U.S. House Natural Resources Committee, Subcommittee on Water, Wildlife, and Fisheries
Hearing on H.R. 520, 2990, 5103, 5504, 5509, 5874, and ____ (Rep. Graves)
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Main Points

- Although the Endangered Species Act has been effective at preventing extinctions, only 3% of listed species have achieved its ultimate goal of recovery. The key to recovering more species is to encourage habitat restoration and other proactive conservation efforts. To do so, ESA regulations must better align the incentives of states and landowners with the interests of imperiled species.
- Instead, the Fish and Wildlife Service has proposed to regulate threatened species as if they were endangered, making states and landowners indifferent to whether species are improving or declining.
- The Service has also proposed to increase conflict over critical habitat by ignoring whether designations contribute to recovery and whether designated land has the features species need to flourish.
- Blocking these proposals is a step in the right direction, but more is needed to deliver on the ESA's promise of recovering species.

Introduction

Chairman Bentz, Ranking Member Huffman, and members of the committee, thank you for the invitation to participate in this afternoon's discussion. While this hearing concerns numerous bills, my remarks will focus on the Endangered Species Act, proposed threatened-species and critical-habitat regulations that would set back species recovery, and H.R. 5504's proposal to block those counterproductive regulations.

The "ultimate goal" of the Endangered Species Act is to recover species to the point that they are no longer threatened with extinction.[1] The ESA has been effective at achieving part of this goal, preventing extinction so that it is possible to recover species. Although 32 species have tragically been declared extinct,[2] 99% of listed species persist to this day. However, disappointingly few species have recovered (3%)[3] or are improving (4%).[4]

[1] U.S. Fish & Wildlife Serv., *ESA Basics: 50 Years of Conserving Endangered Species* (2023).
[2] *See* U.S. Fish & Wildlife Serv., Press Release, *Fish and Wildlife Service Delists 21 Species from the Endangered Species Act due to Extinction* (Oct. 16, 2023); ECOS, *Delisted Species* (last visited Oct. 19, 2023).
[3] *See* Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (2023).
[4] *See* Department of the Interior, *2017/2018 Annual Performance Plan & 2016 Report* 15 (May 26, 2017).

The reason for the dearth of recoveries is poor incentives for habitat restoration and other proactive recovery efforts. To fix this, PERC released last month *A Field Guide for Wildlife Recovery* that explores how ESA implementation could be strengthened to deliver on the law's promise of recovery.[5]

Unfortunately, the Fish and Wildlife Service has recently proposed regulations that would worsen recovery incentives and set back species conservation. One of these regulations proposes to automatically impose on threatened species the prohibitions Congress designed for endangered species, without regard to the unique needs of each species and the best approach to encourage its recovery. Another would stoke conflict and distract from conservation by eliminating requirements that the Service consider whether an area designated as critical habitat will contribute to a species recovery and contains the features species need to flourish. Blocking these rules, as H.R. 5504 would, is a positive step to improve recovery incentives. But more is needed to fully realize the ESA's potential. I urge the Committee to consider additional reforms, like those proposed in PERC's *Field Guide*, to spur habitat restoration and proactive recovery efforts and make species an asset rather than a liability.

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. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana. Through research, law and policy, and innovative applied conservation programs, PERC explores how aligning incentives for environmental stewardship produces sustainable outcomes for land, water, and wildlife. PERC and its affiliated scholars have long studied the ESA and how it could be better implemented to empower states to lead in recovering species, to remove perverse incentives that set species back, and to create the positive incentives needed to spur habitat restoration and proactive recovery efforts.[6]

The Unfulfilled Promise of Recovery

The purpose of the ESA is to "conserve" listed species and their habitats, with conservation defined explicitly in recovery terms.[7] This recovery mandate is reflected in every significant provision of the act.[8] Consequently, there is broad agreement that the act's goal is "in a word . . . recovery," as Michael Bean once put it.[9] But we are not

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[5] *See* PERC, *A Field Guide for Wildlife Recovery: The Endangered Species Act's Elusive Search to Recover Species—and What to Do About It* (2023).

[6] *See Field Guide*, *supra* n. 5; *Missing the Mark*, *supra* n. 3; Jonathan Wood & Tate Watkins, *Critical Habitat's "Private Land Problem": Lessons from the Dusky Gopher Frog*, 51 Envtl. L. Rep. 10,565 (2021); 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).

[7] 16 U.S.C. §§ 1531(b), 1532(3) (defining conservation as bringing listed species "to the point at which the measures provided pursuant to this chapter are no longer necessary").

[8] *See* 16 U.S.C. §§ 1532(5) (definition of critical habitat), 1533(d) (standard for threatened-species regulations), 1533(f) (standard for recovery plans), 1534 (standard for land acquisition), 1535 (standard for collaborating with states), 1536 (standard for inter-agency consultation), 1539(j) (standard for establishing experimental populations).

[9] *See* Michael J. Bean, *The Endangered Species Act: Science, Policy, and Politics*, in The Year in Ecology and Conservation Biology, Annals of the New York Academy of Science (2009).

recovering species at the rate we should be. Over the last 50 years, only 3% of species have recovered.[10] Using newly compiled Fish and Wildlife Service data, a recent PERC study found that the Service predicted the recovery of 300 species by now, but scandalously few of those species have actually recovered.[11] Indeed, the recovery rate for species predicted to recover by now—species which should be easier and quicker to recover than average—is little better than the rate for all listed species (4% v. 3%).[12] Nor are we likely on the verge of a dramatic increase in the recovery rate. According to the most recent data from the Service, only 4% of species are even improving and, therefore, on the road to recovery.[13]

The lack of progress toward species recovery should alarm all of us concerned with wildlife conservation. But entrenched political conflict distracts us from focusing on recovery and finding ways to better deliver on the ESA's promise. Ultimately, wildlife pays the price for this conflict. Species that don't improve and recover are left perpetually on the precipice of extinction. For instance, there are only 135 dusky gopher frogs left at six sites in Mississippi.[14] Without habitat restoration and proactive recovery effort, the species will remain extremely vulnerable to drought and floods that could damage its little remaining habitat and cause its extinction.[15]

But the current approach to implementing the ESA does not adequately encourage habitat restoration and proactive conservation. The Fish and Wildlife Service has made little progress in implementing recovery plans.[16] States have limited flexibility to innovate.[17] And heavy-handed regulations discourage landowners from restoring habitat or, worse, encourage them to preemptively destroy habitat before it can attract a species and the regulations that accompany it.[18]

To boost species recovery, we need better incentives for federal officials, states, tribes, and private landowners to restore habitat and invest in proactive conservation. That is the key challenge we face in the ESA's second half-century. PERC's *Field Guide for Wildlife Recovery* offers dozens of ideas for how to do this, including making recovery planning more effective, reducing conflict over reintroduction efforts, and rewarding federal agencies, states, and landowners for progress toward recovery. Unfortunately, the proposed rules we're discussing today do the opposite, stoking conflict while undermining recovery incentives.

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[10] *See Missing the Mark*, *supra* n. 3.
[11] *See id.*
[12] *See id.*
[13] *See Performance Plan*, *supra* n. 4 at 15.
[14] *See Field Guide*, *supra* n. 5 at 22-23.
[15] *See id.* at 22–25.
[16] *See Missing the Mark*, *supra* n. 3. Recovery plans may also not correctly anticipate what species need to recover, as recovered species have on average completed or partially completed only 28% of the actions described in their recovery plans. *See id.*
[17] *See Field Guide*, *supra* n. 5 at 26–29.
[18] *See id.* at 44.

A Cookie-Cutter Approach Where Creativity is Needed to Encourage Recovery

In June, the Service proposed to restore the so-called "blanket rule" under which the Endangered Species Act's regulations for endangered species would automatically apply to threatened species as well.[19] This would replace the current approach of tailoring regulations to the unique needs of each threatened species.[20] The unscientific blanket rule is a failed approach to regulating threatened species. Restoring it would undermine incentives to recover species.

When Congress enacted the ESA, it intentionally limited the take prohibition and other Section 9 prohibitions to endangered species. It did so, according to the bill's Senate floor manager, John Tunney (D-CA), 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."[21] For threatened species, Congress gave the Service "an almost infinite number of options" to "facilitate regulations that are tailored to the needs of the animal."[22] In other words, Congress expected threatened species regulations to be designed creatively to facilitate recovery.

From 1975 to 2019, however, the Service followed a cookie-cutter approach. Under the so-called blanket rule, which purported to overrule Congress' decision to regulate endangered and threatened species differently,[23] the Service automatically imposed on threatened species all of the prohibitions that apply to endangered species.[24] It could set that rule aside and tailor a rule to the needs of a particular animal. But, because it was procedurally more burdensome to craft a tailored rule than reflexively apply the blanket rule, tailored rules were the rare exception. For 75% of species listed as threatened during that time, the blanket rule was applied without any analysis of whether that was best for the species.[25] Indeed, the blanket rule caused Service personnel to treat a species' status upgrade as a non-event, with one official downplaying improvements for the Florida manatee by asserting that it is a "misperception" that endangered and threatened are distinct classifications.[26]

This began to change during the Obama administration. It discarded the blanket rule in favor of tailored rules more than "nearly every other presidential administration," according to a Defenders of Wildlife report.[27]

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[19] *See* 88 Fed. Reg. 40,742 (June 22, 2023).
[20] *See* 84 Fed. Reg. 44,753, 44,757 (Aug. 27, 2019).
[21] *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).
[22] *See* Congressional Research Service, *supra* n. 21, at 358.
[23] Congress did not give the Service this authority. Consequently, the blanket rule is and always has been unlawful. *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). *See also* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule" Regulating Threatened Species as if They Were Endangered 11 (Aug. 22, 2023).
[24] *See Field Guide*, *supra* n. 5 at 6–9.
[25] *See* 88 Fed. Reg. at 40,744.
[26] Patricia Sagastume, *Reclassifying Florida Manatees: From Endangered to Threatened*, Al Jazeera America (August 8, 2014) (quoting Patrick Underwood, a U.S. Fish and Wildlife Service spokesman, as saying "People have misperceptions that we have two lists. It's one classification.").
[27] *See* Ya-Wei Li, *Section 4(d) Rules: The Peril and the Promise*, Defenders of Wildlife White Paper 1 (2017).

PERC's research supported this policy shift because tailored rules encourage species recovery by aligning the incentives of landowners with the interests of species.[28] Regulating threatened species less stringently than endangered species gives states and landowners a stake in a species' status. It does so through the promise that recovering the species to the point that its status can be upgraded will be rewarded with regulatory relief. Likewise, efforts to prevent a threatened species' further slide are motivated through the implicit threat that, if the species is downgraded, it will trigger more burdensome regulation.

The Trump administration continued the shift in policy that began during the Obama administration and formalized it by rescinding the blanket rule in 2019. It did so to "incentivize conservation for both endangered species and threatened species."[29] Consistent with PERC's research, the Service explained that "[p]rivate landowners and other stakeholders may see more of an incentive to work on recovery actions" through the promise of "reduced regulation."[30] Under the 2019 rule, every threatened species listing has been accompanied by a regulation tailored to the unique needs of that species.

Now, the Service proposes to reverse this decision and reinstate the blanket rule. Doing so would be a clear loss for species. As discussed above, few species improved and recovered while it was in place. In fact, only 29 domestic species progressed enough to be upgraded from endangered to threatened during the more than 40 years that the blanket rule was in place.[31] And, because of the blanket rule, states and landowners generally saw no reward even in the few cases where that progress was achieved. It is also notable that the National Marine Fisheries Service, which has never had a blanket rule, has done significantly better at recovering species under its care, achieving a 6.7% recovery rate compared to the Service's 2.5%.[32]

Ironically, the Biden administration itself has demonstrated that restoring the blanket rule would undermine species recovery. In implementing the 2019 rule, it has considered what regulation would best promote the conservation of each species it has listed as threatened. The administration could have imposed endangered-level regulation for any of them. But it has rejected that approach every time.[33] Instead, it has found tailored regulations better for species.[34] This is no coincidence. The National Marine Fisheries Service has found

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[28] *See Field Guide*, *supra* n. 5 at 6–9. *See also Road to Recovery*, *supra* n. 6.
[29] 84 Fed. Reg. at 44,757.
[30] *See id.*
[31] *See Missing the Mark*, *supra* n. 3. *See also* FWS, ECOS: Reclassified Species, https://ecos.fws.gov/ecp/report/species-reclassified. During this time, 10 domestic species also declined to the point that they had to be downgraded from threatened to endangered. But because there are significantly more species listed as endangered than threatened, the percentages are basically the same (2.4% threatened species downgraded to endangered v. 2.2% endangered species upgraded to threatened). *See* FWS, ECOS: Reclassified Species.
[32] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule," *supra* n. 23 at 11. Of course, NMFS is responsible for fewer and different species than the Service, which may explain these results. But it's alarming that, in proposing to reinstate the blanket rule, the Service does not even consider NMFS' higher recovery rate or the role its tailoring of 4(d) rules may play in it. *See id.*
[33] *See Field Guide*, *supra* n. 5 at 8. *See also* 88 Fed. Reg. at 40,744.
[34] *See Field Guide*, *supra* n. 5, at 8.

endangered-level regulation conducive to the conservation of threatened species only 3% of the time.[35] What this shows is that the blanket rule is almost never the right solution to promote the conservation and recovery of species. Yet the Service is not only proposing to reinstate the blanket rule but also made clear that it would no longer consider what approach would be best for each species before applying the blanket rule.[36]

At the same time that it was proposing to restore the blanket rule, the Biden administration was also committing not to apply it to reintroduced wildlife populations, which are treated as threatened under the ESA.[37] 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.[38] One-size-fits-all approaches, the Service continued, do "not provide the flexibility that is needed to further the conservation of the species."[39] Of course, the same is true of threatened species generally, but the Service has not reconciled these contradictory positions.

Despite the importance of recovery and incentives to the ESA's text and the 2019 rescission of the blanket rule, the Service ignores those critical considerations in its proposal. It does not dispute the earlier determination that tailored rules produce better incentives for habitat restoration and other proactive recovery efforts. Instead, it explicitly confirms it.[40] 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.[41] The Service is, instead, ignoring the most important factors for assessing whether a regulation is "necessary and advisable for the conservation," *i.e.* recovery, of a species. Therefore, the proposed regulations violates the ESA.

Blocking the blanket rule by passing H.R. 5504 and restoring the ESA's original intent would help improve incentives to recover species. But that should be the beginning, not the end, of Congress' efforts to reform how threatened-species regulations are designed and implemented. To achieve the ESA's purpose, the Service must be nudged to use the flexibility Congress has given it to tailor regulations more creatively to improve conservation incentives and put more species on the road to recovery.

It likely will not do this on its own. Consider the lesser prairie chicken. When the Service proposed to list a population of that species as threatened, it proposed a regulation under the 2019 rule that would strictly regulate ranching. Conservation groups, including PERC, National Wildlife Federation, and the Nature Conservancy, opposed the proposed regulation because it would irrationally penalize landowners who were

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[35] *See* Li, *supra* n. 26.
[36] *See* 88 Fed. Reg. at 40,747 ("If this proposal is finalized, . . . we will not make necessary and advisable determinations for the use of those blanket rules in future proposed or final listing rules.").
[37] *See* 88 Fed. Reg. 42,632, 42,645 (July 3, 2023).
[38] *See id.*
[39] *See id.*
[40] 88 Fed. Reg. at 40,747.
[41] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule." *supra* n. 23.

voluntarily conserving the species' grassland habitat.[42] Ultimately, the Service revised its proposal in response to this pushback. But, indicating its resistance to considering such incentives generally, it also disputed having any obligation to consider "the costs of [its] rules on landowners, assessment of previous conservation provided by landowners and other groups, and calculation of what incentives for conservation [its] rules provide."[43]

A diverse mix of experts and practitioners have urged the more creative tailoring of threatened-species regulations to support species conservation and recovery.[44] A few of those merit specific mention. Earlier this year, Professor Robert Fischman from Indiana University appeared as a minority witness before this subcommittee and testified to the potential for better tailored regulations for threatened species to promote more conservation.[45] In a forthcoming book chapter, David Willms of the National Wildlife Federation proposes a creative way to use threatened species regulations to facilitate the recovery of grizzly bear populations and reduce litigation over their future delistings.[46] And, in 2017, the Western Governors' Association issued recommendations for ESA reform including "greater distinction between the management of threatened versus endangered species in ESA to allow for greater management flexibility, including increased state authority for species listed as threatened."[47]

PERC's contribution to this debate has been to propose that threatened species regulations be designed as "roadmaps to recovery" for each species.[48] The regulation should set incremental recovery goals for the species, such as population targets, habitat restoration objectives, or other metrics, and provide for the extent or stringency of the regulation to automatically adjust as they are met. For a species like the grizzly bear, this could

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[42] 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).

[43] See 87 Fed. Reg. 72,674, 72,717 (Nov. 25, 2022).

[44] *See, e.g.,* Alejandro Camacho, et al., *Six Priority Recommendations for Improving Conservation Under the ESA*, 51 Envtl. L. Rep. 10,785, 10,788, 10,789–90 (2021) (listing better tailoring of 4(d) rules as a "key reform" identified in a dialogue among the conservation community hosted by UC Irvine School of Law and the Environmental Policy Innovation Center); Temple Stoellinger, et al., *Improving Cooper ving Cooperative State and F e State and Federal Species Conser al Species Conservation Efforts*, 20 Wyo. L. Rev. 183, 202–205 (2020) (describing improvements to the design of 4(d) rules as one of seven reform ideas to receive general agreement in a workshop of diverse stakeholders).

[45] *See* Testimony of Robert L. Fischman Before the Subcommittee on Water, Wildlife and Fisheries of the House Committee on Natural Resources, Hearing on Proposed Congressional Joint Resolutions Disapproving Rules Enacted under the Endangered Species Act (Apr. 18, 2023).

[46] 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). *See also* Brian Yablonski, *A Path Forward for the Grizzly Bear*, PERC Reports (Oct. 17, 2023).

[47] Western Governors' Association, Policy Resolution 2017-11: Species Conservation and the Endangered Species Act (2017). States and organizations representing state officials also filed comments opposing the reinstatement of the blanket rule for these and other reasons. *See, e.g.,* Nat'l Ass'n of State Foresters, Comment on Proposed ESA Rules (Aug. 17, 2023); Comment of 18 States Opposing the Proposed Rule (Aug. 21, 2023).

[48] *See Field Guide*, *supra* n. 5 at 18–21.

mean gradually transferring authority to the states as populations are reintroduced or rebound, thereby enabling states to build trust with the conservation community over their ability to manage the recovering population.[49] For a species like the American burying beetle, whose recovery depends on relocating beetles north in response to climate change, regulation might recede gradually as habitat is restored in the northern part of their range and as beetles are relocated from the southern portion.[50] The key to this strategy is to set clear, objective recovery goals and provide frequent, incremental rewards (in the form of regulatory relief) as they are met, thereby encouraging states and private landowners to invest in habitat restoration and other conservation efforts.[51]

Beyond promoting species recoveries, the roadmaps to recovery approach would also help give effect to recovery plans, empower states to take the lead on recovery, and reduce the stakes of listing decisions.[52] These are critical because, currently, recovery plans have no binding effect and little progress has been made under them, states have been sidelined from their intended role in managing and recovering wildlife under the ESA, and persistent litigation has kept species on the list years past the point that they biologically recovered.[53] Although the Service already has the authority to use these innovative approaches, it is apparent that additional nudging from Congress will be required to make it seize those opportunities and recover more species.

The Conservation Costs of Poorly Conceived Critical Habitat Designations

The Service, along with the National Marine Fisheries Service, has also proposed changes to the critical habitat process that will stoke conflict while doing nothing to promote conservation. Limited habitat is one of the major threats causing species to be endangered or threatened. Therefore, conserving existing habitat and restoring additional habitat are critical to recover species. But the main provision of the ESA targeting habitat, the critical habitat provision, is an imperfect tool for these purposes. Indeed, Martha Williams, the Director of the Fish and Wildlife Service, has observed, in an article co-authored with other former Obama administration officials, that critical habitat designations "have very little impact" from a "conservation perspective."[54]

This is because designating land as critical habitat does not necessarily extend any sort of regulatory protection to habitat features on that land. Instead, a critical habitat designation only affects the use of designated land if that use happens to receive federal funding or require a federal permit, such as a "dredge and fill" permit under the Clean Water Act.[55] Otherwise, the landowner is as free to degrade or destroy habitat features after a designation as she was before.

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[49] *See id.*
[50] *See* PERC, Comment Opposing the Proposed Reinstatement of the "Blanket Rule", *supra* n. 23 at 7.
[51] *See Field Guide*, *supra* n. 5 at 18–21.
[52] *See id.*
[53] *See id.*
[54] *See* David J. Hayes, Michael J. Bean, Martha Williams, *A Modest Role for A Bold Term: "Critical Habitat" Under the Endangered Species Act*, 43 Envtl. L. Rep. 10,671, 10,672 (2013).
[55] *See Field Guide*, *supra* n. 5 at 22–25. *See also* Wood & Watkins, *supra* n. 6.

Although a critical habitat designation does not necessarily mean a landowner's property will be regulated, a designation still affects them. Studies show that designations immediately and significantly reduce the value of designated land.[56] According to one study, for instance, critical habitat for the bay checkerspot butterfly reduced the value of undeveloped land by 78%.[57] This is because critical habitat designations have a "stigma effect." If a buyer were considering similar properties, one of which was designated, she would discount the amount she would pay for the designated property to reflect potential regulatory consequences in the future.[58]

To mitigate this risk, landowners may be perversely encouraged to preemptively destroy habitat features on their land.[59] One study of the critical habitat designation for a pygmy owl in Arizona, for instance, found that parcels proposed for designation were developed faster than equivalent tracts outside of it.[60] This is a serious problem because 80% of listed species rely on private land, most of them for the majority of their habitat.[61]

Because critical habitat designations harm landowners but do not necessarily benefit species, it is critical that they be done carefully and with the incentives of landowners in mind. However, this has often not been the case. For the dusky gopher frog, for instance, the Service designated 1,500 acres of private land in Louisiana as critical habitat despite the land lacking the habitat features the frog needs to thrive.[62] The land would aid the frog's recovery only if the existing forest were chopped down and replaced with a different forest type, if the property were regularly burned to limit understory growth, if an ephemeral pond were managed for the frog's benefit, and if frogs were introduced.[63] Based on the Nature Conservancy's efforts to restore dusky gopher frog habitat on its own property in Mississippi, this would be an incredibly difficult and expensive undertaking.[64] But the designation provided no incentive for the landowner to do any of these things; instead, it alienated them and provoked a conflict that ensured these recovery efforts would never occur.[65]

Currently, whenever land that is not occupied by a species is considered for critical habitat, regulations require a determination that "the area will contribute to the conservation of the species."[66] This means that the Service must consider how the designation will affect the likelihood that any existing habitat features on the property

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[56] *See Field Guide*, *supra* n. 5 at 22–25.
[57] Maximillian Aufhammer et al., *The Economic Impact of Critical-Habitat Designation: Evidence from Vacant-Land Transactions*, 96 Land Econ. 188 (2020).
[58] *See* Wood & Watkins, *supra* n. 6.
[59] *See id.*
[60] John A. List, Michael Margolis, & Daniel E. Osgood, *Is the Endangered Species Act Endangering Species?*, NBER Working Paper 12777 (2006).
[61] 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).
[62] *See* Wood & Watkins, *supra* n. 5.
[63] *See id.*
[64] *See id*
[65] *See Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018). Prior to my work at PERC, I was one of the attorneys that represented the private landowners before the Supreme Court.
[66] *See* 88 Fed. Reg. 40,764, 40,769 (June 22, 2023).

will be conserved or if habitat features will be restored. This is a critical consideration that determines whether a designation will help or hinder a species' recovery. Unfortunately, the Service recently proposed to eliminate this requirement. Worse, it offered no explanation for this proposal. Instead, its explanation focuses exclusively on other proposed changes to the regulation containing this requirement.[67] The inevitable consequence of this proposal, if it is finalized, will be designations that undermine habitat conservation and restoration by alienating landowner partners and by creating perverse incentives.

For that reason, PERC's research recommends reforming the ESA's critical habitat provisions to explicitly require consideration not only of economic costs, as is currently required, but also the "conservation costs" of designations, such as where designations discourage landowners from conserving or restoring habitat.[68] In practice, this would mean that the Service would prioritize the designation of federal land over private land, as it has repeatedly acknowledged is more effective.[69] It would also mean that land occupied by a species would continue to be prioritized over unoccupied lands.[70] And it likely means that lands currently unsuitable for a species would virtually never be designated.[71]

That last point might surprise. If restoring habitat is essential to recover species, why shouldn't critical habitat designations encompass areas where that restoration could occur? Based on this sort of reasoning, the Service has proposed to eliminate a requirement that unoccupied lands have one or more of the physical or biological features essential to a species' conservation.[72] But designating land that could be restored as habitat does not mean that it will be. Instead, the opposite is more likely. It is likely that the designation would not affect the landowners' ability to ensure that the land never becomes habitat for the species. Even if a federal permit might be required to use the property, constitutional limits would forbid the government from conditioning that permit on creating habitat.[73] For this reason, the Supreme Court long ago recognized that the ESA's land acquisition authority, rather than critical habitat provisions, are the proper tool for conserving "land that is not yet but may in the future become habitat for an endangered or threatened species."[74]

Avoiding counterproductive critical habitat designations by blocking these proposals is an important step. But, again, it won't be enough to spur habitat restoration at the scale needed to recover species. Additional reforms

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[67] *See id.* at 40,769–70 (discussing the removal of a requirement that unoccupied lands contain habitat features).
[68] *See Field Guide*, *supra* n. 5 at 25.
[69] *See id. See also* 81 Fed. Reg. 7,226, 7,231 (Feb. 11, 2016) (citing "the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species" as reason to, "[t]o the extent possible, . . . focus designation of critical habitat on Federal lands").
[70] *See* Wood & Watkins, *supra* n. 6. *See also* Environmental Policy Innovation Center, *Endangered Species Act: 2018 Administrative Reform* 7 (2018) (finding that unoccupied land constituted only 1% of lands designated as critical habitat in the previous decade).
[71] *See Field Guide*, *supra* n. 5 at 25.
[72] *See* 88 Fed. Reg. at 40,769.
[73] *See* Wood & Watkins, *supra* n. 6 at 10,571. To its credit, the Service acknowledges this fact. *See* 88 Fed. Reg. 31,000, 31,001 (May 15, 2023) (discussing *Koontz*, *Dolan*, and *Nollan*).
[74] *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 703 (1995).

are needed to encourage this effort. According to PERC's research, the best way to encourage habitat restoration is for conservation organizations, states, and the federal government to provide incentives to landowners for voluntarily undertaking this critical work.[75] Where restored habitat also provides other services, such as a wetland that supports wildlife but also improves water quality, existing regulatory programs can be improved to directly reward the restoration of those features.[76] Ultimately, we must heed Aldo Leopold's admonition that "Conservation will ultimately boil down to rewarding the private landowner who conserves the public interest."

Incentives Matter for Conservation

After 50 years, the ESA has achieved significant accomplishments, including avoiding the extinction of dozens or hundreds of species.[77] But we are falling far behind in achieving its ultimate goal of recovering species, with only 3% of species achieving this goal and a similarly small proportion making progress toward it. We must do better.

I encourage the members of this Committee to consider the dozens of recovery-focused reforms in PERC's *Field Guide for Wildlife Recovery*. In addition to improving regulations for threatened species and critical habitat, we explore how to address the large number of listed species that have no recovery plan and the limited progress in implementing plans for the species that have them.[78] We also discuss how to free up the Service to make science-based listing and delisting decisions by addressing the litigation that too often interferes with those decisions.[79] We propose restoring states to the role Congress originally intended, including taking the lead on implementing recovery actions and permitting.[80] We urge more populations to be established by reintroduction, while making those populations an asset to neighboring landowners and communities rather than a liability.[81] We analyze how agencies can be encouraged to use their authorities to advance the recovery of species, rather than the ESA being an obstacle to their work.[82] And, finally, we call for permitting reform so that landowners and conservation groups will face fewer obstacles to habitat restoration and on-the-ground conservation work.

The motivation for all of these ideas is to recover more species without sacrificing the ESA's effectiveness at preventing extinction. This is precisely what the ESA is intended to do. We do America's wildlife a disservice by refusing to consider what the act does well *and* does not do well. It is not enough to simply state that the ESA is on time and on target in the face of the overwhelming evidence to the contrary. We can do better. With better policies and implementation we can deliver better results for species and landowners alike.

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[75] *See Field Guide*, *supra* n. 5. at 25.
[76] *See id.*
[77] Noah Greenwald, et al., *Extinction and the U.S. Endangered Species Act*, PeerJ (2019) (estimating that as many as 291 extinctions have been avoided due to the ESA, but relying on assumptions that make this more of an upper bound than reliable estimate). *See* Testimony of Jonathan Wood to the U.S. House Natural Resources Committee, Subcommittee on Water, Wildlife, and Fisheries, Hearing on the Endangered Species Act at 50, 2–3 (July 18, 2023).
[78] *See Field Guide*, *supra* n. 5 at 10–12.
[79] *See id.* at 13–17.
[80] *See id.* at 26–29.
[81] *See id.* at 30–33.
[82] *See id.* at 38-41.