



NATIONAL ASSOCIATION OF STATE FORESTERS

444 North Capitol Street NW | Suite 387 | Washington, DC 20001 | www.stateforesters.org

April 10, 2023

Public Comments Processing
ATTN: FWS-HQ-ES-2021-0152
US Fish and Wildlife Service MS:PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Dear Sir/Madam:

The National Association of State Foresters (NASF) is pleased to provide comments on proposed changes to rules that implement the Endangered Species Act (ESA). Specifically, these proposed changes are intended to simplify and clarify the procedures for issuing Enhancement of Survival Permits (ESPs) and Incidental Take Permits (ITPs).

NASF represents the directors of the forestry agencies in all 50 states, five U.S. territories, three nations in compacts of free association with the U.S., and the District of Columbia. Our members assist in the management and protection of state and privately-owned forests and are frequent cooperators in the management and protection of federally-owned lands.

NASF remains ardent in our support of the ESA's goal of protecting threatened and endangered species. As many of the species conserved under ESA protections depend on forested landscapes, how the ESA is interpreted and enforced can significantly affect how, and if, forests nationwide are appropriately managed.

As a result, NASF has a substantial interest in how ESA provisions are applied and what effects they have. NASF supports a modernized 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. Forests and woodlands are key habitats for a host of species that occur on both public and private land, and the sustainable management of those properties can be heavily influenced by regulations promulgated under ESA. ESA implementation can be improved without curtailing the conservation of threatened and endangered species.

We cite the issues identified below from NASF's adopted position paper *Improving the Effectiveness of the Endangered Species Act, NASF 2020-003* (attached) in reference to the subsequently provided recommendations.

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

Executive Director
Jay Farrell

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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.

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

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).”

Recommendation:

- Create processes that motivate small landowner participation in cooperative agreements.

With the aforementioned issues in mind, changes that streamline the procedures related to ESPs and ITPs are welcome. Those suggested in the current proposed rulemaking should provide some incremental improvement. Specifically, the following revisions aim to clarify and simplify processes, conceivably lowering costs and encouraging increased participation:

- Combining Safe Harbor Agreements and Candidate Conservation Agreements with Assurances into a single Conservation Benefits Agreement;
- Allowing that agreements can include non-listed species without having to include a listed species and clarifying that these agreements could satisfy future permitting requirements should the species become listed; and
- Codifying a number of policies and procedures that are not currently within the rule.

Unfortunately, issues remain that will be persistent impediments to landowner participation. As noted in our position paper, where an agreement also involves species under the jurisdiction of the National Oceanic and Atmospheric Administration - Marine Fisheries Division, it becomes subject to the rules of two separate federal agencies and there is no apparent coordination between the two organizations in this proposed rule.

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 disincentivizes (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.

Recommendation:

- Allow for greater landowner discretion where management recommendations for one species are in conflict with the requirements of another species.

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.”

NASF continues to support the purposes of the ESA originally adopted in 1973, though we have concerns as to the Act’s effectiveness and some of its unintended consequences. Notably, when an endangered or threatened species listing places restrictive and/or financially difficult burdens on a landowner, the end result could well be the disposal and conversion of that land to other uses. We feel the administration and implementation of the ESA has, in the past, made many landowners fearful that an endangered species may reside on their property. NASF is hopeful a modernized ESA could one day lead to landowners celebrating their ability to help a species at risk rather than dreading regulatory intervention.

Although there are some financial assistance programs available to private landowners who seek to improve habitat, the overwhelming regulatory framework of ESA still, in our view, causes more dread than celebration on the part of a landowner who becomes aware of a protected species on their property. We are not certain these proposed changes will alter that perception significantly.

Thank you for the opportunity to comment. We would be pleased to meet and further discuss any aspect of the ESA that can enhance its success.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Kacey KC', with a long horizontal flourish extending to the right.

Kacey KC
NASF President
Nevada State Forester