



# Habitat Conservation Plan Incidental Take License Information Package



Hawaiian stilt, a'eo, *Himantopus mexicanus knudseni* - Photo: Garret Lau

State of Hawaii  
Department of Land and Natural Resources  
Division of Forestry and Wildlife

Includes:  
State HCP Fact Sheet  
State HCP Process  
State HCP Agreement for Technical Services  
State HCP Application  
Federal HCP Fact Sheet



# Habitat Conservation Plans Incidental Take Licenses

## Quick Facts

- Take of endangered or threatened species is illegal under state and federal law
- Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct - Chapter 195D Hawaii Revised Statutes
- ITLs provide a means to authorize take that is incidental to activities that are otherwise legal
- ITLs must be accompanied by an approved HCP
- HCPs provide measures for avoidance, minimization, mitigation, monitoring, and net recovery benefit to the affected species



Hawaiian petrel, 'ua'u, *Pterodroma sandwichensis*)

## Parties involved in HCPs and ITLs

- Applicant
- Department of Land and Natural Resources
- US Fish and Wildlife Service
- Endangered Species Recovery Committee
- Board of Land and Natural Resources
- Attorney General
- Public

For more information contact:  
Division of Forestry and Wildlife  
808-587-0166



## **Habitat Conservation Plan Incidental Take License Development Process**

### **1. Application**

- a. Applicant submits application

### **2. Draft**

- a. Staff provides technical assistance for compliance with statutory requirements
- b. Applicant submits draft HCP
- c. Staff reviews draft HCP for compliance with statutory requirements
- d. Staff advises applicant as to whether HCP meets statutory requirements and provides technical assistance for amendments if needed

### **3. Review**

- a. Public
  - i. Application and draft HCP noticed in Office of Environmental Quality Control environmental bulletin
  - ii. 60 day public comment period
  - iii. Public hearing held on the affected island(s)
- b. Endangered Species Recovery Committee (ESRC)
  - i. Request for ESRC review and comments
  - ii. ESRC conducts site visit

### **4. Amendments**

- a. Staff provides technical assistance for amendments if needed

### **5. Approval**

- a. Compliance with Chapter 343, Hawaii Revised Statutes
- b. ESRC
  - i. Request for review and recommendation of approval to Board of Land and Natural Resources (BLNR)
- c. BLNR
  - i. Request for approval
- d. Chairperson
  - i. Approval and issuance

AGREEMENT FOR TECHNICAL SERVICES

This Agreement, entered into this \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_ by and between the State of Hawaii, Department of Land and Natural Resources (Department) whose address is \_\_\_\_\_ and \_\_\_\_\_ (Applicant) whose address is \_\_\_\_\_.

WITNESSETH:

WHEREAS, Hawaii Revised Statutes (HRS) Chapter 195D authorizes the Board of Land and Natural Resources (Board) to issue temporary licenses (ITL) as part of a habitat conservation plan (HCP) to allow take of endangered or threatened species that is incidental to, and not the purpose of, carrying out an otherwise lawful activity; and

WHEREAS, the development of HCPs are complex and oftentimes requires technical assistance from Department staff; and

WHEREAS, HRS §195D-23 authorizes the Department to establish a technical assistance program to assist landowners in the development, review, or monitoring of HCPs, and allows the Department to collect fees at a rate of \$50 per hour and payment for costs incurred for the use of the technical assistance program in the development, review, or monitoring of a specific HCP; and

WHEREAS, Applicant desires to obtain technical assistance from Department in the development or review of an HCP relating to its \_\_\_\_\_ (Project); and

WHEREAS, DLNR is willing to provide technical assistance to Applicant in the development or review of Applicant's HCP relating to the Project.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the Department and Applicant agree as follows:

1. The Department will provide technical assistance in the development or review of Applicant's HCP by means of the technical assistance program.
2. The Departments' technical assistance will consist of activities including, but not limited, to the following:
  - a. Reviewing draft HCP
  - b. Formulating recommendations for amendments to draft HCP
  - c. Meetings with or calls to Applicant to communicate concerns or comments regarding the HCP

d. Site visits of project site and proposed mitigation sites

3. The Department estimates the **staff hours** related to the development or review of the HCP prior to approval of the HCP by the Board to be \_\_\_\_\_ hours (at \$50 per hour = \$\_\_\_\_\_ ) for the first fiscal year. The Department estimates the technical assistance **costs** to be incurred in connection with the development or review of the HCP to be \_\_\_\_\_ for the first fiscal year. The estimate of staff hours and costs will be broken down into quarterly projections for the year (attached and made part of this Agreement). The estimate by the Department will not represent either a minimum or maximum amount of technical assistance staff time to be provided per annum.

Thirty (30) days prior to the end of the first fiscal year, the Department will provide an estimate of the staff hours related to the development and review of the HCP for the following fiscal year, if necessary. If Applicant agrees in writing to the estimate for the following fiscal year, this Agreement will automatically be extended to the following fiscal year. If Applicant does not agree in writing to the estimate for the following fiscal year prior to the end of the current fiscal year, then this Agreement will automatically terminate. This procedure shall apply to any requirement for subsequent years work.

4. The Department agrees to provide invoices to Applicant on a quarterly basis, pursuant to the state's fiscal year, setting forth the staff hours provided and technical assistance costs incurred during the preceding quarter.

5. Applicant agrees to compensate the Department for the technical assistance provided in the development and review of the HCP prior to its approval by the Board at the rate of fifty dollars (\$50) per hour of staff time.

6. Applicant agrees to reimburse the Department for any costs incurred on behalf of Applicant or in connection with the development and review of the HCP.

7. Applicant agrees to provide payment for all fees and costs incurred pursuant to this Agreement by means of a check made payable to “\_\_\_\_\_” within 30 days of receipt of each quarterly invoice. Failure to make payment of any fees or costs within this time shall be deemed a breach of this Agreement and the Department may terminate this Agreement within ten (10) days of delivery of a written notice of breach to Applicant by personal service, certified mail, or registered mail at Applicant's address stated above.

8. This Agreement may be terminated by either party at any time by providing ninety (90) days prior written notice to the other party. Payment of all outstanding fees and costs shall be due immediately upon termination of this Agreement.

9. All material or information provided to the Department by Applicant will be kept confidential to the degree necessary to comply with HRS § 195D-24, unless otherwise required by law to be disclosed.

10. The Department does not make any warranties with respect to the HCP developed by the Applicant with the technical assistance of the Department. This includes but is not limited to any warranties regarding whether any HCP developed with the technical assistance of the Department will be acceptable to the Board, whether the Endangered Species Recovery Committee will make a recommendation for approval of the HCP, or whether the HCP meets any federal requirements.

11. Neither party shall be responsible for special, indirect, or consequential damages. The remedies set forth in this Agreement are exclusive, and the liability of the Department with respect to this Agreement, or anything done in connection with this Agreement, whether in contract, in tort, under any warranty, or otherwise, shall not be other than as expressly provided in this Agreement.

12. For purposes of this Agreement, the term "Applicant" shall include the Applicant named above, its employees, representatives, agents, consultants and contractors.

13. This Agreement shall be construed, interpreted, and governed by the laws of the State of Hawaii.

14. If any term, provision, covenant, or condition of this Agreement should be held to be invalid, void, or unenforceable, the remainder of this Agreement shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

By \_\_\_\_\_  
WILLIAM J. AILA, JR., Chairperson  
Department of Land and Natural Resources

\_\_\_\_\_  
\_\_\_\_\_

By \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



# Application Habitat Conservation Plan Incidental Take License



Submit this application and an attachment with all information requested pursuant to items 1-6 in this application to:

State of Hawaii  
Department of Land and Natural Resources  
Division of Forestry and Wildlife  
1151 Punchbowl Street Room 325  
Honolulu, HI, 96813  
808-587-0166  
Attention: Habitat Conservation Plan Program

Contact information for applicant (or consultant if applicable):

Name \_\_\_\_\_  
Address \_\_\_\_\_  
Phone \_\_\_\_\_  
Email \_\_\_\_\_

Pursuant to Hawaii Revised Statutes Chapter 195D-21(a), identify:

1. The geographic area encompassed by the plan;
2. The ecosystems, natural communities, or habitat types within the plan area that are the focus of the plan;
3. The endangered, threatened, proposed, and candidate species known or reasonably expected to occur in the ecosystems, natural communities, or habitat types in the plan area;
4. The measures or actions to be undertaken to protect, maintain, restore, or enhance those ecosystems, natural communities, or habitat types within the plan area;
5. A schedule for implementation of the proposed measures and actions; and
6. An adequate funding source to ensure that the proposed measures and actions are undertaken in accordance with the schedule.

Check box if waiving confidentiality provided under Chapter 195D-24 Hawaii Revised Statutes.



# Habitat Conservation Plans Under the Endangered Species Act

## Introduction

Why should we save endangered species? Congress answered this question in the introduction to the Endangered Species Act of 1973 (Act), recognizing that endangered and threatened species of wildlife and plants “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”

After this finding, Congress said that the purposes of the Act are “. . . to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species. . . .” Habitat Conservation Plans (HCPs) under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal parties to conserve the ecosystems upon which listed species depend, ultimately contributing to their recovery.

## What are HCPs?

HCPs are planning documents required as part of an application for an incidental take permit. They describe the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded.

HCPs can apply to both listed and nonlisted species, including those that are candidates or have been proposed for listing. Conserving species before they are in danger of extinction or are likely to become so can also provide early benefits and prevent the need for listing.

## Who needs an incidental take permit?

Anyone whose otherwise-lawful activities will result in the “incidental take” of a listed wildlife species needs a permit. The U.S. Fish and Wildlife Service (FWS) can help determine whether a proposed project or action is likely to result in “take” and whether



John Cleckler/USFWS

*The endangered California tiger salamander is among the listed species included in the East Contra Costa County Habitat Conservation Plan.*

an HCP is needed. FWS staff can also provide technical assistance to help design a project to avoid take. For example, the project could be designed with seasonal restrictions on construction to minimize disturbance to a species.

## What is the benefit of an incidental take permit and habitat conservation plan to a private landowner?

The permit allows the permit-holder to legally proceed with an activity that would otherwise result in the unlawful take of a listed species. The permit-holder also has assurances from the FWS through the “No Surprises” regulation.

## What is “take”?

The Act defines “take” as “. . . to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” “Harm” includes significant habitat modification that actually kills or injures a listed species through impairing essential behavior such as breeding, feeding, or sheltering.

Section 9 of the Act prohibits the take of endangered and threatened species. The purpose of the incidental take permit is to exempt non-Federal permit-holders—such as States and private landowners—from the prohibitions of section 9, not to authorize the activities that result in take.

## What do habitat conservation plans do?

In developing habitat conservation plans, people applying for incidental take permits describe measures designed to minimize and mitigate the effects of their actions—to ensure that species will be conserved and to contribute to their recovery.

Habitat conservation plans are required to meet the permit issuance criteria of section 10(a)(2)(B) of the Act:

- (i) taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;

- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) other measures, as required by the Secretary, will be met.

### What needs to be in HCPs?

Section 10 of the Act and its implementing regulations define the contents of HCPs. They include:

- an assessment of impacts likely to result from the proposed taking of one or more federally listed species.
- measures that the permit applicant will undertake to monitor, minimize, and mitigate for such impacts, the funding available to implement such measures, and the procedures to deal with unforeseen or extraordinary circumstances.
- alternative actions to the taking that the applicant analyzed, and the reasons why the applicant did not adopt such alternatives.
- additional measures that the Fish and Wildlife Service may require.

HCPs are also required to comply with the Five Points Policy by including:

1. biological goals and objectives, which define the expected biological outcome for each species covered by the HCP;
2. adaptive management, which includes methods for addressing uncertainty and also monitoring and feedback to biological goals and objectives;
3. monitoring for compliance, effectiveness, and effects;
4. permit duration which is determined by the time-span of the project and designed to provide the time needed to achieve biological goals and address biological uncertainty; and
5. public participation according to the National Environmental Policy Act.

### What are “No Surprises” assurances?

The FWS provides “No Surprises” assurances to non-Federal landowners through the section 10(a)(1)(B)

process. Essentially, State and private landowners are assured that if “unforeseen circumstances” arise, the FWS will not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permit-holder. The government will honor these assurances as long as permit-holders are implementing the terms and conditions of the HCPs, permits, and other associated documents in good faith. In effect, the government and permit-holders pledge to honor their conservation commitments.

### Are incidental take permits needed for listed plants?

There are no Federal prohibitions under the Act for the take of listed plants on non-Federal lands, unless taking those plants is in violation of State law. However, the FWS analyzes the effects of the permit on listed plant species because section 7 of the Act requires that issuing an incidental take permit may not jeopardize any listed species, including plants. In general, it is a good idea to include conservation measures for listed plant species in developing an HCP.

### What is the process for getting an incidental take permit?

The applicant decides whether to seek an incidental take permit. While FWS staff members provide detailed guidance and technical assistance throughout the process, the applicant develops an HCP and applies for a permit. The components of a completed permit application are a standard application form, an HCP, an Implementation Agreement (if applicable), the application fee, and a draft National Environmental Policy Act (NEPA) analysis. A NEPA analysis may result in a categorical exclusion, an environmental assessment, or an environmental impact statement.

While processing the permit application, the FWS prepares the incidental take permit and a biological opinion under section 7 of the Act and finalizes the NEPA analysis documents. Consequently, incidental take permits have a number of associated documents.

### How do we know if we have listed species on our project site?

For assistance, check with the appropriate State fish and wildlife

agency, the nearest FWS field office, or the National Marine Fisheries Service (NMFS), for anadromous fish such as salmon.

### What kinds of actions are considered mitigation?

Mitigation measures are actions that reduce or address potential adverse effects of a proposed activity on species included in an HCP. They should address specific conservation needs of the species and be manageable and enforceable. Mitigation measures may take many forms, including, but not limited to, payment into an established conservation fund or bank; preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access. Which type of mitigation measure used for a specific HCP is determined on a case by case basis, and is based upon the needs of the species and type of impacts anticipated.

### What is the legal commitment of a HCP?

Incidental take permits make binding the elements of HCPs. While incidental take permits have expiration dates, the identified mitigation may be in perpetuity. Violating the terms of an incidental take permit may constitute unlawful take under section 9 of the Act.

### Who approves an HCP?

The FWS Regional Director decides whether to issue an incidental take permit, based on whether the HCP meets the criteria mentioned above. If the HCP addresses all of the requirements listed above, as well as those of other applicable laws, the FWS issues the permit.

### What other laws besides the Endangered Species Act are involved?

In issuing incidental take permits, the FWS complies with the requirements of NEPA and all other statutes and regulations, including State and local environmental/planning laws.

### Who is responsible for NEPA compliance during the HCP process?

The FWS is responsible for ensuring NEPA compliance during the HCP process. However, if the Service does not have sufficient staff resources, an applicant may, within certain limitations, prepare the draft NEPA

analysis. Doing so can benefit the applicant and the government by expediting the application process and permit issuance. In cases like this, the FWS provides guidance, reviews the document, and takes responsibility for its scope, adequacy, and content.

### **Does the public get to comment on our HCP? How do public comments affect our HCP?**

The Act requires a 30-day period for public comments on applications for incidental take permits. In addition, because NEPA requires public comment on certain documents, the FWS operates the two comment periods concurrently. Generally, the comment period is 30 days for a Low Effect HCP, 60 days for an HCP that requires an environmental assessment, and 90 days for an HCP that requires an environmental impact statement. The FWS considers public comments in permit decisions.

### **What kind of monitoring is required for a HCP, and who performs it?**

Three types of monitoring may be required: compliance, effectiveness, and effects. In general, the permit-holder is responsible for ensuring that all the required monitoring occurs. The FWS reviews the monitoring reports and coordinates with the permit-holder if any action is needed.

### **Does the Fish and Wildlife Service try to accommodate the needs of HCP participants who are not professionally involved in the issues?**

Because applicants develop HCPs, the actions are considered private and, therefore, not subject to public participation or review until the FWS receives an official application. The FWS is committed to working with people applying for permits and providing technical assistance throughout the process to accommodate their needs.

However, the FWS does encourage applicants to involve a range of parties, a practice that is especially valuable for complex and controversial projects. Applicants for most large-scale, regional HCPs choose to provide extensive opportunities for public involvement during the planning process. Issuing permits is, however, a Federal action that is subject to public review and comment. There is time for such review during the period when the FWS reviews the information. In addition, the FWS solicits public involvement and review, as well as requests for additional information during the scoping process when an EIS is required.

### **Are independent scientists involved in developing an HCP?**

The views of independent scientists are important in developing mitigation and minimization measures in nearly all HCPs. In many cases, applicants contact experts who are directly involved in discussions on the adequacy of possible mitigation and minimization measures. In other cases, the FWS incorporates the views of independent scientists indirectly through their participation in listing documents, recovery plans, and conservation agreements that applicants reference in developing their HCPs.

### **How does the FWS ensure that species are adequately protected in HCPs?**

The FWS has strengthened the HCP process by incorporating adaptive management when there are species for which additional scientific information may be useful during the implementation of the HCP. These provisions allow FWS and NMFS to work with landowners to reach agreement on changes in mitigation strategies within the HCP area, if new information about the species indicates this is needed. During the development of HCPs, the FWS and NMFS discuss any changes in strategy with landowners, so that they are aware of any uncertainty in management strategies and have concurred with the adaptive approaches outlined.

### **What will the FWS do in the event of unforeseen circumstances that may jeopardize the species?**

The FWS will use its authority to manage any unforeseen circumstances that may arise to ensure that species are not jeopardized as a result of approved HCPs. In the rare event that jeopardy to the species cannot be avoided, the FWS may be required to revoke the permit.

### **How can I obtain information on numbers and types of HCPs?**

Our national HCP database displaying basic statistics on HCPs is available online from our Habitat Conservation Planning page at [http://ecos.fws.gov/conserv\\_plans/servlet/gov.doi.hep.servlets.PlanReportSelect?region=9&type=HCP](http://ecos.fws.gov/conserv_plans/servlet/gov.doi.hep.servlets.PlanReportSelect?region=9&type=HCP).

**U. S. Fish and Wildlife Service  
Endangered Species Program  
4401 N. Fairfax Drive, Room 420  
Arlington, VA 22203  
703-358-2171  
<http://www.fws.gov/endangered/what-we-do/hcp-overview.html>**

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