



Protecting Endangered Species Habitat on Private Land

A Position of the Society of American Foresters

Initially adopted by the SAF Council on September 23, 1992, under the title Reauthorization and Amendment of the Endangered Species Act, and revised and renewed on June 8, 2002, December 3, 2005, March 8, 2008, October 21, 2013, and June 7, 2018. This position statement will expire in 2023, unless, after subsequent review, it is further extended by the SAF Board of Directors.

Position

The Society of American Foresters (SAF) recognizes that private forestlands are an important source of habitat for threatened and endangered species (T&E species). Federal laws and the resulting regulations affecting private landowners' obligations to protect endangered species and their habitats can and should be balanced with the needs of landowners. SAF urges that federal legislation and regulations dealing with T&E species: (1) provide for innovation and flexibility for habitat protection and management on private lands; (2) provide adequate financial incentives and technical support for landowners to voluntarily manage and enhance such habitat in ways consistent with their overall objectives; and (3) fundamental / administrative reform to the Endangered Species Act (ESA), including single species designation process with the responsibility to overcome the burden of proof resting with the petitioner. Additionally, SAF urges that Congress and the Administration support ongoing evaluation of landowner participation, administrative reforms, and associated program funding to encourage greater participation of landowners in implementing habitat conservation practices for listed species.

Issue

The federal Endangered Species Act (ESA) is a regulatory approach to protect T&E species that considers habitat protection an integral part of the effort. It has been amended several times since 1973, most recently in 2004 to allow exemption of Department of Defense activities from critical habitat designation so long as an integrated natural resource management plan is prepared. Although the ESA has long been considered instrumental to species protection (USFWS 2017), it is also one of the most contentious environmental laws, in part because the strict substantive provisions of the law can substantially affect the use of both public and private lands (Meltz 2013). Federal statutory requirements for the protection of habitat to avoid harm to listed species on private lands directly and indirectly affect many SAF members and their clients. Many landowners are concerned that the presence of a listed species on their land will result in restrictions of current or future activities and subsequent loss of all or some of their property value. There is also concern that critical habitat designation could make their land a target for third-party lawsuits (Buck et al. 2002).

Finally, the judicial costs of enforcement are enormous; lawsuits from both pro-environmental and pro-growth factions add greatly to the expense of implementing the ESA. The list includes 2,300 endangered animals and plant species, and since the last revision to the Act in 2004, only 40 species have been delisted (USFWS, 2017). Designating critical habitat, as well as accounting for species impact requires a complex balancing of environmental versus economic factors. Increased emphasis on incentives to voluntarily protect and enhance critical habitat on private lands is viewed favorably by many landowners and a viable alternative to strictly regulatory approaches (Evans et al. 2016). SAF favors reforms to the administrative petition process that improve the scientific basis and efficiency of the regulatory process.

Background

Critical Habitat

The ESA's primary purpose is to "provide a means whereby the ecosystems upon which T&E species depend may be conserved." The means to this end is the listing of individual species and designation of "critical habitat" essential for their conservation (81 FR 7214 2016).

Approximately half of listed species have at least 80 percent of their habitat on private lands (Evans 2016). ESA section 9 prohibits all persons from any action causing "take" of a protected species, which is defined to include "harm." The Fish and Wildlife Service (FWS) regulations define "harm" to include "significant habitat modification" that "significantly" impairs essential behavioral patterns that "actually kills or injures" listed species, including the impairment of essential behaviors like nesting, denning, feeding, etc., per ESA language. In effect, it prohibits harm to a species and applies wherever a species happens to be, regardless of whether or not critical habitat has been designated. Penalties for violators are significant, and any person/entity can sue any other person/entity suspected of violating the ESA "taking" prohibition (USFWS 2013).

The ESA has been subject to numerous court battles particularly in regard to critical habitat (see Bean and Rowland 1997, Feldman and Brennan 1997, SELS 2001). A series of lawsuits by citizen conservation groups has forced the FWS to spend much of its listing budget on court-ordered critical habitat designations (Jesup 2013). The Supreme Court ruled in *Sweet Home* (1995) that the FWS had devised a "harm" regulation that complied with the ESA but left open interpretation of the regulation in specific circumstances (Feldman and Brennan 1997, SELS 2001).

There is broad concern and documented evidence that the ESA may have an unintended effect on private landowner behavior in that some landowners, to avoid federal regulation, may engage in activities to prevent the possibility of listed species using their land (Zhang 2000, Meltz 2013). In response, under Section 10(a)(2) of the ESA, the FWS has sought to allay landowners' fears by developing several tools and policy options designed to reduce a landowner's financial and regulatory risk if private forests are managed partially as habitat for threatened or endangered species. For example, streamlined permit procedures for small landowners have been established and under "safe harbor agreements" landowners who increase species habitat can return to baseline conditions without penalty. Furthermore, the establishment of "no surprises agreements" assures landowners that if they implement an approved Habitat Conservation Plan (HCP) there will generally be no further costs or land use restrictions covered by the HCP (Rodgers et al. 2017).

Recent listing actions for T&E species have often been predicated on environmental changes less directly linked to habitat concerns (e.g., disease or climatic changes) (USFWS 4d Rule 2015). How these changes interact with ESA provisions for critical habitat must be carefully considered in order to facilitate species recovery without overly burdening landowners for changes they do not control.

Recovery

The ultimate goal of the ESA is to conserve ecosystems by recovering component threatened and endangered species (NRC 1995). In other words, maintain the ecosystem by keeping all the parts. To that end, recovery plans are often prepared. These plans must provide objective and measurable criteria as to when a species can be down-listed or delisted, intermediate goals, and costs of recovery actions. For many listed species recovery goals are not achievable without active management and strategies, such as incentives, that go beyond acquiring or regulating private land (Wood 2018). Biologists have suggested that nonbiological factors, including social, economic, and political considerations, be explicitly identified in recovery plans in order to determine which factors contribute to species decline and recovery (Evans et al. 2016). Recovery plans are one of the principal devices for engaging private landowners cooperatively in species conservation efforts.

Incentives for Private Landowners

Private lands play an important role in the protection and recovery of many protected species (GAO 1994, USDI 2007). Many private landowners are willing to protect and manage their land for the benefit of endangered species. A number of administrative policies and tools have been created to encourage private landowners to do so, including HCPs, the Safe Harbor Policy, Candidate Conservation Agreements with Assurances, financial grants to individuals and groups, and others at both the federal and state level (Rodgers et al. 2017). Several of these programs are designed specifically for forest habitats and landowners. In 2003, Title V of the Healthy Forest Restoration Act authorized the federal government to acquire short- and long-term conservation easements on private lands through the Healthy Forest Reserve Program to promote the recovery of listed species, improve biodiversity, and enhance carbon sequestration. However, due to economies of scale, use of these programs has tended to be weighted towards private landowners with large holdings or large financial resources. Certain voluntary programs like the Environmental Quality Incentives Program (EQIP) and the Conservation Stewardship Program (CSP) are designed to provide technical and financial assistance to landowners to manage their lands for species conservation and enhancement. However, chronic underfunding and inconsistency of programs designed to assist landowners achieve land management and species recovery objectives continue to present barriers to participation. Use of these authorizations by larger number of landowners with more consistent support of these programs may result in greater participation among all landowners.

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