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EI-20987

May 8, 2015

Ms. Amanda Nicodemus
ICF International
405 West Boxelder Road, Suite A-5
Gillette, WY 82718

RE: Lone Star Railroad Project, Big Spring, Howard County, Texas

Dear Ms. Nicodemus:

Texas Parks and Wildlife Department (TPWD) has received the request for comments regarding the above-referenced proposed project located in Big Spring. TPWD staff has reviewed the information provided and offers the following information, comments, and recommendations concerning this project.

TPWD Wildlife Habitat Assessment Program is now accepting projects through electronic submittal. Future project review requests can be submitted to WHAB@tpwd.texas.gov. If submitting requests electronically, please include geographic location files when available (e.g. GIS shape file, .kmz, etc.).

Please be aware that a written response to a TPWD recommendation or informational comment received by a state governmental agency may be required by state law. For further guidance, see the Texas Parks and Wildlife Code, Section 12.0011, which can be found online at <http://www.statutes.legis.state.tx.us/Docs/PW/htm/PW.12.htm#12.0011>. For tracking purposes, please refer to TPWD project number 34558 in any return correspondence regarding this project.

Project Description

Lone Star Railroad has filed a petition with the Surface Transportation Board requesting authority to construct a new rail line. The proposed line would be approximately 16,750-feet long and would connect to an industrial lead track planned by Union Pacific Railroad Company between N. Midway Road and N. Moss Lake Road.

Federal Laws

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) prohibits taking, attempting to take, capturing, killing, selling/purchasing, possessing, transporting, and importing of migratory birds, their eggs, parts and nests, except when specifically authorized by the Department of the Interior. This protection applies to most native bird species, including ground nesting species. The U.S. Fish and Wildlife Service (USFWS) Migratory Bird Office can be contacted at (505) 248-7882 for more information on potential impacts to migratory birds.

Recommendation: If migratory bird species are found nesting on or adjacent to the project area, they must be dealt with in a manner consistent with the MBTA. TPWD recommends excluding vegetation clearing activities during the general bird nesting season, March through August, to avoid adverse impacts to this group. If clearing vegetation during the migratory bird nesting season is unavoidable, TPWD recommends surveying the area proposed for disturbance to ensure that no nests with eggs or young will be disturbed by operations. Any vegetation (trees, shrubs, and grasses) where occupied nests are located should not be disturbed until the eggs have hatched and the young have fledged.

State Laws

Parks and Wildlife Code, Section 68.015

Section 68.015 of the Parks and Wildlife Code regulates state-listed species. Please note that there is no provision for take (incidental or otherwise) of state-listed species. A copy of *TPWD Guidelines for Protection of State-Listed Species*, which includes a list of penalties for take of species, can be found on-line at http://www.tpwd.state.tx.us/huntwild/wild/wildlife_diversity/habitat_assessment/media/tpwd_statelisted_species.pdf. State-listed species may only be handled by persons with a scientific collection permit obtained through TPWD. For more information on this permit, please contact the Wildlife Permits Office at (512) 389-4647.

Texas horned lizard (*Phrynosoma cornutum*) – State-listed Threatened

The Texas horned lizard can be found in open, arid and semi-arid regions with sparse vegetation, including grass, cactus, scattered brush or scrubby trees.

Based on the information provided and publically available aerial photographs, suitable habitat for the Texas horned lizard may be present at the proposed project site.

If present in the project area, the Texas horned lizard could be impacted by ground disturbing construction activities. Horned lizards may hibernate on-site in the loose soils a few inches below ground during the cool months from September/October to March/April. Construction in these areas could harm hibernating lizards. Horned lizards are active above ground when temperatures exceed 75 degrees Fahrenheit. If horned lizards (nesting, gravid females, newborn young, lethargic from cool temperatures or hibernation) cannot move away from noise and approaching construction equipment in time, they could be affected by construction activities.

Recommendation: TPWD recommends that a pre-construction survey be conducted to determine if horned lizards are present on the project site or directly adjacent to the construction area. A useful indication that the Texas horned lizard may occupy the site is the presence of harvester ant (*Pogonomyrmex barbatus*) nests since harvester ants are the primary food source of horned lizards. The survey should be performed during the warm months of the year when the horned lizards are active. Fact sheets, including survey protocols and photos of Texas horned lizard can be found on-line at http://www.tpwd.state.tx.us/huntwild/wild/wildlife_diversity/texas_nature_trackers/horned_lizard/ and <http://www.tpwd.state.tx.us/huntwild/wild/species/thlizard/>.

If horned lizards are found on site, TPWD recommends contacting this office to develop plans to relocate them, particularly if there is likelihood that they would be harmed by project activities. To minimize impacts to the Texas horned lizard, TPWD recommends the use of the best management practices (BMPs) described in the *Texas Horned Lizard Watch – Management and Monitoring Packet* which can be found on-line at http://www.tpwd.state.tx.us/publications/pwdpubs/media/pwd_bk_w7000_0038.pdf. and *Texas Tortoise Best Management Practices* which can be found on-line at http://www.tpwd.state.tx.us/huntwild/wild/wildlife_diversity/habitat_assessment/media/texas_tortoise_bmps.pdf. Please note that Texas tortoise BMPs are applicable to the Texas horned lizard.

Rare Species

In addition to state and federally-protected species, TPWD tracks special features, natural communities, and rare species that are not listed as threatened or endangered. TPWD actively promotes their conservation and considers it important to evaluate and, if necessary, minimize impacts to rare species and their habitat to reduce the likelihood of endangerment and preclude the need to list. These species and communities are tracked in the Texas Natural Diversity Database (TXNDD). The most current and accurate TXNDD data can be requested at: TexasNatural.DiversityDatabase@tpwd.texas.gov.

No records of rare, threatened, or endangered species have been documented within 1.5 miles of the proposed project area in the TXNDD. However based on the information provided and publically available aerial photographs, suitable habitat may be present for the Spot-tailed earless lizard (*Holbrookia lacerata*) on the proposed project site.

In January 2010, the Spot-tailed earless lizard was petitioned for listing under the Endangered Species Act (ESA). On May 24, 2011, the USFWS issued a 90-day finding on that petition. Based on their review, the USFWS found the petition presents substantial scientific or commercial information indicating that listing the Spot-tailed earless lizard may be warranted. The USFWS has therefore initiated a status review to determine if listing is in fact warranted. Based on this status review, the USFWS will issue a 12-month finding on the petition.

Recommendation: TPWD recommends monitoring the listing status of the Spot-tailed earless lizard throughout project planning and construction and perform required consultation, permitting, and mitigation with the USFWS if this species becomes listed under the ESA. TPWD also recommends surveying for this species in areas proposed for disturbance, and avoid impacts to this species if found on-site.

Please note that the absence of TXNDD information in an area does not imply that a species is absent from that area. Given the small proportion of public versus private land in Texas, the TXNDD does not include a representative inventory of rare resources in the state. Although it is based on the best data available to TPWD regarding rare species, the data from the TXNDD do not provide a definitive statement as to the presence, absence or condition of special species, natural communities, or other significant features within your project area. These data are not inclusive and cannot be used as

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presence/absence data. This information cannot be substituted for on-the-ground surveys.

Recommendation: Please review the TPWD county list for Howard County, as rare species could be present, depending upon habitat availability. These lists are available online at <http://tpwd.texas.gov/gis/rtest/>. If during construction, the project area is found to contain rare species, natural plant communities, or special features, TPWD recommends that precautions be taken to avoid impacts to them. The USFWS should be contacted for species occurrence data, guidance, permitting, survey protocols, and mitigation for federally-listed species. For the USFWS threatened and endangered species lists by county, please visit <http://ecos.fws.gov/ipac/>.

Determining the actual presence of a species in a given area depends on many variables including daily and seasonal activity cycles, environmental activity cues, preferred habitat, transiency and population density (both wildlife and human). The absence of a species can be demonstrated only with great difficulty and then only with repeated negative observations, taking into account all the variable factors contributing to the lack of detectable presence. If encountered during construction, measures should be taken to avoid impacting wildlife.

TPWD strives to respond to requests for project review within a 45 day comment period. Responses may be delayed due to workload and lack of staff. Failure to meet the 45 day review timeframe does not constitute a concurrence from TPWD that the proposed project will not adversely impact fish and wildlife resources.

TPWD advises review and implementation of these recommendations. If you have any questions, please contact me at (806) 761-4936 or Richard.Hanson@tpwd.texas.gov.

Sincerely,



Rick Hanson
Wildlife Habitat Assessment Program
Wildlife Division

RH:gg.ERCS-10860