

In Reply Refer To:
FWS/R4/ES

Memorandum

To: Deputy Regional Director, FWS, Atlanta, GA

From: Assistant Regional Director, Ecological Services

Subject: Set of Findings: Safe Harbor Agreement and Application of an Enhancement of Survival Permit for the Fine-lined Pocketbook, Ovate Clubshell and Southern Clubshell in Chewacla Creek, near Auburn Lee County, Alabama

A number of landowners and cooperators, including the Alabama Department of Natural Resources (ADCNR); Bob and Fannie Harris LLC (Harris); John W. Pace III (Pace); Phillips Family Partnership, Ltd. (Phillips); Water Works Board of the City of Auburn, Alabama (Water Board); Martin Marietta Materials Inc., Shorter Sand and Gravel Plant (Martin Marietta); and the City of Auburn (Auburn), (collectively: "Applicants") have applied to the Service for approval of a Safe Harbor Agreement (SHA) and the issuance of a section 10(a)(1)(A) Enhancement of Survival Permit (ESP) for the endangered ovate clubshell mussel (*Pleurobema perovatum*) and southern clubshell mussel (*Pleurobema decisum*), and the threatened fine-lined pocketbook mussel (*Lampsilis altilis*). The Agreement's term is for a period of 30 years, and will implement conservation measures for the above identified freshwater mussel species (covered species), by providing minimum flows and controlling subsidence features to Chewacla Creek downstream of Lake Ogletree Dam, in order to expand available and suitable habitat. Baselines are established for each of the Applicants and are described in terms of numbers and locations of covered species.

The Service's Daphne, Alabama, Ecological Services Field Office and the Regional Office have worked with the Applicants on producing the SHA and the necessary Service documents associated with the accompanying ESP application. The ESP is a necessary component for implementation of the SHA, and the Daphne and Regional Office staffs concur that the ESP application meets the regulatory and statutory standards required for issuance of the requested ESP/approval of the SHA. The SHA, Environmental Assessment (EA)/ Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA), and Biological Opinion (BO) were reviewed by Service personnel at the Daphne and Regional Offices. None of the Service reviewers objected to the issuance of the ESP.

I. DESCRIPTION OF PROPOSAL:

The proposed action is issuance of an ESP to the Applicants pursuant to section 10(a)(1)(A) of the Endangered Species Act (Act). The species to be covered by the requested ESP are the fine-lined pocketbook, southern clubshell, and ovate clubshell mussels (e.g., the covered species), and the scope of the action is a section of Chewacla Creek, downstream from the Lake Ogletree Dam. Under the SHA, the Applicants will implement conservation measures intended to attract and retain the mussels to a dry section in Chewacla Creek, for a period of 30 years. Specific conservation measures identified in the SHA are: repair of subsidence features within and adjacent to Chewacla Creek, supply quarry water into Lake Ogletree with a minimum guaranteed release into Chewacla Creek, and conduct continuous stream flow monitoring and annual biological assessments. In return, the ESP will authorize to the Applicants to incidentally take any/all of the covered species that are above the existing baseline (and subject to the terms and conditions of the ESP).

The Service has concluded that the SHA and the accompanying ESP applications include terms that, when implemented, are expected to provide a net conservation benefit to the covered species. These benefits are expected to include maintenance of potential mussel habitat, restoration of the three mussel species to the site, and long-term enhancement of mussel host fish habitat. The Service considers this action a low effect SHA and has concluded that there will be no individual or cumulative significant effects on the environment caused by this action as described in the EA/FONSI on this project. The Service recommends ESP issuance based on the expected short- and long-term benefits to the covered species provided through implementation of the SHA.

II. ISSUANCE CRITERIA-ANALYSIS AND FINDINGS

The Applicants have met all application requirements for the ESP. In addition, the Applicants have met all issuance criteria for the ESP. These criteria are detailed below.

Enhancement of Survival Permit

1. The take will be incidental to an otherwise lawful activity and will be in accordance with the terms of the Safe Harbor Agreement.

The Service finds that the proposed take of the fine-lined pocketbook, southern clubshell, and ovate clubshell, as described in the ESP application and SHA, would be incidental to otherwise lawful activities. The SHA/ESP provides adequate safe guards, identifying and conserving the baseline conditions, and identifying the terms under which incidental take is authorized. During the term of the SHA, incidental take could occur as a result of the following activities (see the ESP and SHA for a complete listing): emergency reduction in guaranteed minimum flows; accidents; construction and maintenance actions to repair creek subsidence; and actions associated with operation of the Martin Marietta Materials quarry. Each of these referenced

activities are considered otherwise lawful.

2. The implementation of the terms of the Safe Harbor Agreement will provide a net conservation benefit to the affected listed species by contributing to the recovery of listed species included in the permit and the Safe Harbor Agreement otherwise complies with the Safe Harbor policy available from the Service.

The Applicants have developed the SHA and ESP application in accordance with the requirements in the implementing regulations, the final Safe Harbor policy, and the issuance criteria for an ESP. The Service has concluded that only one population of one of the three covered species currently inhabits the enrolled lands within the SHA, and that the SHA is expected to provide the following net conservation benefits for the covered species: (1) maintenance and enhancement of habitat for the covered species and their host fish, and (2) potential restoration of covered species to the site. Whether from dispersal of covered species from adjacent creek segments where the covered species are currently located, there exists the potential for new mussel beds to become established within the affected section of Chewacla Creek. In the long term, the establishment of additional population(s) of the covered species would contribute directly with existing recovery efforts. In addition, the project will serve as a demonstration and model for other landowners in the region to familiarize them with the Safe Harbor concept.

The ESP does authorize the Applicants to return to baseline conditions, potentially resulting in the loss of any newly-created habitat and species populations. However, it is important to note that such taking may or may not ever occur. The Applicants have indicated that the management activities specified in the SHA will be carried out for as long as the property remains in its present ownership, which is expected to be greater than the duration of the ESP. The expectation underlying the SHA is that the management measures to be undertaken in Chewacla Creek will result in the re-colonization of the affected section of the creek by the covered species and the creation of additional suitable habitat. In a worst case scenario, should any of the participating landowners/cooperators decide to drop out of the program, it could mean a return to the baseline conditions that existed without the SHA. If this occurred, the SHA would have provided interim benefits in the form of population and demographic maintenance during its duration.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of the survival and recovery in the wild of any listed species.

The Act's legislative history establishes the intent of Congress that this issuance criteria be identical to a regulatory finding of no "jeopardy" under section 7(a)(2) of the Act. As a result, issuance of this section 10(a)(1)(A) ESP was reviewed by the Service according to provisions of section 7 of the Act. In the BO, which is incorporated by reference, the Service concludes that approval of the SHA and issuance of the ESP is not likely to adversely affect or jeopardize the continued existence of any of the covered species or any other listed species. The BO discusses the analysis and factors the Service used in reaching this conclusion.

4. Implementation of the terms of the Safe Harbor Agreement is consistent with applicable Federal, State, and Tribal laws and regulations.

The Service believes that implementation of the terms of the SHA is consistent with applicable Federal, State, and Tribal laws and regulations. The Alabama Department of Conservation and Natural Resources (ADCNR), State Lands Division is one of the Applicants for the SHA.

The ESP includes conditions that the Applicants maintain compliance with any applicable State, Federal, or Tribal laws or regulations to maintain the incidental take authorization provided by the ESP. Therefore, we are unaware of any law or regulation that would prevent the implementation of the SHA and issuance of the accompanying ESP.

In summary, we believe, that by (1) requiring the Applicants to maintain compliance with the applicable protected species laws of the State of Alabama, (2) not authorizing direct take under the ESP (that may be in violation of the Alabama statutes), and (3) incorporating a variety of measures to minimize the likelihood of any incidental take (such as stream flow and biological monitoring), there will be little risk of having the ESP become void due to the Applicants' violation of Alabama's statutes. In addition, any direct take would have to be authorized by a separate section 10(a)(1)(A) scientific permit from the Service. This issue is also discussed in the "Public Comments" section below.

5. Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit.

The proposed SHA furthers ongoing conservation activities for the recovery of the covered species, and will serve as a model for future SHAs of the same type.

6. The Applicants have shown capability for and commitment to implementing all of the terms of the Safe Harbor Agreement.

The Applicants have committed to provide financial support and personnel necessary to implement the provisions of the SHA. The Applicants have contracted with qualified biologists familiar with the biology of the covered species and the necessary skills and experience to successfully implement the conservation measures identified in the SHA. Based on conservation measures described in the SHA and the ESP provisions, the Service does not expect any unforeseen circumstances that would preclude the Applicant's funding and implementation of the SHA.

III. GENERAL CRITERIA AND DISQUALIFYING FACTORS-ANALYSIS AND FINDINGS

The Service has no evidence that the permit application should be denied on the basis of criteria and conditions set forth in 50 Code of Federal Regulations (CFR), 13.21 (b)-(c).

IV. PUBLIC COMMENTS

A 30-day public comment period was initiated on March 10, 2003, and ended on April 9, 2003. During this time, the Service responded to requests for information from two. The Service received only two public comment letters on the SHA, one from Environmental Defense and one from Mr. Jeff Garner, who is the Mussel Management Supervisor for the ADCNR, Division of Wildlife and Freshwater Fisheries. The Environmental Defense letter included comments on three specific issues, including two issues that Environmental Defense believed were for inappropriate form of agreement, the use of a SHA rather than Habitat Conservation Plan. The issue Mr. Garner raised was related to a general issue on a portion of the SHA's text. The full response and concerns raised by the public on this action are attached and incorporated by reference.

Summaries of the main public issues/concerns are paraphrased and underlined in the paragraphs below followed by a summary response.

Issue 1: Environmental Defense was concerned that a Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) was the appropriate form of agreement to be used rather than the proposed SHA and ESP. We responded that since we had concluded no take had yet occurred, and no take was allowed for the baseline population of mussels already located within the action area, we believed a SHA and associated ESP were the appropriate regulatory tool to use in this case.

Issue 2: Environmental Defense was also concerned that the proposed SHA was in response to the settlement of a lawsuit and was therefore not a voluntary action. Our response pointed out that the Service was not a party to the lawsuit, nor bound to any action described in the lawsuit's settlement agreement. In addition, we pointed out that a settlement agreement, by its very nature, is a voluntary action.

Issue 3: Mr. Garner was concerned with a provision in the NPDES permit requiring an emergency discharge in Chewacla Creek, which could adversely effect the baseline population of the covered species immediately downstream of the Lake Ogletree dam. We responded that this was a valid concern; however, the SHA does not authorize take of the baseline population of the covered species and should this emergency outfall be used, the Applicants would be exposing themselves to potential liability under the Act. The Service would pursue an investigation into the circumstances surrounding the event and would move forward with an appropriate response to protect the covered species. Such actions might include, but are not limited to, seeking civil and/or criminal penalties as provided in the Act and/or revoking the SHA.

V. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on our findings with respect to the ESP application/SHA and our internal analysis documents, the issuance of a section 10(a)(1)(A) ESP to the Applicants is recommended.

Attachments

Submittal:

Assistant Regional Director - Ecological Services

Date

Concurrence:

Deputy Regional Director - Southeast Region

Date

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