

The Center for Growth and
Opportunity at Utah State University

Public Interest Comment on
The Fish and Wildlife Service's Proposed Rule:
**Revision of the Regulations for Prohibitions
to Threatened Wildlife and Plants**

Authors:

Megan E. Hansen
Camille Harmer

October 2018

Docket ID No. FWS-HQ-ES-2018-0007

The Center for Growth and Opportunity at Utah State University is a university-based research center located on the Logan campus of Utah State University. The Center for Growth and Opportunity is dedicated to producing policy-relevant research that explores the interactions between key institutions—business, government, and civil society—to better understand how to improve opportunity, broad-based economic growth, and individual well-being. As part of its mission, the Center conducts independent analyses addressing rulemakings and proposals. Therefore, this reply comment is designed to assist the agency as it explores these issues.



The Center for
Growth and Opportunity
at Utah State University

Introduction:

In this proposed rule the Fish and Wildlife Service (FWS) seeks comment on changes to the way the Endangered Species Act (ESA) is implemented. Rather than continuing to extend the same protections to threatened and endangered species alike, the rule change would require the FWS to determine whether species-specific protections are warranted for threatened species. This rule change would likely have significant impacts both on species and on landowners, states, tribes, and private groups involved in conservation efforts.

In this comment, we evaluate the likely outcomes of this proposed rule change by drawing on previous research on conservation of endangered species. We begin by discussing the evolution of federal protections for endangered and threatened species over time and review key problems with the current approach to conserving species. We draw extensively on our research on cooperative conservation and the importance of incentives in achieving successful conservation outcomes.

Based on this research, we conclude that restoring a two-tiered approach would increase incentives for cooperative conservation efforts and will lead to better conservation outcomes, but only if implemented correctly. We then discuss the possible challenges that a two-tiered approach may create and highlight possible policy changes that could be made to overcome those challenges, including increasing the involvement of state and local conservation actors.

Background:

The Endangered Species Act of 1973 was enacted to both protect species from going extinct and to help recover species to the point that they no longer need protection. To do this, the Act stipulates two tiers of protected species—endangered and threatened. Endangered species are those in danger of going extinct across all or most of their habitat while threatened species are those likely to become endangered within the foreseeable future.

In its current form, the ESA protects endangered and threatened species by prohibiting the “take” of species—a term that has been defined broadly as any action that will harm a species or its habitat. This approach includes the possibility of regulatory restrictions, foregone profits, fines, and perhaps prison time for those that harm listed species or habitats. The threat of punishment under the ESA is meant to deter individuals from harming species and thus help protect and recover endangered and threatened species.

When the ESA was passed in 1973, the prohibition on the “take” of a species applied only to endangered species. Congress purposely enacted the ESA with two tiers of protection to preserve the most stringent regulation for those species most in danger of going extinct. Threatened species were to be protected primarily at the state level through more local efforts to help species recover. As California Senator John Tunney noted at the time:

The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions. Since most of our resources for restoring and propagating species lie with the States, they are encouraged to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction.¹

In 1975, the Fish and Wildlife Service enacted a regulatory change that extended the taking prohibition to all threatened species, unless the agency issues an exemption for that particular species.² Since that time, both threatened and endangered species have been treated the same by default. The FWS can enact species-specific rules exempting actions that would otherwise be considered an illegal taking, but unless they do this, threatened species are treated with the same punitive approach as endangered ones. Although this regulatory change was meant to provide greater protection for threatened species, it created perverse incentives that actually hamper recovery efforts.

Preemptive Habitat Destruction

The punitive approach of the ESA results in unintended consequences that foster conflict rather than cooperation and can harm the very species the Act is meant to protect. These consequences are well-documented in the academic literature. In their 2003 paper, economists Dean Lueck and Jeffrey Michael documented the phenomenon of preemptive habitat destruction. They showed that forest landowners in North Carolina were more likely to harvest their timber prematurely when their land was closer to a known population of the endangered red-cockaded woodpecker.³

A 2006 survey of private landowners in Utah showed that 34 percent of surveyed landowners admitted to taking action to discourage the threatened Utah prairie dog from inhabiting their land to avoid regulation.⁴ Habitat protection is crucial to species recovery and preemptive habitat destruction works in direct conflict to this goal. Preemptive habitat destruction suggests that enacting ever stricter regulations with the goal of helping species recover may be counterproductive. Those species with the most restrictive regulations in place may also be the most likely to be harmed by preemptive habitat destruction. When faced with the possibility of more stringent regulations, landowners may take action to discourage species, thereby reducing the likelihood of having to comply with additional constraints.

¹ Jonathan Wood, "The Road to Recovery," April 2018, PERC Policy Report, <https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf>

² U.S. Fish and Wildlife Service and National Marine Fisheries Service, "Proposal to Reclassify the American Alligator and Other Amendments," *Federal Register*, Vol. 40, No. 188 (September 26, 1975), p. 44425, https://ecos.fws.gov/docs/federal_register/fr72.pdf

³ Dean Lueck & Jeffrey A. Michael, "Preemptive Habitat Destruction under the Endangered Species Act," *The Journal of Law and Economics* 46 (2003): 51

⁴ R. Dwayne Elmore & Terry A. Messmer, "Public Perceptions Regarding the Utah Prairie Dog and its Management: Implications for Species Recovery," *Berryman Institute Publication*, no.23 (2006): 11

Incorrect & Incomplete Data

Collecting and maintaining good data on how many species exist and where they are located is a massive task. Incomplete and inaccurate data currently limits the ability of the ESA to help endangered and threatened species recover. Over the past 40 years, 21 species were listed because of inaccurate or incomplete data only to later be delisted once the errors were discovered.⁵ This is a small portion of the total number of listed species, but it represents nearly one-fourth of all delisted species. This means that scarce resources were devoted to species that were never endangered in the first place, rather than being spent on those that are in greater need.

Because half of listed species rely on private land for 80 percent of their habitat, biological surveys on private land are crucial in collecting species data.⁶ Unfortunately, the ESA, as currently implemented, may actually discourage landowners from allowing biological surveys on their land. Because landowners may face increased restrictions if endangered or threatened species are discovered on their land, they may not allow biological surveys to take place on their land. One study found that 56 percent of landowners surveyed would not be willing to allow a biological survey on their land for the benefit of the threatened Preble's meadow jumping mouse. When asked why they would decline a survey on their land, "many landowners considered allowing surveying to be a great risk because data collected could possibly be used to regulate their property and because many did not trust the government or conservation organization biologists who would be conducting the survey."⁷

By discouraging landowners from helping improve data quality regarding endangered and threatened species, the current approach to implementing the ESA likely worsens the challenge already presented by poor and incomplete data. If landowners are instead treated as conservation partners and incentivized to allow data collection related to endangered and threatened species on their land, these problems may be alleviated. Working with landowners to collect better data would likely lead to more effective conservation efforts, as we would have more and better information about where endangered and threatened species live as well as the conditions of that habitat.

Analysis of Proposed Rule:

The proposed rule would require the FWS to determine whether species-specific protections are warranted for threatened species, rather than continuing to extend the same protections to threatened and endangered species alike. If enacted carefully, this change could increase incentives for cooperative conservation, benefiting both species and landowners alike.

⁵ "Delisted Species Report," US Fish & Wildlife Service, accessed July 8, 2018, <https://ecos.fws.gov/ecp0/reports/delisting-report>

⁶ "Our Endangered Species Program and How It Works with Landowners," US Fish & Wildlife Service, July 2009, <https://www.fws.gov/endangered/esa-library/pdf/landowners.pdf>

⁷ Amara Brook, Michaela Zint & Raymond Deyoung, "Landowners' Responses to an Endangered Species Act Listing and Implication for Encouraging Conservation," *Conservation Biology* 17, no.6 (2003): 1643

Incentives for Cooperative Conservation

Restoring the ESA's two-tiered approach would increase incentives for landowners, state agencies, and conservation groups to work together to help threatened species recover before they are listed as endangered. Under the current approach, threatened species are treated the same as endangered ones. That means the same protections and the same regulatory restrictions that apply to endangered species also extend to those listed as threatened. This leaves little incentive for those interested in conservation to work together to prevent a threatened species from being listed as endangered.

Because landowners currently face the same regulatory approach to both endangered and threatened species, there is no incentive to take active steps to help a species improve from endangered to threatened. In fact, landowners may engage in preemptive habitat destruction or prevent biological surveys from taking place on their land when threatened species are present in an effort to avoid facing restrictions.⁸ If the two-tiered system of the ESA were restored, species that warrant a threatened listing could be listed as threatened without the same regulatory burden being placed on landowners.

If threatened species were regulated differently from endangered species, landowners, states, and other groups would likely respond to the positive incentive to help species improve. In a 2018 report, Jonathan Wood suggests a two-tiered process could help better achieve the goals of the ESA by creating a “carrot and stick” approach.⁹ The “carrot” in this case would be the potential reward of reduced regulatory requirements when a species improves to the point that it is downlisted from endangered to threatened. The “stick” refers to the possibility of increased restrictions if a species ends up moving from threatened to endangered. Individuals, organizations, and states who would be affected by an endangered listing may be motivated to help the species recover so that it is not listed as endangered.

This two-tiered approach would better align the goal to help species recover with the goals of landowners who value having greater autonomy and ability to use their land as they see fit. Under this type of approach, endangered species would benefit from increased conservation efforts. Landowners would also benefit from reduced regulatory restrictions when their conservation efforts successfully help recover endangered species to the point that they are listed as threatened or delisted.

A two-tiered process would help create incentives for landowners and others to help threatened species improve before they become endangered. In the “carrot and stick” approach described by Wood, the threat of increased regulatory restrictions associated with an endangered status would encourage conservation efforts to help prevent threatened species from becoming endangered in the first place. There is significant and encouraging evidence that voluntary, cooperative conservation efforts can lead to substantial improvements for species and their habitats.

The example of the greater sage-grouse suggests the threat of a listing can be an effective stick in encouraging cooperative conservation. In 2010, the Fish and Wildlife Service announced that the greater

⁸ Dean Lueck & Jeffrey A. Michael, “Preemptive Habitat Destruction under the Endangered Species Act,” *The Journal of Law and Economics* 46 (2003): 51; Amara Brook, Michaela Zint & Raymond Deyoung, “Landowners’ Responses to an Endangered Species Act Listing and Implication for Encouraging Conservation,” *Conservation Biology* 17, no.6 (2003): 1643

⁹ Jonathan Wood, “The Road to Recovery,” April 2018, PERC Policy Report, <https://www.perc.org/wp-content/uploads/2018/04/endangered-species-road-to-recovery.pdf>

sage-grouse was a candidate for potential listing as threatened or endangered. Because the bird's sagebrush habitat covers much of the western U.S., a threatened or endangered listing could have had significant economic impacts across the West.

Following the FWS announcement, Secretary of the Interior Ken Salazar invited the 11 western states with habitat for the bird to develop their own management plans. Montana, Idaho, Utah, Oregon, Wyoming, and others across the West developed sage-grouse plans with the explicit goal of preventing a formal listing of the bird.¹⁰ An important actor in facilitating these efforts was the National Resources Conservation Service-led Sage Grouse Initiative. As of 2015, the Initiative had voluntary conservation agreements with private landowners that covered 4.4 million acres. The FWS and BLM also worked with landowners to obtain commitments for conservation efforts on 5.5 million acres through the use of Candidate Conservation Agreements. In conjunction with public and private partners, these cooperative efforts were successful enough that in 2015 the Fish and Wildlife Service found that protection of the species under the ESA was unnecessary.¹¹

If a two-tiered approach to the ESA were restored, these cooperative efforts would likely see even more success and could be applied to additional species. If threatened species could be listed without the same level of regulatory restrictions as endangered species, then conservation partners would have more time to work together to develop a plan to help threatened species recover before they become endangered. Private landowners would then face an incentive to help with these efforts to avoid heavy-handed regulatory restrictions.

A two-tiered approach would also be more likely to get private landowners engaged in conservation efforts. This is especially important given evidence that suggests private landowners want to be involved in conservation efforts. In a survey of Utah landowners concerning the threatened Utah prairie dog, researchers from Utah State University found that 62 percent of surveyed landowners agreed with the original intent of the ESA. Of surveyed landowners, 70 percent also stated that “the fear of restrictions under the act hindered their willingness to receive aid or assistance.”¹²

Although many landowners may agree with the overall goals of conservation under the ESA, the fear of future restrictions may limit their willingness to engage in conservation programs. A two-tiered approach that relaxes regulatory requirements for threatened species may be more likely to successfully engage landowners.

Potential Challenges of a Two-Tiered Approach

A two-tiered approach through the ESA would need to be implemented correctly to achieve successful conservation outcomes. One potential concern with treating threatened species differently than

¹⁰ Jordan Lofthouse and Camille Harmer, “A Bird in the Hand,” July 2017, Strata, <https://www.strata.org/pdf/2017/sage-grouse.pdf>

¹¹ U.S. Department of Interior, “Historic conservation campaign protects Greater Sage-Grouse,” September 22, 2015, <https://www.doi.gov/pressreleases/historic-conservation-campaign-protects-greater-sage-grouse>

¹² R. Dwayne Elmore & Terry A. Messmer, “Public Perceptions Regarding the Utah Prairie Dog and its Management: Implications for Species Recovery,” *Berryman Institute Publication*, no.23 (2006): 7

endangered ones is that threatened species may not be adequately protected. The two-tiered approach proposed by FWS would allow the agency to set up species-specific protections for those species where some additional management is deemed necessary. This means that, when appropriate, threatened species could still receive additional protections. Tailored, species-specific protections may also be more likely to achieve successful outcomes than a one-size-fits-all approach.

Species-specific recovery plans have shown some success for species like the lesser prairie-chicken. The Western Association of Fish & Wildlife Agencies partnered with New Mexico, Colorado, Kansas, Oklahoma, and Texas to develop a Range-wide Conservation Plan (RCP) that established population goals for the species and laid out a path for collaborative conservation that promotes the species' recovery while minimizing economic impacts and engaging local partners. The Western Association of Fish & Wildlife Agencies publishes an annual progress report that evaluates the plan based on nine criteria including population goals, habitat quantity and quality, expanding cooperative and incentive-based conservation efforts, and addressing input from a variety of stakeholders. The group's most recent report showed improvement in all nine areas, suggesting that a collaborative, species-specific plan is working well for the lesser prairie-chicken and those who live and work across its habitat.¹³

Even for species where tailored management plans are not deemed necessary, a two-tiered approach is likely to do a better job of incentivizing cooperative conservation efforts than the current system. Local landowners would have the opportunity to enter into voluntary conservation agreements to help threatened species recover with the assurance that they might face decreased restrictions if their efforts are successful. Likewise, a two-tiered system would create incentives for local actors to work to recover endangered species to the point that they are delisted or can move from endangered to threatened.

A potential challenge of a two-tiered approach is that a variety of species-specific plans that vary among threatened species may make it difficult for businesses, landowners, and others to know which rules apply to them. Landowners in particular may face increased difficulty in complying with the ESA if they do not know the rules that apply to a species on their property. One way to ensure that information about species-specific rules is shared effectively would be for FWS to work more closely with local actors such as university-based cooperative extension officials at land grant universities. These extension officials are locally based and could help spread the word about species-specific protections for threatened species in particular areas. Academic research also suggests that university extension officials have some of the highest levels of trust among landowners and could thus work effectively to help ensure effective conservation outcomes and local engagement.¹⁴

Implementing a two-tiered approach to species conservation could be costly for the FWS. Creating species-specific protections would require that the FWS consider the needs and requirements of each

¹³ William E. Van Pelt, Sean Kyle, Jim Pitman, Deb VonDeBur & Michael Houts, "The 2014 Lesser Prairie-Chicken Range-wide Conservation Plan Annual Progress Report," March 2015, Western Association of Fish and Wildlife Agencies, https://www.wafwa.org/Documents%20and%20Settings/37/Site%20Documents/Initiatives/Lesser%20Prairie%20Chicken/LPC%20Annual%20final%20report%20033312015_FINAL%202.pdf

¹⁴ R. Dwayne Elmore & Terry A. Messmer, "Public Perception Regarding the Utah Prairie Dog and its Management: Implications for Species Recovery," *Berryman Institute Publication* no.23 (2006): 10; Shari L. Rodriguez, M. Nils Peterson, Frederick W. Cabbage, Erin O. Sills & Howard D. Bondell, "Private Landowner Interest in Market-Based Incentive Programs for Endangered Species Habitat Conservation," *Wildlife Society Bulletin* 36, no.3 (2012): 472

individual species, rather than relying on preset protections applied across all species. However, this upfront cost could save the FWS in the long run. Species-specific protections may provide more cost-effective ways to help species by focusing on actions that are actually likely to benefit that particular species rather than applying blanket protections that may be more wide-reaching than necessary.

Finally, another potential challenge with a two-tiered approach is that it would require state and local groups to step up to the plate to help develop conservation plans for threatened species. One concern may be that states do not have the funding to adequately protect species and to give them the support they need to recover. While funding is always a limitation, examples like the greater sage-grouse and the lesser prairie-chicken suggest that cooperative conservation efforts are likely to emerge with the help and financial support of a variety of conservation actors including federal and state programs, universities, non-profits, and industry groups. For species whose designation would lead to wide-scale economic impacts, states may also find it in their best interest to work together on collaborative conservation efforts in the short-run to prevent long-term negative economic impacts.

Conclusion:

This proposed rule change would require the FWS to determine whether species-specific protections are warranted for threatened species, rather than continuing to extend the same protections to threatened and endangered species alike. This rule change would likely lead to better conservation outcomes by creating incentives for cooperative conservation efforts. Under a two-tiered approach in which threatened species do not receive the same protections as endangered ones, local landowners would be rewarded for helping threatened species stay off the endangered species list and for helping endangered species recover. The prospect of reduced regulatory restrictions would serve as a “carrot” to encourage more efforts like those undertaken for the benefit of the lesser prairie-chicken and the greater sage-grouse.

This rule change would need to be implemented carefully to ensure that local people have adequate knowledge about species-specific protections for threatened species. Engaging with local conservation officials such as those at university-based extension offices would be one way to accomplish this effectively. By relying on effective incentive-based outcomes, the current rule change proposed by FWS is likely to result in better conservation outcomes for endangered and threatened species.