Public Interest Comment on
Fish and Wildlife Service’s Revisions to “Safe Harbor Agreements and
Candidate Conservation Agreements with Assurances” 

The Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University is dedicated to advancing knowledge of the impact of regulation on society. As part of its mission, RSP conducts careful and independent analyses employing contemporary policy, legal, and economic scholarship to assess rulemaking proposals from the perspective of the public interest. Thus, this comment on the Fish and Wildlife Service’s “Safe Harbor Agreements and Candidate Conservation Agreements with Assurances; Revisions to the Regulations,” does not represent the views of any particular affected party or special interest group, but is designed to evaluate the effect of the Agency’s draft policy on overall consumer welfare.

I. Introduction

The Fish and Wildlife Service (FWS) is proposing to revise its regulations regarding enhancement of survival permits issued under the Endangered Species Act (ESA). The revisions make Safe Harbor and Candidate Conservation Agreements with Assurances (Safe Harbors) easier to understand and implement and they provide better incentives for landowners to use these programs. In 1995, the FWS promulgated its Safe Harbors Policy because it realized that the ESA provides negative incentives for landowners to conserve species. The presence of an endangered or threatened species on private property reduces the value of the property because it limits the land use activities the owner can engage in. This makes landowners view endangered species as a liability.

Safe Harbor Agreements serve to reduce the liability of endangered and threatened species by providing guarantees to landowners who work with the FWS that the landowner’s management activities will not result in further regulations. These proposed

1 Prepared by Daniel R. Simmons, Mercatus Center Research Fellow. This comment is one in a series of Public Interest Comments from Mercatus Center’s Regulatory Studies Program and does not represent an official position of George Mason University.

Regulations are an important first step that will enhance the ability of the ESA to protect and enhance populations of threatened and endangered species. However, to make real improvement, the FWS needs to go further and turn endangered and threatened species into assets for landowners, instead of merely limiting the liability landowners face when threatened or endangered species are found on their land.

a. The ESA as Pit Bull

The ESA rightly deserves its nickname as the “pit bull of environmental laws.” It trumps property rights on private and state lands and gives the FWS broad authority to regulate these non-federal lands. Property owners have complained for years that the ESA “takes private property” (under the 5th Amendment) without just compensation, and they have complained that the FWS’s regulations give it overly broad regulatory authority.

Property owners have taken their grievances to Congress and to courts, but they have found little solace. While Congress has tried many times over the past 15 years to amend the ESA, it has failed to do so. The ESA was last amended in 1988 and its spending authorization expired in 1992. The Supreme Court’s takings jurisprudence has provided property owners limited relief, since unconstitutional regulatory takings have only been found when the regulations deprive the property owner of all economically viable uses of the land.

However, the Supreme Court has also affirmed FWS regulations that give the Service the ability to regulate not only the physical “taking of a species” (as defined in §9 of the ESA), but also to regulate “adverse habitat modification.” In Babbitt v. Sweet Home Chapter of Communities for a Great Oregon the Supreme Court deferred to the FWS’s interpretation of “harm,” holding that habitat modification is indeed a harm under the ESA and that regulatory control of private property in the name of species protection is permissible under the ESA. The practical effect of this decision is that, as Michael Bean, attorney for Environmental Defense, has explained, “a forest landowner harvesting timber, a farmer plowing new ground, or developer clearing land for a shopping center stood in the same position as a poacher taking aim at a whooping crane.”

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4 See Lucas v. South Carolina Coastal Commission,

5 Section 9 of the ESA prohibits the “take of any [endangered or threatened] species.” Section 3 of the ESA explains that “the term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”


b. Effects of Legal Rules on Species

What are the results of treating landowners as poachers? In the past thirty years, the FWS has actively added species to the list of endangered and threatened species, but has had few clear results in terms of recovery. The number of listed species has increased from 114 in 1973 to 1,263 today. The Fish and Wildlife Service’s most recent report on the status of endangered species found that 9 percent are improving, 30 percent of species are stable, the status is uncertain for 24 percent, 34 percent are declining, less than 1 percent are only found in captivity, and 2 percent are presumed extinct.

Since the ESA was passed, only 37 species have been delisted (removed from the list of threatened or endangered species)—seven because they became extinct, and thirteen more because they should not have been listed in the first place. The FWS claims that fourteen species that were once listed are now recovered. Of those fourteen, three are Australian kangaroo species that were delisted when the Australian government changed its management practices. Six more may be cases of data error, which is certainly the case with the gray whale and American alligator. The brown pelican’s and Arctic peregrine falcon’s decline is attributed to reproductive failure resulting from the use of the pesticide DDT. Their recovery had far more to do with banning DDT than with the

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11 See U.S. Fish and Wildlife Service, Threatened and Endangered Species System: Delisted Species Report 11/4/2003, http://ecos.fws.gov/tess_public/TESSWebpage?delisted?listings=0. The listed species that have gone extinct are the Longjaw cisco (Coregonus alpenae), Amistad Gambusia (Gambusia amistadensis), Sampson’s Pearlmussel (Epioblasma sampsoni), Blue Pike (Stizostedion vitreum glaucum), Tecopa Pupfish (Cyprinodon nevadensis calidae), the Dusky Seaside Sparrow (Ammodramus maritimus nigrescens), and the Santa Barbara Song Sparrow (Melospiza melodia graminea).

12 See U.S. Fish and Wildlife Service, Threatened and Endangered Species System: Delisted Species Report 11/4/2003, http://ecos.fws.gov/tess_public/TESSWebpage?delisted?listings=0. The species that should not have been listed in the first place include the Indian Flap-Shelled Turtle (erroneous data); the Spineless Hedgehog Cactus (not a listable entity); Truckee Barberry, Mexican Duck, Purple-Spined Hedgehog Cactus, Lloyd’s Hedgehog Cactus, Cuneate Bidens, Costal Cutthroat Trout, and the Gray Wolf (all delisted because of taxonomic revisions); and the Pine Barren Treefrog, McKittrick Pennyroyal, Tumamoc Globeberry, Dismal Swamp Southeastern Shrew (all delisted because new information was discovered).

13 Id.


16 Id.
Endangered Species Act (DDT was banned in 1972 and the ESA was passed in 1973). The American peregrine falcon, also a near-casualty from DDT, recovered after the DDT ban and because of reintroduction efforts by private parties. The Aleutian Goose recovered because of actions taken by the California Fish and Game Commission and the FWS, acting under the ESA. Thus, while a very few species have recovered, there is little evidence that any of these recoveries were brought about by the ESA’s regulation of private property.

We note that there are some highly visible ESA programs that appear to be having success—releasing experimental populations of California Condors in California and gray wolves in Yellowstone, leading whooping cranes along historic migration paths with ultralight airplanes, and cooperating with falcon breeders to restore the American peregrine falcon are a few.

Yet, measuring success by numbers of species delisted, or by visible reintroduction programs, may be the wrong measurements. It takes time, perhaps a long time, to effectively promote the recovery of “near-extinct populations” and to have populations recover. Thus, expecting listed species to be on their way to recovery may be the wrong expectation. The only reasonable short-run expectation for many species may be to slow their slide toward extinction while habitats are protected and helped to once again

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17 Id.
18 Id.
21 By the 1930s, all populations of the gray wolf had been extirpated from the western United States. U.S. FISH AND WILDLIFE SERVICE, ROCKY MOUNTAIN WOLF RECOVERY: 2001 ANNUAL REPORT 1 (2002) (available at http://westerngraywolf.fws.gov/annualrpt01/2001report.pdf. According to the latest report from the Fish and Wildlife Service on gray wolf populations, there are 218 wolves in the Greater Yellowstone recovery area. Id.
23 In the 1960s there were no peregrine falcons left east of the Mississippi. The Peregrine Fund, Peregrine Falcon Recovery, (available at http://www.peregrinefund.org/conserv_peregrine.html) (last visited Mar. 11, 2003). Through the efforts of research and captive release programs pioneered by the Peregrine Fund, the peregrine falcon was delisted in 1999. Id.; see also Final Rule to Remove the American Peregrine Falcon from the Federal List of Endangered and threatened Wildlife, 64 Fed. Reg. 46,542 (Aug. 25, 1999).
achieve the biological richness that is necessary for the endangered species to begin to recover.

c. Effects of Legal Rules on Landowners

Nearly 80 percent of all listed species occur partially or entirely on private lands.\(^{24}\) Many analysts agree with Michael Bean of Environmental Defense that one overall effect of enforcing the ESA has been to create “unintended negative consequences, including antagonizing many of the landowners whose actions will ultimately determine the fate of many species.”\(^{25}\) Bean underscored these problems in a 1994 speech at a training and education seminar sponsored by the Fish and Wildlife Service for government employees. In the speech he said that there is, “increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems.”\(^{26}\) By that, he meant the landowners are removing habitat that might attract an endangered species. He emphasized, however, that these actions are “not the result of malice toward the environment” but are instead “fairly rational decisions, motivated by a desire to avoid potentially significant economic constraints.”\(^{27}\) He even said they are a “predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others.”\(^{28}\)

The National Association of Home Builders explains in their *Developer’s Guide to Endangered Species Regulation*,

> Unfortunately, the highest level of assurance that a property owner will not face an ESA issue is to maintain the property in a condition such that protected species cannot occupy the property. Agricultural farming, denuding of property, and managing the vegetation in ways that prevent the presence of such species are often employed in areas where ESA conflicts are known to occur.\(^{29}\)

Similarly, the authors of an Environmental Defense Fund report note that the ESA discourages private landowners from protecting, creating, restoring or enhancing habitat for endangered species. They explain:

> [Landowner’s] unwillingness often stems from the fear of new restrictions.


\(^{27}\) Id.

\(^{28}\) Id.

They are afraid that if they take actions that attract new endangered species to their land or increase the populations of the endangered species that are already there, their “reward” for doing so will be more regulatory restriction on the use of their property. In its most extreme manifestation, this fear has prompted some landowners to destroy unoccupied habitats of endangered species before the animals could find it. One landowner, referring to the presence of red-cockaded woodpeckers on a small section of his property, announced, “I cannot afford to let those woodpeckers take over the rest of the property. I’m going to start massive clearcutting.”

Starting “massive clearcutting” is one manifestation of what is now known as “preemptive habitat destruction.” One clear case of preemptive habitat destruction occurred when a property owner made sure there would not be any San Diego mesa mint on his 279 acres where he wanted to build a 1,429-unit subdivision. His property contained one of only three populations of the mint, but when he discovered the mint was about to be added to the endangered species list, he “bulldozed the population while it was still unprotected.”

Although there are many stories of preemptive habitat destruction, there are few studies that rely on hard, systematic data. There is, however, one systematic study of preemptive habitat destruction that examines timber-harvest practices in forests occupied by red-cockaded woodpeckers. The authors, Dean Lueck and Jeffrey Michael, used data from over 1000 individual forest plots from the U.S. Forest Service’s Forest Inventory and Analysis and a 1997–98 North Carolina State University survey of over 400 landowners.

Red-cockaded woodpeckers provide a good test of claims that the ESA produces perverse incentives. The birds have been listed as an endangered species list for 30 years. They live in colonies consisting of the breeding pair, the current year’s offspring, and sons of

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33 Id.


they only nest or roost in cavities in living pine trees that are at least 60 years old—which means there is a clearly measurable test of habitat modification.37 There are no other endangered species using the same habitat so there are no competing ESA policies that might make it difficult to measure the effects of policies to protect woodpeckers.

Lueck and Michael found that trees close to colonies of red-cockaded woodpeckers are logged prematurely.38 That is, the trees are not allowed to get old enough to provide nesting cavities for the birds. As the distance from a known colony of woodpeckers increases, the chance of harvest decreases, and the age at which the forest is harvested increases.39 Lueck and Michael conclude, “This evidence from two separate micro-level data sets, indicates [red-cockaded woodpecker] habitat has been reduced on private land because of the ESA.”40 In fact, enough habitat was reduced because of the ESA between 1984 and 1990 to have supported a woodpecker population sufficient to meet the FWS’ recovery goals for the species, according to one set of Lueck and Michael’s estimates.41

It appears that the answer to how people react to standing “in the same position as a poacher taking aim at a whooping crane” is that at least some of them take legal and even illegal preemptive actions. Potential results include active habitat destruction, passive non-protection, and an unwillingness to undertake improvements. It would be surprising if other regulations did not produce similar results and Lueck and Michael identify some. They relate how when stricter wetland draining rules were proposed in North Carolina, “landowners went on a drainage and ditching spree.”42 In just a few months, 15–20 times more wetlands were lost than were normally lost in an entire year.43

During the Clinton Administration, the FWS started taking steps to alleviate the negative incentives the ESA creates for landowners. One of the devices the Clinton Administration came up with was the Safe Harbors. The FWS realized that it needed to insulate landowners from the ESA’s effects if the landowners manage their land in a way that produces more and better habitat for endangered species.

II. Statutory Basis for Regulation

To achieve some regulatory relief for landowners, the FWS used section 10(a)(1)(A) of the ESA. Section 10(a)(1)(A) gives the Secretaries of the Interior and Commerce

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36 Lueck & Michael, supra note XX at 8.
37 Id. at 9.
38 Id. at 30.
39 Id. at 25.
40 Id. at 30 (emphasis in original).
41 Id. at 31.
42 Id. at 34.
43 Id.
authority to permit “any act otherwise prohibited by section 1538 for scientific purposes or to enhance the propagation or survival of the affected species.”\textsuperscript{44} The FWS correctly reasoned that they could promote voluntary conservation of listed species, and species that are likely to be listed, by limiting regulations associated with listing additional species. Thus, if a landowner draws up a plan with the FWS that creates a net conservation benefit, the FWS may authorize incidental take through an “enhancement of survival permit” issued under 10(a)(1)(A). This permit allows participating landowners to take individual members of a listed species if the ultimate effect would be expected to return population levels and habitat condition to those conditions agreed upon as the baseline conditions.

In June 1999, the FWS promulgated its Safe Harbor policy. Since then, the FWS has only entered into 30 Safe Harbor agreements with landowners.\textsuperscript{45} While these 30 agreements protect nearly three million acres, there is much more that can be done, especially because 80 percent of all listed species occur partially or entirely on private lands.

One reason more has not been done is that landowners recognize problems with the current regulations. Another reason is that Safe Harbor Agreements are costly for landowners to enter into. The FWS requires a landowner to take time and money to prepare the information necessary and then more time and money to carry out the program. Many of these problems are addressed by the FWS in the proposed regulations.

\section*{III. Costs and Benefits of the Regulation}

For regulations such as Safe Harbors to be effective, they need to provide regulatory certainty to landowners. This should not only include certainty regarding future FWS actions, but certainty that these agreements will withstand legal challenges by private parties. Organizations such as the Center for Biological Diversity frequently file suit against the FWS, and unless the agreement (and policy as a whole) is litigation-proof, the FWS could lose the suit, resulting in new and unforeseen restrictions being placed on the landowner’s land.

The proposed regulations make a number of improvements that increase regulatory certainty for landowners. The regulations would also implement a number of other benefits for species and landowners alike. Below is a section-by-section analysis of the proposed amendments to current regulations:

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\item [\textsuperscript{44}] 16 U.S.C. § 1539(a)(1)(A)(emphasis added).
\end{itemize}
\end{footnotesize}
§13.25—Transfer of Permits and Scope of Permit Authorization

One problem the FWS identifies is that current regulations “create uncertainty as to the ability of successors for the property interest to assume the rights and responsibilities of the original Agreement.”\(^{46}\) The proposed regulations help resolve some of the uncertainty, but they do not go far enough. The FWS should treat the permits as if they were restrictive covenants on residential or commercial property. Restrictive covenants run with the land and the party seeking to enforce the restrictive covenant does not usually need to approve the transfer of the restrictive covenants.

A far more troubling issue, however, is that the new regulations for the transfer of permits do not accomplish what the preamble says they accomplish. The preamble states, “we propose to revise the regulation to make the permit transfer provisions consistent with the Safe Harbor policies by allowing a permit to be transferred as long as the new owner agrees to become a party to the original agreement and permit.”\(^{47}\) However, the new regulation would still require that the FWS make a determination that, (1) “the proposed transferee has provided adequate written assurances,”\(^{48}\) (2) that the proposed transferee would “provide sufficient funding for the conservation plan or Agreement”\(^{49}\) (3) that the proposed transferee would “implement the relevant terms and conditions of the permit, including any outstanding minimization and mitigation requirements”\(^{50}\) and (4) “the proposed transferee has provided such other information as the Service determines is relevant to the processing of the submission.”\(^{51}\) By requiring the FWS to make so many determinations, especially when the determinations are based on qualitative factors such as “adequate written assurances”, “sufficient funding”, the inclusion of “relevant” information, the FWS is given significant discretion in deciding whether or not to transfer the permit. When the FWS has such discretion, the permits are less valuable because they are harder to transfer.

While the proposed regulation would make the permits somewhat easier to transfer, the changes represent a marginal improvement at best. To make these permits more valuable and less of a liability, the FWS should restrict its discretion on awarding the permits.

§17.22—Permits for Scientific Purposes, Enhancement of Propagation or Survival, or for Incidental Taking

§17.22(c)(1), §176.22(d)(1), §17.32(c)(1), §17.32(d)(1)—These sections expand the number of people who can enter into Safe Harbor Agreements to include any property


\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id. at 13.25(b)(3).
holder eligible to meet the requirements. This change clarifies that a holder of a property interest less than a complete fee simple interest can participate in these programs. This is a welcome change because it allows more property owners to participate in Safe Harbor Agreements. If, as the FWS analysis suggests, these agreements will encourage the protection and creation of habitat for threatened and endangered species, then allowing more property owners participate in them should serve the goals of the ESA.

§17.22 (c)(ii), §17.32(c)(ii)—The preamble describes the changes to these sections as clarifying that there are “two broad categories of incidental take that may occur under a Safe Harbor Agreement.”\textsuperscript{52} The problem is that in clarifying that there are two broad categories of incidental take, the new regulations increase the requirements for receiving an incidental take permit. The new regulations require that an applicant describe not only “the activity for which the applicant requires incidental take” (as the current regulations require) but also how incidental take is likely to occur “both as a result of management activities and as a result of the return to baseline”\textsuperscript{53} (emphasis added). The new regulations require the property owner to submit more information to obtain a permit because he has to submit (1) information on how take (of a species) will occur as a result of management and (2) how this take will occur as a result of a return to baseline. This makes obtaining a permit more costly, and therefore, less likely to occur.

§17.22(c)(2)(ii), §17.32(c)(2)(ii)—The issuance criteria for a permit currently requires the Director to find that the Agreement “will provide a net conservation benefit.” Changing “will provide a net conservation benefit” to “is reasonably expected to provide a net conservation benefit” is a good and logical change. No one knows the future, and these regulations should not require the FWS to be omniscient.

§17.22(c)(3)(ii), §17.22(d)(3)(ii), §17.32(c)(3)(ii), §17.32(d)(3)(ii)—Under current regulations, when a landowner plans on undertaking an activity authorized by a permit that could take a threatened or endangered species, the landowner is required to notify the FWS. The proposed regulations change the notice requirement from a mandatory requirement, to a requirement that the FWS is notified “when appropriate.” This is a welcome change because it provides greater flexibility for the landowner. When landowners have greater flexibility, they are less likely to engage in acts like preemptive habitat destruction. This flexible rule helps both the landowner and the FWS care for threatened and endangered species.

§17.22(c)(5)(ii), §17.32(e)(5)(ii)—The biggest problem with the current Safe Harbors regulations is that there is no truly Safe Harbor since the Director can unilaterally require the landowner to take additional conservation and mitigation measures. This defeats much (if not all) of the benefits in the current regulations because the current regulations do not give landowners any real assurances that once they are regulated, the Director will not decide tomorrow or next month that more regulation is required.

\textsuperscript{52} 68 Fed. Reg. at 53,321.

\textsuperscript{53} Id. at 53,325.
Interior Secretary Bruce Babbitt understood that landowners need the correct incentives. Talking about “No Surprises” Babbitt said that landowners:

want some assurance that, once they agree to be a party to an HCP and to mitigate the effects of their activities on listed species, we won’t come back later for a second bite from the apple. ‘No Surprises’ addresses that concern in a very concrete way: like its name, it signifies that a deal is a deal and that there will be no surprises down the road.54

Just as “No Surprises” should truly have no surprises, “Safe Harbors” should truly create safe harbors. The proposed regulations make a necessary improvement by requiring the Director to get the consent of the landowner before requiring “additional or different management activities.”55 With this modification, Safe Harbor agreements will truly create Safe Harbors.

§17.22(c)(7), §17.22(d)(7), §17.32(c)(7), §17.32(d)(7)—As noted in the last section, the biggest problem with the current Safe Harbor Regulations is that they do not truly provide safe harbor for landowners. The current regulations allow the Director to unilaterally force the landowner to take additional conservation and mitigation measures and they grant the FWS great latitude in canceling a permit. The preamble states that the FWS is justifiably concerned that the revocation authority “may create a disincentive to landowners considering development of a Safe Harbor Agreement.”56

The proposed regulations are a step in the right direction in this regard. The proposed regulations limit the Director’s ability to revoke a permit. The proposed regulations also give the landowner a voice in the process. As the proposed regulations explain, “Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options.”57

While this change is appropriate, the Director is still not forced to choose one of the options short of permit revocation, but rather to “pursue” one of the options. The term “pursue” is not defined in the regulations and because the FWS does not have a history of being landowner-friendly, landowners can only hope the FWS will pursue these options in good faith.

Also, this requirement of working with the landowner should be extended to permits revoked under §13.28(a)(4). Section 13.28(a)(4) allows for permit revocation for changes in statute or regulations. The problem with this section is that future Administrations could weaken these rules, reducing the regulatory certainty that the Safe

56 Id.
57 Id.
Harbor Rule was supposed to create. To give current permit holders needed regulatory certainty, the proposed regulation should provide safe harbor also against future regulatory changes.

IV. Conclusions and Recommendations

There are reasons the ESA does not do a better job of recovering species. Landowners frequently view threatened and endangered species as their enemies because landowners have their land use options limited when an endangered or threatened species take up residence on their land. Safe Harbors are one way the FWS is working to create better incentives for landowners. Overall, the proposed changes make positive progress in creating the correct, positive incentives for landowners. While the FWS can improve the proposed regulations, they are a good first step.

The proposed regulations reduce the liability of having endangered species and threatened species on one’s property. But, the FWS can do more to protect endangered and threatened species by making them an asset for landowners. A good example is the FWS’s Private Stewardship Program that funds a number of private projects designed to improve the conservation of species. While this program is a step in the right direction, for endangered species to be an asset, some landowners would need to be paid for producing quality habitat and species on their property. The FWS is obviously limited by its budget and its statutory authority, but it could do more to promote conservation.

The FWS can also improve species protection by reducing the complexity of the process for entering into a Safe Harbor Agreement. Conscientious landowners who want to protect species will go through all of the necessary procedures, but many landowners do not especially care for endangered species and they distrust the FWS. This type of landowner is more likely to “shoot, shovel, and shut up,” than to contact the FWS or enter into the necessary research or agreements. The FWS needs to further reduce the barriers to such people for entering into a Safe Harbor Agreement.

The FWS should also develop a better track record of working with landowners. Horror stories about over-zealous ESA enforcement spread quickly and do not die for years. With 80 percent of threatened and endangered species living on privately owned land, the FWS should take the long view of partnering with landowners, not regulating them into submission. The fate of too many species depends on the FWS being a partner and not the policeman.
APPENDIX I
RSP CHECKLIST

The purpose of the RSP Checklist is designed to evaluate the analytical support for major rules against a common metric. Since the FWS policy change is not a major rule, some of the elements (such as the requirement for a comprehensive benefit-cost analysis) are less applicable.

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<tr>
<th>Element</th>
<th>Agency Approach</th>
<th>RSP Comments</th>
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<tbody>
<tr>
<td>1. Has the agency identified a significant market failure?</td>
<td>The FWS implicitly recognizes that existing ESA regulations, by attenuating private property rights, undermine market incentives to protect species. <strong>Grade: B</strong></td>
<td>There is a lack of a market in endangered species habitat, in part because endangered species are “ferae naturae” and as such they are not owned by anyone, not even the Federal government. The ESA’s regulation of private lands has magnified this problem by removing some of the sticks of the bundle of property rights. The title to the land stays with the owner, but the FWS controls some of the property rights associated with the land.</td>
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<td>2. Has the agency identified an appropriate federal role?</td>
<td><strong>Grade: NA</strong></td>
<td>The Endangered Species Act directs the FWS to take action at the federal level, yet state and local solutions, which are better able to address the diverse needs of different species and regions, would likely yield superior results in terms of both species protection and property values.</td>
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<td>3. Has the agency examined alternative approaches?</td>
<td>The FWS’s draft policy is an alternative approach to past policy. <strong>Grade: B</strong></td>
<td>The alternative approach proposed in this proposed rule recognizes that alternatives to past policy may promote greater conservation.</td>
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<td>Element</td>
<td>Agency Approach</td>
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<td>4. Does the agency attempt to maximize net benefits?</td>
<td>The FWS does not quantitatively examine benefits and costs, but understands qualitatively that improving incentives for conservation will provide net benefits. <strong>Grade: B</strong></td>
<td>By providing better incentives for landowners to conserve threatened and endangered species, the proposed rule does a better job of maximizing net benefits than existing rules. Because this is not a major rule, a formal quantitative analysis is not required.</td>
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<td>5. Does the proposal have a strong scientific or technical basis?</td>
<td>FWS bases its policy change on what has proven successful elsewhere. <strong>Grade: A-</strong></td>
<td>The FWS bases its proposed rule on experience and hearing from landowners.</td>
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<td>6. Are distributional effects clearly understood?</td>
<td>N/A</td>
<td>The revised policy will help not only threatened and endangered species, but also the people who will have better economic incentives to protect them.</td>
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<td>7. Are individual choices and property impacts understood?</td>
<td>The FWS recognizes that past policies have provided incentives for people to make choices contrary to the interest of preserving threatened and endangered species. <strong>Grade: A</strong></td>
<td>The policy does a better job of respecting landowners’ property rights. By giving landowners more respect and regulatory certainty, the FWS demonstrates that it understands individual choice and the property impacts of the ESA. While the FWS could do more to make threatened and endangered species an asset for landowners, this proposed rule in an important step forward.</td>
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