

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Chapter IV

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Chapter IV

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**Revised Interagency Cooperative Policy Regarding the Role of State Agencies in
Endangered Species Act Activities**

AGENCY: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy revision.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service announce an interagency policy to clarify the role of State agencies in activities undertaken by the Services under authority of the Endangered Species Act of 1973, as amended, and associated regulations. The policy, which is a revision of a policy issued in 1994, reflects a renewed commitment by the Services and State fish and wildlife agencies to work together in conserving America’s imperiled

wildlife.

FOR FURTHER INFORMATION CONTACT: Gary Frazer, Assistant Director for Ecological Services, U.S. Fish and Wildlife Service, 18th and C Streets NW, Washington, DC 20240; telephone 202/208-4646; facsimile 703/358-5618, or Angela Somma, Chief, Endangered Species Division, National Marine Fisheries Service, 1355 East-West Highway, Silver Spring, Maryland 20910; telephone 301/427-8403; facsimile 301/713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (ESA or Act), to establish a program for the conservation of endangered and threatened species and the ecosystems on which they depend. The Secretaries of the Interior and Commerce (hereafter referred to as “the Secretaries”) have the responsibility for administering the ESA. The Secretaries have delegated this responsibility to the U.S. Fish and Wildlife Service of the Department of the Interior and the National Marine Fisheries Service of the Department of Commerce (hereafter referred to as “the Services”).

The Services recognize that, in the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife, and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and responsibility for protection and management of fish, wildlife, and plants and their habitats.

State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. The term State agency means any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

State Involvement

In 1994, the Services published a policy regarding the role of State fish and wildlife agencies in implementing the ESA (59 FR 34275; July 1, 1994). That policy has been available on the Services' websites. We are now updating and revising that policy. The updated policy, developed in coordination with the State fish and wildlife agencies, reaffirms the commitment for engagement and collaboration between the Services and State fish and wildlife agencies on many aspects of ESA implementation, with the understanding that this collaboration is undertaken in the context of the ESA's statutory timelines.

The revised policy reflects a renewed commitment by the Services and State fish and wildlife agencies to work together in conserving America's imperiled wildlife. The revised policy also references the suite of ESA conservation tools not available or in common use when the policy was originally developed in 1994. These tools include Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements. All of these tools are set forth in regulations in title 50 of the Code of Federal Regulations in part 17.

Changes to the policy include more proactive conservation of imperiled species before they require protections of the ESA, expanded opportunities for engagement on listing and recovery activities, and improved planning with State agencies across a species' range. The revised policy follows:

Policy Regarding the Role of State Agencies in Endangered Species Act Activities

Section 6 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (ESA), directs the Secretaries of the Interior and Commerce to cooperate to the maximum extent practicable with the States in carrying out ESA programs. In furtherance of this provision of the law, it is the policy of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to involve State agencies as described in the items listed below for the following ESA activities:

A. Prelisting Conservation

1. Use the expertise and solicit the information of State agencies in determining which species should be included on the list of candidate animal and plant species.
2. Use the expertise and solicit the information of State agencies in conducting population status inventories and geographical distribution surveys to determine which species warrant listing.
3. Use the expertise of State agencies in designing and implementing prelisting stabilization actions, consistent with their authorities, for species and habitat to remove or alleviate threats so that the listing priority is reduced or listing as endangered or threatened is not warranted. Encourage collaborative conservation planning with State agencies across the range of a species, including, as appropriate, through State Wildlife

Action Plans, and work collaboratively with State agencies to facilitate voluntary conservation actions on behalf of species before they reach the point at which they need to be listed as threatened or endangered under the Act.

4. Work collaboratively with State agencies to design and encourage the use of Candidate Conservation Agreements with Assurances to provide non-Federal landowners with incentives for engaging in voluntary proactive conservation of species that are candidates for listing under the Act.

B. Listing

1. Use the expertise of, and coordinate and collaborate with, State agencies in developing the scientific foundation upon which the Services base their determinations for listing actions, including: 12-month petition findings; proposed and final listing rules; section 4(d) rules that specify the prohibitions necessary and advisable for the conservation of species listed as threatened; proposed and final critical habitat designations; and proposed and final rules to change the status of a species from endangered to threatened (or vice versa) or to remove a species from the list.

2. Provide notification to State agencies of any proposed regulation in accordance with provisions of the Act and coordinate with State agencies in developing any work plans for future listing activities.

C. Consultation

1. Inform State agencies of any Federal agency action that is likely to adversely affect listed species or designated critical habitat, or that is likely to adversely affect species proposed for listing or proposed critical habitat, and request relevant information from

them, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.

2. Request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.

3. Recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information. Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions not containing such classified or confidential business information will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

D. Habitat Conservation Planning

1. Use the expertise and solicit the information and participation of State agencies in all aspects of the habitat conservation planning process.

2. Work collaboratively with State agencies to the maximum extent practicable to advance efficiency and avoid duplication of effort when the Services and the States both have similar authority for permitting activities related to threatened and endangered species.

E. Recovery

1. Use the expertise and solicit the information and participation of State agencies in all aspects of the recovery planning process for all species under their jurisdiction.
2. Use the expertise and solicit the information and participation of State agencies in implementing recovery plans for listed species. State agencies have the capabilities to carry out many of the actions identified in recovery plans and are in an excellent position to do so because of their close working relationships with local governments and landowners.
3. Recognize and use the expertise and authority of State agencies in designing and implementing monitoring programs for species that have been removed from the Lists of Endangered and Threatened Wildlife and Plants. Unless preempted by Federal authority (e.g., Marine Mammal Protection Act, Bald and Golden Eagle Protection Act), States possess primary authority and responsibility for protection and management of fish, wildlife, and plants and their habitats, and are in an excellent position to provide for the conservation of these species following their removal from the lists.
4. Work collaboratively with State agencies to design and encourage the use of Safe Harbor Agreements to assist in recovery of listed species.

Authors

The primary authors of this draft policy are the staff members of the Ecological Services Program, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041 and staff members of the Endangered Species Division, National Marine Fisheries Service, 1355 East-West Highway, Silver Spring, Maryland 20910

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 5, 2016

Signed: Daniel M. Ashe

Director, U.S. Fish and Wildlife Service.

Dated: February 10, 2016

Signed: Eileen Sobeck

Assistant Administrator for Fisheries, National Marine Fisheries Service.