

## **APPENDIX 6:**

### **FWS Guidance on Integrating HCPs With National Wildlife Refuges**



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

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### Memorandum

To: Regional Directors, Regions 1, 2, 3, 4, 5, 6,  
Assistant Director - Ecological Services  
Assistant Director - Fisheries  
Assistant Director - Refuges and Wildlife  
Assistant Solicitor - Fish and Wildlife

From: Deputy Director

Subject: Relationship of National Wildlife Refuges and Habitat Conservation  
Planning Efforts

In recent years, the Habitat Conservation Plan program under section 10(a)(1)(B) of the Endangered Species Act has grown rapidly. When Congress enacted the HCP provisions into law in 1982, it stressed the need for developing "creative partnerships" between the public and private sector in resolving endangered species issues, especially on private lands.

One of the ways the Fish and Wildlife Service is developing these "creative partnerships" is through the integration of the National Wildlife Refuge System with HCPs in many areas. These partnerships, although very effective, raise several important questions regarding the relationship between Federal habitat acquisition and HCP efforts.

Some have questioned government land acquisition programs in HCP planning areas, claiming that such programs, in effect, absolve private land developers of their obligations to mitigate the impacts of their activities on listed species. This misconception can be clarified by ensuring that the Federal activity of establishing a NWR, in conjunction with a HCP, does not obviate the habitat mitigation requirements for the incidental take permittee. Under section 10 of the Act, an incidental take permittee is required to "minimize and mitigate" the effects of his/her taking of listed species and the permittee has specific conservation responsibilities within any HCP program. The incidental take permittee **must** mitigate regardless of what is required of or carried

out by other entities within the HCP, to the extent deemed appropriate, as defined in an approved HCP.

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The Service believes that HCPs and NWRs each have their respective roles in habitat conservation efforts and also believes that, in many cases, the two can work together to achieve greater results. However, because HCP efforts sometimes require a public agency funding component in establishing a preserve system, it is critically important to define the relationship between NWR and HCP efforts occurring in the same geographic area early in the planning process. Through proper planning and design a NWR and an HCP can be integrated so that greater benefits to the species can be achieved while, at the same time, the incidental take permittee fulfills their mitigation requirements under the HCP. In other cases, physical separation of the NWR and HCP can result in greater benefits to the species than would integration.

The following simple guidelines are provided for determining appropriate courses of action in cases involving establishment and management of NWRs and HCPs occurring in the same geographical area.

- (1) The primary objective in deciding whether it is desirable to integrate any NWR within any HCP program is to maximize benefits to the species and the ecosystem upon which they depend.
- (2) A NWR must not be established or managed to substitute for the mitigation required of an incidental take permittee, although the NWR may complement an HCP by helping to meet comprehensive conservation and recovery goals for the species or the ecosystem.

Additional guidance and examples can be found in the Service's Habitat Conservation Planning and Incidental Take Permit Processing Handbook.

## **Additional Guidance and Examples Detailing the Relationship of National Wildlife Refuges and Habitat Conservation Planning Efforts**

In recent years, the Habitat Conservation Plan (HCP) program under section 10(a)(1)(B) of the Endangered Species Act has grown rapidly. At the same time, Congress and the Service have begun to play a larger role in helping to fund and support HCP efforts. For example, Congress appropriated funds to the Service to assist in development of the Brevard County HCP in Florida; these funds were subsequently distributed through a Service grant to the HCP applicant. In other cases, Congress has appropriated funds under the Land and Water Conservation Fund (LWCF) for habitat acquisition in areas where HCP efforts are also underway to maximize cooperative Federal, State, and local land protection efforts (e.g., in the Washington County HCP in Utah and Balcones Canyonlands HCP in Texas). By law, lands acquired by the Service with LWCF or Migratory Bird Funds, must be managed as part of the National Wildlife Refuge System (NWR).

These trends raise several important questions concerning the relationship between the two programs (i.e., habitat acquisition under privately funded HCP efforts and publicly funded NWRs) and how such programs should be jointly managed. Some have criticized government land acquisition programs in HCP planning areas, claiming that such programs, in effect, absolve private land developers of their obligations to mitigate the impacts of their activities on listed species.

The Service believes that HCPs and NWRs each have their respective roles in habitat conservation efforts and that the two can actually work together to achieve mutual goals. It is critically important to clearly define the relationship between a NWR and HCP efforts occurring in the same vicinity and establish to what extent and how the efforts may be complementary. However, the Federal activity of establishing a NWR should never be considered a substitute for the habitat mitigation requirements for the incidental take permittee that are established by the HCP.

This memorandum provides guidance that will help define the relationship between NWRs and HCPs occurring in the same geographic area, as well as to help determine how the programs should be managed. The guidance is provided to help determine the appropriate courses of action in cases involving joint establishment and management of NWRs and HCPs.

- (1) The primary objective in integrating any NWR with any HCP program is to increase benefits to the species and the ecosystem upon which it depends. The option that most benefits the species is preferable.
- (2) A NWR should not be established or managed to substitute for the mitigation required by an HCP, but may complement an HCP in meeting comprehensive conservation and recovery goals for the species or the ecosystem. Endangered species habitat acquisition under NWR and HCP programs that occurs in the same area is generally regarded as independent, but complementary.

To the extent that establishment of a NWR helps a community initiate, complete, or maintain an HCP program by sharing the burden of habitat protection, it has contributed to species conservation and recovery. However, the Federal activity of establishing a NWR should never be considered a substitute for the habitat mitigation requirements for the incidental take permittee that are established by the HCP. Under section 10 of the Act, an incidental take permittee is required to “minimize and mitigate” the effects of its taking of listed species and the permittee has specific conservation responsibilities within any HCP program. It must be stressed that the incidental take permittee **must** mitigate regardless of what is required of or carried out by other entities in terms of habitat management and protection, to the extent deemed appropriate, as defined in an approved HCP.

When developing a NWR in conjunction with an HCP, the lands available to the incidental take permittee for mitigation purposes must be clearly identified in the HCP. The area targeted by the HCP for acquisition by the Service for the refuge is separate from the targeted for acquisition by the incidental take permittee to fulfill mitigation requirements. The lands acquired for mitigation purposes by the permittee could subsequently become part of the refuge and managed as such. Mitigation required by an HCP should compensate for lost habitat, whereas the establishment of the NWR in conjunction with an HCP should be complementary to the HCP, but should not be compensation for habitat lost through the HCP.

With respect to this guidance, the Service's first responsibility is to promote the conservation and recovery of endangered and threatened species, whereas the responsibility of the incidental take permittee is to meet the habitat mitigation requirements of the HCP. NWRs can clearly contribute to listed species recovery where they protect large or important listed species habitat areas. Large-scale regional HCPs, such as those in the Balcones Canyonlands, TX and Washington County, UT areas, also contribute to endangered species recovery by establishing predictable, enforceable conservation programs across large areas. If one program in an area helps listed species, two different, but complementary programs working together synergistically can support species recovery needs even more.

Through proper planning and design a NWR and an HCP can be integrated so that the species is conserved or recovered while, at the same time, the incident take permittee meets the mitigation requirements of the HCP. The integration of a NWR into an HCP can be accomplished, if the two are established through a coordinated effort and incorporated into the initial planning processes for the HCP. However, this is true only if the NWR and HCP are managed in a coordinated manner so the benefits of both programs exceed the benefits of either program working alone. Maximum benefit for the species can be derived by cooperatively establishing a NWR that would help support a regional HCP initiative. The Federal activity of establishing a NWR, in conjunction with a HCP, does not replace the habitat mitigation requirements for the incidental take permittee. However, as part of the mitigation requirements and conditions of an HCP, permittees may purchase land specifically designated in the HCP, that eventually could become part of the NWR and be managed as such, if the plan is properly coordinated and planned.

Many factors can affect how Federal and private habitat protection efforts should be coordinated, and what is appropriate in one situation may not be appropriate in another. We believe the principles outlined above--adherence to the provisions of the HCP (particularly the mitigation requirement), adherence to the NWR's purpose, and cooperative efforts to increase the benefits to the species--should provide the basis for any future decisions of this type. The following two examples (i.e., independent project and complementary project) represent different relationships between NWRs and HCPs and illustrate why these relationships need to be defined on a case-by-case basis.

**Independent Project:** An HCP for the Balcones Canyonlands in Travis County, TX was initiated in 1988 to address the conservation needs of the golden-cheeked warbler, black-capped vireo, and several cave invertebrates. The draft Balcones HCP calls for acquisition by the permittee of approximately 30,500 acres of warbler and vireo habitat. Of this area, 22,000 acres has already been acquired. Meanwhile, in 1991, the Service decided to establish the Balcones Canyonlands NWR in the same vicinity as the Balcones HCP. The environmental assessment for the project, completed in December 1991, projected a 41,000-acre Refuge (an additional 5,000 acres was later authorized). The area targeted for refuge acquisition was separate from the area targeted by the HCP acquisition.

A potential conflict arose when a developer proposed to purchase private lands inside the Balcones NWR acquisition boundary for use as mitigation lands for development activities in the Balcones HCP area. The issue was whether the Service should accept private lands purchased inside the Refuge boundary as mitigation lands for purposes of the HCP.

Planners for both the HCP and NWR envisioned that the two programs would be independent with respect to land acquisition (i.e., Refuge acquisition would not occur in targeted HCP reserves and vice versa). The Golden-cheeked Warbler Recovery Plan, approved September 1992, divides the warbler's range into eight "recovery regions" and requires protection of sufficient breeding habitat to maintain a viable warbler population in each of these regions. Habitat areas targeted for acquisition under the Balcones HCP and NWR are in the same recovery plan region and both are necessary for fulfillment of the recovery goal for that region. This means that acquiring habitat independently under the two programs will best achieve golden-cheeked warbler recovery. Allowing "cross over," or purchase inside the Refuge boundary by private developers, may ultimately slow or decrease progress toward recovery.

Based on these considerations, the Service did not allow land procurement for HCP mitigation purposes inside the boundary of the Balcones NWR and maintained the independence of the two programs. This does not mean that land purchases inside the Refuge boundary by private entities cannot occur, only that such purchases would not count toward the mitigation goals under the HCP.

**Complementary Project:** A complementary agreement is currently being developed between the Service and the private sector through the establishment of a NWR and an HCP in southern California. The goal of this specific HCP is to conserve 87 listed and non-listed species within a 164,000 acre preserve in southern San Diego County. To accomplish this goal, the Service has

entered into the preserve process both in its Federal capacity and as a partner. The Service has committed funds, land, and personnel to the planning and implementation process of the preserve.

The Federal government's contribution to the San Diego habitat protection effort will include a variety of activities. In addition to participation with the local communities on developing a Multiple Species Conservation Planning (MSCP) effort, the Federal government will also be a land manager. Lands currently administered by the Bureau of Land Management (BLM) will become a part of the overall habitat preserve. The Service is planning to establish the San Diego National Wildlife Refuge, and lands that would be acquired with LWCF or other sources within the San Diego NWR boundary, which partially overlays the proposed preserve, will become part of the NWR. The Federal activities associated with establishment, acquisition and management of the NWR, in conjunction with San Diego's HCP, will not replace the mitigation requirements of incidental take permittees in the HCP.

The expectation is that the overall preserve will consist of a mosaic of ownerships, including land acquired by the HCP incidental take permittees, local governments, State resource agencies, and the Federal government, including the Service. The approved refuge boundary would also likely consist of a mosaic of ownerships. BLM lands within the boundary may have management responsibilities transferred to the Service; State and local government agencies may enter into cooperative management agreements with the Service for management of their properties; and lands acquired by other entities to meet mitigation requirements of the HCP for off-site development may also be included. Entities may enter into mitigation banking agreements with the Service by purchasing lands within the refuge boundary, transferring title to the Service for management and credit for future mitigation needs, under an approved HCP or other agreements. The area will also contain inholdings of privately-owned lands, some of which may be contributed to the preserve as mitigation for on-site land disturbances. The Service will prioritize the private land holdings within the refuge boundary and seek to purchase lands or conservation easements from willing sellers as funding is available. The NWR will also focus on providing connecting links between habitats protected through the overall HCP/refuge preserve. These links are essential for the MSCP and for the conservation of the whole ecosystem upon which the threatened and endangered species depend.

When Congress enacted the HCP provisions into law in 1982, it stressed the need for developing "creative partnerships" between the public and private sector in resolving endangered species issues, especially on private lands. We believe that establishing and managing NWRs within the vicinity of HCP planning areas based on the principles outlined above is consistent with the intent of the HCP process and the Service's mission to protect and recover federally listed species.