

MAR 10 2015

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March 2, 2015

Mr. William Conrad, Secretary
Balcones Canyonlands Conservation Plan
Coordinating Committee
625 East 10th Street
Austin, Texas 78701

Re: Balcones Canyonlands Conservation Plan Comments on the Draft Habitat Conservation Plan and
Environmental Assessment for the Leander Independent School District

Dear Mr. Conrad:

We received your comments (dated January 29, 2015) on the very preliminary draft documents that the Leander Independent School District (LISD) provided to the U.S. Fish and Wildlife Service (Service) Austin Ecological Services Field Office for their technical assistance. Contrary to your assertion, LISD has submitted no application to the Service for an incidental take permit, draft or otherwise. In my extensive experience with this office of the Service, it is unusual that the Service would provide documents to a third party at this stage of the process; such documents are, by definition, pre-decisional and fall under an exception to Freedom of Information Act requirements. It is also surprising to me that the Service failed to notify LISD of your request.

History of LISD Coordination with Balcones Canyonlands Conservation Plan Coordinating Committee

We provide in this letter a brief history of LISD's attempted coordination with the City of Austin, Travis County, and the Balcones Canyonlands Conservation Plan (BCCP) Coordinating Committee.

On February 7, 2013, LISD and its representatives met with staff from the City of Austin, Travis County, and the Service to present the proposed access road and receive any initial comments and concerns. On April 10, 2013, LISD and its representatives met with the City of Austin and Travis County staff to address the concerns raised at the February 2013 meeting.

On May 15, 2013, the Executive Director of Capital Improvements for LISD, Jimmy Disler, and I presented to the BCCP Coordinating Committee a summary of LISD's access road proposal. You presented a BCCP Staff Recommendation at that meeting, and there were several letters and other communications between you and Sedgwick. On May 29, 2013, LISD requested information from the BCCP regarding sensitive environmental features that were included on the Staff Recommendation map. We did not receive any of the requested spatial data.

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On June 13, 2013, Sedgwick sent a letter to the BCCP Coordinating Committee, the City of Austin, and Travis County regarding LISD's concerns with the Committee's Staff Recommendation. You provided a memo to the same parties on June 28, 2013 in which you sought to rebut various aspects of the Sedgwick letter. Sedgwick responded to your memo on August 6, 2013, and included Mayor Leffingwell, Commissioner Daugherty, and Adam Zerrenner (Service).

On August 5, 2013, LISD submitted an application to the BCCP for construction of the proposed access road. On August 22, 2013, you set a letter to Jimmy Disler (LISD) denying LISD's request to construct an access road in the BCP Infrastructure Corridor. On August 27, 2013, we provided notice to you, the City of Austin, and Travis County, that LISD would appeal the denial of construction approval.

In a continued effort at coordination and reconciliation, LISD made a presentation to the BCCP Citizens Advisory Committee on September 10, 2013 and to the Coordinating Committee on September 18, 2013. The purpose of this presentation was to provide the BCCP Coordinating Committee additional information regarding LISD's proposal, including (but not limited to) the various avoidance and minimization measures being proposed at that time, as well as additional information regarding project parameters and anticipated impacts. In any case, LISD put the application and appeal in abeyance and decided to pursue independent take authorization from the Service.

The brief history above evidences the lengths to which LISD has gone to both coordinate and draw constructive feedback from not only the BCCP Coordinating Committee, but the City of Austin and Travis County as well. With that in mind, below, we provide a few responses to the comments you provided to the Service regarding LISD's preliminary draft HCP.

Responses to Comments

Because the comments you provided were both out of order and untimely, we will not, at this time, waste precious LISD resources to provide detailed responses. As an initial matter, the vast majority of your comments are incorrect and evidence your apparent strong desire to simply kill this project by whatever means and at whatever cost. Your 24 pages of comments represent an unnecessary waste of considerable City resources. The appropriate time for third parties to comment on a draft habitat conservation plan is during the official public comment period noticed in the Federal Register. There has been no public comment period on the preliminary draft habitat conservation plan, as the draft will go through various iterations before being submitted to the Service as part of an application for an incidental take permit. At that time, as you know, the draft habitat conservation plan as it then stands will be subject to public review and comment.

While we are not obligated to provide any response to your comments, we feel it important to ensure that the record reflects information that is accurate. Therefore, in the pages that follow, we provide a few key points relative to the road project described in the preliminary draft habitat conservation plan. We reserve the right to respond at a later date to each of the comments provided by you in your letter.

1. As stated above, the draft documents you obtained from the Service were at a very preliminary stage and submitted to the Service to obtain technical assistance. Your input on these documents was not solicited by either party. In fact, the Service's guidance regarding the habitat conservation planning process specifically states: "Because applicants develop HCPs, the actions are considered private

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and, therefore, not subject to public participation or review until the FWS receives an official application.” See handout at <http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>.

2. LISD is a Texas public entity. LISD possesses full rights of condemnation, including the right to use other government land where it can demonstrate paramount use. We believe that no court of law in Texas would conclude that the conservation value of an already heavily impacted infrastructure corridor is more important to the public wellbeing than this vital safety improvement. We have consulted with LISD’s legal condemnation counsel, who believes that LISD may obtain via condemnation the necessary right-of-way for the proposed access road, if it so chooses.
3. You indicated in the first page of your comments that LISD submitted its draft habitat conservation plan without coordinating with the City of Austin, Travis County, or the BCCP. As you well know, and as indicated by the history cited above, LISD has gone above and beyond to coordinate with each of the aforementioned entities. It has been, from the beginning, LISD’s desire to work alongside the City, County, and BCCP to provide for the safe passage of approximately 2,400 students, faculty, and staff to and from school each day. It has been abundantly clear from the outset of our coordination, however, that you have no intention of working with us. Rather, you have made your position as an adversary quite clear. Moreover, as you know, LISD is under no obligation to inform anyone of its intent to begin a pre-coordination process with the Service regarding a very preliminary draft HCP that was neither accompanied by a permit application nor sought the Service to take any agency action. Rather, and consistent with the Service’s *Habitat Conservation Planning Handbook*, LISD sought the Service’s input on various aspects of the draft habitat conservation plan at this early stage so that the draft ultimately submitted to the Service along with the eventual application for an incidental take permit would be something both parties could support.
4. Your comments concerning LISD’s lack of ownership or control of the lands needed to construct the proposed access road are completely misguided. The Service routinely grants permits to public entities having the right of condemnation prior to the acquisition of rights-of-way. Recent examples include the incidental take permits issued to the Lower Colorado River Authority and Oncor Electric Delivery. In fact, legally, you have the point backwards. If LISD continues to pursue this project, the incidental take permit will be reviewed under the National Environmental Policy Act (NEPA). Any such acquisitions prior to the conclusion of the NEPA review could be considered pre-decisional and in violation of the NEPA process. At any rate, any pre-permit acquisition of right-of-way by LISD would be at its own risk. For you to insist that a school district expend resources to acquire property without any assurance that it can be used is further evidence that you have no sympathy for the mission of LISD.
5. You complain that the preliminary draft habitat conservation plan suggests that mitigation will be accomplished by providing funding to the Balcones Canyonlands Conservation Plan (BCCP) to further its conservation objectives. While LISD is happy to provide funding to another conservation entity to be put towards conservation of the species ultimately covered by its incidental take permit, LISD made the apparently erroneous assumption that the BCCP would welcome any “free” funds to acquire and manage preserve land. Since it appears from your comments that the BCCP does not wish to be the recipient of this funding, we will pursue other avenues for mitigation. It is also worth pointing out that there are a number of examples of individual incidental take permits mitigating for the impacts of authorized take by providing funding to the BCCP. It is

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unclear why you now assert that such mitigation is impermissible. Furthermore, neither the form nor amount of mitigation negotiated by LISD and the Service are matters with which the City should be concerned.

6. If LISD does, in fact, pursue an incidental take permit in connection with this project, it will be wholly and completely independent from the BCCP. It will require neither the approval of the BCCP Coordinating Committee nor amendment of the BCCP. It will be a separate authorization by the Service, which the Service will have no grounds to deny provided that LISD meets the statutory issuance criteria. Additionally, it is important again to point out that LISD worked with the BCCP Coordinating Committee for more than a year with the hope of coming to an acceptable arrangement with the Committee. Despite LISD's best efforts, we were thwarted at every turn. Because we detailed our negotiations with you in the paragraphs above, we will not restate that history here.
7. You indicated in your comment letter that our request would increase the incidental take authorized by the BCCP and reduce the mitigation provided in that plan. LISD is not seeking authorization for potential incidental take associated with its proposed project through the BCCP permit. Rather, LISD is seeking a separate incidental take permit to authorize any take that may occur during construction, operation, and maintenance of the proposed road. It appears that you may have confused LISD's proposed mitigation (e.g., provision of funding to the BCCP to be used towards acquiring preserve land) with LISD's method of take authorization (e.g., a wholly-separate incidental take permit unrelated to the take authorized pursuant to the BCCP). Moreover, the designated infrastructure corridors – and areas adjacent to the limits of the corridors – were considered fully “taken” with complete loss of habitat for the BCCP's covered species. As detailed below, even under the terms of the BCCP itself, any mitigation fees collected for activities conducted within infrastructure corridors does not go to increase the mitigation obligations under the BCCP. This is because the corridors were expected to be taken and the overall preserve system was expected to be sufficient to cover that take.
8. You also have significantly overstated the potential impacts of the proposed 30-foot-wide roadway that would be constructed within a heavily damaged infrastructure corridor containing not one, but several, overhead electric transmission and distribution lines. When the Service approves incidental take permits for new electric transmission lines of similar characteristics as those already present in the infrastructure corridor, the agency typically considers all habitats within the right-of-way to be completely “taken” and all habitats within a 300-foot-wide buffer of the right-of-way to be partially “taken”. Construction of the proposed road within this already impacted area, then, would have very little – if any – additive effect on the species potentially present within the infrastructure corridor.
9. While the BCCP may require infrastructure providers to pay participation fees to be covered by the BCCP's incidental take permit, those fees are put toward funding the acquisition and management of the preserve system as originally proposed in the BCCP, not toward the acquisition and management of other *additional* “replacement” preserve lands. So, the fees required to participate in the BCCP – even at 5:1 mitigation ratios - do not, in fact, result in biological mitigation beyond that envisioned in the original scope of the BCCP's preserve system. Notwithstanding those impacts and fees, the overall preserve system remains exactly the same for the covered species. Therefore, we are exactly correct when we say that the existing and future impacts within and adjacent to the infrastructure corridors are already biologically mitigated by the original design of the BCCP preserve system. The

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fact that some birds may continue to use the right-of-way does not equate the conditions within the right-of-way with high quality habitat, nor does it change the fact that the loss of this habitat has already been mitigated by the BCCP.

10. We find that the City of Austin's all out assault on this modest and highly important proposal to be particularly ironic given the scale of the infrastructure project that the City itself recently installed in this same vicinity. The City installed this new infrastructure across the Bull Creek macrosite of the BCCP and across an area established as mitigation by an individual developer's incidental take permit. We can assure you that the footings for LISD's proposed bridge will be nothing near the scale of the shafts that the City recently constructed.
11. Contrary to your assertions, the original site selection process for the LISD Vandegrift and Four Points campus is completely irrelevant to the processing of the preliminary draft HCP shared by LISD with the Service. We have assured you before that the site selection process was thorough and considered all reasonable alternatives available to LISD at the time. The only feasible alternative to this site would have been to bus 2,400 students twice per day, approximately 25 miles each way. This alternative obviously presents significant and obvious safety, financial, and environmental concerns.
12. Your comments clearly evidence a misunderstanding of the alternatives to be considered in a habitat conservation plan. The law requires that the habitat conservation plan describe the alternatives considered by the applicant and provide a reason why they were rejected. The applicant has the discretion to choose the alternative with which it wants to proceed, so long as any take is incidental to the activities to be undertaken and the habitat conservation plan submitted as part of the permit application meets the issuance criteria. The Service has no involvement in the alternatives considered by the applicant, nor the rationale in rejecting them. Moreover, under NEPA, the Service's action under review is the issuance of the requested permit for the applicant's proposed alternative. The Service's sole role in issuing an incidental take permit is to determine whether the application and habitat conservation plan meet the issuance criteria as set forth in section 10 of the Endangered Species Act and any implementing regulations. The Service is not approving the underlying action to be undertaken by the applicant and lacks the discretion under law to require the applicant to pursue any other alternative.
13. It is disheartening that the City of Austin appears to be throwing its entire weight into killing a modest project designed by a local school district to protect the safety of children. Using the BCCP and the ESA as a bludgeon does a disservice to both of those otherwise laudable programs and will only hurt the cause of conservation in the long run. There simply can be no question that if the ESA or the BCCP prohibit an important improvement for the safety of school children that it is those programs, not LISD, that will lose public support.

In conclusion, we believe that you have grossly overinflated the BCCP's interest in this matter and made numerous incorrect statements in your unwavering attempts to kill this project. The City does not own any of the land in question. Moreover, LISD has the power of eminent domain and, if need be, can use that power to acquire the lands necessary to complete this important project. If LISD pursues its own incidental take permit it would be wholly independent from the BCCP and the terms associated with the BCCP would be irrelevant. For its part, the Service will seek to ensure that the impacts of the proposed taking of species

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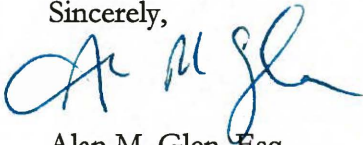
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ultimately covered by the habitat conservation plan are minimized and mitigated to the maximum extent practicable, whether or not that includes a direct benefit to the BCCP.

Sincerely,

A handwritten signature in blue ink, appearing to read "A M Glen".

Alan M. Glen, Esq.
Sedgwick LLP

cc: The Honorable Steve Adler, City of Austin and BCCP Coordinating Committee
The Honorable Gerald Daugherty, Travis County Precinct 3 and BCCP Coordinating Committee
Council Member Don Zimmerman, City of Austin District 6
Adam Zerrenner, U.S. Fish and Wildlife Service and BCCP Coordinating Committee
Jon White, Travis County BCCP
Robert Goode, Assistant City Manager, City of Austin
Daryl Slusher, Assistant Director, Austin Water Utility
Sherri Kuhl, City of Austin BCCP
Chris Herrington, Managing Engineer, City of Austin Watershed Protection Department
Mitzi Cotton, Senior Attorney, City of Austin
Jimmy Disler, Executive Director for Capital Improvements, LISD
The Honorable John Cornyn, United States Senate
The Honorable Ted Cruz, United States Senate
The Honorable John Carter, United States House of Representatives District 31
The Honorable Roger Williams, United States House of Representatives District 25
The Honorable Paul Workman, Texas House of Representatives District 47