Sidebar

Sensible Updates Should Appeal to All Sectors

The Endangered Species Act was crafted in a different era and does not anticipate the increased interest in voluntary conservation and state and local engagement. There is also widespread acknowledgement that improvements are necessary to reflect modern science and best practices for species conservation. The obstacle that remains is how to overcome the political polarization concerning ESA reform legislation, in which every bill introduced, regardless of merit, is accused of "gutting" or "weakening" the law simply because it proposes a new pathway to a shared goal of making the statute work better for species and people alike.

Improvements to the ESA should include new ideas and approaches to species conservation. First, the law should promote and encourage pre-listing voluntary conservation efforts by creating new avenues for states, local governments, and private property owners to proactively work to protect species before the ESA is invoked. Voluntary conservation efforts have been at the heart of most species' recovery. However, except for Habitat Conservation Plans, the ESA contains no statutory provisions specifically devoted to voluntary conservation.

States and localities have unique authorities and knowledge regarding the management, protection, and conservation of species and habitat within their jurisdiction. The act should leverage this expertise and interest by ensuring that states and local governments have a greater role in ESA conservation programs and decisions.

The process for designating critical habitat must also be improved to leverage modern data gathering and analytical tools that increase the accuracy and quality of science. The Fish and Wildlife Service and the National Marine Fisheries Service must properly account for existing habitat protection measures (including voluntary conservation efforts) that render designations redundant, and minimize adverse economic impacts from overbroad habitat designations. Finally, critical habitat designations must only include areas where essential physical or biological features for the species occur and their designation as critical habitat is essential for the conservation of the species.

The ESA Section 7 consultation process is unwieldly in its scope, susceptible to delays in agency reviews, and lacking in clarity. The process must be revised to avoid consultations on actions with only incremental beneficial effects; to limit consultations to the footprint of the proposed action and use the existing environment as the baseline for effects analyses; and to require that protection measures imposed on a project as a result of a consultation be consistent with the federal agency's authorities and are technically and economically feasible. These and other improvements will allow for timely and consistent consultations and provide greater certainty and reasonableness regarding the end result.

Jordan Smith

Further, many species do not have recovery plans and, consequentially, no criteria for delisting. In other cases, existing recovery plans are out of date and do not accommodate the broader scope of voluntary private and state efforts behind so many successful recovery programs. The ESA recovery planning process needs to be revised to establish meaningful and enforceable delisting criteria, streamline the downlisting and delisting process, and ensure that species can be removed from the list when recovery is achieved.

Finally, the ESA's statutory deadlines are inflexible, unrealistic, and routinely missed. Petition deadlines are often enforced through litigation and settlements, without public involvement, which usurps an orderly management of species decision-making. The Services need additional flexibility to allow for the proper prioritization of ESA petitions and for full consideration of the petitioned action as expeditiously as possible.

During the last two years of the past administration, the Services finalized a series of regulatory changes, particularly relating to the designation of critical habitat. One of the shortcomings of those efforts was that, in most cases, the administration made little or no changes between its proposed and final rules. In essence, the public comment process was a box to be checked.

Many stakeholders had significant concerns with these regulations and proposed meaningful changes that would have improved ESA implementation. The new administration, as part of its regulatory reform initiative, should reexamine and act upon many of the worthwhile improvements that have emerged from the regulated community.

The ESA requires a renewed focus that reflects forty years of lessons learned. Improvements are long overdue, necessary, and possible if stakeholders would replace the polarized debate with productive discussions about how to make the law work better.

Jordan Smith is executive director of the National Endangered Species Act Reform Coalition and a senior director of governmental issues at Van Ness Feldman LLP.