

LEGISLATIVE BILL 1335

Approved by the Governor April 16, 2024

Introduced by Moser, 22.

A BILL FOR AN ACT relating to the Nongame and Endangered Species Conservation Act; to amend sections 37-801, 37-802, and 37-807, Reissue Revised Statutes of Nebraska, and sections 37-201 and 37-806, Revised Statutes Cumulative Supplement, 2022; to define terms; to change provisions of and provide duties and exemptions under the Nongame and Endangered Species Conservation Act relating to designation of endangered species and critical habitat and transportation infrastructure; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 37-201, Revised Statutes Cumulative Supplement, 2022, is amended to read:

37-201 Sections 37-201 to 37-811 and 37-1501 to 37-1510 and sections 6 to 8 of this act and the State Park System Construction Alternatives Act shall be known and may be cited as the Game Law.

Sec. 2. Section 37-801, Reissue Revised Statutes of Nebraska, is amended to read:

37-801 Sections 37-801 to 37-811 and sections 6 to 8 of this act shall be known and may be cited as the Nongame and Endangered Species Conservation Act.

Sec. 3. Section 37-802, Reissue Revised Statutes of Nebraska, is amended to read:

37-802 For purposes of the Nongame and Endangered Species Conservation Act, unless the context otherwise requires, the definitions found in sections 37-203 to 37-236, 37-238, 37-239, 37-241, and 37-243 to 37-247 and the following definitions are used:

(1)(a) Critical habitat means any specific area within the geographical area occupied by any endangered or threatened species at the time such species was listed pursuant to section 37-806 that contains the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection.

(b) Critical habitat includes any specific area outside the geographical area occupied by the species at the time such species is listed pursuant to section 37-806 upon a determination by the commission that such area is essential for the conservation of the species.

(c) Critical habitat does not include any manmade structure that is not necessary to the survival or recovery of any endangered or threatened species that is listed pursuant to section 37-806, including any transportation infrastructure or human settlement.

(d) Each public road, street, and highway, including any associated right-of-way, is a manmade structure and is not critical habitat for purposes of the Nongame and Endangered Species Conservation Act;

(2) (1) Endangered species means any species of wildlife or wild plants whose continued existence as a viable component of the wild fauna or flora of the state is determined to be in jeopardy or any species of wildlife or wild plants which meets the criteria of the Endangered Species Act;

(3) Exempt party means any state agency or political subdivision with a lawful duty to design, construct, reconstruct, repair, operate, or maintain transportation infrastructure, or any agent, employee, consultant, or contractor of any such state agency or political subdivision;

(4) (2) Extirpated species means any species of wildlife or wild plants which no longer exists or is found in Nebraska;

(5) (3) Nongame species means any species of mollusks, crustaceans, or vertebrate wildlife not legally classified as game bird, game animal, game fish, fur-bearing animal, threatened species, or endangered species by statute or regulation of this state;

(6) (4) Person means an individual, corporation, partnership, limited liability company, trust, association, or other private entity or any officer, employee, agent, department, or instrumentality of the federal government, any state or political subdivision thereof, or any foreign government;

(7) Restore means to return to a state that is not less beneficial for endangered or threatened species than the property was prior to an exempt party's actions;

(8) (5) Species means any subspecies of wildlife or wild plants and any other group of wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature;

(9) (6) Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct; and

(10) (7) Threatened species means any species of wild fauna or flora which appears likely to become endangered, either by determination of the commission or by criteria provided by the Endangered Species Act; and -

(11) Transportation infrastructure includes any:

(a) Road, street, highway, or right-of-way of a road, street, or highway;

(b) Previously approved and utilized interdependent or interrelated

contractor-use site that is identified on the website of the Department of Transportation, including any borrow, waste, plant, stockpile, or construction debris site;

(c) Actions permitted by a state agency or political subdivision within any road, street, highway, or right-of-way of any road, street, or highway controlled by the state agency or political subdivision;

(d) Pedestrian or bicycle trail, lane, or bridge;

(e) Technology with the primary purpose of benefiting the traveling public; and

(f) Broadband infrastructure placed by the Department of Transportation.

Sec. 4. Section 37-806, Revised Statutes Cumulative Supplement, 2022, is amended to read:

37-806 (1)(a) ~~(1)~~ Any species of wildlife or wild plants determined to be an endangered species pursuant to the Endangered Species Act shall be an endangered species under the Nongame and Endangered Species Conservation Act, and any species of wildlife or wild plants determined to be a threatened species pursuant to the Endangered Species Act shall be a threatened species under the Nongame and Endangered Species Conservation Act.

(b) Within a reasonable time after any federal listing, downlisting, removal, or uplisting, the The commission may determine that any species of wildlife or wild plant should receive a different state-listed status such ~~threatened species is an endangered species~~ throughout all or any portion of the range of such species within this state by completing the formal listing process as prescribed in this section or by retaining its previous state-listed status.

(2) In addition to the species determined to be endangered or threatened pursuant to the Endangered Species Act, the commission shall, by adopting and promulgating rules and regulations, ~~regulation~~ determine whether any species of wildlife or wild plants normally occurring within this state is an endangered or threatened species as a result of any of the following factors:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational sporting, scientific, educational, or other purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence within this state.

(3)(a) The commission shall make determinations required by subsection (2) of this section on the basis of the best scientific, commercial, and other data available to the commission.

(b) Except with respect to species of wildlife or wild plants determined to be endangered or threatened species under subsection (1) of this section, the commission shall ~~may~~ not add a species to nor remove a species from any list published pursuant to subsection (5) of this section unless the commission has first:

(i) Provided public notice of such proposed action by publication in a newspaper of general circulation in each county in that portion of the subject species' range in which it is endangered or threatened or, if the subject species' range extends over more than five counties, in a newspaper of statewide circulation distributed in the county;

(ii) Provided notice of such proposed action to and allowed comment from the Department of Agriculture, the Department of Environment and Energy, ~~and~~ the Department of Natural Resources, and any other state agency that the commission determines might be impacted by the proposed action;

(iii) Provided notice of such proposed action to and allowed comment from each natural resources district and public power district located in that portion of the subject species' range in which it is endangered or threatened;

(iv) Notified the Governor of any state sharing a common border with this state, in which the subject species is known to occur, that such action is being proposed;

(v) Allowed at least sixty days following publication for comment from the public and other interested parties;

(vi) Held at least one public hearing on such proposed action in each game and parks commissioner district of the subject species' range in which it is endangered or threatened;

(vii) Submitted the scientific, commercial, and other data that ~~which~~ is the basis of the proposed action to scientists or experts outside and independent of the commission for peer review of the data and conclusions. If the commission submits the data to a state or federal fish and wildlife agency for peer review, the commission shall also submit the data to scientists or experts not affiliated with such an agency for review. For purposes of this section, state fish and wildlife agency does not include a postsecondary educational institution; and

(viii) For species proposed to be added under this subsection but not for species proposed to be removed under this subsection, developed an outline of the potential impacts, requirements, or rules and regulations that may be placed on private landowners, or on other persons who hold state-recognized property rights on behalf of themselves or others, as a result of the listing of the species or the development of a proposed program for the conservation of the species as required in subsection (1) of section 37-807.

(c) The inadvertent failure to provide notice as required by subdivision (3)(b) of this section shall not prohibit the listing of a species and shall

not be deemed to be a violation of the Administrative Procedure Act or the Nongame and Endangered Species Conservation Act.

(d) ~~(e)~~ When the commission proposes ~~is proposing~~ to add or remove a species under this subsection, public notice under subdivision (3)(b)(i) of this section shall include, but not be limited to, (i) the species proposed to be listed and a description of that portion of its range in which the species is endangered or threatened, (ii) a declaration that the commission submitted the data that which is the basis for the listing for peer review and developed an outline if required under subdivision (b)(viii) of this subsection, and (iii) a declaration of the availability of the peer review, including an explanation of any changes or modifications the commission has made to its proposal as a result of the peer review, and the outline required under subdivision (b)(viii) of this subsection, if applicable, for public examination.

(e) ~~(d)~~ In cases when the commission determines that an emergency situation exists involving the continued existence of such species as a viable component of the wild fauna or flora of the state, the commission may add species to such lists after having first publishing ~~published~~ a public notice that such an emergency situation exists together with a summary of facts that which support such determination.

(4) In determining whether any species of wildlife or wild plants is an endangered or threatened species, the commission shall take into consideration those actions being carried out by the federal government, by other states, by other agencies of this state or its ~~political subdivisions thereof~~, or by any other person which may affect the species under consideration.

(5) The commission shall adopt and promulgate rules and issue ~~issue~~ regulations containing a list of all species of wildlife and wild plants normally occurring within this state that which it determines, in accordance with subsections (1) through (4) of this section, to be endangered or threatened species and a list of all such species. Each list shall refer to the species contained in such list therein by scientific and common name or names, if any, and shall specify with respect to each such species over what portion of its range it is endangered or threatened.

(6) Except with respect to species of wildlife or wild plants determined to be endangered or threatened pursuant to the Endangered Species Act, the commission shall, upon the petition of an interested person, conduct a review of any listed or unlisted species proposed to be removed from or added to the lists published pursuant to subsection (5) of this section, but only if the commission publishes a public notice that such person has presented substantial evidence that which warrants such a review.

(7) Whenever any species of wildlife or wild plants is listed as a threatened species pursuant to subsection (5) of this section, the commission shall issue such rules and regulations as are necessary to provide for the conservation of such species. The commission may prohibit, with respect to any threatened species of wildlife or wild plants, any act prohibited under subsection (8) or (9) of this section.

(8) With respect to any endangered species of wildlife, it shall be unlawful, except as provided in subsection (7) of this section or section 37-807, for any person subject to the jurisdiction of this state to:

- (a) Export any such species from this state;
- (b) Take any such species within this state;
- (c) Possess, process, sell or offer for sale, deliver, carry, transport, or ship, by any means whatsoever except as a common or contract motor carrier under the jurisdiction of the Public Service Commission or the federal Surface Transportation Board Interstate Commerce Commission, any such species; or

(d) Violate any rule or regulation pertaining to the conservation of such species or to any threatened species of wildlife listed pursuant to this section and adopted and promulgated by the commission pursuant to the Nongame and Endangered Species Conservation Act.

(9) With respect to any endangered species of wild plants, it shall be unlawful, except as provided in subsection (7) of this section, for any person subject to the jurisdiction of this state to:

- (a) Export any such species from this state;
- (b) Possess, process, sell or offer for sale, deliver, carry, transport, or ship, by any means whatsoever, any such species; or
- (c) Violate any rule or regulation pertaining to such species or to any threatened species of wild plants listed pursuant to this section and adopted and promulgated by the commission pursuant to the act.

(10) Any endangered species of wildlife or wild plants that which enters this state from another state or from a point outside the territorial limits of the United States and that which is being transported to a point within or beyond this state may be so entered and transported without restriction in accordance with the terms of any federal permit or permit issued under the laws or regulations of another state.

(11) The commission may permit any act otherwise prohibited by subsection (8) of this section for scientific purposes or to enhance the propagation or survival of the affected species.

(12) Any law, rule, regulation, or ordinance of any political subdivision of this state that which applies with respect to the taking, importation, exportation, possession, sale or offer for sale, processing, delivery, carrying, transportation other than under the jurisdiction of the Public Service Commission, or shipment of species determined to be endangered or threatened species pursuant to the Nongame and Endangered Species Conservation

Act shall be void to the extent that it may effectively (a) permit that which is prohibited by the act or by any rule or regulation that which implements the act or (b) prohibit that which is authorized pursuant to an exemption or permit provided for in the act or in any rule or regulation that which implements the act. The Nongame and Endangered Species Conservation Act shall not otherwise be construed to void any law, rule, regulation, or ordinance of any political subdivision of this state which is intended to conserve wildlife or wild plants.

Sec. 5. Section 37-807, Reissue Revised Statutes of Nebraska, is amended to read:

37-807 (1) The commission shall establish such programs, including acquisition of land or aquatic habitat or interests therein, as are necessary for the conservation of nongame, threatened, or endangered species of wildlife or wild plants. Acquisition for the purposes of this subsection shall not include the power to obtain by eminent domain.

(2) In carrying out programs authorized by this section, the commission shall consult with other states having a common interest in particular species of nongame, endangered, or threatened species of wildlife or wild plants and may enter into agreements with federal agencies, other states, political subdivisions of this state, or private persons with respect to programs designed to conserve such species including, when appropriate, agreements for administration and management of any area established under this section or utilized for conservation of such species.

(3)(a) For purposes of this section, state agency means any department, agency, board, bureau, or commission of the state or any other entity whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency does not include a natural resources district or any other political subdivision.

~~(b) (3) The Governor shall review other programs administered by him or her and utilize such programs in furtherance of the purposes of the Nongame and Endangered Species Conservation Act. All other state agencies shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of the act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-806, and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. For purposes of this subsection, state agency means any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.~~

(c) Each state agency shall, in consultation with and with the assistance of the commission, ensure with the best scientific and commercial data available that any action authorized, funded, or carried out by such state agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of any designated critical habitat.

(4)(a) After each consultation described in subsection (3) of this section, the commission shall provide each state agency, applicant, and project proponent, if any, with a written statement described in subdivision (4)(b) of this section if the commission concludes that:

(i) The agency action will not violate the restrictions in subdivision (3) (c) of this section, or, if the agency action might violate such restrictions, the agency offers reasonable and prudent alternatives that the commission believes will not violate such restrictions; and

(ii) The taking of any endangered or threatened species incidental to the potential action of the state agency will not violate the restrictions in subdivision (3)(c) of this section.

(b) The written statement described in subdivision (4)(a) of this section shall:

(i) Specify the impact of any incidental taking of any endangered or threatened species;

(ii) Specify reasonable and prudent measures that the commission considers necessary or appropriate to minimize such impact; and

(iii) Set forth terms and conditions with which the state agency, applicant, and project proponent, if any, shall comply to implement the measures specified in subdivision (3)(c) of this section, including reporting requirements.

(5) Any taking of any endangered or threatened species that is in compliance with the terms and conditions specified in a written statement provided under subsection (4) of this section is not a prohibited taking of such species.

(6) If the written statement provided under subsection (4) of this section pertains to any species that was listed pursuant to subsection (1) of section 37-806 and a federal incidental take statement has been issued for the same action pursuant to the Endangered Species Act, the commission shall issue a written statement with the same terms as the federal incidental take statement.

~~(7) (4) The commission shall provide notice and hold a public meeting prior to the implementation of conservation programs designed to reestablish threatened, endangered, or extirpated species of wildlife or wild plants through the release of animals or plants to the wild. The purpose of holding~~

such a public meeting shall be to inform the public of programs requiring the release to the wild of such wildlife or wild plants and to solicit public input and opinion. The commission shall set a date and time for the public meeting to be held at a site convenient to the proposed release area and shall publish a notice of such meeting in a legal newspaper published in or of general circulation in the county or counties where the proposed release is to take place. The notice shall be published at least twenty days prior to the meeting and shall set forth the purpose, date, time, and place of the meeting.

Sec. 6. The Nongame and Endangered Species Conservation Act does not apply to any action of an exempt party in furtherance of its lawful duties associated with designing, constructing, reconstructing, repairing, operating, or maintaining transportation infrastructure, except that:

(1) This exemption does not extend to any state agency as defined in section 37-807 performing any action that would require consultation pursuant to subsection (3) of section 37-807 if such state agency is not actually engaged in designing, constructing, reconstructing, repairing, operating, or maintaining transportation infrastructure; and

(2) The Nongame and Endangered Species Conservation Act applies to any initial action by an exempt party that creates new transportation infrastructure in areas not previously dedicated to the exempt party's lawful duties or any subsequent action that increases the area of existing transportation infrastructure.

Sec. 7. (1) To the extent the exempt party deems practical and compatible with the primary purposes of transportation infrastructure, such exempt party shall:

(a) Consider the impact on endangered or threatened species when designing, constructing, reconstructing, repairing, operating, or maintaining transportation infrastructure. The exempt party may modify or amend designs and operation and maintenance practices to decrease or avoid any negative impact on any endangered or threatened species; and

(b) Restore areas of temporary disturbance on real property it owns in fee simple at the conclusion of any construction, reconstruction, repair, operation, or maintenance.

(2)(a) Upon request of any exempt party, the commission shall provide support and recommendations to such exempt party relating to any potential impact caused by the actions of the exempt party on any endangered or threatened species related to the design, construction, reconstruction, repair, operation, or maintenance of transportation infrastructure.

(b) The exempt party may enter into any written agreement with the commission or any other governmental entity for the purpose of providing aid in the conservation of any endangered or threatened species.

Sec. 8. (1) Any federally designated critical habitat under the Endangered Species Act shall be critical habitat under the Nongame and Endangered Species Conservation Act.

(2)(a) In addition to federally designated critical habitat under the Endangered Species Act, the commission shall by rule and regulation determine if any additional habitat of a species listed pursuant to subsection (2) of section 37-806 is critical habitat as a result of any of the following factors:

(i) The present or threatened destruction, modification, or curtailment of the habitat or range of such species;

(ii) Overutilization for commercial, recreational, scientific, educational, or other purposes;

(iii) Disease or predation;

(iv) The inadequacy of existing regulatory mechanisms; or

(v) Other natural or manmade factors affecting the continued existence within this state of such species.

(b) The commission shall not designate as critical habitat for any endangered or threatened species the entire geographical area that can be occupied by such endangered or threatened species unless the commission determines that such designation is essential for the survival of the endangered or threatened species.

(c) The commission may, concurrently with making a determination under subsection (2) of section 37-806 that a species is an endangered or threatened species, designate any habitat of such species that is also considered to be critical habitat.

(d) The commission may designate critical habitat for any plant or animal species that is listed under section 37-806 that does not have a designated critical habitat.

(e) The commission may revise any previous designation of critical habitat.

(3)(a) The commission shall make determinations required by subsection (2) of this section on the basis of the best scientific, commercial, and other data available to the commission.

(b) Except with respect to critical habitat designated under subsection (1) of this section, the commission shall not designate or remove designation of critical habitat for a species from any list published pursuant to subsection (5) of this section unless the commission:

(i) Provides public notice of such proposed action by publication in a newspaper of general circulation in each county in which the critical habitat is proposed to be designated, or if the proposed critical habitat designation extends over more than five counties, in a newspaper of statewide circulation distributed in each of the counties;

(ii) Provides notice of such proposed action to and allows comment from

the Department of Agriculture, the Department of Environment and Energy, the Department of Natural Resources, and any other state agency that the commission determines might be impacted by the proposed action;

(iii) Provides notice of such proposed action to and allows comment from each natural resources district and public power district located within the area proposed to be designated as critical habitat;

(iv) Notifies the Governor of any state sharing a common border with this state, in which the species for which the critical habitat that is being proposed to be designated is known to occur, that such action is being proposed;

(v) Allows at least sixty days following publication for comment from the public and other interested parties;

(vi) Holds at least one public hearing on such proposed action in each game and parks commissioner district where the critical habitat is proposed to be designated;

(vii) Submits the scientific, commercial, and other data that is the basis of the proposed action to scientists or experts outside and independent of the commission for peer review of the data and conclusions. If the commission submits the data to a state or federal fish and wildlife agency for peer review, the commission shall also submit the data to scientists or experts not affiliated with such agency for review. For purposes of this section, state fish and wildlife agency does not include a postsecondary educational institution; and

(viii) For critical habitat proposed to be designated under this subsection, but not for critical habitat proposed to be removed from designation under this subsection, develops an outline of any potential impact, requirement, or rule or regulation that might be placed on any private landowner or other person who holds any state-recognized property right as a result of the listing of the critical habitat designation.

(c) The inadvertent failure to provide notice as required by subdivision (3)(b) of this section shall not prohibit the designation of critical habitat and shall not be deemed to be a violation of the Administrative Procedure Act or the Nongame and Endangered Species Conservation Act.

(d) When the commission proposes to designate or remove designation of critical habitat under this subsection, public notice under subdivision (3)(b) (i) of this section shall include (i) the critical habitat proposed to be listed as designated critical habitat and a description of the portion of the range in which the species for which critical habitat is proposed to be designated is endangered or threatened, (ii) a declaration that the commission submitted the data that is the basis for the listing for peer review and developed an outline if required under subdivision (b)(viii) of this subsection, and (iii) a declaration of the availability of the peer review, including an explanation of any changes or modifications the commission has made to its proposal as a result of the peer review, and the outline required under subdivision (b)(viii) of this subsection, if applicable, for public examination.

(e) In cases when the commission determines that an emergency situation exists that requires the designation of critical habitat to provide for the continued existence of a species as a viable component of the wild fauna or flora of the state, the commission may add the designated critical habitat to such lists after first publishing public notice that such an emergency situation exists together with a summary of facts that support such determination.

(4) In determining whether any endangered or threatened species requires the designation of critical habitat, the commission shall take into consideration those actions being carried out by the federal government, by other states, by other agencies of this state or its political subdivisions, or by any other person which may affect the species under consideration.

(5) The commission shall adopt and promulgate rules and regulations containing a list of all designated critical habitat in this state and the endangered or threatened species for which such critical habitat was designated. Each species on such list shall be referred to by both scientific and common name or names, if any.

Sec. 9. Original sections 37-801, 37-802, and 37-807, Reissue Revised Statutes of Nebraska, and sections 37-201 and 37-806, Revised Statutes Cumulative Supplement, 2022, are repealed.