



August 29, 2016

Submitted via Federal eRulemaking Portal
<http://www.regulations.gov/>

Public Comments Processing
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Attn.: Trish Adams, USFWS, and Heather Coll, NMFS

Re: Comments on the Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning (HCP) Handbook (81 Fed. Reg. 41,986, June 28, 2016)
Docket No. FWS-HQ-ES-2016-0004 / NOAA-NMFS-2016-0004

Dear Ms. Adams and Ms. Coll:

This letter contains Western Urban Water Coalition (WUWC) comments on the 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 (HCP) Handbook (81 Fed. Reg. 41,986, June 28, 2016) (*Draft Handbook*).

Created in 1992 to address the West's unique water issues, the WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in four states. The membership of the WUWC includes the following urban water utilities: Arizona - Central Arizona Project, City of Phoenix and Salt River Project; California - Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission and Santa Clara Valley Water District; Colorado - City of Aurora, City of Colorado Springs, and Denver Water; Nevada - Las Vegas Valley Water District, Southern Nevada Water Authority and Truckee Meadows Water Authority.

As individual urban water utilities, WUWC members are in the position of serving both as public entities, for purposes of providing services to urban customers, and as nonfederal entities, for purposes of regulation under the Endangered Species Act (ESA). As an organization, the WUWC has a longstanding commitment to, and involvement with, ESA issues, beginning at a policy level during the Clinton Administration nearly 20 years ago. The WUWC played an active role in the development of Secretary Babbitt's Five Point Plan for ESA Reform, including participating in the formal press conference to unveil the Plan. Since then, our members have

been included in some of the most significant HCPs in the country, including complex multi-species and ecosystem-based plans. We have testified frequently before Congress to support an effective and efficient ESA, including to oppose bills that would weaken the law. The WUWC participated actively during the Bush Administration Cooperative Conservation initiative, has commented extensively on virtually every ESA proposed rule and policy, and intervened on the side of the government as defendant in litigation challenging the No Surprises Rule. Our formal ESA policies have specifically stressed the importance of maintaining a strong ESA and for looking for creative administrative solutions rather than sweeping legislative overhauls.

ESA Improvement Initiative

In May 2011, FWS issued a press and policy statement on *Improving ESA Implementation Through Regulation Review*. That notice was to implement President Obama's Executive Order 13563 on "Improving Regulation and Regulatory Review." The stated purpose was to "improve conservation effectiveness, reduce administrative burden, enhance clarity and consistency for agency staff and impacted stakeholders, and encourage partnerships, innovation, and cooperation." To fulfill that goal, one of the specific tasks was to "clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners, including habitat conservation plans, safe harbor agreements, and candidate conservation agreements." A key improvement for this purpose was "[r]educing the transaction costs associated with developing and approving landowner agreements; [and] providing guidance to allow flexibility and creativity in application of the tools to accommodate diverse landowner needs."

These were meritorious goals and valid tasks, which the WUWC supported in its comment letter of August 10, 2011. The *Draft Handbook* appears to be intended to be in furtherance of the policy statement. For the reasons discussed in these comments, however, the *Draft Handbook* does not fulfill these goals, and in fact is likely to have a contrary effect by creating disincentives to enter into such conservation agreements by frustrating, rather than allowing, flexibility and creativity in the application of ESA tools.

The Need for More Collaboration and Cooperation

For many years, the WUWC has encouraged the Services to engage in a collaborative process to revise the *HCP Handbook*. Based on its extensive experience with the ESA generally, and the HCP program in particular, the WUWC regrets that it must provide critical comments on the *Draft Handbook* and the process used to develop it. Unfortunately, the *Draft Handbook* did not travel through an open and cooperative discourse before it was published, and as a result it does not reflect the views of the WUWC and many other stakeholders who have developed specific recommendations, based on experience, to improve the HCP procedure.

The best course of action for the Services at this time is to stop working on the current *Draft Handbook* and not try to rush it to final publication before the end of the Obama Administration based on this single comment period. Instead, the Services should use the comments submitted on the *Draft Handbook* as the starting point for an interactive dialogue with stakeholders about how to make the HCP process and resulting decision documents, permits, and agreements work better. This dialogue could involve listening sessions, public meetings, and outreach to key

stakeholder groups. An outreach program of that nature would invest affected parties in the process of revising the *Handbook*, lending credibility and “buy-in” to the resulting product.

Adding the dimension of desired involvement by stakeholders is especially important for the HCP program, which is strongly dependent on creating the incentive for non-federal entities to make the very substantial investment of time, resources, and money in HCP development. Without the commitment and positive support of the applicant community, the HCP program will falter, and the significant conservation benefits to be derived from incentivizing the private and non-federal governmental sectors to engage in proactive conservation will largely be lost. It was the recognition of the need for attracting non-federal landowners into the ESA conservation program that caused the Clinton Administration to pursue active engagement in developing the Five Point Plan. The same motivation was at the heart of Secretary Kempthorne’s Cooperative Conservation initiative, spearheaded by public meetings and listening sessions around the country. Unfortunately, the *Draft Handbook* has not had the benefit of such an informative dialogue. The sheltered nature of policy formulation for the *Draft Handbook* has even carried over to the Services’ decision to deny the numerous requests for an extension of the comment period. The WUWC submitted two such requests. Simply put, the *HCP Handbook* is far too important to be the product of nothing more than internal agency deliberations and a short public comment period.

In general terms, the *Draft Handbook* reflects too much “inside ballgame” on how the bureaucratic process of processing HCPs should unfold, and not enough sensitivity to the concerns of applicants to the ever-increasing costs, inefficiencies and erosion of regulatory assurances that have bogged down the HCP program in recent years. WUWC members and their consultants and representatives rely heavily on the current *Handbook*, and the *Draft Handbook* is far less helpful than it should be for outside parties. For sure, there are some important and positive features to the *Draft Handbook*. On balance, however, it accomplishes less than it could at this critical juncture in the HCP program. The WUWC is anxious to participate in such a discussion, and we pledge our support to helping the Services develop a new *Draft Handbook*.

Beneficial *Draft Handbook* Proposals

On the positive side, we welcome the revised format and organization of the *Draft Handbook* to track the phases of the HCP development and implementation process. The general approach of providing more specific information on the key elements of the process is valuable, and we support the elements of the *Draft Handbook* that are process-oriented. It also is valuable to provide guidance on how to address compliance with other incidental take laws, such as the Migratory Bird Treaty Act, when unlisted species protected by those laws will be involved. As a general matter, as requested by the applicant and to the extent it is possible to do so, all incidental take authorization of species involved in the covered action of the HCP should be processed at the same time. The *Draft Handbook* sets the stage for this kind of coordinated review, and additional detail would be helpful. In this regard, it is important to clarify that different federal laws have different definitions of take and different permit issuance thresholds. When coordinated reviews apply, the *Draft Handbook* should be clear that the respective standards of each law will be applied, rather than measuring all permits under the highest or most stringent test.

The WUWC also supports the goal of streamlining NEPA compliance associated with HCPs. We generally agree that more effective use can be made of environmental assessments (EAs) and categorical exclusions (CEs). However, we urge that the preference of the applicant be fully considered in choosing the NEPA compliance level. There might indeed be cases where an applicant prefers to use an EIS, to avoid litigation risk or ensure the highest level of environmental review, consistent with other obligations, including obligations under state law. The *Draft Handbook* is correct in recognizing the voluntary nature of the HCP program. As noted on page 2-7, an HCP is the applicant's document. This recognition, as well as the desire to collaborate with applicants on the best overall strategy for an HCP, should carry over into defining the nature of NEPA compliance.

We also applaud the Services for several aspects of the *Draft Handbook* that have real promise to improve the HCP program for applicants, the Services, and listed species. We encourage the Services to expand on these concepts:

- Expanded applicability of the low-effect HCP process to HCPs with mitigated effects. This has the potential to vastly simplify the review and approval process post-application and should be encouraged. We suggest that the Services provide more guidance on how to use the low-effect HCP process and under what circumstances a "mitigated effect" HCP may be applicable.
- Delegation of signatory power to local Field Offices for HCPs paired with an EA. Field Offices are the applicant's contacts and the face of the Services when negotiating the details of an HCP that consider the specific circumstances of that applicant. It is important to not create confusion over the need local decisions, unless broad principles of the HCP program and issuance criteria are involved. We recommend that the Services expand the use of this delegation as a way to streamline the HCP approval process.
- Emphasis on the true scope of the Services' federal action as it applies to NEPA and section 7 review, where the Services are approving the HCP and authorizing take of listed species, but are not authorizing the applicant's activities, including non-federal activities. We encourage the Services to ensure that this important concept is consistently and clearly stated throughout the *Draft Handbook*.
- "Start Slow to Go Fast" - We applaud the Services for recognizing that the HCP process has, in many circumstances, become an overly burdensome process and to look for ways to streamline that process. However, we caution that applying overly complex processes (stakeholder/science team involvement, modeling, decision tools, etc.) is not always likely to achieve that goal or result in outcomes that are better for listed species.
- Expanded use of Safe Harbors combined with HCPs to help address circumstances where species benefit from repeated disturbance, and appropriate management requires going below baseline to ultimately get above baseline. For example, threatened streaked horned larks (*Eremophila alpestris strigata*) and endangered black-capped vireos (*Vireo atricapilla*) both rely on habitat that quickly grows out of suitability via natural vegetative succession. The Services should encourage the use of combined Safe Harbor agreements and HCPs to avoid creating an incentive for landowners to delay their

incidentally beneficial activities until habitats are no longer used. These landowners should be entitled to both take the species baseline to zero under the HCP portion of the plan and rely on Safe Harbor assurances to avoid additional liability if their actions ultimately increase the baseline. Safe Harbor agreements should also be appropriate for activities that might not have a conservation or management focus, but where species incidentally or indirectly benefit from an applicant's development or resource use activities. The applicant's motivations or objectives should not be relevant to deciding if a Safe Harbor agreement is an appropriate tool for ESA compliance.

- Similarly, we encourage expanded application of Candidate Conservation Agreements with Assurances (CCAAs) to address applicant activities without a "conservation-first" objective (i.e., let CCAAs truly function like HCPs for non-listed species). Alternately, we encourage the Services to find ways to adapt the HCP program in ways that would allow coverage of non-listed species, even when there is not a listed species in the HCP.
- We applaud the Services for exploring ways to integrate HCPs with section 7 consultations. However, a better understanding of how completion of an HCP process and Incidental Take Permit (ITP) authorization may streamline a consultation would be helpful for other federal agencies and non-federal proponents. We also encourage greater consistency between the discussions of the scope of the federal role in the discussion of the NEPA and section 7 analysis. As noted above, and in the NEPA discussion, the action of the Services is to approve the HCP and authorize take. The Services are not authorizing the applicant's activities or approving their project.

Draft Handbook Provisions That Are Deficient and Problematic

There are several themes that emerge in the *Draft Handbook* of concern to the WUWC. These major themes are discussed in this section.

Expansion of Federal Control

In several places, the proposed revisions to the *HCP Handbook* seem to reinterpret the ESA and its implementing regulations in ways that expand the Service's interests, eroding considerations for balance and practicability that are essential to making the HCP program successful. The proposed revisions in the *Draft Handbook* make subtle changes to statements regarding the purpose of the ESA and congressional intent for the HCP program that emphasize conservation over practicability. For example, the first sentence of Chapter 1 describes the "purpose" of the ESA as "to protect and recover threatened and endangered species and the ecosystems upon which they depend." However, this language is not found in the Purposes of the Act, in section 2(b). 16 U.S.C. § 1531(b). The *Draft Handbook* would be better served by simply quoting the language of this section, rather than interpreting it.¹ This restatement of the purpose of the ESA does not conform to the language in the Act itself that includes neither the words "protect" nor "recover."

¹ The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

While revisions of this nature to the *Draft Handbook* may be subtle and not directly related to the content or process of preparing an HCP, they do provide a foundation for understanding how the ESA is to be applied. By de-emphasizing considerations of balance and practicability, the *Draft Handbook* also runs the risk of de-emphasizing the voluntary nature of HCPs and puts Service officials in more of a regulatory mode than a position of providing technical assistance when requested, evaluating the HCP with respect to the statutory issuance criteria, and preparing its process documentation to support its decision (which draw heavily from the materials provided by the applicant).

The HCP process is deliberately flexible to accommodate the wide variety of circumstances that arise. The *Draft Handbook*, however seeks to control too much, by specifying process, standards and outcomes for a wide array of circumstances. We are concerned that the *Draft Handbook* sets the stage for federal micromanagement of the preparation of HCPs -- it appears that the Services intend to exert more control over the content of an applicant's HCPs and the process for preparing it. We suggest that this is the wrong direction if the goal is to make the HCP process work better for the regulated community and listed species.

Weakening of No Surprises Assurances

A bedrock principle of HCP derived from the Five Point Plan is the No Surprises rule that provides permit holders with the economic and regulatory certainty needed to make the significant investment in species conservation efforts. Under this rule, the permit holder must implement the conservation and mitigation measures specified in the HCP if there are reasonable foreseeable changes in circumstances. Other changed circumstances cannot be charged to the permit holder without consent. These principles are at risk because the *Draft Handbook* appears to call for the Services to adopt a very broad interpretation of reasonably foreseeable circumstances such that a wide range of even low probability events also could be considered foreseeable and, therefore, required to be addressed by the permit holder. The implication is that the Services would not adhere to a reasonably foreseeable test when determining changed circumstances subject to the HCP. Similarly, heavy reliance of adaptive management also runs the risk of being at odds with No Surprises. The *Final Handbook* must be sure to reaffirm a strong commitment to No Surprises and the principle that additional compensation or restrictions cannot be required without the permit holder's consent.

Guidance for Small and Mid-sized HCPs

The *Draft Handbook* does not provide sufficient guidance on the process for small to mid-sized HCPs, which represent the vast majority of applications received by the Services. The *Draft Handbook* introduces a number of new "tools" for organizing people, information, and decision-making that may be appropriate for large-scale HCPs. However, little guidance is provided for HCPs that may be low-effect, or involve a single applicant, single project, limited species or otherwise be more modest in scale than a multi-species, multi-stakeholder, landscape-scale plan. Clarifying what content and process is required, as opposed to what may simply be recommended as potentially useful or desired, is needed to help the Services provide suitable guidance to applicants with less complicated projects and HCPs.

Furthermore, the Services should more clearly and consistently indicate that use of the highlighted tools is not required for HCPs of any scale, and may not even be appropriate for many types of HCPs. In addition the *Draft Handbook* correctly recognizes that a common problem with the current HCP process is that it takes too long and lacks deadlines. Yet, there has been little effort in the *Draft Handbook* to specify deadlines for low effect HCP processing or set forth goals to ensure that this process is streamlined.

Climate Change

The *Draft Handbook* requires that climate change be taken into account in the HCP process. We applaud the Services for recognizing the importance of climate change and how difficult an analysis involving climate change and species can be. However, the *Draft Handbook* is not clear that taking climate change into account does not change the clear statutory standards that govern HCP review and approval. Applicants should not be charged with addressing the effects of climate change on species to be covered in an HCP. The applicant is responsible for minimizing and mitigating the impacts of the taking. We also note that the evaluation of climate change must be based on the best scientific information available. For example, the current resolution of climate predictive models is not sufficient to be useful for all listed species and HCP planning actions. Micro-climates and site-specific factors can play a very large role in the survival of listed species, and relying on regional-scale models to make determinations regarding climate change effects and adaptation strategies may not only be misleading but may, in some circumstances, actually be detrimental to the species recovery. A great deal of time and money can be spent on climate change models with little actual predictive value.

We recommend that the use of climate change data be phased in and be first applied to only the largest HCPs and use only those predictive climate data that can be shown, over time, to be highly correlated with on-the-ground effects, such as the likely sea level rise effects to marine species such as key deer or eel grass, when the HCP implementing agreement provides a mechanism for incorporating new data and making adjustments that comply with the No Surprises Rule. We believe that climate change adaptation should be incorporated into future adaptive management decision making only as the climate change science and models become further developed with finer resolution that can be applied on a HCP level.

Statistical Predictions of Take

The *Draft Handbook* lacks guidance for translating statistical predictions of take to the established thresholds for determining when seeking authorization for take is warranted. For instance, the threshold for when an applicant should seek take authorization and, under section 7, for the Services to consider issuing an incidental take statement is “reasonable certainty.” The plain language meaning of this relative term implies that it is a higher threshold than “likely to occur” and certainly higher than something that is merely “possible.” However, many of the statistical models that the Services are currently requiring some HCP applicants to use calculate take based on statistical probabilities for highly unlikely events, and the Services assert that activities with even a vanishingly small probability of take must have take authorization. These concepts do not conform. Better guidance -- with public review and comment -- is needed to resolve the disconnect and hopefully reduce the assumed need for incidental take coverage for some species in some circumstances.

Specific Comments by Chapter

In addition to the general comments above, the WUWC offers the following comments on a chapter-specific basis.

Glossary

- Notes about the origin of certain terms and their order of authority as statutory, regulatory, policy, guidance is helpful and a good addition to the HCP Handbook. We suggest that this kind of clarity would benefit most other chapters of the document as well.
- The intermingling of HCP and non-HCP terminology in the glossary is confusing. We suggest separating terms relating to other related processes from those that apply directly to the preparation of the HCP.
- Many terms included in the Glossary do not seem relevant to HCPs or have definitions that are poorly grounded, awkwardly worded, or completely unnecessary. We suggest more attention be given to the content in this chapter.
- The term “landscape-scale” is used frequently through the *Draft Handbook*, yet there is no definition, and there is limited scientific consensus on the scope of a “landscape-level” plan.
- “Alternatives to the taking” - The proposed definition for this term suggests that the applicant include alternatives that avoid take or that significantly reduce the impact of the taking. It would be more appropriate and consistent with the statutory language of the ESA to frame this as “significantly reduce the amount or extent of the taking,” not the impact of the taking. We offer this seemingly minor comment as an example of many such subtle misinterpretations of the statutory and regulatory requirements for HCPs throughout the *Draft Handbook*. We encourage more careful fidelity to the authoritative language of the statute and implementing regulations.
- “Conservation program” - The definition suggests that the HCP’s conservation program address impacts on covered species that result from “authorized activities.” The *Draft Handbook* correctly notes elsewhere that the Services do not authorize the activities addressed in an HCP, but instead authorizes the take that is incidental to those activities. Clarification should be added that the underlying activities are typically “authorized” by other laws.
- “Maximum extent practicable” - This is a critically important component of the statutory issuance criteria, and the proposed definition does little to clarify the term. Instead, the text only highlights how this concept is a “major point of concern.” For such an important concept, a more complete and thoughtful definition is warranted. For HCPs, if the conservation program desired by the Services to “fully offset the impacts of the taking” would make the applicant’s proposed activity unfeasible (i.e., too expensive, too much delay, too much alteration of location/timing/methods, etc.), then clearly the

threshold for “practicability” has been exceeded. We suggest that the Services limit required measures to be those that would not cause more than “minor change” to the applicant’s proposed activities (including financial calculations of profitability) to help bring clarity to this key term.

- “Non-federal property owner” - The inclusion of this term in the glossary seems unnecessary. Furthermore, the definition provided suggests that only “property owners” can apply for incidental take permits. This would seem to unnecessarily limit the applicability of HCPs to only those non-federal entities that own property. The ESA does not include this limitation; only that ITPs address non-federal activities.
- “Plan area” - The definition suggests that the plan area for an HCP must include the area where mitigation will occur. However, the Services are increasingly encouraging the use of third-party conservation bank credits as mitigation. In such cases, it would be inappropriate to include the location of the conservation bank in the HCP plan area.

Chapter 1: Introduction

- Hyperlinks to additional information - While we appreciate the Services’ desire to keep the HCP Handbook up-to-date with respect to the evolving nature of the program, we are concerned that documents linked to the HCP Handbook will substantially change the guidance provided by the Services in ways that will not be subject to public review and comment. We have seen in other instances where the Services have inappropriately applied guidance with the same authority as rule without adequate notice and review. We are concerned that this “living document” concept will have the same effect. We encourage the Services to uncouple the HCP Toolbox from the Handbook or to make it clear that any such documents posted therein are for convenience only.

Chapter 2: Overview

- Much of the content in Chapters 2.2 and 2.3 is excellent and properly emphasizes the overall vision for the HCP process.
- Timelines - We are concerned that the Services are overly complicating the preparation of HCPs in ways that unnecessarily lengthen the timeline for completion. We suggest that the Services avoid micromanaging the process and the content of an HCP, and instead focus simply on whether issuance criteria are met in accordance with applicable regulations, using the best available science, and considering the magnitude of the impact to the listed species. Focusing on the outcome (i.e., the actual federal decision to issue a permit or not) and not the process would go a long way towards reducing the timeline and acknowledge that HCPs are an applicant-driven process. The timelines proposed in the draft are simply not workable for many applicants and projects.
- Roles and Responsibilities - The preparation of HCPs is an applicant-driven process. It is not appropriate for the Services to dictate or manage the roles and responsibilities on the applicant’s “side of the table.” Each circumstance is different, and this chapter does not sufficiently acknowledge that different parties may have different parts to play depending

on the circumstances. In particular, we are concerned about statements relating to how applicants chose consultants to assist them with HCP. How applicants interact with their consultants is not a matter for the Services' involvement, and the Services should acknowledge that consultants are representatives of the applicant.

Chapter 3: Getting Started

- Harass - The Services appear to be taking the position that “harass” includes activities related to “habitat disruptions.” Consistent with case law, we note that take via habitat loss or modification is not considered a form of harass, but instead is a form of harm. Harass requires a demonstration that an activity has “annoyed” a listed species to the extent that death or injury is likely as a result of significant disruptions of essential behaviors. The plain meaning of “harass” and “annoy” indicate that they are a direct and immediate effect on an individual of a listed species itself - and not an indirect effect on the individual by way of habitat changes. We strongly recommend that the Services remove text that reinterprets harass from the *Draft Handbook*.
- When to Seek a Permit - The Services should incorporate its standards for issuance of an incidental take statement that rely on a threshold of “reasonable certainty” that take will occur. HCPs and related ITPs are only appropriate when take is reasonably certain to occur as a proximate cause of the applicant’s activities, *unless the applicant desires* the regulatory assurances that come with an ITP and is willing to meet the standards for an obtaining an ITP, even where take is not reasonably certain to occur. Furthermore, the Services should clarify (with consistency throughout the *Draft Handbook*) that it is the applicant’s decision whether or not to prepare an HCP or seek an ITP.
- Addressing Other Regulations in a Permit - We appreciate that the Services are seeking ways to streamline environmental compliance by integrating considerations for other regulatory programs into the HCP process and ITPs. However, we request more clarity that doing so must be with the consent of the applicant, who may or may not want to complicate its HCP process with other considerations. The decision to seek an ITP is the applicant’s, and it should be the applicant’s decision to expand the process to address other factors.
- HCP and NEPA consultants - This section is unwarranted. It is not the Services’ role to manage how the applicant prepares the HCP or interacts with its HCP team. The Services should not recommend for or against consultants in the HCP process. We strongly recommend that the Services strike Subchapter 3.8.2.

Chapter 4: Communicating and Coordinating

- Communication between the Services and the applicant is indeed an important topic and we applaud the Services for highlighting the need for open, transparent, effective, and respectful communication between Service representatives and applicants. However, the Services should emphasize that the HCP is the applicant’s document and process. Therefore, the decision to involve stakeholders and other outside parties (including States) in the process is not the Services’ until the application package goes out for public

comment. Until that point, the degree of stakeholder involvement in an HCP is the applicant's decision, not the Services.

- The Services should clarify that new guidance and tools regarding communication processes are voluntary and may not apply to every, or even most, HCPs.

Chapter 5: Activities and Alternatives

- The Services should clarify that new guidance and tools regarding Effects Pathway Management are voluntary and may not apply to every, or even most, HCPs. We encourage the Services to provide guidance suitable for less complex HCPs.

Chapter 6: Plan Area, Permit Area, and Analysis Area

- Throughout the *Draft Handbook*, the Services provide guidance that may apply to different aspects of the HCP process (HCP preparation, ITP standards, NEPA, Section 7, etc.) without adequately identifying what part of the process the guidance applies to. This chapter provides a good example of mixed terms and concepts, without an adequate roadmap to understand how each of these “areas” are relevant to the process and to what party.
- The Services should clarify that new guidance and tools regarding data management are voluntary and may not apply to every, or even most, HCPs.
- The Services should emphasize that it will make any and all data it anticipates using to evaluate an HCP available to the applicant.

Chapter 7: HCP Species

- The Services state that the HCP process requires “thorough, up-to-date biological information on the project area, covered lands, and species.” Similarly, the Services state that they may decide to not allow an applicant to cover a particular species if the Services lack sufficient information to develop a “conservation strategy” for that species - which, presumably, is different than the HCP's conservation program. The Services must make their decisions on the basis of the best available scientific and commercial information in their possession. Delaying an HCP process where an applicant has an immediate or urgent need for take authorization on the basis of insufficient information is not appropriate and contrary to the Services' obligations to process applications in a timely manner.

Chapter 8: Calculating Take

- This chapter illustrates a fundamental misunderstanding of the concept of take, as it is defined in statute and regulation and interpreted by the courts. We suggest that much more attention be given to this key concept so that Service representatives and applicants understand what take means. In our experience, this is a significant problem with the

HCP program that affects how applicants decide if seeking an ITP is warranted and precisely what activities, species, and impacts need to be addressed in an HCP.

- The Services should clarify that the applicant determines how much take to request coverage for. The Services may advise the applicant on calculating take, but ultimately it is the applicant that makes the request for a specific amount or extent of take - with the understanding that if take is exceeded, then the additional take is not authorized by the applicant's ITP and the applicant may be at risk for an enforcement action.
- The text of this chapter inappropriately establishes that applicants are responsible for addressing "take of habitat" for a listed species. However, take applies to individuals of a listed species, not habitat per se. Habitat itself is not protected by the ESA, outside of designated critical habitat, but even here, take is not a relevant concept. While the definition of harm includes consideration for "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering," take only occurs when habitat changes affect individuals of a listed species to the point where actual death or injury occurs. This is a fundamental misunderstanding of take that the Services routinely make and that greatly overestimates the amount of take.
- This chapter does not address uncertainty in the chain of causation between an activity and take, or uncertainty in the likelihood of an effect rising to the level of take. The Services should clarify that an ITP is only warranted in circumstances where take is foreseeable, reasonably certain to occur, and proximately caused by a non-federal activity. Where these thresholds have not been met, preparation of an HCP or coverage by an ITP may not be warranted for the activity to proceed. The Services' guidance regarding reasonable certainty in the issuance of an incidental take statement should also be applicable to ITPs.
- Similarly, this chapter lacks sufficient discussion about the use of surrogate metrics for measuring and tracking take. We recommend that the Services revise this section to be more consistent with recent guidance on the use of surrogate metrics in incidental take statements.

Chapter 9: Conservation Strategy

- This chapter opens with a broad statement that an HCP's conservation program "must" fit within a larger conservation context established by the Services. This concept is expanded on in Chapter 9.1.9, and is an example of over-reaching by the Services over the content of the applicant's HCP, and the "required" application of standards to an HCP that do not appear in the statutory issuance criteria. This kind of emphasis contributes to the over-complexity of the HCP program.
- Avoiding Take - Throughout this chapter and elsewhere in the *Draft Handbook*, the Services assert that applicants should or must (see concerns about inconsistent guidance) adjust their activities to avoid as many impacts as possible - and therefore, avoid some or all potential take - as a first step in the HCP's conservation program. While it may be

advantageous for applicants and listed species to avoid take, the suggestion that take must be avoided where possible is not required by the ESA or regulations where such take would not jeopardize the continued existence of species.

- We note that the Services recommend consideration for uncertainty in the HCP's conservation program and promote strong adaptive management and monitoring provisions (which often come at significant cost to the applicant), but do not explicitly address uncertainty in the calculation of take (see earlier comment regarding threshold standards for seeking take authorization: foreseeable, reasonable certainty, and proximate causation). The *Handbook* would benefit from a more balanced approach that helps the Service representatives identify opportunities for reducing a potential applicant's regulatory burden.
- Mitigation Policy and Mitigation Hierarchy - The Services cite passages of the proposed mitigation policy as providing support for the application of a strong mitigation hierarchy to HCPs. There is simply no basis in the ESA or its implementing regulations for approaching an HCP conservation program in a sequential manner - where take must first be avoided, then the impacts of any avoidable take minimized to the maximum extent practicable, and then compensatory mitigation provided for any remaining impacts. The proposed mitigation policy itself qualifies that "nothing in this policy supersedes the statutes and regulations governing prohibited 'take' of wildlife (81 Fed. Reg. 12,389) and that "some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities" (81 Fed. Reg. 12,393). We recommend that the Services clarify that applicants have no obligation to avoid take (short of jeopardy) and may propose an HCP conservation program that includes a mix of minimization and mitigation measures that best suit their circumstances, so long as the conservation program is consistent with the issuance criteria.
- Fully Offset - The *Draft Handbook* appears to require that an HCP will "fully offset" the impacts of the taking. The meaning of "fully offset" is equated with "a net benefit goal, or, at a minimum a no net loss goal." This standard is not included in the statutory criteria for HCP approval and ITP issuance. The ESA simply provides that the applicant will "to the maximum extent practicable, minimize and mitigate the impacts of such taking." 16 U.S.C. § 1539(a)(2)(B)(ii). There is no authority to apply a "net benefit" or "no net loss" standard. As a result, the "fully offset" requirement must be deleted.
- The Services define the term "fully offset" to mean "the biological value that has been lost will be at least replaced with equivalent biological value." This definition seems to expand the consideration of addressing the impacts of take on listed species to other, broader concerns in an undefined concept of "biological value." The Services even point to Resource Equivalency Analyses that compare "natural resource services" as a good example of tools for applying this concept. Take applies to identifiable individuals of a species (even in cases of habitat degradation or modification) and not to habitat itself. Although applicants may measure take using a habitat surrogate for convenience, applicants are responsible only for addressing the impacts of their foreseeable, proximate, and reasonable certain taking of the species.

- We urge that the Services use extreme care in the wording of the HCP Handbook to avoid conflating a surrogate metric for take with actual take, as defined by statute and regulation.
- The Services are correct in emphasizing that applicants are not obligated to provide conservation that exceeds the impacts of their taking, even if doing so would be practicable in light of their proposed activities and circumstances. However, Services should to make it consistently clear that applicants broadly address the impact of the taking on the species as a whole; and that take does not apply to habitat independent of a demonstration of death or injury to an individual of that species. It is the effect of the loss (kill, death, shoot, trap, collect) or decreased fitness (wound, injure, pursue, capture, hunt) of those taken individuals that is appropriately the subject of the analysis - not the effect of habitat loss, in and of itself, on the conservation status of the species. Both harm (which may include significant habitat degradation or modification) and harass require a demonstration of actual or likely death or injury to an individual of the listed species to rise to the level of take. This is an important concept that warrants more careful treatment in the HCP Handbook.
- Maximum Extent Practicable - The Services should place substantial deference on the applicant's explanation of how and why its proposed HCP conservation program meets the "maximum extent practicable" test, and consider this information in light of the applicant's purpose, need, and objectives for its covered activities. The HCP conservation program is not practicable if the applicant cannot substantially achieve its objectives as originally proposed. Furthermore, we believe that relying on an outside third party to evaluate a practicability argument is unnecessary and invites parties into an applicant's HCP process that it may not wish to involve.
- Timing of Mitigation - The *Draft Handbook* emphasizes that mitigation should be provided prior to take. However, there is nothing in the ESA or its regulations that indicates mitigation must occur prior to the take. Applicants must only demonstrate that sufficient funding is assured to implement the conservation program as specified in the HCP. While it is fine for the Services to prefer advance mitigation and doing so can help demonstrate assurances that the HCP will be implemented, the HCP Handbook should be clear that this is not a component of the issuance criteria and is not required. Nor is there an obligation to provide mitigation for "temporal impacts" when the mitigation occurs after the taking - particularly when the preservation of occupied habitat is the mitigation method. In such cases, which represent the majority of mitigation actions associated with HCPs, the execution of legal instruments to preserve occupied habitat does ensure temporal benefit to the species.
- Biological Goals and Objectives - The *Draft Handbook* presents a significant deviation from the well-crafted explanation and application of biological goals and objectives to HCPs currently found in the Five Point Policy. Here, the Services propose that "permittees are held accountable for achieving goals and objectives" and that biological goals and objectives should be included in the ITP as terms and conditions. The rationale behind this significant shift in policy is not explained, nor does it seem appropriate given the myriad factors that can influence the outcome of conservation measures on the

ground and are beyond the control of the permittee. Key aspects of the language in the Five Point Policy that are missing from the proposed revisions to the HCP Handbook include recognition that biological goals of an individual HCP are not necessarily equivalent to the range-wide recovery goals and conservation of the species, and that a permittee's obligation for meeting the biological goals and objectives is proper implementation of the operating conservation program of the HCP. We recommend that the Services use language from the Five Point Policy to express guidance regarding biological goals and objectives and remove suggestions that these aspirational statements be written into permit terms and conditions.

Chapter 10: Monitoring and Adaptive Management

- We strongly recommend the Services acknowledge that monitoring and adaptive management measures often come with substantial cost to the applicant and must be included in the evaluation of whether the HCP conservation program is practicable to implement. We also suggest the HCP Handbook clarify that on-the-ground conservation measures are preferred to monitoring or adaptive management measures when a conservation program is approaching the limits of practicability.
- The Services should clarify that “baseline” monitoring is an exercise that applicants may undertake to help them decide if seeking an ITP is warranted and to help assess the amount and extent of take from its activities, and not necessarily a part of the HCP conservation program. Also, the Services should clarify that new or updated baseline data are not required to prepare an HCP, and in the absence of such data the Services are obligated to make decisions on the basis of the best available information. Delaying an HCP process where take authorization is urgently needed to obtain better data would be unwarranted.
- Complex monitoring and research programs are expensive and can complicate the development and implementation of an HCP in ways that may not be in the applicant's interest to perform and not directly contribute to the conservation of the covered species. The Services should avoid pressing applicants to include such measures in an HCP when there is not a clear need for the information or when such measures would exceed the applicant's limit of practicability.

Chapter 11: Funding and Financial Assurances

- The Services indicate that applicants must “secure concrete funding sources before the plan is approved.” It is not clear what “concrete funding sources” means. In addition, this statement is inconsistent with the issuance criteria that only require an applicant to provide assurances that sufficient funding *will* be provided. The ESA does not require that the funding must be secured upfront, only that the applicant assure the Services that it will be available when needed.
- The funding chapter states that applicants must provide funding and assurances to remedy “secondary impacts” to their conservation programs. The examples provided by the Services imply that applicants must provide funding to address impacts caused by others

or that are outside of their control. The suggestion that applicants are responsible for addressing impacts that they do not cause is a significant overreach that is contrary to statute and regulation. To the extent practicable, applicants minimize and mitigate for the impacts of their takings - not for the actions of others or circumstances outside of their control, unless agreed to as a response to an explicitly identified changed circumstance. But, even then, any additional financial obligations should be measured and have clear limits.

- We applaud the Services for the expanded guidance on types of funding sources and financial assurances that may be used in HCPs.

Chapter 12: Net Effects and Permit Duration

- Much of the content of this chapter seems out of place. For example, this chapter provides additional guidance on the calculation of take that should more appropriately be placed in Chapter 8.
- The Services do not clearly articulate how an analysis of “net effects” is required to make a determination regarding the issuance criteria. In this regard, an applicant must only describe the impacts of the taking and demonstrate that it has minimized and mitigated for the impacts of the taking to the maximum extent practicable. The Services should clarify that it is their responsibility to evaluate the conservation benefits of the HCP and impacts of the take against the status of the species to determine if issuance of the ITP would jeopardize listed species as part of its section 7 obligations. It is not the obligation of the applicant to do so in the HCP.
- The Services do not sufficiently explain how an analysis of net effects relates to permit duration. The ITP authorizes incidental take resulting from the covered activities and the duration of the permit need only be long enough to cover the period in which authorized takings may occur. The duration of any impact (positive or negative) resulting from the taking is immaterial to the permit duration.
- The Services should expand on guidance pertaining to how jeopardy and adverse modification of critical habitat are evaluated in the context of an HCP, where the underlying actions are non-federal in nature. As explained in the WUWC comments on the proposed rules, the Services’ recent rules on the designation of critical habitat and adverse modification of critical habitat are significant deviations from previous principles. The *Final Handbook* should explain how these new policies apply to the HCP process.

Chapter 13: NEPA

- We applaud the Services for several excellent clarifications and expanded guidance on how to appropriately apply NEPA to the HCP process. Key among these is the early discussion of the need to properly characterize the scope of the federal action in order to avoid analyzing impacts that do not arise from the federal action. We also applaud clarifications that an EIS is not automatically triggered by uncertainty or controversy, that

“no action” can properly be interpreted as “no HCP/ITP” and not necessarily as “no project,” and the reduced public comment periods.

- We also recommend that the Services continue to emphasize clarity and brevity in NEPA documents and hold to the goal of keeping NEPA EAs at 10 to 15 pages. We suggest that the Services provide an example of an acceptable EA that achieves this goal.
- However, we recommend that the Services revise their suggested language for NEPA purpose to focus on the implementation of its regulatory function under section 10 and not on concepts of achieving long-term conservation of species, other ecosystem conservation objectives, or spatially explicit landscape conservation design principles (it is not even clear what this refers to). The purpose of the NEPA analysis for a proposed issuance of an ITP is to simply to cover the issuance of an ITP under section 10.

Chapter 14: Processing

- This chapter asserts that it is the Services (at the Field Office level) that decide when an applicant should submit a draft HCP for processing. This is incorrect - the applicant prepares the draft HCP and decides if and when to submit the draft with an application form and fee to the Services. The Services should clarify that applicants initiate the application process with the Services.
- The Services indicate on page 14-3 that applicants should provide chapters of their draft HCPs to the Services for review as they are drafted. This practice is not likely to result in faster or more complete reviews. HCPs are integrated planning documents that must be read as an entire document to fully understand and appreciate how the components are related.
- The Services make an important point in this chapter that “when the Services get an adequate draft HCP that meets all requirements and issuance criteria, with a complete and correctly filled out application for a permit, we issue a permit unless there are disqualifying factors.” This very simple statement accurately captures the Services’ role in this process. This principle should be constantly repeated throughout the lengthily *Handbook*, which describes a complicated engagement, coordination, and involvement, process that could be construed to depart from this simple and clear admonition.

Chapter 15: Final Documents

- We encourage the Services to consider expanding guidance specifying ways for speeding the finalization of decision documents and achieving ITP issuance as soon as possible following the close of public comment periods. For example, the package of decision documents for most small to mid-scale HCPs – which often draw few, if any, substantive public comments – should be in a near final state by the close of the public comment period and able to be immediately routed for final approvals and signature.

- We suggest that the Services emphasize the importance of giving applicant’s an opportunity to review and comment on ITP terms and conditions prior to permit issuance, in order to ensure that the ITP accurately reflects the content of the HCP.

Chapter 16: Permit Decisions

- Chapter 16.1.3.4 suggests that the cost of implementing the conservation program should not be tied to considerations regarding practicability. However, it is impossible in most circumstances for applicants to disconnect these concepts - the cost of implementing the conservation program is absolutely a factor in determining how much conservation can be achieved within the limits of practicability. The Services should clarify that it is absolutely appropriate for reduced funding availability to be a changed circumstance if the main body of the conservation program does not already include sideboards on the amount of funding an applicant is expected to provide for HCP implementation.
- Chapter 16.2.1 (permit terms and conditions) indicates that the Services should ensure that the terms and conditions of the ITP are the same as or a summary of those measures described in the HCP. The Services also note that they “may need to incorporate additional conditions...for instance, if the Section 7 incidental take statement includes reasonable and prudent measures and implementing terms and conditions that go beyond what is proposed in the HCP.” However, we suggest the Services clarify that any such additional terms and conditions must adhere to the minor change rule for reasonable and prudent measures, described in the Section 7 regulations.

We appreciate the opportunity to provide these comments. If you have any questions regarding our comments, please contact the WUWC’s National Counsel, Don Baur of Perkins Coie LLP, at (202) 654-6234.

Sincerely,



Michael Carlin
Chair
Western Urban Water Coalition

cc: Perkins Coie LLP
700 Thirteenth St. NW, Suite 600
Washington, D.C. 20005-3960