



## COMMENT ON PROPOSED RULE: ENDANGERED AND THREATENED SPECIES: LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

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### INTRODUCTION

The Institute for Energy Research strongly supports the U.S. Fish and Wildlife Service’s proposal to rescind the Endangered Species Act (ESA) “blanket rule” for threatened species and to require species-specific regulations under Section 4(d).

This proposal restores the ESA’s statutory structure, incentive design, and cooperative federalism framework, all of which Congress intentionally embedded to promote recovery, not permanent regulation. The blanket rule undermines these objectives by treating threatened species as if they were endangered, eliminating incentives for habitat restoration, discouraging voluntary conservation, and imposing regulatory burdens untethered from species-specific recovery needs.

The Service itself has repeatedly acknowledged the benefit of species-specific 4(d) rules. The proposed rule appropriately returns the Service to this lawful and evidence-based approach.

### **I. The ESA Requires Species-Specific Regulation of Threatened Species**

In the Endangered Species Act, Congress deliberately distinguished

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between endangered and threatened species. For example, Section 4(d) only applies to threatened species, and automatic take prohibitions apply only to endangered species under Section 9. For threatened species specifically, Congress authorized regulations only when, and only to the extent, they are “necessary and advisable to provide for the conservation of such species.”<sup>1</sup>

Section 4(d) is inherently species-specific. Section 4(d) refers repeatedly to “any species,” “such species,” and “that species,” mirroring other provisions of Section 4 that require individualized determinations, including listing decisions,<sup>2</sup> critical habitat designations,<sup>3</sup> and recovery planning.<sup>4</sup>

Legislative history confirms Congress’s intent to minimize the use of the most stringent prohibitions and to reserve them for “those species on the brink of extinction,”<sup>5</sup> while encouraging states to exercise discretion to recover threatened species.

The blanket rule, however, reverses this statutory design by automatically imposing endangered-level restrictions without any species-specific analysis. With the statutory text, structure, and legislative history all pointing in the same direction, rescinding the blanket 4(d) rule is the correct decision.

## **II. The Blanket Rule Is Inconsistent with Recovery and Discourages Conservation**

The purpose of the ESA is “the conservation of ... endangered species and threatened species,”<sup>6</sup> and defines conservation as the recovery of species.<sup>7</sup> The purpose of the ESA is the recovery of endangered and threatened species—not the mere designation of critical habitat.

The blanket rule, however, undermines recovery in several ways:

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<sup>1</sup> 16 U.S.C. § 1533(d).

<sup>2</sup> *See e.g.* 16 U.S.C. § 1533(a)(2)(C).

<sup>3</sup> *See* 16 U.S.C. § 1533(a)(3).

<sup>4</sup> *See* 16 U.S.C. § 1533(f).

<sup>5</sup> *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.

<sup>6</sup> *See* 16 USC §1531(b).

<sup>7</sup> *See e.g.* 16 USC §1532(3) “The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are 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.”

1. **It eliminates regulatory rewards for improvement.** When threatened species are regulated identically to endangered species, states and landowners receive no benefit when a species improves, destroying incentives to invest in recovery.
2. **It discourages voluntary habitat restoration.** Conservation activities such as prescribed fire, invasive species removal, grazing management, stream restoration, and wildlife-friendly fencing often require permits under the blanket rule, even when those same activities are routinely exempted under species-specific rules.
3. **It converts species presence into a liability.** Economic literature demonstrates that rigid take prohibitions predictably encourage preemptive habitat destruction and discourage proactive management on private lands, where most imperiled species reside.<sup>8</sup>

The Service has repeatedly acknowledged these dynamics. In rescinding the blanket rule in 2019, the Service found that species-specific rules remove redundant permitting, facilitate beneficial conservation actions, and provide incentives for recovery.<sup>9</sup> In 2023, the Service affirmed there were “significant conservation benefits from developing and implementing species-specific rules”<sup>10</sup> and in 2024, the Service stated, “We do not deny the benefit of species-specific 4(d) rules as we referenced in our 2019 4(d) rule.”<sup>11</sup>

The blanket rule is fundamentally at odds with the ESA’s mandate to conserve and thereby recover endangered and threatened species.

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<sup>8</sup> See Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction under the Endangered Species Act*, 46 The Journal of Law & Economics 1, April 2003; Jacob P. Byl, *Perverse Incentives and Safe Harbors in the Endangered Species Act: Evidence From Timber Harvests Near Woodpeckers*, 157 Ecological Economics, 100, March 2019.

<sup>9</sup> See Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants*, 84 Fed. Reg. 44753, 44755.

<sup>10</sup> Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 88 Fed. Reg. 40742, 40745.

<sup>11</sup> Fish and Wildlife Service, *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 89 Fed. Reg. 23919, 23926.

### **III. Empirical Evidence Confirms Species-Specific Rules Perform Better**

The divergent approaches of the Fish and Wildlife Service and the National Marine Fisheries Service (NMFS) provide a natural experiment in ESA implementation.

- NMFS has never used a blanket rule.
- NMFS applies endangered-level prohibitions to only about 3% of threatened species.
- NMFS has achieved a recovery rate nearly three times higher than the Service.<sup>12</sup>

Before 2019, the Service applied the blanket rule to roughly 75% of threatened species without any species-specific analysis, and overall recovery under the ESA remains exceedingly rare—approximately 3% of listed species.<sup>13</sup> If nothing else, recovering only 3% of species should call for the Service to try different methods to improve its success rate. Ending the blanket 4(d) rule is one way to improve incentives for increased recovery.

### **IV. Species-Specific 4(d) Rules Should Function as Recovery Roadmaps**

Rescinding the blanket rule is necessary but not sufficient. To fully align ESA implementation with recovery, species-specific 4(d) rules should operate as regulatory roadmaps, not merely customized prohibitions. Effective rules should establish objective recovery benchmarks (population, habitat, connectivity); tie incremental regulatory relief to verified conservation progress; and provide predictable incentives for states and landowners to invest in recovery.

This approach transforms ESA regulation from static restriction into

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<sup>12</sup> See Property and Environment Research Center (PERC), Comment Opposing the Proposed Reinstatement of the “Blanket Rule” Regulating Threatened Species as if They Were Endangered, Aug. 21, 2023, [https://downloads.regulations.gov/FWS-HQ-ES-2023-0018-106269/attachment\\_1.pdf](https://downloads.regulations.gov/FWS-HQ-ES-2023-0018-106269/attachment_1.pdf).

<sup>13</sup> The Service reports that it has listed 1678 species in the United States, but only 55 have been delisted due to recovery. Fish and Wildlife Services, *ESA Basics*, Feb. 2023, <https://www.fws.gov/sites/default/files/documents/endangered-species-act-basics-february-2023.pdf>.

dynamic, outcome-based conservation, consistent with economic theory, decades of practical experience on working lands, and the text of the ESA itself, which defines conservation as recovery.<sup>14</sup>

## V. Cooperative Federalism and State Leadership Must Be Restored

Congress expected states to play a central role the recovery of threatened species. As Jonathan Wood of the Property and Environment Research Center has explained in Congressional Testimony:

...federal regulations governing the take of threatened species were expected to require state approval as a means of encouraging state conservation efforts. Section 6 of the Endangered Species Act requires the Fish and Wildlife Service to enter into cooperative agreements with any state that develops a program to conserve listed species if such program satisfies five criteria. If a state obtains a cooperative agreement under this provision, Section 4(d) provides that federal regulations governing take of threatened species apply “only to the extent that such regulations have also been adopted by such State.” By offering states this say over federal regulation, Senator Tunney explained, Congress wished to “encourage[]” states “to use their discretion to promote the recovery of threatened species” by developing their own innovative strategies.<sup>15</sup> [citations omitted]

Blanket federal prohibitions undermine these cooperative efforts of federal and state governments. It conflicts with state fiduciary obligations (including management of trust lands), and discourages state-led innovation.

The proposed rule appropriately restores the ESA’s intended conservation-focused flexibility by allowing species-specific rules that delegate meaningful management authority to states, recognize state conservation programs as regulatory substitutes, and reduce conflict between

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<sup>14</sup> See 16 USC §1531(b).

<sup>15</sup> Prepared Statement of Jonathan Wood Vice President of Law and Policy Property and Environment Research Center (PERC) U.S. Senate Committee on Environment and Public Works Hearing on S. 2372, The Recovering America’s Wildlife Act December 8, 2021, [https://www.epw.senate.gov/public/\\_cache/files/d/1/d1127b30-4ef8-409e-85d1-3567b56fd313/BD61E67710A54C8762F009597F6080B0.12-08-2021-wood-testimony.pdf](https://www.epw.senate.gov/public/_cache/files/d/1/d1127b30-4ef8-409e-85d1-3567b56fd313/BD61E67710A54C8762F009597F6080B0.12-08-2021-wood-testimony.pdf).

conservation and other lawful land uses. This restoration of cooperative federalism is critical to the success of long-term species recovery.

## **CONCLUSION**

The proposed rescission of the blanket 4(d) rule is legally required, empirically justified, and essential to species recovery. It restores the distinction Congress deliberately created between endangered and threatened species, realigns incentives toward habitat restoration, and corrects a regulatory approach that has generated conflict without recovery.

The Service's record of only recovering 3% of listed species is terrible. Rolling back the blanket 4(d) rule will aid species conservation by creating much better incentives for actual conservation and recovery.