State agency can be the primary preparer of the NEPA document if the agency meets the requirements of section 102(2)(D) of NEPA.

Refer to the [HCP Handbook Toolbox](#)) for an example of a disclosure statement from a contractor to include in a draft and final EIS. Alternatively, electronic copies can be obtained from the Regional HCP Coordinator. Also see 40 CFR 1506, and 43 CFR 46, in the toolbox.

The Services should work directly with the contractor on NEPA-related matters and provide technical direction in preparing the EA or EIS. To ensure a contractor's draft NEPA analysis is adequate and concise we must define our expectations early and provide strong oversight of the NEPA contractor during document development. We must make clear to the applicant and to the contractor, that although the contractor is paid by the applicant, the contractor is obliged to follow the direction and guidance of the Services. We should tell the contractor which factors to include for analysis. We should also give the contractor a page limit and a time limit for draft completion for our review (while we may or may not enforce page limits, by giving contractors better guidelines according to our expectations, we expect to stop receiving unnecessarily lengthy NEPA analyses).

When several parties are involved in preparing the NEPA review and the HCP, it may be desirable to have a memorandum of understanding (MOU), project agreement, or some other similar document to establish roles and present a project schedule. For example, the MOU should state whether the Services, the contractor, or both would conduct scoping. The MOU should also address who will be responsible for printing the NEPA documents. We should inform the contractor of all NEPA compliance requirements including CEQ regulations (40 CFR 1500-1508), Departmental requirements (43 CFR Part 46), and the Services requirements (e.g., FWS Service Manual and this Handbook).

All such requirements must be met, including those for public involvement. Although the Services must respond to comments received on the EA or EIS, the contractor may organize the comments and prepare responses for the Services' review and approval. The Services must also independently review the EA or EIS before we accept it and take responsibility for its scope and contents. No matter who drafts the NEPA documents, we are responsible for writing and approving the decision document [FONSI if EA, record of decision (ROD) if EIS] or a Notice of Intent (NOI) to prepare an EIS, if an EA finds that a significant impact is likely.

The [HCP Handbook Toolbox](#) also contains sample Requests for Proposals (RFPs) for developing typical EAs and EISs.