

Interim Report

Policy & Regulation Working Group

of the Invasive Species Advisory Council

June 8, 2000

Co-chairs:

Keith Pitts
Marc Miller

DRAFT

{This Draft is based on extensive discussions among Policy & Regulation Working Group members, including a conference in Washington, D.C. on June 5 & 6, 2000. The particular text in this Draft is currently being vetted by the Policy & Regulation Working Group and will be finalized by June 16.}

INTRODUCTION

This report reflects the interim recommendations of the Policy and Regulation Working Group of the Invasive Species Advisory Council.

This report is labeled an interim report to reflect the ongoing work of this and other working groups. It reflects, as well, the challenges of a group of people with widely varying backgrounds and expertise from around the United States working together on a vast and complex array of issues. Finally, the interim status of this report reflects two initial substantive challenges for the Policy and Regulation (P&R) Working Group.

First, a complete assessment of law, regulations, and implementation requires some metric – some statement and measure of the goals to be achieved. While there is increasingly wide recognition of the harm from invasive species, reflected in Executive Order 13112, we believe that some of the key judgments about the concerns and objectives of invasive species law and policy have yet to be determined. For example, key questions yet to be addressed in law and policy include the acceptable level of risk that new introductions will occur, the acceptable level of risk that intentional introductions or present non-indigenous species will become invasive species, and the acceptable level of risk that invasive species will spread or cause harm.

Second, we found that prior evaluations of the law and policy related to invasive species were useful but incomplete. Therefore, there was no model, in theory (a clear statement of principles and goals) or in practice (a comprehensive effort to evaluate federal invasive species law and policy), on which the Policy and Regulation Working Group could build.

The Guiding Principles of the Invasive Species Advisory Council (ISAC) now provide one general framework, along with the language of Executive Order 13112, and the P&R Working Group has worked within the boundaries of these directives. We also believe that the reports of the other Working Groups will, when final, provide another source of principles and goals around which a more complete analysis of policy and regulation should be developed.

Questions about the implementation of current policies raise a different challenge. Assessments of implementation also require some metric, starting with the explicit goals of the law and policies governing the agencies in question. However, the federal law and policy in the area of invasive species is sufficiently fractured and incomplete that only fairly narrow assessments of implementation – where particular agencies are carrying out their particular mandates – are even conceptually possible.

Moreover, there is a general lack of information about invasive species “on the ground” that would be necessary for a careful and complete evaluation of even the narrower mandates and agendas of particular agencies. Reviews of implementation without external measures of success will provide only limited insights about agency activities or the social and economic problems they address. Questions of implementation are, therefore, not a focus of this interim report.

For all of these reasons, this interim report of the P&R Working Group is largely focused on gaps in law and policy identified in prior documents, by agency lawyers and stakeholders, and by members of this and other Working Groups. In other words, the gaps in law and policy identified in this interim report substantially reflect a sense of current problems given current and emerging objectives. This interim report does not claim, therefore, in any way to be a comprehensive, final or complete assessment of federal invasive species law and policy. We view the challenges of assessing policy and regulation, including issues of implementation, as an ongoing process.

This interim report begins with the scoping statement for the Policy and Regulation Working Group. The remaining recommendations and observations about policy and regulation are divided into short sections reflecting general principles, prevention of new introductions, prevention of spread of invasive species, identification, control and eradication of invasive species, and finally issues of authority, information, education and funding.

SCOPING STATEMENT

The Policy and Regulation Working Group shall consider existing and prospective policies, regulations, and authorities for:

- identifying the pathways by which invasive species are introduced and spread;
- minimizing the risk of these pathways;
- preventing further introductions and spread; and
- providing for invasive species control.

Based on its consideration, the Working Group shall recommend needed policy, regulatory, funding, and legislative changes to the National Invasive Species Council. Recommendations shall be consistent with the Council’s Guiding Principles and may include suggestions for resolving outstanding issues.

I. GENERAL PRINCIPLES

For all aspects of basic invasive species policy, including prevention of introductions, identification of invasions, response to invasions, control and eradication of harmful invasive species, research, education, and funding, federal law and policy are fractured and unclear, with some notable but limited exceptions. Most of the available legal authority was promulgated in response to particular problems that have been recognized over the past 100 years (starting with the Lacey Act, first enacted in 1900, and, as amended, still an important part of the federal legal picture for invasive species).

Unlike Executive Order 13112, federal statutes do not identify the principles that should govern invasive species policy and regulation. An Executive Order can draw on all available statutory and constitutional authorities vested in the Executive Branch.

Guiding principles and goals in statutory law

* We recommend that a statement of general governing principles regarding invasive species be enacted into statutory law. These principles should recognize the pervasive effects of invasive species on United States lands and waters, including domesticated and wild areas, and both public and private lands. Invasive species impact human and economic activities, human and animal health, biodiversity, and natural and cultural resources.

Clarity and coherence

* Many critical questions of policy cannot be squarely answered within the current legal framework. In line with ISAC Guiding Principles #2, 3 and 5, we support the unification or harmonization of federal law and policy regarding the full range of invasive species issues.

* We recommend that efforts be made by federal agencies and in future legislation to establish greater consistency in definitions of critical terms regarding invasive species policy. Inconsistencies among current laws and policies inhibit clear policy-making.

Adaptive management

* In line with ISAC Guiding Principle #3, to “work smart, be adaptive,” at each stage all actors should apply the following adaptive management principles.

- (1) articulate harms, benefits, and goals,
- (2) develop law, regulations and practices that address that harms, benefits and goals,

- (3) involve the full range of government levels and stakeholders in development, implementation and assessment of harms, benefits and goals,
- (4) continually collect information that measures the full impact of law, policy and practices,
- (5) periodically evaluate the effectiveness and efficiency of the law, policy and practices, and
- (6) revise laws, policies and practices in light of those evaluations.

Human social and economic behavior, technology and knowledge, and natural systems are all subject to change, sometimes gradually, and sometimes suddenly. Policies that are efficient and effective at one time and place are certain to be inefficient and ineffective at another. Systems and attitudes must be developed and nurtured with habits in mind of continual evaluation, including both external and self-evaluation.

Cooperative activities

* Harms from invasive species occur at scales from local to global. Indeed, harms from invasive species extend to individuals and their property and livelihoods. Response to invasive species requires action by individuals, stakeholders, non-governmental organizations, and local, state and federal governments. In line with ISAC Guiding Principles, federal agencies should be encouraged to cooperate with state and local governments and with stakeholders in the detection, control and eradication of invasive species.

* Many harmful invasive species come from outside United States lands and waters. Wise invasive species policy must include cooperatives activities with other nations. The extensive United States borders, traffic and trade with Canada and Mexico create special concerns. In line with ISAC Guiding Principles, United States law, policy and regulation should reflect a concern for the biological and economic harms from species native to the United States but invasive to other places.

Local needs

* It is important to recognize the biological, economic and political variation among states, localities, and regions with respect to harm from and concern about invasive species. We recommend, as a matter of policy, that greater flexibility be allowed for local needs to control invasive species in those areas where federal law currently preempts state and local law.

II. PREVENT INTRODUCTIONS OF NEW INVASIVE SPECIES INTO THE NATION AND NATION'S WATERS

Current legal authorities with regard to both intentional and unintentional introductions are highly fragmented. No existing statutory law or combination of laws provides clear authority to prohibit or regulate import of all kinds of living organisms or regulate all vectors/pathways. Even for the most highly regulated area – insects – gaps remain in authority to prevent introduction. For the most clearly regulated vector – ballast water – gaps remain in authority to prevent introductions.

Screening intentional introductions

* We recommend that clear statutory authority be enacted to support a systematic, effective and efficient clearance process for evaluation of risk prior to approval of importation for all intentional introductions. Where agencies have authority under current law, they should implement some form of screening for all introductions. (See Aquatic Nuisance Species Task Force, Findings, Conclusions, and Recommendations of the Intentional Introductions Policy Review (1994)).

Principles relating to pathways for unintentional introductions

* Pathways are important because they are the functional mechanisms for the unintentional introduction of non-indigenous species. To the extent current authority allows, agencies should (1) conduct science-based setting of priorities among all pathways based upon risk; (2) adopt effective and efficient methods and mechanisms to minimize risk of introductions through those pathways, and; (3) establish a system to detect new introductions and new or changed pathways, and to respond appropriately. Clear statutory authority should be enacted to direct and authorize these actions.

Adaptive management for prevention of introductions

* As with all aspects of invasive species policy, and in line with the guiding principles adopted by ISAC, it is critical to apply adaptive management principles to law and policies regarding prevention of introduction of new invasive species including goal identification, collection of relevant information, ongoing assessment, and revision of policies in light of the fact of experience and the inevitability of change.

Internet sales

* The Internet, which enables purchase and sale of plants, seeds and animals, is a critical, emerging pathway. We recommend that the threat from Internet sales be fully assessed and law or policy enacted as soon as possible.

III. PREVENT THE SPREAD OF INVASIVE SPECIES WITHIN THE NATION AND BETWEEN THE NATION’S WATERS

Significant gaps exist in the federal government’s authority and ability to react to non-indigenous species after their entry into the United States.

Movement among the States

* Significant gaps exist in the federal government’s authority and ability to regulate movement of NIS among the states.

Cooperative actions

* Systems should be established to enable the federal government to more easily work with one or more states on specific invasive species problems. Though true generally for invasive species policies, given the local nature of new introductions, and the local need for identification and initial response, it is especially critical that the federal government work with state and local governments and stakeholders for the prevention of spread of invasive species.

Safe minimum standards in the States

* We pay a high price for the lack of safe minimum standards for containing spread of invasive species among the States. Gaps in state authority limit the ability of the federal government to efficiently and effectively control the spread of invasive species. States should be encouraged to set safe minimum standards. Where limitations are imposed on states due to a lack of funds for developing or enforcing standards to control the spread of invasive species, increased federal funding may be appropriate.

State enforcement of Lacey Act to protect state invasive species laws

* The Lacey Act provides for civil and criminal penalties for violations of state law. In particular, 16 U.S.C. §3372 provides:

It is unlawful for any person—

- (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
- (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
 - (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or
 - (B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

Section 3375 of Title 16 provides that “The provisions of this chapter and any regulations issued pursuant thereto shall be enforced by the Secretary [of Agriculture], the Secretary of Transportation, or the Secretary of the Treasury.” Federal officials may utilize by agreement “the personnel, services, and facilities of any other Federal agency or any State agency or Indian tribe for purposes of enforcing” the Act. However, jurisdiction is limited by statute to federal court. As with many other federal laws, we recommend that Congress allow state officials to enforce the Lacey Act in state court. State enforcement is especially appropriate in pursuit of state interests recognized in the original Lacey Act.

Adaptive management for prevention of spread

* As with all aspects of invasive species policy, and in line with the guiding principles adopted by ISAC, there is a critical need to apply adaptive management principles to law and policies regarding prevention of spread of invasive species including goal identification, collection of relevant information, ongoing assessment, and revision of policies in light of the fact of experience and the inevitability of change.

IV. IDENTIFICATION, CONTROL AND ERADICATION ACTIONS TO MINIMIZE HARM FROM INVASIVE SPECIES

New invasions

Significant gaps exist in federal authority and ability to assure early identification and quick response to new invasions, and identification of the scope and proper response to widespread invasions that have or may have interstate impacts.

- * New statutory authority should be enacted to clearly support and mandate early identification and quick response to new invasions.
- * There are gaps in state authority to assure early identification and to respond quickly to invasions. States should be encouraged to develop minimum processes and funding for early identification of and rapid response to invasions.
- * A system should be developed to incorporate local, state or regional priorities into the response to invasions.
- * Federal law should require use of the best available technologies in response to new and established invasions. It is important to recognize in law and policy that control methods (including, as illustration only, biological controls and chemicals) have costs as well as benefits.
- * Technologies and protocols should be developed in advance for sufficiently risky potential invasive species.

* It is important that funding and institutions be in place ahead of time to deal with emergencies. By definition, the particular emergencies cannot be specified in advance, but the fact that there will be emergency needs – biological “brushfires” – can be determined in advance.

Widespread invasions

Federal, state, and local governments, and stakeholders, should and must work together to control widespread invasions. Widespread invasions, by definition, are likely to extend beyond federal lands. A few widespread invasions have generated a coordinated federal, state, tribal, and local response.

* Federal law should clearly authorize federal agencies to respond to widespread invasions on federal land. Federal law should clearly recognize that federal agency funds may be spent for cooperative action off of federal lands that benefits federal lands.

* Some widespread invasions extend to other countries. International cooperative efforts should be encouraged in response to widespread invasions.

Adaptive management for identification, control and eradication of invasions

* As with all aspects of invasive species policy, and in line with the guiding principles adopted by ISAC, there is a critical need to apply adaptive management principles to law and policies regarding identification of new invasions, rapid response to new invasions, assessment of the scope of widespread invasions, and effective and efficient response to widespread invasions.

* We recommend that an agency be designated with the principle responsibility for assessing the collective and cumulative effects of control measures of invasive species, with the goal of finding ways to minimize those effects, including environmental impacts. This agency will help to determine the best available technology to respond to new and widespread invasions.

V. GENERAL AUTHORITY, INFORMATION AND FUNDING

The invasive species problem is in some ways very complex, but there is a single coherent and recognizable core issue. Prior federal legislative responses to invasive species, and the responses in most states, have been fragmentary and focused on pieces and parts of the larger problem. Many gaps remain, including foundational gaps such as collection of basic information about invasive species present in the United States, and information regarding identification of new invasions and responses to new and established invasive species. Through legislative and administrative paths, notably the Executive Order that authorized the National Invasive Species Council, the Invasive Species Advisory Committee, and therefore this Working Group, the problem of invasive species should be recognized as a coherent problem, and the guiding principles, authorities, and responsibilities for various aspects of the problem clearly identified.

Lead agencies and conflict resolution

* Within the federal government, many agencies and offices deal with some aspect of controlling harm from invasive species. For aspects of the invasive species problem where no office has responsibility, such as organizing or collecting information about all invasive species in the United States, responsibility should be allocated, and, if needed, authorization and funding provided. For aspects of the invasive species problem where multiple agencies have responsibilities for different aspects of the problem, such as responding to new invasions, or reviewing proposed responses from stakeholders and private actors, a lead agency should be designated.

* Where multiple agencies have authority over some aspect of the invasive problem, a process should be developed for resolving conflicts, whether that process is identification of a superior decision-maker when conflicts arise, or a process of appeal within the federal government.

Information and reporting requirements

* There is no current policy or requirement for the development and maintenance of a sound and usable inventory of invasive species that could be used for planning, setting priorities, or explaining needs, including funding needs. Such an inventory is foundational to rational policy, planning and implementation. Some data are available, though they have been collected by different public and private entities, and such data are not comprehensive or uniform in structure or coverage, nor have they been compiled in any one location. Various partial efforts are taking place within and outside of the federal government, and at the very least these efforts should be encouraged and supported, as a matter of law and policy.

* Various federal and states lists of invasive species have been developed under a myriad of federal and states laws and policies. As a matter of policy, those lists should

be regularly updated and made readily accessible. Increased awareness of species prohibited or restricted under federal or state law will assist with compliance, education and control. One area of special importance in this regard is administration of restrictions on interstate movement.

* Ultimately, information in the United States should be linked to international databases such as the database being developed by IUCN (the World Conservation Union, a non-governmental organization). Information about species around the world is necessary to identify new invasive species, to understand pathways, and to predict and prevent likely and possible invasions.

* As a general matter, information collected or held by the government on invasive species should be public, accessible and as transparent as possible, subject only to carefully limited exceptions necessary to protect legitimate privacy interests of private stakeholders.

* At the most basic levels, including how many and which non-indigenous species are in the United States, and where, how many new invasive species arrive each year, how many of the invasive species present in the United States are harmful, how fast they are spreading, and what impacts they are having, information currently does not exist, nor is there any agency charged with collecting or distribution such information. We recommend that regular biannual reports on the “state of non-indigenous species in the United States” be required, including assessment of the impacts and effects of invasive species on the environment, agriculture, the economy, and human and animal health. These reports should include assessment of cumulative impacts, recognize regional, state and local variations, and keep track of invasive species trends. A summary of the report should be included that is readily accessible to and targeted at the general public.

Education

* Aspects of public education about the risks and harms from invasive species, pathways, identification, and control, are currently handled by several federal agencies. We recommend that a public campaign regarding invasive species be expanded and coordinated, and, as with each aspect of invasive species policy, that the effectiveness and efficiency of education efforts be assessed.

Funding

* Current federal resource allocation is not commensurate with the risk and harm of invasive species. Nor has funding been consistent or dependable for critical aspects of current invasive species programs. Some funding has been earmarked for particular problems that have justifiably earned the attention of the public, rather than for the more general problem of which the specific problem is an illustration.

* As a general matter, expanded use of user fees may be appropriate in areas of invasive species policy, especially in situations where the primary benefits of particular invasive

species policies accrue to identifiable stakeholders. User fees, where used, should be calibrated to reflect benefits and risks. We strongly encourage user fees in situations where such fees can enable assessments or decisions that allow stakeholders to more efficiently and efficiently pursue their interests.

- * We encourage the development of positive incentives, through direct support, tax incentives, or through other mechanisms, to encourage prevention, identification, and response to invasions, and to encourage the greater use of native species in restoration, control and all other activities.

- * Funds to support invasive species policies on private lands should be encouraged in a cost-sharing framework, and based upon competitive grants.

- * Note: The Policy and Regulation Working Group recognizes the complexity of the broad range of issues involved with civil and criminal liability for harm, user fees, insurance for risky activities, and other funding and cost recovery issues. The P&R Working Group has not yet conducted any general review of these issues.

- * Existing invasive species programs should be conducted at authorized levels of expenditure. Some major invasive species programs, for example some aquatic nuisance species programs, have been authorized but not funded, or funded at levels well below authorization.

Priority use and encouragement of native species

- * Federal law and policy should support the use of native species, including the development of markets for native species, and limit the use of non-native invasive species, wherever possible.

- * A screening or risk-assessment process analogous to the process proposed for new intentional introductions should limit use of non-native species on natural lands.

- * Federal agencies should favor the native species in their own restoration, development and other programs.

///