



# Endangered Species Act: A Landowner's Guide

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# Endangered Species Act: A Landowners' Guide

Charles E. Gilliland and Michael Mays

After two previous Congressional acts failed to slow the extinction rates of endangered species, the Endangered Species Act (ESA) of 1973 enshrined species protection as the ultimate societal objective. Species preservation trumped all other considerations, even existing social and economic programs.

This uncompromising approach encountered vigorous opposition as the act took effect and unanticipated restrictions inhibited planned projects. After a tiny fish — a snail darter — initially killed the Tellico Dam project in Tennessee, the ESA came under the glare of the media spotlight. Public policy began to soften the act by creating some exceptions. The incidental take permit, which resulted from 1983 revisions to the ESA, opened the door to development even in the presence of endangered species.

In the 1990s, as newly designated species gained ESA protection, landowners facing enforcement of the ESA raised a series of highly publicized challenges. Political fallout from those confrontations has prevented renewal of the act since 1993. However, Congress continues to appropriate funds for ESA enforcement, and it remains in effect. Some current and potential landowners, fearing applications of what they refer to as the “Darth Vader” of environmental law, continue to regard ESA enforcement as a potentially debilitating regulatory straightjacket. They see ESA restrictions as a threat to the profitable use of their land.

In view of continued opposition, policy makers continue to search for regulations that can preserve endangered species while accommodating reasonable land uses. Consequently, the ESA regulatory framework now includes an array of measures designed to facilitate landowners' plans and protect endangered species.

## ESA Basic Provisions

The U.S. Fish and Wildlife Service (FWS) of the Department of the Interior and

the National Marine Fisheries Service (NMFS) administer ESA for both land- and marine-based species. According to the FWS, Texas could provide habitat for 82 endangered and 16 threatened species. Texas species range from the blue whale, two of which were reported to have beached on the coast at different times, to the coffin cave mold beetle.

Endangered or threatened status provides species a broad range of protections that can severely restrict how landowners can use their property. Many Texas landowners' objections to the ESA resulted from the uncertainty they faced concerning use of their property after the FWS listed the Golden-Cheeked Warbler as endangered. To comply with the ESA and maximize property potential, landowners must understand what the act does and does not allow.

## Section 9

Taking an endangered species violates the law, according to section 9(a)(1)(B) of ESA. Most people interpret *take* to mean capturing or killing an endangered plant

or animal. However, the ESA defines take as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.” Through regulation, the FWS further defines *harm* to include any activity that “actually kills or injures wildlife” and incorporates actions “significantly impairing essential wildlife behavioral patterns, including breeding, feeding, or sheltering.” In the *Sweet Home* decision, the U.S. Supreme Court upheld this broader interpretation of take (115 S. Ct. 2407 [1995]).

Most litigation addressing landowner activities under the ESA has focused on differing Congressional and FWS and NMFS interpretations of harm. The First Circuit Court has ruled that harm means actually killing or injuring wildlife and requires proof of past or present injury. The Ninth Circuit, however, has ruled that harm includes actions that are “reasonably certain” to cause injury in the future. The U.S. Supreme Court has not explicitly chosen between these conflicting standards.



**MANY TEXAS LANDOWNERS** became personally acquainted with the Endangered Species Act when the Golden-Cheeked Warbler was added to the federal endangered species list. This warbler winters in Mexico and Central America but nests and breeds only in the juniper-oak woodlands of the Texas Hill Country.

Little or no litigation has addressed the other elements of the take definition. For example, no rulings have established the meaning of *harass* under the ESA. However, activity that adversely impacts existing habitat qualifies as a take and, in the areas subject to Ninth Circuit jurisdiction, activity that may destroy habitat in the future may also be a take. Texas is in the Fifth Circuit, which has not yet seen litigation testing these specific issues dealing with the meaning of *harm*. Therefore, Texas landowners do not know which standard may apply.

Landowners running afoul of the take provision face both civil and criminal penalties from \$25,000 to \$50,000 per violation. Criminal penalties could include up to one year in prison.

Because the ESA allows both the U.S. Attorney General and private citizens to seek an injunction to prevent the taking of an endangered species, landowners face the prospect of both government and private individual intervention. Under the act's language, each action that takes an endangered species could result in imposition of a penalty. An incident that results in the deaths of several members of an endangered species thus could be considered separate violations, each requiring a separate penalty.

The broad scope of the ESA and the substantial penalties for breaching it make it a critical consideration for both current and prospective landowners. Land market participants would undoubtedly prefer to be able to apply a standardized checklist to determine if a given property contains critical habitat. This would allow them to evaluate the potential for restrictions on a property's use.

Each endangered species has unique habitat requirements, however, making it necessary to judge the potential for land use restrictions on a case-by-case basis. To assess the likelihood of future complications, landowners and land buyers should investigate the ecosystem surrounding a property to identify the possible presence of endangered or threatened species. It may be prudent to involve a specialist in endangered species at this step.

placed off-limits to any use other than habitat for endangered species. But the ESA has evolved to allow some exceptions to the Section 9 take prohibition. These options vary depending on the species' status within the listing process.

### Candidate Conservation Agreements

Candidate species are those that may eventually be proposed for listing as endangered. Landowners in areas inhabited by candidate species can enter into a Candidate Conservation Agreement (CCA) with the FWS or NMFS. Under ESA provisions, landowners can obtain regulatory guarantees from the services by protecting habitat prior to listing. These owners can voluntarily enter into a CCA that allows an incidental take if and when the species is listed.

The ESA defines an incidental take as one that is "incidental to . . . the carrying out of an otherwise lawful activity." An owner with an incidental take permit legally could engage in activities that destroy

habitat in the course of using that property for an otherwise legal pursuit.

In negotiating the agreements, the FWS or NMFS strives for land management practices that would make species listing unnecessary if used by all landowners in the area. In return for employing these practices, owners receive a guarantee that they will not face more onerous measures should the endangered species listing eventually occur. If an incidental take occurs after a listing, but the landowner remains in compliance with the terms of the CCA, the owner can continue to use those specified

practices. The CCA limits much of the uncertainty the landowner faces regarding the identified species and possibly contributes to species recovery without listing.

**WEBSITES**

**Endangered species in Texas**  
<http://ifw2es.fws.gov/EndangeredSpecies/lists/>

**Endangered species, all states**  
[http://ecos.fws.gov/webpage/webpage\\_usa\\_lists.html?state=all](http://ecos.fws.gov/webpage/webpage_usa_lists.html?state=all)

**Texas Parks and Wildlife Department**  
<http://www.tpwd.state.tx.us/nature/endang/endang.htm>

Planned activities that will result in a take, such as land development, generally require a permit from either the FWS or the NMFS. Landowners and prospective buyers must identify which activities are prohibited by the ESA. The FWS and NMFS can assist in determining which, if any, proposed actions are likely to result in a take.

If the land is in an area with no listed species, ESA restrictions do not apply. If listed species inhabit the region, however, landowners may well discover protected habitat on their land. Land with extensive habitat may be effectively



**THE TEXAS BLIND SALAMANDER**  
*and the Houston Toad are among Texas species protected by the ESA.*

## Safe Harbor Agreements

The potential restrictions on land use associated with the ESA make many landowners reluctant to expand or enhance habitat on their properties. Owners fear that if they attract larger numbers of threatened or endangered species, they may be required to maintain the habitat at that higher level to avoid possible ESA penalties.

The FWS, in an effort to encourage rather than discourage voluntary land management practices that could aid in species recovery, offers the Safe Harbor program. Landowners signing Safe Harbor Agreements can improve habitat without fear of facing punitive action if they later choose to discontinue their extra efforts. The NMFS offers a similar form of protection.

## Habitat Conservation Plans

While Safe Harbor Agreements do not normally allow an incidental take of the endangered species, a landowner may apply for a Habitat Conservation Plan (HCP) with the FWS or NMFS to obtain an Incidental Take Permit (ITP). The HCP process, created under Section 10 of the ESA, seeks to balance endangered species protection with economic development activities on a specified property.

The plan mandates practices the landowner must follow to secure the ITP. Once the HCP is in place, the landowner is able to undertake activities consistent with the plan even if an incidental take of protected species results. The landowner also may negotiate to avoid further management and mitigation requirements under the so-called "No Surprises" rule, which establishes the maximum requirements an owner will face, even if the FWS and the NMFS begin to impose stricter requirements on other landowners.

The FWS and NMFS have pledged to conduct the HCP application review process as expeditiously as possible. However, the process can be lengthy, depending on the potential effect on the species in question. An application may require specialized scientific studies and opinions such as environmental assessments or environmental impact statements.

After the landowner submits the application, the FWS or NMFS publishes an announcement in the *Federal*



***BREACHING THE ESA*** still carries substantial penalties, but landowners now have options that may help them comply with the act and maintain profitable use of their land.

*Register.* Next, the public reviews and comments on the HCP application and the FWS and NMFS evaluate the comments. Other documentation including an Implementation Agreement and Environmental Action Memorandum plus a legal review of the application may be required.

The FWS or NMFS must verify that the plan will "to the maximum extent practicable, minimize and mitigate the impacts . . .", that there will be adequate funding to complete the plan, and that the HCP will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The agency also provides guarantees that the plan will be implemented. Even after the HCP is approved, third parties can sue if they consider it inadequate, adding to both the delay and expense of the process. The entire application process may take several years in complicated situations.

Entities such as cities, counties and citizen groups can negotiate an HCP to cover a geographic region. The City of Austin and Travis County secured an ITP to cover habitat for the Golden-Cheeked Warbler, Black-Capped Vireo and more than 30 invertebrates in Travis County. The ITP was issued in connection with the HCP creating the Balcones Canyonlands Conservation Preserve (BCCP) in Travis County.

Landowners within western Travis County have the option of cooperating

with the BCCP to obtain access to its ITP rather than submitting their own applications. Landowners can proceed with development after the BCCP approves their application. Fees range from \$55 to \$5,500 per acre. Before applying for an individual HCP, landowners can contact the Transportation and Natural Resources Department of Travis County to determine whether this option would be less expensive and time consuming.

Landowners and landbuyers must be aware of the consequences of violating the take provisions of ESA. The FWS and the NMFS have created mechanisms to allow private landowners to comply with the ESA while making profitable use of their property. The prudent landowner should consider engaging experts with experience in filing applications for the various permits available to them. Despite efforts to simplify the process, landowners wishing to develop areas with habitat for threatened or endangered species must anticipate potentially costly and lengthy time delays.

## Applying for an Incidental Take Permit

Ask a developer to explain how to obtain a permit to develop property in compliance with the ESA and you're liable to hear something like, "You'd better sit down. This will take a while."

That's certainly the truth. The process to secure an ITP is at best long and arduous. The worst-case scenario would intimidate the toughest, most persistent among us.

In the context of the ESA, a "take" is causing harm to a threatened or endangered species, either directly or indirectly. An ITP is required if a development project may result in a take. Without an ITP, landowners who "take" a listed species are subject to judicial action from federal agencies and private citizens alike.

The USFWS and the NMFS enforce the ESA for land and marine species, respectively. In this article, "services" is used to refer to both organizations. Landowners should contact the appropriate service before beginning development to determine whether an ITP is necessary.

### **Habitat Conservation Plan Development**

An ITP application must be accompanied by an HCP, which ensures that any incidental take is minimized and that the effects of the take are mitigated. Developing an HCP typically takes from eight to 24 months.

After initial, informal consultations between the landowner and one of the services, the landowner generally assembles a team of experts to draft the HCP. Although the ESA does not mandate the use of experts, enlisting a team of experienced consultants likely will save both time and money, especially for complex developments. In addition, the services and the public may more readily accept plans developed by experts.

Small-scale projects, such as building a home, barn or addition to an existing building, usually do not require a team.

### **Drafting the HCP**

An HCP drafting team usually includes a project manager, scientists, attorneys and communications specialists. The project manager oversees the development plan, identifying activities required for a successful project. The scientists

estimate the project's potential impacts on listed species by surveying the property and evaluating field data. Attorneys ensure project compliance with the ESA and the services' regulations. Communications specialists describe the various elements of the project and HCP to both the services and the public.

Because of vast differences in biological features and habitat requirements among species, landowners must adapt the composition of their teams to conform to their specific projects. For example, cave-dwelling insects differ remarkably from flying raptors. Therefore, a team charged with writing an HCP for the former would require different scientific expertise than one writing a plan for raptors.

The team begins by pinpointing the HCP's objectives and establishing strategies to accomplish them. A time line for drafting the HCP and securing the ITP is established.

The HCP must clearly describe the proposed development activities and

to ensure compliance with the plan. The magnitude of required mitigation is based on analyses of the biological and ecological data collected in the field. Consequently, these biological data and the credentials of the experts who collect them often become the focus of the negotiations.

The type of information and number of experts needed to accurately assess the amount of required mitigation depends on the complexity of the development and the species involved. Landowners can generally satisfy either service's requirements for biological data by employing a professional consulting biologist with expertise in the ESA and the protocols established for surveying the subject species. Biologists with Wildlife Society certification (<http://www.wildlife.org/professional/index.cfm>) lend credibility to data used because they have met the society's requirements, including coursework, and have five years of full-time professional experience. In addition, they must have



**PUBLIC HABITAT**  
*conservation plans such as the Balcones Canyonlands Conservation Plan in Travis County offer developers an alternative to the complicated incidental take permit application process.*

identify the potential impacts on listed species. Because the services and interested members of the public, including environmental organizations, will carefully review the HCP, team biologists must provide a sound scientific basis for the plan.

Team members then negotiate with the appropriate service in establishing the extent of the foreseen take, what steps will be required to mitigate the take and what mechanisms will be put in place

references and are subject to review by a certification review board.

### **Implementation Agreement**

One step in the HCP creation process requires an implementation agreement (IA) to be executed between the landowner and the appropriate service. The agreement legally obligates both parties to fulfill the terms of the plan. When the HCP requires it, the IA includes a monitoring program to evaluate the impact of



**PECK'S CAVE AMPHIPOD** (below), an endangered aquatic crustacean, can be found in some underground caves in the Edwards Aquifer. The eyeless, unpigmented, subterranean species is one of six karst invertebrates covered by the Balcones Canyonlands Conservation Plan.



HCP provisions on listed and candidate species over the life of the plan.

### National Environmental Policy Act

The HCP must comply with the National Environmental Policy Act (NEPA) and any state environmental policy act (SEPA) provisions that apply. Currently, Texas has no SEPA.

NEPA's scope goes beyond the ESA, requiring consideration of the impact of all federal agency actions on natural resources, including water quality and air quality. Each federal agency must consult with the appropriate service to ensure NEPA compliance when they take actions that could affect the environment.

Because the services are themselves federal agencies, the NEPA compliance consultation step in the HCP process amounts to the services consulting with themselves. However, the consultation should not be taken lightly. It can be both costly and time consuming.

The NEPA consultation results in one of the following actions:

- the HCP is excluded from further NEPA review,
- a formal environmental assessment (EA) is required or
- an environmental impact study (EIS) is required. NEPA only requires an EIS when the proposed project involves a major federal action that significantly affects the quality of the human environment.

The team conducting the NEPA consultation determines which action is taken on a case-by-case basis. Land uses that clearly do not significantly affect the environment individually or cumulatively are excluded from further NEPA review. EAs are required in two circumstances: when a project does not qualify for a categorical exclusion but does not require an EIS or when significant effects are foreseen but do not clearly indicate the need for an EIS. The results of the EA prompt a decision either to require an EIS or issue a "finding of no significant impact."

### Permitting Phase

The permitting phase, which can take ten to 12 months, begins after the landowner has provided drafts of the HCP, IA and NEPA documents to one of the appropriate services for formal review and public comment. During this phase,

the landowner's team of experts negotiates the terms of the IA and the HCP with the service's regional counsel and agency biologists.

Once informal agreement is reached regarding the content of the HCP, the counsel and the biologists conduct a formal review of the biological impact of the plan. Then they prepare an opinion statement that evaluates the HCP's adequacy. This opinion may require stricter protective measures than those prescribed by the HCP draft. The landowner may be required to add these measures before the HCP is approved.

Meanwhile, the HCP draft is released for public comment. The landowner must review all comments and respond to the issues raised. New issues arising from the formal review of biological impact and public comments frequently necessitate further negotiations.

### Implementation Phase

Approval of the HCP, execution of the IA and issuance of the ITP initiate the implementation phase. The landowner, as the permit holder, is responsible for implementing the HCP and ensuring that the terms of the HCP are not breached. Implementation includes specified monitoring activities to verify compliance, including third-party inspections and

#### Abundance of Abbreviations

BCCP	Balcones Canyonlands Conservation Plan
EA	environmental assessment
EIS	environmental impact study
ESA	Endangered Species Act
HCP	habitat conservation plan
IA	implementation agreement
ITP	incidental take permit
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
SEPA	State Environmental Policy Act
USFWS	U.S. Fish and Wildlife Service



any internal compliance mechanisms delineated in the HCP and IA documents.

Monitoring mechanisms may include inspections of the development to ensure that limits on building types, extent of construction and amount of habitat acreage consumed each year are not exceeded. Landowners typically employ third-party consultants to conduct these inspections.

HCPs frequently require landowners to “contribute” payments to the National Fish and Wildlife Fund to mitigate the effects of habitat destruction. This, too, would be monitored. These monitoring activities continue for the duration of the permit.

HCPs can last as few as five years or as many as 50. The typical HCP is in effect for 30 years. Once an HCP expires, the agreement is either renewed or dissolved. Generally, the USFWS expects species in the HCP area to recover, making HCP renewal unnecessary.

Certain contingencies may cause the services to require amendments to existing IAs, ITPs or HCPs. When a species not previously covered by an ITP becomes listed within the HCP area after implementation, or if a landowner wishes to add land or seek coverage for previously nonpermitted activities, amendments to the HCP would be required.

Property owners can avoid the possibility of further amendments by incorporating “no surprises” assurances into their HCP. “No surprises” assurances amount to regulatory guarantees that no additional land use restrictions or financial compensation will be required. These assurances apply only to species already covered by an ITP and exempt a landowner from more extensive mitigation requirements even in light of new research. “No surprises” assurances are not automatic — they must be negotiated during the permitting phase.

A landowner may face criminal prosecution if an HCP is breached. However, because the HCP process is so complicated and lengthy,

the services prefer to preserve existing HCPs and usually try to work with landowners to resolve problems.

### Defending the HCP

Because the ESA allows private citizens to sue to ensure ESA enforcement, landowners must be prepared to defend the HCP and ITP. This underscores the need for a plan based on sound scientific principles. It is unlikely that a court would overturn a scientifically credible HCP, but a lawsuit could further complicate and delay the process.

### Public HCPs

In some areas, landowners may participate in a public HCP held by a regional authority instead of pursuing an individual ITP. In Texas, as previously noted, the City of Austin and Travis County have cooperated with USFWS to establish an HCP covering the habitat of the golden-cheeked warbler, black-capped vireo and six karst invertebrates in western Travis County. The BCCP holds a 30-year HCP.

To participate, landowners must sign a contract with the Balcones Canyonlands Coordinating Committee. Usually, clearing for construction can begin when the landowner receives the participation certificate. However, land containing golden-cheeked warbler and black-

capped vireo habitat cannot be disturbed between March 1 and August 31.

Fees for BCCP participation vary by species and land use. Landowners are told the cost for participation within 15 working days of submitting an application. They must pay fees for all of the acreage in the tract if it lies within the boundaries of the preserve, even if only part of the tract contains habitat. By contrast, under an individual ITP, payments would normally be for the actual number of acres of habitat on the tract.

The publicly held BCCP/ITP offers a timesaving alternative to the individual ITP process. However, mitigation costs may be higher. When time is not a factor, landowners may opt for the lengthier individual permit process. However, that option applies only to parts of western Travis County.

Landowners planning development that may threaten endangered species and their habitat face a long and daunting process to ensure compliance with the ESA. The sooner they begin the process, the better.

For more information on incidental takes and HCPs, see the USFWS publication “Habitat Conservation Plans” at [http://endangered.fws.gov/HCP/HCP\\_Incidental\\_Take.pdf](http://endangered.fws.gov/HCP/HCP_Incidental_Take.pdf); and the Balcones Canyonlands Conservation Plan website <http://www.co.travis.tx.us/tnr/bccp/default.asp>.



**BLACK-CAPPED VIREOS**, a Texas endangered species, build cup-shaped nests low to the ground in shrubs such as shin oak or sumac. The birds return to the same territory to nest throughout their lives.

## Proactive Plan for Landowners

Fear of violating the ESA and frustration with the complicated process to secure an ITP often drive landowners in one of two directions. Some wave a white flag and invite the USFWS to scour their land for signs of habitat. Others resort to a “shoot, shovel and shut up” strategy, hoping to escape penalties by eradicating threatened or endangered species habitat.

Before opting for either of these extremes, landowners should consider taking proactive steps to determine their level of exposure to penalties.

### Perform Self-Assessment

So how do landowners know if conditions on their properties necessitate an incidental take permit and habitat conservation plan? Inviting the USFWS to inspect the land is one way to find out, but the lengthy process may be unnecessary. Instead, landowners can perform a self-assessment of conditions on the property.

Self-assessment consists of classifying areas within a property based on whether they contain habitat for a threatened or endangered species, whether the habitat is occupied and how much the proposed land use will disturb the habitat. Once the landowner has identified key aspects of the property, a reasonable ESA compliance strategy becomes clearer.

The self-assessment should answer the following questions:

- Are listed species in the area?
- What constitutes habitat for any listed species?
- Does the property contain habitat for any listed species?
- If yes, is the habitat occupied?
- Do current activities disturb the habitat?
- Are proposed activities likely to disturb the habitat?

Landowners face possible penalties under Section 9 of the ESA when property contains habitat of a listed species (for a discussion of penalties, see “Endangered Species Act: What Landowners Should

Know,” *Tierra Grande*, October 2002, <http://recenter.tamu.edu/pdf/1587.pdf>). If the habitat is occupied, disturbing it constitutes a “take” under the ESA. Land that contains no habitat suitable for ESA-listed species is not subject to penalties. Owners can safely presume that land use activities may be undertaken without risk.

If the land contains habitat, but the habitat is unoccupied, disturbance or destruction of the habitat will not incur a penalty. But the landowner must prove to the satisfaction of the USFWS that the habitat is unoccupied.

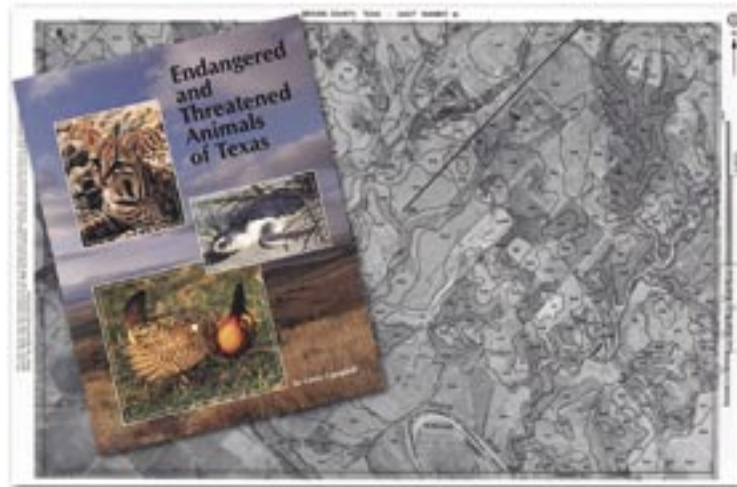
Presence of suitable, occupied habitat increases the likelihood of encountering ESA restrictions. Land uses that do not alter or disturb habitat do not result in a “take” of a listed species, and therefore represent no risk of ESA penalties.

Land uses that alter or disturb habitat — building or development activity, for example — probably call for consultation with the USFWS or the Texas Parks and

landowner’s ESA “bible.”

The book includes all species listed in Texas along with detailed, illustrated descriptions of habitat requirements, breeding and feeding behavior and approved management practices. Using this guide, landowners can inspect the property for threatened or endangered species habitat.

For example, Bastrop County is home to the Houston toad, an endangered species. Landowners wanting to build homes or construct improvements in that area can learn from *Endangered and Threatened Animals of Texas* that the toad prefers “large areas of predominantly sandy soils greater than 40 inches deep. . . .” Landowners can then study Bastrop County soil maps to locate those soil types. Information on local soil surveys is available through the Natural Resources Conservation Service. To locate the nearest office, go to [http://offices.usda.gov/scripts/ndCGI.exe/oip\\_public/USA\\_map](http://offices.usda.gov/scripts/ndCGI.exe/oip_public/USA_map).



### DO SOME HOMEWORK.

Resources such as soil maps and a guide to Texas endangered and threatened species help landowners determine whether they are at risk for ESA penalties.

Wildlife Department (TPWD). Ultimately, such land may require an ITP. However, landowners should confine the consultation to the specific areas containing habitat rather than opening the entire property to inspection.

### Landowner’s ESA ‘Bible’

The first step in evaluating the risk of penalties involves researching threatened and endangered species to identify those that may inhabit the area. *Endangered and Threatened Animals of Texas* (Texas Parks and Wildlife Press, 1996; ordering information is at <http://www.tpwd.state.tx.us/news/press/index.htm>) is widely considered the

If the land in question and surrounding properties do not contain the preferred soils, the property probably contains no toad habitat. Searching for particular types of vegetation and wetlands may further reduce the probability. If those soil types do exist on the property along with certain vegetation and wetlands, the risk of ESA penalties is high.

Golden-cheeked warblers prefer moist, steep hillsides like canyon walls with mature Ashe juniper mixed with hardwoods. Maintaining the canopy cover of trees is critical to preserving golden-cheeked warbler habitat. Because clearing a building site in such a location would destroy a portion of the canopy,

such activity would most likely constitute a take under ESA.

*Endangered and Threatened Animals of Texas* spells out management guidelines approved by the regional director of the USFWS that allow landowners to avoid the permitting process. This approval explicitly excuses landowners who follow the prescribed management guidelines from obtaining an ITP.

For the Houston toad, these guidelines appear to preclude most if not all building activity. Any plan that fails to conform to the guidelines puts the property at high risk of incurring ESA penalties. A prudent owner should therefore consult with a professional. Even then, plans to build would likely require an ITP.

Some land-use activities may improve an endangered species' habitat. The black-capped vireo prefers a mixture of grasslands and shrubs. Studies have shown that excessive browsing by an overabundant deer population can destroy the kind of brush the birds prefer. A landowner with vireo habitat could initiate an intensive hunting operation to control deer populations without running afoul of the ESA. A well-designed game management plan that did not destroy habitat probably would enhance vireo recovery by limiting destruction of brush.

## **Commission Versus Omission**

Activities that result in a take of a species are called acts of commission. However, another option for landowners may be doing nothing — an act of omission. Acts of commission result in USFWS punitive action; acts of omission do not.

For example, East Texas is home to the red-cockaded woodpecker. Landowners harvesting timber in this area would violate the ESA if nesting red-cockaded woodpeckers occupied the stand of timber being cut.

However, red-cockaded woodpeckers prefer forest with little or no understory — trees and shrubs that grow between the forest canopy and the ground cover. A landowner could allow the understory to grow (an act of omission) until the woodpeckers vacated the area, at which time the landowner could harvest timber without violating the ESA. This act of omission would not constitute a “take” under the law. By doing nothing, the landowner lets Mother Nature resolve the ESA habitat issue.

## **Expert Consultation**

When self-assessment prompts landowners to consult an expert, choosing a qualified consultant can be difficult. TPWD biologists are an often-overlooked resource

for this type of inspection. They can provide the landowner with expert assessments of the extent of potential habitat on a property. There is no fee for consultation with the TPWD and TPWD biologists are bound by law to maintain confidentiality.

The disadvantage of using TPWD biologists is that the agency does not have the manpower to serve all the landowners requesting consultations. A wait is usually necessary.

Depending on the results of the TPWD inspection, it may be necessary for the landowner to hire a professional consulting biologist, a potentially costly undertaking. Fees vary widely based on several factors. Often, only a few biologists are qualified to evaluate a particular species. Property size and the intensity of the development goals can further affect the number and type of biologists required. Factors such as these obviously affect costs.

Congress authorized the ITP process to allow human activities to continue while affording protection to endangered creatures. Landowners should take care to identify habitat and endangered species on their properties to ensure compliance with ESA. A proactive stance allows landowners to comply with the ESA and conduct land-use activities with minimum interference.



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