



HABITAT CONSERVATION PLANNING 201: WINDS OF CHANGE

Kely Mertz
Karen Tyrell, PhD
Mike Sponsler

HCPs IN THE BEGINNING

Habitat Conservation Plans (HCPs) initially were most often completed by a single project Applicant seeking a discreet Incidental Take Permit (ITP) covering one or two listed species and a well-defined activity within a relatively small area (e.g., 40 acres or a single property). Over time, as HCP Applicants and the US Fish and Wildlife Service (FWS) gained experience with section 10 consultation, the need for different types of HCPs to meet varying requirements of unique or complex projects became apparent.

HCP STRATEGY TODAY

These days, many developers face the same questions about effects to certain species, often for multiple projects within the same region. Project proponents must decide what makes more sense - a more comprehensive HCP designed to programmatically address impacts to a number of projects and perhaps multiple species within a region, or a more narrow, project-specific HCP. FWS realizes the magnitude of personnel and budget resources required to actively participate in and evaluate multiple individual HCPs. As a result of these and other factors, there is a growing trend towards agency encouragement of multi-Applicant, multi-species, and large-scale HCPs. Still, ultimately it is up to the Applicant (developer) to decide the scale and scope of their HCP and the processes supporting it.



KEY DIFFERENCES IN STRATEGY

HCP strategies vary in key aspects, including:

- content of the HCP (there are required elements, others are discretionary)
- when corresponding section 7 consultation and NEPA compliance processes occur (from once to potentially multiple times)
- opportunities for litigation during the processes
- who the designated permittee, responsible for implementing and enforcing the terms and conditions of the resulting permit, will be

The HCP strategy guides many aspects along the course of compliance, including section 10 consultation, section 7 consultation, and the NEPA process. Therefore, careful consideration of the overall scope and intent of the HCP is critical to understanding project schedule and budget implications.

SELECTING THE RIGHT STRATEGY

An Applicant can choose the right HCP strategy by answering key questions such as:

- How must the permit function to meet project needs and the Applicant's overall business objectives?
 - Can the Applicant(s) define all activities for which the permit is desired? Do future activities exist that cannot yet be defined for which permit coverage will be sought?
- Will multiple entities seek coverage under the permit, and will those entities be known at the time of permit issuance?
- What are the pros and cons of joining together with other developers when seeking permit coverage? What are the cost and schedule implications?

Once a strategy is selected, additional issues should be examined, including:

- How will multiple entities seeking coverage under the permit cooperate during HCP development and following issuance of the permit?
- Will Applicant(s) be issued individual permits or participate under a master permit? If the latter, who will hold the master permit and how will that body enforce permit requirements?

To answer such questions, it is key for the Applicant(s) to coordinate early and often with internal legal counsel, FWS, and Department of Interior - Office of the Solicitor.

THE BOTTOM LINE

Section 10 of the ESA provides a means by which developers can lawfully construct and operate wind facilities expected to incidentally take listed species. Within section 10, there are options for structuring an HCP and permit to meet the specific needs of the Applicant and its project. Working with internal counsel, FWS, and the Department of Interior to understand HCP options and consequences will help Applicants efficiently manage risk, navigate the HCP and related processes, and optimize chances for success in obtaining timely, cost-effective incidental take coverage that meets the needs of wind industry while conserving listed species.



For further information:

Kely Mertz, BHE Environmental, Inc.
11733 Chesterdale Road, Cincinnati, Ohio 45246
513.326.1500 • KMertz@BHEEnvironmental.com