A Field Guide for Wildlife Recovery

The Endangered Species Act's Elusive Search to Recover Species — and What to Do About It

PERC

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Summary

December 28, 2023, marks the 50-year anniversary of the Endangered Species Act. Since the act became law five decades ago, most species listed under it have avoided extinction. Only a tiny fraction of listed species, however, have ever recovered and come off the list. The vast majority remain at risk, not quite plunging over the cliff to extinction, but not backing away a safe distance from the edge either.

This report from the Property and Environment Research Center (PERC) presents 10 ideas to enhance the recovery of imperiled species in the future. It highlights wildlife that exemplify various aspects of endangered species policy and proposes specific reforms that would improve the act's effectiveness at encouraging recovery over the act's second half-century and beyond.

“The law’s ultimate goal is to ‘recover’ species so they no longer need protection under the Endangered Species Act.”

- U.S. Fish and Wildlife Service
ESA Basics, 50 Years of Conserving Endangered Species, 2023

Introduction

JONATHAN WOOD

Fifty years after its enactment, the Endangered Species Act may be simultaneously the nation's most popular and controversial environmental law. The popularity is easy to understand. Its laudable goal of preventing extinction enjoys near-universal support, especially when it comes to charismatic animals such as bald eagles and grizzly bears. And the law has proven effective at achieving this goal, with 99 percent of listed species persisting to this day.

> **Only 3 percent of species ever listed as endangered or threatened have recovered.**

If the statute's popularity stems from its "why," the controversy stems from its "how." The Endangered Species Act has earned a reputation as "the pitbull of environmental laws." Not only does it impose uniquely strict regulations, but as one landowner put it, "Once it gets ahold of you, it doesn't let go."[1] The act's regulatory powers—arguably the most powerful environmental law in the U.S. Code—can affect land use decisions across the country. And because two-thirds of listed species depend on private lands for habitat, these restrictions can be especially burdensome for private landowners.

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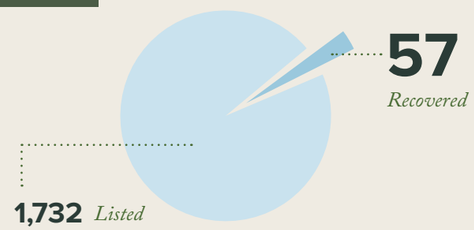

Domestic species listed under the Endangered Species Act

Unfortunately, the law's strictness complicates its ultimate goal of recovering species. By imposing stringent regulatory burdens wherever a rare species or its habitat are found, the law makes species liabilities that landowners would do well to avoid. This creates perverse incentives for landowners to preemptively destroy habitat before it attracts a rare species and the regulatory consequences that accompany it.[2] And because the act relies almost entirely on punitive regulatory provisions, it lacks positive incentives for landowners to undertake the proactive efforts necessary to restore habitat and recover species.

Consequently, the Endangered Species Act has a poor track record of recovery. Only 3 percent of species ever listed as endangered or threatened have recovered. And the U.S. Fish and Wildlife Service has reported that only 4% of listed species are even improving.[3] According to the agency's own assessments, 85 percent of listed species have completed less than a quarter of their recovery objectives.[4] As a result, most species languish on the endangered species list for years, if not decades, longer than anticipated. The agency projected 300 species to recover by now, but just 57 have done so.[5]

Delivering on the Endangered Species Act's promise to recover species "to the point at which" federal regulations "are no longer necessary" will require fixing the law's perverse incentives and finding innovative, flexible ways to make imperiled species assets to the landowners who conserve them and restore their habitat.

Background on the Act

The Endangered Species Act charges the Fish and Wildlife Service and National Marine Fisheries Service to identify species currently in danger of extinction or at risk of facing that danger in the foreseeable future and list them as "endangered" or "threatened," respectively. A listing generally triggers strict regulation of land where the species or its habitat is found, including a prohibition against the "take" of—any activity that harms—an endangered species. It also provides for extra scrutiny of federal activities that may affect a species or its "critical habitat," areas of public or private land deemed essential to recovering a species. This scrutiny extends to any federal permitting of activities on private land under other federal laws, such as the Clean Water Act.

These prohibitions are so broad that they even implicate federal, state, and private conservation projects that may cause small, temporary harms to species but produce larger, longer-term benefits to species. For example, Endangered Species Act regulations have delayed forest restoration projects designed to protect habitat from catastrophic wildfires, discouraged the reintroduction of animals to suitable areas of habitat out of harm's way, and stymied innovative market approaches that make species an asset to private landowners and businesses. The act also generally lacks positive incentives to compensate for these adverse regulatory consequences borne by landowners and others who accommodate rare species or conserve their habitat.

Instead of encouraging collaborative conservation, the law's approach to regulating species and their habitats too often breeds conflict between federal agencies, states, landowners, and conservation groups, to the detriment of species. States and landowners often feel like regulatory targets for federal officials, rather than potential partners in conservation, discouraging them from cooperating in federal programs or even allowing access to information about the presence of species and their habitats. And some environmental groups are discouraged from seeking common ground with landowners due to the law's invitation to sue to enforce its prohibitions, with the promise of lucrative attorney's fees if successful.

Steering Toward Recovery

The key challenge in the Endangered Species Act's second half-century will be to dramatically boost the rate at which endangered and threatened species recover. Fortunately, enterprising government officials, private landowners, and conservation organizations have developed a variety of innovative and voluntary tools to encourage and reward recovery efforts. If regulatory disincentives can be addressed and the relationships between many federal regulators, states, landowners, and conservationists mended, then these tools could be expanded to play a bigger role in species conservation.

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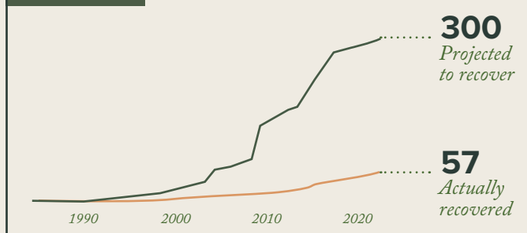

The Fish and Wildlife Service expected 243 more species to recover than actually did.

To help make that possible, this report explores 10 ideas to improve the law or its implementation to produce better incentives for proactive conservation efforts, encourage greater federal and state innovation, and—ultimately—make rare species an asset rather than liability to the countless private landowners responsible for conserving and recovering them.

Restore the Two-Step Process

JONATHAN WOOD

West Indian Manatee

Trichechus manatus

Est. population : 8,000 manatees

Listed in : 1972

Avg. weight : 800 - 1,200 lbs.

The West Indian manatee, often referred to as a "sea cow," is actually a closer relative of the elephant. One of the first species listed under the Endangered Species Act, Florida's official marine mammal numbered only a few hundred in the early 1970s.[1] Loss of natural springs and other warm-water habitats has been the primary threat to the species.

Fortunately, the manatee's popularity has spurred the state, landowners, and conservation groups to invest in proactive habitat conservation and restoration. Save Crystal River, a local conservation nonprofit, has spent years restoring more than 800 natural warm-water springs gummed up by algae and sediment, planting sea grass, and removing phosphorus to improve water quality. These and other investments have paid off. The population has grown to nearly 8,000 and expanded into more of its historical range on the East and Gulf Coasts.[2]

Citing the results of these recovery efforts, the U.S. Fish and Wildlife Service updated the species' status from endangered to threatened at Save Crystal River's urging in 2017. While this seemed like a cause for celebration, the service quickly doused such hopes. It announced that the status upgrade would not result in any change in federal regulation, with one official even dismissing as a "misperception" that endangered and threatened are distinct classifications.[3]

The story of the manatee demonstrates a significant shortcoming in the Fish and Wildlife Service's implementation of the Endangered Species Act. Rather than using the law's two classifications to motivate and reward recoveries, the agency has generally treated all listed species the same. This undermines the incentives Congress originally built into the law, which were intended to provide regulatory relief as a species' status moves from endangered to threatened.

Recently, the agency restored the law's original two-step approach to encourage greater recovery efforts, but that reform may soon be reversed, to the detriment of states, tribes, landowners, and vulnerable species such as the manatee. Today, more investments are needed to improve water quality and restore the sea grass that the species relies on. But the service's failure to reward past efforts may hinder further recovery efforts.

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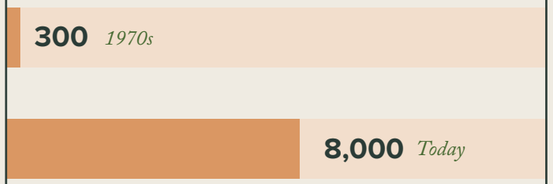
Estimated manatee population when it was listed and today



Recovering Congress's Original Intent

In addition to designating a species currently at risk of extinction as "endangered," the Endangered Species Act provides for the listing of "threatened" species that are likely to become endangered in the foreseeable future.[4] Congress's intent in creating this category was to provide a measure of protection for species before they reached the precipice of extinction.

These categories were intended to provide different degrees of regulation for endangered and threatened species commensurate with the threats they face. Most notably, the strict prohibition against private activities that harm members of a species applies to endangered species but not threatened species.[5] That prohibition, known colloquially as the take prohibition, covers not only activities that intentionally harm endangered species but also those that incidentally do so, including routine land-use activities like farming, timber harvesting, and home building. It even applies to activities intended to benefit species, like relocating animals to better habitat or temporarily disturbing them during habitat restoration.

> **The two-step approach aligns the incentives of landowners with the interests of rare species.**

For threatened species, Congress authorized the Fish and Wildlife Service and National Marine Fisheries Service to issue regulations prohibiting take if "necessary and advisable for the conservation" of the species.[6] According to Senator John Tunney (D-CA), the Senate floor manager for the bill that became the Endangered Species Act, Congress expected "[t]he two levels of classification [to] facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions." Indeed, states were expected "to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction."[7]

Losing the Distinction

Shortly after the Endangered Species Act was enacted, the Fish and Wildlife Service issued a regulation eliminating any regulatory distinction between endangered and threatened species. According to this "blanket" rule, all of the prohibitions for endangered species automatically apply to threatened species unless the service issues a separate rule relaxing them for a particular species.[8] These threatened species rules are commonly referred to as "4(d) rules" after the provision of the act under which they are issued. The blanket rule is why the manatee's status upgrade did not result in any regulatory reward for those who contributed to the recovery.

The blanket rule has contributed to the Endangered Species Act's anemic recovery rate by undermining incentives for states, tribes, private landowners, and others to conserve and recover listed species. Under the statute's original two step-process, landowners who restore habitat and contribute to a species recovering from endangered to threatened are rewarded by the removal of the take prohibition and its consequences. Likewise, landowners

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Percentage of threatened animals for which the Biden administration has rejected endangered level regulation as worse for the species.

would be encouraged to prevent a threatened species' further slide because that would trigger stricter regulations. In this way, the two-step approach aligned the incentives of landowners with the interests of rare species. Under the service's "blanket rule" approach, landowners are made indifferent to a species' status.

The blanket rule also undermined Congress's expectation that states would take the lead in developing innovative programs to recover threatened species. Because the rule prohibits even beneficial activities if they involve relocating an animal, disturbing it, or temporarily damaging its habitat to improve it, many things states might do to contribute to threatened species' recovery require federal permission. The blanket rule likewise deprives states of flexibility to manage conflicts between threatened species and other values.

Fortunately, the Fish and Wildlife Service has recently moved away from the blanket rule. The Obama administration discarded the blanket rule in favor of tailoring regulations to individual threatened species more than "nearly every other presidential administration," according to a Defenders of Wildlife report.[9] The Trump administration formalized this shift by rescinding the blanket rule in 2019.[10] Since then, the service has considered what regulation would be best for each threatened species.

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In 2023, the Biden administration proposed reinstating the blanket rule, despite the fact that the Fish and Wildlife Service has been consistently declining to apply endangered-level regulations for threatened species. For each of the 17 animals listed as threatened during the Biden administration, the service has rejected endangered-level regulation in favor of tailored rules.[11] This is consistent with the National Marine Fisheries Service's experience, which has never had a blanket rule. Over the last 50 years, that agency has found it appropriate to extend endangered-level regulations to threatened species less than 3 percent of the time.[12]

Turn the Tide

The Endangered Species Act's two-step process was intended to encourage states, tribes, and landowners to recover endangered species with the promise that regulations would lighten as a species' status is upgraded to threatened. But, for most of the law's 50 years, that hasn't been the case, leading to a disappointingly low rate of recovering species. Restoring and sticking with the statute's original intent better aligns the incentives of states and landowners with the interests of rare species.

Recovery Recommendations

Endangered and threatened species are distinct categories that require different conservation approaches. Regulating these two categories the same makes states, tribes, and landowners indifferent to species' status. To boost species recoveries, we need positive incentives, not indifference, to encourage proactive recovery efforts.

1. Restore the Endangered Species Act's two-step process.

The blanket rule undermined the Endangered Species Act's design and discouraged the recovery of species. The Fish and Wildlife Service should retain the act's original two-step process to enhance incentives for species recovery. Congress should also reiterate that the take prohibition should be absolutely enforced only for species on the verge of extinction. By committing the service to honor the statute's two-step approach, we can tailor regulations to match a species' particular needs and better align the incentives of states, tribes, and landowners with the interests of species.

2. Empower states to lead on conserving threatened species.

Congress expected states to take the lead on conserving and recovering threatened species. It even gave states a means of vetoing any federal regulations the Fish and Wildlife service might issue for threatened species within their borders. And the Service has adopted a policy encouraging states to develop conservation plans and avoid the need to list a species.[13] The blanket rule, however, undermined state conservation plans and relegated states to merely helping implement federal decisions about how to conserve species. States have repeatedly expressed interest in returning to their proper role in recovering threatened species. The federal government should let them.

3. Clarify the line between endangered and threatened species.

If a species' listing as threatened results in reduced regulation, that may lead to pressure for the service to misclassify species, especially by interest groups that seek to manipulate the listing process to increase or decrease regulation. This could worsen the already politicized listing process. Therefore, Congress or the Fish and Wildlife Service should clarify how immediate and likely an extinction threat a species must face to merit an endangered listing, using as objective and quantitative a standard as possible.

Go Deeper

- 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).
- Jonathan Wood, "'Yellowstone' and the Endangered Species Act," *PERC Reports* 40, no. 2 (2021).
- Jonathan Wood, "Testimony on the Recovering America's Wildlife Act," U.S. Senate Committee on Environment and Public Works, December 8, 2021.