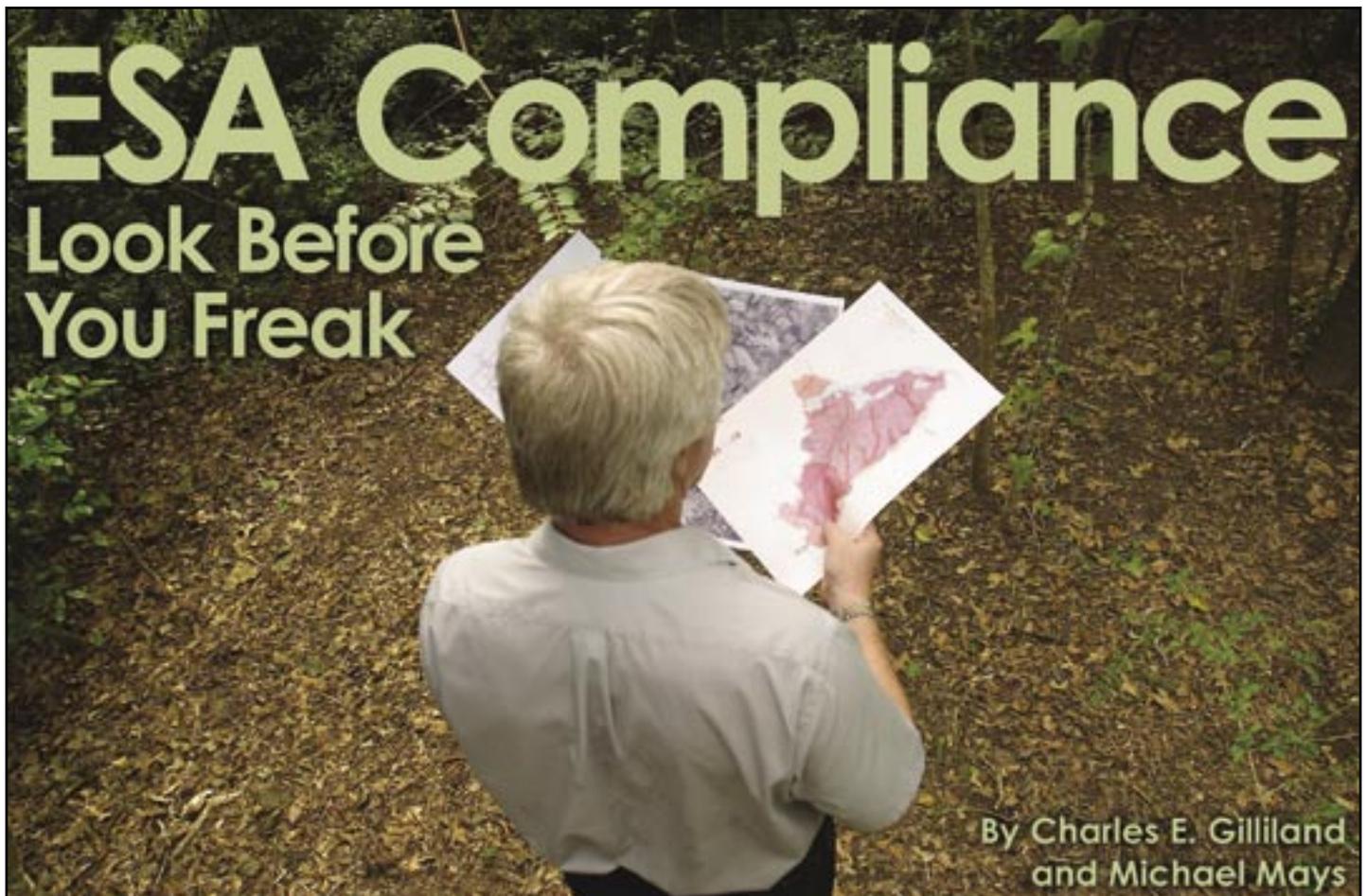


A Reprint from *Tierra Grande*

**F**ear of violating the Endangered Species Act (ESA) and frustration with the complicated process to secure an incidental take permit (ITP) often drive landowners in one of two directions. Some wave a white flag and invite the U.S. Fish and Wildlife Service (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.

**P**resence 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 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 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).

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 narrow 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.

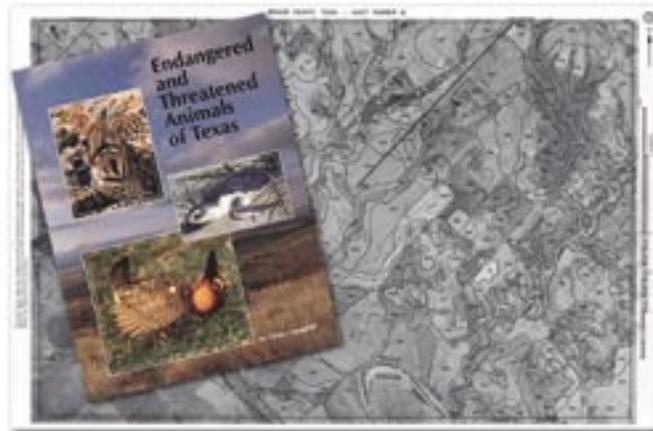
However, red-cockaded woodpeckers prefer forest with little or no understory — trees and shrubs that grow between the forest canopy and the ground cover. A landowner could allow the understory to grow (an act of omission) until the woodpeckers vacated the area, at which time the landowner could harvest 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



**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.

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.

For further information on landowner obligations and strategies, see "Capturing the Elusive Incidental Take Permit," *Tierra Grande*, July 2003, <http://recenter.tamu.edu/pdf/1627.pdf>. ♣

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