Endangered Species Act Programmatic Consultation Agreement

Black-Capped Vireo and Golden-Cheeked Warbler

This letter agreement provides a programmatic approach to address project effects to the Black-Capped Vireo and Golden-Cheeked Warbler under the Endangered Species Act for projects that “may affect, but are not likely to adversely affect” the species in the following TxDOT Districts: Abilene, Austin, Brownwood, Dallas, El Paso, Fort Worth, Laredo, Odessa, San Angelo, San Antonio, Waco, and Wichita Falls.
Jodi Bechtel, Natural Resources Management Section Director  
Texas Department of Transportation  
Environmental Affairs Division  
125 East 11th Street  
Austin, Texas 78701-2483

Dear Ms. Bechtel,

This responds to your request of July 27, 2017, in which the Texas Department of Transportation (TxDOT) proposes to initiate informal Programmatic Consultation to perform routine and predictably occurring activities related to transportation improvement projects in the Abilene, Austin, Brownwood, Dallas, El Paso, Fort Worth, Laredo, Odessa, San Angelo, San Antonio, Waco, and Wichita Falls Districts. These Districts include counties having known and potential habitat for black-capped vireo (Vireo atricapilla) and/or golden-cheeked warbler (Setophaga chrysoparia). TxDOT submitted documentation to the U.S. Fish and Wildlife Service (Service) requesting concurrence that the proposed routine transportation improvements may affect, but are not likely to adversely affect the black-capped vireo (BCV) and the golden-cheeked warbler (GCW), species listed pursuant to the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 et seq.).

Section 7 of the Act requires that all Federal agencies consult with the Service to ensure that the actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of any threatened or endangered species or adversely modify or destroy designated critical habitat of such species. In a Memorandum of Understanding dated December 16, 2014, (23 U.S.C. 327) the Federal Highway Administration (FHWA) assigned responsibility for compliance with the National Environmental Policy Act (NEPA) and all federal resource agency consultations, including section 7 of the Act, to TxDOT. As such, TxDOT is the Federal Agency associated with this project.

Since 2013, TxDOT has initiated informal consultations with the Service on 17 transportation projects within the current range of the BCV and GCW. Typical projects included the
modernization of roads, including; resurfacing, seal coats, restoration, rehabilitation, reconstruction, adding shoulders or auxiliary lanes; highway safety improvements such as adding safety end treatments, bridge rails, or traffic signs; and the maintenance or construction of locally-sponsored trail projects funded under the FHWA Recreational Trails Program. A summary of these consultations was provided as Table 1 in your request for consultation.

TxDOT proposed to conduct recurring activities for the necessary and routine improvement of transportation infrastructure in Texas counties within the ranges of the BCV and GCW. Project activities included under this programmatic consultation will meet each of the following eligibility criteria:

1. Be located in, or within 300-feet proximity to, known or potential BCV or GCW habitat, as determined by a qualified biologist;
2. Be confined to existing right-of-way (ROW) or on Recreational Trails Program properties;
3. Be of transient, short-duration, and/or convoy-type in kind of operation;
4. Having either no impacts to habitat; or having impacts that do not occur during the breeding and nesting season(s), as described below in Voluntary Conservation Measures (VCM), and those impacts are limited to those described herein.

These project activities consist of a subset of routine improvement projects which are listed and described in “Attachment 1. Definition of Activities” included with TxDOT's request for programmatic consultation dated July 27, 2017. The projects authorized under this Programmatic Consultation are similar to the types of projects that have been previously consulted on. The schedule for carrying out activities proposed through this programmatic consultation would vary, and depend on multiple factors including purpose, safety, and available funding.

The specific project activities that may affect habitat for the BCV and GCW and create noise disturbance include the following: maintenance of travel information centers, rest areas, and roadside parks; maintenance of picnic areas; maintenance of vehicle pullouts and parking areas; maintenance of access to historical markers and sites; maintenance of entrances to TxDOT ROW; hazardous material cleanup; maintenance of ditches; reshaping of ditches; repair and stabilization of slopes; maintenance of culverts and storm drains; repair and installation of riprap; removal of beaver dams; installation and maintenance of storm water pollution protection plan (SW3P); adding a shoulder/minor widening; adding handicap ramps; adding and repairing sidewalks; and adding turnouts.

Additional project activities that may create noise disturbance but are not expected to affect habitat for the BCV and GCW, including: maintenance of storm water pump stations; inspecting utilities; removal and replacement of base and/or sub-grade material; in place repair of base and/or sub-grade material; leveling or overlaying of flexible surfaces; sealing cracks in flexible surfaces; applying a seal coat to flexible surfaces; applying strip or spot seal coat to flexible surfaces; applying fog seal to flexible surfaces; microsurfacing flexible surfaces; pothole repair in flexible surfaces; slab stabilization/jacking of rigid surfaces; cleaning and sealing joints and cracks in rigid surfaces; repair of blowouts and stress relief in rigid surfaces; repair spalling in rigid surfaces; full depth removal and replacement of rigid surfaces; milling or planning of flexible
surfaces; spot milling of flexible surfaces; treating bleeding pavement; installation and maintenance of paint and bead striping; installation and maintenance of high performance striping; installation and maintenance of specialty markings; installation and maintenance of raised and reflective pavement markers; and removal of pavement markers.

Project activities covered by this Programmatic Consultation may result in the removal of small amounts of vegetation typically found in BCV or GCW habitat, thereby reducing the total amount of available potential habitat. All vegetation clearing activities would take place outside of the breeding season of the BCV and GCW. Also, noise produced by project activities may negatively impact birds utilizing habitat near roadways by: inflicting hearing damage, inducing stress, masking communications within and among species, or otherwise affecting the behavior of individual birds. Noise and construction related disturbances may disrupt the normal nesting, breeding, or foraging patterns of individual birds. However additional noise associated with the proposed maintenance activities, above and beyond existing routine roadway use, is expected to be limited in spatial extent and be of short-duration (typically less than a few days). In conclusion, TxDOT believes that all activities proposed in this programmatic consultation would have no effect, or would have effects that are discountable, insignificant, or wholly beneficial to BCV or GCW and their habitat. This determination is based on the following:

- Although some projects may require trimming or removal of individual trees or shrubs or narrow linear strips of woody vegetation that have encroached into the ROW and along fence lines, culverts, or unmaintained road cuts, these areas already represent *de facto* edge habitat and no additional edge is expected to be created, thus... these effects [are not likely to rise to the level of significance].

- New or rehabilitated recreational trails projects requiring vegetation management in or near potential habitat would be limited to narrow, linear strips that would not create woodland canopy gaps greater than 16-feet (Texas Parks and Wildlife Department, 2003) and would not significantly diminish the quality of the woodland habitat, thus these effects [are not likely to rise to the level of significance].

- Any removal of woody vegetation in, or within 300-feet of, potential habitat will be identified and phased such that it occurs outside of breeding season (i.e., between September 15 and March 1) to minimize effects to individual birds. Because these effects would take place while the birds are not using the habitat, these effects [are not likely to rise to the level of significance].

- The amount of woody vegetation removed in any single location along an existing ROW or recreational trail would be smaller than an individual BCV or GCW territory and would not significantly decrease the total amount of potential habitat available in the vicinity of the project action area. For the purposes of this consultation only, a BCV territory is considered to be a minimum 2.5-acres and a GCW territory is considered to be a minimum of 7.5-acres. However, actual territory size can vary considerably across the breeding range, and over time given responses of individual birds to annual climatic
variability and other factors. Given the relatively small scale of these effects, they [are not likely to be rise to the level of significance].

- In the event that any project requires the removal of cumulative total of 8 or more acres of potential habitat over the entire length of the project or 2 or more acres in any single patch, the project would be reviewed by the Service to determine eligibility under this Programmatic Consultation.

 TxDOT proposed the following VCMs to avoid and minimize direct and indirect effects to the BCV and GCW resulting from the activities described in the Programmatic Consultation:


2. Any known potential habitat for BCV and GCW will be presumed occupied, and as such, presence/absence surveys will not be required. BCV and GCW nesting and survey seasons are between March 1 and September 15. Projects that will involve clearing or trimming of individual trees or shrubs in or immediately adjacent to potential habitat would be phased such that any clearing activities will occur outside the breeding season to minimize impacts to BCV and GCW.

3. If project-specific locations are required outside of the project area but within TxDOT ROW, they will be placed such that no potential habitat or woody vegetation immediately adjacent to potential habitat would be removed.

4. New location recreational trails will not create new woodland canopy gaps greater than 16-feet wide and will not remove trees with ≥ 12-inch diameter-at-breast-height.

By June 30 of each year, TxDOT will provide the Service with a list of projects completed under this BCV and GCW Programmatic Consultation. The list will include the project name with description of activities, project location in a shapefile or similar format, and confirmation that all VCMs were implemented, including a discussion of relevant BMPs. TxDOT and the Service will meet on an annual basis, or as needed, to discuss the project activities covered during the previous year, evaluate and discuss the effectiveness of the Programmatic Consultation, and update consultation procedures or conservation measures, as necessary. This consultation is subject to review and renewal after five years from the date of this concurrence letter.

Based on the information provided and proper implementation of the above stated VCMs, the Service concurs with TxDOT’s conclusion that the projects associated with this BCV and GCW programmatic consultation may affect, but are not likely to adversely affect, the BCV and GCW pursuant to section 7 of the Act. No further endangered species consultation will be required.
unless: 1) the identified action is subsequently modified in a manner that causes an adverse effect on any listed species or designated critical habitat; 2) new information reveals the identified action may affect federally protected species or designated critical habitat in a manner or to an extent not previously considered; 3) a new species is listed or a critical habitat is designated under the Act that may be affected by the identified action; 4) additional federally protected species are identified in the project area or, 5) the project is not completed within three years of the date of this consultation.

If new effects are identified in the future, the project proposal should be resubmitted to our office for further consideration.

We appreciate your efforts to conserve these sensitive species. If you have any questions or comments, please contact Kevin Maurice at 512-334-8402 or at Kevin_Maurice@fws.gov.

Sincerely,

[Signature]

Adam Zerrenner
Field Supervisor

E-fax: john.maresh@txdot.gov
Jodi Bechtel, Natural Resources Management Section Director
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125 East 11th Street
Austin, Texas 78701-2483

Dear Ms. Bechtel,

This responds to your request of September 27, 2017, in which the Texas Department of Transportation (TxDOT) proposes to use the July 27, 2017, black-capped vireo (*Vireo atricapilla*) and golden-cheeked warbler (*Setophaga chrysoparia*) informal Programmatic Consultation for the Heritage Oaks Trail project (proposed action). The proposed action is sponsored by the City of Killeen. The informal Programmatic Consultation includes new location trail projects although it specifically identifies "locally-sponsored trail projects funded under the Federal Highway Administration (FHWA) Recreational Trails Program." The proposed action is a new location trail project that is receiving federal funds from the Transportation Alternatives Program (TAP) of the Fixing America's Surface Transportation (FAST) Act.

The informal Programmatic Consultation's specific identification of the FHWA Recreational Trails Program as the sole funding source for trails development is now amended to include other funding sources for locally-sponsored trail projects provided they are sited, constructed and maintained within the specific parameters described in the July 27, 2017, informal Programmatic Consultation. This amendment allows the proposed action to be covered under the informal Programmatic Consultation.

We appreciate your efforts to conserve these sensitive species. If you have any questions or comments, please contact Kevin Maurice at 512-334-8402) or at Kevin_Maurice@fws.gov.

E-fax: john.maresh@txdot.gov

Sincerely,

Adam Zerrermer
Field Supervisor