CHAPTER 6
APPLICATION REQUIREMENTS AND PROCESSING PROCEDURES

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this chapter--particularly with respect to permit denial, suspension, and revocation procedures--may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Except where noted, the procedures described in this chapter apply to both FWS and NMFS. For NMFS, 50 CFR 222.22 contains regulations specific to incidental take permits. General permit procedures are found in 50 CFR 217, 220, as well as 222. NMFS is also in the process of revising its ESA regulations at 50 CFR parts 217-227. Therefore, citations to NMFS regulations may change from those provided in this handbook.

A. Guidance to the Applicant

1. What to Provide the Applicant.

The following documents should be provided to any prospective permit applicant or applicant's consultant.

- For FWS, Federal Fish and Wildlife License/Permit Application (Form 3-200) with "Incidental Take Permit Application" supplement, instructions, and Notice of Permit Application Fee/Privacy Act Notice (Appendix 9).

- For NMFS, incidental take application instructions (Appendix 9).

- This handbook, if appropriate (some applicants may find it too technical; although it may be useful to experienced consultants).

- List of candidate, proposed, endangered, and threatened species of wildlife and plants for the prospective planning area.

- List of appropriate local, state, and federal contacts, such as state conservation agencies.

- General Permit Procedures - for FWS, 50 CFR Part 13; for NMFS, 50 CFR 217, 220, and 222 (Appendix 11).

- Endangered and Threatened Wildlife and Plant Permit procedures - for FWS, excerpts from 50 CFR Part 17; for NMFS, 50 CFR 222.22 (Appendix 11).

2. Application Form and Instructions.

For FWS, an applicant must complete and submit an official Form 3-200 [50 CFR 17.22(a)(1)]. Instructions for this form are provided below and in Appendix 9. The appropriate Regional Office address and phone number should be typed on the top of the form where it reads "Send Application To." NMFS does not have an official permit application form but provides instructions for what information the applicant needs to submit and where (see Appendix 9). A list of FWS and NMFS Regional Offices is provided in Appendix 12.

3. Name of the Applicant.

For FWS, if the applicant is an individual, that person must sign the application and complete block 4 of Form 3-200. If the applicant is a city, county, business, or consortium, the application must be signed by the appropriate authority responsible for actions granted under the permit and block 5 must be completed. In all cases, there must be an **original** signature and date in the certification block. An application form may be faxed to begin the permit processing phase, but only if the original application with an original signature is submitted immediately afterward. The application will not be considered complete without the original application form. For NMFS, the applicant should follow the application instructions in Appendix 9.

4. Application Fee.

The processing fee for FWS and NMFS is $25.00 for each new permit application, amendment request, or renewal, except as noted below. Money orders or checks should be made payable to the "U.S. Fish and Wildlife Service" or "National Marine Fisheries Service." The fee is for processing the application, not for the permit, and therefore is non-refundable if the application is abandoned or the permit is denied. The fee may be refunded only if the applicant withdraws the application in writing before any significant processing of the application has occurred. For FWS, if the check has been forwarded to the Denver Finance Center, request the Finance Center to send a refund to the applicant. State or local government agencies or any individual or institution under contract to such agency to conduct proposed activities are fee exempt.

Checks and money orders must be safeguarded as if they are cash; they should be placed in a fire-proof safe except when being processed by employees designated as collection officers.

Application fees need to be deposited in a timely manner and each Regional Office should establish deposit procedures. For FWS, since Regional Division of Law Enforcement offices already have such procedures, the Assistant Director for Ecological Services may wish to coordinate with the Assistant Director for Law Enforcement in handling application fees.

5. Providing the General Permit Requirements.

The applicant should be provided copies of the general permit procedures and pertinent excerpts from the procedures for endangered and threatened species permits. By signing Form 3-200, the applicant is certifying (1) that the applicant has read and is familiar with applicable regulations; (2) that the information submitted in the application is complete and accurate; and (3) that the applicant understands that any false statements may result in criminal penalties.

50 CFR Part 13 provides conditions for the general administration of FWS's fish, wildlife, and plant permit program. 50 CFR Part 17 provides conditions for endangered and threatened species incidental take permits specifically. It should be explained to the applicant that if any general provision of Part 13 is inconsistent with Part 17 or with provisions of section 10(a) of the ESA governing incidental take permits, it is the intention of the FWS to seek regulatory clarifications which would provide that the more specific provisions of Part 17 or the statute apply. This also applies to NMFS, except that 50 CFR Part 222 takes precedent over Parts 217 and 220. The FWS is currently drafting language to clarify and resolve the differences between the Part 13 and 17 and a proposed rule will be published in the near future.

B. Processing the Application

1. Processing Time.

No mandatory time frames for processing incidental take permit applications have been established under Section 10 or its implementing regulations. However, this handbook establishes the following target processing times, depending on the type of NEPA action associated with the permit application [see Chapter 1, Section F.1].

Permit processing times are defined as the period between receipt of a complete application package by the responsible Regional Office and issuance of the incidental take permit, including Federal Register public comment notifications. The targets do not include any portion of the HCP development phase.

HCP With EIS . . . . . less than 10 months
HCP With EA . . . . . 3 to 5 months
Low-effect HCP (Categorically Excluded) . . . . . less than 3 months

These targets will apply as the maximum processing times unless project controversy, staff or workload problems, or other legitimate reasons make delays unavoidable. All affected FWS and NMFS offices are expected to streamline their incidental take permit programs and to meet these processing targets to the maximum extent practicable. In many cases it is expected actual processing times will be less than these targets and Service offices are encouraged to improve on the targets whenever possible.

2. Timing of Document Preparation and Submission.

The Section 10 permit process consists of three phases: (1) the HCP development phase; (2) the formal permit application processing phase; and (3) the post-issuance phase.

The length of the HCP development phase will vary depending on the complexity and scope of the project and length of time required to prepare the HCP. It concludes when a "complete application package" with a Field Office certification that it has reviewed the HCP and found it to be statutorily complete is forwarded to the appropriate Regional Office [see below, Sections B.2(b)-(c)]. The formal permit application processing phase begins with receipt of the complete application package by the Regional Office. Permit processing requirements will also depend on the scope and complexity of the HCP.

a. Description of Required HCP Documents.

The following documents are needed (or are optional as indicated) to apply for and issue an incidental take permit:

Must be Provided Before Federal Register Notice Can Be Published

- A Habitat Conservation Plan including the elements required by section 10(a)(2)(A) of the ESA.

- For FWS, a permit application form (3-200) and fee (see Appendix 9). For NMFS, an application according to the instructions in Appendix 9.

- A NEPA analysis (either an EA or EIS, unless the HCP is categorically excluded) pursuant to the National Environmental Policy Act. The section 7 biological opinion should be prepared in conjunction with the NEPA analysis.

- Certification by the Field Office that assisted the applicant with the HCP to the issuing Regional Office that the HCP and associated documents are statutorily complete.

- An Implementing Agreement, if requested by the applicant or otherwise required by Regional Director policy (see Chapter 3, Section B.8).

- o Federal Register Notices; a Notice of Receipt of a Permit Application and Notices of Availability of the NEPA analysis (see Appendix 16).

Can Be Prepared During or After the Public Comment Period

- o A biological opinion concluding formal section 7 consultation and providing the Services' findings with respect to the effects of the action on federally listed species.

- o If required by Regional Director policy, a Set of Findings documenting how the HCP meets statutory issuance criteria and optionally including the Field Office's recommendation about whether to issue the permit [see Section B.2(d) below and Appendix 13).

- o For FWS, an Environmental Action Memorandum (EAM) describing what action the FWS took with respect to NEPA and explaining the reasons why the action is considered categorically excluded. (For low-effect, categorically excluded HCPs only (see Appendix 14 and definition in Chapter 8)). Public comments will be addressed and, if applicable, will help shape the final decision.

- o For FWS, the draft permit (Form 3-201) with proposed terms and conditions; for NMFS, the permit is printed on agency letterhead with terms and conditions and a cover letter. The draft permit and terms and conditions must be further reviewed in light of any substantive public comments received.

b. Submitting a Complete Application Package.

The formal application phase begins with receipt by the appropriate Regional Office of a "complete permit application" package consisting, at a minimum, of the application form, application fee (if applicable), the proposed HCP, the Implementing Agreement (if required), draft NEPA analysis (EAM, EA, or EIS), which was submitted by the applicant, and a certification by the Field Office that it has reviewed these documents and finds them to be statutorily complete. Prompt submission of each of these documents is essential to efficient processing of the permit application because they either initiate the processing phase or are required for the Federal Register notice initiating the 30-day public comment period.

The Implementing Agreement (if required) should be submitted as part of the complete application package and is usually included as an appendix to the HCP. Since the IA can help enforce the implementation of the HCP, it should be included with the complete package so the public can get a sense of how implementation of the HCP will be managed. It should also be included when the HCP is provided to persons wishing to comment on the permit application.

c. Certification of Application Documents By the Field Office.

When the Field Office that assisted the applicant in developing the HCP forwards the application package to the Regional Office for processing, it should include a certification memo. The Regional Office should not initiate the formal permit processing phase without this certification. (see below, Section B.5 for a discussion of what to do when the Field Office believes the HCP to be inadequate but the applicant wishes to submit the package for formal processing against Field Office recommendation). This certification should include: (1) a statement that the Field Office has conducted a preliminary review of the application package and believes it to be complete; (2) the date of the HCP documents to which the memo refers; (3) a recommendation by the Field Office that the HCP qualifies for the "low-effect" category, if applicable [see Chapter 1, Section F.2]; (4) exceptions to standard processing procedures it recommends, if any, and the reason for those exceptions; and (5) other pertinent information as needed. The Field Office certification can be in memorandum format, a signed standardized form, or any other format mutually agreed to by the Field and Regional Offices.

d. Timing of Other Application Documents.

Another document needed early in the process is the Notice of Receipt of an Incidental Take Permit Application for publication in the Federal Register. Typically, this is drafted and forwarded to the Regional Office by the Field Office. The Regional Office then finalizes and signs the notice and sends it to the Federal Register (see below, Section D). The draft Federal Register notice is not a required part of the complete application package. It can be prepared while the HCP, NEPA analysis, and Implementing Agreement are being reviewed in the Regional office so long as it is completed when these documents are ready for transmission to the Federal Register. To expedite the public notification process, the Federal Register Notice of Availability of the NEPA analysis should be published jointly with the Notice of Receipt of the permit application (see Appendix 16).

In addition to the above documents, processing the permit application will require a: biological opinion on the proposed incidental take; Set of Findings; for FWS, an Environmental Action Memorandum (EAM) for categorically excluded HCPs only; and the permit (for FWS, Form 3-201) or permit letter (for NMFS). The Set of Findings provides an administrative record of how the HCP program satisfies each of the section 10(a)(2)(B) issuance criteria, responses to public comments received, if any, and may include a recommendation from the appropriate ARD to the Regional Director's Office (for FWS) whether to issue or deny the permit. However, it is not required by regulation or Director's Order and whether to include it as a processing requirement is at the discretion of the Regional Directors (see Appendix 13 for examples of a Set of Findings). The EAM is a record of FWS's NEPA decision and is required by Director's Order No. 11, but only for HCPs that are categorically excluded (see definition, Chapter 8, and Appendix 14).

How these documents are handled may vary. Typically, the Field Office drafts the biological opinion [see below, Section C.3(b)], FONSI or ROD, and Set of Findings, and forwards the draft documents to the Regional Office to be finalized. The applicant should not draft these documents because they involve internal Service decisions. The Regional Office typically prepares the EAM and permit. The permit usually includes an attachment incorporating terms and conditions of the HCP and referencing applicable Federal regulations and other conditions, including the permitted incidental take levels and terms and conditions.

In the interests of efficient processing, the Field Office should prepare a draft biological opinion and draft Set of Findings and forward them to the Regional Office as soon as possible during the permit processing phase--typically during or immediately after the close of the 30-day public comment period. The biological opinion can be finalized by the Field Office. The Regional Office should not finalize and sign the biological opinion, FONSI or ROD, or Set of Findings until after the public comment period has terminated and public comments have been addressed.

To meet the target section 10 permit processing times, it is essential that formal application processing steps overlap, not run consecutively. The formal processing phase begins when the Regional Office receives the application form, fee (if applicable), HCP, IA (if required), draft NEPA analysis, and certification memo from the Field Office. Publication of a notice in the Federal Register requires the HCP, IA, NEPA analysis, and Federal Register notice. Issuing the permit requires all the above plus the biological opinion, signed FONSI or ROD, Environmental Action Memorandum (for low-effect HCPs only), Set of Findings, and the permit.

Try to complete each document as early as possible in the process, but do not hold up one stage while waiting for non-essential components of the previous stage. Whenever possible, complete the components of one stage while another is underway. The Field Office can begin drafting the FR Notice while the Regional Office reviews the application package; the Field Office can draft the biological opinion and Set of Findings during the public comment period; and so on.

e. Labeling the Documents as Draft/Final.

The HCP and IA (if required) are subject to change during Regional Office review and the public comment period, and for this reason they need to be labeled as "drafts" and dated when submitted for processing. The EA should be labeled draft until the Regional Office Environmental Coordinator or HCP Coordinator has reviewed the document, and until the public comments, if any, are incorporated; the accompanying FONSI should be labeled as "preliminary" until public comment, if any, are incorporated into the HCP and EA. An EIS must always be announced in the Federal Register as a draft and final EIS and must be so labeled.

f. Dating Section 10 Documents.

Since HCPs can go through many drafts during the HCP development phase, all HCP copies, draft and final, should bear a date on the front page or inside title page that includes the month, year, and day. This will confirm at any stage in the process what HCP draft or version is being referenced in correspondence or discussions and which is the most up-to-date.

To ensure a complete administrative record, the Field Office and Regional Office should state in writing what measures and revisions they recommend to the applicant or Field Office, respectively, throughout the HCP development and formal application processing phases. Also, all Offices should reference the date of the specific HCP to which it refers in any written correspondence or other records.

g. Finalizing the Implementing Agreement.

The following process should be followed, if the applicant and Regional Director have decided to complete an IA; remember this document is optional, left to the discretion of the Regional Director, and not required for a low-effect HCP. The timing of finalization of the Implementing Agreement is essential, because improper handling of the Agreement can result in unnecessary delays. All signatories to the Implementing Agreement should have reviewed draft versions of the Agreement and all non-federal signatories should have agreed to its provisions before it is forwarded to the Regional Office with the complete application package. It should not be signed at that point because it must still be submitted for public comment with the HCP and may require Solicitor's Office review. If the Agreement was already signed when submitted with the application package, and subsequent changes are required, re-circulation for a second signing may be necessary. This is frustrating for permit applicants, particularly when the Agreement requires approval by local authorities (e.g., a county Board of Supervisors), which must then re-approve the Agreement. However, the Agreement must be signed prior to permit issuance. The Implementing Agreement should be circulated for signature after the public comment period has closed and changes to the HCP or IA, if any, have been incorporated. An original signature copy of the Implementing Agreement should be provided to each signatory to the Agreement. For FWS, signature authority for the Implementing Agreement lies with the Regional Director's Office. For NMFS, this authority lies with either the Regional Director or the Director of the Office of Protected Resources, Washington, D.C.

3. Who Submits the Application Package?

There are several ways the complete application package can be submitted to the Regional Office. The HCP, IA, and draft NEPA analysis (if not prepared by the FWS or NMFS), can be forwarded by the applicant to the Field Office, and the Field Office then forwards these materials, together with its certification memo, to the Regional Office. Or, the Field Office

and applicant can forward to the Regional Office, respectively, the documents for which they are responsible; in this case the Regional Office would compile the complete application package and supply the Field Office with the final versions of the HCP and IA. There are other possible variations; however, most FWS Offices prefer that the Field Office submit the entire application package to the Regional Office.

This handbook delegates to the Regional Offices the task of establishing specific methods by which permit application packages will be submitted. Each Regional Office must develop clear protocols for this procedure, and notify all affected Field Offices.

4. Judging the Application for Completeness.

The applicant must provide all information requested on the application form or in the application instructions for NMFS (Appendix 9). If the form has not been completed correctly, the applicant should be notified, in writing or by phone with an accompanying memo that should be filed in the administrative record, and asked to correct the deficiency or submit additional information. Requests for information should include notification that if the information is not received within the allotted time, the application will be deemed inactive [50 CFR 13.11(e) or 50 CFR 220.13]. The applicant should refer to the inactive application if he or she reapplies in the future. This paragraph refers only to data required on the application form; it does not apply to requests for further biological information or other information upon which a substantive decision with respect to the permit application would be made.

To determine whether the HCP is complete, see Chapter 3, Section B.1, B.8, and Chapter 6, Section B.4. To determine whether the NEPA analysis is complete, see Chapter 5, Sections A.1-4. In most HCPs, however, the adequacy of these documents will be evaluated during the HCP development phase, not after the permit application is submitted. Only in relatively rare cases--e.g., when an applicant has prepared the HCP without Service assistance--will their adequacy need to be evaluated for the first time at the beginning of the formal permit processing phase.

5. Problems Identified During the HCP Development.

Problems identified during the HCP development phase should be elevated to the Regional Offices early in the process for suggestions that might be helpful to the applicant and the Field Office for resolving differences. Even if the Services perceive that problems remain, the applicant is entitled to submit a permit application. The Services should publish a Notice of Receipt of the permit application in the Federal Register and duly process the application. However, prior to announcing receipt of such an application in the Federal Register, FWS or NMFS may detail the HCP's deficiencies and the reasons for them to the applicant in writing.

The above discussion applies to biological issues and issues of scientific judgement only. The Services need not process a permit application that lacks statutory HCP components or other application components required by Federal regulation.

6. FWS Law Enforcement LEMIS System.

For FWS, all permits and permit numbers issued under the ESA must be issued through LEMIS (Law Enforcement Management Information System), managed by the FWS Law Enforcement Division. LEMIS contains the following information for each permit and permit application:

- Basic information on the permit applicant (e.g., name, address, telephone number);
- Pertinent dates (e.g., application receipt date, issuance and expiration dates, report due dates, and revocation dates);
- Permit authorizations and/or conditions;
- Species involved;
- Location of the authorized activities; and,
- Identity of the permit issuing office.

Once the application review process is complete and a decision is made to issue the permit, the permit must be issued with a LEMIS number and the issuance must be recorded in LEMIS. The terms and conditions that go with the permit are often printed on a separate sheet of paper and are attached to the permit (see Appendix 15 for a sample permit form and Appendix 17 for examples of issued permits).

C. Internal FWS/NMFS Review

1. Early Coordination Between the Field and Regional Office.

To ensure timely processing of permit applications, the Regional Office, Field Office, Solicitor's Office (FWS) or General Counsel's Office (NMFS), and in some cases the NMFS Office of Protected Resources, should begin communicating about an HCP effort as soon as possible after serious discussions on the HCP begin. Early coordination helps avoid processing delays by identifying and resolving internal disagreements and other problems before the HCP is completed. This allows Regional Office staff to provide technical assistance to the Field Office as needed, and ensuring Regional Office familiarity with the HCP when the application is received by that office and formal permit processing begins.

Management should always be involved early in the process. Under no circumstances should the Field Office and Regional Office find themselves in serious disagreement on the substantive aspects of an HCP after a permit applicant who has requested Field Office assistance in developing the HCP has submitted the application to the Regional Office for approval.

There are various ways that coordination between the Field Office and Regional Office on a developing HCP can occur: (1) periodic briefing statements from the Field Office to the Regional Office; (2) meetings between Field Office and Regional Office staff; (3) joint Field/Regional review of HCP drafts; and (4) participation by Regional Office staff management in important meetings (sometimes referred to as "milestone" meetings). Specific methodologies are left to the discretion of the individual Regions.

At a minimum, during the HCP development phase the Field Office should regularly apprise the Regional Office about: (1) the proposed project or activity; (2) the species involved; (3) current status of the planning effort including primary features of the mitigation program; (4) positions with respect to the planning effort of affected public and private interests; (5) any obvious or underlying controversies or issues that could affect the final outcome of the HCP or the permit processing phase; and (6) any pertinent information that would help the Regional Office understand the HCP and process the application when it is submitted. Questions about HCP policy interpretation or procedure by the Field Office should be elevated quickly to the Regional Office when they arise. The Regional Office should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the Assistant Director for Ecological Services to ensure the interpretation of the policy is sufficient and within the overall National policy guidance for the HCP program. The Regional Office should also keep the Solicitor's or General Counsel's Office informed and request assistance on legal issues promptly when needed.

If the Regional Office, Solicitor's Office, or General Counsel's Office has specific concerns about ongoing or pending HCPs or foresees any problems with pending permit applications in light of section 10 permit issuance criteria or other requirements, it should notify the Field Office as soon as possible. The Field Office and Regional Office must then jointly resolve any outstanding internal concerns. Briefing statements and other written records of coordination between the Field and Regional Office during the HCP development phase should be maintained as part of the administrative file. They may also be forwarded to other FWS/NMFS Regions to aid inter-Regional awareness of HCP activities.

2. Distribution of the Application Package.

The Regional Office that receives the permit application package should send the package to the following offices for review, generally requesting comments within 30 days; this should be done as early as possible so that this review period can run concurrently with the 30-day public comment period:

- The appropriate Solicitor's (FWS) or General Counsel's (NMFS) Office with a written request for review, unless legal review is waived (see Section C.4 below).

- For FWS, the Assistant Regional Director(s) of Law Enforcement with jurisdiction over the applicant's Region of residence, and the Region(s) where the proposed taking would occur. The appropriate ARD and ARD-LE should jointly determine whether, and under what circumstances, FWS law enforcement personnel need to review the entire application package. Such review is advised if there are questions about the enforceability of the HCP or the HCP involves other potential law enforcement issues.

  For FWS, check with Law Enforcement whether LEMIS gives a "PRIOR INVESTIGATION RECORD" warning about the applicant. If such a warning appears, a permit may not be issued until the ARD-LE approves.

  For NMFS, the Regional Law Enforcement Division with jurisdiction over the applicant's Region of residence, and the Region where the proposed taking would occur. The Regional Director and Law Enforcement Division will determine whether further review is necessary.

- If the application package is submitted to a Regional Office other than the Regional Office with lead responsibility for the affected species, comments from the lead Region and other Regions in the species' range should be requested.

- The Field Office conducting the internal section 7 consultation, if that office is different than the Field Office that assisted in developing the HCP [see Section C.3(b) below].

- The state fish and wildlife conservation agencies of states in which the proposed taking will occur, as well as any Federal agencies that are directly involved in or affected by the HCP program. This may not be necessary if these agencies received the package directly from the permit applicant.

- Where appropriate, technical scientific comment could be solicited from species experts within or outside the Services and from the recovery team if one is available.

3. Internal Section 7 Consultation.

Under section 7 of the ESA, issuance of an incidental take permit by FWS or NMFS is a Federal action subject to section 7 compliance. This means the Services must conduct an internal (or intra-Service) formal section 7 consultation on permit issuance. For FWS, this

can be conducted between the Regional Director's office, which issues the permit, and the Ecological Services office, which is responsible for the endangered species program. It may also be conducted between the Assistant Regional Director for Ecological Services and the Field Office that assisted the applicant in developing the HCP. It is strongly encouraged to include the section 7 biologist in the developmental process of the HCP, so that the section 7 requirements can be addressed early in the process to eliminate possible difficulties or the potential call of jeopardy at the end of the process. The Services regard these two processes as concurrent and related.

For NMFS, consultation may be conducted between the Field Office and the Regional Director or between the Endangered Species Division and the Office of Protected Resources in Washington, D.C. In the HCP context, informal consultation may be considered to include all Service Field Office/Regional Office coordination and assistance to the applicant during the HCP development phase. Formal consultation on a section 10 permit typically is not initiated until the permit processing phase.

a. Role of the Section 7 Consultation.

The purpose of any formal consultation is to insure that any action authorized, funded, or carried out by the Federal government is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat of such species. Formal consultation terminates with preparation of a biological opinion, which provides the Services' determination as to whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Internal consultation on a section 10 action ensures that issuance of the permit meets ESA standards under section 7. In practice, because one of the section 10 issuance criteria is the same as the regulatory definition of jeopardy under section 7 (see Chapter 7, Section B.4), the section 7 consultation represents a last internal "check" that the fundamental standard of avoiding jeopardy has been satisfied.

Another purpose of formal section 7 consultation is to develop reasonable and prudent measures and terms and conditions to minimize anticipated incidental take, or, if necessary, reasonable and prudent alternatives to eliminate the risk of jeopardy. These are included with the biological opinion. However, since the Services ordinarily will have provided technical assistance in developing the HCP, and included all necessary mitigation, reasonable and prudent measures or alternatives rarely will need to be developed during the section 7 consultation. This should be necessary only in cases where an applicant did not consult with the FWS or NMFS in developing the HCP or did not incorporate Service recommendations and such measures or alternatives are necessary to satisfy the requirements of section 7.

Reasonable and prudent measures are defined as required actions identified during formal intra-Service consultation which the Regional Director believes necessary or appropriate to minimize the impacts of incidental take. Reasonable and prudent measures, if necessary, can

be used to modify the HCP. However, such adjustments should be made only if they are minor in scope, and they ensure compliance with the requirements of the ESA. There should be very few cases where the Services introduce reasonable and prudent measures at the end of the HCP process since such matters should have been fully discussed with the permit applicant prior to the submission of the HCP. Any changes necessitated by the reasonable and prudent measures should be discussed in advance with the applicant.

b. Who Conducts the Section 7 Consultation?

The Services must be held to the same rigorous consultation standards that other Federal agencies are required to meet under section 7. This means, in part, that internal consultations on section 10 permit applications should be as impartial as possible. However, it is also important that section 7 consultation on a permit application does not result in otherwise avoidable delays when meeting target permit processing times. Such delays may result if the section 7 consultation is assigned to an office too far removed from the location and circumstances of the HCP. 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. The biological opinion is then reviewed and finalized by the Regional Office processing the permit application. This ensures a good balance between independent review and timely permit processing. The biological opinion may also be finalized and signed by the Field Office, if the Regional Director has delegated the authority to do so.

This handbook allows FWS and NMFS Regional Offices and Field Offices the discretion to use any reasonable method for conducting internal section 7 consultations, so long as (1) the resulting determination is reviewed or finalized by Service staff other than the Field Office staff HCP representative; and (2) the method does not result in failures to meet permit processing times described on pages 1-14 and 6-3.

c. Conferences on Proposed Species.

Under Section 7(a)(4) of the ESA and 50 CFR 402.10, a Federal agency must "confer" with the FWS or NMFS "...on any agency action which is likely to jeopardize the continued

existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species." Thus, the Services must confer, formally or informally, on any HCP and section 10 permit application that addresses proposed species or proposed critical habitat. Technically, this needs only be done if issuance of the permit is likely to result in jeopardy to a proposed species or adverse modification of proposed critical habitat; this should not occur if the FWS or NMFS has assisted the applicant in preparing the HCP. Nevertheless, the Services should document any conclusion reached that issuance of the section 10 permit is not likely to jeopardize proposed species or adversely modify proposed critical habitat. This information can be included with the biological opinion prepared for listed species addressed in the HCP, thus avoiding the need for a second section 7 document. The FWS/NMFS section 7 handbook contains further information about preparation of section 7 conference documents.

For purposes of section 10 permit applications, FWS and NMFS will treat candidate species or any species (e.g., unlisted species) that are adequately covered in an HCP (see Chapter 4, Section A) in the same manner as proposed species with respect to conferencing procedures. This will ensure that such species have been addressed by the Services with respect to section 7 requirements should they become listed after the permit has been issued. Refer to the FWS's Endangered Species Act Intra-Service Consultation Handbook for further guidance.

d. Biological Opinion Formats/Requirements.

It is essential that section 7 consultation on a section 10 permit application be expeditiously completed and that the resulting biological opinion is legally sound. The following suggestions are provided.

Incorporation by Reference between the Biological Opinion & Set of Findings A biological opinion for an HCP and the Set of Findings (which describes how the HCP meets statutory issuance criteria) can also be duplicative. To avoid this, the Set of Findings may incorporate the biological opinion by reference to the extent that they duplicate each other. This may include incorporating the description of the project and the jeopardy analysis.

Cross Referencing An HCP contains many of the same components typically provided in biological opinions--including a project description, assessment of impacts, and description of a mitigation program. Significant consolidations to the HCP, through cross referencing, should be avoided since the HCP must meet the statutory requirements of section 10(a)(2)(A) and be a stand alone document, however, the biological opinion can be treated more flexibly. When possible without the loss of clarity or legal adequacy, the biological

opinion could cross-reference technical information provided in the HCP rather than repeat the same information.

Requirements of the Biological Opinion Under Federal regulation [50 CFR 402.14(h)-(i)] and section 7(b)(3) and 7(b)(4) of the ESA, the biological opinion for a section 10(a)(1)(B) permit application must contain, at a minimum:

- A summary of the information on which the opinion is based. This should include a brief description of the HCP and other documents prepared with the HCP, including memoranda of understanding, biological reports, and the NEPA analysis.

- A detailed discussion of the effects of the action on listed species or critical habitat.

- The Services' opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. This constitutes the Service's "jeopardy" or "no jeopardy" determination with respect to the permit application.

In most cases, reasonable and prudent measures and terms and conditions will simply require compliance with the permit, HCP, or IA, since these documents typically have identified the equivalent of such measures and ensured their implementation. The only exception to this is if the Services determine that additional measures are needed to minimize the impact of taking, or the Services and applicant agree to include additional terms and conditions not otherwise specified in the HCP. Reasonable and prudent alternatives are only needed in those rare cases when the Services determine that permit issuance would be likely to jeopardize the continued existence of the species involved.

The Incidental Take Statement Section 7(o)(2) states that "any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section [referring to the terms and conditions] shall not be considered to be a prohibited taking of the species concerned." This "incidental take statement" provides a take authorization mechanism for Federal actions similar to section 10(a)(1)(B) for non-Federal actions.

What is the role of the incidental take statement in a biological opinion for an HCP application? This can create considerable confusion among HCP reviewers since the take proposed under an HCP ultimately is authorized by the section 10(a)(1)(B) permit, not the incidental take statement. At the same time, the section 7 implementing regulations [50 CFR 402.14(i)] require an incidental take statement in a biological opinion where the Federal action is expected to result in take but will not violate section 7(a)(2).

Clearly, the Service action of issuing an incidental take permit will result in take. Thus, inclusion of an incidental take statement with a biological opinion for an HCP application is necessary to avoid any uncertainty about regulatory compliance with 50 CFR 402.14(I). At the same time, any reasonable and prudent measures or terms and conditions included with an incidental take statement for an HCP application should be consistent with the conservation program in the HCP and any terms and conditions included with the permit except in instances described above. It is also wise to avoid unnecessary duplication between the terms and conditions of the permit and those of the incidental take statement.

With these considerations in mind, the following language is recommended for the incidental take statement for any section 10(a)(1)(B) permit application:

> Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the proposed action is not considered to be prohibited taking under the Act provided that such taking is in compliance with this Incidental Take Statement.
>
> The proposed [*name*] HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions described in any associated Implementing Agreement and any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR 402.14(I). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed [*name*] HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit[*s*].

In some cases, the Service(s) must specify authorized levels of incidental take in the incidental take statement as well as in the HCP and permit. However, the incidental take

levels specified in the HCP and permit and those specified in the incidental take statement should be consistent with each other. In such cases, the following introductory paragraph should be included:

> Based on the proposed [*name*] HCP and on the analysis of the effects of the proposed action provided above, the Service[*s*] anticipates that the following take may occur as a result of the proposed action:

If requested by the applicant, the following paragraph may be included where plants are addressed in the HCP and are named on the permit.

> Generally, section 9 take prohibitions do not apply to listed plant species on non-Federal lands. Therefore, listed plants typically do not have to be included in the incidental take permit. However, State law may have take prohibitions associated with the HCP. In addition, the Service must review the effects of its own actions on listed plants, even when those listed plants are found on private lands. In approving an HCP and issuing an incidental take permit during the intra-Service section 7 consultation, the Service must determine that the permit will not "jeopardize the continued existence" of listed plants. In the interest of conserving listed plants, the Service may request that the landowner voluntarily assist the Service in restoring or enhancing listed plant habitats that are present within the area covered by the HCP.

4. Legal Review of the Application Package.

The purpose of legal review of the permit application package is to ensure that the HCP and associated documents meet the legal requirements of the ESA. This is especially important for an HCP, which has specific requirements, and for Implementing Agreements which address unique or first impression issues. It is also important for large-scale or regional HCPs which are often complex and address a variety of activities. The need for legal review of "low-effect" HCPs is less critical, since these projects are by definition minor in scope and impact (see Chapter 8).

For NMFS, all section 10 permit applications must receive legal review by the General Counsel's Office. For FWS, it is agency policy to require Solicitor's Office review of all section 10 permit applications, with the exception noted below. This will be true unless additional exceptions are allowed by a line authority no lower than the Assistant Regional Director for Ecological Services. However, Solicitor's review of HCPs categorized as "low-effect" can be waived if the HCP meets all applicable criteria for low-effect HCPs as defined in Chapter 1, Section F.2. The template in Appendix 4 can be used as a basis for developing Implementing Agreements for HCPs that are not low-effect, though Solicitor's Office review would be required in such cases.

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 Solicitor's Office on a permit application package should begin as soon as possible in the permit processing phase and ideally during the HCP development phase. After Solicitor review is complete, the Solicitor's Office should forward a memorandum to the RD or appropriate ARD stating that it has reviewed the IA and other documents, as applicable, and that they meet statutory and regulatory requirements.

5. Preparing the Signature Package.

When all HCP and NEPA analyses have been completed and reviewed by appropriate Service staff, the Regional Ecological Services Office (FWS), or Endangered Species Division or Environmental and Technical Services Division (NMFS), should sign those for which it has signature authority and assemble those and all others that are necessary for permit issuance into a "signature package." This package is then forwarded to the Regional Director's Office for finalization and signature (for FWS), or to the Regional Director's Office or Office of Protected Resources in Washington, D.C. (for NMFS). Signature authority for HCP documents may vary somewhat from Region to Region. Typically, for FWS documents requiring signature by the appropriate ARD are the: (1) biological opinion (unless signed by the Field Office) and (2) Set of Findings. Documents requiring signature by the Regional Director or Deputy Regional Director are the: (1) Implementing Agreement; (2) NEPA decision document (EAM, FONSI, or ROD); and (3) the permit. The signed biological opinion and Set of Findings should be attached to the signature package for the Regional Director's or Deputy Regional Director's reference. Where applicable, the Solicitor's memorandum stating that the HCP and associated documents meet statutory requirements also should be attached to the signature package. For NMFS, the permit documents will require the signature of the Chief, Endangered Species Division, and Director, Office of Protected Resources, if the permit is issued in Washington, D.C., or the Regional Director and Environmental and Technical Services Division if it is issued by the Regional Office. All of the supporting documents must be signed prior to the issuance of the permit.

The incidental take permit is considered effective as of the date and time the permit is signed. Immediately upon signature, the original permit and one original copy of the Implementing Agreement (if required) must be forwarded to the new permittee.

6. New Policies or Legal Questions.

Both FWS and NMFS should discuss the incorporation or implementation of any new policies, which are introduced while preparing an HCP, with the appropriate legal counsel and the Assistant Director for Ecological Services (FWS) to ensure the interpretation of the policy is legally sufficient and within the overall National policy guidance for the HCP

program or the new policy. Additionally, it is imperative to discuss any legal questions (e.g., statutory or regulatory issues) or uncertainties with the appropriate legal counsel (the Solicitor for FWS and the General Counsel for NOAA) early in the permit development or permit processing phases.

D. Federal Register Notices of Receipt

1. Timing of the Notice.

Under section 10(c) of the ESA and Federal regulation [50 CFR 17.22 and 17.32(b)(1) (ii) or 50 CFR 217], publication of a Notice of Receipt of a permit application in the Federal Register is required for each section 10 permit application received by the FWS or NMFS. NEPA regulations or FWS policy also require publication of Notices of Availability of NEPA analysis (see Chapter 5, Section A). These Federal Register notices should be published after submission of the complete application package and final review of the application package by Regional Office staff, but as early in the formal processing phase as possible. The notices must offer the public at least 30 days to comment on the documents where an EA is being prepared. A longer review is required for a draft EIS.

To streamline the public review process, the Notice of Receipt of a Permit Application and Notice of Availability of the NEPA analysis should be published concurrently.

2. Content of the Notice.

The Federal Register Notice of Receipt of an Incidental Take Permit Application must include the following information (see Appendix 16 for sample Notices of Receipt):

- Applicant's name and city and state of residence;
- For FWS, the application file number (PRT-____) as issued by LEMIS;
- A brief description of the proposed activity, the species involved, estimated number of individual animals or habitat quantity to be taken, affected locations, and proposed length of the permit, if known;
- Length of the comment period (minimum is 30 days from date of publication); for a draft EIS, a minimum 45-day comment period is required;
- Name and mailing address of the office(s) from which a copy of the application package may be obtained; street address and business hours where persons may view the application in person; and address of office where comments are to be submitted, including FAX number, if available;

- The name, address, and telephone number of a Service employee to contact for further information; and

- Supplementary information including a brief description of the measures the applicant will implement to minimize, mitigate, and monitor the incidental taking; a summary of the alternatives considered; a description of long-term funding, if any; and a summary of significant environmental effects. The notice should be brief but of sufficient detail to convey the main aspects of the proposed activity.

3. Submission to the Office of the Federal Register and PDM.

For FWS, when the Federal Register notice is ready for publication, **three** copies of the notice with **original** signatures by the appropriate ARD on all copies, and the name and title of the signatory below the signature, must be submitted to the Office of the Federal Register at the address below. A transmittal letter is usually included.

U.S. Mail
National Archives & Records Administration
Office of the Federal Register
Washington, D.C. 20408
(Telephone 202/523-3187)

Overnight/Courier Delivery
Office of the Federal Register
Room 700
800 North Capitol Street, Northwest
Washington, D.C. 20002
(Telephone 202/523-3187)

Federal Register notices generally are published within 3 working days after receipt by the Office of the Federal Register, if received prior to 2:00 p.m.

A copy of the Federal Register notice, with the originating office's billing code, should also be sent to the FWS Division of Policy and Directives Management (PDM) in Washington, D.C. at the address below. The notice should be sent to PDM no later than the time it is sent to the Office of the Federal Register. The purpose of this is to allow the Washington D.C., PDM Office to assist in prompt publication of the notice in case questions arise after the notice has been submitted.

U.S. Fish and Wildlife Service
Division of Policy and Directives Management
ARLSQ-224
4401 N. Fairfax Drive

Arlington, VA 22203
FAX: 703-358-2269

For NMFS, all Federal Register notices must be cleared through the Office of Fisheries Conservation and Management in Washington, D.C. (see Appendix 12 for address).

If the Regional Office believes an HCP permit application is potentially controversial, faces a likelihood of legal challenge, or otherwise address issues deserving of Secretarial attention, it should notify the Regional Public Affairs Office and request the Regional Public Affairs Officer to coordinate with appropriate FWS or Department personnel in Washington, D.C. For NMFS, the Office of Protected Resources should be notified (see Appendix 12 for address).

4. Providing HCP Documents to the Public/FOIA Considerations.

Once a permit application is received, the Service should encourage the applicant to involve all appropriate parties. This is especially true for complex and controversial projects. The Service should also notify interested parties when documents (e.g., NEPA analysis or HCP) become available for public review. In addition, during the public comment period the Service may wish to hold informational meetings and answer questions that members of the public may have regarding the HCP or permit issuance.

During the comment period, the Services should provide the permit application package to those requesting copies. The Services should provide information that documents compliance with the requirements of section 10 (a)(2) of the ESA. The Service should not release confidential, proprietary, or individual privacy information which may be protected under 43 CFR 2.13(c)(4) and (6) respectively. If the applicant is a business or sole proprietorship, the Services should review the application for any information that may be deemed "confidential business information" or could cause "competitive harm." In such cases, the program should release information in accordance with guidance found in 43 CFR 2.15(d). If the applicant is an individual, the information in block 4 of the application (date of birth, social security number, etc.) must be blocked out before mailing in accordance with the Privacy Act and FOIA (see Appendix 11). The program should also review the remainder of the application for information that could invade personal privacy.

In both cases, the Services should send the requestor a note explaining what was deleted and that it may be available under the FOIA. If the requestor filed a FOIA request initially for the information, the program in consultation with the Solicitor's office, must provide an explanation of what material was exempted and why; and provide appeal rights to the requestor in accordance with the FOIA.

Documents that reflect intra-agency or inter-agency deliberations are most likely exempt under the FOIA. Exemption would depend on whether the agency can show such

information is predecisional and deliberative, foreseeable harm will result in their release; and apply to both the deliberations and any other information which is not reasonably segregated from them.

After the comment period, the Services should provide copies of applications and related material to those requesting a copy. Though a FOIA request is not required to receive information, release of the information should still be done in accordance with the FOIA.

The application package, including the NEPA analysis, must be provided to all affected interests who request the package or have a record of significant interest in the planning program. For EISs it is wise to prepare a distribution list before the EIS is printed, since an adequate number of copies must be printed to meet the demand. For HCPs, Field Offices should estimate the number of copies needed to send to commenters and the affected public and arrange for duplication.

When requested, copies of the application package should be mailed immediately since the public has a limited time to review documents and submit comments.

If additional significant information is submitted by the applicant after the 30-day comment period has closed, which requires a change to the application, the comment period should be reopened through a second Federal Register notice.

The Services are not obligated to consider comments received after the 30-day comment period has closed, but may elect to do so, especially if they contain significant biological information or if discussions with the applicant have continued after the close of the comment period. All late comments must then be considered, however. If any new information received from either commenters or the applicant is of relevance to the decision regarding issuance of the permit, it will be necessary to reopen the public comment period.

5. Objection to the Permit.

Any individual may object to issuance of an incidental take permit for an **endangered** species during the 30-day comment period. An objection should be in writing, refer to the permit application number, and provide specific, substantive reasons why the individual believes the application does not meet the permit issuance criteria or other reasons why the permit should not be issued. For FWS, if the objector requests notification of the final action in writing and the FWS decides to issue the permit, the agency must notify the objector in writing that the permit will be issued. A reasonable effort must be made to accomplish this notification at least 10 days before permit issuance. If notification is verbal, it must later be followed in writing. If notification prior to permit issuance could lead to harm to the endangered species or population involved, or unduly hinder proposed activities to be authorized, FWS may dispense with prior notification; however, written explanation for doing so must be provided to the objector following permit issuance.

The objection process described above does not apply to **threatened** species. Under 50 CFR 17.32(b)(1)(ii), the FWS must publish notice in the Federal Register for each application to incidentally take a threatened species, and the notice should invite written comments from interested parties during a 30-day comment period. The FWS is not required to address objections to permit issuance for threatened species in the manner described above, though doing so is recommended.

6. Notice of Permit Issuance, Amendment, Denial, or Abandonment.

Although not required by law or Federal regulation, it is FWS policy to notify the public of their section 10 permit application decisions. NMFS is required by its regulations at 50 CFR 222.24(c) to publish a notice of the decision within 10 days after the date of issuance or denial. Notices of permit issuances, denials, and amendments should be published in the Federal Register on a quarterly or biannual basis. A 45-day waiting period is recommended prior to publication of permit denial notices to allow time for appeals by the applicant. Appendix 18 contains "templates" for preparing Notices of Issuance for a single permit and for multiple permits. Notice of the abandonment of a permit application by the applicant need not be published.

E. Permit Issuance Conditions and Reporting Requirements

The permit (for FWS, Form 3-201; for NMFS, agency letterhead) must identify the species, stipulate the activities authorized, and indicate the location(s) where the activities can be conducted. The permit, together with its attached terms and conditions, must contain sufficient information so that no question remains by the permittee or an enforcement officer as to the scope of the authorized taking. Appendix 17 contains examples of issued FWS incidental take permits.

1. Permit Conditions.

The Services have the authority to impose terms and conditions in the permit necessary to carry out the purposes of the permit, including but not limited to, monitoring and reporting requirements necessary for determining whether such terms and conditions are being complied with. The terms and conditions placed in the permit should be the same as, or a re-statement of, those described in the final HCP, with the exception of standard conditions that go into all permits. However, in some cases FWS or NMFS may need to incorporate additional conditions resulting from the section 7 consultation. Reasonable and prudent alternatives, if provided in the section 7 consultation to avoid jeopardy, as well as reasonable and prudent measures and terms and conditions, if included in the incidental take statement, must be included in the permit conditions. Permits should also identify protocols for handling dead and/or injured specimens of protected species taken under authority of the permit.

2. Permit Duration. [See 50 CFR 13.21(f) or 50 CFR 222.22(e)]

The Conference Report for the 1982 Section 10 amendments states, "The Secretary is vested with broad discretion in carrying out the conservation plan provision to determine the appropriate length of any section 10(a) permit issued pursuant to this provision in light of all of the facts and circumstances of each individual case" (H.R. Rep. No. 97-835, 97th Congress, Second Session).

Thus, the allowable duration of a permit is flexible but an expiration date **must** be specified (for FWS, in block 7 of the permit Form 3-201). The duration of planned activities, the potential positive effects to listed species provided under the permit, and the potential negative effects to the species that may result from premature permit expiration should be considered in determining permit length. Also, local government agencies may wish to tie the permit expiration date to local land use plans. Development or land use activities and the conservation program proposed in the HCP may require years to implement. The Services must assure the applicant that authorizations under the permit will be available for the life of the project, and the public that conservation measures under the permit will remain in effect for as long as necessary to implement the conservation program.

3. Distribution of Copies of the Permit.

A copy of the issued permit should be provided to the Endangered Species Division in Washington, D.C. (FWS and NMFS), applicable Field Offices, other Federal agencies involved in the HCP, and affected state wildlife and conservation agencies.

4. Reporting Requirements. [See 50 CFR 13.45; 50 CFR 17.22(b)(3) and 17.32(b)(3) or 50 CFR 222.22(d)(1)]

The permit should include reporting requirements necessary to track take levels occurring under the permit and to ensure the conservation program is being properly implemented. Federal regulation (50 CFR 13.45) requires annual reports unless otherwise specified by the permit. The HCP itself will often specify reporting requirements. Unless reporting requirements in addition to those in the HCP are deemed to be necessary, reporting requirements in the HCP and the permit should be the same. Failure to submit adequate reports as required by the permit is a violation of the permit and may lead to permit suspension or revocation.

- Each permittee must file a report, even if no activity was conducted under the permit in that reporting interval.

- No permittee should be required to include in a report information of a private or personal nature (for individuals). Sensitive business information or information

that is otherwise considered proprietary (for businesses) should also generally not be required.

- o If a report required by the permit is not submitted or is inadequate, the permittee should be notified in writing and offered at least 30 days to demonstrate compliance. If the permittee fails to comply within the allotted time, permit suspension procedures (50 CFR 13.27) or revocation procedures (50 CFR 13.28 for FWS, 50 CFR 222.27 for NMFS) should be initiated.

- o Report due dates should be flexible and wherever possible tailored to the activities being conducted under the permit (e.g., due at the end of a particular stage of the project). If possible, the due date should also be coordinated with other (e.g., state) reporting requirements so the permittee can satisfy more than one reporting requirement with a single report. For low-effect HCPs in which the project or activity is completed in less than a year or in which annual reporting is otherwise deemed to be unnecessary, a single "post-activity" or "post-construction" report is often adequate.

- o A copy of the report, or a notice that it is available should be sent to state wildlife agencies and other appropriate parties, either by the applicant or the FWS or NMFS.

- o Reports should be monitored closely to ensure that they contain adequate information and the permittee is complying with the authorizations and conditions of the permit. For FWS, information about apparent violations should be forwarded to the appropriate ARD-LE Office and Law Enforcement special agent. The Regional Office, in coordination with Law Enforcement, should immediately notify the permittee of apparent noncompliance and request an explanation. For NMFS, permit violations should be reported to the appropriate Regional Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation.

F. Permit Denial, Review, and Appeal Procedures

1. Permit Denial.

If the HCP and associated documents do not satisfy issuance criteria under the ESA and Federal regulation, the permit application must be denied. The applicant must be notified of the denial in writing and the reasons for the denial, of applicable regulations resulting in the denial, and of the applicant's right to request reconsideration of the permit application. For NMFS, denials must be made in accordance with 15 CFR part 904.

2. Review Procedures. [See 50 CFR 13.29 or 50 CFR 220.21]

A section 10 applicant has access to a two-tiered system of review of a permit denial within the issuing office: (1) if the permit is denied, the applicant can request reconsideration of the permit application; and (2) if the request for reconsideration is denied, the applicant can appeal the decision. To ensure independent review of a permit denial at each stage, review decisions and signature authority should be as follows:

- For FWS, initial permit denials should be signed by the appropriate Assistant Regional Director;
- Decisions on requests for reconsideration should be signed by the Deputy Regional Director (DRD);
- Appeal decisions (the final administrative action) should be signed by the Regional Director (RD).

For NMFS, the above decisions must be signed by the Regional Director or the Director of the Office of Protected Resources Division in Washington, D.C.

3. Requests for Reconsideration. [See 50 CFR 13.29(a)-(d) or 50 CFR 220.21]

For FWS, a permit applicant may request reconsideration of (1) denial of a permit application, renewal, or amendment request; and (2) amended, suspended, or revoked permits, except for permit actions required by changes in statute or regulations. The applicant's request must meet the criteria outlined in 50 CFR 13.29, be in writing, be signed by the applicant or a designated representative, and be addressed to the Deputy Regional Director.

When the DRD's office receives a request for reconsideration, the ARD that issued the denial must forward a copy of the applicant's file, along with a summary of the file's pertinent points, to the DRD. If the DRD determines that permit issuance criteria have been satisfied, the denial is reversed and a permit may be issued. If the denial is sustained, the DRD must notify the applicant of the decision within 45 calendar days of receipt of the request. This notification must be in writing, state the reasons for the decision, and describe the evidence used to make it. The letter must also provide information concerning the applicant's right to appeal, the office to which the appeal should be made, and the procedures for making the appeal.

For NMFS, procedures for requests for reconsideration are addressed in 50 CFR 220.21.

4. Appeal. [See 50 CFR 13.29(e)-(f)]

For FWS, an applicant may appeal a second denial of the permit in accordance with 50 CFR 13.29(e)-(f). The written appeal request must be signed by the applicant or a designated

representative and be addressed to the Regional Director. Before a decision is made, the appellant may present oral arguments before the RD if the RD believes this could clarify issues raised in the written record.

The RD shall provide the appellant with written notification of the appeal decision within 45 calendar days of receipt of the request. This time frame may be extended with good cause if the appellant is notified of and concurs with the extension. The RD's decision on a permit appeal constitutes the final administrative decision of the Department of the Interior.

5. 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 ARD-LE, and the Division of Endangered Species in Washington, D.C. For NMFS, copies should be sent to affected Field Offices and Regional Offices and the Endangered Species Division in Washington, D.C.

G. Permit Amendments [See 50 CFR 13.23 or 50 CFR 222.25]

For FWS, amendment of existing permits may be requested by a dated letter signed by the applicant and referencing the permit number. The $25 application fee is required unless the applicant is fee exempt (see Appendix 10). Procedurally, a permit amendment application is treated in the same way as the original permit application. However, documentation needed in support of a permit amendment will vary depending on the nature of the amendment and the content of the original HCP. If the amendment involves an action that was not addressed in the original HCP, Implementing Agreement, or NEPA analysis, these documents may need to be revised or new versions prepared addressing the amendment submitted. If the circumstances necessitating the amendment were addressed in the original documents (e.g., a previously unlisted species adequately addressed in the HCP is subsequently listed), then only amendment of the permit itself is generally needed. See Chapter 4 for a discussion of how previously unlisted species are treated if they are listed.

For NMFS, applications to modify a permit are subject to the same issuance provisions as an original permit application as provided in 50 CFR 222.22.

H. Permit Renewal [See 50 CFR 13.22 or 50 CFR 220.24]

For FWS, Federal fish and wildlife permits may be renewed if indicated in block 4 of the permit. Whether or not the permit is renewable should be determined by the Regional Office when the permit is issued.

If the permittee files a renewal request and the request is on file with the issuing FWS office at least 30 days prior to the permit's expiration, the permit will remain valid while the renewal is being processed, provided the existing permit is renewable. The permittee may

not take listed species beyond the quantity authorized by the original permit, however. A renewal request must:

- Be in writing;
- Reference the permit number;
- Certify that all statements and information in the original application are still correct or include a list of changes;
- Provide specific information concerning what take has occurred under the existing permit and what portions of the project are still to be completed; and
- Request renewal.

If a permittee fails to file a renewal request 30 days prior to permit expiration, the permit becomes invalid after the expiration date. If the permittee seeks extension of the expiration date only and proposes no additional taking, a public comment period generally is required. A permittee must have complied with annual reporting requirements to qualify for renewal.

For NMFS, requirements for permit renewal are contained in 50 CFR 220.24.

I. Permit Transferals

Important Notice: On September 5, 1995, the Fish and Wildlife Service published a proposed rule in the Federal Register amending the general regulations for its permit program (50 CFR Part 13 and Part 17). The Service is currently drafting additional language to clarify the relationship between the Part 13 and Part 17 procedures and a proposed rule will be published in the near future. Consequently, some information contained in this section may be outdated upon publication of a final rule. Users of this handbook should check the revised permit procedures when available or contact the Service's Division of Law Enforcement to ensure that the handbook's description of permit administration is consistent with the new regulations.

Congress amended section 10(a)(1) of the Act in 1982 to authorize new incidental take permits associated with HCPs. Many HCP permits involve long-term conservation commitments that run with the affected land for the life of the permit. The Services negotiate such long-term permits recognizing that a succession of owners may purchase or resell the affected property during the term of the permit. In other HCP situations, the HCP permittee may be a State or local agency that intends to issue subpermits that authorize the incidental take for the permit to those entities involved in the HCP.

The Services do not view these situations as problems since the terms of such permits frequently run with the land, binding successive owners to the terms of the HCP. Landowners similarly do not view this as a problem as long as the Services can easily transfer incidental take authorization from one purchaser to another. However, the new landowners must be able and willing to assume the responsibilities associated with the permit (i.e., the minimization/mitigation strategy and the terms and conditions of the permit) to receive the assurances of the permit.

If a landowner, who is a section 10(a)(1)(B) permittee, transfers ownership of the land that occurs within an approved HCP, the Services will regard the new owner as having the same rights with respect to the permit as the original landowner, provided that the new owner agrees to be bound by the terms and conditions of the original permit. Actions taken by the new landowner resulting in the incidental take of species covered by the permit would be authorized if the new landowner agrees to the permit and continues to implement the minimization and mitigation strategies of the HCP.

To ensure that original permittees inform new landowners of their rights and responsibilities, a section 10(a)(1)(B) permit must commit the permittee to notify the Services of any transfer of ownership of any lands subject to the permit before the transfer is finalized. The Services should attempt to contact the new landowner to explain the prior permit, and determine whether the new landowner would like to continue the original permit or enter into a new permit. In addition, the original permittee needs to work with the new landowner(s) to ensure they understand the obligations associated with permit transfer. The Services will provide any technical assistance necessary to ensure that all parties understand their rights and responsibilities.

If, however, the new landowner <u>does not</u> agree to the terms and conditions of the original permit, the original permittee must work with the Services to determine whether, and under what circumstances, the permit can be terminated. In order to terminate the permit, the Services must determine if the minimization and mitigation measures that were conducted up to that point were commensurate with the amount of incidental take that occurred during the term of the permit. If the incidental take occurred during the initial stages of implementing the permit, but the minimization and mitigation measures occur throughout the term of the permit, the Services shall require that the remainder of the minimization and mitigation measures be implemented before the permit is terminated. In this fashion, the Services will be able to ensure that there is adequate and sufficient minimization and mitigation for the incidental take that occurred during the term of the permit.

J. Permit Violations, Suspensions, and Revocations

On occasion, the Services may find that a permittee has violated conditions of the permit. This may become evident through review of a permittee's annual report, a field inspection, or

other means. Implementing Agreements sometimes contain provisions concerning the failure of signatory parties to perform their assigned responsibilities under an HCP.

1. Notifying Law Enforcement.

In the event of a known or suspected permit violation, the appropriate ARD-LE and Law Enforcement Special Agent must be notified before any official action is taken (for FWS). If the violation is deemed technical or inadvertent in nature, the ARD-LE may advise that the permittee be sent a notice of noncompliance by certified mail or may recommend alternative action to regain compliance with the terms of the permit. Concurrence from the ARD-LE should be obtained before mailing any correspondence concerning an alleged permit violation to avoid wording that could compromise a current or future investigation. For NMFS, the appropriate Law Enforcement Division and NOAA General Counsel for Enforcement and Litigation should be notified.

2. Permit Suspension/Revocation. [See 50 CFR 13.27 and 13.28]

The Services may suspend or revoke all or part of the privileges authorized by a permit, if the permittee does not:

- Comply with conditions of the permit or with applicable laws and regulations governing the permitted activity; or
- Pay any fees, penalties, or costs owed to the government.

If the permit is suspended or revoked, incidental take must cease and wildlife held under authority of the permit must be disposed of in accordance with Regional Office instructions. For further information, consult the regulations on procedures to suspend or revoke permits.