



# United States Department of the Interior

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In Reply Refer To:  
FWS/R2/AESO/061356

## Memorandum

To: Regional Director, Southwest Region

Through: Assistant Regional Director, Ecological Services

From: Field Supervisor, Austin Ecological Services Field Office

Subject: Findings and Recommendations on Issuance of an Incidental Take Permit (TE58612B) for the CEMEX Balcones Quarry Northeast Area Habitat Conservation Plan

## I. DESCRIPTION OF PROPOSAL

The CEMEX Construction Materials South, LLC (Applicant) has applied to the U.S. Fish and Wildlife Service (FWS) for an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (16 USC §1531-1544, Act) for the Balcones Quarry Northeast Area tract in Comal County, Texas. As part of this application, the Applicant submitted a Habitat Conservation Plan (HCP), which is incorporated herein by reference. The requested ITP, which is for a period of 15 years, would authorize incidental take of the golden-cheeked warbler (GCWA) (*Setophaga [=Dendroica] chrysoparia*, Covered Species).

The preferred alternative is issuance of an ITP under section 10(a)(1)(B) of the Act to authorize incidental take of the GCWA resulting from removal or modification of vegetation in preparation for rock mining operations (Covered Activities, see a detailed description in Section 4.1 of the HCP) on the Balcones Quarry Northeast Area tract. While the CEMEX Balcones Quarry Northeast Area tract is a patch of woodland that is 246 acres, the permit area is only a portion of the larger tract (199.4 acres) and is located east and northeast of CEMEX's current Balcones Quarry operations. The Covered Activities may generate effects that result in incidental take of GCWAs including harm or harassment. The Applicant's HCP describes the incidental take expected to result from the Covered Activities and the conservation plan for how they will minimize and mitigate, to the maximum extent practicable, as well as activities specifically intended to contribute to the recovery of the GCWA.

The accompanying final Environmental Assessment (EA) was prepared to comply with the FWS's National Environmental Policy Act of 1969 (NEPA) responsibilities to analyze the effects of issuing the proposed ITP on the human environment. The Final EA is incorporated herein by reference. The Final EA also analyzes the effects of not issuing the proposed ITP (the "no action" alternative describing conditions that would accrue in the absence of the ITP).

A number of other federally listed species occur within Comal County, and we determined that none of these species will be affected by the proposed action. The No Surprises assurances (50 CFR 17.22(b)(5)) do not apply to any species other than the GCWA.

#### Analysis of Effects:

The effects of the proposed action and impacts from HCP implementation on the affected species are fully analyzed in the FWS's Biological Opinion (BO), which is also incorporated herein by reference. The proposed plan area has been evaluated for federally listed threatened or endangered species, and further information is available in the HCP and in the BO.

We find that the proposed HCP Covered Activities are not expected to appreciably reduce the survival and recovery of GCWAs in the wild. Conservation actions described in the HCP, such as clearing outside of the GCWAs breeding season (March 1 through August 31), following the Texas Forest Service's or professional arborist's guidelines for the prevention or spread of oak wilt, and mitigating through purchase of credits from a FWS approved GCWA habitat conservation bank will benefit this species. No critical habitat has been designated for the GCWA; therefore, none will be affected by the proposed action.

## II. PUBLIC COMMENT

A Notice of Availability of the draft EA, draft HCP, and permit application, and request for public comment was published in the *Federal Register* on May 13, 2015 (80 FR 27349). The Notice of Availability was posted to the FWS's Austin Ecological Services Field Office website (<http://www.fws.gov/southwest/es/AustinTexas/>). The 60-day public comment period closed on July 13, 2015. We received comments from nine individuals who could be impacted by the expansion of the quarry. Some commenters are concerned that noise, traffic, and air pollution will increase as a result of the expanding quarry operations, while others do not want the woodlands to be cleared or GCWA habitat to be disturbed.

## III. INCIDENTAL TAKE PERMIT CRITERIA-ANALYSIS AND FINDINGS

Section 10(a)(1)(B) requires that the FWS determine, after public comment, that five issuance criteria are satisfied before a permit can be issued. The five issuance criteria and our analysis and findings follow:

- (i) The taking will be incidental.

We have determined that the Covered Activities within the permit area are lawful activities. Any take anticipated from the Covered Activities under the Balcones Quarry Northeast Area HCP

will be incidental to, and not the purpose of the Covered Activities. Incidental take that may occur as a result of these Covered Activities is expected to occur in the form of harm and harassment; direct mortality is not expected.

(ii) The Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.

The Applicant has committed to implementing the following conservation measures intended to minimize and mitigate the impacts of incidental taking that may result from the Covered Activities.

1. Observing seasonal clearing restrictions during the GCWA breeding season (March 1 through August 31).
2. Implementing oak wilt prevention measures during all clearing activities.
3. Purchasing 147 credits from a FWS approved GCWA habitat conservation bank.

The minimization measures are intended to reduce take of the GCWA. We find that the proposed mitigation is commensurate with the anticipated level of take anticipated over the duration of the proposed ITP.

The Applicant has also included provisions for reasonably foreseeable changed circumstances (Section 7.0 of the HCP). These strategies ensure that the effects of potential take resulting from changed circumstances will also be minimized and mitigated to the maximum extent practicable. We find, therefore, that the Applicant has minimized and mitigated for the impacts of such taking to the maximum extent practicable.

(iii) The Applicant will ensure that adequate funding for the plan will be provided.

The Applicant has already funded and performed pre-activity studies (e.g., GCWA presence/absence surveys, habitat assessments, and tree species evaluations) of the Balcones Quarry Northeast Area and will purchase conservation credits, as described in Section 6.4 of the HCP, prior to initiation of the Covered Activities. Additionally, implementation of the avoidance and minimization measures described above will be funded by the Applicant; although, costs are expected to be minimal since the measures involve only adjustments of project timing and methods. Mitigation credits will be purchased prior to clearing any GCWA habitat in the permit area; therefore, if funding is not available to comply with the mitigation described in the HCP then take will not occur.

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

The legislative history of the Act establishes the intent of Congress that this issuance criteria be based on a finding of “not likely to jeopardize” under section 7(a)(2) of the Act (50 CFR 402.02). As a result, issuance of the ITP has been reviewed by the FWS under section 7 of the Act. Our BO 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 the GCWA, so none

will be destroyed or adversely modified. The BO also addresses other listed and candidate species that may be in the action area and concludes that HCP implementation will have no effect on those species. Therefore, the direct and indirect effects of the issuance of the ITP will not appreciably reduce the likelihood of survival and recovery of other listed species or destroy or adversely modify any designated critical habitat.

(v) The measures, if any, required under subparagraph (A)(iv) will be met; and the Secretary of the Interior has received such other assurances as may be required that the plan will be implemented.

The FWS assisted the Applicant in developing their HCP, commented on draft documents, participated in meetings and conference calls, and worked closely with the Applicant's consultants throughout the planning and document preparation phases of the proposal to ensure that the conservation needs of the covered species would be assured and recovery would not be precluded by the Covered Activities. The HCP incorporates our recommendations for minimization and mitigation of impacts, as well as steps to monitor the effects of the HCP and ensure success. The Applicant will submit an annual report to the FWS until build-out is complete describing implementation of avoidance, monitoring, minimization, and mitigation measures described in the HCP. Coordination mechanisms have been designed to ensure that changes in conservation measures can be implemented if changed circumstances occur over the duration of the ITP. It is our position that no additional measures are required to implement the intent and purpose of the HCP to those detailed in the HCP and its associated ITP.

The FWS included the five-point policy as an addendum to the Habitat Conservation Planning Handbook on July 3, 2000, (65 FR 35242). The policy emphasizes the development of biological goals and objectives, adaptive management strategies, monitoring provisions, permit duration considerations, and public participation into HCPs as a way to increase their effectiveness. The CEMEX Balcones Quarry Northeast Area HCP addresses each of the five-point policy criteria for permit.

#### IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS—ANALYSIS AND FINDINGS

The FWS has no evidence that the 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 ITP and there are no disqualifying factors that would prevent the ITP from being issued under current regulations.

#### V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, issuance of an ITP to authorize incidental taking of the golden-cheeked warbler (*Setophaga [=Dendroica] chrysoparia*) by the Applicant, in accordance with the HCP and the final EA, is recommended.

The following special conditions apply:

- A. Acceptance of the permit serves as evidence that the Permittee (CEMEX Construction Materials South, LLC) agrees to abide by the terms and conditions of this permit and all applicable sections of Title 50 CFR Parts 13 and 17 pertinent to issued permits. Terms and conditions of the permit are inclusive. Any activity not specifically permitted is prohibited. Please read through these conditions carefully as violations of permit terms and conditions could result in your permit being suspended or revoked. Violations of your permit terms and conditions that contribute to a violation of the Act could also subject the Permittee to criminal or civil penalties.
- B. The authorization granted by the permit will be subject to full and complete compliance with, and implementation of, the CEMEX Balcones Quarry Northeast Area HCP, and all specific conditions contained herein. The permit terms and conditions shall supersede and take precedence over any inconsistent provisions in the HCP or other program documents.
- C. This permit only authorizes incidental take of the golden-cheeked warbler (*Setophaga [=Dendroica] chrysoparia*) within the 246-acre CEMEX Balcones Quarry Northeast Area tract, Comal County, Texas. Incidental take authorized by the permit is for a 15 year period.
- D. Covered Activities include removal or modification of vegetation in preparation for limestone quarrying and mining operations (as detailed in Section 4.1 of the HCP).
- E. 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 FWS's Law Enforcement Office in San Antonio, Texas, at 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.
- F. Conditions of the permit shall be binding on, and for the benefit of, the Permittee and any successors and/or assignees. 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 50 CFR 13.23. The Covered Activities proposed or in progress under the original permit may not be interrupted provided the conditions of the permit are being followed.
- G. If, during the tenure of the permit, the project or the extent of the habitat impacts is altered, such that there may be an increase in the anticipated take of the GCWA, the

Permittee is required to contact the FWS'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, at 512-490-0057 within 48 hours. This situation will require an amendment of the permit and HCP and shall be processed as a major amendment in accordance with 50 CFR 13.23 (a) and (b), and shall require an amended HCP, an updated analysis under NEPA, and reinitiation of the BO.

- H. If actions associated with implementation of the HCP 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, at 512-490-0057 within 48 hours.
- I. The HCP (Section 7.0) describes procedures the Permittee has agreed to undertake to address changed circumstances. To qualify for No Surprises assurances, the Permittee must implement all provisions included in the HCP and the incidental take permit that addresses such changed circumstances. If a changed circumstance has not been addressed by the HCP or ITP, the FWS will not require additional conservation or mitigation measures of the Permittee, provided that the terms of the HCP and ITP are being fully implemented.

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

- J. The Permittee is authorized to impact no more than 145 acres of GCWA habitat (as detailed in Section 5.1.2 of the HCP, permit area).
- K. All clearing of vegetation will occur outside of the GCWA breeding season (March 1 through August 31).
- L. If GCWA habitat remains on the Balcones Quarry after the start of a breeding season (March 1), then all clearing and quarrying activities will occur at least 300 feet away from any remaining GCWA habitat.
- M. The Permittee, including contractors or subcontractors, will follow the Texas Forest Service's or professional arborist's guidelines for the prevention or spread of oak wilt.
- N. The Permittee will mitigate for expected impacts to GCWAs by one of the following:
  - 1. Purchase 147.44 acres of conservation credits from a FWS-approved GCWA conservation bank.
  - 2. Acquire and preserve a minimum of 147.44 acres of GCWA habitat through fee simple title or establishment of a conservation easement. If preserving habitat, the 147.44 acres would be contiguous with a minimum of 352.56 additional acres of

preserved GCWA habitat to ensure the total size of the preserved area was at least 500 acres. This preserve will be in compliance with current FWS guidance on the establishment and management of GCWA preserves in perpetuity.

3. Purchase credits from the Comal County Regional Habitat Conservation Plan.
- O. The FWS will be notified in writing of the finalization of mitigation prior to any clearing or construction within the permit area.
- P. An annual report will be submitted by December 15 to the addresses below and will describe the previous calendar year's activities and compliance with this permit and the HCP. Annual reports will be submitted each year until all GCWA habitat is cleared from the permit area.
1. U.S. Fish and Wildlife Service  
Austin Ecological Services Field Office  
10711 Burnet Road, Suite 200  
Austin, Texas 78758
  2. U.S. Fish and Wildlife Service, Region 2  
Branch of Environmental Review  
P.O. Box 1306, Room 6034  
Albuquerque, New Mexico 87103

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Field Supervisor  
Austin Ecological Services Field Office

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Date

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Assistant Regional Director – Ecological Services  
Southwest Region

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Date