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Improving the Effectiveness of The Endangered Species Act

A Policy Statement approved by Resolution
by the National Association of State Foresters



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Introduction

Quoting the **Endangered Species Act of 1973** (Public Law 93-293):

“The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.”

In many cases the “ecosystems” involved in implementing this federal law are forested. The National Association of State Foresters (NASF) is comprised of the chief administrators of the forestry agencies in all fifty states, the U.S. Territories and the District of Columbia. These agencies protect, manage, or assist in the protection and management of state, local government and privately owned forest lands totaling over 500 million acres. Implementation of the Endangered Species Act (ESA) can significantly affect how forests are protected and managed. Therefore, NASF has a substantial interest in the law’s provisions and their impacts.

The purpose of this position paper is to highlight our observations and provide recommendations for improving the law and how it is carried out.

History of Legislative Actions Involving ESA

Looking at the performance of species conservation laws passed in 1966 and 1969 then President Richard M. Nixon labeled these earlier efforts “inadequate” and called on Congress to pass more comprehensive endangered species legislation. Congress responded and sent him the Endangered Species Act which he signed into law in 1973.

After several years of implementation major amendments were passed in 1982 that set out the Section 7 exemption process, known as the “God Squad,” which outlined a process for waiving elements of the law for a specific species in specific instances. At the same time the amendment established that the listing decision itself be based “solely on best scientific and commercial data” effectively disallowing considerations of economic impact during the listing process. The amendment also authorized agencies to set priorities for recovery plan development and created the framework for cooperative agreements such as:

- Habitat Conservation Plans coupled with Incidental take permits;
- Safe Harbor Agreements;
- Candidate Conservation Agreements; and
- Agreements to allow for state management of species recovery.

Other minor amendments have been passed, including the last in 1988 which specified the minimum content for Species Recovery Plans. In 1992 funding authority for the Act expired but appropriations continue to be provided to implement its administrative provisions and the law remains in force.

For the past decade, and more, there has been ongoing legislative interest in the Act and its impacts.

A major attempt to re-authorize the ESA was put forward, unsuccessfully, by the House and Senate in 2006. Both were meant to encourage greater voluntary conservation efforts by state and private landowners and included such provisions as:

- Eliminating or changing the role of Critical Habitat Designation;
- Expanding Section 10 authorities for the issuance of Incidental Take Permits; and
- Expanding the ability for states to assume management of a species' recovery.

There have been almost yearly hearings since.

And, in 2014 the House passed HR 4315, "The Endangered Species Transparency and Reasonableness Act." It did not, and was never expected to, pass the Senate. Provisions focused on opening up the various regulatory processes (listing, critical habitat designation, etc.) to more formal participation by outside interests.

NASF Concerns with ESA

Since NASF's first position paper was prepared in 1993, the Association has supported the goal of protecting threatened and endangered species, and will continue to do so. Still, experiences with the law and its implementation have identified a number of concerns.

Over the decades since enactment of the ESA members of NASF have observed how provisions of the law can impact not just survival of the species in question, but also approaches to forest management and the cost of forest management, as well as the overall health and well-being of forests, and thus all forest-dependent species. Among other things, ESA requirements that make it more expensive, and more difficult, to manage forests can have the unintended consequence of accelerating the conversion of those lands to other uses. For example, in an instance where state-owned public trust lands had a constitutional mandate for revenue generation, lawsuits brought under the Endangered Species Act and directed at the property curtailed revenue to the point that some of the lands were sold and the funds invested in higher earning opportunities.

Based on this and other problematic impacts the Association believes aspects of the Act and its implementation could be improved in ways that would successfully conserve species in a more effective manner.

Our concerns are summarized as follows.

The Listing Process:

- Because “distinct population segments” can be difficult to validate listings and the regulatory requirements that are imposed often apply to the entire range of the species even though the species may be thriving in some smaller parts of its range
- Petitions must be acted on within ninety days to determine if a species should be considered a candidate for listing and then a final decision must be made within one year, plus an allowed six month extension. Still, these time frames are often too short to ensure that agencies have access to and are using the best available science rather than only the science provided by the petitioner
- There is no clear standard for judging best available science
- There is no clear direction for circumstances where inadequate science is an issue
- When petitions for listing are filed the only procedure available for other interests to participate is the public comment period, when in fact other parties may be able to play a more formal role in negotiated settlements

Critical Habitat Designation:

- Though the law allows consideration of economic impacts for the designation of critical habitat, such consideration is not allowed if doing so would “result in extinction of the species.” This provision seems in conflict with court findings that critical habitat must also be defined based on what is needed for recovery, not just survival.
- Questions exist concerning whether critical habitat designation as currently implemented has any great bearing on recovery success.
- There are instances where factors other than habitat are the most significant reasons for species decline, yet regulatory actions around habitat and how habitat is managed strongly dictate decision-making. For example:
 - Ocean conditions have a profound impact on year-to-year salmon populations even when habitat is generally satisfactory;
 - Barred owl competition, not habitat could now be the greatest threat to spotted owl; and
 - White nose syndrome has decimated some populations of northern long-eared bat while management of their habitat has remained fairly unchanged before and after the decline.

Section 7 Consultation:

- Special interests, through litigation of the Section 7 consultation process, are able to use ESA to marginalize the goals and authorities of other federal natural resource policies such as:
 - The Federal Insecticide, Rodenticide and Fungicide Act of 1972
 - The National Forest Management Act of 1976
 - The Federal Land Policy and Management Act of 1976
 - The Healthy Forest Restoration Act of 2003

- Section 7 consultations on federal projects can take substantial amounts of time and add considerably to project costs
- When a federal project is identified as potentially involving an endangered species the exemption process for Section 7 consultations is seldom used; instead findings of “adverse impact” or “jeopardy” on federal projects almost automatically mean that ESA requirements strongly dictate over other federal objectives

Cooperative Agreements:

- In order to withstand challenges Habitat Conservation Plans and accompanying Incidental Take Permits must be both legal documents and biological dissertations....as such they are extremely costly and time consuming to develop
- Agreements allowing state-level management and issuance of Incidental Take Permits are very difficult to achieve
- Individual properties can have habitat for endangered species that come under the jurisdictions of both USFW and NOAA Fisheries, making cooperative agreements even more challenging to obtain

Relationship to Landowners:

- Whether deserved or not, private landowners often fear the regulatory impact that an endangered species listing may have on the use of their property and can allow this concern to act as a disincentive for managing for these species, as well as a disincentive to look for or report on species. The more landowners feel at odds with ESA, the worse our understanding of endangered species on private land may become.
- What constitutes a legal taking is often more comprehensive in scope than what actually might be necessary for adequate protection of the species.
- **Direction on protocols and practices to avoid taking can vary widely among the federal agency regions, creating inconsistent and unequal treatment applied to different landowners.**

NASF Recommendations for Improvement to ESA

To address these concerns NASF supports the following recommendations for improving the Act and how it is carried out.

The Listing Process:

- ✓ Allow interveners with positions that are not in agreement with the original petitioners to be formal participants in the petition process in the event that subsequent decisions are adjudicated
- ✓ Ensure that all scientific and commercial information is considered and made publicly available
- ✓ Adopt guidance on determining whether or not the available science is substantial and well-rounded enough to support a listing decision

- ✓ Adopt clear procedures for inadequate science that include the indefinite deferral of a decision until adequate science exists
- ✓ Ensure that inadequate science is addressed as a funding priority
- ✓ Ensure that an endangered listing only applies to those parts of a species' range where populations are actually at risk; taking into account that species which are at the edge of their range may have a natural vulnerability that may not be appropriate to address under the Act.

Critical Habitat Designation:

- ✓ Strengthen the provision that allows agencies to consider the adverse impacts to current land use as a reason not to designate specific areas as critical habitat and provide guidance on what represents such a condition – the economic impacts that can lead to forest land conversion should be considered directly alongside species impacts
- ✓ Provide that critical habitat designation is not required when loss of habitat is not the prevailing reason for decline
- ✓ Ensure that management protocols within critical habitat are clearly aligned with species needs
- ✓ Streamline the critical habitat process by allowing discretion as to when designation should be sufficient for recovery versus when designation might only address survival

Section 7 Consultation:

- ✓ Allow federal agencies with subject matter expertise to make their own findings of adverse impact or jeopardy

Cooperative Agreements:

- ✓ Where species under the jurisdictions of both USFW and NOAA Fisheries are involved in a cooperative agreement with a landowner, delegate all authority for negotiating and approving the agreement to one agency
- ✓ Require that cooperative agreement processes receive the highest agency priority so that they can be completed in a more timely and less costly manner
- ✓ Clarify procedures for modifying or opting out of cooperative agreements
- ✓ Place greater emphasis on helping states get into a position whereby they manage endangered species under cooperative agreement

Relationship to Private Landowners:

- ✓ Significantly increase financial incentives for providing endangered species habitat on private land
- ✓ Authorize and fund substantive landowner education programs to engender more celebration around hosting an endangered species and less fear of regulatory constraints
- ✓ Allow substantially more flexibility in defining what constitutes a legal taking when it will not increase threats to the population to any significant degree
- ✓ Allow for greater landowner discretion where management recommendations for one species may be in conflict with another species

- ✓ When landowners' use of their land is impacted by ESA requirements they should be financially compensated
- ✓ Regional direction on protocols and practices to avoid taking should be subject to national oversight that ensures consistency.