



Advancing Wind Power in Illinois Conference 2011

Habitat Conservation Plans

What Are They and When Are They Needed

Friday, July 22, 2011, 1:30 PM

Terry VanDeWalle - Stantec

Karen Tyrell - BHE Environmental

Alan Glen – Smith | Robertson

Keith Shank – IL Dept. of Natural Resources

Introduction to Habitat Conservation Plans

Presented by Terry VanDeWalle
Stantec



What is an HCP?

- ❖ Preparation of an HCP is required to support an application for an incidental take permit (ITP) under section 10(a)(1)(B) of the ESA. The HCP sets forth anticipated effects of the proposed incidental taking and ways in which those effects will be minimized and mitigated
- ❖ An ITP will allow a permittee to proceed with activity that would otherwise result in the unlawful take of a listed species
- ❖ The HCP provides the measures that will be undertaken by the permittee to minimize and mitigate the impacts of the proposed taking



Background

- ❖ Section 9 prohibits “take”
- ❖ Section 7 can authorize take for federal actions
- ❖ Until 1982, ESA provided no mechanism for non-federal “take”
- ❖ San Bruno Mountain/1982 amendment [10(a)(1)(B)]
- ❖ HCPs are the mechanism by which a non-federal “take” permit is obtained
- ❖ Obtaining an ITP is voluntary



Required Elements of an HCP

- ❖ Impacts that will likely result from the taking
- ❖ Steps applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such impacts
- ❖ Alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized
- ❖ Other measures required by the Secretary



Also, by Policy

- ❖ Biological goals and objectives
- ❖ Monitoring
- ❖ Adaptive management



HCP Issuance Criteria

- ❖ Taking will be incidental
- ❖ Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking
- ❖ Applicant will ensure adequate funding
- ❖ Taking will not appreciably reduce likelihood of survival and recovery in wild (jeopardy standard)
- ❖ Secretary's measures will be met
- ❖ "No surprises" assurances for species (listed and non-listed) found to be "adequately covered" (meets issuance criteria)



HCP Process

- ❖ Lengthy pre-application effort is typical
- ❖ NEPA
- ❖ Section 7 Consultation
- ❖ Mandatory public notice and opportunity for comment
- ❖ Implementing agreements
- ❖ Processing times?



HCP Resources

- ❖ In November of 1996, FWS published the *Habitat Conservation Planning and Incidental Take Permit Processing Handbook*
- ❖ A revised Handbook is currently in progress
- ❖ 1996 version available at <http://www.fws.gov/endangered/esa-library/index.html#hcp>



Photo Credits



High Sheldon Wind Farm
Sheldon, New York
Photo: Stantec



Indiana Bat, Fernald Natural Resources
Fernald Closure Project
Photo: Department of Energy



Sage Grouse
Photo: U.S. Bureau of Land Management

Determining the Need for an HCP

Presented by Terry VanDeWalle
Stantec



When is an HCP Needed?

Decision: To do or not to do an HCP

- ❖ The decision to obtain a section 10(a) incidental take permit (ITP) and prepare an HCP in support of that permit lies with the project proponent and is a very important judgment call
- ❖ Preparing an HCP can be a lengthy and expensive process, depending on the complexity of the situation
- ❖ BUT, unauthorized “take” of a federally listed species, intentional or not, is subject to enforcement and penalty under section 9 of the ESA. Failure to comply with the ESA, or to inadequately comply, can result in far greater project delays and costs



When is an HCP Needed?

Key Project Elements

- ❖ An ITP and HCP is needed for the project if:
 - ❖ Incidental “take” of a listed species cannot be avoided and is likely to occur during a proposed project
 - ❖ Compliance with the ESA via section 7 is unavailable to the project proponent. That is, the project has no a federal nexus (i.e., no federal land affected; no federal funding involved; no federal permits required)



Additional Considerations

- ❖ If the project may impact a candidate, proposed, or petitioned species (species not yet listed but likely to be in the future), an HCP can offer significant protection for the project against future listings
- ❖ Obtaining an ITP would require compliance with the National Environmental Policy Act (NEPA), which would otherwise not be necessary for projects lacking a federal nexus



How to Determine the Key Project Elements

- ❖ Key Question: Would any federally listed species potentially be impacted by your project?



How to Determine the Key Project Elements

❖ Before agency contact

- ❖ Have project biologist compile the best available scientific evidence on the potential occurrence of listed species
 - ❖ Consult USFWS county-by-county lists
 - ❖ If any listed species may occur in general area, conduct habitat assessment / species surveys on project site
 - ❖ Consider potential for project-related, off-site impacts (transmission line, access roads)
 - ❖ If species impacts possible, explore opportunities for designing project to AVOID impacting species
 - ❖ If species impacts cannot be avoided, consider options for designing project to MINIMIZE impacts and estimate potential “take” for those options



How to Determine the Key Project Elements

❖ Agency Contact:

- ❖ Develop consultation strategy
- ❖ Provide USFWS with project description
- ❖ Provide USFWS with written report on biological findings
- ❖ If species impacts can be avoided and USFWS concurs, no ITP and HCP is needed

❖ Advice:

- ❖ Listen to what agency personnel have to say and take it seriously. Their input is essential for determining whether an HCP is needed or advantageous for your project
- ❖ Maintain clear communications with the agencies from day 1. Assumptions can lead to expensive misunderstandings



Cost Considerations

- ❖ Potential Impacts Unavoidable; ITP / HCP Needed:
 - ❖ Is it cost-effective to pursue the project? HCP-related costs may include:
 - ❖ Additional biological studies (e.g., radio-tracking, bat monitoring, radar)
 - ❖ Minimization measures (e.g., reducing project size, relocating turbines, cut-in speed management)
 - ❖ Mitigation measures (e.g., monitoring, long-term habitat preservation and management, adaptive management)
 - ❖ Project delays (2 years to ITP issuance typical)
 - ❖ Legal consultation
 - ❖ Plan development and document preparation
 - ❖ NEPA compliance



National Environmental Policy Act (NEPA)

- ❖ What will be the project NEPA strategy? Costs vary by NEPA level
- ❖ Does the project qualify for a Low-effect ITP/HCP and a NEPA categorical exclusion? ("Low-effect" ITPs are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP.)
- ❖ If not, will an Environmental Assessment suffice or is an Environmental Impact Statement necessary?
- ❖ This is the USFWS's call, but the applicant funds the effort and needs to be aware of the time and cost differences and have input into the decision



Final Thought: A Warning from the Trenches

- ❖ Do not underestimate the level of effort needed to justify a persuasive and defensible estimate of potential impact to a listed species
- ❖ Focus on having the best available biological science lead your design team



Photo Credits



Golden Eagle Impact
Photo: <http://www.windfarmfactsutah.org/>



Indiana Bat
Photo: <http://www.fhwa.dot.gov/environment/wildlifeprotection/images/indianabat.550.jpg>



Ecologist
Photo: Stantec

Components of an HCP

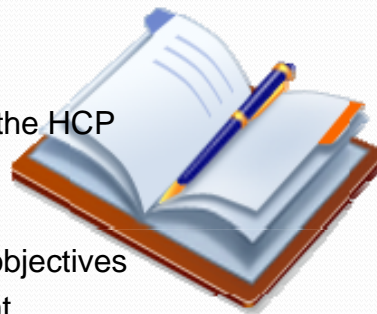
Presented by Karen Tyrell
BHE Environmental, Inc.



Components of the Working HCP

So far, we've talked about

- ❖ Purpose of the HCP
- ❖ How the HCP will function
- ❖ Guidelines for developing the HCP
 - ❖ HCP Handbook
 - ❖ 5 Points Policy
 - ❖ Biological goals and objectives
 - ❖ Adaptive management
 - ❖ Monitoring



How Do You Write the HCP to Accomplish This?

- ❖ Meet all requirements
- ❖ Craft an effective operating conservation program
- ❖ Adhere to your project scope and schedule



HCP Components and Organization

- ❖ Provide background, applicant history and information
 - ❖ State purpose and need
 - ❖ Delineate HCP boundaries
 - ❖ Define permit duration
- ❖ Present HCP structure and regulatory framework
- ❖ Identify project impacts and environmental consequences
 - ❖ Determine proposed activities that may lead to incidental take (covered activities)
 - ❖ Collect and synthesize biological data on affected environment and biological resources (species range and distribution, life history, status, threats)
 - ❖ “Overlay” activities and species resources to determine direct and indirect impacts to species



HCP Components and Organization

- ❖ Quantify anticipated take
 - ❖ Number of animals taken
 - ❖ Acres of habitat (or other units) affected
- ❖ Define conservation program
 - ❖ Biological goals and objectives
 - ❖ Minimization and mitigation measures
 - ❖ Effects of implementing the conservation plan



HCP Components and Organization

- ❖ Analyze alternatives
- ❖ Design monitoring and reporting program
 - ❖ Effectiveness of conservation program (progress toward meeting goals and objectives)
 - ❖ Compliance with terms of the HCP/ITP
- ❖ Discuss No Surprises assurances
 - ❖ Changed circumstances
 - ❖ Unforeseen circumstances
- ❖ Describe funding, additional measures, amendments



Completing the HCP and Applying for an ITP

- ❖ Coordinate HCP with ESA Section 7
- ❖ Complete HCP/ITP package
 - ❖ Application form and fee
 - ❖ Proposed HCP
 - ❖ Implementing agreement (if needed)
 - ❖ Draft NEPA analysis
 - ❖ Certification by USFWS FO that documents are statutorily complete



Completing the HCP and Applying for an ITP

ITP permit processing also includes:

- ❖ Federal Register notices
- ❖ Solicitor's Office review
- ❖ Formal section 7 consultation
- ❖ Set of Findings



HCP Preparation: How Long Does it Take?

Section 10 permit process includes three phases, the timing of which can vary and depends on size, complexity, and impacts

- ❖ HCP development
- ❖ Formal permit application processing
 - ❖ HCP with EIS
 - ❖ HCP with EA
 - ❖ Low-effect HCP with categorical exclusion
- ❖ Post-issuance



Photo Credit



Florida Panther
Photo: Larry Richardson, USFWS



Whooping Crane
Photo: USFWS



Karner Blue Butterfly
Photo: Paul Labus, The Nature Conservancy

Issues in Development and Implementation of HCPs

Presented by Alan M. Glen
Smith|Robertson, LLP



Making the Record

- ❖ National Environmental Policy Act (NEPA)
- ❖ Endangered Species Act (ESA) section 10
- ❖ ESA section 7
- ❖ Judicial Challenge under the Administrative Procedure Act
 - ❖ Legal Standard: arbitrary, capricious or against law (based on a cold record)



Don't be Greedy / Third-Party Review

- ❖ “Don't let their mistakes be your mistakes”
(Professor J.B. Ruhl)
- ❖ An extremely favorable permit will be of no use to you if it is struck down in court
- ❖ Use caution when attempting to get top-down resolution; plaintiffs are quick to characterize that as political interference
- ❖ Make sure record supports ITP terms



Succession and Transferability

- ❖ Original 50 CFR Part 13 regulations did not fit HCPs.
- ❖ Section 13.25 now covers HCP issues. Subsections (d) and (e) provide that:
 - ❖ (d) Except as otherwise stated on the face of the permit, any person who is under the direct control of the permittee, or who is employed by or under contract to the permittee for purposes authorized by the permit, may carry out the activity authorized by the permit.
 - ❖ (e) In the case of permits issued under §17.22(b)–(d) or §17.32(b)–(d) of this subchapter to a State or local governmental entity, a person is under the direct control of the permittee where:
 - ❖ (1) The person is under the jurisdiction of the permittee and the permit provides that such person(s) may carry out the authorized activity; or
 - ❖ (2) The person has been issued a permit by the governmental entity or has executed a written instrument with the governmental entity, pursuant to the terms of the implementing agreement.



Succession and Transferability, cont.

- ❖ Key issues on scope and structure:
 - ❖ Umbrella HCPs
 - ❖ Certificate of Inclusion HCPs
 - ❖ Regulatory permittees
 - ❖ Non-regulatory permittees



No Surprises

- ❖ “No Surprises Policy” - “In negotiating “unforeseen circumstances” provisions for HCPs, the Fish and Wildlife Service and National Marine Fisheries Service shall not require the commitment of additional land or financial compensation beyond the level of mitigation which was otherwise adequately provided for a species under the terms of a properly functioning HCP. Moreover, FWS and NMFS shall not seek any other form of additional mitigation from an HCP permittee except under extraordinary circumstance.”
- ❖ Changed Circumstances means “changes that can reasonably be anticipated and planned for (e.g., the listing of new species, modifications in the project or activity as described in the original HCP, or modifications in the HCPs monitoring program).”
- ❖ Unforeseen Circumstances means “changes in circumstances surrounding an HCP that were not or could not be anticipated by HCP participants and the Services, that result in a substantial and adverse change in the status of a covered species.”
- ❖ Adaptive Management – FWS will often incorporate adaptive management concepts into the HCP process to minimize the uncertainty associated with listed or unlisted species where there are gaps in the scientific information or their biological requirements.



No Surprises, cont.

50 CFR 13.28 - A permit may be revoked for any of the following reasons:

- ❖ (1) The permittee willfully violates any Federal or State statute or regulation, or any Indian tribal law or regulation, or any law or regulation of any foreign country, which involves a violation of the conditions of the permit or of the laws or regulations governing the permitted activity; or
- ❖ (2) The permittee fails within 60 days to correct deficiencies that were the cause of a permit suspension; or
- ❖ (3) The permittee becomes disqualified under 13.21(c) of this part; or
- ❖ (4) A change occurs in the statute or regulation authorizing the permit that prohibits the continuation of a permit issued by the Service; or
- ❖ (5) Except for [certain] permits..., the population(s) of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.

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 **SMITH|ROBERTSON**
Attorneys at Law

Maximum Extent Practicable Standard

- ❖ “This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant.”

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Attorneys at Law

Its NEPA Too

- ❖ Categorical Exclusions (CE)
- ❖ Environmental Assessment (EA)
- ❖ Environmental Impact Statement (EIS)
- ❖ Nature of the Action



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SMITH|ROBERTSON
Attorneys at Law

Public Involvement

- ❖ Proper Notices
- ❖ Document Availability
- ❖ Response to Comments



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Attorneys at Law

Other Regulated Resources

- ❖ Cultural/historic
- ❖ Migratory birds
- ❖ Eagles
- ❖ Wetlands
- ❖ Subsequent section 7



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Attorneys at Law

And, Now, We Have to Amend

- ❖ “Amendment of a section 10(a)(1)(B) permit is required when the permittee wishes to significantly modify the project, activity, or conservation program as described in the original HCP. Such modifications might include significant boundary revisions, alterations in funding or schedule, addition of a species to the permit that was not addressed in the original HCP, or adjustments to the HCP necessitated by unforeseen circumstances. A permit amendment consists of the same process as the original permit application, requiring an amendment to the HCP addressing the new circumstance(s), a Federal Register notice, NEPA compliance, and an intra-Service section 7 consultation.”

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Attorneys at Law

And, Now, We Have to Amend, cont.

- ❖ Minor amendments can be processed in an expedited fashion. These typically include “corrections in land ownership; minor revisions to survey, monitoring, or reporting protocols; and minor changes in reserve boundaries that result in no net loss of reserve land or do not otherwise alter the effectiveness of the HCP.” Minor amendments can be made in two ways:
 - ❖ Formal Amendment - The HCP and permit can be formally amended just as with more significant changes. NEPA documentation will be required, but is often less onerous for a permit amendment than for the original permit application
 - ❖ Administrative (informal) amendment – This expedited process is available where “(1) the amendment has the unanimous consent of the permittee and FWS or NMFS; (2) the original HCP established specific procedures for incorporating minor amendments so that the public had an opportunity to comment on the process, and such amendments are consistent with those procedures; (3) the HCP defines what types of amendments are considered minor; (4) a written record of any such amendments is prepared; and (5) the net effect on the species involved and level of take resulting from the amendment is not significantly different than analyzed under the original HCP and the Service’s decision documents.”

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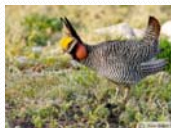
Public Involvement Meeting
Photo: Stantec



Golden Eagle
Photo: Kevin Nibur, Bay Nature



Townsend Big Eared Bat
Photo: J. Scott Altenbach



Lesser Prairie Chicken
Photo: Aaron Eckert Photography

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 **SMITH|ROBERTSON**
Attorneys at Law

Incidental Take in Illinois

Presented by Keith Shank
Illinois DNR



State of Illinois
Pat Quinn, Governor

Illinois Department of Natural
Resources

Illinois Endangered Species Protection Act

- ❖ Illinois Endangered Species Protection Act [520 ILCS 10/1 et seq.]
 - ❖ This statute is not derived from nor related to the federal Endangered Species Act
 - ❖ The federal statute neither pre-empts nor supersedes state law
 - ❖ Illinois currently lists 152 animals



Illinois Endangered Species Protection Act

- ❖ Federally-listed species which occur in Illinois are automatically also listed by the state
- ❖ State requirements fully apply to federally-listed species when they are in Illinois
- ❖ Consequently, taking a federally-listed species in Illinois requires both state and federal permits



Illinois' Definition of "Take"

- ❖ ...to harm, hunt, shoot, pursue, lure, wound, kill, destroy, harass, gig, spear, ensnare, trap, capture, collect, or to attempt to engage in such conduct.
[520 ILCS 10/2]



Incidental Take

- ❖ “...any taking otherwise prohibited ...if that taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” [520 ILCS 5.5(a)]



Title 17 Ill. Admin. Code Part 1080

- ❖ Requirements and process to obtain an Incidental Take Authorization
- ❖ CONSERVATION PLAN
- ❖ This is the analog to the federal HCP or Biological Assessment



Title 17 Ill. Admin. Code Part 1080

- ❖ Illinois law allows applicants to submit an approved federal HCP or BA in lieu of a Conservation Plan
- ❖ Illinois will review the federal document
- ❖ Illinois may accept, modify, or reject the federal documents, in whole or in part



When Do You Need an Illinois ITA?

- ❖ Whenever your estimate of the risk exceeds your willingness to accept it
- ❖ What is at stake?
- ❖ Violation of the statute is a Class "A" Misdemeanor for each count. Penalties include fines, imprisonment, or both



The Department of Natural Resources will aid your decision

- During consultation, if IDNR estimates the risk of take is very high, it will “recommend” that an ITA be sought. Take that seriously
- Otherwise, IDNR will share its data but will not advance an opinion regarding take. If an animal is present, a “take” is possible!
- Remember, in consultation IDNR is evaluating the *adverse modification of essential habitat* NOT *the risk of take*



The Department of Natural Resources will aid your decision

- ❖ An IDNR opinion that *adverse modification of essential habitat* is unlikely IS NOT An IDNR opinion on the risk of taking
- ❖ Migratory animals may be taken far from the nearest “essential habitat”



So far...

- ❖ Three wind projects have Illinois ITAs for:
 - ❖ Indiana Bat, Gray Bat, Regal Fritillary Butterfly, Blanding's Turtle, Ornate Box Turtle, Upland Sandpiper, Loggerhead Shrike, Short-eared Owl, and Northern Harrier
- ❖ Fifteen others have IDNR "recommendations"
- ❖ None have a federal HCP/BA



Points to Take Away

- ❖ State and federal requirements for legal taking are NOT interdependent
- ❖ State and federal officials may differ sharply about potential impacts and about avoidance, minimization, and mitigation approaches
- ❖ There is no need to wait on a federal permit before obtaining a state permit for a federally-listed animal



Photo Credits



Upland Sandpiper
Photo: Bob Gress
www.flickr.com



Ornate Box Turtle
Photo: Illinois DNR



Ornate Box Turtle
Photo: Ann Swengel
for Wisconsin DNR

Special Thanks To...

- ❖ Illinois Wind Working Group
- ❖ Illinois Institute of Technology
- ❖ SWCA Environmental Consultants

