

MEMORANDUM

TO: EARIP Steering Committee and Stakeholders
FROM: Covered Species Work Group
DATE: December 3, 2010
SUBJECT: Background and Recommendations Regarding Covered Species

I. Listing Process

For a species to be listed under the Endangered Species Act (“ESA”), the United States Fish and Wildlife Service must find the existence of any of the five criteria:

1. the present or threatened destruction, modification, or curtailment of its habitat or range;
2. overutilization of the species for commercial, recreational, scientific, or educational purposes;
3. the species is declining due to disease or predation;
4. inadequacy of existing regulatory mechanisms; or
5. other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533 (a)(1)(A)-(E).

There are two ways for a species to be listed. The first is for the FWS to propose the species through its candidate assessment process. This process currently is used infrequently.

The second process, used almost exclusively today, is the petition process. Under this process an interested person can petition to have a species listed. 16 U.S.C. § 1533(b)(3)(A). Under the statute, FWS must make a finding within 90 days of receipt of the petition as to whether substantial information is presented in the petition that listing “may be warranted. *Id.* This finding is commonly referred to as the “90-day Finding.”

If FWS finds that listing may be warranted, FWS has 12 months to make a finding as to whether listing is warranted. 16 U.S.C. § 1533(b)(3)(B). This finding is commonly referred to as the “12-month finding.” The 12-month finding can take three forms. First, FWS can find that listing is not warranted. In this case, no further action is taken on the petition. Second, it can find that listing is warranted and publish a proposed rule to list the species. It typically takes at least one year after a species is proposed for the final listing decision to be made. Finally, FWS can find that listing is warranted but precluded by higher priority listing actions. Because of limited resources, the “warranted but precluded” finding is most commonly made for petition species for which listing is found to be warranted. Currently, 251 species designated as “warranted but precluded” species are awaiting a listing proposal. 75 Fed. Reg. 69,222-69,224 (Nov. 10, 2010).

II. Covered Species

The term “Covered Species” means “unlisted species that have been adequately addressed in an HCP as though they were listed, and are therefore included on the permit or, alternatively, for which assurances are provided to the permittee that such species will be added to the permit if listed under certain circumstances. ‘Covered Species’ are also subject to the assurances of the “No Surprises” policy.” U.S. Department of the Interior Fish and Wildlife Service, U.S. Commerce National Oceanic and Atmospheric Administration, National Marine Fisheries Service, “Habitat Conservation Planning and Incidental Take Permit Processing Handbook, November 4, 1996 (“HCP Handbook”).

In short, by treating a species that is not listed but may be listed in the future as though it were listed the EARIP can lock in the “take” protection for those species in the event they are ultimately listed.

Covered Species are covered under the “No Surprises” policy. The “No Surprises” policy assures the permittee that if “unforeseen circumstances” arise, FWS will not require the “commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed” to in the HCP. *See* 50 C.F.R. § 17.22(b)(5)(B). FWS has the burden of showing that “unforeseen circumstances” exist. 50 C.F.R. § 17.22(b)(5)(C).

Even if the EARIP were to decide not to include any unlisted species as a Covered Species, the potential direct, indirect, and cumulative effects of the action on these unlisted species will have to be discussed in the Environmental Impact Statement required by the National Environmental Policy Act. 40 C.F.R § 1508.8. The discussion includes both the potential beneficial and detrimental effects. *Id.*

III. Options

A. Address the candidate species in the HCP and name them in the permit

If the species are “adequately addressed” in the HCP, it is possible to delay the effective date for the species being named until the species are actually listed. The term “adequately addressed” means that the species is addressed in the HCP “as if it was listed pursuant to section 4 of the ESA, and in which HCP measures for that species would satisfy permit issuance criteria under section 10(a)(10)(B) of the ESA if the species was listed.” HCP Handbook at 4-4.

1. Advantages

- If the species is listed, the applicant is automatically protected under the incidental take permit (“ITP”) against a section 9 “take” violation.
- Because Covered Species are covered under the “No Surprises” policy, the EARIP may be able to limit the requirements for those species to those set out in the HCP.

2. Disadvantages

- There has to be enough known about the species (1) to evaluate whether the proposed action has a significant impact on the species; (2) if so, to design a mitigation program; and (3) to allow FWS to determine if the issuance criteria are met.
- The HCP needs to be manageable in size and scope. The more species that are included the more difficult and expensive the HCP is to manage. This may not be a significant disadvantage if the requirements for the species are identical or very similar to those for one of the listed species.

B. Do not include any covered species in the HCP but consider amending the permit if new species are listed.

The ITP can be amended to add newly listed species. 50 C.F.R. § 222.25; HCP Handbook at 6-28.

1. Advantages

- The strategy keeps the HCP focused on the eight listed species. Managing the program with eight listed species will be challenging enough.
- Decision to include the species later will allow a more informed decision – not only in terms of species requirements but also in terms of the additional information that will be gained during the initial phase of the permit.

2. Disadvantages

- A permit amendment can be costly in term of time and resources. If multiple species are listed during the permit term, the permit may have to be amended multiple times.
- If the requirements for the previously unlisted species involve flow or other issues in the HCP, amending the permit could effectively reopen the entire permit.
- The EARIP could be subject to a section 9 “take” suit during the pendency of the permit amendment process.
- While a decision to include the species through the amendment process will allow a more informed decision, the permitting requirements may be more onerous.

C. Do nothing.

This strategy leaves the EARIP susceptible to a Section 9 “take” lawsuit.

IV. Some Considerations for In Deciding Whether to Include a Species as a Covered Species:

1. What is the likelihood of listing during the permit term?
2. Does the proposed action adversely affect the species or its likely critical habitat?
3. Is there enough known about the species to design a mitigation program for any adverse effects?
4. Is there enough known about the species to allow FWS to determine if the proposed action will meet the issuance criteria for the species?
5. What is the cost of treating the species as though it were listed?
6. What problems does the inclusion of additional species add to the implementation of the HCP?

V. Discussion

The Covered Species Workgroup met on November 5, 2010. Species discussed were categorized into two groups to aid in the discussion:

- Mussels – Those included in the 9 species petition and several from the 475 species petition (Agenda Attachment 3)
- Aquifer species – From the 475 species petition (Agenda Attachment 4)

Determined that four species of mussels had a historic range in the Guadalupe basin. They are:

- Texas Fat Mucket
- Golden Orb
- Texas Pimpleback
- False Spike

USFWS has indicated a December 2010 deadline to make a 12 month finding for the Texas Fat Mucket, Golden Orb and the Texas Pimpleback. The Workgroup requested additional research of existing literature for the next meeting to focus on where the live populations of mussels are located.

The aquifer species were discussed in two groups: deep aquifer species and aquifer spring species that could benefit from measures to protect the eight species listed in the EARIP Memorandum of Agreement. The Workgroup decided that three aquifer spring species (Comal Springs salamander, Edwards Aquifer diving beetle and Texas Troglobitic water slater) had

significant potential to benefit from the measures being considered by the EARIP and requested that additional information be developed for consideration at the next meeting.

The Covered Species Workgroup met again on November 29, 2010 to develop its recommendation. The additional information regarding the location of live populations of mussels in the Guadalupe basin indicated the populations were located downstream of the Blanco River confluence on the San Marcos River and at and downstream of Gonzales on the Guadalupe River. Zara Environmental prepared additional information regarding the three aquifer spring species identified at the November 5th meeting (Agenda Attachment 5). The Workgroup also discussed an additional aquifer spring species, the Comal Springs diving beetle, for inclusion as a covered species.

The Workgroup applied the questions in Section IV above to each of the species groups to assist in developing its recommendation.

Question	Mussels	Four Aquifer Spring Species
1	Yes	Yes – slightly less likelihood for Comal Springs diving beetle
2	Unknown	Yes
3	No	Yes
4	No	Yes
5	High	Low
6	Different habitat, range, potential reasons for decline	None
Include as a Covered Species	No	Yes – with the condition if significant information or actions are requested during the review of the HCP or proposed in the draft ITP then the EARIP can reconsider listing as a Covered Species.

VI. Recommendation

The Covered Species Workgroup recommends the following:

1. The mussel species not be included as a “covered species” in the Habitat Conservation Plan.
2. Four aquifer spring species be included as “covered species” in the Habitat Conservation Plan with the condition if significant information or actions are requested during the review of the Habitat Conservation Plan or proposed in the draft Incidental Take Permit then the EARIP can reconsider listing as a Covered Species. The four species are as follows:
 - a. Comal Springs salamander (*Eurycea sp. 8*)
 - b. Edwards Aquifer diving beetle (*Haideoporus texanus*)

- c. Texas Troglobitic water slater (*Lirceolus smithii*)
- d. Comal Springs diving beetle (*Comaldessus stygius*)