

# Endangered Species Act: A Landowner's Guide<sup>1</sup>

## **Endangered Species Act (ESA) Basic Provisions**

The U.S. Fish and Wildlife Service (FWS) of the Department of the Interior administers the ESA for land-based species. 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 the 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 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."

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. Planned activities that will result in a take, such as land development, generally require a permit from the FWS. Landowners and land buyers must be aware of the consequences of violating the take provisions of the ESA.

## **Incidental Take Permit**

One mechanism created by the FWS to allow private landowners to comply with the ESA while making profitable use of their property is the incidental take permit (ITP). In some areas, landowners may participate in a public Habitat Conservation Plan (HCP) held by a regional authority instead of pursuing an individual ITP. This alternative is available to landowners in Bastrop County who are undertaking activities within the Lost Pines Habitat Conservation Plan (LPHCP) area because the county is the holder of an ITP. Without an ITP, landowners who "take" a listed species are subject to judicial action from federal agencies and private citizens alike.

Landowners face possible penalties under Section 9 of the ESA when property contains habitat of a listed species. *Endangered and Threatened Animals of Texas* (<http://www.tpwd.state.tx.us/huntwild/wild/species/endang/index.phtml>) spells out management guidelines approved by the regional director of the FWS that allows 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.**

## **Proactive Plan for Landowners**

Landowners should consider taking proactive steps to determine their level of exposure to penalties by performing a self-assessment of conditions on their property. 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?

## **Lost Pines Habitat Conservation Plan**

Contact Bastrop County's Lost Pines Habitat Conservation Plan Administrator at 512-332-7284 for more information about the alternatives available to landowners for complying with the ESA.

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<sup>1</sup> Excerpts from *Endangered Species Act: A Landowner's Guide* reproduced with permission from the Real Estate Center at Texas A&M University. Technical Report 1648, November 2003, Charles E. Gilliland and Michael Mays. The complete Technical Report may be found at <http://recenter.tamu.edu/pdf/1648.pdf>

## About the Houston Toad

Houston toads are found in pine and/or oak woodlands underlain by pockets of deep sandy soils, with temporary pools of water available for breeding. This habitat type occurs within narrow bands of geologic formations in south central Texas. Small, isolated Houston toad populations have been found scattered across these formations in remnant woodlands.

Houston toads are generally brown and speckled, but individual coloration can vary considerably, with some appearing to be light brown and others almost black. They also may have a slightly reddish, yellowish or greyish hue. Their legs have darker bands across them, and there are two dark bands extending from each eye down to the mouth. A variable white stripe usually extends down the middle of the back, but can be absent, and there are irregular white streaks along the sides of the toad's body. Their undersides are generally white with variable amounts of black speckling. In males the throat is black. Adult Houston toads are medium-sized (2 to 3.5 inches) with females larger and bulkier than males. As with most toads, they are stout-bodied animals with short legs and rough warty skin. They move by making short hops.



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The Houston toad is a very secretive species and is seldom seen, except on warm, humid evenings during its breeding season (January-June, with a peak in February and March), when males call to attract females. A breeding pond with calling males is known as a "chorus." The chorus heralds the coming of spring. Echoing through the forest, the high clear trills sound much like the tinkling of small bells. Males vocalize by distending the vocal sac. When the sac is distended, the skin of the throat appears dark and bluish. Females of this species do not vocalize.

After adult and young toads leave the breeding pond, they forage across the landscape looking for insects and other invertebrates, traveling up to a mile within a 24-hour period. Because their skin is more-or-less permeable to water, toads become dormant to escape harsh weather conditions, such as winter cold (hibernation) and drought (aestivation). They seek protection during this time by burrowing into sand or hiding under rocks, logs, leaf litter, or in abandoned animal burrows. Even though the Houston toad secretes distasteful chemicals, adults and young are known to fall victims to predators as diverse as spiders, snakes, turtles, owls, raccoons, and other frogs.