

BB Southeast Endangered Species Update

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

New Tax Deduction for Endangered Species Recovery

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A new federal tax code provision provides opportunities to recoup money spent on endangered species protection and recovery activities. On June 18, 2008, the Food, Conservation, and Energy Act of 2008 (“2008 farm bill”) was enacted after both the House and the Senate voted to override a Presidential veto of the bill. The 2008 farm bill contains fifteen titles that govern commodities, conservation, agricultural trade and food, nutrition, farm credit, rural development, research, forestry, energy, horticulture and organic agriculture, livestock, crop insurance and disaster assistance, commodity futures, miscellaneous programs (i.e., disadvantaged farmers and food security), and trade and tax provisions.

One of the tax provisions in the 2008 farm bill allows a deduction for expenditures paid or incurred after December 31, 2008 for endangered species recovery. The 2008 farm

bill amended Section 175 of the Internal Revenue Code—it now provides: “A taxpayer engaged in the business of farming may treat expenditures which are paid or incurred by him during the taxable year . . . for endangered species recovery, as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction.” I.R.C. § 175(a).

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Feds Release Draft Economic Analysis for Proposed Listing of Farmed Rocksnails

Public Hearing Set for March 2

In June of 2009, the U.S. Fish & Wildlife Service (the Service) proposed 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). On February 10, 2010, the Service announced the availability of a draft economic analysis for the proposed designation of critical habitat for these “farmed” species. See 75 Fed. Reg. 6613 (Feb. 10, 2010).

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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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. ADCNR propagated the snails in captivity at its Alabama Aquatic Biodiversity Center in Marion, Alabama. ADCNR stocked this population without seeking designation of the population as “experimental” under Section 10(j) of the ESA, and without soliciting public comments on the reintroduction, which is the usual practice when reintroducing imperiled species. Thus, the farmed snails will have the full protection of the Endangered Species Act (ESA) if the listing is finalized.

Along with the interrupted rocksnail, the Service also proposes to list the rough hornsnail (*Pleurocera foremani*), and the Georgia pigtoe mussel (*Pleurobema hanleyianum*). In total, the Service proposes to designate approximately 160 miles on parts of eight rivers and streams in Alabama, Georgia, and Tennessee, as critical habitat for the mussel and snails. Approximately 63 miles of the proposed area is designated for the interrupted rocksnail. The draft economic analysis was released pursuant to the ESA, which requires the Service to consider the potential economic impact associated with the proposed critical habitat designation. An area may be excluded from critical habitat designation if the benefits of excluding it outweigh the benefits of including it.

Public comments on the proposed listing, critical habitat designation, and draft economic analysis for these three species are due March 12, 2010. The Service will hold a public hearing from 7 to 10 p.m. on Tuesday, March 2, 2010, in Montgomery, Alabama, at Auburn University’s Taylor Center conference room.

Eight public comments were submitted in response to the initial notice of the proposed listing in June. Public comments received include comments from the Alabama Aquatic Biodiversity Center and ADCNR supporting the proposal, comments from the Department of Energy Southeastern Power Administration expressing concern over the proposals effect on its ability to meet customer contractual requirements for power generation and comments from Southeastern Federal Power Customers, Inc. suggesting

that the designation of the critical habitat units is not supported by sound science or sufficient data. The Mobile District of the Corps also submitted comments stating that it would submit more in-depth comments when the economic analysis was published. To review these comments, go to www.regulations.gov, and enter FWS-R4-ES-2008-0104.

Wildlife Agencies Take Action on Climate Change

The Service and the National Marine Fisheries Service (NMFS), which both implement the ESA, have recently indicated the approaches they will take in regard to the effects of global climate change on fish and wildlife. The Service administers the ESA for more than 1,800 threatened and endangered species, including most southeastern species, while the NMFS implements the ESA with respect to sixty-eight ocean-going species and anadromous fish. The NMFS is an agency within the National Oceanic and Atmospheric Administration (NOAA), which is the lead federal agency with responsibility for the study and assessment of climate change.

While the Service has already begun to take climate change considerations into account in regard to listing decisions and other actions under the ESA, the Service has proposed to incorporate climate change into all of its actions and decisions. On September 23, 2009, the Service announced its Climate Change Strategic Plan (Climate Plan), building on Secretarial Order No. 3289 that was issued by the Secretary of the Interior, Ken Salazar, on September 14, 2009. The Service's Climate Plan develops strategies for (1) adaptation to changes in habitat, (2) the mitigation of climate risks, and (3) the engagement of agencies, stakeholders, and the general public. In addition, the Service has requested \$28,750,000 for climate-related activity for its 2011 budget—an increase of 44% from current levels.

The Service, however, has declined to undertake certain actions in regard to climate change when insufficient scientific data exists. For example, in the case of the polar bear, the Service determined that melting sea ice associated with climate change was one of the factors contributing to the polar bear's status as an endangered species. However, the Service announced that it would not attempt to regulate sources of carbon emissions under the ESA because there was insufficient scientific evidence to link a particular source of greenhouse gases to the condition of the polar bear's habitat. In other cases, environmental groups have petitioned the Service to list non-polar species primarily on the basis of climate-related changes to their habitats. The Center for Biological Diversity (CBD) petitioned the Service to list the American pika, a small mammal that lives in the Rocky Mountains, on the theory that rising temperatures were forcing it into higher elevations where habitat was scarce. CBD also urged the Service to list the ashy storm-petrel, a California seabird, due to climate-related factors including rising sea levels and ocean acidification. In both cases, the Service again found that, based on the best scientific data available, a listing decision was not warranted. *See* 75 Fed. Reg. 6438 (Feb. 9, 2010) (pika); 74 Fed. Reg. 41832 (Aug. 19, 2009) (ashy storm-petrel).

On the other hand, a recent action of the NMFS indicates that this agency be more inclined to act on the basis of climate concerns. NMFS responded to another CBD petition, this one urging the listing of eighty-three species of coral. The petition cited factors including ocean warming and acidification, which CBD claims to be attributable to climate change. NMFS found the petition was not supported by sufficient information. However, NMFS did not deny the petition. Rather,

NMFS found the listing petition *may* be warranted and solicited additional scientific data from the public. *See* 75 Fed. Reg. 6616 (Feb. 10, 2010).

Therefore, NMFS could take a different approach than the Service in response to the information it receives regarding the effects of climate change on endangered species. Although NMFS is responsible for only a small fraction of threatened and endangered species, NOAA's climate mission means that NMFS may have a disproportionately large influence on the question of how climate considerations should affect implementation of the ESA.

New Tax Deduction for Endangered Species Recovery

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The deduction is limited to 25% of the gross income derived from the business of farming during the taxable year. I.R.C. § 175(b). In order to be in the "business of farming," a person must "cultivate, operate, or manage a farm for profit, either as an owner or a tenant." *Farmer's Tax Guide*, I.R.S. Publication No. 225, at 28 (2009). On the other hand, a person is not in the "business of farming" if they "cultivate or operate a farm for recreation or pleasure, rather than for profit," and a person is "not farming if [they] are engaged only in forestry or the growing of timber." *Id.*

To qualify for the deduction, conservation expenses for endangered species recovery must be "for the purpose of achieving site-specific management actions recommended in recovery plans approved pursuant to the Endangered Species Act of 1973." I.R.C. § 175(c)(1). Conservation expenses that can be deducted as endangered species recovery expenses include, but are not limited to, the following: (1) "the treatment or moving of earth, including (but not limited to) leveling, grading and terracing, contour furrowing;" (2) "the construction, control, and protection of diversion channels, drainage ditches, earthen dams, watercourses, outlets, and ponds;" (3) "the eradication of brush;" (4) and "the planting of windbreaks." *Id.*

For more information on the tax deduction see Chapter 5 in the *Farmer's Tax Guide*, I.R.S. Publication No. 225, available at <http://www.irs.gov/pub/irs-pdf/p225.pdf>. In addition, recovery plans can be found at http://ecos.fws.gov/tess_public/TESSWebpageRecovery?sort=1.

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