United States Department of the Interior

FISH AND WILDLIFE SERVICE
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Memorandum

To: Assistant Regional Directors, Regions 1, 2, 3, 4, 5, 6, and 7
Manager, California/Nevada Operations Office

From: Director H Dale Hall

Subject: Final General Conservation Plan Policy

Purpose

The Service is committed to developing policy for streamlining and reducing the processes associated with developing Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the Endangered Species Act (Act). To that end, we have developed an approach, outlined below, that we believe will achieve these goals as well as providing an equal or better conservation benefit to threatened and endangered species. In brief, this approach, known as a "General Conservation Plan (GCP)," allows the Service to develop a 10(a)(1)(B) conservation plan suitable for the needs of a local area, complete all NEPA requirements for 10(a)(1)(B) incidental take permit issuance, and then issue individual permits to landowners who wish to apply for an incidental take permit (ITP) and demonstrate compliance with the terms and conditions of the GCP. The time and workload associated with the development of this type of plan should be much less than the traditional HCP, since the GCP is formulated by Service personnel without the need for the typical negotiation process of the traditional HCP. Additionally, once the GCP is finalized, the issuance of permits could become formulaic, thus eliminating the need for in-depth review of each application.

It is important to note that this approach will not do away with the traditional HCP program. Rather in developing this policy, our intention is to add an additional method for evaluating permit applications to be used when it is determined to be the best solution to specific circumstances. Though not restricted in its potential uses, this approach is recommended in cases where a large-scale HCP covering many similar actions is needed, but where such a plan is not available or feasible.

Background

The HCP development process can sometimes be cumbersome and can be burdensome in time and expense for small landowners and the Service.

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Under a traditional HCP, the small landowner applicant has had the responsibility of developing a HCP which must then be reviewed by the Service. At a minimum, this has meant that an applicant must hire a biological consultant to assist in developing the HCP. This may require biological studies to determine the range and distribution of the species to be covered by the HCP within its covered area, mapping of habitat and other pertinent information, expected impacts from the activities to be permitted, or any other data compilation, as needed. Additionally, these consultants often draft the documents required for compliance with NEPA. Often, attorneys and other parties, such as "facilitators" are employed to review these documents. Each of these components adds to the complexity, expense and time required to produce the draft documents. The documents are then submitted to the Service for review and comment. This process may then be repeated numerous times until the draft HCP and supporting documents contain the information required for permit issuance and is published in the Federal Register. Consequently, the process that culminates with the issuance of an ITP can take anywhere from a few months to several years and can cost large sums of money. While large-scale regional HCPs may be eligible for federal grants under section 6 of the Act to assist in development of their plan, small landowners typically must bear the costs themselves.

Policy

We propose the development and use of a "General Conservation Plan," which would be authorized under section 10(a)(1)(B) of the Act, and which could be issued under existing statutory and regulatory authorities. Consequently, there is no need to develop new regulations with the attendant NEPA review, Federal Register noticing, or any other statutory requirement. Additionally, there will be no "learning curve" or legal confusion while Service personnel learn to implement new regulations.

In the traditional HCP process, the applicant is required to develop the draft HCP which is then provided to the Service for review and comment. After the Service's review, our comments are returned to the applicant for incorporation into the subsequent draft HCP. This process continues until both parties are satisfied that the HCP meets issuance criteria as required in section 10(a)(2)(B) of the ESA. In some cases, this process can take years, at significant expense of both time and money to the applicant and the Service. As an alternative HCP process, the landowner/applicant is relieved of this burden through the GCP process, as described below. In short, the development of a GCP is undertaken by the Service, rather than an individual applicant, and is ideally based upon a conservation strategy for the species (see below) and addresses the needs of the local community. Landowners may then choose whether they wish to receive an Incidental Take Permit under this Plan, or conversely, whether they prefer to develop their own plan using the traditional HCP process. An applicant who chooses to participate would subsequently be granted an Incidental Take Permit under the Plan in an expeditious manner.

<u>Prior to GCP Development</u>

This approach will be most effective for both species and applicants/permittees if it is placed within a large-scale context. First, if they have not already done so, we recommend that the Regional Office and/or the Field Office(s) (RO/FO) develop a conservation strategy for the target species or suite of species. This would allow for long

term planning at a landscape level. Such a strategy is not envisioned as development of a full recovery plan, but rather, it should be a succinct summary of the threats and needs of the target species to address those threats with recommended avoidance, minimization and mitigation measures including Best Management Practices (BMPs), if applicable. This strategy can then be used to determine where and how the best conservation can be obtained for each target species, thus contributing to its recovery and removal from the Threatened and Endangered Species lists. Please note that development of the conservation strategy is not necessarily a part of the GCP process. Rather, it provides a biological basis upon which the GCP planning, as well as other planning efforts, can then be based.

Plan Development

Obtaining and using input from the local communities as needed, the RO/FO will determine which specific activities need to be covered by the GCP; e.g., homebuilding on small lots, specific agricultural practices, or other identified activity, as well as which listed species are likely to be affected by them, and the geographical area to be included. Then Service personnel from the RO/FO will formulate a GCP that is consistent with the conservation strategy referenced above. The GCP will specify the amount of take anticipated, avoidance and minimization measures, mitigation required, and any other measures necessary to meet the issuance criteria as required by section 10(a)(2)(B) of the Act. Basically, this GCP will include everything that a traditional HCP has EXCEPT the names of an applicant or the future permittees. The NEPA document, ITP and Implementing Agreement, if applicable, will also be drafted at this time.

It is particularly important to note that in developing the GCP and NEPA documents, special care should be given to ensure that all ITPs are severable, that is, that the conservation benefits of the GCP will not be dependant upon any one permittee.

NEPA Compliance

The Service will comply with NEPA by noticing the entire draft GCP (with no associated permit or applicant) with all appropriate draft NEPA documents and in the Federal Register and inviting public comment. It should be noted that the Service will prepare only one Set of Findings, one biological opinion and one NEPA decision document for all of the actions to be covered under the GCP. By completing the NEPA and public review in this manner, the public will be able to review and connect on the action as a whole rather than permit by permit. Subsequent to the completion of the NEPA review process and finalization of the GCP, the Service will issue ITPs to individuals who apply and demonstrate compliance with the terms and conditions of the GCP. The Service must also comply with all noticing requirements as specified by section 10(c) of the Act.

Discussion

We believe that this General Conservation Planning process will benefit the species, the landowner and the Service. For example, under the GCP, each landowner/applicant is not required to spend the time and money to develop a separate HCP. All he/she needs to do is to complete an application form, pay the application fee and demonstrate

compliance with the terms and conditions of the Plan. Having done so, he/she may then be granted an individual ITP, subject to determination of eligibility pursuant to 50 CFR 13.21(c) and completion of any administrative or noticing requirements.
We wish to make clear that this is not a new or novel idea. In fact, similar approaches have been used in the past (e.g., the Houston toad HCP in Texas and the pending Florida scrub jay HCP in Florida). These types of plans have been previously described by terms of art, such as "template HCPs," "umbrella HCPs" or "programmatic HCPs." In short, the GCP is a HCP and is required to meet all issuance criteria under section 10(a)(2)(B) of the Act, as well as all NEPA and other public noticing requirements that are requisite for traditional HCPs. We stress that the only difference between the GCP and a traditional HCP is that the Service develops the GCP under which individual ITPs can then be issued to landowners, instead of an applicant doing so.

It is also important to note that the GCP is not a substitute for a regional multiple action HCP. The use of the GCP will be limited to activities that the Service has the expertise and ability to analyze. Because of the complexities of fully analyzing all activities for which a county or other jurisdiction may require coverage under a 10(a)(1)(B) permit, the GCP would probably be ill-suited to needs of this scope and magnitude. Such a large-scale effort would be better developed using the traditional HCP approach. Rather, the GCP will be most useful in situations in which a smaller subset of activities, such as building single family homes, a specific type of agricultural practice, or similar activities of limited scope can be described and their impacts to listed species and their habitats can be adequately analyzed by the Service. It will be left to the discretion of the RO/FOs to determine when the use of a GCP will be most beneficial.

It should be noted that the development of the GCP may require an initial increase in workload for Service personnel, though such an increase would still be less than that required for the development of a traditional HCP. However, this increase would be alleviated by the subsequent reduction in overall workload upon completion of the GCP because once completed, there would be no need for analyzing and processing numerous individual HCPs.

For example, Region 4 has recently used this approach to develop a GCP for the Florida scrub jay (*Aphelocoma coerulescens*). This plan addressed the building of single-family homes on suburban infill lots of one acre or less in portions of 34 counties. The areas covered by the plan are experiencing rapid development and consist of poor quality, fragmented habitat for the scrub jay. Region 4 and the FOs had already devised a conservation strategy for the scrub jay and had developed a mitigation approach that consisted of land acquisition within identified conservation areas. With this framework prepared, the development of the plan required the use of three FTEs for a total of about four weeks in order to develop the draft Plan and draft NEPA documents ready for publication in the Federal Register. Note that these FTEs were a combination of RO and FO personnel, and the time was distributed over a period of several months, with one week of concentrated effort, so that there was relatively little disruption of routine obligations. This plan will allow individual landowners to receive an ITP without the expense and time constraints for themselves and for the Service of preparing numerous individual HCPs. Likewise, upon finalization, the RO/FO will be able to process individual applications and the ITPs can be issued expeditiously.

By contrast, a traditional regional HCP of this size and scope would have taken several FTEs in a Field Office, several FTEs in the Regional Office, plus periodic Solicitor's review over a period of several years to reach the same point. When viewed in this light, the GCP approach required far less time and personnel over all to develop a plan and issue Incidental Take Permits than the traditional HCP process.

FAQs

1. **Q: Why individual ITPs? Why not issue an ITP to ourselves and then enroll individuals through certificates of inclusion?**

A: The Service can legally hold an incidental take permit (ITP) and issue certificates of inclusion to individuals; however, in general we don't recommend this approach for two reasons. First, if the Service is the master permit holder, we incur the responsibility of implementation, including all monitoring and adaptive management, as required by the Five Points Policy. This could require substantial commitments of personnel, time and money which would off-set any perceived streamlining benefits. By contrast, the GCP approach would allow us to issue individual ITPs to landowners, alleviating the need to administer a master permit.

Secondly, this approach is problematic with regard to No Surprises assurances to landowners. Both Washington and most regional solicitors agree that No Surprises assurances are attached to an ITP upon issuance. However, federal agencies, including the Service, are not allowed to have No Surprises assurances. A certificate of inclusion is not a permit; rather, it is merely a legal instrument by which a third party can be "covered" by someone else's ITP, and therefore, is limited to what is provided by the ITP. Consequently, although we can issue an ITP to ourselves, albeit without No Surprises assurances, there is no legal mechanism for conveying No Surprises assurances to a third party via certificate of inclusion. We suggest that the GCP concept would solve this problem because it involves essentially the same level of planning and processing workloads and would result in applicants receiving their own ITP complete with No Surprises assurances.

2. **Q: What are some limitations of GCPs?**

A: Because there is no applicant to assist with an analysis of the effects of covered activities and with drafting the NEPA documents, the scope of a GCP will be limited to what Service personnel can effectively analyze. Notwithstanding this fact, it is possible that under some circumstances a county or local jurisdiction may be willing to assist with some analysis or writing since they will not be required to hold and implement a master permit. RO/FOs will use their discretion in determining when the GCP approach will be most beneficial.

3. **Q: Why don't we always do HCPs this way?**

A: A GCP is not a substitute for a County- or State-wide regional HCP which would cover many activities differing in scope and type of impact. The Service does not have the personnel or expertise to adequately analyze all activities that would be

addressed in planning efforts of this scale. Additionally, some applicants will prefer to develop their own plan. In these cases, a traditional HCP will be the preferred approach.

4. **Q: We have so much work to do—do we have to drop everything and do this?**

A: No, the GCP is not mandatory. It is intended to be another "tool in the toolbox," to be used in cases where the RO or FO determines that it would be useful.

5. **Q: This looks like a lot of extra work for the Service.**

A: Remember that though there is likely to be an initial increase in workload because the work is "frontloaded," afterwards there will be a substantial reduction in workload associated with issuance of ITPs.

6. **Does the GCP meet the same standards as a traditional HCP?**

A: Yes. The GCP must meet all issuance criteria pursuant to 10(a)(1)(B) of the Act, as well as compliance with the Five Points Policy.

7. **Q: What type of documentation is needed to demonstrate compliance with Terms and Conditions (T&Cs) of the Plan?**

A: We envision a checklist or similar one-two page document that can be completed and placed in the file to demonstrate that all conditions have been met and that all processing has been completed. The specific documentation will depend upon what is required and is up to the discretion of the RO/FO. For example, if the T&Cs include placement of a conservation easement or payment of an in-lieu fee, the documentation should contain proof of recording of easements or receipt of payment of the fee. There should be a statement verifying the eligibility of the applicant to receive an ITP, pursuant to 50 CFR 13.21(c). There should also be a statement verifying that the take to be authorized was analyzed pursuant to NEPA and is consistent with the biological opinion which was prepared for the GCP. The RO/FO may also include any additional information deemed necessary.