

## **Comment on Rescinding the Blanket Rule and Improving how Species-Specific Rules are Developed**

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.
- The “blanket rule” automatically regulates threatened and endangered species the same, which undermines recovery incentives and makes states and landowners indifferent to whether a species is endangered or threatened, improving or declining.
- The rule also violates the Endangered Species Act, which requires the Service to develop regulations that are tailored to the unique recovery needs of each threatened species, consider the costs imposed on regulated parties, and the incentives needed to recover the species.

The Property and Environment Research Center (PERC) respectfully submits this comment in response to the Department of the Interior’s request for recommendations to reduce regulatory burdens while promoting responsible stewardship of America’s public lands and resources. Specifically, we urge the Department to rescind the Fish and Wildlife Service’s “blanket rule” that automatically regulates threatened species as if they were endangered.<sup>1</sup> This rule disincentivizes states and private landowners from participating in wildlife and habitat conservation, while also undermining species recovery and provoking conflict with states and private landowners.<sup>2</sup> These harms, combined with the blanket rule’s violation of the ESA’s statutory language, prompted PERC to file its first ever lawsuit, challenging the legality of the rule.<sup>3</sup> PERC urges the Department to rescind this counterproductive rule and instead use

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<sup>1</sup> See 50 C.F.R. § 17.31(a).

<sup>2</sup> 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 (Apr. 2018). See also Hannah Downey et al., *A Field Guide for Wildlife Recovery*, PERC (Sep. 20, 2023).

<sup>3</sup> *Rocky Mountain Elk Foundation v. U.S. Department of the Interior*, 2:25-cv-00029-DWM (D. Mt. filed Mar. 10, 2025).

its authority to tailor regulations more creatively to improve conservation incentives and put more species on the road to recovery.

## **The Property and Environment Research Center**

PERC is the national leader in market solutions for conservation, with over 45 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. Unlike other conservation groups, PERC is firmly committed to private property rights and pursuing conservation through voluntary markets and incentives, rather than top-down regulation. PERC has produced extensive research on how the ESA could be better implemented to achieve its ultimate goal of recovering species by providing incentives for states and landowners to contribute to species recovery.<sup>4</sup> Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

## **The Blanket Rule Undermines Conservation Incentives and Does Not Effectively Support Species Recovery**

Congress explicitly distinguished between regulating endangered and threatened species in the ESA. Rather than automatically regulating private and state activities affecting threatened species, Congress authorized such regulation only if, and to the extent, “necessary and advisable for the conservation of such species.”<sup>5</sup> Because Congress defined “conservation” in recovery terms,<sup>6</sup> 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.<sup>7</sup>

During the ESA’s first-half century, the Service violated this statutory language and instead followed an arbitrary and unscientific approach of automatically treating threatened and endangered species the same, under the so-called “blanket rule.”<sup>8</sup> It could, and sometimes did, tailor regulations for individual threatened species, but even those 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

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<sup>4</sup> See, e.g., Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (July 26, 2023); Jonathan Wood & Tate Watkins, *Critical Habitat’s “Private Land Problem”: Lessons From the Dusky Gopher Frog*, 51 Env’t. L. Rep. 10,565 (2021); Wood, *Road to Recovery*, *supra* n.2; Jonathan H. Adler, *The Leaky Ark: The Failure of Endangered Species Regulation on Private Land*, (Case Rsch. Paper Series in Legal Stud., Working Paper No. 09-34, Dec. 30, 2009); Richard Stroup, *The Endangered Species Act: Making Innocent Species the Enemy*, PERC Policy Series (Apr. 1, 1995).

<sup>5</sup> 16 U.S.C. § 1533(d).

<sup>6</sup> 16 U.S.C. § 1532(3).

<sup>7</sup> See Wood, *Road to Recovery*, *supra* n.2.

<sup>8</sup> See *id.*

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.

The blanket rule undermines incentives to recover species in at least two ways. First, by presumptively regulating endangered and threatened species the same, it eliminates any expectation that a species' improvement will be rewarded with regulatory relief. 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.<sup>9</sup>

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 deemed "necessary and advisable 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. In the years before the blanket rule was rescinded in 2019, the Service applied it to approximately 75% of threatened species without further analysis.<sup>10</sup> For example, the Service applied the blanket rule to both the northern spotted owl and the delta smelt, a small fish native to the Sacramento-San Joaquin River Delta, despite providing no evidence, analysis, or explanation for the decision.<sup>11</sup> The result is that neither species has recovered, with the delta smelt being essentially extinct in the wild.<sup>12</sup> When the blanket rule was rescinded in 2019 and the Service considered what approach was best for each species, the percentage of species to whom endangered-level regulations were applied dropped to zero.

This is precisely why the Service rescinded the blanket rule in 2019. It explained that requiring tailored rules for every threatened species would "incentivize conservation for both endangered species and threatened species."<sup>13</sup> In addition, "[p]rivate landowners and other stakeholders may see more of an incentive to work on recovery actions," the Service explained, through the promise of "reduced regulation."<sup>14</sup> Unfortunately, in 2024, the Service reinstated the blanket rule despite the benefits of species-specific 4(d) rules detailed in its 2019 rescission rule—benefits that the Service reaffirmed in the

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<sup>9</sup> *See id.*

<sup>10</sup> Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40742, 40744 (proposed June 22, 2023).

<sup>11</sup> *See* Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12854, 12862 (Mar. 5, 1993); Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26114, 26193 (June 26, 1990).

<sup>12</sup> Robin Meadows, [\*Notebook Feature: Ramping up releases of hatchery Delta smelt to the wild\*](#), Mavens Notebook (Jan. 29, 2024).

<sup>13</sup> Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753, 44757 (Aug. 27, 2019).

<sup>14</sup> *Id.*

regulation reinstating the blanket rule.<sup>15</sup>

The benefits of issuing tailored, species-specific 4(d) rules have been realized by listed species regulated by the National Marine Fisheries Service (NMFS). NMFS has never employed a blanket rule and only imposes endangered-level regulations for threatened species 3% of the time.<sup>16</sup> By tailoring regulations for each threatened species, NMFS has recovered species at nearly triple the rate of the Service, with a 6.7% recovery rate versus 2.5%.<sup>17</sup> The Service cited this fact as a reason why it did away with the blanket rule originally.<sup>18</sup>

The blanket rule, which imposes the strictest possible regulations by default to threatened species, increases the cost of implementation by discouraging private participation and limiting the government's use of tailored rules. To advance the conservation and recovery of endangered and threatened species, the Service should rescind the blanket rule. It should then use its authority to tailor regulations for threatened species more creatively to incentive recovery of these species by encouraging and rewarding habitat restoration and other proactive conservation efforts. By doing so, conflict over the ESA can be reduced and listed species are more likely to recover and thrive.

### **The Blanket Rule Also Violates the ESA**

The blanket rule does not only disincentivize conservation efforts, it also violates the ESA. Section 4(d) of the ESA permits the Service to only issue regulations “[w]henver any species is listed as a threatened species,” that are “necessary and advisable to provide for the conservation of such species.”<sup>19</sup> This “necessary and advisable” standard requires regulations issued for threatened species to be based on the unique needs of that species and to consider how the regulation will affect that species’ recovery.

Thus, Section 4(d) authorizes only species-specific regulations of threatened species that satisfy this standard. This reading is clear from the text of the provision, which refers to threatened species in the singular,<sup>20</sup> and is confirmed by the Senate Report that accompanied the Act, which describes Section 4(d) as allowing 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*.”<sup>21</sup> In addition, Section 4 provides for a number of other species-specific determinations, such as listing decisions, designation

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<sup>15</sup> See Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23919, 23926 (Apr. 5, 2024).

<sup>16</sup> See Jonathan Wood, [A Blanket 4\(d\) Rule Doesn't Incentivize Recovery](#), PERC (Aug. 22, 2023).

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

<sup>18</sup> *Regulation for Prohibitions to Threatened Wildlife and Plants*, 88 Fed. Reg. at 44756.

<sup>19</sup> 16 U.S.C. § 1533(d).

<sup>20</sup> See *id.*

<sup>21</sup> S. Rep. No. 93-307 (1973) (emphasis added).

of critical habitat, regulation of “look alike” species, and development of recovery plans.<sup>22</sup>

Congress had good reason to distinguish the regulation of endangered and threatened species in this way. Reserving the most extensive regulations for the most vulnerable species and relaxing them as species progress to recovery gives states and landowners incentive to recover and conserve species. The legislative history supports this rationale and indicated that Congress intended “[t]he two levels of classification [to] facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions.”<sup>23</sup>

### **The Service Should Also Revise Its Approach to Developing Species-Specific Rules to Comply with Section 4(d)**

Rescinding the blanket rule is a major step in supporting species conservation, but once it is gone, the Service must focus on creating tailored regulations that effectively recover threatened species. PERC has urged the Service to think of threatened species regulations as opportunities to chart “roadmaps” to recover species.<sup>24</sup> Under this approach, the Service would establish objective recovery goals for species, such as population levels, habitat improvements, range expansions, or new populations established. The Service would use these goals as triggers to adjust the extent of federal regulation, gradually reducing regulations as an incentive for incremental progress toward recovery. This would encourage states and landowners to invest in habitat restoration and other efforts needed to meet recovery goals. It would also contribute to the administration’s goal of limiting government regulation to only what is necessary for efficient management of our natural resources, rather than a system that imposes the harshest regulations possible on all threatened species.

In 2024, Congressman Westerman introduced “America’s Wild Habitat Conservation Act,” which would have mandated that the Service set incremental recovery targets for threatened species and reward states and landowners with regulatory relief as those targets are met, giving them a direct stake in whether the species is improving or declining.<sup>25</sup> These changes would be beneficial, but the Service does not need to wait for Congress to force it to create these incentives to recover species—it has the power to do so right now. Creating these tailored recovery targets now will provide a framework for easing regulations on states and landowners immediately while also promoting conservation efforts for threatened species.

This roadmap approach could also help provide additional incentives to recover endangered species.

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<sup>22</sup> 16 U.S.C. § 1533.

<sup>23</sup> 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).

<sup>24</sup> 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); Wood, [Road to Recovery](#), *supra* n.2; Downey, [Field Guide](#), *supra* n.2.

<sup>25</sup> Jonathan Wood, [America’s Wildlife Habitat Conservation Act, Explained](#), PERC (Feb. 29, 2024).

The Service could include in the recovery plans for endangered species a summary of the regulations the Service will issue when the species is upgraded to threatened. If the Service honors these commitments when species are upgraded, states and landowners would have a stronger incentive to work towards a species' recovery. Additionally, the Service could provide goals that, when met, would trigger reduced regulations under the 4(d) rule. This would provide incentives to states and landowners to work towards clear recovery benchmarks.

This approach is especially important since open ended standards like “necessary and advisable” require the consideration of costs imposed on regulated entities.<sup>26</sup> A court recently relied on this language to vacate a Section 4(d) rule for the lesser prairie chicken because the Service failed to consider the cost of implementing the regulation.<sup>27</sup> Moving forward, even if the Service does not adopt the roadmap approach, it must consider how the costs imposed by Section 4(d) rules could influence states' and landowners' incentives to restore habitat and otherwise contribute to a species' recovery. Imposing rules without analyzing these effects risks imposing prohibitive costs of regulatory compliance on landowners, which will discourage these landowners from participating in future conservation efforts.

Finally, regulations for threatened species should especially be 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.<sup>28</sup> 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.<sup>29</sup>

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<sup>26</sup> See *Michigan v. U.S. Env't Prot. Agency*, 576 U.S. 743 (2015).

<sup>27</sup> See *Kan. Nat. Res. Coal. v. U.S. Fish and Wildlife Serv.*, MO:23-CV-00159-DC, 2025 WL 1367834 (W.D. Tex. Mar. 29, 2025).

<sup>28</sup> Jonathan Wood, *Testimony on A Roadmap to Recovery*, Cong. W. Caucus Endangered Species Act F. (July 27, 2022); *The Recovering America's Wildlife Act: Hearing on S. 2372 Before the S. Comm. On Env't and Pub. Works*, 117th Cong. (Dec. 8, 2021) (statement of Jonathan Wood, Vice President of Law and Policy, PERC); Temple Stoellinger, *Wildlife Issues Are Local—So Why Isn't ESA Implementation?*, 44 Ecology L.Q. 681 (2017).

<sup>29</sup> See, e.g., Nat'l Ass'n of State Foresters, *Comment on FWS-HQ-ES-2023-0018* (Aug. 17, 2023); Wyo. Game & Fish Dept., *Comment on Proposed Regulations Pertaining to Endangered and Threatened Species* (Aug. 17, 2023); W. Governors' Ass'n, *Policy Resolution 2017-11: Species Conservation and the Endangered Species Act* (2017).

## **Conclusion**

The blanket rule undermines species conservation and recovery as well as provoking conflict between the federal government, states, and private landowners. Threatened species require tailored rules that will incentivize their recovery, not blanket rules that treat them like endangered species and discourage participation in conservation efforts. We urge the Department to rescind the blanket rule and, instead, to focus on ways to tailor species specific rules more creatively to meet the needs of threatened species and to encourage habitat restoration and other proactive recovery efforts.