Comment on Endangered Species Act Regulations to Reduce Permitting and Encourage Proactive Conservation

Property and Environment Research Center (PERC)

Bozeman, Montana

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Main Points

- Slow, expensive, and inefficient Endangered Species Act permitting needlessly saps public and private resources and discourages conservation and recovery efforts.
- To reduce unnecessary burdens, the Service should use its authority under Sections 10 and 11(f) to create safe harbors and general permits for common and low-impact activities, especially activities that benefit species recovery.
- The Service should also seek opportunities to transfer permitting authority to states.

The Property and Environment Research Center (PERC) respectfully submits this comment recommending that the Fish and Wildlife Service revise its Endangered Species Act (ESA) regulations to reduce permitting burdens and to encourage proactive conservation. The Service's current regulations have created a slow and costly permitting process that needlessly delays private projects and discourages voluntary conservation efforts. We urge the Service to streamline permitting by developing general permits or regulatory safe harbors, by delegating permitting responsibility to states, and by giving federal agencies a path to reduced consultation burdens.

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 research on how permitting reform would benefit wildlife and the environment and permit more effective management of our natural lands. Founded in 1980, PERC is nonprofit, nonpartisan, and proudly based in Bozeman, Montana.

The Need for Permitting Reform

ESA permitting is widely regarded as slow, expensive, and inefficient, posing significant challenges for both the Service and permit applicants. The current system often involves lengthy reviews, extensive documentation requirements, and complex consultations, all of which contribute to delays. If permits were only required for harmful activities, these inefficiencies might benefit species. But permits and consultations are also often required for proactive recovery efforts, for which permitting inefficiencies create a strong disincentive. These inefficiencies also strain the limited resources of the Service, diverting staff time and funding away from conservation priorities.

ESA permitting involves extensive procedural obligations that contribute to lengthy timelines. The Service must review every permit, no matter how routine or picayune, and evaluate it based on five factors and subject it to public notice and comment.[1] ESA permits also frequently trigger review under the National Environmental Policy Act, which imposes additional bureaucracy.

The Service has recognized that the time and expense to negotiate permits undermines conservation by discouraging private landowners from pursuing voluntary conservation projects that require a permit.[2] To its credit, the Service has sought to address this problem by designing permitting programs tailored to voluntary conservation programs, including Candidate Conservation Agreements with Assurances and Safe Harbor Agreements—but substantial work remains to be done.[3]

Reduce the Number of Formal Federal Permits

The most effective way to address ESA permitting burdens is to limit the number of activities that require federal permits. This can be done by being more thoughtful and creative in designing regulations initially. For threatened species, the Service has wide latitude to tailor regulations to fit the circumstances of a particular species.[4] However, the agency has traditionally favored a "blanket" approach under which threatened species are automatically regulated the same as endangered species, without any consideration for the consequences.[5] In 2019, the Service rescinded this blanket approach, primarily on the grounds that it would improve incentives for recovery efforts.[6] But it also cited the benefit of "reduc[ing] unneeded permitting," saving agency resources that can be redirected to recovering species.[7]

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[1] *See* 16 U.S.C. § 1539(a), (c).

[2] Enhancement of Survival and Incidental Take Permits, 88 Fed. Reg. 8380, 8381 (Feb. 9, 2023).

[3] The Service recently merged Candidate Conservation Agreements and Safe Harbor Agreements into a single, new permit type: Conservation Benefits Agreement. Fish & Wildlife Serv., *Conservation Benefit Agreements* (last visited June 18, 2025).

[4] 16 U.S.C. § 1533(d).

[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* 6–9 (Sep. 20, 2023).

[6] Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753, 44755–56 (Aug. 27, 2019).

[7] *Id.* at 44756.

In 2024, the Service reinstated the blanket rule, without considering the effect on the agency's permitting resources. As explained in a separate PERC comment on that rule, the Service should once again rescind the blanket rule.

Another way to reduce the number of minor or beneficial activities that must be federally permitted is to restore states to the role Congress intended them to have under the ESA. PERC Senior Fellow Temple Stoellinger has written that Congress expected states, through the ESA's cooperative agreement provisions, to develop conservation programs that would supersede federal regulation of species within the relevant state.[8] The Service has, through regulation, thwarted these provisions and, as explained in a separate PERC comment, should revise those regulations to facilitate greater state engagement. But, even short of that, the Service has the opportunity under the ESA to delegate permitting to states, an opportunity that it has rarely utilized.[9] Doing so would free up limited agency resources to process permits that cannot be delegated.

The Service Should Develop Regulatory Safe Harbors and General Permits for Common, Low-Impact, and Beneficial Activities

Even if the Service reduced the number of activities subject to federal permitting, the process would likely still be difficult to complete in a time-efficient and cost-effective manner. Therefore, the Service should seek to build off existing innovations to further streamline the process wherever possible.

Congress has given the Service considerable latitude to manage the permitting program. Section 11(f) of the statute authorizes the Service "to promulgate such regulations as may be appropriate to enforce this chapter[.]"[10] The Service has used this authority to establish several permitting programs, including Candidate Conservation Agreements with Assurances and Safe Harbor Agreements. But none of these existing programs use this authority to its fullest to streamline permitting.

The Service should consider establishing general regulatory safe-harbors for common activities with de minimis or beneficial effects on species. The Service has already established these for some take of endangered species, including broad exemptions from permitting for take of endangered species for (1) activities permitted under another federal law;[11] (2) a federal or state official killing an endangered species to mitigate human-wildlife conflict;[12] (3) euthanization of endangered birds by veterinarians;[13]

[8] *See* Temple Stoellinger, *Wildlife Issues Are Local — So Why Isn't ESA Implementation?*, 44 Ecology L.Q. 681 (2017).

[9] *See id.* at 717–18.

[10] 16 U.S.C. § 1540(f).

[11] 50 C.F.R. § 17.21(c)(6).

[12] 50 C.F.R. § 17.21(c)(3).

[13] 50 C.F.R. § 17.21(c)(7).

and (4) possession, take, and trade in certain captive-bred species.[14] Most of these safe-harbors were established in the 1970s and the Service did not cite the statutory authority used to create them. But the National Marine Fisheries Service has long cited Section 11(f) as its authority to issue similar rules for endangered species.[15] The Service should establish similar regulatory safe-harbors for landowners and other private parties engaged in proactive conservation efforts, such as habitat maintenance or restoration.

When a full exemption would be difficult to craft, the Service should consider using its Section 11(f) authority to establish a system of general permits, similar to the permits that the Army Corps of Engineers has established under the Clean Water Act.[16] While, unlike the Clean Water Act, the ESA does not contain an explicit provision governing general permits, that need not be a barrier to moving forward. The purpose of that provision in the Clean Water Act is primarily to constrain the Army Corps use of general permits, suggesting that the absence of a similar provision in the ESA gives the Service more discretion in issuing general permits, not less.[17] And the Service has long issued something like general permits by issuing permits to itself, state agencies, or other intermediaries that would automatically cover activities of third parties.[18] Based on this authority, the Service should develop a series of general permits beginning with 5-10 activities most frequently permitted under the ESA that have de minimis or beneficial impacts on species. This would free up the Service's resources to process other, more challenging permit requests more efficiently.

The Service may find it challenging to develop safe-harbors or general permits for some activities or for certain species. But the Service could still streamline ESA permitting even in these cases by using its Section 11(f) authority to clarify and make consistent what the Service requires from a permittee to satisfy the standards in Section 10(a)(2). The Service could, for instance, provide a streamlined review process for certain activities, e.g. small-scale residential development, by establishing a preset menu of minimization and mitigation options that are deemed sufficient for purposes of Section 10(a)(2)(A)(ii) and commit that the Service will demand no further measures of the applicant under Section 10(a)(2)(A)(iv).

Conclusion

[14] 50 C.F.R. § 17.21(g).

[15] *See, e.g.,* Protective Regulations for Killer Whales, 76 Fed. Reg. 20870 (Apr. 14, 2011); Regulations Governing the Approach to Humpback Whales in Alaska, 66 Fed. Reg. 29502 (May 31, 2001); *North Atlantic Right Whale Protections*, 62 Fed. Reg. 6729 (Feb. 13, 1997).

[16] *See* U.S. Army Corps of Eng'rs, *Nationwide Permits Program* (last visited June 18, 2025).

[17] *See* 33 U.S.C. § 1344(e).

[18] *See* Michael J. Bean, *Endangered Species Safe Harbor Agreements: An Assessment*, Sand County Foundation 4–5 (Nov. 2017).

The ESA's permitting process serves many critical functions, including allowing important projects to move forward and promoting the conservation of species. But these functions depend on the permitting process being as efficient and effective as possible, which it hasn't been. The proposed reforms addressed in this comment would allow the Service to substantially streamline the process for essential conservation activities, to simplify the process for activities with de minimis impacts to species, and to reallocate its limited permitting resources to more challenging permit applications.