

A Reprint from *Tierra Grande*

Capturing the Elusive Incidental Take Permit

By Charles E. Gilliland and Michael Mays



Ask a developer to explain how to obtain a permit to develop property in compliance with the Endangered Species Act (ESA) and you're liable to hear something like, "You'd better sit down. This will take a while."

That's certainly the truth. The process to secure an incidental take permit (ITP) is at best long and arduous. The worst-case scenario would intimidate the toughest, most persistent among us.

In the context of the ESA, a "take" is causing harm to a threatened or endangered species, either directly or indirectly. An ITP is required if a development project may result in a take. Without an ITP, landowners who "take" a listed species are subject to judicial action from federal agencies and private citizens alike.

The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) enforce the ESA for land and marine species, respectively. In this article, "services" is used to refer to both organizations. Landowners should contact the appropriate service before beginning development to determine whether an ITP is necessary.

Habitat Conservation Plan Development

An ITP application must be accompanied by a habitat conservation plan (HCP), which ensures that any incidental take is minimized and that the effects of the take are mitigated.

Developing an HCP typically takes from eight to 24 months.

After initial, informal consultations between the landowner and one of the services, the landowner generally assembles a team of experts to draft the HCP. Although the ESA does not mandate the use of experts, enlisting a team of experienced consultants likely will save both time and money, especially for complex developments. In addition, the services and the public may more readily accept plans developed by experts.

Small-scale projects, such as building a home, barn or addition to an existing building, usually do not require a team.

Drafting HCP

An HCP drafting team usually includes a project manager, scientists, attorneys and communications specialists. The project manager oversees the development plan, identifying activities required for a successful project. The scientists

estimate the project's potential impacts on listed species by surveying the property and evaluating field data. Attorneys ensure project compliance with the ESA and the services' regulations. Communications specialists describe the various elements of the project and HCP to both the services and the public.

Because of vast differences in biological features and habitat requirements among species, landowners must adapt the com-

Hiring experienced consultants with scientific expertise to write the habitat conservation plan can save both time and money in the long run.

position of their teams to conform to their specific projects. For example, cave-dwelling insects differ remarkably from flying raptors. Therefore, a team charged with writing an HCP for the former would require different scientific expertise than one writing a plan for raptors.

The team begins by pinpointing the HCP's objectives and establishing strategies to accomplish them. A time line for drafting the HCP and securing the ITP is established.

The HCP must clearly describe the proposed development activities and identify the potential impacts on listed species. Because the services and interested members of the public, including environmental organizations, will carefully review the HCP, team biologists must provide a sound scientific basis for the plan.

Team members then negotiate with the appropriate service in establishing the extent of the foreseen take, what steps will be required to mitigate the take and what mechanisms will be put in place to ensure compliance with the plan. The magnitude of required mitigation is based on analyses of the biological and ecological data collected in the field. Consequently, these biological data and the credentials of the experts who collect them often become the focus of the negotiations.

The type of information and number of experts needed to accurately assess the amount of required mitigation depends on the complexity of the development and the species involved. Landowners can generally satisfy either service's requirements for biological data by employing a professional consulting biologist with expertise in the ESA and the protocols established

for surveying the subject species. Biologists with Wildlife Society certification (<http://www.wildlife.org/professional/index.cfm>) lend credibility to data used because they have met the society's requirements, including coursework, and have five years of full-time professional experience. In addition, they must have references and are subject to review by a certification review board.

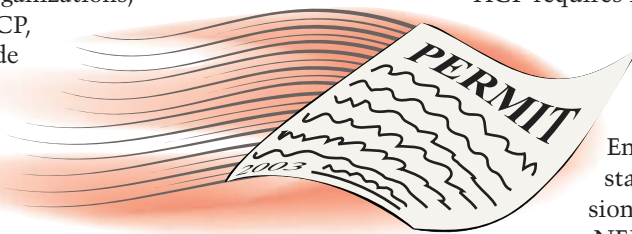
One step in the HCP creation process requires an implementation agreement (IA) to be executed between the landowner and the appropriate service. The agreement legally obligates both parties to fulfill the terms of the plan. When the HCP requires it, the IA includes a monitoring program to evaluate the impact of HCP provisions on listed and candidate species over the life of the plan.

The HCP must comply with the National Environmental Policy Act (NEPA) and any state environmental policy act (SEPA) provisions that apply. Currently, Texas has no SEPA. NEPA's scope goes beyond the ESA, requiring consideration of the impact of all federal agency actions on natural resources, including water quality and air quality. Each federal agency must consult with the appropriate service to ensure NEPA compliance when they take actions that could affect the environment.

Because the services are themselves federal agencies, the NEPA compliance consultation step in the HCP process amounts to the services consulting with themselves. However, the consultation should not be taken lightly. It can be both costly and time consuming.

The NEPA consultation results in one of the following actions:

- the HCP is excluded from further NEPA review,
- a formal environmental assessment (EA) is required or



PUBLIC HABITAT
conservation plans such as the Balcones Canyonlands Conservation Plan in Travis County offer developers an alternative to the complicated incidental take permit application process.



PECK'S CAVE AMPHIPOD (below), an endangered aquatic crustacean, can be found in some underground caves in the Edwards Aquifer. The eyeless, unpigmented, subterranean species is one of six karst invertebrates covered by the Balcones Canyonlands Conservation Plan.



- an environmental impact study (EIS) is required. NEPA only requires an EIS when the proposed project involves a major federal action that significantly affects the quality of the human environment.

The team conducting the NEPA consultation determines which action is taken on a case-by-case basis. Land uses that clearly do not significantly affect the environment individually or cumulatively are excluded from further NEPA review. EAs are required in two circumstances: when a project does not qualify for a categorical exclusion but does not require an EIS or when significant effects are foreseen but do not clearly indicate the need for an EIS. The results of the EA prompt a decision either to require an EIS or issue a “finding of no significant impact.”

Permitting Phase

The permitting phase, which can take ten to 12 months, begins after the landowner has provided drafts of the HCP, IA and NEPA documents to one of the appropriate services for formal review and public comment. During this phase, the landowner’s team of experts negotiates the terms of the IA and the HCP with the service’s regional counsel and agency biologists.

Once informal agreement is reached regarding the content of the HCP, the counsel and the biologists conduct a formal review of the biological impact of the plan. Then they prepare an opinion statement that evaluates the HCP’s adequacy. This opinion may require stricter protective measures than those prescribed by the HCP draft. The landowner may be required to add these measures before the HCP is approved.

Meanwhile, the HCP draft is released for public comment. The landowner must review all comments and respond to the issues raised. New issues arising from the formal review of biological impact and public comments frequently necessitate further negotiations.

Implementation Phase

Approval of the HCP, execution of the IA and issuance of the ITP initiate the implementation phase. The landowner, as the permit holder, is responsible for implementing the HCP and ensuring that the terms of the HCP are not breached. Implementation includes specified monitoring activities to verify compliance, including third-party inspections and any internal compliance mechanisms delineated in the HCP and IA documents.

Monitoring mechanisms may include inspections of the development to ensure that limits on building types, extent of construction and amount of habitat acreage consumed each year are not exceeded. Landowners typically employ third-party consultants to conduct these inspections.

HCPs frequently require landowners to “contribute” payments to the National Fish and Wildlife Fund to mitigate the effects of habitat destruction. This, too, would be monitored. These monitoring activities continue for the duration of the permit.

HCPs can last as few as five years or as many as 50. The typical HCP is in effect for 30 years. Once an HCP expires, the agreement is either renewed or dissolved. Generally, the USFWS expects species in the HCP area to recover, making HCP renewal unnecessary.

Certain contingencies may cause the services to require amendments

to existing IAs, ITPs or HCPs. When a species not previously covered by an ITP becomes listed within the HCP area after implementation, or if a landowner wishes to add land or seek

Abundance of Abbreviations

BCCP	Balcones Canyonlands Conservation Plan
EA	environmental assessment
EIS	environmental impact study
ESA	Endangered Species Act
HCP	habitat conservation plan
IA	implementation agreement
ITP	incidental take permit
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SEPA	State Environmental Policy Act
USFWS	U.S. Fish and Wildlife Service

coverage for previously nonpermitted activities, amendments to the HCP would be required.

Property owners can avoid the possibility of further amendments by incorporating “no surprises” assurances into their HCP. “No surprises” assurances amount to regulatory guarantees that no additional land use restrictions or financial compensation will be required. These assurances apply only to species already covered by an ITP and exempt a landowner from more extensive mitigation requirements even in light of new research. “No surprises” assurances are not automatic — they must be negotiated during the permitting phase.

A landowner may face criminal prosecution if an HCP is breached. However, because the HCP process is so complicated and lengthy, the services prefer to preserve existing HCPs and usually try to work with landowners to resolve problems.

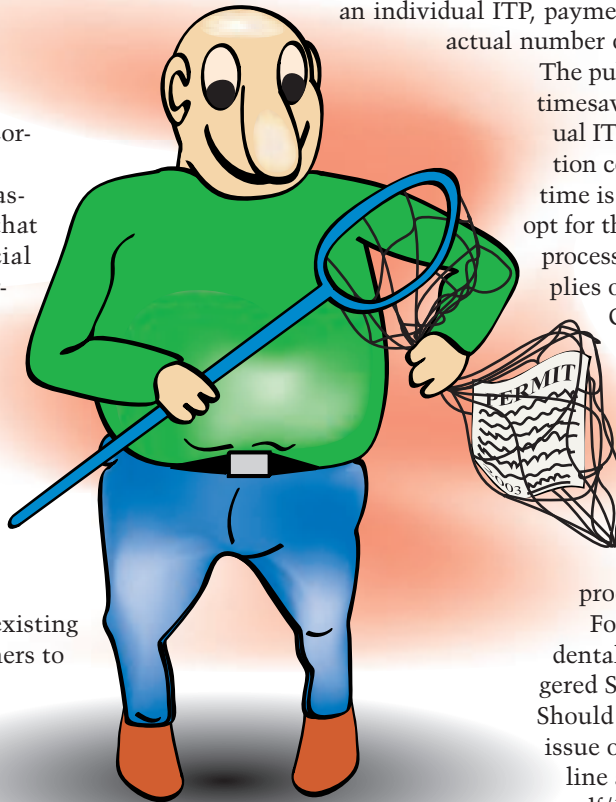
Because the ESA allows private citizens to sue to ensure ESA enforcement, landowners must be prepared to defend the HCP and ITP. This underscores the need for a plan based on sound scientific principles. It is unlikely that a court would overturn a scientifically credible HCP, but a lawsuit could further complicate and delay the process.

Public HCPs

In some areas, landowners may participate in a public HCP held by a regional authority instead of pursuing an individual ITP. In Texas, the City of Austin and Travis County have cooperated with USFWS to establish an HCP covering the habitat of the golden cheeked warbler, black-capped vireo and six karst invertebrates in western Travis County. The Balcones Canyonlands Conservation Plan (BCCP) holds a 30-year HCP.

To participate, landowners must sign a contract with the Balcones Canyonlands Coordinating Committee. Usually, clearing for construction can begin when the landowner receives the participation certificate. However, land containing golden-cheeked warbler and black-capped vireo habitat cannot be disturbed between March 1 and August 31.

Fees for BCCP participation vary by species and land use. Landowners are told the cost for participation within 15 working days of submitting an application. They must pay fees for all of the acreage in the tract if it lies within the boundaries of the preserve, even if only part of the tract contains habitat. By contrast, under



an individual ITP, payments would normally be for the actual number of acres of habitat on the tract.

The publicly held BCCP/ITP offers a timesaving alternative to the individual ITP process. However, mitigation costs may be higher. When time is not a factor, landowners may opt for the lengthier individual permit process. However, that option applies only to parts of western Travis County.

Landowners planning development that may threaten endangered species and their habitat face a long and daunting process to ensure compliance with the ESA. The sooner they begin the process, the better.

For more information on incidental takes and HCPs, see “Endangered Species Act: What Landowners Should Know” in the October 2002 issue of *Tierra Grande* (available online at <http://recenter.tamu.edu/pdf/1587.pdf>); the USFWS publication “Habitat Conservation

Plans” at http://endangered.fws.gov/HCP/HCP_Incidental_Take.pdf; and the Balcones Canyonlands Conservation Plan website <http://www.co.travis.tx.us/tnr/bccp/default.asp>. ➤

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BLACK-CAPPED VIREOS, a Texas endangered species, build cup-shaped nests low to the ground in shrubs such as shin oak or sumac. The birds return to the same territory to nest throughout their lives.



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