

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

AQUIFER GUARDIANS IN URBAN §  
AREAS, CHRIS HILL; MWM HELOTES §  
RANCH, LTD., §  
*Plaintiffs,* §

v. §

UNITED STATES FISH AND WILDLIFE §  
SERVICE, THE UNITED STATES §  
DEPARTMENT OF THE INTERIOR, THE §  
UNITED STATES ARMY CORPS OF §  
ENGINEERS, DIRK KEMPTHORNE, IN §  
HIS OFFICIAL CAPACITY AS §  
SECRETARY OF THE INTERIOR; H. §  
DALE HALL, IN HIS OFFICIAL §  
CAPACITY AS DIRECTOR OF THE §  
UNITED STATES FISH AND WILDLIFE §  
SERVICE; COL. CHRISTOPHER W. §  
MARTIN, IN HIS OFFICIAL CAPACITY §  
AS THE DISTRICT COMMANDER OF §  
THE FORT WORTH DISTRICT OF THE §  
UNITED STATES ARMY CORPS OF §  
ENGINEERS; LIEUTENANT GENERAL §  
CARL A. STROCK, IN HIS OFFICIAL §  
CAPACITY AS COMMANDER AND §  
CHIEF OF ENGINEERS, UNITED §  
STATES ARMY CORPS OF ENGINEERS §  
*Defendants.* §

CIVIL ACTION NO. \_\_\_\_\_

**PLAINTIFFS' ORIGINAL COMPLAINT**

**COME NOW**, the Aquifer Guardians in Urban Areas (hereinafter "AGUA"), Chris Hill and MWM Helotes Ranch, Ltd., Plaintiffs, and complain of the United States Fish and Wildlife Service, the United States Department of the Interior, the United States Army Corps of Engineers, Dirk Kempthorne in his official capacity as Secretary of the Interior, H. Dale Hall in his official capacity as the Director of the United States Fish and Wildlife Service, Col. Christopher W. Martin, in his official capacity as the District Commander of the Fort Worth

District, United States Army Corps of Engineers, and Lieutenant General Carl A. Strock, in his official capacity as Commander and Chief of Engineers, United States Army Corps of Engineers (collectively Defendants), and for cause of action would respectfully show the following:

## **I. INTRODUCTION AND SUMMARY OF THE CASE**

1. The Golden-cheeked warbler was listed as an endangered species under federal Endangered Species Act on May 4, 1990.

2. The endangered Golden-cheeked warbler breeds only in the mixed evergreen-deciduous woodlands of central Texas.

3. In 1992 a "Recovery Plan" was issued by the U.S. Fish and Wildlife Service for the Golden-cheeked warbler pursuant to the requirements of the Endangered Species Act.

4. In accordance with Nationwide Permit #12, City Public Service Energy (hereinafter "CPSE") applied to the U.S. Army Corps of Engineers to build the Cagnon to Kendall electrical transmission line through the breeding habitat of the Golden-cheeked Warbler.

5. Pursuant to the requirements of § 7(a) of the Endangered Species Act, the Corps of Engineers engaged in consultation with the U.S. Fish and Wildlife Service regarding whether or not the Golden-cheeked warbler would be "jeopardized" by the construction of the electric power transmission line through the breeding habitat.

6. In accord with § 7(b) of the Endangered Species Act, the U.S. Fish and Wildlife Service prepared a biological opinion regarding the impact of the proposed project on the Golden-cheeked warbler.

7. This litigation challenges the biological opinion prepared by the U.S. Fish and Wildlife Service as not complying with the applicable rules and regulations governing the preparation of biological opinions.

8. This litigation challenges the finding by the U.S. Army Corps of Engineers that the action will not jeopardize the continued existence of the Golden-cheeked warbler because the appropriate issues were not considered in that finding of jeopardy as per the federal rules.

9. Specifically, this litigation challenges that the direct, indirect and cumulative impacts of the proposed project were not properly considered in either the biological opinion or in the determination of jeopardy, and that the “no jeopardy” opinion relied upon uncertain and inadequate mitigation measures.

10. This litigation asks that the U.S. Fish and Wildlife Service be ordered to prepare a new Biological Opinion that complies with federal law.

11. This litigation asks that the U.S. Fish and Wildlife Service be ordered to prepare a new Biological Opinion that requires additional mitigation.

## **II. JURISDICTION**

12. This court has jurisdiction of this action by virtue of 28 U.S.C.A. § 1331 (federal question arising under 16 U.S.C. § 1536, the Endangered Species Act). This review is requested pursuant to the federal Administrative Procedure Act, 5 U.S.C. § 704.

## **III. VENUE**

13. Venue is proper in this Court pursuant to 28 U.S.C.A. §1391(b) and (e) because the defendants are officers of the United States, several of the plaintiffs officially reside within the district, and the affected property giving rise to the claims asserted occurred in this district.

## **IV. PARTIES**

14. Plaintiff, Aquifer Guardian in Urban Areas, is a non-profit organization with approximately 400 members, whose mission is to strengthen the regulations designed to protect the Edwards Underground Aquifer, to ensure enforcement of existing laws controlling activities

affecting the Edwards Aquifer, to alert the public to impending threats to the aquifer, and to mobilize public opinion to support efforts to protect Edwards Aquifer.

15. Aquifer Guardians in Urban Areas brings this action on behalf of its members including the San Geronimo Watershed Alliance and many individuals who live in the area crossed by the CPSE Cagnon to Kendall transmission line.

16. These members will be adversely affected by wildlife habitat loss and potential impacts to the aquifer from cumulative impacts occurring over the aquifer and within the habitat of the Golden-cheeked warbler.

17. Plaintiff, Chris Hill retains the underlying fee interest in The Nature Conservancy's 731 acre Elizabeth P. Hill Preserve that was created by conservation easement for the purposes of wildlife protection, including the Golden-cheeked warbler, and for aquifer recharge .

18. Chris Hill and the Elizabeth P. Hill Preserve will be directly impacted by the proposed Cagnon to Kendall electric transmission line.

19. Golden-cheeked warblers have been confirmed on the Elizabeth P. Hill Preserve in the portion of the preserve adjacent to the proposed electric transmission line.

20. Plaintiff, MWM Helotes Ranch, Ltd. is a co-owner of the R.L. White Ranch that is located at 19744 Bandera Road.

21. The proposed Cagnon to Kendall electric transmission line will directly impact the R.L. White Ranch.

22. Golden-cheeked warbler habitat and the presence of one individual warbler has been confirmed on the R.L. White Ranch, Morales Pasture, that will be impacted by the proposed Cagnon to Kendall electric transmission line.

23. Defendant, U.S. Fish and Wildlife Service is being sued for their role in preparing the biological opinion in violation of the requirements of the federal Endangered Species Act..

24. Defendant, Department of Interior is being sued for its role in preparing the biological opinion in violation of the requirements of the federal Endangered Species Act..

25. Defendant, U.S. Army Corps of Engineers is being sued for the action of the Fort Worth District of the Corps of Engineers in approving the construction of the Kendall to Cagnon electric transmission line in violation of the Endangered Species Act.

26. Defendant, Dirk Kempthorne is sued in his official capacity as the Secretary of the United States Department of the Interior (the "Secretary").

27. Defendant, H. Dale Hall is being sued in his official capacity as the Director of the Fish and Wildlife Service, United States Department of the Interior.

28. Defendant, Col. Christopher W. Martin is being sued in his official capacity as the District Commander of the Fort Worth District of the U.S. Army Corps of Engineers.

29. Defendant, Lt. Gen. Carl A. Strock is being sued in his official capacity as the Commander and Chief of Engineers of the U.S. Army Corps of Engineers.

## V. FACTS

### **The Proposed Cagnon-Kendall Transmission Line**

30. San Antonio City Public Service Electric (CPSE) provides electricity and transmission line services within San Antonio and has authority to provide service outside of the boundaries of the City.

31. CPSE proposed in association with the Lower Colorado River Authority (LCRA) to construct a 345 kV transmission line from the Kendall substation in the LCRA service area to the Cagnon substation owned by CPSE.

32. This proposed transmission line is called the Cagnon to Kendall electric transmission line.

33. LCRA's portion of the Cagnon to Kendall electric transmission line was proposed to extend from the LCRA substation in Kendall to a tie point at the Bexar County line.

34. CPSE's portion of the Cagnon to Kendall transmission line proposed to extend northward from CPSE's Cagnon station up the San Geronimo Valley, to the tie point at the Bexar County line.

35. The CPSE portion of this Cagnon to Kendall electric transmission line crosses private property owned by several members of AGUA as well as property owned by plaintiffs Chris Hill and MWM Helotes Ranch, Ltd..

36. The CPSE portion of this Cagnon to Kendall electric transmission line crosses parklands owned by the City of San Antonio for aquifer protection purposes.

37. The CPSE portion of this Cagnon to Kendall electric transmission line crosses lands over which conservation easements have been placed for aquifer protection purposes.

38. This CPSE portion of the Cagnon to Kendall electric transmission line crosses through breeding habitat of the endangered Golden-cheeked Warbler.

39. The CPSE portion of the Cagnon to Kendall electric transmission line crosses through an area identified as Region 6 in the Recovery Plan for the Golden-cheeked warbler prepared pursuant to the Endangered Species Act.

40. This CPSE portion of the Cagnon to Kendall electric transmission line crosses over the recharge zone of Edwards Aquifer and the contributing zone of Edwards Aquifer.

41. In order to construct its portion of the Cagnon to Kendall electric transmission line, CPSE proposed to discharge dredge or fill material in the waters of the United States.

42. Discharge of dredge or fill material into the waters of the United States is regulated by the United States Army Corps of Engineers under Section 404 of the Clean Water Act.

43. CPSE applied to the U.S. Army Corps of Engineers for permission to construct its portion of the Cagnon to Kendall electric transmission line under the provisions of Nationwide Permit 12.

44. Nationwide Permit 12 applies to utility lines.

45. According to the 2002 Nationwide Permit General Conditions, the U.S. Army Corps of Engineers may not use any NWP to authorize an activity which is likely to jeopardize the continued existence of a threatened or endangered species.

46. Members of AGUA contacted the U.S. Army Corps of Engineers to complain about the proposed project and requested that an individual permit be required as per 33 CFR 330.4(f) rather than nationwide permit authorization due to the impact of the proposed project on the habitat of the endangered Golden-cheeked warbler as well as due to the impact of the proposed action on parklands.

### **The Golden-cheeked Warbler**

47. The male Golden-cheeked warbler in breeding plumage has brilliant yellow cheeks outlined in black, the only North American warbler with such coloration.

48. The Golden-cheeked warbler breeds only in the mixed evergreen-deciduous woodlands of central Texas and winters in the highland pine-oak woodlands of southern Mexico and northern Central America.

49. Human activities to date have eliminated much Golden-cheeked warbler habitat within the warbler's breeding range that was identified in initial surveys in 1962.

50. Recent surveys suggest that the rate of habitat loss is accelerating due to suburban developments spreading into prime warbler habitat, especially in the growth corridor from Austin to San Antonio.

51. The Golden-cheeked warbler was placed on the federal endangered species list in May 1990 by emergency rule (55 Fed. Reg. 18844).

52. In December 1990 a final rule formally listed the Golden-cheeked warbler as an endangered species (55 Fed. Reg. 53153).

53. In accordance with the Endangered Species Act, a Golden-cheeked warbler Recovery Plan (Plan) was prepared by the U.S. Fish and Wildlife Service (USFWS) and released in 1992.

54. A key finding of the Golden-cheeked warbler Recovery Plan is that unfragmented habitat must be protected if viable breeding populations are to be maintained.

55. The Golden-cheeked warbler was given a recovery priority of 2C, indicating a "species with a high degree of threats; in conflict with construction or development projects or other forms of economic activity; and, a high potential for recovery".

56. Stated otherwise, there is still time to prevent the extinction of the Golden-cheeked warbler if sufficient steps are taken to protect habitat.

57. The Plan identifies that the breeding range of the Golden-cheeked warbler primarily lies within 26 counties in the central portion of the State of Texas.

58. The Plan divides the 26-county area into eight regions.

59. The Plan mandates that sufficient breeding habitat should be protected in each region to ensure the continued existence in each of the eight regions of at least one self-



sustaining population that is either viable on its own or through its connection to other populations.

60. Region 6 includes Bexar County and the San Geronimo Valley, the area impacted by the CPSE portion of the proposed Cagnon to Kendall electric transmission line.

61. The goal of the Recovery Plan is for Region 6 to have one self-sustaining population of golden-cheeked warblers.

62. A comprehensive census of Golden-cheeked warbler populations in Region 6 - the location for the proposed Cagnon-Kendall transmission line - has never been undertaken.

63. Subsequent to the release of the recovery plan in 1992, the Recovery Team has emphasized the absolute necessity of maintaining and recovering the species in Bexar County if the Golden-cheeked warbler is to survive, yet alone recover to the point at which it no longer requires the protections of the ESA.

64. According to the Recovery Team, "in looking at the relative contribution that various regions make to overall species' survival, some regions are more critical than others." Golden-cheeked Warbler Recovery Team April 2-3, 1998 Meeting Minutes: Responses to USFWS's Questions at 1.

65. According to the Recovery Team, "[l]ooking at the regions from this perspective, the most critical to the survival of the species are regions 5 and 6 (these two regions collectively encompass the Austin-San Antonio corridor). *Id.* at 2; see also *id.* at Figure 4 (depicting range of warbler and placing Bexar County in Region 6).

66. According to the Recovery Team, "because of their importance to the [Golden-cheeked warbler's] survival, at least two viable populations are needed for both recovery regions 5 and 6. The Austin-San Antonio corridor is undergoing rapid urban expansion, and thus each

population in these regions should have enough area to support a carrying capacity of 2,000-3,000 singing males . . . Preserve design and configuration and buffers from urban areas . . . are critical to minimize edge effects and threats.” *Id.* at 6-7.

67. Two male Golden-cheeked warblers were identified in 2004 on the The Nature Conservancy’s Elizabeth P. Hill Reserve that was created by conservation easement on the Gallagher Headquarters Ranch.

68. One Golden-cheeked warbler was confirmed on the R.L. White Ranch that consists, at least in part, of Golden-cheeked warbler habitat.

69. Although no comprehensive survey has been taken of the habitat and Golden-cheeked warbler populations in Region 6, data from literature and interviews with land managers indicate that fewer than 300 pairs of birds are currently protected in Region 6.

70. 300 pairs of birds on protected lands is far less than the estimated 1,000 pairs needed to provide population viability in Region 6.

71. Recent surveys suggest that the rate of habitat loss is accelerating as suburban developments spread into prime warbler habitat along the Balcones Escarpment, especially in the growth corridor from Austin to San Antonio and into the San Geronimo Watershed.

72. A review of new electrical connections for Bexar County from 1990-1996 shows that the northwest and northeast quadrants were the fastest growing areas in the county.

73. The prime habitat for Golden-cheeked warblers in Region 6 is adjacent to and west of the Balcones Escarpment and includes the northwest and northern portion of Bexar County.

74. These datasets indicate that significant development has occurred and future developments will occur in the area designated as Region 6 in the Golden-cheeked warbler Recovery Plan.

### **Biological Opinion**

75. Section 7 of the Endangered Species Act prohibits a federal agency from engaging in any action that is likely to jeopardize the continued existence of endangered or threatened species. 16 U.S.C. § 1536(a)(2)

76. If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the Service, after which the Service must provide the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(b)(3)(A).

77. If the Service concludes that the proposed action will “jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat],” § 1536(a)(2), the Biological Opinion must outline any “reasonable and prudent alternatives” that the Service believes will avoid that consequence, § 1536(b)(3)(A).

78. Additionally, if the Biological Opinion concludes that the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Service must provide the agency with a written statement (known as the “Incidental Take Statement”) specifying the “impact of such incidental taking on the species,” any “reasonable and prudent measures that the [Service] considers necessary or appropriate to minimize such impact,” and setting forth “the terms and conditions . . . that must be complied with by the Federal agency . . . to implement [those measures].” § 1536(b)(4).

79. The Biological Opinion is a final agency action for the purposes of the Administrative Procedure Act (“APA”).

80. On January 11, 2006 the USACE requested formal consultation from the U.S. Fish and Wildlife Service (Service) regarding the proposed construction of the transmission line by CPSE in Bexar and Medina counties, Texas, and its effects on the Golden-cheeked warbler in accordance with section 7 of the Endangered Species Act.

81. On June 23, 2006 the Service transmitted its Biological Opinion on the impacts of the proposed transmission line on the Golden-cheeked warbler and Incidental Take Statement to the U.S. Army Corps of Engineers.

82. At that time, the Biological Opinion was not made available to the public.

83. The Biological Opinion clearly identified that an adverse impact would occur to breeding habitat utilized by the Golden-cheeked warbler.

84. The Biological Opinion documents that 10.59 acres will be permanently lost or impaired as a direct effect of the proposed action.

85. The Biological Opinion further notes that utility lines, road improvements, drainage facility improvements, and other appurtenant structures, all may potentially increase use of areas not previously subject to human use and may have indirect effects to the Golden-cheeked warbler, specifically from human intrusion.

86. The Biological Opinion does not consider the direct impacts of transmission lines on bird strike mortality.

87. The Biological Opinion does not consider edge effect impacts on the Golden-cheeked warbler.

88. The Biological opinion does not consider the increased probability of spreading oak wilt fungus that will directly impact the breeding habitat of the Golden-cheeked warbler.

89. The Biological Opinion lists the 'action area' (the area that may be directly or indirectly affected by the proposed action) to be up to 300 ft on either side of the transmission line along its length.

90. The Biological Opinion does not quantify the total size of the 'action area,' i.e. 600 ft multiplied by the length of line running through Golden-cheeked warbler habitat.

91. The Biological Opinion does not quantify any secondary impacts (e.g. indirect effects) to the Golden-cheeked warbler.

92. The Biological Opinion attempted to address cumulative impacts to the Golden-cheeked warbler.

93. The Biological Opinion identified six specific types of cumulative effects that are likely to occur if the project goes forward, including 1) unpredictable fluctuations in habitat due to urbanization; 2) increase in impervious cover due to urbanization and the installation of appurtenant facilities, i.e., roads, etc.; 3) use of pesticides on listed species habitat; 4) contaminated runoff from agriculture and urbanization; 5) nest parasitism; and, 6) predation by feral animals and pets.

94. The Biological Opinion identified CPSE's mitigation efforts as including the acquisition of 55 acres of property to offset the permanent loss or impairment of 10.59 acres of current Golden-cheeked warbler habitat.

95. The Biological Opinion identifies that out of the 55 acres of mitigation property, only 6.5 acres is suitable Golden-cheeked warbler habitat.

96. The Biological Opinion identifies that out of the 55 acres of mitigation property, 48 acres was previously cleared and does not currently contain suitable Golden-cheeked warbler habitat.

97. Without further explanation, the Biological Opinion states that this 48 acres “will continue to grow back and will likely become suitable [Golden-cheeked warbler] habitat.”

98. The Biological Opinion fails to explain how the permanent loss of 10.59 acres of habitat is mitigated by the acquisition of 6.5 acres of current Golden-cheeked warbler habitat.

99. There is no identification or quantification of past habitat loss within Recovery Region 6 in the environmental baseline section of the Biological Opinion.

100. There is no identification of the number of breeding pairs currently protected in Recovery Region 6, a key criterion to assessing the viability of the population.

101. There is no identification of currently proposed state, local and private actions within Recovery Region 6.

102. There is no identification of reasonably certain future actions within Recovery Region 6.

103. The Biological Opinion concludes with a finding that the project is not likely to jeopardize the continued existence of the Golden-cheeked warbler.

104. An incidental take statement allowing the project to go forward is included as part of the Biological Opinion.

105. No reasonable and prudent alternatives to the proposed action were proposed or evaluated in the Biological Opinion.

#### **Corps of Engineers Permit Action**

106. On July 27, 2006 the Corps of Engineers issued authorization to CPSE under Nationwide Permit 12.

107. In its decision to authorize CPSE pursuant to Nationwide Permit 12, the Corps of Engineers relied on the Biological Opinion issued June 23, 2006 by the U.S. Fish and Wildlife Service.

108. No public notice or information regarding the Corps' authorization of the CPSE Kendall to Cagnon electric transmission line was provided to those who were concerned about this action.

109. Construction of certain transmission towers began by CPSE in August, 2006 although the entire project is not anticipated to be completed until 2007.

## **VI. CAUSES OF ACTION**

### **CAUSE OF ACTION #1 –CONCLUSIONS OF THE BIOLOGICAL OPINION ON DIRECT AND INDIRECT EFFECTS ARE UNSUPPORTED AND CONTRADICTED BY THE RECORD AND CONTRARY TO THE APA**

110. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

111. Section 7(a) of the ESA imposes a substantive duty on each federal agency, including the USFWS and the Corps, to ensure that any activity it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify any listed species' designated critical habitat. 16 U.S.C. § 1536(a)(2).

112. An action "jeopardize[s] the continued existence" of a listed species if it reasonably would be expected to reduce appreciably the likelihood of both survival and recovery of the species in the wild. 50 C.F.R. § 402.02.

113. To ensure agency compliance with the substantive duty not to jeopardize threatened or endangered species, Section 7(a)(2) of the ESA also imposes on the agency a procedural duty to consult with the Secretary of the Interior. 16 U.S.C. § 1536(a)(2).

114. Following consultation, the Secretary must issue a “biological opinion” which determines whether the proposed action is likely to jeopardize a listed species and provide a summary of the reasons for its conclusion. 16 U.S.C. § 1536(b)(3)(A).

115. In formulating the biological opinion, the Secretary must use the best scientific and commercial data available. 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.14(g)(8).

116. If the biological opinion concludes that the proposed action will jeopardize the species, the Secretary must recommend “reasonable and prudent alternatives” that can be taken by the agency to implement the action that would not jeopardize the continued existence of the species. 16 U.S.C. § 1536(b)(3)(A).

117. The Secretary of the Interior has delegated his consultation and other duties under the ESA to USFWS. 50 C.F.R. § 402.01(b).

118. In determining whether an agency action is arbitrary or capricious, the issue is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.

119. The Biological Opinion not only fails to establish the necessary link between the facts found and the conclusions made, but, indeed, is filled with factual findings that contradict its “no jeopardy” conclusions.

120. For example, in the Biological Opinion, there is no description of the current population of the Golden-cheeked warbler that is breeding on protected lands.



121. In the Biological Opinion, there is no analysis of the sufficiency of mitigating 10.59 acres of permanently lost or impaired Golden-cheeked warbler habitat with only 6.5 acres of currently suitable Golden-cheeked warbler habitat and 48 acres of cleared land that might become Golden-cheeked warbler habitat in the future.

122. In the Biological Opinion, there is no analysis of the impact of mortality from bird strikes upon the population of Golden-cheeked warblers.

123. In the Biological Opinion, there is no analysis of the impact of habitat fragmentation or edge effects.

124. In the Biological Opinion, there is no attempt to follow the goals of the Golden-cheeked warbler Recovery Plan.

125. The conclusion in the Biological Opinion is that the planned Kendall-Cagnon transmission line and associated activities will not jeopardize the continued existence of the Golden-cheeked warbler has no basis in the biological opinion or elsewhere in the record, and is in fact contradicted by the findings in the Biological Opinion itself.

126. The Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not meet the requirements of properly analyzing the direct and indirect impacts.

127. These conclusions of the Biological Opinion, therefore, are arbitrary and capricious, an abuse of discretion, and not in accordance with the law contrary to the APA. 5 U.S.C. § 706(2).

**CAUSE OF ACTION #2 –FAILURE TO ANALYZE CUMULATIVE IMPACTS UNDER THE ENDANGERED SPECIES ACT AND CONTRARY TO THE APA**

128. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

129. Section 7 of the Endangered Species Act requires consideration of not only impacts of the particular project subject to consultation, but also cumulative effects of other activities or programs which may have similar impacts on listed species or its habitat.

130. Cumulative effects are those effects of future State or private activities, not involving Federal activities, which are reasonably certain to occur within the action area of the Federal action subject to consultation. 50 CFR § 402.2.

131. The Biological Opinion prepared by USACE for the proposed transmission line identified several reasonably foreseeable future actions including: 1) unpredictable fluctuations in habitat due to urbanization; 2) increase in impervious cover due to urbanization and the installation of appurtenant facilities, i.e., roads, etc.; 3) use of pesticides on listed species habitat; 4) contaminated runoff from agriculture and urbanization; 5) nest parasitism; and, 6) predation by feral animals and pets.

132. In the Biological Opinion, the USFWS states that “after reviewing the current status of the Golden-cheeked warbler, the environmental baseline for the action area, the effects of CPSE’s proposed Cagnon-Kagnon 345-kV Transmission Line Project, Bexar and Medina counties, Texas, and the cumulative effects, the project, as proposed, is not likely to jeopardize the continued existence of the Golden-checked warbler”. (Biological Opinion, p. 9-10).

133. There is no analysis to back up these conclusory statements contained in the Biological Opinion.

134. For example, there is no description of the current population of the Golden-cheeked warbler breeding on unprotected lands.

135. There is no description or analysis of the impact of federal, state or private projects occurring or planned to occur in the area.

136. In the Biological Opinion, there is no description of the reasonably certain future urbanization in Bexar County and Region 6 of the Recovery Plan - development that will likely clear significant acreage of Golden-cheeked warbler habitat, potentially causing significant impacts on the existence of the Golden-checked warbler.

137. In the Biological Opinion, there is no description or analysis of Texas Department of Transportation projects that are planned for the area.

138. In the Biological Opinion, there is no description of the incremental impact of the increase in impervious cover due to urbanization and the installation of appurtenant facilities.

139. In the Biological Opinion, there is no description of the use of pesticides on listed species habitat.

140. In the Biological Opinion, there is no description of the incremental loss from contaminated runoff from agriculture and urbanization.

141. In the Biological Opinion, there is no description of the incremental increase of nest parasitism.

142. In the Biological Opinion, there is no description of the incremental increase of predation by feral animals and pets.

143. In short, there is no credible analysis of cumulative impacts in the Biological Opinion and the statement of findings associated with the incidental take.

144. The USFWS Biological Opinion violates section 7 of the ESA, 16 U.S.C.A. §1536, and its implementing regulations, 50 C.F.R. § 402, by failing to analyze cumulative impacts in accordance with the regulations.

145. In turn, the Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not meet the requirements of the cumulative impact provisions.

146. By issuing a biological opinion that does not comply with the rules requiring the analysis of cumulative impacts, the U.S. Fish and Wildlife Service was arbitrary, capricious, abused its discretion or otherwise acted not in accordance with the law, contrary to the APA, 5 U.S.C.A. § 706(2).

**CAUSE OF ACTION #3 – RELIANCE ON UNCERTAIN AND INADEQUATE MITIGATION MEASURES AS A BASIS FOR THE NO JEOPARDY OPINION AND CONTRARY TO THE APA**

147. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

148. In the Biological Opinion, there is no analysis of the sufficiency of mitigating 10.59 acres of permanently lost or impaired Golden-checked warbler habitat with only 6.5 acres of currently suitable Golden-checked warbler habitat and 48 acres of cleared land that might become suitable habitat in the future.

149. The Biological Opinion improperly relies on unsupported statements and claims from CPSE regarding the proposed 55 acre mitigation tract.

150. Forty-eight acres of the mitigation tract do not contain habitat that is suitable for the Golden-cheeked warblers.

151. Regarding these 48 acres, the Biological Opinion simplistically states that “CPSE believes the remainder of the site will eventually revert back to suitable habitat.”

152. There is no analysis of whether CPSE’s belief is reasonable.

153. There is no analysis of the time it will take for the habitat to become suitable for Golden-cheeked warblers.

154. There is no attempt to analyze management techniques that CPSE could utilize to accelerate the creation of habitat suitable for Golden-cheeked warblers.

155. There is no analysis of how the proposed mitigation complies with the state goals of the Recovery Plan.

156. Because the Biological Opinion fails to fully analyze and quantify the direct, indirect, and cumulative impacts, the proposed mitigation measures cannot be determined to be an adequate basis to support the 'no jeopardy' opinion.

157. In turn, the Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not properly analyze or require sufficient mitigation.

158. In relying on this uncertain hope that suitable habitat will develop on the mitigation tract, and on the incomplete analysis of the impacts, the Biological Opinion violated section 7(a)(2) of the ESA and was arbitrary, capricious, an abuse of discretion, and not in accordance with law, contrary to the APA. 5 U.S.C. § 706(2).

#### **CAUSE OF ACTION #4 – IMPROPER RELIANCE ON THE BIOLOGICAL OPINION**

159. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in the preceding paragraphs.

160. The Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not meet the requirements of properly analyzing the direct and indirect impacts.

161. The Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not meet the requirements of the cumulative impact provisions.

162. The Corps of Engineers violated Section 7 of the Endangered Species Act by acting in reliance on a Biological Opinion that does not properly analyze or require sufficient mitigation.

163. By issuing a authorization under Nationwide Permit No. 12 in reliance upon the improper Biological Opinion, the Corps of Engineers violated Section 7 of the Endangered Species Act, contrary to the APA, 5 U.S.C.A. § 706(2).

## **VII. STANDING**

164. Plaintiff, Aquifer Guardian in Urban Areas, is a non-profit organization with approximately 400 members. AGUA is a coalition of concerned individuals and citizen groups working together to protect the Edwards Aquifer. AGUA's goals are to strengthen the regulations designed to protect the aquifer, ensure enforcement of existing laws, alert the public to impending threats, and mobilize public opinion to support aquifer protection efforts.

165. The protection of habitat in the aquifer recharge and contributing zone is directly related to the protection of the Edwards Underground Aquifer.

166. Aquifer Guardians in Urban Areas brings this action on behalf of, and to protect the interests of its members including the San Geronimo Watershed Alliance and many individuals who live in the area crossed by the CPSE Cagnon to Kendall transmission line.

167. These members will be adversely affected by wildlife habitat loss and potential impacts to the aquifer from the cumulative impacts of development occurring over the aquifer recharge and contributing zones within the habitat of the Golden-cheeked warbler.

168. The San Geronimo Watershed Alliance is a non-profit corporation incorporated under the laws of the State of Texas, and is a member of AGUA.

169. Its address is 15960 San Cayetano, Helotes, Bexar County, Texas 78023.

170. San Geronimo Watershed Alliance was formed to protect the Greater Government Canyon Conservation Area (the majority of which is the San Geronimo watershed) from all impacts, whether environmental or otherwise.

171. Members of Agua and the San Geronimo Watershed Alliance live in and visit the areas that will be impacted by the Cagnon to Kendall transmission line.

172. Jerry Morrissey is a member of AGUA, and is a bird watcher who has visited the area of the proposed transmission line several times, where he has seen Golden-cheeked warblers.

173. Mr. Morrissey has plans to revisit the area in Spring, 2007, and in subsequent years to see Golden-cheeked warblers when they return to their breeding area.

174. Mr. Morrissey is concerned about the loss of habitat for the Golden-cheeked warbler caused by the proposed CPSE Cagnon to Kendall Transmission line.

175. If the habitat is destroyed, the Golden-cheeked warbler may not be available for Mr. Morrissey to view on his bird watching trips.

176. Survival of the Golden-cheeked warbler is more likely if a revised Biological Opinion with appropriate mitigation, analysis of direct and indirect impacts, and cumulative impacts is performed.

177. The impacts of the CPSE Cagnon to Kendall transmission line directly impinges upon the values and directly impinges upon the purposes for which the San Geronimo Watershed Alliance was formed.

178. Several members of the San Geronimo Watershed Alliance including Chris Hill, will be directly impacted by CPSE Cagnon to Kendall transmission line.

179. Chris Hill is a member of the San Geronimo Watershed Alliance whose property located adjacent to State Highway 211 – the Gallagher Headquarters Ranch and the fee estate underlying the Elizabeth P. Hill Preserve – will be directly impacted by the proposed CPSE portion of the Cagnon to Kendall electric transmission line.

180. The Elizabeth P. Hill Preserve was set aside for the protection of endangered species and aquifer recharge.

181. Golden-cheeked warblers have been confirmed on the Elizabeth P. Hill Preserve in the portion of the preserve adjacent to the proposed electric transmission line.

182. MWM Helotes Ranch, Ltd. is a co-owner of the R.L. White Ranch that is located at 19744 Bandera Road.

183. The proposed Cagnon to Kendall electric transmission line will directly impact the R.L. White Ranch.

184. Golden-cheeked warbler habitat and the presence of one individual has been confirmed on the R.L. White Ranch, Morales Pasture, that will be impacted by the proposed Cagnon to Kendall electric transmission line.

### **VIII. RELIEF REQUESTED**

185. Plaintiff respectfully requests the Court to:

- A. exercise jurisdiction over this matter;
- B. issue an order finding that the Biological Opinion did not comply with the requirements of Section 7 of the Endangered Species Act, e.g., it failed to correctly analyze direct, indirect and cumulative impacts, and mitigation;

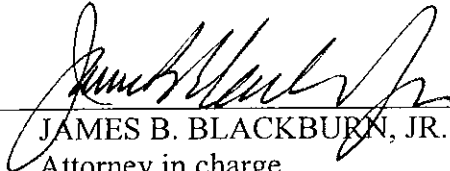


- C. issue an order finding that it was arbitrary, capricious, an abuse of discretion and otherwise in violation of the law for the U.S. Army Corps of Engineers to rely upon a wrongfully prepared Biological Opinion;
- D. issue an order remanding the permit authorization back to the Corps of Engineers and remanding the Biological Opinion back to the U.S. Fish and Wildlife Service pending actions consistent with the Court's findings;
- E. issue an order requiring that defendant U.S. Fish and Wildlife Service prepare another biological opinion that correctly analyzes direct, indirect and cumulative impacts;
- F. issue an order requiring that defendant U.S. Fish and Wildlife Service prepare another biological opinion that correctly analyzes the proposed Golden-cheeked warbler habitat mitigation;
- G. issue an order enjoining the Corps of Engineers from approving the CPSE Cagnon to Kendall project pending the preparation of a Biological Opinion by the U.S. Fish and Wildlife Service that correctly analyzes direct, indirect and cumulative impacts, and mitigation;
- H. issue an injunction against the Corps of Engineers and the U.S. Fish and Wildlife Service to prevent future permits, Biological Opinions, and Incidental Take Statements authorizing actions affecting Golden-cheeked warbler habitat in Region 6 of the Recovery Plan, until a plan is developed and agreed to that will set aside sufficient acreage of existing Golden-cheeked warbler habitat to protect the species in accordance with the goals identified in the Golden-cheeked warbler Recovery Plan;

I. grant Plaintiff such additional relief as this Court may deem just, proper and equitable, including an award of reasonable attorneys' fees, expenses, and costs.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by:   
JAMES B. BLACKBURN, JR.  
Attorney in charge  
TBA No. 02388500  
4709 Austin  
Houston, Texas 77004  
713/524-1012  
713/524-5165 (fax)

**OF COUNSEL:**

Mary W. Carter  
TBA No. 03926300  
Charles W. Irvine  
TBA No. 24055716  
BLACKBURN CARTER, P.C.  
4709 Austin  
Houston, Texas 77004  
713/524-1012  
713/524-5165 (fax)

*Counsel for Plaintiff*