

CHAPTER 2 OVERVIEW OF FWS AND NMFS ROLES AND RESPONSIBILITIES

A. Delegation of Permit Authority

In the past, the FWS's Office of Management Authority (OMA) in the Washington, D.C. area processed and issued all section 10(a)(1)(A) and 10(a)(1)(B) permits. Effective February 12, 1992, the FWS Director delegated incidental take permit responsibilities to the Regional Directors. For NMFS, the responsibility for issuing incidental take permits is divided between the Office of Protected Resources in Silver Spring, Maryland (Washington, D.C. area), and its west coast Regions.

B. Roles and Responsibilities

FWS and NMFS offices at the regional, field, and Washington, D.C. level, and the permit applicant, all have specific responsibilities in implementing the HCP program. This section summarizes the roles and responsibilities of each of these participants.

Keep in mind that specific HCP procedures may vary somewhat between FWS Regions or between FWS and NMFS. This is because the circumstances faced by individual HCP participants may differ widely across regional boundaries or agency jurisdictions, and this handbook, while establishing consistent program standards, also seeks to maintain the flexibility to adjust to specific local needs. Thus, while fundamental legal and policy issues will be consistent nationwide, individual procedures (e.g., document handling requirements) may vary depending on the decisions of FWS Regional Directors or the NMFS Regional or Washington, D.C. Offices.

1. Applicant.

The applicant is responsible for compliance with the take prohibition and exceptions under sections 9, 4(d), and 10(a) of the ESA. Once the decision to obtain a permit has been made, the applicant is also responsible for preparing the HCP and, if approved, for implementing it. Requesting technical assistance from FWS, NMFS, and other interests during preparation of the HCP is strongly recommended to ensure the HCP ultimately submitted for approval is biological sound and meets statutory requirements. The applicant:

- o Should coordinate with FWS, NMFS, affected Federal and state agencies, tribal governments, and where appropriate, affected private interests and organizations in preparing an HCP that satisfies the requirements of section 10(a)(1)(B) of the ESA and Federal regulations.

- o Generally, develops a draft Environmental Assessment (EA) with technical assistance from the Services, and draft Federal Register notices for Service use during the permit processing phase. Normally, EISs are also prepared by the applicant, or through a contractor, or an HCP applicant, under certain circumstances and strict guidance from FWS or NMFS, can assist in developing an EIS. However, FWS or NMFS is ultimately responsible for the content of all section 10 NEPA documents.
- o Submits a permit application (Form 3-200), a \$25 application fee (unless applicant is fee exempt), a completed HCP, draft NEPA analysis (optional) and an IA (as needed) to the appropriate FWS Field or Regional Office or NMFS Regional or Washington, D.C. Office (see Chapter 6, Section B.3).

For FWS applications, note that Federal regulation [50 CFR 13.11(b)] calls for the application to be submitted to the Arlington, Virginia office; however, these regulations are being amended to reflect delegation of the permit program to the Regional Directors. NMFS regulations [50 CFR 222.22] state that applications should be sent to the Silver Spring, Maryland Office, but applications involving west coast anadromous fish should be submitted to the Southwest or Northwest Regional Directors.

- o During the permit processing phase, coordinates with the appropriate FWS or NMFS Field Office to amend or correct the HCP or associated documents, as necessary. Also should provide the Field Office with additional information necessary for the Services to respond to public comments when appropriate.
- o If the permit is issued, implements all measures and programs required by the HCP permit and submits all documentation, monitoring reports, etc. as required over the life of the permit.

2. Field Office.

FWS Responsible Party - Field Supervisor.

NMFS Responsible Party - Field Supervisor.

The Field Office is responsible for assisting the applicant in preparing the HCP; ensuring that the HCP and associated documents are complete; and coordinating with the appropriate Regional Office (or NMFS Washington, D.C. Office) throughout HCP development, approval, and implementation. The Field Office:

- o Provides technical assistance to the permit applicant and serves as applicant's point of contact for information concerning HCP, permit processing, and NEPA

requirements during the HCP development phase. Provides assistance to the applicant's HCP steering committee, if any, as requested (see Chapter 3, Section A.3).

- o Encourages permit applicant to include affected state and Federal agencies and tribal governments to participate in the HCP process. Other Federal agencies might be involved, for example, if they are involved in adjacent planning areas or would administer mitigation lands under the HCP. Inclusion of affected state agencies insures efficient consideration of any additional requirements of state law.
- o Coordinates review of HCP development with FWS or NMFS Law Enforcement agents involved in enforcing permit conditions.
- o Stays informed on planning progress, problems, significant issues, and decisions; routinely advises the Regional Office of HCP progress on key policy and substantive issues (see Chapter 6, Section C.1).
- o Reviews drafts of the HCP and IA for adequacy and comments as necessary. Draft HCPs should be returned to the permit applicant within 30 days of submission, to the maximum extent possible.
- o Prepares NEPA analysis, or reviews draft documents if prepared by the applicant or contractor. Draft NEPA analysis should also be returned to the permit applicant within 30 days of submission, to the maximum extent possible.
- o Certifies to the Regional Office in writing that HCP documents have been reviewed by Field Office staff and are found to be statutorily complete, when the "complete application package" is transmitted to the Regional Office (see Chapter 6, Section B.2).
- o Reviews public comments received, if any, and coordinates necessary changes to the HCP or IA with the FWS or NMFS Regional HCP Coordinator during the permit application processing phase; notifies applicant(s) of recommended revisions to the draft HCP or IA, if any, identified as a result of legal or public review; and discusses remedies. Coordinates with FWS or NMFS Regional Office Environmental Coordinator, NMFS Washington, D.C. Office HCP Coordinator, or the applicant or applicant's contractor to make revisions to the NEPA document, if necessary.
- o For FWS, briefs the Regional Director, appropriate Assistant Regional Director, ARD for Law Enforcement, and the Solicitor's Office concerning HCP issues as

requested. For NMFS, briefs the Regional Director, Deputy Director, Law Enforcement, and General Counsel's Office, as requested.

- o Drafts the following documents (see Chapter 6, Section B.2):

NEPA analysis, either an EA or EIS that is integrated with the proposed HCP (unless drafted by the applicant or contractor).

Federal Register Notice of Receipt of permit application and Notice(s) of Availability of EA or EIS.

Biological opinion concluding formal section 7 consultation. The biological opinion concluding formal section 7 consultation may be done by the FWS or NMFS office that assisted in HCP development or by another office. To avoid possible biases, the staff member conducting the section 7 consultation should not be the section 10 biologist providing technical assistance to the HCP applicant. This will help ensure that the intra-Service section 7 consultation is an independent analysis of the proposed HCP. If, because of staff time constraints, this is not possible, then the biological opinion should be reviewed by another knowledgeable biologist before it is signed by the approving official. It is very important that the staff member that completes the section 7 consultation be involved in the initial stages of the HCP process. This will help ensure that the section 7 requirements are addressed in the HCP and that the two processes are integrated which will help expedite the permitting process. If the Regional Director has delegated the authority, the biological opinion may be signed by an approving official in the Field Office.

Set of Findings (see Chapter 6. Section B.2).

An Environmental Action Memorandum for low-effect HCPs that are categorically excluded from NEPA, Finding of No Significant Impact (FONSI) for the EA, or Record of Decision (ROD) for the EIS.

News releases as appropriate or requested by the Regional Office.

Responses to comments, as necessary.

Permit Terms and Conditions for inclusion in the permit (FWS's Form 3-201), if requested by the Regional Office or NMFS Washington, D.C. Office.

- o Monitors compliance with HCP provisions and permit terms and conditions and evaluates success of the HCP at least annually. Arranges for independent biological peer review, as appropriate.

- o Provides an accounting of fund expenditures administering the section 10 program to the Regional Office as requested.

3. Regional Office.

FWS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD); appropriate Assistant Regional Director (ARD); and Assistant Regional Director for Law Enforcement (ARD-LE).

NMFS Responsible Parties - Regional Director (RD); Deputy Regional Director (DRD).

For FWS, the Regional Office oversees and administers the incidental take permit program for its respective region. For NMFS, this is true for the Northwest and Southwest Regions only, and only for activities concerning west coast anadromous fish species; the Washington, D.C. Office administers the balance of the permit program. Currently, the only HCPs in development in these NMFS regions are for anadromous species. The FWS and applicable NMFS Regional Office is responsible for coordinating with the Field Office throughout the HCP process, reviewing and processing the permit application; and issuing or denying the permit. It is also responsible for ensuring that permit processing targets described in Chapter 1 and Chapter 6 are met. The Regional Office:

- o Receives complete permit application package with supporting documents from the Field Office or applicant, and accounts for fee processing (see Chapter 6, Section B.3).
- o Processes application check.
- o Coordinates with ARD-LE to have permit number assigned through LEMIS (Law Enforcement Management Information System); coordinates review of permit application by ARD-LE, as necessary (FWS only).
- o Reviews permit application package for adequacy and reports any deficiencies to the Field Office (Section 10 Coordinator reviews HCP and IA; Environmental Coordinator reviews NEPA analysis) (see Chapter 6, Section B.4 and C.1). Prior periodic Field Office review and reporting on key policy and substantive issues should result in the identification and elimination of most deficiencies prior to formal Regional Office review.
- o Transmits Federal Register notices to the Office of the Federal Register for publication (see Chapter 6, Section D).

- o Files copies of any draft and final EIS with the Environmental Protection Agency [see Chapter 5, Section A.4].
- o Reviews draft and finalizes internal section 7 consultation, if the biological opinion was drafted by the Field Office that participated in HCP development, or incorporates biological opinion completed by the Field Office into the administrative record.
- o Reviews and finalizes Set of Findings (unless finalized by the Field Office).
- o Prepares the Environmental Action Memorandum (EAM) for low-effect HCP permit applications (see Chapter 6, Section B.2).
- o Coordinates with the Assistant Director for Ecological Services for major policy issues to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP program.
- o Briefs the Director or Washington, D.C. Office on all significant HCP developments, permit application processing, and post-issuance efforts, as necessary. Reports HCPs in development and section 10 permits issued to Washington Office, as requested.
- o Coordinates with lead Region responsible for the species prior to issuance of the permit to ensure agency-wide consistency for species that overlap more than one FWS or NMFS Region.
- o Prepares permit and associated documents (IA, FONSI, ROD, EAM) for RD or DRD signature, as necessary or requested (see Chapter 6, Section C.5).
- o Issues or denies the permit and (FWS only) updates LEMIS. Sends the signed permit with terms and conditions or a denial letter to the permittee or applicant. Sends copies of these documents to the Field Office, other affected offices, and Division of Endangered Species (FWS) and Office of Protected Resources (NMFS) in Washington, D.C.
- o Sends Notice of Permit Issuance to the Office of the Federal Register for publication on a quarterly or biannual basis.
- o Coordinates Freedom of Information Act (FOIA) requests.

4. Washington Office.

FWS Responsible Parties - Director; Assistant Director of Ecological Services (AES); and Chief, Division of Endangered Species (DTE).

NMFS Responsible Parties - Director, Office of Protected Species; Chief, Endangered Species Division.

The FWS Washington Offices provide guidance and oversight to the Regional and Field Offices. It is responsible for nationwide administration of the program:

- o Develops regulations and national policy guidance.
- o Assists in resolving issues or disputes when requested by the Regional Offices.
- o Briefs Director or other authorities or coordinates such briefings as necessary.
- o Prepares HCP, NEPA, and other related training and technical assistance to Regional Offices and Field Offices, as needed.
- o Maintains and updates national list or data base of HCPs in development and permits issued.

The NMFS Washington, D.C. Office of Protected Resources has the same functions as described for FWS. It also processes all permit applications and issues or denies all permits, except for those concerning anadromous species in the Northwest or Southwest Regions. NMFS permits for activities such as state fish hatcheries, and commercial or recreational fisheries must comply with all statutory provisions of section 10(a)(1)(B) of the ESA, but may have fewer documentation requirements than other types of incidental take permits. (Refer to NMFS final regulations for the program contained in Appendix 1 (55 FR 20603)). The NMFS Washington, D.C. Office should be contacted for assistance in handling any such permits. Generally, all other NMFS-issued incidental take permits are subject to the documentation requirements described in this handbook.

5. Solicitor's Office/General Counsel Office.

FWS Responsible Parties - Solicitor's Office

NMFS Responsible Parties - General Counsel's Office

For FWS, the Solicitor's Office need review only those parts of the permit application package that the Regional Director request be reviewed--typically the HCP and Implementing Agreement. Coordination with the Regional Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and during the HCP development phase. After Solicitor review is complete, the

Regional Solicitor's office should forward a memorandum to the RD or appropriate ARD stating that he or she has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements. The Regional Solicitor's Office should review the documents, as necessary, throughout the HCP process to ensure regulatory and statutory compliance and to avoid "last minute" identification of problems in documents submitted for final approval. For NMFS, the General Counsel's Office (either in the Region or Headquarters) must review the entire application package and all supporting ESA and NEPA documentation.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the strict requirements of the ESA and its regulations. This is especially important for the HCP, which has specific legal requirements, and the Implementing Agreement, which legally binds the applicant to complying with the HCP and permit terms. For NMFS, legal review of all documents must be conducted by either the Headquarters or Regional General Counsel's Office.