RECORD OF DECISION

Issuance of an Incidental Take Permit (TE-223267-0) for Golden-cheeked Warbler and Black-capped Vireo to Comal County, Texas

Introduction

Comal County has applied to the U.S. Fish and Wildlife Service (Service) for an incidental take permit (ITP) pursuant to §10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act)(16 U.S.C. §1531-1544). The requested permit, which is for a period of 30 years, would authorize incidental take of, and impacts to, the endangered golden-cheeked warbler (*Dendroica chrysoparia*; GCWA) and the endangered black-capped vireo (*Vireo atricapilla*; BCVI). Comal County is seeking authorization for incidental take resulting from the proposed construction, use, or maintenance of public or private land development projects; construction, maintenance, or improvement of transportation infrastructure; installation or maintenance of utility infrastructure; construction, use, or maintenance of institutional projects or public infrastructure; and management activities (Covered Activities) within Comal County, Texas (Permit Area).

We prepared this Record of Decision (ROD) in compliance with the agency decision-making requirements of the National Environmental Policy Act of 1969, as amended (NEPA; 40 CFR 1505.2). The purpose of this ROD is to document the Service's decision regarding the selection of the preferred alternative as evaluated in Comal County's final RHCP and our final Environmental Impact Statement (EIS). This ROD provides: (1) the Service's decision; (2) the proposed action; (3) alternatives considered in the EIS, including the preferred alternative; (4) key issues; (5) associated impacts, mitigation, and findings, providing all practicable means to avoid and minimize environmental harm; (6) public involvement; and (7) the conclusion. The Service will not issue an ITP until at least 30 days after publication of the notice for the final EIS.

The Decision

We intend to issue an ITP allowing Comal County to implement the preferred alternative (Alternative B) based on a thorough review of the alternatives and their environmental consequences as described in the final EIS. This alternative meets the needs of Comal County and has been determined to be economically feasible. Implementation of this decision entails the issuance of the ITP, including all terms and conditions governing the permit, and requires adherence to all of the avoidance, minimization, and mitigation measures specified in Comal County's Regional Habitat Conservation Plan (RHCP) to offset impacts to the GCWA and BCVI to the maximum extent practicable, including the described monitoring and adaptive management measures. The RHCP meets all issuance criteria for an ITP. Since implementation of Alternative B would result in incidental take and the resulting impacts, we prepared a Biological Opinion prior to making a permit decision in accordance with section 7 of the Act.

Alternatives Considered
Three alternatives, including the No Action Alternative, and their environmental consequences were evaluated in the draft EIS released June 3, 2010. Publication of a Notice of Availability of the draft RHCP and draft EIS, and a request for comments, initiated a 90-day public comment period (75 FR 31463). Several elements were common to all action alternatives and included interagency coordination, NEPA compliance, and protection of threatened and endangered species and cultural resources. The following is a brief summary of the alternatives considered. A longer summary and complete description is included in the final EIS.

Alternative A (No Action): Under the No Action alternative, Comal County would not request and the Service would not issue an ITP. Instead, development activities in Comal County that would cause take of listed species would require individual authorizations through section 10(a)(1)(B) of the Act or through a section 7 consultation where a Federal nexus (authorized by a Federal agency [e.g., section 404 permit under the Clean Water Act]) exists, on a project-by-project basis over the next 30 years.

Alternative B (Preferred Alternative): Our selected alternative is the proposed RHCP, the preferred alternative (Alternative B) as described in the final EIS, which provides for the issuance of an ITP to Comal County for incidental take of GCWA and BCVI that is anticipated to occur as a result of Covered Activities. This alternative includes implementation of measures to avoid, minimize, and mitigate for the potential incidental take of federally listed species to the maximum extent practicable. This alternative also provides a mechanism for streamlined compliance with the Act.

Alternative C (Reduced Take RHCP): Compared to Alternative B, this alternative: (1) eliminates the BCVI as a Covered Species, (2) reduces the areal extent of covered take for GCWA, and (3) reduces funding for the research and public awareness programs, the endowment, and the preserve system.

Rationale for Decision
We intend to select the preferred alternative (Alternative B) for implementation based on multiple environmental and social factors, including potential impacts and benefits to Covered Species and their habitat, the extent and effectiveness of minimization and mitigation measures, and social and economic considerations. We did not choose the No Action Alternative because a project-by-project approach for complying with the Act would be more time-consuming, less efficient, and would result in piecemeal mitigation for Covered Species, incapable of providing comprehensive or comparable net benefits with respect to the preferred alternative. We did not choose the Reduced Take Alternative because we do not believe that the amount of take requested is sufficient for the permit duration.

In order for us to be able to issue an ITP, we must ascertain that the RHCP meets the criteria set forth in the Endangered Species Act of 1973, as amended (16 U.S.C.

§1539(a)(2)(A) and (B)). We have made that determination. These criteria, and how the RHCP satisfies these criteria, are summarized below:

1. **The taking will be incidental.** We find that the take will be incidental to otherwise lawful activities, including the proposed construction, use, or maintenance of public or private land development projects; construction, maintenance, or improvement of transportation infrastructure; installation or maintenance of utility infrastructure; construction, use, or maintenance of institutional projects or public infrastructure; and management activities. The take of individuals of Covered Species will be primarily due to indirect impacts of habitat destruction and/or alteration.

2. **The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such takings.** The County has committed to a wide variety of conservation measures, land acquisition, management activities, monitoring, adaptive management, and other strategies designed to avoid and minimize harm to the Covered Species and mitigate for any unavoidable loss. Mitigation will be commensurate with the actual level of take. Comal County will ensure compliance with the avoidance, minimization, and conservation measures through on-the-ground habitat assessments, making available to the public maps of potential habitat; requiring RHCP participants to abide by the seasonal clearing restrictions to avoid immediate impacts to GCWAs and BCVIs during their breeding seasons; and developing a public education and outreach programs to educate landowners and residents about GCWAs, BCVIs, and the RHCP.

3. **The applicant will develop an HCP and ensure that adequate funding for the HCP will be provided.** Comal County has developed and will implement the RHCP. These obligations include the cost for purchase and management of mitigation lands in perpetuity, enforcement of conservation easements, and monitoring of species populations and habitat. In addition, the County has committed to implement adaptive management measures that: identify areas of uncertainty and questions that need to be addressed to resolve such uncertainty; identify alternative management strategies and how to determine which experimental strategies to implement; integrate a monitoring program that is able to acquire the necessary information for effective strategy evaluation; and incorporate feedback loops that link implementation and monitoring to the decision-making process that result in appropriate changes in management. The County will fund the cost of implementing the RHCP with application and mitigation fees, County General Maintenance and Operations fund contributions, and County Conservation Investments.

   The Service's no surprises assurances, changed circumstances, and unforeseen circumstances are discussed in Chapter 8 of the RHCP. Unforeseen circumstances would be addressed through the Service's close coordination with Comal County in the implementation of the RHCP, and the County has committed to a coordination process to address such circumstances. Adaptive management, Chapter 6 of the RHCP, will be used to direct changes to conservation, mitigation, or management

measures and monitoring when needed. We have, therefore, determined that Comal County's financial commitment and plan, along with their willingness to address changed and unforeseen circumstances in a cooperative fashion, is sufficient to meet this criterion.

4. **The taking will not appreciably reduce the likelihood of the survival and recovery of any listed species in the wild.** As the Federal action agency considering whether to issue an ITP to Comal County, we have reviewed the proposed action under section 7 of the Act. Our biological opinion, dated August 1, 2013, concluded that issuance of the ITP will not jeopardize the continued existence of the Covered Species in the wild. No critical habitat has been designated for either of the Covered Species, and thus none will be affected. The biological opinion also analyzes other listed species within the planning area and concludes that the direct and indirect effects of issuance of the ITP will not appreciably reduce the likelihood of survival and recovery of other listed species and no adverse modification of any designated critical habitat within the permit area is expected.

5. **The applicant agrees to implement other measures that the Service requires as being necessary or appropriate for the purposes of the HCP.** We assisted Comal County in the development of their RHCP. We commented on draft documents, participated in numerous meetings and conference calls, and worked closely with Comal County during every step of plan and document preparation, so that conservation of the Covered Species would be assured and recovery would not be precluded by the Covered Activities. The RHCP incorporates our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the RHCP and ensure success. Annual 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 is our position that no additional measures are required to implement the intent and purpose of the RHCP to those detailed in the RHCP and its associated ITP.

We have determined that the preferred alternative best balances the protection and management of habitat for Covered Species, while allowing and providing a streamlined process for compliance with the Act for continued development in Comal County. Considerations used in this decision include: (1) mitigation will benefit the Covered Species, (2) mitigation lands will be managed for the species in perpetuity, (3) other conservation measures will protect and enhance habitat; (4) mitigation measures for the Covered Species will fully offset anticipated impacts of development to the species and provide recovery opportunities; and (5) the RHCP is consistent with the Covered Species recovery plans.

Section 9 of the Act and its implementing regulations prohibit the "taking" of threatened or endangered species. However, under limited circumstances, we may issue permits to take listed wildlife species incidental to, and not the purpose of, otherwise lawful

activities. Permit Terms and Conditions A through D are standard Permit Terms and Conditions, the following are the Comal County RHCP specific Terms and Conditions:

E. Acceptance of this permit serves as evidence that the Permittee (Comal County) agrees to abide by the terms of the permit and all applicable sections of Title 50 CFR Parts 13 and 17 pertinent to issued permits.

F. The authorization granted by this permit is subject to full and complete compliance with, and implementation of, the Comal County RHCP, including, but not limited to the avoidance, minimization, mitigation, survey, monitoring, and reporting measures described in the RHCP, which are incorporated herein by reference; and all specific conditions contained in this permit. These permit terms and conditions shall supersede and take precedence over any inconsistent provisions in the RHCP, Environmental Impact Statement, or other permit documents.

G. This permit only authorizes incidental take of golden-cheeked warbler (*Dendroica chrysoparia;* GCWA) and black-capped vireo (*Vireo atricapilla;* BCVI) (covered species) within Comal County, Texas (covered area). Covered Activities include: 1) public or private construction and development; 2) utility installation and maintenance, including but not limited to power and cable stations, substations, and transmission lines; water, sewer, and natural gas pipelines; and other facilities; and 3) public infrastructure projects such as school development, road construction and maintenance, and development of parks.

H. Upon locating a dead, injured, or sick individual of the covered species, or any other endangered or threatened species, the Permittee is required to contact the Service's Law Enforcement Office in San Antonio, Texas 210/681-8417, for care and disposition instructions. Extreme care should be taken in handling sick or injured individuals to ensure effective and proper treatment. Care should also be taken in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured endangered/threatened species, or preservation of biological materials from a dead specimen, the Permittee and any contractor/subcontractor has the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

I. Conditions of this permit shall be binding on, and for the benefit of, the Permittee and any successors and assigns. If this permit needs to be transferred due to a change in ownership the transfer will be accomplished in accordance with 50 CFR 13.25. Any change in the names, addresses, or other administrative correction or alteration of the permit will be accomplished in accordance with 50 CFR 13.23(c). The construction activities proposed or in progress under the original permit may not be interrupted provided the conditions of the permit are being followed.

J. If, during the tenure of the permit, the project design and/or the extent of the habitat impacts is altered, such that there may be an increase in the anticipated take of the covered species, the Permittee is required to contact the Service's Austin Ecological Services Office (ESFO) and obtain an amendment to this permit before commencing any construction or other activities that might result in take beyond that authorized by the permit. If authorized take is exceeded, all activities that are shown to cause take must immediately cease and any take above that authorized shall be reported to the Austin ESFO (512/490-0057) within 48 hours. This situation will require an amendment of the permit and RHCP. Any amendment that alters the permit terms and conditions shall be processed as a major amendment in accordance with 50 CFR 13.23 (a) and (b); and shall require an amended HCP, updated analysis under NEPA, and reinitiation of the Biological Opinion.

K. If actions associated with implementation of the Comal County Regional Habitat Conservation Plan (RHCP) are shown to result in incidental take of listed species not covered by the permit, those activities that are shown to cause take must immediately cease and any take that has occurred shall be reported to the Austin ESFO (512/490-0057) within 48 hours.

L. Comal County and Participants will follow the Texas Forest Service's or professional arborists' guidelines for preventing the spread of oak wilt when clearing or trimming trees. Please report any incidence of oak wilt seen to the Austin ESFO (512/490-0057) within 48 hours.

M. The RHCP (Chapter 8) describes the procedures Comal County has agreed to undertake to address the following changed circumstances: 1) levels of funding to implement the RHCP become inadequate, 2) property values of preserve land needed to meet mitigation goals increases more than predicted, 3) the conservation bank runs out of credits, 4) sufficient suitable preserve sites are not available, 5) an evaluation species becomes listed, 6) public use of preserve lands is determined to impact species, and 7) global climate change significantly and negatively alters the status of the covered species.

N. To qualify for No Surprises Assurances, the Permittee must implement all provisions included the RHCP and the incidental take permit that addresses such circumstances. If a changed circumstance has not been addressed by the RHCP and/or incidental take permit, the Service will not require additional conservation or mitigation measures of the Permittee, provided that the terms of the RHCP and incidental take permit are being fully implemented.

To fully implement the RHCP, the following species-specific avoidance, minimization, and mitigation measures are required:

GOLDEN-CHEEKED WARBLER

O. Comal County is authorized to impact no more than 5,238 acres of GCWA habitat within Comal County, during the permit term. The following conditions also apply:

1. Clearing and construction activities on participating parcels within 300 feet of or within GCWA habitat will occur from September 1 to February 28, avoiding the breeding season, with the following exceptions:

   a. breeding season surveys, conducted by a Service permitted biologist for GCWAs, according to the most current Service protocols, indicate GCWAs are not present within 300 feet of the activity, and

   b. construction activities within 300 feet of or within GCWA habitat that began during the non-breeding season and are performed in a reasonably prompt and expeditious manner may continue, as long as activities do not include the additional removal of potential breeding habitat.

2. If Comal County cannot avoid impacts to GCWA habitat, mitigation for direct and indirect impacts to habitat will be made at the following ratios:

   a. impacts to GCWA habitat that are adjacent to or in close proximity (within 300 feet) to preserved lands benefitting GCWAs that are 500 acres or greater or are within a patch of habitat that is 500 acres or greater shall be mitigated at 3 acres of preserved habitat for every 1 acre impacted;

   b. impacts to GCWA habitat that are adjacent to or in close proximity (within 300 feet) to preserved lands benefitting GCWAs that are 250-499 acres or are within a patch of habitat between 250-499 acres shall be mitigated at 2 acres of preserved habitat for every 1 acre impacted; and

   c. impacts to GCWA habitat that are adjacent to or in close proximity (within 300 feet) to preserved lands benefitting GCWAs that are less than 250 acres or are part of a patch of habitat less than 250 acres shall be mitigated at 1 acre of preserved habitat for every 1 acre impacted.

   d. Indirect impacts to GCWA habitat will be mitigated at half the ratio of the direct impacts assessed.

   e. Mitigation will follow the Mitigation Strategies described below.

3. Any disturbance activity caused by an RHCP participant and authorized by the County with potential for direct and/or indirect effects to the GCWA, whether on or off of the project site, must be mitigated as appropriate. As the permit holder, the County is responsible for any unauthorized take resulting

from activities authorized under the RHCP (50 CFR 13.50), as well as for compliance monitoring, reporting, and corrective measures.

BLACK-CAPPED VIREO

P. Comal County is authorized to impact no more than 1,000 acres of BCVI habitat within Comal County, during the permit term. The following conditions also apply:

1. Clearing and construction activities on participating parcels within 300 feet of or within BCVI habitat will occur from September 1 to March 14, avoiding the breeding season, with the following exceptions:

    a. breeding season surveys, conducted by a Service permitted biologist for BCVIs, according to the most current Service protocols, indicate BCVIs are not present within 300 feet of the activity, and

    b. construction activities within 300 feet of or within BCVI habitat that began during the non-breeding season that are performed in a reasonably prompt and expeditious manner may continue, as long as activities do not include the additional removal of potential breeding habitat.

2. If Comal County cannot avoid impacts to BCVI habitat, mitigation for direct and indirect impacts to BCVI habitat will be made at a 1:1 ratio (1 acre of conservation for each acre of impact). Mitigation will follow the Mitigation Strategies described below.

3. Any disturbance activity caused by an RHCP participant and authorized by the County with potential for direct and/or indirect effects to the BCVI, whether on or off of the project site, must be mitigated as appropriate. As the permit holder, the County is responsible for any unauthorized take resulting from activities authorized under the RHCP (50 CFR 13.50), as well as for compliance monitoring, reporting, and corrective measures

MITIGATION STRATEGIES

Q. Comal County will mitigate for expected impacts to GCWA and BCVI habitat prior to Covered Activities that may result in take of Covered Species. Any mitigation will meet a minimum standard of criteria, including blocks of high quality habitat with a low edge to area ratio, confirmation of Covered Species presence, a site that is sustainable into the future (such that it has low levels of adjacent urbanization and low oak wilt presence), and will be managed and monitored in perpetuity. Additionally, the mitigation should support the recovery and conservation strategy of the Covered Species by protecting habitat in a

recovery unit that helps secure a viable population of the species. The mitigation strategies include:

4. Comal County establishes permanent preserves within the County. Each preserve established by the County for the purpose of generating credits must be approved by the Service and must be in place prior to the use of any credits.

5. Comal County purchases credits from a Service-approved conservation bank. The service area of the bank must include Comal County. Purchase of credits must occur prior to impacts.

6. Work with willing landowners or other entities in the creation of preserves. Preserves and the credits they generate must be approved by the Service and in place prior to the use of any credits.

R. Once a preserve/conservation bank is established by the County, the County will sell credits from the bank to RHCP participants.

S. Funding for preservation of habitat will include an amount to adequately cover the perpetual preservation, operations, and management of GCWA and/or BCVI habitat.

T. With regard to projects that may involve a Federal nexus, the Federal action agency may mitigate for effects to GCWAs and/or BCVIs through the RHCP. However, Federal action agencies are still required to consult with the Service pursuant to section 7 of the ESA prior to arranging specific mitigation (i.e., no mitigation, in lieu fee, etc. shall be paid by the Federal action agency until conclusion of their section 7 consultation). Although voluntary mitigation through an appropriate HCP may expedite their consultation, it is no guarantee of such.

U. Each preserve acquisition will be subject to Service approval and the mitigation credits will be determined based on the number of acres of occupied habitat for the Covered Species. The number of mitigation credits allowed for each preserve will be based on, and commensurate with, Service policy and guidelines regarding mitigation (such as, but not limited to, the *Guidance for the Establishment, Use, and Operation of Conservation Banks*) in order to ensure that the quality of the mitigation is equal to or greater than the quality of the habitat impacted.

V. The County will work collaboratively with the Service to ensure that mitigation assessments are performed in accordance with the methodology described here and in the RHCP. The Service reserves the right to review all mitigation assessments. The County will provide the mitigation assessment for each individual participant to the Service. Once received by the Service, the Service

will review the mitigation assessment within ten Federal working days and notify the County if it has any objections. If necessary, the Service may notify the County that it requires an additional ten Federal working days for its review. The Service does not anticipate that review of assessments will take additional time. As the permit holder, the County is responsible for ensuring that mitigation assessments are developed following the methodology described in the RHCP (50 CRF 13.50) and meets the obligations under the RHCP and permit to mitigate the effects of authorized incidental take. Failure to meet RHCP and permit requirements is cause for suspension or revocation of the permit (50 CFR 13.27 and 13.28) and the loss of No Surprises Assurances.

REPORTING REQUIREMENTS

W. Comal County will provide an annual report, due on January 1 of each year, to:
   a. U.S. Fish and Wildlife Service
      Austin Ecological Services Field Office
      10711 Burnet Road, Suite 200
      Austin, Texas 78758

   b. U.S. Fish and Wildlife Service
      Arlington Ecological Services Field Office
      2005 NE Green Oaks Blvd, Suite 140
      Arlington, Texas 76006

   c. U.S. Fish and Wildlife Service
      Division of Threatened and Endangered Species
      P.O. Box 1306
      Albuquerque, New Mexico 87103

X. Annual reports will document the activities and Applicant's permit compliance for the previous year, thus documenting progress toward the goals and objectives of the RHCP and demonstrating compliance with the terms and conditions of the incidental take permit. The annual report will include:
   a. descriptions of the Covered Activities undertaken;
   b. a description, including acreage, of occupied habitat impacted;
   c. a description, including acreage of potential habitat impacted;
   d. a description, including acreage of indirect impacts to habitat;
   e. results of any presence/absence or habitat assessment surveys;
   f. fees assessed;
   g. an account of all mitigation credits purchased and mitigation fees paid, identified by activity, project, and species impacted;
   h. an evaluation of the effectiveness of the avoidance, minimization and conservation measures;

i. an evaluation of the implementation and effectiveness of the terms of the Permit, including financial obligations;
j. recommendations for improvement; and
k. any other appropriate information to document compliance with the Permit.

Y. Information provided in the annual report will be used to determine what, if any, adaptive management strategies should be implemented to most effectively implement the conservation program outlined in the RHCP and to ensure that management changes in response to new, appropriate data are implemented in a timely fashion.

Z. The Service's current "No Surprises" policy provides that additional mitigation requirements for land, water, or financial obligations shall not be required of Comal County, for the species fully covered in the RHCP and this Permit, beyond the level of mitigation provided for in the permit and the habitat conservation plan, if fully and completely complied with and implemented. The GCWA and BCVI are the only species fully covered by this permit.

Public Comments on the EIS

The Service prepared an EIS for Comal County's ITP application. A Notice of Availability was published in the *Federal Register* notifying the public of the availability of the draft EIS and HCP from June 3, 2010, through September 1, 2010, for a 90-day period (75 FR 31463). A public hearing was held on July 27, 2010, and the public comment period closed on September 1, 2010.

One Federal agency, U.S. Environmental Protection Agency, commented with "no objection." Most of the comments received from the public focused on: (1) the process of the RHCP and how it may expedite certain projects (e.g., roads and quarry operations) that impact GCWA habitat, (2) the difficulties and decisions involved with modeling and quantifying GCWA habitat, (3) the potential occurrence of listed invertebrates in the plan area, and (4) the alleged lack of documentation ensuring impacts to the Covered Species will be minimized and mitigated to the maximum extent practicable. One comment letter supported the RHCP as proposed. We believe these comments are addressed and reasonably accommodated in the final documents.

For More Information

The Final EIS is available at the Service's Albuquerque Regional Office or Austin, Texas Field Office. A copy of this Record of Decision will be made available at ***http://www.fws.gov/southwest/es/AustinTexas*** or at the offices listed above. For additional information, call Mr. Marty Tuegel at 505-248-6651.

Regional Director, Southwest Region
U.S. Fish and Wildlife Service

11/22/13
Date