

IMPROVING THE EFFECTIVENESS OF THE ENDANGERED SPECIES ACT

A policy statement approved by resolution
of the National Association of State Foresters



INTRODUCTION

“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.” Endangered Species Act of 1973 (Public Law 93-293)

The National Association of State Foresters (NASF) represents the directors of forestry agencies in all 50 states, eight U.S. territories, and the District of Columbia. These agencies protect and help manage over 500 million acres of forest across the U.S., hand-in-hand with local governments, individuals, and families. They also regularly contribute to the management and protection of federally-owned lands.

How the Endangered Species Act (ESA) is interpreted and enforced can significantly affect how, and if, forests nationwide are appropriately managed. This is because many of the “*ecosystems*” conserved with ESA protections depend on forested landscapes.

NASF has a substantial interest in how ESA provisions are applied and what effects they have. NASF also supports an updated ESA that encourages greater cooperation, more efficient regulatory processes, and a renewed emphasis on sound science in the management of threatened or endangered plants and animals.

BACKGROUND

NASF’s first position paper on ESA was prepared in 1993. Then and now, the association ardently supports ESA’s goal of protecting threatened and endangered species. Revised versions of the association’s ESA positions have been developed periodically, with the latest edition being adopted by the full membership in 2015. Since 2015, there have not been substantial amendments to the law, but there have been changes to the Code of Federal Regulations (50 CFR 424), which prescribe rules for the implementation of ESA.

In 2016, rule changes were made to petitioning procedure for species listings and critical habitat designations and/or modifications. The changes established a standard for what constitutes credible scientific information, reinforced timeframes for agency review, and required petitioners to give prior notice to states that would be potentially impacted by a listing.

The same year, an amendment was made clarifying that critical habitat designations may not always be necessary; like in cases (1) when disease is the primary cause of population decline instead of a change in, or threat to, habitat or (2) a Habitat Conservation Plan (HCP), Safe Harbor Agreement (SHA), or a Candidate Conservation Agreement with Assurances (CCAA) is already in place. Another change provided more specificity on what added conservation benefits warrant a CCAA.

No other significant amendments were made until 2019, when the rules for Section 7 consultations were modified to make mandated cooperation among federal agencies more efficient. More rules made (1) the standards for listing species the same as for delisting species and (2) the criteria for identifying critical habitat slightly more restrictive. Another specified (3) that threatened species cannot be treated as endangered.

By and large, NASF has been supportive of these rule changes; however, it still maintains there are issues left to be resolved.

ISSUES AND RECOMMENDATIONS

Over the decades since ESA was enacted, NASF has observed how ESA provisions affect approaches to forest management, the costs of forest management, the overall health of forests and forest-dependent species.

ESA requirements that make it more expensive and/or more difficult to manage forests can have the unintended consequence of accelerating the conversion of forests to other land types and uses. In at least one instance, state-owned public trust lands with a constitutional mandate to generate revenue were subject to ESA-related lawsuits that curtailed revenues to such an extent that the state was forced to sell the land and invest the proceeds elsewhere.

ESA implementation can be improved without curtailing the conservation of threatened and endangered species. The following are issue areas that NASF has identified as needing attention. Alongside each issue, NASF provides recommendations for improvement:

I. The Listing Process

ISSUE 1.1: Because “distinct population segments” can be difficult to validate, listings (and the regulatory requirements they impose) often apply to a species’ entire range even when it is presently thriving in parts of that range.

RECOMMENDATION: Ensure that an endangered listing only applies to those parts of a species’ range where populations are actually at risk, taking into account that individuals living at the edge of their species’ range may have a natural vulnerability that may not be appropriate to address with ESA restrictions.

ISSUE 1.2: The federal government is required to act on listing petitions within 90 days of filing. A final decision must be made within one year. If the decision is deferred because of other listing activities the decision is supposed to be revisited yearly until a listing is published or a finding on “no listing” is made. These timeframes are rarely met and often lead to lawsuits that divert federal personnel and budgetary resources away from on-the-ground conservation.

RECOMMENDATIONS:

- 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.
- Ensure that inadequate science is addressed as a funding priority.

II. Critical Habitat Designation

ISSUE 2.1: Although ESA allows for the consideration of economic impacts in the review of critical habitat designations, these impacts are not weighed heavily enough.

RECOMMENDATION: Provide guidance on and strengthen the provision that allows agencies to consider land use conversion as an adverse economic impact of critical habitat designations. The threat of forestland conversion should be considered alongside the other threats to a species.

ISSUE 2.2: Recent regulatory changes have clarified what circumstances critical habitat designations may not be necessary, but there have been recent instances in which critical habitat has been designated despite needing significant modification.

RECOMMENDATIONS:

- More closely evaluate the need for a critical habitat designation when loss of habitat is not the prevailing reason for decline.
- Require that lands designated as critical habitat currently have habitat attributes suitable for the listed species. Designated lands should not have to undergo significant change in order to provide suitable habitat.
- Ensure that management protocols within critical habitat areas are clearly aligned with species' needs and are not approximations of what listed species may (or may not) benefit from.
- Only designate critical habitat in areas that are *necessary* to a threatened or endangered species' recovery.

ISSUE 2.3: Critical habitat designation is only applicable to federal ownerships or other ownerships that may have federal nexus(es). Designating critical habitat across ownerships where no federal nexuses exist can be confusing to state land managers and private landowners.

RECOMMENDATION: Capture the nuance of where critical habitat designation actually has bearing and reflect that nuance not only in accompanying documentation, but in the data layers and maps produced.

III. Section 7 Consultation

ISSUE 3.1: Through litigation, special interests are able to use the Section 7 consultation process to marginalize the goals and authorities of other federal natural resource policies, including: (1) the Federal Insecticide, Rodenticide and Fungicide Act of 1972, (2) the National Forest Management Act of 1976, (3) the Federal Land Policy and Management Act of 1976, and (4) the Healthy Forest Restoration Act of 2003. Even with recent changes, Section 7 consultations on federal projects can take substantial amounts of time, add considerably to project costs, and unduly constrain the active management necessary to improve forest health.

RECOMMENDATION: The U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NOAA Fisheries) should partner with other federal agencies to increase their collective capacity for completing biological opinions more efficiently.

IV. Cooperative Agreements

ISSUE 4.1: To withstand legal challenges, habitat conservation plans (HCPs) and accompanying incidental take permits must be both legal documents and biological dissertations. These burdensome requirements make these plans extremely costly and time consuming to develop. Even more time and financial resources are required when cooperative agreements involve multiple species with some under the jurisdiction of USFWS and others under the jurisdiction of NOAA Fisheries.

RECOMMENDATIONS:

- Require that cooperative agreement processes receive the highest agency priority so that they can be completed in the timeliest, least costly manner.
- Where species under the jurisdictions of both USFWS and NOAA Fisheries are involved in a cooperative agreement with a landowner, delegate all authority for negotiating and approving the agreement to one agency.
- Clarify procedures for modifying or opting out of cooperative agreements.

ISSUE 4.2: Cooperative agreements allowing state-level management and issuance of incidental take permits are very difficult to achieve.

RECOMMENDATION: Place greater emphasis on allowing states to manage endangered and threatened species through cooperative agreements.

ISSUE 4.3: There is little to motivate private landowners to participate in HCPs, Safe Harbor Agreements (SHAs), or Candidate Conservation Agreements with Assurances (CCAAs).

RECOMMENDATIONS:

- Create meaningful financial incentives for landowners to participate in HCPs, SHAs, and CCAAs.
- Create processes that motivate small landowner participation in cooperative agreements.

V. Relationship to Landowners

ISSUE 5.1: Private landowners often fear the repercussions an endangered species listing may have on the use of their property. This fear often disincentives (1) monitoring for and reporting listed populations and (2) managing their land in ways that help protect listed species. The more landowners are at odds with ESA, the less access biologists and land managers have to listed species on private lands.

RECOMMENDATIONS:

- Significantly increase financial incentives for private landowners that manage for listed species and critical habitat, even in instances when a recognized cooperative agreement is not yet in place.
- Authorize and fund substantive landowner education programs to engender pride in hosting listed species and to alleviate fear of regulatory constraints.
- Allow for greater landowner discretion where management recommendations for one species are in conflict with the requirements of another species.
- Financially compensate landowners whose land use is affected by ESA requirements.

ISSUE 5.2: What constitutes a legal taking is often more comprehensive in scope than what actually might be necessary for adequate protection of a listed species. Additionally, federal guidance on protocols and practices for avoiding takes can vary widely among regional offices, creating inconsistent and unequal treatment of landowners based on geography.

RECOMMENDATION: Develop and publish science-based protocols for take avoidance that are consistent across regions.

CONCLUSION

NASF supports the goal of protecting threatened and endangered species. Since 1993, the association has periodically drafted position papers identifying ways in which ESA implementation can be improved.

The association recognizes that several regulatory changes have been implemented in recent years and is generally supportive of those changes. Still, some issues remain. The recommendations set out in this policy statement would help to address these issues and provide relief to forestland owners and managers without compromising the efficacy of ESA.