

# The Keystone Working Group on Endangered Species Act Habitat Issues

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Executive Summary of the Final Report  
April 2006



# Executive Summary

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On May 18, 2005, The Keystone Center received a letter from a bipartisan group of six U.S. Senators<sup>1</sup> requesting that it convene and facilitate a cross-sector working group on the habitat provisions of the Endangered Species Act (ESA). Serving as a neutral and independent facilitator, Keystone brought together a high-caliber and diverse group of 24 individuals from the environmental and regulated communities to tackle these contentious issues. (See Appendix A for a list of participants.) Working group participants came to the table in their individual capacities and with distinctly different experiences and perspectives. Despite genuine and significant differences of opinion, participants worked together collaboratively and with an absence of the rancor that sometimes characterizes discussions about the ESA. As requested by the six Senators, the group sought to provide its “best consensual guidance” around three questions, as follows.

## **1. As currently written and implemented, is the ESA adequately protecting and conserving the habitat that listed species need to recover?**

Working group participants believe that the ESA could more effectively protect and conserve the habitat that species need to recover. While broadly agreeing that the ESA could function better, perspectives in the group varied as to the reasons why. This in turn led to divergent suggestions for potential improvements to the ESA. Some perceive that the ESA by its nature must wait until a species is in critical condition, often with its habitat almost entirely depleted, before attempting to address habitat protection and species recovery. Many identified the lack of adequate funding as a central limiting factor for the ESA as currently written and implemented. Participants generally agreed that various transactional inefficiencies can be a key pitfall for the ESA. Many felt that significant limitations to the effectiveness of the ESA stem from its inability to achieve an optimum interplay between regulations and incentives. Through discussion, it became clear that perspectives about the value and role for regulation within the context of protecting habitat varied significantly within the group.

## **2. If not, how can the ESA be improved to better conserve habitat and help species recover?**

Working group participants agreed that if new measures could be identified that would both improve the effectiveness of habitat conservation efforts for species and reduce the burden upon landowners and other regulated interests, those new approaches should be embraced. Participants made a concerted effort to identify and evaluate ideas that could achieve these twin objectives, and they believe that improvements to the ESA will ultimately need to be built on the following principles.

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<sup>1</sup> The signatories included Senators Chafee, Clinton, Crapo, Inhofe, Lincoln, and Jeffords. The letter can be viewed at [www.keystone.org/spp/env-esa.html](http://www.keystone.org/spp/env-esa.html).

- **Applying Three Tests.** A consensus-based set of revisions to the ESA must improve current law in three ways. It must: (a) enhance the recovery of listed species; (b) reduce regulatory burdens and costs (including the time and money needed for making decisions) for affected parties; and (c) increase the willingness and ability of nonfederal parties to promote the recovery of listed species.
- **Providing Greater Focus on Recovery.** Currently, critical habitat is supposed to be designated at the time of listing. Identification of the habitat that species require to recover is better done in the context of recovery planning, however, after more rigorous analysis and deliberation have been completed.
- **Optimizing Regulations and Incentives.** Regulation is necessary and worthwhile; however, it can be made less burdensome for the regulator and the regulated and more effective for the species. Wherever possible, the goals of species protection and recovery should be achieved through incentives rather than regulation.
- **Improving Cooperation.** The twin goals of the ESA, and the criteria by which its success or failure is ultimately gauged, are the prevention of extinction and the fostering of recovery. The Act's success can be facilitated by improving cooperation and reducing friction between private, governmental, and NGO interests in the implementation process.
- **Distinguishing Risk Analysis from Risk Taking.** Recovery planning is, as a whole, an iterative process. However, the question of *what* the risks of extinction are for a given species should be based upon the best-available scientific data and judgments; the question of *how much* risk should be taken or avoided is a policy decision informed by economic, social, and cultural factors, as well as scientific considerations.
- **Ensuring Adaptability.** Recovery planning is not a once-and-forever activity but typically changes depending on the state of the species and the availability of information. Various forms of adaptive management are therefore essential to effective and intelligent recovery planning.
- **Providing Agencies with Money.** An effective ESA will require adequate funding for operation and implementation. In addition to sufficient baseline funding, efficiencies should be sought through the strengthening of partnerships among the federal government, tribes, and states.

### 3. What specific changes and recommendations can the regulated and NGO communities jointly recommend, advocate for, and help to implement?

Most working group participants felt that the concept holding the most promise for consensus would likely include: New provisions for integrating habitat protection and conservation into the ESA; a greater focus on the function, content, scope, and mechanics of recovery plans; clarification or modification of the §7 standard; more effective incentives for nonfederal parties; new sources of funding for better coordinated and more workable ESA provisions pertaining to

habitat; and a clearer, more effective role for the states. Hence, the working group explored the advantages and drawbacks associated with replacing the current “critical habitat” framework with one that would: Boost the role of incentives; centralize the role of recovery and recovery planning; and revise the §7 consultation standard. Participants discussed various aspects of these three points in considerable detail, with the understanding that they were contingent and interconnected elements. In some cases, agreement in one area was predicated on the outcome of one or both of the other two; this was particularly true with respect to the §7 consultation standard and the role of recovery.

## **Incentives**

Working group participants believe that an attractive incentives program will be integral to advancing the goals of both conservation interests and the regulated sector. Effective incentives would expand the prospects for improving the biological status of listed species and potentially reduce (though likely not eliminate) the extent to which regulatory measures—which have certain limitations and tend to engender greater conflict—will be needed to achieve recovery. Conversely, without an effective incentives program it would be markedly more difficult to advance the goals of the group. In the report, working group participants offer specific recommendations on incentives relating to Farm Bill measures, voluntary cooperative agreements, tax incentives, and streamlining.

## **Recovery Planning**

Recovery may be thought of as a listed species reaching a point where it will exist over a socially and biologically meaningful timeframe. Recovery plans are documents prepared for listed species that detail the specific actions needed for recovery. The working group consistently underscored the need for scientifically sound, financially reasonable, and adaptive recovery plans. Participants explored questions that would need to be addressed if recovery plans were to assume greater importance under the ESA. A number of participants felt that at least some of the questions were difficult to address in isolation and depended in part upon other issues (e.g., whether or not any revisions to the §7 standard would be recommended). Should recovery assume a more centralized position in the Act, participants felt it important that Congress articulate a policy as to what “recovery” means. Federal agencies would then need to translate this national policy into regulation, guidance, and practice. At an operational level, defining recovery may mean establishing some acceptable level of risk, or some approach to risk that can be adapted on the ground in different places and for different species but that remains explicit and transparent. These issues, along with a number of ideas for potentially strengthening the mechanics of recovery planning, are discussed in greater detail in the report.

## **Regulatory Issues**

While the Keystone working group reached a solid consensus on many aspects of the incentives topic and identified issues needing to be addressed in recovery planning, its greatest challenge centered on the question of whether changes to the ESA’s regulatory requirements could achieve the twin goals of producing a more effective and less burdensome conservation program. Participants devoted considerable effort toward developing a recommendation aimed at

reorienting the §7(a)(2) standard to a focus on species recovery. The report describes the various issues and dimensions that the working group felt were important in considering any possible revisions to the §7 standard.