



United States Department of the Interior

FISH AND WILDLIFE SERVICE
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In Reply Refer to:
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Memorandum

To: Regional Director, Southwest Regional Office, Albuquerque, New Mexico

Through: Assistant Regional Director – Ecological Services, Southwest Regional Office, Albuquerque, New Mexico

From: Acting Project Leader, Austin Ecological Services Field Office, Austin, Texas

Subject: Findings and Recommendations on Issuance of an Amended Incidental Take Permit (TE-102437-1) for the Golden-cheeked Warbler on the 1,600-acre Cibolo Canyon Master Phase II; Habitat Conservation Plan Located in Bexar County, Texas

I. DESCRIPTION OF PROPOSAL

TF Cibolo Canyons, LP (Applicant) has requested to amend the section 10(a)(1)(B) incidental take permit (TE102437-0; ITP), and the Cibolo Canyon Master Phase II Environmental Assessment (EA)/Habitat Conservation Plan (HCP) that was prepared in accordance with the National Environmental Policy Act of 1969 (NEPA) and Endangered Species Act of 1973, as amended (16 U.S.C. §1531-1544; ESA). The original 30-year ITP was issued on February 28, 2006, and authorized take of the golden-cheeked warbler (*Setophaga chrysoparia*; GCWA) in Bexar County, Texas. TF Cibolo Canyons, LP purchased the property from the previous Permittee, Lumbermen's Investment Corporation (now Forestar Real Estate Group), in 2018. The primary purpose of the amendment request is to revise the boundaries of the original 768-acre GCWA Conservation Area, which was placed under conservation easement as mitigation for the HCP. TF Cibolo Canyons, LP requests to exchange 30 acres of non-breeding GCWA habitat for 144 acres of Master Phase II development area. This boundary modification will result in an overall reduction of the development area from 846 acres to 732 acres, and an increase in the Conservation Area from 768 to 882 acres, which will reduce the amount of habitat loss and take of the GCWA. The 144 acres being added to the Conservation Area has sufficient habitat to support breeding warblers periodically, while the 30 acres being removed no longer supports breeding GCWAs due to adjacent development, although non-breeding individuals may be occasionally reported in this area. In addition to the inclusion of the new, larger area of higher quality breeding habitat, the 144 acres will reduce the overall edge to area ratio of the Conservation Area and will provide contiguity between two occupied portions of the

Conservation Area¹. Information concerning the species baseline, beneficial management activities, and monitoring plan are included in the HCP dated January 9, 2006, and are incorporated herein by reference.

Analysis of Effects

The Service fully analyzed the effects of the proposed action on the GCWA in our NEPA screening form. We incorporate the NEPA screening form herein by reference.

We have determined that the amendment to the existing HCP and ITP will have only minor or negligible effects on federally listed, proposed, or candidate species and their habitats; is not expected to have any negative effects to the human environment, including environmental values and environmental resources; and the incremental effects of the Programmatic SHA are not expected to be additive such that past, ongoing, and future actions are not in themselves significant, nor would those actions result in significant effects due to implementation of the amended HCP and ITP. The proposed action falls under 516 DM 8.5 C(2): “The issuance of Endangered Species Act (ESA) Section 10 (a)(1)(B) “low-effect” incidental take permits that, individually or cumulatively, have a minor or negligible effect on the species covered in the habitat conservation plan.”

The proposed amendment will not require an amendment to the previously issued February 17, 2006, biological opinion (BO) because no reinitiation triggers have been met, and the proposed amendments do not change the analysis of the BO. The BO is incorporated herein by reference. More specifically, (1) the amount or extent of incidental take will not be exceeded; (2) no new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in the original BO; (3) the agency action has not been subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in the original BO; and (4) there has not been a new species listed or critical habitat designated that may be affected by the action.

Critical habitat has not been designated for the GCWA, and thus does not need to be addressed. We evaluated the proposed amendments for effects to federally listed threatened or endangered species and designated critical habitat, and we do not expect effects to any other listed species or designated critical habitat. Other than a reduction in total take authorized and an increase in total acreage established in the Conservation Area, all information pertaining to the GCWA within the HCP, ITP, and BO and its associated Terms and Conditions and Reasonable and Prudent Measures remain valid.

The Austin Ecological Services Field Office (AESFO) has evaluated the Applicant’s request to amend the existing HCP and ITP, and we find that the proposed changes are considered negligible. The proposed amendments will benefit the GCWA to a greater extent when compared to the original HCP and ITP due to the expansion of the Conservation Area.

II. PUBLIC COMMENT

A Notice of Availability of the proposed amendments to the EA/HCP and ITP was published in the Federal Register on January 17, 2024 (89 FR 2975). The Notice of Availability, along with

¹ Such reductions in the edge to area ratio were specifically addressed in the Permit’s Terms and Conditions. Section 6.4(e), Proposed Permit Terms and Conditions (page 65) of the EA/HCP states, “as development plans are perfected, slight modifications to the preserve/development line may be required. Additionally, efforts will be made to straighten this line thereby reducing the amount of edge. Modifications to the preserve line will be coordinated with the Service, and in no event will result in less than 760-acres.”

the proposed amendments, the original HCP and EA, and a map depicting the proposed land swap were posted to the Service's Austin Ecological Services Field Office website (<https://www.fws.gov/media/cibolo-canyon-habitat-conservation-plan>). The public comment period closed on February 16, 2024. We received 303 individual comments of which the majority opposed the amendments. Several of the comments were duplicates of various form letters. The primary criticisms of the amendments were opposition to changing the conservation easement boundaries and removal of what appears to be GCWA habitat for what appears to not be GCWA habitat. Other criticisms included financial gain for the developer; increased development, impervious cover, traffic, demand on local water supply impacts to the Edwards Aquifer; incorrect responses on the NEPA screening form; and that TF Cibolo Canyons, LP violated the 2006 Permit terms during previous development within the HCP boundary.

Numerous comments were concerned with the change in the conservation easement boundary, which was noted to be a perpetual conservation easement. Several commenters questioned the ability for any adjustment to a recorded conservation easement referencing the precedent that may be set by this action. The Cibolo Canyon Conservation Area conservation easement is currently held by The Nature Conservancy, which is in favor of the proposed swap, because it would result in a more contiguous shape to the Conservation Area benefitting both the GCWA and The Nature Conservancy's ability to monitor the fence line for signs of trespass. So long as the GCWA remains the primary conservation value of the conservation easement, the Service has no authority or influence over the terms of the easement or any subsequent modifications. Modifications are to be settled between The Nature Conservancy and TF Cibolo Canyons LP.

According to the Conservation Area management plan, starting in 2005, GCWA surveys were to be conducted in the Conservation Area every other year for the first 10 years, then every third year for the next 10 years. The surveys completed so far were conducted by various consulting firms with qualified staff meeting or, in some cases, exceeding the required minimum survey frequency. For example, surveys were conducted in 2018, 2019, 2021, and 2022, well exceeding the requirement of survey completions every third year. The 30-acre parcel being proposed for the swap does appear to be GCWA habitat; however, the last GCWA documented by qualified surveyors was on April 1, 2021. This individual was on the edge of the 30-acre patch (see purple diamonds on attached map) and not documented again that season in the area despite subsequent surveys being conducted. Prior to that a GCWA was documented by surveys again only on a single day on March 19, 2019 (see blue hexagon on attached map). These single day sightings indicate that GCWAs did perhaps pause during migration or forage in these areas but did not nest in the area, likely due to the encroaching housing developments.

Although the 144 acres being added to the Conservation Area does not have confirmed surveys documenting use by breeding GCWAs, this is largely due to the initial intended use of the parcel. These acres were not subject to survey requirements because this parcel was initially expected to be developed and thus the available survey data is limited to areas adjacent to this parcel. However, since the parcel will no longer be developed and due to its potential to become high-quality breeding habitat, we anticipate its inclusion in the Conservation Area will benefit breeding GCWAs. We anticipate the undeveloped parcel to become high-quality GCWA habitat by providing sufficient cover, continuity, and forage. GCWA prefer habitat that is connected and not fragmented for successful nesting and foraging.

Regarding the financial gain for the developer, it is not within the Service's purview to be involved in the finances around developments covered by HCPs. The only funding requirement for receiving an ITP from the Service is to show that avoidance, minimization, and mitigation will be adequately funded as part of the HCP, which we confirm prior to issuance of the ITP.

Regarding increased development, impervious cover, traffic, and expected demand on the local water supply, the ITP requires that the Permittee adheres to all applicable foreign, state, local or other Federal laws. Issuance of the Service's ITP does not waive those obligations, which we understand govern such things as traffic, impervious cover, and procurement of a water supply. Regarding impacts to the local Edwards Aquifer, a sole source aquifer for the City of San Antonio and the surrounding areas, the Edwards Aquifer Authority and the Texas Commission on Environmental Quality (TCEQ) have numerous rules, requirements, and permits required for the purpose of protecting the Edwards Aquifer, which are outside of the scope and purview of the Service for the Covered Activities proposed under the HCP and ITP.

A few commenters stated that the NEPA screening form was incorrectly completed. Comments included the following statements: 1) incorrect GCWA habitat characterization of the 144- and 30-acre parcels were used, which would result in an increase in the amount of GCWA take; 2) other effects of this proposed action should not be considered minor or negligible, including impacts to socio-economic resources and visual resources; 3) impacts to the GCWA and Edwards Aquifer would increase; and 4) the amendment would result in a new precedent, which would specifically allow for changes to a perpetual conservation easement. In response to these and other similar comments, we have provided responses in this section of the Findings and have revised our responses in Section II of the NEPA screening form. Other than those responses already provided herein, there was no evidence provided that supported anything but "no" answers to Sections A-L in 43 CFR 46.215 (Section III of the NEPA screening form).

Regarding TF Cibolo Canyons, LP and comments surrounding their lack of ITP compliance, some commenters stated that several best management practices had not been met, such as: clearing for construction was not minimized to those areas undergoing transition to impervious cover; planting of native vegetation did not occur, and areas remained barren; construction was conducted year-round; silt fencing and other erosion control methods were largely non-existent; preserve perimeter fencing and signage was not maintained; and educational materials were not provided. However, available information confirms these measures were implemented to the extent practicable. For example, regarding the clearing not being minimized or planting of natives, it is apparent from timelapse aerial imagery that lots have been cleared in preparation for construction of homes and were subsequently revegetated (even if likely with turf grass and small trees). Additionally, there remain numerous treed areas behind houses and in what appears to be open spaces as part of the neighborhood development. There are also treed areas surrounding the various greens of the golf course. Without specifics or documentation, there was no evidence presented that this term of the ITP was violated. The ITP also states that clearing will not be conducted during the breeding season, although there is no restriction regarding construction in already cleared areas; therefore, comments about construction during the breeding season being in violation of the ITP appear to be in error. One requirement for developing within the Edwards Aquifer Recharge Zone is obtaining a permit from the TCEQ that requires submission of a Water Pollution Abatement Plan (WPAP) and a commitment to implementing this plan and following all best management practices, including proper use of silt fencing and other erosion control methods. Violations of the WPAP should be reported to TCEQ and can result in permit suspension and fines. As previously stated, it is the requirement by all ITP Permittees to follow all other applicable laws. According to TF Cibolo Canyons, LP they did acquire the proper permitting and implemented their WPAP. And, while commenters stated there was a violation, there was no evidence presented supporting this statement. According to the Conservation Area management plan annual reports, when fencing was damaged or signage removed, it was reported and corrected in a timely manner. Finally, the 2007 annual report for the HCP attached a draft educational brochure, and, in 2011, the Permittee reported that the Cibolo Canyons Homeowners Association was handing the brochure out to residents.

All comments submitted are attached to this Findings. We did receive one request to extend the public comment period; however, we had already received over 300 comments and felt sufficient time was provided for the public to submit comments; therefore, we did not extend the public comment period.

III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

- (i) The proposed taking will be incidental to otherwise lawful activities.

As with the original HCP, we have determined that the proposed amendments are lawful activities. Any take anticipated from the covered activities as part of the Cibolo Canyons HCP will be incidental to, and not the purpose of the covered activities. Direct mortality due to the covered activities (i.e., clearing) is not expected to occur as no clearing will be allowed during the GCWA breeding season.

- (ii) To the maximum extent practicable, avoid, minimize, and mitigate for the impacts of such taking.

The Applicant has committed to implementing conservation measures intended to minimize and mitigate the impacts of incidental taking that may result from covered activities. These measures are summarized above and detailed within the proposed amendments document. These minimization measures are intended to reduce take of the covered species. We find that the proposed mitigation is commensurate with the anticipated level of take anticipated over the duration of the 30-year permit term.

- (iii) Ensure adequate funding for the plan will be provided.

The HCP's primary conservation measures focus on avoidance and minimization that have minimal costs. All funding methods for the existing HCP will be maintained, including the perpetual management and monitoring of the Conservation Area, which will now include an additional 144 acres.

- (iv) The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

As the Federal action agency considering whether to issue an amended ITP to the Applicant, we have reviewed the proposed action under section 7 of the ESA. Our BO dated February 17, 2006, concluded that issuance of the ITP is not likely to jeopardize the continued existence of the covered species in the wild. No critical habitat has been designated for the covered species, thus none will be affected. The BO also analyzes potential impacts to other listed species within the planning area and concludes that the issuance of the ITP will not result in effects to non-covered listed species or their designated critical habitat within the permit area. This remains true with the proposed amendments.

- (v) The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting.

We assisted the original Permittee in the development of their HCP. The HCP incorporated our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the HCP and ensure success. Monitoring, as well as coordination and reporting

mechanisms, have been designed to ensure that changes in conservation measures can be implemented if proposed measures prove ineffective (adaptive management) or impacts exceed estimates (changed circumstances). It was our position that no additional measures were required to implement the intent and purpose of the HCP and its associated ITP, and we consider that to still be the case with the proposed amendments.

(vi) The Secretary of the Interior has received assurances that the plan will be implemented.

The Applicant has been implementing the HCP since their purchase in 2018 of the remaining portions to be developed. Thus, we expect the final build-out of the HCP to continue to follow all avoidance and minimization measures.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

The Service has no evidence that the amended ITP should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). The Applicant has met the criteria for the issuance of the amended ITP and there are no disqualifying factors that would prevent the amended ITP from being issued under current regulations.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, we recommend issuance of an amended ITP to authorize incidental taking of the GCWA by TF Cibolo Canyons LP, in accordance with their amended HCP and the findings of this document.

Deputy Regional Director,
Southwest Region

Date