

# POTENTIAL IMPACTS ON PRIVATE LANDOWNERS AND LAND USERS FROM THE EASTERN DIAMONDBACK RATTLESNAKE'S LISTING AS A THREATENED SPECIES UNDER THE ENDANGERED SPECIES ACT

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## INTRODUCTION

On May 10, 2012, the U.S. Fish and Wildlife Service (FWS) published notice in the Federal Register that it is considering a petition to list the Eastern Diamondback Rattlesnake as “threatened” under the Endangered Species Act (ESA or the Act).<sup>2</sup> FWS is currently soliciting comments on this proposal. Any such comments are due to FWS no later than July 9, 2012.<sup>3</sup>

The Eastern Diamondback is found throughout the Southeast, to include certain counties in southwestern Alabama, and if the FWS lists the species as threatened, certain activities by private landowners and land users (i.e., timber operations) in Alabama may become subject to federal regulation.<sup>4</sup>

The principal provision that impacts private landowners is found in the ESA's section 9, which prohibits certain types of interference and harm to listed species. Section 7 of the Act also imposes a requirement on federal agencies to ensure that its activities do not jeopardize a protected species or its habitat. Section 7 indirectly affects private landowners whose activities

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<sup>2</sup> 77 Fed. Reg. 27,403 (May 10, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> The FWS treats “threatened” and “endangered” species virtually identically. 50 C.F.R. 17.31(a) (2011). The only significant difference is the FWS's discretionary authority to promulgate special rules for threatened species, discussed briefly below. 16 U.S.C. § 1533(d); 50 C.F.R. 17.31(c); *see, e.g.*, 50 C.F.R. 17.40–17.48.

depend on federal permitting or funding. The basics of these two sections and their likely application if the Eastern Diamondback is listed are explained in turn below.

#### **I. SECTION 9: THE “TAKING” PROHIBITION AS A MEANS TO REGULATE PRIVATE LAND USE**

Section 9 prohibits the “taking” of a protected species.<sup>5</sup> The Act defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” and in its regulations, the FWS has defined “harm” broadly to include “an act which actually kills or injures wildlife.”<sup>6</sup> “Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>7</sup> The FWS has emphasized that actual, as opposed to potential, death or injury is required to constitute a taking, though the normal legal principles of foreseeability and causation apply.<sup>8</sup> Where the connection between habitat modification and harm is close enough, section 9’s prohibitions will restrict land use even without direct evidence of death or injury.<sup>9</sup> But for more attenuated connections between habitat modification and harm, the distinction between activities that cause actual, as opposed to potential, harm depends on the degree and type of modification and the nexus between the habitat modification and the protected species’ essential behavior patterns.<sup>10</sup> The result of the FWS’s interpretation of section 9 to include habitat modification has been to move the ESA from a statute that prohibits direct physical

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<sup>5</sup> 16 U.S.C. § 1538(a)(1)(B) (2011); *cf.* 16 U.S.C. § 1540(b)(1) (allowing for criminal prosecution for knowing violation of the ESA or its implementing regulations).

<sup>6</sup> 16 U.S.C. § 1532(19); 50 C.F.R. 17.3.

<sup>7</sup> 50 C.F.R. 17.3; *see also* *Babbitt v. Sweet Home Chapter of Communities for Ore.*, 515 U.S. 687 (1995) (upholding the FWS’s interpretation of “harm” in the ESA to include habitat modification).

<sup>8</sup> *See* 46 Fed. Reg. 54,748 (Nov. 4, 1981); *Sweet Home*, 515 U.S. at 700 n.13.

<sup>9</sup> *See Sweet Home*, 515 U.S. at 699–700.

<sup>10</sup> For a discussion of the “actual harm” requirement in the FWS regulations, see Steven G. Davidson, *The Aftermath of Sweet Home Chapter: Modification of Wildlife Habitat as a Prohibited Taking in Violation of the Endangered Species Act*, 27 WM. & MARY ENVTL. L. & POL’Y REV. 541 (2003).

harm—for example, from hunting or trapping—to one that regulates private land use that causes indirect, unintended harm.<sup>11</sup>

The FWS is not required to compensate landowners for a decrease in land values from section 9's limitations. The Fifth Amendment to the U.S. Constitution more generally requires the government to compensate landowners for a "regulatory taking"—a de facto exercise of eminent domain power in the form of overly-restricted use of private property—however, where the government does not physically occupy or take title to private land, the U.S. Supreme Court has required compensation under the Fifth Amendment only where regulation diminishes "all economic value" of the impacted property or, in the case of less burdensome results, where the restriction satisfies a fact-specific balancing test that evaluates the nature of the regulation, the economic impact on the property, and investment-backed expectations in the property.<sup>12</sup> Even under section 9's potentially onerous restrictions, the standard for a regulatory taking is highly fact dependent and is unlikely to be satisfied in most cases.<sup>13</sup> Section 7's broad scope combined with the lack of a reliable compensation mechanism can lead to substantially diminished private property values with no corresponding benefit to the landowner other than the diffuse public good of conserving rare species. In effect, therefore, the ESA has the potential to impose the concentrated costs of conservation on a relatively small number of landowners on whose property the species resides.

The Act does provide a few outlets to mitigate the impact section 9 can have on private landowners. First, the FWS may exercise its authority under section 5 of the ESA to purchase

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<sup>11</sup> *Sweet Home*, 515 U.S. at 701.

<sup>12</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); see generally Robert Meltz, *The Endangered Species Act (ESA) and Claims of Property Rights "Takings"*, Congressional Research Service, paper 7-5700 (2011).

<sup>13</sup> See Meltz, *supra* note 12, at 9–14 (listing a number of unsuccessful claims involving constitutional takings based on ESA restrictions on private property).

listed species' habitat for conservation.<sup>14</sup> This section 5 power is dependent on Congressional appropriations and is not routinely exercised. Second, the FWS can issue Incidental Take Permits (ITPs) for activities that only indirectly impact protected species.<sup>15</sup> ITPs are explained below. Third, the FWS has adopted policies to avoid penalizing landowners who manage their land in a way that makes it more attractive for protected species. These policies are also explained below. Fourth, for threatened, but not endangered, species, the FWS has the authority to issue special rules that replace section 9's general taking prohibition with rules that "provide for the conservation of" the species. The special management needs of a particular species may prompt the FWS to issue tailored rules, but this ability is discretionary, and if the FWS chooses not to issue special rules, the default rules apply to endangered and threatened species alike.<sup>16</sup> Finally, although not applicable to land management, section 11 allows landowners to act in self defense against protected species.<sup>17</sup> Of these tools, ITPs and the FWS's policies for beneficial land uses bear examination in more detail and are discussed in turn below.

Section 10 of the ESA authorizes the FWS to issue ITPs for activities that result in takings that are "incidental to, and not the purpose of, carrying out an otherwise lawful activity."<sup>18</sup> To apply for an ITP, landowners must submit to the FWS a Habitat Conservation Plan (HCP) that describes the impact on the listed species, the landowner's plan to minimize and mitigate the adverse impacts on the listed species, and an evaluation of alternative courses of action.<sup>19</sup> If the FWS is satisfied that the HCP will be properly implemented and will sufficiently minimize and mitigate the impact on the species, and that any takings will not appreciably reduce

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<sup>14</sup> 16 U.S.C. § 1534.

<sup>15</sup> 16 U.S.C. § 1539(a)(1)(B).

<sup>16</sup> 16 U.S.C. § 1533(d); 50 C.F.R. 17.31; *see, e.g.*, 50 C.F.R. 17.40–17.48.

<sup>17</sup> 16 U.S.C. §§ 1540(a)(3), (b)(3); 50 C.F.R. 17.21(c)(2). The FWS has given no indication that the self-defense exception may be applied to proactive efforts to remove a dangerous species from private property.

<sup>18</sup> 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. 17.22.

<sup>19</sup> 16 U.S.C. § 1539(a)(2)(A).

the likelihood of the species' survival or recovery, it must issue the ITP.<sup>20</sup> The FWS can revoke the permit if the landowner does not comply with the terms of the HCP; however, if conditions change or the terms of the HCP turn out to be insufficient to adequately protect the listed species, the FWS will not require the landowner to revise the HCP—the terms of the HCP are fixed upon the ITP's approval.<sup>21</sup>

The FWS has also adopted a “Safe Harbors” policy for landowners who manage their land in a way that makes it more attractive to listed species.<sup>22</sup> Under the policy, if a landowner undertakes an activity that provides a “net conservation benefit”—for example, through land management that creates or improves habitat—but subsequently uses his land in a way that removes that habitat or decreases the species population, it will not be considered a taking under section 9 unless habitat or population depreciates to a point below the baseline conditions that existed before the landowner's improvements.<sup>23</sup> In other words, the FWS will not apply section 9 in a way that imposes a penalty on land uses that make private property more attractive for protected species.

## **II. SECTION 7: RESTRICTIONS ON PRIVATE LAND USES THAT DEPEND ON FEDERAL ACTION**

Section 7 of the Act requires all federal agencies, not just the FWS, to ensure that the agency's actions, including private actions the agency permits or funds, do not jeopardize a protected species or adversely modify its “critical habitat.”<sup>24</sup> When the FWS lists a species as

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<sup>20</sup> 16 U.S.C. § 1539(a)(2)(B).

<sup>21</sup> 16 U.S.C. § 1539(a)(2)(C); 50 C.F.R. 17.22(b)(5), 17.32(b)(5). This rule is commonly called the “No Surprises” policy.

<sup>22</sup> 50 C.F.R. 17.22(c), 17.32(c).

<sup>23</sup> 50 C.F.R. 17.22(c), 17.32(c).

<sup>24</sup> 16 U.S.C. § 1536(a)(2). An example of such a permit is a Clean Water Act section 404 “dredge and fill” permit, often issued for the filling of wetlands.

threatened or endangered, it must also designate “critical habitat” for the species.<sup>25</sup> Critical habitat is defined by the ESA as areas that are essential to a listed species’ conservation, regardless of whether the species actually resides in that area.<sup>26</sup> The FWS is allowed to consider economic factors when designating critical habitat, and the FWS may grant specific area exclusions if the benefits of the exclusion outweigh the cost, unless the exclusion would result in the species’ extinction.<sup>27</sup>

To evaluate the impact a federal action will have on a species or its critical habitat, federal agencies are required to consult with the FWS when undertaking, funding, or permitting activities that may impact a listed species.<sup>28</sup> Upon review, if the FWS concludes that the species will be jeopardized or its critical habitat will be adversely modified, it must provide reasonable and prudent alternatives that do not violate section 7’s mandate.<sup>29</sup> In that case, the agency proposing the action must either implement one of the FWS alternatives or seek an exemption from the Endangered Species Committee.<sup>30</sup> The Committee can only grant an exemption for an action that has no reasonable or prudent alternatives, is of significant regional or national importance, and that produces benefits clearly in excess of its impact to protected species.<sup>31</sup>

Once the implementing agency has consulted with the FWS and identified a course of action that does not run afoul of section 7—either the originally proposed action or one of the FWS alternatives—the FWS will issue an incidental take statement (ITS) that exempts public or

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<sup>25</sup> 16 U.S.C. § 1533(a)(3)(A); 50 C.F.R. 17.

<sup>26</sup> 16 U.S.C. § 1532(5)(A).

<sup>27</sup> 16 U.S.C. § 1533(b)(2).

<sup>28</sup> 16 U.S.C. §§ 1536(a)(2), (b); 50 C.F.R. 402.10(a). The consultation process is described in detail in 50 C.F.R. 402.01–402.48.

<sup>29</sup> 16 U.S.C. § 1536(d); 50 C.F.R. 402.14(h)(3).

<sup>30</sup> 16 U.S.C. §§ 1536(e), (h).

<sup>31</sup> 16 U.S.C. § 1536(h)(1)(A).

private actors operating within the scope of the approved activity, along with any mitigation requirements included in the ITS, from section 9's general takings prohibition.<sup>32</sup>

While section 7 does not directly apply to private landowners, it has the potential to impact any private activity that the federal government permits or funds. The FWS evaluates federally permitted or funded private activities under section 7 the same as if the agency itself were directly performing the action. Importantly, critical habitat designation only affects private activities that involve a federal agency; the FWS's section 9 "harm" definition is limited to habitat modification that actually injures or kills a listed species, so private landowners are only affected by the critical habitat designation if a federal action brings them within the purview of section 7.<sup>33</sup>

### **III. FORESEEABLE IMPACT OF THE EASTERN DIAMONDBACK'S LISTING ON THE FORESTRY INDUSTRY IN THE SOUTHEAST**

The Eastern Diamondback's range historically encompassed the Southeastern United States' Coastal Plain, from North Carolina to Florida and as far west as Mississippi and Louisiana.<sup>34</sup> Its principal native habitat is longleaf pine savannas, which were also historically distributed throughout the Coastal Plain.<sup>35</sup> Today, the old-growth longleaf pine savannas are mostly gone, and the Eastern Diamondback's modern habitat includes second-growth longleaf pine and other forests and grasslands that mimic its native habitat.<sup>36</sup> Large populations of the Eastern Diamondback remain in northern Florida and southern Georgia, but the species' numbers

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<sup>32</sup> 16 U.S.C. § 1536(b)(4); 50 C.F.R. 402.14(i). Apart from the federal-private distinction, sections 7 and 9 operate independently, though with some incidental overlap: section 7's focus is on the species as a whole, while section 9 protects individuals of a protected species. *See Sweet Home*, 515 U.S. at 703.

<sup>33</sup> *See supra* note 8 and accompanying text.

<sup>34</sup> 77 Fed. Reg. at 27,404.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 27,404-05.

in Louisiana, North Carolina, and South Carolina have dwindled.<sup>37</sup> In Alabama, the Eastern Diamondback is most commonly found the southwestern part of the state where longleaf pine and wiregrass originally grew—primarily Washington and Mobile Counties, with recorded sightings in Bon Secour National Wildlife Refuge in Baldwin County.<sup>38</sup> If the Eastern Diamondback is listed, common land-management activities undertaken by the forestry industry may become subject to regulation under the ESA. Some of the policies designed to mitigate the ESA’s impact on private landowners will be available to landowners and the FWS; the foreseeable application of these policies is discussed briefly below.

If listed, section 9 will prohibit intentional takings of the Eastern Diamondback. Because the FWS is considering listing the Eastern Diamondback as threatened instead of endangered, the FWS has the option under section 4(d) to issue tailored rules to accommodate the special management needs presented by listing a poisonous snake; these rules would completely replace section 9’s generalized taking prohibition. The FWS has issued special rules for dangerous species in the past.<sup>39</sup> In addition to issuing a wholesale list of new rules, section 11’s self-defense provision allows individuals to kill an Eastern Diamondback to prevent bodily harm to a person, but the FWS has given no indication of how far the self-defense allowance stretches, particularly whether it includes proactive removal of a dangerous species.

Assuming for the sake of analysis that the ordinary section 9 rules remain in place, if Eastern Diamondbacks are present on private property managed for forestry purposes, section 9’s taking provision will prevent habitat modification that will foreseeably injure or kill Eastern Diamondbacks. The nexus between habitat modification and actual harm required to

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<sup>37</sup> *Id.* at 27,405.

<sup>38</sup> *Id.* at 27,406.

<sup>39</sup> *See, e.g.*, 50 C.F.R. 17.40(b), 17.40(d) (providing special rules for the Grizzly Bear and Gray Wolf).

trigger section 9's protection is fact-dependent, but, if the connection is sufficiently close to restrict forestry management, landowners can likely obtain an ITP from the FWS since any harm done to Eastern Diamondbacks would be incidental to an otherwise legal activity. The costs of obtaining the permit and fulfilling the necessary HCP will again depend on the circumstances of each case.

The FWS's safe harbor policy will likely be the most significant protection from section 9 for the forestry industry, particularly for cyclical tree growth and harvesting or other forest management practices that intermittently create and destroy Eastern Diamondback habitat. Once the species' baseline conditions are established pursuant to a Safe Harbors Agreement with the FWS, landowners need only take care to ensure that forest management practices do not depreciate habitat or populations below baseline conditions.

To the extent that forestry land management depends on federal permitting or funding—for example, from the U.S. Forest Service or U.S. Army Corps of Engineers—landowners will bear some of the added regulatory burden imposed by section 7 on the permitting agency. If the affected area is designated as critical habitat or the private activity would otherwise jeopardize the Eastern Diamondback, private landowners may have to implement an alternative action proposed by the FWS or forego the activity altogether. Once the FWS concludes that the private activity satisfies section 7's requirements, it will issue an ITS that allows the landowner to operate within the approved activity without running afoul of section 9.

## CONCLUSION

If the FWS lists the Eastern Diamondback Rattlesnake as a threatened species under the ESA, private landowners in the South will be required to comply with section 9's taking

prohibition, which would not only prohibit direct, intentional harm to the Eastern Diamondback, but would also regulate land use decisions that affect the Eastern Diamondback's habitat.

Although landowners can mitigate the economic impacts section 9 may impose by obtaining an ITP or entering into a Safe Harbors Agreement with the FWS, there are costs—in terms of both time and effort—associated with such programs. Furthermore, for private activities that depend on federal funding or permits, landowners will have to comply with any restrictions placed on the permitted activity by the FWS's review of other federal agencies. In the end, the costs and obligations associated with compliance with either section 9 or section 7 will require a fact-specific inquiry that will depend on the activity undertaken and its impact on the Eastern Diamondback.