

August 29, 2016

Comments regarding the June 28, 2016

**Notice of Availability and Request for Public Comment on the
Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service
Habitat Conservation Planning Handbook**

Submitted by:

Energy and Wildlife Action Coalition

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The Energy and Wildlife Action Coalition (“EWAC”) submits these comments in response to the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) June 28, 2016 notice of availability and request for public comment on the joint USFWS and NMFS Habitat Conservation Planning Handbook (the “Draft Handbook”).¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

As an initial matter, we offer our appreciation for the effort the Services put towards the Draft Handbook. While there are many excellent aspects of the Draft Handbook, there are numerous internal inconsistencies as well as a number of areas about which we remain significantly concerned. Unfortunately, we believe there is much work still to be done to put the Draft Handbook in a position to enjoy the same degree of longevity as the Services’ current Handbook, which was published more than 20 years ago.

We have enclosed for the Services’ use a table that provides our detailed comments and concerns regarding the Draft Handbook. The purpose of this cover letter is to point out several overarching aspects of the Draft Handbook that we believe merit the Services’ further consideration. Additional detail regarding these concerns can be found in the enclosed table. For purposes of brevity, our comments do not focus on the aspects of the Draft Handbook with which we have no suggestions for improvement. We believe that, with the revisions we have suggested herein and in the enclosed table, the Draft Handbook, once finalized, will be a useful tool for all stakeholders in the habitat conservation plan (“HCP”) program.

I. COMPLEXITY.

The Services’ 1996 Habitat Conservation Planning Handbook (the “1996 Handbook”)² aptly reflected the state of the HCP program at the time. Although several large-scale regional HCPs were under development at that time, most incidental take permits (“ITPs”) had been issued to individual projects such as subdivision and commercial developments. The 1996 Handbook proved valuable as a guide for such projects while also laying out the framework for undertaking regional and other larger-scale permitting initiatives of greater scope and complexity.

Since then, while individual projects continue to seek ITPs, it seems the Services have often been asked to address the development of large-scale HCPs of increasing complexity in terms of the number of covered species, ecosystem diversity, stakeholder involvement, actions covered, geographic extent, and permitting mechanics. In general, the Draft Handbook provides a useful, albeit perhaps exceedingly complex, guide for designing and processing such ITPs, but it does so largely at the expense of providing clear, consistent, and straightforward guidance for smaller-scale or individual projects, which really are the backbone of the program. As a result, the Draft Handbook could be interpreted to apply long, complicated, and complex processes to

¹ *Notice of Availability and Request for Public Comment on the Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook*, 81 Fed. Reg. 41,986 (June 28, 2016) (the “Notice of Availability”).

² *Habitat Conservation Planning and Incidental Take Permitting Handbook* (USFWS & NMFS 1996), found at: <https://www.fws.gov/midwest/angered/permits/hcp/hcphandbook.html>.

what should otherwise be simple, straightforward HCPs. To be clear, “smaller-scale,” “simple,” or “project-level” HCPs in this context can refer to HCPs covering take in connection with projects of significance, such as major infrastructure or development, but generally do not involve multiple stakeholders or structural complexity. Activities such as construction and operation of individual wind farms, power plants, and transmission lines should all in most circumstances fit into the category of less complex or project-level HCPs not requiring many – or, in some cases, any – of the extensive processes contemplated in the Draft Handbook.

Consider, for example, a utility project in an area where no regional HCP provides an umbrella or programmatic process for obtaining incidental take approval. Assume as well that the incidental take involves a one-time clearing of habitat, that minimization involves leaving some buffering between remaining habitat and project features and seasonally-restricted initial clearing, and that mitigation involves purchasing credits from a relevant Services’-approved conservation bank. This is a fairly typical scenario for a project-level HCP, and it would not be unusual to find that several very similar HCPs had already been issued in the area. Although we are not suggesting that designing and evaluating such an HCP is a “cookie-cutter” process, many of the visioning, modeling, stakeholder, and other processes discussed at length in the Draft Handbook would be unnecessarily burdensome and of little actual value in terms of refining and evaluating the smaller-scale HCP. Similarly, and as provided in greater detail in Section VI below, the Draft Handbook does not go far enough in describing the basics of the use of low-effect HCPs. The remainder of this Section I discusses project-level HCPs that exceed the low-effect HCP threshold.

Between low-effect HCPs and the kind of large-scale HCPs that are the primary focus of the Draft Handbook, one would find a spectrum of HCP scenarios in terms of scale and complexity. Our concern is that the Draft Handbook does not clearly describe the full “track” for HCPs of low or moderate complexity, which often involve individual applicants. Sections 2.4 and 3.4 of the Draft Handbook do, to some degree, provide this sense of variation of scale and complexity, and the discussion of funding in Chapter 12 reflects a variety of HCP scenarios and provides an array of tools and approaches that can be matched to the scale and complexity of the HCP. However, many of the processes and evaluations described in the Draft Handbook would not be appropriate for most HCPs (e.g., Chapter 4 on communication; section 7.7 on models; section 9.2 on goals; Chapter 10 on monitoring and adaptive management), yet there is no indication to that effect in the body of those materials. Indeed, from the perspective of an applicant for a project-specific ITP, our sense is that the Draft Handbook overall makes the HCP process look daunting and inaccessible and creates a disincentive to undertake the process.

This aspect of the Draft Handbook could be rectified by further emphasizing in the introduction to each chapter how varied HCP scale and complexity can be and that not all of the processes outlined in the chapter would necessarily be appropriate for all or even most HCPs. Sections 2.4 and 3.4 and Chapter 12 provide excellent examples. In addition, where intensive processes are described in the body of chapters, caveats could be provided regarding how to shorten, simplify, or even eliminate the process for less complex HCPs. It would also be very helpful to provide several example scenarios early in the Draft Handbook, perhaps as an extension of section 2.4, reflecting differing scales and complexity and walk the reader through the entire permitting process in outline form – including target processing timelines – for various types of HCPs (e.g., low-effects HCPs, small-scale or project-level HCPs, and regional, industry, and/or landscape-scale HCPs) in order to illustrate when different steps require full intensity or can be streamlined or eliminated.

Another example of the Draft Handbook's failure to distinguish between large-scale, complex HCPs and most others is reflected in the Notice of Availability, in which the Services indicate that one of the more significant changes made by the Draft Handbook is the concept that applicants for ITPs should "start slow to go fast" – or, that they should engage in pre-planning prior to developing an HCP, especially in relation to "landscape-scale HCPs."³ While some HCPs may benefit from a "start slow to go fast" approach, we believe that concept is much more applicable to large, complex, multi-agency, and region-wide HCPs. The Draft Handbook should be rooted in the clear statutory intent that HCP development is intended to be a voluntary, applicant-driven process. In general, we believe the Draft Handbook injects the Services too broadly and deeply in the process and that the Services' resources will be strained to a breaking point in attempting to play the roles contemplated in the Draft Handbook.

In sum, the Draft Handbook should be revised throughout to reflect the fact that many – if not most – of the HCPs that come before the Services are project-specific rather than landscape-scale in nature. This cover letter and the detailed comments set forth in the attached table offer many suggestions as to how the Draft Handbook could do a better job distinguishing between requirements appropriate for large-scale HCPs and those appropriate for a smaller-scale plan.

Finally, we encourage the Services to look for ways to streamline and shorten the Draft Handbook in order to make it easier for the Services' staff and applicants of all types to use. We also encourage the Services focus on ways to make the Executive Summary, table of contents, and index helpful tools to simplify use of the Handbook, in particular for small and modest size projects.

II. TAKE AVOIDANCE.

As the Draft Handbook correctly recognizes, the applicant for an ITP establishes project design and prepares the HCP. For example, the Draft Handbook at 14-6 advises permitting staff to "remember that the HCP is the applicant's document. If any substantive changes are needed, the applicant must approve them or make them itself." The Draft Handbook also recognizes that the Service must issue the ITP if the Service concludes the issuance criteria of Endangered Species Act ("ESA") section 10(a)(2)(B) are met, one of which is that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking."

Under this statutory mandate, avoidance of take is a fundamental matter of *project design*, not of HCP conservation measures design. The HCP provides the applicant's basis for establishing that the *impacts of the taking* proposed by the applicant have been minimized and mitigated to the maximum extent practicable, but it is not the role of the HCP, or the Services, to address measures to reduce the level of take. This is the only logical way to implement section 10(a)(2) permitting, for any take that is avoided necessarily does not require minimization or mitigation. As the Draft Handbook states at page 9-23, "in some instances, it may be possible to avoid all project impacts so there is no need to develop an HCP." Hence, while the Services may suggest project design revisions that reduce the level of take, they may not legally impose take level reduction measures in the HCP. In other words, reducing the level of take is a choice left solely to the applicant for an ITP and is a matter of project design.

In general, the Draft Handbook correctly adheres to this distinction between project design as within the purview of take avoidance measures and HCP design as within the purview

³ Notice of Availability at 41987.

of impact minimization and mitigation measures. For example, the Draft Handbook states at page 3-3 that “an incidental take permit may not be required if a proposed project can be redesigned to avoid taking listed species or altering listed species habitat,” and at page 9-23 states that “avoidance generally occurs by siting and designing the project in a way that avoids impacts to covered species.” Most directly, the Draft Handbook states at page 5-5 that

In some cases, you may find there are reasonable measures that could eliminate the likelihood of take from certain activities, such as modifying beach lighting to avoid impacts to sea turtles. You should advise the applicant that committing to such measures not only would be good for the species, but also would remove the need for the applicant to mitigate for the impacts of such take. *Ultimately, the applicant chooses whether to design their project to avoid take or to include certain activities for take coverage.*

Section 9.1 of the Draft Handbook also clearly and accurately describes how the minimization and mitigation evaluation is to be conducted, making clear that the applicant describes “the amount of take expected from covered activities” and from there the purpose of measures to minimize and mitigate is to address the impacts of such taking.

At several points in the Draft Handbook, however, take avoidance is inappropriately lumped into HCP design as a conservation measure. For example, at page 9-23 the Draft Handbook states that “conservation measures implemented in HCPs” include “avoiding the impact through project design.” And it also states that “avoidance should be the first step in minimizing project impacts on covered species.” Neither statement accurately distinguishes avoidance as being part of project design rather than part of the HCP’s statutorily required conservation measures, and neither statement appears to recognize that avoiding take is not at all required by the incidental take permitting provisions of ESA section 10. Similarly, at points (e.g., page 12-2), the Draft Handbook conflates the *level* of take with the *impacts* of take. Importantly, the relevant ITP issuance criteria set forth in ESA section 10 do not deal with the level of take, but require only minimization and mitigation of the *impacts* of the take proposed by the applicant.

It will be important as the Services finalize the Draft Handbook to provide clear distinctions in these regards. Key principles are that reducing the *level* of take is a choice left solely to the incidental take permit applicant and is purely a matter of project design. Avoidance cannot be required as part of an HCP, as the measures required under an HCP are statutorily limited to minimizing and mitigating the impacts of the take.

III. MAXIMUM EXTENT PRACTICABLE STANDARD.

Throughout the Draft Handbook, the Services appear to indicate that it is permissible to analyze minimization and mitigation sequentially when applying the maximum extent practicable standard. For example, in section 9.1, the Services state, “...the amount of mitigation is directly related to the amount of and significance of the impacts of the taking that remain after minimization.” Thus, the Services imply that an applicant must minimize to the maximum extent practicable before mitigation is a consideration. This position, however, is incorrect. In a case to which the Services themselves cite in the Draft Handbook, the D.C. Circuit Court of Appeals held that when assessing whether an applicant had met the maximum extent practicable standard, USFWS appropriately looked at minimization and mitigation measures as a whole

rather than sequentially. Based on that holding, USFWS' issuance of the ITP in question was upheld.⁴

IV. NO NET LOSS/NET BENEFIT TO SPECIES.

Unlike the 1996 Handbook, the Draft Handbook focuses heavily on conservation of listed species. While we understand the Services' desire to provide significant conservation benefit to listed species any time an ITP is issued, the Draft Handbook should reflect the fact that Congress' focus in amending the ESA in 1982 to include the ITP program was to provide a resolution for the conflicts that arise between non-federal project proponents and listed species.⁵

One significant example of the Draft Handbook's unusually heavy focus on conservation is the discussion concerning a preference for "no net loss" and "net benefit" results with respect to the resources covered by HCPs. For example, the Draft Handbook states:

HCPs should at a minimum fully offset their impacts which results in a 'no net loss' of resources or individual animals or plants. Further, large scale plans provide a landscape scale conservation vision and programmatic approach, which should confer a net benefit to conservation by virtue of their scale and strategic approach to wildlife conservation.⁶

This statement is not consistent with the relevant ESA statutory provisions defining ITP issuance criteria, which require issuance of an ITP upon a finding that the applicant's HCP "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and that "the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild," among other things.⁷ None of the statutory criteria imposes a mandatory no net loss requirement, much less a net benefit requirement. Indeed, both criteria set forth above contemplate and allow a net loss to the species and appear to recognize – correctly – that no net loss is the maximum that can be required. Despite other statements to the contrary, the Draft Handbook at 9-11 references the extensive body of judicial opinions recognizing the same. Additionally, we would like to point out that where the impact has been appropriately minimized and mitigated, the "maximum extent practicable" standard is superfluous.

Regarding the ESA criterion that requires that the Services find that the "taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild," the Draft Handbook has surprisingly little guidance to offer. The only place in the Draft Handbook that appears to address this requirement is on page 12-5, which states that "the finding for this criterion is a summary of the biological and conference opinion conclusions regarding jeopardy." The 1996 Handbook provided more extensive guidance in this respect, explaining on page 3-20 that the standard "does not explicitly require an HCP to recover listed species, or contribute to their recovery objectives outlined in a recovery plan. This reflects the fact that HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools." Even the single statement on the "appreciably reduce" standard contained in the Draft Handbook, however, recognizes that the standard imposes nothing like a no net loss requirement, as the jeopardy standard applied under section 7 of the ESA has never been understood to impose such a standard. The Draft Handbook should avoid deviating from the clear, concise ESA statutory

⁴ *Union Neighbors United, Inc. v. Jewell*, 2015 U.S. Dist. LEXIS 33664 (D. D.C., March 18, 2015).

⁵ See Notice of Availability.

⁶ Draft Handbook at 9-3.

⁷ See 16 U.S.C. 1539(a)(2)(B).

language, and thereby creating confusion by making – or even suggesting – that no net loss could be a mandatory requirement.

Similarly, the Draft Handbook does not go far enough to drive home the point that a net benefit standard is, at most, purely aspirational rather than mandatory. The 1996 Handbook made this point more explicitly. It explained at pages 3-7 and 3-21 that the Services should advise ITP applicants regarding “project modifications that would minimize take and reduce impacts, or, ideally, *and with concurrence of the applicant*, would generate an overall measurable net benefit to the affected species” (emphasis added).

A sound reason for explicitly limiting the “no net loss/net benefit” preference to one which is aspirational only is due to the inherent difficulty in determining when species and/or their habitat may be declining due to reasons unrelated to the covered activities in a given HCP. For example, White Nose Syndrome affecting certain bat species and sea level rise affecting sea turtle habitat are likely not tied to any given applicant’s covered activities; thus, it may be impossible for an applicant’s HCP to meet a “no-net-loss/net-benefit” standard – especially when one considers the issue of practicability. Although minimization and mitigation measures may, in fact, produce a net benefit with respect to impacts of the particular proposed taking, other exogenous factors may be causing an overall loss. Minimizing and mitigating the impacts of the taking resulting from the covered activities in the HCP is the most direct and quantifiable means to ensure that the impacts under the control of an applicant are appropriately addressed.

In sum, there is no basis for stating a no net loss standard as the minimum requirement; rather, it is the *maximum* that could possibly be required, and even then *only if it is practicable*. The only source the Draft Handbook points to as authority for imposing no net loss as the minimum requirement is the November 6, 2015 Presidential Memorandum regarding mitigating natural resource impacts,⁸ section 3(b) of which states that “agencies’ mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives.” The Presidential Memorandum, however, correctly acknowledges that its standards apply only “to the extent permitted by each agency’s legal authorities.” A Presidential Memorandum cannot augment, supplant, replace, or otherwise alter an agency’s statutory authority. Indeed, presumably in recognition that the ESA’s ITP issuance criteria do not require no net loss as a minimum, section 4(d) of the Presidential Memorandum instructs USFWS to “finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973.” To avoid confusion, therefore, the statement at page 9-3 quoted above, suggesting that no net loss is a mandatory minimum standard for issuance of an ITP, should be deleted from the Draft Handbook, and the Services should clarify that providing a net benefit to covered species is purely aspirational, optional, and voluntary for the applicant, and is in no way to be a requirement of an HCP.

The Draft Handbook could be greatly improved if the Services focused on the actual legal requirements applicable to HCPs and ITPs as set forth in ESA section 10, relevant implementing regulations, and applicable federal case law. We believe such a focus would benefit the Draft Handbook as a whole, making the Handbook more useful both to the Services and to the

⁸ *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*. Found at <https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related>.

regulated community, which often looks to the agencies' guidance to assist in the development of HCPs that will meet ESA section 10 issuance criteria and allow projects to move forward as quickly and efficiently as possible.

V. CLIMATE CHANGE PLANNING.

The Draft Handbook makes numerous references to planning for climate change, but it is unclear how such planning is to be integrated into the permit issuance criteria of ESA section 10(a)(2)(B). For example, the Draft Handbook states at page 7-16 with respect to threat evaluation that the Services should consider whether there are "areas within the HCP that should be conserved to help reduce the effects of climate change on the species (e.g., provide a diversity of conditions that will allow the species to adapt to changing conditions, or that facilitate movement in response to changing conditions)." Later, on page 9-4, the Draft Handbook states that "HCP conservation strategy, as well as our section 7 and NEPA work related [sic] HCP permit issuance, must consider climate change and its effects." Yet the Draft Handbook does not explain how these evaluations are or will be tied to any of the issuance criteria.

Of particular concern in this regard is how climate change planning is factored into the minimization and mitigation criterion. For example, at page 9-24 the Draft Handbook states that mitigation can include "restoration of degraded habitat to natural condition/function, or to a condition likely to be resilient to projected changes (e.g., in response to ongoing and projected climate change impacts)." In this scenario, should habitat be restored to historic natural conditions, any additional measures to facilitate climate resilience should be considered as a net benefit to the species. However, and as discussed above, under no circumstance should it be required that an applicant for an ITP create such a net benefit to the species.

The starting point for considering how to integrate climate change in this respect is that the ESA does not require that any resource owner implement measures to prevent impacts of climate change from affecting a listed species. For example, if rising surface temperatures were expected to degrade habitat of a listed species, the owner of the habitat would not be required to intervene to reduce or avoid those effects or otherwise make the habitat climate resilient. In other words, a landowner conducting no activities on the land has no obligation under the ESA (or any other statute) to make a listed species more climate-resilient.

This principle necessarily must carry over to the ITP issuance criteria. For example, if the owner of the habitat described above were to seek an ITP for an action involving clearing some of the habitat, mitigation could involve providing compensatory habitat elsewhere through habitat enhancement. The point of such compensatory mitigation is to replicate habitat conditions as they exist at the time of permit issuance. The anticipated effects of climate change on that compensatory habitat would be part of the baseline for purposes of the mitigation criterion, meaning that the ITP applicant should not be required to compensate above the baseline condition. The Draft Handbook should provide more guidance in this respect and make clear that any measures in the HCP designed to reduce future effects of climate change within compensatory habitat cannot be forced upon the applicant.

Climate change also may present scenarios in which it makes sense in terms of species benefits to place less emphasis on enhancing present habitat for purposes of mitigation and focus instead on securing areas likely to provide suitable habitat for the species in the future. For example, if a species' range is moving northward due to temperature regime shifts, securing habitat ahead of that shift may provide more benefit to the species than would securing habitat in

areas expected to fall out of the species' range. The Draft Handbook could more clearly address this possibility and how it would be factored into the mitigation criterion.

Finally, it may be worthwhile for the Services to consider the fact that, particularly for project-specific HCPs, it may be impossible – or at least prohibitively impractical – to predict what might happen to habitat at the project-scale. Climate change considerations may be more appropriately kept for geographically-large HCPs (e.g., multi-state plans) or for cumulative effects – rather than minimization and mitigation – discussions.

VI. LOW-EFFECT HCPs.

As noted in Section I above, the Draft Handbook lacks clear and sufficient guidance regarding developing HCPs that are small or modest in scale. Significantly, the Draft Handbook provides scant information regarding the “low-effect HCP.” While the 1996 Handbook described in relatively sparse detail whether and when a low-effect HCP was appropriate, due to changes in the overall federal regulatory landscape since the release of the 1996 Handbook, the Draft Handbook should include a robust discussion of the requirements, subtleties, and nuances associated with these types of HCPs, particularly in light the recent decision in *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31 (D.C. Cir. 2015). That case held that while USFWS was free to conduct its ESA section 7 analysis using an action area defined by USFWS regulations, a federal action agency could, at the same time, limit the scope of its jurisdiction in an ESA section 7 consultation to those areas over which the agency exercises direct control. This lack of congruence regarding the jurisdictional action area places a project proponent in the undesirable situation of being required to undergo ESA section 7 consultation, while at the same time, potentially being unable to receive incidental take authorization for take that may occur outside the area over which the federal action agency is willing to take jurisdiction. In such a case, a project proponent may desire to seek a small-scale or low-effect HCP to cover potential take in areas included within the Services' action area but outside the area over which the federal action agency took jurisdiction. In such cases, procuring low-effect or small-scale ITPs in a prompt and timely manner will be important for project proponents, and delays in processing these types of plans will likely create a disincentive for project proponents to use the program at all.

While the 1996 Handbook indicates that processing a project-level HCP should take between three and ten months, the reality is that approval of an HCP and issuance of an ITP often take much longer. Unlike the timeframe for HCPs that require an environmental assessment or environmental impact statement pursuant to the National Environmental Policy Act (“NEPA”), the 1996 Handbook indicates that the processing time for a low-effect HCP should be less than three months.⁹ In a scenario such as that described above, a low-effect HCP may both be appropriate and desirable as often the impacts that occur outside the federal action agency's jurisdiction are minimal and the timeframe in which the project proponent needs to complete its project is set by some other, extraneous, factor such as the expiration of a federal tax credit or lending requirement.

Finally, the Services should make clear in the Draft Handbook that, with respect to both small-scale and low-effect HCPs, an applicant should be able to mitigate for temporary and small permanent effects without having to follow the expensive, complicated, long-term or perpetual adaptive management requirements described in the current Draft, which are better suited, when

⁹ 1996 Handbook at 1-14.

warranted, for large, complex HCPs where administrators are often retained for that very purpose.

VII. NEPA AND ESA SECTION 7.

Like the 1996 Handbook, the Draft Handbook is predicated on the assumption that the provisions of NEPA and ESA section 7 apply to the Services' issuance of ITPs under ESA section 10. However, the Services and federal courts recognize that those provisions do not apply to all agency actions. Indeed, following the U.S. Supreme Court's decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 687 (2007) ("*Home Builders*"), the assumption that NEPA and ESA section 7 apply to the Services' issuance of ITPs may not be correct, as that case implies that incidental take permitting may be the kind of action that falls outside the scope of both NEPA and ESA section 7.

Home Builders involved the Services' joint regulations for implementing section 7, which provide that "[s]ection 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."¹⁰ In other words, ESA section 7 consultation requirements do not apply to actions over which there is no discretionary federal involvement or control. In *Home Builders*, the Court upheld the regulation and the agencies' implementation, ruling that the regulation is reasonable in light of the statute's text and the overall statutory scheme. Similarly, for decades the Department of Justice has argued, and the courts have agreed, that NEPA does not apply to nondiscretionary agency actions.¹¹

At issue in *Home Builders* was whether the provision of the Clean Water Act governing transfer of permitting authority from the Environmental Protection Agency ("EPA") to the states fit the above-referenced regulation's description of a nondiscretionary federal action and thus fell outside the purview of ESA section 7. The majority of the Court determined that because the provision requires EPA to evaluate specified enumerated standards and, if met, mandates that EPA "shall" delegate authority, ESA section 7 is not applicable to the delegation decision. Rather, the majority concluded, "while the EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out [the] enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list."^{12, 13} Hence, once the EPA determines that a state has met the enumerated criteria, it is duty-bound to transfer permitting authority to the state and thus cannot subject the decision to ESA section 7 review.

Prior to *Home Builders*, the EPA had been subjecting its delegation decisions to ESA section 7 assessments—the agency's change of mind regarding the meaning of the joint consultation regulations is what led to the litigation in that case. Since *Home Builders*, a number of federal agencies have re-examined the implications of their respective permitting and other authorities to determine whether NEPA and ESA section 7 procedures apply, and lower courts have adhered to the *Home Builders* principle by not requiring agencies to undergo those

¹⁰ See 50 C.F.R. § 402.03

¹¹ See, for example, the discussion in *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144 (D.C. Cir. 2001).

¹² *Id.* As noted above, the majority also rejected the argument that the ESA imposes such a prerequisite by its own terms, concluding that the ESA neither explicitly nor impliedly preempted the Clean Water Act's narrow enumerated standards. *Id.* at 664.

¹³ *Id.* at 671.

procedures when statutory provisions specify that an agency “shall” issue a permit or other approval if specified findings are met.¹⁴

The statutory provision at issue in *Home Builders* (Clean Water Act section 402(b)) is remarkably similar to the statutory provision in ESA section 10 governing issuance of ITPs. Section 10(a)(2)(B) states that “if the Secretary finds” that the issuance criteria set forth in sections (i)-(iv) of that section are satisfied and implementation assurances have been received, “the Secretary *shall* issue the permit” (emphasis added). The Draft Handbook, in section 13.1.2 similarly points out that “[s]ection 10 of the ESA specifically directs the Service[s] to issue incidental take permits...for take of [listed] species when the criteria in section 10(a)(2)(B) are satisfied by the applicant.” As *Home Builders* establishes, the fact that the Services have some discretion as to whether the conditions for permit issuance are met is not the relevant question. The question is what discretion the agencies have once they find an HCP meets the conditions. In that respect, there is no room under the statutory structure for the Services to decline to issue an ITP if the stated conditions are met, hence there is no discretion left in the agencies’ decision once they find the conditions are met. Under *Home Builders*, ESA section 7 cannot apply to such an action, and under extensive judicial precedent, neither can NEPA.

It is also reasonable to conclude that Congress did not mean to subject ITP issuance to NEPA and ESA section 7. As for NEPA, the sole environmental factor the Services are authorized to consider in the ITP evaluation is the impact (or impacts) of the taking on the covered species. Thus, no other environmental impacts are relevant. As for ESA section 7, the “not appreciably reduce” issuance criterion discussed above duplicates the standard applied under ESA section 7, thus indicating Congress meant it to apply only to the species involved in the HCP rather than subjecting the incidental take permitting process to a broader scope—for example, that would include examining impacts to listed plant species—under section 7. Had Congress meant ESA section 7 to apply to ITP issuance, the “not appreciably reduce” issuance criterion would have been unnecessary to specify in section 10.

Given these considerations and the extensive case law developments on this issue after *Home Builders*, it would be appropriate and prudent for the Services to reevaluate its application of NEPA and ESA section 7 to the ITP program.

VIII. NATIONAL HISTORIC PRESERVATION ACT (“NHPA”).

Similar to our concerns regarding NEPA and ESA section 7 described above in Section VII, it is not entirely clear as a legal matter that issuance of an ITP constitutes a federal “undertaking” under the NHPA, as the Services’ issuance of ITPs can be construed as non-discretionary activity. Assuming for the sake of argument that the issuance of an ITP is considered an “undertaking” pursuant to NHPA, we are concerned that, unlike the Draft Handbook’s treatment of NEPA, the Handbook fails to define the limited nature of that undertaking: it is simply the Services’ authorization of take and not authorization of an underlying project. Indeed, the Draft Handbook seems to suggest that NHPA review attaches to the entire underlying project. Such an interpretation is incorrect.

Finally, the Draft Handbook offers little, if any, guidance on how to address NHPA in large-scale HCPs where the area of potential effects cannot be known with precision at the time of ITP issuance. In sum, treatment of the NHPA in the Draft Handbook needs careful reconsideration by the Services, including specifically revising any language suggesting that the

¹⁴ See, for example, the discussion in *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir.2015).

“undertaking” for purposes of NHPA includes activities other than the Services’ authorization of incidental take.

IX. APPENDIX B – SPECIAL CONSIDERATIONS FOR INCLUDING USE OF PESTICIDES IN HABITAT CONSERVATION PLANNING.

We believe it important to point out the Services’ unexpected decision to devote an entire appendix to the application of pesticides—the only non-federal activity treated in such detail—even though there are myriad other non-federal activities that may cause equal or greater impact on listed species. This is an abrupt departure from the single sentence mention in the 1996 Handbook. We do note several overarching concerns for the Services’ consideration.

EWAC recognizes that some federal courts have required the EPA and the Services to undergo ESA section 7 consultation in connection with registration and registration review of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”). If such a review of pesticides is to be required, the registration and review process is the appropriate context to undertake such a review, as it is the EPA, along with the manufacturers and importers of pesticides who possess the requisite knowledge to undergo meaningful consultation. We understand that ESA section 7 analysis on the potential impacts of a given pesticide is extremely complex and costly, consumes a very large amount of data, and requires complicated scientific research, modeling, and study. Indeed, it is typical that such consultations are measured in years and not months. For this reason, EWAC believes it is unreasonable for the Services to require such analysis be conducted with respect to most – if not all – HCPs. Applicants for ITPs, simply, are not the appropriate parties to undertake this review.

In requiring consultation over pesticide application as part of the ITP process, Appendix B would subject applicants to a level of informational and analytical demand that typically would be reserved for registration and reregistration reviews of pesticides under FIFRA. Such analysis in the HCP context would unnecessarily and inappropriately duplicate analyses already undertaken under FIFRA. Furthermore, this position is completely unreasonable as most applicants will not possess the level of knowledge, expertise, or resources required to undertake this kind of analysis. As a result, applicants are likely either to abandon pesticide application as a covered activity under an ITP or to abandon the ITP process altogether because an ITP without pesticide use coverage could eliminate the very regulatory certainty sought by applicants in the first place. Certainly neither outcome is desired by the Services.

Finally, we note that Appendix B places a substantial burden upon the Services by establishing a new set of federal agency actions that must undergo pesticide-related consultation. The Services already are underwater attempting to complete consultation associated with the EPA’s registration and registration review under FIFRA. The Services do not have the resources to process an entirely new category of FIFRA-related consultations. EWAC recommends that the Services remove Appendix B when they finalize the Draft Handbook.

X. HCP HANDBOOK TOOLBOX

The Draft Handbook makes multiple references to an HCP Handbook Toolbox, which is described on page 1-14 of the Handbook as containing “detailed information” about the “processes and requirements for developing and approving HCPs.” As indicated throughout the Draft Handbook, however, the HCP Handbook Toolbox is not yet available for public review. We believe this Toolbox should be submitted for public review and comment prior to finalization of the Draft Handbook.

Moreover, EWAC is concerned that the HCP Handbook Toolbox is described by the Services as a “dynamic” document that is “equally [as] important to understanding the HCP program” as the Handbook itself, and apparently will include items that could have a significant impact on the HCP process such as “compliance checklists” and a more detailed description of how climate change should be addressed in HCPs.¹⁵ In addition to making the current draft Toolbox available for public review and comment prior to finalization of the Draft Handbook, EWAC believes any future revisions to the Toolbox should be given the same treatment.

Thank you for the opportunity to comment on the Draft Handbook. EWAC looks forward to continuing to work with the Service in its efforts to continually improve implementation of the ESA and other federal wildlife laws. Please feel free to contact the following EWAC representatives:

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¹⁵ See, e.g., Draft Handbook at 1-14, 2-3, and 9-5.

Detailed EWAC Comments on June 28, 2016 Draft Revised HCP Handbook

#	Chapter and Section	Handbook Provision or Concept	Comment
1	List of Acronyms	Abbreviations	This section appeared to contain a few typos. We recommend a careful review prior to finalization. For example, the Glossary includes the acronym “BGPA” but the body of the Draft Handbook uses “BGEPA.” Similarly, the Glossary uses the acronym “FWS” while the body of the Draft Handbook uses “USFWS.”
2	Glossary	Definition of “action”	We believe that either here or elsewhere in the Draft Handbook it would be useful for the Services to explain how federal courts, including the Supreme Court, have interpreted what are and are not federal discretionary actions for the purposes of the ESA. Please see our cover letter for further elaboration on this concern with regard to incidental take permitting (“ITP”) actions.
3	Glossary	Definition of “amendment”	The text should be clear that the Services’ right to amend an ITP is subject to the No Surprises Rule.
4	Glossary	Definition of “anticipated/allowable/authorized”	This definition should include the concept of take being “reasonably certain to occur,” as emphasized in recent USFWS regulations. See 80 Fed. Reg. 26832, 26837 (May 11, 2015).
5	Glossary	Definition of “applicant”	This definition appears to adopt the ESA section 7 definition of an applicant in the Draft Handbook, which concerns HCPs and ITPs under ESA section 10. This contradicts the established principle that HCPs and ITPs are not a “prerequisite to conducting an action” but are purely voluntarily sought by an applicant.
6	Glossary	Definition of “conservation program”	This definition refers to a conservation plan, “the aim of which is to avoid, minimize, and compensate for impacts...” This is inconsistent with the actual language of the ESA, which states that a conservation plan need

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			only minimize and mitigate the impacts of the proposed taking. Avoidance measures are at the discretion of the applicant as a feature of project design. Please see our cover letter for further elaboration on this concern.
7	Glossary	Definition of “direct effects,” ESA	Contrary to this definition, the ESA and its regulations do not contemplate direct effects to <i>habitat</i> . Effects to habitat should in almost all instances be considered as indirect impacts to the species, as any impacts to species would occur later in time.
8	Glossary	Definition of “funding assurances”	This definition is too long and extends into more detailed guidance. This topic is addressed in detail in the body of the Draft Handbook and including a definition in the glossary is not necessary.
9	Glossary	Definition of “goal”	The definitions for the terms “goal” and “biological goal” appear to be identical. We recommend using only one term.
10	Glossary	Definition of “HCP area,” “HCP boundary,” and “plan area”	These definitions appear redundant. We suggest using only one term throughout the Draft Handbook for clarity or further elucidating the difference between the terms, if any.
11	Glossary	Definition of “low effect HCPs”	The Services should consider consolidating all guidance on low-effect HCPs to a single chapter.
12	Glossary	Definition of “maximum extent practicable” (“MEP”)	This definition essentially says that MEP is the most an applicant can practically do. This is particularly unhelpful and will lead to confusion and conflict as applied in the field. There are numerous considerations that should be mentioned, including the scope and scale of the impacts proposed. If an applicant proposes a minimization and mitigation program that does not appropriately offset the impacts of the taking, then the applicant should be required to provide a level of minimization and mitigation that is commensurate with the scale of

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			the undertaking, taking into account potentially numerous factors, such as technological and financial viability, availability, risk, market factors, precedents, etc. It should categorically not be that MEP means the applicant provides the last dollar that it possibly can.
13	Glossary	Definition of “NEPA (analysis) document”	We suggest merging this definition with the definition for “Environmental document” and deleting the term “NEPA (analysis) document.”
14	Glossary	Definition of “operating conservation program”	This definition indicates that one aim of an HCP is to avoid take. This is not true as it is inconsistent with the relevant statutory provisions of the ESA. Avoidance is not required under the ESA. An applicant may voluntarily include avoidance measures in an HCP as part of project design. Please see our cover letter for further elaboration on this concern. Additionally, we wonder whether this term is necessary given that an HCP includes the conservation program supporting the application for an ITP. We also note that the Draft Handbook does not actually use this term in its body.
15	Glossary	Definition of “qualified applicant”	This definition should be expanded to include applicants that <i>will</i> have legal authority to implement the terms of the ITP and HCP at the relevant time, and should not limit ITP applicants only to those that have actual control at the time of the application. Revising this definition in such a way would reflect the reality that, often, a project proponent will seek to ensure that its project can move forward prior to committing resources towards gaining the kind of control required by the current definition. In fact, in some instances, it could be impossible or even illegal for certain entities to own land prior to an ITP application (e.g., utilities, schools, pipeline companies, etc.) In addition, this definition should

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			include entities having the right of eminent domain to gain control of the lands in question as and when necessary to implement an HCP.
16	1.1	There is a statement that: “Before 1982, the ESA had a mechanism for exempting take prohibitions from Federal actions (section 7) [...]”	The 1982 amendments to the ESA included the incidental take statement provisions of section 7 as well as the ITP provisions of section 10.
17	1.2.3	There is a statement that: “It also addresses opportunities for streamlining NEPA compliance with the National Environmental Policy Act (NEPA) on the action of issuing an incidental take permit.”	As we describe in our cover letter on overarching issues, there is at least a question given the inclusion of the term “shall” in ESA section 10, and under Supreme Court and lower federal court, as to whether NEPA and section 7 apply to the Services’ issuance of ITPs.
18	1.2.3	There is a statement that: “Another lesson learned in recent years is that the important task of integrating climate change considerations into HCPs...can be challenging.”	We note that for HCPs to truly and effectively integrate climate change, mitigation policies must be more flexible. For example, current occupancy of a mitigation site might be irrelevant if that site is reasonably likely to be inundated by sea level rise in the next decades. Instead, currently unoccupied, more upland sites should be considered. Further discussion on climate change is included in our cover letter.
19	1.3.1	There is a statement that: “The heads of Federal departments and agencies can issue policies to inform staff and the public about how they interpret and implement specific regulations or other requirements.”	These would be interpretive rules and would require appropriate public notice and comment.
20	1.3.1	There is a statement that: “Federal agencies are expected to comply with all formally promulgated policies that apply to their work.”	It is not clear what is meant by “formally promulgated policies.” Non-legislative rules and policies are not binding on the agency.
21	1.3.1	There is a statement that: “These policies can be issued in the form of Secretarial, Executive, or Director’s Orders; agency policy manuals; memoranda; or handbooks, such as this HCP Handbook.”	There is no difference between these and “guidance.” EWAC has prepared and will soon provide to the Service a detailed paper on these issues, providing examples from recent actions by the Services.
22	1.3.1	There is a statement that: “Staff typically must comply with formal	EWAC would like to point out that the Services must be careful not to treat

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		guidance...”	guidance as law. Federal courts have weighed in on the question of whether something that on its face appears to be guidance has gone so far as to be tantamount to regulation and, therefore, requires compliance with the notice and comment provisions of the APA. In some instances, courts have even ruled such guidance as invalid.
23	1.3.2.3	There is a statement that: “States, counties, cities, municipalities and other political subdivisions that regulate or issue permits for certain activities (e.g., building permits, capital improvement projects, etc.) that could result in unauthorized take may be held equally liable for violation of section 9.”	This statement concerns EWAC, as the Services appear to be taking a new approach by implying that they will hold governmental entities vicariously liable for unauthorized take of listed species. This is problematic for many reasons. In some places, governmental entities are prohibited by state law from basing permitting decisions on an applicant’s compliance with the ESA. Furthermore, pursuing an enforcement action against a governmental entity based on the entity’s issuance of some kind of approval to a third party, who then violated section 9 of the ESA, would seem to place a new requirement upon the general population: that failure to prevent another party from taking a listed species is a violation of section 9. Certainly had Congress intended such an interpretation, it would have made its desire clear. As it stands, the statute, regulations, and case law are devoid of any indication that such a state or local governmental entity is responsible for preventing third parties from violating the ESA.
24	1.3.2.3	There is a statement that: “The Services must conduct an intra-Service consultation under section 7(a)(2) when issuing a permit for incidental take under section 10(a)(1)(B).”	As noted above and discussed in greater detail in our cover letter, there is precedent that suggests that section 7 consultation may not apply to the Services’ issuance of ITPs under ESA section 10.
25	1.3.3	There is a statement that: “Issuance of an incidental take permit is a Federal action subject to NEPA compliance.”	As noted above and discussed in greater detail in our cover letter, there is precedent that implies that NEPA may not apply to the Services’ issuance of ITPs under ESA section 10.

#	Chapter and Section	Handbook Provision or Concept	Comment
26	2	Overview of the HCP Planning Process	Chapter 2 and much of the Draft Handbook are geared to large HCPs. The Services should explain in Ch. 1 that there are many types of HCPs and much of the top-heavy, intensive provisions are neither necessary nor intended for smaller-scale HCPs. Comments to this effect follow throughout and are addressed in further detail in our cover letter.
27	2.2.4	“Although some listed species are located on wildlife refuges, national parks, military bases, and other Federal lands, the majority of listed species are on non-Federal lands. The Services can’t recover those listed species alone. Flexible, creative partnerships between public and private sectors that consider the best available science, and good judgment, and that collaborate in good faith can help to integrate non-Federal development and land use activities with conservation goals. HCPs provide a solution to applicants’ doing what they need or want to do – while complying with the ESA.”	As set forth in greater detail in our cover letter, while species recovery is a laudable goal, it is not required by the ESA with respect to the Services’ issuance of ITPs. HCPs were designed by Congress to authorize incidental take, not to be mandatory recovery tools.
28	2.3	There is a bullet stating: “Remember the HCP is the applicant's document.”	We appreciate the Services’ inclusion of this statement. We also believe it is important to emphasize that the applicant – and not the Services – is responsible for specifying the activity that causes take and the amount of take requested to be covered by the ITP, among other things. The Services are free to suggest changes in project design that would reduce the level of take, but cannot require any such changes be incorporated into the HCP.
29	2.3	There is a statement that: “Some HCP conservation strategies and mitigation programs are relatively straightforward, while those for large-scale, regional planning efforts may be quite complicated.”	One of the overarching comments in our cover letter is that the Draft Handbook seems focused to a great degree on large-scale HCPs and does not place enough emphasis on how the guidance and practices set forth in the Draft Handbook should be adjusted depending on the scope or complexity of the particular HCP in question.

#	Chapter and Section	Handbook Provision or Concept	Comment
30	2.3	Tips for Success	As noted above and described in greater detail in our cover letter, the purpose of an HCP is not to recover a species. The purpose of an HCP is to support an application for an ITP, and to meet the issuance criteria of ESA section 10(a), none of which require driving a species towards recovery.
31	2.3	There is a statement that: “At the beginning of the HCP process, explain to the applicant the Services' section 7, NEPA, and NHPA obligations for issuing an ITP.”	As noted above and discussed in greater detail in our cover letter, there is precedent that ESA section 7 and NEPA may not apply to the Services’ issuance of ITPs. Additionally, NHPA may not apply to nondiscretionary actions. <i>National Association of Home Builders v. Defenders of Wildlife</i> , 551 U.S. 687 (2007). See also <i>Citizens Against Rails-to-Trails v. Surface Transp. Bd.</i> , 267 F.3d 1144 (D.C. Cir. 2001).
32	Table 2.4a	Hypothetical Timeline for HCPs	Given the Draft Handbook’s emphasis on streamlining, we believe that, in some instances, timelines can be compressed to be at least somewhat more reasonable. As noted above and in greater detail in our cover letter, an overarching issue with the Draft Handbook is that it tends to focus heavily on large-scale, complex HCPs. While such HCPs are important, care should also be given to addressing the more routine, well-established project-level HCPs, as well as low-effect HCPs. For example, it should not take 2.5 years to obtain an ITP for a small stretch of electric transmission line impacting a single species. There have been dozens of preceding HCPs. The same should be true for any small- to mid-sized project – regardless of the industry involved. In these instances, we believe 12-18 months is perfectly reasonable. We also believe that the Draft Handbook should put more emphasis on matching the expected level of effort of the responsible parties to the scale, scope, context, and

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33	2.5.1.1	This section involves advice the Services should give to applicants when selecting HCP consultants.	historical precedent for each HCP under consideration. Small, non-controversial HCPs should move forward with a markedly lower level of effort. Finally, the Services should consider providing specific target timelines for processing the following: low-effect HCPs; project specific HCPs; and regional, industry, and/or large-scale multi-species HCPs. We believe this section should be deleted in its entirety. The Services should not have any role in the process of applicants selecting their HCP consultants. Such a role is a slippery slope and can and has resulted in some serious abuses. The relationship between the Services and the consulting community is complex and nuanced. A number of consultants have prior careers at the Services. This section creates an environment that could lead to favoritism on one end or black listing on the other.
34	2.5.2.1	“The June 24, 2014, FWS Service Manual Part 730 FW1 allows incidental take permit signature authority to be delegated to the field office supervisor by the Regional Director for HCPs that meet categorical exclusion (e.g., low-effect HCPs) and for incidental take permits for HCPs that met the environmental assessment requirements under NEPA. In these cases, the field office closely coordinates with the Regional office, but the tasks usually assumed by the Regional office to issue the permit are the responsibility of the field office. This process is described in more detail in Chapters 13-15.”	The Services should consider consolidating all guidance on low-effect HCPs into a single chapter. This comment applies to any place in the Draft Handbook where low-effect HCPs are mentioned or discussed.
35	2.5.2.1	There is a paragraph describing how NEPA documents must be prepared by a consultant other than the HCP consultant.	We believe that for the vast majority of HCPs this approach is unnecessary and overly burdensome. Most project-specific HCPs are reviewed at an EA level. Many of these EAs are fairly straightforward documents. Requiring a separate consultant to prepare the

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			<p>EAs in those instances will undoubtedly increase cost and time. This goes against the overall streamlining approach of the Draft Handbook. There are numerous instances in which project-specific EAs have been prepared by the HCP consultant, although sometimes the Services have required that the consultant provide a different specialist from within the consultant's ranks for that purpose. In all events, the EA remains the Services' document subject their review and approval. We note that the Services appear to clarify in section 3.8.2 of the Draft Handbook that this required separation applies strictly to preparation of an EIS, but not necessarily to preparation of an EA, and recommend that the Services either make that point in section 2.5.2.1 or remove this paragraph in its entirety. Notwithstanding the foregoing, we note again that NEPA may not apply to the Services' issuance of ITPs.</p>
36	3.1.1	<p>“Harassment occurs when an activity creates the likelihood of injury to wildlife by annoying it to such an extent that it significantly disrupts normal behavioral patterns which include breeding, feeding, or sheltering.”</p>	<p>It should be noted in the text of this section that, as with harm, the action must be the proximate and foreseeable cause of actual injury, and the injury must be of reasonable likelihood.</p>
37	3.1.1	<p>“Harassment results from habitat disruptions, like removal of inactive nest or den trees, removal of forage sources, or other necessary habitat resources.”</p>	<p>We believe strongly that this is not a correct interpretation of harassment. The harm regulation addresses habitat impacts. Extending “harass” to habitat impacts is inconsistent with that regulation, relevant case law, and ordinary meanings of the term “harass.”</p>
38	3.2	<p>Avoiding Take and Avoiding the Need for an Incidental Take Permit</p>	<p>As discussed comprehensively in the cover letter, take avoidance fundamentally is a matter of project design.</p>
39	3.2	<p>There is a statement that: “However small, no project is exempt from an incidental take permit if we are</p>	<p>This sentence needs to be reworded or deleted. It implies that the Services can require a party to obtain an ITP or</p>

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		reasonably certain it will result in take of a listed species.”	exempt that party from obtaining an ITP. Neither is, of course, true. Obtaining an ITP remains the voluntary choice of the applicant no matter what the Services consider to be the likelihood of take.
40	3.3	“A qualified applicant is one who has the legal authority to execute a project on the lands that are proposed for coverage under an HCP, and who has enough legal control of the land to implement the HCP. Legal control may comprise ownership of property in fee simple, a lease agreement that grants authority for the proposed project, or a similar type of legal authority to conduct the proposed activities (50 CFR 17.22(b)(2)(F), 17.32(b)(2)(F)).”	As mentioned elsewhere in the Draft Handbook, contracts can also qualify as legal authority. Also, as we mentioned, consideration should be given to entities possessing the right of eminent domain.
41	3.3	“Under certain conditions, see section 3.4.4, below, contractually bound groups can apply.”	It is important to recognize that the Services have approved HCPs where the applicant does not have this form of legal ownership or control. Indeed, many – if not most – transmission line rights-of-way are obtained through legal agreements rather than through a utility company’s outright purchase of fee simple title.
42	3.3	“In addition to having legal authority to carry out the proposed project, the applicant must also have direct control over any other parties who will implement any portion of the proposed activity and the HCP, (see 50 CFR 13.25; 50 CFR 222.305(b)). ‘Direct control’ under this regulation extends to: [...] anyone under the regulatory jurisdiction of a permittee, such as where the permittee is a governmental agency (e.g., a county that issues building permits to individuals and puts conditions in their permits to implement the HCP)[...]”	The Draft Handbook should make clear that requisite control can be and has been exercised through contract, even in ITPs issued to local governments. For example, in Texas, where it is legally impermissible for local governments to regulate lands or activities on the basis of endangered species, all county-wide plans rely on contracts for control, rather than regulation.
43	3.4.2	“In contrast, programmatic plans typically rely on a central, or master, permit holder, often a State, county, or municipality, in the area proposed for	The use of the word “landowner” should be broadened, as possible participants in large-scale HCPs can include individuals and entities other

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		plan coverage. The Services negotiate an HCP with the central authority so that that authority receives an incidental take permit as the master permittee. Eligible landowners in the permit area can receive incidental take authority and No-Surprises assurances through the master permit via local regulatory instruments (building permit, percolation test, certificate of occupancy, etc.), or through a certificate of inclusion provided for in the HCP and incidental take permit.”	than landowners.
44	3.5.1	“For such routine activities, we must stay mindful that we do not enforce State and local laws authorizing the activity. This means that we do not generally evaluate an applicant’s compliance with local requirements (though we may refer an applicant’s noncompliance with appropriate authorities), nor do we second guess a local jurisdiction’s interpretation or enforcement of its requirements.”	As a practical matter, ITP applicants may not be in a position to confirm that all other necessary federal, state, and local approvals are finalized at the time the ITP application is being processed.
45	3.5.1	“Such questions may become more important when the activity under consideration is controversial, such as a community that allows vehicles on a beach, or a State’s fur trapping program. If there is local controversy or political dispute over the covered activity, we may need to ask the applicant for an explanation of their authority concerning covered activities.”	It is not clear how the Services will assess the level of controversy or how this issue factors into the ITP issuance criteria established by ESA section 10. Typically, a large, controversial project is seeking multiple permits and authorizations more or less at the same time. In addition, it can be the case that obtaining an ITP is considered a critical entitlement and the project proponent seeks the ITP in advance of many other permits.
46	Table 3.6	“Is the plan area likely to provide refugia or movement corridors for species vulnerable to climate change effects that are either within the plan area, or that might now exist outside the plan area?”	Please see our cover letter for our concerns regarding planning for climate change and the manner in which it is taken into account in terms of ITP issuance criteria.
47	Table 3.6	“In addition to the ESA permit being sought, are there other permits or regulatory processes that need to be considered?”	We do not believe it is the role of the Services in the voluntary ITP process to consider other permits or regulatory processes. That should be the concern

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48	3.7	“Issuance of an incidental take permit is a Federal action and subject to other Federal requirements. NEPA and NHPA are the two considered in all HCP decisions. The Services must also conduct intra-Service section 7 consultation.”	of the applicant. Furthermore, regulatory processes vary widely from state to state, are site-specific, and often are unknown until a project is underway. As noted above, we do not believe this is necessarily the case. Please see our cover letter for further elaboration on this concern.
49	3.7.3	“Just as we can require conservation measures for listed plants and critical habitat, FWS can also require conservation measures in the HCP and permit conditions to fulfill its MBTA responsibilities. Negotiating conservation measures for non ESA-listed birds will not, however, carry the same weight as listed plants or critical habitat because non-listed bird conservation lacks requirements equivalent to an ESA section 7 consultations.”	There are several legal flaws found within this statement. First, we do not believe there exists legal authority for the Services to require conservation measures for plants and critical habitat within the ITP process. ESA section 9 does not prohibit take of listed plant species, and critical habitat concerns are not invoked except through ESA section 7 consultation. The Services have pointed to no legal authority for including such a requirement in the ITP process. Second, we do not believe that the Services have any legal support to insist on conservation measures in an HCP for non-covered, migratory bird species that are not listed under the ESA.
50	3.7.5	There is a statement that: “...we seek to restore proportion to our NEPA analyses by: empowering the Services to focus the scale and extent of NEPA review.”	We support and agree with this goal and feel it would benefit the ITP process.
51	3.8.2	This section concerns HCP and NEPA documents and makes it clearer that there are, perhaps numerous, instances where it is appropriate and expeditious to have NEPA documentation (particularly EAs) prepared either by the applicant’s HCP consultant or another consultant engaged by the applicant.	Without conceding that NEPA applies in the ITP context, we point out that there is a statement in this section that even where the NEPA document is prepared by the HCP consultant or another consultant engaged by the applicant, the Services still must “select” the consultant. This is highly problematic as it presumably triggers

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52	3.8.3	Advice to Applicants on Selecting HCP Consultants	<p>the Services' cumbersome and time-consuming procurement processes, which would be inconsistent with the type of HCP appropriate for handling the NEPA consultants in this way. Perhaps the NEPA consultant selected by the applicant could be "approved" by the Services, but we do not believe that in these sorts of cases the Services actually intend to go through federal procurement processes.</p> <p>Again, and as mentioned in our comments on section 2.5.1.1 above, we do not believe including a section such as this is appropriate. It creates a slippery slope where, even through relatively benign statements, the Services can influence consultant selection. The vast majority of ITP applicants are sophisticated businesses and state and local governments who have tremendous experience in selecting consultants. Our members have seen situations where applicants were inappropriately steered to former employees of the Services or away from consultants the Services felt were controversial or had taken other, unrelated actions (such as participating in comments on listing/delisting decisions) that had annoyed the Services.</p>
53	Chapter 4, generally	Communicating and Coordinating	<p>A general comment, addressed in more detail in the cover letter, is that this chapter seems to be almost exclusively focused on large-scale, complex HCPs. Guidance should be given on the much reduced need for stakeholder involvement in most project-specific HCPs. Outside of the NEPA context, it is the applicant who should drive the nature and level of stakeholder involvement. For example, in the majority of single-project HCPs it would be inappropriate for the Services to invite a third-party stakeholder to the table without the applicant's consent.</p>

#	Chapter and Section	Handbook Provision or Concept	Comment
54	4.2	<p>“The next step is to decide on a desired response from the stakeholder group. The ultimate response of course is to get all livestock farmers in the region to control their runoff (i.e., to take some form of action conducive to the problem). However, from the Communications Spectrum we know that 100 of the livestock farmers in the karst recharge area may be unaware that runoff from livestock farms is having an adverse effect on endangered species, while 50 others may recognize the problem, but are not convinced they need to do something about it. In this case, we develop communication objectives to: 1) inform those farmers who are unaware that a problem exists, and 2) motivate those farmers that are aware of the problem but not yet taking action to control runoff from their farming operations. Communication objectives for this example might look something like this:”</p>	<p>We suggest that the second to last sentence in Section 4.0 be moved to near the beginning of this section.</p> <p>As a general comment on the overall Draft Handbook, we are concerned that this is one of a multitude of steps the Services have inserted into the process, which is the opposite of streamlining.</p> <p>Specifically with respect to this particular step, it is unreasonable to impose these tasks on the Services. If such a step is necessary, it should be the role of the applicant’s consultant.</p>
55	4.2	<p>“Once we have identified the stakeholders, gained some prior knowledge about them, and decided on a desired stakeholder response, the next step is to develop messages. Messaging requires solving four problems, which means deciding on:</p> <ol style="list-style-type: none"> 1. Message Content (what to say), 2. Message Structure (how to say it logically), 3. Message Format (how to say it symbolically), and 4. Message Source (who should say it). <p>It is important to state up-front that communicators must come to agreement on what needs to be said before any time and money is spent on how best to say it and through which channels. What can you say to farmers in the region that will move them from</p>	<p>We believe these types of concepts in the Draft Handbook are overblown and will apply to very, very few actual HCPs. The Draft Handbook should refrain from prescribing these kinds of strategies to this level of detail and should, instead, leave such strategies to the stakeholders in the very few HCPs that actually require them.</p>

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		their present state of readiness-to act to a higher state of readiness-to-act (i.e., unaware → aware → comprehension → conviction → action)?”	
56	5.1.2	“As we explain in more detail in Chapter 3, otherwise lawful activities are those that the applicant ensures are in compliance with other local, State, and Federal laws.”	The applicant is not required to “ensure” that its activities are otherwise lawful in the sense of providing some kind of guarantee or assurance to the Services. Rather it is simply an applicant’s responsibility.
57	5.1.2	“The HCP must also describe activities that may result in impacts to covered species or their habitats even if those impacts are not in the form of take. For example, noise from an activity might cause a covered avian species to flush, but that flushing response may be infrequent enough that it does not result in death, reduced fitness, or impaired recruitment. Even though such noise does not result in take, the HCP needs to describe the effects and how they may impact the covered species.”	We do not believe this is appropriate. At a minimum, this statement requires further explanation. Any activity that does not result in take is outside the scope of the ITP process.
58	5.2	This section describes the range of activities that may be covered under an HCP/ITP and provides as one example as constructing a multi-state natural gas pipeline.	It may be a small point, but because such pipelines are federally regulated by the Federal Energy Regulatory Commission, would the pipelines not ordinarily be covered under ESA section 7 rather than through the ITP provisions of ESA section 10? We recognize that at least one multi-state pipeline program has been covered through ESA section 10, but perhaps this is simply a very rare exception?
59	5.4	“You should advise the applicant that committing to such measures not only would be good for the species, but also would remove the need for the applicant to mitigate for the impacts of such take. Ultimately, the applicant chooses whether to design their project to avoid take or to include certain activities for take coverage.”	We agree that this correctly characterizes avoidance measures as part of the applicant’s project design and not a required element of an HCP.
60	5.6	Alternative Actions There is a statement in this section that the “no action” alternative means an	In our members’ experience, that is often not the reality. Deciding whether to apply for an ITP can be a complex

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		applicant will abandon the project.	and nuanced risk assessment. An applicant may decide, all things being equal, he or she would rather have an ITP for the assurances it provides. However, there are times an applicant may elect not to pursue an ITP for any number of reasons but still pursues the project. The relevant statutory language requires an HCP to set forth alternatives <i>to the taking</i> considered by the applicant (and why such alternative was not pursued). This is an important distinction as it underscores that in issuing ITPs, the Services are not approving projects. Rather, the Services are authorizing take of listed species that may occur incidentally in connection with those projects.
61	5.6	Alternative Actions to the Taking in the HCP	The rest of this section advances as if section 10 does not limit the analysis to alternatives "the applicant considered." The ESA imposes no requirement that applicants consider alternatives suggested to them by the Services or third parties. The HCP need include only those alternatives the applicant actually considered.
62	5.6	"The HCP must demonstrate that the applicant reasonably considered the alternatives to the proposed action and explain why the applicant did not select each alternative. These explanations do not have to justify impracticability of any alternative. The Services are obligated only to evaluate whether the applicant's explanations appear to be credible and reasonable; therefore, we do not have to analyze the feasibility of the alternatives."	This needs to be emphasized. Section 10 places no substantive standard on rejected alternatives--nothing is required to justify rejection of any alternative. Moreover, we disagree with the Services' statement that the agencies are "obligated...to evaluate whether the applicant's explanations appear credible and reasonable." As previously stated, section 10 places no substantive standard on the applicant's rejected alternatives.
63	5.6	There is a statement that: "... (e.g., burying a power line rather than constructing it above ground where listed birds might otherwise strike it)."	We request that the Services select an alternative hypothetical example. Burying power lines is drastically more expensive than overhead lines and can also require future land disturbances to find and/or fix buried lines which can, in some cases, have greater impact to listed species than repairing overhead

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			lines.
64	6.2	“Although there is not a minimum permit area size, it must be within the plan area and under the control of the permittee or holder of a certificate of inclusion.”	We are not sure it makes sense to require the permit area to be “under the control of” the permittee or holder of a certificate of inclusion. For example, in the multi-state wind HCPs, virtually none of the permit area is currently under the control of the potential permittee or participants.
65	6.3	Analysis Areas	We find this section very confusing and likely contrary to section 7 and the consultation regulations. We believe the discussion of the analysis regarding impacts on a species contained in the current Consultation Handbook provides a much more cogent and understandable approach. To the contrary, section 6.3 of the Draft Handbook could imply that the Services have to look at cumulative impacts to the species over its range. The better and more supported construct is that the Services review the direct and indirect effects of the action within the Action Area (meaning the area within which the species may suffer direct or indirect effects from the action itself.) As the Consultation Handbook points out, the purpose of the analysis is to examine the impacts to the species at the “action level” and then determine whether those impacts – when viewed against the status of the species as a whole – are likely to result in jeopardy. See Consultation Handbook at 4-23 and 4-33. The Services then look at the cumulative effects reasonably certain to occur within the Action Area, not some larger area and certainly not the entire range of the species (unless in the rare circumstance where the entire range of the species falls within the Action Area).
66	6.3.2	Section 7 Action Areas and Analysis Areas	This section is likewise confusing and seems to misconstrue the appropriate Action Area. It suggests, for example,

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			that the Action Area under section 7 should include all areas affected by project noise out to the point that noise levels return to ambient background. This example is missing a critical factor. To be included in the Action Area, an area must be where a <u>species</u> is likely to be affected by the action. The concept of “Analysis Areas” appears out of whole cloth and we do not believe is necessary for the functioning of the HCP program.
67	6.3.2	“Ultimately, the action area can be represented by a polygon that is the farthest extent of all areas likely to be affected directly or indirectly by the covered activities.”	Not necessarily. Impacts could be non-coterminous with activities. The Action Area will not always be determined the way it is described here.
68	6.4.3	Data Management Plan	Requiring a data management plan for essentially all HCPs seems unnecessary and the opposite of streamlining. Perhaps a simple template could be employed?
69	Table 7.0a	Species Coverage in HCPs	This table, and perhaps other discussion, indicates the Services would like listed plants to be “covered” in HCPs. We do not think this is what the Services intend, as actual coverage is not possible. Perhaps a better word might be “discussed” or “considered”? This table also indicates that coverage of an ESA-listed species is “mandatory” if it occurs in the Plan Area. We do not believe that is correct. It is certainly possible that an ESA-listed species may occur in the Plan Area but is not likely to be taken by the covered activities, in which case there is no reason to cover it.
70	7.1	“The impact of the taking cannot be clearly articulated without some baseline information about the presence of the species in the covered area, or a logical explanation of potential impacts based on habitat characteristics, carrying capacities, etc. and by taking into consideration likely future changes	Predictions of future climate change impacts are not part of the baseline.

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		due to climate change impacts or other causes.”	
71	7.1	“If there’s not enough information about a species’ habitat requirements, its potential reaction to changes in habitat resulting from the proposed activities, or the effects associated with some form of disturbance (e.g., noise, artificial light, airplane/helicopter flyovers, human presence, pets, etc.), then the species should not be included in the HCP.”	There are numerous HCPs where, in the absence of better information, the applicants are willing to conservatively assume presence and take. It should not always be the case that lack of information should preclude coverage. The Services are required to make their decisions on the basis of the best science available and are without the discretion to reject an applicant’s proposal to cover a species merely because information is lacking.
72	7.1	“All covered species, listed or not, will be assessed under section 7 for direct, indirect, and cumulative effects and the likelihood of jeopardy, and for listed covered species, adverse modification (if critical habitat is designated in the plan area).” “This is especially important when non-listed species are involved, since there often is little or no information in our files for background information.”	We do not believe the Services possess the legal authority to consult on non-listed covered species. The Services may conduct a section 7 conference with respect to species proposed for listing, but there is no such process for unlisted species that are not proposed for listing.
73	7.2	“If there are listed plants in the HCP area, encourage applicants to also cover those plants.”	There is no take within the meaning of ESA of listed plants and thus an ITP has no effect. Plants simply cannot be “covered” as coverage implies take authorization.
74	7.2	“Each species covered in the HCP will require a thorough analysis of effects and a commitment of time to understand their conservation needs to offset the impacts of the taking.”	It should be noted that this process can likely be streamlined where multiple HCPs have already been processed on a given species.
75	7.4.1	Migratory Birds	This section seems to say that development of Bird and Bat Conservation Plans might be recommended or even required in connection with HCPs. We do not believe this is appropriate. The concept of these plans grew out of a detailed collaborative effort with the wind industry. All participants – including USFWS – agreed that these plans

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			should be voluntary. While a number of ITP applicants are also developing Bird and Bat Conservation Plans, we believe those plans should be on separate, parallel paths with the HCP process and should not by virtue of that process become mandatory conditions.
76	7.4.1	“The Migratory Bird Treaty Act (MBTA) prohibits take of all migratory birds in the United States, and currently the FWS does not have a regulation to authorize take that is incidental to an otherwise lawful activity.”	We note that three federal Circuit Courts of Appeals do not accept that the MBTA prohibits incidental take as that term is understood in an ESA section 10 context.
77	7.4.1	“In general, inclusion of conservation measures, including nest avoidance and disturbance buffers, within the HCP may be incorporated as other measures required as necessary and appropriate.”	We do not believe the Services have the legal authority to require coverage or conservation measures for MBTA species that are not listed as threatened or endangered under the ESA.
78	Figure 7.4a	Different approaches to receive take coverage for eagles and for non-ESA listed birds, different approaches to demonstrate good faith effort to comply with MBTA	Perhaps the Services should address eagles in a stand-alone appendix that can be more readily revised as final eagle permitting rules are adopted and change over time.
79	7.4.2	Bald and Golden Eagles	This section will need to be revised when the final eagle permitting rule is issued.
80	7.4.6	“Because the Services cannot issue a permit that would jeopardize the continued existence or adversely modify the designated critical habitat of any listed species (including plants) covering plants in an HCP may be prudent to avoid these problems in the HCP permitting process.”	As noted above, plants cannot be “covered.” The applicant may discuss listed plants or voluntarily adopt conservation measures if the applicant fears a jeopardy conclusion in the intra-Services consultation associated with the Services’ issuance of an ITP, but they cannot be covered in any legal sense.
81	7.5.1	Effects of Critical Habitat on HCPs	This section should be revised to describe with greater precision the process the Services must follow in accordance with ESA section 7 and relevant implementing regulations. For example, the Draft Handbook indicates that where issuance of an ITP will result in destruction or adverse modification of designated critical habitat, the applicant must adjust the

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			<p>plan to avoid that outcome. However, that description does not accurately describe the requirements of ESA section 7. Rather, the Services, working with the applicant, must develop one or more “reasonable and prudent alternatives” that avoids that outcome. Reasonable and prudent alternatives must be technologically and economically feasible and must be within the jurisdiction of the action agency to implement. Importantly, this section of the Draft Handbook also says that designation of critical habitat within an <i>existing</i> HCP requires reinitiation. It is important to note that with respect to some HCPs, the Services may not even retain sufficient continuing discretion to require reinitiation of consultation. See, e.g., <i>EPIC v. Simpson Redwood Co.</i>, 255 F.3d 1073 (9th Cir. 2001). With respect to HCPs where the Services may retain sufficient continuing discretion to require reinitiation, the Draft Handbook should not include a blanket requirement that the Services reinitiate consultation whenever critical habitat is designated, since the determination of whether critical habitat may be affected is dependent upon the specific facts concerning the particular HCP. There are numerous examples of HCPs that include provisions that anticipate future designation of critical habitat, as well as “No Surprises” limitations on the Services’ imposition of additional measures to address impacts on any such critical habitat.</p>
82	7.5.1.1	Critical Habitat Exclusions	<p>This section needs to be updated based on issuance of the final policy.</p>
83	7.7	Tools	<p>Again, and as noted in several places above, this section should emphasize that the process can be streamlined significantly where ITPs on the same species have already been issued. This draft is extremely daunting to someone</p>

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			who has not worked in this field because it makes every HCP look like an extreme undertaking.
84	7.7.1	Climate Change Analysis	Please see our cover letter for further elaboration on this concern.
85	8.2	Determining Take	Early in this section there is a statement that “Harass occurs when covered species habitat is altered such that species use it less or are totally displaced.” We do not believe this is a reasonable interpretation of harass. Harass connotes activities that directly and immediately change behavior in an injurious way. Defining harass as above is essentially creating a lower threshold of harm.
86	8.2.1	“FWS has developed a conceptual model to guide the process of evaluating effects to individuals, called the effect pathway model.”	While this model may have merit, it should nevertheless be approached with caution. Too often, models intended as mere guidance end up being applied as regulations in the field. The Draft Handbook contains a lot of new approaches, many of which may be very time consuming exercises and may be appropriate only for large-scale, complex HCPs. Therefore, we recommend a cautious, step-by-step approach to implementing this model, as well as care in determining when use of such model is most appropriate.
87	8.2.1	“Interpret the demographic consequence of the individual responses. Once we have identified the responses of individuals, we must translate them into terms that relate to species conservation potential. For example, reduction in a species’ forage base can translate into reduced growth that can delay age at sexual maturity (or reduce size at sexual maturity, or reduce fecundity), which in turn affects reproduction, which ultimately affects species conservation potential.”	We do not believe that “species conservation potential” is the correct target for measuring the impacts of the taking on a given species. The analysis should, instead, look at how the impacts of the taking affect the current status of the species.
88	8.2.2	“When identifying a surrogate measure, it also is important to take climate change considerations into account	This would only be necessary if the HCP has a long time frame over which take will occur. For an HCP with one-

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		because what previously were causal links will not necessarily remain valid due to various effects of climate change. Consider climate change effects that may be important enough to address in the monitoring plan and adaptive measures. Possible examples include: [...]”	time limited duration take that uses a bank for mitigation, this language is not useful. This is yet another example of the Handbook placing too heavy a focus on complex HCPs. Please see our cover letter for further elaboration on this concern.
89	8.3	“While take occurs to individuals, the impact of taking occurs at levels above the individual, such as to the population and the species. Covered activities cause take of individuals, which in turn impacts the population.”	This point should be emphasized.
90	8.3	“Duration of the taking is at least as long as the duration of the permit.”	We do not believe this is quite accurate. If the take is associated with clearing 10 acres of habitat, that take is over once the acres are cleared. The HCP lives on, but the take does not. Again, this draft is geared for large-scale, long-duration actions and fails repeatedly to come back to small-scale, limited duration take scenarios. Please see our cover letter for further elaboration on this concern.
91	8.3	“This is because reproduction, numbers, and distribution are explicitly associated with survival and recovery of the species in the wild as well as one of the incidental take permit issuance criterion [50 CFR 17.22 (b)(2)(i)(D) and 50 CFR 222.307(c)(1)(ii) for NMFS] and the required section 7 analysis.”	Please see our cover letter for detailed comments on imposing a no net loss or a net benefit standard, as well as other related issues.
92	9.0 second paragraph	“On the other hand, a small and simple HCP, such as a low effect HCP, may not need to have in-depth goals and objectives, and may need to account for uncertainty to a much smaller degree (e.g., uncertainty of mitigation in the face of climate change providing conservation value).”	The Services should develop guidance that relieves applicants from having to develop goals and objectives for activities with temporary effects or small permanent effects. Climate change should not be a factor for consideration for low-effect and small-scale HCPs. Moreover, and as noted above, the Services should provide clear and concise guidance and

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93	9.0 third paragraph	Introduction (issues of avoidance and no net loss).	<p>direction regarding the differences in analysis and processing involved for large, landscape-scale HCPs and smaller-scale and low-effects HCPs.</p> <p>This paragraph mischaracterizes an applicant’s obligations under 10(a) of the ESA. It says that an applicant must first do all things to avoid impacts and only then will be required to minimize and mitigate impacts. There is no requirement that an applicant for an ITP avoid impacts to species. The only requirement is that an applicant must minimize and mitigate the impacts of the taking to the maximum extent practicable. While many applicants do voluntarily avoid impacts and incorporate those measures into their project design, our members have had the experience of being told by the Services that the standard is: avoid, minimize, and mitigate, in that order. And, while that is true for some other environmental programs, it is not the standard for ITPs under the ESA. Likewise, the citation to the Presidential memorandum concerning mitigation is misplaced. The Presidential memorandum cannot alter the plain meaning of the ESA and USFWS mitigation policy proposed in response to the Presidential memorandum clearly so states and contemplates a separate policy for mitigation under the ESA. This section also states that HCPs should result in “no net loss of resources or individual animals or plants.” There is quite a bit wrong with that statement. First, there is no legal way to map a “no net loss” standard over ESA section 10(a). Second, because the vast majority of mitigation provided and preferred under HCPs is the preservation of other existing habitat, there is in all of those HCPs by definition a loss in the acres of habitat available to the species. This is considered nonetheless beneficial to</p>

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			<p>the species because the mitigation lands are then perpetually protected from the relevant threats. Third, there is no basis for requiring mitigation to impacts to plants or other unspecified “resources” under an HCP.</p> <p>Please see our cover letter for further elaboration on these concerns.</p>
94	9.0	“Because of the dual nature of HCPs (providing both an avenue for an activity that may impact species and an avenue to implement conservation of species) the applicant must consider how the development affects conservation.”	This is not accurate. The HCP is not the instrument that authorizes take. It is the ITP that does this.
95	9.0	“Applicants should give first priority to adjusting the development project to avoid as many impacts as possible while those impacts that cannot be avoided should be minimized through best management practices.”	This is a project design decision over which the Services have no legal authority. The HCP comes to the Services with project design set. Any discussion of avoidance would be geared towards voluntary project design modification, not requirements of the HCP. Please see our cover letter for further elaboration on this concern.
96	9.0	Section 2. Definitions.	While we understand that this portion of Chapter 9 is summarizing the Presidential memorandum addressing mitigation generally, the Services should point out that the definition of mitigation as set forth in the Presidential memorandum differs from the definition of mitigation in the context of ESA section 10. As noted elsewhere and further elaborated in our cover letter, ESA section 10 does not include avoidance as part of the issuance criteria.
97	9.0	Section 3. Establishing Federal Principles for Mitigation.	The Presidential memorandum cannot and does not take precedence over the ESA itself. The Services cannot impose a no net loss or net benefit standard given the statutory issuance criteria. Please see our cover letter for further elaboration on this concern.
98	9.0	“As considered in this handbook and	This standard is incorrect. Please see

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		consistent with the Presidential memo on mitigation, HCPs should at a minimum fully offset their impacts which results in a ‘no net loss’ of resources or individual animals or plants.”	our cover letter for further elaboration on this concern.
99	9.0	“Further, large scale plans provide a landscape scale conservation vision and programmatic approach, which should confer a net benefit to conservation by virtue of their scale and strategic approach to wildlife conservation.”	As we explain in several comments and in our cover letter, we do not believe it is appropriate to attempt to place a “net benefit” requirement on HCPs. In the quoted language “should” should be “may.”
100	9.0.1	“We should encourage applicants to develop an HCP conservation strategy that integrates climate change considerations throughout the process, and thus is “climate-aligned” by design; this approach is likely to be more efficient and effective than developing a conservation strategy and then trying to retrofit it to include these considerations.”	Please refer to our cover letter, which addresses integrating climate change planning with HCP conservation strategy.
101	9.1	“This is a key point to emphasize when discussing avoidance and minimization with applicants because the amount of mitigation is directly related to the amount of and significance of the impacts of the taking that remain after minimization.”	In addition to our concerns with including avoidance as part of HCP negotiations (see above comments), this language implies that minimizing and mitigating are to be considered sequentially (use of the word “after”). This is not the case. Please see our cover letter for further elaboration on this concern.
102	9.1	“A major point of concern for applicants is knowing how much conservation they will be responsible for achieving. They should develop HCPs to provide conservation that is commensurate with the amount and significance (i.e. impacts) of the taking and we should help applicants understand and navigate how to develop a plan that does this. One HCP permit issuance criterion provides particularly helpful guidance: ‘the applicant will, to the maximum extent practicable, minimize and mitigate the impact of the taking.’”	We appreciate the inclusion of this language in the Draft Handbook. However, we believe it important to point out that, often, ITPs authorize temporary – rather than permanent – impacts to listed species habitat. The Services should provide clear guidance on appropriate mitigation for impacts that either are purely temporary or constitute negligible permanent impacts. The Draft Handbook should encourage the Services to work with ITP applicants to develop mitigation solutions that are commensurate with temporal or negligible impacts

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103	9.1.1	How to Demonstrate “Fully Offset” (Golden cheeked warbler example)	proposed, as, in many cases, shorter term mitigation measures may be more commensurate with the impacts of the proposed taking than typical permanent mitigation approaches. This section contains an example for how to determine appropriate mitigation for the impacts of the taking of golden-cheeked warblers. This example suggests the posited mitigation ratios were “based on research.” We are not aware of any peer-reviewed publications addressing the appropriate mitigation ratio for impacts to the golden-cheeked warbler. Indeed, the ratios set forth in this section are essentially arbitrary and should not be cited as an example of a biologically determined full offset. Given the current available habitat and extensive preserved habitat, one could well argue that lower ratios, in fact, fully offset habitat impacts to golden-cheeked warblers.
104	9.1.3	<i>Union Neighbors United, Inc. v. Jewell</i> , 2015 U.S. Dist. LEXIS 33664 (D. D.C., March 18, 2015)	As noted in several places in these comments and further elucidated in our cover letter, it is inappropriate for the Services to assess minimization and mitigation sequentially when applying the maximum extent practicable standard. Indeed, the <i>Union Neighbors United</i> case cited by the Services in this section supports our position. In that case, the D.C. Court of Appeals found that when assessing whether the applicant had met the maximum extent practicable standard, USFWS appropriately looked at minimization and mitigation measures as a whole rather than sequentially. Based on that holding and others, USFWS’ issuance of the ITP in question was upheld.
105	Figure 9.1d	“Recommendations: ● The goal for every HCP, should be, at a minimum, to fully offset the impacts of covered activities and ideally to contribute to the recovery of	Please see above comments addressing this issue. In addition, our cover letter provides further elaboration on our concern.

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		the species.”	
106	Figure 9.1d	“• The applicant should show in the HCP that it considered at least one alternative that is more protective of the species than the one it chose (e.g., no action/abandon the project, low mitigation alternative, one that fully offsets impacts, one that more than fully offsets impacts).”	The ESA does not require the applicant to consider any alternatives proposed by the Services. NEPA, however, requires the Services to develop and consider alternatives to issuance of the ITP. We also note that NEPA may not apply to the Services’ issuance of ITPs.
107	9.1.5	There is a statement in the bullet list that asks: “Did the applicant look at all the options.”	There is no legal basis for the Services to require that an applicant “look at all the options” to prove that its mitigation plan meets the maximum extent practicable standard. Ultimately, practicability is a call only the applicant itself can make, as there are numerous considerations, including economic feasibility, timing of other approvals, and project timelines, to name but a few.
108	9.1.7	Timing of Mitigation	We believe that this section is too restrictive. There are many valid reasons why implementation of mitigation should precede the actual impacts; however, the practical reality is that implementation of mitigation is often a complicated and involved process. Private or non-governmental applicants often are not in the position of providing mitigation prior to impacts, and the Services have recognized this situation in the past. Moreover, at the regional scale, it is often advantageous to aggregate mitigation funds over time and to apply them to larger and more beneficial mitigation opportunities. While we do not disagree that the temporal lag in mitigation should be considered, in most instances, assurance of funding should be enough.
109	9.1.9	Developing the Conservation Strategy	Generally, the notion of a “conservation strategy” is woven throughout the Draft Handbook. This appears to be a new concept in the HCP context. The concept appears vague,

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			<p>confusing, and lacks specificity as to who is responsible. We question the actual need for this concept, given that the Services already can and do, in fact, consider all relevant information concerning covered species when they review HCPs. This includes listing decisions, status reviews, recovery plans, peer reviewed research, and other data relevant to the species addressed in the HCP. We suggest replacing the concept of “conservation strategy” with a simple statement that the Services are to consider HCPs in the context of all available information. We fear that the implementation of this new concept in the HCP context would have the opposite effect of streamlining and would add an unnecessary new term for readers to consider. If the Services desire to keep it, we suggest limiting the concept to large-scale, complex, multi-species HCPs.</p>
110	9.2	Biological Goals	<p>We question the Services’ reliance on a refuge management handbook for the development of biological goals for HCPs. The Services already have workable guidance specific to HCPs. It is unlikely that refuge management goals are a good fit to the specific context of HCP development. We perceive that the discussion of biological goals focusing on the general needs of the species is somewhat off-target. The requirement of an HCP is to minimize and mitigate the impacts of a specific taking. While it is desirable that such mitigation fit within the overall needs of the species, the biological goals should be specific to the impacts sought to be offset.</p>
111	9.2	<p>“The development of vision statements, goals, and objectives is iterative, and they may need to change during the HCP development process as the plan changes or as new information becomes available.”</p>	<p>We believe this is the opposite of streamlining and should apply, if at all, to only the largest and most complex HCPs. Please see our cover letter for further elaboration on this concern.</p>

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112	9.3	Biological Objectives	We believe the Services should make clear that while it may be a legitimate biological objective to maintain or increase a certain population level, the failure to do so should not in and of itself be considered a failure to meet ESA section 10 permit issuance criteria or a be breach of permit terms. Population levels are stochastic, unpredictable, and often have many sources of causation unrelated to the covered activities (i.e., White Nose Syndrome for certain bat species). Objectives should be defined in terms that provide the opportunity for the desired population maintenance or increase.
113	9.3.2	Considering Climate Change in the Development of Goals and Objectives	Please refer to the comments above and our cover letter for further elaboration on this concern.
114	9.4	“Conservation measures implemented in HCPs usually take one of the following forms: • avoiding the impact through project design”	Project design is not an HCP conservation measure. Rather, project design is up to the discretion of the applicant. Please see our cover letter for further elaboration on this concern.
115	9.4.1	Avoidance	This section states that “Avoidance of take of individuals or habitat is an important component of every HCP.” This is incorrect. Neither the statute nor the regulations require that an applicant seek to avoid take of individuals. Rather, the applicant determines the take that is likely to result from its proposed activity and then proposes to minimize and mitigate the impacts of such take on the species as a whole. We certainly agree that avoidance strategies are an important, voluntary component of HCPs, but to suggest that avoidance is required goes beyond the Services’ legal authority. Please see our cover letter for further elaboration on this concern.
116	9.4.1	“Avoidance should be the first step in minimizing project impacts on covered species. In some instances, it may be	Please see our cover letter for further elaboration on this concern.

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117	9.4.3	Mitigation	<p data-bbox="464 289 922 352">possible to avoid all project impacts so there is no need to develop an HCP.”</p> <p data-bbox="964 369 1435 1392">We believe that the Services should include in the Draft Handbook a caution that the scope and degree of requested mitigation are constrained by at least three U.S. Supreme Court decisions interpreting the Constitution: <i>Nollan v. California Coastal Comm’n</i>, 483 U.S. 825 (1987); <i>Dolan v. City of Tigard</i>, 512 U.S. 374 (1994); and <i>Koontz v. St. John’s River Management District</i>, 133 S. Ct. 2586 (2013)(“<i>Nollan, Dolan, and Koontz</i>”). <i>Nollan, Dolan, and Koontz</i> require that all forms of mitigation arising in the context of the ESA be subject to the constitutional limits on takings of private property and, specifically, the limits on “exactions,” which are conditions upon which a federal agency’s approval is based. In short, under <i>Nollan, Dolan, and Koontz</i>, in order for an exaction to be constitutional, there must be an “essential nexus” between the condition imposed by the federal agency and the underlying purpose of the agency approval to which the condition is attached, and the condition must be “roughly proportional” both in nature and extent to the impact of the proposed land use.</p>
118	9.5.2	<p data-bbox="464 1413 704 1440">Conservation Banks</p> <p data-bbox="464 1444 932 1707">This section includes the statement: “To approve an applicant’s purchase of credits from the bank, we must determine that the bank’s management plan, management assurances, monitoring, and adaptive management measures will meet the HCP’s conservation standards.”</p>	<p data-bbox="964 1413 1435 1875">This is incorrect. An established bank should have already satisfied these criteria and they should not be reconsidered at the time a subsequent HCP proposes to mitigate through a bank within its approved service area. In addition, contrary to what is stated in this section, there is no legal reason an HCP should be required to meet the same conservation standards as an approved conservation bank existing in a region. Also in this section, there is a reference to “unavoidable impacts.” Again, there is no obligation for an ITP</p>

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			applicant to first avoid impacts to the species and then minimize and mitigate those impacts.
119	9.5.2	<p>“Implementing small-scale and low-effect HCPs that require the permittee to acquire, restore, and manage listed species habitat in perpetuity can be daunting and costly for the permittee who often lacks the knowledge and experience to fulfill these responsibilities themselves. The ability to purchase credits from a Service-approved conservation bank that has biological goals and objectives that are compatible with their HCP instead of implementing permittee-responsible mitigation lifts this burden from the permittee and usually reduces their mitigation costs. In addition, the use of conservation banks for this purpose provides effective compensatory mitigation that is much more likely to be located on the landscape within high priority conservation areas than permittee-responsible mitigation. This approach will increase regulatory certainty for all parties.”</p>	Please see our cover letter for further information regarding our concerns on this topic.
120	9.5.3	<p>“Usage of in-lieu-fee varies across the nation: check with your Regional HCP Coordinator before proposing this to applicants.”</p>	The Presidential memorandum indicates such programs should be consistent nationally and we agree with that approach.
121	9.5.8	<p>“As we guide the development of HCPs, the Services must remember that in the worst possible case a permittee could fulfill all ESA obligations under the permit and HCP, but still fail to meet the HCP’s goals and objectives.”</p>	We do not understand this statement. We feel it could be construed in a variety of ways in the field. We recommend clarifying this statement or deleting it altogether.
122	9.6.1	<p>“The HCP must include a section on changed circumstances that can potentially affect a covered species or geographic area covered by a conservation plan and that can reasonably be anticipated by plan developers and the Services (e.g., the listing of new species, invasion of a non-native species, fire or flooding in</p>	We encourage the Services to include in the Draft Handbook guidance addressing the appropriate degree of analysis that should be undertaken with respect to changed and unforeseen circumstances for low-effect HCPs and HCPs that are not regional or landscape-scale. An applicant preparing a smaller-scale or low-effect

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		an area prone to such events, or where future increases are highly likely, etc.). Changed circumstances should include any significant event that would change the conditions or add threats in the plan area that the applicant can reasonably predict to occur during the permit term. See the changed and unforeseen circumstances worksheet for help identifying them. The HCP should describe the modifications in the project or activity that a permittee will implement if such an event occurs during the permit term, with cost estimates (and assured funding) associated with those events.”	HCP in connection with an application for an ITP should not be forced to provide the same degree of analysis and assurances as an applicant or set of applicants seeking a large-scale or regional ITP.
123	10	Monitoring and Adaptive Management	This chapter is another example of the failure of the Draft Handbook to explain that not all of the specified processes are necessarily applicable to every HCP and creates the perception that HCPs are always highly complex. Please see our cover letter for further elaboration on this concern.
124	11.3.5	“Every plan is different. Every applicant is different. We developed this chapter to present options, not to dictate decisions. Use these tools when they make sense.”	We strongly agree with and appreciate this statement and suggest it be emphasized in multiple locations throughout the Draft Handbook.
125	12.1	“It is better for species conservation and almost always less expensive for the applicant to reduce the amount of take, rather than mitigate for more take.”	The Services have no basis to judge what is less expensive for the applicant. This sentence should be deleted.
126	12.1	“Like many other aspects of the HCP planning process, determining anticipated take levels and development of the conservation program are a dynamic and iterative process.”	Determining the level of take is a project design issue. The purpose of the HCP is to minimize and mitigate the impacts of the level of taking proposed by an applicant. Please see our cover letter for further elaboration on this concern.
127	12.1	“Once efforts to minimize take have been exhausted, the applicant can determine the final amount of anticipated take. This is the amount of take that they anticipated will occur	This language is incorrect in at least two respects. There is no obligation to first exhaust minimization and the obligation is to minimize and mitigate the impacts of the taking, not minimize

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		from covered activities after accounting for the minimization measures that they commit to implementing.”	the taking itself. Please see our cover letter for further elaboration on this concern.
128	12.3	“Benefits associated with conservation measures that avoid or minimize take should already have been accounted for by reducing the amount of anticipated take.”	Please see our cover letter for further elaboration on this concern.
129	12.7	Comparison of HCP Impact of the Take Analysis with NEPA Analysis of Effects	It would be helpful if in this section the Services clarified that the action subject to NEPA is not approving the underlying project; rather, it is the Services’ action of issuing a permit authorizing incidental take.
130	12.8	“The Services’ responsibilities under section 106 of NHPA and associated implementing regulations (36 CFR 800) are to identify historic properties that may be affected and to take into account the effect of issuance of an incidental take permit and implementing the HCP conservation program on these properties (i.e., the Federal “undertaking”).”	As noted above, NHPA may not apply to the Services’ issuance of ITPs. Please see our cover letter for further elaboration on this concern.
131	13.1.1	NEPA Purpose Statement for ITP Applications	This section includes a statement that the Services will ensure that issuance of an ITP and implementation of the associated HCP will achieve long-term species and ecosystem conservation objectives at ecologically appropriate scales. While this is undoubtedly a laudable goal, it has no basis in law or regulation. For that reason, we request this statement be deleted.
132	13.1.2	“Section 10 of the ESA specifically directs the Service to issue incidental take permits to non-Federal entities for take of endangered and threatened species when the criteria in section 10(a)(2)(B) are satisfied by the applicant.”	We agree with this statement and it supports our overarching point that it is not at all clear that the Services’ issuance of ITPs in fact triggers review under NEPA or section 7. Please see our cover letter for further elaboration on this concern.
133	13.2	“The federal action for NEPA purposes includes the following components: <ul style="list-style-type: none"> • The non-federal activities that cause incidental take.” 	We do not believe this is correct and it is, in fact, inconsistent with other statements in the Draft Handbook.

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134	13.3.1	“Where possible, we can segregate aspects of a project that need an ITP from aspects that do not require an ITP when the non-ITP portions do not trigger a NEPA review, can proceed without the ITP-covered portions, and do not depend on the entire project for justification. In this way, our NEPA analysis considers effects due to only those portions subject to an incidental take permit (also see section 13.3.2.1, below).”	We appreciate this discussion. It could be enhanced by providing examples.
135	13.3.2.1	No Action	We believe a discussion of the “no action” alternative should include the possibility that, without an ITP, an applicant may simply proceed with the project at their risk. Since determining whether to seek an ITP is a complex balancing of risks, time, and expense, it is often the case that in the absence of an ITP, a project proponent will nonetheless proceed with the underlying activity.
136	13.3.2.2	Proposed Action	The proposed action for NEPA purposes is limited to issuance of an ITP for the covered actions.
137	13.4	“In this revised Handbook, we establish new public comment periods. Low-effect and EA-level HCPs need only the 30-day notice period as required by ESA. Preparation of an EIS requires a notice of intent to prepare an EIS, scoping public notice, a notice of availability of the proposed HCP and the draft EIS, and notice of availability for the HCP and final EIS. Also, for an EIS, we must coordinate with EPA on concurrent notice that they publish. We require a minimum 60-day notice of availability of the proposed HCP and draft EIS.”	Hypothetical timeframe examples should be developed for both small-scale and low-effect HCPs, similar to the timeframe example prepared as Table 2.4a on page 2-10.
138	13.4.1	Categorical Exclusions	We believe the Services should affirmatively encourage the use of low-effect HCPs wherever possible. This will reduce the burden on both the applicants and the Services. Some

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			regions (e.g., USFWS Region 2) strongly resist the use of low-effect HCPs, thus creating HCP processing bottlenecks.
139	14.3	“• if the HCP is low effect, ensure that it meets the statutory requirements for a NEPA categorical exclusion (use the screening form for low-effect incidental take permits and NEPA environmental action statement located in the HCP Handbook Toolbox [Link will be added in final version]);”	The screening form should have been included directly in the Draft Handbook and should be made available for public review and comment prior to adoption of the final version.
140	14.3	“• ensure that climate change considerations (changes in climate and related direct and indirect effects) are adequately addressed;”	It is not clear in the Draft Handbook what the scope of climate change considerations entails. Please see our cover letter for further elaboration on this concern.
141	14.3.1	“The ESA required alternatives are described, not analyzed;”	There are no "ESA required" alternatives other than those specifically considered by the applicant.
142	14.7.2	“Legal review of the permit application package ensures that the draft HCP and associated documents meet the legal requirements of the ESA and NEPA. It is very important to get legal review for large-scale, Regional, multi-Regional, or joint-agency HCPs, which are often complex and address a variety of activities and species. The need for legal review of low-effect HCPs is less critical. They may not need legal review since these projects are by definition minor in scope and impact.”	As noted elsewhere in these comments and in our cover letter, the Services should consider consolidating all guidance on low-effect HCPs to a single chapter. That chapter should include additional information regarding the Services’ position that projects seeking incidental take authorization through a low-effect HCP are “by definition minor in scope and impact,” and should consider including a discussion that projects with a small amount of permanent effects and/or temporary effects fit within the scope of activities that can be covered through a low-effect HCP.
143	14.7.2	“It is FWS policy to require DOI solicitor’s office (legal counsel) review of all ESA section 10 permit application packages. However, solicitor’s review of HCPs categorized as low-effect may be waived if the HCP meets all applicable criteria for low-effect HCPs. For other exceptions, discuss the HCP with the Regional	This statement seems to conflict with FWS Service Manual Part 730 FW1 which allows incidental take permit signature authority to be delegated to the field office supervisor by the Regional Director for HCPs that meet categorical exclusion (e.g., low-effect HCPs) and for incidental take permits for HCPs that met the environmental

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		HCP Coordinator.”	assessment requirements under NEPA.
144	14.7.2	“A NMFS section 10(a)(1)(B) incidental take permit application package, including supporting ESA and NEPA analysis documents, must have legal review by the office of the general counsel (legal counsel) either in the appropriate Regional office of the general counsel or the General Counsel-Fisheries and Protected Resources Section. Legal review of low-effect HCPs should be discussed with the legal counsel to determine whether review is needed.”	The Services should point out that these review requirements differ from those of the USFWS.
145	14.12.3	“This framework does not apply in situations where the Regional Director has delegated signature authority to field office Project Leaders. In such cases, the Regional Director must provide guidance and procedures for implementing the delegated signature authority, including conducting intra-Service consultation, at the time of delegation. Consultations for low-effect HCPs must be consistent with national Service policy as described in the Endangered Species Consultation Handbook (FWS and NMFS 1998).”	When the upcoming Consultation Handbook is revised, guidance on consultations for low-effect HCPs should be incorporated into the Draft Handbook.
146	15.1.2	There is a statement that: “If comments raise major substantive issues not adequately covered in the NEPA analysis, or suggest new alternatives not screened out by the purpose and need statement, we must rewrite the NEPA analysis...”	This language does not necessarily reflect with accuracy the requirements of NEPA. We suggest revising this statement to conform to actual NEPA requirements. The current statement appears to imply that any suggested alternative that could meet the purpose and need would trigger a supplement and, potentially, an endless cycle of re-analysis.
147	15.5.1.2	“[Note: Change in policy - previously for an HCP to qualify as low-effect, it had to qualify as a categorical exclusion (CatEx) prior to any mitigation. This means you couldn’t mitigate to a CatEx. We are changing this so simple HCPs can be designated as low-effect. For instance, an HCP	EWAC supports this change in policy and is generally supportive of policies that broaden the use of low-effect HCPs. To help strengthen this statement, the Services should describe further what is meant by the term "simple" HCPs.

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		where the applicant intends to remove marginal habitat for a species plans to mitigate by buying credits from a conservation bank that preserves high quality habitat. This HCP would have required an EA and finding of no significant impact because you could not mitigate into a CatEx.]”	The Services should also make clearer that in this example, having small permanent effects on habitat or where only temporary effects occur should also qualify as a simple HCP (i.e., a low- effect HCP) that can be approved through a CatEx (Environmental Action Statement - not an EA/FONSI).
148	16.1.1	“It provides a very brief description of the activities, location of activities, covered species, and anticipated take.”	We believe this should refer to “covered activities” in order to continue to emphasize that the Services authorize take and not the underlying activities.
149	16.1.3.1	“For example, take of a covered species resulting from use of heavy equipment during home construction that is in compliance with all other applicable Federal, State, or local laws generally would be considered incidental to an otherwise lawful activity and could be authorized by an incidental take permit.”	This language concerns us, as it may imply or encourage an interpretation that the Services should examine things like local laws, building codes, etc. The Draft Handbook should be consistent and clear that it is not the job of the Services to look at whether the activities underlying authorized take meet all non-ESA-related legal requirements. The Services simply do not have the resources, expertise, or time to take on this kind of analysis. It is the permittee’s responsibility.
150	16.1.3.2	“Generally, impacts that rise to the level of take that are not avoided or eliminated as the result of implementing an HCP must be minimized, and any remaining impacts must then be mitigated (e.g., “offset” or “rectified”).”	The Draft Handbook is inconsistent in addressing avoidance, minimization, and mitigation measures. It often slips into the hierarchical approach of statutes other than the ESA. Under ESA section 10, it is not first avoid, then minimize, then mitigate, with each step being to the maximum extent practicable. To avoid confusion and misapplication, the Draft Handbook should consistently use the exact statutory language. Please see our cover letter for further elaboration on this concern.
151	16.1.3.2	“However, mitigation with little or no minimization may provide more of a benefit to the species.”	This should have been emphasized much earlier in the Draft Handbook. It is a key point that sets the HCP program apart from several other federal environmental programs.
152	16.2.1	Permit Terms and Conditions	We suggest that the Services be

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153	16.3	<p>“For final low-effect HCPs and CatEx packages, we only have to notify the public that we issued the permit. There is no timing requirement for the notice, so we recommend that these notices be batched on an annual basis as a streamlining measure. The Headquarters office will compile and publish the annual notice. Put final approved and signed HCPs and associated documents on the Services’ Web sites to satisfy the requirement to make documents available to the public.”</p>	<p>encouraged to provide applicants drafts of proposed permit terms and conditions to ensure there are no misunderstandings.</p> <p>We disagree on the timing for public notice requirements. Public notice should be made as soon as possible in coordination with the needs of the applicant. For many activities and projects, the approval and issuance of an ITP is often the critical path for starting a project or activity on time.</p>
154	App. A	<p>“The U.S. Fish and Wildlife Service (FWS) decided in 1999 that the issuance of an incidental take permit (and/or enhancement of survival permit) under section 10 of the Endangered Species Act (ESA) is an undertaking subject to compliance with section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended [see Assistant Director - Endangered Species (AES) memo dated 2000].”</p>	<p>As noted above, NHPA may not apply to the Services’ issuance of ITPs. Please see our cover letter for further elaboration on our concerns.</p>
155	App. B	Entire Appendix.	<p>Please see our cover letter for our concerns regarding Appendix B, which also recommends removing this Appendix.</p>
156	App. C	<p>“• alternative actions considered by the applicant that would not result in take and the reasons why such alternatives are not being used;”</p>	<p>This is not the statutory language. It says alternatives "to such taking." The language of the statute implies that alternative actions could be those that would result in more or less take than that proposed, and not only alternatives that would result in no take.</p>