

## **Memo: The Blanket Rule Would Undermine Species Recovery By Creating Perverse Incentives, and the Service’s Failure to Analyze These Conservation Costs Violates the ESA**

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The Endangered Species Act’s “ultimate goal is to ‘recover’ species so they no longer need protection[.]”<sup>1</sup> The law has been very successful at a part of this goal: preventing species’ extinction so that recovery remains possible, with 99% of listed species persisting today. Progress toward recovery, however, has been all too rare. Only 3% of species have achieved recovery, a small fraction of the species the Service predicted would recover by now.<sup>2</sup> And, according to the most recent public data, only 4% of species are even improving.<sup>3</sup>

The Fish and Wildlife Service’s proposed “blanket rule” would, if finalized, undermine species recovery and violate the text and purpose of the ESA. It would adopt a presumption that threatened species are regulated the same as endangered species. This would discourage recovery by making states, landowners, and other key partners indifferent to whether species are improving or declining.<sup>4</sup>

### **Tailored regulations promote species recovery**

In 2020, a group of leading ESA scholars and representatives from Defenders of Wildlife, the Nature Conservancy, Environmental Defense Fund, National Wildlife Federation, and Center for American Progress convened to discuss how to seize the “rare moment” created by “[t]he election of President Joe Biden, along with the current Democratic-controlled House and Senate” to “improve the ESA from a conservation perspective.”<sup>5</sup> The number one priority identified by the group was to “tailor protections for threatened, endangered, and recovered species and their habitats based on level of vulnerability.”<sup>6</sup> “Better use of section 4(d) rules that account for whether a threatened species is improving or declining,” they explained, would “provide incentives to landowners to help reduce threats in an effort to move a species into a lower tier with its less stringent protection requirements.”<sup>7</sup> Conservationists, including PERC, recognize that offering regulatory relief to landowners in exchange for measurable progress toward species recovery is a clear win-win.<sup>8</sup>

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<sup>1</sup> U.S. Fish and Wildlife Service, *ESA Basics, 50 Years of Conserving Endangered Species* (2023).

<sup>2</sup> Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).

<sup>3</sup> Department of the Interior, *2017/2018 Annual Performance Plan & 2016 Report* 15 (May 26, 2017).

<sup>4</sup> PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act’s Elusive Search to Recover Species—and What to Do About It* 6–9, 18–21 (2023).

<sup>5</sup> Alejandro E. Camacho, et al., *The Six Priority Recommendations for Improving Conservation under the Federal Endangered Species Act*, UCI Law 2 (2021).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *See id.* at 9–10.

<sup>8</sup> *See Field Guide, supra* n. 4, at 6–9, 18–21. *See also* David Willms, *Unlocking the Full Power of Section 4(d) to Facilitate Collaboration and Greater Species Recovery*, in *The Codex of the Endangered Species Act: Volume II: The Next Fifty Years* (2023); Temple Stoellinger, et al., *Improving Cooperative State and Federal Species Conservation Efforts*, 20 Wyo. L. Rev. 183, 202–205 (2020); Timothy Male, *Wildlife Service Gets It Right* (Apr. 6, 2018).

The Service itself has consistently found that tailored regulations encourage recovery of threatened species better than endangered-level regulations.<sup>9</sup> Yet the “blanket rule” would impose endangered-level regulation for threatened species without regard to whether that’s the best way to encourage their recovery. This would only undermine incentives to recover species, as shown by the lack of progress toward recovery when the blanket rule was previously in place. Indeed, the National Marine Fisheries Service, which has never had a blanket rule, has achieved a recovery rate more than double that of the Fish and Wildlife Service.<sup>10</sup>

### **The Fish and Wildlife Service ignores the “conservation costs” of the blanket rule**

The blanket rule purports to regulate every activity that harms any threatened species that may ever be listed in the future. Yet in proposing the rule, the Fish and Wildlife Service did not analyze the costs and benefits of such sweeping regulation. This indifference to costs is especially concerning because regulatory burdens imposed on states and landowners directly influence their incentives to restore habitat and invest in recovery efforts. It is well established that regulatory burdens can make species a liability to landowners, creating perverse incentives to preemptively destroy habitat.<sup>11</sup> And even if that affirmative harm could be stopped through aggressive enforcement, landowners may still be discouraged from restoring habitat or engaging in proactive recovery efforts because of regulatory consequences.

### **Contrary to the Service’s assertions, these costs can be estimated and accounted for**

The Service does not consider these conservation costs. Instead, it asserts that “it is not possible” to estimate costs or benefits because of uncertainty about how the blanket rule will be applied and which species will be listed in the future. But the Service faces substantially less uncertainty here than other agencies face routinely in cost-benefit analyses. It has experience operating both with and without a blanket rule, allowing it to compare how the rule affects regulatory burdens and landowner incentives. It also has a work plan identifying which species will be considered for listing in the coming years and for which the blanket rule may be applied.<sup>12</sup>

### **Ignoring these and other costs violates the Endangered Species Act**

Based on the large number of states, tribes, landowners, and conservation groups that have criticized the blanket rule, it is almost certain to be challenged. The Service’s arbitrary decision to ignore costs and benefits will likely lead to the rule being overturned. The ESA requires any regulation of threatened species to be “necessary and advisable” for the conservation—which Congress defined as recovery—of the species.<sup>13</sup> Based on the Supreme Court’s interpretation of virtually identical language in the Clean Air Act,<sup>14</sup> the ESA does not permit the blanket rule to be issued without consideration of the costs it would impose, especially where those costs can create perverse incentives and undermine species recovery.

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<sup>9</sup> 88 Fed. Reg. 40,742, 40,744 (June 22, 2023). See 84 Fed. Reg. 44,753, 44,757 (Aug. 27, 2019).

<sup>10</sup> PERC, [Comment Opposing the Proposed Reinstatement of the “Blanket Rule” Regulating Threatened Species as if They Were Endangered](#) 11 (Aug. 22, 2023).

<sup>11</sup> Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. Law & Econ. 27 (2003).

<sup>12</sup> U.S. Fish & Wildlife Serv., [National Domestic Listing Workplan: FY23-27 Workplan](#) (Apr. 13, 2023).

<sup>13</sup> 16 U.S.C. § 1533(d). See 16 U.S.C. § 1532(3).

<sup>14</sup> *Michigan v. Env’tl. Prot. Agency*, 576 U.S. 743 (2015).