



## **Comment on the Proposed Enhancement of Endangered Species Act Survival and Incidental Take Permits**

Property and Environment Research Center (PERC)

Bozeman, Montana

April 10, 2023

### **Main Points:**

- **Voluntary, proactive conservation efforts are essential to recover listed species.**
- **Because proactive recovery efforts often require a federal permit, the cost and time to get a permit is a substantial obstacle that discourages conservation.**
- **The proposal to streamline permitting is a step in the right direction.**
- **Instead of a vague and subjective purpose standard, conservation benefit agreements should cover any activity intended and expected to result in a net-benefit for species.**
- **The Service should further ensure that voluntary conservation isn't penalized by shielding neighboring landowners from regulatory consequences.**

### **Introduction**

The Property and Environment Research Center (PERC) appreciates and supports the Fish and Wildlife Service's proposal to reduce the costs and time required to approve landowners' voluntary conservation efforts under the Endangered Species Act. The proposed codification of existing policies encouraging voluntary conservation will provide greater certainty to landowners. The proposal's benefits could be further enhanced with slight modifications that would avoid potential conflict and strengthen incentives for conservation.

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 has advocated streamlining Safe Harbor Agreements to encourage landowners to conserve endangered and

threatened species.<sup>1</sup> PERC has also advocated removing bureaucratic obstacles to proactive, voluntary conservation.<sup>2</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

### **Voluntary, proactive conservation efforts are essential to recovering species**

The Endangered Species Act has a laudable purpose. It aims to prevent endangered species' extinction and encourage their recovery. But purpose alone is not enough to accomplish these goals. In practice, the Endangered Species Act creates perverse incentives for private landowners by making a species' presence or its habitat on land a significant liability for the landowner. Moreover, it provides little reward for landowners who proactively restore habitat and recover species. These problems are a major hindrance because roughly half of listed species rely on private land for 80% of their habitat.<sup>3</sup> Consequently, in the 50 years since the Endangered Species Act's enactment, less than three percent of listed species have recovered and been delisted.<sup>4</sup> Ultimately, species recovery is something that must be done *with* landowners, rather than *to* them.

### **Often, proactive species conservation requires a costly and time-consuming federal permit**

In many cases, restoring habitat and taking other steps to recover species will result in some short-term, incidental impact to the species that requires an ESA permit. To facilitate proactive conservation, the Service has created two types of permits to reduce some regulatory burdens for landowners and, thereby, encourage this important work.

Candidate Conservation Agreements with Assurances (CCAAs) are agreements that provide incentives to private landowners to conserve species before they are listed.<sup>5</sup> In exchange for this early, voluntary conservation, CCAAs assure landowners that they will not face additional regulatory burdens if the species is later listed. CCAAs have made significant contributions to restoring habitat and recovering species. In

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<sup>1</sup> See, e.g., Hannah Downey, *The Role of Working Lands in Providing Public Conservation Benefits: Part II – Policy Challenges to Conservation*, PERC 8 (Oct. 2017), available at [https://www.perc.org/wp-content/uploads/old/pdfs/PERC\\_CPLS\\_Part\\_2.pdf](https://www.perc.org/wp-content/uploads/old/pdfs/PERC_CPLS_Part_2.pdf); see also Jonathan Wood, *The Road To Recovery*, PERC REP. 16 (Apr. 2018), available at <https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf>.

<sup>2</sup> See, e.g., Property and Environment Research Center, Comment Letter in Support of Allowing Experimental Populations Outside a Species' Historic Range (Aug. 8, 2022), available at <https://www.perc.org/wp-content/uploads/2022/08/PERC-Public-comment-10j-July-14.docx-1-1.pdf>.

<sup>3</sup> Megan E. Hansen et al, *Cooperative Conservation: Determinants of Landowner Engagement in Conserving Endangered Species*, cent. growth & opp. 4 (Nov. 2018), available at <https://www.thecgo.org/wp-content/uploads/2020/10/Cooperative-Conservation.pdf>.

<sup>4</sup> See Kat Dwyer, *Federal Court Strikes Down ESA Rules by Fiat*, PERC (Jul. 6, 2022), available at <https://perc.org/2022/07/06/federal-court-strikes-down-esa-rules-by-fiat/>.

<sup>5</sup> *Candidate Conservation Agreements with Assurances*, USFWS (last accessed Apr. 3, 2023), available at <https://www.fws.gov/service/candidate-conservation-agreements-assurances>.

Montana, for instance, a CCAA between private landowners and the Service has helped recover the Arctic Grayling population by 127 percent since the early 2000s.<sup>6</sup> Prior to the CCAA, the grayling was threatened by low river flows. Under the CCAA, landowners agreed to enhance streamflows, restore habitat, and fence off riparian areas from livestock grazing in exchange for the Service's guarantee that their water rights and agricultural activities would not be threatened if the species were listed.<sup>7</sup> Absent such an agreement, there would likely have been little voluntary conservation by private landowners—who own 90% of land in the area.<sup>8</sup>

Similarly, Safe Harbor Agreements (SHA) authorize landowners to perform voluntary habitat restoration or other recovery efforts and guarantee that they won't be punished because their land now contains more of the species and its habitat. The landowner is also guaranteed the right to return their property to the condition it was in before the restoration if conflict later arises. SHAs, too, have been helpful in facilitating voluntary conservation. In 2013, an SHA between the Service and Turkey Creek Ranch in Colorado resulted in a successful reintroduction of endangered black-footed ferrets.<sup>9</sup> For the ranch, restoring ferrets to the ecosystem helped to control a disruptive prairie dog population. It was a win-win. Elsewhere SHAs have been utilized to conserve 2.5 million acres of red-cockaded woodpecker habitat,<sup>10</sup> support the recovery of endangered coho salmon,<sup>11</sup> and protect the endangered speckled pocketbook mussel.<sup>12</sup> The regulatory relief these programs provide to landowners works.

Solutions that encourage voluntary collaboration, like CCAs and SHAs, are the correct approach to fulfilling the ESA's mission.

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<sup>6</sup> Shawn Regan, *Save Endangered Species From Environmental Regulations*, REASON (Feb. 10, 2023), available at

<https://reason.com/2023/02/10/save-endangered-species-from-environmental-regulations/>.

<sup>7</sup> *Id.*

<sup>8</sup> *Drought Management Plan & Grayling Recovery*, BIG HOLE WATERSHED COMMITTEE (last accessed Mar. 15, 2023), available at <https://bhwc.org/project/dmp-grayling/>.

<sup>9</sup> *Colorado 2014: Turkey Creek Ranch*, SAOUND COUNTY FOUNDATION (last accessed Mar. 15, 2023), available at <https://sandcountyfoundation.org/our-work/leopold-conservation-award-program/walker-family-turkey-creek-ranch>.

<sup>10</sup> Lowell E. Baier, *Saving Species on Private Lands*, PERC (May 6, 2020), available at <https://www.perc.org/2020/05/06/saving-species-on-private-lands/>.

<sup>11</sup> *See Shasta River Safe Harbor Agreement Delivers Win for Coho Salmon and for Landowners*, NOAA FISHERIES (Mar. 15, 2021), available at <https://www.fisheries.noaa.gov/feature-story/shasta-river-safe-harbor-agreement-delivers-win-coho-salmon-and-landowners#:~:text=The%20Shasta%20River%20Safe%20Harbor%20Agreement%20supports%20recovery,and%20the%20California%20Department%20of%20Fish%20and%20Wildlife>.

<sup>12</sup> *See Ozark Rivers Program: Arkansas*, NATURE CONSERVANCY (last accessed Mar. 15, 2023), available at <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/ozark-rivers-program/>.

## **Streamlining the Process for Voluntary Conservation Will Make It More Attractive**

While CCAAs and SHAs have helped conserve species, the time and cost required to negotiate them remain a substantial obstacle. The Service is correct that their approval process is too burdensome.<sup>13</sup> Currently, it can take longer than 9 months for an SHA or CCAA to be approved.<sup>14</sup> By combining SHAs and CCAAs into a new “conservation benefit agreement,” the Service can provide program participants with a simpler, more reliable process.<sup>15</sup> For instance, the proposal clarifies that a conservation benefit agreement does not permit the voluntary conservation effort but only the incidental take of the species that results. This appropriately limits the Service’s role to ESA compliance and leaves to the landowner’s judgment other aspects of the decision.

Furthermore, by codifying portions of the 2016 Habitat Conservation Planning Handbook, 5-point policy, SHA policy, and CCAA policy, the Service directly addresses parts of the enhancement of survival and incidental take permit application process that take up the most time.<sup>16</sup> Clarifying what makes an application complete will provide applicants with a direct path to application processing. This will allow applicants to avoid excessive transaction costs and, thus, encourage participation.

The proposed rule also provides that all conservation benefit agreements will guarantee landowners a choice to return their land to its prior condition without consequence.<sup>17</sup> Currently, this option is limited to SHAs. The right to return to the prior condition is an essential protection for landowners. If the species' increased presence is later discovered to be an unexpected conflict with the landowner’s use of the property, this protection ensures that they are not made worse off for trying conservation. It may also give conservation groups an incentive to work with landowners to address unexpected costs and conflicts to retain the agreement’s conservation benefits.

## **A Primary Purpose Standard Will Be Difficult To Apply And Could Discourage Conservation**

The proposal suggests that conservation benefit agreements will be limited to activities the “primary purpose” of which is to benefit species. Landowners’ purposes in implementing voluntary conservation efforts are usually mixed,

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<sup>13</sup> Endangered and Threatened Wildlife and Plants; Enhancement of Survival and Incidental Take Permits, 88 Fed. Reg. 8380, 8383 (Feb. 9, 2023).

<sup>14</sup> *See Safe Harbor Agreements for Private Landowners*, FWS (last accessed Mar. 15, 2023), *available at* <https://www.fws.gov/sites/default/files/documents/safe-harbor-agreements-fact-sheet.pdf>; *see also Candidate Conservation Agreements*, fws (last accessed Mar. 15, 2023), *available at* <https://www.fws.gov/sites/default/files/documents/candidate-conservation-agreements-fact-sheet.pdf>.

<sup>15</sup> 88 Fed. Reg. 8380, 8382.

<sup>16</sup> *Id.* at 8383-84.

<sup>17</sup> *Id.* at 8382.

including both a desire to benefit the species and to minimize future regulatory risks. A subjective purpose standard would give landowners less certainty and would likely provoke further conflict between the Service and landowners. The Environmental Policy Innovation Center reports in its comments that most existing CCAAs and SHAs may not qualify for a conservation benefit agreement because the landowner has mixed motives. To avoid this problem and to encourage voluntary conservation, the proposal should be revised to instead focus on a project's intended and expected benefits to species.

### **Neighboring Landowners Should Be Guaranteed Protection from Regulatory Burdens**

While this proposed rule is a step in the right direction, the Service should consider revising one of its features. The proposed rule provides that the Service “may” extend protections to neighboring landowners whenever conservation activities may result in additional regulatory burdens for them. Rather than a discretionary authority subject to no consistent standard, the proposal should be revised to guarantee this protection to neighboring landowners. This could be done by changing the “may” to “shall” and minimizing the burdens imposed on neighboring landowners to obtain this protection.

This change is essential because landowners that plan to take advantage of the conservation benefit agreements will be wary to do so if their actions penalize their neighbors. Instead of putting landowners in a tough spot, and effectively giving them an incentive not to participate, the Service should follow California's lead. California protects neighboring landowners from regulatory burdens if conservation efforts carried out under a safe harbor agreement increase the presence of a regulated species on surrounding lands.<sup>18</sup> If the Service adopts that approach, landowners will not need to worry about what impact their actions will have on their neighbors.

Consider the Sandhills safe harbor program, which protected neighboring landowners from adverse regulatory consequences.<sup>19</sup> At its launch, two dozen landowners with over 19,000 acres enrolled in the program.<sup>20</sup> Studies have shown that “attitudes toward conservation changed quickly and have remained much more positive.”<sup>21</sup> Furthermore, many landowners subsequently have enrolled in the

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<sup>18</sup> See Cal. Dept. of Fish and Wildlife, *Safe Harbor Agreements*, <https://wildlife.ca.gov/Conservation/CESA/Safe-Harbor-Agreements#56126935-details>. See also Hannah Downey, *The Role of Working Lands in Providing Public Conservation Benefits: Policy Challenges to Conservation*, PERC (2017), [https://www.perc.org/wp-content/uploads/old/PERC\\_CPLS\\_Part\\_2%20ESA.pdf](https://www.perc.org/wp-content/uploads/old/PERC_CPLS_Part_2%20ESA.pdf) (urging the Service to adopt this approach to safe harbor agreements).

<sup>19</sup> See *Safe Harbor: Helping Landowners Help Endangered Species*, LAND CONSERVATION ASSISTANCE NETWORK 14 (1999), available at <https://www.landcan.org/pdfs/edf-safe-harbor.pdf>.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> See Jennifer A. Smith et al., *How effective is the Safe Harbor program for the conservation of Red-cockaded Woodpeckers?*, BIOONE COMPLETE (Jan. 24, 2018), available at

Sandhills program over the last twenty years and the program has been successful.<sup>22</sup> The Sandhills program likely would have been less successful had neighboring landowners been burdened by their neighbors' program enrollment. Federal tension pitting neighbor against neighbor would have discouraged landowners from participating.

The Service should use incentives to promote proactive habitat restoration and recovery efforts. The changes the Service advocates in this proposed rule will do that but only if the Service ensures that vague, permissive discretion does not act as a deterrent.

### **Conclusion**

PERC commends the Fish and Wildlife Service for proposing a reasonable solution to the burden of the CCAA and SHA application process. These conservation programs have been proven to work. Making them easier to enroll in will make them more attractive to a larger number of private landowners.

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<https://bioone.org/journals/the-condor/volume-120/issue-1/CONDOR-17-113.1/How-effective-is-the-Safe-Harbor-program-for-the-conservation/10.1650/CONDOR-17-113.1.full>

<sup>22</sup> *Id.*