

## **Memo: Restoring the Blanket 4(d) Rule Would Undermine Species Recovery and Frustrate the Biden-Harris Administration's Conservation Initiatives**

Contact: Jonathan Wood, PERC VP of Law and Policy, [jonathan@perc.org](mailto:jonathan@perc.org)

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The Biden-Harris administration has articulated a new vision for conservation that favors collaboration over conflict and recognizes the critical role of incentives to spur positive action.<sup>1</sup> While the Fish and Wildlife Service has committed in litigation to consider rescinding the 2019 threatened species rule, actually doing so would contradict this conservation vision, provoke conflict, and undermine incentives to recover species. Therefore, any proposal should be written to preserve the administration's flexibility to keep the 2019 rule, should request comment on the conservation benefits of the 2019 rule, including its support of the administration's voluntary conservation programs, and should request comment on how the 2019 rule might be improved rather than simply discarded.

The Endangered Species Act aims to prevent species extinctions and promote recoveries. It has been effective at the former, with 99% of listed species persisting today. It has not, however, done as well at recovering species, with only 3% of listed species achieving that goal. There is widespread agreement that this is because the ESA can inadvertently create perverse incentives for private landowners to destroy habitat.<sup>2</sup> Sam Hamilton, former FWS Director, summed up the problem well: "If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears."<sup>3</sup> Only by improving the incentives for private landowners to restore habitat and perform proactive recovery efforts can we boost the recovery rate for listed species.

Although the ESA provides different levels of regulation for endangered and threatened species, the Service has long treated these two categories the same under a regulation known as the "blanket 4(d) rule." In 2018, the Property and Environment Research Center, a conservation group founded by environmental economists and dedicated to improving incentives for conservation, proposed repealing this rule to better align the incentives of private landowners with the interests of rare species.<sup>4</sup> The logic behind this reform is simple. The blanket rule discouraged landowners from conserving and recovering species by making them indifferent to a species' status. If, however, regulatory burdens decreased incrementally as species recovered, private landowners would have an

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<sup>1</sup> *Conserving and Restoring America the Beautiful* (2021); Robert Bonnie, Undersecretary of Agriculture for Farm Production and Conservation, *Keynote Address for the University of Wyoming's 150th Anniversary of Yellowstone Symposium: The Importance of Private, Working Lands to Yellowstone in the Twenty-First Century* (May 20, 2022) ("[C]onservation is succeeding where conservation is being done with private landowners, not to them.")

<sup>2</sup> See, e.g., Alejandro E. Camacho, et al., *The Six Priority Recommendations for Improving Conservation under the Federal Endangered Species Act* (2021); Western Gov'ts Assoc., *Policy Resolution 2021-04: Species Conservation and the Endangered Species Act* (2021); Temple Stoellinger, et al., *Improving Cooperative State and Federal Species Conservation Efforts*, 20 Wyo. L. Rev. 183, 202–05 (2020); Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003).

<sup>3</sup> See Betsy Carpenter, *The Best Laid Plans*, 115 U.S. News and World Rep. 89 (1993).

<sup>4</sup> Jonathan Wood, *The Road to Recovery: How Restoring the Endangered Species Act's Two-Step Process Can Prevent Extinction and Promote Recovery*, PERC Policy Report (2018). See Timothy Male, *Wildlife Service Gets It Right* (Apr. 6, 2018) (supporting the reform for the same reasons).

incentive to invest in habitat restoration and other recovery efforts. Likewise, if regulations tighten if species decline, landowners would have incentives to prevent habitat destruction and population losses. In rescinding the blanket rule, the Service explicitly recognized these conservation benefits.<sup>5</sup>

### **The blanket rule doesn't advance species conservation**

While many actions by the Trump administration merit reconsideration by the Biden-Harris administration, the 2019 threatened species rule is not among them. In fact, the rule formalized a shift begun during the Obama administration, which departed from the blanket rule “more . . . than nearly every other presidential administration.”<sup>6</sup> The 2019 rule was notably excluded from the list of Trump-era actions to be reviewed under President Biden’s E.O. 13990.<sup>7</sup> And, in litigation, this administration has noted that the 2019 rule does not interfere with the Service’s ability to conserve species.<sup>8</sup>

This administration has also repeatedly found tailored regulations better for threatened species than regulating those species as if they were endangered. It has listed 12 species as threatened, giving it so many opportunities to adopt the blanket rule’s approach or to develop a less-restrictive tailored rule. In *every case*, the Service has found a tailored rule better for the species.<sup>9</sup> This is consistent with the National Marine Fisheries Service’s experience, which has never had a blanket 4(d) rule. That agency has found it appropriate to extend endangered-level regulations to threatened species only 4% of the time.<sup>10</sup> Tailored rules have been shown to encourage pre-listing conservation and participating in other voluntary conservation programs, making them valuable to the America the Beautiful initiative and other conservation efforts.<sup>11</sup> It doesn’t make sense, from a conservation perspective, to impose a blanket approach that the Services consistently reject when they consider what’s best for species.

### **The blanket rule erects procedural and political barriers to tailored rules**

The blanket rule doesn’t forbid the Service from designing tailored regulations that are better for species. But it puts a thumb on the scale that makes it harder to craft more effective tailored rules. Under the blanket rule, tailored alternatives are perceived as weakening protections for threatened species, an unfair criticism often leveled against the Obama administration.<sup>12</sup> The blanket rule also biased the Service to that approach by requiring additional rulemaking procedures for tailored rules. Under the 2019 rule, for instance, PERC and other conservation groups criticized a proposed 4(d) rule for the lesser prairie chicken, arguing that strictly

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<sup>5</sup> See 84 Fed. Reg. 44,753, 44,755–57 (Aug. 27, 2019).

<sup>6</sup> Ya-Wei Li, [Section 4\(d\) Rules: The Peril and the Promise](#), Defenders of Wildlife White Paper 1 (2017).

<sup>7</sup> See White House, [Fact Sheet: List of Agency Actions for Review](#) (2021).

<sup>8</sup> See 2nd Frazer Decl., *California v. Haaland*, No. 19-cv-6013 (filed Aug. 13, 2021).

<sup>9</sup> See 88 Fed. Reg. 14,794 (Mar. 9, 2023) (Longsolid and Round Hickorynut); 87 FR 76,882 (Dec. 15, 2022) (whitebark pine); 87 Fed. Reg. 73,655 (Dec. 1, 2022) (Puerto Rican Harlequin Butterfly); 87 FR 72,674 (Nov. 25, 2022) (lesser prairie chicken); 87 FR 67,380 (Nov. 8, 2022) (sickle darter); 87 Fed. Reg. 64,700 (Oct. 27, 2022) (emperor penguin); 87 FR 546 (Jan. 5, 2022) (Panama City crayfish); 86 Fed. Reg. 72,394 (Dec. 21, 2021) (Hermes Copper butterfly); 86 Fed. Reg. 64,000 (Nov. 16, 2021) (Atlantic pigtoe); 86 FR 48,545 (Aug. 30, 2021) (Bartram’s Stonecrop); 86 Fed. Reg. 30,688 (June 9, 2021) (Neuse River waterdog).

<sup>10</sup> See Ya-Wei Li, *supra* n. 6 (finding NMFS deemed the blanket approach appropriate in only 2.7% of cases, if you count each distinct population segment separately, and that NMFS is far more likely to find forging ESA regulation better for threatened species).

<sup>11</sup> See Robert L. Fischmann, et al., *Collaborative Governance Under the Endangered Species Act: An Empirical Analysis of Protective Regulations*, 38 Yale J. 976, 1033–35 (2021) (finding that tailored 4(d) rules encourage pre-listing conservation and participation in post-listing conservation efforts).

<sup>12</sup> See Tanya Sanerib, et al., [Lethal Loopholes: How the Obama Administration Is Increasingly Allowing Special Interests to Endanger Rare Wildlife](#), Ctr. for Biological Diversity (2016).

regulating grazing would penalize ranchers' conservation of the birds' grassland habitat and threaten future recovery efforts.<sup>13</sup> Because a tailored rule was proposed and comment on changes to it requested, the Service could easily heed that advice. But, under the blanket rule, this change could have required a new proposed rule and an additional round of public comment, costing agency resources and delaying a decision.

### **The blanket rule increases permitting costs**

Critics of the 2019 rule have argued that crafting a tailored rule for each threatened species costs the agency time and resources. But this argument is unconvincing, even assuming that the ESA allows the Service to sacrifice a species' conservation for administrative convenience. Tailored rules avoid even greater costs to permit individual projects later. In its comments criticizing the lesser prairie chicken proposal, for instance, the Nature Conservancy emphasized that individual grazing permits throughout the species' 11-million-acre range would "require a monumental level of Service and partner staff capacity and resources to provide site-specific consultation and associated administrative services."<sup>14</sup> When these downstream costs are accounted for, tailored rules reduce bureaucracy and free up the Service to pursue other proactive recovery efforts for species.

### **The blanket rule undermines cost-benefit analysis**

The ESA provides that 4(d) rules should be "necessary and advisable" for the conservation of the species, a standard that requires cost-benefit analysis.<sup>15</sup> That analysis is especially valuable in the ESA context because costs and benefits are not simply trade offs but influence each other. As we've seen over the last 50 years, if a rule imposes costs on private landowners that create perverse incentives for them, habitat will not be restored and species will not recover.<sup>16</sup> Under the blanket rule, the Service does not consider this, in contradiction of the ESA's text and decades of executive orders and federal policies favoring cost-benefit analysis.<sup>17</sup>

### **Conclusion**

Restoring the blanket rule would discourage species recovery, provoke conflict, and undermine this administration's vision for conservation that honors property rights and supports voluntary stewardship. And the blanket rule would impose these costs without any consideration of whether species benefit. As the Service reconsiders the rule, it should be careful not to include anything in the proposal that might complicate keeping the 2019 rule. It should also consider how tailored rules could support other administration conservation initiatives and whether the blanket rule, by penalizing private landowners' habitat conservation, undermines participation in those initiatives. At a minimum, the proposal should seek comments on whether the 2019 rule should be retained, how the rule benefits conservation incentives and other agency's conservation initiatives, and how the rule might be amended rather than be discarded to address concerns.

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<sup>13</sup> See PERC, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Sept. 1, 2021); National Wildlife Fed'n, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Aug. 31, 2021); Turner Enterprises & Turner Endangered Species Fund, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Aug. 16, 2021); The Nature Conservancy, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Aug. 2, 2021).

<sup>14</sup> The Nature Conservancy, *Comment*, *supra* n. 13.

<sup>15</sup> 16 U.S.C. § 1533(d). See *Michigan v. E.P.A.*, 576 U.S. 743, 752 (2015).

<sup>16</sup> See PERC *Comment*, *supra* n. 13 at 3–5.

<sup>17</sup> See Richard L. Revesz & Michael Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2011) (explaining that cost-benefit analysis is not a threat to the environment but can produce better, more effective environmental regulation).