Comment on Regulations to the Endangered Species Act's Federalism Provisions

Property and Environment Research Center (PERC)

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Main Points

- Recognizing states' primacy in wildlife management, Congress expected states to play a significant role under the Endangered Species Act on par with or greater than their role under other federal environmental laws.
- Instead, the Fish and Wildlife Service's regulations have hobbled the Act's federalism provisions and reduced states to minor advisor or grantee roles.
- The Service should issue a new Section 6 regulation that gives full effect to the Endangered Species Act's language to "cooperate, to the maximum extent practicable with the States," provides a path for states to obtain cooperative agreements allowing them to determine how species should be regulated and recovered, and clarifies that the Act does not commandeer states.

The Property and Environment Research Center (PERC) respectfully submits this comment recommending that the Fish and Wildlife Service revise its Endangered Species Act (ESA) regulations to give full effect to the ESA's federalism provisions. As PERC Senior Fellow Temple Stoellinger has documented, the ESA's federalism provisions have been eroded by regulations and policies that reduce opportunities for states to exercise their authority and to lead in species recovery.[1] To correct this longstanding error, the Service should issue revised regulations that restore states to their proper role under the ESA. In particular, these regulations should give teeth to the Service's obligation under the ESA to "cooperate, to the maximum extent practicable with the States,"[2] establish a process for states to secure cooperative agreements that require state approval of federal take regulations, encourage states to pursue that process,[3] and clarify that the ESA does not commandeer state regulatory authority.[4]

[1] *See* Temple Stoellinger, *Wildlife Issues Are Local—So Why Isn't ESA Implementation?*, 44 Ecology L.Q. 681 (2017).

[2] 16 U.S.C. § 1535(a).

[3] *See* Stoellinger, *Wildlife Issues Are Local*, *supra* n.1.

[4] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 Iowa L. Rev. 377 (2005).

The Need for and Congress' Expectation of State Leadership in Species Recovery

When Congress enacted the ESA, it did so mindful of states' traditional primacy in wildlife management.[5] During the debates over the Act, "the proper role of the states was the dominant concern."[6] That discussion was informed by state backlash to the Marine Mammal Protection Act, enacted a year earlier, which broadly preempted state authority.[7] States were expected to "play a leading role," according to Jonathan Nagle, and any states that "already possessed adequate programs would not be affected by the ESA."[8] Senator Stephens of Alaska emphasized that "provid[ing] a larger role for the States" was a significant reason the ESA drew minimal opposition.[9]

This expectation of a substantial state role is reflected in Section 6 and elsewhere in the ESA. To preserve state autonomy, the ESA's preemption provision is incredibly narrow, applying only to state regulation of interstate and foreign commerce.[10] And it is accompanied by a broad savings clause covering "any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such wildlife."[11]

The ESA also requires that the Service "shall cooperate to the maximum extent practicable with the States."[12] Additionally, the Act directs the Service to "enter into a cooperative agreement" with any state that has "an adequate and active program for the conservation of endangered species and threatened species."[13] The ESA also provides five exclusive factors the Service can consider when evaluating whether a state program is "adequate and active."[14] The primary benefit of a state obtaining a cooperative agreement is that federal take prohibitions cannot apply with respect to any domestic species unless the state formally adopts those prohibitions.[15] Indeed, this power for states to approve (or not) federal regulations appears not once but twice in the statute.[16]

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[5] *Geer v. Connecticut*, 161 U.S. 519, 535 (1896).

[6] John Nagle, *The Original Role of States in the Endangered Species Act*, 53 IDAHO L. REV. 385, 393 (2017).

[7] *Id.* at 394.

[8] *Id.*

[9] *Id.*

[10] 16 U.S.C. § 1535(f).

[11] *Id.*

[12] 16 U.S.C. § 1535(a).

[13] 16 U.S.C. § 1535(c).

[14] *Id.*

[15] 16 U.S.C. § 1535(g)(2).

[16] *See also* 16 U.S.C. § 1533(d).

The intended state role under the ESA differs markedly from the role states have had in practice over the last half century. That is because the Service has adopted regulations that effectively nullify the ESA's federalism provisions. In 1975, it issued a regulation under which the Service only offered states cooperative agreements for the narrow purpose of providing federal funding for individual state conservation projects.[17] Its regulations for implementing Section 9 also addressed cooperative agreements, but, rather than requiring state approval of prohibitions in states that had such agreements, that regulation only exempted from the regulation state personnel who took a species as part of a research or conservation program covered by a cooperative agreement.[18] And the Service's policy implementing its obligation to "cooperate to the maximum extent practicable with the States" merely identifies the channels for states to communicate or share information with the Service.[19] Due to these actions by the Service, "the intent of Congress" reflected in the ESA's federalism provisions "has not been fully realized."[20]

This failure to empower states as Congress envisioned has likely contributed to the limited number of recoveries that have occurred over the last half-century. To date, only 3% of endangered or threatened species have recovered. According to PERC's research, the Service expected 300 species to recover by now, of which only 11 have.[21] The dearth of recoveries is, at least in part, explained by the failure to motivate proactive habitat restoration and other recovery efforts, which depend on goodwill and collaboration. Empowering states to lead on recovery, rather than centralizing power in the Service, could help to encourage such efforts. According to a report from the Duke Nicholas Institute for the Environment, the public strongly prefers states rather than the federal government to lead on environmental issues, with the preference most pronounced in rural areas (65% prefer state leadership compared to 25% preferring federal leadership).[22] Surveys of landowners have also found that they are much more willing to participate in conservation efforts led by state wildlife agencies than those led by the Service.[23]

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[17] Conservation of Endangered and Threatened Species of Fish, Wildlife, and Plants—Cooperation with the States, 40 Fed. Reg. 47509, 47509–10 (Oct. 2, 1975); *See* Stoellinger, *Wildlife Issues Are Local*, *supra* n.1., at 701–02.

[18] Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44414 (Sep. 26, 1975); *See* Stoellinger, *Wildlife Issues Are Local*, *supra* n.1., at 702.

[19] Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 81 Fed. Reg. 8663, 8664 (Feb. 22, 2016).

[20] Stoellinger, *Wildlife Issues Are Local*, *supra* n.1., at 723.

[21] Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its own Recovery Goals*, PERC (July 26, 2023).

[22] Robert Bonnie et al., *Understanding Rural Attitudes Toward the Environment and Conservation in America* 20 (Duke Nicholas Inst. for Env't Pol'y Sols., 2020).

[23] R. Dwayne Elmore & Terry A. Messmer, *Public Perceptions Regarding the Utah Prairie Dog and Its Management: Implications for Species Recovery*, Utah State Univ. Berryman Inst. Publ'n No. 23 (2006).

The Service Should Issue a Section 6 Regulation that Fully Embraces Environmental Federalism

To reconcile its implementation of the ESA with Section 6's text and to capture the benefits of environmental federalism, the Service should issue substantially revised Section 6 regulations. That regulation should cover each of the three topics addressed below, as well as additional topics requested by states.

1. The Regulation Should Meaningfully Commit the Service to Cooperating with States

The Service's current Section 6 policy is inadequate. It should be replaced by a regulation that provides meaningful commitments, on the Service's part, for how it will cooperate with the States, including supporting state conservation efforts. Improving the policy and formalizing it in regulation is essential to provide "a sense of permanency, importance, consistency in application, and an enforcement opportunity if the regulations are not being followed."[24]

Based on the types of cooperation commitments that states have long asked the Service for,[25] that regulation should, at a minimum:

- Address how the Service will incorporate and give due respect to the input of state wildlife agencies, including their data, during listing, critical habitat, and other decisions;[26]
- Address the role of state programs in assessing the adequacy of existing regulations in the listing process;[27]
- Convert the Policy for Evaluating Conservation Efforts When Making Listing Decisions (PECE Policy) into a formal regulation and update it to reflect two decades of implementation experience, including clarifying the standards the Service will use to evaluate state conservation efforts and how it will consider the initial results of those efforts;[28]

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[24] *See* Stoellinger, *Wildlife Issues Are Local*, *supra* n.1., at 724.

[25] *See, e.g.,* Western Governors' Association, *Policy Resolution 2017-11: Species Conservation and the Endangered Species Act* (June 28, 2017).

[26] The Service has some existing policies relevant to this, including a requirement that states be notified of upcoming listing petitions so that they can share data with the Service.

[27] Several recent delisting conflicts have arisen over the Service's judgment of state plans to manage recovered species. The Service should develop a clear policy for applying this standard that gives appropriate deference to states' need for flexibility to manage recovered species.

[28] The Service's commitment to the PECE Policy appears to change radically from one administration to another. In several recent cases, for instance, the Service refused to apply the PECE Policy to state conservation efforts because they were deemed to have been in place for too long to qualify as a new effort (a question for which the Policy establishes no meaningful standard). *See, e.g., Proposed Threatened Species Status With Section 4(d) Rule for Monarch Butterfly*, 89 Fed. Reg. 100662 (Dec. 12, 2024) (refusing to apply the PECE Policy to a 50-year state-led conservation plan and, instead, judging it based on

- Empower states to develop and propose, subject to clear standards of review by the Service, recovery plans, 4(d) rules for threatened species, and other decisions;[29]
- Establish a streamlined federal permit process for activities approved under an equivalent state permit; and
- Setting standards limiting federal regulation of states' voluntary recovery efforts, including the reintroduction of species under Section 10(j).[30]

2. The Regulation Should Give Full Effect to Cooperative Agreements and Encourage States to Pursue Them

Congress intended cooperative agreements to be a means for states to assert meaningful leadership in the management and recovery of endangered and threatened species. To date, no state has entered into the sort of cooperative agreement envisioned by Congress, mainly because Service regulations have instead limited states to a narrower role. To restore states to their proper role in managing and recovering species, the Service should issue regulations that give full effect to Section 6(c) and (g).

That regulation should set standards for how the Service will evaluate a state's qualification for a cooperative agreement and emphasize that a state that obtains a cooperative agreement will have the power to approve any federal regulation of species within its borders. The regulation should clarify, for instance, how the Service will determine whether "authority resides" in a state agency "to conserve resident species."[31] The ESA's use of the term "conserve," which is defined expansively to include any means of promoting species recovery, means that this authority does not have to be channeled through regulation but could include more creative and incentive-based approaches.[32]

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the first 5 years of implementation); *Lesser Prairie-Chicken; Threatened Status With Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment*, 87 Fed. Reg. 72,764 (Nov. 25, 2022). Considering that the Service asks that its recovery efforts be judged only over decades or more, it is exceedingly unfair to judge state programs based on their initial few years rather than their potential to recover a species over the long term.

[29] Congress is considering legislation that would require the Service to do some of this, including letting states lead in developing regulations for threatened species under Section 4(d). But the Service undoubtedly has the authority to do this on its own initiative.

[30] *See*, PERC, *Comment on the Proposed Establishment of a Nonessential Experimental Population of Gray Wolf in Colorado* (Apr. 18, 2023) (questioning the Service's proposal to impose restrictive federal regulations on a state that was proposing to voluntarily reintroduce wolves).

[31] 16 U.S.C. § 1535(c)(1).

[32] *See* 16 U.S.C. § 1532(3).

Likewise, the Service should set a clear, consistent standard for evaluating whether a state "has established acceptable conservation programs" for resident species.[33] Notably, "acceptable" is not a high bar but suggests Congress expected the Service to be deferential to a state's preferred approach to conserving species, provided that the state program was adequately explained and was a rational approach. In setting this standard, the Service should look to State Wildlife Action Plans and how the Service currently reviews them. Perhaps those plans, which did not exist when the ESA was originally enacted, are sufficient under the acceptable conservation programs language.

The regulation should also establish a process for states with cooperative agreements to notify the Service whether federal prohibitions can be enforced within the state under Sections 4(d) and 6(g). And, importantly, the regulation should make clear that a cooperative agreement cannot be withheld due to, or conditioned on, the state adopting federal regulations as its own. Instead, that decision must be treated as a discretionary one for the state to make after the cooperative agreement is reached.

To ensure that states take advantage of this opportunity to lead on species management and conservation, the Service should also take proactive steps to encourage states to go through the cooperative agreement process, especially the first few that will set the model for other states. The Service may find it helpful to consider the steps the Environmental Protection Agency has pursued to encourage states and tribes to assume the Clean Water Act's 404 program, including outreach to organizations representing state agencies and conscious efforts to reduce the burdens on states that pursue the opportunity.[34]

3. The Regulation Should Clarify that the ESA Does Not Compel State Governments to Administer Federal Law

To restore states to their proper leadership role, the Service should also address a growing body of egregiously wrong court decisions holding that states violate the ESA if they fail to regulate private activities in ways similar to federal regulation.[35] These decisions are impossible to reconcile with the anti-commandeering doctrine, which forbids the federal government from forcing states to act in furtherance of federal policy or statute.[36] But they also prevent the realization of the benefits of

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[33] 16 U.S.C. § 1535(c)(2).

[34] *See, e.g., Clean Water Act Section 404 Tribal and State Assumption Program*, 89 Fed. Reg. 103454 (Dec. 18, 2024).

[35] *See, e.g., Bear Warriors United, Inc. v. Lambert*, No. 6:22-cv-2048-CEM-LHP, 2025 WL 1122327 (M.D. Fla. Apr. 11, 2025) (holding that Florida violated the ESA and must apply to the Service for an incidental take permit because its regulation of septic tank installation doesn't prevent damage to manatee habitat); *Ctr. for Biological Diversity v. Little*, 724 F. Supp. 3d 1113 (D. Idaho Feb. 2025) (holding Idaho violated the ESA by allowing wolf trapping in grizzly bear areas); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (holding that Massachusetts violated the ESA by authorizing certain fishing practices that could injure listed whales).

[36] *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 470–75 (2018). *See also* Adler, *Judicial Federalism*, *supra* n. 4.

environmental federalism, which depend on states having the ability to adopt unique solutions to policy challenges.[37]

The Service should issue regulations clarifying that the take prohibition does not apply to the states' exercise of their sovereign authority. That prohibition applies to states and state officials only to the extent their activities directly take species, such as construction projects or wildlife management activities. (As explained above, the Service should also limit regulation of these activities pursuant to its obligation to cooperate with states, but these activities do not implicate the anti-commandeering doctrine.)

The ESA only affects states' exercise of sovereign authority through the statute's exceedingly narrow preemption clause.[38] There is no plausible case that state regulation of hunting non-listed species[39] or septic tank installations[40] is implicated by that clause. And in the rare scenario that the ESA preempted a state law, the remedy would be that the responsibility for advancing federal policy would fall exclusively on the Service. It would not mean that, as these cases have held, the state must submit regulatory programs unrelated to listed species to the Service for review, modification, and approval.[41] Federal micromanagement of everything a state does that tangentially and indirectly affects listed species is the antithesis of Congress' intent in enacting the ESA with such strong federalism provisions.

Conclusion

Wildlife management is inherently local. The recovery of endangered and threatened species has been immeasurably setback by the over-centralization of ESA implementation. This misalignment undermines conservation outcomes, burdens federal resources, and alienates the very people needed for recovery. The Service not only has the authority under the ESA to decentralize implementation, but in several respects, it is also required to do so. It should issue a comprehensive Section 6 regulation that gives teeth to the Service's obligation to cooperate with states to the maximum extent practicable, to allow states to take the lead in managing and recovering species under cooperative agreements, and to ensure that the ESA does not infringe state sovereignty and deny species the benefits of environmental federalism.

[37] *See* Terry Anderson & P.J. Hill, *Environmental Federalism: Thinking Smaller*, PERC Policy Series (Dec. 1, 1996).

[38] 16 U.S.C. § 1535(f).

[39] *Little*, 724 F. Supp. 3d.

[40] *Bear Warriors United, Inc.*, 2025 WL 1122327.

[41] *See id.*