

June 29, 2005

Robert Pine
Field Supervisor
Austin Ecological Services Field Office
U.S. Fish & Wildlife Service
10711 Burnet Rd.
Austin, TX 78758

RE: Comments on the EA/HCP for a Portion of the Cibolo Canyon Property (Master Phase II), Bexar County, Texas

Dear Mr. Pine:

INTRODUCTION

The draft Habitat Conservation Plan (“HCP”) for this development contains a number of laudable aspects. Alamo Group of the Sierra Club, Aquifer Guardians in Urban Areas, Bexar Audubon Society, Esperanza Peace and Justice Center, Government Canyon Natural History Association, Greater Edwards Aquifer Alliance, League of Women Voters of the San Antonio Area, Save Our Springs Alliance, Sustainable Energy & Economic Development Coalition, and West Texas Springs Alliance commend these measures and the work of the Fish and Wildlife Service (“FWS”), as well as the authors of the HCP and environmental assessment (“EA”), on a well-written and largely comprehensive document.

We would like to caution, based on our experiences with other developments and their HCPs – such as the Barton Creek/Lantana development southwest of Austin – that the residents of Bexar County are right to be concerned about the enforceability and long-term implementation of this HCP. We also believe that this project warrants a full environmental impact statement, especially in the absence of more concrete guarantees to ensure the plan is carried out fully. We are also concerned about the impact of this development on the viability of the golden-cheeked warbler (“GCW”) in the region and the inadequacy of the cumulative effects analysis. Finally, we suggest some additional conservation measures that should be incorporated into the HCP.

COMMENTS

I. Third Party Beneficiaries, with rights to enforce the terms of the HCP, Should Be Designated, Based on Local and National Deficiencies in the Implementation and Enforcement of Such Plans.

Foremost, based on our experiences – including with the HCP for the Barton Creek/Lantana development in Austin as well as other HCPs nationally and other types of conservation commitments made by developers in the San Antonio area that have not been fully implemented – we suggest that all of the following be designated as third party beneficiaries of the incidental take permit and implementing agreement between the FWS and the permittee (and,

therefore, entitled to enforce the terms of the HCP, as incorporated into the implementing agreement, as a matter of contract law):

- 1) The Edwards Aquifer Authority,
- 2) Audubon Texas,
- 3) Any residents within five miles of any boundary of the project area, and
- 4) Any residents along waterways draining the property for 10 miles downstream.

In 1994, the FWS received an EA/HCP for the “construction and operation of a 4684-acre residential resort development for the Barton Creek Community, Austin, Texas.” Based on the EA/HCP, FWS issued a permit for the take of GCW and entered into an Implementing Agreement regarding the HCP. The EA, HCP, and Implementing Agreement all, in addition to covering GCW habitat and impacts, addressed water quality impacts and effects on the soon to be listed Barton Springs salamander. Among the provisions of the Stratus EA/HCP was that:

Total impervious cover on the Barton Creek Community will be about 10 percent of the area; impervious cover on Lantana will be about 20 percent of the area.

(Barton Creek EA/HCP at 16.) Also, the Implementing Agreement had very specific provisions for the protection of the Barton Springs salamander should it be listed, including:

within six months of the date of this Agreement, FM properties and USFWS shall mutually agree upon the requirements of a water quality monitoring program

(Implementing Agreement at 9.)

An extensive monitoring program was developed. Yet, years later it became clear that the developers were not effectively implementing the water quality monitoring program. Seawell, Acting Field Supervisor, FWS, letter to Armbrust, Stasburger & Price, dated 1/16/98. When the FWS informed the developer that “[f]ailure to implement the water quality monitoring plan could result in the revocation of [the] permit and coverage under the ‘no surprises’ policy for the Barton Springs salamander,” (*id.*), the developers informed the FWS that they did not consider themselves bound to the water quality provisions of the implementing agreement. The FWS capitulated stating:

The . . . permit issued to FM Properties for Barton Creek Community covers incidental take for the golden-cheeked warbler only and does not cover incidental take for the Barton Springs salamander. Since the water quality monitoring program is not required to avoid take of the warbler and does not benefit the warbler, the Service agrees that continuation of the water quality monitoring program is not necessary to maintain the permit.

Frederick, Supervisor, FWS, letter to Glen, Drenner-Stuart, dated 10/14/98. The Implementing Agreement was subsequently modified in January 2004 “to delete any reference to a water quality monitoring program” in exchange for payments to the Hill Country Conservancy.

In addition to the repeal of the water quality monitoring provisions, the developers, especially if the recently proposed relocation of Advanced Micro Devices to the development occurs, will significantly exceed the impervious cover levels in the Barton Creek EA/HCP based on current and planned development. Also, portions of one of the most important GCW locations on the Barton Creek site – POD 9, which was designated as open space in the plans filed with FWS when it issued the permit – have been cleared recently.

This Austin area development is just one glaring example of the severe problems with the implementation and enforcement of the HCPs. This is a national problem as well. The Seattle Post-Intelligencer recently ran an exhaustive series on the deficiencies in habitat conservation planning and implementation throughout the country. See attached articles. Even the FWS acknowledges its inability to monitor the multitude of HCPs it enters into.

In the San Antonio area, there are numerous examples of conservation commitments that have been made by developers in different types of plans that the citizens of the area continue to wait to see them fulfilled.

In Bexar County a property adjacent to the Scenic Loop Tract contains Helotes Hilltop Cave, which is known to support the endangered species *Rhadine exilis* and *Batrisodes venyivi*. Helotes Hilltop Cave is on parcels of land that were set aside as mitigation habitat in the La Cantera developments Habitat Conservation Plan and Incidental Take Permit whereby the FWS allowed the La Cantera developers to destroy the habitat of endangered species on their property and mitigate that damage by purchasing other parcels containing karst features with endangered species. Three preserve sites were purchased as mitigation localities suitable for preservation of four of the nine listed karst invertebrates. Caves included in the mitigation proposal were chosen based on type and diversity of troglobitic species contained therein and availability of land in surrounding areas. Clearly, neither the FWS nor the Court anticipated that the environmental integrity of the Helotes Hilltop Cave could be maintained and the survival of its resident endangered species assured if high-density development were to be constructed on adjoining properties.

Presently, the adjoining property is being considered as the site of a Wal Mart Superstore. Should this or any other commercial development on the adjacent property upstream of the Hill Top Cave characterized by a large building footprint, density over 15% impervious cover, and/or large paved parking areas will threaten the survival of the endangered species living within the mitigation property, rendering the property useless in its intended purpose to guarantee the preservation of the endangered species taken from the La Cantera development. Without the oversight of citizens groups this fact would have gone unnoticed. In the absence of a third party beneficiary named to oversee the ongoing protection of the species in the Helotes Hill Top Cave property, all value of this property as mitigation of a taking of endangered species may be rendered worthless.

Over the years that development has been occurring on the Edwards Recharge Zone within San Antonio's City limits, water pollution abatement plans (WPAP's) have been submitted to the State regulatory agency that seem to be reasonable attempts at insuring that water quality is not compromised by the development in question. It is often the case, however,

that WPAP's submitted as required for permitting by the Texas Commission on Environmental Quality, or its predecessor the Texas Natural Resources Commission (TNRCC), have not always been implemented as described. A case in point is the WPAP submitted by La Cantera-Fiesta Texas to the TNRCC in 1991. During the years of 1992 through 1994 Fiesta Texas failed to fulfill commitments made to the State in its WPAP. It collected less than half of the water quality samples it agreed to collect and failed to analyze the samples for all constituents named in the WPAP. A major purpose of the water quality samples is to determine the effects of the Fiesta Texas parking lot on water quality. For over two years, however, samples were only collected in February and March, when the park was closed. As a result, it was not discovered until more than two years after the theme park opened that the quality of runoff water released from water pollution abatement basins contained concentrations of oil and grease in amounts indistinguishable from that of the water entering the basins. Although Fiesta Texas had been aware of the problems since 1992, they did nothing to correct these problems until a citizens' group looked into and publicized the matter in 1994. Had the State named the Edwards Underground Water District or some other local entity as beneficiary with responsibility for oversight of the WPAP submitted by Fiesta Texas, it is likely that the problems with its implementation would have been discovered and corrected much sooner.

Therefore, we respectfully suggest that the Audubon Texas, local residents and the Edwards Aquifer Authority be made third party beneficiaries of the EA/HCP and Implementing Agreement for the Cibolo Canyon Property. Otherwise any and all of the provisions that do not directly relate to the "take" of GCW may not be enforced should the current or future landowners decide not to implement the HCP as written. (See Draft EA at 92) ("the applicant concludes that any change in the development plan that does not affect the size or configuration of the Development Area and the conservation area cannot pose any threat of an additional amount of take to the GCWA . . . [so] no amendment of the permit should be . . . required due to any amendment of the development plan within those areas identified as 'development' in the community plan"). Indeed, it is quite likely that even provisions directly related to the take of GCW will not be enforced. FWS readily acknowledges that it lacks the resources to monitor the vast number of permits and HCP provisions it is supposed to oversee.

II. Especially in the Absence of a Provision for Third Party Beneficiaries Able to Enforce the Terms of the HCP, a Full EIS Is Clearly Required.

A full environmental impact statement should be completed for a project of this scope that will destroy such a large amount of habitat for the endangered GCW. Eight hundred and forty six acres of GCW habitat will be effectively destroyed and a significant amount of the high quality habitat not directly destroyed will be lessened in habitat value due to edge effects, increased intrusion of non-native species (including cow birds and feral cats), and habitat fragmentation. The draft EA states that the habitat in the region should already likely be considered fragmented and that "[a]dditional studies are currently underway to determine whether or not GCWA habitat patches large enough to sustain two populations with over 3,000 breeding pairs each are feasible in this recovery unit." (EA at 57.) Large blocks of contiguous habitat are essential for the survival and recovery of the GCW. The loss of 846 acres of occupied habitat that is adjacent to other large blocks of habitat must be considered significant –

and necessitate the preparation of an EIS – especially in light of the scientific uncertainty and controversy over the long-term viability of a recovered GCW population in the area.

Additionally, the level of impervious cover in the watershed is environmentally significant. The EA properly recognizes that “EPA studies have indicated that the concentrations of pollutants in urban runoff can be directly related to the degree of development, especially the amount of impervious cover.” (EA at 42.) However, the EA seems to incorrectly equate a 15 percent impervious cover level with an insignificant environmental impact. We agree that limitation on impervious cover “is one of the most effective ways to preserve the site’s predevelopment runoff characteristics,” yet the scientific literature overwhelmingly suggests that significant impacts to the watershed begin to occur as impervious cover levels reach 5 to 10 percent (Schueler, 1994). Therefore, the stated 15 percent impervious cover levels in this project, while a vast improvement over many developments, do not bring this large-scale project down to the level of having environmentally insignificant impacts. This is especially true when considering the cumulative impervious cover levels in the watershed. Moreover, many of the areas that the EA considers pervious should be included within the calculation of the level of impervious cover. FWS has used a 15 percent impervious cover level within the uplands development zone as a benchmark, but the that zone, according to FWS, only “includes all land not within a buffer zone and not within turf areas subject to fertilizer, pesticide and herbicide application. Buffer zones and turf areas should not be included in impervious cover calculations.” (Draft Recovery Plan for the Barton Springs Salamander dated 12/9/03 at Appendix C.)

Finally, for the reasons described above, we are deeply concerned that the entirety of the conservation measures will not be fully implemented. If that were to be the case, there would clearly be significant environmental impacts. However, we would have little to no recourse to seek compliance with these promises, or even to seek meaningful supplemental environmental review. Therefore, we again urge that local residents and a citizen’s group be made third party beneficiaries to the implementing agreement. In the absence of such a provision it is even more imperative that a full environmental impact statement be completed for this project.

III. The Cumulative Effects Analysis Is Insufficient.

As described above, the amount of destruction of GCW habitat on this site alone is substantial. A far more detailed analysis of the impacts of the loss of such a large block of habitat within the context of habitat conditions and trends in the region is required. Again this habitat is especially valuable because of its location adjacent to large blocks of high quality habitat in a region where the GCW habitat is highly fragmented and the viability of a recovered population is currently unknown. The Draft EA notes that separate studies are ongoing as to the ability of the habitat in the region to support a recovered GCW population. However, it is “not appropriate to defer the cumulative impact assessment to a future date” after this significant amount of habitat is lost – and possibly the potential for a viable recovered population of GCW along with it. (Defenders of Wildlife v. Ballard, 73 F.Supp.2d 1094, 1114 (D.AZ. 1999).)

IV. Additional Conservation Measures Should Be Incorporated.

In addition to the native-scaping and low-water use landscapes, as well as restrictions to the use of organic fertilizers, pesticides and herbicides, there should be restrictions on pets. House cats should be banned or prohibited from being let outside unrestrained or unconfined. Also, exotic pets, such as snakes or lizards that might prey on GCWs or their eggs, should similarly be banned or restricted. There should be a program for the humane trapping and removal of non-native predators.

Sincerely,

Alamo Group of the Sierra Club,
Aquifer Guardians in Urban Areas,
Bexar Audubon Society,
Esperanza Peace and Justice Center,
Government Canyon Natural History Association
Greater Edwards Aquifer Alliance,
League of Women Voters of the San Antonio Area,
Save Our Springs Alliance,
Sustainable Energy & Economic Development Coalition,
West Texas Springs Alliance

Enclosures:

San Antonio Current *The bird is the word* by Lisa Sorg 6/2/2005

Seattle Post-Intelligencer – Special Report Series *A License to Kill*
Three part series by Robert McClure and Lisa Stiffler 5/3/2005 through 5/5/2005

Flaws in habitat conservation plan threaten scores of species
by Robert McClure & Lisa Stiffler 5/3/2005

Some see politics in habitat planning
by Robert McClure & Lisa Stiffler 5/3/2005

Pioneer conservation plan falls short by Robert McClure 5/3/2005

Lands lose guardian when trust goes bust by Robert McClure 5/3/2005