Comment Supporting the Elimination of the "Blanket Rule" that Regulates Threatened Species as if They were Endangered

Property and Environment Research Center and Rocky Mountain Elk Foundation

Montana

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Main Points:

- The Fish and Wildlife Service (Service) should finalize the proposed rescission of the blanket rule to meet the Endangered Species Act's (ESA) ultimate goal of recovering species.
- By restoring the Act's distinction between endangered and threatened species, the Service would remove barriers to voluntary conservation, including habitat restoration, ensure that science rather than arbitrary whim drives the development of ESA regulations, and give states needed flexibility to manage recovering species. Rescinding the rule would also increase incentives for proactive conservation and, ultimately, recover more species.
- The blanket rule is not only bad policy but also clearly violates the ESA by reversing, without any statutory authorization, Congress' choice to limit automatic and broad regulation of take to endangered species, circumventing the requirement to assess what is necessary and advisable to conserve each threatened species, and ignoring the incentives needed to recover species. The Service has never offered a plausible justification for the blanket rule under the ESA's text.

The Property and Environment Research Center (PERC) and Rocky Mountain Elk Foundation (RMEF) respectfully submit this comment supporting the Service proposed rescission of the "blanket rule," which regulates threatened species as if they were endangered without regard to whether that approach is necessary and advisable to provide for the conservation of that threatened species.[1] This rule disincentivizes states and private landowners from participating in wildlife and habitat conservation, while also undermining species recovery and provoking conflict

[1] Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52587 (proposed Nov. 21, 2025).

with states and private landowners.[2] These harms, combined with the blanket rule's violation of the ESA's statutory language, prompted PERC and RMEF to file a lawsuit challenging the legality of the rule.[3] This litigation was stayed after the Service agreed to reconsider the blanket rule, and to issue species-specific 4(d) rules for all newly listed threatened species during this rulemaking.[4] We urge the Service to rescind this counterproductive rule and to instead use its authority to tailor regulations more creatively to improve conservation incentives and put more species on the road to recovery.

Restoring the ESA's Two-Tiered Framework Incentivizes Conservation and Species Recovery

The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend.[5] Congress defined "conserve" to mean actions necessary to bring a species to the point at which ESA protection is no longer needed.[6] Thus, the ultimate goal of the ESA is not just to keep species from going extinct, but to recover them to the point that they are no longer endangered or threatened.

Over the past five decades, the results have been mixed. On one hand, only 1% of species listed under the Act have gone extinct.[7] On the other hand, only 3% of the hundreds of species listed have recovered.[8] This stark discrepancy suggests that while stringent regulations for endangered species can stave off extinction, they do not promote the proactive conservation efforts needed to recover species. It is therefore imperative that the Service's policies encourage and reward proactive, voluntary recovery efforts by states, conservation groups, landowners, and other stakeholders—the people who manage habitat and can implement on-the-ground conservation measures.

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[2] *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) (Attachment 1).

[3] *Rocky Mountain Elk Foundation v. U.S. Dep't of the Interior*, 2:25-cv-00029-DWM (D. Mont. filed Mar. 10, 2025).

[4] *See* Unopposed Motion to Stay, *RMEF*, 2:25-cv-00029-DWM (Aug. 14, 2025) Dkt. 3.; Order Granting Stay, *RMEF*, 2:25-cv-00029-DWM (Aug. 19, 2025) Dkt. 40.

[5] 16 U.S.C. § 1531(b).

[6] 16 U.S.C. § 1532(3).

[7] *See* Katherine Wright & Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, PERC (July 26, 2023).

[8] *See id.* The number of recoveries significantly lags what the Service itself predicted. The Service projected, in a series of reports to Congress, the recovery of 300 species by the ESA's 50th anniversary. *Id.* Only 11 of those species have recovered, however, a mere 4% rate for the species that should have been most likely to recover. *Id.*

Congress understood the necessity of providing incentives for species recovery and established two distinct categories of protected species within the ESA—"endangered" and "threatened"—to provide those incentives. The ESA provides different approaches to regulating each category, with the most stringent regulations reserved for endangered species. Section 9's categorical take prohibition applies only to endangered species.[9] Congress opted not to automatically regulate take of threatened species, instead permitting the Service to issue regulations "necessary and advisable" to the "conservation" of each threatened species, which may include limits on take.[10]

This two-tiered approach serves an important incentive function. By reserving the most extensive regulations for the most vulnerable species and relaxing them as species recover, the ESA was designed to give states and private landowners an incentive to conserve species. When conservation efforts improve a species' status (from endangered to threatened, and eventually to delisted), it should bring a corresponding reduction in regulatory burdens. Conversely, if there is not a correlation between a species' recovery and its regulated status, the incentive to assist in its recovery vanishes. As the Service itself explained in 2019, rewarding landowners and states with regulatory relief as species' status improves provides "an incentive to work on recovery actions," to the benefit of both endangered and threatened species.[11] This incentive-based framework is imperative to the ESA's cooperative federalism approach and advances this administration's commitment to voluntary and collaborative conservation efforts.[12]

The Blanket Rule Undermines Conservation Efforts and Effective Recovery

Unfortunately, for most of the ESA's history, this two-tier system was largely short-circuited. The blanket rule effectively eliminated the distinction between endangered and threatened species by automatically extending endangered-level regulation to threatened species, without any consideration of whether it's justified or a good approach to promote the species' recovery.[13]

The detrimental impact of the blanket rule is not just theoretical; it has been borne out in practice. For over 40 years, the Service overwhelmingly relied on the blanket rule instead of developing individualized rules for threatened species, applying the

[9] 16 U.S.C. § 1538(a).

[10] 16 U.S.C. § 1533(d).

[11] Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753, 44757 (Aug. 27, 2019).

[12] Exec. Order No. 14313, Establishing the President's Make America Beautiful Again Commission, 90 Fed. Reg. 30197 (July 9, 2025).

[13] Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44414, 44425 (Sept. 26, 1975).

rule to approximately 75% of all threatened species without any further analysis.[14] And, once the Service applied the blanket rule to a threatened species, it never came back to analyze whether the rule was working or whether a different approach could better provide for the species' conservation. Thus, for 75% of threatened species, the Service never analyzed what was necessary and advisable to provide for their conservation.

During this time, only 3% of listed species recovered.[15] Alternatively, the National Marine Fisheries Service, which has never had a blanket rule, found endangered-level restrictions almost never appropriate for threatened species, applying them only 3% of the time. And it achieved a recovery rate of 6.7%, nearly triple that of the Service.[16]

The Service's experience when the blanket rule was rescinded from 2019 to 2024 confirms that the rule is worse for species. During this time, the Service committed to evaluating each newly listed threatened species individually and deciding what level of regulation was "necessary and advisable" for the conservation of that particular species. For these five years, the Service listed numerous threatened animals and, in every case, opted against endangered-level regulation in favor of a species-specific rule.[17] In particular, the Service consistently tailored rules to avoid prohibiting or discouraging proactive conservation efforts, as well as common activities with only de minimis effects on species.

A common argument for keeping the blanket rule is that the Service does not have the resources to develop tailored 4(d) rules for every threatened species. This argument fails for several reasons. First, the Service has reaffirmed time and time again that species-specific rules "mak[es] better use of [the Service's] limited personnel and fiscal resources and reduc[es] regulatory burden."[18] Second, the Service was able to develop tailored 4(d) rules for every species when the blanket rule was rescinded,[19] and developed specific rules for most species during President Obama's administration, even though the rate of listing was higher during that

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[14] Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 88 Fed. Reg. 40742, 40744 (proposed June 22, 2023).

[15] *See* *Missing the Mark*, *supra* note 7.

[16] PERC, *Comment Opposing the Proposed Reinstatement of the "Blanket Rule" Regulating Threatened Species as if They Were Endangered* 11 (Aug. 21, 2023).

[17] 88 Fed. Reg. at 40744. The Service occasionally provided endangered-level regulation of threatened plants during this time. But the ESA treats plants markedly different from animals, including by limiting take regulations to federal land. 16 U.S.C. § 1538(a)(2).

[18] *See, e.g.*, 88 Fed. Reg. at 40742; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23919, 23921 (Apr. 5, 2024).

[19] 88 Fed. Reg. at 40744.

administration.[20] Third, any costs of developing tailored rules must not only be weighed against their conservation benefits but also the future permitting costs they avoid. Tailored rules typically avoid prohibitions on proactive conservation efforts and common practices that have only de minimis effects on species. When these activities are instead prohibited under the blanket rule, the Service must individually permit each of these activities, a much more cumbersome and time-consuming process that discourages recovery activities. Finally, there is no evidence that the promulgation of tailored rules, instead of applying endangered species-level regulations, has hindered the Service's work in conserving listed species in any way.

In sum, the blanket rule undermines species conservation and recovery. By automatically imposing the strictest possible regulations on most threatened species, it raised the costs and conflicts of ESA compliance without discernible benefit to recovery, and it discouraged private and state participation in conservation efforts. It also replaces the expertise of experienced wildlife professionals with an unlawful easy-button regulation that ignores the needs of the specific species it purports to protect. This is contrary to what Congress intended. Instead of automatically imposing the most restrictive regulations on threatened species, Congress wished to "facilitate regulations that are tailored to the needs of the [threatened] animal"[21] by giving the Service "an almost infinite number of options"[22] to tailor these restrictions. Congress expected the Service to use this authority to be creative to incentivize proactive recovery efforts, including "encourage[ing states] to use their discretion to promote the recovery of threatened species." The blanket rule instead eliminates Congress' intention for states to play a leading role in recovering listed species,[23] and prevents states from using their resources and expertise to create novel and incentive-based conservation programs.[24] Rescinding the blanket rule will remove these barriers and refocus attention on what is actually necessary and advisable for each threatened species' conservation and recovery while leveraging state and conservation partners.

The Blanket Rule Violates the ESA

Beyond the policy reasons for rescinding the rule, PERC and RMEF agree with the Service that the blanket rule violates the ESA. As the Service notes, the "existing

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[20] Ya-Wei Li et al., *Section 4(d) Rules: The Peril and the Promise* 6, Defenders of Wildlife (Jan. 2017)

[21] 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] H.R. Rep. No. 412, 93rd Cong. (1973).

[23] *See, e.g.*, Temple Stoellinger, *Wildlife Issues Are Local—So Why Isn't ESA Implementation?*, 44 Ecology L.Q. 681 (2017); Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 Iowa L. Rev. 377, 428–30 (2005).

[24] *See, e.g.*, *Empower States to Recover Species*, in *A Field Guide for Wildlife Recovery*, *supra* note 2; PERC, *Comment on Regulations to the Endangered Species Act's Federalism Provisions* (June 2025).

regulations do not match the 'single, best meaning' of the" ESA, and instead, "the statutory text, structure, and context make clear that Congress intended the Service to determine" threatened species regulations "on a species-by-species basis."[25] As we explained in our lawsuit challenging the blanket rule, we agree and offer this additional context supporting the Service's legal position.[26]

The blanket rule flaunts the ESA's language in three ways: First, it reverses Congress' decision to encourage species recovery by regulating endangered and threatened species differently. Under Section 9 of the ESA, listing a species as endangered automatically triggers a prohibition against the unpermitted "take" of such species.[27] Congress intentionally excluded threatened species from this automatic take prohibition to "minimize the use of the most stringent prohibitions" because these regulations should "be absolutely enforced only for those species on the brink of extinction."[28] The blanket rule, however, purports to overrule Congress' choice by making Section 9 automatically apply to threatened species as well.

Second, Section 4(d) only permits the Service to issue species-specific rules. This is demonstrated by Section 4(d)'s language referring to individual species.[29] While the Service argued in its 2024 reinstatement of the rule that the use of "species" can be singular or plural depending on the context, this argument is spurious because the language used in this section clearly refers to individual species.[30] The language in Section 4(d) also mirrors other provisions in Section 4 that authorize only species-specific actions informed by a species-specific analysis, including the critical habitat and recovery planning provisions.[31] And it omits language Congress used to refer to species in the plural.[32] The ESA's legislative history supports requiring the Service

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[25] 90 Fed. Reg. at 52589.

[26] Complaint, *RMEF*, 2:25-cv-00029-DWM (March 10, 2025) Dkt. 1 (Attachment 2).

[27] 16 U.S.C. § 1538.

[28] *A Legislative History of the Endangered Species Act of 1973*, *supra* note 21 at 358.

[29] 16 U.S.C. § 1533(d) ("Whenever *any* species *is* listed as *a* threatened species" (emphasis added)); *id.* ("*such* species" (emphasis added)); *id.* ("*any* threatened species" (emphasis added)).

[30] *See id.*

[31] *See, e.g.*, 16 U.S.C. § 1533(a)(3) (directing the Service, whenever it lists "a species" as "an endangered species or a threatened species," to designate critical habitat for "such species"); 16 U.S.C. § 1533(e) (providing that the Service may "treat any species as an endangered species or a threatened species" if "such species" sufficiently resembles "a species which has been listed").

[32] *See, e.g.*, 16 U.S.C. § 1533(c)(2)(A) (directing the Service to review the status of "all species" every five years); 16 U.S.C. § 1533(f)(1)(A) (referencing "those endangered species or threatened species . . . most likely to benefit from [recovery] plans"); 16 U.S.C. § 1533(f)(3) (requiring a report on recovery progress for "all species"); 16 U.S.C. § 1533(g) (requiring monitoring of "all species" that have been delisted).

to only issue "regulations that are tailored to the needs of the [threatened] animal" as well.[33]

Finally, Section 4(d)'s requirement that threatened species' regulations be "necessary and advisable to provide for the conservation of such species" can only be fulfilled by assessing each species recovery needs and issuing species-specific rules.[34] The blanket rule cannot be squared with this language. This standard requires the Service to consider how a regulation will support a species recovery, including considering costs imposed and how the regulation influences states' and landowners' incentives to restore habitat and contribute to the conservation of that species.[35] Because the needs of species vary dramatically, it is impossible to say what approach will be necessary and advisable for all the unknown species that may ever be listed as threatened in the future.

The Service seemed to concede as much when it reimplemented the blanket rule in 2024 by acknowledging that it cannot analyze the benefits or costs of restoring the blanket rule because it does not know which species it will be applied to.[36] It is simply not possible to pre-judge the needs of unknown threatened species that may be listed in the future without access to any of the scientific or other information that must inform such decisions. Yet that's precisely what the Service does when using the blanket rule.

While an earlier D.C. Circuit decision held that the blanket rule was legal under *Chevron* deference,[37] the Supreme Court overruled *Chevron* and eroded that decision's foundation. Even before *Chevron* was overruled, other circuits, including the 9th Circuit, rejected the D.C. Circuit's rationale on statutory and constitutional grounds. In *Christy v. Hodel*, for instance, the 9th Circuit held that any regulation of take of threatened species must satisfy the necessary and advisable standard—the very proposition *Sweet Home* rejected—to avoid a nondelegation problem.[38] Under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Service has it right: it must follow the "single best meaning" of the ESA's text, and that reading forecloses the blanket rule.

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[33] *See A Legislative History of the Endangered Species Act of 1973*, *supra* note 21 at 358.

[34] 16 U.S.C. § 1533(d).

[35] *See Michigan v. U.S. Env't Prot. Agency*, 576 U.S. 743 (2015) (holding that open ended standards like "necessary and advisable" require consideration of the costs imposed on regulated entities); *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).

[36] *See* 88 Fed. Reg. 40749.

[37] *See Sweet Home Chapter of Cmties. for a Great Or. v. Babbitt*, 1 F.3d. 1, 8 (D.C. Cir. 1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C. Cir. 1994), rev'd on other grounds, 515 U.S. 687 (1995)).

[38] *See* 857 F.2d 1324, 1336–37 (9th Cir. 1988).

Recommendations for Developing Species-Specific 4(d) Rules

In addition to rescinding the blanket rule, the Service's proposal clarifies that it will analyze the costs and benefits of future species-specific rules under the necessary and advisable for conservation standard. It also indicates that it may begin to develop species-specific rules for those species previously subject to the blanket rule and for which the Service has never considered what regulations, if any, are necessary and advisable to conserve those species. We agree with both parts of the Service's proposals and offer additional suggestions to further assist the Service in evaluating conservation and economic impacts when conducting a "necessary and advisable" assessment:

First, the Service should always evaluate the costs and benefits of species-specific rules, especially as they relate to the role of states in species management and incentives to conserve and recover species. Doing so is required by the ESA's text.[39] But it's also good policy. If regulations impose high costs on states or landowners who maintain habitat or accommodate species, the effect will be to discourage them from doing so. To be effective, threatened species rules should be designed carefully and creatively to prevent harm to species while promoting recovery.

Second, threatened species regulations should directly account for and reward recovery progress. Many existing species-specific rules apply the same way whether species improve or decline. PERC, RMEF, and other conservation partners recently proposed a new way to think about threatened species rules in a comment proposing changes to the 4(d) rule for grizzly bears.[40] Specifically, we proposed incorporating the objective goals from the species' recovery plan into the rule so that regulations automatically adjusted as the species progresses toward and ultimately meets those goals.[41] For populations that have met recovery goals, like the Greater Yellowstone Ecosystem and Northern Continental Divide Ecosystem grizzly bears, threatened species rules should authorize states to manage these populations in anticipation of a future delisting. Just as reducing regulations when species are upgraded from endangered to threatened provides an incentive for conservation efforts, providing more opportunities for state management and regulatory relief based on gradual recovery progress would also encourage continuous investment in those efforts. Rules that allow states to demonstrate how they will continue to conserve the species after its recovery and delisting will also give states an opportunity to build trust with communities and stakeholders and lower the stakes of delisting decisions and litigation.

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[39] *See Michigan*, 576 U.S. 743; *Kan. Nat. Res. Coal.*, 2025 WL 1367834.

[40] PERC et al., *Comment on the Proposed Grizzly Bear Listing with a Revised 4(d) Rule, RIN 1018–BI14* (May 16, 2025).

[41] *Id.*

Third, the Service must embrace state partnerships and management. Congress intended states to play a leading role in managing threatened species.[42] Therefore, 4(d) rules should, wherever possible, delegate management authority or provide flexibility to state wildlife agencies to implement conservation programs, including through authorization of activities under state conservation plans or permits.[43] States could even take the lead in drafting threatened species rules, to ensure that the provisions align with the state's long-term management approach and meet local needs.[44]

Fourth, the Service should promulgate species-specific rules for species currently covered by the blanket rule. Because of the blanket rule's conflict with the ESA's text, the application of it to each of these species would be legally vulnerable in any future enforcement action. Developing a tailored rule for each species over time would head off this risk. It would also promote the recovery of these species. Many species covered by the blanket rule have seen little recovery progress because of the lack of incentives and the cost of prohibitive regulation. Indeed, the Service has never even considered what approach is necessary and advisable for these species. By developing species-specific rules, the Service could accelerate the recovery of many threatened species.

Conclusion

For decades, the blanket rule has undermined both the spirit and letter of the ESA. It has disincentivized proactive conservation by treating endangered and threatened species the same, and it violates the ESA's mandate for tailored, recovery-focused regulation of threatened species. We strongly support the Service's proposal to eliminate this rule. Doing so will restore the Act's two-tier framework Congress intended, bolster cooperative conservation efforts, and ensure that regulatory measures for threatened species are grounded in science and necessity. We are optimistic that this change will lead to more success stories and put more species on the road to recovery.

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[42] 16 U.S.C. § 1536.

[43] *See id.*

[44] *See A Field Guide for Wildlife Recovery*, *supra* note 2; ESA Amendments Act of 2025, H.R. 1897, 119th Cong. (2025).