

Landowner Assurances Under the ESA

Endangered Species Act Policy Series



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ACKNOWLEDGMENTS

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Sand County Foundation is a non-profit conservation organization dedicated to working with private landowners across North America to advance ethical and scientifically sound land management practices that benefit the environment.

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The Environmental Policy Innovation Center was established to develop innovative policies that expand environmental markets, improve water quality, speed endangered wildlife recovery, and incentivize conservation on private lands. We also provide solutions that allow water, energy and other essential infrastructure to move forward while benefiting natural resources. We believe in having an organizational culture built upon trust for a staff of creative people. Taking down non-profit cultural barriers to innovation and risk taking in the development of policy gives the Innovation Center a unique niche from which to provide valuable tools to make conservation faster, bigger and stronger.

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Foreword

By Timothy Male, Executive Director of the Environmental Policy Innovation Center

Incentives Have Helped Private Landowners and Endangered Species Under the Endangered Species Act

In 1973, when Congress articulated the purpose for a national effort to conserve endangered species of American wildlife, it spoke of the need to develop a system of incentives for states and other partners. Congress stated that those incentives are “a key” to better safeguard our heritage in fish, wildlife and plants. Yet, there is no other mention of incentives in the remainder of the text that fills out the Endangered Species Act (ESA). Today, you still wouldn’t find actual “incentives” described in any detail in the ten-times amended law.

Despite the absence of explicit incentives written into the law, there is a vibrant diversity of incentive-based tools that the U.S. Fish and Wildlife Service, National Marine Fisheries Service, state agencies and partners have developed through policy and regulation. These tools enable approaches to wildlife conservation that recognize the opportunities for partners, especially private landowners, to help wildlife when the right incentives are put in place. In thousands of cases, alleviating the fear of regulation, or of the unpredictability of future regulation, is enough to stimulate extensive conservation efforts for wildlife.

In this working paper, Michael Bean, former Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of Interior, describes the major categories of assurances available to private landowners and businesses under the ESA and that have benefited thousands of landowners and businesses and in turn had substantial benefits for endangered and threatened species. This paper was produced because of the relative lack of information about these tools and their use in America by conservationists and to start a dialogue about how to better deliver more incentives for conservation through the creative use of regulatory assurances under the ESA.

Habitat Conservation Plans

Since 1982, the ESA has included language allowing people or businesses to receive permits to harm species in limited ways (before that, there was no legal way for a private entity to do so). While seemingly contradictory, allowing some limited harm to a species can actually unleash considerable conservation activity to mitigate the effects of activities that, without a permit, would be unlawful. To do so, the Fish and Wildlife Service approves Habitat Conservation Plans, which describe a set of authorized development or other land use activities along with a mix of conservation actions that minimize or offset the harm of those activities. The use of this tool didn’t really take off until after 1994, when the U.S. Fish and Wildlife Service clarified through a regulation that once they had agreed with the proponents of a plan, finalized the plan and issued a permit, they would not go back and order changes in the plan or permit except in a very limited set of circumstances. Those policy and regulatory changes resulted in a profusion of small and large-scale plans, some covering many states. In total, there are more than 1,000 plans covering 46 million acres that have been approved. While many plans facilitate development and other land uses more than they benefit species, in other cases these plans have resulted in the permanent protection of thousands of acres of habitat, new populations of rare species and more effective conservation actions.

Safe Harbor

Most of the time, the landowners who help endangered species by increasing habitat or species' populations do not want to face increased regulation as a result. Since 1995, a tool called a 'safe harbor' agreement has provided landowners the written assurance that no additional regulatory burden will ensue from good deeds to help endangered species. Safe harbor agreements have been used in dozens of states and cover millions of acres of private land.

Assurances for Declining Species

In many cases, declining species are not protected under the ESA either because they have not yet declined far enough or because of insufficient resources to conduct the necessary analysis for a decision. At the very moment when more conservation action could possibly turn such species around, landowners and businesses rightly fear what would happen to their ability to use land or other assets if a species does get listed. A tool called "Candidate Conservation Agreements with Assurances" has been available since 2002. It provides written assurances for private landowners who take beneficial actions for species that might one day be protected under the ESA. They have assurance that future listings will not result in limits on their land uses beyond what they committed to under the agreement. In a number of cases, these agreements have been so successful in stimulating conservation and stewardship on enrolled lands that they have prevented the need to list species.

Assurances for Landowners Participating in Federal Programs

The ESA creates a separate process when one federal agency's actions might affect endangered or declining species. The result of this process may either authorize the federal agency to take specific conservation actions or allow harm to some portion of the species' numbers. When landowners enroll or participate in a federal agency's programs such as grant programs, USDA cost-share assistance, or any number of other federal programs, an overarching agreement between the agency and the U.S. Fish and Wildlife Service (or National Marine Fisheries Service) can provide assurances that safeguard future land uses for participating landowners. In this approach, the landowners do not need to apply for or receive a written permit directly. As a result, the paperwork is far simpler. For example, the 1,200 landowners who have joined USDA programs to help the Greater Sage-Grouse in nine western states are all covered by this kind of assurance.

Regulatory Assurances Delivered Through Special Regulations

When species are listed as 'threatened' instead of 'endangered', the ESA allows protections to be customized to the needs of the species. The customization comes through a rule-making process that often allows particular activities that could otherwise be prohibited in the absence of a special rule. These special rules spell out what limits or requirements exist for actions that affect that species. Federal agencies have put in place customized regulations that cover more than 100 threatened species and some of these can address landowners' concerns about future regulation. For example, more than 30 rules make any activities legal under state law also legal under federal law. Other rules exempt certain activities, like routine farming and ranching practices, preventing farmers from having to worry about resulting harm to threatened species in those areas.

Conclusion

As Michael Bean describes in the working paper that follows, there are a variety of ways for private landowners and businesses to get assurances under the ESA. These assurances offer predictability

about how the law will affect them now and in the future. That predictability is often enough to incentivize those landowners to take action in ways that benefit wildlife. However, except for Habitat Conservation Plans, each of these tools has received limited federal or state funding. There are very few staff within agencies whose job is focused on reaching agreements with landowners and businesses, and negotiating the paperwork and permits that are essential to make these tools work. Too often, landowners, and even other federal agencies, tire of waiting on the process or give up before Fish and Wildlife Service staff can even start to work on their agreement. Perhaps the most important changes that would expand the reach of assurances so that tens of thousands of additional private landowners participate is to make the procedural steps to complete an agreement much simpler and faster.

Landowner Assurances Under the ESA

A Paper for Sand County Foundation

By Michael J. Bean

Introduction

More than eighty years ago, Aldo Leopold penned an essay that is as timely today as it was then. He titled it “Conservation Economics,” and in it he wrestled with the following dilemma: many of the things that can be produced on privately owned land have great social value, but little or no economic value to the landowner who produces them. As a result, the landowner has little incentive to produce them. Among such things, Leopold observed, were rare wildlife. The landowner with a rare species on his land was, in Leopold’s view, the “custodian of a public interest.” Leopold went on to opine “that conservation will ultimately boil down to rewarding the private landowner who conserves the public interest.”

Economic considerations, while important, are not all that matters to many landowners. Farmers, ranchers, and forest landowners typically love the land on which they earn their livelihoods, want to be good stewards of it, and enjoy the wildlife with which they share it. They may seek out programs that reward good stewardship, but for many of them, good land stewardship is its own reward. What often troubles them, however, is the uncertainty about the regulatory environment in which they operate, an uncertainty to which the federal Endangered Species Act (ESA) is a frequent contributor. Because of that uncertainty, many landowners have been reluctant or unwilling to participate in programs that assist good stewardship, or implement management actions on their own that could help rare species.

In recent years, this problem has gotten the attention of the agencies that administer the ESA, and other leaders in federal and state government. They have come to understand the importance of giving landowners greater predictability about the regulatory consequences of the management actions they seek to encourage. As a result of that understanding, there are now a variety of agreements and other conservation tools that are intended to give private landowners the reasonable assurances they need to be willing to become partners in the effort to conserve endangered and threatened species. This paper examines and evaluates those tools, after first explaining the regulatory framework of the ESA.

Regulatory Framework

The Prohibition Against Taking Endangered Wildlife

Most of the landowner anxiety about the ESA stems from a provision that received little notice or discussion when the Act was passed with near-unanimous support in Congress in 1973. That provision makes it unlawful to “take” an endangered animal without a permit or other authorization. The word “take” has long been used in both state and federal wildlife legislation as a broadly encompassing term for hunting, trapping, collecting, and similar activities that have, as their purpose, the killing or capturing of a wild animal. In the ESA, however, Congress supplied a definition of the word “take” that suggested a more far-reaching scope. As defined in that law, the word “take” included not only the activities traditionally encompassed within that term, but also

activities that wound, harass, or harm endangered wildlife.

That broad statutory definition immediately raised the question as to the actual scope of the taking prohibition. The U.S. Fish and Wildlife Service, the federal agency principally charged with administering the ESA, focused on the term “harm” and through a 1975 rulemaking (with a minor revision in 1981) gave that term an expansive definition that was noteworthy in two important respects. First, under the Service’s definition, one could “harm” an endangered animal by significantly modifying its habitat, provided that such modification resulted in actual death or injury to a protected animal. Second, such harm need not have been the intended effect of an action; rather, one could harm (and therefore “take”) an endangered animal as the unintended, incidental result of an otherwise lawful action that was carried out for another purpose.

The implications of this broad definition were soon apparent. Land clearing in anticipation of development, timber harvest, diverting water for irrigation, and a host of other routine activities had the potential to result in a violation of the ESA. A lawsuit challenging the Service’s broad definition of “harm” went all the way to the Supreme Court, which upheld it in 2005. As a result, habitat modification, at least under some circumstances, can constitute a violation of the ESA.

While that conclusion is alarming for many landowners, there are some important qualifications to it. First, most of the species protected by the ESA are plants and, with very few exceptions, the Act’s taking prohibition does not apply to plants. Second, nearly half of the animal species protected under the ESA are “threatened” rather than “endangered”, and for threatened species, the Act gives the Service the discretion to tailor regulatory prohibitions to the needs of each particular species. For at least some threatened species the Service has used this authority to narrow or limit the taking prohibition, as will be discussed later in this paper. Third, as interpreted by the Supreme Court, the Service’s definition of “harm,” though broad, requires that actual death or injury to a protected animal be proximately caused by habitat modification, a requirement that is often difficult to demonstrate and that explains in part the relative paucity of enforcement actions against those who modify habitat.

Finally, as noted earlier, the ESA does not absolutely prohibit the taking of endangered wildlife. Rather, it prohibits taking *without a permit or other authorization*. As will be discussed in detail later, there are available to landowners a variety of permits under Section 10 of the Act that authorize otherwise prohibited taking. There are also other means of securing authorization to engage in activities that result in such taking. Those too will be examined in more detail.

The Duty of Federal Agencies to Ensure Against Jeopardy

The preceding discussion of the “taking” prohibition concerns a provision of the Act that applies directly to all persons, including landowners. No less important is another provision that applies directly only to federal agencies, but that can indirectly affect private landowners and businesses who need federal permits – or who receive federal funding – for their activities. This provision – set forth in Section 7 of the Act – requires each federal agency to ensure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species (either plant or animal) or adversely modify or destroy its critical habitat.

Federal agencies comply with this duty by consulting with the Fish and Wildlife Service regarding each action that may affect any listed species. The end product of that consultation is a written “biological opinion” from the Service in which it expresses its opinion as to whether the proposed

action complies with the above requirement. If the Service concludes that it does, then the requirements of Section 7 are met. However, ensuring that a proposed federal action will not jeopardize the continued existence of a listed species or adversely modify its critical habitat does not mean that no take of listed wildlife will occur. If such take is expected, the Service has had the authority since 1982 to include in its biological opinion a section (commonly known as an “incidental take statement”) that sets forth reasonable measures to minimize the effects of the anticipated taking. So long as those measures are taken, any take of listed wildlife that results from the federal action is authorized.

For landowners needing other federal permits or authorizations or receiving federal funding for their activities, the Section 7 consultation process can provide a relatively speedy and simple means of securing authorization to take listed wildlife. For landowners who lack such a federal nexus with their activities, however, an ESA permit to take such wildlife will be needed. There are a variety of permits and other authorizations available to fit a variety of situations. These, and the regulatory assurances they provide, have helped make possible habitat restoration, species introductions, and other conservation actions on millions of acres of land owned by thousands of landowners.

“No Surprises” and Habitat Conservation Plans

As noted earlier, the ESA’s prohibition against taking endangered wildlife applies not only to actions intentionally directed at an animal, such as hunting, but also to actions that harm a protected animal unintentionally and only incidentally. As originally enacted in 1973, the Act contained no clear mechanism by which such activities could be authorized. Congress changed that in 1982. It authorized the Service to issue permits that allowed the taking of protected species when doing so was “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” This authority is set forth in Section 10(a)(1)(B) of the Act.

Congress imposed rather rigorous requirements to secure an “incidental take permit.” Principal among these was that the permit applicant had to prepare and commit to implement a conservation plan (commonly referred to as a “habitat conservation plan” or HCP) that would “to the maximum extent practicable, minimize and mitigate the impacts” of the expected incidental taking.

Incidental take permits have been issued for an extraordinarily broad range of activities, both large and small. Some have authorized take of a single species incidental to single housing lot development by an individual landowner. Others have been county-wide in their scope and decades long in their duration, authorizing take of dozens of species incidental to all forms of development under local zoning ordinances. Two state-wide HCPs and incidental take permits in Wisconsin and Michigan cover forestry activities that affect the endangered Karner blue butterfly. There are even multi-state HCPs, such as one by a gas pipeline company that covers construction and maintenance activities on thousands of miles of pipelines and other infrastructure across 17 states.

As HCPs began to be developed for broader areas and longer durations, the question arose as to whether new information could force their reopening and revision. From the perspective of incidental take permit applicants, the question was whether the government could insist on a second (or third or more) bite at the apple after having approved an HCP and issued a permit for it. This issue came to a head during the mid-1990s, as several California counties were developing ambitious HCPs to guide future development over the course of several decades. The counties made clear that their willingness to make the substantial commitments contemplated by their

HCPs was dependent on an assurance that the government would not later take that second bite.

The resolution of this issue took the form of a “no surprises” policy announced by the Fish and Wildlife Service and codified in its regulations in 1994. Under that policy, an incidental take permittee will not be required to make any additional resource or financial commitments in response to unforeseen or changed circumstances, except to the extent that such changed circumstances were expressly addressed in the HCP. Effectively, the no surprises policy puts the responsibility of responding to changed or unforeseen circumstances on the government, and not on the permittee whose HCP had been found to meet the rigorous requirements of the Act. The only exception to this result is when continuation of the permitted action would jeopardize the continued existence of a listed species. That such a revocation is exceedingly unlikely to occur is evidenced by the fact that it has never yet happened for any of the hundreds of HCPs in the roughly two decades that the no surprises policy has been in effect.

To summarize, for the landowner who is planning an activity that will incidentally take a listed animal species, and who neither needs a federal permit under some law other than the ESA, nor receives federal funding for that activity, an incidental take permit is likely the only way to ensure compliance with the ESA. To secure such a permit, the landowner will need to prepare an HCP or fit within the scope of a multi-landowner HCP for which a permit has been issued to another party. As a result of the no surprises policy, landowners who are covered by an incidental take permit can have a very high level of confidence that their regulatory responsibilities will not be changed, regardless of whatever changed or unforeseen circumstances may arise in the future.

“Safe Harbor” for the Landowner Who Implements Voluntary Conservation Measures

As discussed above, incidental take permits, and the HCPs on which they are based, provide a reliable means of achieving ESA compliance and regulatory certainty for landowners planning a near-term activity that is expected to take a protected wildlife species. But what about the landowner who is contemplating an action that may be expected to attract a protected species to his land or to increase the presence on his land of a protected species that is already there? That, presumably, is what the ESA should want landowners to do. Yet, the landowner who voluntarily lays out the welcome mat for endangered species to occupy his land is effectively inviting not just the species, but also the regulatory restrictions that accompany those species. Such a landowner may have no near-term plans to do anything that will result in the taking of an endangered species, but the presence of such species on his land may limit his land use options in the longer term future.

Concerns such as these have led at least some landowners to forego management actions that could attract endangered species to their land. Others have been prompted to manage their land defensively to keep it from becoming an attractive place for such species. These are unintended consequences of the ESA, but nonetheless legal, since nothing in the Act requires a landowner to manage his land to attract endangered species to it.

Fortunately, there is a solution to this dilemma, one that allows willing landowners to implement voluntary conservation measures that benefit endangered species without encumbering the landowner’s future use of his property. That solution takes the form of a “Safe Harbor Agreement.” Under a Safe Harbor Agreement a landowner agrees to carry out or allow conservation measures that are expected to benefit an endangered species, and the Fish and Wildlife Service issues a

permit to the landowner that assures him that no new or additional restrictions will be imposed on the landowner as a result of those measures. If the landowner already has endangered species on his property when the agreement is reached, that fact is documented in the landowner's "baseline" regulatory responsibilities, as set forth in the agreement. The agreement acknowledges those baseline regulatory responsibilities while also effectively freezing them, thus assuring the landowner that his "reward" for implementing voluntary conservation measures will not be new regulatory restrictions.

The first Safe Harbor Agreement, launched in 1995, covered forest landowners and the endangered red-cockaded woodpecker in the Sandhills region of North Carolina. Its embrace by private forest landowners there prompted statewide red-cockaded woodpecker Safe Harbor Agreements for that species in eight states. Several hundred landowners and several million acres of private forestland in the Southeast are now subject to these agreements.

These statewide agreements take the form of programmatic agreements between the Fish and Wildlife Service and a "program administrator," which is typically a state conservation agency. The program administrator negotiates cooperative agreements with individual landowners to enroll them in the program. This arrangement takes advantage of the fact that state conservation agencies generally have an established network of contacts among the private landowner community and are better able to negotiate cooperative agreements with them.

In states with programmatic agreements, the Service issues only one permit, and it is issued to the program administrator. That permit authorizes the taking of red-cockaded woodpeckers incidental to timber harvest, land clearing, or other generally lawful activities on enrolled land, provided that the landowner maintains his baseline responsibilities and meets other minor requirements. Put differently, the agreement and permit allow the landowner, after a specified period of years, to return his property to its baseline conditions if he wishes, notwithstanding that in the interim his voluntary conservation measures have created improved conditions that may have increased the presence of woodpeckers on the enrolled property.

Safe harbor agreements have been used to improve habitat management for the red-cockaded woodpecker, secure landowner permission to reintroduce endangered northern aplomado falcons on ranchland in Texas, and benefit a large number of other species in a wide variety of ways. They have contributed to the recovery of at least one recently delisted species, the Oregon chub, and have the potential to do so for many others. The landowners who have enrolled lands in these agreements have been able to be the good land stewards they want to be, while also securing certainty about their future regulatory obligations.

Although the first Safe Harbor Agreements were developed in the mid-1990s, the authority upon which the Fish and Wildlife Service relies in approving them is a provision that has been a part of the ESA since its enactment in 1973. That provision, in Section 10(a)(1)(A) of the Act, authorizes permits allowing otherwise prohibited activities if they "enhance the propagation or survival of the affected species." For the first two decades or so of the Act's implementation, that provision had primarily been used to authorize activities associated with captive breeding of listed species. However, Safe Harbor Agreements recognized that the language of the statute had a much broader potential reach, one that could encompass agreements with private landowners to implement voluntary conservation measures that contribute to species' survival. As the next section of this paper describes, an even more creative use of this longstanding authority has made it possible to incentivize conservation efforts for at-risk species even before they are listed as endangered.

Regulatory Assurances Regarding Candidate Species

Safe Harbor Agreements made voluntary conservation efforts possible by landowners who would otherwise refrain from managing their land to make it more attractive to endangered species because of fear that such management would result in the imposition of new – and unwanted – regulatory restrictions. Similar considerations underlie another type of landowner agreement, called a “Candidate Conservation Agreement with Assurances” or CCAA.

Whereas Safe Harbor Agreements apply only to listed species under the ESA, CCAAs apply to formally designated “candidate species” and species that are deemed likely to become candidates. Both are intended to facilitate voluntary conservation efforts by non-federal landowners by providing them with regulatory assurances.¹ The nature of those assurances differs, however. Safe Harbor Agreements typically assure a landowner, who has maintained for some specified period of years an action that improves upon the baseline conditions on his land, that he can undo that improvement in the future if he so chooses. Thus, the typical Safe Harbor Agreement results in an important, but non-permanent conservation benefit. The underlying rationale for such agreements is that they effectively buy time in which longer term conservation strategies can be developed and implemented. Also, there is an implicit expectation (which thus far appears to be well founded) that many landowners with Safe Harbor Agreements will continue their conservation actions even after they have the right to return to baseline conditions.

The regulatory assurance provided by a CCAA is different. CCAAs assure a landowner that if the species covered by his or her agreement is subsequently listed as endangered or threatened, that listing will not result in any new or different requirements for the landowner. So long as the landowner continues to abide by the terms of his or her agreement, nothing more will be required. CCAAs can incorporate the concepts of “baseline” responsibilities and a right to return to baseline, but those are not necessary elements of a CCAA.

Both Safe Harbor Agreements and CCAAs may be approved by the Fish and Wildlife Service if it determines that the agreements will provide a “net conservation benefit” to the affected species. In explaining this standard as it applies to CCAAs, the Service stated that “[t]he conservation measures and property-management activities covered by the agreement must be designed to reduce or eliminate those key current and likely future threats on the property that are under the property owner’s control in order to increase the species’ populations or improve its habitat.” Where the species or its habitat is already adequately managed, the required net conservation benefit can be found if the “property owner commits to continuing to manage the species for a specified period of time.”

Like Safe Harbor Agreements, CCAAs can be either individual landowner agreements or programmatic agreements under which a program administrator enters into individual landowner agreements pursuant to a permit issued to the program administrator by the Fish and Wildlife Service. The authority for both is Section 10(a)(1)(A) of the ESA, authorizing permits to “enhance

1. CCAAs should not be confused with Candidate Conservation Agreements (CCAs) which typically are agreements between the Service and one or more other federal agencies. Their principal purpose is to memorialize the conservation commitments of the federal agency with respect to a candidate species, and thus to reduce the likelihood that it will need to be listed. If the species is later listed, however, the CCA provides no regulatory assurance against the possibility that additional measures will be imposed on the agency through the interagency consultation process described earlier in this paper.

the propagation or survival” of endangered or threatened species. Programmatic CCAAs and Safe Harbor Agreements both offer the advantage of administrative efficiency, if there is a willing and capable program administrator. A CCAA program administrator might be a state agency, a federal agency such as USDA’s Natural Resources Conservation Service or a non-governmental organization.

One might fairly ask how the Fish and Wildlife Service can issue a permit under Section 10(a)(1)(A) authorizing take of a candidate species, since that provision applies only to endangered and threatened species, and a candidate species is neither. The answer is that permits for CCAAs are contingent on the covered candidate species becoming a threatened or endangered species. If it does, the permit takes effect without need of any further process. If it does not, the permit never takes effect, because there is no need to authorize take under the Act for a species not covered by the law.

Interagency Consultation: An Alternative Pathway for Regulatory Assurances

The earlier summary of the ESA’s regulatory framework described how the authority to take endangered wildlife can be secured through permits under Section 10 of the ESA or through an interagency consultation process. That interagency consultation process is governed by Section 7 of the Act, which requires federal agencies to ensure that their actions not jeopardize the continued existence of any listed species or adversely modify or destroy critical habitat. When a federal action that does not jeopardize the continued existence of a listed species, but will nevertheless result in the taking of some individuals of that species, that take needs to be authorized. Congress amended the Act in 1982 to create a means of doing so as part of the interagency consultation process. That mechanism is known as an “incidental take statement,” and it is included as part of the Fish and Wildlife Service’s written biological opinion on a proposed federal action. The incidental take statement specifies both “reasonable and prudent measures” to minimize the impact of any expected take and terms and conditions that must be complied with to implement those measures. Under Section 7(o), any take in compliance with those terms and conditions is authorized.

The Section 7 interagency consultation process thus provides a mechanism to address the regulatory assurance concerns of landowners who participate in federally funded programs that are subject to review and consultation under Section 7. For example, some beneficial conservation practices may be funded by a federal program aimed at restoring or enhancing habitat (such as the use of prescribed fire to restore habitat for species associated with fire-dependent ecosystems). These programs may harm individual listed animals in the short term. The incidental take that is expected to result from such conservation practices can be authorized through the incidental take statement incorporated into the biological opinion on the federal program that results from the consultation and can apply to private landowners participating in the program.

Of likely greater concern to landowners considering participating in federal conservation programs are questions about their future ability to use their land and its resources. On this score, the practice of the Fish and Wildlife Service has not always been consistent. It has sometimes narrowly limited the scope of its incidental take statements to only that take resulting from the conservation practices implemented as part of the government conservation program. At other times it has taken a more expansive view, one that recognizes, for example, that the ability to make certain future economic

uses of restored or enhanced habitat (e.g., harvest of timber from stands of longleaf pine planted with federal financial assistance) is an implicit and inherent expectation of most federal conservation cost-share programs and a reasonably foreseeable consequence of those programs. Taking this more expansive view, the incidental take statement addresses and authorizes not only any taking that is the immediate and direct consequence of implementing the conservation measures consulted upon (i.e., the tree planting), but also the future take that results from foreseeable land uses well after the conservation measures have been implemented (i.e., the tree harvest). Under this more expansive view, the participating landowner will have a stronger assurance of regulatory predictability and thus a stronger incentive to participate in the conservation program.

“Conferring” on Actions Affecting Candidate Species

The interagency consultation process discussed above is required whenever a proposed federal action may affect a listed species. However, nothing in the ESA requires federal agencies to consult with the Fish and Wildlife Service on proposed actions that affect candidate or other unlisted species. Nevertheless, the Service sometimes “confers” with other federal agencies about such actions. The origin of this practice can be found in Section 7(a)(4) of the ESA, which in a very limited set of circumstances requires federal agencies to confer with the Service regarding actions that affect species that have been proposed for listing, but that are not yet listed. The outcome of that conferral process is a “conference opinion” that is analogous to a biological opinion for actions affecting listed species. Indeed, if a species covered by a conference opinion is later listed, and if no other significant changes have occurred in the meantime, the Service essentially converts its earlier conference opinion into a biological opinion, thus ensuring compliance with Section 7’s procedural and substantive duties for the federal action at issue.

Although the conferral duty mandated by Section 7(a)(4) applies only to species that have been proposed for listing, the Fish and Wildlife Service has often used the same conferral process to address the impacts of actions affecting candidate species. A recent example is the Service’s conferral with the Natural Resources Conservation Service regarding that agency’s Sage Grouse Initiative, which provided federal cost-share assistance to private landowners for restoring or enhancing habitat for the greater sage grouse.

The conferral process thus may be a useful means of providing regulatory assurances regarding candidate species potentially affected by practices supported by federal funds. However, several caveats need to be recognized. The first, as noted above, is that the statute only addresses the conferral process in the context of species that have been proposed for listing. The Service’s extension of that process to candidate species is likely within its discretion, but it lacks an explicit statutory mandate. Second, as also noted, the conversion of a conference opinion into a biological opinion is not automatic, but is dependent upon a finding that there have been no significant new developments since the conference opinion was issued. Third, to be truly meaningful to most landowners, the regulatory assurances provided will need to extend beyond the immediate effects of implementing particular conservation practices to the effects of clearly foreseeable later land use decisions.

Threatened Species: Providing Regulatory Assurances through Special Regulations

The threatened species category was a novel feature of the ESA when it was enacted in 1973.

Its purpose was to provide a flexible means of extending protection to imperiled species before they were at the very brink of extinction. In practice, the Act treats endangered and threatened species differently in only one very important respect. For endangered species, it automatically imposes certain prohibitions, including against taking. In contrast, the Act imposes no automatic prohibitions for threatened species. Rather, for these the Act gives the Fish and Wildlife Service the discretion to impose by regulation such prohibitions as are “necessary and advisable to provide for the conservation of such species.”

The Service has used this authority (contained in section 4(d) of the Act) to fashion a wide variety of “special rules” for particular threatened species. Typically these set forth a general prohibition against taking the species, then exempt particular activities from that prohibition. For example, the 1992 rule applicable to the recently recovered and delisted Louisiana black bear exempted take that was incidental to “normal forest management activities ... except for activities causing damage to or loss of den trees.” The special rule that had been in effect for the lesser prairie-chicken while that species was listed exempted take that was incidental to a list of specified “conservation practices ... carried out in accordance with a conservation plan providing for lesser prairie-chicken conservation developed by [NRCS] in coordination with the U.S. Fish and Wildlife Service.”

Other special rules sometimes set forth a list of narrowly tailored prohibitions. For example, the special rule for the northern long-eared bat prohibits tree removal that incidentally takes the bat, but only when such removal takes place within a quarter mile of a known hibernaculum, cuts or destroys known occupied maternity roost trees, or takes place within 150 feet of a known maternity roost tree.

A somewhat different approach was taken in the special rule promulgated for the black pinesnake in 2015. That rule exempted any take that was incidental to a broad set of management activities including prescribed burning or forest management activities that maintain land in a forested condition except for (1) conversion of longleaf dominated forests to other forest types or land uses, and (2) activities causing significant subsurface disturbance.

All of the above special rules provide potential models for fashioning rules that effectively conserve threatened species while providing a reasonable expectation of regulatory assurances to landowners engaged in a wide range of land use activities. Such rules are the simplest way to tailor protections and provide assurances across a large number of landowners or land uses because they do not necessarily require participation in a particular program, designation of a program administrator, or a special enrollment process. It should be noted, however, that the flexibility to fashion special rules exists for threatened species, but not for endangered species. For these some other means of securing regulatory assurances, such as those discussed in earlier sections of this paper, will be necessary.

Conclusion

Landowners can secure reasonable assurances regarding their future regulatory responsibilities under the ESA through a variety of mechanisms. Habitat conservation plans and associated incidental take permits have proven to be a versatile tool for reconciling development and conservation objectives in a wide variety of contexts. In the nearly thirty-five years since this conservation tool was authorized, over a thousand habitat conservation plans collectively encompassing some 46 million acres have been approved. The process associated with developing and securing approval for

habitat conservation plans is sufficiently demanding, however, that these plans are best suited for large scale development proposals, the impacts of which require significant mitigation.

For the smaller landowner, particularly one who wants to contribute positively to the conservation of imperiled species, but who is concerned about the potential regulatory consequences of doing so, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances offer a workable means of responding to those concerns. These agreements are most appropriate for landowners whose land management objectives are compatible with the conservation needs of imperiled species. While both of these types of agreements have been used to good effect in particular places, their use has been limited by the fact that there are often few or no economic incentives to participate in such agreements beyond the fact of securing regulatory assurances. Though typically less demanding than for habitat conservation plans, the procedural requirements applicable to Safe Harbor Agreements and CCAAs have discouraged some landowners from pursuing them. Simplifying the procedural requirements to secure these agreements could pay significant conservation dividends on the working landscape of farms, ranches, and forest lands.

The Section 7 interagency consultation process and the authority under Section 4(d) to issue special rules for threatened species may offer the most efficient and expeditious means of addressing the concerns of landowners regarding regulatory assurances. With respect to Section 4(d), the Fish and Wildlife Service has shown an increasing willingness to use this authority and to do so in an increasingly creative way. That is to be encouraged.

The Section 7 interagency consultation and conferral processes have the important advantages of being familiar, relatively efficient processes. Provided that the Fish and Wildlife Service takes an expansive view of the scope of its authority to authorize future take through incidental take statements, Section 7 could be the preferred vehicle for extending regulatory assurances to landowners participating in federal cost-sharing or other conservation programs.

In sum, there are a number of different ways to provide regulatory assurances to landowners. Some are relatively easy and straightforward; others less so. What all share in common, however, is a recognition that the desire of most landowners for greater predictability of what will be asked or required of them is a legitimate desire and one that, if fulfilled, will help further the conservation of endangered and threatened species.