



Improving the Endangered Species Act

THE CASE FOR INCREASED STATE PARTICIPATION

By Nick Wiley, Jennifer Mock Schaeffer and Jonathan Mawdsley

As described in the article, “Congress Examines the Endangered Species Act,” published in the May/June issue of *The Wildlife Professional* (Schadegg 2017), the Senate Committee on Environment and Public Works heard testimony in February from an expert panel on modernization of the 1973 Act. Senators expressed concerns about the impacts of listings on states, private landowners and other stakeholders, but also about the small percentage of species that have recovered sufficiently to be delisted. No doubt, many wildlife professionals are also concerned about the efficacy of the ESA.



Courtesy of USFWS

▲ Close collaboration among state fish and wildlife agencies, USFWS, and a wide range of other public and private sector partners is credited with avoiding an ESA listing decision for the New England cottontail (*Sylvilagus transitionalis*). State agencies want to see new options that could help them achieve conservation of threatened and endangered species under ESA's regulatory provisions.

Over the last two years, three organizations — the Western Governors' Association (WGA), the National Governor's Association (NGA), and the Association of Fish and Wildlife Agencies (AFWA) — have openly deliberated improvements that would enhance ESA's effectiveness and facilitate greater involvement of private landowners in conservation and recovery of listed species. These organizations, which represent states' interests and authorities for fish and wildlife conservation, support the ESA, but assert there are additional tools and approaches that can help achieve conservation of threatened and endangered species.

Building consensus at the state level

WGA is a bipartisan organization consisting of 22 governors that are particularly affected by the ESA because of the preponderance of public lands in their states. ESA's regulatory approach can impact western states' economic development, population growth, and infrastructure such as roads, water projects and transmission lines. As is true throughout the U.S., each state has the responsibilities to conserve fish and wildlife for their citizens, while at the same time balancing multiple public needs and interests. But

to comply with the ESA, western states often face significant economic burdens.

WGA works collegially through consensus to develop resolutions that reflect the states' shared policy positions. The organization has held multiple public forums with landowners, business owners, farmers, ranchers, industry representatives, state and county governments, scientists, developers, hunters, anglers, and environmentalists to solicit input on how to improve the ESA. Through a highly deliberative process, WGA arrived at a [set of principles](#) for improving the ESA that all 22 governors endorsed. The principles call for providing expanded and meaningful opportunities for states to comment, participate in implementing the ESA, or take action to conserve species before the federal government takes action under the ESA.

In February at the urging of the WGA, the bipartisan National Governors' Association (NGA) adopted its own ESA [improvement principles](#) congruent with those of the WGA, but less detailed. NGA endorsed reauthorization of ESA that offers broad bipartisan support and maintains the intent of the ESA to effectively conserve and recover imperiled species.

Concurrently, and in cooperation with WGA and NGA, AFWA recently developed its [recommendations for ESA improvements](#). AFWA, which is composed of the fish and wildlife agencies from all states, works to promote states' interests and supports scientifically informed management that sustains fish and wildlife for the use and enjoyment of citizens. AFWA's policy decision-making process involves subject matter committees, an executive committee, and a twice-yearly business meeting, which is open to the public. All state agency directors vote on motions and actions. Working through this deliberative process, AFWA staff drafted its ESA improvement principles after exhaustive discussions with state directors, program managers for threatened and endangered species, fish and wildlife chiefs, and agency legal counsels.



Recognizing states' authority

The 10th Amendment of the U.S. Constitution is the section of the Bill of Rights that states that any power that is not given to the federal government is reserved to the people or the states. Fish and wildlife conservation is one of these powers. These natural resources are owned by the public and managed as trust resources by the state fish and wildlife agencies. Each state has primary authority for managing the natural resources within its borders and concurrent management authority with federal agencies for migratory birds, inter-jurisdictional fishes, and threatened and endangered species.

Only Congress can give a federal agency authority to preempt states' authority for managing fish and wildlife, and then only for certain federal actions. The ESA is one example where states' authorities have been preempted by Congress. When the ESA was written, however, Congress explicitly affirmed in section 6 that the authority of federal agencies exists concurrently with the authority of the state fish and wildlife agencies for the listed fish and wildlife species.

By giving state agencies the opportunity to exercise their authority as section 6 originally intended, we believe conservation efforts for threatened and endangered species would be executed more efficiently and effectively. For example, giving state agencies the opportunity to bring in relevant scientific expertise at the state level early on in the process will help deliver better conservation measures for listed species and also help avoid more listings. Moreover, state agencies are already developing and implementing landscape-level conservation plans for species of conservation concern, plans that could help preclude species listings or contribute to recovery. Finally state agencies often have positive relationships with private landowners, counties, local governments and other state agencies that can all be directed toward the conservation of at-risk fish and wildlife species.

Where from here?

The ESA has played an important role in saving species from extinction; however, AFWA believes that the conservation community, regulated businesses and private landowners would benefit from greater engagement and involvement of the state fish and wildlife agencies in all stages of the ESA listing and implementation processes. Our recommendations for modernizing the ESA center on revising section 6 to give state fish and wildlife agencies multiple options for implementing the provisions of the Act in cooperation with the Secretary of the Interior.

We recommend that state agencies and the secretary enter into cooperative agreements that would outline the legal authorities and relationships between the individual states and the secretary. The state agency would have the options of cooperating or mutually agreeing with the secretary, and the secretary's authority could be delegated in full or part to the state agency. Under all circumstances, however, the secretary would retain the final decision-making authority.

AFWA also recommends the secretary use state agency data and analysis in listing decisions, unless the data are inconsistent with the best available scientific and commercial data. Designation of critical habitat should be moved to the recovery plan process and include only those areas necessary to recover the species as recommended by the appointed recovery team. Finally, all aspects of the recovery team should be mutually agreed to by the secretary and the state agency, with the state agency director having full authority for appointing the state agency representatives on the team.

All these are common-sense recommendations, grounded in science, that will allow qualified state agencies, if they so choose, to exercise their authority over fish and wildlife within the states' boundaries. Governors and state agencies are accountable to solve problems for the citizens of their states. It is time to give them the opportunity to conserve threatened and endangered species more effectively. ■



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