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The Role of the States Under the Endangered Species Act (ESA)

The Endangered Species Act (ESA; 16 U.S.C. §§1531-1544) aims to conserve species determined to be endangered or threatened and the ecosystems upon which those species rely. To that end, the act authorizes the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, *the Services*) to evaluate proposed species for their risk of extinction—presently (i.e., *endangered species*) or in the foreseeable future (i.e., *threatened species*). The ESA has a process by which the Services must determine whether species are endangered or threatened and, if so, list them under the ESA. Listing a species triggers protections and provisions intended to promote recovery and prevent extinction.

Although the ESA gives the federal government regulatory authority over listed species, states traditionally manage and conserve species under their general police powers. When the ESA was enacted, Congress recognized the key role states would continue to play in conserving the nation's species. The act declares the importance of encouraging states to develop and maintain conservation programs, such as by providing federal financial assistance and other incentives, and requires the Services to cooperate with the states in implementing the ESA through agreements and funding. This CRS product provides an overview of the states' role in conserving species listed under the ESA.

Listing Species

Any person, including a state, may petition the Services to list, delist, or reclassify a species through a process outlined in Section 4(b) of the ESA. For listing petitions, the Services consider whether the species qualifies as an endangered species or a threatened species, as defined by the act, pursuant to a five-factor analysis of threats to the species. If the Services determine that a petition from a state is not warranted, the Services must provide the state with a written justification for not taking the action. If the Services determine that the petition is warranted, they may initiate the listing process through a proposed rule.

Monitoring and Conservation of Candidate Species

The Services have a third option for petitions to list species: deeming the petition "warranted but precluded" by other agency priorities. In this case, the species becomes a *candidate species*. The Services are required to monitor the status of candidate species. The ESA allows states that have entered into cooperative agreements with the Services to receive federal funds to monitor candidate species' status.

A species may not ultimately become a listed species if its status improves before the listing is finalized. States can play a role in conserving species to preclude the need to list them. In addition to state conservation resources and authorities, the Services' implementing regulations allow parties to apply for enhancement of survival permits associated with conservation benefit agreements (CBAs) for threatened and endangered species. Parties under a CBA can be states or can work in cooperation with states. Under a CBA, the party agrees to undertake specified conservation activities to benefit one or more species in exchange for assurances that no further activities or limitations will be required. If a covered candidate or proposed species is eventually listed, the party receives a permit to continue carrying on the covered activities. In some cases, state or local agencies or other entities may choose to administer a programmatic CBA, which provides an umbrella CBA for a region or state in which prospective participants may enroll.

State Involvement in the Listing Process

Whenever the Services propose to list a species, they must provide actual notice of the proposed rule—including its text—to the states and local jurisdictions where the species is believed to occur. The Services are further required to "invite the comment" of such jurisdictions and provide them with at least 90 days to review and comment on the proposed rule. If a state objects to all or part of a proposed rule and the Services finalize the rule in a way that conflicts with the state's comments, the Services are required to provide the state with a written justification.

State-level activities may affect listing decisions in a number of ways. In considering petitions to list, reclassify, or delist a species, the Services are to "give consideration" to species listed as endangered or threatened under state-level ESA-equivalent laws. When analyzing whether a species is endangered or threatened, one of the five factors the Services must consider is whether existing regulatory mechanisms are adequate to prevent a species' extinction, now or in the foreseeable future. These regulatory mechanisms may include state statutes, regulations, and policies. The Services also must take into account any efforts that states are making to protect the species—such as controlling predators or protecting habitats or food supply—when making listing decisions.

Listed Species

Once a species is listed, states have various potential roles under the ESA to protect and recover the species.

Prohibited and Authorized Activities

The Services' regulations allow state agencies to undertake certain actions involving listed species that otherwise would require a permit. For example, FWS regulations allow state agencies to aid sick or orphaned endangered or threatened species or salvage dead specimens for disposal or scientific research. They also allow state agencies to *take* listed species (which means to harass, harm, or kill a listed species, or to attempt to do so) presenting a "demonstrable

but nonimmediate threat to human safety." In addition, state agencies in states that are party to a cooperative agreement may take endangered or threatened species consistent with the agreement, subject to certain limitations. The Services also may—with state agreement—use state agencies' personnel, services, or facilities for enforcement.

For threatened species, the Services may craft species-specific rules under Section 4(d) of the ESA that tailor the protections for the species. Any prohibitions on taking threatened species only apply to resident species if adopted by the state. In many cases, these rules incorporate state law or authorize state agencies to undertake specific activities.

Section 6(f) of the ESA includes a preemption clause that delineates the interaction of state and federal law. For commerce in listed species, any state law related to the import or export of, or interstate or foreign commerce in, listed species is "void to the extent that it may effectively (1) permit what is prohibited" by the ESA or "(2) prohibit what is authorized pursuant to an exemption or permit provided for" by the ESA. A savings clause clarifies that the act does not preempt state laws "intended to conserve migratory, resident, or introduced fish or wildlife" or to permit or prohibit the sale of such species. With respect to the taking of listed species, state laws "may be more restrictive" than the ESA's exemptions and permits "but not less restrictive" than the ESA's prohibitions.

Recovery Plans and Teams

Section 4(f) of the ESA generally requires the Services to create and implement recovery plans for listed species. The Services generally are required to include objective, measurable recovery criteria in recovery plans. These are meant to be criteria that, if met, would result in delisting the species. The statute allows the Services to seek the assistance of stakeholders such as states, among others, in developing and implementing recovery plans.

To delist a species, the Services use the same criteria used for listing species under Section 4(a). When assessing existing regulatory mechanisms for purposes of delisting, the Services must predict how the species will fare under state laws and regulations that may be preempted while the species is listed. In some cases, the Services have included post-delisting state management plans as part of the recovery plan criteria. For example, the *Northern Rocky Mountain Gray Wolf Recovery Plan* included developing state regulations for delisted populations as a criterion, and FWS analyzed the state regulatory frameworks in Idaho, Montana, and Wyoming when determining whether to designate and delist that gray wolf population.

Agreements with States and Funding

Section 6 of the ESA—"Cooperation with States"—directs the Services to "cooperate to the maximum extent practicable" with states in carrying out the ESA. It also requires the Services to consult with affected states before acquiring any interests in land or water to conserve species.

Section 6 provides for two types of agreements with states. First, the Services may enter into *management agreements* with any state that allow the state to administer and manage areas established to conserve listed species. Second, the Services may enter into *cooperative agreements* with any state that "establishes and maintains an adequate and active program for the conservation of" listed species. In states with cooperative agreements, Section 6(g)(2) provides that the prohibitions on take of resident listed species only apply in those states if contrary to state law, with certain exceptions. One district court has clarified that a state's less restrictive definition of take is still preempted under Section 6(f). States with cooperative agreements also become eligible for federal funding authorized under Section 6(d), which may be used to conserve listed species or to monitor candidate species or delisted species.

Delisted Species

If a species is removed from the list of endangered and threatened species, it returns to being managed by the state(s) in which it is found. The ESA requires the Services to cooperate with the relevant states to "monitor effectively" the status of the delisted species under state management for at least five years after delisting. Guidance states that the Services "encourage state agency(ies) to adopt the lead role in planning and implementation of ... [post-delisting monitoring], when appropriate." The Services may provide funds to states with cooperative agreements to assist with monitoring recovered species.

In the event such monitoring indicates there is a "significant risk to the wellbeing of any recovered species," the act directs the Services to employ emergency authority to relist the species for up to 240 days. If the Services use that authority, they must give actual notice to the state agency of any state where a resident species is believed to occur.

Considerations for Congress

Some stakeholders contend that states should have greater responsibility for managing and recovering species listed under the ESA. They argue that state agencies have greater knowledge and expertise of how to manage and conserve species, among other factors. Some other stakeholders counter this proposal by asserting that state management of listed species might not be consistent with federal standards and might lack funding, leading to the detriment of some listed species. Congress might consider this issue when analyzing potential modifications to the role of the states under the ESA. In the 119th Congress, for example, H.R. 180 and H.R. 1897 would require the Services to provide states with all the data supporting a listing decision and to consider state-submitted data in listing decisions. H.R. 1897 would amend the regulatory framework for threatened species to give the states more opportunities to manage such species. Congress also might consider providing additional funding to states to conserve and recover listed species as well as species that might be considered for listing. The Recovering America's Wildlife Act, which has been introduced in several iterations in recent Congresses including as H.R. 10390 in the 118th Congress, would have provided additional funding and technical assistance to states to help them manage species to avoid the need for listing or to recover listed species.

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