

**INVASIVE SPECIES COUNCILS:
THE Pervasiveness of Model Language in State Law**



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I. Introduction

Invasive species can displace native plants and animals, disrupt ecological processes, threaten ecosystem stability, and alter both natural and man-made landscapes, thereby endangering the ecological integrity of our nation’s natural systems and threatening public health and safety.¹ Federal, state, and local governments the world over spend exorbitant amounts of money attempting to remedy the adverse effects of species invasions while businesses, farmers, and other landowners are often left to suffer substantial economic harm.² Invasive species management efforts in the United States are particularly difficult to implement as multiple state and federal agencies may have overlapping regulatory or administrative responsibilities for invasive species prevention, management, control, and research. Furthermore, U.S. state and federal agencies often share responsibilities.

According to the Environmental Law Institute (ELI)—a preeminent source for environmentally centered legal analysis—states with invasive species councils (ISCs) are better prepared to implement and enforce state laws and programs aimed at the prevention, control, and management of invasive species. ISCs are entities meant to facilitate the coordination of statewide actions regarding: (1) the prevention of and early detection and rapid response to new invaders; (2) control and management of established invasive species; (3) restoration of native species and invaded habitats; and (4) monitoring, research, and public education and outreach efforts.³ Councils can take many forms, but generally help state management agencies coordinate invasive species management authorities and efforts across multiple sectors.

Because invasive species management schemes are largely fragmented from state-to-state, agency coordination efforts such as ISCs are vital in forming an effective and expeditious response to invasion events. According to ELI, “[c]oordination among federal, state, and local agencies, alongside key players within the private sectors, allows for more comprehensive and complementary coverage and implementation of regulatory and administrative authorities, policies, programs, and priority issues regarding invasive species within a state.”⁴ However, achieving such coordination is not always simple in practice. State laws addressing invasive species councils vary in content and stringency from state-to-state, potentially limiting their effectiveness. For example, the role played by state departments of agriculture in invasive species councils is extremely variable. In some states, the agricultural department might run the council, whereas in others, the department may not even be an active member. Active participation and engagement of agricultural departments in state invasive species councils is critical in ensuring the needs of the agricultural sector are considered and addressed, yet their inclusion may not always be required by law.

¹ ENVTL. LAW INST., *INVASIVE SPECIES CONTROL: A COMPREHENSIVE MODEL STATE LAW 1* (2004), available at <https://www.eli.org/sites/default/files/eli-pubs/modellaw.pdf>.

² *Id.*

³ ENVTL. LAW INST., *HALTING THE INVASION: STATE TOOLS FOR INVASIVE SPECIES MANAGEMENT 84* (2002), available at <https://www.eli.org/sites/default/files/eli-pubs/d12-06.pdf>.

⁴ *Id.* at 83.

Partially in response to this coordination issue, ELI released two reports approximately fifteen years ago that are meant to inform policy decisions related to invasive species management in the United States. ELI's first report, entitled "Halting the Invasion: State Tools for Invasive Species Management" ("Halting the Invasion") was published in 2002, and sets forth seventeen separate tools states can utilize to prevent, regulate, control, and manage invasive species and to effectively enforce and implement their related programs.⁵ The second report, entitled "Invasive Species Control: A Comprehensive Model State Law" was produced in 2004 as a companion to ELI's initial publication, and combines most or all of those seventeen tools into a model state law that, in ELI's view, would allow states to effectively implement comprehensive invasive species management programs.⁶ In response to those forward-thinking documents and considering that more than a decade has passed since their publication, the National Sea Grant Law Center (NSGLC) decided to examine how closely state law mirrors the invasive species council-specific recommendations made in ELI's model law.

II. Research Methodology

As an initial step towards assessing the pervasiveness of ELI's model language in state law, the National Sea Grant Law Center conducted a comprehensive review of state laws authorizing the establishment of "all taxa" invasive species councils.⁷ Eleven states and one territory have created invasive species councils through legislation, and two through executive orders. Two states had invasive species councils at one time, but have since cancelled (as is the case in Michigan) or allowed their authorization to expire (as is the case in Virginia). One state, Missouri, introduced legislation that would have created an invasive species council, but the proposed legislation failed to pass. Another state, Massachusetts, has introduced legislation that would create an invasive species council, but the legislation is still pending as of September 2019.

Several states have invasive species councils or committees that operate as membership organizations governed through bylaws. Although state agencies are often active participants in such councils, their structure and function can be quite different. Additionally, several states have enacted authorizing legislation for invasive species councils or committees that are meant to address a limited subset of invasive species, such as aquatic invasive species. In this report, the NSGLC limited its analysis to the fourteen current "all taxa" state invasive species councils established through state legislation or executive order, meaning those councils that address *all* invasive species.

For each of the fourteen invasive species councils the NSGLC analyzed, a comparative analysis was undertaken to examine the extent to which those states' laws address the key provisions of ELI's model law that relate to invasive species councils. To conduct the comparative analysis, the NSGLC searched for the presence of those key provisions in the authorizing legislation and executive orders for the fourteen "all taxa" state invasive species councils. The product of this research was captured in individual Excel spreadsheets for each state and provided the foundation for the development of the

⁵ See generally *Id.*

⁶ See generally *Envtl. Law Inst., supra* note 1.

⁷ This review was conducted by Bryce Burgwyn, Harvard Law School J.D. Candidate, Class of 2021, while serving as the National Sea Grant Law Center's 2019 Summer Intern.

following summary report. Following the summary report is an appendix of charts the NSGLC created to help synthesize this information into a more readily digestible format. Some of the information discussed in the narrative summary report is excluded from the appendix charts due to a lack of significant, translatable information.

III. Establishing Invasive Species Councils

To facilitate interagency and intersector coordination and cooperation, ELI generally recommends in its model law that state invasive species councils (ISCs) be formed to advise governors and state agencies on matters relating to invasive species in the state and to directly manage the prevention, regulation, and control of non-native and invasive species.⁸ In Section 2.01 of its model law, ELI sets forth its recommendations for the structure and makeup of ISCs.⁹ Specifically, it recommends that councils consist of a number of *ex officio* voting members as well as a number of appointed voting members and non-voting members.

Ex officio members are members whose inclusion on a council is by virtue of their office. They are not necessarily elected or appointed, rather they continually serve on the council because it requires the expertise or influence they have acquired as a part of, for example, a state agency. *Ex officio* voting members have all the rights and obligations of the ISC, including the right to discuss, debate, make decisions, and vote. ELI recommends that a number of state agencies involved with invasive species designate a representative as an *ex officio* voting member. Specifically, ELI mentions eight state organizations that should be included on ISCs, including: (1) the State Department of Agriculture, (2) the State Department of the Environment, (3) the State Department of Natural Resources, (4) the State Fish and Wildlife Agency, (5) the State Forestry Agency, (6) the State Department of Transportation, (7) the State Land Grant University, and (8) the Sea Grant College of the State University.¹⁰ ELI notes that members from other agencies (such as the Department of Health) may be added as appropriate.

According to ELI's model law, appointed voting members should be chosen by a state's governor, and differ from *ex officio* voting members in that they are appointed to ISCs from several categories due to their general interest in controlling populations of invasive species. Specifically, ELI recommends that state governors appoint one or more voting members representing: (1) the agricultural and horticultural industries, (2) environmental and conservation interests, (3) the pet and/or aquarium industry, and (4) the port and/or shipping industry.¹¹

ELI also recommends that councils include as non-voting members the designated representatives of federal agencies with an interest and involvement in invasive species prevention, control, and management in the state. It notes that such members should be designated at the discretion of their state's governor upon nomination by the federal agencies.

⁸ *Id.* at 14.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The NSGLC’s research revealed that the composition of “all taxa” ISCs in the thirteen states and one territory that have created such vary widely in their adherence to ELI’s recommendations in Section 2.01 of its model law. As noted in the executive summary, the role played by state departments of agriculture in ISCs also ranges widely from state to state, with not all enjoying the *ex officio* voting member status that ELI recommends. For example, in California, the Department of Agriculture is the co-lead agency of the state’s ISC along with the Natural Resources Agency, and the legislation authorizing the council itself is codified in the state’s Food and Agricultural Code.¹² This firmly entrenches the Department of Agriculture’s role within state law and unequivocally establishes it as the co-head of the council into the future.

However, in some states, the Department of Agriculture’s role is less defined. For example, the provisions of the Montana and Wisconsin Codes that establish their respective ISCs fail to specifically mention what the makeup of those councils should be, leaving it up to the state to decide.¹³ In both states, representatives of the state departments of agriculture are listed as council members, but neither state explicitly names those representatives to leadership positions.¹⁴ Additionally, one state—New Hampshire—qualifies the role of the Department of Agriculture in its Invasive Species Committee.¹⁵ In New Hampshire, the Department of Agriculture is not actually a member of the Committee, but instead advises the Commissioner of Agriculture, Markets, and Food, who then adopts the state’s invasive species-related rules.

Whether the other state organizations mentioned in ELI’s model law enjoy *ex officio* voting member status on their respective ISCs also varies widely. In many instances, ELI-recommended organizations are not included at all. This is the case for state land grant universities, which were not included in the required composition of any of the “all taxa” states’ ISCs. The NSGLC found that the ELI-recommended organizations most often included on ISCs (other than state departments of agriculture) are state departments of transportation and the environment as well as state fish and wildlife agencies. Conversely, those least included (other than land grant universities) are Sea Grant colleges and state forestry agencies.

In its research, the NSGLC also found many instances of states including *ex officio* voting members that differ from those explicitly recommended by ELI in its model law. For example, in Hawaii, representatives of the University of Hawaii, the Department of Business, Economic Development, and Tourism, and the Department of Health are all included.¹⁶ Furthermore, these additional *ex officio* voting members are sometimes given extra roles. For example, in Indiana, a representative from the Purdue University College of Agriculture acts as secretary of the council, while an employee of the division and entomology and plant pathology serves as the terrestrial invasive species coordinator.¹⁷

¹² CAL. FOOD & AGRIC. CODE § 7700(b).

¹³ MONT. CODE ANN. § 80-7-1201; WISC. STAT. ANN. § 23.22(3)(a).

¹⁴ *MISC Members, Partners and Committees*, THE MONTANA DEPARTMENT OF NATURAL RESOURCES & CONSERVATION, <http://dnrc.mt.gov/divisions/cardd/montana-invasive-species-program/misc/misc>; *Council Members*, WISCONSIN INVASIVE SPECIES COUNCIL, <https://invasivespecies.wi.gov/council/members/>.

¹⁵ N.H. REV. STAT. ANN. § 430:54.

¹⁶ HAW. REV. STAT. ANN. § 194-2(b).

¹⁷ IND. CODE ANN. § 15-16-10-5.

In the context of appointed ISC voting members, no state fully measures up to the recommendations ELI sets forth in its model law. However, some states do partially meet the model. For example, Indiana provides for three appointed council members from the hardwood tree industry, horticulture industry, agriculture industry, and aquaculture industry.¹⁸ Additionally the state's code provides for the appointment of one individual representing research interests as well as two individuals who represent organizations or local government agencies primarily concerned with any of the following: (1) land trusts, (2) biodiversity conservation, (3) aquatic conservation, and (4) local parks and recreation.¹⁹ As another example, in Oregon,²⁰ the applicable code section notes that *ex officio* voting members on the council will appoint ten voting members to the council.²¹ The state goes on to set forth ten different categories of interest that the appointed voting members must represent, and requires that a single appointed member represent only a single interest area.²² Those interest areas include environmental stewardship organizations, private industry organizations, Indian tribes, specified geographic areas, and the general public.²³

The involvement of federal agency representatives as non-voting members of invasive species councils is similarly varied. The codes of Hawaii, Nebraska, Oregon, Washington, and Guam all provide for such involvement, but differ in the federal agencies specifically mentioned.²⁴ For example, Washington's ISC must invite one representative each from the U.S. Department of Agriculture, the Fish and Wildlife Service, the Environmental Protection Agency, and the Coast Guard.²⁵ Additionally, while New York does not specifically designate federal agency representatives involved with its state ISC as non-voting members, it notes that "[t]he council may consult with any organization, educational institution, or government agency" including, but not limited to, several listed federal and state agencies and organizations.²⁶

IV. Council Practice & Procedure

In order to function in the most efficient and effective way possible, Section 2.02 of ELI's model law recommends that ISCs adopt certain practices and procedures on which to ground their operations.²⁷ First and foremost, ELI recommends that ISCs choose one of their *ex officio* voting members to serve as chairperson every three years. In its research, the NSGLC found that, while almost all "all taxa" states set forth provisions related to the election or appointment of a chairperson, no state adhered to ELI's exact model.

¹⁸ IND. CODE ANN. § 15-16-10-5(a).

¹⁹ *Id.*

²⁰ Oregon has recently amended the legislation authorizing its Invasive Species Council. While the changes will not take effect until January 1, 2020, this report analyzes the newly amended legislation in contrast to that effective in 2019.

²¹ S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).

²² *Id.*

²³ *Id.*

²⁴ HAW. REV. STAT. ANN. § 194-2(b); NEB. REV. STAT. ANN. § 37-1403(4); S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).; WASH. REV. CODE ANN. § 79A.25.320; 5 G.C.A. § 70104.

²⁵ WASH. REV. CODE ANN. § 79A.25.320.

²⁶ N.Y. ENVTL. CONSERV. LAW § 9-1705.

²⁷ ENVTL. LAW INST. *supra* note 1 at 14-15.

Two states, Montana and Wisconsin, do not address the chairperson position at all (and, in fact, fail to put forth any statutory provisions related to practice and procedure). However, every other state the NSGLC examined does so. In Pennsylvania and Idaho, the chairperson position defaults to the states' respective Department of Agriculture, thereby solidifying its place as head of the respective councils.²⁸ However, it is important to note that, in both of those states, the councils were created by virtue of an Executive Order, not from the passage of legislation. While enacted legislation is relatively difficult to modify, Executive Orders can be easily repealed and/or replaced by states' Governors (whose political ideals can change drastically from one election cycle to another). In several other states, chairpersons must necessarily come from specific state departments. For example, in Hawaii, the council must designate either the state Department of Agriculture, Health, or Land and Natural Resources as the lead agency for each function of the ISC.²⁹ Similarly, some states provide for co-chairpersons that must come from specified state departments. For example, in California, the Department of Agriculture and Department of Natural Resources serve as co-chairs,³⁰ while, in New York, the Commissioner of Environmental Conservation and Commissioner of Agriculture and Markets serve as co-chairs. Additionally, at least one state—Oregon—is unique in the organization of its chairperson structure, requiring that its ISC select both a chairperson and a vice-chairperson.³¹

ELI also recommends that the term of each appointed member be three years, except as necessary to establish staggered terms so that only one-third of appointed members be up for re-appointment in a single year. In its research, the NSGLC found that no state met these model requirements. In fact, only two states mentioned appointed membership terms at all. The state that comes closest to ELI's model is Indiana, which requires that appointed council members generally serve three years, continuing until a successor has been appointed.³² Pennsylvania limits the terms of appointed council members to four years.³³ However, neither of those states have enacted any provisions related to staggered terms as ELI recommends.

Regarding expense reimbursement, ELI's model law recommends that appointed members be reimbursed from ISC funds for travel and other expenses incurred while performing their duties. One state, Pennsylvania, almost directly adheres to the model law, providing that council members may, upon request, be reimbursed for the expenses ELI mentions.³⁴ However, the state is careful to note that no council member may receive direct compensation for their service.³⁵ Two other states, Indiana and Oregon, also allow for compensation, but with qualifications. In Indiana, members who are not state or county employees are entitled to reimbursement for their travel, but only as provided in Purdue University's travel policies and procedures and subject to the availability of money in the ISC's fund.³⁶ Oregon's related legislation is also unique, permitting council members to recoup their travel and other related expenses at the discretion of the council, but noting that the State Invasive Species

²⁸ Pa. Exec. Order No. 2017-07 (Dec. 20, 2017); Idaho Exec. Order No. 2017-05 (Apr. 6, 2017).

²⁹ HAW. REV. STAT. ANN. § 194-2(a)(7).

³⁰ CAL. FOOD & AGRIC. CODE § 7700(c); N.Y. ENVTL. CONSERV. LAW § 9-1705.

³¹ S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).

³² IND. CODE ANN. § 15-16-10-5.

³³ Pa. Exec. Order No. 2017-07 (Dec. 20, 2017).

³⁴ *Id.*

³⁵ *Id.*

³⁶ IND. CODE ANN. § 15-16-10-5.

Coordinator is entitled to reimbursement without being subject to such discretion.³⁷ Nebraska, in contrast, outright prohibits council members from receiving any compensation or reimbursement for expenses associated with their service on the council.³⁸ The remaining “all taxa” states NSGLC analyzed made no mention of reimbursement in their ISC-related legislation or executive orders.

ELI next recommends that a majority of the voting members of a council constitute a quorum, provided that there are at least 5 *ex officio* members present.³⁹ Of the states that NSGLC analyzed, only four discussed quorum. Hawaii, Oregon, and Guam each noted that a majority is enough to establish quorum, but make no mention of required numbers of *ex officio* members.⁴⁰ Indiana mentions quorum, but only requires that six members of its council be present to establish such.⁴¹

The last recommendation ELI makes in its model law in relation to council practice and procedure relates to the frequency of council meetings. In its model, ELI recommends that ISCs meet at least quarterly in public session. In its research, the NSGLC found that states vary widely in their adherence to this model, with some states requiring quarterly meetings and others only requiring that their council members meet annually. The meeting frequency requirements of the nine states and one territory that specify such fall into four general categories: (1) quarterly meetings, (2) biannual meetings, (3) annual meetings, and (4) meetings either at the discretion of the council chairperson or by a request of a majority of council members. Only New York, Pennsylvania, and Guam stipulate that their ISCs should meet at least quarterly.⁴² In Nebraska and Oregon, councils are only required to meet either at the discretion of the chairperson or by request of its members.⁴³ In ELI’s view, quarterly meetings would give a state’s ISC ample opportunity to address emerging and continued invasive species issues in the state. However, when a state’s authorizing legislation does not specifically provide for mandatory meeting frequency, a council could theoretically choose not to meet at all—an improbable scenario, to be sure, but one worthy of consideration.

V. Council Directors

In Section 2.03, ELI sets out its recommendations for ISC directors.⁴⁴ Though brief, ELI’s model language suggests that state governors appoint directors who have the authority to administer and implement their Council’s rulemakings (if permitted) and/or recommendations.⁴⁵ ELI goes on to recommend that directors should be able to submit a budget and hire staff in order to best effect their duties, and concludes by suggesting that the director and their staff be housed within a state agency determined by the governor, with the advice and consent of the council.⁴⁶

³⁷ S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).

³⁸ NEB. REV. STAT. ANN. § 37-1403(1).

³⁹ “Quorum” refers to the minimum number of members of an ISC that must be present at any of its meeting to make proceedings of that meeting valid.

⁴⁰ HAW. REV. STAT. ANN. § 194-2(d)(1); S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019); 5 GUAM CODE ANN. § 70106.

⁴¹ IND. CODE ANN. § 15-16-10-5.

⁴² N.Y. ENVTL. CONSERV. LAW. § 9-1705; Pa. Exec. Order No. 2017-07 (Dec. 20, 2017); 5 GUAM CODE ANN. § 70106.

⁴³ NEB. REV. STAT. ANN. § 37-1403(6); S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).

⁴⁴ ENVTL. LAW INST. *supra* note 1 at 15.

⁴⁵ *Id.*

⁴⁶ *Id.*

No state or territory that the NSGLC analyzed explicitly mentioned such a director position in its authorizing legislation or executive order. However, Texas notes that the State Soil and Water Conservation Board must provide a full-time employee to serve as its committee’s “coordinator.”⁴⁷ It is unclear from the state’s statutory language whether the “coordinator” position is analogous to that of a director. The provision makes no mention of what powers and duties the coordinator must fulfill, nor does it cede any rule administration or implementation authority to said coordinator. The statute goes on to note that Texas’s council is “administratively attached” to the State Soil and Water Conservation Board; however, whether the council and its coordinator are actually “housed” within said agency is, again, unclear from the statutory language.⁴⁸ Oregon’s statutory language also makes mention of a “State Invasive Species Coordinator,” but does not state where that coordinator should be sourced from nor what their powers and/or duties should be.⁴⁹

VI. Council Duties & Powers

Section 2.04 of ELI’s model law discusses powers and duties of ISCs.⁵⁰ This section is split up into four subdivisions: (1) general authority, (2) regulatory authority, (3) additional authority, and (4) delegation authority.⁵¹ As to general authority, ELI suggests that councils be permitted to adopt regulations, rules, and procedures as reasonably necessary to carry out the purpose of the council, including the authority to adopt an invasive species management plan.⁵²

In its research, the NSGLC discovered that only two of the states and territories analyzed choose to cede any rulemaking authority to their ISCs—Hawaii and Oregon. Hawaii’s authorizing legislation specifically notes that “[t]he invasive species council may adopt rules” to effectuate its purpose.⁵³ In Oregon, the council may “[a]dopt rules or perform other acts the council considers reasonable for carrying out the powers, duties and functions of the council.”⁵⁴ In the remaining nine states and one territory that address their councils’ rulemaking authority, the ISCs are only permitted to make recommendations. For example, Nebraska’s ISC has an explicit duty to “[r]ecommend action to minimize the effects of harmful invasive species on Nebraska’s citizens in order to promote the economic and environmental well-being of the state.”⁵⁵ The state’s Game and Parks Commission can then use the council’s recommendations to influence the adoption of its own rules and regulations without further input from the council if not desired. This distinction is significant because it helps determine just how much influence ISCs have in their home states. In ELI’s view, ISCs should have direct rulemaking authority, not merely the power to make recommendations, in order to be the most effectual at mitigating invasive species threats.

⁴⁷ TEX. GOV’T CODE ANN. § 776.006.

⁴⁸ *Id.*

⁴⁹ S.B. 445, 80th Gen. Assemb., Reg. Sess. (Or. 2019).

⁵⁰ ENVTL. LAW INST. *supra* note 1 at 15-16.

⁵¹ *Id.*

⁵² *Id.* at 15.

⁵³ HAW. REV. STAT. ANN. § 194-7.

⁵⁴ OR. REV. STAT. ANN. § 570.755(3)(c).

⁵⁵ NEB. REV. STAT. ANN. § 37-1404(1).

Regarding regulatory authority, ELI further recommends that councils have the power and authority necessary to fulfill the regulatory requirements of the council, including, without limitation, the following five powers and duties as applicable to invasive species control efforts within the state: (1) the authority to enter and inspect any premises; (2) the authority to establish border check stations at state points of entry or other necessary facilities; (3) the authority to seize or destroy non-native or invasive species from public or private ownership as necessary; (4) the authority to conduct studies, undertake research, and engage in monitoring or tracking activities as necessary; and (5) the authority to develop and implement rules establishing appropriate and reasonable administrative enforcement mechanisms to enforce compliance, including, without limitation, investigation and information collection, notices of violations, permit revocation, administrative hearings and injunctions, and fines.⁵⁶

As to general regulatory authority, the NSGLC’s research revealed that no state cedes any level of such authority to its ISC, instead choosing to reinforce the councils’ advisory status. For example, Hawaii notes that its ISC has a duty to “[a]dvise, consult, and coordinate invasive species-related efforts with and between the departments of agriculture, land and natural resources, health, and transportation, as well as state, federal, international, and privately organized programs and policies.”⁵⁷ This language ultimately leaves regulatory decisions up to Hawaii’s agencies themselves rather than its ISC, again contravening ELI’s model.

Nevertheless, a number of states have chosen to specifically cede one or more of ELI’s five listed regulatory powers and duties to their ISCs. While no state has chosen to give their ISC the authority to establish border check stations as ELI recommends, a fair number of states grant their councils the power to conduct studies, undertake research, and/or engage in monitoring or tracking activities as necessary. For example, Wisconsin’s authorizing legislation makes it an ISC duty to “conduct studies of issues related to controlling invasive species” that must address a number of things, including the effect of the state’s bait industry on the introduction and spread of invasive species and the acquisition of invasive species through mail order and Internet sales.⁵⁸ However, two states—Texas and New Hampshire—either qualify the council’s authority to conduct studies and the ilk or explicitly cede such authority to another entity. In Texas, the ISC cannot conduct studies, undertake research, or engage in monitoring on its own, but can make recommendations to state agencies regarding research, technology transfer, and management actions related to invasive species control.⁵⁹ New Hampshire’s legislation notes that its Commissioner of Agriculture conducts research and educational activities addressing the environment and economic effects of invasive species upon the state in lieu of its ISC.⁶⁰ Similarly, New Hampshire vests in its Commissioner enforcement powers as well as the authority to prohibit the collection, possession, importation, transportation, sale, propagation, transplantation, or cultivation of listed invasive species (authority that necessarily permits the Commissioner to enter and inspect premises for individuals of such species).⁶¹ Only one state—Oregon—vests such authority

⁵⁶ *Id.*

⁵⁷ HAW. REV. STAT. ANN. § 194-2(a)(2).

⁵⁸ WISC. STAT. ANN. § 23.22(3)(b).

⁵⁹ TEX. GOV’T CODE ANN. § 776.004.

⁶⁰ N.H. REV. STAT. ANN. § 430:53.

⁶¹ N.H. REV. STAT. ANN. § 430:55; N.H. REV. STAT. ANN. § 430:53.

with its ISC as ELI recommends, going even further by permitting the council to expend funds from its Invasive Species Control Account to effect such authority.⁶²

In the way of additional authority, ELI recommends that councils be further authorized to engage in the following five activities: (1) create and maintain appropriate Internet sites, toll-free telephone numbers, or other means of communication for statewide use in reporting invasive species sightings and encourage such through publicization; (2) produce educational material and press releases concerning invasives as well as conduct educational meetings and conferences; (3) solicit proposals, review applications, and make grants or loans to further projects providing education about invasive species; (4) do the same, but for activities related to the detection, prevention, control, management, or eradication of invasive species or for the restoration of native species; and (5) apply for and receive grants to support the council's own activities.⁶³

Though the states are varied as to which of these additional sources of authority they choose to give their ISCs, Oregon's legislation fully meets ELI's model. In fact, the state goes even further by ceding to its council additional authority such as permitting the costs associated with compensating owners of infested or infected materials that were destroyed under an eradication or control program to be funded from the ISC account.⁶⁴ However, no other state comes close to meeting ELI's model, with the remaining states authorizing their ISCs to engage in two of the five listed activities at most. The biggest conflict from state-to-state can be seen with ELI's fifth recommendation (that ELIs be permitted to apply for and receive grants to support their own activities). In the states that address this point, three explicitly grant such authority—Indiana, Montana, and Oregon—while three others—California, Hawaii, and New Hampshire—explicitly prohibit it. Additionally, Texas qualifies its ISC's ability to engage in such activities, noting that, while the council cannot apply for and receive grants itself, the state Soil and Water Conservation Board may accept and administer grants on its behalf.⁶⁵

As to delegation authority, ELI suggests that councils be given the authority to delegate selected and clearly identified elements of its authorities and duties to another state agency that has appropriate expertise or administrative capacity upon mutual agreement with that agency. ELI goes on to recommend that the selected agency be permitted to act as an agent of the council in implementing the delegated authority or duty while the council be permitted to retain primary authority and responsibility unless noted otherwise.⁶⁶ Only Hawaii's legislation mentions delegation authority, allowing it to deputize the United States Department of Agriculture's plant protection and quarantine inspectors to help prevent invasive species from entering the state.⁶⁷

⁶² OR. REV. STAT. ANN. § 570.810.

⁶³ *Id.* at 16.

⁶⁴ OR. REV. STAT. ANN. § 570.810(4)(j).

⁶⁵ TEX. GOV'T CODE ANN. § 776.006.

⁶⁶ *Id.*

⁶⁷ HAW. REV. STAT. ANN. § 194-2(a)(5)(E).

VII. Invasive Species Management Plans

ELI's next model section, Section 2.05, addresses invasive species management plans. ELI generally recommends that ISCs develop and periodically update a statewide strategic plan for addressing invasive species that should be completed within two years of the council's formation and updated at least once every five years.⁶⁸ It also suggests that such management plans should include a review of state authority and resources, including agency budgets, available to: (1) detect, monitor, and prevent the introduction of invasive species; (2) rapidly respond to newly identified invasions; and (3) eradicate, control, contain, or manage existing populations of invasive species.⁶⁹ This review should take into account any existing state agency plans for managing noxious weeds or other invasive species as well as the plans, programs, and recommendations of existing entities addressing invasives.⁷⁰ Additionally, ELI suggests that plans set forth a framework for a comprehensive and efficient state program to combat invasive species, including recommendations for administrative and legislative actions as well as standards for measuring the success of state departments and agencies in meeting the purposes of the plan.⁷¹

Of the states and territory with ISCs that the NSGLC examined, most require that their councils develop invasive species management plans. In fact, nine states and one territory have produced statewide plans, while California's council is charged to do so specifically in the context of shot hole borers (invasive, wood-boring beetles that target dozens of tree species in Southern California).⁷² However, the terminology by which those states and territory refer to their plans sometimes varies. For example, Nebraska uses the term "adaptive management plan" while Idaho uses "Strategic Action Plan for Invasive Species."⁷³ Of those states and territory that have developed plans, roughly half require that they include a review of state authority and resources as ELI recommends. Washington, for example, notes that its council's strategic plan "should incorporate the reports and activities of the aquatic nuisance species committee, the state noxious weed control board, and other appropriate boards and activities."⁷⁴ Presumably, ELI's recommendation as to this point helps ensure that ISCs utilize existing state resources in lieu of wasting council time and money doing largely duplicative and/or contradictory work. Only two states—New York and Washington—address the promulgation of state invasive species program frameworks within management plans. New York's legislation notes that its council's plan should "recommend New York state or federal legislation or regulation[s]," while Washington stipulates that its strategic management plan must address "[r]ecommendations for legislation necessary to carry out the [plan's] purposes."⁷⁵

As to the specific components of invasive species management plans, ELI recommends that plans address, without limitation, the following nine elements: (1) statewide coordination and intergovernmental cooperation; (2) prevention of new biological invasions through deliberate import or introduction or

⁶⁸ ENVTL. LAW INST. *supra* note 1 at 16.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² CAL. FOOD & AGRIC. CODE § 7708.

⁷³ NEB. REV. STAT. ANN. § 37-1405; Idaho Exec. Order No. 2017-05 (Apr. 6, 2017).

⁷⁴ WASH. REV. CODE ANN. § 79A.25.340(1).

⁷⁵ N.Y. ENVTL. CONSERV. LAW § 9-1705(5c); WASH. REV. CODE ANN. § 79A.25.340(2)(k).

through unintentional pathways; (3) inventory and monitoring of invasive species; (4) early detection of and rapid response to new invasions; (5) control, management, and eradication of established populations of invasive species; (6) restoration of native species following control or eradication of invasive species; (7) public education; (8) research; and (9) funding and resources available for invasive species prevention, control, and management.⁷⁶

The “all taxa” states and territory that NSGLC examined are extremely varied in what specific components they require their invasive species management plans to address. Two states, Montana and Idaho, only mention the requirement for invasive species management plans in a general sense, failing to address with specificity what provisions those plans must contain. Conversely, Washington and New York either fully meet ELI’s model language (in the case of Washington) or come very close (in the case of New York, which only fails to require that inventory and monitoring of invasive species be addressed in its management plan).⁷⁷ Several other states’ statutorily required provisions are also worth noting due to their unique nature. Hawaii, for example, requires that control, management, and eradication of established populations of invasive species be addressed in its council’s management plan, but only with respect to the coqui frog—an amphibian native to Puerto Rico that has infested large swaths of the state’s Big Island.⁷⁸ Additionally, while Oregon does not require that early detection and rapid response; control, management, and eradication; or restoration of native species be addressed in its council’s plan, such activities are listed as authorized uses of council funds in the state’s pertinent statute.⁷⁹ Of the management plan components that ELI recommends, NSGLC’s research revealed that states are least likely to require that plans address the inventory and monitoring of invasive species, with only Nebraska and Washington’s statutes mentioning such.⁸⁰ Additionally, though New York, Oregon, and Washington’s statutes all mention the restoration of native species in some capacity, Oregon does not specifically require that it be addressed in its council’s management plan, as noted above. Therefore, such provisions can also be said to be comparatively unpopular among the states and territory that NSGLC analyzed.

ELI’s final recommendations in Section 2.05 deal with the duties of state departments and agencies named to ISCs. First, it recommends that each of those entities be required to conduct an evaluation of their current statutory authorities, rules, and programs relevant to invasive species control and make that evaluation available to the ISC within one year of its formation.⁸¹ The evaluation should identify opportunities to incorporate invasive species control into agency operations, clarify authorities, eliminate duplication among agency efforts, find efficiencies, and identify gaps in state invasive species programs.⁸² Next, ELI recommends that each state department and agency named to an ISC make “best efforts” to implement elements of the completed invasive species management plan that are applicable to such department or agency.⁸³ Only Washington addresses either of these recommendations by enacting a

⁷⁶ ENVTL. LAW INST. *supra* note 1 at 16-17.

⁷⁷ WASH. REV. CODE ANN. § 79A.25.340; N.Y. ENVTL. CONSERV. LAW § 9-1705(5c).

⁷⁸ HAW. REV. STAT. ANN. § 194-2(a)(4).

⁷⁹ OR. REV. STAT. ANN. § 570.810(4).

⁸⁰ NEB. REV. STAT. ANN. § 37-1405(4); WASH. REV. CODE ANN. § 79A.25.340(2)(c).

⁸¹ ENVTL. LAW INST. *supra* note 1 at 17.

⁸² *Id.*

⁸³ *Id.*

statutory provision related to “best efforts.” Specifically, the state notes that “[e]ach state department and agency named to the council shall, consistent with state law, make best efforts to implement elements of the completed plan that are applicable to the department or agency.”⁸⁴ No state or territory requires that such entities conduct an evaluation of their current statutory authorities as ELI recommends.

VIII. Invasive Species Advisory Committees

The final section in ELI’s model law deals with invasive species advisory committees—entities meant to inform council decision-making by allowing various interest groups to voice their thoughts and concerns. According to ELI, ISCs should create such committees upon public notice.⁸⁵ In a general sense, the model law suggests that committees consist of individuals with significant expertise in fields relevant to non-native and invasive species ecology, identification, impacts, management, and control.⁸⁶ More specifically, ELI notes that the number and makeup of such committees should be determined by councils themselves, with their members equally representing state agencies, regulated and benefited industries, environmental and conservation interests, academia and the scientific community, and the general public.⁸⁷ The model law further recommends that ISCs should establish practices and procedures governing the appointment and reappointment of advisory committee members, the holding of meetings, the provision of advice to the council, and reimbursement.⁸⁸

Of the “all taxa” states and territory that the NSGLC analyzed, only one comes close to fully meeting ELI’s model. New York requires that an advisory committee be established in order to provide information, advice, and guidance to its council, including assistance with developing the state’s classification system for nonnative animal and plant species.⁸⁹ The committee is made up of up to twenty-five at-large members with at least one member from each of the following seventeen entities: (1) the New York Biodiversity Research Institute, (2) New York state’s land grant university, (3) New York Sea Grant, (4) a statewide organization formed to address invasive species, (5) a statewide land conservation organization, (6) a statewide organization formed to address invasive species, (7) a statewide land conservation organization, (8) a statewide agricultural organization, (9) a nursery business, (10) a boating organization, (11) the Darrin Fresh Water Institute, (12) the soil and water conservation districts, (13) the Natural Heritage Program, (14) a New York state forestry school, (15) a lake association, (16) the New York City Department of Environmental Protection, and (17) a statewide local government organization.⁹⁰ Save for the state’s failure to require members sourced from state agencies, its statutory language meets ELI’s model. Furthermore, New York’s statute addresses committee practice and procedure by noting that committee members must serve without compensation except for reimbursement for necessary and actual expenses incurred during the course of their committee work.⁹¹ This language also meets ELI’s model, though only partially.

⁸⁴ WASH. REV. CODE ANN. § 79A.25.340(4).

⁸⁵ ENVTL. LAW INST. *supra* note 1 at 17.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ N.Y. ENVTL. CONSERV. LAW § 9-1707.

⁹⁰ *Id.*

⁹¹ *Id.*

The remaining six states with legislation that addresses invasive species advisory committees—California, Indiana, Nebraska, Oregon, Texas, and Washington—vary in their adherence to ELI’s model. First, none of those six states *require* that a committee be formed as ELI recommends. Instead, they merely *permit* their ISCs to create such. For example, Indiana’s statute notes that “[t]he council may create advisory committees to provide information and recommendations to the council.”⁹² By including permissive language such as this instead of mandatory language, those six states leave it up to the councils themselves as to whether they would find the formation and utilization of an invasive species advisory committee helpful in their decision-making process, whereas ELI believes such entities should be required.

Statutory provisions related to the makeup of those committees are also varied. For example, California generally notes that its advisory committees and working groups “may consist of representatives from state agencies, federal agencies, county agricultural commissioners, academia, nonprofit organizations, tribal nations, industry representatives, and members of the public.”⁹³ The state further specifies that its California Invasive Species Advisory Committee (which the ISC is permitted, not required, to establish) must consist of the following nineteen members: (1) four members designated by the Secretary of Agriculture; (2) four members designated by the Secretary of the Natural Resources Agency; (3) one member appointed by the Secretary for Environmental Protection; (4) one member appointed by the Secretary of Transportation; (5) one member appointed by the Secretary of California Health and Human Services; (6) one member appointed by the Director of Emergency Services; (7) six members appointed by the co-chairs of the ISC to create a diverse makeup of federal, nonprofit organization, tribal, industry, and other representatives; and (8) one member appointed by the California Agricultural Commissioners and Sealers Association.⁹⁴ These provisions, while not word-for-word in line with ELI’s model, are close to it. In contrast, two of the other states mentioning committee makeup—Oregon and Washington—leave the decision completely up to their states’ ISCs, thereby allowing for the possibility that not all ELI-recommended interest groups be represented.⁹⁵

Oregon is the only state other than New York that mentions practices and procedures in relation to its invasive species advisory committee. It similarly notes that committee members are not entitled to compensation, but may be reimbursed for travel and other expenses incurred in the course of performing their official duties.⁹⁶

IX. Conclusion

On the whole, no “all taxa” state or territory fully meets the recommendations for invasive species councils that ELI sets out in its model law. While some states, such as Oregon, Washington, New York, and Hawaii, oftentimes come close, their differing statutory language exemplifies just how drastically states can vary in what provisions they view as vital to the formation and function of their respective ISCs.

⁹² IND. CODE ANN. § 15-16-10-4(c).

⁹³ CAL. FOOD & AGRIC. CODE § 7700(f)(2).

⁹⁴ CAL. FOOD & AGRIC. CODE § 7704.

⁹⁵ OR. REV. STAT. ANN. § 570.790(1); WASH. REV. CODE ANN. § 79A.25.360.

⁹⁶ OR. REV. STAT. ANN. § 570.790(2).

As noted above, state councils have many duties, but primarily function to coordinate statewide actions; control and manage established invasive populations; restore native populations and habitats; and engage in relevant monitoring, research, and education and outreach.⁹⁷ Though strictly adhering to ELI's model law would undoubtedly facilitate councils' ability to accomplish these duties, every step a state takes towards forming and maintaining effective ISCs is a step closer to mitigating the invasive species crisis the United States is currently facing.

⁹⁷ ENVTL. LAW INST. *supra* note 3 at 84.

APPENDIX

Chart Legend:

✓	Affirmatively mentioned in statutory language.
✗	Negatively mentioned in statutory language.
[blank]	Not mentioned in statutory language.
[other language]	Mentioned, but qualified in statutory language.

Establishment of Council

I. Ex Officio Voting Members

	CA	HI	IN	MT	NB	NH	NY	OR	TX	WA	WI	PA	ID	GU
<i>Department of Agriculture</i>	✓	✓	✓		✓		✓	✓	✓	✓		✓	✓	✓
<i>Department of the Environment</i>	✓					✓	✓	✓		✓		✓	✓	
<i>Department of Natural Resources</i>	✓	✓				✓				✓		✓		
<i>Fish & Wildlife Agency</i>		✓	✓		✓			✓		✓		✓	✓	
<i>Forestry Agency</i>					✓			✓	✓					
<i>Department of Transportation</i>	✓	✓	✓			✓	✓			✓		✓	✓	✓
<i>Land Grant University</i>														
<i>Sea Grant College</i>								✓						
<i>Others</i>	✓	✓	✓			✓	✓	✓	✓	✓		✓	✓	✓

II. Appointed Voting Members and Federal, Non-Voting Members

	CA	HI	IN	MT	NB	NH	NY	OR	TX	WA	WI	PA	ID	GU
<i>Agricultural & Horticultural Industry</i>			✓			✓		✓*				✓†	✓‡	✓§
<i>Environmental & Conservation Interests</i>						✓		✓				✓†	✓‡	✓§
<i>Pet &/or Aquarium Industry</i>								✓*					✓‡	✓§
<i>Port &/or Shipping Industry</i>								✓*				✓†	✓‡	✓§
<i>Federal, Non-Voting Members</i>		✓		✓			✓			✓				✓

* In Oregon, ex officio voting members must appoint a single voting member who represents an organization or association that advocates on behalf of private industry in the state, without specification as to what private industry that member should represent in particular.

† In Pennsylvania, the council can have up to 14 appointed members representing agriculture, natural resources organizations, and the transportation sector, among other interest groups.

‡ In Idaho, private and not-for-profit organizations with an interest in the well-being of the state pertaining to invasive species may be invited to participate by the director of the state Department of Agriculture.

§ In Guam, the council may invite additional public and private sector members to serve on sub-committees with significant responsibilities concerning invasive species, and may prescribe special procedures for their participation.

| New York's legislation does not specify that federal entities should be included on its council as non-voting members, but does note that the council may "consult" with any governmental agency, including, but not limited to, the U.S. Department of Agriculture and the U.S. Coast Guard.

Council Practice and Procedure

	Chairperson	Term of Office (Appointed Members)	Expense Reimbursement	Quorum	Meeting Frequency
California	Departments of Agriculture & Natural Resources Co-Chair				Annually & as needed
Hawaii	Selected from Departments of Agriculture, Health,			Simple majority of voting members	No less than twice annually
Indiana	Council elects	Three years, & until successor appointed	Subject to availability of funds & Perdue University policies	Six council members	At least annually, & special meetings allowed
Montana					
Nebraska	Council elects		No reimbursement or compensation		Called by chairperson or a majority of members
New Hampshire	Council elects				
New York	Commissioners of Env't'l Conservation, & Agriculture & Markets Co-Chair				At least quarterly
Oregon	Council elects chair & vice-chair		At discretion of council - discretion not required for State Invasive Species Coordinator	Six council members	At least annually, & special meetings allowed
Texas	Council elects				Annually or more if in bylaws
Washington	Council elects				
Wisconsin					
Pennsylvania	Department of Agriculture	Four years	No compensation, but travel & expense reimbursement permitted		Quarterly
Idaho	Department of Agriculture				Twice annually
Guam	Council elects			Simple majority	At least quarterly

Powers and Duties of the Council

I. Rulemaking & Regulatory Authority

	Rulemaking Authority	Regulatory Authority	Enter & Inspect Premises	Border Check Stations	Seize & Destroy Invasives	Studies, Research, & Monitoring	Enforcement Rules
<i>CA</i>	✘	✘					
<i>HI</i>	✓	✘	✓		✓	✓	
<i>IN</i>	✘	✘					
<i>MT</i>	✘					✓	
<i>NB</i>	✘						
<i>NH</i>	✘		✘			✘	✘
<i>NY</i>	✘					✓	
<i>OR</i>	✓		✓		✓		✓
<i>TX</i>						✘ *	
<i>WA</i>							
<i>WI</i>	✘					✓	
<i>PA</i>	✘	✘					
<i>ID</i>	✘						
<i>GU</i>	✘						

II. Additional & Delegation Authority

	Reporting Sites/Numbers	Educational Materials	Grants/Loans - Education	Grants/Loans - Activities	Receive Grants	Delegation Authority
CA					✘	
HI					✘	✓
IN			✓		✓	
MT		✓			✓	
NB						
NH					✘	
NY			✓	✓		
OR	✓	✓	✓	✓	✓	
TX					✘*	
WA						
WI			✓	✓		
PA						
ID						
GU						

* In Texas, the council cannot conduct studies, undertake research, or engage in monitoring, but can make recommendations to state agencies regarding research, technology transfer, and management actions related to invasive species control. Furthermore, while the council cannot apply for and receive grants itself, the Soil and Water Conservation Board may accept and administer grants on its behalf.

Invasive Species Management Plan

	CA	HI	IN	MT	NB	NH	NY	OR	TX	WA	WI	PA	ID	GU
<i>Statewide Strategic Plan?</i>	✘*	✓		✓	✓		✓	✓		✓	✓	✓	✓	✓
<i>Includes Review</i>							✓	✓		✓		✓		✓
<i>Sets Forth Framework</i>							✓			✓				
<i>Addresses Coordination</i>		✓					✓			✓		✓		✓
<i>Addresses Prevention</i>		✓					✓			✓		✓		✓
<i>Addresses Inventory</i>					✓					✓				
<i>Addresses Early Detection & Monitoring</i>					✓		✓	✘‡		✓				✓
<i>Addresses Control, Management, & Eradication</i>		✓†					✓	✘‡		✓		✓		
<i>Addresses Restoration</i>							✓	✘‡		✓	✓			
<i>Addresses Public Education</i>							✓			✓	✓			
<i>Addresses Research</i>							✓			✓	✓			✓
<i>Addresses Funding</i>							✓							
<i>Evaluation?</i>														
<i>Best Efforts?</i>										✓				

* No statewide plan for all invasive species, but state is instructed to develop such specifically for shot hole borers.

† Specific to the coqui frog.

‡ Not specifically addressed in strategic plan, but listed as an authorized use of council funds.

Invasive Species Advisory Committee

	Appointed Advisory Committee	Makeup of Committee	Practices & Procedures
<i>California</i>	Permitted but not required	Representatives from federal agencies, non-profits, & other groups	
<i>Hawaii</i>			
<i>Indiana</i>	Permitted but not required		
<i>Montana</i>			
<i>Nebraska</i>	May seek advisory support from federal, state, or local agencies		
<i>New Hampshire</i>			
<i>New York</i>	✓	Co-chairs appoint members from a number of listed user groups	✓
<i>Oregon</i>	Permitted but not required	Council determines membership	✓
<i>Texas</i>	Bylaws may permit but not required		
<i>Washington</i>	Permitted but not required	Council determines membership	
<i>Wisconsin</i>			
<i>Pennsylvania</i>			
<i>Idaho</i>			
<i>Guam</i>			