

## **Chapter 16: Making a Permit Decision**

### **16.1 Documenting Our Findings - Section 10 Findings and Recommendations Memorandum**

#### *16.1.1 Introduction and Project Description*

#### *16.1.2 Section 10(a)(2)(A) HCP Criteria – Analysis and Finding*

#### *16.1.3 Permit Issuance Criteria – Analysis and Finding*

16.1.3.1 The taking will be incidental – section 10(a)(2)(B)(i)

16.1.3.2 The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking – section 10(a)(2)(B)(ii)

16.1.3.3 The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.

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

16.1.3.5 The measures, if any, required under paragraph (A)(iv) of this section will be met (FWS); and The applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate (NMFS)

16.1.3.6 He or she has received such other assurances as he or she may require that the plan will be implemented (FWS); and There are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator (NMFS)

#### *16.1.4 Disqualifying Factors*

### **16.2 Writing the Permit**

#### *16.2.1 Permit Terms and Conditions*

#### *16.2.2 Reporting Requirements*

### **16.3 Federal Register Notice of Availability - Final HCP, Final NEPA Analysis, and Draft or Final Decision Documents**

### **16.4 Preparing and Processing the Signature Package**

#### *16.4.1 Contents of the Signature Package*

#### *16.4.2 Who Signs the Documents and Why*

16.4.2.1 FWS

16.4.2.2 NMFS

#### *16.4.3 Timing – When Documents are Signed*

16.4.3.1 Environmental Action Statement and Permit

16.4.3.2 Finding of No Significant Impact and Permit

16.4.3.3 Record of Decision and Permit

### **16.5 Implementing the HCP and Executing the NEPA Decision**

### **16.6 Permit Issuance and Distribution of Copies of the Permit**

### **16.7 Permit Denial, Review, and Appeal Procedures (Who Signs the Permit and Why)**

#### *16.7.1 Permit Denial*

#### *16.7.2 Request for Reconsideration of a Permit Denial*

#### *16.7.3 Copies of Denials*

### **16.8 SPITS, APPS, and ECOS**

## 16.1 Documenting our Findings - Section 10 Findings and Recommendations Memorandum

The findings and recommendations memorandum (also known as the “set of findings” or “findings”) documents the Services’ conclusions on permit issuance in response to an application and Habitat Conservation Plan (HCP). Although it is not a statutory requirement, it is a key component of the administrative record demonstrating that the HCP satisfies statutory and regulatory requirements, including section 10(a)(2)(B) issuance criteria and responses to public comments received (if any). It should also include a recommendation from the appropriate official on whether to issue or deny the permit.

Do not confuse the set of findings with a National Environmental Policy Act (NEPA) finding of no significant impact (FONSI) or record of decision (ROD). They address different decisions. However, they also contain much of the same background information. To streamline the HCP process by reducing duplication and paperwork, you can add the NEPA decision document to the set of findings (40 CFR 1506.4) (see Combined Findings and Recommendations and NEPA Decision Document in the [HCP Handbook Toolbox](#)).

### *16.1.1 Introduction and Project Description*

The introduction to the set of findings provides litigation references to the authority under which we may issue an incidental take permit. It provides a very brief description of covered activities, the location of covered activities, covered species, and anticipated take. It also incorporates the HCP by reference.

This is an appropriate place to provide any other relevant project history that affected our review of the HCP.

If there is a lot of controversy and a high likelihood of litigation challenges, this section may be written as a guide to the administrative record to explain the purpose and function of all the other documents. Since this is not common practice, seek advice from the Regional HCP Coordinator before writing the set of findings this way.

### *16.1.2 Section 10(a)(2)(A) HCP Criteria – Analysis and Findings*

Although the HCP was certified as complete prior to public notice, it is helpful to formally document that the HCP addresses each of the required elements of section 10(a)(2)(A):

- i. *The impact to result from such taking:* As noted in Chapter 14, the impact of the taking is not merely a quantification of take. This section of the findings should summarize the amount of take anticipated for each species covered in the HCP and then describe the expected impacts from such taking (i.e., the results). If the HCP uses impacts to habitat as a surrogate for take, use that common currency for this description.
- ii. The steps taken to minimize and mitigate such impacts, and the funding that will be available to implement them: Summarize the proposed measures to minimize and mitigate for unavoidable take resulting from the impacts of implementing the HCP. Briefly discuss the

sources of funding for the minimization, mitigation, and implementation of the HCP, including adaptive management and changed circumstances.

iii. Alternative actions to the taking considered by the applicant and reasons why such alternatives are not being used: Briefly summarize any alternatives the applicant considered and that are described in the HCP, with reasons those alternatives were rejected by the applicant. The alternatives to the taking (e.g., not doing the project doesn't meet the applicant's needs and doesn't provide benefits to the species) are not the same as the NEPA alternatives. These alternatives are described, not analyzed.

iv. Other measures the Secretary may require as being necessary or appropriate for purposes of the plan: Describe any additional measures we determined are necessary (e.g., requiring that the HCP be fully implemented).

Alternatively, you may insert a paragraph at the end of the project description stating that the applicant submitted an HCP that meets the requirements of section 10(a)(2)(A).

### *16.1.3 Permit Issuance Criteria – Analysis and Findings*

Section 10(a)(2)(B) (see issuance criteria in the [HCP Handbook Toolbox](#) of the Endangered Species Act (ESA) requires the following criteria to be met before the Services may issue an incidental take permit. If these criteria are met, and there are no disqualifying factors, we must issue the incidental take permit (ESA section 10(a)(2)(B)(v)). The results of our analysis must be thoroughly presented in the findings and recommendations document.

16.1.3.1 The taking will be incidental – ESA section 10(a)(2)(B)(i); 50 CFR 17.22(b)(2)(i)(A)/17.32(b)(2)(i)(A); 50 CFR 222.307(c)(2)(i)

Per 50 CFR 17.3, incidental taking means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity. For example, take of a covered species resulting from use of heavy equipment during home construction that is in compliance with all other applicable Federal, State, or local laws generally would be considered incidental to an otherwise lawful activity and could be authorized by an incidental take permit. Although compliance with those other laws is the applicant's responsibility, we must be able to reasonably assume that their activities are otherwise lawful. Conversely, deliberately shooting or wounding a listed species because it is disrupting a landowner's business is not incidental take and does not qualify for an incidental take permit because: (1) it is deliberate, not incidental; and (2) it is not an otherwise lawful activity.

Briefly describe the proposed activity(ies) and document that the covered activities are lawful and proposed take is incidental to those activities.

16.1.3.2 The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking – ESA section 10(a)(2)(B)(ii); 50 CFR 17.22(b)(2)(i)(B)/17.32(b)(2)(i)(B); 50 CFR 222.307(c)(2)(ii)

While the applicant is responsible for determining what type and amount of minimization and mitigation to include in their HCP, we are responsible for determining whether or not the proposed minimization and mitigation satisfies this statutory issuance criterion.

The Services cannot issue permits based on alternative versions of the HCP that the applicant did not propose. For example, some have argued that if a project proponent who plans to develop a 100-home subdivision could practicably reduce the subdivision to 10 homes based on financial viability, the Services could only issue an incidental take permit for the 10-home subdivision according to the practicability standard. This argument ignores that the level of mitigation required is, in the first instance, directly dependent on the take anticipated to result from the proposed covered activities. Where we conclude that the plan does not fully offset the impacts of the taking, we would certainly attempt to get the project proponent to avoid or minimize take where possible, reduce the number of homes, and reconfigure the design to further reduce impacts. However, even if the developer agrees to reduce the number of homes and reconfigure several of the lots to further reduce impacts, the ESA still requires an evaluation of any remaining biological impacts. We should identify what minimization and mitigation is required to fully offset the biological impacts of the taking, and then evaluate whether the conservation measures the applicant has proposed are either fully commensurate with the level of impacts, or if not, whether they minimize and mitigate those impacts to the maximum extent practicable.

Note that differing interpretations of the minimization and mitigation to the maximum extent practicable standard often result in confusion and can become a source of delay during the development of the conservation program in an HCP. Some have interpreted the statute to mean that the applicant must minimize the impacts of take to the maximum extent practicable first and then second mitigate the remaining impacts to the maximum extent practicable. The 2016 Union Neighbor's decision [Union Neighbors United, Inc. v. Jewell, 831 F.3d 564 (D.C. Cir. 2016)] held that the "sequential" interpretation is not required by the statute and affirmed the Services' interpretation that the phrase "minimize and mitigate" should be considered jointly, rather than as independent findings. This decision supports the Services' interpretation as originally provided for in the 1996 HCP handbook. Regardless of the approach, our responsibility is to ensure that the types and amounts of minimization and mitigation in an HCP produce a reasonable biological outcome for the covered species. See Chapter 9.5 for a full discussion on maximum extent practicable.

16.1.3.3 The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided - ESA section 10(a)(2)(B)(iii); 50 CFR 17.22(b)(2)(i)(C)/17.32(b)(2)(i)(C); 50 CFR 222.307(c)(2)(v).

To demonstrate adequate funding the applicant should identify the costs necessary to implement all components of the conservation program, including minimization and mitigation measures, adaptive management and monitoring plans, maintenance of conservation easement lands, and measures to address changed circumstances. They must also identify the funding mechanisms that they will use to ensure payment of those costs. The applicant must identify the specific financial/legal documents (e.g., letters of credit, corporate guarantees, performance bonds, non-wasting endowments, endowment for management, etc.) that they will use to ensure that funding

will be available in appropriate amounts at appropriate times throughout the life of the permit and into perpetuity. See Chapter 11 for more specific information regarding funding.

The applicant must provide sufficient documentation so we can reasonably conclude that the conservation plan will be fully implemented. We should also make it clear to the applicant that once the permit is issued, it is the permittee's responsibility to implement the plan, including providing the funds necessary for implementation. The HCP and permit (and implementing agreement, if there is one) should contain a clear commitment on the part of the applicant to fund the plan even if the estimates included in the applicant's budget prove to be inaccurate. An underestimate of funds needed is not a valid reason to not fully implement the HCP and permit. For instance, instead of the HCP and permit stating that "the applicant agrees to provide \$100K to protect 10 acres of habitat for covered species" it should state that "the applicant agrees to provide 10 acres of habitat...".

No Surprises assurances only apply to an HCP that is being properly implemented. If the HCP is not being properly implemented due to funding lapses, the No Surprises assurances no longer apply.

**Helpful Hint: Check the changed circumstances for reduced funding availability. If it is part of the changed circumstances, it must either be removed or clearly stated that No Surprises will not be in effect if full funding is not provided. We can also state that the permit coverage may lapse during any period that full funding is not provided.**

16.1.3.4 The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild - ESA section 10(a)(2)(B)(iv); 50 CFR 17.22(b)(2)(i)(D) /17.32(b)(2)(i)(D); 50 CFR 222.307(c)(2)(iii); 50 CFR 222.307(c)(2)(iii)

Include the following template language in every set of findings:

"This criterion incorporates the ESA Section 7 jeopardy standard, which is defined at 50 CFR 402.02: "Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." In accordance with section 7 of the ESA, the Service(s) prepared an intra-agency biological opinion to evaluate whether the taking associated with the HCP would jeopardize the continued existence of any covered species. In the biological opinion, which we have attached and incorporated into this document by reference, the Service(s) concluded that the proposed incidental take of the (name covered species) is not likely to jeopardize the continued existence of this/these species."

**Helpful Hint: While the criterion states "the species" in reference to the covered species, it applies to all listed species in the plan area. If implementing the HCP would jeopardize any listed species (including plants) or adversely modify critical habitat, we cannot issue the permit.**

16.1.3.5 (FWS) The measures, if any, required under subparagraph (B)(1)(iii)(D) will be met (50 CFR 17.22(b)(2)(i)(E)/17.32(b)(2)(i)(E)) and (NMFS) the applicant has amended the conservation plan to include any measures (not originally proposed by the applicant) that the Assistant Administrator determines are necessary or appropriate (50 CFR 222.307(c)(2)(iv))

This section refers to the requirement that the HCP application include “other measures such that the Director may require as being necessary or appropriate for purposes of the plan.”

Other measures may still be deemed “necessary or appropriate” in addition to the issuance criteria above so that the applicant can assure full implementation of the HCP's conservation plan, monitoring, etc., or to meet the Services’ other legal obligations. These obligations include such things as avoiding jeopardy of listed plant species, destruction or adverse modification of designated critical habitat, jeopardy or take of listed wildlife species not covered by the HCP or incidental take permit, and avoiding take of migratory birds or eagles, or Marine Mammal Protection Act (MMPA) concerns. Discuss these issues with the Regional HCP Coordinator.

16.1.3.6 (FWS) He or she has received such other assurances as he or she may require that the plan will be implemented (50 CFR 17.22(b)(2)(i)(E) /17.32(b)(2)(i)(E)) and (NMFS) There are adequate assurances that the conservation plan will be funded and implemented, including any measures required by the Assistant Administrator (50 CFR 222.307(c)(2)(v))

Other assurances would be project-specific. Discuss any specific needs with the Regional HCP Coordinator. We recommend working with applicants to determine if other measures would be appropriate to complement the HCP strategy, such as developing and implementing a bird and bat conservation strategy where there is a high likelihood of significant impacts to non-listed migratory birds or bats, either in the HCP or as a stand alone agreement; providing conservation measures for an unlisted species not covered in the HCP; or contributing funds for research above and beyond that needed for the HCP’s adaptive management program.

#### *16.1.4 Disqualifying Factors*

If the HCP meets issuance criteria and all other requirements, and the Services have no evidence that the HCP should be denied on the basis of the criteria and conditions in 50 CFR 13.21(b)-(c) (disqualifying factors), we must issue the incidental take permit. However, in some instances you may have indications (or even knowledge) of an applicant’s civil penalty or criminal conviction of any statute or regulation relating to the activity for which the application is filed, that could be considered evidence of a lack of responsibility. If the applicant didn’t provide all required information or is found to have lied about information in the permit application, failed to demonstrate a valid reason for having a permit, or is not qualified to have a permit, we would deny the application. Regulations allow us to use such knowledge for further inquiry or investigation. You may request that your servicing Office of Law Enforcement search their database for records of applicable violations. A conviction, or entry of a plea of guilty or nolo contendere, for a felony violation of the Lacey Act, the Migratory Bird Treaty Act, or the Bald and Golden Eagle Protection Act disqualifies an applicant from receiving or exercising the

privileges of a permit. Be sure to do due diligence (see the [HCP Handbook Toolbox](#) ). It is much easier to deny a permit for cause than revoke an issued permit for the same reason.

If an applicant has violated statutes or regulations relating to the activity for which the application is filed that do not rise to the level of a felony, and those violations are remedied (e.g., violation for killing birds in an oil pit, but the oil pit was covered and required restitution was made), that may not be grounds for denying a permit. However, if the applicant has been assessed a civil penalty or convicted of any criminal provision of any statute or regulation relating to the activity for which the application is filed, it may show a lack of responsibility, which is grounds for denying a permit (50 CFR 13.21(b)(1)). Another example might be that of an applicant who has been convicted of savings and loan fraud, but has made restitution. The felony (it's not related to the permit application) wouldn't provide cause for permit denial, but if the applicant didn't make restitution, that might show a lack of responsibility.

If there are no disqualifying factors you may use the following template language:

“The Service has no evidence the incidental take permit application should be denied on the basis of criteria and conditions set forth in 50 CFR 15.21(b)-(c).”

Note that applications for renewed permits or amendments to active permits have a record of compliance to consider when making the permit decision.

## 16.2 Writing the Permit

The permit is the controlling document in the HCP package. There are very specific requirements for a valid permit:

The incidental take permit, together with its attached (or included) terms and conditions, must clearly identify the scope and extent of the authorized taking. The face of the permit has specific blocks for some of this information. Additional, clarifying information can be inserted into the terms and conditions section of the permit. If you use attachments, they should be uploaded into the Services Permit Issuance and Tracking System (SPITS) or Authorizations and Permits for Protected Species (APPS) so all parts of the permit are together and readily available to the Services and law enforcement.

Following are the main categories of information that are needed on the face of the permit:

**Permittee.** Name, address, and telephone number of the permittee goes on the face of the permit in block 1. You may include an email address. Additional information may be included under the conditions section such as the affiliation of the permittee and how they directly control activities covered under the permit.

**Permit Area.** Describe the area(s) where take associated with covered activities is authorized in block 10 of the permit. Additional location details or a map may be attached to the permit.

**Dates.** Include permit signature date, effective date, and expiration date, as well as report due dates (e.g., annually on January 31).

**Permittee Signature Line.** The following standard condition should be on the face of the permit and requires the permittee to sign for the permit (signature must be in blue ink) with the following understanding (see example in the [HCP Handbook Toolbox](#)):

“Acceptance of the permit serves as evidence that the permittee agrees to abide by all conditions stated.”

The permittee must sign for the permit to acknowledge receipt and signify agreement to fully abide by and implement the permit.

### *16.2.1 Permit Terms and Conditions*

The Services have the authority and responsibility to impose terms and conditions in the permit necessary to carry out the purposes of the HCP, including but not limited to, monitoring and reporting requirements necessary for determining whether the permittee is complying with such terms and conditions. The permit should describe all activities likely to result in take under the HCP, including those necessary for the conservation program, and the amount of take authorized for each covered species. The terms and conditions placed in the permit should be the same as, or a summary of, those described in the final HCP, with the exception of standard conditions that go into all permits. In some rare cases the Services may need to incorporate additional conditions, but that should be avoided, if possible. If we intend to include terms and conditions not proposed in the HCP, we should fully explain our intentions to the applicant—don’t surprise them. Many times the applicant will add them to their HCP if approached and asked to do so.

SPITS will generate standard conditions applicable to all FWS permits. We must add all other conditions needed to clarify the scope of the project, including, but not limited to, details associated with the above categories. Alternatively, depending on Regional preference, permit terms and conditions may require full compliance with the approved HCP, including changed circumstances. Check with the Regional HCP Coordinator for your Region’s policy.

Generally, FWS uses the following additional standard terms and conditions:

- Upon locating a dead, injured, or sick [covered species] or any other endangered or threatened species, the permittee must contact the Service’s [insert name of field office or law enforcement office and phone number], for care and disposition instructions. Use extreme care when handling sick or injured individuals to ensure effective and proper treatment. Also take care in handling dead specimens to preserve biological materials in the best possible state for an analysis of cause of death. Along with the care of sick or injured endangered/threatened species, or preservation of biological materials from a dead specimen, the permittee is responsible for ensuring that evidence intrinsic to the specimen is not unnecessarily disturbed.
- Terms and conditions of the permit are inclusive; take resulting from any activity not specifically covered is prohibited. Please read through these conditions carefully as violations of permit terms and conditions could result in your permit being suspended or revoked. Violations of your permit terms and conditions that contribute to a violation of the Endangered Species Act (ESA) could also subject you to criminal or civil penalties.

- The authorization granted by this permit is subject to full and complete compliance with, and implementation of, the (name of HCP) HCP and all specific conditions in this permit. The permit terms and conditions supersede and take precedence over any inconsistent provisions in the HCP or other program documents.

**Helpful Hint: We may provide a template condition for eagle “incidental take”, but we do not have a final rule to base such language on at this time. Although the current 50 CFR 22.11 language seems to eliminate the need at this point, we must remind Service HCP practitioners and permit applicants that there are additional requirements for covering eagles under an ESA permit.**

Standard conditions in all NMFS permits include:

- permit duration;
- conditions to monitor, minimize, and mitigate impacts to listed species;
- reporting requirements;
- requirements for interactions with FWS species (usually manatees); and
- general permit conditions under 50 CFR 222.301.

There may also be other Regionally required terms and conditions for each Service. Check with the Regional HCP Coordinator for other standard terms and conditions.

For both Services, these are some things to remember when writing permit terms and conditions:

- use language a non-expert will understand.
- be very specific—the permit must be enforceable.
- don’t equivocate or use ambiguous words (e.g., may, if possible, at the permittee’s discretion, to the maximum extent practicable).
- use descriptive headings to organize the permit (e.g., species 1, conservation measures, minimization measures, mitigation strategy, etc.).

Terms and conditions specific to the HCP are written on the following topics (lengthy descriptions may be incorporated by reference from the HCP into the permit):

- covered species—common name, scientific name, ESA status;
- amount of incidental take authorized for each covered species—describe the level of take authorized in measurable and enforceable terms for each species covered by the permit; This can be done using numbers of individuals, stream miles, acres of habitat, or another appropriate habitat unit. If you’re using a surrogate, it must be fully explained in the HCP;
- minimization and mitigation measures for each species covered in the permit;
  - type and amount of minimization measures for each species;
  - type and amount of mitigation for each species; and
  - negotiated conservation measures;
- permit area – area under the permittee’s control where take may occur;
- as needed for multiple-party, co-permittee arrangements, define areas of responsibility, coordination measures, and address severability (if applicable);

- minimization/mitigation measures for all take (including any indirect take outside the permit area, e.g., downstream siltation);
- covered activities – name the activities or project for which we’re authorizing take and include conditions related to those activities. You may restate in detail or briefly summarize conditions in the HCP. If the permit has more than one permittee and activities are different for each permittee, spell them out per permittee;
- changed circumstances and the permittees’ proposed responses;
- monitoring requirements;
- reporting requirements;
- any conditions the Services require; and
- if the permit has more than one permittee, describe terms and conditions for each permittee (if they’re different).

The following table provides an “at a glance” set of requirements for terms and conditions for a 10(a)(1)(B) permit.

**Table 16.2a: Requirements for Terms & Conditions**

<b>Terms &amp; Conditions (T&amp;Cs)</b>	<b>Components</b>	<b>Sub-components</b>
<b>Standard T&amp;Cs</b>	see above	may also include Regionally-specific T&Cs
<b>Species-specific</b>	amount of take authorized for each covered species	use common currency – # of individuals, stream miles, acres of habitat
	conservation measures/mitigation strategy	minimization measures for each species
		mitigation measures for each species
<b>Multi-party requirements</b>	Identify other permittees or co-permittees and their geographic and/or project-related areas of responsibility	as appropriate, delineate spheres of responsibility and coordination among multiple parties/co-permittees
<b>Permit Area</b>	description	where activities that may result in take are conducted
<b>Plan Area</b>	offsite impacts (not a conservation bank unless the permittee is also the banker)	the permit area plus the location of off-site conservation measures (e.g., offsite mitigation lands not owned by the permittee)
<b>Covered Activities</b>	per permittee, if different	n/a
<b>Changed Circumstances</b>	permittee response to changed circumstances	per permittee, if applicable
<b>Monitoring Requirements</b>	for species, effectiveness, & compliance	specific information needed
<b>Reporting Requirements</b>	specific information needed	required format

**Helpful Hint: In some cases, activities in the HCP will require hands-on work with species (e.g., moving fish from site to site, monitoring populations or individuals of covered species, building artificial nests within occupied habitat). If the Services agree to such activities, they should be listed in the permit along with any restrictions or stipulations. For some sensitive species, certain activities may require specialized experience and handling by a permitted biologist (i.e., has an ESA section 10(a)(1)(A) permit). The permit for the HCP should state specifically that those activities must be conducted by (or under the direct, on-site supervision of) an experienced, permitted biologist (e.g., nest surveys, translocations, moving species out of harm's way to a safe location).**

### *16.2.2 Reporting Requirements*

The ESA emphasizes the necessity for “reporting requirements ... for determining whether the incidental take permit terms and conditions are being complied with” (section 10(a)(2)(B)(v)). In addition, an applicant’s HCP must include steps to monitor and then report on the effects of take (50 CFR 17.22(b)(1)(iii)(B), 17.32(b)(1)(iii)(B), and 222.307).

The permit must include the reporting requirements described in the HCP to ensure permittee compliance. If the Services have other requirements, they also must be in the permit terms and conditions. Permittees are usually required to submit annual reports with very specific information in required formats (as described in in Chapter 10). However, for some small (e.g., single family residence) or low-effect HCPs, we may just require one report after project completion.

**Helpful Hint: To ensure that they accurately reflect the content of the HCP, we recommend that you send the draft permit terms and conditions to the applicant for review.**

### **16.3 *Federal Register* Notice of Availability–Final HCP, Final NEPA Analysis, and Draft or Final Decision Documents**

The process for developing the notice of availability (NOA), is described in Chapter 14.5 and 14.8 (FWS & NMFS) and the *Federal Register* Notices & (Entire) Process for Publishing an NOA is in the [HCP Handbook Toolbox](#) *Federal Register* Notices and Process for Publishing a Notice of Availability (NOA) and Notice of Intent (NOI) for FWS.

For final low-effect HCPs and categorical exclusion (CatEx) packages, we only have to notify the public that we issued the permit. There is no timing requirement for the notice, so we recommend that these notices be batched on an annual basis as a streamlining measure. The Headquarters office will compile and publish the annual notice. The field or Regional office should put final approved and signed HCPs and associated documents on their local Web sites to satisfy the requirement to make documents available to the public.

For final HCPs with an environmental assessment (EA), we are required to notify the public that we have approved the HCP, finalized the EA, and issued a FONSI and permit. There is no timing requirement for this notice either, so we recommend that these notices be batched on an annual basis with notices of permit issuance on HCPs that the Headquarters office will compile and publish. However, to ensure we meet the requirements in 40 CFR 1506.6(b), we recommend that

the NOA on the draft HCP and draft EA state that FONSI's will be available along with HCPs and EAs on the Services' Web sites as soon as they are finalized.

If the NOA is for a final HCP and final environmental impact statement (EIS), it should be published when those documents are finalized and draft decision documents are completed. If the NOA for the draft ROD and draft permit and terms and conditions are published with the final HCP and final EIS, the notice can include a date (30 days after publication date) that the public can request copies of the final ROD and permit (they will not be signed and effective until after the 30-day waiting period). They should also be available on the Services' Web site as soon as they are signed. If done this way, the final notice of permit issuance may also be batched with the other notices described above. Again, the Headquarters office will compile and publish the annual notice.

## **16.4 Preparing and Processing the Signature Package**

### *16.4.1 Contents of the Signature Package*

The signature package consists of the following documents:

- HCP;
- NEPA analysis;
- biological opinion;
- FWS:
  - findings & recommendations memorandum, and
  - NEPA decision document (unless it was combined with the set of findings);
  - transmittal memo from the field office to the Regional Office (draft permit terms and conditions) (see example in the [HCP Handbook Toolbox](#))
- NMFS – decision memo documenting statutory findings, considerations, and determinations;
- implementing agreement (if there is one);
- NOA of the final HCP, final NEPA analysis, and draft decision documents:
  - We recommend batching notices of issuance of an environmental action statement (EAS) and permit issuance annually. We must notify the public of the issuance of a FONSI, but if the public were invited to request final, signed copies in the NOA for the final HCP and final EA, this could also be added to the annual notice that the Headquarters office will compile and publish.
  - cover letter to the Office of the Federal Register
- for an EIS you must also have cover letters (see Example Letters in the HCP [HCP Handbook Toolbox](#)) to:
  - EPA's Regional office (see examples and addresses in the [HCP Handbook Toolbox](#)),
  - FWS – DOI Library,
  - NMFS – NOAA Library,
  - National NEPA Coordinator (for FWS, or NMFS, or both),
  - note to reviewer, and
  - draft permit and draft terms and conditions

You can find a table that outlines the contents of the signature package and identifies who signs each document for FWS and NMFS in the [HCP Handbook Toolbox](#).

**Helpful Hint: For an EIS the ROD cannot be signed and the permit cannot become effective until 30 days after publication of a notice in the *Federal Register*. The NOA should state that the final, signed ROD will be available for review on the Service's Web site. The draft ROD may be placed on the Web site, then should be replaced by the final, signed version.**

#### *16.4.2 Who Signs the Documents and Why*

While the NOA for draft or final packages may be signed by the Regional Director, Regional Administrator, and their acting officials, or anyone that has been delegated authority to do so, the final supporting/decision documents should not be signed by the Regional Director or Regional Administrator because of the appeal process (50 CFR 13.29) (also see Chapter 17.6).

**Helpful Hint: Neither the Regional Director or Regional Administrator should sign the permit as they may later be called upon to review and make the final decision on any appeal of a permit decision. This allows the final decision to remain in the region.**

##### 16.4.2.1 FWS

Depending on whether the Regional Director has delegated signature authority, the appropriate official to sign the decision documents (NEPA decision, set of findings, and permit) would be the Deputy Regional Director or whomever else it was delegated to (see example signed delegation in the [HCP Handbook Toolbox](#)).

If permittees disagree with the terms and conditions of the issued permit (e.g., because the requested amount of take was not authorized, one or more of the requested activities was not approved, etc.), they have the right to request reconsideration or to refuse the permit. Reconsideration is finalized by the issuing officer (that signed the permit) (50 CFR 13.29(d)). If that decision is appealed, the Regional Director would review and make the final decision.

##### 16.4.2.2 NMFS

The appropriate official to sign the decision memo (NEPA decision, set of findings, and permit) would be the Assistant Regional Administrator, or whomever it was delegated to within that NMFS Region.

#### *16.4.3 Timing – When Documents are Signed*

If the NEPA conducted is a CatEx or EA, all of the documents in the signature package may be signed at the same time, and they become effective upon signature. On an annual basis the Headquarters office will compile and publish a batch *Federal Register* notice of issued permits and NEPA decision documents that will satisfy the Services' requirement to notify the public (40 CFR 1506.6(b)).

If the NEPA conducted is an EIS, the final signature package includes:

- the *Federal Register* NOA (of the final HCP, final EIS, and draft decision documents);
- final HCP & final EIS; and
- draft ROD, draft permit with terms and conditions, and draft findings memo (if not combined with the ROD).

All decision documents are reviewed at this point and the findings and recommendations memo is signed (unless it has been combined with the ROD). The ROD and permit are not signed or dated pending the close of the final 30-day public notice period (40 CFR 1506.10(2)) and Services response to any comments made. The EPA's notice is the official opening of the 30-day notice.

The ROD becomes effective immediately upon signature. The permit becomes effective on the effective date on the face of the permit (block 7) after signature. Final documents should be made available to the public by request and on the issuing Services' Web site, as soon as they are signed and as stated in the *Federal Register* notice.

**Helpful Hint: This is a change from previous procedures. However, as a streamlining measure it should cut considerable time in the surname process (one round instead of two).**

If the NEPA decision is of national interest, after all documents are signed, we must publish a notice of our ROD in the *Federal Register* (40 CFR 1506.6(b)(2)). This may include multi-State or multi-Regional HCPs.

#### 16.4.3.1 Environmental Action Statement and Permit

There are no requirements to publish an NOA for a signed EAS (which is the decision document for a CatEx), but it should be added to the annual NOA for signed permits that the Headquarters office will compile and publish. Final documents should be put on the Services' Web sites so they are available to the public.

#### 16.4.3.2 Finding of No Significant Impact and Permit

The draft FONSI may be made available to the public with the final EA. Since the signed FONSI is an environmental document under 40 CFR 1506.6(b) and must be made available to the affected public, the NOA can inform the public that they may request a copy of it on the closing date. Signed FONSI should also be placed on the Services' Web sites as soon as possible after signature.

You may use a combination of methods to provide notice, tailored to the needs of the particular case, such as local mailings, publications in newspapers, radio announcements, and other means, in addition to publication in the *Federal Register*.

### 16.4.3.3 Record of Decision and Permit

The decision to implement the action in the final EIS cannot be made sooner than 30 days following EPA's publication of the NOA of the final EIS in the *Federal Register*. We should make the draft ROD and draft permit with terms and conditions available when the NOA of the final HCP and final EIS is published, with a 30-day notice period. The ROD and permit may be signed immediately following the closing date. The NOA should advise the public that they may request a copy of the final signed copies on the closing date and that we will put final documents on our Web site to satisfy the requirement under 40 CFR 1506.6(b). Alternatively, the signed ROD and signed permit may be made available by other means (e.g., newspaper, on the Services' Web site, etc.).

### 16.5 Implementing the HCP and Executing the NEPA Decision

- a low-effect HCP may be implemented as soon as the permit is signed.
- an HCP with an EA may be implemented as soon as the FONSI and permit are signed (550 FW 3(B)(4)).
- an HCP with an EIS may be implemented on whichever of the following dates is later—the date the ROD is signed or the effective date on the permit.

### 16.6 Permit Issuance and Distribution of Copies of the Permit

As soon as the decision documents and permit are signed, we must copy them for the administrative record and send the original permit to the permittee. Provide copies to all affected offices.

### 16.7 Permit Denial, Review, and Appeal Procedures (Who Signs the Permit and Why)

FWS permit denials should be signed at the Deputy Regional Director or Assistant Administrator-level or below to allow the Regional Director or Regional Administrator to be the final administrative decision maker on a denied, suspended, or revoked permit appeal. If the Regional Director signs the permit denial and it is appealed, it would have to go to Headquarters for a decision.

#### *16.7.1 Permit Denial*

If we must deny the permit for any reason (i.e., doesn't meet issuance criteria or other requirements, or has disqualifying factors), we must notify the applicant of the denial in writing. The letter must describe the reasons for the denial, including reference to the applicable regulations we relied on when denying the application. It should also include information indicating the applicant's right to request reconsideration of the permit application denial.

For NMFS, denials must be made in accordance with 15 CFR 904.

### *16.7.2 Request for Reconsideration of a Permit Denial*

**For FWS**, anyone who has received written notice of denial may request reconsideration. The process is described in detail in the regulations at 50 CFR 13.29 (see the [HCP Handbook Toolbox](#)). The reconsideration and appeals processes are the same as those used for permit suspension and revocation decisions, as summarized in Chapter 17.6. Such an administrative appeal is required by FWS regulations before the applicant can sue FWS in Federal court. The request must be in writing, be signed by the person requesting reconsideration, and submitted to the issuing officer within 45 days of the notification that the application was denied.

The issuing officer must notify the applicant of the decision on their request for reconsideration within 45 days. If the decision is adverse, the applicant has 45 days to appeal to the Regional Director. The Regional Director will notify the applicant of his/her decision within 45 days. The decision of the Regional Director is the final administrative decision of the Department of the Interior.

**For NMFS**, if the permit has been denied under 50 CFR 222.303(e)(1), the applicant must be notified in writing. If authorized in the denial letter, the applicant can submit further information or reasons why the permit should not be denied. The final action by the Assistant Administrator is the final administrative decision of the Department of Commerce (50 CFR 222.303(e)(2)).

### *16.7.3 Copies of Denials*

**For FWS** – A copy of all section 10 permit denials, including denial of reconsideration and appeal requests, should be sent to all affected field offices, the Special Agent in Charge - Law Enforcement, and the Headquarters Ecological Services office in Falls Church, VA.

**For NMFS** – Copies should be sent to affected field offices, Regional offices, and the Endangered Species Division in Silver Spring, MD.

## **16.8 SPITS, APPS, and ECOS**

Enter final terms and conditions and dates into SPITS (see instructions in the [HCP Handbook Toolbox](#)).

Enter final information into the Environmental Conservation Online System (ECOS) for tracking (see instructions in the [HCP Handbook Toolbox](#)). Upload electronic copies of the HCP, final NEPA analysis and decision documents, biological opinion, and signed permit.