

## **PHASE 2: Developing the HCP and Environmental Compliance Documents**

### **Chapter 5: Covered Activities and Alternatives to the Taking**

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### **5.1 Activities Covered by the Incidental Take Permit and the Habitat Conservation Plan (HCP)**

An incidental take permit under section 10 of the Endangered Species Act (ESA) (see [HCP Handbook Toolbox](#)) authorizes take that is incidental to otherwise lawful activities that are covered in the HCP. The HCP describes how the activities would be implemented and how they would impact the species. Hence, the HCP “covers” the activities. The permit authorizes the resulting take, not the activities, *per se*. Hence, the permit “covers” the take.

#### *5.1.1 Covered Activity Eligibility*

To be eligible for incidental take authorization, covered activities must be: (1) otherwise lawful, (2) non-Federal, and (3) under the direct control of the permittee. As we explain in more detail in Chapter 3.5.1, otherwise lawful activities are activities that may legally be carried out provided the applicant is in compliance with other local, State, and Federal laws. The applicant is responsible for complying with other applicable local, State and Federal laws. Non-Federal activities are those that are not funded, authorized, or carried out by a Federal agency. Activities under the direct control of the permittee are those that the entity controls through jurisdictional authority, employment, contracts, leases, or land ownership.

#### *5.1.2 HCP Measures that Result in Take*

The permit also authorizes any take that may result from the HCP’s required conservation and monitoring measures (e.g., capture or harassment of individuals to avoid death or injury; accidentally crushing individuals while restoring its habitat; or capturing and marking individuals to track responses to conservation measures).

Consultants and researchers often already hold ESA section 10(a)(1)(A) enhancement of survival permits authorizing take associated with monitoring, research, and conservation purposes. They may be contracted to conduct these types of activities if required in an HCP. If the applicant elects to hire someone holding an enhancement of survival permit, and such activities fall under

the scope of that permit, the associated take does not need to be included on the incidental take permit. However, the HCP should explain such an arrangement.

On the other hand, if the applicant prefers to use their own staff or contractor without an enhancement of survival permit, the incidental take permit can authorize take associated with monitoring, research, and conservation purposes for the HCP. The Services should advise the applicant to weigh the efficiencies of contracting individuals already holding enhancement of survival permits against using their own staff or contractors. If the applicant intends to use their own staff or contractors to conduct management and monitoring under the incidental take permit, such personnel must meet the same qualifications and demonstrate the same expertise as required for an enhancement of survival permit.

**Helpful Hint: Enhancement of survival permits cannot be used to authorize moving individuals out of harm's way of proposed project activities to side step applying for an incidental take permit and preparing the required HCP. They also cannot be used to authorize take incidental to non-Federal activities that are not for research purposes or to enhance the propagation or survival of the species.**

### *5.1.3 Including All Effects from Covered Activities*

The HCP must also describe activities that may result in all effects to covered species or their habitats, including any effects that do not rise to the level of take. The HCP needs to describe the effects and how they may or may not impact the covered species, because the Services must consider this information when analyzing effects in their section 7 biological opinions, National Environmental Policy Act (NEPA), and findings documents (see [HCP Handbook Toolbox](#)) documents.

## **5.2 Types of Land and Water Use Activities Covered in HCPs**

The Services' section 10 regulations do not limit the type and extent of activities that an HCP can cover, as long as the activities meet all the eligibility criteria and the HCP meets the permit issuance criteria. HCPs can cover a variety of residential, commercial, agricultural, and industrial development and any associated activities that may result in incidental take. They can also cover resource extraction (e.g., oil and gas, mining), sustainable use (e.g., timber harvest, wind energy production, fisheries harvest), recurring activities (e.g., irrigation ditch clearing, water diversions, hydroelectric power, seawall maintenance, recreation), or ongoing operations and maintenance of existing or new projects.

Many activities that HCPs cover are permanent projects on the landscape with permanent effects, such as loss of habitat from a development of a residential sub-division. HCPs also can cover short-term activities that result in temporary effects, such as one-time take of a specific number of individuals from a bridge replacement. Some longer term activities may result in temporary rather than permanent effects, such as rotational timber harvest.

Covered activities can be of any scale, from building a single-family residence to constructing a multi-State gas pipeline. Local governments can choose to cover their own infrastructure projects (e.g., buildings, roads, bridges, etc.), building permits for developers, or a combination of these in the HCP. A single party can cover a single project, such as an individual wind energy facility,

or a consortium of wind energy companies can collaborate on an HCP to cover several facilities across a defined area. You should work with applicants to weigh the benefits and challenges of covering multiple activities in an HCP. Benefits include:

- developing a comprehensive conservation strategy that addresses impacts from several activities, rather than attempting to piece together separate mitigation strategies from individual HCPs as they are developed over time;
- efficiencies that result by covering take for a range of activities under a single permit; and
- reducing overall workload impact by investing time and resources up-front in a single comprehensive HCP, rather than reviewing and processing multiple HCPs.

On the other hand, some challenges to consider are:

- increased complexities with understanding multiple activities and all the various resulting impacts, developing a variety of activity-specific minimization measures, and coordinating with multiple parties involved with different activities;
- the demand on time and resources due to these complexities at the time of the up-front investment;
- developing more complex monitoring and adaptive management programs necessary for the suite of covered activities; and
- difficulties in understanding proposed activities when multiple competing commercial entities under a single HCP must protect proprietary business information.

### 5.3 Analyzing the Components of Land and Water Use Activities

Most activities (e.g., a wind energy project) that an HCP covers have multiple components that can result in different types of take and impacts. Ask applicants to provide information on how every aspect of the covered action would be implemented. Take the time to meet with project proponents specifically to exchange information based on your respective technical expertise, theirs on the action and yours on the covered species.

**Helpful Hint: Visiting similar projects already on the ground or in progress can be particularly helpful in identifying the variety of components of an action and understanding potential impacts.**

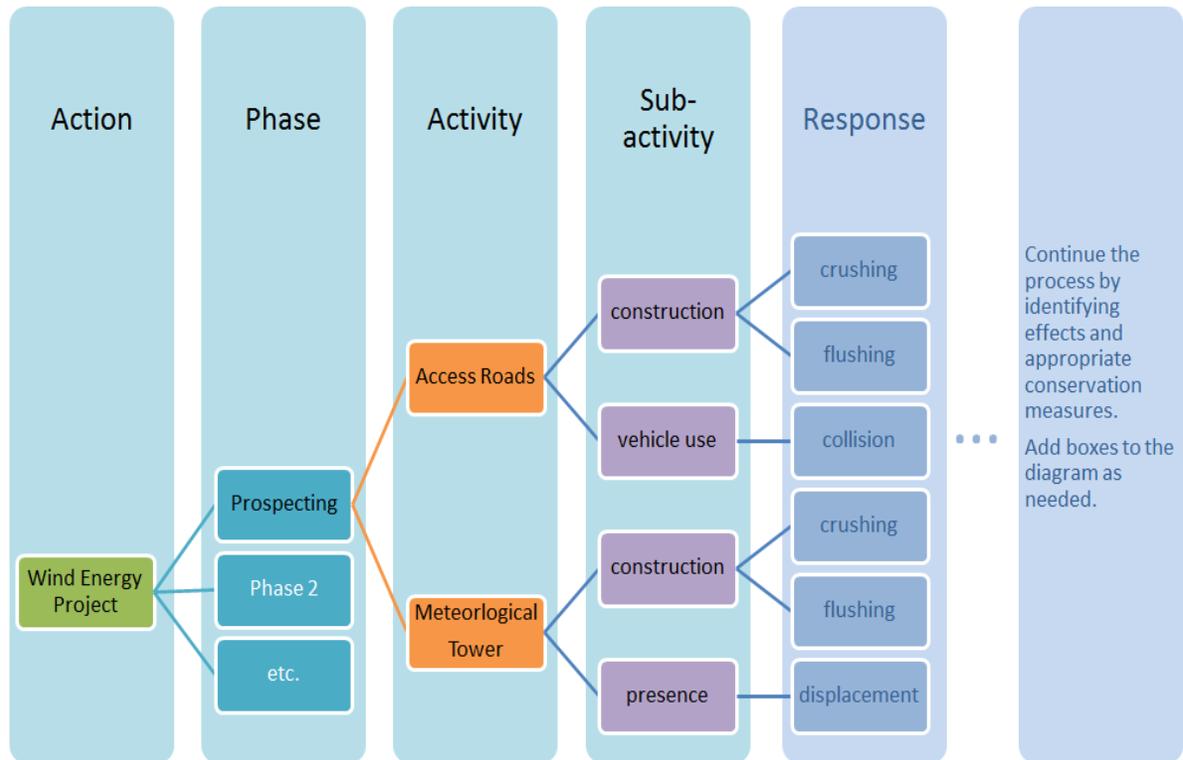
Breaking down an overall action into sub-activities is key to understanding which ones may result in take, which may result in other impacts, and which may not affect the covered species at all. Analyzing the action in this manner also helps us understand the geospatial and temporal relationship of all the sub-activities of the proposed action, which are key in identifying the permit area, determining the permit duration, and developing appropriate avoidance and minimization measures specific to the sources of take. Collaborating to analyze the components of the action will likely lead to a better understanding by all parties on the rationale behind the identification of the appropriate covered activities and the conservation measures, which in turn should reduce or eliminate prolonged debate during HCP development.

The FWS developed a process, called the Effects Pathway Model (EPM) (see [HCP Handbook Toolbox](#)) to help identify the connections between project activities and species effects and to ultimately develop corresponding conservation measures.

**Helpful Hint: EPM also contains detailed breakdowns of many types of actions that can help you consider the effects of actions on species and their habitats. Using one of these completed breakdowns, if applicable to your HCP, can save you and the applicant time.**

Using a diagram or table helps visualize and track the relationship between the components of an action and effects to the species (see Figure 5.3a). Use this process for each covered species or guild of species if effects would be the same.

**Figure 5.3a: Visualizing How to Break Down Components of an Action to Identify Species Responses.**



This graphic focuses on breaking down activities associated with a proposed wind energy facility affecting the lesser prairie chicken, using a couple of examples from just one phase of the action. The process should continue by adding more steps to connect effects on the individual and demographic levels and appropriate conservation measures.

Typically, development actions can first be broken into broad phases, such as construction, operations, and maintenance, while others may have additional phases. For example, the phases for wind energy development are:

1. prospecting,
2. siting and development,
3. construction and commissioning,
4. operations and maintenance, and
5. repowering or decommissioning.

Identify the activities associated with each phase. For example, a few of the components of the prospecting phase for a wind energy facility include access roads and construction and operation of meteorological towers (see Figure 5.3a).

Next, break down each activity into sub-activities that may affect the covered species. Then identify the type of response the sub-activity may elicit in the covered species. The example in Figure 5.3a shows that activities associated with construction of access roads could cause repeated flushing of lesser prairie chickens, vehicles traveling access roads could strike lesser prairie chicken individuals, while the presence of a meteorological tower may cause lesser prairie chickens to abandon nearby habitat. Include only those components that likely impact the covered species. See Chapters 8.2 and 9.3 for subsequent steps to identify how these responses would ecologically and demographically affect the species and determine appropriate avoidance, minimization, and mitigation measures.

#### **5.4 Excluding Certain Activities**

In some cases, you may find there are reasonable measures that could eliminate the likelihood of take from certain activities, such as modifying beach lighting to avoid impacts to sea turtles. You should advise the applicant that committing to such measures not only would be good for the species, but also would remove the need for the applicant to mitigate for the impacts of such take. Ultimately, the applicant chooses whether to design their project to avoid take or to include certain activities for take coverage. However, if take from such activities is likely to jeopardize the species or destroy or adversely modify its critical habitat, they cannot be covered in the permit. In this case, you will need to work with the applicant to modify the activity and incorporate conservation measures to eliminate the risk of jeopardy or critical habitat destruction or adverse modification.

#### **5.5 Describing Covered Activities in the HCP**

Because the HCP is the applicant's document, the applicant ultimately decides how to write it. However, you should provide guidance on what they should include as covered activities so that we can adequately review the document and the public can understand and comment on what is proposed. A detailed description of the covered activities in the HCP is also key for future permittees and Service staff to understand how the covered activities will be implemented over the duration of a permit.

The process of breaking down the action into components is particularly helpful in establishing what the HCP should describe and in what detail.

- An HCP should thoroughly describe activities and associated components that are likely to have impacts, but should not include overly detailed information about sub-activities that do not affect covered species.
- Brief descriptions of such sub-activities and citations to support why they do not impact species is sufficient.
- Describing all the ways a particular activity could be conducted may not be necessary if the anticipated impacts would be the same. For instance, if the impacts of a proposed development are solely the permanent loss of a specified amount of currently unoccupied

habitat that is projected to remain unoccupied in the future, whether the structures are residential or commercial may not be important. In this case, broadly describing the activity as development gives the applicant flexibility without affecting the outcome of analyses of impacts.

Flexibility in how multiple activities for large-scale HCPs are described can be helpful. In some cases, a local agency's planning documents fully describes the activities to be covered by the HCP and can be incorporated by reference. Regardless, the HCP must provide enough information about the activities to enable an adequate analysis of anticipated take.

## **5.6 Alternative Actions to the Taking in the HCP**

Section 10 of the ESA and its regulations require that an HCP describes actions the applicant considered as alternatives to the take that would result from the proposed action and the reasons why they are not using those alternatives. When describing alternative actions in the HCP, the applicant should focus on significant differences in project design that would avoid or reduce the take. These alternatives should be meaningful and not merely involve small changes in project implementation or minimization and mitigation measures that do not avoid or reduce take.

The regulations do not require that the HCP include a specific number of alternatives to the taking. Besides the proposed alternative, HCPs typically include a no-action alternative, in which the applicant would not proceed with their proposed project or modify it to avoid take altogether. Other types of alternatives will depend on the situation, but can include implementing the project in a different location or changing the project or land use in a way that would eliminate or reduce the take in a meaningful way (e.g., restricting the timing of certain timber harvest activities to when grizzly bears are denning).

The HCP must demonstrate that the applicant reasonably considered the alternatives to the proposed action and explain why the applicant did not select each alternative. These explanations do not have to justify impracticability of any alternative. The Services need to only to evaluate whether the applicant's explanations appear to be credible and reasonable; therefore, we do not have to analyze the feasibility of the alternatives.

## **5.7 NEPA Alternatives**

NEPA alternatives differ from HCP alternatives, and the distinctions are subtle and often confused. See Chapter 13.3 for a detailed discussion of NEPA alternatives. Figure 5.7a compares the differences between the alternatives in the two contexts. The NEPA alternatives that the Services must analyze in the Environmental Assessment (EA) or Environmental Impact Statement (EIS) are alternatives to the Federal action of issuing the incidental take permit based on the HCP proposed by the applicant and including terms and conditions to comply with the HCP. These alternatives are not necessarily the same as the HCP's alternatives to the taking (see Figure 5.7a). The NEPA alternatives should meet the purpose and need of the action, which essentially is to fulfill our conservation obligations under section 10 of the ESA while responding to the applicant's request for authorization of take incidental to the covered activities (see Chapter 13.1 for a fuller explanation of our purpose and need).

The range of alternatives typically includes:

1. the proposed action,
2. no action, and
3. one or more variations of the proposed action (usually with more or less take).

For an EA level review, two to three alternatives are usually sufficient. For an EIS level review, three or more alternatives are generally needed.

While the applicant develops the alternatives to the taking in the HCP, the Services are responsible for developing NEPA alternatives. The Services may confer with the applicant to ensure that the NEPA alternatives are reasonable, but determining which alternatives to analyze in the NEPA document is ultimately up to the Services. The alternatives the Services select to analyze are not required to be reasonable to the applicant (CEQ 40 FAQs and Answers) (see [HCP Handbook Toolbox](#)).

Besides the proposed action, we must analyze a no-action alternative. We should also consider a range of alternatives that include reasonable ways for an HCP to meet the permit issuance criteria, particularly related to measures to minimize and mitigate the impacts of the take to the maximum extent practicable.

- Such alternatives can entail measures different from those in the proposed HCP to minimize impacts from the take. For example, an HCP might propose to translocate individuals of a covered species out of harm's way of construction activities, while we might consider an alternative as starting construction outside of the breeding season.
- Other alternatives might focus on a different conservation strategy for the HCP. An HCP might propose to restore and enhance habitat to offset impacts of the project, while we might examine a strategy to focus on perpetual protection of other habitat vulnerable to development threats.
- Finally, an alternative might include the same conservation strategy as the one proposed by the applicant, but with a different permit duration.

Theoretically, one could generate an infinite number of alternatives with variations to the proposed HCP. However, we are required to examine only a range of reasonable alternatives in depth. Do not feel compelled to invent alternatives just to have them. We also must discuss alternatives we considered, but rejected, and the reasons why we rejected them. For more guidance on determining and analyzing NEPA alternatives, see the Council on Environmental Quality's (CEQ) 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations in the [HCP Handbook Toolbox](#).

**Figure 5.7a: Differences between HCP and NEPA Alternatives**

