

Technical Memorandum

To: Nathan Pence, Executive Manager of Environmental Science
(Guadalupe-Blanco River Authority)

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Re: Permit Term for the Guadalupe River Habitat Conservation Plan and Incidental Take Permit

The purpose of this memorandum is to present guidance and options for the permit term of the Guadalupe-Blanco River Authority's (GBRA's) Guadalupe River Habitat Conservation Plan (GRHCP) and Incidental Take Permit (ITP). Normally, the permit applicant requests a permit term in a habitat conservation plan (HCP) and ITP application, and the U.S. Fish and Wildlife Service (USFWS) reviews the request to ensure that the species being covered by the HCP, for which incidental take coverage is requested, are adequately protected for the proposed duration of the ITP.

The permit term identified in an HCP is the length of time, or duration, for which the ITP is issued and the period of time when take coverage is provided for the activities covered by the ITP. The permit term is also the length of time during which all mitigation and conservation measures must be implemented.

AGENCY GUIDANCE

HCP Handbook. Section 12.9 of the joint USFWS and National Marine Fisheries Service (NMFS) "Habitat Conservation Planning and Incidental Take Permit Processing Handbook" (HCP Handbook) (USFWS and NMFS 2016) discusses Permit Duration Considerations and states that the Services will "set the duration of permits for a period long enough so that the permittee has adequate assurances to commit funding for the HCP, including conservation activities and land use restrictions." The HCP Handbook lists the following considerations in this decision:

- the duration of the planned covered activities;
- whether available information is sufficient to develop a conservation program and determine effects to covered species over the proposed permit duration;
- how much certainty there is that the conservation program will enhance the habitat and increase the long-term survivability of covered species [see 50 CFR 17.22 and 17.32(b)(4) for USFWS, and 50 CFR 222.307(e) for NMFS];

- how well the monitoring and adaptive management program addresses risk and uncertainty; and
- whether the funding strategy for the conservation program is sufficient for the proposed duration of the ITP.

50 Code of Federal Regulations (CFR) 17.22 (b)(2)(4). The final regulations for issuance of an ITP state the following regarding the duration of permits:

“Duration of permits. The duration of permits issued under this paragraph shall be sufficient to provide adequate assurances to the permittee to commit funding necessary for the activities authorized by the permit, including conservation activities and land use restrictions. In determining the duration of a permit, the Director shall consider the duration of the planned activities, as well as the possible positive and negative effects associated with permits of the proposed duration on listed species, including the extent to which the conservation plan will enhance the habitat of listed species and increase the long-term survivability of such species.”

EXAMPLE PERMIT TERMS

Most recent permit terms for large-scale HCPs range from 30 to 50 years. The Balcones Canyonlands Conservation Plan, Bastrop County Lost Pines HCP, Hays County Regional HCP (RHCP), Comal County RHCP, Williamson County RHCP, Southern Edwards Plateau HCP (SEP-HCP), and Lower Colorado River Authority (LCRA) Transmission Services Corporation (TSC) HCP have a permit term of 30 years.

Some large-scale HCPs have shorter permit terms, such as the HCP for Managed Groundwater Withdrawals from the Barton Springs Segment of the Edwards Aquifer (20 years) and the Edwards Aquifer HCP (15 years and currently in the initial phase of permit amendment). Both of those HCPs are designed primarily to address the possible take of covered species by groundwater pumping or from physical disturbance in the spring runs rather than an entire river basin. Groundwater withdrawals will not be a covered activity under the proposed GRHCP. Both of these HCPs were designed with a shorter permit term and subsequent permit renewal.

Some large-scale HCPs with primary covered activities including water management have permit terms of 50 years (National HCP Coalition [NHCCPC] 2021). These include the Bull Run Water Supply HCP, City of Seattle Cedar River Watershed HCP, the Upper Santa Ana River HCP, and the Lower Colorado Multi-Species Conservation Plan.

CONSIDERATIONS FOR THE GRHCP

The following factors should be considered in deciding the GRHCP permit term.

- Limitations of forecasts, projections, and resulting assumptions used to develop the HCP.
- Water modeling assumptions needed to develop habitat and impact modeling for covered species.
- Regional water plans and other long-range planning horizons.

- The length of time that covered activities are anticipated to occur.
- The time needed to implement conservation measures successfully, including assembling any protected lands (if needed).
- Adequacy of existing biological information for species, habitat, and changing future conditions, with and without the HCP.
- The time needed to conduct effectiveness monitoring in order to verify the achievement of the biological goals and objectives.
- The time needed to assemble sufficient funding to fully implement the HCP conservation strategy.
- Awareness that permit certainty can include the obligation to conduct certain conservation actions regardless of whether they are later found to be unnecessary because of new information. Commitments made in the HCP and subsequently included as permit conditions will remain in effect throughout the duration of the permit.

Short permit terms (5 to 10 years) are most common for small, project-specific HCPs that only need a few years of take authorization in which to construct a project. The permit term for large-scale HCPs covering a large geographic area and/or numerous projects and/or activities, similar to the GRHCP, range from 30 to 75 years, with 30 or 50 years being the most common choices, as discussed above (USFWS and NMFS 2016). Permit terms of 99 or 100 years were adopted for some HCPs in the mid-1990s (NHCPC 2021); however, the USFWS no longer considers permit terms of this length because of the large uncertainty in allowing take over such a long period of time.

ALTERNATIVES

The following discusses considerations, relative to the GRHCP, associated with the two most common permit terms for large-scale HCPs.

30-Year Permit Term. A 30-year permit term may provide sufficient time for GBRA (and stakeholders) to construct planned and foreseeable infrastructure projects, to secure all necessary funding for HCP implementation, and to fully implement conservation measures. This timeframe is also likely to provide certainty to the USFWS that the conservation strategy and monitoring and adaptive management program are sufficient to contribute adequately to species recovery. However, GBRA plans to continue operating both existing and future infrastructure beyond 30 years, and GBRA may need to construct additional infrastructure projects beyond 30 years to meet future population growth and associated water supply and wastewater treatment needs. Under this option, a 30-year plan could be used together with a permit-renewal strategy (see **Appendix A** for details on ITP renewals).

50-Year Permit Term. A 50-year permit term would provide sufficient time for GBRA (and stakeholders) to construct planned and foreseeable infrastructure projects, to secure all necessary funding for HCP implementation, and to fully implement conservation measures. A 50-year permit term would also provide certainty for GBRA construction and operations over a longer time period. Compared to a 30-year permit term, a 50-year timeframe may provide more certainty to the USFWS that the conservation strategy and

monitoring and adaptive management program will contribute adequately to species recovery, as GBRA would be committed to implementing the conservation measures that will benefit the covered species for a longer time period (regardless of GBRA's future activities).

The USFWS has noted that issuing ITPs for terms in excess of 30 years may entail additional considerations and/or analyses, such as addressing potential effects of climate change and developing a robust adaptive management program in the HCP. The degree to which this is important in the GRHCP will be determined, in part, by the climate-change modeling process and associated measures developed for the GRHCP.

ANTICIPATED GRHCP PERMIT TERM

In consideration of the factors identified above, at this time GBRA anticipates proposing a GRHCP permit term of 50 years, provided there is sufficient information on the covered activities, covered species, and other factors to support a 50-year term. A 50-year permit term would better address GBRA's long-term operations, which are projected to continue 50 years and beyond. A 50-year permit term would also provide more certainty, compared to a 30-year permit term, that the conservation strategy and monitoring and adaptive management program will contribute adequately to species recovery. GBRA recognizes that for a 50-year permit term, climate-change effects would need to be incorporated into the GRHCP analyses, and the GRHCP would need to include a robust adaptive management plan to address potential changes that could occur during the permit term.

As GBRA continues to compile and evaluate information on covered species, covered activities, and other components of the GRHCP, the permit term will continue to be evaluated.

REFERENCES

50 CFR 13.22. <https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-13>. Last accessed November 2021.

50 CFR 17.22. <https://www.ecfr.gov/current/title-50/chapter-I/subchapter-B/part-17/subpart-C/section-17.22>. Last accessed November 2021.

National HCP Coalition (NHCPC). 2021. Large-scale HCP database. <https://www.nhcpccoalition.org/habitat-conservation-plan-projects/hcp-list/>. Last accessed November 2021.

U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). 2016. Habitat Conservation Planning and Incidental Take Permit Processing Handbook. 361 pp + apps. https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html. Last accessed November 2021.

APPENDIX A – Permit Renewal Regulations in 50 CFR 13.22

Current regulations in 50 CFR 13.22 governing renewal of Incidental Take Permits (ITPs) state the following:

- (a) Application for renewal. Applicants for renewal of a permit must submit a written application at least 30 days prior to the expiration date of the permit. Applicants must certify in the form required by § 13.12(a)(5) that all statements and information in the original application remain current and correct, unless previously changed or corrected. If such information is no longer current or correct, the applicant must provide corrected information.
- (b) Renewal criteria. The Service shall issue a renewal of a permit if the applicant meets the criteria for issuance in § 13.21(b) and is not disqualified under § 13.21(c).
- (c) Continuation of permitted activity. Any person holding a valid, renewable permit may continue the activities authorized by the expired permit until the Service acts on the application for renewal if all of the following conditions are met:
 - (1) The permit is currently in force and not suspended or revoked;
 - (2) The person has complied with this section; and
 - (3) The permit is not a CITES document that was issued under part 23 of this subchapter (because the CITES document is void upon expiration).
- (d) Denial. The issuing officer may deny renewal of a permit to any applicant who fails to meet the issuance criteria set forth in § 13.21 of this part, or in the part(s) or section(s) specifically governing the activity for which the renewal is requested.

The language of 50 CFR 13.22 paragraph (b) says the Service shall issue a renewal, if all other requirements are met. The Service generally addresses this matter in ITPs by including a permit condition that indirectly acknowledges a permit is renewable. For example, the Southern Edwards Plateau HCP (SEP-HCP) permit includes the following in Condition A of the permit:

“General conditions set out in subpart d of 50 CFR 13, and specific conditions contained in Federal regulations cited in block #2, above, are hereby made a part of this permit. All activities authorized herein must be carried out in accordance with and for the purposes described in the application submitted. Continued validity, or renewal, of this permit is subject to compliance with all applicable conditions, including the filing of all required information and reports; and full implementation of the SEP-HCP.”

Most Texas HCPs include the same or very similar language in Condition A of their permit, but some permits also have a condition that more directly states that a permit is renewable. The HCP for Managed Groundwater Withdrawals from the Barton Springs Segment of the Edwards Aquifer includes similar language as the SEP-HCP for Condition A, but also includes the following language in Condition R:

“The permittee(s) may apply for the renewal of the permit prior to its expiration date in accordance with the provisions of 50 CFR § 13.22.”

Although 50 CFR 13.22(b) states “the Service shall issue a renewal of a permit if the applicant meets the criteria...,” some HCPs include specific language in the HCP to include renewal language in the issued permit. As an example, the LCRA TSC HCP includes the following under the heading 8.4.2 Permit Term, Renewals, and Suspensions or Revocations:

“LCRA TSC seeks a renewable ITP from the USFWS with an initial term of 30 years from the date of issuance. LCRA TSC requests that USFWS indicate on the ITP that the ITP is renewable. If LCRA TSC files a request for an ITP renewal 30 days prior to the expiration of the ITP, the ITP will remain valid while the USFWS processes the request (50 CFR §13.22). If LCRA TSC fails to file a renewal request at least 30 days prior to ITP expiration, the ITP will become invalid on the stated expiration date. Any changes to the HCP, ITP, or related documents needed to implement the renewal will be processed in accordance with the provisions described in Chapter 8.4. LCRA TSC anticipates that the USFWS will publicly notice any ITP renewals in the Federal Register for at least 30 days.”

Inclusion of this type of request in the HCP may help prevent a later dispute over the meaning of language that arises over subsequent revision of the relevant permit regulations.