

The ESA Amendments Act of 2025 Will Help Species

Species benefit when the law works for property owners, too

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In 1973, the Endangered Species Act (ESA) was enacted into law.¹ Since that time, more than half a century ago, the law has been unsuccessful in its principal goal of recovering species.² While roughly 99 percent of listed species have not gone extinct, only about 3 percent of species have been delisted because of recovery.³

Not only that, but the Fish and Wildlife Service (FWS) has come up short of its own recovery projections. A report by the Property and Environment Research Center identified 300 species that the FWS had projected would be recovered by 2023. Of those 300 species, only 13 had been recovered.⁴

Unsurprisingly, over the years, many lessons have been learned about how the ESA and its implementation can be changed to achieve better outcomes. Unfortunately, many people equate amending the statute with an attack on species conservation. This misconception is also prevalent in Congress.

If legislators share the desire for an ESA that does a better job of recovering species and works better for property owners, there must be a willingness to modernize the ESA to reflect the lessons learned. An important effort to reform the statute is the ESA Amendments Act of 2025 (H.R. 1897), introduced by Rep. Bruce Westerman (R-AR).⁵

This bill addresses several long-standing problems, including treating threatened species as if they are



endangered, frivolous critical habitat designations, a lack of transparency on costs, and more.⁶ Addressing these issues would make the ESA work better for both listed species and property owners.

This paper focuses on three specific reforms in the bill that would make common-sense changes to the ESA.

Reform 1: Stop treating threatened species as if they are endangered

There are two agencies responsible for implementing the ESA: the FWS for terrestrial species and the National Marine Fisheries Service (NMFS) for marine species.

¹ S. 1983 – Endangered Species Act of 1973, 93rd Congress, First Session, <https://www.congress.gov/bill/93rd-congress/senate-bill/1983>.

² Section 2 of the ESA is clear that the principal goal is to ‘conserve’ species, 16 U.S.C. § 1531. Section 3 defines “conserve” as “the use of all methods... to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3). Bringing species to the point where the measures of the law are no longer necessary is, in other words, recovery. Since this definition of conserve is synonymous with the ordinary definition of recovery, by the transitive property the principal goal of the ESA is the recovery of species.

³ In total, 32 species have gone extinct, 82 species have recovered, and 2,524 have been listed. See “Listed Species Summary (Boxscore),” Fish and Wildlife Service Environmental Conservation Online System (ECOS), accessed February 13, 2026, <https://ecos.fws.gov/ecp/report/boxscore>; and “Delisted Species,” Fish and Wildlife Service Environmental Conservation Online System (ECOS), accessed February 13, 2026, <https://ecos.fws.gov/ecp/report/species-delisted>.

⁴ Katherine Wright and Shawn Regan, *Missing the Mark: How the Endangered Species Act Falls Short of Its Own Recovery Goals*, (Bozeman, MT: Property and Environment Research Center, July 26, 2023), <https://www.perc.org/2023/07/26/missing-the-mark/>.

⁵ H.R. 1897 – ESA Amendments Act of 2025, 119th Congress, First Session, <https://www.congress.gov/bill/119th-congress/house-bill/1897/text/toc-H75468ECFB5E844FEEA915EB39D3B68EC>.

⁶ For additional reforms, see Jonathan Wood, Property and Environment Research Center (PERC), “Modernization of the Endangered Species Act,” Testimony before the US House Committee on Natural Resources, September 26, 2018, <https://www.perc.org/2018/09/26/modernization-of-the-endangered-species-act/>; and American Stewards of Liberty, “7 Essential Provisions Needed,” <https://americanstewards.us/issues/esa/>.

For most of the ESA's history, the FWS has mismanaged threatened species and burdened property owners by improperly treating threatened species as if they are endangered species.⁷

In the ESA, Congress differentiated between threatened and endangered species based on the risk posed to each. Endangered species are those in danger of extinction throughout all or a significant portion of their range.⁸ Threatened species are likely to become an endangered species within the foreseeable future.⁹ This different level of concern should be reflected in how the ESA applies in practice.

That understanding is simply common sense. After all, why would Congress create two categories of species based on risk levels unless it intended to treat them differently? Some species are on the brink of extinction and might benefit from strong prohibitions on certain activities to help conserve them. Others are more stable but still vulnerable and would benefit from a more flexible approach.

The ESA reinforces that idea by automatically applying some prohibitions, listed in section 9 of the statute, to endangered species but not to threatened species.¹⁰ However, for most of the law's existence, the FWS has ignored this distinction and automatically applied section 9 prohibitions to threatened species. This policy is known as the blanket 4(d) rule.¹¹

While section 4(d) of the statute does authorize the FWS and the NMFS to apply some (or all) of the section 9 prohibitions to threatened species under certain conditions,¹² the restrictions were meant to be tailored and species-specific not categorical.¹³

How the take prohibition hurts property owners. The blanket 4(d) rule is a problem for property owners, particularly because the section 9 prohibitions include what is known as the "take" prohibition.¹⁴ The statute defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."¹⁵

Section 4(d) of the statute is clear that the prohibition against take automatically applies to endangered species and *can* apply to a threatened species on a case-by-case basis, but only under certain conditions.¹⁶

The take prohibition is one of the most direct ways the agency uses the ESA to impose severe restrictions on property use, arguably infringing on property rights and making private property owners bear a disproportionate share of the cost of the ESA.

In the past, courts and the FWS have interpreted take extremely broadly to reach all manner of ordinary land-use activities on private lands.¹⁷ As a result, the agency has barred property owners from engaging in otherwise regular activities on their land, like farming or timber harvesting, even when barring those activities is unlikely to

⁷ The blanket 4(d) protections for wildlife were first implemented pursuant to Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants Reclassification of American Alligator and Other Amendments," final rule, *Federal Register*, Vol. 40, No. 118 (September 26, 1975), p. 44425, https://www.fws.gov/sites/default/files/federal_register_document/FR-1975-09-26.pdf#page=115. The blanket 4(d) protections for plants were first implemented pursuant to Fish and Wildlife Service, "General Provisions, General Permit Procedures and Endangered and Threatened Wildlife and Plants," final rule, *Federal Register*, Vol. 42, No. 122 (June 24, 1977), p. 32380, <https://www.govinfo.gov/content/pkg/FR-1977-06-24/pdf/FR-1977-06-24.pdf#page=148>.

⁸ 16 U.S.C. § 1532(6).

⁹ 16 U.S.C. § 1532(20).

¹⁰ 16 U.S.C. § 1538(a).

¹¹ The blanket 4(d) protections for wildlife were first implemented pursuant to Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants Reclassification of American Alligator and Other Amendments," final rule, *Federal Register*, Vol. 40, No. 118 (September 26, 1975), p. 44425, https://www.fws.gov/sites/default/files/federal_register_document/FR-1975-09-26.pdf#page=115. The blanket 4(d) protections for plants were first implemented pursuant to Fish and Wildlife Service, "General Provisions, General Permit Procedures and Endangered and Threatened Wildlife and Plants," final rule, *Federal Register*, Vol. 42, No. 122 (June 24, 1977), p. 32380, <https://www.govinfo.gov/content/pkg/FR-1977-06-24/pdf/FR-1977-06-24.pdf#page=148>.

¹² 16 U.S.C. § 1533(d).

¹³ Competitive Enterprise Institute, "CEI Comments on the Proposed Rescission of the Blanket 4(d) Rule," December 22, 2025, https://cei.org/regulatory_comments/cei-comments-on-the-proposed-rescission-of-the-blanket-4d-rule/.

¹⁴ 16 U.S.C. § 1538(a)(1)(b) and 16 U.S.C. § 1538(a)(1)(c).

¹⁵ 16 U.S.C. § 1532(19).

¹⁶ *Ibid* and see Comments of the Pacific Legal Foundation and American Forest Resource Council in the matter of reinstating the blanket 4(d) rule before the Fish and Wildlife Service, Docket No. FWS-HQ-ES-2023-0018, August 21, 2023, <https://www.regulations.gov/comment/FWS-HQ-ES-2023-0018-106287>.

¹⁷ Specifically, the term harm within the definition of take has been interpreted broadly. See, Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Final Redefinition of 'Harm,'" final rule, *Federal Register*, Vol. 46, No. 213 (November 4, 1981), pp. 54748 – 54750, https://archives.federalregister.gov/issue_slice/1981/11/4/54746-54750.pdf#page=3; and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). For additional discussion on how the term harm has been interpreted, see Pacific Legal Foundation, "Rescinding the Definition of 'Harm' Under the Endangered Species Act (Docket No. FWS-HQ-ES-2025-0034)," May 19, 2025, <https://www.regulations.gov/comment/FWS-HQ-ES-2025-0034-232862>.

contribute to species conservation.¹⁸ Even worse, the FWS often restricts private land usage under the ESA without compensating the property owners.¹⁹

Perverse incentives. There are already perverse incentives in the ESA.²⁰ For example, the threat of severe restrictions on property use from the take prohibition incentivizes property owners to preemptively destroy any potential habitat so that their property is never regulated in the first place.²¹

The blanket 4(d) rule makes this problem worse by automatically applying the take prohibition to threatened species, thereby incentivizing even more property owners to destroy potential habitat preemptively.

When properly implemented, the ESA can create some positive incentives. For example, property use restrictions due to the take prohibition for endangered species are lifted as the species' status improves to threatened. Therefore, property owners are incentivized to participate in species conservation. Similarly, property owners are incentivized to avoid having a threatened species fall to endangered because they would not want the take prohibition imposed upon them. The blanket 4(d) rule eliminates these positive incentives.

In 2019, the Trump administration FWS appropriately rescinded the blanket 4(d) rule. In its rulemaking, the agency captured how the change would create better incentives: "Private landowners and other stakeholders

may see more of an incentive to work on recovery actions for endangered species, with an eventual goal of downlisting to threatened species status with a species-specific 4(d) rule that might result in reduced regulation."²²

NMFS properly interprets the law. The blanket 4(d) rule also appears to be detrimental to species recovery. The other agency responsible for implementing the ESA, NMFS, has rightfully never adopted the blanket 4(d) rule. Notably, species under NMFS jurisdiction have experienced better recovery rates than those under FWS jurisdiction. As noted by PERC's Jonathan Wood, NMFS has a recovery rate of 6.7 percent while the FWS has a recovery rate of only 2.5 percent.²³ While many factors contribute to these outcomes, the agencies' differing approaches under section 4(d) are likely one of them. Aligning the FWS's implementation with the NMFS's model could improve consistency and potentially conservation outcomes.

Regulatory uncertainty. As noted above, the FWS appropriately rescinded the blanket 4(d) rule in 2019 to restore ESA implementation to the way Congress intended.²⁴ Unfortunately, in 2024 the Biden administration FWS reinstated the blanket rule.²⁵

At the end of 2025, the second Trump administration FWS once again proposed rescinding the blanket 4(d) rule. In the proposed rule, the agency correctly noted that, "[t]he statutory text, structure, and context make clear that Congress intended for the Service to determine what

¹⁸ For example, in Utah, the listing of the Utah prairie dog restricts residents from conducting normal activities on their property. See Roger Pilon, Ilya Shapiro, Trevor Burrus, Julio Colomba, Jonathan H. Adler, and Josh Blackman, *People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, Cato Institute, May 26, 2015, <https://www.cato.org/legal-briefs/people-ethical-treatment-property-owners-v-us-fish-wildlife-service>; and *Prairie dogs and property owners: Both need protection from massive federal overreach*, Pacific Legal Foundation, <https://pacificlegal.org/case/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/>.

¹⁹ For a recent case study on this issue see *United Water Conservation District v. United States*, 133 F.4th 1050 (Fed. Cir. 2025). For additional discussion on this case, see Thomas A. Berry, Dan Greenberg, and Sam Rutzick, *United Water Conservation District v. United States*, Cato Institute, December 3, 2025, <https://www.cato.org/legal-briefs/ united-water-conservation-district-v-united-states>; and Benjamin Rubin, *Federal Circuit Diverts ESA Takings Challenge*, Nossaman LLP, April 9, 2025, <https://www.endangeredspecieslawandpolicy.com/federal-circuit-diverts-esa-takings-challenge>. While property owners have the option to obtain an incidental take permit, doing so is costly, tedious, and are only awarded in certain situations. Incidental take permits allow non-federal actors to partake in what are otherwise lawful activities when the activity may result in the take of a listed species. "3-200-56: Incidental Take Permits Associated with a Habitat Conservation Plan," Fish and Wildlife Service, accessed February 13, 2026, <https://www.fws.gov/service/3-200-56-incidental-take-permits-associated-habitat-conservation-plan>.

²⁰ For additional discussion on the blanket rule's perverse incentives, see Property and Environment Research Center (PERC), "Comment Opposing the Proposed Reinstatement of the 'Blanket Rule' Regulating Threatened Species as if They Were Endangered," August 21, 2023, <https://www.perc.org/wp-content/uploads/2023/08/PERC-4dComment-8212023.pdf>.

²¹ For further discussion on the incentive to destroy habitat preemptively, see Jonathan H. Adler, "Anti-Conservation Incentives," *Regulation*, Winter 2008, <https://www.cato.org/sites/cato.org/files/serials/files/regulation/2007/12/v30n4-6.pdf>.

²² Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants," final rule, *Federal Register*, Vol. 84, No. 166 (August 27, 2019), p. 44757, <https://www.federalregister.gov/documents/2019/08/27/2019-17519/endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife>.

²³ Property and Environment Research Center (PERC), "Comment Opposing the Proposed Reinstatement of the 'Blanket Rule' Regulating Threatened Species as if They Were Endangered," August 21, 2023, <https://www.perc.org/wp-content/uploads/2023/08/PERC-4dComment-8212023.pdf>.

²⁴ Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants," final rule, *Federal Register*, Vol. 84, No. 166 (August 27, 2019), pp. 44753 – 44760, <https://www.federalregister.gov/documents/2019/08/27/2019-17519/endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife>.

²⁵ Fish and Wildlife Service, "Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants," final rule, *Federal Register*, Vol. 89, No. 67 (April 5, 2024), pp. 23919 – 23941, <https://www.federalregister.gov/documents/2024/04/05/2024-06901/endangered-and-threatened-wildlife-and-plants-regulations-pertaining-to-endangered-and-threatened>.

protections are needed for threatened species on a species-by-species basis.”²⁶

If this rulemaking is finalized, a future administration will likely reinstate the blanket rule again, as is so often the case. This back-and-forth creates uncertainty for regulated stakeholders who must continually adapt to new regulations. Congress can help address this issue by passing legislation.

The ESA Amendments Act ends the blanket 4(d) rule. The ESA Amendments Act²⁷ amends section 4(d) of the statute²⁸ to help clarify that a blanket 4(d) rule is unauthorized. If enacted, the language would treat threatened species the way Congress originally envisioned in 1973 and create better incentives for property owners to participate in species conservation. Enacting the new statutory language will also help ensure that property owners do not bear a disproportionate share of the ESA’s costs and that affected stakeholders will have regulatory certainty. (See Appendix 1 for the ESA Amendments Act’s language on the blanket 4(d) rule.)

Reform 2: Stop regulating land that is not actually critical habitat for endangered or threatened species

Section 4 of the ESA requires the agencies to designate critical habitat concurrently with the listing of species.²⁹ The statute defines “critical habitat,”³⁰ but does not define habitat. In simple terms, as the FWS explains, critical habitat is specific areas that are essential to a species’ conservation.³¹

Critical habitat designations are another way the ESA imposes the costs of conserving species on property owners rather than society. Few examples illustrate this issue better than the critical habitat designations for the dusky gopher frog.

In 2001, the dusky gopher frog was listed as an endangered species,³² and on June 12, 2012, the FWS designated 1,544 acres of private forest land in St. Tammany Parish, Louisiana, as unoccupied critical habitat.³³ A group of families primarily owned the land. Weyerhaeuser, a commercial timber company, leased that land and owned the remainder.

From the beginning, the designation was unlikely to benefit the frog. In fact, the frog was unable to survive on the property. In its final rule designating the critical habitat, the FWS admitted that the property does “not currently contain the essential physical or biological features of critical habitat”³⁴ but decided to designate it as critical habitat anyway. There had not even been a single sighting of the frog in the state of Louisiana since 1965.³⁵ Mark Miller of the Pacific Legal Foundation and lead counsel for the family landowners put it best when he said, “[t]he feds may as well have labeled this Louisiana property critical habitat for a polar bear. It would have done just as much good.”³⁶

The agency also projected that the designation would bar future development of the property and deprive the property owners of a whopping \$33.9 million.³⁷

If the FWS can designate property as critical habitat for a species even though the species could not survive there and the property does not contain the essential features

²⁶ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants,” proposed rule, *Federal Register*, Vol. 90, No. 233 (November 21, 2025), pp. 52587 – 52592, <https://www.federalregister.gov/documents/2025/11/21/2025-20552/endangered-and-threatened-wildlife-and-plants-regulations-pertaining-to-endangered-and-threatened>.

²⁷ H.R. 1897 – ESA Amendments Act of 2025, 119th Congress, <https://www.congress.gov/bill/119th-congress/house-bill/1897/text/toc-H75468ECFB5E-844FEAA915EB39D3B68EC>.

²⁸ 16 U.S.C. § 1533(d).

²⁹ 16 U.S.C. § 1533(a)(1)(3).

³⁰ 16 U.S.C. § 1532(5).

³¹ “Critical Habitat,” Fish and Wildlife Service, accessed April 8, 2026, <https://www.fws.gov/project/critical-habitat>.

³² Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Final Rule To List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered,” final rule, *Federal Register*, Vol. 66, No. 233 (December 4, 2001), pp. 62993 – 63002, <https://www.federalregister.gov/documents/2001/12/04/01-29923/endangered-and-threatened-wildlife-and-plants-final-rule-to-list-the-mississippi-gopher-frog>.

³³ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog),” final rule, *Federal Register*, Vol. 77, No. 113 (June 12, 2012), pp. 35118 – 35161, <https://www.federalregister.gov/documents/2012/06/12/2012-13488/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-dusky-gopher-frog>.

³⁴ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog),” final rule, *Federal Register*, Vol. 77, No. 113 (June 12, 2012), pp. 35135, <https://www.federalregister.gov/documents/2012/06/12/2012-13488/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-dusky-gopher-frog>.

³⁵ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Mississippi Gopher Frog,” revised proposed rule; availability of draft economic analysis; and reopening of comment period, *Federal Register*, Vol. 76, No. 187 (September 27, 2011), p. 59783, <https://www.federalregister.gov/documents/2011/09/27/2011-24046/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-mississippi-gopher-frog#:~:text=gopher%20frogs%20were%20last%20observed%20in%20Louisiana%20in%201965>.

³⁶ Pacific Legal Foundation, “Final victory for Edward Poitevent and property rights,” press release, July 3, 2019, <https://pacificlegal.org/press-release/final-victory-for-edward-poitevent-and-property-rights/>.

³⁷ *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S. 9, 9 (2018).

of critical habitat, then everyone's property is at risk of being designated and regulated. When such a policy is in place, property owners are incentivized to preemptively destroy potential habitat to try to avoid having their property designated.

Fortunately, the property owners successfully challenged the critical habitat designation. In *Weyerhaeuser v. Fish and Wildlife Service*, the US Supreme Court unanimously found that an area must first be habitat before it can be considered critical habitat. The Court also found that the Service's decision not to exclude areas from designation is subject to judicial review.³⁸

Nearly two-thirds of listed species rely on private land for habitat,³⁹ but imposing unnecessary costs and burdens on private property owners does no favors for species. To better fulfill the purpose of the law, Congress must find a way to make the ESA work for property owners not against them. To start, Congress should define habitat so that areas that cannot realistically support a species cannot be designated as critical habitat.

The ESA Amendments Act ends improper critical habitat designations. To limit the ability of agencies to designate critical habitat frivolously, the ESA Amendments Act does two things.

The bill, like *Weyerhaeuser*, clarifies that an area must first be considered habitat before it can be designated as critical habitat.

The bill's definition of habitat states that habitat (and therefore critical habitat) must contain the resources and conditions needed to support the life processes of the species. It also clarifies that habitat does not include areas outside the species' current or historic range, or areas visited by vagrant individual animals. Vagrant individual animals are those that have wandered outside their normal range. This definition will help ensure that fewer designations like that of the dusky gopher frog are promulgated in the future. As a result, fewer property owners will bear the unreasonable costs of critical habitat designations that do not even benefit the species.

The ESA Amendments Act also requires the agencies to consider how critical habitat designations will affect the existing efforts of private landowners to conserve species.

This requirement helps ensure that federal regulations do not undermine continuing private conservation efforts.⁴⁰ (See Appendix 2 for the ESA Amendments Act's critical habitat language.)

Reform 3: Assess the economic effects

The ESA states that listing decisions must be made "solely on the basis of the best scientific and commercial data available."⁴¹ Specifically, the agencies rely on a five-factor, scientific analysis in section 4(a)(1) of the ESA that does not include the consideration of costs or economic effects to determine whether a species warrants listing.⁴² Unfortunately, the agencies have used this science-only requirement to avoid conducting any analysis of the economic effects of listing.

The requirement to make listing decisions solely on science and commercial data does not preclude the agencies from analyzing the economic effects of listing decisions so long as the analysis does not inform whether a species is listed. The agencies should conduct economic effects analyses for the express purpose of informing the public and promoting transparency, not for listing decisions.

The FWS and NMFS could look at the way the Environmental Protection Agency informs the public about National Ambient Air Quality Standards. When the EPA promulgates new standards, it produces a regulatory impact analysis to inform the public about the social costs and benefits of the regulation.⁴³ The purpose of the analysis is not to inform the decision to regulate.

A similar type of analysis would give the agencies, Congress, and the public a sense of the true costs of the ESA and a starting point for figuring out how to improve the law. Further, listings can have substantial effects on local and national economies. Economic analyses ensure that any burdens on those economies are visible and give affected parties an opportunity to prepare accordingly. This type of disclosure is far better than hiding the economic effects until regulations are enforced.

The ESA Amendments Act requires economic effects analyses. To help promote transparency about the costs of the ESA, the ESA Amendments Act requires the agencies to prepare analyses to determine the economic effects of listing a species. Additionally, they must analyze effects on

³⁸ *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S. 9 (2018).

³⁹ See the first sentence of "Habitat Conservation Plans," Fish and Wildlife Service, accessed February 13, 2026, <https://www.fws.gov/service/habitat-conservation-plans>.

⁴⁰ For a case study on the issue of FWS regulations undermining private conservation efforts, see Pacific Legal Foundation, "Illegal critical habitat designation punishes family's voluntary conservation efforts," <https://pacificlegal.org/case/skipper-v-u-s-fish-and-wildlife-service/>.

⁴¹ 16 U.S.C. § 1533(a)(1).

⁴² The five-factor analysis can be found at 16 U.S.C. § 1533(a)(1).

⁴³ "Regulatory Impact Analyses for Air Pollution Regulations," Environmental Protection Agency, accessed February 13, 2026, <https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/regulatory-impact-analyses-air-pollution>.

national security, human health and safety, and any other relevant effects of listing a species. The bill’s language also clarifies that these analyses do not change the five factors used to determine whether a species warrants listing, which are outlined in section 4(a)(1).⁴⁴ (See Appendix 3 for the ESA Amendments Act’s language on economic effects of listings.)

Policy recommendations

The ESA was amended three times within its first 15 years. As legislators learned how to conserve species more effectively, they sought to implement those lessons. However, the last major amendment to the statute was made in 1988, almost 40 years ago.

Congress should again amend the statute to reflect lessons learned. Below are some reform ideas. Congress should:

- **Adopt the three reforms discussed in this report.** While there are many important reforms that Congress should address regarding the ESA, the three reforms in this report offer a good starting point. Adopting these reforms will help make the ESA work better for property owners and listed species.
- **Not rely on agency regulations.** In 2019, the agencies finalized rules that addressed many important problems with the ESA.⁴⁵ In 2024, the Biden administration rescinded those rules.⁴⁶ Last year, the Trump administration re-proposed rules that mirrored those from 2019.⁴⁷ This regulatory back-and-forth shows why it is essential that Congress speak on these issues in the statute in order to make the changes durable.

- **Develop a standard template for economic analyses.** The ESA Amendments Act requires the FWS and the NMFS to conduct economic effects analyses when species are listed. Having a template that agencies can use for these analyses will streamline the process and promote consistency and coordination.

A different outcome requires different policy

The ESA has been unsuccessful in its principal goal of recovering species. Only 3 percent of species have ever been delisted because of recovery. Some changes should be made.

The ESA Amendments Act addresses some of the ways the law has failed in the past so that the failures do not continue.

When a law has been unsuccessful for over 50 years, lawmakers should try something new. If legislators want the ESA to work better for species and people, they should adopt the three reforms above in the ESA Amendments Act as well as many other changes to improve the statute.

About the author

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⁴⁴ 16 U.S.C. § 1533(a)(1).

⁴⁵ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants,” final rule, *Federal Register*, Vol. 84, No. 166 (August 27, 2019), pp. 44753 – 44760, <https://www.federalregister.gov/documents/2019/08/27/2019-17519/Endangered-and-threatened-wildlife-and-plants-regulations-for-prohibitions-to-threatened-wildlife>; Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,” final rule, *Federal Register*, Vol. 84, No. 166 (August 27, 2019), pp. 44976 – 45018, <https://www.federalregister.gov/documents/2019/08/27/2019-17517/Endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation>; Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; and Regulations for Listing Species and Designating Critical Habitat,” final rule, *Federal Register*, Vol. 84, No. 166 (August 27, 2019), pp. 45020 – 45053, <https://www.federalregister.gov/documents/2019/08/27/2019-17518/Endangered-and-threatened-wildlife-and-plants-regulations-for-listing-species-and-designating>.

⁴⁶ Fish and Wildlife Service, “Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants,” final rule, *Federal Register*, Vol. 89, No. 67 (April 5, 2024), pp. 23919 – 23941, <https://www.federalregister.gov/documents/2024/04/05/2024-06901/Endangered-and-threatened-wildlife-and-plants-regulations-pertaining-to-endangered-and-threatened>; Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation,” final rule, *Federal Register*, Vol. 89, No. 67 (April 5, 2024), pp. 24268 – 24298, <https://www.federalregister.gov/documents/2024/04/05/2024-06902/Endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation>; and Fish and Wildlife Service and the National Oceanic and Atmospheric Administration, “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat,” final rule, *Federal Register*, Vol. 89, No. 67 (April 5, 2024), pp. 24300 – 24335, <https://www.federalregister.gov/documents/2024/04/05/2024-06899/Endangered-and-threatened-wildlife-and-plants-listing-endangered-and-threatened-species-and>.

⁴⁷ “Administration Revises Endangered Species Act Regulations to Strengthen Certainty, Reduce Burdens and Uphold the Law,” Fish and Wildlife Service, accessed February 26, 2026, <https://www.fws.gov/press-release/2025-11/administration-revises-endangered-species-act-regulations-strengthen>.

Appendix 1: Addressing the Blanket 4(d) Rule

Section 4(d) of the Endangered Species Act

“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, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.”⁴⁸

Revised Section 4(d)(1) – 4(d)(2)(A) statutory language under the ESA Amendments Act

“(1) ISSUANCE.—

“(A) IN GENERAL.—Whenever any species is listed as a threatened species pursuant to subsection (c), the Secretary shall issue such regulations as are necessary and advisable to provide for the conservation of that species.

“(B) REQUIREMENT.—In issuing a regulation under subparagraph (A), the Secretary, consistent with the findings, purposes, and policy described in section 2 and based on the best scientific and commercial data available, shall consider the conservation and economic effects of such regulation.

“(2) RECOVERY GOALS.—

“(A) IN GENERAL.—If the Secretary issues a regulation under paragraph (1) that prohibits an act described in section 9(a), the Secretary shall, with respect to the species that is the subject of such regulation...”⁴⁹

⁴⁸ 16 U.S.C. § 1533(d).

⁴⁹ H.R. 1897 – ESA Amendments Act of 2025, 119th Congress, Title III, Sec. 301, <https://www.congress.gov/bill/119th-congress/house-bill/1897/text/toc-H75468ECFB5E844FEAA915EB39D3B68EC>.

Appendix 2: Addressing Improper Critical Habitat Designations

Definition of habitat under the ESA Amendments Act

“(D) (i) For the purpose of designating critical habitat for a threatened species or an endangered species under this Act, the term ‘habitat’—

“(I) means the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support 1 or more life processes of the threatened species or endangered species; and

“(II) does not include an area—

“(aa) outside the current or historic range of the threatened species or endangered species; or

“(bb) visited by only vagrant individual members of the threatened species or endangered species.

“(ii) If the setting described in clause (i)(I) does not support all of the life processes of the relevant threatened species or endangered species, the threatened species or endangered species must be able to access, from the setting, other areas necessary to support its remaining life processes.”⁵⁰

Consideration of private conservation efforts

The following provision requires the secretary to consider existing conservation efforts when designating critical habitat:

“(c) Designation considerations.—Section 4(b) of the Endangered Species Act of 1973 (16 U.S.C. 1533(b)) is amended—

(1) in paragraph (2)—

(A) by inserting “the impact on existing efforts of private landowners to conserve the species,” after “impact on national security...”⁵¹

⁵⁰ H.R. 1897 – ESA Amendments Act of 2025, Sec. 2. Endangered Species Act of 1973 Definitions.

⁵¹ H.R. 1897 – ESA Amendments Act of 2025, Title III, Sec. 304.

Appendix 3: Addressing the Economic Effects of Species Listing

Economic and other effects language added to section 4(a) by the ESA Amendments Act

“(5) (A) The Secretary shall, concurrently with determining under paragraph (1) whether a species is a threatened species or an endangered species, prepare an analysis with respect to such determination of—

“(i) the economic effect;

“(ii) the effects on national security;

“(iii) the effects on human health and safety; and

“(iv) any other relevant effect.

“(B) The analysis is to be prepared in coordination with the States, local governments, and Tribes impacted by the determination.

“(C) Nothing in this paragraph shall delay a determination made by the Secretary under paragraph (1) or change the criteria used by the Secretary to make such a determination.”⁵²

⁵² H.R. 1897 – ESA Amendments Act of 2025, Title IV, Sec. 405



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