

BACKGROUND

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Take It Back: Extending the Endangered Species Act's "Take" Prohibition to All Threatened Animals Is Bad for Conservation

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Abstract

The Endangered Species Act (ESA) includes a prohibition of the "take" of an endangered species, defined to include a broad set of actions that harm, harass, or otherwise cause injury to endangered animals. The law provides that the "take" prohibitions may be applied selectively by special rule to animals that are not yet endangered but are threatened to become so. However, in 1975, the Department of the Interior promulgated a rule applying the "take" provision of the ESA to all threatened animals. This rule contradicts the system created by Congress and creates conservation disincentives. While at the very least this regulation should not be applied to future listings of threatened animals, the best course of action would be to rescind it.

Under the Endangered Species Act (ESA), species¹ that are determined to be endangered or threatened with extinction are included on a list of federally regulated species, commonly referred to as being "listed."²

Under the ESA, an endangered species is "in danger of extinction throughout all or a significant portion of its range," while a threatened species is "likely to become an endangered species within the foreseeable future." Essentially, the ESA provides two different levels of regulation, with the status "endangered" reserved for species determined to be facing a more immediate danger.³

Critical habitat for species is usually designated by regulation.⁴ Critical habitat is supposed to be specific habitat occupied by the species that has physical or biological features essential to the species' conservation, and which may require special management or even unoccupied habitat.⁵

KEY POINTS

- Under the Endangered Species Act, it is against the law to cause injury or harm to "endangered" species and, only when a special rule is adopted, is this prohibition applied to "threatened" species.
- This U.S. Fish and Wildlife Service turned this structure upside down with a regulation that applies the prohibition to all threatened species unless a special rule makes exemptions.
- This improper regulation erases the congressionally intended distinction between "threatened" and "endangered" species and creates potential conservation disincentives and conflict. The Trump Administration should eliminate this regulation.
- At a minimum, the Trump Administration should not apply this regulation to threatened species listed in the future, and should provide unique special rules for newly listed threatened species as appropriate.

This paper, in its entirety, can be found at <http://report.heritage.org/bg3267>

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Put more simply, the ESA is used to identify species that do, or may, face extinction, add them to a list, and then recover them so that they may be removed from that list.⁶ The ESA provides two primary regulatory mechanisms to conserve species.⁷

One mechanism is the ESA's Section 7 and is known as "consultation." Under consultation, federal agencies are required to ensure that any discretionary actions undertaken do not jeopardize a species or adversely modify designated critical habitat.⁸

The second mechanism is Section 9's prohibition against "take." The take prohibition includes actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in

any such conduct."⁹ The take prohibition applies to endangered animals and, by "special rule," may be selectively applied to threatened animals if it is "necessary and advisable."¹⁰

According to the U.S. Fish and Wildlife Service (FWS), there are 1,652 listed U.S. species, of which 209 are threatened animals—and of these 55 currently have a special rule.¹¹ The National Marine Fisheries Service has also issued special rules for threatened animals it regulates including, for example, multiple pacific coast salmonids.¹²

A Bureaucracy Serves Itself

Creating two listing levels was not an arbitrary or capricious congressional decision. The manner in

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- 1 The term "species" is used here in a legal, not a biological, sense. The Endangered Species Act of 1973 incorporates "sub-species" and the unscientific "distinct population segment" within the term "species." See ESA, Definitions, Section 3(16). Additionally, by regulation, the Department of Commerce's National Marine Fisheries Service (NMFS) also uses the term evolutionarily significant unit (ESU), which is not found within the ESA. See National Marine Fisheries Service, "Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon," *Federal Register*, Vol. 56, No. 224 (November 20, 1991), p. 58612, <http://www.nmfs.noaa.gov/pr/pdfs/fr/fr56-58612.pdf> (accessed September 20, 2017).
 - 2 As used here, the terms "endangered" and "threatened" refer to species that have been so determined under Section 4. Although not addressed here, opinions about the veracity of the federal ESA determinations differ greatly.
 - 3 This does not include the designation "endangered by similarity of appearance," an uncommonly used provision of the ESA.
 - 4 Endangered Species Act, Section 4(a)(3)(A).
 - 5 Endangered Species Act, Section 3(5)(A). Recent rules regarding critical habitat define unoccupied so potentially expansive as to be potentially meaningless. U.S. Fish and Wildlife Service and National Marine Fisheries Service, "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat," Final Rule, *Federal Register*, Vol. 81, No. 28 (February 11, 2016), p. 7414, https://www.fws.gov/endangered/improving_esa/pdf/Designating_Critical_Habitat-2016-02680-02112015.pdf (accessed September 20, 2017).
 - 6 Under the ESA, conservation means "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." Endangered Species Act, Definitions, Sec. 3(3).
 - 7 Authority for enforcement of the ESA resides with the Secretary of the Department of the Interior and the Secretary of Commerce, who have, respectively, delegated the FWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) the tasks of administering the ESA. (NMFS is more commonly referred to as NOAA Fisheries.) The agencies divvy up authority for different species based on taxonomic and geographical characteristics established in a memorandum of understanding.
 - 8 Endangered Species Act, Interagency Cooperation, Section 7.
 - 9 Endangered Species Act, Prohibitions, Section 9(a)(1).
 - 10 Also known as "4d" rules. Endangered Species Act, Determination of Endangered and Threatened Species 4(d): "Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation *prohibit* with respect to *any threatened species any act* prohibited under section 9(a)(1), in the case of fish or wildlife." (Emphasis added.) Additionally, substantially less restrictive rules are applied to listed plants. Endangered Species Act, Section 9(a)(2).
 - 11 U.S. Fish and Wildlife Service, "ECOS, Environmental Conservation Online System: Listed Species Summary," <https://ecos.fws.gov/ecp0/reports/box-score-report> (accessed August 14, 2017). Threatened species include 13 animal species that have multiple independent listings; that is, one species is broken into two or more subgroups, and each is included on the federal list under a different rule. This includes foreign species as the ESA is the U.S. implementing act for the Convention on International Trade in Endangered Species of Wild Fauna and Flora. U.S. Fish and Wildlife Service, "ECOS, Environmental Conservation Online System: Species with 4d Rules," <https://ecos.fws.gov/ecp0/reports/species-with-special-rules-report> (accessed December 7, 2017). Special rules cover 11 kinds of mammals, two kinds of birds, five kinds of reptiles, five kinds of amphibians, 30 kinds of fish, one kind of invertebrate, and one kind of crustacean.
 - 12 National Marine Fisheries Service, "A Citizen's Guide to the 4(d) Rule for Threatened Salmon and Steelhead on the West Coast," June 20, 2000, http://www.westcoast.fisheries.noaa.gov/publications/reference_documents/esa_refs/section4d/4d-citizens-guide.pdf (accessed September 20, 2017), and "Enumeration of threatened marine and anadromous species," 50 C.F.R. 223.102.
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which Congress paired these different listing levels with regulatory mechanisms provides logically distinct regulatory regimes for each.

The ESA prohibits federal actions that could adversely affect the species as a whole by adverse modification of critical habitat, or by otherwise jeopardizing the endangered or threatened species. The actions trapped by consultation tend to be larger in scope or scale, and consequently have effects that are unlikely to be limited to a single specimen.

For example, the construction of the Tellico Dam by the Tennessee Valley Authority was a discretionary federal action that some argued would imperil the existence of a certain species, a small fish now synonymous with the ESA, the snail darter. Construction of the dam was near complete when halted by a famous Supreme Court ruling finding that Congress' intent was to "halt and reverse the trend toward species extinction whatever the cost."¹³ Ultimately, another act of Congress exempted and allowed completion of the dam while the snail darter was subsequently discovered to be more numerous and more widely distributed and was eventually downlisted from "endangered" to "threatened" status.¹⁴

Congress' stricter regulatory regime for endangered species couples the requirement for consultation with the take prohibition. In essence, the take prohibition indicates that if a species' future is possibly precarious enough that the loss of a single specimen could be detrimental to the species as a whole, then every last specimen must be protected.

The California condor is a good example. California condors, huge vultures with wingspans of eight feet to ten feet, were and remain so rare that each specimen is considered potentially essential to the species' survival. There was a "planned extinction" in the wild, meaning that the remaining 27 condors were captured for captive-breeding programs.¹⁵ (This was carried out despite early opposition by environmental organizations that argued the condor should be allowed "death [meaning extinction] with dignity."¹⁶) The captive condors are used to propagate offspring that are then reintroduced into the wild. Although large hurdles to condor recovery may remain, three decades into the breeding program carried out by zoos have shown significant successes, with more than 400 condors now roughly split between captive and wild populations.¹⁷

It is, by far, the exception that an endangered species would have a population as small as that of the condor. Congress' default regulatory regime for threatened species that might become endangered in the "foreseeable future" is therefore less severe.¹⁸ The foundation of the regulatory program for threatened species is the requirement for consultation, and only when it is necessary and advisable is the take prohibition applied to a specific threatened animal by a specific special rule. The default position is that the population of these animals is generally secure enough that the incidental loss of some specimens would not push the species over the edge.

13 *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

14 Department of the Interior, "Endangered and Threatened Wildlife and Plants; Final Rule Reclassifying the Snail Darter (*Percina Tanasi*) from an Endangered Species to a Threatened Species and Rescinding Critical Habitat Designation," *Federal Register*, Vol. 49, No. 130 (July 5, 1984), pp. 27510-27514, https://ecos.fws.gov/docs/federal_register/fr854.pdf (accessed October 4, 2017).

15 News release, "Last Wild California Condor Captured for Breeding Program," U.S. Fish and Wildlife Service, April 21, 1987, <https://www.fws.gov/news/Historic/NewsReleases/1987/19870421.pdf> (accessed September 21, 2017).

16 Peter S. Alagona, "Biography of a 'Feathered Pig': The California Condor Conservation Controversy," *Journal of the History of Biology*, Vol. 37, No. 3 (October 2004), pp. 557-583, <https://link.springer.com/article/10.1007/s10739-004-2083-6> (accessed September 20, 2017).

17 U.S. Fish and Wildlife Service Pacific and Southwest Region, "California Condor (*Gymnogyps californianus*)—5-Year Review: Summary and Evaluation," June 2013, https://ecos.fws.gov/docs/five_year_review/doc4163.pdf (accessed November 8, 2017).

18 The statutorily undefined and inherently problematic phrase "foreseeable future" appears to have been first suggested to Congress in earlier drafts of endangered species legislation provided by the Department of the Interior. Given greatly varying facts amongst different species, the Department of the Interior subsequently tried to provide regulatory guidance on the phrase, stating: "In summary, the foreseeable future describes the extent to which the Secretary can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future. Those predictions can be in the form of extrapolation of population or threat trends, analysis of how threats will affect the status of the species, or assessment of future events that will have a significant new impact on the species. The Secretary's ability to rely on predictions may significantly vary with the amount and substance of available data." Memo from David Bernhardt, Solicitor, U.S. Department of the Interior, "The Meaning of 'Foreseeable Future' in Section 3(20) of the Endangered Species Act," January 16, 2009, <https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf> (accessed September 20, 2017).

Along the U.S. eastern seaboard, for example, loggerhead sea turtles are designated as threatened. As a species, this turtle occurs throughout the temperate and tropical regions of the Atlantic, Pacific, and Indian Oceans. It requires decades for females to reach sexual maturity, but when they do, each female may nest three to five times a year, laying some 35 pounds of eggs in a year.¹⁹ They repeat this incredible exercise in propagation every year for well over a decade. Counts of nesting females indicate that there are two areas where more than 10,000 turtles nest, four areas where 1,000 to 9,999 turtles nest, and at least 10 areas where 100 to 999 turtles nest.²⁰ Unlike the condors that are assigned numbers and names, no one has any idea how many loggerhead sea turtles there are.

In designing a system that would deal with the disparate threats facing condors and loggerhead sea turtles, Congress was sensible. However, just a few years after the ESA was enacted, the regulatory agencies adopted a rule turning Congress' system upside down. With a 1975 rule, the stringent take prohibition was applied to *all threatened animals for all acts* that could be considered a "take."²¹ The rule applies to any threatened species added to the list unless a specific special rule is issued for that species.

Under the rule's complex, sweeping scheme, the agencies may, on a case-by-case basis, promulgate a special rule to *exempt* actions that would otherwise be considered illegal. Consequently, everything is illegal that "takes" any threatened animal, unless the agency issues a special rule allowing the particular action with regard to a particular species, say harvesting a kind of tree where the species may nest, or plowing a field where the species may burrow. This is the opposite of Congress' design that everything is legal, unless the agency promulgates a special rule

prohibiting a specific action with respect to a specific threatened animal.

The Pacific Legal Foundation (PLF), counsel to petitioners seeking rescission of this regulation, points out that the ESA's structure clearly supports the conclusion that Congress did not intend for the take prohibition to be applied in this manner. Further, the PLF documents that the legislative history, including the Senate's ESA floor manager statements, legislative report text, and early Department of the Interior statements support this conclusion.²²

The "Take" Prohibition's Aggravating Factors

The take prohibition is more severe than other ESA prohibitions in that it strictly prohibits any act that takes a single member of a listed species. Those found guilty of "taking" a single threatened snail species (of which there are about a dozen) could "be fined not more than \$50,000 or imprisoned for not more than one year, or both."²³

A prohibition with such potentially drastic consequences is a more severe restriction than the consultation prohibitions against jeopardizing an entire species or destroying its critical habitat that apply to both endangered and threatened species. It makes sense to generally limit such severe regulations only to endangered species.

Additionally, while many elements of the take prohibition might seem to be avoidable bright lines that, when crossed, would reveal malicious intent, this is not necessarily so. One can be engaged in otherwise perfectly legal, ethical, moral and, in fact, laudable and socially essential, activity like providing food or water, energy, fiber, minerals, transportation, or shelter for humanity, and still illegally "kill" a listed

19 National Marine Fisheries Service, "Loggerhead Turtle (*Caretta caretta*)," www.nmfs.noaa.gov/pr/species/turtles/loggerhead.html (accessed December 7, 2015).

20 U.S. Fish and Wildlife Service, North Florida Ecological Services Office, "Loggerhead Sea Turtle (*Caretta caretta*)," Fact Sheet, last updated April 2015, <https://www.fws.gov/northflorida/seaturtles/turtle%20factsheets/loggerhead-sea-turtle.htm> (accessed September 20, 2017).

21 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 (accessed September 20, 2017).

22 National Federation of Independent Business' Petition to Repeal Title 50 of the Code of Federal Regulations Section 17.31, Petition to the United States Fish and Wildlife Service, Damien Schiff and Johnathan Wood, Pacific Legal Foundation, March 15, 2016. The legality of the regulation was challenged once and was upheld in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 1 F.3d 1 (D.C. Cir. 1993). However, Jonathan Wood thoroughly documents why that decision was wrong: "Take it to the Limit: The Illegal Regulation Prohibiting the Take of Any Threatened Species Under the Endangered Species Act," *Pace Environmental Law Review*, Vol. 33, No. 1 (Fall 2015), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1784&context=pehr> (accessed September 20, 2017).

23 Endangered Species Act, Penalties and Enforcement, Sec. 11(b).

animal species. This is because the ESA is a “strict liability law,” under which someone can be held legally responsible for his actions regardless of his intent or mental state.

A farmer on his tractor could unwittingly plow a snake’s burrow or could put his cow in a pasture where it steps on salamanders in a seasonal puddle. The law does not require the farmer to intend to hit the snake with his plow, or the rancher to intend for his cow to step on salamanders, to potentially become felons. It is enough under the ESA for the rancher to know that he put his cow in the pasture, the farmer to know that he was driving his tractor, or even the homeowner to know that he was mowing his lawn. For example, the U.S. FWS outlined a raft of extraordinary rules for homeowner’s association members on a Lake Erie island to follow in order to make sure that they would not be prosecuted for accidentally “taking” a threatened water snake: Homeowners were not allowed to let their pet cats outside, they are forbidden from spraying poison ivy with weed killer if a snake was within 20 feet, they had to pay for government research and allow researchers to access their property (including the two artificial snake dens constructed on each property), and they could not mow certain portions of their lawns unless it is at least 60 degrees Fahrenheit.²⁴ The ESA’s prohibitions no longer apply to the Lake Erie watersnake, as it was delisted.²⁵

It is bad policy to criminalize these otherwise lawful and socially beneficial activities. For criminal violations, there should be a heightened *mens rea* requirement, meaning that the government should have to prove that violators were knowingly flouting the law and were not law-abiding people who wound up becoming unwittingly snared by the criminal law because they had no idea that an otherwise lawful act

was illegal.

It is also unwise to arm enforcement officials with the ability to pursue criminal prosecution for normal, reasonable behavior and, consequently, the ability to use the threat of doing so to extract concessions.

“Harm”—the Most Expansive Take Prohibition

Additionally, innumerable actions essential to farming, ranching, mining, energy production, building roads, bridges, homes, and other vital activities can easily run afoul of the “harm” prohibition. The terms “harm,” and “harass” to some degree, are more subjective than the other elements making up the take prohibition, and harm has been interpreted particularly broadly.

Harm is defined as

an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.²⁶

While this may appear rather clear cut, to prove “actual” injury, the U.S. FWS explains that evidence used can include population studies, laboratory studies, model-based procedures, and information and data in the scientific literature.²⁷ Further, an act could violate the take prohibition even if, on its own, it would only constitute a contributor to the “injury.”²⁸

The golden-cheeked warbler, for example, is a bird that nests in juniper trees. Nesting, by definition, is part of its breeding, rearing, and sheltering behavior. There may be a few juniper trees on someone’s

24 U.S. Fish and Wildlife Service Environmental Conservation Online System, “Biological Opinion for the issuance of a Section 10(a)(1)(B) Incidental Take Permit for Lake Erie Water Snake (*Nerodia sipedon insularum*) in the Long Point Homeowner’s Association, LLC Habitat Conservation Plan, Kelleys Island, Erie County, Ohio,” May 2003, https://ecos.fws.gov/docs/plan_documents/bobs/bobs_188.pdf (accessed November 8, 2017).

25 U.S. Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Removal of the Lake Erie Watersnake (*Nerodia sipedon insularum*) From the Federal List of Endangered and Threatened Wildlife,” *Federal Register*, Vol. 76, No. 158, P50680-50702, August 16, 2011, <https://www.gpo.gov/fdsys/pkg/FR-2011-08-16/pdf/2011-20104.pdf> (accessed December 7, 2017).

26 National Marine Fisheries Service and National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; Definition of ‘Harm,’” *Federal Register*, Vol. 64, No. 215 (November 8, 1999), p. 60727, <https://www.fws.gov/endangered/esa-library/pdf/f991108.pdf> (accessed September 20, 2017).

27 *Ibid.* “Injury may be shown through a variety of methods and types of evidence. These include, but are not limited to, field surveys and assessments, population studies, laboratory studies, model based procedures, information and data in the scientific literature, or expert witness testimony consisting of inferences or opinions drawn from facts pertaining to a given act(s) of habitat modification or degradation.”

property where the owner wants to plant different trees, and so cuts down the junipers. This particular action may not have amounted to causing actual injury to a golden-cheeked warbler. However, if the action is considered, along with the actions of other people who cut down other juniper trees, the U.S. FWS could conclude that the property owner contributed to actual injury and thus harmed a golden-cheeked warbler. The agency could argue that warblers nest in juniper trees at a density of X birds per acre, and that the total acreage of juniper trees has diminished by Y, so the warblers must have been reduced by Z. The property owner could face serious legal jeopardy for cutting down some trees.

Bad Incentives Made Worse

The arbitrary application of the take prohibition to all threatened animals has a number of negative consequences.

While this regulatory sleight of hand indiscriminately applied the take prohibition, it did not change the threshold for listing a threatened species. Since the bar for listing threatened animals is lower, but the regulatory powers accrued are the same, it creates an incentive to list threatened animals for those seeking expanded regulatory authority or seeking to thwart economic activity.

In fact, regulatory agencies arguably increase their authority more with a “threatened” listing than with an “endangered” listing. With threatened animals as now managed, regulatory agencies may seek to permit selected activities, such as specific farming, ranching, or forestry practices (whatever they choose), under a subchapter of law titled “prohibitions,” essentially setting up a system where licenses are doled out.

Environmental activists who seek to use the ESA’s citizen-suit provisions to extract concessions, or to delay or outright block productive activities,

understand the significance of the rule. According to the PLF’s Jonathan Wood, during the 1990s environmental groups launched three times as many lawsuits against the U.S. FWS about the listing of threatened species than about the listing of endangered species.²⁹

The regulation also creates a disincentive for landowners to make agencies aware of threatened animals or suitable habitat on their property: Doing so is more likely to invite a regulatory regime with severe consequences. The disincentive may result in less information, which could be valuable to evaluating and managing species, provided to the agencies. As private property is recognized as providing crucial habitat, this is not an inconsequential consideration.³⁰

Perverse incentives under the ESA have been long recognized. A former FWS official addressing the availability of the juniper habitat for golden-cheeked warblers and another listed bird, the black-capped vireo, stated that the “incentives are wrong here. If I find a rare metal on my property the value goes up. But if a rare bird occupies the land, the value disappears.”³¹ This perverse structure gave rise years ago to the phrase “shoot, shovel, and shut up.” Decades before Michael Bean became the Obama Administration’s Principle Deputy Assistant Secretary for Fish, Wildlife and Parks, he acknowledged that there is “increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems” and that these were “fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints.”³²

The twisted regulatory regime may discourage landowners from taking part in conservation activities to prevent a threatened animal from being “uplisted” to endangered. Unless a special rule would be eliminated, having the species uplisted may make

28 Ibid. The notice explains: “An action which contributes to injury can be a ‘take’ even if it is not the only cause of the injury.”

29 National Federation of Independent Business’ Petition to Repeal Title 50 of the Code of Federal Regulations Section 17.31, Petition to the United States Fish and Wildlife Service, Damien Schiff and Johnathan Wood, Pacific Legal Foundation, March 15, 2016.

30 U.S. Department of Agriculture Forest Service, “Threatened and Endangered Species and the Private Landowner,” <https://www.na.fs.fed.us/spfo/pubs/wildlife/endangered/endangered.htm> (accessed September 20, 2017).

31 Jonathan H. Adler, “Bad for Your Land, Bad for the Critters,” *The Wall Street Journal*, December 31, 2003, <https://www.wsj.com/articles/SB107283504618484600> (accessed September 20, 2017).

32 Michael Bean as quoted by Brian Seasholes, “Anecdotes on Perverse Incentives under the Endangered Species Act,” Competitive Enterprise Institute, Washington, DC, 1997.

no difference to a landowner. In fact, a landowner could conclude that extinction is more likely to alleviate a burden.

Similarly, there is less incentive to help improve an animal's status from endangered to threatened if the change does not eliminate take prohibitions. Under the system designed by Congress, the default outcome eliminates the take prohibition, while under the twisted system currently in place it requires a special rule. The landowner, however, can have no assurance that a downlisting would include the special rule.

The structure this rule creates likely contributes to increased conflict between landowners and regulators, as more acts potentially run afoul of more species, and the species, being threatened as opposed to being endangered, are generally more likely to be more numerous or widespread. Further, this contortion exacerbates a fundamental flaw of the ESA in that it increases the burden imposed on private landowners. Landowners are forced to bear a national conservation program's costs—which can be likened to having to provide property for national parks without compensation.

Recommendations

As the Administration seeks to identify regulations that “are outdated, unnecessary, or ineffective,” the “take” regulation should itself be endangered.³³ If this rule is rescinded, it could require the issuance of some special rules for some threatened species that have been wrongly regulated up to this point, but the convenience of continuing to regulate arbitrarily and capriciously is not a persuasive argument. No matter what changes are proposed to this law or its implementation, there will be opposition.

To avoid such confrontation is, at best, to accept the fallacy that the current law and its implementation are fine. Ample evidence shows that is not the case.

Therefore, the Administration should implement the following recommendations:

- Do not apply the blanket take prohibition to any future threatened species listings.
- Ensure that any necessary and advisable specific prohibitions against take of a species are identified in special rules that accompany future listings of threatened species or future downlistings of endangered species to threatened status.
- Rescind the rule generally applying the take prohibition to threatened species. This will likely require issuance of new special rules for some of the currently listed threatened species.

Conclusion

Whether preferred by regulatory agencies or not, the indiscriminate application of the take prohibition to threatened species and the scheme it establishes contradict the system created by Congress, and create conservation disincentives. Restoring the distinction between endangered and threatened species as called for in law would reduce conservation disincentives and constitute a significant improvement in the endangered and threatened species recovery program.

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33 News release, “Presidential Executive Order on Enforcing the Regulatory Reform Agenda,” The White House, February 24, 2017, <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda> (accessed September 20, 2017).