

BB Southeast Endangered Species Update

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Prepared by the Environmental and Natural Resources Section of Balch & Bingham LLP

Birmingham Improves Habitat for Endangered Darters

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The City of Birmingham has completed significant habitat improvements at Roebuck Spring to benefit endangered watercress darters (*Etheostoma nuchale*). The darters live in the Roebuck Spring pool and in portions of the downstream spring run at the City's Hawkins Park in the East Lake area.

Over the last year, the City has worked in close consultation with the U.S. Fish and Wildlife Service (Service) to identify and implement habitat improvements at the park and adjacent golf course. Improvements include the design and installation of a concrete water control structure to provide a stable and consistent water level in the spring pool. Other habitat improvements include establishment of vegetative buffer zones around the pool and spring run, water quality monitoring, and the revision of golf course maintenance protocols.



New Watercress Darter Sign at Roebuck Spring (Stephen Gidiere 2009)

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The Service Initiates Status Review of Eastern Population of Gopher Tortoise

On September 9, 2009, the Service announced that it was initiating a status review of the eastern population of the gopher tortoise in order to determine whether that particular population warrants protection as a threatened species under the Endangered Species Act (ESA). Presently, the western population of the gopher tortoise, which lives in the southeastern Coastal Plain from extreme southeastern Louisiana to the Mobile and Tombigbee Rivers in Alabama, is listed

About us:

The Attorneys in **BALCH & BINGHAM'S Environmental & Natural Resources section** have helped clients navigate the complexities of the Endangered Species Act for decades. The Section has 20 attorneys focused exclusively on environmental law. These attorneys represent clients in all matters involving endangered species, including evaluating listing proposals, assisting in formal and informal consultations, preparing private landowner grant applications, negotiating safe harbor agreements, and defending government enforcement actions.

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as threatened. Now, the Service is assessing the status of the tortoise's eastern population, which is found from the Mobile and Tombigbee Rivers eastward into Florida, through Georgia, and into southeastern South Carolina. Should the tortoise be determined to be threatened, then critical habitat for the tortoise could be proposed as well. The Service's initiation of this status review is the result of a petition filed by several environmentalist groups and a threatened lawsuit.

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Gopher Tortoise
(U.S. Fish and Wildlife Service)

Etowah Aquatic Habitat Conservation Plan Moves Forward

On August 31, 2009, the 60-day public comment period closed for the Etowah Aquatic Habitat Conservation Plan (Etowah HCP) and draft Environmental Aquatic HCP. The Service has announced that it will also be conducting public meetings within the Etowah basin to provide additional opportunities for comments, though the public meeting schedule has not yet been announced. The Service is currently reviewing the comments received during the comment period.

HCPs are developed under the authority of the Endangered Species Act and intended to promote species protection particularly on non-federal lands. The Etowah HCP originated in 2002, when the counties and cities of the Etowah River Basin embarked on a multi-jurisdictional effort to create a HCP to protect three federally-listed threatened and endangered fish species (the Cherokee, Amber and Etowah Darters), while accommodating the continued growth and development of the area, located just north of Atlanta.

While most HCPs are designed to protect one species in a small area, the Etowah HCP covers three species and thirteen local jurisdictions, making it a unique model for HCPs. The purpose of the HCP is to ensure that the HCP policies were sufficiently protective of the fish species while placing no unnecessary burdens on landowners, developers, or local governments.

Now that the comment period has closed, all submitted comments will be considered by the Service and the HCP and Environmental Assessment will be revised as necessary. The Service will then prepare a draft Statement of Finding, which will explain how it made its decisions on what and what not to include in the HCP and Environmental Assessment. The Incidental Take Permit (ITP) will also be drafted at that time.

Once the Service has issued its approval, the responsibility will shift to the local governments who submitted an application for an ITP to determine whether they want to move forward with acceptance of the ITP which includes formal adoption of the HCP. All the provisions of the final HCP, including the policies and ordinances contained in it, must be adopted to receive the ITP.

Feds to List Rocksnails Grown by State “Snail Farm”

The Service is proposing to list as endangered a population of interrupted rocksnails (*Leptoxis foremani*) that was propagated in captivity and reintroduced into the wild by the Alabama Department of Conservation and Natural Resources (ADCNR). *See* 74 Fed. Reg. 31114 (June 29, 2009).

In December of 2003, ADCNR released over 3,000 interrupted rocksnails into a localized area in the Lower Coosa River, about two miles below Jordan Dam, near Wetumpka, Alabama. The snails were propagated in captivity at ADCNR’s Alabama Aquatic Biodiversity Center. ADCNR stocked this population without seeking designation of the population as “experimental” under Section 10(j) of the ESA, which is the usual practice when reintroducing imperiled species, and without soliciting public comments on the reintroduction. Thus, the farmed snails will have the full protection of the ESA if the listing is finalized. The current range of naturally occurring populations of interrupted rocksnails appears restricted to the Oostanaula River in Floyd County, Georgia.

In addition, the Service is proposing to list another snail species, the rough hornsnail (*Pleurocera foremani*), and one mussel species, the Georgia pigtoe (*Pleurobema hanleyianum*). The proposal also designates critical habitat for the three species.

Public comments on the listings were due to the Service by August 28, 2009. Eight public comments were submitted. The Alabama Aquatic Biodiversity Center and ADCNR submitted comments in support of the proposal, and the Mobile District of the Corps stated that it would submit more in-depth comments when the economic analysis is published. In addition, the Southeastern Power Administration and the Southeastern Federal Power Customers, Inc., submitted comments opposing the proposal. To review these comments, go to www.regulations.gov, and enter FWS-R4-ES-2008-0104.

Service Proposes Bald Eagle Incidental Take Permit Program

On September 11, 2009, the Service proposed rules for a new incidental take permit program under the federal Bald and Golden Eagle Protection Act (BGEPA). *See* 74 Fed. Reg. 46836 (Sept. 11, 2009). The bald eagle (*Haliaeetus leucocephalus*) was delisted as a threatened species under the ESA in 2007. This delisting meant that the ESA's incidental take permit program was inapplicable to the bald eagle. However, the bald eagle remained protected under the BGEPA—the BGEPA's implementing regulations prohibit anyone from “taking” bald eagles, which includes “disturbing” the eagles. Thus, the delisting of the bald eagle created a regulatory gap that complicated management of the no-longer-threatened bald eagle.

Accordingly, the Service is finalizing permit regulations to authorize the limited take of bald and golden eagles under the BGEPA, and to establish permit provisions for the intentional take of eagle nests under particular, limited circumstances. The Service indicated that the increasing number of bald eagles could significantly curtail lawful human activities if such permits were not available.

The Service says that it anticipates that permits issued under this regulation will likely authorize takings that occur in the form of disturbance. However, the Service recognizes that in limited circumstances lethal takes may occur where it is the result of lawful activity and not the purpose of such activity. In addition, programmatic takes—takings that are recurring and not in a specific, identifiable timeframe or location—will be authorized only where such takings are unavoidable. The purposeful take of eagles is not authorized, except when it is necessary to avoid an incidental take of eagles under certain situations specified in the Code of Federal Regulations. To manage the population impacts of these new take permits, the service intends to cap take permits of eagles at 5% of estimated annual productivity. The Service is currently drafting implementation guidelines for the rule, which will be released for public notice and comment. The final rule goes into effect on November 10, 2009.

Polar Bear Retains Threatened Status under the ESA

In May of 2009, the U.S. Department of the Interior announced that it will retain a special rule issued by the Bush administration. In May of 2008, the Service listed the polar bear as a threatened species under § 4(d) of the ESA based primarily on the fact that the Service alleges climate change is melting the species' sea ice habitat, leaving bears unable to hunt. Section 4(d) of the ESA allows the Service to develop a special rule specifically tailored to the conservation needs of a threatened species—unless such a special 4(d) rule is issued, the general “take” prohibitions under Section 9 of the ESA will apply. The 4(d) rule implemented for the polar bears limits the application of take prohibitions of the ESA to activities occurring within the habitat range of the polar bear.

The objective and practical impact of this limitation is to exclude activities that emit green house gases (GHG) outside the polar bear's range from the ESA's take prohibition. Essentially, this means that a GHG emitting steel facility in Birmingham, whose emissions arguably contribute to climate change, will not be required to consult with the Service regarding its effects on the polar bear under the ESA. Nonetheless, in 2008 the Center for Biological Diversity, along with the Natural Resource Defense Council and Greenpeace filed a lawsuit, which is still pending, challenging the decision to adopt the rule from the Bush administration leaving the polar bear listed as a threatened species under the ESA.

New Article Examines “Recovery” Successes under the ESA

Balch & Bingham partner Jim Noles recently published an article recounting the Service’s efforts to “de-list” species from the endangered species list. The article offers insight into the de-listing process and examines whether the Service has been successful in achieving the statute’s goal of recovery with respect to de-listed species. The article was published in the Cumberland Law Review, and reprinted by the Michigan State University College of Law’s Animal Legal and Historical Center. It can be accessed at <http://www.animallaw.info/articles/arus39cumbrev387.htm>.

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Birmingham Improves Habitat for Endangered Darters

The City has also installed signs throughout the park to educate park users about the presence of the darter and prohibited activities.

The watercress darter was initially listed by the Service as an endangered species in 1970. The watercress darter is a colorful fish capable of reaching just over two inches in length and thrives in densely vegetated, slow moving spring pools, feeding on insect larvae and crustaceans. The fish is naturally located in only four areas of the Black Warrior River Watershed, all within Jefferson County, Alabama—Seven Springs, Glenn Spring, Thomas Spring, and Roebuck Spring. In 1980, the Service established the Watercress Darter National Wildlife Refuge at the Thomas Spring location. And in 1988, a transplanted population of the watercress darter was established at Tapawingo Springs, which is also located within Jefferson County, Alabama.

Early indications are that the darter population is responding positively to the improvements at Roebuck Spring. Preliminary survey results by biologists under contract with the City indicate the darter population is above historic levels and the population is healthy. The Service recently recognized the positive developments at Roebuck Spring by awarding an Honor Award in May 2009 to its Roebuck Springs Watercress Darter Team, which worked with the City to implement the habitat enhancements.

Balch & Bingham represents the City in its endangered species enhancement and compliance efforts at Roebuck Spring.

The Service Initiates Status Review of Eastern Population of Gopher Tortoise

At the present time, the Service views the primary threat to the eastern population of the gopher tortoise to be loss of its preferred natural pine habitat, either through urbanization or conversion to pine plantations that reputedly provide inadequate habitat due to the ecology of those plantations. The Service further recognized that, “because of the natural life history parameters of the gopher tortoise, including low reproductive rate and delayed age to sexual maturity, the mortality experienced by other threats can be amplified within populations.”

For more information on the ongoing status review, visit The Service’s Jacksonville Ecological Services Field Office’s webpage regarding the status review at http://www.fws.gov/northflorida/GopherTortoise/90-Day-Finding/GT_90-day_finding_FR_notice_as_signed.htm. The Service is accepting comments on the status review until November 9, 2009. Comments may be submitted either by hand delivery, by U.S. Mail, or electronically via www.regulations.gov.

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