

## **DRAFT RECORD OF DECISION**

### **Regarding the Service's Decision on the Issuance of an Incidental Take Permit for Golden-cheeked Warbler and Black-capped Vireo to Hays County, Texas**

#### **Introduction**

This Record of Decision (ROD) signifies the end of the permitting process for the development of a Regional Habitat Conservation Plan (RHCP) and issuance of an Incidental Take Permit (ITP) to Hays County, Texas. Hays County has applied to the U.S. Fish and Wildlife Service (Service) for an ITP for incidental take of the endangered golden-cheeked warbler (*Dendroica chrysoparia*) and the endangered black-capped vireo (*Vireo atricapilla*) under the authority of Section 10(a)(1)(B) of the Endangered Species Act of 1973 (ESA), as amended. Hays 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 within Hays County, Texas. This ROD documents the Service's decision based on information contained in the final Environmental Impact Statement (EIS). The Service's decision to issue the ITP was not made final until at least 30 days after publication of the notice for the final EIS.

#### **The Decision**

We, the Service, intend to issue an ITP allowing Hays County to implement the preferred alternative (Alternative B), as described in the final EIS. This intention is based on a thorough review of the alternatives and their environmental consequences. This alternative meets the needs of Hays 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. Implementation of this decision requires adherence to all of the minimization and mitigation measures specified in the Hays County Regional Habitat Conservation Plan (RHCP) to offset impacts to the golden-cheeked warbler and black-capped vireo to the maximum extent practicable, as well as the described monitoring and adaptive management measures. Hays County and the RHCP meet all issuance criteria for an ITP. Since implementation of Alternative B would result in incidental take under the ESA, the Service prepared an intra-Service Biological Opinion prior to making a permit decision.

#### **Alternatives Considered**

Four alternatives, including the No Action Alternative, and their environmental consequences were evaluated in the draft EIS released November 2, 2009 for a 90-day public comment period. Several elements were common to all action alternatives and included interagency coordination, National Environmental Policy Act (NEPA)

compliance, and protection of threatened and endangered species and cultural resources. 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):** The No Action alternative assumed that we would not issue a regional permit for the County. Although development could occur on lands not occupied by endangered species, development activities that would cause take of listed species would require individual authorizations through section 7 or section 10(a)(1)(B) of the ESA. Individual entities could also elect to avoid take on properties containing endangered species by avoiding direct and indirect impacts to the species (i.e., take-avoidance). Processing individual section 10(a) permits could cause delays in permit issuance, because we often take 1 to 2 years to process an individual permit.

**Alternative B (Environmentally Preferable Alternative):** Our selected alternative is the Proposed RHCP, the preferred alternative (Alternative B) as described in the final EIS. This alternative provides for the issuance of an ITP to the County for incidental take anticipated to occur as a result of projects described above. This alternative includes implementation of RHCP measures to minimize and mitigate for the potential incidental take of federally listed species to the maximum extent practicable. The intent of this alternative is to allow continued development in the County; to minimize the biological, environmental, and socioeconomic impacts; to satisfy the covered species needs; and meet issuance criteria of section 10 of the ESA.

For golden-cheeked warblers, the take associated with direct and indirect impacts to 9,000 acres of habitat are authorized over the 30-year life of the permit. These impacts shall be mitigated by a combination of purchasing mitigation credits in nearby conservation banks and by purchasing high quality habitat within Hays County for designated golden-cheeked warbler preserves. For black-capped vireos, the take associated with direct and indirect impacts to 1,300 acres of habitat are authorized over the life of the permit. Impacts will be mitigated primarily through habitat restoration, habitat management, enhancement of existing protected black-capped vireo habitat, or an alternate, Service-approved mitigation program.

**Alternative C (Moderate Preserve System with a Take Limit):** Compared to Alternative B, this alternative features the acquisition of a modestly sized, pre-determined preserve system and a proportionately smaller amount of incidental take authorized by the ITP. This alternative illustrates a conservation program that could be relatively easy for the County to afford, but (due to relatively smaller size of the preserve system compared to the proposed RHCP) might not satisfy the anticipated need for incidental take authorization over the duration of the plan.

**Alternative D (Large-scale Preserve System):** Compared to Alternative B, this alternative involves a conservation program that utilizes a pre-determined preserve approach. The preserve system would be large enough to authorize incidental take of any remaining golden-cheeked warbler or black-capped vireo habitat in the County, outside of the target acquisition area of the preserve system, during the duration of the plan.

## **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.

In order for us to be able to issue an ITP, we must ascertain that the RHCP meets the criteria set forth in 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. Impacts to the covered species will be minimized and mitigated as described in the environmentally preferable alternative section above (fully described in section 10 of the RHCP and section 3 of the EIS).

3. The applicant will develop an HCP and ensure that adequate funding for the HCP will be provided.

The County has developed the RHCP and committed to fully fund all of the obligations necessary for its implementation. These obligations include the cost for purchase and management of golden cheeked warbler and black capped vireo 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; developing alternative management strategies and 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. To accomplish RHCP implementation, the County estimated that costs could total up to \$182.6 million. The County will fund the actual costs of implementing the RHCP by application and

mitigation fees, the County General maintenance and operations fund contributions, and the County Conservation Investments.

The Service's No Surprises Assurances are discussed in the RHCP, and measures to address changed and unforeseen circumstances have been identified. Adaptive management in the form of conservation, mitigation, or management measures and monitoring will be implemented to address changed circumstances over the life of the permit that were able to be anticipated at the time of RHCP development. Unforeseen circumstances would be addressed through the Service's close coordination with the County in the implementation of the RHCP. The County has committed to a coordination process to address such circumstances.

The No Surprises Assurances do not apply to any listed species not fully covered in the HCP. There are no measures described to address changed circumstances regarding foreseeable severe drought conditions (drought of record) or when springflows drop to critically low levels.

We have, therefore, determined that the County's financial commitment and plan, along with the County's 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 the species in the wild.

As the Federal action agency considering whether to issue an ITP to the County, we have reviewed the issuance of the ITP under section 7 of the ESA. Our biological opinion, dated January 31, 2011, concluded that issuance of the ITP will not jeopardize the continued existence of the golden cheeked warbler and black capped vireo 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 effect of the 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.

5. The applicant agrees to implement other measures that the Service requires as being necessary or appropriate for the purposes of the HCP.

We have cooperated with the County in the development of the RHCP. We commented on draft documents, participated in advisory group meetings, and worked closely with the County in 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 measures prove ineffective or impacts exceed estimates. 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 ESA compliance for continued development in Hays County. Considerations used in this decision include: (1) mitigation will benefit the golden cheeked warbler and black capped vireo, mitigation lands will be managed for the species in perpetuity, and other conservation measures will protect and enhance habitat; (2) mitigation measures for the covered species will fully offset anticipated impacts of development to the species and provide recovery opportunities; and (3) the RHCP is consistent with the golden cheeked warbler and black capped vireo 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.

To minimize impacts, Hays County must:

- A. The permit does not authorize take, whether direct or indirect, of any listed species other than the covered golden-cheeked warbler and black-capped vireo.
- B. If conditions exist (e.g., severe drought, springflows drop to critically low levels) where actions associated with the Hays County Regional Habitat Conservation Plan (RHCP) are shown to result in incidental take of listed species not fully covered by the permit, the permit may be suspended or revoked because the taking is not otherwise lawful. The Service will notify Hays County that their permit is no longer valid if any unauthorized direct or indirect take occurs, as soon as we become aware of such take. All activities associated with the RHCP that are shown to cause take must cease until further notice.
- C. For golden-cheeked warblers: the incidental take associated with direct and indirect impacts to 9,000 acres of habitat are authorized over the life of the Permit. These impacts shall be mitigated by a combination of purchasing mitigation credits in nearby conservation banks and, by purchasing high quality habitat within Hays County for golden-cheeked warbler preserves, anticipated to include 10,000 to 15,000 acres combined. Preserves for golden-cheeked warblers will be managed and monitored in perpetuity to maintain the biological value for the benefit of the species. Mitigation ratios shall be commensurate with Service mitigation policies in accordance with the Fish and Wildlife Act of 1956 (16 U.S.C. 742(a)-754), the Fish and Wildlife Coordination Act (16 U.S.C. 661-667(e)), the Watershed Protection and Flood Prevention Act (16 U.S.C. 1001-1009), and the National Environmental Policy Act (42 U.S.C. 4321-4347).

- D. Clearing and construction activities on participating parcels within 300 feet of golden-cheeked warbler habitat is not authorized between February 28 and July 31 (reproductive season), with the following exceptions: 1) protocol breeding season surveys indicate golden-cheeked warblers are not present; 2) construction activities that began during the non-breeding season and are performed in a reasonably prompt and expeditious manner may continue, and; 3) construction activities that do not involve the removal of potential habitat may continue only if not adjacent (within 300 feet) to potential habitat. However, any disturbance activity with potential for direct and indirect effects to the golden-cheeked warbler, whether on or off of the project site, must be mitigated as appropriate.
- E. For black-capped vireos: the incidental take associated with direct and indirect impacts to 1,300 acres of habitat are authorized over the life of the Permit. Impacts will be mitigated primarily through habitat restoration, habitat management, enhancement of existing protected black-capped vireo habitat, or an alternate, Service-approved mitigation program. Mitigation activities and acquisition are anticipated to cover approximately 1,300 acres and must be maintained in perpetuity. Mitigation ratios shall be commensurate with Service mitigation policies in accordance with the Fish and Wildlife Act of 1956 (16 U.S.C. 742(a)-754), the Fish and Wildlife Coordination Act (16 U.S.C. 661-667(e)), the Watershed Protection and Flood Prevention Act (16 U.S.C. 1001-1009), and the National Environmental Policy Act (42 U.S.C. 4321-4347).
- F. Clearing and construction activities on participating parcels within 300 feet of black-capped vireo habitat is not authorized between March 15 and August 31 (reproductive season), with the following exceptions: 1) protocol breeding season surveys indicate that black-capped vireos are not present; 2) construction activities that began during the non-breeding season and are performed in a reasonably prompt and expeditious manner may continue, and; 3) construction activities that do not involve the removal of potential habitat may continue only if not adjacent (within 300 feet) to potential habitat. However, any disturbance activity with potential for direct and indirect effects to the black-capped vireo, whether on or off of the project site, must be mitigated as appropriate.
- G. With regard to projects that may involve a Federal nexus, the Federal action agency may mitigate for effects to golden-cheeked warblers and/or black-capped vireos 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. If Federal projects are analyzed under the Hays County EIS, impacts and mitigation are counted as part of the authorization under the Hays County RHCP permit.

- H. Clearing and construction activities covered by the RHCP and the Permit shall be consistent with the current practices recommended by the Texas Forest Service to prevent the spread of oak wilt.
- I. Each preserve acquisition will be subject to Service approval and the mitigation credits will be determined based on the number of acres of potential and/or 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.
- J. The County will ensure that mitigation assessments are performed in accordance with the methodology described in the RHCP. The County will provide the mitigation assessment for each individual participant to the Service, and the Service will notify the County when the assessment is received. Once received by the Service, the Service will strive to review the mitigation assessment within 10 Federal working days and notify the County if it has any objections. No response from the Service after 10 days is not implicit approval of the mitigation assessment.

The Service reserves the right to review and approve all mitigation assessments by the County during a probationary period of five years from the date of issuance of the permit. Within three years after issuance, the Service will consult with the County and, if the Service is satisfied with the accuracy of the County's mitigation assessments, the Service's review of mitigation assessments may be reduced or eliminated.

### **Other Factors Considered – National Historic Preservation Act**

Historic and archeological resources are currently protected by State and Federal laws, including the Texas Antiquities Code administered by the Texas Historical Commission and the National Historic Preservation Act. The EIS assumes that the proponents of all projects covered by a regional HCP action alternative would abide by State and Federal regulations regarding cultural resources. Entities proposing projects on property owned by the State or a subdivision of the State are required by the Texas Antiquities Code to coordinate with the Texas Historical Commission and the proponents of any project receiving Federal permits or funding (such as an incidental take permit under the ESA) are required by the National Historic Preservation Act to coordinate with the State Historic Preservation Officer to determine if the project would affect properties that are included in or that meet the criteria for listing on the National Register of Historic Places. Therefore, given the existing protections for cultural resources, the activities associated with the authorized take, proposed mitigation, or funding/administration of a regional HCP under one of the action alternatives would have only negligible impacts on archeological, historical, or other cultural resources in Hays County.

## Public Comments on the EIS

The Service prepared an EIS for this 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 November 2, 2009, through February 1, 2010, for a 90-day period (74 FR 56655). A public hearing was held on November 18, 2009, providing the public an additional outlet in which to provide comments. Three sets of comments on the draft RHCP were received from the public. No comments on the RHCP or the DEIS were received from government agencies.

Generally, most of the comments received were supportive of the RHCP and its implementation process. Two comments indicated concern regarding 1) lack of access to preserve parcels for recreation and 2) lack of discretionary authority by Hays County to deny use of the RHCP for “bad” developments.

The Service believes these comments are addressed and reasonably accommodated in the implementation procedures.

## 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.

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Date