



Comment Opposing the Proposed Reinstatement of the “Blanket Rule” Regulating Threatened Species as if They Were Endangered

Property and Environment Research Center (PERC)

Bozeman, Montana

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Main Points:

- To meet the Endangered Species Act’s ultimate goal of recovering species, better incentives are needed for habitat restoration and other proactive recovery efforts. Without them, few species improve and recover.
- Creative threatened species regulations can provide these incentives and spur recovery. By charting “roadmaps to recovery” rewarding gradual recovery progress with incremental regulatory relief, the Service can encourage proactive conservation by states and landowners.
- The proposed “blanket rule” treating threatened and endangered species the same would, instead, undermine recovery incentives and make states and landowners indifferent to whether a species is endangered or threatened, improving or declining.
- The proposed rule also violates the ESA.

The Property and Environment Research Center (PERC) respectfully submits this comment opposing the Fish and Wildlife Service’s proposed reinstatement of a “blanket rule” presumptively regulating threatened species as if they were endangered.¹ While the Endangered Species Act has proven effective at preventing extinction, better incentives for habitat restoration and other proactive conservation efforts are urgently needed to recover species. The proposed blanket rule would undermine these incentives by making states and private landowners indifferent to whether a species is endangered or threatened, improving or declining.² It would undermine species conservation and recovery, while provoking conflict with states and private landowners. PERC urges the Service to withdraw this proposal and, instead, use its authority to tailor regulations more creatively to improve conservation incentives and put more species on the road to recovery.

¹ Dkt. No. FWS-HQ-ES-2023-0018. See 88 Fed. Reg. 40,742 (June 22, 2023).

² See 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).

The Property and Environment Research Center

PERC is the national leader in market solutions for conservation, with over 40 years of research and a network of respected scholars and practitioners. Through research, law and policy, and innovative field conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC has produced extensive research on the Endangered Species Act and its implementation, especially ways to better encourage habitat restoration and other proactive, voluntary recovery efforts.³ Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

I. The Unfulfilled Promise of Recovery

The purpose of the ESA is to “conserve” endangered and threatened species and the ecosystems on which they depend.⁴ Congress elaborated that these were explicitly recovery-focused purposes, by defining “conserve” as whatever is “necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”⁵ Consequently, the Service has explained, the statute’s “ultimate goal is to ‘recover’ species so they no longer need protection under the ESA.”⁶

The statute’s effectiveness at preventing extinction—99% of listed species remain around today—has not been matched by its recovery results.⁷ Over the last 50 years, only 3% of listed species have recovered and been delisted.⁸

In theory, at least, the low recovery rate could be explained by a lack of time. If many species required decades to recover, you might not expect many to have done so yet—even after 50 years. But the available evidence refutes this speculation.

³ See, e.g., Katherine Wright and Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC.org (2023); Jonathan Wood & Tate Watkins, *Critical Habitat’s “Private Land Problem”: Lessons From the Dusky Gopher Frog*, 51 ENVTL. L. REP. 10,565 (2021); *Road to Recovery*, *supra* n. 2; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, in REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (2011); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (1995).

⁴ 16 U.S.C. § 1531(b).

⁵ 15 U.S.C. § 1532(3).

⁶ See FWS, *ESA Basics: 50 Years of Conserving Endangered Species* (2023) (“”).

⁷ See *Missing the Mark*, *supra* n. 3.

⁸ See *id.*

A new study by PERC researchers, *Missing the Mark*, has found that the recovery rate for species that the Service itself predicted could recover by now is not significantly better than the overall recovery rate.⁹ Until 2014, the Service included in reports to Congress projected years to recovery for many species.¹⁰ According to those reports, 300 species were projected to recover by 2023.¹¹ However, only 13 of those species have recovered, a 4% recovery rate.¹² And the gap between the number of species that could have recovered and the number actually recovered is widening substantially over time.

Endangered Species Act Recovery Progress is Slower than Expected

Total number of species the U.S. Fish and Wildlife Service expected to recover vs. actual recoveries.

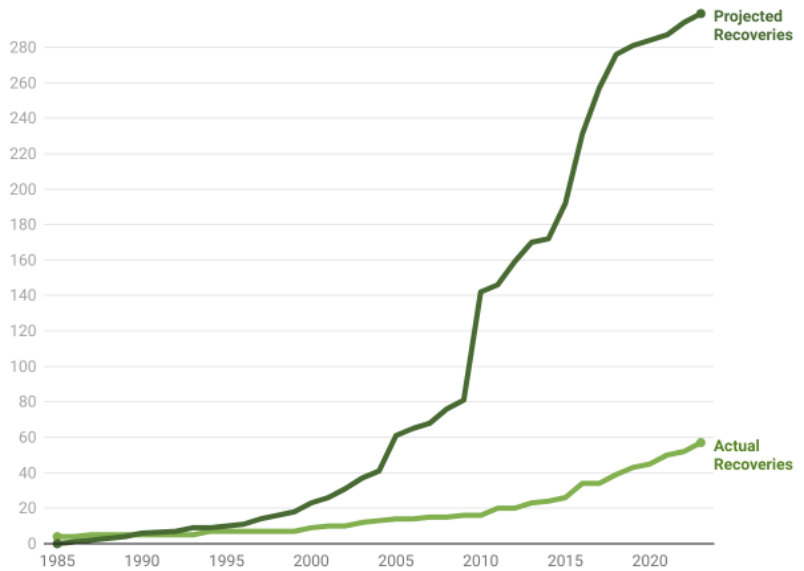


Chart: Katherine Wright • Source: PERC, ECOS, Katherine Wright • Created with Datawrapper

If the overall recovery rate were biased by species with unusually long recovery times, then a sample biased in the other direction (because it is limited to species the Service has determined could be recovered by now) should have a substantially higher recovery rate. It doesn't. This suggests the low recovery rate is due to a more fundamental problem, rather than a mere lack of time.

Evidence of incremental progress toward species recovery is in accord. The Service last reported the percentage of listed species improving in 2017.¹³ Unfortunately, only 4% of species were making progress toward recovery. In fact, according to the Department of the Interior's 2017 Performance Plan and Report, the percentage of species improving had declined and was projected to continue doing so.

Strategic Plan Performance Measures	Bureau	2012 Actual	2013 Actual	2014 Actual	2015 Actual	2016 Target	2016 Actual	2017 Target	2018 Target	2012-2018 Trend
Strategy: Sustain fish, wildlife, and plant species										
Percent of Threatened & Endangered species that have improved based on the latest 5-year status review recommendation	FWS	4.5%	4.5%	4.4%	4.1%	3.7%	4.1%	4.0%	3.8%	
		47	48	50	48	43	47	49	46	
		1,037	1,067	1,131	1,178	1,152	1,152	1,221	1,221	

⁹ See *Missing The Mark*, *supra* n. 3.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ Department of the Interior, [2017/2018 Annual Performance Plan & 2016 Report](#) 15 (May 26, 2017).

Progress toward implementation of recovery plans has also been lacking. According to PERC’s *Missing the Mark* report, less than 25% of recovery actions have been completed or partially completed for 85% of species with recovery plans.¹⁴ This figure is actually worse for species that have been listed for 30 years or more, for which an average of only 10% of recovery actions have been completed or partially completed.¹⁵

Species Struggle to Meet Recovery Plan Objectives

Number of species sorted by the percent of recovery actions that have been completed or partially completed

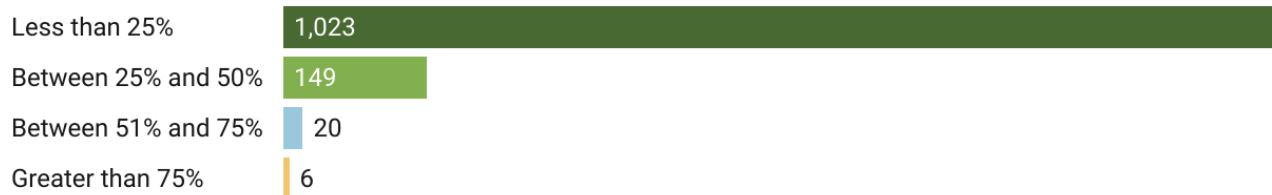


Chart: Katherine Wright • Source: Katherine Wright ECOS, and PERC • Created with Datawrapper

As Michael Bean has observed, “anyone who wishes to improve the [ESA]’s results should start by addressing” the need for “positive incentives” to engage in recovery efforts. Insufficient habitat is one of the main factors limiting species recovery.¹⁶ And private landowners provide a disproportionate share of this habitat and control many of the areas where habitat might be restored.¹⁷ Therefore, the incentives for private landowners to invest in habitat restoration and other proactive recovery efforts are critical factors in determining whether species recover or stagnate. And no matter how well intentioned they are, ESA regulations can get these incentives wrong. Strict prohibitions against incidental harm to species and contentious critical habitat designations can make species and their habitats a liability for landowners, discouraging them from maintaining or restoring features that might attract a listed species and the regulatory consequences that accompany it.¹⁸

¹⁴ See *Missing the Mark*, *supra* n. 3.

¹⁵ See *id.*

¹⁶ See Eric Holst, [“The ‘dean of endangered species protection’ on the past, present, and future of America’s wildlife](#), EDF Growing Returns (2017).

¹⁷ See *ESA Basics*, *supra* n. 6 (two-thirds of listed species depend on private land for habitat); Fish and Wildlife Service, [Our Endangered Species Program and How It Works with Landowners](#) (2009) (estimating that private landowners provide 80% of habitat for listed species).

¹⁸ See, e.g., *Critical Habitat’s “Private Land Problem”*, *supra* n. 3; *Road to Recovery*, *supra* n.2; Dean Lueck & Jeffrey Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 J. LAW & ECON. 27 (2003).

II. Threatened Species Regulations Must Be Designed to Put Species on the Road to Recovery

The above focus on these disappointing recovery results is not to criticize the ESA or the Service. PERC shares the Service's desire to see more species recover and less conflict over conservation. Indeed, we recognize and appreciate the administration's focus on incentives in many of its conservation initiatives, including America the Beautiful, and commitment to pursue conservation in ways that "honor private property rights and support voluntary stewardship."¹⁹ PERC has proudly supported the administration when it has acted consistent with this vision of conservation as something done "with private landowners, not to them."²⁰ We urge the Service to apply that same conservation vision to the Endangered Species Act. And we focus the agency's attention on the less-than-expected recovery results and the importance of conservation incentives because those are the critical issues that must guide the design of threatened species regulations.

Rather than automatically regulate private activities affecting threatened species, Congress authorized such regulation only if, and to the extent, "necessary and advisable for the conservation of such species."²¹ Because Congress also defined "conservation" in recovery terms,²² the principal factor in designing threatened species regulations must be setting those species up for recovery. To meet this standard, these regulations should provide incentives for states and private landowners to restore habitat and engage in other proactive conservation efforts.²³

Congress' decision to explicitly distinguish regulation of endangered and threatened species is one way it sought to provide these incentives. According to the bill's Senate floor manager, John Tunney (D-CA), the two differently regulated categories were established to "minimiz[e] the use of the most stringent prohibitions," which Congress believed should "be absolutely enforced only for those species on the brink of extinction."²⁴ By providing stricter regulation for endangered species than threatened species, the ESA aligned the incentives of states and private landowners with the interests of rare species.²⁵ Efforts to recover endangered species are encouraged through the promise that upgrading the species to threatened will also bring regulatory relief.²⁶ Likewise, efforts to prevent a threatened species'

¹⁹ See, e.g., [Conserving and Restoring America the Beautiful](#) (2021).

²⁰ See Robert Bonnie, 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).

²¹ 16 U.S.C. § 1533(d).

²² 16 U.S.C. § 1532(3).

²³ See *Road to Recovery*, *supra* n. 2.

²⁴ See Congressional Research Service, A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 358 (statement of Sen. Tunney).

²⁵ See *Road to Recovery*, *supra* n. 2.

²⁶ See *id.*

further slide are motivated through the implicit threat that, if the species is downgraded to endangered, it will trigger more burdensome regulation.²⁷ In these ways, less stringent regulation of threatened species gives states and private landowners a stake in the status of species.

Congress didn't expect this to be the only way the distinction between endangered and threatened species would encourage recovery. It also wished to "facilitate regulations that are tailored to the needs of the [threatened] animal."²⁸ It gave the Service "an almost infinite number of options" to tailor these regulations.²⁹ But it expected this authority to be used creatively to encourage proactive recovery efforts, including "encourag[ing states] to use their discretion to promote the recovery of threatened species."³⁰

PERC has urged the Service to think of threatened species regulations as opportunities to chart "roadmaps" to recover species.³¹ Under this approach, the Service would establish objective, recovery goals for species, such as population increases, habitat improvements, range expansions, or new populations established. And the Service would use those goals as triggers to adjust the extent of federal regulation, gradually reducing regulations as a reward for incremental progress toward recovery. This would encourage states and landowners to invest in habitat restoration and other efforts needed to meet recovery goals.

Of course, there's no one-size-fits-all roadmap to recover threatened species. Each one may differ based on the threats a species faces, surrounding land-uses, and the proactive recovery efforts needed. But a couple of examples may help to illustrate how this approach would fulfill the purposes of the ESA and to recover endangered and threatened species.

When the Service recently listed the northern population of lesser prairie chicken as threatened, states, landowners, and conservation organizations had already developed and were working to implement voluntary plans to recover the population. A roadmap supporting those plans could have limited federal regulation to intentional take of the species, provided that the population did not drop below a certain threshold or fail to grow at a determined rate.³² This way, the affected states and landowners would have had a direct incentive to continue implementing voluntary conservation efforts and ensure

²⁷ *See id.*

²⁸ *See* Congressional Research Service, *supra* n. 21, at 358.

²⁹ H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973.

³⁰ *See* Congressional Research Service, *supra* n. 21, at 358.

³¹ *See* [Testimony of Jonathan Wood](#), VP of Law and Policy, Property and Environment Research Center, to the House Natural Resources, Water, Wildlife, and Fisheries Subcomm., Hearing on ESA at 50 (July 18, 2023); PERC, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Sept. 1, 2021); *Road to Recovery*, *supra* n. 2.

³² PERC, [Comment on Proposed Lesser Prairie Chicken 4\(d\) Rule](#) (Sept. 1, 2021).

their success.³³ Or, to provide additional incentives for proactive conservation, it could have regulated take more broadly but provided for that regulation to gradually sunset based on population increases, habitat permanently conserved, or acres of grasslands restored.

For a species like the American burying beetle, for which recovery is dependent on relocating the species north in response to climate change, a roadmap might regulate incidental take in the northern portion of the range until a certain number of acres of habitat were restored or permanently conserved. For the southern part of the range, regulations might sunset once a certain number of beetles were relocated to suitable habitat further north. In this way, states and landowners would have a direct incentive to advance the species recovery needs, rather than relying principally on regulatory exactions to motivate conservation. Conservation banks, which play a significant role in restoring habitat for the beetle, would also have a larger market and opportunity to recover the species. States and landowners could pay them to achieve the 4(d) rule's goals and trigger regulatory relief rather than using them exclusively to offset harms to the species from permitted activities.

For a species like the grizzly bear, the recovery of which depends on establishing new populations, growing existing populations, and securing connectivity between populations, a roadmap might adjust regulations for each population and connectivity zone according to local conditions. For populations that far exceed the targets established in the species' recovery plan, including the Greater Yellowstone Ecosystem and Northern Continental Divide Ecosystem population, a 4(d) rule might provide little or no regulation. This would allow the states to take over management while retaining federal oversight under the ESA, allowing the states to build trust with the local and conservation communities and providing an offramp toward a future delisting.³⁴ For still struggling populations and connectivity zones, a roadmap might authorize states to take over management gradually as population and connectivity targets are met, giving them an incentive to pursue gradual recovery progress and an opportunity to slowly prove they're able to manage recovery in those areas. For an extirpated population like the Northern Cascades, federal regulation might be limited to quell controversy and attract the support of surrounding communities for reintroductions.³⁵ And additional regulatory incentives can be provided to states or communities with healthy populations that contribute bears

³³ Under the PECE policy, the Service will not list a species if new voluntary conservation efforts are deemed likely to address the threats to the species. 68 Fed. Reg. 15,100 (Mar. 28, 2003). While this policy has been beneficial, some environmentalists have expressed concern that once the Service decides not to list a species, the incentives to continue the voluntary conservation efforts disappears. *See Road to Recovery*, *supra* n. 2. A threatened listing with no or a very limited 4(d) rule presents an alternative pathway to reward voluntary efforts, while addressing the risk of backsliding. *See id.*

³⁴ *See Testimony of Jonathan Wood*, VP of Law and Policy, Property and Environment Research Center, to the House Natural Resources, Water, Wildlife, and Fisheries Subcomm., Hearing on ESA at 50 (July 18, 2023).

³⁵ *See* PERC, [Comment on the Proposed Establishment of an Experimental Population of Gray Wolf](#) (Apr. 18, 2023); PERC, [Comment on Establishing Experimental Populations Outside a Species' Historic Range](#) (Aug. 8, 2022).

toward reintroduction (contributions which, as the Service is learning with wolves in Colorado, should not be taken for granted).³⁶ A more creative 4(d) rule for grizzly bears would, according to a forthcoming publication by David Willms of the National Wildlife Federation, also substantially reduce conflict between federal and state agencies while lowering the stakes of delisting decisions and the incentives to litigate them.³⁷

This roadmap approach could also help provide additional incentives to recover endangered species. The Service could include in the recovery plans for endangered species an analysis of the kind of regulation the Service might issue when the species is upgraded to threatened. If the Service honored those commitments when species were upgraded, states and landowners would have a stronger incentive to work towards a species' upgraded status. Consider, for instance, the plight of the Pacific pocket mouse. Listed as endangered in 1994, the Service issued a recovery plan in 1998 establishing several criteria for upgrading the species to threatened, including increasing the number of populations from 3 to 10 as well as a fivefold increase in occupied habitat.³⁸ The Service predicted these goals could be met this year. Unfortunately, the species has made little progress in the last 25 years. According to a 2020 status review, there remained only three populations and the area of occupied habitat may have shrunk.³⁹ The Service might have motivated more proactive effort by states and landowners if it signaled to them in the recovery plan that they would receive some reward for progress.

In sum, to satisfy the ESA's text and purpose, regulations for threatened species should be designed to encourage habitat restoration and other proactive conservation efforts needed to recover species. Those regulations should be especially sensitive to the role of states, which Congress expected to use their discretion to recover species. If such discretion (or at least reasonable opportunities to acquire it) is withheld from states, this purpose is undermined, as is the ESA's cooperative federalism approach to recovering species.⁴⁰ For that reason, numerous states and state entities have urged the Service to use tailored rules to give them the flexibility needed to recover threatened species.⁴¹

³⁶ See Elise Schmelzer, [Another Western state says it won't send wolves to Colorado, citing "enormous price" of managing the species](#), Denver Post (July 21, 2023).

³⁷ 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, eds. Lowell E. Baier, John F. Organ, and Christopher E. Segal (Lanham, MD: Rowman & Littlefield, forthcoming 2023).

³⁸ https://ecos.fws.gov/docs/recovery_plan/980928c.pdf.

³⁹ https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/species_nonpublish/3087.pdf.

⁴⁰ Jonathan Wood, "[Testimony on A Roadmap to Recovery](#)," Congressional Western Caucus Endangered Species Act Forum (July 27, 2022); Jonathan Wood, [Testimony Before the U.S. Senate Committee on Environment and Public Works on the Recovering America's Wildlife Act](#), PERC.org (Dec. 8, 2021); Temple Stoellinger, *Wildlife Issues are Local: So Why Isn't ESA Implementation?*, 44 ECOLOGY L.Q. 681 (2017).

⁴¹ See, e.g., Nat'l Ass'n of State Foresters, [Comment on FWS-HQ-ES-2023-0018](#) (Aug. 17, 2023); Wyoming Game & Fish Dept., [Comment on Proposed Regulations Pertaining to Endangered and Threatened Species](#) (Aug. 17, 2023); Western Governors' Association, [Policy Resolution 2017-11: Species Conservation and the Endangered Species Act](#) (2017).

III. Restoring the Blanket Rule Would Undermine Recovery Incentives and Be a Step Backwards for Species

During the ESA's first half-century, the Service has not designed threatened species regulations to provide incentives to restore habitat and recover species. Instead, for most of that time, the Service followed an arbitrary and unscientific approach of automatically treating threatened and endangered species the same under the so-called "blanket rule."⁴² It could, and sometimes did, tailor regulations for individual threatened species, but even these exceptions were far less creative than what was needed to encourage species recovery. Worse, the Service rejected any obligation to consider—much less explain—how reflexively applying the blanket rule to a particular species was necessary and advisable for that species' recovery or would create the incentives needed to spur habitat restoration and other proactive conservation efforts.

This blanket rule undermined incentives to recover species in at least two ways. First, by presumptively regulating endangered and threatened species the same, it eliminated any expectation that a species' improvement from endangered to threatened would be rewarded with regulatory relief. This perception is perhaps best reflected in comments by a Service official when the West Indian manatee was upgraded from endangered to threatened. Rather than celebrating that recovery milestone, he dismissed it, asserting (wrongly) that it is a "misperception" that endangered and threatened are distinct classifications.⁴³

If states and landowners are unlikely to see any benefit from a species improving from endangered to threatened, they will have little incentive to invest in the efforts required to achieve that recovery progress.⁴⁴ Indeed, during the more than 40 years that the blanket rule was in place, only 40 species progressed enough to be upgraded from endangered to threatened.⁴⁵ More alarmingly, states and private landowners may be indifferent to threatened species' further slide. Since they are already suffering all of the consequences of an endangered listing, they have nothing to lose from a species being downgraded.⁴⁶

The blanket rule also undermines recovery incentives by making it less likely that the Service will establish tailored rules for threatened species. In theory, this shouldn't be the case, since the regulation

⁴² See *Road to Recovery*, supra n. 2.

⁴³ Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, Al Jazeera America (August 8, 2014) (quoting Patrick Underwood, a FWS spokesman, as saying "People have misperceptions that we have two lists. It's one classification.").

⁴⁴ See *Road to Recovery*, supra n. 2.

⁴⁵ See *Missing the Mark*, supra n. 3. See also FWS, ECOS: Reclassified Species, <https://ecos.fws.gov/ecp/report/species-reclassified>.

⁴⁶ See *Road to Recovery*, supra n. 2.

deemed “necessary and appropriate” for a particular species could be the same regardless of whether the Service began from a presumption of endangered-level regulation or no regulation. But this has not been borne out in practice. When the blanket rule was previously in place, the Service applied it to approximately 75% of threatened species without further analysis.⁴⁷ When the blanket rule was rescinded and the Service, for the first time, considered what approach was best for each species, this percentage dropped to zero for threatened animals.⁴⁸ This isn’t a coincidence. The National Marine Fisheries Service, which has never had a blanket rule, has almost never found it appropriate to regulate threatened species as if they were endangered, doing so a mere 3% of the time.⁴⁹

This is precisely why the Service rescinded the blanket rule in 2019. It explained then that requiring tailored rules for every threatened species would “incentivize conservation for both endangered species and threatened species.”⁵⁰ “Private landowners and other stakeholders may see more of an incentive to work on recovery actions,” the Service explained, through the promise of “reduced regulation.”⁵¹

Despite the importance of recovery incentives to the Service’s decision to rescind the blanket rule, the Service is silent about them in its proposal to restore it. The only reference to incentives in the Service’s announcement is a statement, consistent with the agency’s earlier finding, that exceptions to the blanket rule may help to conserve species.⁵² The Service’s notice does not mention private landowners, much less discuss how the blanket rule would affect the likelihood that they or states would invest in habitat restoration or other proactive conservation efforts. Indeed, the only reference to recovery is a single sentence asserting, without explanation or evidence, that the blanket rule will promote the recovery of species. Considering the central importance of motivating recovery to the standard for issuing a 4(d) regulation and to the Service’s previous decision to rescind the blanket rule, the proposal’s lack of attention to recovery and the incentives needed to accomplish it is deeply troubling.

Additional evidence that restoring the blanket rule would be a step backwards for species can be found in the Service’s recent rulemaking for experimental populations, which are treated as threatened under

⁴⁷ See 88 Fed. Reg. at 40,744.

⁴⁸ See *id.* As the Service notes, it has imposed endangered-level regulation for 5 plant species since the blanket rule was rescinded. See *id.* However, activities harming plants on private land are generally unregulated even for endangered plants, since the take prohibition for plants only applies in areas “under federal jurisdiction. 16 U.S.C. § 1538(b). Thus regulations for threatened plants do not raise concerns about the incentives of states and landowners that regulations for threatened animals do.)

⁴⁹ See Ya-Wei Li, [Section 4\(d\) Rules: The Peril and the Promise](#), Defenders of Wildlife White Paper 1 (2017).

⁵⁰ 84 Fed. Reg. at 44,757.

⁵¹ See *id.*

⁵² 88 Fed. Reg. at 40,747. Even comments supporting the proposed restoration of the blanket rule principally find benefits from departures from that rule rather than applications of it. See, e.g., Robert Fischman, [Comment on ESA Section 4\(d\) Proposed Blanket Rule](#) (July 19, 2023) (citing the benefits of tailored rules for threatened species that encourage collaborative conservation).

the act. Within a few weeks of proposing the blanket rule, the Service publicly committed that, even if the rule is restored, the Service “will not consider using it for an experimental population in the future.”⁵³ It will not do so, the Service explained, because “each situation is unique and requires careful consideration of what prohibitions may be necessary” to conserve each population.⁵⁴ One-size-fits-all approaches, the Service continued, do “not provide the flexibility that is needed to further the conservation of the species.”⁵⁵ The same is true for all threatened species, yet the Service proposes just such a cookie-cutter approach to them.

Considering that the blanket rule was in place for more than 40 years, more than mere speculation is required to show that restoring it is necessary and advisable to the conservation of threatened species. As discussed above, the results achieved under that policy are far from encouraging, with only a small percentage of species recovering (including among those predicted to recover) and a similarly small percentage improving. Indeed, it’s noteworthy that the National Marine Fisheries Service, which has never had a blanket rule, has achieved a significantly higher recovery rate: 6.7% compared to the Service’s 2.5%. There may be multiple factors contributing to NMFS’ (relative) success in recovering species, but the Service should not abandon a policy that has worked for NMFS without even considering its role in that agency’s better results.

The Service seems to admit that the blanket rule is not the best approach for threatened species by justifying it, at least in part, on the grounds that the Service may lack the information necessary to design the ideal rule when a threatened species is initially listed.⁵⁶ This assertion, which the Service does not support, is dubious based on the available evidence. If it were true, you would expect that without the blanket rule, the Service and the National Marine Fisheries Service would frequently impose endangered-level regulation for threatened species on a temporary basis and later revise the rule after more information is gathered through a recovery plan or status review. As discussed in more detail above, this has not been the case. Since rescinding the blanket rule, the Service has not once found it appropriate to impose endangered-level regulation for threatened animals. And, over the past half-century, the National Marine Fisheries Service has found this appropriate only 3% of the time.

Moreover, even if this were true, it would only justify the temporary application of the blanket rule. But the Service doesn’t propose to apply it to threatened species only until a better rule can be developed through recovery planning or status reviews. Nor is this likely to happen without such a requirement. Over the 40 years that the blanket rule was previously in place, the Service applied it to a

⁵³ See 88 Fed. Reg. 42,632, 42,645 (July 3, 2023).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See 88 Fed. Reg. at 40,744.

species and later developed a tailored rule for that species only twice.⁵⁷ In every other case in which the Service has developed a tailored rule, it proposed or finalized such a rule when the species was listed as threatened. And the two exceptions don't support the Service's uncertainty explanation for the blanket rule. In the case of the Preble's jumping mouse, for instance, there was a seven month delay between the species listing and the Service's proposal of a tailored 4(d) rule. That was not due to uncertainty but to allow Colorado to finish a conservation plan on which the tailored rule would be modeled.⁵⁸

To advance the conservation and recovery of endangered and threatened species, the Service should not restore the blanket rule. Instead, it should use its authority to tailor regulations for these species more creatively to chart roadmaps for recovering those species that encourage and reward habitat restoration and other proactive conservation efforts. By doing so, conflict over the ESA can be reduced and listed species can recover and thrive.

IV. Restoring the Blanket Rule Would Violate the ESA

While PERC's principal concern with the proposal to restore the blanket rule is that it will undermine incentives to conserve and recover endangered and threatened species, the proposal also violates the Endangered Species Act. As discussed in more detail above, the standard Congress set for issuing regulations for threatened species is that they must be necessary and advisable to recover those species.⁵⁹ By failing to consider how the blanket rule contributes to species recovery or affects the incentives for states and private landowners to contribute to that recovery, the proposal does not satisfy this standard. Moreover, given the disappointing results for species recovery previously experienced under the blanket rule, the proposal conflicts with the text of 4(d) and undermines the purposes of the ESA generally.

The proposed blanket rule also violates the ESA because the Service has no authority to reverse Congress' decision to only automatically apply the prohibitions of Section 9 to endangered species.⁶⁰ Thus, the Service's reliance on species' threatened status to justify application of a blanket rule is

⁵⁷ See 71 Fed. Reg. 19,244 (Apr. 13, 2006); 66 Fed. Reg. 28,125 (May 22, 2001).

⁵⁸ See 63 Fed. Reg. 26,517, 26,526 (May 13, 1998).

⁵⁹ It is unclear whether the Service recognizes that its proposal is subject to this standard. See 88 Fed. Reg. at 40,743 (suggesting it does), 40,745 (suggesting it doesn't), 40,746 (suggesting it doesn't), 40,747 (suggesting it does and doesn't in separate places). The best reading of Section 4(d) is that the "necessary and advisable" standard applies to any regulation issued under that section. See Jonathan Wood, *Take It to the Limit: The Illegal Regulation Prohibiting the Take of Threatened Species Under the Endangered Species Act*, 33 PACE ENVTL. L. REV. 23 (2015). If it doesn't, however, the Service may prohibit every activity affecting every threatened species that might ever be listed and that authority is governed by no legislative standard whatsoever. Were that the case, the authority granted in Section 4(d)'s second sentence would be unconstitutional under the nondelegation doctrine. See *id.* at 38–40. And the major questions doctrine would make such an interpretation extremely disfavored. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

⁶⁰ See *Take It to the Limit*, *supra* n. 55.

invalid.⁶¹ If the Service believes that Congress should have written Section 4(d) to automatically apply Section 9 to threatened species while authorizing the Service to carve out exceptions to those prohibitions where necessary and advisable for the conservation of particular threatened species, it should urge Congress to amend the statute. But, as written, the ESA allows no automatic regulation of private activity affecting threatened species and puts the onus on the Service to demonstrate that any such regulation is necessary and advisable for the conservation of a particular species, which requires more than the mere fact that the species is threatened.⁶²

The legislative history supports the ordinary meaning of the statute's text.⁶³ The Senate Report, for instance, explains that Section 4(d) allows the Service to "make any or all of the acts and conduct defined as 'prohibited acts' . . . as to 'endangered species' also prohibited acts *as to the particular threatened species*."⁶⁴ The Department of the Interior, for its part, conceded that any regulation of threatened species must "depend on the circumstances of each species."⁶⁵ There is no support in the text or the legislative history for the Service's claimed authority to overrule Congress' decision that private activities affecting threatened species are presumptively unregulated.

The blanket rule also can't be squared with Section 4(d)'s necessary and advisable standard. Because the threats to, conflicts with, and needs of species vary dramatically, it is impossible to say what approach will be necessary and advisable for all the unknown species that may ever be listed as threatened in the future. The Service seems to concede as much in its acknowledgement that it cannot analyze the benefits or costs of restoring the blanket rule because it does not know which species it will be applied to.⁶⁶ In context, the Service is citing this uncertainty only to explain its decision not to analyze the costs of restoring the blanket rule. But if, for the same reason, the Service cannot show the benefits to species of restoring the blanket rule, it can demonstrate that it is necessary and advisable for their conservation. It is simply not possible to pre-judge the needs of unknown threatened species that may be listed in the future without access to any of the scientific or other information that must inform such decisions. Yet that's precisely what the Service proposes to do.

⁶¹ See *id.* See also 88 Fed. Reg. 40,744 (citing species threatened status as the first reason to impose the blanket rule).

⁶² See *Take It to the Limit*, *supra* n. 55. While the Service has previously applied a blanket rule, Congress has never taken any action that could be interpreted as an acquiescence to that interpretation.

⁶³ See *id.* at 35–37.

⁶⁴ See S. REP. NO. 93-307, at 8 (1973), reprinted in ESA LEGISLATIVE HISTORY, *supra* note 23, at 307 (emphasis added).

⁶⁵ See Letter from Douglas P. Wheeler, Acting Assistant Secretary of the Interior, to Rep. Leonor Sullivan, Chairman, House Committee on Merchant Marine and Fisheries (Mar. 23, 1973), in ESA LEGISLATIVE HISTORY, *supra* note 23, at 162.

⁶⁶ See 88 Fed. Reg. 40,749.

This is not to suggest that the Service cannot issue general regulations interpreting its authority under Section 4(d). It could, for instance, issue a regulation interpreting “necessary and advisable” and describing factors the Service must consider in applying that standard. That is precisely the approach the Service has taken for its critical habitat authority, including regulations defining habitat and clarifying the process for excluding areas where the costs of designation exceed the benefits. But it could not issue a regulation that automatically treated all areas occupied by species as critical habitat without applying the standards for designating critical habitat to the particular circumstances of each species and its habitat. Yet that sort of pre-judging is precisely what the Service proposes to do for threatened species. The proposed rule makes clear the Service’s intention “not [to] make necessary and advisable determinations for the use of [] blanket rules in future proposed or final listing rules.”⁶⁷

The Service’s proposal is also illegal because it attempts to circumvent the ESA’s mandate to consider the costs of threatened species regulations. There can be no serious doubt that the “necessary and advisable” standard requires consideration of the costs imposed on states and private landowners, considering the Supreme Court’s interpretation of virtually identical language.⁶⁸ More to the point, the critical role incentives play in whether species receive the habitat restoration and proactive conservation efforts needed to recover make these costs a key factor in assessing whether a regulation is necessary and advisable for a species’ conservation. These costs are not merely economic but, where they create perverse incentives or discourage recovery efforts, they are also significant conservation costs.

The Service does not analyze the costs to regulated entities or to species of its proposed rule. Instead, it asserts “it is not possible” to say whether the rule will produce costs or benefits.⁶⁹ As noted above, this is a reason the blanket rule can’t be squared with the ESA. But, setting that aside, the Service cannot ignore costs so easily. The Service has experience operating both with and without a blanket rule and could analyze the differences between those periods to estimate how the blanket rule would affect the Service’s implementation of 4(d), the costs it imposes on states and private landowners, and the likelihood that species recover. But other than acknowledging that it was significantly less likely to develop tailored rules under the blanket rule, the Service considers none of these factors. The ESA does not permit the Service to ignore costs and benefits in this way.

Next, the Service asserts that threatened species regulations are easier to understand if they are modeled

⁶⁷ See 88 Fed. Reg. at 40,747.

⁶⁸ See *Michigan v. EPA*, 135 S. Ct. 2699, 2717 (2015). The only argument the Service has offered to the contrary reads legislative history out of context and asserts that it trumps the text of 4(d) whenever the Service issues a regulation simultaneously with a species’ listing. See 87 Fed. Reg. at 82,717. Not only is that argument legally inadequate but, since the proposed blanket rule is not a part of a listing decision, it would not apply here.

⁶⁹ See 88 Fed. Reg. at 40,749.

after Section 9.⁷⁰ It is not clear why the blanket rule is necessary to accomplish this. Since 2019, the Service has consistently issued tailored rules modeled on Section 9 without difficulty. Indeed, the Service's formulaic approach to designing these rules has likely caused it to overlook opportunities to develop more creative rules that would do a better job of encouraging species recovery.⁷¹

Finally, the Service proposes that the blanket rule is justified by administrative convenience. It will result in less text in future Federal Register documents and the Code of Federal Regulations because the Service will not have to repeat the prohibitions covered by it in tailored threatened species regulations, and that this reduction in text will also lower the agency's costs. Any such savings are tiny or illusory. The Service has averaged about 5 threatened listings per year in recent years. When issuing tailored rules for those species, explaining and reproducing the text of the prohibitions applying to those rules has averaged approximately 1 page in the Federal Register and less than a page of the Code of Federal Regulations.⁷² At the General Printing Offices current rates, this translates to a cost of less than \$1100 per species, or an approximate total of \$5,500 per year to issue five proposed and final tailored rules.⁷³ Service personnel must also prepare these documents. But as this text is largely copied and pasted from one decision to the next, these costs are likely small.

These costs are also only a part of the administrative costs implicated by the Service's proposal. As the Service explained when rescinding the blanket rule in 2019, tailored regulations produce substantial administrative savings by avoiding the need to individually permit many activities that benefit or have only trivial impacts to species.⁷⁴ The savings almost certainly exceed the small administrative costs the Service now references to justify the blanket rule. It would not be surprising, in fact, if the issuance of a single additional permit under the blanket rule was enough to cancel out the administrative savings that the Service identifies. If the Service is going to consider administrative costs, it must consider all of them rather than ignoring those that are inconvenient to the proposal.

More importantly, it is far from clear that the necessary and advisable standard allows the Service to trade-off conservation for mere administrative convenience. So these savings, even if they were far more substantial, may not justify imposition of a rule that is inferior for species.

⁷⁰ 88 Fed. Reg. at 40,744–45.

⁷¹ See [Testimony of Jonathan Wood](#), VP of Law and Policy, Property and Environment Research Center, to the House Natural Resources, Water, Wildlife, and Fisheries Subcomm., Hearing on ESA at 50 (July 18, 2023).

⁷² See, e.g., 84 Fed. Reg. 69,918, 69,942–43 (Dec. 19, 2019); 50 C.F.R. § 17.41(d).

⁷³ See GPO, *OFR Publishing Services*, <https://www.gpo.gov/how-to-work-with-us/agency/services-for-agencies/ofr-publishing-services>.

⁷⁴ 84 Fed. Reg. at 44,754.

Conclusion

In sum, PERC's principal concern with the Service's proposal is that it will undermine species conservation and recovery. But there is also a near certainty that it will provoke conflict and high likelihood that it will ultimately be found to violate the ESA. This means that the proposal will only consume agency time and resources that could be better spent on proactive recovery efforts. We urge the Service to abandon the proposal and, instead, focus on ways to tailor 4(d) rules more creatively to meet the needs of species and to encourage habitat restoration and other proactive recovery efforts.